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*Advocacy: the voice of small business in government*

# **Background Paper on the Office of Advocacy 2001–2008**

*The mission, activities, and accomplishments  
of the Office of Advocacy from 2001 to 2008*

*October 2008*

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

For more information on the Office of Advocacy, visit <http://www.sba.gov/advo>, or call (202) 205-6533. Receive email notices of new Office of Advocacy information by signing up on Advocacy's Listservs at <http://web.sba.gov/list>

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Chief Counsels for Advocacy (from left to right) Jere Glover, Tom Sullivan, Tom Kerester, Frank Swain, and Milt Stewart (seated) at Advocacy's 25th Anniversary Symposium.

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# Foreword

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It is with great pride that I present this background report on the Office of Advocacy to all of our many stakeholders. In preparation for the transition in administrations that will follow the 2008 election, I asked our staff to prepare this historical document to help those who will next year be new to Advocacy and to SBA better understand our mission, activities and accomplishments. Although we hope that this report will be of special use to the transition team and new personnel, we are again making the entire paper available to the general public and posting it on our website. Advocacy believes strongly that good public policy requires transparency and good information, and we want people to know who we are and what we do. We are also again releasing the background paper on November 1, before the election, as my predecessor and friend, former Chief Counsel Jere Glover, did in 2000. I hope that this becomes a tradition that future Chief Counsels will continue.

As we focus on the transition to new leadership in the coming months, I remember how helpful the entire Advocacy staff was to me as I began my tenure as Chief Counsel nearly seven years ago. Advocacy has accomplished much since then, and in the pages that follow we have tried to summarize these accomplishments in a way that will be informative and useful for technicians and casual readers alike. The background 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 RFA issues. It is also exhaustively documented and includes 24 appendices with a wealth of background material. This report is the most comprehensive single publication on Advocacy's mission, history and activities ever published, and I hope that it will serve its purpose for years to come.

Since 2001, Advocacy has annually reviewed an average of about 1,300 public regulatory notices. Through its electronic e-notify system, Advocacy also receives directly from agencies about 600 notifications of regulatory activity annually. In any given year, more than 500 regulatory proposals are also reviewed in confidential interagency consultations prior to their publication. Since 2001, Advocacy has filed more than 300 public regulatory comment letters with 60 departments and agencies. Working with small business organizations and trade associations, Advocacy regulatory interventions have resulted in one-time cost savings in excess of \$65 billion, with annually recurring savings of nearly \$22 billion.

Also since 2001, we have published more than 200 economic research reports, presented testimony before Congress at 39 hearings, and provided statements for the record or comments on legislation to members of Congress on 35 other occasions. Advocacy has sponsored six major conferences or symposia since 2001, and we have seen the electronic circulation of our monthly newsletter, *The Small Business Advocate*, grow to nearly 30,000. Our regional advocates have worked tirelessly to advance the concept of regulatory flexibility at the state level, with the result that 44 states now have implemented regulatory flexibility either by statute or administrative action. Importantly, key facets of Advocacy's mission were given formal recognition by President Bush in Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking*.

This is quite a record, and one that our entire team made possible. Advocacy is a relatively small office, with the benefit that I have been able to work closely with virtually every single one of our staff. Their dedication, professional skills, and institutional memory make a huge difference for small business. But it's not just our in-house staff that makes that difference. We could not accomplish what we do without Advocacy's extended family of stakeholders. Special recognition goes to our friends in small business organizations and trade associations, congressional offices, and executive branch agencies, with whom we work daily.

In closing, I want to offer special thanks for all the assistance and good counsel I have had over the years from the four former Chief Counsels for Advocacy. All of us have been good friends. Sadly, we lost Milt Stewart, the first Chief Counsel, in November 2004. He was Advocacy's "founding father" and an extraordinary champion for small business. The photo reprinted here of the five of us together reminds me that as each of us has had the benefit of his predecessors' experience, so too in the coming months will the entire Advocacy team continue the tradition and do everything possible to ensure a smooth transition.

A handwritten signature in black ink, appearing to read "Thomas M. Sullivan". The signature is fluid and cursive, with a large initial "T" and "S".

Thomas M. Sullivan  
Chief Counsel for Advocacy  
October 24, 2008

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**Epigraph Sources**

# Chapter 1

## Introduction

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*“The Office of Advocacy will, if we are successful, be a key point of effective spokespersonship 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)**

In the year 2000, in preparation for the transition in administrations that would follow the election that year, the Office of Advocacy compiled 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: 1994–2000*<sup>1</sup> also included a variety of information on Advocacy work products such as reports and publications, regulatory cost savings, congressional testimony, and participation in SBREFA panels; reference materials such as Advocacy’s legislative charter and the Regulatory Flexibility Act; and commentary on pending issues.

The utility of the 2000 background paper was evident as soon as it was published, and it proved to be of considerable value not only to President Bush’s SBA transition team, but also to his own new Chief Counsel for Advocacy, Thomas M. Sullivan, and other new staff who joined Advocacy after the Chief Counsel’s confirmation. In preparation for another transition after the 2008 election, Chief Counsel Sullivan determined that Advocacy would again compile a background paper for the use of the next transition team, the next Chief Counsel and other new personnel, both in Advocacy and SBA.

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 SBA. However, Advocacy is proud to continue the tradition of making this document available to all of its wide range of stakeholders and to the general public through its posting on the office’s website. Advocacy believes strongly that good public policy requires transparency and good information, and we want people to know who we are and what we do.

Since its inception, Advocacy has taken its direction from its small entity stakeholders. Advocacy actively solicits input from business and trade associations; members of Congress and their staffs; officials in executive branch agencies throughout the federal government, up to and including the White House; state and local governments; economists and other academic researchers, as well as teachers; organizations supporting women, minority, and veteran entrepreneurship; the press; the nationwide network of SBA resource partners; and, of course, some 27 million small businesses! All of these are Advocacy “customers.” The Office of 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.

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<sup>1</sup> *Background Paper on the Office of Advocacy: 1994–2000*; November 1, 2000. See: [http://www.sba.gov/advo/advo\\_backgr00.html](http://www.sba.gov/advo/advo_backgr00.html).

# Advocacy's Background and Mission

This section surveys the history and development of the Office of Advocacy and its mission. For readers who may not wish to follow this journey in detail, the main points we make 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, and the 2002 Executive Order 13272.

- Advocacy has often been called upon to perform duties not specified in Public Law 94-305, but still comporting with its general purposes. These have included extensive support of all three White House Conferences on Small Business, resulting in landmark small business legislation that is still in force today. Similarly, from the first edition of the President's *State of Small Business* in 1982, the White House delegated to Advocacy the responsibility for this major annual report.
- 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

So what is Advocacy's mission? The simple answer to that question 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 where did this mission originate and why is it important?

The 2000 background paper began this discussion by asking the question: "Are small firms important?" This was the title of a collection of studies on the economic contributions of small business which was published with Advocacy support.<sup>2</sup> Its editor summarized two key findings in his own introductory essay:

<sup>2</sup> Zoltan J. Acs, editor (1999). *Are Small Firms Important? Their Role and Impact*. Boston: Kluwer Academic Publishers.

- 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.<sup>3</sup>

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 address problems proactively 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 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 proactive 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; and it was terminated in 1946, its functions reverting to the RFC and 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

<sup>3</sup> Ibid., pp. 16-17.

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.<sup>4</sup>

## The Small Business Act

President Eisenhower signed the Small Business Act of 1953<sup>5</sup> in July of that year. 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 a new Small Business Administration (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 interests of small business concerns in order to preserve free competitive enterprise ... and to maintain and strengthen the overall economy of the Nation.<sup>6</sup>

## 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.”<sup>7</sup> 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;

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

5 The Small Business Act was originally enacted as Title II of Public Law 83-163; July 30, 1953; 67 Stat. 232. Title II was subsequently withdrawn as part of that law, which also liquidated the prior Reconstruction Finance Corporation; and it was made a separate Act by Public Law 85-536; July 18, 1958; 72 Stat. 384, 15 U.S.C. § 631 *et seq.*

6 15 U.S.C. § 631(a).

7 Executive Order 11518, 35 Fed. Reg. 4939 (March 20, 1970).

- ...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...<sup>8</sup>

The executive order directed that 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.”<sup>9</sup> 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 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.<sup>10</sup>

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.”<sup>11</sup>

## 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.<sup>12</sup>

The new Chief Counsel for Advocacy was to be named by the SBA Administrator, and the statute specified his 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;<sup>13</sup> and
- represent the views and interests of small businesses before other Federal agencies whose policies and activities may affect small businesses.<sup>14</sup>

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 more than 30 years.

<sup>12</sup> Public Law 93-386, Small Business Amendments of 1974; August 23, 1974; 88 Stat. 742. Section 10 established the position of Chief Counsel for Advocacy and enumerated his or her duties.

<sup>13</sup> § 5(e)(3) of the Small Business Act, as amended by Public Law 93-386, subsequently recodified in 1976 as § 203(3) of Public Law 94-305; June 4, 1976; 15 U.S.C. § 634(c)(3).

<sup>14</sup> § 5(e)(4) of the Small Business Act, as amended by Public Law 93-386, subsequently recodified in 1976 as § 203(4) of Public Law 94-305; June 4, 1976; 15 U.S.C. § 634(c)(4).

<sup>8</sup> Ibid.

<sup>9</sup> Ibid., § 1.

<sup>10</sup> Ibid., § 2.

<sup>11</sup> Ibid., § 3.

## 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 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.<sup>15</sup> 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.<sup>16</sup>

At the same hearing, James D. "Mike" McKeivitt, Washington 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.<sup>17</sup>

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.<sup>18</sup>

## The new Office of Advocacy

Public Law 94-305 provided the basic legislative framework under which the Office of Advocacy operates today. It significantly upgraded the position and duties of the Chief Counsel for Advocacy, and it provided him or her with 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.<sup>19</sup> In 1976, the only other Senate-confirmed presidential appointee at SBA was the

<sup>15</sup> 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.

<sup>16</sup> *Ibid.*, p. 82.

<sup>17</sup> *Ibid.*, pp. 121-122.

<sup>18</sup> Title II, Public Law 94-305; June 4, 1976; 15 § U.S.C. 634a *et seq.* See Appendix A.

<sup>19</sup> 15 U.S.C. § 634a.

Administrator; and subsequently the Congress has conferred this status on only two other positions at SBA, the Inspector General in 1978,<sup>20</sup> and the Deputy Administrator in 1990.<sup>21</sup>

### Public law hiring authority

In addition to his or her 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.<sup>22</sup> 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.<sup>23</sup>

### No prior clearance on Advocacy work products

Public Law 94-305 authorized the Chief Counsel to prepare and publish such reports as he or she deems 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.”<sup>24</sup> 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...”<sup>25</sup>

### 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.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> 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

20 Public Law 95-452, Inspector General Act of 1978; October 12, 1978; 92 Stat. 1101, 5 U.S.C. App.

21 § 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).

22 15 U.S.C. § 634d.

23 § 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.

24 15 U.S.C. § 634f.

25 15 U.S.C. § 634e.

26 § 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.

27 § 202, Public Law 94-305, 15 U.S.C. § 634b.

28 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.

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.<sup>29</sup> 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 more than 30 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,<sup>30</sup> 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.<sup>31</sup> 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 1980 to hammer out an "Agenda for Action" comprising 60 recommendations for the President and the Congress to consider.<sup>32</sup>

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.

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,<sup>33</sup> the Equal Access to Justice Act of 1980,<sup>34</sup> the Paperwork Reduction Act of 1980,<sup>35</sup> the Prompt Payment Act of 1982,<sup>36</sup> and the Small Business Innovation Development Act of 1982.<sup>37</sup> 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.<sup>38</sup>

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

<sup>29</sup> See Appendix A for the full statutory text.

<sup>30</sup> See Chapter 6 for a listing of these.

<sup>31</sup> Executive Order 12061, 43 Fed. Reg. 21865 (May 18, 1978).

<sup>32</sup> *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.

<sup>33</sup> Public Law 96-354; September 19, 1980; 5 U.S.C. § 601 *et seq.*

<sup>34</sup> Public Law 96-481; October, 21, 1980; 5 U.S.C. § 504.

<sup>35</sup> Public Law 96-511; December 11, 1980. 5 U.S.C. § 3501 *et seq.*

<sup>36</sup> Public Law 97-177; May 21, 1982; 31 U.S.C. § 3901 *et seq.*

<sup>37</sup> Public Law 97-219; July 22, 1982; 15 U.S.C. § 638.

<sup>38</sup> 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).

members of Congress.<sup>39</sup> 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 or administrative action.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup>

Importantly for Advocacy, the Small Business Economic Policy Act of 1980 required the

39 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.).

40 House Report 99-1036 (Summary of Activities, 99<sup>th</sup> Congress, House Committee on Small Business; January 2, 1987), p. 450. Unfortunately, one recommendation which was not adopted was that Advocacy’s budget should be not less than five percent of SBA’s overall salary and expense budget. See Appendix P.

41 Title III, Public Law 96-302; July 2, 1980; 94 Stat. 848; 15 U.S.C. §§ 631a, 631b.

42 15 U.S.C. § 631a(a).

President to transmit to Congress an annual “Report on Small Business and Competition,” which was popularly known as *The State of Small Business*.<sup>43</sup> 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 the Office of 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,<sup>44</sup> which took effect in 2000, the final year in the series. However, because this report was so important to Advocacy’s stakeholders, 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 2001. The former report from the President to the Congress became an Advocacy report to the President and the Congress. More information on this report will appear in Chapter 2.

### *Equal Access to Justice Act*

Public Law 96-481, the Equal Access to Justice Act of 1980,<sup>45</sup> provided that a federal agency losing an adversarial adjudication should pay, with

43 15 U.S.C. § 631b.

44 § 3003, Public Law 104-66; December 21, 1995; 109 Stat. 734, 31 U.S.C. § 1113 note.

45 Public Law 96-481; October, 21, 1980; 5 U.S.C. § 504.

some exceptions, the fees and other expenses incurred by a prevailing party. 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 the Equal Access to Justice Act, after consultation with the Chief Counsel for Advocacy. This function ended for Advocacy when the Administrative Conference was terminated in 1996.<sup>46</sup>

### 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 responded proactively 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)<sup>47</sup> and its 1979 successor, Executive Order 12135 (The President's Advisory Committee for Women).<sup>48</sup> 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.<sup>49</sup>

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.<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup>

### 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).<sup>53</sup> 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 House Small Business Committee staff member who worked on the original legislation and later

<sup>46</sup> Public Law 104-52; November 19, 1995; 109 Stat. 480. The Administrative Conference was subsequently reauthorized for fiscal years 2005 through 2007 (by Public Law 108-41; October 30, 2004), but funding was not provided for it to resume operations. More recently, the Conference was again reauthorized for fiscal years 2009 through 2011 (by Public Law 110-290; July 30, 2008), but as this report was being finalized, the Conference remained unfunded.

<sup>47</sup> Executive Order 12050, 43 Fed. Reg. 14431 (April 4, 1978).

<sup>48</sup> Executive Order 12135, 44 Fed. Reg. 27639 (May 9, 1979).

<sup>49</sup> House Report 96-1542 (Summary of Activities, 96<sup>th</sup> Congress, House Committee on Small Business; December 29, 1980), p. 242.

<sup>50</sup> *Advocacy Notes*; June 15, 1982.

<sup>51</sup> *Advocacy Notes*; August 15, 1982.

<sup>52</sup> 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.

<sup>53</sup> Public Law 96-354; September 19, 1980; 5 U.S.C. § 601 *et seq.* See Appendix B.

became President of the Small Business Exporters Association, 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.<sup>54</sup>

Often, agencies could 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 resulted in regulatory overkill, usually at the expense of smaller entities.<sup>55</sup> One of the top five recommendations of the 1980 White House Conference on Small Business included the sunset review and economic impact analysis of regulations, and RFA legislation incorporating these features moved swiftly through Congress after the Conference.<sup>56</sup>

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.

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

55 Advocacy has sponsored significant research relating to the cost of 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 <http://www.sba.gov/advo/research/regulation.html>.

56 Op. cit., p. 56.

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,<sup>57</sup> their initial regulatory flexibility analyses,<sup>58</sup> and their certifications of rules without significant effects.<sup>59</sup> Additionally, the Chief Counsel was tasked to report annually to the President and the Congress on agency compliance with the RFA,<sup>60</sup> and was authorized to appear as *amicus curiae* in any action brought in a court of the United States to review a rule.<sup>61</sup> 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.<sup>62</sup> But a new act of Congress would be

57 5 U.S.C. § 602.

58 5 U.S.C. § 603.

59 5 U.S.C. § 605.

60 5 U.S.C. § 612(a).

61 5 U.S.C. §§ 612(b), 612(c).

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

required for that, and consensus remained elusive. Evidence continued to mount that the RFA needed to be strengthened. Chief Counsel Frank Swain testified before the Senate Committee on Small Business in 1989 that “agency compliance with the RFA runs the gamut from near total compliance to near total disregard for this Act.”<sup>63</sup>

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.<sup>64</sup> 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.<sup>65</sup>

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.

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.<sup>66</sup> 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.”<sup>67</sup>

In June 1995, the third White House Conference on Small Business met in Washington. It had been preceded by 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 Regulatory Flexibility Act, including the establishment of RFA judicial review and direct small business participation in the rulemaking process.<sup>68</sup>

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 the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).<sup>69</sup> The new legislation included a variety of provisions of major importance to small business, including amendments to the Regulatory Flexibility Act to permit judicial review based on RFA compliance.<sup>70</sup> 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

63 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.

64 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.

65 Ibid.

66 United States General Accounting Office, “Regulatory Flexibility Act: Status of Agencies’ Compliance,” April 1994.

67 Ibid., p. 18.

68 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.

69 Title II, Public Law 104-121, Contract with America Advancement Act of 1996; March 29, 1996; 110 Stat. 857.

70 Ibid., § 242, 110 Stat. 865, 5 U.S.C. § 611.

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.<sup>71</sup> 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.<sup>72</sup> SBREFA’s review panel process applies specifically to proposals of EPA and OSHA, and its coverage has not been extended to other agencies to date.

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 rule-makings.<sup>73</sup> 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.

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 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 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).<sup>74</sup> 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.<sup>75</sup>

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,

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

72 *Ibid.*, § 244, 110 Stat. 867, 5 U.S.C. § 609.

73 See Appendix O for a synopsis of major RFA court cases to date.

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

75 *Ibid.*, § 1.

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.<sup>76</sup>

- Notify Advocacy of any draft rules that may have a significant economic impact on a substantial number of small entities under the Act.<sup>77</sup>
- 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.<sup>78</sup>

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.<sup>79</sup> Advocacy was also mandated to provide RFA compliance training to agencies,<sup>80</sup> and to report not less than annually to the OMB Director on agency compliance with the executive order.<sup>81</sup>

## Conclusion

This completes our survey of Advocacy's background and the development of its mission.<sup>82</sup> 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 poli-

cies 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 which 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. Who are these small businesses whose interests Advocacy represents? What role do they play in our economy today? Just how important are they?

## The Small Business Constituency

Advocacy's Office of Economic Research annually prepares a two-page summary of important small business statistics that can help us answer the questions just posed.<sup>83</sup> First, what is a small business? For general research purposes, Advocacy defines a small business as an independent

76 Ibid., § 3(a).

77 Ibid., § 3(b).

78 Ibid., § 3(c).

79 Ibid., § 2(c).

80 Ibid., § 2(b).

81 Ibid., § 6.

82 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 20<sup>th</sup> anniversary of the Office of Advocacy, is reprinted in its entirety in Appendix V.

83 Office of Advocacy, Frequently Asked Questions; September 2008. This resource can be accessed at <http://www.sba.gov/advo/stats/sbfaq.pdf>. It includes the source citations for all information presented in this section, except that relating to veterans, which is at <http://www.census.gov/csd/sbo/veteran2002.htm>.

firm having fewer than 500 employees.<sup>84</sup> With this in mind, small firms:

- represent 99.7 percent of all employer firms;
- employ about half of all private sector employees;
- pay nearly 45 percent of total U.S. private payroll;
- have generated from 60 to 80 percent of net new jobs annually over the last decade;
- account for half of nonfarm private gross domestic product (GDP);
- supplied 23 percent of the total value of federal prime contracts in FY 2007;
- hire 40 percent of high-tech workers (e.g., scientists, engineers, computer specialists);
- are 52 percent home-based and 2 percent franchises; and
- were 97.3 percent of all known exporters, and produced 28.9 percent of known export value in FY 2006.

### How many small businesses are there?

Advocacy estimates that in 2007 there were 27.2 million businesses in the United States. Small firms with fewer than 500 employees represent 99.9 percent of these (including both employers and nonemployers). In 2005, there were 26.4 million firms, of which 6.0 million were employers and 20.4 million were nonemployers.

### How many businesses open and close in a year?

Advocacy estimates that in 2007 there were 637,100 new firms; 560,300 closures; and 28,322 bankruptcies.

<sup>84</sup> 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 <http://www.sba.gov/size>.

### How many new jobs do small firms create?

In the last decade, small businesses created 60 to 80 percent of net new jobs. In the most recent year with data (2005), small firms accounted for 78 percent of net new jobs. Firms with fewer than 500 employees had a net gain of 979,102 new jobs. Large firms with 500 or more employees added 262,326 net jobs.

### Women, minority and veteran entrepreneurs

Data collected by the Bureau of the Census as part of its Economic Census conducted once every five years found that:

- Of the 23 million nonfarm businesses in 2002, women owned 6.5 million firms; another 2.7 million firms were owned equally by both men and women.
- In 2002, minorities owned 4.1 million firms; Hispanic Americans owned 6.6 percent of all U.S. firms; African Americans, 5 percent; Asian Americans, 4.6 percent; American Indians or Alaska Natives, 0.8 percent; and Native Hawaiian or other Pacific Islanders, 0.1 percent.
- About 12.2 percent of firms responding to the 2002 Census survey reported one or more U.S. military veterans as majority-interest owners. About 14.5 percent of all respondent firm owners reported being a veteran, and about 6.5 percent of these were service-disabled.

### 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 instructive here.

- Very small firms with fewer than 20 employees annually spend 45 percent more per employee than larger firms to comply with federal regulations. They spend 67 percent more per employee on tax compliance, and more than 4 ½ times as much to comply with environmental regulations than their larger counterparts.
- Small innovative firms produce 13 to 14 times more patents per employee than large patenting firms, and their patents are twice as likely as large firm patents to be among the one percent most cited.
- Two-thirds of new employer establishments survive at least two years, and 44 percent survive at least four years.

## 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 which small business makes every day to our nation.

At the beginning of this chapter, we posed a simple question, “Are small firms important?” The answer is simple, too: “You bet they are!”

# Chapter 2

## The Role of Data and Research

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*“If you want to know about a nation’s future growth, measure the number of small businesses, look at the jobs and livelihoods they create, see if they have the capital and economic freedom to develop new ideas, find out how easily they can start up and, yes, fail and start over again. And assess whether they’re more often helped or hamstrung by their surroundings, including the marketplace and their government’s policies.”*

**Jere W. Glover, fourth Chief Counsel for Advocacy (1994 – 2001)**

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 over 27 million businesses in the United States in 2007,<sup>1</sup> of which 99.7 percent were small, with fewer than 500 employees.<sup>2</sup> Small firms employ half of the private sector workforce<sup>3</sup> and account for half of the private, nonfarm real gross domestic product.<sup>4</sup> Small businesses provided for 60 to 80 percent of the net new jobs during the decade of the 1990s. More recently, all net job creation has come from small firms, especially from new entrepreneurs.<sup>5</sup> 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.<sup>6</sup> 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;
- 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;

1 Office of Advocacy, *Frequently Asked Questions*, September 2008. This annually updated resource can be accessed at <http://www.sba.gov/advo/stats/sbfaq.pdf>.

2 Office of Advocacy, *Private Firms, Establishments, Employment, Annual Payroll and Receipts by Firm Size, 1988–2005*, [http://www.sba.gov/advo/research/us88\\_05.pdf](http://www.sba.gov/advo/research/us88_05.pdf).

3 Ibid.

4 Office of Advocacy sponsored research by Katherine Kobe, *The Small Business Share of GDP, 1998–2004*, April 2007, <http://www.sba.gov/advo/research/rs299tot.pdf>.

5 Office of Advocacy, *Employer Firm Births and Deaths by Employment Size of Firm, 1989–2004*, [http://www.sba.gov/advo/research/dyn\\_b\\_d8904.pdf](http://www.sba.gov/advo/research/dyn_b_d8904.pdf).

6 § 202, Public Law 94-305, 15 U.S.C. § 634b.

- 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 2008, OER had nine staff economist positions, including the Chief Economist and Director of Economic Research. The current economics team specializes in the following areas: small firm dynamics, small business finance, small business employee benefits, tax and regulatory policy, women- and minority-owned business, 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 working papers, to present them at conferences, and whenever possible to publish them in professional peer-reviewed journals. Academic papers written by Advocacy staff are also posted as working papers on Advocacy’s website.<sup>7</sup> To facilitate research efforts, all Advocacy economists have access to STATA statistical software<sup>8</sup> and full-text journal articles using both JSTOR<sup>9</sup> and the American Economic Association’s electronic bibliography, EconLit.<sup>10</sup>

7 For Advocacy research working papers, see: <http://www.sba.gov/advo/research/wkpapers.html>.

8 For more information, see: <http://www.stata.com/>.

9 For more information, see: <http://www.jstor.org/>.

10 For more information, see: <http://www.econlit.org/>. The provider of this service for the Office of Advocacy is EBSCO Publishing.

## Advocacy—The Source for Small Business Statistics and Research

In the early years of Advocacy, the research mandate of Public Law 94-305 was more than ambitious. Statistics on small businesses themselves, let alone more derivative topics, were hard to come by. 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.<sup>11</sup> 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 Fiscal Year 2000, approximately \$1.1 million has been allocated annually to the Office of Advocacy for economic research and data products.<sup>12</sup>

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 on more specialized issues. In each instance, Advocacy’s Office of Economic Research strives to produce 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

11 Title III, Public Law 96-302; July 2, 1980; 94 Stat. 848; 15 U.S.C. §§ 631a, 631b.

12 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 within SBA’s “Executive Direction” budget.

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. The good news is that there are many data sources.

The bad news is that most data sources are not designed to produce information specifically on small firms. One of the most important functions 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.

The Office of Economic Research 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 came from Advocacy either directly or indirectly. 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, Advoca-

cacy always seeks to provide them with the best information and economic research possible.

The following sections discuss various sources of data used by OER, its research products, its outreach initiatives, and work with the Office of Interagency Affairs on regulatory issues.

## 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. The U.S. Census Bureau's Statistics of U.S. Businesses (SUSB) Division produces static and dynamic firm size data by North American Industrial Classification System (NAICS) codes,<sup>13</sup> by states, and by metropolitan statistical areas (MSAs).<sup>14</sup> Advocacy partially funds the development of these data annually, and they are 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 2005, providing a sufficient time series for analysis.<sup>15</sup>

### The Economic Census

Advocacy makes extensive use of Census Bureau data to describe small business owner demographics. Every five years, Census conducts an

<sup>13</sup> Data before 1998 are available using the prior U.S. Standard Industrial Classification (SIC) system codes.

<sup>14</sup> See <http://www.sba.gov/advo/research/data.html> for more information on firm size data.

<sup>15</sup> For example, see Advocacy-sponsored research by Donald Bruce, John A. Deskins, Brian C. Hill, and Jonathon C. Rork; *Small Business and State Growth: An Econometric Investigation*, February 2007, <http://www.sba.gov/advo/research/rs292tot.pdf>; and research by Robert M. Feinberg, *The Impact of International Competition on Small-Firm Exit in U.S. Manufacturing*; March 2008, <http://www.sba.gov/advo/research/rs320tot.pdf>.

Economic Census required by law, in which many types of highly specific data are collected using large scientifically selected survey samples. Advocacy used one part of the 2002 Economic Census, its *Survey of Business Owners (SBO)*<sup>16</sup> as the basis for reports on business ownership by women,<sup>17</sup> individuals belonging to minority groups,<sup>18</sup> and veterans, including service-disabled veterans.<sup>19</sup> (Unfortunately, because of time lags in producing data, tabulations from the 2007 SBO now in progress are not expected to be available until 2010 or later.) Advocacy also explores the 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.

## 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).<sup>20</sup> These data allow Advocacy's Office of Economic Research to analyze taxation and income trends.<sup>21</sup> With that

said, it is important to remember that 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 do not 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 probably the only method of obtaining much of the information used in many of Advocacy's research products.

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.<sup>22</sup> 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

16 For more information on the Survey of Business Owners, see: <http://www.census.gov/csd/sbo/>.

17 Office of Advocacy, *Women in Business: A Demographic Review of Women's Business Ownership*; August 2006, <http://www.sba.gov/advo/research/rs280tot.pdf>.

18 Office of Advocacy, *Minorities in Business: A Demographic Review of Minority Business Ownership*; April 2007, <http://www.sba.gov/advo/research/rs298tot.pdf>.

19 Office of Advocacy, "Characteristics of Veteran Business Owners and Veteran-Owned Businesses;" Chapter 5, *The Small Business Economy*; December 2007, [http://www.sba.gov/advo/research/sb\\_econ2007.pdf](http://www.sba.gov/advo/research/sb_econ2007.pdf).

20 For more on the IRS Statistics of Income Division, see: <http://www.irs.gov/taxstats/index.html>.

21 For example, see Office of Advocacy, *Dynamics of Women-Operated Sole Proprietorships, 1990–1998*, March 2003, [http://www.sba.gov/advo/stats/rwosp\\_03.pdf](http://www.sba.gov/advo/stats/rwosp_03.pdf); or Advocacy spon-

sored research by Innovation and Information Consultants, Inc., *The Impact of Tax Expenditure Policies on Incorporated Small Businesses*, April 2004, <http://www.sba.gov/advo/research/rs237tot.pdf>; or by Joanne H. Pratt, *The Impact of Location on Net Income: A Comparison of Homebased and Non-Homebased Sole Proprietors*, May 2006, <http://www.sba.gov/advo/research/rs275tot.pdf>.

22 For more information on BITS, see: <http://www.census.gov/csd/susb/defterm.html#goBITS>. For illustrations of how the BITS dataset might be accessed and used, see: Advocacy-sponsored research by Zoltan C. Acs and Catherine Armington, *Using Census BITS to Explore Entrepreneurship, Geography, and Economic Growth*, February 2005, <http://www.sba.gov/advo/research/rs248tot.pdf>; and by Lawrence Plummer and Brian Headd, *Rural and Urban Establishment Births and Deaths Using the U.S. Census Bureau's Business Information Tracking Series*, February 2008, <http://www.sba.gov/advo/research/rs316tot.pdf>.

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.<sup>23</sup> The research significance of this dataset is twofold. First, it allows researchers and policymakers to more precisely ascertain employment dynamics sooner than is 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.<sup>24</sup>

## 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.<sup>25</sup> Another major Federal Reserve

data source is its *Survey of Consumer Finances (SCF)*,<sup>26</sup> 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 Practices* to track small firm commercial and industrial lending standards and demand.<sup>27</sup> Finally, Advocacy's annual examination of the lending activities of commercial banks and other depository institutions<sup>28</sup> uses data from two types of reports that these institutions make to their regulatory agencies: Community Reinvestment Act (CRA)<sup>29</sup> reports and lenders' Consolidated Reports of Condition and Income, often referred to as "call reports."<sup>30</sup>

## Additional data sources

In addition to the government data sources just outlined, Advocacy's Office of Economic Research 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." For example, one of the perennial top concerns of small firms has been the cost of providing health insurance to their employees. The

23 For more information on BED data, see: <http://www.bls.gov/bdm/>.

24 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, <http://www.bls.gov/opub/mlr/2007/03/art3full.pdf>.

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

26 For more information, see: <http://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.

27 For more information, see: <http://www.federalreserve.gov/boarddocs/SnLoanSurvey/>.

28 For more on Advocacy's annual bank study, see: <http://www.sba.gov/advo/research/lending.html>. 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.

29 For more information about the CRA and its associated reports, see: <http://www.ffiec.gov/cra/>.

30 For more information on call reports, see: <https://cdr.ffiec.gov/public/>. The Office of Advocacy contracts annually for special tabulations of CRA and call report data. For general information on these and other datasets for the study of small business finance, see Advocacy research by Charles Ou, *Statistical Databases for Economic Research on the Financing of Small Firms in the United States*, <http://www.sba.gov/advo/research/wkp04Ou.pdf>.

Office of Advocacy has been able to illustrate the challenges small businesses face in providing benefits (including health insurance, retirement, annual and sick leave, etc.) compared with their larger counterparts.<sup>31</sup> Data sources for such studies include the Census/BLS Current Population Survey,<sup>32</sup> the Census Bureau's Survey of Income and Program Participation,<sup>33</sup> the Department of Health and Human Services's Medical Expenditure Panel Survey,<sup>34</sup> and other surveys from the Kaiser Family Foundation<sup>35</sup> and the Employee Benefit Research Institute.<sup>36</sup>

The Office of 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 views on the economy for its monthly *Small Business Economic Trends*

publication.<sup>37</sup> 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*.<sup>38</sup>

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.<sup>39</sup> 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,<sup>40</sup> the Kauffman Firm Survey,<sup>41</sup> and the Angel Investor Performance Project.<sup>42</sup> 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 nonemployer business units in the U.S.<sup>43</sup>

The Kauffman Foundation and the Office of Advocacy share a mission for the study and en-

31 For example, see Advocacy-sponsored research by Joel Popkin and Company, *Cost of Employee Benefits in Small and Large Businesses*, August 2005, <http://www.sba.gov/advo/research/rs262tot.pdf>; and by Econometrica, Inc., *Structural Factors Affecting the Health Insurance Coverage of Workers at Small Firms*, March 2007, <http://www.sba.gov/advo/research/rs295tot.pdf>.

32 The Current Population Survey (CPS) is a monthly survey of about 50,000 households conducted by the Bureau of the Census for the Bureau of Labor Statistics. The survey has been conducted for more than 50 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: <http://www.census.gov/cps/>.

33 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: <http://www.bls.census.gov/sipp/>.

34 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: <http://www.meps.ahrq.gov/mepsweb/>.

35 For more information on the Kaiser Family Foundation, see: <http://www.kff.org/>.

36 For more information on the Employee Benefit Research Institute, see: <http://www.ebri.org/>.

37 *Small Business Economic Trends* is published monthly by the NFIB Research Foundation. For more information, see: <http://www.nfib.com/page/sbet>.

38 The National Small Business Poll is conducted by the NFIB Research Foundation, and new data are added to its website at <http://www.411sbfacts.com/> eight times annually.

39 For more information on the PSED, see: <http://www.psed.isr.umich.edu/psed/home>.

40 For more information on the Kauffman Index of Entrepreneurial Activity, see: <http://www.kauffman.org/kauffmanindex/>.

41 For more information on the Kauffman Firm Survey, see: <http://www.kauffman.org/kfs/>.

42 For more information on the Angel Investor Performance Project, see: <http://www.kauffman.org/aipp/>.

43 For more information on the Census Bureau's Integrated Longitudinal Business Database project, see: [http://www.ces.census.gov/index.php/ces/cespapers?detail\\_key=101744](http://www.ces.census.gov/index.php/ces/cespapers?detail_key=101744).

couragement 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 in recent years. Advocacy and Kauffman have also collaborated since 2001 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 the Office of Advocacy.<sup>44</sup> 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.<sup>45</sup>

## Advocacy Economic Research Products

On average, the Office of Advocacy releases at least 25 economic research reports each year.<sup>46</sup> These are produced by the professional staff of Advocacy’s Office of Economic Research (OER) and by contract researchers, subject to the availability of funding. In this section, we will take a closer look at some of Advocacy’s research products.

### *The Small Business Economy*

Since 1982, the Office of Advocacy has prepared an annual report on the state of small business, and since 2001 this report has been known as *The Small Business Economy: A Report to the*

*President*.<sup>47</sup> Perhaps the largest and most anticipated of all Advocacy periodic reports, it features chapters on the economic conditions for small business during the prior year, small business lending and procurement trends, and regulatory flexibility updates. Each edition also features numerous data tables on small businesses with information in a consistent format from year to year, so as to be helpful for those seeking a quick statistic. Starting with the 2004 edition, there has been an effort to use at least some work from outside contributors. This allows for the report to explore new and various topics of relevance, keeping it fresh and timely. Past examples by outside authors include chapters on veteran entrepreneurship, an analysis of the impact of education on entrepreneurship, a discussion of “economic gardening,” an examination of the linkage between small business and innovation, government policies to promote technology transfer, and an illustration of how social entrepreneurship might help governments solve various problems. Future *Small Business Economy* editions will also feature chapters that are informative, timely, and thought-provoking for policymakers, entrepreneurs, and researchers.

### Other periodic reports

In addition to *The Small Business Economy*, Advocacy produces a variety of other periodic reports that enjoy wide audiences. In fact, most of the following have become standard reference items.

- *Frequently Asked Questions*. This two-page document is designed for a general audience and serves as a summary of information from other research materials. It provides a series of quick, easy-to-recite facts recognizing the importance of small business in the economy. Revised annually, it is an excellent introduction for

44 Kauffman’s Entrepreneurship Research Portal can be accessed at: <http://research.kauffman.org/>.

45 For more information on the SSRN Entrepreneurship Research and Policy Network, see: <http://www.ssrn.com/erpn/index.html>.

46 For a chronological listing, see: <http://www.sba.gov/advo/research/chron.html> and Appendix I.

47 Chapter One has already outlined the early history of this report, which was popularly known as *The State of Small Business* until 2000. See <http://www.sba.gov/advo/research/sbe.html> for past editions.

individuals to acquaint themselves with Office of Advocacy research and data.<sup>48</sup>

- *Office of Economic Research: Research Publications*. This annual publication lists all of the economic research work products released by Advocacy in any given year and is organized by various categories. As such, it serves as a year-end report on the research accomplishments of the previous year.<sup>49</sup>
- *Quarterly Indicators: The Economy and Small Business*. This regular publication pulls together data from a variety of sources to highlight quarterly economic trends relevant to small businesses.<sup>50</sup>
- *Research Resources*. This document addresses a number of questions about small business research and data from the perspective of a faculty member, student, or researcher. It includes a brief listing of journals and recommended readings, links to data and other web-based sources, and information about research funding. It is produced periodically, but not necessarily annually.<sup>51</sup>
- *Small Business and Micro Business Lending in the United States*. This is an annual study of lending to small firms using 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 reports required by the Community Reinvestment Act (CRA). Because data are available only by the size of loan, small business loans are defined as those

smaller than \$1 million, and micro business loans are those for under \$100,000.<sup>52</sup>

- *Small Business Profiles for States and Territories*. This report profiles the economic condition of small businesses in the United States overall and in each of the 50 states, the District of Columbia, and the U.S. territories. Each state profile includes sections on the following topics: the number of firms, industry composition, small business income, banking, women’s and minority business ownership, and employment.<sup>53</sup>

## Issue-specific research

In addition to the regular periodic reports we have just described, 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. From seven to 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.<sup>54</sup> They are typically small business set-asides (only small firms can

48 For the most recent *Frequently Asked Questions*, see <http://www.sba.gov/advo/stats/sbfaq.pdf>.

49 For the most recent and past *Publication Catalogues*, see <http://www.sba.gov/advo/research/pub.html>.

50 For the most recent and past *Quarterly Indicators*, see <http://www.sba.gov/advo/research/sbei.html>.

51 For the most recent *Research Resources*, see <http://www.sba.gov/advo/research/rrsb.pdf>.

52 For the most recent and past banking studies, see <http://www.sba.gov/advo/research/lending.html>.

53 For the most recent and past state profiles, see <http://www.sba.gov/advo/research/profiles/>.

54 For more information on FedBizOpps, see <http://www.fbo.gov/>.

compete), and Advocacy has also used a special authority to allow competition to be reserved for firms owned by service-disabled veterans.<sup>55</sup> 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. 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). Occasionally, an unsolicited proposal is approved if it is of exceptional interest and it meets the requirements of federal contracting rules.<sup>56</sup> Each Advocacy contract research project is monitored by an Advocacy staff member serving as the contracting officer's technical representative (COTR).

Since 2001, the Office of Advocacy has released more than 200 publications,<sup>57</sup> 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. Highlights from some of these studies include:

### Cost of Federal Regulations

Among the most frequently cited of Advocacy economic research products are its perennial analyses of the disproportionate cost of federal regulations to small firms. Advocacy has sponsored such research from its inception, its first product on this topic being released in 1980. More recent examinations of this subject were

released in 1995,<sup>58</sup> 2001,<sup>59</sup> and 2005.<sup>60</sup> The latter study found that the cost of federal regulations totaled \$1.1 trillion in 2004, and that the cost per employee for firms with fewer than 20 employees was \$7,647 annually, about 45 percent more per employee than for their larger counterparts. Advocacy is currently planning to update this analysis.

### Entrepreneurship by Owner Demographics

A number of Advocacy studies have examined various demographic characteristics of entrepreneurs, with many of these focusing on business ownership by women, individuals belonging to minority groups, veterans, and service-disabled veterans. The most prominent studies have been the *Women in Business*<sup>61</sup> and *Minorities in Business*<sup>62</sup> reports that are released once every five years in conjunction with the release of economic census data. In 2007, the Office of Advocacy also released a report on veteran business ownership as part of *The Small Business Economy*.<sup>63</sup> These studies have shown dramatic gains in small business ownership among women and minority individuals over the past few decades, and in particular they show how entrepreneurship can benefit one's economic well-being.<sup>64</sup> Despite such progress, there is still much potential for

55 In fact, the very first contract awarded by SBA using this set-aside authority for service-disabled veterans was for an Advocacy-sponsored research project.

56 Unsolicited proposals must meet the conditions of the Federal Acquisition Regulations (FAR) Subpart 15.6. See: [http://www.arnet.gov/far/current/html/Subpart%2015\\_6.html](http://www.arnet.gov/far/current/html/Subpart%2015_6.html).

57 These include: 13 reports in FY 2001, 17 reports in FY 2002, 30 reports in FY 2003, 21 reports in FY 2004, 34 reports in FY 2005, 28 reports in FY 2006, 32 reports in FY 2007, and 27 reports in FY 2008.

58 Advocacy-sponsored research by Thomas D. Hopkins, *Profiles of Regulatory Costs*, November 1995, <http://www.sba.gov/advo/research/rs1995hoptot.pdf>.

59 Advocacy-sponsored research by W. Mark Crain and Thomas D. Hopkins, *The Impact of Regulatory Costs on Small Firms*, October 2001, <http://www.sba.gov/advo/research/rs207tot.pdf>.

60 Advocacy-sponsored research by W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, September 2005, <http://www.sba.gov/advo/research/rs264tot.pdf>.

61 Office of Advocacy, *Women in Business: A Demographic Review of Women in Business*, August 2006, <http://www.sba.gov/advo/research/rs280tot.pdf>.

62 Office of Advocacy, *Minorities in Business: A Demographic Review of Minority Business Ownership*, April 2007, <http://www.sba.gov/advo/research/rs298tot.pdf>.

63 Office of Advocacy, "Characteristics of Veteran Business Owners and Veteran-Owned Businesses," Chapter 5, *The Small Business Economy*, December 2007, [http://www.sba.gov/advo/research/sb\\_econ2007.pdf](http://www.sba.gov/advo/research/sb_econ2007.pdf).

64 Advocacy research by Ying Lowrey, *Business Density, Entrepreneurship and Economic Well-Being*, June 2004, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=744804](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=744804).

further growth.<sup>65</sup> With regard to veterans, while their overall number in the workforce might be falling (especially among World War II, Korean War, and Vietnam-era veterans), their overall rate of self-employment has been consistently higher than that of nonveterans.<sup>66</sup> One of the keys to success in entrepreneurship – regardless of demographic group – is increased human capital investment and prior experiences.<sup>67</sup>

### Importance of Technology and Innovation

Small businesses are responsible for much of the net job creation in the economy. Much of that growth in employment can be attributed to innovation and new venture creation, and small businesses play a unique role in our economy in that process, as they are often responsible for bringing “breakthrough technologies” to market.<sup>68</sup> One Advocacy study found that small patenting firms produced 13 to 14 times more patents per employee than their larger counterparts, and that those patents were more likely to be cited in other patent applications.<sup>69</sup> Moreover, colleges and universities that spent more on research and development were more likely to have higher levels of

new firm formation in the surrounding metropolitan region,<sup>70</sup> and regions that stress innovation are more likely to be entrepreneurial centers.<sup>71</sup>

### Small Business Benefits

Consistent with research from other sources, Advocacy-funded research shows that employees at small businesses are less likely to receive health insurance or other benefits, putting small business owners at a competitive disadvantage when attempting to attract talented workers.<sup>72</sup> This hurts employee retention,<sup>73</sup> and it leads to more small business workers depending on health insurance coverage from their spouse’s (large firm) employer.<sup>74</sup> The challenge for entrepreneurs, though, has been twofold. First, health insurance premiums have risen dramatically in recent years;<sup>75</sup> and second, it is more difficult for very small businesses to obtain coverage for their workers because administrative costs for them are significantly higher.<sup>76</sup>

65 Office of Advocacy, *Dynamics of Minority-Owned Employer Establishments, 1997–2001*, February 2005, <http://www.sba.gov/advo/research/rs251tot.pdf>; and Advocacy-sponsored research by the Initiative for a Competitive Inner City, *State of the Inner City Economies: Small Business in the Inner City*, October 2005, <http://www.sba.gov/advo/research/rs260tot.pdf>.

66 Advocacy-sponsored research by Robert W. Fairlie, *Self-Employed Business Ownership Rates in the United States: 1979–2003*, December 2004, <http://www.sba.gov/advo/research/rs243tot.pdf>.

67 See relevant chapters in recent editions of Advocacy’s annual *The Small Business Economy* at: [http://www.sba.gov/advo/research/sbe\\_05\\_ch04.pdf](http://www.sba.gov/advo/research/sbe_05_ch04.pdf), [http://www.sba.gov/advo/research/sbe\\_05\\_ch05.pdf](http://www.sba.gov/advo/research/sbe_05_ch05.pdf), [http://www.sba.gov/advo/research/sbe\\_06\\_ch05.pdf](http://www.sba.gov/advo/research/sbe_06_ch05.pdf); in addition to Advocacy research by Chad Moutray, *Educational Attainment and Other Characteristics of the Self-Employed: An Examination Using Data from the Panel Study of Income Dynamics*, December 2007, <http://www.sba.gov/advo/research/rs313tot.pdf>.

68 Advocacy-sponsored research by William J. Baumol, “Small Firms: Why Market-Driven Innovation Can’t Get Along Without Them,” Chapter 8, *The Small Business Economy—2005*, [http://www.sba.gov/advo/research/sbe\\_05\\_ch08.pdf](http://www.sba.gov/advo/research/sbe_05_ch08.pdf).

69 Advocacy-sponsored research by CHI, Inc., *Small Serial Innovators: The Small Firm Contribution to Technical Change*, February 2003, <http://www.sba.gov/advo/research/rs225tot.pdf>.

70 Advocacy-sponsored research by BJK Associates, *The Influence of R&D Expenditures on New Firm Formation and Economic Growth*, October 2002, <http://www.sba.gov/advo/research/rs222tot.pdf>.

71 Advocacy-sponsored research by Advanced Research Technologies, LLC, *The Innovation-Entrepreneurship NEXUS*, April 2005, <http://www.sba.gov/advo/research/rs256tot.pdf>.

72 Advocacy-sponsored research by Joel Popkin and Company, *Cost of Employee Benefits in Small and Large Businesses*, August 2005, <http://www.sba.gov/advo/research/rs262tot.pdf>.

73 Advocacy-sponsored research by John B. Hope and Patrick C. Mackin, *The Relationship Between Employee Turnover and Employee Compensation in Small Business*, July 2007, <http://www.sba.gov/advo/research/rs308tot.pdf>.

74 Advocacy-sponsored research by Eric E. Seiber and Curtis S. Florence, *Changes in Family Health Insurance Coverage for Small and Large Firm Workers and Dependents: Evidence from 1995 to 2005*, March 2008, <http://www.sba.gov/advo/research/rs321tot.pdf>.

75 See various employer-sponsored health insurance surveys at <http://www.kff.org/insurance/employer.cfm>.

76 Advocacy-sponsored research by Actuarial Research Corporation, *Study of the Administrative Costs and Actuarial Values of Small Health Plans*, January 2003, <http://www.sba.gov/advo/research/rs224tot.pdf>.

## Small Business Finance

Simply put, lending to small businesses is profitable,<sup>77</sup> with many banks pursuing such loans. Although there have been concerns in the past about the increased use of credit scoring and rapid banking consolidation – both of which might steer banks away from “relationship lending” – evidence shows that small businesses have not been disadvantaged by either of these developments.<sup>78</sup> Office of Advocacy research has also documented the financing patterns of small firms based on Federal Reserve Board data.<sup>79</sup> These studies, for instance, show how small business owners have utilized alternative sources of capital, such as friends and family, credit cards, and finance companies, as well as traditional sources of commercial lending. Research has also shown that business owners are more likely to have greater income and wealth.<sup>80</sup>

## Federal Procurement from Small Business

In fiscal year 2007, more than \$378 billion worth of contracts from the federal government for the

purchase of goods and services were considered small business-eligible. Of this amount, small firms received direct prime contracts for more than \$83 billion. Another estimated \$65 billion worth of subcontracts went to small firms.<sup>81</sup> Federal law has established a goal that 23 percent of all federal prime contract dollars should go to small businesses,<sup>82</sup> and the government has been very close to meeting that goal in recent years, with more dollars flowing to small businesses each year. Office of Advocacy research has shown that large firms have benefited from trends toward streamlining government,<sup>83</sup> contract bundling,<sup>84</sup> the use of purchase cards,<sup>85</sup> A-76 contracting,<sup>86</sup> and government-wide acquisition contracts.<sup>87</sup> Despite such disadvantages, there remains enormous potential for small businesses to “tap into” the federal procurement marketplace, and with each Office of Advocacy analysis, federal policymakers have responded with initiatives to address small business concerns.<sup>88</sup>

## Small Business and Regional Economic Development

New firm creation is an important component of regional economic development. Some local officials have pursued a strategy of nurturing ex-

77 Advocacy-sponsored research by James W. Kolari, *Assessing the Profitability and Riskiness of Small Business Lenders in the Banking Industry*, May 2003, <http://www.sba.gov/advo/research/rs229tot.pdf>; and by Joe Peek, *The Value to Banks of Small Business Lending*, May 2007, <http://www.sba.gov/advo/research/rs301tot.pdf>.

78 Advocacy-sponsored research by Charles D. Cowan and Adrian M. Cowan, *A Survey Based Assessment of Financial Institution Use of Credit Scoring for Small Business Lending*, November 2006, <http://www.sba.gov/advo/research/rs283tot.pdf>; and Advocacy research by Charles Ou, *Banking Consolidation and Small Business Lending: A Review of Recent Research*, March 2005, <http://www.sba.gov/advo/research/wkp05ou.pdf>.

79 Advocacy research, *Financing Patterns of Small Firms: Findings from the 1998 Survey of Small Business Finance*, September 2003, [http://www.sba.gov/advo/stats/ssbf\\_98.pdf](http://www.sba.gov/advo/stats/ssbf_98.pdf); and *Banking and SME Financing in the United States*, June 2006, <http://www.sba.gov/advo/research/rs277tot.pdf>. Also, Advocacy-sponsored research by George W. Haynes and Charles Ou, *A Profile of Owners and Investors of Privately Held Businesses in the United States, 1989–1998*, April 2002, <http://www.sba.gov/advo/stats/wkp02co.pdf>; and by George W. Haynes, *Finance Companies and Small Business Borrowers: Evidence from the 1993 and 1998 Surveys of Small Business Finances*, April 2005, <http://www.sba.gov/advo/research/rs255tot.pdf>.

80 Advocacy-sponsored research by George W. Haynes, *Income and Wealth: How Did Households Owning Small Businesses Fare from 1989 to 2004?*, April 2007, <http://www.sba.gov/advo/research/rs300tot.pdf>.

81 Chapter 3, *The Small Business Economy—2007*, [http://www.sba.gov/advo/research/sb\\_econ2007.pdf](http://www.sba.gov/advo/research/sb_econ2007.pdf).

82 15 U.S.C. § 644(g).

83 Advocacy research by Major Clark and Chad Moutray, *The Future of Small Businesses in the U.S. Federal Government Marketplace*, October 2004, <http://www.sba.gov/advo/stats/wkp04m-ccm.pdf>.

84 Advocacy-sponsored research by Eagle Eye Publishers, Inc., *The Impact of Contract Bundling on Small Business FY 1992–FY 2001*, October 2002, <http://www.sba.gov/advo/research/rs221tot.pdf>.

85 Advocacy-sponsored research by Eagle Eye Publishers, Inc., *The Impact of Purchase Card Activity on Small Businesses*, March 2003, <http://www.sba.gov/advo/research/rs226tot.pdf>.

86 Advocacy-sponsored research by Eagle Eye Publishers, Inc., and Jack Faucett Associates, Inc., *Impact of A-76 Competitive Sourcing on Small Government Vendors, FY 2001–FY 2006*, May 2007, <http://www.sba.gov/advo/research/rs302tot.pdf>.

87 Advocacy-sponsored research by Eagle Eye Publishers, Inc., and Jack Faucett Associates, Inc., *The Impact of Government-Wide Acquisition Contracts on Small Business*, August 2006, <http://www.sba.gov/advo/research/rs279tot.pdf>.

88 *The Small Business Advocate*; Vol. 24, No. 6; June 2005, <http://www.sba.gov/advo/junnewsletter05.pdf>, pp. 2-3.

isting small firms (“economic gardening”) versus the approach of luring larger employers into the region, which may or may not work (“economic hunting”).<sup>89</sup> One recent study suggested that a state’s ability to create new establishments was the best measure of its success in terms of gross state product, state personal income, and total state employment.<sup>90</sup> In general, though, state entrepreneurship rates vary by many factors, including changes in population, innovation, human capital, and perceived business climate.<sup>91</sup>

### Small Business Statistics and the Economy

Small businesses are significant contributors to the overall economy, and the Office of Advocacy has released a number of studies over the years that serve to document this importance. Many studies document the number of small businesses in the U.S. economy and show the effects of small firm job creation (see the introduction to this chapter or read the talking points in *Frequently Asked Questions*). In addition, a series of papers have discussed the issue of data measurement and trends; these include the development and use of various data sources for purposes of research in this area,<sup>92</sup> the appropriate statistical

distribution for measuring firm growth,<sup>93</sup> methods of estimating current employer and nonemployer firm data,<sup>94</sup> general small business data “stylized facts,”<sup>95</sup> and information on business survival.<sup>96</sup>

All Office of Advocacy research since the mid-1990s is available on its website at <http://www.sba.gov/advo/research>, along with listings of earlier studies that are available from the National Technical Information Service.<sup>97</sup> In addition to the reports themselves, each study released by Advocacy includes a Research Summary – a layman’s version of the overall findings which is typically written by the Advocacy staff member serving as the coordinator and COTR for the study. Since December 2004, the studies and their accompanying research summaries have been attached as one file, downloadable from Advocacy’s website.

## 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.<sup>98</sup> All research products are peer-reviewed internally by at least two members of the economics team. Some reports,

89 Advocacy-sponsored research by Steve Quello and Graham Toft, “Economic Gardening: Next Generation Applications for a Balanced Portfolio Approach to Economic Growth,” Chapter 6, *The Small Business Economy—2006*, [http://www.sba.gov/advo/research/sbe\\_06\\_ch06.pdf](http://www.sba.gov/advo/research/sbe_06_ch06.pdf).

90 Advocacy-sponsored research by Donald Bruce, John A. Deskins, Brian C. Hill, and Jonathon C. Rork, *Small Business and State Growth: An Econometric Investigation*, February 2007, <http://www.sba.gov/advo/research/rs292tot.pdf>.

91 *The Small Business Advocate*; Vol. 26, No. 2; February 2007, <http://www.sba.gov/advo/feb07.pdf>, pp. 6-7.

92 Advocacy research by Charles Ou, *Statistical Databases for Economic Research on the Financing of Small Firms in the United States*, February 2004, <http://www.sba.gov/advo/research/wkp04Ou.pdf>. Also, Advocacy-sponsored research by Lawrence A. Plummer and Brian Headd, *Rural and Urban Establishment Births and Deaths Using the U.S. Census Bureau’s Business Information Tracking Series*, February 2008, <http://www.sba.gov/advo/research/rs316tot.pdf>; by Zoltan C. Acs and Catherine Armington, *Using Census BITS to Explore Entrepreneurship, Geography, and Economic Growth*, February 2005, <http://www.sba.gov/advo/research/rs248tot.pdf>; and by Catherine Armington, *Development of Business Data: Tracking Firm Counts, Growth,*

*and Turnover by Size of Firm*, December 2004, <http://www.sba.gov/advo/research/rs245tot.pdf>.

93 Advocacy-sponsored research by Daniel Teitelbaum and Robert Axtell, *Firm Size Dynamics of Industries: Stochastic Growth Processes, Large Fluctuations, and the Population of Firms as a Complex System*, January 2005, <http://www.sba.gov/advo/research/rs247tot.pdf>; and by Rich Perline, Robert Axtell, and Daniel Teitelbaum, *Volatility and Asymmetry of Small Firm Growth Rates Over Increasing Time Frames*, December 2006, <http://www.sba.gov/advo/research/rs285tot.pdf>.

94 Advocacy research by Brian Headd, *Business Estimates from the Office of Advocacy: A Discussion of Methodology*, June 2005, <http://www.sba.gov/advo/research/rs258tot.pdf>.

95 Advocacy-sponsored research by Brian Headd and Bruce Kirchoff, *Small Business Growth: Searching for Stylized Facts*, October 2007, <http://www.sba.gov/advo/research/rs311tot.pdf>.

96 Advocacy research by Brian Headd, “Redefining Business Success: Distinguishing Between Closure and Failure,” *Small Business Economics*, 21: 51-61, 2003; [http://www.sba.gov/advo/stats/bh\\_sbe03.pdf](http://www.sba.gov/advo/stats/bh_sbe03.pdf).

97 For more information, see: <http://www.ntis.gov/>.

98 <http://www.whitehouse.gov/omb/fedreg/reproducible.html>.

which by their nature might be deemed “influential” under data quality guidelines, also undergo an external peer review process. 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 Office of 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.<sup>99</sup> To date, no such request for corrective action has ever been filed with the OCIO on an Office of Advocacy product.

## Counsel on Economic Issues for Senior Management and Policymakers

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. The Chief Economist gives monthly economic briefings to the SBA Administrator, and is available as needed to respond to special requests as the need arises.

Each day, there are numerous requests for small business information from the media, academics, small business owners, and fellow colleagues throughout SBA’s nationwide network of offices, in addition to its various resource part-

ners. 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. These inquiries – most of which come from the media – were consistent enough to warrant the creation and release of Advocacy’s regular *Quarterly Indicators: The Economy and Small Business*, which began publication in the first quarter of 2004. Advocacy economists have also been speakers at a variety of events around the country, and in a few foreign countries as well, on small business economic trends.

## University and Academic Outreach

The Office of Advocacy has an active outreach program to the academic community for many reasons. First, the 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. In some recent years, an RFQ has focused on graduate student research. Also, Advocacy has awarded a best doctoral student award at the United States Association for Small Business and Entrepreneurship (USASBE) since 2003, and a best research paper award at the Babson Entrepreneurial Research Conference since 2007. The best papers are posted on the Advocacy working paper webpage.

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

<sup>99</sup> [http://www.sba.gov/idc/groups/public/documents/sba\\_homepage/sba\\_hp\\_infoquality.pdf](http://www.sba.gov/idc/groups/public/documents/sba_homepage/sba_hp_infoquality.pdf).

being utilized by academics in their curricula or in external research. In 2003 and 2004, the Chief Economist conducted ten focus groups with academics – one in each SBA region – in order to gauge how the office might better produce products that academics would find helpful in their classrooms and for their own research. The findings of these focus groups were discussed in the 2004 edition of *The Small Business Economy: A Report to the President*.<sup>100</sup>

Advocacy has had an annual goal of documenting examples of the use of its economic research and data products in the classroom or in research by at least 16 academics per fiscal year. Between FY 2004 and FY 2007, these examples were to come from the “top 100” college and university entrepreneurship programs in the country, as designated by *Entrepreneurship* magazine in 2003. During that time frame, 78 of these institutions had examples of such usage of Advocacy products by their professors. Beginning in FY 2008, the 16 examples no longer need to be from schools in the *Entrepreneurship* magazine ranking.

Advocacy has also contracted for a study to examine how its research products are cited in the academic literature to gain insight not only on how often and where Advocacy materials are being used, but also to measure their influence in the academic community.

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.

## The Role of Research in Regulatory Review

Advocacy’s Office of Economic Research (OER) staff work closely with their colleagues in Advocacy’s Office of Interagency Affairs to assist in the review of rules promulgated by federal agencies. The Regulatory Flexibility Act (RFA), as amended, requires federal agencies to conduct economic analyses of the effects of their rule-makings on small entities if a significant effect on a substantial number of small entities is expected, or to certify that their rules will not have such an effect. OER economists provide technical assistance to Advocacy attorneys in the review of these economic analyses, including making determinations on the adequacy of agency RFA compliance. Together, they examine agency regulatory dockets in search of the appropriate mandated information on small business impacts. Advocacy lawyers and economists ascertain not only whether such required documentation is presented, but also whether such information is presented in a format that is transparent and useful to the small entities that will be affected by the rule, so that they may engage the agency with their concerns through public comments.

In order to improve agency RFA compliance, Advocacy often works behind the scenes 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 assist attorneys in producing such comment letters

<sup>100</sup> [http://www.sba.gov/advo/research/sb\\_econ2004.pdf](http://www.sba.gov/advo/research/sb_econ2004.pdf), Appendix B therein.

by providing 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.

Finally, in their role as experts on small business regulatory analysis, Advocacy economists also work with Advocacy attorneys to provide RFA compliance training to regulatory staff in agencies throughout the federal government.

# Chapter 3

## Advocacy and the Regulatory Flexibility Act

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*“Government agencies have an uncanny ability to do things and not realize they end up costing small firms a lot of money.”*

**Frank S. Swain, second Chief Counsel for Advocacy (1981–1989)**

In this chapter, we will examine one of Advocacy’s most important core missions, the representation of small entity concerns before federal agencies and the closely related task of monitoring those agencies’ compliance with the federal Regulatory Flexibility Act (RFA).<sup>1</sup> 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, and Executive Order 13272 in 2002.

Advocacy’s basic charter enumerates a number of duties which 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 which affects small businesses;
- to develop proposals for changes in the policies and activities of any agency of the federal government which 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 businesses before other federal agencies whose policies and activities may affect small business.<sup>2</sup>

The RFA, SBREFA, and Executive Order 13272 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 15 positions in 2008, 12 of whom were attorneys. The legal team monitors federal regulatory and other activity with 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 2001, Interagency has reviewed an annual average of more than 1,300 regulatory proposals, notices of regulatory activity, or

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<sup>1</sup> Public Law 96-354; September 19, 1980; 5 U.S.C. § 601 *et seq.* See Appendix B.

<sup>2</sup> These points are adapted from 15 U.S.C. § 634c.

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 other agencies about 600 notifications of regulatory activity. In any given year, more than 500 regulatory proposals are also 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. Since 2001, Advocacy has also submitted more than 300 formal public comment letters to 60 agencies throughout government at an average rate of 38 per year. Breakdowns of these communications by year, agency, and key RFA compliance issue are also presented later in this chapter.<sup>3</sup>

Advocacy clearly spends a lot of effort looking at rules and working with the agencies that propose them. So why is this important? One major reason 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 2001 through FY 2007 has resulted in a minimum of \$65 billion in one-time regulatory cost savings for small businesses, with an additional \$22 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 problem, an effort that continues today.<sup>4</sup> The most recent study available

shows that small businesses continue to bear a disproportionate share of the federal regulatory burden, and these findings are consistent with earlier research.<sup>5</sup> This study found that the cost of federal regulation amounted to \$1.1 trillion in 2004, and that the cost per employee for firms with fewer than 20 employees was \$7,647 annually, 45 percent greater than the per-employee cost of regulations for firms with 500 or more employees.

The same study also detailed the distribution of regulatory costs for five major sectors of the U.S. economy: manufacturing, trade (wholesale and retail), services, health care, and other (a residual category with all enterprises not included in the other four sectors). Sector-specific findings reveal that the disproportionate cost burden on small firms is particularly stark for the manufacturing sector. The compliance cost per employee for small manufacturers is at least double the compliance cost for medium-sized and large firms.

As shown in Table 1, environmental and tax compliance regulations appear to be the main cost drivers in determining the severity of the disproportionate impact on small firms. Compliance with environmental regulations cost 364 percent more per employee in firms with fewer than 20 employees than in firms with 500 or more employees. Similarly, the cost of tax compliance regulations was 67 percent higher for these smaller firms than the per-employee cost for their larger counterparts.

<sup>3</sup> 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.).

<sup>4</sup> For a listing of Advocacy research on this subject, see: <http://www.sba.gov/advo/research/regulation.html>. Advocacy awarded a contract in September 2008 to update and continue this important research.

<sup>5</sup> Advocacy-sponsored research by Mark Crain, *The Impact of Regulatory Costs on Small Firms*, September 2005, <http://www.sba.gov/advo/research/rs264tot.pdf>. The material in this section is based largely on the Crain study.

Type of regulation	Cost per employee for firms with:			
	All firms	< 20 employees	20 - 499 employees	500+ employees
All federal regulations	5,633	7,647	5,411	5,282
Economic regulations	2,567	2,127	2,372	2,952
Workplace regulations	922	920	1,051	841
Environmental regulations	1,249	3,296	1,040	710
Tax compliance regulations	894	1,304	948	780

Source: Advocacy-sponsored research by Mark Crain, *The Impact of Regulatory Costs on Small Firms*, September 2005

## 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 regulatory overkill, usually at the expense of smaller entities. After years of frustration with a lack of sensitivity to this problem on the part of many, if not most, federal rulemaking agencies, Congress recognized that legislation would be needed to address this government-caused impediment to small business formation, health, and growth.

### The RFA in general

Enacted in 1980, the Regulatory Flexibility Act (RFA)<sup>6</sup> 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 findings:

- (1) when adopting regulations to protect the health, safety and economic welfare of the Nation, Federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public;
- (2) laws and regulations designed for application to large scale entities have been applied uniformly to small businesses, small organizations, and small governmental jurisdictions even though the problems that gave rise to government action may not have been caused by those smaller entities;
- (3) uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources;
- (4) the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;

<sup>6</sup> Public Law 96-354; September 19, 1980; 5 U.S.C. § 601 *et seq.* See Appendix B.

(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.<sup>7</sup>

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.<sup>8</sup>

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 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.<sup>9</sup>

## 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)<sup>10</sup> or any other law.<sup>11</sup> 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.<sup>12</sup> Also, except where notice or hearing is required by statute, the APA does not apply 1) to interpretative 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.<sup>13</sup>

Although interpretative rules are generally exempt from APA requirements, and thus from the RFA as well, the Small Business Regulatory Enforcement Fairness Act (SBREFA) amended the RFA to bring certain interpretative rulemakings of the Internal Revenue Service (IRS) within the RFA's scope, namely those IRS rules

9 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 2003, <http://www.sba.gov/advo/laws/rfaguide.pdf>.

10 5 U.S.C. § 553(b).

11 5 U.S.C. § 601(2).

12 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.

13 5 U.S.C. § 553(b).

7 5 U.S.C. § 601 note.

8 Ibid.

published in the *Federal Register* that would impose a “collection of information” requirement on small entities.<sup>14</sup>

## 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.<sup>15</sup>

## 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 impact on a substantial number of small entities,<sup>16</sup> 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;

<sup>14</sup> § 241, Public Law 104-121; March 29, 1996; 110 Stat. 864, 5 U.S.C. §§ 603(a), 604(a). Congress made 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)).

<sup>15</sup> 5 U.S.C. § 602.

<sup>16</sup> 5 U.S.C. § 605.

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

(5) an identification, to the extent practicable, of all relevant federal rules which may duplicate, overlap, or conflict with the proposed rule.<sup>17</sup>

Each IRFA should also include a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis 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.<sup>18</sup>

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

<sup>17</sup> 5 U.S.C. § 603.

<sup>18</sup> *Ibid.*

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 impact on a substantial number of small entities,<sup>19</sup> the RFA requires that it prepare and make available to the public a FRFA for that rule that includes:

- (1) a succinct statement of the need for, and objectives of, the rule;
- (2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, 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) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
- (4) a description of the projected reporting, record-keeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
- (5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.<sup>20</sup>

<sup>19</sup> 5 U.S.C. § 605.

<sup>20</sup> 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.<sup>21</sup> 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;
- (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.<sup>22</sup>

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

<sup>21</sup> 5 U.S.C. § 610.

<sup>22</sup> *Ibid*.

also to be solicited on each such rule. We will return later in this chapter 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.<sup>23</sup> Since then, a growing body of case law has informed agency RFA compliance efforts.<sup>24</sup>

## 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,<sup>25</sup> their initial regulatory flexibility analyses,<sup>26</sup> and their certifications of rules without significant effects.<sup>27</sup> Additionally, the Chief Counsel was tasked to report annually to the President and the Congress on agency compliance with the RFA,<sup>28</sup> 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.<sup>29</sup> 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 business interests within the federal government.

## SBREFA, judicial review, and *amicus* authority

As we have seen, in 1996 SBREFA provided 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 to agencies for failure to comply with the RFA.<sup>30</sup> 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.<sup>31</sup>

Although RFA compliance issues were not directly reviewable by the courts under the original RFA, Congress did authorize the Chief

23 § 242, Public Law 104-121; March 29, 1996; 110 Stat. 865, 5 U.S.C. § 611.

24 For a summary of RFA court decisions, see Appendix O.

25 5 U.S.C. § 602.

26 5 U.S.C. § 603.

27 5 U.S.C. § 605.

28 5 U.S.C. § 612(a).

29 5 U.S.C. §§ 612(b), 612(c).

30 For a summary of RFA court decisions, see Appendix O. The decisions have been Shepardized and posted on Advocacy’s website at [www.sba.gov/advo/laws/rfa\\_shep.pdf](http://www.sba.gov/advo/laws/rfa_shep.pdf).

31 5 U.S.C. § 612(b).

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.”<sup>32</sup> In 1986, the Chief Counsel filed the first such *amicus curiae* brief in *Lehigh Valley Farmers v. Block*,<sup>33</sup> 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,<sup>34</sup> 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*.<sup>35</sup> The brief was prepared, but the issue was resolved with the commission before the filing deadline. During discussions with the Federal Communications Commission (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.<sup>36</sup> 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*.<sup>37</sup> 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.

In 1998, Advocacy’s first post-SBREFA *amicus* brief was filed in *Northwest Mining Assoc. v. Babbitt*.<sup>38</sup> 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*.<sup>39</sup> 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.

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

33 829 F.2d 409 (3<sup>rd</sup> Cir. 1987).

34 Executive Order 12146, 44 Fed. Reg. 42657 (July 18, 1979).

35 56 F.3d 151 (D.C. Cir. 1995).

36 § 243(b), Public Law 104-121; March 29, 1996; 110 Stat. 866, 5 U.S.C. § 612.

37 55 F. Supp. 2d 1336 (M.D. Fla. 1999).

38 5 F. Supp. 2d 9 (D.D.C. 1998).

39 154 F.3d 455 (D.C. Cir. 1998).

In 2004, Advocacy again filed a Notice of Intent to file a brief in *United States Telecom Association, et al., v. Federal Communications Commission*,<sup>40</sup> 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 otherwise recalcitrant agencies 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.<sup>41</sup>

## The SBREFA Panel Process

Even before the enactment of the RFA, it was recognized that early participation in the rule-making process by small firms was essential if their interests were to be properly considered. Towards this end, one of most important innovations provided by 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.

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, OMB’s Office of Information and Regulatory Affairs (OIRA), and the agency proposing the rule.<sup>42</sup> 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.<sup>43</sup> SBREFA’s review panel process applies specifically to EPA and OSHA proposals, and its coverage has not been extended to other agencies to date.

Since SBREFA established the review panel process in 1996, Advocacy has participated in 32 completed EPA panels, with three more currently in progress. There have also been nine OSHA regulatory review panels in the same period.<sup>44</sup> Each of these panels closely examined a regulatory proposal expected to have significant 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

40 400 F.3d 29 (D.C. Cir. 2005).

41 For additional information on the referenced cases, see the 2005 edition of Advocacy’s annual RFA report at <http://www.sba.gov/advo/laws/flex/05regflex.pdf>, pp. 10-11.

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

43 § 244, Public Law 104-121; March 29, 1996; 110 Stat. 867, 5 U.S.C. § 609.

44 For a complete listing of all panels, see Appendix M. EPA panels and the disposition of their rules are also posted at [http://www.sba.gov/advo/laws/is\\_epanel.html](http://www.sba.gov/advo/laws/is_epanel.html). OSHA panels and the disposition of their rules are posted at [http://www.sba.gov/advo/laws/is\\_oshanel.html](http://www.sba.gov/advo/laws/is_oshanel.html).

panel process. In other cases, revisions or adjustments could be made to an agency 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 EPA and OSHA 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 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 August 2002 signed Executive Order 13272, Proper Consideration of Small Entities in Agency Rule-making.<sup>45</sup> 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.<sup>46</sup>

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.<sup>47</sup>
- Notify Advocacy of any draft rules that may have a significant economic impact

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

46 *Ibid.*, § 1.

47 *Ibid.*, § 3(a).

on a substantial number of small entities under the Act.<sup>48</sup>

- 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.<sup>49</sup>

Advocacy is also mandated to provide RFA compliance training to agencies,<sup>50</sup> and to report annually to OMB’s Office of Information and Regulatory Affairs (OIRA) on agencies’ compliance with the executive order.<sup>51</sup> 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 OIRA, with which Advocacy works closely.<sup>52</sup>

One important way in which Advocacy works with OIRA is through the regulatory review process established by Executive Order 12866 (Regulatory Planning and Review),<sup>53</sup> which is coordinated by OIRA. The order sets forth government-wide principles of regulation and establishes a centralized review process for “significant” rules and guidance documents, as defined in the order.<sup>54</sup> 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. 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)...”<sup>55</sup> Advocacy staff members frequently participate in 12866 reviews and assist OIRA in soliciting input from small entities. Advocacy’s own Executive Order 13272 specifically states that its mandates are consistent with those of Executive Order 12866.<sup>56</sup>

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.<sup>57</sup> In subsequent years, Advocacy has consolidated its annual report under Executive Order 13272 with its annual Regulatory Flexibility Act report.<sup>58</sup>

## RFA compliance training program

One major provision of Executive Order 13272 is its requirement that Advocacy provide RFA compliance training to federal regulatory agencies.<sup>59</sup> When this task was given to Advocacy in 2002, a new position of Senior Counsel was established to oversee this important ongoing effort, and a training team was formed consisting

48 Ibid., § 3(b).

49 Ibid., § 3(c).

50 Ibid., § 2(b).

51 Ibid., § 6.

52 Ibid., § 2(c).

53 Executive Order 12866, 58 Fed. Reg. 51735 (September 30, 1993), as amended by Executive Order 13258, 67 Fed. Reg. 9385 (February 26, 2002), and by Executive Order 13422, 72 Fed. Reg. 2763 (January 23, 2007). Executive Order 12866 is reprinted in Appendix D, and additional information can be accessed at [http://www.sba.gov/advo/laws/law\\_lib.html#ex](http://www.sba.gov/advo/laws/law_lib.html#ex).

54 Ibid., § 3(f).

55 Ibid., § 1(b)(11).

56 Executive Order 13272, § 2.

57 Both the memoranda and the 2003 report can be accessed at [http://www.sba.gov/advo/laws/law\\_lib.html#rfa](http://www.sba.gov/advo/laws/law_lib.html#rfa).

58 These reports are available at <http://www.sba.gov/advo/laws/flex/>.

59 Executive Order 13272, § 2(b).

of attorneys in the Office of Interagency Affairs and a regulatory economist from Advocacy's Office of Economic Research. As of September 30, 2008, Advocacy has held 76 training sessions for nearly 1,600 professionals. Agency staff – 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. In a real-life regulatory setting, 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. Making this determination is frequently where agencies make their initial mistakes under the RFA. The classroom session helps explain 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 promulgate 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 noncompliance with the RFA.

Advocacy's success over the past five years in providing RFA compliance training to regulatory and policy experts 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 train-

ing call Advocacy earlier in the rule development process, share draft documents, and recognize that if they don't 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 burdens that their rules place 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.

In order to ensure that as many regulatory agency staff as possible are able to participate in Advocacy's RFA compliance training, Advocacy has also developed an online RFA training course to complement its more intensive classroom training. The online training site was launched in 2006, and federal agency rule development staff, policymakers, and the public can now access the online RFA compliance training course at their leisure. Online training does not take the place of the live, half-day classroom training that Advocacy provides on request, especially the give and take of discussion and the many questions that arise of specific application to the agencies at which such sessions are held. Still, online training can be a convenient refresher for those who have attended live training classes, and it also is a useful resource for those unable to attend a classroom session, new employees, association or congressional staff, and those in the general public with an interest in the RFA. Advocacy's online RFA training site can be accessed at [www.sba.gov/advo/rfaonline-training.html](http://www.sba.gov/advo/rfaonline-training.html).

Advocacy continues to train agencies as requests are made for additional and more detailed assistance on RFA compliance. In the next phase of its RFA training program, Advocacy will be

able to focus on those agencies needing additional training in the economic analysis of small business impacts, as well as offering basic training to staff members who were unable to attend previous sessions. 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 foundation of a factual basis as a requirement 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 team 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 RFA as amended by SBREFA, resulting in a 73-page resource titled *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies*.

Advocacy’s current RFA compliance guide, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, was created following the approval of Executive Order 13272 in 2002, which included a provision that Advocacy should notify agencies of the requirements of the RFA.<sup>60</sup> In preparing this guide, the Office of Advocacy received input from regulatory agencies, the Office of Management and Budget, small business associations, and Congress. It reflects Advocacy’s three decades 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 135-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

<sup>60</sup> Ibid., § 2(a).

the finer points of the law, and includes examples of actual regulations where an agency did a good job on their RFA analysis.

Advocacy’s RFA compliance guide has been provided to regulatory agencies and other interested parties. It is also available on Advocacy’s website.<sup>61</sup> 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 who 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.”<sup>62</sup> 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.”<sup>63</sup> The fact is, then and now, that a considerable amount of preparation goes into rule

<sup>61</sup> See <http://www.sba.gov/advo/laws/rfaguide.pdf>.

<sup>62</sup> 15 U.S.C. § 634(c)(4).

<sup>63</sup> 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.

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 firms in an industry 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 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 enlightened regulatory approaches every day.

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 preproposal 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 preproposal 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 preproposal 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 expert 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 preproposal 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 have not been 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, listserves, 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 preproposal 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. These have been posted on Advocacy’s website since 2001,<sup>64</sup> and breakdowns of 304 public filings by year and agency (including predecessor agencies) follow in Table 2.

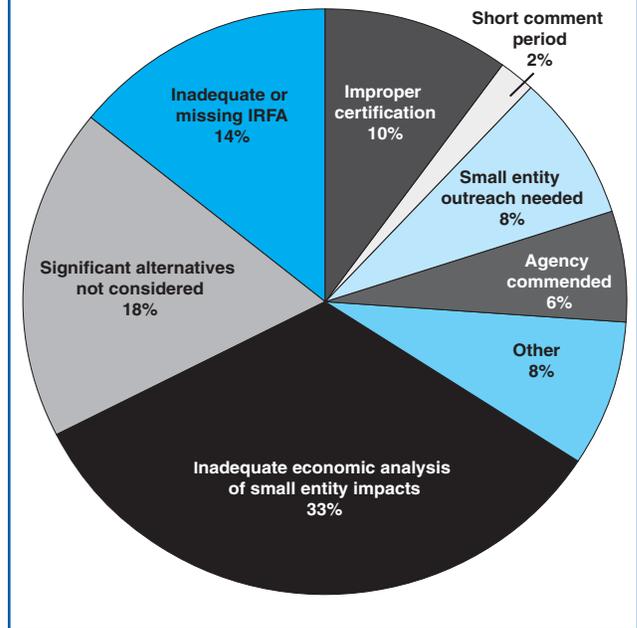
**Table 2. Advocacy Formal Regulatory Comments by Year, 2001–2008 (10/10)**

Year	Number	Year	Number
2001	36	2005	29
2002	42	2006	47
2003	46	2007	34
2004	38	2008	32

As Table 3 shows, formal Advocacy regulatory comments have gone to a large number of

64 For a detailed listing, see <http://www.sba.gov/advo/laws/comments/>.

**Figure 1. Advocacy Comments by Key RFA Compliance Issues (FY 2007)**



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 and OSHA rules reflects this, and also contributes to the relatively larger number of comments going to these two agencies. Also, major issues such as number portability at FCC or Sarbanes-Oxley implementing regulations at SEC 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.

Also of interest is a breakdown of Advocacy comments by key RFA compliance issues. Figure 1 illustrates major concerns raised in both comment letters and prepublication reviews of draft rules for FY 2007, the most recent full year available.

**Table 3. Advocacy Formal Comments by Agency**

Agency	No.	Agency	No.
Federal Communications Commission	57	Defense Acquisition Regulation Council	2
Environmental Protection Agency	46	Farm Credit Administration	2
Securities and Exchange Commission	18	Federal Deposit Insurance Corporation	2
Occupational Safety and Health Admin.	16	Department of Health and Human Services	2
Fish and Wildlife Service	14	Department of the Interior	2
Internal Revenue Service	13	Department of Labor	2
Office of Management and Budget	9	National Highway Traffic Safety Admin.	2
Centers for Medicare and Medicaid Services	8	National Oceanic and Atmospheric Admin.	2
Small Business Administration	7	Office of Thrift Supervision	2
Department of Transportation	7	New England Fishery Management Council	2
Federal Aviation Administration	6	DoT Research and Special Programs Admin.	2
General Services Administration	6	Transportation Security Administration	2
Federal Reserve System	5	Agricultural Marketing Service	1
Department of Homeland Security	4	Animal and Plant Health Inspection Service	1
Department of Justice	4	DOC Bureau of Industry and Security	1
Federal Trade Commission	4	Civilian Acquisition Regulation Council	1
Food and Drug Administration	4	Employee Benefits Security Administration	1
National Marine Fisheries Service	4	Employment and Training Administration	1
Dept. of Housing and Urban Development	3	Federal Motor Carrier Safety Admin.	1
Department of the Treasury	3	Forest Service	1
Customs and Border Protection	3	Missile Defense Agency	1
Employment Standards Admin.	3	National Credit Union Administration	1
Food Safety and Inspection Service	3	National Inst. of Standards and Technology	1
Patent and Trademark Office	3	National Park Service	1
Alcohol and Tobacco Tax and Trade Bureau	2	National Telecommunications and Information Administration	1
Architectural/Transportation Barriers Compliance Board	2	Office of Surface Mining Reclamation and Enforcement	1
U.S. Citizenship and Immigration Svcs.	2	Rural Utilities Service	1
U.S. Coast Guard	2	Social Security Administration	1
Comptroller of the Currency	2	Department of State	1
Consumer Product Safety Commission	2	World Intellectual Property Organization	1

## Regulatory Review and Reform: Section 610 and Advocacy's r3 initiative

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.<sup>65</sup> 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 supposed to take place within ten years of the publication of such rules as final. During a 610 review agencies should 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.<sup>66</sup> 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, are not as effective as they could be.

Partially in response to this GAO report, and recognizing a need for improvements in how agencies comply with Section 610, Advocacy launched its Small Business Regulatory Review and Reform (or r3) initiative in 2007. The r3 program has three distinct components: 1) providing tools that will improve federal agencies' compliance with Section 610 of the RFA, leading to a better understanding of the impact of their current regulations on small entities, 2) developing a process for small business stakeholders to identify current rules that are outdated or ineffective and recommend targeted reforms, and 3) posting the recommended reforms on Advocacy's website and updating the status of reforms twice a year.

With respect to the first r3 component, Advocacy has published a best practices document to help federal agencies know when and how they should conduct a Section 610 review of an existing rule.<sup>67</sup> In addition to this guide, Advocacy is placing greater emphasis on Section 610 through training sessions with agencies and improved tracking of reviews.

The stakeholder involvement component of the r3 initiative has been led by the nomination of rules needing review or reform for inclusion in a "Top Ten" list that Advocacy intends to revise annually. In its first call for r3 nominations, Advocacy received 82 which met posted criteria. The 2008 Top Ten were chosen on the basis of the following factors: 1) whether the rule could reasonably be tailored to accomplish its intended objectives while reducing the impact on small business or small communities; 2) whether the rule had ever been reviewed for its impact on small entities; 3) whether technology, economic conditions, or other factors had changed since the rule was originally written;

<sup>65</sup> 5 U.S.C. § 610.

<sup>66</sup> U.S. Government Accountability Office, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, July 2007, GAO-07-791, <http://www.gao.gov/new.items/d07791.pdf>.

<sup>67</sup> Office of Advocacy, *Section 610 of the Regulatory Flexibility Act: Best Practices for Federal Agencies*, October 2007, [http://www.sba.gov/advo/r3/r3\\_section610.pdf](http://www.sba.gov/advo/r3/r3_section610.pdf).

4) whether the rule imposed duplicative requirements; and 5) the overall importance of the rule to small businesses and small communities. Final selections were made by the Chief Counsel after extensive research and evaluation by Advocacy's legal team.<sup>68</sup> A complete list of the 2008 Top Ten regulations for review or reform, together with background information on each, is included in Appendix L. Advocacy will continue to make a special effort to work with the agencies involved in addressing the needs identified in the r3 Top Ten, and will update on its website new developments on these rules semi-annually.<sup>69</sup>

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 Order 13272, Advocacy's RFA compliance training program and its RFA compliance guide, confidential interagency communications, Advocacy formal comments, and the regulatory review and reform or "r3" initiative. 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 not been made. Cost savings are not claimed

unless the methodologies and sources for their calculation can be well 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 the table below 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.

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 communication. Preproposal oral and written communications between Advocacy and agencies are kept confidential, and that encourages the prepublication exchange of information between them. Often, preproposal 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

<sup>68</sup> A number of otherwise worthy suggestions were not considered because they did not meet nomination criteria (for example, a proposed regulatory reform would require congressional action and thus was beyond the ability of an agency to effect).

<sup>69</sup> Additional information on Advocacy's r3 initiative is posted at <http://www.sba.gov/advo/r3/>.

**Table 4. Regulatory Cost Savings from Advocacy Interventions, 2001–2007\***

Fiscal Year	First Year Savings (\$)	Recurring Annual Savings (\$)
2001	4.402 billion	1.381 billion
2002	21.106 billion	10.200 billion
2003	6.362 billion	5.762 billion
2004	17.064 billion	2.806 billion
2005	6.623 billion	.996 billion
2006	7.253 billion	.117 billion
2007	2.570 billion	.285 billion
<b>Total</b>	<b>65.380 billion</b>	<b>21.547 billion</b>

\* For a list of specific cost savings and the specific rules from which they result, see Appendix N. More detailed information on each rule is available in Advocacy’s annual RFA reports at <http://www.sba.gov/advo/laws/flex/>.

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. How can Advocacy modernize the measurement of its effectiveness to encompass its ongoing regulatory interventions, determine the benefits of earlier intervention in the rulemaking process, and evaluate the success of agency training under the executive order? 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. As a result, Advocacy continues to analyze various alternative methods of quantifying its effectiveness.

## 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 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, Chief Counsel Thomas M. Sullivan and OIRA Administrator John D. Graham signed a Memorandum of Understanding that prefigured important elements of Executive Order 13272, which was to follow in August of

that year.<sup>70</sup> The Advocacy/OIRA MOU 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 certain 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.”<sup>71</sup>

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 preproposal 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.

<sup>70</sup> For the MOU between Advocacy and OIRA, see [http://www.sba.gov/advo/laws/law\\_mou02.pdf](http://www.sba.gov/advo/laws/law_mou02.pdf) or Appendix T.

<sup>71</sup> *Ibid.*, § 1.

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 Ombudsman (Ombudsman).<sup>72</sup> 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.<sup>73</sup>

The activities of the Ombudsman are sometimes confused with those of the Chief Counsel for Advocacy. This is understandable considering

<sup>72</sup> § 222, Public Law 104-121; March 29, 1996; 110 Stat. 860, 15 U.S.C. § 657.

<sup>73</sup> For additional information on SBA’s Office of the National Ombudsman and its activities, see <http://www.sba.gov/aboutsba/sbaprograms/ombudsman/index.html>.

that the same SBREFA that created the Ombudsman's office also had, as we have seen, major provisions relating to Advocacy. Each office also serves small businesses in the regulatory arena. But the two offices are nonetheless distinct by statute. 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 Sullivan and National Ombudsman Nicholas N. Owens signed a MOU in November 2006.<sup>74</sup>

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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<sup>74</sup> For the MOU between Advocacy and the Ombudsman, see [http://www.sba.gov/advo/laws/law\\_mouombu02.pdf](http://www.sba.gov/advo/laws/law_mouombu02.pdf) or Appendix U.

# Chapter 4

## The Public Face of Advocacy: Outreach to Stakeholders

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*“Advocacy has a lot of information. It’s of use to small business. Information is power.”*

**Thomas P. Kerester, third Chief Counsel for Advocacy (1992 – 1993)**

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 which 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 which 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 which are of benefit to small businesses, and information on how small businesses can participate in or make use of such programs and services.<sup>1</sup>

Also, Public Law 94-305 authorizes the Chief Counsel to prepare and publish such reports as he or she deems appropriate,<sup>2</sup> and we have seen how a variety of additional duties involving periodic reports have accrued to Advocacy, including major annual reports on the RFA and *The Small Business Economy*. 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 six positions in 2008. Its highly experienced staff includes many of Advocacy’s longest serving employees, who over the years have developed specialized skills in carrying out their respective responsibilities. 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.

The Office of Information is responsible for Advocacy’s congressional relations; liaison with business organizations and trade associations; press communications; preparation of all Advocacy publications including *The Small Business Economy* 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 its stakeholders.

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<sup>1</sup> These points are adapted from 15 U.S.C. § 634c.

<sup>2</sup> 15 U.S.C. § 634(f).

## 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 small business tax relief to environmental regulation, from health insurance affordability 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 other designated Advocacy staff member. Following are a few examples of testimony delivered by Chief Counsel Sullivan on subjects of major importance to small business.

- *Legislation to Improve the Regulatory Flexibility Act.* In December 2007 testimony before the House Committee on Small Business, Chief Counsel Sullivan described three necessary improvements to ensure fair treatment of small businesses in the regulatory process, improvements that together formed the core of Advocacy's legislative agenda for the 110<sup>th</sup> Congress: consideration of foreseeable indirect impacts of proposed regulations, periodic review of existing regulations, and codification of Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking." The executive order requires agencies to notify the Office of Advocacy when a proposed rule is expected to have a significant impact on small business. One week after the Chief Counsel's testimony, the committee approved legislation including the three provisions he had supported.
- *EPA Toxics Release Inventory (TRI).* For many years, small businesses consistently

voiced their concerns to Advocacy that the Environmental Protection Agency's TRI program imposed substantial paperwork burdens with little corresponding environmental benefit, especially for thousands of small businesses that have zero emissions or discharges of hazardous chemicals to the environment. In October 2007 testimony before the House Energy and Commerce Subcommittee on the Environment and Hazardous Materials, Chief Counsel Sullivan said that the incentive of using a shorter form and less burdensome analysis would encourage small businesses to recycle hazardous chemicals, rather than discharge them into the environment.

- *Impact of Section 404 of the Sarbanes-Oxley Act on Small Businesses.* In April 2007, Chief Counsel Sullivan testified before the Senate Committee on Small Business and Entrepreneurship on the impact of Section 404 of the Sarbanes-Oxley Act on smaller public companies. At the hearing, Sullivan noted that Advocacy's involvement with the issue began in 2002 when the office asked then Senate Banking Committee Chairman Sarbanes and House Banking Committee Chairman Oxley to include flexibility in their bill sufficient to avoid unnecessary impacts on small public firms. The Chief Counsel strongly recommended that the SEC continue to provide further extensions for small public companies until such time as more cost-effective procedures for internal controls could be developed. Additionally, he urged Congress to exempt smaller public companies from Section 404(b), given that 404 compliance costs in relation to revenue would be disproportionately borne by smaller companies. In December 2007, SEC Chairman Cox extended Sarbanes-Oxley compliance deadlines for smaller public companies, as Advocacy had recommended.

**Table 5. Advocacy Congressional Testimony and Legislative Comments, 2001 – 2008 (9/30)**

Year	Congressional Testimony	Record Statements	Legislative Comments
2001	5	0	0
2002	6	1	12
2003	9	1	4
2004	3	2	1
2005	7	0	2
2006	5	0	4
2007	3	1	1
2008	1	0	6
<b>Total</b>	<b>39</b>	<b>5</b>	<b>30</b>

Advocacy also has submitted statements for the record of congressional hearings, and has testified before committees of state legislatures.<sup>3</sup> The following table depicts Advocacy’s congressional hearing testimony and legislative comment letters from 2001 through 2008.<sup>4</sup>

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.

Although the Office of Information coordinates Advocacy’s congressional communica-

tions, 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. The Congress wanted Advocacy to provide it with independent counsel, and that is exactly what happens.

Advocacy has proactively established legislative priorities after consultation with congressional committees, business organizations, trade associations, and other stakeholders.<sup>5</sup> Such outreach to private-sector stakeholders is another important mission for the Office of Information.

## Trade Association Liaison and Advocacy’s “Kitchen Cabinet”

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

3 A complete listing of Advocacy congressional testimony from 2001 – 2008 can be found in Appendix E. The actual testimony can be accessed on Advocacy’s website at <http://www.sba.gov/advo/laws/testimon.html>. For a listing of Advocacy legislative comment letters during the same period, see Appendix F. For the actual letters, see <http://www.sba.gov/advo/laws/comments/legislative.html>.

4 Through the end of the fiscal year on 9/30/08.

5 For Advocacy’s legislative priorities document, see Appendix H. We will return to this subject in Chapter 7.

small business community, and Advocacy proactively seeks their insights and assistance.

Advocacy works closely with small business membership and trade organizations. The Chief Counsel meets regularly with representatives from the largest organizations in “kitchen cabinet” style meetings 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 Roundtables

Advocacy also sponsors frequent “roundtable” meetings on specialized subjects, often relating to regulatory or policy issues of current interest. A typical regulatory roundtable would be attended by 10 to 40 representatives of trade associations and advocacy organizations, small business owners, congressional staff, and agency representatives. Although some roundtables are scheduled regularly, such as Interagency’s roundtables 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, and attendance is not limited to pre-determined attendees. 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. Here are just a few topics on which Advocacy roundtables were held in the last year to share and exchange information:

- Environmental regulations
- Occupational safety and health regulations

- Tax issues
- Homeland security issues, including “No-Match” immigration status letters
- Legislation and regulations affecting home mortgage brokers
- Patent reform
- Regulations implementing the Americans with Disabilities Act
- RFA jurisprudence
- Aviation safety
- Veterans business data
- Federal Motor Carrier Safety Administration training requirements
- HUD regulations implementing the Real Estate Settlement Procedures Act
- Federal contracting

All of these sessions contributed directly to Advocacy’s and the attendees’ working knowledge of topics that were currently the subject of legislation, court decisions, or new regulations.

## Small Business Communicators

Advocacy’s press secretary, a member of the Office of Information team, keeps an updated contact list of business organizations, trade associations, and other stakeholder organizations (e.g., congressional committees, SBA resource partners, etc.) and their “small business communicators” whose primary job is to conduct outreach with their members, the media, and the wider communities with which they interact. Advocacy uses this list for several purposes in order to leverage its own resources and reach a larger audience of small business opinion leaders.

The communicators receive all of Advocacy’s news releases, which they are encouraged to reprint and use, together with Advocacy statistics and research, in their own articles, speeches, op-eds, and news releases. From time to time, Advocacy hosts small business communicator roundtables with guest speakers. Topics have included how to write op-eds and how to manage crisis communications. The primary purpose of

these meetings is twofold: to increase the communicators' professional talents so that the small business message is amplified, and to network so that varied small business groups can join forces to promote their agenda.

## Advocacy's Presence on the Web

Prior to 2001, the Office of Advocacy provided its work products and other information to its many stakeholder 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 worldwide web, at [www.sba.gov/advo](http://www.sba.gov/advo). Advocacy's extensive website and associated listservs and RSS feeds are now an indispensable part of Advocacy's communications efforts.

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. Moreover, these documents are then posted to the Advocacy RSS feed, which ensures worldwide, targeted distribution to interested parties. 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 on the day of their release and publicized through listservs to all who sign up. The website lists all of Advocacy's publications by date and topic and, in addition to all current research, includes information on how to obtain most of

Advocacy's research prior to 2000. Advocacy's annual research report, *The Small Business Economy*, is a web "bestseller" and is found along with hundreds of other research studies and publications at <http://www.sba.gov/advo/research/>. Browsers will also find Advocacy's regulatory reports, including the annual report on agency compliance with the RFA through the regulatory page of Advocacy's website at <http://www.sba.gov/advo/regulatory.html>.

## 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 its formal comment letters to regulatory agencies and related correspondence at <http://www.sba.gov/advo/laws/comments/>.<sup>6</sup> Since 2002 these have been posted chronologically and by subject matter. Additional comments from 1996-2001 are available by subject area. Legislative comments from 2002 forward are posted at <http://www.sba.gov/advo/laws/comments/legislative.html>.<sup>7</sup> Advocacy congressional testimony from 1996 forward is posted at <http://www.sba.gov/advo/laws/testimon.html>.<sup>8</sup>

## Reg Alerts

Advocacy has developed a useful site for small businesses interested in current regulatory developments. Reg Alerts at [http://www.sba.gov/advo/laws/law\\_regalerts.html](http://www.sba.gov/advo/laws/law_regalerts.html) 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

<sup>6</sup> A listing can also be found in Appendix G.

<sup>7</sup> A listing can also be found in Appendix F.

<sup>8</sup> A listing can also be found in Appendix E.

share their comments with Advocacy on these and other regulatory proposals of importance to them. Reg Alerts also links to Regulations.gov, the federal government's one-stop site for commenting on regulations published in the Federal Register, at <http://www.regulations.gov/>. Advocacy's Reg Alerts page is updated frequently with the assistance of its Office of Interagency Affairs.

## Listservs

Advocacy maintains four major listservs for distribution of its monthly newsletter, news releases, research reports, and regulatory comments, respectively. Users can sign on to one or more of these email listservs at <http://web.sba.gov/list/>. 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. In addition to its large listservs, Advocacy also maintains specialized email lists for use in specific issue area advocacy and outreach (e.g., regular roundtable invitation lists) and the *State Reg Flex Roundup* with updates on implementation of state reg flex programs across the country, distributed monthly to the "state reg flex community."

## *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, including updates on Advocacy's efforts to promote the adoption of regulatory flexibility policies in state governments. The newsletter is currently in its 27<sup>th</sup> year of publication. Its production and distribution have continuously evolved to take advantage of current technologies. At the end of FY 2008, *The*

*Advocate* was reaching roughly 40,000 subscribers. Advocacy's newsletter listserv had just over 29,300 subscribers then, and between 9,000 and 10,000 hard copies are printed and mailed each month. The newsletter appears monthly except for an occasional double issue.

The growth in circulation of *The Advocate* has been enormous since it was put online and delivery through listserv subscription began in 2002. This growth is depicted in the Figure 2.

An October 2007 review of *The Advocate's* listserv subscribers found that their addresses generally appeared to be legitimate names. Figure 3 shows a breakdown of their originating domains.

Occasionally, a special issue of *The Small Business Advocate* will be dedicated to a single topic. These have included issues marking the 25<sup>th</sup> anniversary of the Office of Advocacy (October 2001),<sup>9</sup> the 25<sup>th</sup> anniversary of the RFA (September 2005),<sup>10</sup> and Advocacy's 2007 Conference on State Regulatory Flexibility Best Practices (May 2007). Past issues of *The Small Business Advocate* from January 2001 forward are available online at [www.sba.gov/advo/newsletter.html](http://www.sba.gov/advo/newsletter.html). Issues from 2000 are archived online at [www.sba.gov/advo/news/archivenewsletters.html](http://www.sba.gov/advo/news/archivenewsletters.html).

## 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.

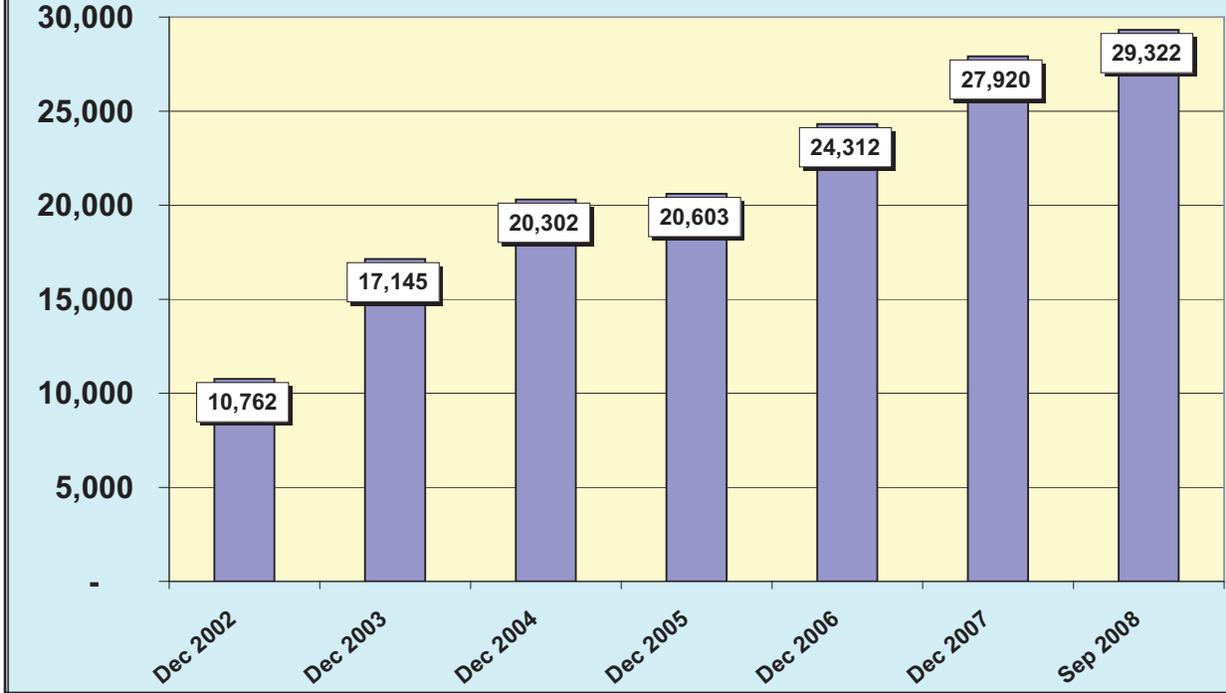
## Entrepreneurship in the 21st Century

Cosponsored with the Ewing Marion Kauffman Foundation, this conference was held on March

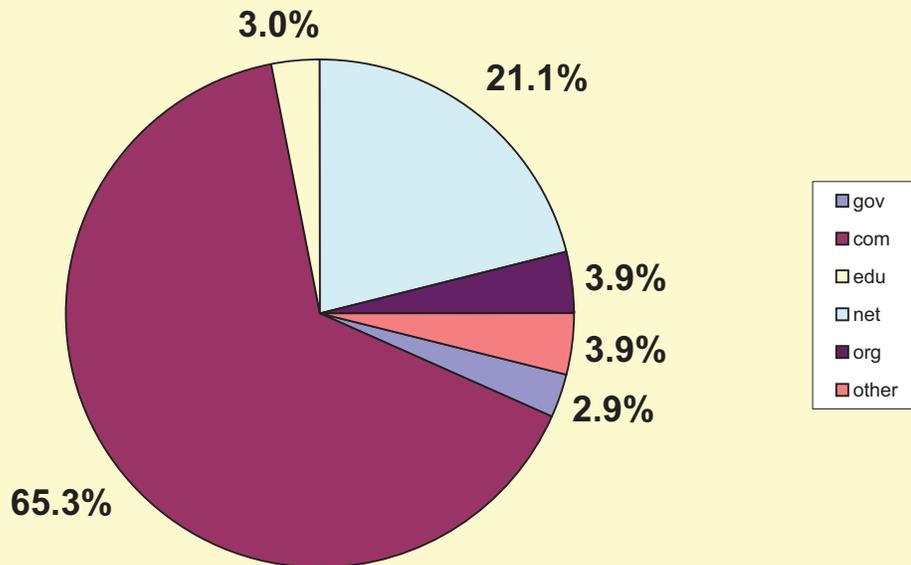
<sup>9</sup> Reprinted in Appendix W.

<sup>10</sup> Reprinted in Appendix X.

**Figure 2. Growth in Electronic Circulation for The Small Business Advocate, 2002 - 2008**



**Figure 3. Advocacy newsletter listserve subscribers by domain**



26, 2004, at the U.S. Chamber of Commerce in Washington, DC. Twenty-one speakers offered perspectives and research on the challenges small businesses face in the 21st century. Topics included small business innovation, owner demographics, the financial environment, the need for quality data and research, and issues such as health care. Groundbreaking research on topics such as the relationship between innovation and interfirm collaboration are summarized in the proceedings, available online (including PowerPoint presentations) at [http://www.sba.gov/advo/stats/proceedings\\_a.pdf](http://www.sba.gov/advo/stats/proceedings_a.pdf), [http://www.sba.gov/advo/stats/proceedings\\_b.pdf](http://www.sba.gov/advo/stats/proceedings_b.pdf), and [http://www.sba.gov/advo/stats/proceedings\\_c.pdf](http://www.sba.gov/advo/stats/proceedings_c.pdf). Videos of the conference are also online at <http://web.sba.gov:8000/advo-video/>.

### Putting it Together: The Role of Entrepreneurship in Economic Development

Held on March 7, 2005 in Washington, DC, this conference looked at various approaches to encouraging entrepreneurship at the state and regional levels. Sessions focused on research that attempts to measure the environment for entrepreneurship; nonprofit efforts including two approaches focusing on inner cities; state adoption of regulatory flexibility legislation; outreach through rural and educational programs; state use of technology and innovation to promote entrepreneurship; and tax incentives along with other legislative proposals. Special presentations focused on the federal “Strengthening America’s Communities” initiative, and four state initiatives received “best practices” awards. The conference was again cosponsored by the Office of Advocacy and the Ewing Marion Kauffman Foundation, with support from the Council of State Governments and the National Lieutenant Governors Association. The conference proceedings are available at [http://www.sba.gov/advo/research/entrep\\_proc.pdf](http://www.sba.gov/advo/research/entrep_proc.pdf), with appendices at [http://www.sba.gov/advo/research/appendix\\_a.pdf](http://www.sba.gov/advo/research/appendix_a.pdf) and [http://www.sba.gov/advo/research/appendix\\_b.pdf](http://www.sba.gov/advo/research/appendix_b.pdf).

### Global Perspectives on Entrepreneurship Policy

Held on June 15, 2005 in Washington, DC, this was a pre-conference session prior to the International Council for Small Business’s 50th annual meeting. Topics included an international perspective on the costs and problems of business entry; international lessons on tech transfer, innovation, and entrepreneurship; small and medium-sized enterprise labor challenges; and an international comparison of the effects of banking industry restructuring on small business lending. The conference was cosponsored by the Office of Advocacy, the National Federation of Independent Business Research Foundation, and the United States Association of Small Business and Entrepreneurship. Proceedings are posted at [http://www.sba.gov/advo/research/proceedings\\_a05.pdf](http://www.sba.gov/advo/research/proceedings_a05.pdf), [http://www.sba.gov/advo/research/proceedings\\_b05.pdf](http://www.sba.gov/advo/research/proceedings_b05.pdf), and [http://www.sba.gov/advo/research/proceedings\\_c05.pdf](http://www.sba.gov/advo/research/proceedings_c05.pdf).

### The RFA Symposium

Held September 19-20, 2005, near the 25th anniversary of the enactment of the RFA, this conference looked at the history of the act and its effectiveness in addressing the burden of federal regulations on small businesses. The law addresses regulations’ disproportionate effect on small firms, documented in a number of studies, including several sponsored by the Office of Advocacy. On Monday, September 19, Advocacy opened the conference with a special training session on the RFA. September 20 workshops focused on e-rulemaking, regulatory research, small business outreach, judicial review, and reducing existing regulatory burdens. W. Mark Crain, author of an important Advocacy-sponsored study, *The Impact of Regulatory Costs on Small Firms*, was a featured speaker. Other speakers, moderators, and panelists came from private-sector trade organizations, universities, federal agencies, law offices, think tanks, and research organizations. The conference had 30 cosponsoring organizations. Proceedings may be

found at [http://www.sba.gov/advo/rfa\\_sym0905.pdf](http://www.sba.gov/advo/rfa_sym0905.pdf) and [http://www.sba.gov/advo/rfa2\\_sym0905.pdf](http://www.sba.gov/advo/rfa2_sym0905.pdf).

## Entrepreneurship: The Foundation for Economic Renewal in the Gulf Coast Region

This conference was held on April 11, 2006 in New Orleans, Louisiana, after the 2005 hurricanes, Katrina, Rita, and Wilma devastated the Gulf Coast region of Louisiana, Mississippi, and Alabama. Thousands of small businesses were destroyed or seriously damaged by high winds, flooding, and many other effects, including the economic aftermath of the storms. Topics covered in the conference included the economic context in the region, regional entrepreneurship and its role in urban and regional renewal, the potential for new and existing businesses in promoting revitalization, public policy initiatives to reduce obstacles and encourage entrepreneurial growth, and key elements of a long-term strategy to rebuild the Gulf Coast region. The conference was cosponsored by the Office of Advocacy and the Ewing Marion Kauffman Foundation, the Public Forum Institute, and the Urban Entrepreneur Partnership. The proceedings document includes a transcript of the entire conference, annotated with website citations for the many organizations represented by the participants. See <http://www.sba.gov/advo/research/proceedings06.pdf>.

## Building a Better Small Business Climate: State Regulatory Flexibility for Small Businesses

This conference was held March 28, 2007, at the Ewing Marion Kauffman Foundation Conference Center in Kansas City, Missouri. Regulatory flexibility allows governments to achieve their regulatory goals without imposing unfair economic burdens on small entities, helping to preserve businesses and jobs. Prior to the conference and since 2002, 37 state legislatures had considered regulatory flexibility legislation, and

19 states had implemented regulatory flexibility via executive order or legislation. (44 states have now implemented regulatory flexibility, either through legislation or executive order. See next chapter.) The conference considered all aspects of successful state regulatory flexibility strategies: teaching agencies, reaching out to small businesses, overseeing compliance, periodically reviewing existing rules, and measuring the success of these efforts. The event was cosponsored by the Office of Advocacy, the Ewing Marion Kauffman Foundation, and the Public Forum Institute. At the conference, the Office of Advocacy released a *State Guide to Regulatory Flexibility for Small Businesses*, which may be found at [http://www.sba.gov/advo/laws/rfa\\_stateguide07.pdf](http://www.sba.gov/advo/laws/rfa_stateguide07.pdf).

## 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 can't 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. 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 SBA staff via internal agency email distribution; 2) stakeholder organizations through Advocacy's small business communicators list; 3) all congressional small business legislative assistants in the Senate and the House of Representatives; 3) a targeted list of key small business reporters and writers; 4) a wider list of small business and issue-specific reporters generated by PR Newswire (Advocacy uses the SBA's account), 5) newsrooms in general through PR Newswire posting, and 6) the thousands of "opt-in" email addresses in our press and other email listservs. Advocacy also relies on its regional

advocates and public information officers in SBA field offices to distribute our news releases to their lists.

## Op-Eds

Placement of op-eds in national, regional, and local publications, as well as in state and local trade publications, has been an integral part of Advocacy's communication strategy.

The press secretary regularly produces localized (by state) op-eds for placement by regional advocates, as well as op-eds for the signature by the Chief Counsel. This effort has resulted in many printed op-eds (including several in key DC publications) on a variety of topics in support of small business.

## Media relations

The Chief Counsel and other Advocacy staff all try to maintain strong and positive personal relations with reporters from national, regional, and specialized publications. Although inquiries do not always begin with a search for "the good news," Advocacy does its best to explain the importance of small business and the office's efforts on its behalf. The results have been numerous positive stories in national, regional, local, and specialized publications.

## Additional outreach/media tools

Advocacy makes use of other outreach and communications vehicles including letters to the editor as appropriate, speeches and PowerPoint presentations, co-sponsorship of special newspaper sections (including four years with the *New York Times*), printed flyers and brochures, and radio public service announcements.

## Regional advocates

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

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*“The Office of Advocacy’s regional advocates serve as my eyes and ears throughout the country... Having representatives from the Office of Advocacy throughout the country allows my office to better identify and assess the key concerns of small businesses and communicate them to federal officials here in Washington, D.C. Regional advocates are Main Street’s direct contact with our office.”*

**Thomas M. Sullivan, fifth Chief Counsel for Advocacy (2002 – 2008)**

In the last chapter we examined how Advocacy conducts extensive outreach activities to facilitate a two-way exchange of information with small businesses and its other 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 fact is that 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 to act as the Chief Counsel’s eyes and ears in their respective areas. In this chapter, we shall look at the role of regional advocacy in furtherance of Advocacy’s mission.

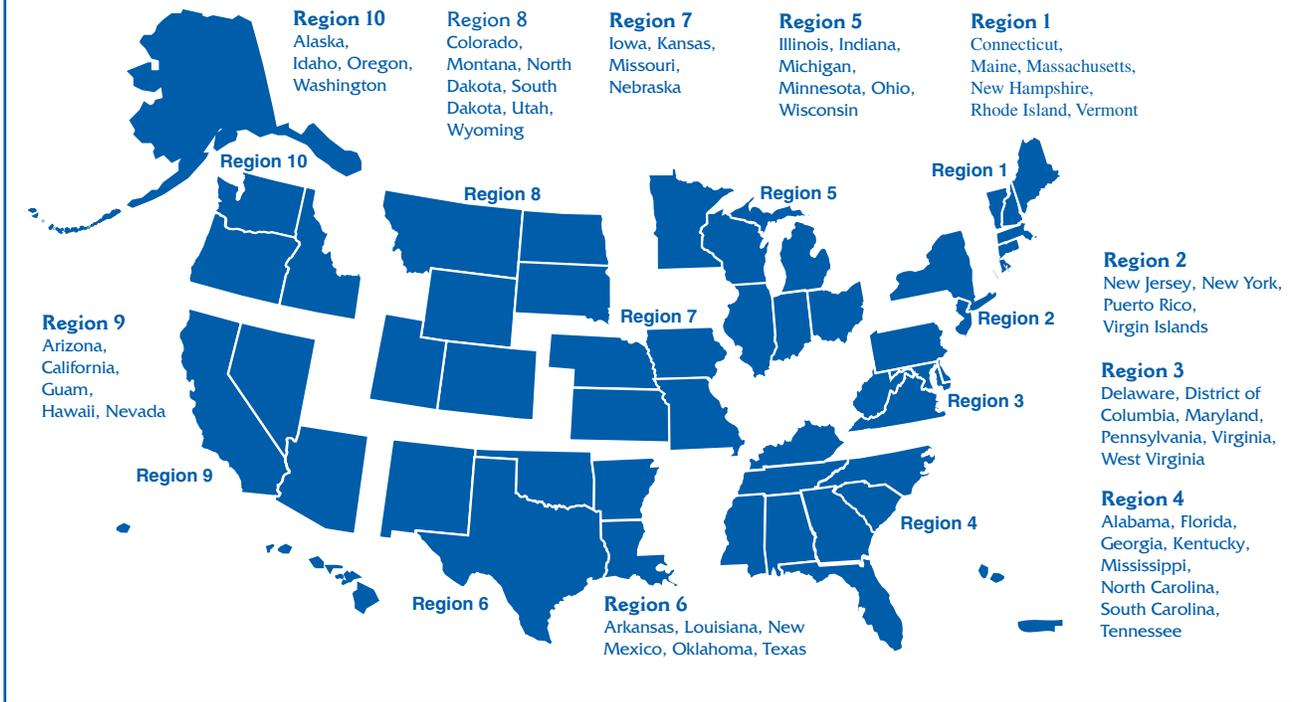
The Office of Regional Affairs is the operational division within Advocacy that carries out the office’s mission at the regional, state, and local levels. The regional team has twelve positions, including its director and a regulatory and legislative counsel in Washington, D.C., and ten regional advocates, located in SBA’s ten geographic regions as depicted in the map in Figure 4.

### 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;
- conduct extensive outreach programs in their areas to facilitate that two-way exchange of information between Advocacy and its stakeholders;
- review, collect, and analyze information relating to existing and proposed laws and regulations in their areas that have or could have small business effects;
- encourage state, county, and local officials to develop within their jurisdictions small business regulatory flexibility programs;
- maintain close working relationships with SBA’s regional administrator, district directors, and their staffs to keep current with current regional business trends and to ensure that SBA’s program staff

**Figure 4. SBA's Ten Geographic Regions**



- members are aware of and makes use of Advocacy research and resources; and
- assist their respective regional Regulatory Fairness Boards and the Office of the National Ombudsman in carrying out their mission, including the identification and reporting of excessive or unfair regulatory enforcement actions of federal agencies in their regions.

The regional team is responsible for carrying Advocacy's message to lawmakers and other small business opinion leaders in the states. This is important because the federal government is not the only source of burdensome regulations and paperwork—state and local governments also contribute their share. Although the federal RFA, Paperwork Reduction Act, and other measures aim to reduce federally imposed burdens on small businesses, separate measures are needed to address problems caused by rules and paperwork at the state and local levels. One of the most important missions of the regional team is to help state and local leaders address the

issue of overly burdensome regulations imposed by those levels of government.

## The State Regulatory Flexibility Legislation Initiative—Model Legislation

In 2002, Advocacy began a major initiative to share with the states model regulatory flexibility legislation<sup>1</sup> patterned after the federal RFA. The goal of the model legislation initiative is to foster a climate for entrepreneurial success in the states so that small businesses will continue to create jobs, produce innovative new products and services, bring more Americans into the economic mainstream, and broaden the tax base. This initiative has become one of the most important activities of the regional team.

<sup>1</sup> This model legislation is posted on Advocacy's website at [http://www.sba.gov/advo/laws/model\\_bill.pdf](http://www.sba.gov/advo/laws/model_bill.pdf).

Since Advocacy’s model legislation initiative began, 44 states have implemented at least some provisions of the regulatory flexibility model, either through legislation or executive order (see Figure 5). As a result of this success, the initiative is entering a new phase. Advocacy’s regional advocacy team is now working with the small business community, state legislators, and state government agencies to assist with implementation of their regulatory flexibility laws and to ensure their effectiveness. Many state policymakers see regulatory flexibility as an economic development tool and have come together in a bipartisan effort to improve the business climate on the state level for small firms.

Successful state-level regulatory flexibility laws address the following areas: 1) a small business definition that is consistent with existing state practices and permitting authorities; 2) a requirement that state agencies perform an economic impact analysis on the effect of a rule on small firms before they regulate; 3) a requirement that state agencies consider less burdensome alternatives for small businesses that still

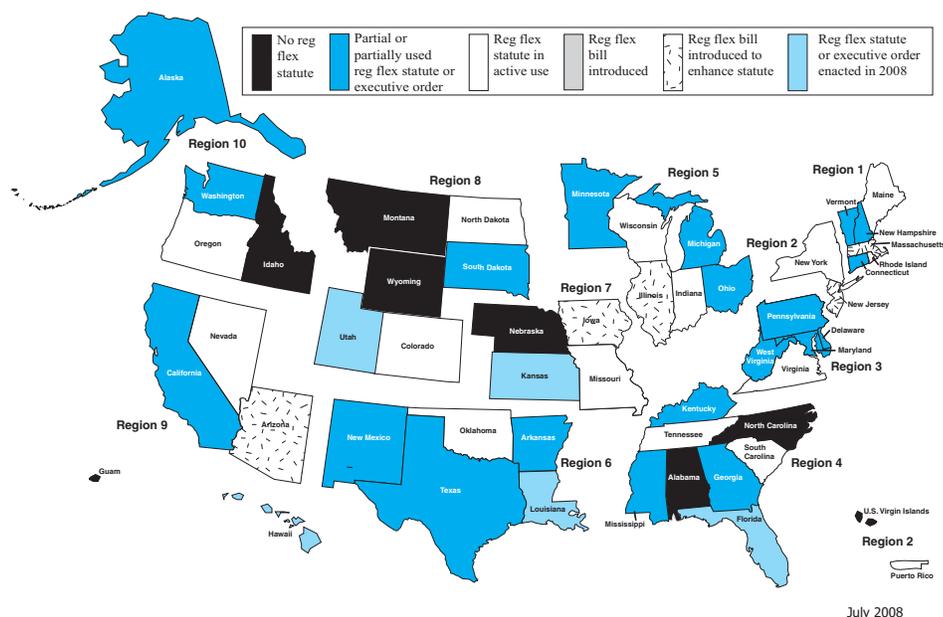
meet the agency’s regulatory goals; 4) judicial review to give the law “teeth;” and 5) a provision that requires state governments to review existing regulations periodically to minimize their impact on small business.

Advocacy’s state model legislation initiative involves three main components: 1) introduction and passage of Advocacy’s state model regulatory flexibility act (RFA); 2) small business activism; and 3) executive leadership.

### Introduction and passage of model RFA legislation

Regional advocates are responsible for facilitating the introduction and implementation of the model RFA in each state in their region. In accomplishing this goal, regional advocates must determine the state’s small business climate and work with state and local government officials, small businesses and other stakeholders to encourage introduction, passage, and implementation of the legislation. Because circumstances in each state are different, the regional advocates must tailor their work in each state accordingly.

**Figure 5. State Regulatory Flexibility Model Legislation Initiative 2008 Legislative Activity**



The state legislative process provides the best opportunity for the fullest consideration of all aspects and benefits of the model RFA. Therefore, regional advocates are encouraged to first pursue the legislative approach in obtaining approval of the model RFA. The regional team's regulatory counsel in Washington offers guidance and systematically reviews and analyzes existing and proposed laws, rules and regulations, policies, and activities of the federal and state government that affect small business. Based on detailed analysis, small business outreach, and other supporting research, counsel prepares policy positions and recommendations for the Chief Counsel's review. The regional advocate then provides information to state legislators, small business owners, trade associations, and other stakeholder groups that communicate the value of the model RFA.

To be successful in this phase, regional advocates must find key "champions" in the state legislature who will support the model RFA, introduce the bill, and expend legislative resources to see the bill through the legislative process. Regional advocates must work continually with the sponsor(s) of the legislation, small businesses, and other support groups throughout the process. Such involvement may include providing educational information, testimony at a committee hearing, or answering questions regarding the model RFA.

Governors are often instrumental in the process of enacting the model regulatory flexibility legislation. Accordingly, regional advocates must work with the governor's office in each state to gain its support. In addition, regional advocates encourage governors to involve their states' regulatory agencies early in the legislative process to increase the chances of enacting all five elements of the model RFA. In states that do not enact the model RFA legislation, regional advocates consider whether it would be beneficial to use the alternative strategy of encouraging the Governor to implement the purposes of the model language through an executive order.

## Small business activism and executive leadership

Following the enactment of model RFA legislation, regional advocates also try to facilitate the implementation of the law by keeping small businesses informed and encouraging their participation in the regulatory flexibility (regflex) process. Executive leadership is also encouraged. Not only are Governors instrumental in securing enactment of model RFA legislation; their leadership in implementing regulatory flexibility law already on the books is critical, as is the support of their executive branch agencies. Small business activism can keep attention focused on making the regflex process work. Business organizations, trade associations, and other stakeholders will benefit more from their state's regulatory flexibility law if they are educated and encouraged to become actively engaged in the system.

Small business outreach is also important to determine whether an existing regulatory flexibility law is or is not working effectively. Through relationships with small business owners, agencies, and other stakeholder groups, regional advocates collect concrete examples where, for example, an alternative regulatory approach was successfully utilized by an agency to minimize the economic impact of the rule on small business. Also important are examples of good practices in each state such as regulatory alert systems, e-mail notification systems, or other programs that have been developed to inform small businesses of agency regulatory activities. Regional advocates also look for examples that show how a state's law or system could be improved to create a friendlier small business regulatory environment.

## State Guide to Regulatory Flexibility for Small Businesses

In March 2007, Advocacy co-hosted with the Ewing Marion Kauffman Foundation a conference in Kansas City, Missouri titled *Building a*

*Better Small Business Climate: State Regulatory Flexibility Best Practices.* The conference was targeted at state-level policymakers and opinion leaders. Participants included representatives from small business advocacy groups; state government leaders, policymakers, and economic development officials; academics; and others with an interest in this area. In connection with the conference, Advocacy prepared a guide to help state officials better understand the need for regulatory flexibility and the key elements that make a regflex program work.<sup>2</sup> The guide explained why regulatory flexibility is important, how to prepare small business economic impact and flexibility analyses, the importance of transparency in the rulemaking process, and how to measure the success of a state regulatory flexibility program. Also included were examples of various state regflex laws and best practices. The regional advocacy team, both in the states and in Washington, was instrumental in preparing this document.

## Regional Team Publications: *the State Reg Flex Roundup*

The response to the Kansas City state regulatory flexibility conference was enthusiastic and participants wanted a way to continue the dialogue begun there. To keep this momentum going, Advocacy created the State Reg Flex Round-Up, a short monthly newsletter sent by email that serves as a forum for the state regflex community. Through the Reg Flex Round-Up, subscribers receive on a continuing basis the latest state regflex news, and they can share best practices and examples of how different regflex strategies are working (or not working). The regional advocates submit articles that feature regulatory flexibility examples from the regions they represent. The State Reg Flex Round-Up is also posted monthly on Advocacy's website at <http://www.sba.gov/advo/>.

<sup>2</sup> Office of Advocacy, *State Guide to Regulatory Flexibility for Small Businesses*, March 2007. This publication is posted at [http://www.sba.gov/advo/laws/rfa\\_stateguide07.pdf](http://www.sba.gov/advo/laws/rfa_stateguide07.pdf).

Advocacy's state regulatory flexibility initiative has been an important part of the regional advocacy team's duties, and it has had measurable results. But regional advocates have many other duties as well, and it is time to look at these now, especially those relating to outreach.

## Regional Role in Outreach

In addition to introducing the small business regulatory flexibility model legislation initiative in 2002, in that year the Office of Advocacy also defined outreach goals for the regional advocates and established a reporting system with certain general categories of activities that reflected the priorities of Advocacy's leadership in Washington, but recognized that some variation from region to region was to be expected. Although it is difficult to measure the many intangible effects regional advocates have had working with Advocacy's stakeholders across the country, many outreach activities can be quantified. "Benchmarks" have been established to act as guidelines for the regional advocates' day-to-day outreach activities. They also provide a common set of activities for each of the regional advocates to document in their periodic reports.

Activity levels for six regional advocate benchmark areas from FY 2002 through FY 2008 (3<sup>rd</sup> quarter) are reported in Table 6. We have already reported on the state model regulatory flexibility initiative above. The activities quantified below include: 1) government contacts; 2) media outreach; 3) stakeholder outreach; 4) SBA collaboration; 5) research outreach to academic and resource partners; and 6) interaction with the Office of the National Ombudsman.

Since this activity reporting has been in place, the tangible results are a clear indication that Advocacy's message is resonating throughout the states. Following is a brief description of each of these types of regional advocate activities.

**Table 6. Consolidated Regional Activity Report, FY 2002 – FY 2008 (6/30)**

Activity	Number
Government contacts	3,089
Media contacts and speeches	5,001
Stakeholder meetings	2,436
SBA collaboration	815
Advocacy research used in "Top 100" schools	54
Referrals to/from the Office of the National Ombudsman	78

### Government contacts

Regional advocates educate federal, state, and local policymakers on the importance of small business to the economy and the impact of government policies and regulations on small business. It is important for regional advocates to maintain good working relationships with government officials in their regions at all levels, federal, state, and local. Liaison with state legislators can be particularly important in furthering the state regulatory flexibility initiative. Regional advocates are prepared to refer more complex questions requiring economic or legal research to the appropriate staff in Advocacy’s Washington office, making this level of expertise more accessible to officials in state and local government. Regional advocates work with Advocacy’s Office of Information to answer requests for publications or other Advocacy materials. In each instance, regional advocates help Advocacy extend its economic research, regulatory advocacy expertise, and publications to a wider audience than would be possible with only a Washington-based staff.

### Media outreach

Regional advocates serve as a voice for small business in their region. They are also on the front line for Advocacy in promoting media interest (print, radio, and television) in small business issues. They work with Advocacy’s press secretary in the Office of Information to attract media interest in Advocacy’s work on regulatory issues and economic research reports, and they provide interviews as necessary. Regional advocates provide any articles of interest that appear in their regions, either through their own efforts or generated by other Advocacy work products, to Advocacy’s press secretary. Media outreach includes cold calls and periodic “check in” calls to journalists, and mass distribution (via email) of Advocacy documents, including fact sheets, op-eds, press releases, etc.

### Stakeholder outreach

Regional advocates serve as the Chief Counsel’s “eyes and ears on Main Street.” There is a continuing effort to establish and build on relationships with small businesses and the various entities that represent them in order to better understand what federal and state regulatory issues and problems they face. Regional advocates interact regularly with small business owners, trade associations, and other small business advocates to help identify their memberships’ local, regional, or national regulatory concerns and to provide information to Advocacy headquarters staff. Regional advocates are the communications link between Advocacy and small business owners, trade and professional organizations, and state and local government. Speech events offer opportunities to introduce stakeholders to Advocacy and, through “question & answer periods” and other follow-up interaction, provide equally important opportunities for regional advocates to collect information from stakeholders that is then forwarded to appropriate Advocacy staff in Washington. They also fulfill requests for additional information about Advocacy or Advocacy

products, as well as any referrals to other agencies or offices within the SBA.

### **SBA headquarters, regional, and district staff**

Each regional advocate maintains a good working relationship with his or her corresponding SBA regional administrator and when appropriate coordinates programming and activities. Regional advocates communicate frequently with SBA district directors and their staffs on Advocacy activities, including regulatory issues and research reports. In addition, regional advocates work with various SBA offices as directed by the Chief Counsel on special requests. Regional advocates are responsible for all follow-up actions necessary to fulfill requests for additional information about Advocacy or Advocacy products, as well as any referrals to other agencies or offices within the SBA.

### **Research outreach to academic and resource partners**

One of Advocacy's office-wide goals is to encourage university professors to use Advocacy research and reports in their curricula and in their own research. Regional advocates share Advocacy's research and reports with deans, professors, and students on a regular basis. They meet with faculty to ensure they are aware of Advocacy's data and research, and follow up to determine how Advocacy's information is being used, including reviewing their weblogs, course syllabi, textbooks or other materials where Advocacy research is employed.

Another important goal is to encourage more research on small business and entrepreneurship. Regional advocates work with colleges, universities, think tanks, and other organizations to encourage research on small business and entrepreneurship.

## **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 National Ombudsman (ONO) headquarters staff to receive and make individual small business case referrals as necessary and required under the Memorandum of Understanding between the ONO and the Office of Advocacy.<sup>3</sup> 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 arise at them. Both Advocacy and the ONO refer information, regulatory complaints, and other issues to each other or another appropriate office to ensure that small business owners are receiving helpful and timely responses to their inquiries. Additional information on the ONO can be accessed at <http://www.sba.gov/ombudsman/>.

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<sup>3</sup> See Appendix U for the full MOU.

# Chapter 6

## Advocacy Authority, Organization and Budget

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*“Economic freedom is measured to the extent there is small business—the number and significance of small businesses. The rate of business formation turns into a measure of political liberty. If you want independence, freedom to make choices, that’s what small business represents.”*

**Milton D. Stewart, first Chief Counsel for Advocacy (1978 – 1981)**

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 divisions, 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 between all divisions and state and local government 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 the “nuts and bolts” that keep Advocacy going. 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, 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 2008. 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.<sup>1</sup> We have seen in Chapter 1 how this legislation superseded Public Law 93-386, which had established the first statutory Chief Counsel for Advocacy.<sup>2</sup> The prior Chief Counsel's activities were authorized under the Small Business Act,<sup>3</sup> and he 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,<sup>4</sup> 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."<sup>5</sup> 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.<sup>6</sup> Among these, Advocacy is 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;
- 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.

### 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).<sup>7</sup> Advocacy is to:

- serve as a focal point for the receipt of complaints, criticisms, and suggestions concerning the policies and activities of federal agencies which 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 which will better fulfill the purposes of the Small

<sup>1</sup> Title II, Public Law 94-305; June 4, 1976; 15 § U.S.C. 634a *et seq.*  
See Appendix A for full text as amended.

<sup>2</sup> Public Law 93-386, Small Business Amendments of 1974; August 23, 1974; 88 Stat. 742. Section 10 established the position of Chief Counsel for Advocacy and enumerated his duties.

<sup>3</sup> Public Law 85-536; July 18, 1958; 72 Stat. 384, 15 U.S.C. § 631 *et seq.*

<sup>4</sup> § 208, Public Law 94-305, 90 Stat. 671.

<sup>5</sup> *Ibid.*, § 201; 15 U.S.C. § 634a.

<sup>6</sup> *Ibid.*, § 202; 15 U.S.C. § 634b.

<sup>7</sup> *Ibid.*, § 203; 15 U.S.C. § 634c.

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 which 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 his or her 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.<sup>8</sup> 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.

Section 204 also permits the Chief Counsel to procure temporary and intermittent services,<sup>9</sup> to consult with experts and other authorities,<sup>10</sup> to utilize the services of SBA’s National Advisory

Council or to appoint other advisory boards or committees,<sup>11</sup> and to “hold hearings and sit and act at such times and places as he may deem advisable.”<sup>12</sup>

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...”<sup>13</sup>

### Section 206. Reports

The Chief Counsel is authorized to prepare and publish such reports as he or she deems 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.”<sup>14</sup> 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

This section provides a \$1,000,000 authorization for Advocacy for unspecified purposes; however, the section is obsolete and has no current effect on Advocacy’s operations.<sup>15</sup> Although the language itself is unclear as to the object of this au-

8 Ibid., § 204(1); 15 U.S.C. § 634d(1).

9 Ibid., § 204(2); 15 U.S.C. § 634d(2).

10 Ibid., § 204(3); 15 U.S.C. § 634d(3).

11 Ibid., § 204(4); 15 U.S.C. § 634d(4).

12 Ibid., § 204(5); 15 U.S.C. § 634d(5).

13 Ibid., § 205; 15 U.S.C. § 634e.

14 Ibid., § 206; 15 U.S.C. § 634f.

15 Ibid., § 207; 15 U.S.C. § 634g.

thorization, the conference report to accompany the bill that became Public Law 94-305 makes it clear that the authorization was for a one-time, comprehensive study on small business topics iterated in that law, to be completed by the Chief Counsel for Advocacy.

The original Senate bill had provided for such a study to be conducted by a special “National Commission on Small Business in America” comprised of eleven members for this express purpose. That study was to have been completed within two years, and such sums as were necessary were authorized. The House bill had no comparable provision. The conference agreement provided that the newly upgraded Chief Counsel for Advocacy should conduct the study that the Senate had previously planned for the Commission. The report further explained that:

The conferees reduced the amount of time allowed for the study to one year and limited the appropriation to one million dollars. The conference substitute also directs the Advocate to deliver the final study to the Congress, the President and the Administration at the same time.<sup>16</sup>

## 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.<sup>17</sup> Section 3(a) of Public Law 96-354 added a new Chapter 6 to Title 5 of the United States Code, titled “The Analysis of Regulatory Functions.”<sup>18</sup> 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.”<sup>19</sup> 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 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.<sup>20</sup> 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.

### Section 605. Avoidance of duplicative or unnecessary analyses

The RFA’s requirement for an IRFA 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.<sup>21</sup> This notification requirement serves as an important flag for Advocacy to review such rule certifications to ensure that they are justifiable.

<sup>16</sup> House Report 94-1115, Conference Report to accompany S. 2498, p. 15; May 10, 1976.

<sup>17</sup> Public Law 96-354; September 19, 1980; 5 U.S.C. § 601 *et seq.*

See Appendix B for full text as amended.

<sup>18</sup> § 3, Public Law 96-354, 94 Stat. 1165.

<sup>19</sup> 5 U.S.C. § 601(3).

<sup>20</sup> 5 U.S.C. § 603(a).

<sup>21</sup> 5 U.S.C. § 605(b).

### 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.<sup>22</sup>

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.<sup>23</sup> 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 rule-making 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 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.”<sup>24</sup> Advocacy’s annual RFA reports are posted on its website at <http://www.sba.gov/advo/laws/flex/>.

<sup>22</sup> 5 U.S.C. § 609(b).

<sup>23</sup> The Chief Counsel may in certain limited circumstances waive the requirement for a SBREFA panel.

<sup>24</sup> 5 U.S.C. § 612(a).

A second provision of interest 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.”<sup>25</sup> Yet a third provision in § 612 directs the courts to allow the Chief Counsel to appear in such actions.<sup>26</sup>

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.

### 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)

<sup>25</sup> 5 U.S.C. § 612(b).

<sup>26</sup> 5 U.S.C. § 612(c).

#### SENATE REPORTS:

- Senate Report 94-420 to accompany S. 2498; October 8, 1975  
(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.<sup>27</sup> Also, its Title III, known as the Small Business Economic Policy Act of 1980,<sup>28</sup> 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.<sup>29</sup> This rank was conferred as a measure 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

<sup>27</sup> 94 Stat. 850.

<sup>28</sup> 94 Stat. 848.

<sup>29</sup> The position of Chief Counsel for Advocacy was added to the list of ES-4 positions set forth at 5 U.S.C. § 5315.

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.<sup>30</sup> 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 relating to the implementation of the Equal Access to Justice Act.<sup>31</sup> This function ended for Advocacy when the Administrative Conference was terminated in 1996.<sup>32</sup>

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.<sup>33</sup> Again, this function ended for Advocacy when the Administrative Conference was terminated in 1996.

HOUSE REPORTS:

House Report 96-1004 to accompany  
H.R. 5612; May 16, 1980  
(Committee on Small Business)

30 94 Stat. 2325. The Equal Access to Justice Act, as amended, is codified at 5 U.S.C. § 504.

31 5 U.S.C. § 504(e), as added by § 203(a) of Public Law 96-481.

32 Public Law 104-52; November 19, 1995; 109 Stat. 480. The Administrative Conference was subsequently reauthorized for fiscal years 2005 through 2007 (by Public Law 108-41; October 30, 2004), but funding was not provided for it to resume operations. More recently, the Conference was again reauthorized for fiscal years 2009 through 2011 (by Public Law 110-290; July 30, 2008), but as this report was being finalized, the Conference remained unfunded.

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

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

**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 which 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.<sup>34</sup> These included the Chief Counsel's important public law hiring authority,<sup>35</sup> and authorities to procure temporary and intermittent services,<sup>36</sup> to consult with experts and other

34 108 Stat. 4204.

35 Public Law 94-305, § 204(1); 15 U.S.C. § 634d(1).

36 *Ibid.*, § 204(2); 15 U.S.C. § 634d(2).

authorities,<sup>37</sup> to utilize the services of SBA's National Advisory Council or to appoint other advisory boards or committees,<sup>38</sup> and to "hold hearings and sit and act at such times and places as he may deem advisable."<sup>39</sup> 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."<sup>40</sup>

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."<sup>41</sup>

#### 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

(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

<sup>37</sup> Ibid., § 204(3); 15 U.S.C. § 634d(3).

<sup>38</sup> Ibid., § 204(4); 15 U.S.C. § 634d(4).

<sup>39</sup> Ibid., § 204(5); 15 U.S.C. § 634d(5).

<sup>40</sup> House Conference Report 103-824 to accompany S. 2060; October 3, 1994; p. 54.

<sup>41</sup> 108 Stat. 4204.

## 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.<sup>42</sup> 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."<sup>43</sup>

#### 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)

#### 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

<sup>42</sup> 113 Stat. 250.

<sup>43</sup> 15 U.S.C. 634b(12).

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS

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

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.<sup>44</sup> The Office of Advocacy has been closely involved with the regulatory review process established by the RFA from its inception. Under the original act, agencies are required to transmit to the Chief Counsel their regulatory agendas,<sup>45</sup> their initial regulatory flexibility analyses,<sup>46</sup> and their certifications of rules without significant effects.<sup>47</sup> Additionally, the Chief Counsel reports annually to the President and the Congress on agency compliance with the RFA,<sup>48</sup> and is authorized to appear as *amicus curiae* in any action brought in a court of the United States to review a rule.<sup>49</sup>

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).<sup>50</sup> As we have seen, among its many other provisions, SBREFA significantly strengthened the RFA, especially by providing judicial review of RFA compliance issues,<sup>51</sup> by establishing a special regulatory panel review process to gather early comments on proposals from EPA and OSHA,<sup>52</sup> and by clarifying the Chief Counsel's authority to appear as *amicus curiae* in cases involving RFA compliance.<sup>53</sup>

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  
(Committee on Government Reform and Oversight)  
House Report 104-284 (Part 2) to accompany H.R. 994; November 7, 1995  
(Committee on the Judiciary)

44 94 Stat. 1164.

45 5 U.S.C. § 602.

46 5 U.S.C. § 603.

47 5 U.S.C. § 605.

48 5 U.S.C. § 612(a).

49 5 U.S.C. §§ 612(b), 612(c).

50 110 Stat. 857.

51 5 U.S.C. § 611.

52 5 U.S.C. § 609(b).

53 5 U.S.C. § 612(b).

## 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

## Independence and Relationship with SBA

Independence and flexibility are what Chief Counsel Sullivan has called the “bedrock principles that underlie the Office of Advocacy’s ability to represent small businesses effectively.”<sup>54</sup> 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.<sup>55</sup>

<sup>54</sup> Hearing before the House Committee on Small Business, “Strengthening the Office of Advocacy,” March 20, 2002.

<sup>55</sup> In 1976, the Office of Advocacy employed twelve, including the Chief Counsel. SBA’s advisory councils were under Advocacy,

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 clarified and strengthened, and Congress was again encouraged by private sector 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.<sup>56</sup>

At the same 1976 Senate hearing, James D. “Mike” McKeivitt, 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:

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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.

<sup>56</sup> Ibid., pp. 82-83.

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.<sup>57</sup>

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 have seen, a new charter for Advocacy followed only two months after this hearing, and it reflected many of the witnesses' recommendations.<sup>58</sup>

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.

<sup>57</sup> *Ibid.*, pp. 121-122.

<sup>58</sup> Title II, Public Law 94-305; June 4, 1976; 15 § U.S.C. 634a *et seq.* See Appendix A.

## 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.<sup>59</sup>

## 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.<sup>60</sup> 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

<sup>59</sup> Prior § 5(e) of the Small Business Act, which was repealed by § 208 of Public Law 94-305.

<sup>60</sup> *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)).

sense, on the President’s team, trying to do better by that administration for small business.<sup>61</sup>

## 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:

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.<sup>62</sup>

## 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 he or she deems 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.”<sup>63</sup> 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.<sup>64</sup>

## 1980 statement of congressional intent

In 1980, 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.<sup>65</sup> 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 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.

61 Hearing before the House Committee on Small Business, “SBA Office of Advocacy,” April 4, 1995; p. 7.

62 Ibid., p. 3.

63 § 206, Public Law 94-305; 15 U.S.C. § 634f.

64 Hearing before the House Committee on Small Business, “SBA Office of Advocacy,” April 4, 1995; p. 7.

65 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.

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.<sup>66</sup>

## 1994 statutory confirmation of independent authorities

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.<sup>67</sup> These included the Chief Counsel's important public law hiring authority,<sup>68</sup> and other authorities to procure temporary and intermittent services,<sup>69</sup> to consult with experts and other authorities,<sup>70</sup> to utilize the services of SBA's National Advisory Council or to appoint other

advisory boards or committees,<sup>71</sup> and to "hold hearings and sit and act at such times and places as he may deem advisable."<sup>72</sup>

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."<sup>73</sup> By removing the Administrator's ability to intervene in the use of these § 204 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 by SBREFA,<sup>74</sup> has conferred additional authorities and duties on the Chief Counsel that are apart from those authorities and duties 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,<sup>75</sup> their initial regulatory flexibility analyses,<sup>76</sup> and their certifications of rules without significant effects.<sup>77</sup> Additionally, the Chief Counsel participates in SBREFA regulatory review panels for certain EPA and OSHA rules,<sup>78</sup> is tasked to report annually to the President and the Congress on agency compliance with the RFA,<sup>79</sup> and is authorized to appear as *amicus curiae* in any action brought in a court

66 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.

67 108 Stat. 4204.

68 Public Law 94-305, § 204(1); 15 U.S.C. § 634d(1).

69 *Ibid.*, § 204(2); 15 U.S.C. § 634d(2).

70 *Ibid.*, § 204(3); 15 U.S.C. § 634d(3).

71 *Ibid.*, § 204(4); 15 U.S.C. § 634d(4).

72 *Ibid.*, § 204(5); 15 U.S.C. § 634d(5).

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

74 5 U.S.C. §§ 601-612.

75 5 U.S.C. § 602.

76 5 U.S.C. § 603.

77 5 U.S.C. § 605.

78 5 U.S.C. § 609(b).

79 5 U.S.C. § 612(a).

of the United States to review a rule, including those based on RFA compliance issues.<sup>80</sup>

## 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 nor personnel. 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 Administrator, and then progressed through a series of legislative refinements that increasingly enhanced and confirmed the office's independence under its own statutory charter 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 simply could not accomplish what it does without the support of SBA in countless ways every day.

Perhaps the most important way in which SBA and Advocacy are still very much attached is through the budget process. Although we have seen how Congress envisions an independent mission for Advocacy, the office's budget remains a part of SBA's larger budget. For budget-

ary purposes, the Office of Advocacy is treated in much the same way as any SBA program office, in fact with less independence than certain other functions which have their own statutory budget accounts.<sup>81</sup> Advocacy participates in every step of the budget process in the same way as most other SBA offices and programs. This entails the preparation of annual budget requests and justifications that “compete” with those of other SBA offices and programs for a share of the agency's annual request to Congress. This process includes the integration of a proposed SBA budget into the President's annual congressional submission for the entire government, as coordinated by OMB. Throughout this multi-year process (at any given time there are always budgets for three separate fiscal years in various stages of consideration), many difficult decisions are made about resource allocations, and many of these decisions are made by the SBA Administrator and his or her senior staff.

So however independent Advocacy has become from SBA with respect to implementation of the Chief Counsel's mission, obtaining the resources necessary to carry out that mission remains very much linked to SBA's internal budget process. We will return to this subject in Chapter 7.

There are many other ways in which Advocacy and the rest of SBA interact. We have referenced some of them in earlier chapters. 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, up to and including the SBA Administrator, who receives regular briefings from Advocacy staff on current economic trends and regulatory issues. 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.

<sup>80</sup> 5 U.S.C. §§ 612(b), 612(c).

<sup>81</sup> Notably, the Office of the Inspector General and disaster operations.

## 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.<sup>82</sup>

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 the Office of Advocacy. I think that it's really unique...it's a tribute to our system that it's been done.<sup>83</sup>

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

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82 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 20<sup>th</sup> anniversary, is reprinted in its entirety in Appendix V.

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

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.<sup>84</sup>

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.<sup>85</sup>

Finally, the fifth and current Chief Counsel, Tom Sullivan 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.<sup>86</sup>

So we see that all of the five 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

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

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

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

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 independence and its relationship with SBA. We will revisit the issue of Advocacy independence legislation in the next chapter, but first we will conclude this chapter with 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 four 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, etc. ASB staff also assists in organizing many of Advocacy's outreach events, answer the phones, direct public inquiries, keep records, and generally manage the countless chores that keep the office running smoothly. Some of Advocacy's longest-serving employees work in ASB, and the office is extremely fortunate to have such institutional knowledge and dedication in the ASB team. Figure 6 depicts Advocacy's organization and authorized staffing levels in 2008.<sup>87</sup>

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<sup>87</sup> A listing of current Advocacy staff can be found in Appendix S.

## Budget History and Current Allocation

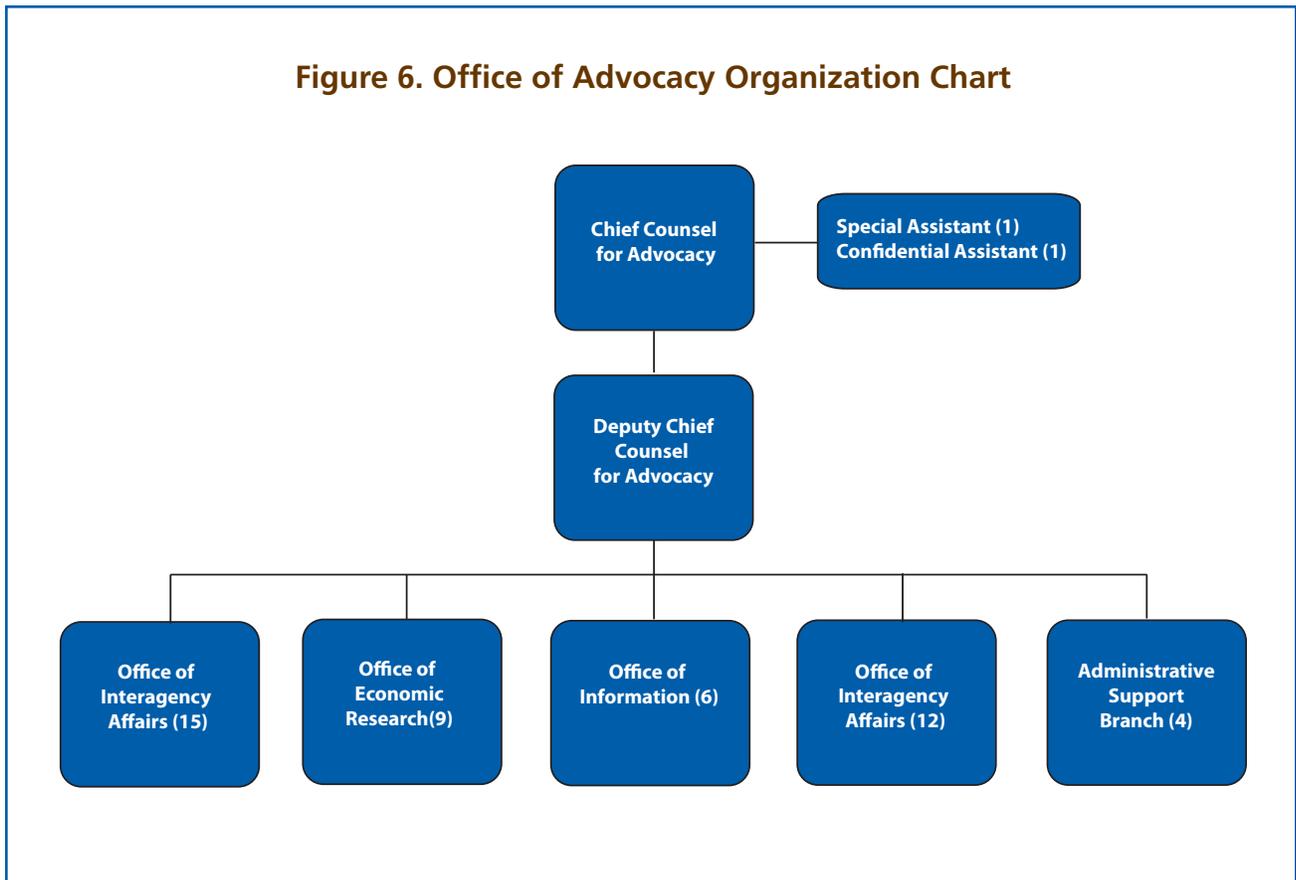
The term "budget" is often used with bewildering inconsistency by those not familiar with the federal budget process. This is understandable because that process is quite complex, and through its many stages an amount specified for any given project, program, or activity (PPA in budget parlance) can 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 only two types of budget numbers for Advocacy, authorized program levels in the office's early years, and the more important 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. Table 7 sets out the Advocacy program

**Figure 6. Office of Advocacy Organization Chart**



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 (shaded in the table) were revised downward with the enactment of P.L. 97-35.

### Advocacy actuals

Throughout most of its history, Advocacy’s “budget” appeared as two items in SBA’s formal congressional budget submission 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 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. Since FY 2006, economic research funding has been included with all other Advocacy expenses, so that the office’s budget now appears as a single item in SBA’s congressional budget submission

under the agency’s “Executive Direction” budget heading. We will return to this subject in Chapter 7. Table 8 depicts Advocacy actual spending from FY 1978, the first year in which Advocacy as chartered by Public Law 94-305 was operational, through FY 2007. Advocacy’s budget requests for FY 2008 and FY 2009 were also provided, because data on FY 2008 actuals were not available as this report was being finalized.

**Table 7. Advocacy Program Levels for the six years in which these appeared in the Small Business Act**

Fiscal Year	Program level	Authorizing law	Enactment
FY 1978	\$6.0 million	Public Law 95-89*	August 4, 1977
FY 1979	\$6.6 million	Public Law 95-89	August 4, 1977
FY 1981	\$8.8 million	Public Law 96-302**	July 2, 1980
FY1982	\$9.68 million	Public Law 96-302	July 2, 1980
FY1982	\$8.0 million	Public Law 97-35***	August 13, 1981
FY 1983	\$9.68 million	Public Law 96-302	July 2, 1980
FY1983	\$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

\* Public Law 95-89; August 4, 1977; 91 Stat. 553.  
 \*\* Public Law 96-302; July 2, 1980; 94 Stat. 833.  
 \*\*\* Public Law 97-35, Title XIX, § 1905; August 13, 1981; 95 Stat. 772.

**Table 8. Advocacy Actual Expenses: FY 1978 - FY 2007<sup>A</sup>**  
(dollars in thousands)

Fiscal Year	Advocacy Expenses	Fiscal Year	Advocacy Expenses
FY 1978	1,930	FY 1994	6,090 <sup>C</sup>
FY 1979	2,836	FY 1995	7,956 <sup>D</sup>
FY 1980	6,050 <sup>B</sup>	FY 1996	4,617
FY 1981	7,264 <sup>B</sup>	FY 1997	4,762
FY 1982	5,755	FY 1998	4,869
FY 1983	6,281	FY 1999	5,134
FY 1984	5,654	FY 2000	5,620
FY 1985	5,701	FY 2001	5,443
FY 1986	5,546	FY 2002	5,019
FY 1987	6,018	FY 2003	8,680 <sup>E</sup>
FY 1988	6,043	FY 2004	9,360 <sup>E</sup>
FY 1989	5,769	FY 2005	9,439 <sup>E</sup>
FY 1990	5,645	FY 2006	9,364 <sup>E</sup>
FY 1991	5,647	FY 2007	9,858 <sup>E</sup>
FY 1992	5,764	FY 2008	11,023 <sup>F</sup>
FY 1993	5,362	FY 2009	11,963 <sup>F</sup>

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 prior years, are estimated to be approximately 75 percent of total expenses under the new accounting.

F Amount requested for Advocacy in SBA’s congressional budget submission.

# Chapter 7

## Pending Issues

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*“The two bedrock principles that underlie the Office of Advocacy’s ability to represent small businesses effectively are independence and flexibility. The office is able to present the views of small entities to lawmakers and policymakers independent of the views of the U.S. Small Business Administration (SBA) and the Administration. The office has broad statutory authority, which gives it the flexibility to be both reactive and proactive on matters of concern to small entities.”*

**Thomas M. Sullivan, fifth Chief Counsel for Advocacy (2002 – 2008)**

In this, the concluding chapter of Advocacy’s 2008 transition background report, we will review a number of pending issues that the transition team and next Chief Counsel should be aware of. 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 a new round of r3 nominated regulations will appear next year. Other concerns have and probably will persist over longer periods. We do not pretend to be able to 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 2009 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 \$1.1 million has been allocated annually to Advocacy for economic research and data products.<sup>1</sup> 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 and OSHA rules subject to SBREFA panels. In each instance, Advocacy strives to produce 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 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

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1 Funds for Advocacy’s economic research function, excluding salaries and expenses, were for many years set by a specific line

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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 under the heading SBA “Executive Direction.”

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, 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.

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 on the popular Frequently Asked Questions publication and of tabular data in *The Small Business Economy: A Report to the President*. (Total annual cost: \$150,000) (<http://www.sba.gov/advo/research/data.html>)

#### *Dynamic Data by Owner Demographics.*

The Office of Advocacy has partnered with the National Women’s Business Council (NWBC) in the past to examine the survival of firms by gender and ethnicity/race. The most recent request is ongoing, with funds divided between FY 2008 and FY 2009 (Total cost in FY 2008 and FY

2009 is \$46,250, subject to availability of funds, with NWBC spending an equivalent amount.)

An example of a previous study using this data was “Dynamics of Minority-Owned Employer Establishments, 1997–2001.” (<http://www.sba.gov/advo/research/rs251tot.pdf>)

*Other Special Tabulations.* From time to time, the Office of 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.

### Internal Revenue Service’s Statistics of Income (SOI)

*Special Tabulations.* The Office of Advocacy periodically requests data from the IRS on sole proprietorship, and it is currently exploring new opportunities whereby other data fields might be examined for research purposes. An example in which SOI data was used was a working paper titled “U.S. Sole Proprietorships: A Gender Comparison, 1985–2000” (<http://www.sba.gov/advo/research/rs263tot.pdf>)

### 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.<sup>2</sup> 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.

#### Contracts awarded in FY 2007 or earlier

*Analysis of Small Business Innovation* by Ceteris Group. This study seeks to investigate the link between patent applications, firm size, and industry. In doing so, it will test a few hypotheses, the most notable of which is “are small firms more innovative than their larger counterparts?”

*An Analysis of Small Business Patents by Industry and Firm Size* by 1790 Analytics. This study will measure the role of small businesses in highly innovative industries and emerging technologies. The data for the study are a large sample of patent applications across industries and technologies, including both large and small firm filers. The study will examine not only what share

of patents small firms file, but how small firm innovation differs from large firm innovation.

*Are Planners Doers? Pre-Venture Planning and the Start-up Behaviors of Entrepreneurs in the PSED.* This study explores whether and when business planning influences entrepreneurial action.

*Estimating the Contribution of Immigrant Entrepreneurs* by Robert Fairlie. Using matched data from the 1996–2006 Current Population Surveys (CPS), the author studies immigrant entrepreneurship using a new measure that captures the rate of business creation at the individual owner level.

*Impact on Small Businesses of Climate Change Proposals* by Economic Consulting Services. The report will use supply chain relationships (as determined by input-output tables) for small firms across a large number of industries to estimate how various climate change initiatives, if enacted at the federal level, would impact small business. Impacts are determined by factors such as how much energy small firms within an industry utilize, and how large an impact on energy prices proposals such as a cap-and-trade system would be likely to have.

*Effective Tax Rates Faced by Small Businesses* by Quantria Strategies. This study attempts to calculate effective income tax rates faced by small businesses by tracing income to its taxable destination. It will also examine what provisions of the tax code are more effective in helping small businesses lower their effective rate.

*An Examination of Financial Patterns using the Survey of Small Business Finances* by George Haynes. This study uses the Federal Reserve Board’s Survey of Small Business Finance (SSBF) data (1993–2003) to study the changes of financing patterns of small business borrowers and the impact (if any) of these changes on the rise of non-traditional commercial lending and small business growth.

*High-Tech Immigrant Entrepreneurship in the United States* by Corporate Research Board (CRB). This project conducts a survey using the CRB’s gazelle database to better understand

2 For more information on FedBizOpps, see <http://www.fbo.gov/>.

the relative roles of immigrants and native-born citizens in founding U.S. high-tech companies. These data allow reliable estimates of rates of immigrant-founded high-tech gazelles at the national, industry, and regional levels. The survey was fielded in September 2008.

*Low-Wage Worker Characteristics by Firm Size and Industry* by Innovation and Information Consultants. This research seeks to explore the impact on small businesses in those industries with significant numbers of low-wage workers, and how changes in minimum wage standards have affected small business. It will also update tabulations of low-wage worker characteristics presented in an earlier study for SBA.

*Office of Advocacy Research Academic Citation Study* by Verner Consulting. This analysis seeks to show how Office of Advocacy research and data are being utilized in academic literature. It will do this by showing how such research is being cited by other authors, and it will be useful in evaluating the Office's overall influence in the field of small business and entrepreneurship research.

*Small Business Retirement Plans by Economic Consulting Services*. This study uses the Census Bureau's ongoing Survey of Income and Program Participation (SIPP) and IRS Form 5500 data to examine and contrast retirement plans between small and large firms.

*Small Business Issues Surrounding U.S. Military Reservists* by SAG Corporation. Anecdotal evidence suggests that extended absences by employees who are members of the National Guard or Reserve components which have been activated and deployed have a disproportionate impact on small businesses. Because they have fewer employees, small businesses face greater difficulties adjusting to extended absences and redistributing work when Reservists return. Using DOD data, the contractor will compare the characteristics of firms employing activated Reservists with the characteristics of firms employing non-activated Reservists and a sample of similar employees with no Reserve experience.

*Small Business Manufacturing, Outsourcing, and Insourcing* by StratEdge. The study examines the role of small U.S. manufacturing firms across a variety of industries to determine the effects of changes in firm, plant, and employment locations. The study further looks at how these changes have impacted small businesses conditioned upon their role in the supply chain.

*Who Needs Credit and Who Gets Credit? Evidence from the SSBF* by Krähenbühl Global Consulting. The report uses data from the Federal Reserve Board's Survey of Small Business Finance (SSBF) to investigate factors that differentiate three types of loan borrowers—non-borrowers, successful borrowers, and those that needed but failed to obtain financing.

*Women Entrepreneurs: Time-Use and Determinants of Self-Employment* by TGC Economic Consulting. This analysis will address two main issues using the American Time Use Survey: (1) time-use patterns among self-employed women and how these patterns differ from other workers and individuals not in the labor market; and (2) the determinants of self-employment among subgroups of women.

*Contracts awarded at the end of FY 2008*

*Analysis of Entrepreneurship Coursework's Influence on Entrepreneurship and Innovation* by Summit Consulting. This research analyzes the extent to which courses of study, pedagogy, and specific entrepreneurial courses influence the selection into entrepreneurship and innovative performance. In particular, it utilizes survey data from the Berkley Center for Entrepreneurial Studies at New York University's Stern School of Business that surveyed graduates of prominent U.S. and foreign universities to measure the influence of their entrepreneurship coursework. (The survey was funded by the Kauffman Foundation.)

*Credit Markets for Small Businesses in the United States* by Krähenbühl Global Consulting. This research seeks to use Federal Reserve SSBF data to examine credit markets for small businesses. This analysis will look specifically at how credit is used by smaller firms, and borrow-

ing patterns will be examined by various owner characteristics.

*Determinants of Growth in Entrepreneurship Concentration across U.S. Labor Market Areas: 1970–2006* by TGC Economic Consulting. The focus of this project will be to explore the factors that drove growth in entrepreneurship concentration across local labor markets during the past 30 years. In particular, it will explore linkages between human capital and regional economic growth.

*Do Depreciation Rules Influence Small Business Activity?* by John Deskins. Accelerated depreciation rules are frequently the subject of discussion among small business policymakers; in fact, the most recent economic stimulus legislation raised the Section 179 expensing limit and included bonus depreciation for capital items purchased in 2008. This study will use the University of Michigan Tax Research Database, a source of public-use tax data spanning the years of 1979 to 1990, to examine the effects of depreciation changes on entrepreneurial activity.

*Impact of International Competition on Survival of Small Wholesalers and Retailers* by Robert Feinberg. The project will examine the vulnerability of small retailers and wholesalers to international competition (e.g., from exchange rate fluctuations and import shares). The time period studied will be 1989–2005. This is a follow-up to the contractor's international manufacturing competition study.

*The Impact of Regulatory Costs on Small Firms* by W. Mark Crain. This research will update previous Advocacy studies on the costs for small businesses of complying with federal regulations. Previous research includes Hopkins (1995), Crain and Hopkins (2001), and Crain (2005) – all of which documented the fact that very small firms have significantly higher compliance costs than their larger counterparts.

*Linking Small Business Education and Training with Employee Retention* by Capitol Research, Inc. The authors of this study plan use data from the National Longitudinal Study of Youth to relate employee training and education to their

retention among small businesses. This study should produce an examination of earnings mobility based on human capital and employee training variables.

*A Look at the Intermingling of Assets for Small Firms* by George Haynes. This study will examine the intermingling of assets between personal and business accounts, measuring this from the Federal Reserve's yet-to-be released 2007 Survey of Consumer Finances (to be released in spring 2009). The study will also continue previous examinations of small business wealth.

*Measuring and Modeling the Federal Income Tax Compliance Burden on Small Business* by Quantria Strategies. This proposal seeks to measure and model the federal income tax compliance burdens of small businesses using microsimulations of public use IRS Statistics of Income (SOI) data.

*Nonemployer Firms Special Tabulations and Write-Up* by Zoltan Acs (with Advocacy economist Brian Headd). Advocacy funded the U.S. Census Bureau to produce special tabulations on nonemployer entry and exit by state and major industry. The contractor and Advocacy staff will evaluate the results of the U.S. Census Bureau's nonemployer special tabulations on business entry and exit. These results will be compared with employer turnover to better understand the dynamics of various small business sectors.

*Survival and Growth Research on Small Businesses* by Berkeley Policy Associates. The authors seek to learn more about self-employment using the National Longitudinal Study of Youth (NSLY). In particular, they will look at self-employment using two separate cohorts – NSLY79, which includes individuals born between 1957 and 1964 and those born between 1980 and 1984. This study seeks to learn more about self-employment dynamics over one's life span.

*Tax and Regulatory Barriers for Veteran Business Owners* by Microeconomic Applications. This study will examine the tax and regulatory climate for small businesses which are owned by veterans and/or service-disabled veterans.

*Where (and Why) in America? Business Start-Ups from 1990 to 2006* by Wyckoff Consulting.

This paper seeks to look at regional economic growth; in particular, it will focus on cluster development and new firm births by county using Census data.

## 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 and OSHA 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. As this paper was being prepared, Advocacy has an IDIQ contract for these purposes with E.H. Pechan & Associates of Durham, North Carolina.

## Study on broadband speed and price on small business

As this report was being finalized, legislation had just been approved that included a provision requiring Advocacy to conduct a study evaluating the impact of broadband speed and price on small business. Section 105 of Public Law 110-385 (approved October 10, 2008) tasks Advocacy, subject to the availability of appropriations, to submit this report within two years of enactment to the Senate Committee on Commerce, Science, and Transportation; the Senate Committee on Small Business and Entrepreneurship; the House Committee on Energy and Commerce; and the House Committee on Small Business. The report is to include: 1) a survey of

broadband speeds available to small businesses; 2) a survey of the cost of broadband speeds available to small businesses; 3) a survey of the type of broadband technology used by small businesses; and 4) any policy recommendations that may improve small business access to comparable broadband services at comparable rates in all regions of the nation.

## Line-item funding for Advocacy research

Over the years, Advocacy economic research generally had a specific line-item in SBA’s congressional budget requests and in the appropriations bills that eventually funded the agency, usually in the report language to accompany such legislation. However, since Fiscal Year 2006, there has been no such explicit line item. Instead, economic research funding has been included in a single amount for all of Advocacy’s operating expenses, which in recent years has appeared in SBA’s budget under the heading “Executive Direction.” While specific amounts for economic research are discussed during SBA’s internal budget process, they no longer appear in either the consolidated congressional submission or in appropriations bills (as of 2008).

Since this change, Advocacy has continued to receive approximately \$1.1 million for economic research expenses annually, roughly the same amount since FY 2000. SBA’s senior management has been very supportive of Advocacy and of its economic research function in particular during these years. However, without any clear guidance in either the budget request or in the appropriations bills that follow, there is room for significant adjustment in the level of funding now being provided with very little transparency to stakeholders and very little notice to Advocacy. Chief Counsel Sullivan has testified at congressional hearings as to the need for Advocacy line-items in the budget, and we will return to this subject later in this chapter.

## 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 will join SBA and Advocacy in 2009. 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, pending “Top Ten” regulations from the r3 initiative, and other anticipated regulatory issues.

### Pending regulations on which Advocacy has commented

From 2001 through October 10, 2008, Advocacy wrote 304 public regulatory comment letters to 58 different federal departments and agencies on an extremely broad variety of subjects. These letters are listed in Appendix G, and live links to additional associated reference materials for each are posted on Advocacy’s website at <http://www.sba.gov/advo/laws/comments/>. For the purposes of this chapter, Advocacy’s Office of Interagency Affairs has identified issues which remain of open interest as this paper was being finalized. These are generally regulatory proposals or other related actions that have not been finalized or withdrawn since Advocacy made its comments or that have been re-opened. These “pending” items are also listed in Appendix K.

All of these issues are ones on which Advocacy has filed public comment letters. There are other pre-proposal regulatory issues on which Advocacy has had confidential interagency discussions or provided technical assistance, but which have not resulted in public comment letters, and these are not reflected here. As we explained in Chapter 3, it is vital for the success of Advocacy’s mission that other federal agen-

cies trust Advocacy to maintain the confidentiality of pre-publication and deliberative consultations. Advocacy is proud that its record in this regard has been exemplary, with the result that it is increasingly being consulted early in the rule development process on RFA compliance and small business effects.

Future readers will find that final dispositions have been made on some of these rules, while other new ones will of course be added to any listing of pending regulatory actions. For ease of reference, entries here are arranged alphabetically by the 29 agencies with items of open interest on which Advocacy has publicly commented. Appendix K lists all entries chronologically.

### Alcohol and Tobacco Tax and Trade Bureau (TTB)

On March 23, 2007, Advocacy submitted a comment letter on a NPRM by the Department of Treasury and the TTB entitled *Tax Classification of Cigars and Cigarettes*. The NPRM designates how a tobacco product is determined to be a cigar or cigarette for federal tax purposes. At a roundtable hosted by Advocacy, small business representatives raised concerns that the NPRM significantly deviated from current market practices. Advocacy recommended that Treasury and TTB consider the comments they receive from small companies regarding the impacts that the proposal will have on current practices.

### Animal and Plant Health Inspection Service (APHIS).

On October 9, 2008, Advocacy submitted a comment letter to APHIS asking that the agency take small aquaculture businesses’ concerns into consideration while promulgating its interim final rule, Restricting Movement and Importation of Fish with Viral Hemorrhagic Septicemia. Advocacy provided APHIS with examples of how certain provisions in the rule would impose significant economic impacts on the affected industries, including the veterinary inspection and certification requirements of the rule.

### Architectural and Transportation Barriers Compliance Board (Access Board)

On November 9, 2006, Advocacy filed a comment letter with the Access Board in response to its draft revised *Americans with Disabilities Act (ADA) Accessibility Guidelines for Passenger Vessels*. In addition to urging that the agency take small business concerns into consideration, Advocacy recommended that the Access Board comply with the RFA in the publication of its notice of proposed rulemaking (NPRM). Advocacy encouraged the Access Board to complete regulatory analyses of the economic impact of its rule on small entities and to consider less burdensome regulatory alternatives.

### Centers for Medicare and Medicaid Services (CMS).

On September 13, 2007, Advocacy filed a comment letter with CMS concerning a proposed Medicare rule that would require suppliers of durable medical equipment (DME) to obtain a \$65,000 surety bond in order to participate in the Medicare program. Advocacy suggested that CMS improve its analysis of the potential economic impact of the rule on DME suppliers, pursuant to RFA requirements. Advocacy also provided CMS with data and alternatives to the rule that it believed would reduce the rule's burden on DME suppliers.

### U.S. Citizenship and Immigration Services (CIS)

On September 15, 2008, Advocacy filed a comment letter with the Department of Homeland Security's U.S. Citizenship and Immigration Services regarding its NPRM entitled, *Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers*. The H-2B program allows employers to obtain temporary non-agricultural workers from foreign countries during seasonal or peak times and is predominantly used by small businesses in the landscaping, hotel, construction and forestry industries. There is a limit of 66,000

foreign workers who can enter the United States using the H-2B program. Due to the high demand for these workers, any delay in processing time by one of the multiple agencies involved in approving and issuing these visas could jeopardize the chances for an employer to have the necessary workers it needs for the season. Advocacy and small business representatives are supportive of provisions in the CIS rule that would make the H-2B visa process more efficient; however, Advocacy recommended that CIS also revise its IRFA to include additional costs arising from provisions intended to curb abuses, and to develop alternatives that minimize these costs and provide flexibilities to small business.

### U.S.Coast Guard (USCG).

On July 23, 2008, Advocacy filed comments with the USCG regarding its proposed *Commercial Fishing Industry Vessels* rule. The proposal would add new requirements for vessel stability and watertight integrity, stability training and assessments, vessel maintenance and self-examinations, immersion suits, crew preparedness, safety training, safety equipment, and additional documentation. Advocacy commended the USCG for seeking comments on the potential economic impact of each requirement on small entities, and recommended that the Coast Guard perform an initial regulatory flexibility analysis (IRFA) as required by the RFA, particularly with respect to the number of small businesses that would be affected, the projected costs of the proposed rule, and less costly alternatives that still meet the objectives for maritime safety.

### Consumer Product Safety Commission (CPSC).

On May 13, 2008, Advocacy filed a comment letter with the CPSC concerning a proposed rule on flammability standards for residential upholstered furniture under the Flammable Fabrics Act. CPSC's proposal included an IRFA. However, because of industry concerns with some

of the data and assumptions contained in the IRFA and in other areas of the rule, Advocacy informed the CPSC of the stakeholders' concerns with the regulation. Advocacy also asked the CPSC to entertain additional alternatives that would reduce the cost of the regulation on those small businesses.

### Department of Homeland Security (DHS)

On April 25, 2008, Advocacy submitted comments to DHS on its supplemental proposed rule on *Safe-Harbor Procedures for Employers Who Receive a No-Match Letter* ("No-Match" rule). Advocacy had previously asked that DHS better consider the rule's impact on small business. DHS issued its supplemental proposal in response to Advocacy's request and to address several legal issues upon which the Federal District Court for the Northern District of California enjoined a prior final "No-Match" rule (which was published on August 15, 2007). In addition, DHS prepared and published an IRFA that assessed the impact of the rule on small business. Advocacy's letter recommends that DHS consider alternatives that will reduce the costs and impacts of the rule on small entities. Advocacy also offered to assist DHS in its preparation of a final regulatory flexibility analysis (FRFA) and Small Entity Compliance Guides that are required as part of the final rule. The "No-Match" rule has also been the subject of prior communications to DHS from Advocacy.

### Department of Housing and Urban Development (HUD)

On June 11, 2008, Advocacy filed comments on HUD's proposed regulations entitled *Real Estate Settlement Procedures Act (RESPA): Proposed Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs*. Advocacy commented that although HUD had put forth a significant effort in its IRFA on this rule, it may have underestimated the economic impact on small businesses. Advocacy made a number of technical recommen-

dations on how to improve the rule and further requested a delayed implementation period for small entities. RESPA implementing regulations have also been the subject of prior Advocacy communications with HUD.

### Department of Justice (DoJ)

On August 6, 2008, Advocacy filed a comment letter with DoJ on its NPRM entitled *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities* that proposed revisions to the Department's 1991 regulations implementing Title III of the Americans with Disabilities Act (ADA). Advocacy urged DoJ to clarify the rule's safe harbor provisions and to publish a Small Business Compliance Guide in conjunction with finalizing the rule. Advocacy also recommended that DoJ include further cost estimates in its IRFA. This rulemaking has also been the subject of prior Advocacy communications.

### Department of Transportation (DoT)

On April 23, 2008, Advocacy filed a comment letter with DoT on its NPRM on *Transportation for Individuals with Disabilities*. DoT certified that this proposed rule would not have a significant economic impact on a substantial number of small businesses, but provided no factual basis for this determination. Advocacy recommended that DoT provide a factual basis for its certification or prepare an IRFA on the impact of this rule on small entities, as required by the RFA.

### Employment Standards Administration (ESA)

On April 7, 2008, Advocacy filed a comment letter with the Department of Labor's ESA in response to its *Notice of Proposed Rulemaking on the Family and Medical Leave Act of 1993 (FMLA)*. Advocacy recommended that DoL reform the definition of a "serious health condition" and the rule's "intermittent leave" provisions to minimize the costs of this rulemaking on small entities. Advocacy also recommended that

DoL perform a review of this rule specifically focused on small business impacts, pursuant to Section 610 of the Regulatory Flexibility Act. This rule has been the subject of prior comment by Advocacy.

### Environmental Protection Agency (EPA)

On March 31, 2008, Advocacy and other members of the SBREFA Small Business Advocacy Review Panel on EPA's planned proposed rulemaking titled *Revisions to the Total Coliform Monitoring and Analytical Requirements and Consideration of Distribution System Issues* transmitted its final report to EPA. This proposal remains pending as this report was being finalized.

On February 10, 2006, Advocacy sent a comment letter to EPA on proposed revisions to its *Spill Prevention, Control and Countermeasure* (SPCC) program. The SPCC program is designed to prevent spills of oil into waterways, and to contain spills after they occur. Facilities subject to the program must develop spill prevention plans designed to prevent and minimize such discharges. In July 2002, EPA amended the SPCC program requirements for hundreds of thousands of small businesses, farms, manufacturers, and electrical facilities. EPA subsequently agreed to postpone the effective date of the amended rule while the agency studied several suggested burden reduction approaches for small and other SPCC facilities. Advocacy supports EPA's burden reduction proposals, and has offered several additional proposals. EPA's December 2005 small facility proposal is based on recommendations that Advocacy made to EPA in comments filed on June 10, 2004. On December 26, 2006, EPA published a final SPCC rule for facilities that manage or use oil. However, this issue remains of open interest to Advocacy, because EPA made a new proposal on October 15, 2007 to further streamline SPCC requirements.

### Federal Acquisition Regulation Council (FAR Council)

On August 7, 2008, Advocacy filed a comment letter with the FAR Council, and its affiliated Civilian Agency Acquisition Council and Defense Acquisition Regulations Council, in response to their notice of proposed rulemaking titled *Employment Eligibility Verification* (E-Verify). Advocacy advised the Councils to better calculate the proposal's impact on small business contractors and to delay implementation of E-Verify for small business contractors until greater accuracy of the system is guaranteed.

### Federal Aviation Administration (FAA)

On March 30, 2007, Advocacy submitted comments on the IRFA for the FAA's *Proposed Production and Airworthiness Approvals, Parts Marking, and Miscellaneous Proposals Rule*. The IRFA assesses the impact of the proposed rule on small businesses and considers less burdensome alternatives that still achieve the agency's objectives. FAA has determined that its proposed "parts" rule would have a significant economic impact on a substantial number of small businesses, including small aviation parts manufacturers. In addition, the rule could also affect numerous repair and maintenance facilities, depending on how it is interpreted. Advocacy is concerned that FAA has understated the cost and impact of the proposed rule on small aviation parts manufacturers. Advocacy has also requested that FAA clarify how the proposed rule would impact small aviation repair and maintenance facilities, particularly with respect to their use of fabricated and commercial parts.

On February 6, 2006, Advocacy submitted comments to the FAA its *Proposed Washington, DC Metropolitan Area Special Flight Rules Area Rule*. FAA's proposed rule would essentially codify flight restrictions for certain aircraft operating in the Washington, DC Metropolitan Area that were adopted in the wake of the terrorist attacks of September 11, 2001. Advocacy expressed its concern that FAA's regulatory flexibility analysis understated the cost and impact of the proposed

rule on small aviation businesses within the affected area (such as small airports, aerial survey firms, flight schools, air charter operations, air tour operators, etc.). Advocacy recommended that FAA revise its economic analysis to include these other small entities.

### Federal Communications Commission (FCC)

On May 19, 2008, The Office of Advocacy filed a letter with the FCC in response to the Commission's request for comment on its proposed rule for *Universal Service Fund Reform*. The proposed rule examines a number of different methodologies aimed at strengthening and sustaining the fund in order to provide quality telecommunications and information services to all areas of the United States. Advocacy's letter recommends that the FCC further investigate the economic impact of the rule on small entities.

On March 7, 2008, Advocacy filed a letter with the FCC in response to the Commission's request for comment on its proposed rule on *The Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act*. The proposed rule calls for comment on whether the FCC should amend the forbearance process in Section 10 of the Communications Act of 1934, as amended. Advocacy recommended changes to the Section 10 procedure that would reduce the economic impact of the FCC's proposed rule on small telecommunications carriers.

On August 8, 2007, Advocacy filed a letter with the FCC in response to the Commission's request to refresh the docket on its *Special Access Notice of Proposed Rulemaking*. In 2005, Advocacy and other interested parties filed letters suggesting ways to improve the FCC's special access regime. In its August 8 letter, Advocacy urged the FCC to consider how recent mergers have affected the special access market, and to take into account new studies and data related to competition and special access.

On May 10, 2007, Advocacy filed a letter with the FCC in response to the increase in copper retirement petitions before the Commission.

Advocacy urged the FCC to open a rulemaking on copper retirement to provide small businesses with a clear channel in which they can voice their concerns on this issue.

On October 25, 2006, Advocacy filed a comment with the FCC in response to an intercarrier compensation reform plan (the Missoula Plan) filed July 24, 2006, by the National Association of Regulatory Utility Commissioners' Task Force on Intercarrier Compensation. Advocacy believes that the Missoula Plan will have a significant economic impact on small telecommunications carriers and urged the FCC to give careful consideration to the impact information and alternatives presented by small entities.

On August 8, 2006, Advocacy filed a letter with the FCC to discuss the regulatory impacts and available alternatives in response to the Commission's proposed rule on *Universal Service Contribution Methodology*. To assist the FCC in its analysis, Advocacy solicited input from small entities and urged the FCC to give careful consideration to the impact of the rule on small entities and alternatives that would minimize that impact.

### Federal Motor Carrier Safety Administration (FMCSA)

On May 19, 2008, Advocacy submitted comments on the FMCSA's *Proposed Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators Rule* (Driver Training Rule). FMCSA's proposed rule would expand federal training requirements for anyone applying for a new or upgraded commercial driver's license to include successfully completing both classroom and behind-the-wheel training from an accredited institution or program. The proposed rule emanates from studies that purport to link increased driver training with reduced accident rates. However, FMCSA readily acknowledged that there are questions concerning these findings. Accordingly, the agency sought comments on whether and to what degree these assumptions are valid. Advocacy hosted a small business roundtable on February 27, 2008

for small business representatives to discuss their concerns with the proposed rule, to which most objected.

### Federal Reserve System and the Department of the Treasury

On December 12, 2007, Advocacy filed comments with the Federal Reserve and the Department of the Treasury concerning proposed regulations on *Unlawful Internet Gambling*. Advocacy commented that the agencies may not have fully considered the economic impact on small businesses as required by the RFA. Although the IRFA submitted by the agencies identified types of small businesses that would be affected by the proposal, it failed to provide information about the nature of the impact, as required by the RFA. The agencies also failed to analyze viable alternatives as required by the RFA. Advocacy encouraged the agencies to prepare and publish for public comment a revised IRFA to determine the full economic impact on small entities and consider significant alternatives to meet its objective while minimizing the impact on small entities before going forward with the final rule.

### Fish and Wildlife Service (FWS)

On October 3, 2006, Advocacy filed a comment letter with the FWS in response to its proposed rule and notice of availability of draft economic analysis titled *Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of Canada Lynx*. Advocacy recommended that FWS issue a supplemental IRFA with a more thorough analysis of the economic impacts of this critical habitat designation on small entities and available regulatory alternatives.

On August 10, 2006, Advocacy filed a comment letter to the FWS in response to its NPRM titled *Endangered and Threatened Wildlife and Plants; Amended Designation of Critical Habitat for the Wintering Population of the Piping Plover*. Advocacy recommended that FWS provide

an IRFA or certification that the proposed rule would not have a significant impact on a substantial number of small entities at the same time as the publication of its NPRM.

On February 1, 2006, Advocacy filed a comment letter with the FWS in response to its notice titled *Endangered and Threatened Wildlife and Plants; Revised Proposed Designation of Critical Habitat for the California Red-Legged Frog (*Rana aurora draytonii*)*. Advocacy recommended that FWS complete an RFA analysis that would consider specific alternatives to minimize small business burdens. Also, Advocacy urged FWS to include in future rulemaking analyses of how their rules would affect the public.

### Food and Drug Administration (FDA)

On February 28, 2008, Advocacy filed a comment letter with FDA concerning a draft guidance document titled *Draft Guidance for Industry: Questions and Answers Regarding the Labeling of Dietary Supplements as required by the Dietary Supplement and Nonprescription Drug Consumer Protection Act*. The guidance would require dietary supplement manufacturers to change the labeling of their products substantially. Industry representatives believed that the use of this guidance would prevent the agency from analyzing how the requirements would economically impact their businesses. Advocacy suggested that FDA consider the industry's concerns and consider analyzing the economic impact of the guidance through notice and comment rulemaking.

### U.S. Forest Service

On July 14, 2008, Advocacy filed comments with the U.S. Forest Service regarding its RFA assessment for its proposed *Locatable Minerals Operations* rule, the subject of a March 2008 NPRM to revise its regulations for locatable minerals operations conducted on National Forest System lands. The proposed revisions would apply to prospecting, exploration, development, mining and processing operations, and reclamation. Pursuant to the RFA, the Forest Service

certified that the proposed revisions would not have a significant economic impact on a substantial number of small entities. However, the Forest Service did not include the required factual basis for its certification. After discussions with Advocacy, the Forest Service subsequently published an RFA assessment with the purpose of providing a factual basis for its previous RFA certification. The RFA assessment concluded that, while the proposed rule would have an impact on a substantial number of small entities, the impact would not be economically significant. In its July comments, Advocacy commended the Forest Service for its RFA assessment and for providing another opportunity for small entities to comment on the proposed rule. However, Advocacy also expressed concerns that the Forest Service has not accurately calculated the cost of the proposed rule on small business.

### Internal Revenue Service (IRS)

On April 24, 2008, Advocacy filed a comment letter on a notice issued by the Department of the Treasury and the IRS, *Government Entities Required to Withhold Three Percent on Payments for Services and Property*. The notice invites public comments regarding guidance to be provided to government entities required to withhold three percent of payments made by them or their paying agents for services and property after December 31, 2010, pursuant to Public Law 109-222. Advocacy made recommendations to reduce the overall burden of the three percent withholding requirement on small businesses.

On March 21, 2008, Advocacy filed a comment letter on an advance notice of proposed rulemaking (ANPRM) issued by the Department of the Treasury and the IRS, *Guidance Regarding Marketing of Refund Anticipation Loans (RALs) and Certain Other Products in Connection With the Preparation of a Tax Return*. Advocacy stands ready to assist Treasury and the IRS to comply with the RFA in the development of proposed rules related to RALs.

### National Highway Traffic Safety Administration (NHTSA)

On March 14, 2008, Advocacy submitted comments to the NHTSA on its *Proposed Tire Registration and Recordkeeping Rule*. NHTSA's proposed rule would allow for the online Internet registration of tires purchased by consumers. Because the proposed rule would reduce costs and recordkeeping requirements for small automobile and tire dealers (and improve registration rates so that consumers receive notification of tire safety recalls), Advocacy strongly supports the proposed rule.

### Occupational Safety and Health Administration (OSHA)

On January 15, 2008, Advocacy and other members of the SBREFA Small Business Advocacy Review Panel on OSHA's draft standard, *Occupational Exposure to Beryllium*, transmitted its final report to OSHA. This proposal remains pending as this report was being finalized.

On November 2, 2006, Advocacy submitted comments on OSHA's ANPRM on *Hazard Communication (Globally Harmonized System of Classification and Labeling of Chemicals (GHS))*. GHS is the product of a long-term international effort to develop a globally harmonized system for the classification of chemicals for their health, physical, and environmental effects, as well as for developing uniform container labels and safety data sheets. OSHA's notice requested public comments on the adoption of GHS, the modification of its current Hazard Communication Standard (HCS), and other information needed to support the rulemaking. Advocacy's comments summarize a number of small business concerns over the adoption of GHS.

October 17, 2006, Advocacy and other members of the SBREFA Small Business Advocacy Review Panel on OSHA's draft proposal on *Cranes and Derricks* transmitted its final report to OSHA. This proposal remains pending as this report was being finalized.

On January 9, 2006, Advocacy submitted comments to OSHA on the agency's *Proposed Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment Rule*. The proposed rule would update the existing OSHA standard for the construction of electric power transmission and distribution installations to make it consistent with the more recently promulgated general industry standard for maintenance and repair of electric power lines and equipment, and would make other changes to both standards, including provisions related to host employers and contractors, training, protective clothing, and more. The proposal was the subject of a SBREFA panel. Although many of the panel's recommendations on ways to improve the rule were incorporated into the proposal, Advocacy's comments note that several of the recommendations were not adopted and that the proposed rule could still be improved.

### Office of Surface Mining Reclamation and Enforcement (OSM)

On November 15, 2007, Advocacy submitted a comment letter to OSM on its proposed rule, *Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States*. Advocacy supported the intent behind OSM's proposal, which is to clarify its regulations regarding the circumstances in which mining activities may be allowed near and in waters of the United States. However, Advocacy does not believe that this rule can be certified under the RFA because it may have a significant economic impact on a substantial number of small entities.

### Securities and Exchange Commission (SEC)

On June 30, 2008, Advocacy submitted a comment letter to the SEC concerning its plan to unify America's current "Generally Accepted Accounting Principles" (GAAP) with the International Financial Reporting Standards (IFRS). Small businesses have contacted Advocacy and expressed concern that they would no longer be permitted to utilize the last-in, first-out (LIFO)

inventory accounting method and that eliminating their ability to use LIFO would result in a tax increase that could ultimately force many small businesses to close.

On June 25, 2008, Advocacy submitted a comment letter to the SEC in support of the agency's approval of a one-year extension for smaller public companies of certain requirements in rules implementing Section 404(b) of the Sarbanes-Oxley Act of 2002. The extension of the auditor attestation requirement will allow the SEC to complete a cost-benefit study of Section 404 for small companies. Section 404 compliance issues have also been the subject of a number of prior Advocacy communications with SEC listed in Appendix L.

On June 27, 2007, Advocacy filed a letter with the SEC recommending that it commence proceedings to disapprove its *Proposed Rule Change Amending FAST and DRS Limited Requirements for Transfer Agents*. The rule was proposed by the Depository Trust Company, a self-regulating organization, in accordance with Section 19(b)(1) of the Securities Exchange Act. Advocacy believes that the rule would have a disproportionate impact on small businesses and their ability to compete, to the extent that these businesses will no longer be able to offer their services as securities transfer agents.

### Small Business Administration (SBA)

On February 20, 2008, Advocacy submitted a comment letter to SBA recommending additional analysis of the agency's proposed rule to establish women-owned small business (WOSB) federal contract procedures, published on December 27, 2007. Advocacy expressed concern that the requirement in SBA's proposal for agencies to make a finding of discrimination prior to the use of a set-aside process for WOSB contracts may actually shift the burden onto the WOSB community to compel agency action on research, analysis, and ultimately, a finding of discrimination. Advocacy recommended that the rule's FRFA should provide cost data on the effort required by WOSBs if they are expected to

play a role in compelling agencies to determine evidence of discrimination.

### Social Security Administration (SSA).

On October 10, 2008, Advocacy submitted a letter to SSA asking that the agency take small hearing health care providers' concerns into consideration while promulgating its proposed rule, Revised Medical Criteria for Evaluating Hearing Loss. The SSA certified that the regulation would not have a significant economic impact on a substantial number of small businesses because it only affected individuals. However, Advocacy was contacted by small hearing health care providers voicing concern about their financial ability to comply with the regulation's requirements, and in its letter Advocacy provided SSA with examples of how certain provisions in the rule would impose significant economic impacts on the affected health care providers.

### Transportation Security Administration (TSA)

On November 2, 2007, Advocacy filed comments with the Department of Homeland Security's TSA on proposed regulations for its *Secure Flight Program*. Advocacy commented that TSA may not have fully considered the economic impact on aircraft operators and travel agents as required by the RFA. Under the Secure Flight Program, aircraft operators would be required to request certain information from passengers and to transmit that information to TSA so that the agency could conduct watch list matching and transmit boarding pass printing instructions back to aircraft operators. TSA calculated initial reprogramming costs for this rule; however, there may be other costs as well, as various trade associations have advised Advocacy. Advocacy encouraged TSA to prepare and publish for public comment a revised IRFA to determine the full economic impact on small entities and to consider significant alternatives to meet its objective while minimizing the impact on small entities before going forward with the final rule.

## Anticipated regulatory issues

Apart from the pending proposals that we have just outlined, there are additional regulatory issues that Advocacy's Office of Interagency Affairs has been monitoring for anticipated action in the near future. Some of these may not have been the subject of a formal notice and comment period yet, but the agencies involved have still made it publicly known that they are considering regulatory action. Rules the subject of current SBREFA Panels, Executive Order 12866 reviews, and court orders are examples of anticipated regulatory action. In other instances, an agency has asked the public for information early in the rule development process. Advocacy commends this kind of early outreach and engagement with the public, and especially with small entities that would be subject to new regulations. All items listed below have been publicly announced in one way or another. Advocacy is also monitoring additional rules in the pre-proposal stage on which confidential interagency consultations have been held.

### Centers for Medicare and Medicaid Services (CMS)

The CMS has published two proposed rules that will change the way health care providers code and bill Medicare and Medicaid for services rendered to beneficiaries. One rule revises medical datasets transitioning from ICD-9 to ICD-10 billing software; the other adopts updated standards for electronic transactions via the use of software version 5010. Advocacy did not question the public policy behind the required computer upgrades, but wanted CMS to provide industry with a more transparent picture of the necessary costs to implement the rule. As this report was being finalized, the CMS proposal remained open for comment.

### Departments of Labor (DoL) and Homeland Security (DHS)

DoL and DHS have proposed revisions to the process by which special visas are issued for

foreign workers in the U.S., specifically H2-A visas for agricultural workers and H2-B visas for non-agricultural workers (e.g., workers in the landscaping, construction, housekeeping, and restaurant industries). In this process, DoL issues labor certifications for visa applicants, and DHS adjudicates the requests for the visas, which are then actually issued by the Department of State. Advocacy is monitoring these proposals because of concerns by some small businesses that they could be costly and disruptive.

### Department of Labor (DoL)

The Department of Labor has proposed a new internal rule for its component agencies, the Occupational Safety and Health Administration and the Mine Safety and Health Administration, to use when they promulgate regulations based on risk assessments. The proposal rule would impose new procedural requirements on the agencies' use of risk assessments, including publication of an ANPRM announcing the opening of a rulemaking process and requesting public input on the subject matter of the risk. The rule is intended to implement best practices announced in OMB's risk assessment bulletin published in 2007.

### Department of Veterans Affairs (VA)

In August 2008, VA published a proposed regulation that would implement provisions of Public Law 109-461, the Veterans Benefits, Health Care, and Information Technology Act of 2006, relating to federal procurement. This legislation provides business opportunities for veterans and service-disabled veterans within the VA. Special procedures are established that will allow VA contracting officers to restrict competition in contracting to firms owned and controlled by service-disabled veterans and that require registration in a VA database to establish eligibility for participation in procurement preference programs at the department. As this report was being finalized, the VA rule remained open for comment.

### Environmental Protection Agency (EPA)

In August 2008 EPA published an ANPRM which lays out possible scenarios under which carbon dioxide and other greenhouse gases would be regulated as "pollutants" under the Clean Air Act (CAA). EPA's regulatory action is in response to the U.S. Supreme Court's 2007 decision in *Massachusetts v. EPA*, wherein the Court found that the CAA authorizes regulation of greenhouse gases because they meet the definition of "pollutant" under the CAA. If EPA ultimately decides to address climate change through CAA regulations, millions of small entities will be impacted. These regulations would significantly affect transportation, energy, construction, commercial and perhaps residential buildings, and institutions such as schools, hospitals, and prisons. Advocacy is monitoring this issue.

EPA has completed a number of court-ordered rulemakings for large and small sources of hazardous air pollutants (HAPs), but additional rulemakings are scheduled over the next two years. Significant rulemakings include upcoming standards for HAPs from small capacity boilers. This rule, which is expected to be finalized in 2009, has the potential to impose large costs on thousands of small entities. Other rulemakings expected in 2009–2010 involve reexamining the current risk of exposure to HAPs in certain industries and determining whether the existing control standards should be tightened or left as they are.

Under the Energy Independence and Security Act of 2007, EPA must write regulations requiring the nation's petroleum refiners to incorporate renewable fuels such as ethanol into gasoline and diesel fuel. EPA's regulation, the *Renewable Fuels Standard* (RFS), will establish specific amounts of renewable fuels that must be added to gasoline and diesel each year. The amount of renewable fuels to be added will increase each year. EPA anticipates that the RFS rule will be finalized in 2009.

EPA is expected to issue rules in 2009 to tighten worker protection standards for agricul-

tural workers who work in areas treated with pesticides, as well as tightening the certification standards for persons who apply pesticides. Advocacy anticipates that the rules will require additional communication of pesticide exposure risks to farm workers, additional training for workers and pesticide applicators, and additional precautions to prevent worker exposure to pesticides.

### Federal Acquisition Regulation Council (FAR Council)

The FAR Council is reviewing a recent new government contracting mechanism, the live electronic reverse auction, and Advocacy has recommended that a uniform government-wide regulation on this technique be adopted. In procurements in which the reverse auction method is used, bidders submit their bids through an online intermediary and are informed of competitors' prices but not their identity. Bidders offer successively lower prices until no lower price is offered. The purchasing agency must then decide whether it will make the award. In some instances, the use of reverse auctions may have the unintended result of circumventing the well-established FAR Part 19, which requires agencies to set aside certain dollar threshold contracts for small businesses. This is a problem because no specific FAR regulation instructs contracting officers on the use of the reverse auction tool. Advocacy is hopeful that a review of reverse auctions should result in a FAR regulation establishing conditions of applicability. This was one of the top ten "r3" recommendations in 2008.

The FAR Council is also reviewing an existing regulation that provides for a 10 percent withholding or retainage of fees due to firms providing fixed-price architectural-engineering services. Retainage restricts the cash flow of small businesses. Revision of this retainage rule was another Advocacy 2008 r3 recommendation.

The FAR Council has created a pilot program requiring contractors to report specific subcontract awards to a public database, in furtherance of the Federal Funding Accountability and Transparency Act, which requires a searchable website

providing public access to information on federal expenditures. The pilot program applies to contracts with values equal to or greater than \$500 million and requires awardees to report subcontract awards exceeding \$1million. Advocacy expects a final regulation on reporting that could modify these threshold reporting levels.

The FAR Council has published a proposed rule that would require government contractors to have codes of business ethics and conduct and to notify an agency's Office of the Inspector General whenever the contractor becomes aware of violations of federal criminal law with regard to government contracts or subcontracts. The contractors—both prime and subcontractors—must also implement a formal awareness and training program and internal control systems. Small businesses would not be required to have a formal training program.

### National Park Service (NPS)

In 2000 the NPS issued a proposed regulation to phase out snowmobile usage in Yellowstone National Park and some other federal parklands. The proposed rule certified that there would be no significant impact on a substantial number of small entities. Advocacy was contacted by a number of small businesses that were located near the affected parks that were concerned that the proposed rule would have a disproportionate economic impact on their businesses. Advocacy continued to follow this rule closely, filing additional comments on the final rule. The NPS took Advocacy suggestions into consideration and it decided to reduce, but not eliminate snowmobiles in the parks. Recently, the United States District Court for the District of Columbia overturned the NPS final rule. Advocacy continues to monitor this regulation.

### Small Business Administration (SBA)

SBA announced in June 2008 that it will review the definitions of small business (also known as size standards) for more than 20 industries, as classified in the North American Industry Classification System (NAICS). This is part of a pro-

cess to update the current set of small business size standards.

## Pending “Top Ten” regulations from Advocacy’s r3 initiative

As we have seen in Chapter 3, 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. 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.

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.<sup>3</sup> 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, are not as effective as they could be.

Partially in response to this GAO report, and recognizing a need for improvements in how agencies comply with Section 610, Advocacy launched its Small Business Regulatory Review and Reform (or “r3”) initiative in 2007. The r3 program has three distinct components: 1) providing tools that will improve federal agencies’ compliance with Section 610 of the RFA, leading to a better understanding of the impact of their current regulations on small entities, 2) developing a process for small business stakeholders to identify current rules that are outdated or ineffective and recommend targeted reforms, and

3) posting the recommended reforms on Advocacy’s website and updating the status of reforms twice a year.

The stakeholder involvement component of the r3 initiative has been led by the nomination of rules needing review or reform for inclusion in a “Top Ten” list that Advocacy intends to revise annually. In its first call for r3 nominations, Advocacy received 82 submissions which met posted criteria. The 2008 Top Ten were chosen on the basis of the following factors: 1) whether the rule could reasonably be tailored to accomplish its intended objectives while reducing the impact on small business or small communities; 2) whether the rule had ever been reviewed for its impact on small entities; 3) whether technology, economic conditions, or other factors had changed since the rule was originally written; 4) whether the rule imposed duplicative requirements; and 5) the overall importance of the rule to small businesses and small communities. Final selections were made by the Chief Counsel after extensive research and evaluation by Advocacy’s legal team.<sup>4</sup>

Following is a synopsis of the 2008 Top Ten regulations for review or reform, listed in alphabetic order by agency.<sup>5</sup> Advocacy will continue to make a special effort to work with the agencies involved in addressing the needs identified in the r3 Top Ten, and will update on its website new developments on these rules semi-annually.<sup>6</sup> Advocacy plans to continue an aggressive follow-through effort to achieve concrete results from the r3 initiative.

### Environmental Protection Agency (EPA)

*EPA should revise outdated or inaccurate testing requirements so that modern dry cleaners can*

3 U.S. Government Accountability Office, Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews, July 2007, GAO-07-791, <http://www.gao.gov/new.items/d07791.pdf>.

4 A number of otherwise worthy suggestions were not considered because they did not meet nomination criteria (for example, a proposed regulatory reform would require congressional action and thus was beyond the ability of an agency to effect).

5 The 2008 r3 Top Ten are also listed in Appendix L for ease of reference.

6 Additional information on Advocacy’s r3 initiative is posted at <http://www.sba.gov/advo/r3/>.

*have a valid method for demonstrating compliance.* The Clean Air Act's required New Source Performance Standard (NSPS) testing method was developed before modern closed-loop dry cleaning technology became widespread. The testing method requires an operator to open the machine to sample emissions. However, most modern machines are closed-loop machines that will automatically shut down if any of the components are disconnected. Dry cleaners cannot conduct the required test in the manner specified by the rule. Similarly, halogenated hydrocarbon detectors typically measure ounces of refrigerant rather than parts per million (ppm), and most are not calibrated to detect them at concentrations down to 25 ppm. Dry cleaners using these detectors therefore cannot meet the 25 ppm sensitivity requirement. EPA should (1) update the outdated NSPS testing methods to reflect current equipment that is in use in the modern dry cleaning industry, and (2) clarify that hydrocarbon detectors for refrigerants are not required to have a sensitivity down to 25 ppm.

*EPA should consider expanding the ways for small communities to qualify to meet alternative drinking water standards, provided that the alternative standards are protective of human health and are approved by state authorities.* The 1996 Amendments to the Safe Drinking Water Act established a process to allow small drinking water systems that cannot meet EPA's national drinking water standards to meet an alternative standard, provided that it is protective of human health and is necessary to avoid financial hardship for the community where the system is located, and that the state regulatory agency agrees with the alternative standard. EPA considers a community's ability to pay when it determines how much a small system must spend to meet the national standards. No small drinking water system has ever qualified to obtain an affordability variance. Small systems are currently required to spend up to \$500 per household to meet the national standards, a severe strain in many localities. These communities may also be forced to spend large sums of money to address trace contami-

nants, such as iron, that have very little potential for serious health impacts. Tens of thousands of small, often rural communities with limited resources to install and operate the treatment equipment are potentially affected. EPA should consider alternative methods for determining affordability, including using different percentages of median household income in the community. If a system's cost exceeds a community's ability to pay, the standard would be deemed "unaffordable," and the system could qualify for a variance if the state approves and the alternative standard remains protective of human health.

*EPA should simplify rules for recycling useful materials that, because of their current classification, must be handled, transported, and disposed of as hazardous wastes.* Current hazardous waste management regulations govern facilities that store, treat, or dispose of hazardous wastes. Currently many useful materials that could otherwise be reused are required to be handled, transported, and disposed of as hazardous wastes. Hundreds of thousands of businesses, primarily in manufacturing, are subject to the hazardous waste standards. Many of these facilities are engaged in recycling hazardous wastes, including solvents recovery. The hazardous waste standards are far more stringent, complex, and costly than those required for materials being recovered for reuse. After this r3 designation was made, EPA considered revisions to standards for materials being recycled, including solvents that are recovered onsite. On October 7, 2008, EPA responded positively to this r3 priority by adopting a definition of solid waste that eliminates certain forms of recycled materials from being considered "hazardous wastes," allowing them to be recycled more easily. This will affect more than 20,000 facilities, at which costs can be reduced while still protecting the environment and encouraging recycling. EPA estimates that its revision will result in annual cost savings of \$95 million.

*EPA should clarify the definition of "oil" in its oil spill program, so that small facilities that store nonpetroleum-based products are not unintention-*

*ally captured by spill program requirements.* The Spill Prevention, Control, and Countermeasure (SPCC) rules govern the prevention and response requirements applicable to facilities that store oil where there is a potential threat of a release of oil to navigable waters. The SPCC rules affect hundreds of thousands of small businesses; a new definition of oil would affect the regulatory status of nonpetroleum oils and chemicals at more than 10,000 small firms. The rule has been in place since 1973, and many facilities are unsure whether a given product is considered “oil” or not, and therefore whether the SPCC rules apply. The current definition relies on the creation of an “oil sheen” or discoloration on surface water—a very broad definition that relies on the judgment of the person making the observation and a variety of other factors. EPA has also moved away from the Coast Guard’s list of materials that are considered oil.

#### Federal Aviation Administration (FAA)

*FAA and other agencies should review the flight restriction rule for the region surrounding Washington, DC, to determine whether the rule could be revised to avoid harming small airports within the region.* Following the events of September 11, 2001, the FAA issued an emergency rule establishing an air defense identification zone (ADIZ) for the region surrounding Washington, DC. The emergency rule imposed a 15-mile flight restricted zone (FRZ) and a 30-mile ADIZ emanating from Reagan National Airport. In August 2005, the FAA proposed to make the emergency rule permanent. The rule, if finalized, would impose flight operation requirements on aircraft operations within that area, including requirements that aircraft operators: (1) file and activate a flight plan before entering (or re-entering) the restricted area; (2) maintain two-way radio communication with air traffic control; and (3) obtain and display a discrete transponder code while operating within the area. The FAA has concluded that while these restrictions are likely to cause considerable burdens to both air traffic control and the aviation sector within

the affected area, they are needed for security reasons. The FRZ and ADIZ have significantly restricted aviation within the Washington, DC region, including limiting flights to and from the three small airports in the FRZ. It is likely that all three of these airports (and any aviation companies operating at the airports) will go out of business if the rules are finalized. The rule also affects some 150 other airports and numerous businesses operating in the ADIZ. A review of the flight restriction rule could identify provisions that are unnecessary, inefficient, or outdated for affected small entities. The r3 nomination submitter suggested a variety of alternatives, including an expandable FRZ that could be extended in a time of heightened security. By conducting a coordinated review of the rule, the FAA, the Department of Homeland Security, the Department of Defense, and the Secret Service would be able to determine whether the rule could be improved, while continuing to provide adequate security. A full analysis of both the security benefits and the economic impacts should be completed prior to finalizing any rule.

#### Federal Acquisition Regulation Council (FAR Council)

*Eliminate Duplicative Financial Requirements for Architect-Engineering Services Firms in Government Contracting.* The current government retainage requirement provides for a 10 percent withholding or retainage of fees on firms providing fixed-price architectural-engineering services. The r3 nomination calls for the removal or reduction of such retainage in architect-engineering services contracts, as has been done for other services. Currently more than 230,000 small architectural and engineering (A&E) firms are in the federal procurement system. A change in this regulation will help increase the cash flow of small A&E firms that contract with the federal government. This change should also encourage more firms to enter the federal procurement market, with concomitant improvements in the quality of services.

## Internal Revenue Service (IRS)

*The IRS should revise their rules to permit a standard deduction for home-based businesses, which constitute 53 percent of all small businesses.* The Internal Revenue Code permits a deduction for a home office if it is the principal place of business of the taxpayer, used exclusively for business, or used to meet with patients, clients, or customers. However, current IRS regulations do not provide a concise definition of the elements in this provision. In the absence of final regulations describing how to qualify for and calculate the deduction, IRS policies and case law have made it more complicated for a home-based business owner to learn how to obtain the exemption. The requirements to qualify for and calculate the deduction are confusing for taxpayers and do not account for changes in technology that affect the way business is conducted. Consequently, many at-home workers do not take advantage of the home office business deduction. The IRS should revise the rules to permit a standard deduction for home-based businesses. Similar to the Form 1040 standard deduction, the home office business deduction should be optional. Taxpayers who wish to claim the home office deduction could choose to continue to follow the current home office deduction rules or they could choose a new standard deduction.

## Mine Safety and Health Administration (MSHA)

*MSHA should update its current rules to be consistent with modern mining industry explosives standards.* MSHA regulations govern the use of explosives in various types of mines, including surface metal and nonmetal mines, underground metal and nonmetal mines, and surface coal mines. The overriding purpose is to promote safety. Key provisions include storage, transportation, use, detonation, maintenance, and other issues. Some of these regulations date to 1971, while others were last updated in 1996. According to the r3 nomination submitter, the rules are outdated and need to be reformed to comport to current industry standards because current

MSHA rules do not address some fundamental aspects of explosive safety, such as electronic detonation. The submitter notes that a small business could receive a citation for operating in conformity with current industry best practices, which are not consistent with MSHA's outdated rules. Also according to the submitter, some 29,000 mines operate in the United States, 95 percent of which are small businesses. Nearly every mine is affected by the rule.

## Occupational Safety and Health Administration (OSHA)

*Update OSHA's Medical / Laboratory Worker Rule.* The current rule should be reviewed to determine whether it can be made more flexible in situations where workers do not have potential exposure to bloodborne pathogens. OSHA's Bloodborne Pathogens Standard is designed to protect workers from exposure to bloodborne pathogens (viruses and other microorganisms) such as hepatitis B virus (HBV), and hepatitis C virus (HCV). These exposures result primarily from needlestick and other sharps-related injuries as well as from other employee exposures to blood. The rule requires any employer with workers exposed to blood or other potentially infectious materials to implement an exposure control plan for the worksite. The plan must describe how an employer will use a combination of engineering and work practice controls; ensure the use of personal protective clothing and equipment; and provide training, medical surveillance, hepatitis B vaccinations, and signs and labels, among other provisions. Although, the rule affects every small business health care office and lab, the rule makes no provision for medical facilities where employees have very limited exposure to blood, such as dental labs. The r3 nomination submitter stated that the risk of employee illness in many circumstances is extremely low and that compliance with the rule costs billions of dollars, needlessly driving up the cost of medical care.

## Office of Federal Procurement Policy (OFPP)

*Update Reverse Auction Techniques for Online Procurement of Commercial Items.* The government's current reverse auction procurement technique should be reviewed to determine whether a government-wide rule is necessary to create a more consistent and predictable online process. In procurements using the reverse auction method, bidders submit their bids through an online intermediary and are informed of competitors' prices but not their identity. Bidders offer successively lower prices until no lower price is offered. The purchasing agency must then decide whether it will make the award. In some instances, the use of reverse auctions may have the unintended result of circumventing the well-established FAR Part 19, which requires agencies to set aside certain dollar threshold contracts for small businesses. The problem exists because no specific FAR regulation instructs contracting officers in how to use the reverse auction tool. The OFPP should review the reverse auction technique and consider structuring a federal government-wide rule that continues to provide the contracting officer with the flexibility embedded in reverse auctions while not conflicting with existing rules on small business competition.

## 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 are considering small entity effects early in the rule-writing process, Advocacy is developing strong working relationships with many agencies, and it is now not uncommon for regulatory develop-

ment 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 did not just happen by accident. A number of factors have contributed to this nascent institutionalization of small business awareness in many regulatory agencies. 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 built on these provisions, and made it clear that 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 its Office of Interagency Affairs provides live and online 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.

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. In the next five years, all government agencies will be experiencing a loss of institutional knowledge and experience of historic dimensions as the bulk of the post-World War II “baby boom” generation moves into retirement age. (This demographic trend is already underway.) Many of the senior-level professionals now responsible for regulatory development will be retiring, and it will be a challenge for Advocacy to ensure that a new generation of professionals understand how important it is for their missions and ours that both the spirit and the letter of the RFA be internalized in their rule development decisions. This, perhaps, is one of the largest pending issues for Advocacy, one that is both a challenge and an opportunity

## Other Advocacy Issues

In addition to the pending research and regulatory issues outlined above, we will conclude this chapter with several other issues which “remain on the plate” as we prepare for the 2008 transition: the challenge of measuring effectiveness and outcomes, Advocacy legislative priorities, size standards for the purposes of the RFA, and legislative actions to increase Advocacy’s independence.

### 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, programs, and initiatives contribute to achieving the agency’s strategic goals. These component activities in turn establish their own indicators to measure whether they are meeting internal goals, which assist the agency to which they belong achieve its overall goals.

Even though Advocacy is an independent office housed within SBA, it participates in SBA’s overall performance plan that is submitted with the agency’s official annual congressional budget submission. SBA uses Advocacy activities and performance measures to contribute to its own strategic goals (in FY 2009, Strategic Goal Three – Improve the economic environment for small business).<sup>7</sup> However, Advocacy is an independent office and maintains its own outcome measures as indicators of whether the office’s long-term objectives and SBA’s primary strategic Goal III are being met. In September 2008, Advocacy had four internal goals/measures to guide budget planning and measure effectiveness:

- to achieve one-time and ongoing regulatory cost savings of \$5.5 billion, as a result of Advocacy interventions in FY 2009;
- through online and classroom training, to ensure that employees of all 66 federal agencies which promulgate regulations that impact small entities have in-house expertise on how to comply with the Regulatory Flexibility Act (RFA) in FY 2009;
- to ensure that there are 10 states that are either introducing or improving small business regulatory flexibility laws or executive orders, or that are demonstrating successful implementation of existing small business regulatory flexibility laws or executive orders in FY 2009; and
- to ensure that there are 15 universities or colleges with business/entrepreneurship programs using Advocacy data and reports as a resource for instruction and/or further research in FY 2009.

In addition, Advocacy has one output measure involving the annual publication of at least 25 research reports on small business issues. As

<sup>7</sup> For additional information, see U.S. Small Business Administration, Fiscal Year 2009 Congressional Submission, pp. 73 ff. [http://www.sba.gov/idc/groups/public/documents/sba\\_homepage/final\\_fy\\_2009\\_performance.pdf](http://www.sba.gov/idc/groups/public/documents/sba_homepage/final_fy_2009_performance.pdf).

we have seen, Advocacy is statutorily required to publish small business research.

Most of Advocacy's indicators are relatively straightforward and not difficult to measure. However, the measurement of regulatory cost savings requires some explanation. We have already covered how cost savings are calculated in Chapter 3, but two points should be repeated 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, occasional "outliers" with unusually large savings, and the willingness of agencies to agree to Advocacy suggestions.
- Advocacy's official cost savings estimates reflect only those savings captured after a regulatory proposal is made public. 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 pre-proposal interagency communications. Advocacy continues to measure its accomplishments through cost savings that can be claimed publicly, but actual 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. How can Advocacy modernize the measurement of its effectiveness to encompass its ongoing regulatory interventions, determine the benefits of earlier intervention in the rulemaking process, and evaluate the success of agency training under

the executive order? 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.

## Legislative priorities

In recent years, Advocacy has published a simple two-page listing of its most important 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.<sup>8</sup> During the 109th Congress (2005–2006), Advocacy identified four legislative priorities. One of these was enacted into law, and the other three remained priorities during the 110th Congress (2007–2008).

The Advocacy priority that became law required that regulatory agencies provide plain language compliance guides to assist small entities in understanding the requirements of new rules that require final regulatory flexibility analyses under the RFA. This provision was included in Public Law 110-28, enacted on May 25, 2007.<sup>9</sup> Advocacy's remaining priorities during the 110th Congress have been considered, but not yet enacted as this report was being finalized.

### I. Review of Existing Rules

Advocacy-sponsored research has shown that regulatory costs to Americans are at least \$1.1 trillion annually.<sup>10</sup> Much of that burden falls on the business community. Because new regula-

<sup>8</sup> See Appendix H.

<sup>9</sup> § 8302, Public Law 110-28; May 25, 2007; 121 Stat. 204.

<sup>10</sup> Advocacy-sponsored research by W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, September 2005, <http://www.sba.gov/advo/research/rs264tot.pdf>.

tions are promulgated each year, the cumulative impact can be staggering. It is necessary to evaluate existing regulations periodically to minimize this impact.

**Advocacy Recommendation:** Modify Section 610 of the Regulatory Flexibility Act which requires federal agencies to review 10-year-old regulations to assess their present-day impact. Section 610 should be broadened so that agencies review all rules periodically and not just those viewed as significant when initially promulgated. This change would encourage agencies to update their rules every ten years to ensure that regulatory protections reflect current conditions.

## II. Proper Consideration of Small Entities in Agency Rulemaking

President Bush prioritized the need for government agencies to consider the impact of their activities on small entities when he signed Executive Order 13272. Section 3 of the order requires agencies to notify Advocacy of draft rules that will have a significant economic impact on a substantial number of small entities. It also requires agencies to give appropriate consideration to Advocacy's comments and address the comments in final rules.

**Advocacy Recommendation:** Codify into law Section 3 of Executive Order 13272 to ensure that the President's attention to the impact of regulation on small entities becomes a permanent part of how government operates. This amendment should also ensure that independent agencies comply with the RFA.

## III. Help States Consider Alternatives to Costly Regulation

The federal government sometimes issues regulations that must be implemented by the states. When this happens, federal agencies are not currently required to do the detailed analyses of impacts and alternatives required under the RFA. Instead, states with RFA-type laws on the books, and with fewer resources than federal agencies,

must do the analyses themselves, resulting in what amounts to an unfunded mandate. Under current law, agencies are only required to analyze direct impacts, even though there may be foreseeable and costly indirect impacts when states enforce federal regulations.

**Advocacy Recommendation:** Amend the RFA to ensure that agencies analyze the impact of their rules on small entities and provide states with regulatory alternatives that will enable states to meet federal requirements while minimizing the impact on small entities.

## H.R. 4458, the Small Business Regulatory Improvement Act.

In December 2007, H.R. 4458, the Small Business Regulatory Improvement Act, was introduced in the House of Representatives by Rep. Brad Ellsworth and nine other members of the Committee on Small Business. The bill was referred to both the Committees on Small Business and on the Judiciary. The legislation addressed all three of Advocacy's current legislative priorities, including the strengthening of Section 610 of the RFA, the codification of key elements of Executive Order 13272, and the modification of the definition of "economic impact" to include any direct or indirect economic effects of a federal rule on small entities.

As this report was being finalized, the House Small Business Committee had ordered the bill favorably reported to the full House by a vote of 26-0, but action had not been taken by the Committee on the Judiciary.

## S. 2902, the Independent Office of Advocacy and Small Business Regulatory Reform Act

In April 2008, Senators Olympia Snowe and Mark Pryor introduced S. 2902, the Independent Office of Advocacy and Small Business Regulatory Reform Act, legislation designed to strengthen the independence of the Office of Advocacy and bolster the federal response to small business regulatory concerns. The bill addressed an Advocacy legislative priority by codifying

provisions of Executive Order 13272, requiring federal agencies to directly address comments by the Office of Advocacy on proposed regulations. The legislation would also provide Advocacy with a separate line-item in the federal budget, a measure that the Chief Counsel has strongly supported and to which we will return later in this chapter.

No action had been taken on this legislation as this report was being finalized.

## Size standards for the purposes of the RFA

Who gets to decide whether a business can be defined as a small business? It seems like a straightforward question, but the answer is not quite so simple. For most program-related purposes (e.g., eligibility for SBA financial assistance, federal contracting programs, etc.), SBA publishes industry-based definitions called “size standards” which are usually based on the number of a firm’s employees or its level of receipts.<sup>11</sup> Generally, for the manufacturing sector, a small business is one with 500 or fewer employees; for the service sector, a small business is generally one with \$6.5 million or less in annual receipts. There are exceptions to these standards based on specific industry classifications—with some higher and some lower than the standard.

For rulemaking purposes, however, things become more complicated. When an agency wants to use a definition of small business other than the published SBA size standard, current procedures to accomplish this differ depending on whether the agency is redefining the size threshold for the purposes of RFA analysis only, or whether the agency intends to redefine small business with the object of treating different-sized businesses differently in some real-world application.

The RFA requires agencies to consult with the Chief Counsel for Advocacy whenever they

want to use a non-SBA size standard in an analysis, and to publish that alternate size standard in the Federal Register for public comment.<sup>12</sup> The Small Business Act and SBA’s regulations require agencies to seek approval from SBA’s Administrator prior to using a non-SBA size standard to define small business.<sup>13</sup> In practice, this means that if an agency wants to analyze different-sized firms to determine whether a proposal would have a disproportionate economic impact on certain small businesses, the agency should first consult with Advocacy to use a non-SBA size standard. Then, however, if an agency wants to take the next step and actually exempt from a regulation businesses with fewer than 20 employees because they are not contributing to the problem addressed by that regulation, that agency must first seek approval from SBA’s Administrator.

Whether Congress intended such a bifurcated small business size standard process is unclear. But agencies view this process as confusing and cumbersome. Advocacy is supportive of placing under its purview all size standard definitions for most rulemaking purposes. Advocacy would not assume responsibility for determining size standards for the purposes of eligibility for SBA program assistance, federal procurement, or other purposes not related to the RFA. There have been unsuccessful legislative efforts to address this problem. In the 109th Congress, H.R. 682 provided that:

...the Administrator [of SBA] may specify detailed definitions or standards by which a business concern may be determined to be a small business concern for purposes of [the Small Business Act] or the Small Business Investment Act of 1958; and...the Chief Counsel for Advocacy may specify such definitions or standards for purposes of any other Act.<sup>14</sup>

In 2006 testimony on H.R. 682, Chief Counsel Sullivan expressed his view that this provi-

11 13 CFR § 121. See [http://www.access.gpo.gov/nara/cfr/waisidx\\_08/13cfr121\\_08.html](http://www.access.gpo.gov/nara/cfr/waisidx_08/13cfr121_08.html).

12 5 U.S.C. § 601(3).

13 15 U.S.C. § 632(a)(2)(C) and 13 CFR § 121.903.

14 § 9(a) of H.R. 682, amending § 3(a)(2)(A) of the Small Business Act (15 U.S.C. § 632(a)(2)(A)).

sion was unneeded and that SBA's Office of Size Standards had the necessary expertise and resources to make appropriate decisions on industry size determinations, but he continued that:

It may be more beneficial to amend the RFA and SBA regulations to require agencies to consult with Advocacy if the agency is interested in changing the size standard for RFA purposes rather than requiring the approval of the Administrator. This would not impact SBA's authority to establish size standards for SBA loan and other programs. This ... may eliminate some of the confusion that currently exists over which office determines size standards for RFA purposes only.<sup>15</sup>

Advocacy believes that agencies should be allowed to provide regulatory relief to regulated small firms or a subset of the affected small firms, subject only to the RFA's requirements of consultation with Advocacy and publication in the Federal Register for notice and comment. If the agency is using a new or modified size standard for RFA purposes only, including both economic impact analyses and regulatory burden reduction, then consultation with Advocacy should be sufficient, and a request to SBA's Office of Size Standards should not be required. Currently, the additional administrative hurdles and uncertainty as to outcomes in seeking approval from two separate offices at SBA can act as a disincentive for agencies that wish to comply with the spirit of the RFA. Such a clarification that Advocacy alone approves size standards for RFA purposes would not affect in any way SBA's statutory authority to establish small business size standards for other purposes.

## Legislative actions to increase Advocacy's independence

In Chapter 6, we discussed the various indicia of Advocacy independence from the rest of SBA, in which the office is housed. These include:

- a separate statutory charter;
- presidential appointment and Senate confirmation of the Chief Counsel;
- mandatory appointment of the Chief Counsel from civilian life only;
- no prior clearance of Advocacy work products by OMB or other federal agencies;
- clear statements of congressional intent on independence in Advocacy legislative history;
- sole discretion in selection of public law employees and their classification for pay purposes;
- independent authority to procure temporary or intermittent services;
- independent authority to consult with experts and other authorities;
- independent authority to appoint advisory boards and committees;
- independent authority to hold hearings and sit and act as the Chief Counsel deems advisable;
- statutory duties and powers conferred directly on the Chief Counsel by the RFA; and
- authority to appear as *amicus curiae* in any U.S. court action to review a rule.

All of these demonstrate the intent of Congress that Advocacy's mission and activities, and the discretion exercised by the Chief Counsel in their implementation, are independent of the SBA and its management and normal chain of command. There are also any number of additional expressions of congressional intent on this independence that have been made during the consideration of Advocacy legislation over the years.

As we noted in Chapter 6, despite its independence, Advocacy remains tied to SBA in many ways. Advocacy relies on SBA for a variety of administrative support services, including office space and equipment, IT and communications support, printing and the purchase of goods and services, technical training, travel, and payroll, benefit, and other personnel administration services (though not classification and

<sup>15</sup> Hearing before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives; July 20, 2006.

selection). Advocacy's own small administrative support staff work with SBA systems and support personnel to keep Advocacy functioning at a high level of productivity. Advocacy relies on the support of SBA in countless ways every day.

One crucial way in which SBA and Advocacy are still very much attached is through the budget process. Although we have seen how Congress envisions an independent mission for Advocacy, the office's budget remains a part of SBA's larger budget. For budgetary purposes, the Office of Advocacy is treated in much the same way as any SBA program office, in fact with less independence than certain other functions which have their own statutory budget accounts.<sup>16</sup> Advocacy participates in every step of the budget process in the same way as most other SBA offices and programs. This entails the preparation of annual budget requests and justifications that "compete" with those of other SBA offices and programs for a share of the agency's annual request to Congress. This process includes the integration of a proposed SBA budget into the President's annual congressional submission for the entire government, as coordinated by OMB. Throughout this multi-year process, difficult decisions are made about resource allocations, and many of these decisions are made by the SBA Administrator and his or her senior staff.

During the years highlighted in this report (2001–2008), Advocacy has been fortunate to have had the strong support of SBA Administrators Barreto, Preston, and Baruah. While they managed SBA's budget, Advocacy actually experienced an increase in the percentage share of total SBA resources devoted to the office, although the number of its authorized staff remains at the same level (50) as that in place before the last transition in 2000–2001.<sup>17</sup> Also, funding for Advocacy's vital economic research function has remained almost constant at approximately \$1.1 million during these years, though since Fiscal

Year 2006 it has not appeared as a line-item in SBA's budget.

Although Advocacy has had accommodating landlords at SBA in recent years, there have been periods in the past during which the office did not enjoy the priority that the small business community and Congress expect. Like most domestic government offices, Advocacy experienced its share of downsizing over the years—in the eight-year period from 1989 to 1996, Advocacy went from 68 to 47 full time employees, while its percentage share of SBA resources went from 1.9 to 1.2 percent during the same period.<sup>18</sup> From 1991 to 1996, actual economic research funding went from \$1.5 million to \$697,000.

The percentage share of SBA resources going to Advocacy, the number of its personnel, and the level of resources going to economic research have all been subject to significant reductions in the past. Advocacy has been especially vulnerable to such shifts during periods between Senate-confirmed Chief Counsels. Chief Counsel Jere Glover testified in 1995 that:

The Office of Advocacy has been characterized as small business' pit bull in Washington's dog-eat-dog bureaucracy. When I was sworn in 11 months ago, I will have to admit that the small business' pit bull was a sad-looking mutt. It had been basically starved, beaten, neutered, and pretty much left for dead. And that was basically because in the previous six years, there had been six different Chief Counsels for Advocacy, all but one of which were acting.<sup>19</sup>

More recently, Chief Counsel Sullivan testified in 2003 that:

Under the current budget process, the Chief Counsel must rely on the budget decisions of the SBA Administrator. To put it more bluntly, each year, the Chief Counsel must go hat-in-hand to SBA's Administrator for a portion of SBA's overall budget appropriation... The current budget process is

<sup>16</sup> Notably, the Office of the Inspector General and disaster operations.

<sup>17</sup> See Appendices P and Q. Advocacy's share of total SBA non-credit, non-disaster expense actuals in Fiscal Year 2007, the last year for which data is available, was 2.0 percent.

<sup>18</sup> *Ibid.*

<sup>19</sup> Hearing before the Committee on Small Business, U.S. House of Representatives; "SBA Office of Advocacy;" April 4, 1995.

a dangerous one because the Office of Advocacy's budget is too easily pillaged when administration priorities change.<sup>20</sup>

But it is not just a question of being vulnerable to changing priorities or temporary interruptions in leadership. There is another underlying problem with the current system, as Chief Counsel Sullivan continued:

When you examine the statutory mandate of my office and the authority we have to defend small business, it becomes obvious why our office is independent. The Office of Advocacy is supposed to be critical of government that treats small business unfairly... The system is flawed when the Office of Advocacy's budget is determined by a part of government we hold accountable for compliance with the RFA... A [budget] line-item would provide assurance to small entities that they can continue to count on the Office of Advocacy as a strong and independent voice on their behalf.<sup>21</sup>

The Congress has considered legislation to address this problem and other Advocacy independence issues on several different occasions during recent years.

### 107th Congress (2001–2002)

During the 107th Congress, both the Senate and the House of Representatives approved bills that included a variety of provisions intended to strengthen Advocacy and its independence. In the Senate, Sen. Christopher Bond, Chairman of the Committee on Small Business, introduced S. 395, the Independent Office of Advocacy Act of 2001, which was approved with amendments by unanimous consent in the Senate on March 26, 2001. This legislation included a statement of findings and purposes; provisions relating to Advocacy functions, personnel, and reports; requirements for administrative support from SBA; authorization of appropriations; and, importantly, the establishment of a separate budget request

20 Hearing before the Committee on Small Business, U.S. House of Representatives; "The Small Business Office of Advocacy Improvements;" April 1, 2003.

21 Ibid.

for Advocacy as part of the uniform annual budget submitted to Congress by the President.<sup>22</sup>

Also during the 107th Congress, Rep. Donald Manzullo, Chairman of the House Committee on Small Business, introduced H.R. 4231, the Small Business Advocacy Improvement Act of 2002, which was approved with amendments by a voice vote in the House on May 21, 2002. This bill was similar to the Senate legislation. It included a statement of findings and purposes; provisions relating to Advocacy functions, personnel, and reports; requirements for administrative support from SBA; authorization of appropriations; and, again, the establishment of a separate line-item for Advocacy in the annual unified budget of the President.<sup>23</sup>

There were, however, a variety of technical differences between the House and Senate bills, and these differences were not resolved before the end of the 107th Congress, when both bills died without further action.

### 108th Congress (2003–2004)

Early in the 108th Congress, new Advocacy legislation was introduced in both the House and the Senate that closely resembled the bills considered in each respective body during the previous Congress.

In the House of Representatives, Reps. Todd Akin and Ed Schrock, both subcommittee chairmen in the Committee on Small Business, introduced a new bill, H.R. 1772, the Small Business Advocacy Improvement Act of 2003, which was similar in most respects to H.R. 4231 in the 107th Congress. The new legislation was approved by a voice vote in the House on June 24, 2003, and it again called for a separate state-

22 For additional information, see Senate Report 107-5 to accompany S. 395 and *Congressional Record*, Vol. 147, pp. S2913 – S2918; March 26, 2001.

23 For additional information, see House Report 107-433 to accompany H.R. 4231 and *Congressional Record*, Vol. 148, pp. H2784 – H2787; May 21, 2002.

ment on Advocacy in the unified annual budget request.<sup>24</sup>

In the Senate, Sen. Olympia Snowe introduced S. 818, the Independent Office of Advocacy Act of 2003. As S. 395 had provided in 2001, the new bill called for a separate line-item statement for Advocacy in the President’s unified budget, but it also went further and provided for a separate account for Advocacy funds, similar to that employed for the Office of the Inspector General. No further action was taken in the Senate on this legislation.<sup>25</sup>

Again, both the House and Senate versions of Advocacy legislation died at the end of the 108th Congress.

### 110th Congress (2007–2008)

During the 110th Congress, Senators Olympia Snowe and Mark Pryor introduced S. 2902, the Independent Office of Advocacy and Small Business Regulatory Reform Act of 2008. This bill was a departure from the prior Advocacy independence legislation outlined above in that it retained from the earlier bills only basic provisions relating to Advocacy authorizations, administrative support from SBA, and most importantly, a separate line-item budget request statement and account for Advocacy. The bill would also clarify in Advocacy’s basic charter, Public Law 94-305, its duty to carry out responsibilities relating to the RFA, and it would codify important elements of Executive Order 13272, a legislative priority for Advocacy, as discussed earlier in this chapter.<sup>26</sup>

Chief Counsel Sullivan expressed Advocacy’s strong support for S. 2902. In a letter to Senators Snowe and Pryor upon the introduction of the bill, he commented that:

The Office of Advocacy’s ability to impact the regulatory process for the benefit of small entities

depends greatly on the office’s independence. Congress, the President, and policy leaders throughout the country value comments, opinions, and research from the Office of Advocacy because they know those views represent an unfiltered perspective. I was sworn in as Chief Counsel in February of 2002, and my ability to advocate for small business honestly and independently has never been compromised. However, as long as the Office of Advocacy remains merged within SBA’s overall budget, the temptation remains for SBA leadership to influence the views of the Office of Advocacy by controlling its budget.<sup>27</sup>

The key feature that is present in each of the five “Advocacy independence” bills we have just described is a separate line-item statement for Advocacy in the President’s unified budget request. Both the House and Senate have approved this in the past (twice in the House), and Advocacy leadership has strongly endorsed it. Advocacy believes that this provision is the most important of all those considered in past Advocacy independence bills and is hopeful that it will eventually be enacted.

24 For additional information, see House Report 108-162 to accompany H.R. 1772 and the *Congressional Record*, Vol. 149, pp. H5720 – H5724; June 24, 2003.

25 For additional information, see S. 818 and *Congressional Record*, Vol. 149, pp. S4964 – S4965; April 8, 2003.

26 For additional information, see S. 2902 and *Congressional Record*, Vol. 154, pp. S3307 – S3308; April 23, 2008.

27 Letter from Chief Counsel Sullivan to Senators Olympia Snowe and Mark Pryor; April 24, 2008. For full text of letter, see [http://www.sba.gov/advo/laws/comments/snowe08\\_0424.html](http://www.sba.gov/advo/laws/comments/snowe08_0424.html).

# Appendices

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## Appendix A

### Title II, Public Law 94-305, as amended (15 §§ U.S.C. 634a - 634g)

#### Statutory Authority for the Office of Advocacy

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### TITLE 15--COMMERCE AND TRADE

#### CHAPTER 14A--AID TO SMALL BUSINESS

\* \* \* \* \*

- Sec. 634a.** Office of Advocacy within Small Business Administration; Chief Counsel for Advocacy
- Sec. 634b.** Primary functions of Office of Advocacy
- Sec. 634c.** Additional duties of Office of Advocacy
- Sec. 634d.** Staff and powers of Office of Advocacy
- Sec. 634e.** Assistance of Government agencies
- Sec. 634f.** Reports
- Sec. 634g.** Authorization of appropriations

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#### **Section 634a. Office of Advocacy within Small Business Administration; Chief Counsel for Advocacy**

There is established within the Small Business Administration an Office of Advocacy. The management of the Office shall be vested in a Chief Counsel for Advocacy who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate.

SOURCE: Public Law 94-305, title II, Sec. 201, June 4, 1976, 90 Stat. 668.

#### **Section 634b. Primary functions of Office of Advocacy**

The primary functions of the Office of Advocacy shall be to -

- (1) examine the role of small business in the American economy and the contribution which small business can make in improving competition, encouraging economic and social mobility for all citizens, restraining inflation, spurring production, expanding employment opportunities, increasing productivity, promoting exports, stimulating innovation and entrepreneurship, and providing an avenue through which new and untested products and services can be brought to the marketplace;

- (2) assess the effectiveness of existing Federal subsidy and assistance programs for small business and the desirability of reducing the emphasis on such existing programs and increasing the emphasis on general assistance programs designed to benefit all small businesses;
- (3) measure the direct costs and other effects of government regulation on small businesses; and make legislative and nonlegislative proposals for eliminating excessive or unnecessary regulations of small businesses;
- (4) determine the impact of the tax structure on small businesses and make legislative and other proposals for altering the tax structure to enable all small businesses to realize their potential for contributing to the improvement of the Nation's economic well-being;
- (5) study the ability of financial markets and institutions to meet small business credit needs and determine the impact of government demands for credit on small businesses;
- (6) determine financial resource availability and to recommend methods for delivery of financial assistance to minority enterprises, including methods for securing equity capital, for generating markets for goods and services, for providing effective business education, more effective management and technical assistance, and training, and for assistance in complying with Federal, State, and local law;
- (7) evaluate the efforts of Federal agencies, business and industry to assist minority enterprises;
- (8) make such other recommendations as may be appropriate to assist the development and strengthening of minority and other small business enterprises;
- (9) recommend specific measures for creating an environment in which all businesses will have the opportunity to complete [\*] effectively and expand to their full potential, and to ascertain the common reasons, if any, for small business successes and failures;  
[\* So in original. Probably should be "compete".]
- (10) determine the desirability of developing a set of rational, objective criteria to be used to define small business, and to develop such criteria, if appropriate;
- (11) advise, cooperate with, and consult with, the Chairman of the Administrative Conference of the United States with respect to section 504(e) of title 5; and
- (12) 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, as defined in section 632(q) of this title, and small business concerns owned and controlled by serviced-disabled [\*] veterans, as defined in such section 632(q) of this title, and to provide statistical information on the utilization of such programs by such small business concerns, and to make appropriate 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.

[\* So in the original. Probably should be "service-disabled"]

SOURCE: Public Law 94-305, title II, Sec. 202, June 4, 1976, 90 Stat. 668; Public Law 96-481, title II, Sec. 203(b), Oct. 21, 1980, 94 Stat. 2327; Public Law 106-50, title VII, Sec. 702, Aug. 17, 1999, 113 Stat. 250.

### **Section 634c. Additional duties of Office of Advocacy**

The Office of Advocacy shall also perform the following duties on a continuing basis:

- (1) serve as a focal point for the receipt of complaints, criticisms, and suggestions concerning the policies and activities of the Administration and any other Federal agency which affects small businesses;
- (2) counsel small businesses on how to resolve questions and problems concerning the relationship of the small business to the Federal Government;
- (3) develop proposals for changes in the policies and activities of any agency of the Federal Government which will better fulfill the purposes of this chapter and communicate such proposals to the appropriate Federal agencies;
- (4) represent the views and interests of small businesses before other Federal agencies whose policies and activities may affect small business; and
- (5) 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 which are of benefit to small businesses, and information on how small businesses can participate in or make use of such programs and services.

SOURCE: Public Law 94-305, title II, Sec. 203, June 4, 1976, 90 Stat. 669.

### **Section 634d. Staff and powers of Office of Advocacy**

In carrying out the provisions of sections 634a to 634g of this title, the Chief Counsel for Advocacy may—

- (1) employ and fix the compensation of such additional staff personnel as is deemed necessary, without regard to the provisions of title 5, governing appointments in the competitive service, and without regard to chapter 51, and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates but at rates not in excess of the lowest rate for GS-15 of the General Schedule: Provided, however, That not more than 14 staff personnel at any one time may be employed and compensated at a rate not in excess of GS-15, step 10, of the General Schedule;
- (2) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5;
- (3) consult with experts and authorities in the fields of small business investment, venture capital, investment and commercial banking and other comparable financial institutions involved in the financing of business, and with individuals with regulatory, legal, economic, or financial expertise, including members of the academic community, and individuals who generally represent the public interest;
- (4) utilize the services of the National Advisory Council established pursuant to the provisions of section 637(b)(13) of this title and in accordance with the provisions of such statute, also appoint such other advisory boards or committees as is reasonably appropriate and necessary to carry out the provisions of sections 634a to 634g of this title; and hold hearings and sit and act at such times and places as he may deem advisable.

SOURCE: Public Law 94-305, title II, Sec. 204, June 4, 1976, 90 Stat. 669; Public Law 96-302, title IV, Sec. 402, July 2, 1980, 94 Stat. 850; Public Law 103-403, title VI, Secs. 605(b), 610, Oct. 22, 1994, 108 Stat. 4203, 4204.

#### **Section 634e. Assistance of Government agencies**

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 under sections 634a to 634g of this title.

SOURCE: Public Law 94-305, title II, Sec. 205, June 4, 1976, 90 Stat. 670.

#### **Section 634f. Reports**

The Chief Counsel may from time to time prepare and publish such reports as he deems appropriate. Not later than one year after June 4, 1976, he shall transmit to the Congress, the President and the Administration, a full report containing his findings and specific recommendations with respect to each of the functions referred to in section 634b of this title, including specific legislative proposals and recommendations for administration or other action. Not later than 6 months after June 4, 1976, he shall prepare and transmit a preliminary report on his activities. The 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.

SOURCE: Public Law 94-305, title II, Sec. 206, June 4, 1976, 90 Stat. 670.

#### **Section 634g. Authorization of appropriations**

There are authorized to be appropriated not to exceed \$1,000,000 to carry out the provisions of sections 634a to 634g of this title. Any sums so appropriated shall remain available until expended.

SOURCE: Public Law 94-305, title II, Sec. 207, June 4, 1976, 90 Stat. 671.

## **Appendix B**

### **The Regulatory Flexibility Act, Public Law 96-354, as amended (5 §§ U.S.C. 601 - 612)**

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#### **TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES**

#### **CHAPTER 6—THE ANALYSIS OF REGULATORY FUNCTIONS**

\* \* \* \* \*

#### **Congressional Findings and Declaration of Purpose** (§ 2 of Public Law 96-354, 5 U.S.C. § 601 note)

(a) The Congress finds and declares that –

- (1) when adopting regulations to protect the health, safety and economic welfare of the Nation, Federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public;
- (2) laws and regulations designed for application to large scale entities have been applied uniformly to small businesses, small organizations, and small governmental jurisdictions even though the problems that gave rise to government action may not have been caused by those smaller entities;
- (3) uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources;
- (4) the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;
- (5) unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;
- (6) the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation;

- (7) alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes may be available which minimize the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions;
- (8) the process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions to examine the impact of proposed and existing rules on such entities, and to review the continued need for existing rules.

(b) It is the purpose of this Act [enacting this chapter and provisions set out as notes under this section] to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

SOURCE: Public Law 96-354, Sec. 2, Sept. 19, 1980, 94 Stat. 1164.

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

## **Section 601. Definitions.**

For purposes of this chapter—

- (1) the term "agency" means an agency as defined in section 551(1) of this title;
- (2) the term "rule" means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law, including any rule of general applicability governing Federal grants to State and local governments for which the agency provides an opportunity for notice and public comment, except that the term "rule" does not include a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances;
- (3) the term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

- (4) the term "small organization" means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;
- (5) the term "small governmental jurisdiction" means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register;
- (6) the term "small entity" shall have the same meaning as the terms "small business", "small organization" and "small governmental jurisdiction" defined in paragraphs (3), (4) and (5) of this section; and
- (7) the term "collection of information"—
  - (A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either-
    - (i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, 10 or more persons, other than agencies, instrumentalities, or employees of the United States; or
    - (ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes; and
  - (B) shall not include a collection of information described under section 3518(c)(1) of title 44, United States Code.
- (8) Recordkeeping requirement.--The term "recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified records.

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1165; amended by Public Law 104-121, title II, Sec. 241(a)(2), Mar. 29, 1996, 110 Stat. 864.

## **Section 602. Regulatory agenda**

- (a) During the months of October and April of each year, each agency shall publish in the Federal Register a regulatory flexibility agenda which shall contain—
  - (1) a brief description of the subject area of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities;
  - (2) a summary of the nature of any such rule under consideration for each subject area listed in the agenda pursuant to paragraph (1), the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking, and
  - (3) the name and telephone number of an agency official knowledgeable concerning the items listed in paragraph (1).

- (b) Each regulatory flexibility agenda shall be transmitted to the Chief Counsel for Advocacy of the Small Business Administration for comment, if any.
- (c) Each agency shall endeavor to provide notice of each regulatory flexibility agenda to small entities or their representatives through direct notification or publication of the agenda in publications likely to be obtained by such small entities and shall invite comments upon each subject area on the agenda.
- (d) Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda.

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1166.

### **Section 603. Initial regulatory flexibility analysis**

- (a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration. In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules published in the Federal Register for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement.
- (b) Each initial regulatory flexibility analysis required under this section shall contain—
  - (1) a description of the reasons why action by the agency is being considered;
  - (2) a succinct statement of the objectives of, and legal basis for, the proposed rule;
  - (3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
  - (4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
  - (5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.
- (c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as—

- (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
- (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
- (3) the use of performance rather than design standards; and
- (4) an exemption from coverage of the rule, or any part thereof, for such small entities.

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1166; amended by Public Law 104-121, title II, Sec. 241(a)(1), Mar. 29, 1996, 110 Stat. 864.

#### **Section 604. Final regulatory flexibility analysis**

- (a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a), the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain
  - (1) a succinct statement of the need for, and objectives of, the rule;
  - (2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, 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) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
  - (4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
  - (5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.
- (b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register such analysis or a summary thereof.

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1167; amended by Public Law 104-121, title II, Sec. 241(b), Mar. 29, 1996, 110 Stat. 864.

#### **Section 605. Avoidance of duplicative or unnecessary analyses**

- (a) Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.

- (b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.
- (c) In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of sections 602, 603, 604 and 610 of this title.

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1167; amended by Public Law 104-121, title II, Sec. 243(a), Mar. 29, 1996, 110 Stat. 866.

#### **Section 606. Effect on other law**

The requirements of sections 603 and 604 of this title do not alter in any manner standards otherwise applicable by law to agency action.

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1168.

#### **Section 607. Preparation of analyses**

In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1168.

#### **Section 608. Procedure for waiver or delay of completion**

- (a) An agency head may waive or delay the completion of some or all of the requirements of section 603 of this title by publishing in the Federal Register, not later than the date of publication of the final rule, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes compliance or timely compliance with the provisions of section 603 of this title impracticable.
- (b) Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the completion of the requirements of section 604 of this title for a period of not more than one hundred and eighty days after the date of publication in the Federal Register of a final rule by publishing in the Federal Register, not later than such date of publication, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes timely compliance with the provisions of section 604 of this title impracticable. If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days from the date of publication of the final rule, such rule shall lapse and have no effect. Such rule shall not be repromulgated until a final regulatory flexibility analysis has been completed by the agency.

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1168.

### **Section 609. Procedures for gathering comments**

- (a) When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques such as—
  - (1) the inclusion in an advanced notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;
  - (2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;
  - (3) the direct notification of interested small entities;
  - (4) the conduct of open conferences or public hearings concerning the rule for small entities including soliciting and receiving comments over computer networks; and
  - (5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.
- (b) Prior to publication of an initial regulatory flexibility analysis which a covered agency is required to conduct by this chapter—
  - (1) a covered agency shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with information on the potential impacts of the proposed rule on small entities and the type of small entities that might be affected;
  - (2) not later than 15 days after the date of receipt of the materials described in paragraph (1), the Chief Counsel shall identify individuals representative of affected small entities for the purpose of obtaining advice and recommendations from those individuals about the potential impacts of the proposed rule;
  - (3) the agency shall convene a review panel for such rule consisting wholly of full time Federal employees of the office within the agency responsible for carrying out the proposed rule, the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel;
  - (4) the panel shall review any material the agency has prepared in connection with this chapter, including any draft proposed rule, collect advice and recommendations of each individual small entity representative identified by the agency after consultation with the Chief Counsel, on issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c);
  - (5) not later than 60 days after the date a covered agency convenes a review panel pursuant to paragraph (3), the review panel shall report on the comments of the small entity representatives and its findings as to issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c), provided that such report shall be made public as part of the rulemaking record; and

- (6) where appropriate, the agency shall modify the proposed rule, the initial regulatory flexibility analysis or the decision on whether an initial regulatory flexibility analysis is required.
- (c) An agency may in its discretion apply subsection (b) to rules that the agency intends to certify under subsection 605(b), but the agency believes may have a greater than de minimis impact on a substantial number of small entities.
- (d) For purposes of this section, the term "covered agency" means the Environmental Protection Agency and the Occupational Safety and Health Administration of the Department of Labor.
- (e) The Chief Counsel for Advocacy, in consultation with the individuals identified in subsection (b)(2), and with the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, may waive the requirements of subsections (b)(3), (b)(4), and (b)(5) by including in the rulemaking record a written finding, with reasons therefor, that those requirements would not advance the effective participation of small entities in the rulemaking process. For purposes of this subsection, the factors to be considered in making such a finding are as follows:
  - (1) In developing a proposed rule, the extent to which the covered agency consulted with individuals representative of affected small entities with respect to the potential impacts of the rule and took such concerns into consideration.
  - (2) Special circumstances requiring prompt issuance of the rule.
  - (3) Whether the requirements of subsection (b) would provide the individuals identified in subsection (b)(2) with a competitive advantage relative to other small entities.

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1168; amended by Public Law 104-121, title II, Sec. 244(a), Mar. 29, 1996, 110 Stat. 867.

#### **Section 610. Periodic review of rules**

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

- (3) the complexity of the rule;
  - (4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and
  - (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.
- (c) Each year, each agency shall publish in the Federal Register a list of the rules which have a significant economic impact on a substantial number of small entities, which are to be reviewed pursuant to this section during the succeeding twelve months. The list shall include a brief description of each rule and the need for and legal basis of such rule and shall invite public comment upon the rule.

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1169.

### **Section 611. Judicial review**

- (a) (1) For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.
- (2) Each court having jurisdiction to review such rule for compliance with section 553, or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.
- (3) (A) A small entity may seek such review during the period beginning on the date of final agency action and ending one year later, except that where a provision of law requires that an action challenging a final agency action be commenced before the expiration of one year, such lesser period shall apply to an action for judicial review under this section.
- (B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section 608(b) of this chapter, an action for judicial review under this section shall be filed not later than—
  - (i) one year after the date the analysis is made available to the public, or
  - (ii) where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 1-year period, the number of days specified in such provision of law that is after the date the analysis is made available to the public.
- (4) In granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with this chapter and chapter 7, including, but not limited to—
  - (A) remanding the rule to the agency, and

- (B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.
- (5) Nothing in this subsection shall be construed to limit the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law or to grant any other relief in addition to the requirements of this section.
- (b) In an action for the judicial review of a rule, the regulatory flexibility analysis for such rule, including an analysis prepared or corrected pursuant to paragraph (a)(4), shall constitute part of the entire record of agency action in connection with such review.
- (c) Compliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section.
- (d) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise permitted by law.

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1169; amended by Public Law 104-121, title II, Sec. 242, Mar. 29, 1996, 110 Stat. 865.

#### **Section 612. Reports and intervention rights**

- (a) The Chief Counsel for Advocacy of the Small Business Administration shall monitor agency compliance with this chapter and shall report at least annually thereon to the President and to the Committees on the Judiciary and Small Business of the Senate and House of Representatives.
- (b) The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as amicus curiae in any action brought in a court of the United States to review a rule. In any such action, the Chief Counsel is authorized to present his or her views with respect to compliance with this chapter, the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities.
- (c) A court of the United States shall grant the application of the Chief Counsel for Advocacy of the Small Business Administration to appear in any such action for the purposes described in subsection (b).

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1170; amended by Public Law 104-121, title II, Sec. 243(b), Mar. 29, 1996, 110 Stat. 866.

# Appendix C

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

53461

Federal Register  
Vol. 67, No. 159  
Friday, August 16, 2002

### Presidential Documents

Title 3—

Executive Order 13272 of August 13, 2002

The President

Proper Consideration of Small Entities in Agency Rulemaking

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

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

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

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

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

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

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

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

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

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

final rule; provided, however, that such inclusion is not required if the head of the agency certifies that the public interest is not served thereby. Agencies and Advocacy may, to the extent permitted by law, engage in an exchange of data and research, as appropriate, to foster the purposes of the Act.

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

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

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

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

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



THE WHITE HOUSE,  
August 13, 2002.

# Appendix D

**Executive Order 12866 of September 30, 1993, as amended by E.O. 13258 of February 26, 2002  
and E.O. 13422 of January 18, 2007**

## **REGULATORY PLANNING AND REVIEW**

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

With this Executive order, the Federal Government begins a program to reform and make more efficient the regulatory process. The objectives of this Executive order are to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public. In pursuing these objectives, the regulatory process shall be conducted so as to meet applicable statutory requirements and with due regard to the discretion that has been entrusted to the Federal agencies.

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

**Section 1. *Statement of Regulatory Philosophy and Principles.*** (a) *The Regulatory Philosophy.* Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

(b) *The Principles of Regulation.* To ensure that the agencies' regulatory programs are consistent with the philosophy set forth above, agencies should adhere to the following principles, to the extent permitted by law and where applicable:

(1) Each agency shall identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action, as well as assess the significance of that problem, to enable assessment of whether any new regulation is warranted.

(2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

(3) Each agency shall 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.

(4) In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.

(5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.

(6) Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

(7) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation or guidance document.

(8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

(9) Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.

(10) Each agency shall avoid regulations and guidance documents that are inconsistent, incompatible, or duplicative with its other regulations and guidance documents or those of other Federal agencies.

(11) Each agency shall tailor its regulations and guidance documents 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.

(12) Each agency shall draft its regulations and guidance documents to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

**Sec. 2. Organization.** An efficient regulatory planning and review process is vital to ensure that the Federal Government's regulatory system best serves the American people.

(a) *The Agencies.* Because Federal agencies are the repositories of significant substantive expertise and experience, they are responsible for developing regulations and guidance documents and assuring that the regulations and guidance documents are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order.

(b) *The Office of Management and Budget.* Coordinated review of agency rulemaking is necessary to ensure that regulations and guidance documents are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency. The Office of Management and Budget (OMB) shall carry out that review function. Within OMB, the Office of Information and Regulatory Affairs (OIRA) is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Executive order, and the President's regulatory policies. To the extent permitted by law, OMB shall provide guidance to agencies and assist the President and regulatory policy advisors to the President in regulatory planning and shall be the entity that reviews individual regulations and guidance documents, as provided by this Executive order.

(c) *Assistance.* In fulfilling his responsibilities under this Executive order, the President shall be assisted by the regulatory policy advisors within the Executive Office of the President and by such agency officials and personnel as the President may, from time to time, consult.

**Sec. 3. Definitions.** For purposes of this Executive order: (a) "Advisors" refers to such regulatory policy advisors to the President as the President may from time to time consult, including, among others: (1) the Director of OMB; (2) the Chair (or another member) of the Council of Economic Advisers; (3) the Assistant to the President for Economic Policy; (4) the Assistant to the President for Domestic Policy; (5) the Assistant to the President for National Security Affairs; (6) the Director of the Office of Science and Technology Policy; (7) the Deputy Assistant to the President and Director for Intergovernmental Affairs; (8) the Assistant to the President and Staff Secretary; (9) the Assistant to the President and Chief of Staff to the Vice President; (10) the Assistant to the President and Counsel to the President; (11) the Chairman of the Council on Environmental Quality and Director of the Office on Environmental Quality; (12) the Assistant to the President for Homeland Security; and (13) the Administrator of OIRA, who also shall coordinate

communications relating to this Executive order among the agencies, OMB, the other Advisors, and the Office of the Vice President.

(b) “Agency,” unless otherwise indicated, means any authority of the United States that is an “agency” under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).

(c) “Director” means the Director of OMB.

(d) “Regulation” means an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency. It does not, however, include:

(1) Regulations issued in accordance with the formal rulemaking provisions of 5 U.S.C. 556, 557;

(2) Regulations that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services;

(3) Regulations that are limited to agency organization, management, or personnel matters; or

(4) Any other category of regulations exempted by the Administrator of OIRA.

(e) “Regulatory action” means any substantive action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.

(f) “Significant regulatory action” means any regulatory action that is likely to result in a regulation that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.

(g) “Guidance document” means an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue

(h) “Significant guidance document” –

(1) means a guidance document disseminated to regulated entities or the general public that, for purposes of this order, may reasonably be anticipated to:

(A) lead to an annual effect of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(B) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(C) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or

(D) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order; and

(2) does not include:

(A) Guidance documents on regulations issued in accordance with the formal rulemaking provisions of 5 U.S.C. 556, 557;

(B) Guidance documents that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services;

(C) Guidance documents on regulations that are limited to agency organization, management, or personnel matters;  
or

(D) Any other category of guidance documents exempted by the Administrator of OIRA.

**Sec. 4. *Planning Mechanism.*** In order to have an effective regulatory program, to provide for coordination of regulations, to maximize consultation and the resolution of potential conflicts at an early stage, to involve the public and its State, local, and tribal officials in regulatory planning, and to ensure that new or revised regulations promote the President's priorities and the principles set forth in this Executive order, these procedures shall be followed, to the extent permitted by law:

(a) *Agencies' Policy Meeting.* The Director may convene a meeting of agency heads and other government personnel as appropriate to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year.

(b) *Unified Regulatory Agenda.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). Each agency shall prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA. The description of each regulatory action shall contain, at a minimum, a regulation identifier number, a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable agency official. Agencies may incorporate the information required under 5 U.S.C. 602 and 41 U.S.C. 402 into these agendas.

(c) *The Regulatory Plan.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). (1) As part of the Unified Regulatory Agenda, beginning in 1994, each agency shall prepare a Regulatory Plan (Plan) of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter. Unless specifically authorized by the head of the agency, no rulemaking shall commence nor be included on the Plan without the approval of the agency's Regulatory Policy Officer, and the Plan shall contain at a minimum:

(A) A statement of the agency's regulatory objectives and priorities and how they relate to the President's priorities;

(B) A summary of each planned significant regulatory action including, to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and benefits of each rule as well as the agency's best estimate of the combined aggregate costs and benefits of all its regulations planned for that calendar year to assist with the identification of priorities;

(C) A summary of the legal basis for each such action, including whether any aspect of the action is required by statute or court order, and specific citation to such statute, order, or other legal authority;

(D) A statement of the need for each such action and, if applicable, how the action will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency;

(E) The agency's schedule for action, including a statement of any applicable statutory or judicial deadlines; and

(F) The name, address, and telephone number of a person the public may contact for additional information about the planned regulatory action.

(2) Each agency shall forward its Plan to OIRA by June 1st of each year.

(3) Within 10 calendar days after OIRA has received an agency's Plan, OIRA shall circulate it to other affected agencies and the Advisors.

(4) An agency head who believes that a planned regulatory action of another agency may conflict with its own policy or action taken or planned shall promptly notify, in writing, the Administrator of OIRA, who shall forward that communication to the issuing agency and the Advisors.

(5) If the Administrator of OIRA believes that a planned regulatory action of an agency may be inconsistent with the President's priorities or the principles set forth in this Executive order or may be in conflict with any policy or action taken or planned by another agency, the Administrator of OIRA shall promptly notify, in writing, the affected agencies and the Advisors.

(6) The Director may consult with the heads of agencies with respect to their Plans and, in appropriate instances, request further consideration or inter-agency coordination.

(7) The Plans developed by the issuing agency shall be published annually in the October publication of the Unified Regulatory Agenda. This publication shall be made available to the Congress; State, local, and tribal governments; and the public. Any views on any aspect of any agency Plan, including whether any planned regulatory action might conflict with any other planned or existing regulation, impose any unintended consequences on the public, or confer any unclaimed benefits on the public, should be directed to the issuing agency, with a copy to OIRA.

(d) *Regulatory Working Group.* Within 30 days of the date of this Executive order, the Administrator of OIRA shall convene a Regulatory Working Group ("Working Group"), which shall consist of representatives of the heads of each agency that the Administrator determines to have significant domestic regulatory responsibility and the Advisors. The Administrator of OIRA shall chair the Working Group and shall periodically advise the Director on the activities of the Working Group. The Working Group shall serve as a forum to assist agencies in identifying and analyzing important regulatory issues (including, among others (1) the development of innovative regulatory techniques, (2) the methods, efficacy, and utility of comparative risk assessment in regulatory decision-making, and (3) the development of short forms and other streamlined regulatory approaches for small businesses and other entities). The Working Group shall meet at least quarterly and may meet as a whole or in subgroups of agencies with an interest in particular issues or subject areas. To inform its discussions, the Working Group may commission analytical studies and reports by OIRA, the Administrative Conference of the United States, or any other agency.

(e) *Conferences.* The Administrator of OIRA shall meet quarterly with representatives of State, local, and tribal governments to identify both existing and proposed regulations that may uniquely or significantly affect those governmental entities. The Administrator of OIRA shall also convene, from time to time, conferences with representatives of businesses, nongovernmental organizations, and the public to discuss regulatory issues of common concern.

**Sec. 5. Existing Regulations.** In order to reduce the regulatory burden on the American people, their families, their communities, their State, local, and tribal governments, and their industries; to determine whether regulations promulgated by the executive branch of the Federal Government have become unjustified or unnecessary as a result of changed circumstances; to confirm that regulations are both compatible with each other and not duplicative or inappropriately burdensome in the aggregate; to ensure that all regulations are consistent with the President's priorities and the principles set forth in this Executive order, within applicable law; and to otherwise improve the effectiveness of existing regulations: (a) Within 90 days of the date of this Executive order, each agency shall submit to OIRA a program, consistent with its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities and the principles set forth in this Executive order. Any significant regulations selected for review shall be included in the agency's annual Plan. The agency shall also identify any legislative mandates that require the agency to promulgate or continue to impose regulations that the agency believes are unnecessary or outdated by reason of changed circumstances.

(b) The Administrator of OIRA shall work with the Regulatory Working Group and other interested entities to pursue the objectives of this section. State, local, and tribal governments are specifically encouraged to assist in the identification of regulations that impose significant or unique burdens on those governmental entities and that appear to have outlived their justification or be otherwise inconsistent with the public interest.

(c) The Director, in consultation with the Advisors, may identify for review by the appropriate agency or agencies other existing regulations of an agency or groups of regulations of more than one agency that affect a particular group, industry, or sector of the economy, or may identify legislative mandates that may be appropriate for reconsideration by the Congress.

**Sec. 6. Centralized Review of Regulations.** The guidelines set forth below shall apply to all regulatory actions, for both new and existing regulations, by agencies other than those agencies specifically exempted by the Administrator of OIRA:

(a) *Agency Responsibilities.* (1) Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. In consultation with OIRA, each agency may also consider whether to utilize formal rulemaking procedures under 5 U.S.C. 556 and 557 for the resolution of complex determinations. Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

(2) Within 60 days of the date of this Executive order, each agency head shall designate one of the agency's Presidential Appointees to be its Regulatory Policy Officer, advise OMB of such designation, and annually update OMB on the status of this designation. The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order.

(3) In addition to adhering to its own rules and procedures and to the requirements of the Administrative Procedure Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, and other applicable law, each agency shall develop its regulatory actions in a timely fashion and adhere to the following procedures with respect to a regulatory action:

(A) Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with a list of its planned regulatory actions, indicating those which the agency believes are significant regulatory actions within the meaning of this Executive order. Absent a material change in the development of the planned regulatory action, those not designated as significant will not be subject to review under this section unless, within 10 working days of receipt of the list, the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action within the meaning of this Executive order. The Administrator of OIRA may waive review of any planned regulatory action designated by the agency as significant, in which case the agency need not further comply with subsection (a)(3)(B) or subsection (a)(3)(C) of this section.

(B) For each matter identified as, or determined by the Administrator of OIRA to be, a significant regulatory action, the issuing agency shall provide to OIRA:

(i) The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; and

(ii) An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.

(C) For those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of section 3(f)(1), the agency shall also provide to OIRA the following additional information developed as part of the agency's decision-making process (unless prohibited by law):

(i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;

(ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and

(iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

(D) In emergency situations or when an agency is obligated by law to act more quickly than normal review procedures allow, the agency shall notify OIRA as soon as possible and, to the extent practicable, comply with subsections (a)(3)(B) and (C) of this section. For those regulatory actions that are governed by a statutory or court-imposed deadline, the agency shall, to the extent practicable, schedule rulemaking proceedings so as to permit sufficient time for OIRA to conduct its review, as set forth below in subsection (b)(2) through (4) of this section.

(E) After the regulatory action has been published in the Federal Register or otherwise issued to the public, the agency shall:

- (i) Make available to the public the information set forth in subsections (a)(3)(B) and (C);
- (ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and
- (iii) Identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.

(F) All information provided to the public by the agency shall be in plain, understandable language.

(b) *OIRA Responsibilities.* The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order and do not conflict with the policies or actions of another agency. OIRA shall, to the extent permitted by law, adhere to the following guidelines:

(1) OIRA may review only actions identified by the agency or by OIRA as significant regulatory actions under subsection (a)(3)(A) of this section.

(2) OIRA shall waive review or notify the agency in writing of the results of its review within the following time periods:

(A) For any notices of inquiry, advance notices of proposed rulemaking, or other preliminary regulatory actions prior to a Notice of Proposed Rulemaking, within 10 working days after the date of submission of the draft action to OIRA;

(B) For all other regulatory actions, within 90 calendar days after the date of submission of the information set forth in subsections (a)(3)(B) and (C) of this section, unless OIRA has previously reviewed this information and, since that review, there has been no material change in the facts and circumstances upon which the regulatory action is based, in which case, OIRA shall complete its review within 45 days; and

(C) The review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head.

(3) For each regulatory action that the Administrator of OIRA returns to an agency for further consideration of some or all of its provisions, the Administrator of OIRA shall provide the issuing agency a written explanation for such return, setting forth the pertinent provision of this Executive order on which OIRA is relying. If the agency head disagrees with some or all of the bases for the return, the agency head shall so inform the Administrator of OIRA in writing.

(4) Except as otherwise provided by law or required by a Court, in order to ensure greater openness, accessibility, and accountability in the regulatory review process, OIRA shall be governed by the following disclosure requirements:

(A) Only the Administrator of OIRA (or a particular designee) shall receive oral communications initiated by persons not employed by the executive branch of the Federal Government regarding the substance of a regulatory action under OIRA review;

(B) All substantive communications between OIRA personnel and persons not employed by the executive branch of the Federal Government regarding a regulatory action under review shall be governed by the following guidelines: (i) A representative from the issuing agency shall be invited to any meeting between OIRA personnel and such person(s);

(ii) OIRA shall forward to the issuing agency, within 10 working days of receipt of the communication(s), all written communications, regardless of format, between OIRA personnel and any person who is not employed by the executive branch of the Federal Government, and the dates and names of individuals involved in all substantive oral communications (including meetings to which an agency representative was invited, but did not attend, and telephone conversations between OIRA personnel and any such persons); and

(iii) OIRA shall publicly disclose relevant information about such communication(s), as set forth below in subsection (b)(4)(C) of this section.

(C) OIRA shall maintain a publicly available log that shall contain, at a minimum, the following information pertinent to regulatory actions under review:

(i) The status of all regulatory actions, including if (and if so, when and by whom) Presidential consideration was requested;

(ii) A notation of all written communications forwarded to an issuing agency under subsection (b)(4)(B)(ii) of this section; and

(iii) The dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications.

(D) After the regulatory action has been published in the **Federal Register** or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.

(5) All information provided to the public by OIRA shall be in plain, understandable language.

**Sec. 7. Resolution of Conflicts.** (a) To the extent permitted by law, disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President, with the assistance of the Chief of Staff to the President (“Chief of Staff”), acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials). Presidential consideration of such disagreements may be initiated only by the Director, by the head of the issuing agency, or by the head of an agency that has a significant interest in the regulatory action at issue. Such review will not be undertaken at the request of other persons, entities, or their agents.

(b) Resolution of such conflicts shall be informed by recommendations developed by the Chief of Staff, after consultation with the Advisors (and other executive branch officials or personnel whose responsibilities to the President include the subject matter at issue). The development of these recommendations shall be concluded within 60 days after review has been requested.

(c) During the Presidential review period, communications with any person not employed by the Federal Government relating to the substance of the regulatory action under review and directed to the Advisors or their staffs or to the staff of the Chief of Staff shall be in writing and shall be forwarded by the recipient to the affected agency(ies) for inclusion in the public docket(s). When the communication is not in writing, such Advisors or staff members shall inform the outside party that the matter is under review and that any comments should be submitted in writing.

(d) At the end of this review process, the President, or the Chief of Staff acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President’s decision with respect to the matter.

**Sec. 8. Publication.** Except to the extent required by law, an agency shall not publish in the **Federal Register** or otherwise issue to the public any regulatory action that is subject to review under section 6 of this Executive order until (1) the Administrator of OIRA notifies the agency that OIRA has waived its review of the action or has completed its review without any requests for further consideration, or (2) the applicable time period in section 6(b)(2) expires without OIRA having notified the agency that it is returning the regulatory action for further consideration under section 6(b)(3), whichever occurs first. If the terms of the preceding sentence have not been satisfied and an agency wants to publish or otherwise issue a regulatory action, the head of that agency may request Presidential consideration through the Director, as provided under section 7 of this order. Upon receipt of this request, the Director shall notify OIRA and

the Advisors. The guidelines and time period set forth in section 7 shall apply to the publication of regulatory actions for which Presidential consideration has been sought.

**Sec. 9. *Significant Guidance Documents.*** Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with advance notification of any significant guidance documents. Each agency shall take such steps as are necessary for its Regulatory Policy Officer to ensure the agency's compliance with the requirements of this section. Upon the request of the Administrator, for each matter identified as, or determined by the Administrator to be, a significant guidance document, the issuing agency shall provide to OIRA the content of the draft guidance document, together with a brief explanation of the need for the guidance document and how it will meet that need. The OIRA Administrator shall notify the agency when additional consultation will be required before issuance of the significant guidance document.

**Sec. 10. *Preservation of Agency Authority.*** Nothing in this order shall be construed to impair or otherwise affect the authority vested by law in an agency or the head thereof, including the authority of the Attorney General relating to litigation.

**Sec. 11. *Judicial Review.*** Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

**Sec. 12. *Revocations.*** Executive Orders Nos. 12291 and 12498; all amendments to those Executive orders; all guidelines issued under those orders; and any exemptions from those orders heretofore granted for any category of rule are revoked.

## Appendix E

### Advocacy Congressional Testimony (2001 – 2008)

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#### 2008

[07/30/08](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Committee on Small Business, U.S. House of Representatives, Subcommittee on Regulations, Health Care and Trade at a hearing titled "Regulatory Burdens on Small Firms: What Rules Need Reforms?" [\[text\]](#) or [\[PDF File\]](#); [Press Release](#).

#### 2007

[12/06/07](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Committee on Small Business, U.S. House of Representatives on legislation to improve the Regulatory Flexibility Act [\[text\]](#) or [\[PDF File\]](#); [Testimony Summary](#).

[10/04/07](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Subcommittee on Environment and Hazardous Materials, Committee on Energy and Commerce, U.S. House of Representatives on H.R. 1055, the Toxic Right-to-Know Protection Act [\[text\]](#) or [\[PDF File\]](#); [Press Release](#); [Testimony Summary](#).

[04/18/07](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, submitted a statement for the record to the U.S. Senate Committee on Small Business & Entrepreneurship titled "Sarbanes-Oxley Act and Small Business: Addressing Proposed Regulatory Changes and their Impacts on Capital Markets" [\[text\]](#) or [\[PDF File\]](#); [Press Release](#).

[03/09/07](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, participated in a roundtable hosted by the U.S. Department of the Treasury and the Internal Revenue Service concerning the "Tax Gap" [\[text\]](#) or [\[PDF File\]](#).

[02/06/07](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Environment and Public Works Committee, United States Senate, concerning oversight on recent EPA actions and documents [\[text\]](#) or [\[PDF File\]](#); [Press Release](#); [Questions & Answers](#) dated 06/08/07.

## 2006

[10/03/06](#)

Bruce Lundegren, Assistant Chief Counsel for Advocacy, participated in a roundtable hosted by the Subcommittee on Rural Enterprise, Agriculture and Technology, Committee on Small Business, U.S. House of Representatives, concerning the Transportation Safety Administration and Coast Guard's jointly proposed "Transportation Worker Identification Credential" rule [\[text\]](#) or [\[PDF File\]](#); Based on [Letter dated 07/05/06 - Transportation Safety Administration and Coast Guard](#) [html]; [Fact Sheet Summarizing Advocacy's Letter](#).

[07/25/06](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Committee on Small Business, U.S. House of Representatives on "Deferred Exchanges of Like Kind Property" [\[text\]](#) or [\[PDF File\]](#); [Testimony Summary](#).

[07/20/06](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives, on the Regulatory Flexibility Improvements Act - H.R. 682 [\[text\]](#) or [\[PDF File\]](#); [Testimony Summary](#); Office of Advocacy: [Legislative Priorities for the 109th Congress](#).

[06/27/06](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Subcommittee on Regulatory Reform and Oversight, Committee on Small Business, U.S. House of Representatives, on "S Corporations - Their History and Challenges" [\[text\]](#) or [\[PDF File\]](#).

[04/05/06](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Committee on Small Business, U.S. House of Representatives, on "IRS' Latest Enforcement: Is the Bulls-eye on Small Businesses?" [\[PDF File\]](#)

## 2005

[12/14/05](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Committee on Environment and Public Works, U.S. Senate, on "Spill Prevention, Control, and Countermeasure (SPCC) Regulations" [\[PDF File\]](#). [February 10, 2006](#) - Advocacy submitted a letter for the hearing record providing additional information in response to a question and follow up letter from Senator James M. Inhofe, Chairman, Committee on Environment and Public Works.

[09/28/05](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Subcommittee on Regulatory Affairs, Committee on Government Reform, U.S. House of Representatives, on "The Impact of Regulation on U.S. Manufacturing: Spotlight on the Environmental Protection Agency" [\[text\]](#) or [\[PDF File\]](#).

[09/21/05](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Committee on Small Business, U.S. House of Representatives, on Reforming the Tax Code to Assist Small Businesses [\[text\]](#) or [\[PDF File\]](#).

[08/09/05](#) - Jim Henderson, Region VII Advocate, testified before a Colorado field hearing of the U.S. House of Representatives Committee on Small Business, Subcommittee on Workforce, Empowerment, and Government Programs, on "Extending Increased Section 179 Expensing Limits."

[04/28/05](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Subcommittee on Regulatory Reform and Oversight, Committee on Small Business, U.S. House of Representatives, on "The Administration's Program to Reduce Unnecessary Regulatory Burden on Manufacturers - A Promise to Be Kept?" [\[PDF File\]](#).

[04/27/05](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Committee on Small Business, U.S. House of Representatives, on "Closing the Tax Gap and the Impact on Small Business" [\[text\]](#) or [\[PDF File\]](#).

[03/16/05](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Committee on Small Business, U.S. House of Representatives on "Improving the Regulatory Flexibility Act - H.R. 682" [\[text\]](#) or [\[PDF File\]](#) See also: Office of Advocacy - [Legislative Priorities for the 109th Congress](#) [\[PDF File\]](#) or [\[text\]](#). [April 22, 2005](#) - Advocacy submitted a letter for the hearing record providing additional information in response to a question and follow up letter from Representative Nydia Velazquez, Ranking Member, Committee on Small Business.

## 2004

[11/17/04](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Committee on Government Reform, U.S. House of Representatives, on "What is the Bush Administration's Record in Regulatory Reform?" [\[text\]](#) or [\[PDF File\]](#).

[05/18/04](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, submitted a letter for the record to the Committee on Small Business, U.S. House of Representatives, for its hearing on "Red Tape Reduction: Improving the Competitiveness of America's Small Manufacturers."

[05/05/04](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Committee on Small Business, U.S. House of Representatives, on Improving the Regulatory Flexibility Act - H.R. 2345 [\[text\]](#) or [\[PDF File\]](#). [May 18, 2004](#) - Advocacy submitted a letter for the hearing record providing additional information in response to a question and follow up letter from Representative Nydia Velazquez, Ranking Member, Committee on Small Business.

[04/22/04](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, submitted a statement to the Subcommittee on Regulatory Reform and Oversight, Committee on Small Business, U.S. House of Representatives, on "Small Businesses Creating Jobs and Protecting the Environment."

[02/25/04](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Committee on Government Reform, U.S. House of Representatives, on "How to Improve Regulatory Accounting: Costs, Benefits, and Impacts of Federal Regulations - Part II" [\[text\]](#) or [\[PDF File\]](#).

## 2003

[09/25/03](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, submitted testimony to the Subcommittee on Energy and Minerals, Committee on Natural Resources, U.S. House of Representatives on the Environmental Protection Agency's Toxics Release Inventory (TRI) program; [Fact Sheet Summarizing Testimony](#).

[08/27/03](#)

Jim Henderson, Region VIII Regional Advocate, testified at a field hearing before the Subcommittee on Tax, Finance, and Exports, Committee on Small Business, U.S. House of Representatives, on "Removing the Roadblocks to Success: How Can the Federal Government Help Small Businesses Revitalize the Economy?" [\[text\]](#) or [\[PDF File\]](#).

[07/23/03](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Committee on Small Business, U.S. House of Representatives, on "Assisting Small Business through the Tax Code-- Recent Gains and What Remains to be Done" [\[text\]](#) or [\[PDF File\]](#).

[07/22/03](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Committee on Government Reform, U.S. House of Representatives on H.R. 2432, the "Paperwork and Regulatory Improvements Act of 2003" [\[text\]](#) or [\[PDF File\]](#).

[07/17/03](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Subcommittee on Rural Enterprise, Agriculture, and Technology, Committee on Small Business, U.S. House of Representatives, on "Endangered Farmers and Ranchers: Unintended Consequences of the Endangered Species Act" [\[text\]](#) or [\[PDF File\]](#).

[07/14/03](#)

Linwood L. Rayford, III, Assistant Chief Counsel for Food, Drug and Health Policy, testified at a field hearing before the Committee on Small Business, U.S. House of Representatives on "The Role of Medical Professionals as Small Business Owners" [\[text\]](#) or [\[PDF File\]](#).

[06/26/03](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Subcommittee on Regulatory Reform and Oversight, Committee on Small Business, U.S. House of Representatives, on “Computer Reservation Systems (CRS) Regulations and Small Business in the Travel Industry” [\[text\]](#) or [\[PDF File\]](#).

[05/01/03](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Committee on Small Business, U.S. House of Representatives, on “Internal Revenue Service Compliance with the Regulatory Flexibility Act” [\[text\]](#) or [\[PDF File\]](#); [Fact Sheet Summarizing Testimony](#).

[04/22/03](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Texas House Committee On Government Reform on HB 2390, an Act Relating to State Agency Rules Affecting Small Business [\[text\]](#) or [\[PDF File\]](#).

[04/03/03](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, submitted testimony to the Subcommittee on Tax, Finance and Exports, Committee on Small Business, U.S. House of Representatives, on “The President’s Proposal to Increase Small Business Expensing” [\[text\]](#) or [\[PDF File\]](#).

[04/01/03](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Subcommittee on Workforce, Empowerment and Government Programs and the Subcommittee on Regulatory Reform and Oversight, Committee on Small Business, U.S. House of Representatives, on “Small Business Office of Advocacy Improvements” [\[text\]](#) or [\[PDF File\]](#).

[03/26/03](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Rhode Island State Senate Committee On Financial Services, Technology and Regulatory Issues, on SB 0198, an Act Relating to Administrative Procedures” [\[text\]](#) or [\[PDF File\]](#).

[02/10/03](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Small Business Committee, Missouri House of Representatives, on HB 322 "Creates the Small Business Regulatory Fairness Board to serve as liaison between the agencies and small business" [\[text\]](#) or [\[PDF File\]](#).

[02/10/03](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Financial and Governmental Organization, Veterans’ Affairs and Elections Committee, Missouri State Senate, on SB 0069 "Creates the Small Business Regulatory Fairness Board to serve as liaison between the agencies and small business" [\[text\]](#) or [\[PDF File\]](#).

## 2002

[06/19/02](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, testified before the Committee on Small Business, U.S. House of Representatives, on “The Impact on Small Business of the Immigration and Naturalization Services’ Proposal to Limit the Period of Admissions for B-2 Tourist’s Visas” [\[text\]](#) or [\[PDF File\]](#).

[06/13/02](#)

Thomas M. Sullivan, Chief Counsel for Advocacy, submitted testimony to the Subcommittee on Regulatory Reform and Oversight, Committee on Small Business, U.S. House of Representatives, on “The Toxic Release Inventory Rule: Costs, Compliance and Science” [\[PDF File\]](#).

[05/16/02](#)

Thomas M. Sullivan, Chief Counsel, Office of Advocacy, testified before the Committee on Small Business, U.S. House of Representatives, on “CMS: New Name, Same Old Game?” [\[text\]](#) or [\[PDF File\]](#).

[04/10/02](#)

Thomas M. Sullivan, Chief Counsel, Office of Advocacy, testified before the Committee on Small Business, U.S. House of Representatives, on “Improved Centers for Medicare and Medicaid Services (CMS) Compliance with the Regulatory Flexibility Act” [\[text\]](#) or [\[PDF File\]](#).

[03/20/02](#)

Thomas M. Sullivan, Chief Counsel, Office of Advocacy, testified before the Committee on Small Business, U.S. House of Representatives, on “Strengthening the Office of Advocacy” [\[text\]](#) or [\[PDF File\]](#).

[03/12/02](#)

Thomas M. Sullivan, Chief Counsel, Office of Advocacy, testified before the Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs, U.S. House of Representatives, on “Regulatory Accounting” [\[text\]](#) or [\[PDF File\]](#).

[03/06/02](#)

Thomas M. Sullivan, Chief Counsel, Office of Advocacy, testified before the Committee on Small Business, U.S. House of Representatives, on “Agency Compliance with the Small Business Regulatory Enforcement Fairness Act (SBREFA)” [\[text\]](#) or [\[PDF File\]](#).

## 2001

[10/04/01](#)

Susan M. Walthall, Acting Chief Counsel, Office of Advocacy, and Kevin L. Bromberg, Assistant Chief Counsel, Environmental Policy, provided written testimony to the Subcommittee on Environment, Technology and Standards, Committee on Science, U.S. House of Representatives, on a review of “The Arsenic and Drinking Water September 2001 National Research Council (NRC) Report” [\[text\]](#) or [\[PDF File\]](#).

[06/20/01](#)

Susan M. Walthall, Acting Chief Counsel, Office of Advocacy, testified before the Committee on Small Business, U.S. House of Representatives, on "Government Procurement Policies and their Impact on Small Business" [\[text\]](#) or [\[PDF File\]](#).

[04/24/01](#)

Shawne Carter McGibbon, Acting Director of Interagency Affairs, Office of Advocacy, testified before the Committee on Small Business, U.S. Senate, on "Agency Compliance with the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act" [\[text\]](#) or [\[PDF File\]](#).

[03/28/01](#)

Robert E. Berney, Ph.D., Chief Economist and Acting Director of Economic Research for the Office of Advocacy, testified before the Finance Committee, United States Senate, on "Preserving and Protecting Main Street U.S.A." [\[text\]](#) or [\[PDF File\]](#).

[03/01/01](#)

Terry Bibbens, Entrepreneur in Residence of the Office of Advocacy, testified before the U.S. Senate Committee on Small Business Forum on Encouraging and Expanding Entrepreneurship: Examining the Federal Role [\[text\]](#) or [\[PDF File\]](#).

## Appendix F

### Advocacy Legislative Comment Letters (2001 – 2008)

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#### 2008

[Letter dated 9/26/08 - The Honorable Charles Gonzalez](#) [html], [\[PDF File\]](#) or [\[text\]](#) - in support of H.R. 7074: Home Office Deduction Simplification and Improvement Act of 2008; [Press Release](#).

[Letter dated 8/19/08 - The Honorable Olympia Snowe](#) [html], [\[PDF File\]](#) or [\[text\]](#) - in support of S. 3371, the Home Office Deduction Simplification and Improvement Act of 2008; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 6/25/08 - Honorable John McHugh](#) [html], [\[PDF File\]](#) or [\[text\]](#) - regarding H.R. 6214, Home Office Deduction Simplification Act of 2008; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 6/04/08 - The Honorable Stephen Buyer and Jim Matheson](#) [PDF File] or [\[text\]](#) - regarding H.R. 5839, Safeguarding America's Pharmaceutical Act of 2008; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 4/24/08 - The Honorable Olympia J. Snowe and Mark Pryor](#) [html], [\[text\]](#) or [\[PDF File\]](#) - commending them for introducing the Independent Office of Advocacy and Small Business Regulatory Reform Act of 2008; [Press Release](#).

[Letter dated 2/07/08 - The Honorable John F. Kerry](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Chair, Committee on Small Business and Entrepreneurship, letter of response from Chief Counsel for Advocacy Thomas Sullivan regarding a proposed study on tax and regulatory barriers to veteran business owners.

#### 2007

[Letter dated 8/16/07 - The Honorable Alan B. Mollohan and Rodney Frelinghuysen](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Chairman and Ranking Member, House Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies regarding the unintended consequences of a proposed funding cut to the Census budget in the FY 2008 Commerce, Justice, Science Appropriations bill (H.R. 3093); [Fact Sheet Summarizing Advocacy's Letter](#).

#### 2006

[Letter dated 10/31/06 - The Honorable Bill Thomas and Charles Grassley](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Chairmen, House Committee on Ways and Means and Senate Committee on Finance, regarding Technical Corrections Act of 2006 (H.R. 6264 / S. 2026) and small business concerns with Section 7; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 8/31/06 - The Honorable Larry E. Craig](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Sponsor, Withholding Tax Relief Act of 2006 (S. 2821); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 05/17/06 - The Honorable Charles Taylor and Norman Dicks](#) [PDF File] or [\[html\]](#) - Chairman and Ranking Member, Subcommittee on Interior, Environment and Related Agencies, House Committee on Appropriations, regarding potential revisions to H.R. 5386, which could affect the U.S. Environmental Protection Agency's (EPA) implementation of reforms to the Toxic Release Inventory's (TRI) annual reporting requirements; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 04/04/06 - The Honorable Melissa Hart](#) [PDF File] or [\[text\]](#) - sent a letter supporting the Equity for Our Nation's Self-Employed Act (H.R. 4961); [Fact Sheet Summarizing Advocacy's Letter](#).

## 2005

[Letter dated 4/13/05 - The Honorable Olympia Snowe](#) - Chair, Committee on Small Business and Entrepreneurship, letter of response from Chief Counsel for Advocacy Thomas Sullivan regarding the Office of Advocacy position on Section 6023 of H.R. 1268, the Iraq/Afghanistan Emergency Supplemental Appropriations Act for 2005.

[Letter dated 3/15/05 - The Honorable Jerry Lewis](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Chairman, House Committee on Appropriations, regarding small business opposition to renewal of Section 8014 in the FY 2006 Defense Appropriations Act.

## 2004

[Letter dated 06/23/04 - The Honorable Joe Barton](#) - Chairman, Committee on Energy and Commerce, regarding H.R. 4600, the Junk Fax Prevention Act of 2004.

## 2003

[Letter dated 10/08/03 - The Honorable Ted Stevens](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Chairman, Senate Committee on Appropriations, regarding amendments to FY 2004 Labor, HHS, and Education appropriations bill; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 10/08/03 - The Honorable Bill Young](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Chairman, House Committee on Appropriations, regarding amendments to FY 2004 Labor, HHS, and Education appropriations bill; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 01/29/03 - The Honorable Olympia J. Snowe](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Chair, Senate Committee on Small Business and Entrepreneurship, regarding S. 158, the Small Business Expensing Improvement Act of 2003.

[Letter dated 01/29/03 - The Honorable Christopher S. Bond](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Original co-sponsor of S. 158, the Small Business Expensing Improvement Act of 2003.

## 2002

[Letter dated 08/07/02 - The Honorable John F. Kerry](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Chairman, Senate Committee on Small Business and Entrepreneurship, regarding S. 2753, the Small and Disadvantaged Business Ombudsman Act.

[Letter dated 08/07/02 - The Honorable Christopher S. Bond](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Ranking Member, Senate Committee on Small Business and Entrepreneurship, regarding S. 2753, the Small and Disadvantaged Business Ombudsman Act.

[Letter dated 07/30/02 - The Honorable John F. Kerry](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Chairman, Senate Committee on Small Business and Entrepreneurship, regarding S. 2483, the National Small Business Regulatory Assistance Act, and H.R. 2666, the Vocational and Technical Entrepreneurship Development Act.

[Letter dated 07/30/02 - The Honorable Christopher S. Bond](#) [html], [\[text\]](#), or [\[PDF File\]](#) - Ranking Member, Senate Committee on Small Business and Entrepreneurship, regarding S. 2483, the National Small Business Regulatory Assistance Act, and H.R. 2666, the Vocational and Technical Entrepreneurship Development Act.

[Letter dated 07/23/02 - The Honorable Michael G. Oxley](#) [html], [\[text\]](#), or [\[PDF File\]](#) - Chairman, House Committee on Financial Services, regarding small business concerns with Accounting Reform Legislation.

[Letter dated 05/17/02 - The Honorable John Kerry](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Chairman, Senate Subcommittee on Oceans, Atmosphere and Fisheries, Committee on Commerce, Science, and Transportation, regarding the May 9, 2002, hearing on the National Marine Fisheries Service (NMFS).

[Letter dated 03/29/02 - The Honorable Susan M. Collins](#) [html] or [\[PDF\]](#) - Sponsor of S. 2023, regarding efforts to expand the provisions of section 179 of the Internal Revenue Code. This would allow small businesses to write-off more expenses instead of depreciating them.

[Letter dated 03/29/02 - The Honorable Tim Hutchinson](#) [html], [\[text\]](#) or [\[PDF\]](#) - Original co-sponsor of S. 2023, regarding efforts to expand the provisions of section 179 of the Internal Revenue Code. This would allow small businesses to write-off more expenses instead of depreciating them.

[Letter dated 03/29/02 - The Honorable Christopher S. Bond](#) [html] or [\[PDF\]](#) - Original co-sponsor of S. 2023, regarding efforts to expand the provisions of section 179 of the Internal Revenue Code. This would allow small businesses to write-off more expenses instead of depreciating them.

[Letter dated 03/29/02 - The Honorable Gordon Smith](#) [html] or [\[PDF\]](#) - Original co-sponsor of S. 2023, regarding efforts to expand the provisions of section 179 of the Internal Revenue Code. This would allow small businesses to write-off more expenses instead of depreciating them.

[Letter dated 03/19/02 - The Honorable Thomas Daschle](#) [html] or [\[PDF\]](#) - Senate Majority Leader, concerning Sections 504 and 505 of the Energy Tax Savings Act of 2002 (S. 1979), Expensing of Capital Costs and a Tax Credit for EPA Sulfur Regulations (An amendment to Section 179 of the Internal Revenue Code).

[Letter dated 03/19/02 - The Honorable Trent Lott](#) [html] or [\[PDF\]](#) - Senate Minority Leader, concerning Sections 504 and 505 of the Energy Tax Savings Act of 2002 (S. 1979), Expensing of Capital Costs and a Tax Credit for EPA Sulfur Regulations (An amendment to Section 179 of the Internal Revenue Code).

## Appendix G

### Advocacy Regulatory Comment Letters (2001 – 2008)

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#### 2008

[Letter dated 10/09/08 – Social Security Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Revised Medical Criteria for Evaluating Hearing Loss; [73 Fed. Reg. 47103 \(August 13, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 10/09/08 – United States Department of Agriculture, Animal and Plant Health Inspection Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Viral Hemorrhagic Septicemia; Interstate Movement and Import Restrictions on Certain Live Fish; [73 Fed. Reg. 52173 \(September 9, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 09/15/08 - Department of Homeland Security, U.S. Citizenship and Immigration Services](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers; [73 Fed. Reg. 49109 \(August 20, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 08/21/08 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - OrbitCom Petition for Forbearance of Sections 61.26(b) and 61.26(c) of the Commission's Rules (WC Docket No. 08-162); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 08/07/08 - Federal Acquisition Council, Civilian Agency Acquisition Council, and the Defense Acquisition Regulations Council](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Acquisition Regulation; Employment Eligibility Verification; [72 Fed. Reg. 33374 \(June 12, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 08/06/08 - Department of Justice, Civil Rights Division](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities; [73 Fed. Reg. 34508 \(June 17, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 07/25/08 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Qwest Petitions for Forbearance Pursuant to 47 U.S.C. Section 160 (c) in the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas; (WC Docket No. 07-97).

[Letter dated 07/23/08 - Department of Homeland Security, United States Coast Guard](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Advance notice of proposed rulemaking on Commercial Fishing Industry Vessels; [73 Fed. Reg. 16815 \(March 31, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 07/14/08 - Department of Agriculture, Forest Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Locatable Minerals Operations Conducted on National Forest Systems Lands; [73 Fed. Reg. 15694 \(March 25, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 06/30/08 - Securities and Exchange Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - regarding the Commission's plans to unify America's current generally accepted accounting principles (GAAP) with the International Financial Reporting Standards (IFRS); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 06/25/08 - Securities and Exchange Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - strongly supporting the Securities and Exchange Commission's (SEC's) approval of a one-year extension of Section 404(b) of the Sarbanes-Oxley Act of 2002 for smaller public companies; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 06/11/08 - Department of Housing and Urban Development](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Real Estate Settlement Procedures Act (RESPA): Proposed Rule; [73 Fed. Reg. 14029 \(March 14, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 05/19/08 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; [73 Fed. Reg. 11591 \(March 4, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 05/19/08 - Department of Transportation, Federal Motor Carrier Safety Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators; Proposed Rule; [72 Fed. Reg. 73225 \(December 26, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 05/13/08 - Consumer Product Safety Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Standard for the Flammability of Residential Upholstered Furniture, Proposed Rule; [73 Fed. Reg. 11701 \(March 4, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 04/25/08 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - commending them for considering a proposal to grant regulatory relief to small cable providers; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 04/25/08 - Department of Homeland Security](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Initial Regulatory Flexibility Analysis; [73 Fed. Reg. 4157 \(March 26, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 04/24/08 - Department of Treasury, Internal Revenue Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Government entities required to withhold 3% on payments for services and property; [IRS Notice 2008-38](#) [PDF File]; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 04/23/08 - Department of Transportation](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Transportation for Individuals With Disabilities: Passenger Vessels; [73 Fed. Reg. 14427 \(March 18, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 04/08/08 - Federal Reserve System](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Truth in Lending; Proposed Rule; [73 Fed. Reg. 1671 \(January 9, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 04/07/08 - Department of Labor, Employment Standards Administration and Wage and Hour Division](#) [html], [\[text\]](#) or [\[PDF File\]](#) - The Family and Medical Leave Act of 1993; Proposed Rule; [73 Fed. Reg. 7875 \(February 11, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 03/31/08 - Environmental Protection Agency](#) [PDF File] - regarding the Report of the Small Business Advocacy Review Panel, including the Executive Summary, on Revisions to the Total Coliform Monitoring and Analytical Requirements and Consideration of Distribution System.

[Letter dated 03/21/08 - Department of Treasury, Internal Revenue Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Guidance Regarding Marketing of Refund Anticipation Loans (RALs) and Certain Other Products in Connection With the Preparation of a Tax Return; [73 Fed. Reg. 1131 \(January 7, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 03/14/08 - Department of Transportation, National Highway Traffic Safety Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Tire Registration and Recordkeeping; Proposed Rule; [73 Fed. Reg. 4157 \(January 24, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 03/07/08 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - Petition To Establish Procedural Requirements To Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended; [73 Fed. Reg. 6888 \(February 6, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 03/03/08 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - Carriage of Digital Television Broadcast Signals; [73 Fed. Reg. 6099 \(February 1, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/28/08 - Department of Labor, Occupational Safety and Health Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Confined Spaces in Construction; Proposed Rule; [72 Fed. Reg. 67351 \(November 28, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/28/08 - Department of Health and Human Services, Food and Drug Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Draft Guidance for Industry: Questions and Answers Regarding the Labeling of Dietary Supplements as Required by the Dietary Supplement and Nonprescription Drug Consumer Protection Act; [73 Fed. Reg. 197 \(January 2, 2008\)](#) [PDF File] and [73 Fed. Reg. 196 \(January 2, 2008\)](#) [PDF File]; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/25/08 - Securities and Exchange Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Commending Chairman Christopher Cox for commencing a cost-benefit study of the auditor attestation requirement for smaller public companies under Section 404(b) of the Sarbanes-Oxley Act of 2002; [73 Fed. Reg. 7449 \(February 7, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/20/08 - Small Business Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Women-Owned Small Business Federal Contract Assistance Procedures; [72 Fed. Reg. 73285 \(December 27, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 01/15/08 - Department of Labor, Occupational Safety and Health Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Transmittal of the Report of the Small Business Advocacy Review Panel on the Occupational Safety and Health Administration's draft standard Occupational Exposure to Beryllium.

## 2007

[Letter dated 12/12/07 - Federal Reserve System and Department of Treasury](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Prohibition on Funding of Unlawful Internet Gambling Act of 2006; [72 Fed. Reg. 56680 \(October 4, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 11/29/07 - Department of Justice, Civil Rights Division](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Submission of the report, [Evaluation of Barrier Removal Costs Associated with the 2004 Americans with Disabilities Act \(ADA\) Accessibility Guidelines](#), prepared by E.H. Pechan & Associates, [Research Summary](#).

[Letter dated 11/15/07 – Office of Surface Mining Reclamation and Enforcement, Department of the Interior](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States; Proposed Rule, [72 Fed. Reg. 48889 \(August 24, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 11/07/07 – Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Response to industry concerns over the FCC's forbearance analysis; [WC Docket No. 06-172 \(August 15, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 11/02/07 - Department of Homeland Security, Transportation Security Administration and Department of Transportation](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Proposed rulemaking on the Secure Flight Program; [72 Fed. Reg. 48356 \(August 23, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 10/25/07 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - National Emission Standards for Hazardous Air Pollutants: Paint Stripping and Miscellaneous Surface Coating Operations at Area Sources; [72 Fed. Reg. 52958 \(September 17, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 10/12/07 - Environmental Protection Agency](#) [html] or [\[PDF File\]](#) - Reply to the notification letter regarding a Small Business Advocacy Review Panel on the proposed SBAR Panel for National Primary Drinking Water Regulations: Revisions to the Total Coliform Monitoring and Analytical Requirements and Consideration of Distribution System Issues (TCR Rule).

[Letter dated 10/02/07 - Securities and Exchange Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Alternative proposals on shareholder proxy access, Shareholder Proposals Relating to the Election of Directors ("Short Proposal"), [72 Fed. Reg. 43488 \(August 3, 2007\)](#) [PDF File] or [\[text\]](#); and Shareholder Proposals ("Long Proposal"), [72 Fed. Reg. 43465 \(August 3, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 09/19/07 - Department of Labor, Occupational Safety and Health Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Reply to the notification letter regarding a Small Business Advocacy Review Panel on the Occupational Safety and Health Administration's draft proposal for Occupational Exposure to beryllium.

[Letter dated 09/18/07 - Department of Homeland Security](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Final Safe Harbor Procedures for Employers Who Receive a No-Match Letter; [72 Fed. Reg. 45611 \(August 15, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 09/13/07 - Department of Health and Human Services, Centers for Medicare & Medicaid Services](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Surety Bond Requirement for Suppliers of Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS); [72 Fed. Reg. 42001 \(August 1, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 09/11/07 - Securities and Exchange Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Smaller Reporting Company Regulatory Relief and Simplification; [72 Fed. Reg. 39669 \(July 19, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 01/09/06 - Department of Labor, Occupational Safety and Health Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Proposed Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment Rule [70 Fed. Reg. 34822, \(June 15, 2005\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 01/06/06 - Office of Management and Budget](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Comments on Proposed Bulletin for Good Guidance Practices; [70 Fed. Reg. 71866 \(November 30, 2005\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 01/03/06 - Department of Treasury, Internal Revenue Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Comments on proposed regulations for the Income Attributable to Domestic Production Activities; [70 Fed. Reg. 67220 \(November 4, 2005\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

## 2005

[Letter dated 12/16/05 - U.S. Fish and Wildlife Service](#) [PDF File] or [\[text\]](#) - Reopening the Comment Period for Injurious Wildlife Species; Black Carp (*Mylopharyngodon piceus*); [70 Fed. Reg. 61,933 \(October 27, 2005\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 11/14/05 - Environmental Protection Agency](#) [PDF File] - Transmittal of the Report of the Small Business Advocacy Review Panel convened for the proposed rulemaking on the Control of Hazardous Air Pollutants from Mobile Sources (or Mobile Source Air Toxics (MSAT)).

[Letter dated 10/31/05 - Department of State, Department of Homeland Security, Bureau of Customs and Border Protection](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Advance notice of proposed rule on Documents Required for Travel within the Western Hemisphere; [70 Fed. Reg. 52037 \(September 1, 2005\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 10/28/05 - Department of Labor, Occupational Safety and Health Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Notice of a Regulatory Flexibility Act Review of Lead in Construction standard; [70 Fed. Reg. 32739 \(June 6, 2005\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 10/27/05 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Ex Parte letter regarding the FCC's Public Notice Seeking Comment Regarding Possible Revision or Elimination of Rules under the Regulatory Flexibility Act, 5 U.S.C. Section 610; [DA-05-1524](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 10/14/05 - Department of Labor, Employee Benefits Security Administration](#) [html] or [\[PDF File\]](#) - Regarding Notice of Proposed Rulemaking Form 5500 E-Filing Regulation; [70 Fed. Reg. 51,542 \(August 30, 2005\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 10/03/05 - Securities and Exchange Commission](#) [html] or [\[PDF File\]](#) - Regarding extension of compliance dates for Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports of Companies That Are Not Accelerated Filers; [70 Fed. Reg. 56,825 \(September 29, 2005\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Comment dated 8/16/05 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - Comment regarding the initial regulatory flexibility analysis for Telephone Number Portability; [CC Dkt. No. 95-116](#) [PDF File]; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 08/23/07 - Securities and Exchange Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3; [72 Fed. Reg. 35117 \(June 26, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 08/13/07 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services; [WC Docket No. 04-440 \(July 30, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 08/08/07 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - Parties Asked To Refresh Record in the Special Access Notice of Proposed Rulemaking; [72 Fed. Reg. 40814 \(July 25, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 08/03/07 - U.S. Fish and Wildlife Services](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Revised Critical Habitat Designation Proposed for Five Endangered and Two Threatened Mussels in Four Northeast Gulf of Mexico Drainages; [72 Fed. Reg. 34215 \(June 21, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 06/27/07 - Securities and Exchange Commission](#) [html] or [\[PDF File\]](#) - Notice of Filing of Proposed Rule Change Amending FAST and DRS Limited Requirements for Transfer Agents; [72 Fed. Reg. 30648 \(June 1, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 05/25/07 - Securities and Exchange Commission](#) [html] [\[text\]](#) or [\[PDF File\]](#) - SEC open Meeting on Section 404 of the Sarbanes-Oxley Act, May 23, 2007.

[Letter dated 05/25/07 - General Services Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Notice of proposed rule regarding Representations and Certifications -Tax Delinquency Regulation; [72 Fed. Reg. 15093 \(March 30, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Comment dated 5/21/07 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - Request for comment on the 700 MHz auction rules; [FCC 07-72](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 05/21/07 - General Services Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Notice of proposed rule regarding Contractor Code of Ethics and Business Conduct; [72 Fed. Reg. 7588 \(February 16, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 05/14/07 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Submission of Technical Memorandum Evaluating the Proposal "NPDES Permit Fee Incentive for Clean Water Act Section 106 Grants; Allotment Formula;" [72 Fed. Reg. 293 \(Jan. 4, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#); [Technical Memorandum/NPDES Permit Fee Incentive for Clean Water Act Section 106 Grants](#) by E.H. Pechan & Associates, Inc.

[Letter dated 05/10/07 - Department of Treasury and Internal Revenue Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - commending them for their recent revised Initial Regulatory Flexibility Analysis (IRFA) for the proposed rule entitled "Escrow Accounts, Trusts, and Other Funds Used During Deferred Exchanges of Like-Kind Property" [72 Fed. Reg. 13055 \(March 20, 2007\)](#) [PDF File] or [\[text\]](#).

[Letter dated 05/10/07 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - request for rulemaking on copper retirement; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 04/30/07 - The Ewing Marion Kauffman Foundation](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Comments on the Kauffman Foundation Document "On the Road to an Entrepreneurial Economy: A Research and Policy Guide."

[Letter dated 03/30/07 - Department of Transportation, Federal Aviation Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Aircraft Production and airworthiness approvals, parts marking, and miscellaneous proposals; [72 Fed. Reg. 6968 \(February 14, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 03/26/07 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - video programming access rulemaking; [72 Fed. Reg. 9289 \(March 1, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 03/23/07 - Department of Treasury, Alcohol and Tobacco Tax and Trade Bureau](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Comments on their Notice of Proposed Rulemaking on Tax Classification of Cigars and Cigarettes; [71 Fed. Reg. 62505 \(October 25, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 03/02/07 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Request for extension public comment period regarding NPDES Permit Fee Incentive for Clean Water Act Section 106 Grants; Allotment Formula; [72 Fed. Reg. 293 \(January 4, 2007\)](#) [PDF File] or [\[text\]](#).

[Letter dated 02/21/07 - Securities and Exchange Commission & Public Company Accounting Oversight Board](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Management's Report on Internal Control Over Financial Reporting; Proposed interpretation; Proposed Rule; [71 Fed. Reg. 77635 \(December 27, 2006\)](#) [PDF File] or [\[text\]](#). Proposed Auditing Standard-An Audit of Internal Control Over Financial Reporting that is Integrated with an Audit of Financial Statements and Related Proposals; [Release No. 2006-007 \(Public Company Accounting Oversight Board, Dec. 2006\)](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/16/07 - Department of Health and Human Services, Centers for Medicare & Medicaid Services](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Medicaid Program; Prescription Drugs; Proposed Rule; [71 Fed. Reg. 77174 \(December 22, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/08/07 - Department of Labor](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Request for Information on the Family and Medical Leave Act of 1993; [71 Fed. Reg. 69504 \(December 1, 2006\)](#); [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/07/07 - Department of Homeland Security](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Proposed Chemical Facility Anti-Terrorism Standards Rule; [71 Fed. Reg. 58276 \(December 28, 2006\)](#); [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/05/07 - Department of Transportation, Federal Aviation Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Proposed rule on Production and Airworthiness Approvals, Part Marking, and Miscellaneous Proposals; [71 Fed. Reg. 58914 \(October 5, 2006\)](#); [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

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[Letter dated 12/19/06 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Congratulatory letter regarding Spill Prevention, Control and Countermeasure (SPCC) program; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 12/7/06 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Service and Auction Rules for 700 MHz Wireless Spectrum Band; [WT Dkt. No. 06-150](#) [PDF File] or [\[text\]](#).

[Letter dated 11/09/06 - Architectural and Transportation Barriers Compliance Board](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Americans With Disabilities Act (ADA) Accessibility Guidelines for Passenger Vessels; Reopening of comment period; [71 Fed. Reg. 53630 \(September 12, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 11/08/06 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Comments on Proposed 2006 Multi-Sector General Permit (MSGP) for Industrial Facilities; [71 Fed. Reg. 40827 \(July 18, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#); [Technical Memorandum/Total Suspended Solids and Multi-sector General Permit](#) by E.H. Pechan & Associates, Inc.

[Letter dated 11/02/06 - Occupational Safety and Health Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Comments on its Advanced Notice of Proposed Rulemaking on Hazard Communication (Globally Harmonized System of Classification and Labeling of Chemicals (GHS)); [71 Fed. Reg. 53617 \(September 12, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 11/02/06 - Consumer Product Safety Commission \(CPSC\)](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Standards for the Flammability (Open Flame) of Mattress Sets; [71 Fed. Reg. 13472 \(March 15, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#); CPSC's [November 17, 2006](#) response to Advocacy's letter.

[Comment dated 10/25/06 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - Comment in addressing the "Missoula Plan," a plan filed by the National Association of Regulatory Utility Commissioners in response to the Commission's proposed rule on Developing a Unified Inter-carrier Compensation Regime; [CC Dkt. No. 01-92](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 10/17/06 - Occupational Safety and Health Administration](#) [PDF File] - Transmittal of the Report of the Small Business Advocacy Review Panel convened on the Occupational Safety and Health Administration's draft proposal for Cranes and Derricks.

[Testimony dated 10/03/06 - at Roundtable hosted by the House Small Business Subcommittee on Rural Enterprise, Agriculture and Technology](#) [html], [\[text\]](#) or [\[PDF File\]](#) - concerning the Transportation Security Administration and Coast Guard's jointly proposed Transportation Worker Identification Credential rule; [Letter dated 07/05/06 - Transportation Security Administration and Coast Guard](#) [html]; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 10/03/06 - U.S. Fish and Wildlife Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Proposed Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx; [71 Fed. Reg. 5515 \(October 3, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Comment dated 9/20/06 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - Comment regarding the Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures; [WT Dkt. No. 05-211](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 09/18/06 - Federal Trade Commission](#) [PDF File] or [\[text\]](#) - Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transaction Act of 2003; [71 Fed. Reg. 40785 \(July 18, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 09/15/06 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Comments on its Proposed Rule regarding National Primary Drinking Water Regulations for Lead and Copper; [71 Fed. Reg. 40827 \(July 18, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#); [Technical Memorandum/Lead and Copper](#) by E.H. Pechan & Associates, Inc.

[Letter dated 09/15/06 - Securities and Exchange Commission](#) [PDF File] - Advance notice of proposed rulemaking concerning Concept Release; [71 Fed. Reg. 40865 \(July 18, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 09/14/06 - Securities and Exchange Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Internal Control Over Financial Reporting in Exchange Act; Periodic Reports of Non-Accelerated Filers and Newly Public Companies; [71 Fed. Reg. 47060 \(August 15, 2006\)](#); [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 09/07/06 - U.S. Fish and Wildlife Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Proposed Designation of Critical Habitat for the Alabama beach mouse; [71 Fed. Reg. 5515 \(February 1, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 09/05/06 - Environmental Protection Agency](#) [PDF File] or [\[text\]](#) - Proposed Consumer and Commercial Products: Control Techniques Guidelines in Lieu of Regulations for Lithographic Printing Materials, Letterpress Printing Materials, Flexible Packaging Printing Materials, Flat Wood Paneling Coatings, and Industrial Cleaning Solvents; [71 Fed. Reg. 44521 \(August 4, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 08/25/06 - Department of Labor, Occupational Health and Safety Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Reply to the notification letter regarding a Small Business Advocacy Review Panel on the Occupational Safety and Health Administration's draft proposal for Cranes and Derricks in Construction.

[Letter dated 08/21/06 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Children's Television Obligations of Digital Television Broadcasters; [CG Dkt. No. 00-167](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 08/10/06 - U.S. Fish and Wildlife Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Amended Designation of Critical Habitat for the Wintering Population of the Piping Plover; [71 Fed. Reg. 33703 \(June 12, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 08/08/06 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - Universal Service Contribution Methodology; [WC Dkt. No. 06-122](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 08/03/06 - U.S. Patent and Trademark Office](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Size Standard for Purposes of United States Patent and Trademark Office Regulatory Flexibility Analysis for Patent-

Related Regulations; [71 Fed. Reg. 38388 \(July 6, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

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[Letter dated 07/17/06 - Small Business Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Notice of proposed rule regarding the Women-Owned Small Business Federal Contract Assistance Program; [71 Fed. Reg. 34550 \(June 15, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 07/06/06 – U. S. Fish and Wildlife Service](#) [PDF File] or [\[text\]](#) - In response to a notice of availability of draft economic analysis, Endangered and Threatened Wildlife Plants; Proposed Designation of Critical Habitat for Spikedace (*Meda fulgida*) and Loach Minnow (*Tiaroga cobitis*); [71 Fed. Reg. 32496 \(June 6, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

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[Letter dated 06/15/06 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Letter regarding the initial regulatory flexibility analysis for application of Universal Service contributions for Internet Telephony; [CC Dkt. No. 96-45](#) [PDF File]; [WC Dkt. No. 04-36](#) [PDF File]; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 06/09/06 - Internal Revenue Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Income Attributable to Domestic Production; [71 Fed. Reg. 31268 \(June 1, 2006\)](#) [PDF File] or [\[text\]](#).

[Letter dated 06/08/06 - Office of Management and Budget](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Comments in response to Proposed Risk Assessment Bulletin; [71 Fed. Reg. 2600 \(January 17, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 06/08/06 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Reply to the notification letter regarding a Small Business Advocacy Review Panel for the proposed Clean Air Act Control of Emissions from Nonroad Spark-Ignition Engines and Equipment (NRSI).

[Letter dated 05/30/06 - Department of State](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Proposed Exchange Visitor Program – Training and Internship Programs Rule; [71 Fed. Reg. 17768 \(April 7, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 05/25/06 – Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Comments in response to their notice of proposed rulemaking entitled, Lead; Renovation, Repair, and Painting Program; [71 Fed. Reg. 1587 \(January 10, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 05/08/06 – Department of Treasury and Internal Revenue Service](#) [PDF File] or [\[text\]](#) - Comments in response to their notice of proposed rulemaking entitled, Escrow Accounts, Trusts and Other Funds Used During Exchanges of Like-Kind Property; [71 Fed. Reg. 6231 \(February 7, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 05/04/06 - Department of Agriculture, Food Safety and Inspection Service](#) [PDF File] or [\[text\]](#) - Regarding Notice of Proposed Rulemaking Availability of Lists of Retail Consignees during Meat or Poultry Product Recalls; [71 Fed. Reg. 11326 \(March 7, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Statement dated 05/03/06 - House Committee on Government Reform](#) [PDF File] or [\[text\]](#) - Regarding the problems small public companies face with new Sarbanes Oxley Act rules.

[Letter dated 04/27/06 - Securities and Exchange Commission](#) [PDF File] or [\[text\]](#) - Regarding compliance experience with section 404 of the Sarbanes Oxley Act of 2002; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 04/27/06 - U.S. Patent and Trademark Office](#) [PDF File] or [\[text\]](#) - Comments in response to Changes to Practice for the Examination of Claims in Patent Applications; [71 Fed. Reg. 61 \(January 3, 2006\)](#) [PDF File]; and to Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims; [71 Fed. Reg. 48 \(January 3, 2006\)](#) [PDF File]; [Fact Sheet Summarizing Advocacy's Letter](#).

[Comment dated 3/14/06 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Summarizing Advocacy's recommendations made at a meeting with the FCC regarding the Junk Fax Prevention Act of 2005; [CG Dkt. No. 05-338](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 03/14/06 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Comments on Proposed 2006 Multi-Sector General Permit (MSGP) for Industrial Facilities; [70 Fed. 72116 \(December 1, 2005\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#); [MSGP Technical Memorandum](#) by E.H. Pechan & Associates, Inc.

[Letter dated 02/10/06 - Environmental Protection Agency](#) [PDF File] or [\[text\]](#) - Spill Prevention, Control and Countermeasure (SPCC) Rule; Proposed Amendments; Qualified Facility, Oil-Filled Equipment and Other Revisions; [70 Fed. Reg. 75324 \(December 12, 2005\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#); [SPCC Technical Memorandum](#) by E.H. Pechan & Associates, Inc.

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[Letter dated 01/26/06 - Securities and Exchange Commission's Advisory Committee](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Smaller Public Companies that strongly supported draft recommendations to reform securities regulation.

[Comment dated 1/18/06 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - Comment regarding the Junk Fax Prevention Act of 2005; [CG Dkt. No. 05-338](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

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[Letter dated 08/01/05 - National Marine Fisheries Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the notice of proposed rulemaking on Fisheries of the Exclusive Economic Zone off Alaska; Groundfish Retention Standard; [70 Fed. Reg. 35054 \(June 16, 2005\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Comment dated 7/27/05 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - Comment regarding the regulatory flexibility analysis for Special Access Rates for Price Cap Local Exchange Carriers; [WC Dkt. No. 05-25](#) [PDF File]; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 07/14/05 - U.S. Fish and Wildlife Service](#) [PDF File] or [\[text\]](#) - Reopening the Comment Period on Proposed Designation of Critical Habitat for the Southwestern Willow Flycatcher; [70 Fed. Reg. 39,227 \(July 7, 2005\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

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[Letter dated 06/27/05 - Environmental Protection Agency](#) - Transmittal of the Report of the Small Business Advocacy Review Panel convened for EPA's Proposed Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone and Section 126 Petition from North Carolina to Reduce Interstate Transport of Fine Particulate Matter and Ozone rules.

[Letter dated 06/23/05 - Environmental Protection Agency](#) [html] or [\[PDF File\]](#) - Reply to the notification letter regarding a Small Business Advocacy Review Panel on the proposed Clean Air Act rule entitled Mobile Source Air Toxics (MSAT) - Control of Hazardous Air Pollutants from Mobile Sources.

[Letter dated 06/14/05 - Office of Management and Budget](#) [PDF File] or [\[text\]](#) - Comments on the Office of Management and Budget's (OMB) [Draft 2005 Report to Congress on the Costs and Benefits of Federal Regulations](#); [70 Fed. Reg. 14735 \(March 23, 2005\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Comment dated 5/23/05 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - Comment regarding the regulatory flexibility analysis for Developing a Unified Intercarrier Compensation Regime; [CC Dkt. No. 01-92](#) [PDF File]; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 05/23/05 - U.S. Department of Justice, Civil Rights Division](#) [PDF File] or [\[text\]](#) - Advance Notice of Proposed Rulemaking; Nondiscrimination on the Basis of Disability in State and Local Government Services; Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities; [69 Fed. Reg. 58,768 \(September 30, 2004\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 5/17/05 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Ex Parte Letter supporting the Extension of the Stay of the Order regarding Rules and Regulations implementing the Telephone Consumer Protection Act (TCPA) of 1991 (also known as the "Do-Not-Call" and the "Do-Not-Fax" rule); [CG Dkt. No. 02-278, FCC 03-153](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 03/29/05 - U.S. Fish and Wildlife Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Proposed Designation of Critical Habitat for the Southwestern Willow Flycatcher; [69 Fed. Reg. 60,706 \(October 12, 2004\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 3/17/05 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the Small Business Advocacy Review Panel for the Federal Implementation Plans to Reduce Interstate

Transport of Fine Particulate Matter and Ozone and Section 126 Petition from North Carolina to Reduce Interstate Transport of Fine Particulate Matter and Ozone rules.

[Letter dated 03/11/05 - Securities and Exchange Commission](#) [PDF File] - regarding extension of compliance dates for the final rule, Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports of Non- Accelerated Filers and Foreign Private Issuers; [70 Fed. Reg. 11528 \(March 8, 2005\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Reply Comment dated 3/8/05 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - Comment regarding the Verizon's Petition for Forbearance from Title II and the FCC's Computer Inquiry Rules; [WC Dkt. No. 04-440](#) [PDF File]; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/25/05 - General Services Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Access to the Federal Procurement Data System- Next Generation (FPDS-NG); [69 Fed. Reg. 77662 \(December 28, 2004\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/07/05 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Standard of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Other Solid Waste Incineration Units; [69 Fed. Reg. 71472 \(December 9, 2004\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/04/05 - U.S. Department of Justice, Civil Rights Division](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Advance Notice of Proposed Rulemaking; Nondiscrimination on the Basis of Disability in State and Local Government Services; Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities; [69 Fed. Reg. 58,768 \(September 30, 2004\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

\*Americans with Disabilities Act Rule that May Affect [Small Manufacturers](#)

\*Americans with Disabilities Act Rule that May Affect [Small Businesses](#)

\*Americans with Disabilities Act Rule that May Affect [Hotels](#)

\*Americans with Disabilities Act Rule that May Affect [Restaurants](#)

\*Americans with Disabilities Act Rule that May Affect [Retailers](#)

[Letter dated 01/18/05 - Centers for Medicare and Medicaid Services, Office of Strategic Operations and Regulatory Affairs](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Agency Information Collection Activities; Proposed Collection; Comment Request; [69 Fed. Reg. 67745 \(November 19, 2004\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 01/13/05 - U.S. Small Business Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Advance Notice of Proposed Rulemaking: Small Business Selected Size Standards Issues; [69 Fed. Reg. 70197 \(December 3, 2004\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 01/05/05 - Office of Management and Budget \(OMB\)](#) [PDF File] - Review of 189 Rules and Guidance Documents listed in OMB's [2004 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local and Tribal Entities](#); [Fact Sheet Summarizing Advocacy's Letter](#).

Previous correspondence:

\* [Letter dated 05/14/04 - Office of Management and Budget \(OMB\)](#) [PDF File] - Comments on the OMB [Draft 2004 Report to Congress on the Costs and Benefits of Federal Regulations](#).

\* [Fact Sheet Summarizing Advocacy's Letter](#).

## 2004

[Letter dated 12/21/04 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - Ex Parte Letter regarding the regulatory flexibility analysis for Developing a Unified Intercarrier Compensation Regime; CC Dkt. No. 01-92; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 12/17/04 - Department of Labor, Occupational Safety and Health Administration](#) [PDF File] or [\[html\]](#) - Notice of Proposed Rulemaking on Occupational Exposure to Hexavalent Chromium; [69 Fed. Reg. 59306 \(October 4, 2004\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 12/15/04 - Department of Commerce, Bureau of Industry and Security](#) [PDF File] or [\[text\]](#) - Notice of Proposed Rulemaking on Revised Knowledge Definition, Revision of Red Flags Guidance and Safe Harbor; [69 Fed. Reg. 60829 \(October 13, 2004\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Reply Comments dated 12/15/04 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - Comment regarding the Initial Regulatory Flexibility Analysis for the Notice of Proposed Rulemaking in Communications Assistance for Law Enforcement Act and Broadband Access and Services; [ET Dkt. No. 04-295, FCC 04-187](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 11/18/04 - U.S. Fish and Wildlife Service](#) [PDF File] or [\[text\]](#) - Notice of Availability of the Draft Economic Analysis on the Proposed Critical Habitat for the Riverside Fairy Shrimp; [Fed. Reg. 61,461 \(October 19, 2004\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Comments dated 11/17/04 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - Comment regarding the Initial Regulatory Flexibility Analysis for the Notice of Proposed Rulemaking in Telephone Number Portability; [CC Dkt. No. 95-116, FCC 04-217](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 10/14/04 - Environmental Protection Agency](#) [PDF File] - Transmittal of the [Report](#), *Risk-Based Analysis of Form A and Form NS Toxics Release Inventory Reform Proposal Alternatives*, prepared by E. H. Pechan & Associates; [Fact Sheet Summarizing the Report](#).

[Letter dated 10/12/04 - U.S. Fish and Wildlife Service](#) [html] or [\[PDF File\]](#) - Notice of Availability of the Draft Economic Analysis on the Proposed Critical Habitat for the Santa Ana Sucker; [69 Fed. Reg. 58,876 \(October 1, 2004\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Comments dated 10/4/04 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - Comment regarding the Initial Regulatory Flexibility Analysis for the Notice of Proposed Rulemaking in Unbundled Access to Network Elements; [WC Dkt. No. 04-313, FCC 04-179](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Comments dated 09/21/04 - Federal Communications Commission](#) [PDF File] - Reply Comment regarding the Initial Regulatory Flexibility Analysis for the Notice of Proposed Rulemaking in Federal-State Joint Board on Universal Service; [CC Dkt. No. 96-45, FCC 04-127](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 9/7/04 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Ex Parte Letter supporting the Extension of the Stay of the Order regarding Rules and Regulations implementing the Telephone Consumer Protection Act (TCPA) of 1991 (also known as the "Do-Not-Call" and the "Do-Not-Fax" rule); [CG Dkt. No. 02-278, FCC 03-153](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 08/24/04 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Ex Parte Presentation regarding the Initial Regulatory Flexibility Analysis for Local Telephone Competition and Broadband Reporting; [Docket No. 04-141, FCC 04-81](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 08/16/04 - Federal Aviation Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Supplemental notice of proposed rule - RE: Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities (FAA-2002-11301); [69 Fed. Reg. 27980 \(May 17, 2004\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 07/01/04 - U.S. Small Business Administration](#) [PDF File] - Withdrawal of the Proposed Rule on Small Business Size Standards; [69 Fed. Reg. 39874 \(July 1, 2004\)](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 06/29/04 - U.S. Small Business Administration](#) [PDF File] - Small Business Size Standards; Restructuring of Size Standards; [69 Fed. Reg. 13130 \(March 19, 2004\)](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Comment dated 06/10/04 - Environmental Protection Agency](#) [PDF File] - Spill Prevention, Control, and Countermeasure (SPCC) Regulation; Recommendations for Regulatory Revisions; 67 Fed. Reg. 47041 (July 17, 2002); [Fact Sheet Summarizing Advocacy's Letter](#); [SPCC Report](#) by Jack Faucett Associates.

[Notice of Withdrawal - 06/10/04 - United States Court of Appeals for the District of Columbia Circuit](#) [PDF File] - Advocacy filed a Notice of Withdrawal of the Notice of Intent to File an Amicus Curiae Brief with the D.C. Circuit Court in a small business challenge to a Federal Communications Commission (FCC) order; [Letter dated 6/18/04](#) - from FCC Chairman Michael Powell to Stan Wise, President, National Association of Regulatory Utility Commissioners (NARUC), [Letter dated 5/06/04](#) - from FCC Chief K. Dane Snowden, Consumer & Governmental Affairs Bureau, to Stan Wise, President, NARUC.

[Comment dated 05/28/04 - Federal Communications Commission](#) [PDF File] - Review of Regulatory Requirements for IP-Enabled Services; [WC Dkt. No. 04-36, FCC 04-28, 68 Fed. Reg. 16193](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 05/14/04 - Office of Management and Budget](#) [PDF File] - Comments on the OMB [Draft 2004 Report to Congress on the Costs and Benefits of Federal Regulations](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 05/18/04 - Honorable Donald Manzullo, Chairman](#) [PDF File] - Transmittal of the comments and nominations for regulatory reform sent to the OMB (5/14/04).

[Comment dated 04/20/04 - Federal Trade Commission](#) [PDF File] - Addressing the small business impacts of the Implementation of the CAN-SPAM Act; [Project No. R411008, RIN 3084-AA96, 69 Fed. Reg. 11776](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 04/15/04 - OCC, FRS, FDIC and OTS](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Request for Burden Reduction Recommendations; Consumer Protection; Lending Related Rules; Economic Growth and Regulatory Paperwork Reduction Act of 1996 Review; [69 Fed. Reg. 2852 \(January 21, 2004\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 04/09/04 - Department of Housing and Urban Development](#) [PDF File] - Withdrawal of Real Estate Settlement Procedures Act (REPSA); Draft Final Rule; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 04/06/04 - OCC, FRS, FDIC and OTS](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Joint proposed rule to amend the Community Reinvestment Act (CRA) regulations; [69 Fed. Reg. 5729 \(February 6, 2004\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 04/02/04 - Federal Aviation Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the notice of proposed rulemaking on the National Air Tour Safety Standards; [68 Fed. Reg. 60572 \(October 22, 2003\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Comment dated 03/31/04 - Federal Trade Commission](#) [PDF File] - Addressing the feasibility of a National Do-Not E-mail Registry under the CAN-SPAM Act; [Project No. R411008, RIN 3084-AA96, 69 Fed. Reg. 11776](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 03/30/04 - Environmental Protection Agency](#) [PDF File] - Final Determination on Effluent Limitation Guidelines and New Source Performance Standards for the Construction and Development Category; [67 Fed. Reg. 42644 \(June 24, 2002\)](#) [PDF File] or [\[text\]](#). [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 03/29/04 - National Marine Fisheries Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the notice of proposed rulemaking on Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Amendment 10; [69 Fed. Reg. 8915 \(February 26, 2004\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 03/12/04 - Federal Reserve System](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the notice of proposed rulemaking on the Availability of Funds and Collection of Checks; [69 Fed. Reg. 1470 \(January 8, 2004\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/27/04 - National Marine Fisheries Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the notice of proposed rulemaking on Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery; Amendment 13; [69 Fed. Reg. 4362 \(January 29, 2004\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Notice of Intent to File Amicus - 02/13/04 - United States Court of Appeals for the District of Columbia Circuit](#) [PDF File] - Advocacy filed a notice of intent alerting the court of Advocacy's plans to file an amicus curiae ("friend of the court") brief in a small business challenge to a Federal Communications Commission (FCC) order; [Fact Sheet Summarizing Advocacy's Notice](#).

[Letter dated 02/04/04 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Toxic Chemical Release Reporting; Online Dialogue Phase II; [68 Fed. Reg. 62759 \(November 5, 2003\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Reply Comment dated 02/04/04 - Federal Communications Commission](#) [PDF File] - Telephone Number Portability; [CC Dkt. No. 95-116, FCC 03-284 68 Fed. Reg. 68831](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 01/30/04 - Department of Labor, Occupational Safety and Health Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Reply to the notification letter regarding a Small Business Advocacy Review Panel on the Occupational Safety and Health Administration's draft proposal for Occupational Exposure to Hexavalent Chromium.

[Letter dated 01/05/04 - Department of Homeland Security](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the Homeland Security Acquisition Regulation; [68 Fed. Reg. 67867 \(December 4, 2003\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

## 2003

[Letter dated 12/22/03 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the Small Business Advocacy Review Panel for the proposed Clean Water Act section 316(b) Phase III rule for Cooling Water Intake Structures.

[Letter dated 12/19/03 - Department of Labor, Occupational Safety and Health Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Transmittal of the Report of the Small Business Advocacy Review Panel on the Occupational Safety and Health Administration's draft proposal for Occupational Exposure to Crystalline Silica.

[Letter dated 12/18/03 - Securities and Exchange Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Proposed Rule, Security Holder Director Nominations; [68 Fed. Reg. 60784 \(Oct. 23, 2003\)](#) [PDF File]; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 12/18/03 - Small Business Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Proposed rule, Small Business Government Contracting Programs; 68 Fed. Reg. 60015 (October 20, 2003); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 12/05/03 - Department of Agriculture, Agricultural Marketing Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Proposed rule, Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural commodities, and Peanuts; [68 Fed. Reg. 61944 \(October 30, 2003\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 11/24/03 - Department of Labor, Occupational Safety and Health Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Transmittal of the Report of the Small Business Advocacy Review Panel on the Occupational Safety and Health Administration's draft proposal for Confined Spaces in Construction.

[Letter dated 11/21/03 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Ex Parte Letter summarizing the participants' discussion at Advocacy's Roundtable regarding the Rules and Regulations implementing the Telephone Consumer Protection Act (TCPA) of 1991 (also known as the "Do-Not-Call" and the "Do-Not-Fax" rule); [CG Dkt. No. 02-278, FCC 03-153](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Notice dated 11/18/03 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Ex Parte Notice of Advocacy's Roundtable regarding the Rules and Regulations implementing the Telephone Consumer Protection Act (TCPA) of 1991 (also known as the "Do-Not-Call" and the "Do-Not-Fax" rule); [CG Dkt. No. 02-278, FCC 03-153](#) [PDF File] or [\[text\]](#).

[Letter dated 11/03/03 - Department of Health and Human Services, Center for Medicare and Medicaid Services](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Proposed rule, Medicare Program; Changes to the Criteria for Being Classified as an Inpatient Rehabilitation Facility; [68 Fed. Reg. 53266 \(September 9, 2003\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 11/03/03 - National Oceanic and Atmospheric Administration](#) [html], [\[text\]](#), or [\[PDF File\]](#) - Regarding Amendment 13 to the New England Groundfish Fishery Management Plan; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 11/03/03 - New England Fishery Management Council](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding Amendment 13 to the New England Groundfish Fishery Management Plan; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 10/31/03 - Department of Labor, Occupational Safety and Health Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Reply to the notification letter regarding a Small Business Advocacy Review Panel on the Occupational Safety and Health Administration's draft proposal for Occupational Exposure to Crystalline Silica.

[Reply to Opposition to the Petition for Reconsideration dated 10/30/03 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Rules and Regulations implementing the Telephone Consumer Protection Act (TCPA) of 1991 (also known as the "Do-Not-Call" and the "Do-Not-Fax" rule); [CG Dkt. No. 02-278, FCC 03-153](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Notice dated 10/10/03 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Ex Parte Presentation regarding the Rules and Regulations implementing the Telephone Consumer Protection Act (TCPA) of 1991 (also known as the "Do-Not-Call" and the "Do-Not-Fax" rule); [CG Dkt. No. 02-278, FCC 03-153](#) [PDF File] or [\[text\]](#).

[Letter dated 10/06/03 - Internal Revenue Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the notice of proposed rulemaking; Depreciation of Vans and Light Trucks; [68 Fed. Reg. 40224 \(July 7, 2003\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 10/06/03 - Department of Labor, Occupational Safety and Health Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Reply to the notification letter regarding a Small Business Advocacy Review Panel on Hazardous Enclosed Spaces and Confined Spaces in Construction.

[Letter dated 09/26/03 - Department of Transportation, National Highway Traffic Safety Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - In Support of Petition for Reconsideration - Denman Tire Corporation; Federal Motor Vehicle Safety Standards; Fires [68 Fed. Reg. 38116 \(June 26, 2002\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 09/09/03 - Internal Revenue Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - To Assistant Deputy Commissioner David A. Mador supplementing [previous comments](#) submitted by the Office of Advocacy in regard to Excise Taxes: Communications Services, Distance Sensitivity. [58 Fed. Reg. 15,690 \(April 1, 2003\)](#) [PDF File]; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 09/02/03 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Toxic Chemical Release Reporting; Alternate Threshold for Low Annual Reportable Amounts; Request for Comment on Renewal Information Collection: [68 Fed. Reg. 39071 \(July 1, 2003\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Petition for Reconsideration dated 08/25/03 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Rules and Regulations implementing the Telephone Consumer Protection Act (TCPA) of 1991 (also known as the "Do-Not-Call" and the "Do-Not-Fax" rule); [CG Dkt. No. 02-278, FCC 03-153](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Petition](#).

[Letter dated 08/20/03 - Environmental Protection Agency](#) [PDF File] - Regarding the notice of proposed rulemaking on the Control of Emissions of Air Pollution From Nonroad Diesel Engines and Fuel; 68 Fed. Reg. 28328 (May 23, 2003); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 08/14/03 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Rules and Regulations implementing the Telephone Consumer Protection Act (TCPA) of 1991 (also known as the

"Do-Not-Call" and the "Do-Not-Fax" rule); [CG Dkt. No. 02-278, FCC 03-153](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 07/07/03 - Bureau of Alcohol, Tobacco and Firearms](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the notice of proposed rulemaking on Commerce in Explosives; [68 Fed. Reg. 4406 \(January 29, 2003\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 07/07/03 - U.S. Department of Treasury](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the notice of proposed rulemaking on the Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Investment Advisers; [68 Fed. Reg. 23646 \(May 5, 2003\)](#) [PDF File] or [\[text\]](#).

[Letter dated 06/27/03 - U.S. Fish and Wildlife Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Arizona Pygmy-owl Critical Habitat Designation; [67 Fed. Reg. 71,032 \(November 27, 2002\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 06/27/03 - Department of Labor, Occupational Safety and Health Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Reply to the notification letter regarding a Small Business Advocacy Review Panel on Electric Power Generation, Transmission and Distribution.

[Letter dated 06/24/03 - U.S. Department of Labor](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the proposed rulemaking, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; [68 Fed. Reg. 15559 \(March 31, 2003\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 06/10/03 - National Marine Fisheries Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the proposed emergency rule on the Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies; [68 Fed. Reg. 20096 \(April 24, 2003\)](#) [PDF File] or [\[text\]](#).

[Letter dated 06/04/03 - Office of Management and Budget](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Comments regarding the Draft Report of the Small Business Paperwork Relief Task Force; [68 Fed. Reg. 25165 \(May 9, 2003\)](#) [PDF File].

[Letter dated 06/03/03 - U.S. Fish and Wildlife Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Notice of Proposed Rulemaking, Establishment of Three Additional Manatee Protection Areas in Florida; [68 Fed. Reg. 16,602 \(April 4, 2003\)](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 05/15/03 - Department of Health and Human Services](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Health Insurance Portability and Accountability Act of 1996 (HIPAA) - Standards for Privacy of Individually Identifiable Health Information; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 05/14/03 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Basic and Enhanced 911 Provision by Currently Exempt Wireless and Wireline Services; [CC Dkt. No. 94-102, FCC 02-326](#) [PDF File] or [\[text\]](#).

[Letter dated 05/12/03 - U.S. Customs Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding its notice of proposed rulemaking on the Tariff Treatment Related to Disassembly Operations Under the North American Free Trade Agreement; [68 Fed. Reg. p. 12011 \(March 13, 2003\)](#) [PDF File] or [\[text\]](#).

[Letter dated 04/09/03 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Broadcast Ownership Rules; [MM Dkt. No. 02-277, FCC 02-249](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 04/07/03 - Department of Health and Human Services, Food and Drug Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Proposed rule, Dietary Supplements Containing Ephedrine Alkaloids, Reopening of the Comment Period; [68 Fed. Reg. 10417 \(March 5, 2003\)](#) [PDF File] or [\[text\]](#).

[Letter dated 03/24/03 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the notice of proposed rulemaking, Acquisition Regulation; Background Checks for EPA Contractors Performing Services On-Site; [68 Fed. Reg. 2988 \(January 22, 2003\)](#) [PDF File] or [\[text\]](#).

[Letter dated 03/14/03 - Department of Transportation](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the notice of proposed rulemaking, Computer Reservations System ("CRS") Regulations; Statements of General Policy; [67 Fed. Reg. 69366 \(November 15, 2002\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 03/07/03 - U.S. Department of Treasury](#) [html], [\[text\]](#) or [\[PDF File\]](#) - To Assistant Secretary Pamela Olson in appreciation of Treasury's action in postponing final action on Excise Taxes: Definition of Highway Vehicle.

[Comment dated 02/28/03 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Federal-State Joint board on Universal Service, et alia, [CC Dkt. No. 96-45, FCC 02-329](#) [PDF File] or [\[text\]](#).

[Testimony dated 02/27/03 - Internal Revenue Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Russell Orban, Assistant Chief Counsel for Tax Policy of the Office of Advocacy, testified before the Internal Revenue Service on the proposed rule, Excise Taxes; Definition of Highway Vehicle.

[Letter dated 02/06/03 - Office of Management and Budget](#) [html], [\[text\]](#) or [\[PDF File\]](#) - In response to the Office of Information and Regulatory Affairs (OIRA) report to Congress entitled, "Stimulating Smarter Regulation," which listed 267 rules recommended for reform. The Office of Advocacy highlighted 30 regulations and guidance documents that are high priorities for reform to benefit small businesses.

[Letter dated 02/05/03 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Initial Regulatory Flexibility Analysis for the Triennial Review of Unbundling Obligations of Incumbent Local Exchange Carriers, [CC Dkt. No. 01-338, FCC 01-361](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 01/27/03 - Department of Transportation](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the notice of proposed rulemaking, Participation by Disadvantaged Business Enterprises in Airport Concessions; [67 Fed. Reg. 76327 \(December 12, 2002\)](#) [PDF File] or [\[text\]](#).

[Letter dated 01/27/03 - Department of Interior](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the notice of proposed rulemaking; Florida Manatees; Incidental Take During Specified Activities; [67 Fed. Reg. 69078 \(November 14, 2002\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 01/24/03 - Department of Labor, Employment and Training Administration](#) [html], [\[text\]](#), or [\[PDF File\]](#) - Regarding the notice of proposed rulemaking; Unemployment Compensation--Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations; [67 Fed. Reg. 72122 \(December 4, 2002\)](#) [PDF File] or [\[text\]](#).

[Letter dated 01/13/03 - Securities and Exchange Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the notice of proposed rulemaking; Strengthening the Commission's Requirements Regarding Auditor Independence; [67 Fed. Reg. 76,780 \(December 13, 2002\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

## 2002

[Letter dated 12/23/02](#) [PDF File] - Transmittal letter to Christine Todd Whitman, Administrator, EPA, regarding the Report of the Small Business Advocacy Review Panel on Control of Emission of Air Pollution from Land-Based Nonroad Compression Ignition Engines.

[Letter dated 12/13/02 - General Services Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the notice of proposed rulemaking; Federal Acquisition Regulation; Procurement of Printing and Duplicating through the Government Printing Office; [67 Fed. Reg. 68,914 \(November 13, 2002\)](#) [PDF File] or [\[text\]](#).

[Testimony dated 12/05/02 - Internal Revenue Service](#) [PDF File] or [\[text\]](#) - Russell Orban, Assistant Chief Counsel for Tax Policy of the Office of Advocacy, testified before the Internal Revenue Service on the proposed rule, Guidance on Reporting of Deposit Interest Paid to Nonresident Aliens; [67 Fed. Reg. 50386 \(August 2, 2002\)](#) [PDF File] or [\[text\]](#).

[Letter dated 12/04/02 - Internal Revenue Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the notice of proposed rulemaking; Excise Taxes; Definition of Highway Vehicle; [67 Fed. Reg. 38,913 \(June 6, 2002\)](#) [PDF File] or [\[text\]](#).

[Letter dated 11/27/02 - Department of Health and Human Services, Food and Drug Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Support for the Petition for Continuation of Stay of Action; FDA Final Rule on Policies, Requirements and Procedures; Prescription Drug Marketing Act of 1987; Prescription Drug Amendments of 1992; [64 Fed. Reg. 67720 \(December 3, 1999\)](#) [PDF File].

[Letter dated 11/14/02 - Internal Revenue Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding Guidance on Reporting of Deposit Interest paid to Nonresident Aliens; [67 Fed. Reg. 50386 \(August 2, 2002\)](#) [PDF File] or [\[text\]](#).

[Letter dated 11/08/02 - National Oceanic and Atmospheric Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the New England Goundfish Management Plan.

[Letter dated 10/30/02 - Department of Labor, Occupational Safety and Health Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Ergonomics for the prevention of Musculoskeletal Disorders: Guidelines for Nursing Homes; [67 Fed. Reg. 55884 \(August 30, 2002\)](#) [PDF File] or [\[text\]](#).

[Letter dated 10/28/02 - New England Fishery Management Council](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the New England Goundfish Management Plan.

[Letter dated 10/28/02 - Department of Housing and Urban Development](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding its notice of proposed rulemaking on the Real Estate Settlement Procedures Act (RESPA); Simplifying and Improving the Process for Obtaining Mortgages to Reduce Settlement Costs to Consumers; [67 Fed. Reg. 49134 \(July 29, 2002\)](#) [text].

[Letter dated 10/09/02 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Reply to the notification letter regarding a Small Business Advocacy Review Panel on Cooling Water Phase III.

[Letter dated 09/25/02 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Comments on Proposed Settlement with the Sierra Club; [67 Fed. Reg. 54804 \(August 26, 2002\)](#); [PDF File] or [\[text\]](#).

[Letter dated 09/06/02 - Architectural and Transportation Barriers Compliance Board](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Recommending that the Compliance Board postpone the vote on the Draft Final Rule to the Americans with Disabilities Act Accessibility Guidelines.

[Letter dated 08/27/02 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; [CC Dkt. No. 02-33, FCC 02-42](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 08/26/02 - National Credit Union Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding Size Standard for Small Credit Unions; [67 Fed. Reg. 38431 \(June 4, 2002\)](#) [PDF File] or [\[text\]](#).

[Letter dated 08/19/02 - Securities and Exchange Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Certification of Disclosure in Companies' Quarterly and Annual Reports Rule; [67 Fed. Reg. 41877 \(June 20, 2002\)](#) [PDF File] or [\[text\]](#).

[Letter dated 08/13/02 - Internal Revenue Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Request for a 90-day extension to file comments on the Notice of Proposed Rulemaking: Excise Taxes; Definition of Highway Vehicle; [67 Fed. Reg. 38,913 \(June 6, 2002\)](#) [PDF File] or [\[text\]](#).

[Letter dated 08/09/02 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Hydrochlorofluorocarbon (HCFC) Foam Allocation Proposed Rule - Noncompliance with the Regulatory Flexibility Act; [66 Fed. Reg. 38063 \(July 29, 2001\)](#) [PDF File] or [\[text\]](#).

[Letter dated 08/06/02 - U.S. Customs Service](#) [html], [\[text\]](#) or [\[PDF\]](#) Regarding its notice of proposed rulemaking on the conditional release period and customs bond obligations for food, drugs, devices and cosmetics regulated by the Food and Drug Administration; [67 Fed. Reg. 39322 \(June 7, 2002\)](#) [PDF File] or [\[text\]](#).

[Letter dated 07/18/02 - Department of Health and Human Services, Centers for Medicare and Medicaid Services](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Thank you letter regarding progress made between the Office of Advocacy and the Centers for Medicare and Medicaid Services on several important small business issues.

[Comments dated 06/28/02 - Federal Trade Commission](#) [html], [\[text\]](#), or [\[PDF File\]](#) - Telemarketing Sales Rule User Fees; [67 Fed. Reg. 37362 \(May 29, 2002\)](#) [PDF File] or [\[text\]](#).

[Letter dated 06/17/02 - Patent and Trademark Office](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Processing Fee for Use of Paper Forms for Submission of Applications for Registration and other Documents; [67 Fed. Reg. 35081 \(May 17, 2002\)](#) [PDF File] or [\[text\]](#).

[Letter dated 06/14/02 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Draft Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information; [67 Fed. Reg. 21234 \(April 30, 2002\)](#) [PDF File] or [\[text\]](#).

[Letter dated 06/12/02 - Environmental Protection Agency](#) [html], [\[text\]](#), or [\[PDF File\]](#) - Transmittal of the Report of the Small Business Advocacy Review Panel on the Environmental Protection Agency's planned proposed rule for Effluent Limitation Guidelines and Standards for the Aquatic Animal Production Industry.

[Letter dated 05/28/02 - Office of Management and Budget](#) [PDF File] or [\[text\]](#) - Comments on the OMB Draft Report to Congress on the Costs and Benefits of Federal Regulation; [67 Fed. Reg. 15014 \(March 28, 2002\)](#) [PDF File] or [\[text\]](#).

[Letter dated 05/23/02 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Control of Emissions from Land-based Recreational Engines; [67 Fed. Reg. 21613 \(May 1, 2002\)](#) [PDF File] or [\[text\]](#).

[Letter dated 05/13/02 - Department of Justice, Immigration and Naturalization Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Proposed Rule Limiting the Period of Admission for B Nonimmigrant Aliens; [67 Fed. Reg. 18065 \(April 12, 2002\)](#) [PDF File] or [\[text\]](#).

[Reply Comments dated 05/7/02 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets and Definition of Radio Markets; MM Docket No. 01-317, MM Docket No. 00-244, FCC 01-329 [\[text\]](#) or [\[PDF File\]](#).

[Letter dated 05/06/02 - Defense Acquisition Regulation Council](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Defense Acquisition Regulation Supplement; Competition Requirements for Purchase of Service Under Multiple Award Contracts; [67 Fed. Reg. 15351 \(April 1, 2002\)](#) [PDF File] or [\[text\]](#).

[Letter dated 05/03/02 - Department of Health and Human Services, Center for Medicare and Medicaid Services](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Medicare Program; Medicare-Endorsed Prescription Drug Card Initiative; [67 Fed. Reg. 10262 \(March 6, 2002\)](#) [PDF File] or [\[text\]](#).

[Letter dated 05/03/02 - Department of Interior](#) [html], [\[text\]](#) or [\[PDF File\]](#) - The National Park Service's Supplemental Environmental Impact Statement over the Snowmobile Phase out in Yellowstone Park [67 Fed. Reg. 15223 \(March 29, 2002\)](#) [PDF File] or [\[text\]](#).

[Letter dated 03/29/02 - Small Business Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Small Business Size Regulations; Government Contracting Programs; HubZone Program Proposed Rule; [67 Fed. Reg. 3826 \(January 28, 2002\)](#) [PDF File] or [\[text\]](#).

[Letter dated 03/25/02 - Environmental Protection Agency](#) [html], [\[text\]](#), or [\[PDF File\]](#) - Transmittal of the Report of the Small Business Advocacy Review Panel on A National Emission Standards for Hazardous Air Pollutants (NESHAP) for Lime Manufacturing Plants.

[Reply Comments dated 03/19/02 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Concerning Nationwide Licensing Areas in Government Transfer Bands; WT Dkt. No. 02-08, FCC 02-15 [\[text\]](#) or [\[PDF File\]](#).

[Comments dated 03/13/02 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; MM Dkt. No. 01-317, MM Dkt. No. 00-244, [FCC 01-329](#) [text] or [\[PDF File\]](#).

[Letter dated 03/11/02 - Department of Transportation](#) [PDF File] - Federal Requirements for Propeller Injury Avoidance Measures; [66 Fed. Reg. 63645 \(December 10, 2001\)](#) [PDF File] or [\[text\]](#).

[Letter dated 03/8/02 - Rural Utilities Service](#) [PDF File] - Telecommunications System Construction and Specifications, 66 Fed. Reg. 43,309, and RUS Standard for Service Installations at Customer Access Locations, 66 Fed. Reg. 43,314.

[Letter dated 03/08/02 - Missile Defense Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Fiscal Year 2002 Research and Development spending for the Small Business Innovation Research program (SBIR).

[Letter dated 02/27/02 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Establishment of Electronic Reporting; Electronic Records; [66 Fed. Reg. 46162 \(August 31, 2001\)](#) [text].

[Presentation dated 02/20/02 - Environmental Protection Agency](#) [html] or [\[text\]](#) - Recommendations for Metals Hazard Assessment Framework and Related Comments on the Science underlying the January 2001 Lead Toxic Release Inventory Reporting Rule.

[Letter dated 02/5/02 - National Telecommunications and Information Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding Privatization of the Management of the U.S. Internet top level domain.

[Letter dated 02/05/02 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Impending Maximum Achievable Control Technology (MACT) "Hammer" Under Clean Air Act §112(j).

## 2001

[Letter dated 12/28/01 - Department of Health and Human Services, Center for Medicare and Medicaid Services](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Medicare Program; Revisions to Payment Policies and Five-Year Review of and Adjustment to the Relative Value Units Under the Physician Fee Schedule for Calendar Year 2002; 66 Fed. Reg. 55245 (November 1, 2001).

[Letter dated 12/07/01 - Department of Agriculture, Food Safety and Inspection Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Notice and Request for Comment on intentions to harmonize procedures with those of the Food and Drug Administration with respect to the target tissue/marker residue policy in testing animal tissues for residues of new animal drugs; [66 Fed. Reg. 40964 \(August 6, 2001\)](#) [PDF File] or [\[text\]](#).

[Letter dated 11/27/01 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the Small Business Advocacy Review Panel for the proposed Effluent Limitations Guidelines and Standards for the Aquatic Animal Production Point Source Category.

[Letter dated 11/21/01 - Farm Credit Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Electronic Commerce Proposed Rule; [66 Fed. Reg. 53348 \(October 21, 2001\)](#) [PDF File] or [\[text\]](#).

[Reply Comments dated 11/6/01 - Federal Communications Commission](#) [PDF File] - Developing a Unified Intercarrier Compensation Regime; CC Dkt. No. 01-92 [\[PDF File\]](#) or [\[text\]](#).

[Letter dated 11/05/01 - Department of Health and Human Services, Food and Drug Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Current Good Tissue Practice for Manufacturers of Human Cellular and Tissue-Based Products; Inspection and Enforcement; [66 Fed. Reg. 1508 \(January 8, 2001\)](#) [PDF File] or [\[text\]](#).

[Letter dated 10/12/01 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Transmittal of the Report of the Small Business Advocacy Review Panel on the Environmental Protection Agency's planned proposed rule for Effluent Limitation Guidelines for the Construction and Development (C&D) Industry Point Source Category.

[Letter dated 08/16/01 - Department of Agriculture, Food Safety and Inspection Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Labeling of Natural or Regenerated Collagen Sausage Casings; [66 Fed. Reg. 40843 \(August 6, 2001\)](#) [PDF File] or [\[text\]](#).

[Letter dated 08/03/01 - Environmental Protection Agency](#) - Proposal for Additional Regulation of the Concentrated Animal Feeding Operations; 66 Fed. Reg. 2960 (January 12, 2001).

[Letter dated 07/20/01 - Department of Labor, Employment Standards Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Supplemental comments regarding the application of the Fair Labor Standards Act to domestic service; [66 Fed. Reg. 5481 \(January 19, 2001\)](#) [PDF File] or [\[text\]](#).

[Letter dated 07/17/01 - Environmental Protection Agency](#) [html] or [\[PDF File\]](#) - Transmittal of the Report of the Small Business Advocacy Review Panel on the Environmental Protection Agency's planned proposed rule for Control of Emissions from Nonroad Large Spark Ignition Engines, Recreational Engines (Marine and Land-based), and Highway Motorcycles.

[Letter dated 07/16/01 - General Services Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Electronic Commerce in Federal Procurement; [66 Fed. Reg. 27407 \(May 16, 2001\)](#) [PDF File] or [\[text\]](#).

[Reply Comments dated 07/9/01 - Federal Communications Commission](#) [html], [\[text\]](#), or [\[PDF File\]](#) - Regarding Streamlining Contributions to the Universal Service Fund; CC Dkt. No. 96-45, et al., [\[PDF File\]](#).

[Letter dated 07/06/01 - General Services Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Support for revoking the proposed rule, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings; [66 Fed. Reg. 17758 \(April 3, 2001\)](#) [PDF File] or [\[text\]](#).

[Correspondence dated 6/29/01 - National Institute of Standards and Technology](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Advocacy's questions regarding small business issues contained in the Request for Quotation to administer the Dot US, an internet name registry.

[Letter dated 06/25/01 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Notice of Data Availability for the Proposal to Regulate Cooling Water Intake Structures for New Facilities [66 Fed. Reg. 28853 \(May 25, 2001\)](#) [PDF File] or [\[text\]](#).

[Comments dated 6/14/01 - World Intellectual Property Organization](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Advocacy's written testimony to the World Intellectual Property Organization in its second Internet domain name process.

[Letter dated 06/07/01 - Department of Transportation](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Participation by Disadvantaged Business Enterprises (DBEs) in Department of Transportation Financial Assistance Programs; [66 Fed. Reg. 23208 \(May 8, 2001\)](#) [PDF File] or [\[text\]](#).

[Letter dated 05/31/01 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding the Small Business Advocacy Review Panel for the proposed Effluent Elimination Guidelines and Standards for the Construction and Development Category.

[Letter dated 05/25/01 - Department of Transportation, Research and Special Programs Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Pipeline Safety: Pipeline Integrity Management in High Consequence Areas (Hazardous Liquid Operators with Less Than 500 Miles of Pipelines); [66 Fed. Reg. 15821 \(March 21, 2001\)](#) [PDF File] or [\[text\]](#).

[Letter dated 05/21/01 - Department of Transportation, Research and Special Programs Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Pipeline Safety: Hazardous Liquid Pipeline Accident Reporting Revisions; [66 Fed. Reg. 15681 \(March 20, 2001\)](#) [PDF File] or [\[text\]](#).

[Letter dated 05/3/01 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding Unauthorized Changes of Consumers' Long Distance Carriers; [CC Dkt. No. 94-129](#) [PDF File] or [\[text\]](#).

[Letter dated 04/19/01 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding Enhanced 911 Emergency Calling Systems; [CC Dkt. No. 94-102](#) [PDF File] or [\[text\]](#).

[Letter dated 04/16/01 - Department of Interior, National Park Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Final Rule phasing out snowmobile use in Yellowstone National Park, the John D. Rockefeller, Jr. Parkway, and with some exceptions, in Grant Teton National Park; [66 Fed. Reg. 7579 \(January 22, 2001\)](#) [PDF File] or [\[text\]](#).

[Comments dated 4/13/01 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding review of Commercial Mobile Radio Service(CMRS) spectrum cap and cross-owner policies.

[Letter dated 04/09/01 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - EPA Review of Lead Toxic Release Inventory Reporting Rule.

[Letter dated 03/30/01 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Number Resource Optimization; CC Dkt. No. 99-200, 96-98.

[Letter dated 03/30/01 - Department of Health and Human Services](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Final Rule on the Standards for Privacy of Individually Identifiable Health Information; 65 Fed. Reg. 82462 (December 28, 2000).

[Letter dated 03/27/01 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - EPA Review of Arsenic Safe Drinking Water Standard.

[Letter dated 03/22/01 - Department of Labor, Employment Standards Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Application of the Fair Labor Standards Act to Domestic Service; [66 Fed. Reg. 5481 \(January 19, 2001\)](#) [PDF File] or [\[text\]](#).

[Letter dated 02/06/01 - Federal Communications Commission](#) [html], [\[text\]](#), or [\[PDF File\]](#) - Regarding Children's Television; Obligations of Digital Television Broadcasters; [MM Dkt. No. 00-167](#) [PDF File].

[Letter dated 01/31/01 - Department of Health and Human Services, Health Care Financing Administration](#) [html], [\[text\]](#), or [\[PDF File\]](#) - Interim Final Rule on the Use of Restraint and Seclusion in Psychiatric Residential Treatment Facilities Providing Psychiatric Services to Individuals Under Age 21; [66 Fed. Reg. 7148 \(January 22, 2001\)](#) [PDF File].

[Letter dated 01/09/01 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Regarding Children's Television; Obligations of Digital Television Broadcasters; MM Dkt. No. 00-167.

[Comments dated 01/05/01 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Automatic and Manual Roaming Obligations pertaining to Commercial Mobile Radio Services.

## Appendix H



# Legislative Priorities

*Advocacy: the voice of small business in government*

### Legislative Priorities for the 110<sup>th</sup> Congress Office of Advocacy, U.S. Small Business Administration

The Office of Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

**The Office of Advocacy's top legislative priority is to give small businesses a legitimate voice in the regulatory process.**

Advocacy's research shows that small businesses pay an average of \$7,647 per employee annually to comply with federal regulations—45% more than large businesses. Yet, small businesses generate 60-80% of all net new jobs, represent 99.7% of employers, employ half of all private sector employees, and innovate at a rate 13 to 14 times greater than large firms.

For more than twenty-five years, the Regulatory Flexibility Act (RFA) has required that agencies consider less burdensome approaches to regulation in order to level the playing field for small business. The RFA was amended in 1996 by the Small Business Regulatory Enforcement Fairness Act (SBREFA). Among other things, the 1996 amendments made agency small business impact analysis subject to judicial review and required two agencies [Occupational Safety and Health Administration (OSHA) and Environmental Protection Agency (EPA)] to seek direct input from small entities prior to issuing regulatory proposals.

Government has saved small entities billions of dollars by following the RFA's direction and minimizing the impact of regulatory mandates on small business. History has shown that regulatory sensitivity towards small entities can be achieved without sacrificing the underlying purpose of environmental protection, workplace safety, border security, and other governmental priorities.

The 110<sup>th</sup> Congress has the opportunity to amend the RFA and SBREFA to improve the regulatory climate for small business. The following four amendments fill in loopholes that currently reduce the effectiveness of both statutes.

**I. Review of Existing Rules** – *The W. Mark Crain study on regulatory costs showed a cost to Americans of \$1.1 trillion. Much of that burden falls on the business community. Since new regulations are promulgated each year, the cumulative impact can be staggering. It is necessary to evaluate existing regulations periodically to minimize this impact.*

**Amendment:** Modify section 610 of the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (RFA), that requires federal agencies to review 10-year-old regulations to assess their present-day impact. Section 610 should be broadened so that agencies review all rules periodically and not just those viewed as significant when initially promulgated. This change would encourage agencies to update their rules every ten years to ensure that regulatory protections reflect current conditions.

**II. Proper Consideration of Small Entities in Agency Rulemaking** – *The President prioritized the need for government agencies to consider their impact on small entities under the RFA when he signed Executive Order 13272. Section 3 of the Executive Order requires agencies to notify the Office of Advocacy of draft rules that will have a significant economic impact on a substantial number of small entities. It also requires agencies to give appropriate consideration to Advocacy's comments and address the comments in final rules.*

**Amendment:** Codify section 3 of the Executive Order to ensure that the President's attention to the impact of regulation on small entities becomes a permanent part of how government operates. This amendment will also ensure that independent agencies comply with the RFA.

**III. Help States Consider Alternatives to Costly Regulation** – *The federal government sometimes issues regulations that must be implemented by the states. When this happens, federal agencies are not required to do the detailed analysis of impacts and alternatives required under the RFA. Instead, states with RFA-type laws on the books, and with fewer resources than federal agencies, must do the analysis themselves, resulting in what amounts to an unfunded mandate. Under current law, agencies are only required to analyze direct impacts, even though there may be foreseeable and costly indirect impacts when states enforce federal regulations.*

**Amendment:** Amend the RFA to ensure that agencies analyze the impact of their rules on small entities and provide states with regulatory alternatives that will enable states to meet federal requirements while minimizing the impact on small entities.

## Appendix I

### Advocacy Research Reports and Publications (2001 – 2008)

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#### 2008

September 2008 – [The Importance of Angel Investing in Financing the Growth of Entrepreneurial Ventures](#) [PDF File], a working paper submitted by Scott Shane; [Research Summary](#) [PDF File].

August 2008 – [Quarterly Indicators: The Economy and Small Business, 2nd Quarter](#) [PDF File] - Provides recent monthly and quarterly data from a wide variety of sources relevant to small businesses. Economic activity of small firms is examined at the national level for 2008.

August 2008 – [Do Business Definition Decisions Distort Small Business Research Results?](#) [PDF File], an Office of Advocacy Working Paper by Brian Headd and Radwan Saade, Office of Advocacy; [Research Summary](#) [PDF].

July 2008 – [Analyzing the Impact of Antitrust Laws and Enforcement on Small Business](#) [PDF File], by Innovation and Information Consultants, Inc.; [Research Summary](#) [PDF File].

June 2008 – [High-Impact Firms: Gazelles Revisited](#) [PDF File], by Zoltan Acs, William Parsons and Spencer Tracy; Corporate Research Board, LLC; [Research Summary](#) [PDF File].

June 2008 – [Small Business and Micro Business Lending in the United States, for Data Years 2006-2007](#) [PDF File], by Victoria Williams and Charles Ou, Office of Advocacy; [Research Summary](#) [PDF File].

June 2008 – [Entrepreneurship and the Barrier to Exit: How Does an Entrepreneur-Friendly Bankruptcy Law Affect Entrepreneurship Development at a Societal Level?](#) [PDF file], submitted by Seung-Hyun Lee, Yasuhiro Yamakawa, and Mike W. Peng of the University of Texas at Dallas, Inc.; [Research Summary](#) [PDF File].

May 2008 – [The HUBZone Program Report](#) [PDF File], submitted by Henry Beale, Microeconomic Applications, Inc.; [Research Summary](#) [PDF File].

May 2008 – [What Do We Know about the Capital Structure of Privately Held Firms: Evidence from the Surveys of Small Business Finance](#) [PDF File], by Rebel A. Cole; [Research Summary](#) [PDF File].

May 2008 – [Quarterly Indicators: The Economy and Small Business, 1st Quarter](#) [PDF file] - Provides recent monthly and quarterly data from a wide variety of sources relevant to small businesses. Economic activity of small firms is examined at the national level for 2008.

April 2008 – [Human Capital and Women's Business Ownership](#) [PDF File], by Darrene Hackler, Ellen Harpel, and Heike Mayer — Business Development Advisors; [Research Summary](#) [PDF File].

April 2008 – [Characterization and Analysis of Small Business Energy Costs](#) [PDF File], submitted by Andy Bollman, E.H. Pechan & Associates, Inc.; [Research Summary](#) [PDF File].

March 2008 – [Changes in Family Health Insurance Coverage for Small and Large Firm Workers and Dependents](#) [PDF File], submitted by Eric E. Seiber and Curtis S. Florence; [Research Summary](#) [PDF File].

March 2008 – [The Impact of International Competition on Small-Firm Exit in U.S. Manufacturing](#) [PDF File] submitted by Robert Feinberg, [Research Summary](#) [PDF File].

February 2008 – [Quarterly Indicators: The Economy and Small Business, 4th Quarter](#), [PDF File] - Provides recent monthly and quarterly data from a wide variety of sources relevant to small businesses. Economic activity of small firms is examined at the national level for 2006.

February 2008 – [The Tax Debts of Small Business Owners in Bankruptcy](#) [PDF File], submitted by Rafael Efrat; [Research Summary](#) [PDF File].

February 2008 – [Rural and Urban Establishment Births and Deaths Using the U.S. Census Bureau's Business Information Tracking Series](#) [PDF File], an Office of Advocacy Working Paper by Lawrence A. Plummer, Clemson University, and Brian Headd, Office of Advocacy; [Research Summary](#) [PDF File].

February 2008 – [Small Business and Micro Business Lending in the United States, for Data Years 2005-2006](#) [PDF File] by Victoria Williams and Charles Ou, U.S. Small Business Administration, Office of Advocacy, Office of Economic Research, [Research Summary](#). [PDF File]

January 2008 – [Research Publications, 2007](#) [PDF File] This annual publication of Advocacy lists and gives a brief summary of all the economic research reports that were produced on a variety of topics.

January 2008 – [Uncovering Knowledge Structures of Venture Capital Investment Decision Making](#) [PDF File], submitted by Pankaj Patel and Rodney D'Souza, University of Louisville; [Research Summary](#); [PDF File].

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## 2007

December 2007 – [The Small Business Economy: A Report to the President 2007](#) [PDF File]; [Research Summary](#) [PDF File] (historical versions, [1996-2006](#)) [PDF File] — The annual reference source since 1982 that business owners, policymakers, and researchers have turned to when they need information on small business' performance in the economy. To obtain a printed copy, see the [U.S. Government Online Bookstore](#).

December 2007 – [Social Entrepreneurship and Government: A New Breed of Entrepreneurs Developing Solutions to Social Problems](#) [PDF File], by Andrew M. Wolk, Root Cause/ Massachusetts Institute of Technology.

December 2007 – [Pre-venture Planning](#) [PDF File], by William B. Gartner and Jianwen (Jon) Liao.

December 2007 – [Educational Attainment and Other Characteristics of the Self-Employed: An Examination using Data from the Panel Study of Income Dynamics](#) [PDF File], a working paper by Chad Moutray, U.S. Small Business Administration, Office of Advocacy; [Research Summary](#) [PDF File].

November 2007 – [Evaluation of Barrier Removal Costs Associated with the 2004 Americans with Disabilities Act \(ADA\) Accessibility Guidelines](#) [PDF File], submitted E.H. Pechan & Associates Inc.; [Research Summary](#) [PDF File].

November 2007 – [Quarterly Indicators: The Economy and Small Business, 3rd Quarter](#) [PDF File] - Provides recent monthly and quarterly data from a wide variety of sources relevant to small businesses. Economic activity of small firms is examined at the national level for 2007.

October 2007 – [Small Business Growth: Searching for Stylized Facts](#) [PDF File], a working paper by Brian Headd, U.S. Small Business Administration, Office of Advocacy and Bruce Kirchoff, New Jersey Institute of Technology; [Research Summary](#) [PDF File].

October 2007 – [Income and Wealth of Veteran Business Owners, 1989 – 2004](#) [PDF File], submitted by George W. Haynes; [Research Summary](#) [PDF File].

September 2007 – [Are Male and Female Entrepreneurs Really That Different?](#) [PDF File], a working paper by Erin Kepler and Scott Shane; [Research Summary](#) [PDF File].

August 2007 – [Quarterly Indicators: The Economy and Small Business, 2nd Quarter](#) [PDF File] - Provides recent monthly and quarterly data from a wide variety of sources relevant to small businesses. Economic activity of small firms is examined at the national level for 2007.

July 2007 – [The Relationship Between Employee Turnover and Employee Compensation in Small Business](#) [PDF File], submitted by John B. Hope and Patrick C. Mackin, SAG Corporation; [Research Summary](#) [PDF File].

July 2007 – [The Effect of Wealth and Race on Start-up Rates](#) [PDF File], submitted by Maritza Salazar (BCT Partners, LLC); [Research Summary](#) [PDF File].

June 2007 – [Corporate Venture Capital and the International Intensity of Portfolio Companies](#) [PDF File], submitted by Joseph A. LiPuma, Boston University; [Research Summary](#) [PDF File].

June 2007 – [A Two-step Analysis of Standardized Versus Relationship Bank Lending to Small Firms](#) [PDF File], submitted by Polly Hardee, Ph.D.; [Research Summary](#) [PDF File].

June 2007 – [Review and Analysis of the Effect of EPA's Toxics Release Inventory \(TRI\) Phase II Burden Reduction Proposal on Tri Data Uses](#) [PDF File], submitted by E.H. Pechan & Associates, Inc.; [Research Summary](#) [PDF File].

June 2007 – [A Real Options Model of Stepwise Entry into Self-Employment](#) [PDF File], submitted by Karl J. Wennberg, Timothy Folta, and Frederic Delmar; [Research Summary](#) [PDF File].

May 2007 – [Impact of A-76 Competitive Sourcing on Small Government Vendors, FY 2001 – FY 2006](#) [PDF File], submitted by Eagle Eye Publishers, Inc. & Jack Faucett Associates, Inc.; [Research Summary](#) [PDF].

May 2007 – [Quarterly Indicators: The Economy and Small Business, 1st Quarter](#) [PDF File] - Provides recent monthly and quarterly data from a wide variety of sources relevant to small businesses. Economic activity of small firms is examined at the national level for 2007.

May 2007 – [The Value to Banks of Small Business Lending](#) [PDF File], submitted by Joe Peek, [Research Summary](#) [PDF File].

April 2007 – [Income and Wealth: How did Households Owning Small Businesses Fare from 1989 to 2004?](#) [PDF File], submitted by George W. Haynes; [Research Summary](#) [PDF File].

April 2007 – [The Small Business Share of GDP, 1998-2004](#) [PDF File], submitted by Kathryn Kobe, Economic Consulting Services, LLC.; [Research Summary](#) [PDF File].

April 2007– [Minorities in Business: A Demographic Review of Minority Business Ownership](#) [PDF File], a report on statistical information about minority-owned businesses such as the number of businesses, types of businesses, business turnover, income, industry, procurement, and financing; [Research Summary](#) [PDF File].

March 2007 – [Entrepreneurship in Silicon Valley During the Boom and Bust](#) [PDF File], submitted by Robert Fairlie; [Research Summary](#) [PDF File].

March 2007 – [Structural Factors Affecting the Health Insurance Coverage of Workers at Small Firms](#) [PDF File], submitted by Econometrica, Inc.; [Research Summary](#) [PDF File].

November 2006 – [Quarterly Indicators: The Economy and Small Business, 4rd Quarter](#), [PDF File] - Provides recent monthly and quarterly data from a wide variety of sources relevant to small businesses. Economic activity of small firms is examined at the national level for 2006.

February 2007 – [Friends or Foes: The Spatial Dynamic Between Established Firms and Entrants](#) [PDF File], submitted by Lawrence Plummer; [Research Summary](#) [PDF File].

February 2007 – [Small Business and State Growth: An Econometric Investigation](#) [PDF File], submitted by Donald Bruce, John Deskins, Brian Hill, and Jonathan Rork; [Research Summary](#) [PDF File].

January 2007 – [Self-Employment in the Veteran and Service-Disabled Veteran Population](#) [PDF File], submitted by Open Blue Solutions; [Research Summary](#) [PDF File].

January 2007 – [Getting the Most Bang for the Buck: An Analysis of States' Relative Efficiencies in Promoting the Birth of Small Firms](#) [PDF File], submitted by Whitney Peake and Maria Marshall, Purdue University; [Research Summary](#) [PDF File].

January 2007 – [Research Publications, 2006](#) [PDF File] - This annual publication of Advocacy lists and gives a brief summary of all the economic research reports that were produced on a variety of topics.

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## 2006

December 2006 – [Identification of the Technology Commercialization Strategies of High-tech Small Firms](#) [PDF File], submitted by Diana Hicks, Dirk P. Libaers, Alan L. Porter, David J. Schoeneck (Search Technology, Inc.); [Research Summary](#) [PDF File].

December 2006 – [Small Business and Micro Business Lending in the United States](#) [PDF File], for Data Years 2004-2005 - prepared annually by the Office of Advocacy using Call Report and CRA data from the Federal Reserve Board; [Research Summary](#) [PDF File].

December 2006 – [The Economic Role of Small Businesses Using Large Data Sets: An Analysis of the Contributions of Small Firms to Urban Growth](#) [PDF File], submitted by Steven Craig and Janet Kohlhase; [Research Summary](#) [PDF File].

December 2006 – [The Small Business Economy: A Report to the President 2006](#); [Research Summary](#) (historical versions, [1996-2005](#)) [PDF File] — The annual reference source since 1982 that business owners, policymakers, and researchers have turned to when they need information on small business' performance in the economy.

December 2006 – [Volatility and Asymmetry of Small Firm Growth Rates Over Increasing Time Frames](#) [PDF File], submitted by Rich Perline, Robert Axtell, and Daniel Teitelbaum; [Research Summary](#) [PDF File].

December 2006 – [Economic Gardening: Next Generation Applications for a Balanced Portfolio Approach to Economic Growth](#) [PDF File], submitted by Steve Quello, CCS Logic and Graham Toft, Growth Economics.

December 2006 – [Entrepreneurship and Education: What is Known and Not Known about the Links Between Education and Entrepreneurial Activity](#) [PDF File], submitted by Mark Weaver; Louisiana State University.

November 2006 – [State Tax Policy and Entrepreneurial Activity](#) [PDF File], submitted by Donald Bruce and John Deskins; [Research Summary](#) [PDF File].

November 2006 – [A Survey Based Assessment of Financial Institution Use of Credit Scoring for Small Business Lending](#) [PDF file], submitted by Charles and Adrian Cowan; [Research Summary](#) [PDF File].

November 2006 – [Quarterly Indicators: The Economy and Small Business, 3rd Quarter](#) [PDF File] - Provides recent monthly and quarterly data from a wide variety of sources relevant to small businesses. Economic activity of small firms is examined at the national level for 2006.

September 2006 – [The Government's Role in Aiding Small Business Federal Subcontracting Programs in the United States](#) [PDF File] - a working paper by Major Clark III, Chad Moutray, and Radwan Saade; [Research Summary](#) [PDF File].

September 2006 – [Entrepreneurship: The Foundation for Economic Renewal in the Gulf Coast Region](#) [PDF File] - The proceedings from the 2006 New Orleans conference include presentation summaries, powerpoint presentations, and conference participants; [Research Summary](#) [PDF File].

August 2006 – [Encouraging New Opportunities for Small Business as Prime Contractors through Changes to DOE's Management and Operating and Other Management Contracts](#) [PDF File], a feasibility study by the SBA Office of Advocacy, Department of Energy, National Nuclear Security Administration, DOE, and Defense Nuclear Facilities Safety Board.

August 2006 – [Women in Business: A Demographic Review of Women's Business Ownership](#) [PDF File], written by Ying Lowrey; [Research Summary](#) [PDF File].

August 2006 – [Quarterly Indicators: The Economy and Small Business, 2nd Quarter](#), [PDF File] - Provides recent monthly and quarterly data from a wide variety of sources relevant to small businesses. Economic activity of small firms is examined at the national level for 2006.

August 2006 – [Impact of Government-Wide Acquisition Contracts on Small Business](#) [PDF File], submitted by Eagle Eye Publishers, Inc.; [Research Summary](#) [PDF File].

July 2006 – [Impact of GSA's Information Technology Cooperative Purchasing Program on Small Businesses](#) [PDF File], submitted by Eagle Eye Publishers, Inc.; [Research Summary](#) [PDF File].

June 2006 – [Banking and SME Financing in the United States](#) [PDF File], submitted by Charles Ou; [Research Summary](#) [PDF File].

June 2006 – [How Did Small Business-Owning Households Fare During the Longest U.S. Economic Expansion?](#) [PDF File], submitted by Charles Ou and George Haynes; [Research Summary](#) [PDF File].

May 2006 – [The Impact of Location on Net Income: A Comparison of Homebased and Non-homebased Sole Proprietors](#) [PDF File], submitted by Joanne H. Pratt Associates; [Research Summary](#) [PDF File].

May 2006 – [Quarterly Indicators: The Economy and Small Business, 1st Quarter](#), [PDF File] - Provides recent monthly and quarterly data from a wide variety of sources relevant to small businesses. Economic activity of small firms is examined at the national level for 2006.

April 2006 – [Health Insurance Deductibility and Entrepreneurial Survival](#) [PDF File], submitted by Tami Gurley-Calvez; [Research Summary](#) [PDF File].

March 2006 – [Innovation and Small Business Performance: Examining the Relationship Between Technological Innovation and the Within Industry Distributions of Fast Growth Firms](#) [PDF File], submitted by Peregrine Analytics, LLC.; [Research Summary](#) [PDF File].

February 2006 – [An Empirical Approach to Characterize Rural Small Business Growth and Profitability](#) [PDF File], submitted by Innovation & Information Consultants, Inc.; [Research Summary](#) [PDF File].

February 2006 – [Quarterly Indicators: The Economy and Small Business, 4th Quarter](#), [PDF File] - Provides recent monthly and quarterly data from a wide variety of sources relevant to small businesses. Economic activity of small firms is examined at the national level for 2005.

January 2006 – [Research Publications, 2005](#) [PDF File] - This annual publication of Advocacy lists and gives a brief summary of all the economic research reports that were produced on a variety of topics.

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## 2005

December 2005 – [The Small Business Economy: A Report to the President 2005](#); [\[Research Summary\]](#) (historical versions, [1996-2004](#)) [PDF File] - The annual reference source since 1982 that business owners, policymakers, and researchers have turned to when they need information on small business' performance in the economy.

December 2005 – [Minority Entrepreneurship](#) [PDF File], submitted by Robert W. Fairlie; University of California; Santa Cruz with a review by Ying Lowrey.

December 2005 – [Entrepreneurship and Business Ownership in the Veteran and Service-Disabled Veteran Community](#) [PDF File], submitted by Waldman Associates, edited for the 2005 edition of *The Small Business Economy*.

December 2005 – [Small Firms: Why Market-Driven Innovation Can't Get Along Without Them](#) [PDF File], submitted by William Baumol.

December 2005 – [Broadband User by Rural Small Businesses](#) [PDF File], submitted by Telenomic Research; [Research Summary](#) [PDF File].

December 2005 – [Agency Costs and Ownership Structure: Evidence From the Small Business Finance Survey Data Base](#) [PDF File], submitted by Jacky Yuk-Chow So; [Research Summary](#) [PDF File].

November 2005 – [Research Resources](#) [PDF File], *Research Resources* is designed as a portal to direct faculty, students, and researchers to small business data and research. This resource was formerly called Academic Frequently Asked Questions.

November 2005 – [The Effect of Changes in Monetary Policy on the Expectations, Spending, and Hiring Decisions of Small Business Owners](#) [PDF File], submitted by William C. Dunkelberg and Jonathan A. Scott; [Research Summary](#) [PDF File].

November 2005 – **Quarterly Indicators: The Economy and Small Business, 3rd Quarter**, [PDF File] - Provides recent monthly and quarterly data from a wide variety of sources relevant to small businesses. Economic activity of small firms is examined at the national level for 2005.

November 2005 – [Banking Studies](#) [PDF File], *Small Business and Micro Business Lending in the United States for Data Years 2003-2004* prepared by the Office of Advocacy lists the activity of small business lenders by [state](#); [Research Summary](#) [PDF File].

October 2005 – **Global Perspectives on Entrepreneurship Policy Agenda – Summary, Part 1, Part II, Part III** - Proceedings from the June conference include summaries of presentations, powerpoint presentations, and biographies of speakers.

October 2005 – [Impact of Litigation on Small Business](#) [PDF File], submitted by Klemm Analysis Group; [Research Summary](#) [PDF File].

October 2005 – [State of the Inner City Economies: Small Businesses in the Inner City](#) [PDF File], submitted by Initiative for a Competitive Inner City; [Research Summary](#) [PDF File].

September 2005 – [The Impact of Regulatory Costs on Small Firms \(Update\)](#) [PDF File], submitted by W. Mark Crain; [Research Summary](#) [PDF File].

September 2005 – Preliminary information on women and minorities in business, developed by the U.S. Census Bureau, are available now on the census [2002 Survey of Business Owners \(SBO\)](#) website. The explanation of the data can be found at <http://www.census.gov/csd/sbo/intro2002SBO.htm>. The census' interactive data is sorted by [industrial sectors](#) and sorted by [state](#). The SBO provides data on the number of firms, sales and receipts, employment, and annual payroll for kind of business, by gender, Hispanic or Latino origin, and race. [Download Tables](#) (Self-Extracting Microsoft Excel File).

September 2005 – [U.S. Sole Proprietorships: A Gender Comparison, 1985 - 2000](#) [PDF File], a working paper submitted by Ying Lowery; [Research Summary](#) [PDF File].

August 2005 – **Quarterly Indicators: The Economy and Small Business, 2nd Quarter**, [PDF File] – Provides recent monthly and quarterly data from a wide variety of sources relevant to small businesses. Economic activity of small firms is examined at the national level for 2005.

August 2005 – **Research Study** [PDF File], *Cost of Employee Benefits in Small and Large Businesses*, submitted by Joel Popkin and Company; **Research Summary** [PDF File].

July 2005 – **Research Study** [PDF File], *A Spatial Model of the Impact of State Bankruptcy Exemptions on Entrepreneurship*, submitted by Aparna Mathur; **Research Summary** [PDF File].

June 2005 – **Research Study** [PDF File], *Technology and Entrepreneurship: A Cross-Industry Analysis of Access to Computers and Self-Employment*, submitted by Robert Fairlie; **Research Summary** [PDF File].

June 2005 – **Working Paper** [PDF File], *Business Estimates from the Office of Advocacy: A Discussion of Methodology*, submitted by Brian Headd; **Research Summary** [PDF File].

May 2005 – **Putting It Together: The Role of Entrepreneurship in Economic Development** – **Summary, Part I, Part II, and Part III** [PDF File] – The conference proceedings includes summaries of presentations, biographies of speakers, powerpoint presentations, and a list of participants from the conference.

May 2005 – **Research Study** [PDF File], *Availability of Financing to Small Firms Using the Survey of Small Business Finances*, submitted by Karlyn Mitchell and Douglas K. Pearce; **Research Summary** [PDF File].

April 2005 – **Research Study** [PDF File], *The Innovation-Entrepreneurship NEXUS: A National Assessment of Entrepreneurship and Regional Economic Growth and Development*, submitted by Advanced Research Technologies, LLC.; **Research Summary** [PDF File].

April 2005 – **Research Study** [PDF File], *Finance Companies and Small Business Borrowers: Evidence from the 1993 and 1998 Surveys of Small Business Finances*, submitted by George W. Haynes; **Research Summary** [PDF File].

March 2005 – **Working Paper** [PDF File], *Banking Consolidation and Small Business Lending: A Review of Recent Research*, submitted by Charles Ou.

March 2005 – **Research Study** [PDF File], *The Effects of Mergers and Acquisitions on Small Business Lending by Large Banks*, submitted by KeyPoint Consulting LLC; **Research Summary** [PDF File].

March 2005 – **Banking Studies** [PDF File], *Small Business and Micro Business Lending in the United States for Data Years 2002-2003*, prepared by the Office of Advocacy, lists the activity of small business lenders by **state**; **Research Bulletin** [PDF File].

March 2005 – **Research Study** [PDF File], *Taxes and Entrepreneurial Activity: An Empirical Investigation Using Longitudinal Tax Return Data*, submitted by Donald Bruce, Ph.D., and Tami Gurley; **Research Summary** [PDF File].

February 2005 – **Research Study** [PDF File], *Using Census BITS To Explore Entrepreneurship, Geography, and Economic Growth*, submitted by Zoltan J. Acs and Catherine Armington; **Research Summary** [PDF File].

February 2005 – [Research Study](#), *Dynamics of Minority-Owned Employer Establishments, 1997-2001* – is an analysis of employer data from the Survey of Minority-Owned Business Establishments; [Research Summary](#) [PDF File].

February 2005 – **Quarterly Indicators: The Economy and Small Business, 4th Quarter**, [PDF File] - Provides recent monthly and quarterly data from a wide variety of sources relevant to small businesses. Economic activity of small firms is examined at the national level for 2004.

January 2005 – [Research Publications, 2004](#) [PDF File] This annual publication of Advocacy lists and gives a brief summary of all the economic research reports that were produced on a variety of topics.

January 2005 – [Working paper](#) [PDF File], *Entrepreneurial Risk and Market Entry*, submitted by Brian Wu and Anne Marie Knott from the United States Association for Small Business Entrepreneurship (USASBE), best paper awards; [Research Summary](#) [PDF File].

January 2005 – [Research Study](#) [PDF File], *Firm Size Dynamics of Industries: Stochastic Growth Processes, Large Fluctuations, and the Population of Firms as a Complex System*, submitted by Daniel Teitelbaum and Robert Axtell, NuTech Solutions, Inc.; [Research Summary](#) [PDF File].

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## 2004

December 2004 – [Research Study](#) [PDF File], *Analysis of Type of Business Coding for the Top 1,000 Contractors Receiving Small Business Awards in FY 2002*, submitted by Eagle Eye Publishers, Inc.' [Research Summary](#) [PDF File]. Advocacy seeks supplemental review of a data glitch from GSA on Titan Corporation contracts referenced in the report, [Further correspondence](#).

December 2004 – [Research Study](#) [PDF File], *Development of Business Data: Tracking Firm Counts, Growth, and Turnover by Size of Firms*, submitted by Catherine Armington; [Research Summary](#) [PDF File].

December 2004 – [Research Study](#) [PDF File], *Evaluating Veteran Business Owner Data*, collaborative research by Advocacy staff; Jack Faucett Associates, Inc.; Eagle Eye Publishers, Inc.; Waldman Associates; and REDA International, Inc.; [Research Summary](#) [PDF File].

December 2004 – [Research Study](#) [PDF File], *Self-Employed Business Ownership Rates in the United States: 1979-2003*, submitted by Robert W. Fairlie; [Research Summary](#) [PDF File].

November 2004 – **Quarterly Indicators: The Economy and Small Business, 1st Quarter, 2nd Quarter, 3rd Quarter** [PDF File] - Provides recent monthly and quarterly data from a wide variety of sources relevant to small businesses. Economic activity of small firms is examined at the national level for 2004.

November 2004 – [Research Study](#) [PDF File], *Entrepreneurship and Business Ownership In the Veteran Population*, submitted by Waldman Associates; [Research Summary](#) [PDF File].

November 2004 – [The Small Business Economy: A Report to the President 2004, \[Bulletin\]](#) [PDF File]; (historical versions, [1996-2003](#)) [PDF File] - The annual reference source since 1982 that business owners, policymakers, and researchers have turned to when they need information on small business' performance in the economy.

November 2004 – [Research Study](#) [PDF File], *Costs of Developing a Foreign Market for a Small Business: The Market & Non-Market Barriers to Exporting by Small Firms*, submitted by Palmetto Consulting; [Research Summary](#) [PDF File].

September 2004 – **Quarterly Indicators: The Economy and Small Business, [1st Quarter](#), [2nd Quarter](#)** [PDF File] - Provides recent monthly and quarterly data from a wide variety of sources relevant to small businesses. Economic activity of small firms is examined at the national level for 2004.

August 2004 – **[The Small Business Economy: A Report to the President 2002-2003, \[Bulletin\]](#)** (historical versions [2001](#), [1999-2000](#), [1998](#), [1997](#), [1996](#)) [PDF Files] - The annual reference source since 1982 that business owners, policymakers, and researchers have turned to when they need information on small business' performance in the economy.

July 2004 – *Entrepreneurship in the 21st Century; Conference Proceedings, [Part I](#), [Part II](#), [Part III](#)* [PDF File] - Includes proceedings, [videos](#), biographies of speakers, and powerpoint presentations from the conference.

June 2004 – **[Research Study](#)** [PDF File], *Trends in Electronic Procurement and Electronic Commerce and Their Impact on Small Business*, submitted by Innovation and Information Consultants, Inc.; [Research Summary](#) [PDF File].

June 2004 – **[Research Study](#)** [PDF File], *Characteristics of Federal Government Procurement Spending With Veteran-Owned Business FY 2000 – FY 2003 (3Q)*, submitted by Eagle Eye Publishers, Inc.; [Research Summary](#) [PDF File].

June 2004 – **[Research Study](#)** [PDF File], *Small Businesses as Culprits and Clients: A Comparison of Brownfield Redevelopment in Los Angeles and Kuala Lumpur*, submitted by Carol S. Armstrong; [Research Summary](#) [PDF File].

May 2004 – **[Quarterly Indicators: The Economy and Small Business](#)**, [PDF file] – Provides recent monthly and quarterly data from a wide variety of sources relevant to small businesses. Economic activity of small firms is examined at the national level.

April 2004 – **[Research Study](#)** [PDF File], *The Impact of Tax Expenditure Policies on Incorporated Small Business*, submitted by Innovation & Information Consultants, Inc.; [Research Summary](#) [PDF File].

March 2004 – **[Academic Frequently Asked Questions](#)** [PDF File], encourages faculty, students, and researchers to study small business [\[HTML file\]](#).

March 2004 – **[The Small Business Economy: A Report to the President 2001](#)**, (historical versions [1999-2000](#), [1998](#), [1997](#), [1996](#)) [PDF Files] - The annual reference source since 1982 that business owners, policymakers, and researchers have turned to when they need information on small business' performance in the economy.

March 2004 – **[Research Study](#)** [PDF File], *A Survey of Small Businesses' Telecommunications Use and Spending*, submitted by Stephen B. Pociask, TeleNomic Research, LLC; [Research Summary](#) [PDF File].

February 2004 – **[Working Paper](#)** [PDF File], *Statistical Databases for Economic Research on the Financing of Small Firms in the United States*, submitted by Charles Ou.

February 2004 – [Research Study](#) [PDF File], *Home-Based Business and Government Regulation - Appendices*, submitted by Henry B. R. Beale, Microeconomic Applications, Inc.; [Research Summary](#) [PDF File].

February 2004 – [Research Study](#) [PDF File], *The Impact of Bank Consolidation on Small Business Credit Availability*, submitted by Dr. Steven G. Craig and Dr. Pauline Hardee.; [Research Summary](#) [PDF File].

January 2004 – [Research Study](#) [PDF File], *Why do Small Firms Choose Quasi-Integration? The Case of the Homebuilding Industry*, submitted by James R. Dewald, Jeremy Hall, and James J. Chrisman.

January 2004 – [Research Study](#) [PDF File], *Small and Technology: Acquisitions, Inventor Movement, and Technology Transfer*, submitted by CHI Research Inc.; [Research Summary](#) [PDF File].

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## 2003

December 2003 – [Small Business Frequently Asked Questions](#) [PDF File] - Provides answers to basic questions about small business.

November 2003 – [Firm size data](#) [PDF Files and Excel Files] - This is a longitudinal that contains the most recent data (1988-2000) on the number of employer and non-employer firms, number of establishments, employment, annual payroll, and receipts. Data are presented by location (U.S., state, and MSA) and industry and by size of firm.

November 2003 – [Research Study](#) [PDF File], *Expect Costs of Startup Ventures*, submitted by Blade Consulting Corporation; [Research Summary](#) [PDF File].

August 2003 – [Research Study](#) [PDF File], *Redefining Business Success: Distinguishing Between Closure and Failure* - This paper uses government data sources to analyze business survival and the success status of closed businesses. It was published in the August 2003 edition of *Small Business Economics*, a journal from Kluwer Online, and appears here with their permission, written by Brian Headd.

July 2003 – [Research Study](#) [PDF File], *Small Business During the Business Cycle*, submitted by Joel Popkin and Company; [Research Summary](#) [PDF File].

June 2003 – [Research Study](#) [PDF File], *Impact of Tight Money and/or Recessions on Small Business*, submitted by PM KeyPoint LLC.; [Research Summary](#) [PDF File].

June 2003 – [Research Report](#) [PDF File] *Small Business Economic Indicator, 2002*, (historical versions [1995 - 2002](#)) - Serves as a quick reference guide to most recent data on small business activity (new firms, employment, income and failures) by state. Includes tables with indicators for roughly the last ten years by state.

June 2003 – [Research Report](#) [PDF File] *Self-employment and Computer Usage*, Includes available data and information on the demographics and characteristics of self-employed with computer ownership. [Research Bulletin](#) [PDF File].

May 2003 – [Research Study](#) [PDF File], *Assessing the Profitability and Riskiness of Small Business Lenders in the Banking Industry*, submitted by James W. Kolari; [Research Summary](#) [PDF File].

May 2003 – [Small Business Frequently Asked Questions](#) [PDF File] - Provides answers to basic questions about small business [[HTML](#)] - [[Text](#)].

April 2003 – [Research Study](#) [PDF File], *Foreign Patenting Behavior of Small and Large Firms: An Update*, submitted by Mary Ellen Moguee; [Research Summary](#) [PDF File].

April 2003 – [Research Study](#) [PDF File], *An Exploration of a Secondary Market for Small Business Loans*, submitted by Kormendi/Gardner Partners; [Research Summary](#) [PDF File].

March 2003 – [Research Study](#) [PDF File], *The Impact of Purchase Card Activity on Small Businesses*, submitted by Eagle Eye Publishers, Inc.; [Research Summary](#) [PDF File].

March 2003 – [Research Study](#) [PDF File], *Dynamics of Women-Operated Sole Proprietorships, 1990-1998*, includes major industries, patterns in the number of gross receipts, and net income of women-operated sole proprietorships based on data from the Statistics of Income, Internal Revenue Service. [Financing patterns](#) of women-owned businesses, based on the Survey of Small Business Finances of the Federal Reserve Board are also available in downloadable tables (Microsoft Excel Files). [Research Bulletin](#) [PDF File].

February 2003 – [Research Study](#) [PDF File], *Small Serial Innovators: The Small Firm Contribution To Technical Change*, submitted by CHI Research, Inc.; [Research Summary](#) [PDF File].

February 2003 – [Research Report](#) [PDF File], *Small Business Economic Indicators, 2001*, [PDF File] - Serves as a quick reference guide to current data on small business activity (new firms, employment, income and failures) by state. Tables listing indicators for about the last ten years by state are included.

January 2003 – [Research Study](#) [PDF File], *Study of the Administrative Costs and Actuarial Values of Small Health Plans*, submitted by Actuarial Research Corporation; [Research Summary](#) [PDF File].

January 2003 – Research Study, State and City (MSA) Firm Size Data - Includes the number of employer firms, number of establishments, employment, annual payroll, and receipts.

January 2003 – [Research Publications, 2002](#) [PDF File] – Advocacy produced economic reports on a variety of topics of importance to U.S. small businesses.

January 2003 – [Working Paper](#) [PDF File], *A Longitudinal Analysis of Industry, Enterprise and Behavioral Predictors of SME Inter-firm cooperation*, submitted by Robert Hartl.

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## 2002

November 2002 – [Working Paper](#) [PDF File], *A Profile of Owners and Investors of Privately Held Businesses in the United States 1989-1998*, submitted by Dr. Charles Ou and Dr. George Haynes.

November 2002 – [Research Study](#) [PDF File], *The Real Effects of Liquidity on Behavior: Evidence from Regulation and Deregulation of Credit Markets*, submitted by Jonathan Zinman; [Research Summary](#) [PDF File].

November 2002 – [Banking Studies](#) [PDF File], *Small Business Lending in the United States, 2001 Edition* prepared by the Office of Advocacy lists the activity of small business lenders by [state](#); [Research Bulletin](#) [PDF File].

November 2002 – [Research Study](#) [PDF File], *Rules Versus Discretion in Tax Policy*, submitted by Dr. Radwan Saade.

October 2002 – [Research Study](#) [PDF File], *Influence of R&D Expenditures on new Firm Formation and Economic Growth*, submitted by BJK Associates; [Research Summary](#) [PDF File].

October 2002 – [Research Study](#) [PDF File], *The Impact of Contract Bundling on Small Business: FY1992-FY2001*, submitted by Eagle Eye Publishers; [Research Summary](#) [PDF File], [Fact Sheet](#) [PDF File].

October 2002 – [Research Study](#) [PDF File], *E-Biz: Strategies for Small Business Success*, submitted by Joanne H. Pratt; [Research Summary](#) [PDF File].

October 2002 – [Research Study](#) [PDF File], *Analysis of State Efforts to Mitigate Regulatory Burden on Small Businesses* submitted by Management Research and Planning Corporation; [Research Summary](#) [PDF File].

September 2002 – [Research Study](#) [PDF File], *Share of Small Business NAICS Industries*, submitted by Joel Popkin and Company; [Research Summary](#) [PDF File].

September 2002 – [Research Study](#) [PDF File], *Estimation of Small Business Wealth*, submitted by Joel Popkin and Company; [Research Summary](#) [PDF File].

August 2002 – [Research Report](#) [PDF File], *Micro-Business-Lending Study 2001* (historical versions 2000, 1999, 1998,(PDF files) 1997, 1996 [HTML Files]. This report uses Call Report and Community Reinvestment Act (CRA) data to identify the micro-business-friendly with significant lending activity in loans under \$100,000.

May 2002 – [Research Study](#) [PDF File], *State Small Business Economic Profiles* - Provides statistics on the number and characteristics of small businesses in each state, submitted by Office of Economic Research

March 2002 – [Research Study](#) [PDF File], *Emissions Trading for Small Businesses*, submitted by Jack Faucett Associates, Inc.; [Research Summary](#) [PDF File].

January 2002 – [Research Study](#) [PDF File], *An Investigation of Venture Capital in Women-and Minority-led Firms*, submitted by Dr. Candida G. Brush; Dr. Nancy Carter; Elizabeth Gatewood; Dr. Patricia G. Greene; and Myra M. Hart; [Research Summary](#) [PDF File].

January 2002 – [Research Study](#) [PDF File], *Value of Worker Training Programs to Small Business*, submitted by Carolyn Loeff and Associates; [Research Summary](#) [PDF File].

January 2002 – [Research Study](#) [PDF File], *Small Business Share of Economic Growth*, submitted by Joel Popkin and Company; [Research Summary](#) [PDF File].

January 2002 – [Firm size data](#) [PDF Files and Excel Files] - contains the data on the number of employer and non-employer firms, number of establishments, employment, annual payroll, and receipts. Data are presented by location (U.S., state, and MSA) and industry and by size of firm.

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## 2001

December 2001 – [Research Study](#) [PDF File], *E-Commerce's Impact on the Travel Agency Industry*, submitted by Heartland Information Research; [Research Summary](#) [PDF File].

November 2001 – [Research Study](#) [PDF File], *Earnings Growth among Disadvantaged Business Owners*, submitted by Dr. Robert Fairlie; [Research Summary](#) [PDF File].

November 2001 – [Research Report](#) [PDF File], *Minorities in Business* – is a report on statistical information about minority-owned businesses such as the number of businesses, types of businesses, business turnover, income, industry, procurement, and financing.

October 2001 – [Research Study](#) [PDF File], *The Impact of Regulatory Costs on Small Firms*, submitted by W. Mark Crain and Thomas D. Hopkins; [Research Summary](#) [PDF File].

October 2001 – [Research Study](#) [PDF File], *Women in Business, 2001* – is a report on the ownership, formation, growth, management, financing and other social and economic characteristics of women in business, based upon data compiled from federal government sources by the Office of Economic Research of the U.S. Small Business Administration, Office of Advocacy. [Research Bulletin](#) [PDF File].

August 2001 – [Research Study](#) [PDF File], *Does a Rising Tide of Small Business Jobs Lift All Boats?* submitted by John M. Fitzgerald and David C. Ribar; [Research Summary](#) [PDF File].

June 2001 – [Research Study](#) [PDF File], *Economic Policy and the Start-up, Survival, and Growth of Entrepreneurial Ventures*, submitted by Douglas Holtz-Eakin and Harvey S. Rosen; [Research Summary](#) [PDF File].

June 2001 – [Research Study](#) [PDF File], *Wealth and Income: How Did Small Businesses Fare from 1989 to 1998?*, submitted by Dr. George W. Haynes; [Research Summary](#) [PDF File].

March 2001 – [Research Study](#) [PDF File], *An Evaluation of Compliance with the Regulatory Flexibility Act by Federal Agencies*, submitted by CONSAD Research Corporation; [Research Summary](#) [PDF File].

March 2001 – [Research Study](#) [PDF File], *Analyses of Business Dissolution by Demographic Category of Business Ownership*, submitted by Dr. Richard J. Boden, Jr.; [Research Summary](#) [PDF File].

March 2001 – [Research Study](#) [PDF File], *Rural and Urban Areas by Firm Size, 1990-1995* – A report on the changing share of small employer firms with regard to establishments and employment in rural and urban areas by major industry and state prepared by Dr. Charles Ou and Dr. Robert Berney.

January 2001 – [Research Study](#) [PDF File], *Impact of E-commerce on Auto Dealers*, submitted by Jack Faucett Associates; [Research Summary](#) [PDF File].

January 2001 – [Research Study](#) [PDF File], *Business Success: Factors leading to surviving and closing successfully* – Article written in the Office of Advocacy and published as a U.S. Census Bureau, Center for Economic Studies working paper analyzing survival and closure issues by business type, submitted by Brian P. Headd.

2001 – [Research Report](#) [PDF File], *Small Business Economic Indicators, 2000* – Contains current data on small business activity (new firms, employment, income and terminations) by state, and serves as a quick reference guide. Tables listing indicators for about the last ten years by state are included.

2001 – [Research Report](#) [PDF File], *Small Business Economic Indicators, 1999* – A reference guide to the latest data on small business activity, including state and industry data.

2001 – [Firm size data](#) [PDF File], - Statistics by business size from the U.S. Census Bureau – Serves as a quick reference guide to Census small business figures, and contains the data on the number of employer and non-employer firms, number of establishments, employment, annual payroll, and receipts. Data are presented by location (U.S., state, and MSA) and industry and by size of firm.

2001 – [Research Report](#) (historical versions [1998](#), [1997](#), [1996](#)) [PDF Files] *The State of Small Business: A Report of the President, 1999–2000* – The annual reference source since 1982 that business owners, policymakers, and researchers have turned to when they need information on small business' performance in the economy.

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## Appendix J

### Pending Economic Research Contracts (October 10, 2008)

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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. This appendix lists research contracts that were outstanding at the beginning of Fiscal Year 2009. 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 be changed before release.

#### Contracts awarded in FY 2007 or earlier:

- ***Analysis of Small Business Innovation by Ceteris Group.*** This study seeks to investigate the link between patent applications, firm size, and industry. In doing so, it will test a few hypotheses, the most notable of which is "are small firms more innovative than their larger counterparts?"
- ***An Analysis of Small Business Patents by Industry and Firm Size by 1790 Analytics.*** This study will measure the role of small businesses in highly innovative industries and emerging technologies. The data for the study are a large sample of patent applications across industries and technologies, including both large and small firm filers. The study will examine not only what share of patents small firms file, but how small firm innovation differs from large firm innovation.
- ***Are Planners Doers? Pre-Venture Planning and the Start-up Behaviors of Entrepreneurs in the PSED.*** This study explores whether and when business planning influences entrepreneurial action.
- ***Estimating the Contribution of Immigrant Entrepreneurs by Robert Fairlie.*** Using matched data from the 1996-2006 Current Population Surveys (CPS), the author studies immigrant entrepreneurship using a new measure that captures the rate of business creation at the individual owner level.
- ***Impact on Small Businesses of Climate Change Proposals by Economic Consulting Services.*** The report will use supply chain relationships (as determined by input-output tables) for small firms across a large number of industries to estimate how various climate change initiatives, if enacted at the federal level, would impact small business. Impacts are determined by factors such as how much energy small firms within an industry utilize, and how large an impact on energy prices proposals such as a cap-and-trade system would be likely to have.

- **Effective Tax Rates Faced by Small Businesses by Quantria Strategies.** This study attempts to calculate effective income tax rates faced by small businesses by tracing income to its taxable destination. It will also examine what provisions of the tax code are more effective in helping small businesses lower their effective rate.
- **An Examination of Financial Patterns using the Survey of Small Business Finances by George Haynes.** This study uses the Federal Reserve Board's Survey of Small Business Finance (SSBF) data (1993-2003) to study the changes of financing patterns of small business borrowers and the impact (if any) of these changes on the rise of non-traditional commercial lending and small business growth.
- **High-Tech Immigrant Entrepreneurship in the United States by Corporate Research Board (CRB).** This project conducts a survey using the CRB's gazelle database to better understand the relative roles of immigrants and native-born citizens in founding U.S. high-tech companies. These data allow reliable estimates of rates of immigrant-founded high-tech gazelles at the national, industry, and regional levels. The survey was fielded in September 2008.
- **Low-Wage Worker Characteristics by Firm Size and Industry by Innovation and Information Consultants."** This research seeks to explore the impact on small businesses in those industries with significant numbers of low-wage workers, and how changes in minimum wage standards have affected small business. It will also update tabulations of low-wage worker characteristics presented in an earlier study for SBA.
- **Office of Advocacy Research Academic Citation Study by Verner Consulting.** This analysis seeks to show how Office of Advocacy research and data are being utilized in academic literature. It will do this by showing how such research is being cited by other authors, and it will be useful in evaluating the Office's overall influence in the field of small business and entrepreneurship research.
- **Small Business Retirement Plans by Economic Consulting Services.** This study uses the Census Bureau's ongoing Survey of Income and Program Participation (SIPP) and IRS Form 5500 data to examine and contrast retirement plans between small and large firms.
- **Small Business Issues Surrounding U.S. Military Reservists by SAG Corporation.** Anecdotal evidence suggests that extended absences by employees who are members of the National Guard or Reserve components which have been activated and deployed have a disproportionate impact on small businesses. Because they have fewer employees, small businesses face greater difficulties adjusting to extended absences and redistributing work when Reservists return. Using DOD data, the contractor will compare the characteristics of firms employing activated Reservists with the characteristics of firms employing non-activated Reservists and a sample of similar employees with no Reserve experience.
- **Small Business Manufacturing, Outsourcing, and Insourcing by StratEdge.** The study examines the role of small U.S. manufacturing firms across a variety of industries to determine the effects of changes in firm, plant, and employment locations. The study further looks at how these changes have impacted small businesses conditioned upon their role in the supply chain.

- ***Who Needs Credit and Who Gets Credit? Evidence from the SSBF* by Krähenbühl Global Consulting.** The report uses data from the Federal Reserve Board's Survey of Small Business Finance (SSBF) to investigate factors that differentiate three types of loan borrowers – non-borrowers, successful borrowers, and those that needed but failed to obtain financing.
- ***Women Entrepreneurs: Time-Use and Determinants of Self-Employment* by TGC Economic Consulting.** This analysis will address two main issues using the American Time Use Survey: (1) time-use patterns among self-employed women and how these patterns differ from other workers and individuals not in the labor market; and (2) the determinants of self-employment amongst subgroups of women.

**Contracts awarded at the end of FY 2008:**

- ***Analysis of Entrepreneurship Coursework's Influence on Entrepreneurship and Innovation* by Summit Consulting.** This research analyzes the extent to which courses of study, pedagogy, and specific entrepreneurial courses influence the selection into entrepreneurship and innovative performance. In particular, it utilizes survey data from the Berkley Center for Entrepreneurial Studies at New York University's Stern School of Business that surveyed graduates of prominent U.S. and foreign universities to measure the influence of their entrepreneurship coursework. (The survey was funded by the Kauffman Foundation.)
- ***Credit Markets for Small Businesses in the United States* by Krähenbühl Global Consulting.** This research seeks to use Federal Reserve SSBF data to examine credit markets for small businesses. This analysis will look specifically at how credit is used by smaller firms, and borrowing patterns will be examined by various owner characteristics.
- ***Determinants of Growth in Entrepreneurship Concentration across U.S. Labor Market Areas: 1970-2006* by TGC Economic Consulting.** The focus of this project will be to explore the factors that drove growth in entrepreneurship concentration across local labor markets during the past 30 years. In particular, it will explore linkages between human capital and regional economic growth.
- ***Do Depreciation Rules Influence Small Business Activity?* by John Deskins.** Accelerated depreciation rules are frequently the subject of discussion among small business policymakers; in fact, the most recent economic stimulus legislation raised the Section 179 expensing limit and included bonus depreciation for capital items purchased in 2008. This study will use the University of Michigan Tax Research Database, a source of public-use tax data spanning the years of 1979 to 1990, to examine the effects of depreciation changes on entrepreneurial activity.
- ***Impact of International Competition on Survival of Small Wholesalers and Retailers* by Robert Feinberg.** The project will examine the vulnerability of small retailers and wholesalers to international competition (e.g., from exchange rate fluctuations and import shares). The time period studied will be 1989-2005. This is a follow-up to the contractor's international manufacturing competition study.
- ***The Impact of Regulatory Costs on Small Firms* by W. Mark Crain.** This research will update previous Advocacy studies on the costs for small businesses of complying with

federal regulations. Previous research includes Hopkins (1995), Crain and Hopkins (2001), and Crain (2005) – all of which documented the fact that very small firms have significantly higher compliance costs than their larger counterparts.

- ***Linking Small Business Education and Training with Employee Retention by Capitol Research, Inc.*** The authors of this study plan use data from the National Longitudinal Study of Youth to relate employee training and education to their retention among small businesses. This study should produce an examination of earnings mobility based on human capital and employee training variables.
- ***A Look at the Intermingling of Assets for Small Firms by George Haynes.*** This study will examine the intermingling of assets between personal and business accounts, measuring this from the Federal Reserve's yet-to-be released 2007 Survey of Consumer Finances (to be released in spring 2009). The study will also continue previous examinations of small business wealth.
- ***Measuring and Modeling the Federal Income Tax Compliance Burden on Small Business by Quantria Strategies.*** This proposal seeks to measure and model the federal income tax compliance burdens of small businesses using microsimulations of public use IRS Statistics of Income (SOI) data.
- ***Nonemployer Firms Special Tabulations and Write-Up by Zoltan Acs (with Advocacy economist Brian Headd).*** Advocacy funded the U.S. Census Bureau to produce special tabulations on nonemployer entry and exit by state and major industry. The contractor and Advocacy staff will evaluate the results of the U.S. Census Bureau's nonemployer special tabulations on business entry and exit. These results will be compared with employer turnover to better understand the dynamics of various small business sectors.
- ***Survival and Growth Research on Small Businesses by Berkeley Policy Associates.*** The authors seek to learn more about self-employment using the National Longitudinal Study of Youth (NSLY). In particular, they will look at self-employment using two separate cohorts – NSLY79, which includes individuals born between 1957 and 1964 and those born between 1980 and 1984. This study seeks to learn more about self-employment dynamics over one's life span.
- ***Tax and Regulatory Barriers for Veteran Business Owners by Microeconomic Applications.*** This study will examine the tax and regulatory climate for small businesses which are owned by veterans and/or service-disabled veterans.
- ***Where (and Why) in America? Business Start-Ups from 1990 to 2006 by Wyckoff Consulting.*** This paper seeks to look at regional economic growth; in particular, it will focus on cluster development and new firm births by county using Census data.

## Appendix K

### Pending Rules of Open Interest to Advocacy (October 10, 2008)

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The following list includes Advocacy public comments on regulatory issues that remain of open interest on October 10, 2008. Generally, this means that the subject rule has not been finalized, withdrawn or reopened, and that it is still under consideration. Future readers will find that final dispositions will be made on some of these proposals while new ones will appear.

#### 2008

[Letter dated 10/09/08 – Social Security Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Revised Medical Criteria for Evaluating Hearing Loss; [73 Fed. Reg. 47103 \(August 13, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 10/09/08 – United States Department of Agriculture, Animal and Plant Health Inspection Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Viral Hemorrhagic Septicemia; Interstate Movement and Import Restrictions on Certain Live Fish; [73 Fed. Reg. 52173 \(September 9, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 09/15/08 - Department of Homeland Security, U.S. Citizenship and Immigration Services](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers; [73 Fed. Reg. 49109 \(August 20, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 08/07/08 - Federal Acquisition Council, Civilian Agency Acquisition Council, and the Defense Acquisition Regulations Council](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Acquisition Regulation; Employment Eligibility Verification; [72 Fed. Reg. 33374 \(June 12, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 08/06/08 - Department of Justice, Civil Rights Division](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities; [73 Fed. Reg. 34508 \(June 17, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 07/23/08 - Department of Homeland Security, United States Coast Guard](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Advance notice of proposed rulemaking on Commercial Fishing Industry Vessels; [73 Fed. Reg. 16815 \(March 31, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 07/14/08 - Department of Agriculture, Forest Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Locatable Minerals Operations Conducted on National Forest Systems Lands; [73 Fed. Reg. 15694 \(March 25, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 06/25/08 - Securities and Exchange Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - strongly supporting the Securities and Exchange Commission's (SEC's) approval of a one-year extension of Section 404(b) of the Sarbanes-Oxley Act of 2002 for smaller public companies; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 06/11/08 - Department of Housing and Urban Development](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Real Estate Settlement Procedures Act (RESPA): Proposed Rule; [73 Fed. Reg. 14029 \(March 14, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 05/19/08 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; [73 Fed. Reg. 11591 \(March 4, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 05/19/08 - Department of Transportation, Federal Motor Carrier Safety Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators; Proposed Rule; [72 Fed. Reg. 73225 \(December 26, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 05/13/08 – Consumer Product Safety Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Standard for the Flammability of Residential Upholstered Furniture, Proposed Rule; [73 Fed. Reg. 11701 \(March 4, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 04/25/08 - Department of Homeland Security](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Initial Regulatory Flexibility Analysis; [73 Fed. Reg. 4157 \(March 26, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 04/24/08 - Department of Treasury, Internal Revenue Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Government entities required to withhold 3% on payments for services and property; [IRS Notice 2008-38](#) [PDF File]; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 04/23/08 - Department of Transportation](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Transportation for Individuals With Disabilities: Passenger Vessels; [73 Fed. Reg. 14427 \(March 18, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 04/07/08 - Department of Labor, Employment Standards Administration and Wage and Hour Division](#) [html], [\[text\]](#) or [\[PDF File\]](#) - The Family and Medical Leave Act of 1993; Proposed Rule; [73 Fed. Reg. 7875 \(February 11, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 03/31/08 - Environmental Protection Agency](#) [PDF File] - regarding the Report of the Small Business Advocacy Review Panel, including the Executive Summary, on Revisions to the Total Coliform Monitoring and Analytical Requirements and Consideration of Distribution System.

[Letter dated 03/21/08 - Department of Treasury, Internal Revenue Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Guidance Regarding Marketing of Refund Anticipation Loans (RALs) and Certain Other Products in Connection With the Preparation of a Tax Return; [73 Fed. Reg. 1131 \(January 7, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 03/14/08 - Department of Transportation, National Highway Traffic Safety Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Tire Registration and Recordkeeping; Proposed Rule; [73 Fed. Reg. 4157 \(January 24, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 03/07/08 – Federal Communications Commission](#) [PDF File] or [\[text\]](#) - Petition To Establish Procedural Requirements To Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended; [73 Fed. Reg. 6888 \(February 6, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/28/08 - Department of Labor, Occupational Safety and Health Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Confined Spaces in Construction; Proposed Rule; [72 Fed. Reg. 67351 \(November 28, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/28/08 – Department of Health and Human Services, Food and Drug Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Draft Guidance for Industry: Questions and Answers Regarding the Labeling of Dietary Supplements as Required by the Dietary Supplement and Nonprescription Drug Consumer Protection Act; [73 Fed. Reg. 197 \(January 2, 2008\)](#) [PDF File] and [73 Fed. Reg. 196 \(January 2, 2008\)](#) [PDF File]; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/25/08 - Securities and Exchange Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Commending Chairman Christopher Cox for commencing a cost-benefit study of the auditor attestation requirement for smaller public companies under Section 404(b) of the Sarbanes-Oxley Act of 2002; [73 Fed. Reg. 7449 \(February 7, 2008\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/20/08 - Small Business Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Women-Owned Small Business Federal Contract Assistance Procedures; [72 Fed. Reg. 73285 \(December 27, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 01/15/08 - Department of Labor, Occupational Safety and Health Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Transmittal of the Report of the Small Business Advocacy Review Panel on the Occupational Safety and Health Administration's draft standard Occupational Exposure to Beryllium.

## 2007

[Letter dated 12/12/07 - Federal Reserve System and Department of Treasury](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Prohibition on Funding of Unlawful Internet Gambling Act of 2006; [72 Fed. Reg. 56680 \(October 4, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 11/29/07 - Department of Justice, Civil Rights Division](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Submission of the report, [Evaluation of Barrier Removal Costs Associated with the 2004 Americans with Disabilities Act \(ADA\) Accessibility Guidelines](#), prepared by E.H. Pechan & Associates, [Research Summary](#).

[Letter dated 11/15/07 – Office of Surface Mining Reclamation and Enforcement, Department of the Interior](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States; Proposed Rule, [72 Fed. Reg. 48889 \(August 24, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 11/07/07 – Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Response to industry concerns over the FCC's forbearance analysis; [WC Docket No. 06-172 \(August 15, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 11/02/07 - Department of Homeland Security, Transportation Security Administration and Department of Transportation](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Proposed rulemaking on the Secure Flight Program; [72 Fed. Reg. 48356 \(August 23, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 10/12/07 - Environmental Protection Agency](#) [html] or [\[PDF File\]](#) - Reply to the notification letter regarding a Small Business Advocacy Review Panel on the proposed SBAR Panel for National Primary Drinking Water Regulations: Revisions to the Total Coliform Monitoring and Analytical Requirements and Consideration of Distribution System Issues (TCR Rule).

[Letter dated 09/19/07 - Department of Labor, Occupational Safety and Health Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Reply to the notification letter regarding a Small Business Advocacy Review Panel on the Occupational Safety and Health Administration's draft proposal for Occupational Exposure to beryllium.

[Letter dated 09/18/07 - Department of Homeland Security](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Final Safe Harbor Procedures for Employers Who Receive a No-Match Letter; [72 Fed. Reg. 45611 \(August 15, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 09/13/07 - Department of Health and Human Services, Centers for Medicare & Medicaid Services](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Surety Bond Requirement for Suppliers of Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS); [72 Fed. Reg. 42001 \(August 1, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 09/11/07 - Securities and Exchange Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Smaller Reporting Company Regulatory Relief and Simplification; [72 Fed. Reg. 39669 \(July 19, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 08/08/07 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - Parties Asked To Refresh Record in the Special Access Notice of Proposed Rulemaking; [72 Fed. Reg. 40814 \(July 25, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 06/27/07 - Securities and Exchange Commission](#) [html] or [\[PDF File\]](#) - Notice of Filing of Proposed Rule Change Amending FAST and DRS Limited Requirements for Transfer Agents; [72 Fed. Reg. 30648 \(June 1, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 05/25/07 - Securities and Exchange Commission](#) [html] [\[text\]](#) or [\[PDF File\]](#) - SEC open Meeting on Section 404 of the Sarbanes-Oxley Act, May 23, 2007.

[Letter dated 05/10/07 - Department of Treasury and Internal Revenue Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - commending them for their recent revised Initial Regulatory Flexibility Analysis (IRFA) for the proposed rule entitled "Escrow Accounts, Trusts, and Other Funds Used During Deferred Exchanges of Like-Kind Property" [72 Fed. Reg. 13055 \(March 20, 2007\)](#) [PDF File] or [\[text\]](#).

[Letter dated 05/10/07 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - request for rulemaking on copper retirement; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 03/30/07 - Department of Transportation, Federal Aviation Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Aircraft Production and airworthiness approvals, parts marking, and miscellaneous proposals; [72 Fed. Reg. 6968 \(February 14, 2007\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 03/23/07 - Department of Treasury, Alcohol and Tobacco Tax and Trade Bureau](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Comments on their Notice of Proposed Rulemaking on Tax Classification of Cigars and Cigarettes; [71 Fed. Reg. 62505 \(October 25, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/21/07 - Securities and Exchange Commission & Public Company Accounting Oversight Board](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Management's Report on Internal Control Over Financial Reporting; Proposed interpretation; Proposed Rule; [71 Fed. Reg. 77635 \(December 27, 2006\)](#) [PDF File] or [\[text\]](#). Proposed Auditing Standard-An Audit of Internal Control Over Financial Reporting that is Integrated with an Audit of Financial Statements and Related Proposals; [Release No. 2006-007 \(Public Company Accounting Oversight Board, Dec. 2006\)](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/08/07 - Department of Labor](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Request for Information on the Family and Medical Leave Act of 1993; [71 Fed. Reg. 69504 \(December 1, 2006\)](#); [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/07/07 - Department of Homeland Security](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Proposed Chemical Facility Anti-Terrorism Standards Rule; [71 Fed. Reg. 58276 \(December 28, 2006\)](#); [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/05/07 - Department of Transportation, Federal Aviation Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Proposed rule on Production and Airworthiness Approvals, Part Marking, and Miscellaneous Proposals; [71 Fed. Reg. 58914 \(October 5, 2006\)](#); [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

## 2006

[Letter dated 12/19/06 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Congratulatory letter regarding Spill Prevention, Control and Countermeasure (SPCC) program; [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 11/09/06 - Architectural and Transportation Barriers Compliance Board](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Americans With Disabilities Act (ADA) Accessibility Guidelines for Passenger Vessels; Reopening of comment period; [71 Fed. Reg. 53630 \(September 12, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 11/08/06 - Environmental Protection Agency](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Comments on Proposed 2006 Multi-Sector General Permit (MSGP) for Industrial Facilities; [71 Fed. Reg. 40827 \(July 18, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#); [Technical Memorandum/Total Suspended Solids and Multi-sector General Permit](#) by E.H. Pechan & Associates, Inc.

[Letter dated 11/02/06 - Occupational Safety and Health Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Comments on its Advanced Notice of Proposed Rulemaking on Hazard Communication (Globally Harmonized System of Classification and Labeling of Chemicals (GHS)); [71 Fed. Reg. 53617 \(September 12, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Comment dated 10/25/06 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - Comment in addressing the "Missoula Plan," a plan filed by the National Association of Regulatory Utility Commissioners in response to the Commission's proposed rule on Developing a Unified Inter-carrier Compensation Regime; [CC Dkt. No. 01-92](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 10/17/06 - Occupational Safety and Health Administration](#) [PDF File] - Transmittal of the Report of the Small Business Advocacy Review Panel convened on the Occupational Safety and Health Administration's draft proposal for Cranes and Derricks.

[Letter dated 10/03/06 - U.S. Fish and Wildlife Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Proposed Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx; [71 Fed. Reg. 5515 \(October 3, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 09/15/06 - Securities and Exchange Commission](#) [PDF File] - Advance notice of proposed rulemaking concerning Concept Release; [71 Fed. Reg. 40865 \(July 18, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 09/14/06 - Securities and Exchange Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Internal Control Over Financial Reporting in Exchange Act; Periodic Reports of Non-Accelerated Filers and Newly Public Companies; [71 Fed. Reg. 47060 \(August 15, 2006\)](#); [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 08/25/06 - Department of Labor, Occupational Health and Safety Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Reply to the notification letter regarding a Small Business Advocacy Review Panel on the Occupational Safety and Health Administration's draft proposal for Cranes and Derricks in Construction.

[Letter dated 08/10/06 - U.S. Fish and Wildlife Service](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Amended Designation of Critical Habitat for the Wintering Population of the Piping Plover; [71 Fed. Reg. 33703 \(June 12, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 08/08/06 - Federal Communications Commission](#) [PDF File] or [\[text\]](#) - Universal Service Contribution Methodology; [WC Dkt. No. 06-122](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 07/17/06 - Small Business Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Notice of proposed rule regarding the Women-Owned Small Business Federal Contract Assistance Program; [71 Fed. Reg. 34550 \(June 15, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 05/30/06 - Department of State](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Proposed Exchange Visitor Program – Training and Internship Programs Rule; [71 Fed. Reg. 17768 \(April 7, 2006\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Statement dated 05/03/06 - House Committee on Government Reform](#) [PDF File] or [\[text\]](#) - Regarding the problems small public companies face with new Sarbanes Oxley Act rules.

[Letter dated 04/27/06 - Securities and Exchange Commission](#) [PDF File] or [\[text\]](#) - Regarding compliance experience with section 404 of the Sarbanes Oxley Act of 2002; [Fact Sheet Summarizing Advocacy's Letter](#).

[Comment dated 3/14/06 - Federal Communications Commission](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Summarizing Advocacy's recommendations made at a meeting with the FCC regarding the Junk Fax Prevention Act of 2005; [CG Dkt. No. 05-338](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/10/06 - Environmental Protection Agency](#) [PDF File] or [\[text\]](#) - Spill Prevention, Control and Countermeasure (SPCC) Rule; Proposed Amendments; Qualified Facility, Oil-Filled Equipment and Other Revisions; [70 Fed. Reg. 75324 \(December 12, 2005\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#); [SPCC Technical Memorandum](#) by E.H. Pechan & Associates, Inc.

[Letter dated 02/06/06 - Department of Transportation, Federal Aviation Administration](#) [PDF File] - Proposed Washington, DC Metropolitan Area Special Flight Rules Area Rule; [70 Fed. Reg. 45250 \(August 4, 2005\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 02/01/06 - U.S. Fish and Wildlife Service](#) [PDF File] - Proposed Designation of Critical Habitat for the California Red-Legged Frog (*Rana aurora draytonii*); [70 Fed. Reg. 66,906 \(November 3, 2005\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

[Letter dated 01/26/06 - Securities and Exchange Commission's Advisory Committee](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Smaller Public Companies that strongly supported draft recommendations to reform securities regulation.

[Letter dated 01/09/06 - Department of Labor, Occupational Safety and Health Administration](#) [html], [\[text\]](#) or [\[PDF File\]](#) - Proposed Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment Rule [70 Fed. Reg. 34822, \(June 15, 2005\)](#) [PDF File] or [\[text\]](#); [Fact Sheet Summarizing Advocacy's Letter](#).

## Appendix L

### Top Ten 2008 Regulatory Review and Reform (r3) Nominations

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*Environmental Protection Agency (EPA).*

- **EPA should revise outdated or inaccurate testing requirements so that modern dry cleaners can have a valid method for demonstrating compliance.** The Clean Air Act's required New Source Performance Standard (NSPS) testing method was developed before modern closed-loop dry cleaning technology became widespread. The testing method requires an operator to open the machine to sample emissions. However, most modern machines are closed-loop machines that will automatically shut down if any of the components are disconnected. Dry cleaners cannot conduct the required test in the manner specified by the rule. Similarly, halogenated hydrocarbon detectors typically measure ounces of refrigerant rather than parts per million (ppm), and most are not calibrated to detect them at concentrations down to 25 ppm. Dry cleaners using these detectors therefore cannot meet the 25 ppm sensitivity requirement. EPA should (1) update the outdated NSPS testing methods to reflect current equipment that is in use in the modern dry cleaning industry, and (2) clarify that hydrocarbon detectors for refrigerants are not required to have a sensitivity down to 25 ppm.
- **EPA should consider expanding the ways for small communities to qualify to meet alternative drinking water standards, provided that the alternative standards are protective of human health and are approved by state authorities.** The 1996 Amendments to the Safe Drinking Water Act established a process to allow small drinking water systems that cannot meet EPA's national drinking water standards to meet an alternative standard, provided that it is protective of human health and is necessary to avoid financial hardship for the community where the system is located, and that the state regulatory agency agrees with the alternative standard. EPA considers a community's ability to pay when it determines how much a small system must spend to meet the national standards. No small drinking water system has ever qualified to obtain an affordability variance. Small systems are currently required to spend up to \$500 per household to meet the national standards, a severe strain in many localities. These communities may also be forced to spend large sums of money to address trace contaminants, such as iron, that have very little potential for serious health impacts. Tens of thousands of small, often rural communities with limited resources to install and operate the treatment equipment are potentially affected. EPA should consider alternative methods for determining affordability, including using different percentages of median household income in the community. If a system's cost exceeds a community's ability to pay, the standard would be deemed "unaffordable," and the system could qualify for a variance if the state approves and the alternative standard remains protective of human health.
- **EPA should simplify rules for recycling useful materials that, because of their current classification, must be handled, transported, and disposed of as hazardous wastes.**

Current hazardous waste management regulations govern facilities that store, treat, or dispose of hazardous wastes. Currently many useful materials that could otherwise be reused are required to be handled, transported, and disposed of as hazardous wastes. Hundreds of thousands of businesses, primarily in manufacturing, are subject to the hazardous waste standards. Many of these facilities are engaged in recycling hazardous wastes, including solvents recovery. The hazardous waste standards are far more stringent, complex, and costly than those required for materials being recovered for reuse. After this r3 designation was made, EPA considered revisions to standards for materials being recycled, including solvents that are recovered onsite. On October 7, 2008, EPA responded positively to this r3 priority by adopting a definition of solid waste that eliminates certain forms of recycled materials from being considered “hazardous wastes,” allowing them to be recycled more easily. This will affect more than 20,000 facilities, at which costs can be reduced while still protecting the environment and encouraging recycling. EPA estimates that its revision will result in annual cost savings of \$95 million.

- **EPA should clarify the definition of “oil” in its oil spill program, so that small facilities that store nonpetroleum-based products are not unintentionally captured by spill program requirements.** The Spill Prevention, Control, and Countermeasure (SPCC) rules govern the prevention and response requirements applicable to facilities that store oil where there is a potential threat of a release of oil to navigable waters. The SPCC rules affect hundreds of thousands of small businesses; a new definition of oil would affect the regulatory status of nonpetroleum oils and chemicals at more than 10,000 small firms. The rule has been in place since 1973, and many facilities are unsure whether a given product is considered “oil” or not, and therefore whether the SPCC rules apply. The current definition relies on the creation of an “oil sheen” or discoloration on surface water—a very broad definition that relies on the judgment of the person making the observation and a variety of other factors. EPA has also moved away from the Coast Guard’s list of materials that are considered oil.

*Federal Aviation Administration (FAA).*

- **FAA and other agencies should review the flight restriction rule for the region surrounding Washington, DC, to determine whether the rule could be revised to avoid harming small airports within the region.** Following the events of September 11, 2001, the FAA issued an emergency rule establishing an air defense identification zone (ADIZ) for the region surrounding Washington, DC. The emergency rule imposed a 15-mile flight restricted zone (FRZ) and a 30-mile ADIZ emanating from Reagan National Airport. In August 2005, the FAA proposed to make the emergency rule permanent. The rule, if finalized, would impose flight operation requirements on aircraft operations within that area, including requirements that aircraft operators: (1) file and activate a flight plan before entering (or re-entering) the restricted area; (2) maintain two-way radio communication with air traffic control; and (3) obtain and display a discrete transponder code while operating within the area. The FAA has concluded that while these restrictions are likely to cause considerable burdens to both air traffic control and the aviation sector within the affected area, they are needed for security reasons. The FRZ and ADIZ have significantly restricted aviation within the Washington, DC region, including limiting flights to and from the three small airports in the FRZ. It is likely that all three of these airports (and any aviation

companies operating at the airports) will go out of business if the rules are finalized. The rule also affects some 150 other airports and numerous businesses operating in the ADIZ. A review of the flight restriction rule could identify provisions that are unnecessary, inefficient, or outdated for affected small entities. The r3 nomination submitter suggested a variety of alternatives, including an expandable FRZ that could be extended in a time of heightened security. By conducting a coordinated review of the rule, the FAA, the Department of Homeland Security, the Department of Defense, and the Secret Service would be able to determine whether the rule could be improved, while continuing to provide adequate security. A full analysis of both the security benefits and the economic impacts should be completed prior to finalizing any rule.

*Federal Acquisition Regulation Council (FAR Council).*

- **Eliminate Duplicative Financial Requirements for Architect-Engineering Services Firms in Government Contracting.** The current government retainage requirement provides for a 10 percent withholding or retainage of fees on firms providing fixed-price architectural-engineering services. The r3 nomination calls for the removal or reduction of such retainage in architect-engineering services contracts, as has been done for other services. Currently more than 230,000 small architectural and engineering (A&E) firms are in the federal procurement system. A change in this regulation will help increase the cash flow of small A&E firms that contract with the federal government. This change should also encourage more firms to enter the federal procurement market, with concomitant improvements in the quality of services.

*Internal Revenue Service (IRS).*

- **The IRS should revise their rules to permit a standard deduction for home-based businesses, which constitute 53 percent of all small businesses.** The Internal Revenue Code permits a deduction for a home office if it is the principal place of business of the taxpayer, used exclusively for business, or used to meet with patients, clients, or customers. However, current IRS regulations do not provide a concise definition of the elements in this provision. In the absence of final regulations describing how to qualify for and calculate the deduction, IRS policies and case law have made it more complicated for a home-based business owner to learn how to obtain the exemption. The requirements to qualify for and calculate the deduction are confusing for taxpayers and do not account for changes in technology that affect the way business is conducted. Consequently, many at-home workers do not take advantage of the home office business deduction. The IRS should revise the rules to permit a standard deduction for home-based businesses. Similar to the Form 1040 standard deduction, the home office business deduction should be optional. Taxpayers who wish to claim the home office deduction could choose to continue to follow the current home office deduction rules or they could choose a new standard deduction.

*Mine Safety and Health Administration (MSHA).*

**MSHA should update its current rules to be consistent with modern mining industry explosives standards.** MSHA regulations govern the use of explosives in various types of mines, including surface metal and nonmetal mines, underground metal and nonmetal

mines, and surface coal mines. The overriding purpose is to promote safety. Key provisions include storage, transportation, use, detonation, maintenance, and other issues. Some of these regulations date to 1971, while others were last updated in 1996. According to the r3 nomination submitter, the rules are outdated and need to be reformed to comport to current industry standards because current MSHA rules do not address some fundamental aspects of explosive safety, such as electronic detonation. The submitter notes that a small business could receive a citation for operating in conformity with current industry best practices, which are not consistent with MSHA's outdated rules. Also according to the submitter, some 29,000 mines operate in the United States, 95 percent of which are small businesses. Nearly every mine is affected by the rule.

*Occupational Safety and Health Administration (OSHA).*

- **Update OSHA's Medical / Laboratory Worker Rule.** The current rule should be reviewed to determine whether it can be made more flexible in situations where workers do not have potential exposure to bloodborne pathogens. OSHA's Bloodborne Pathogens Standard is designed to protect workers from exposure to bloodborne pathogens (viruses and other microorganisms) such as hepatitis B virus (HBV), and hepatitis C virus (HCV). These exposures result primarily from needlestick and other sharps-related injuries as well as from other employee exposures to blood. The rule requires any employer with workers exposed to blood or other potentially infectious materials to implement an exposure control plan for the worksite. The plan must describe how an employer will use a combination of engineering and work practice controls; ensure the use of personal protective clothing and equipment; and provide training, medical surveillance, hepatitis B vaccinations, and signs and labels, among other provisions. Although, the rule affects every small business health care office and lab, the rule makes no provision for medical facilities where employees have very limited exposure to blood, such as dental labs. The r3 nomination submitter stated that the risk of employee illness in many circumstances is extremely low and that compliance with the rule costs billions of dollars, needlessly driving up the cost of medical care.

*Office of Federal Procurement Policy (OFPP).*

- **Update Reverse Auction Techniques for Online Procurement of Commercial Items.** The government's current reverse auction procurement technique should be reviewed to determine whether a government-wide rule is necessary to create a more consistent and predictable online process. In procurements using the reverse auction method, bidders submit their bids through an online intermediary and are informed of competitors' prices but not their identity. Bidders offer successively lower prices until no lower price is offered. The purchasing agency must then decide whether it will make the award. In some instances, the use of reverse auctions may have the unintended result of circumventing the well-established FAR Part 19, which requires agencies to set aside certain dollar threshold contracts for small businesses. The problem exists because no specific FAR regulation instructs contracting officers in how to use the reverse auction tool. The OFPP should review the reverse auction technique and consider structuring a federal government-wide rule that continues to provide the contracting officer with the flexibility embedded in reverse auctions while not conflicting with existing rules on small business competition.

## Appendix M

### SBREFA Panels (1996 – 2008)

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#### Summary of the Environmental Protection Agency (EPA) Small Business Advocacy Review Panels

#### Mandated by the Small Business Regulatory Enforcement Fairness Act of 1996

Rule Title	Date Convened	Date Completed	Published NPRM1/	Final rule Published
<a href="#">Nonroad Diesel Engines</a>	03/25/97	05/23/97	<a href="#">09/24/97</a>	<a href="#">10/23/98</a>
<a href="#">Industrial Laundries Effluent Guideline 2/</a>	06/06/97	08/08/97	<a href="#">12/17/97</a>	
<a href="#">Stormwater Phase II</a>	06/19/97	08/07/97	<a href="#">01/09/98</a>	<a href="#">12/08/99</a>
<a href="#">Transportation Equipment Cleaning Effluent Guidelines</a>	07/16/97	09/23/97	<a href="#">06/25/98</a>	<a href="#">08/14/00</a>
<a href="#">Centralized Waste Treatment Effluent Guideline</a>	11/06/97	01/23/98	<a href="#">09/10/03</a> <a href="#">01/13/99</a>	<a href="#">12/22/00</a>
<a href="#">UIC Class V Wells</a>	02/17/98	04/17/98	<a href="#">07/29/98</a>	<a href="#">12/07/99</a>
<a href="#">Ground Water</a>	04/10/98	06/09/98	<a href="#">05/10/00</a>	<a href="#">11/08/06</a>
<a href="#">FIP for Regional NOx Reductions</a>	06/23/98	08/21/98	<a href="#">10/21/98</a>	<a href="#">04/28/06</a>
<a href="#">Section 126 Petitions</a>	06/23/98	08/21/98	<a href="#">09/30/98</a>	<a href="#">05/25/99</a>
<a href="#">Radon in Drinking Water</a>	07/09/98	09/18/98	<a href="#">11/02/99</a>	
<a href="#">Long Term 1 Enhanced Surface Water Treatment</a>	08/21/98	10/19/98	<a href="#">04/10/00</a>	<a href="#">01/14/02</a>
<a href="#">Filter Backwash Recycling</a>	08/21/98	10/19/98	<a href="#">04/10/00</a>	<a href="#">06/08/01</a>
<a href="#">Arsenic in Drinking Water</a>	03/30/99	06/04/99	<a href="#">06/22/00</a>	<a href="#">01/22/01</a>
<a href="#">Recreational Marine Engines</a>	06/07/99	08/25/99	<a href="#">10/05/01</a> <a href="#">08/14/02</a>	<a href="#">11/08/02</a>

<a href="#"><u>LDV/LDT Emissions and Sulfur in Gas</u></a>	08/27/98	10/26/98	<a href="#"><u>05/13/99</u></a>	<a href="#"><u>02/10/00</u></a>
<a href="#"><u>Diesel Fuel Sulfur Control Requirements</u></a>	11/12/99	03/24/00	<a href="#"><u>06/02/00</u></a>	<a href="#"><u>01/18/01</u></a>
<a href="#"><u>Lead Renovation and Remodeling Rule</u></a>	11/23/99	03/03/00	<a href="#"><u>01/10/06</u></a>	
<a href="#"><u>Metals Products and Machinery</u></a>	12/09/99	03/03/00	<a href="#"><u>01/03/01</u></a>	<a href="#"><u>05/13/03</u></a>
<a href="#"><u>Concentrated Animal Feedlots</u></a>	12/16/99	04/07/00	<a href="#"><u>01/12/01</u></a>	<a href="#"><u>02/12/03</u></a>
<a href="#"><u>Reinforced Plastics Composites</u></a>	04/06/00	06/02/00	<a href="#"><u>08/02/01</u></a>	<a href="#"><u>04/21/03</u></a>
<a href="#"><u>Stage 2 Disinfectant Byproducts Long Term 2 Enhanced Surface Water Treatment</u></a>	04/25/00	06/23/00	<a href="#"><u>08/11/03</u></a> <a href="#"><u>08/18/03</u></a>	<a href="#"><u>01/04/06</u></a> <a href="#"><u>01/05/06</u></a>
<a href="#"><u>Construction and Development Effluent Limitations Guidelines 3/</u></a>	07/16/01	10/12/01	<a href="#"><u>06/24/02</u></a>	
<a href="#"><u>Nonroad Large SI Engines, Recreation Land Engines, Recreation Marine Gas Tanks and Highway Motorcycles</u></a>	05/03/01	07/17/01	<a href="#"><u>10/05/01</u></a> <a href="#"><u>08/14/02</u></a>	<a href="#"><u>11/08/02</u></a>
<a href="#"><u>Aquatic Animal Production Industry</u></a>	01/22/02	06/19/02	<a href="#"><u>09/12/02</u></a>	<a href="#"><u>08/23/04</u></a>
<a href="#"><u>Lime Industry - Air Pollution</u></a>	01/22/02	03/25/02	<a href="#"><u>12/20/02</u></a>	<a href="#"><u>01/05/04</u></a>
<a href="#"><u>Nonroad Diesel Engines - Tier IV</u></a>	10/24/02	12/23/02	<a href="#"><u>05/23/03</u></a>	<a href="#"><u>06/29/04</u></a>
<a href="#"><u>Cooling Water Intake Structures Phase III Facilities</u></a>	02/27/04	04/27/04	<a href="#"><u>11/24/04</u></a>	<a href="#"><u>06/15/06</u></a>
<a href="#"><u>Section 126 Petition (2005 CAIR Rule)</u></a>	04/27/05	06/27/05	<a href="#"><u>08/24/05</u></a>	<a href="#"><u>04/28/06</u></a>
<a href="#"><u>FIP for Regional Nox/So2 (2005 CAIR Rule)</u></a>	04/27/05	06/27/05	<a href="#"><u>08/24/05</u></a>	<a href="#"><u>04/28/06</u></a>
<a href="#"><u>Mobile Source Air Toxics</u></a>	09/07/05	11/08/05	<a href="#"><u>03/29/06</u></a>	<a href="#"><u>02/26/07</u></a>
<a href="#"><u>Non-Road Spark-Ignition Engines/Equipment</u></a>	08/17/06	10/17/06	<a href="#"><u>05/18/07</u></a>	
<a href="#"><u>Total Coliform Monitoring (TCR Rule)</u></a>	01/31/08	03/31/08		

1. Notice of Proposed Rulemaking (NPRM) published in the *Federal Register*.
2. Proposed Rule [withdrawn August 18, 1999](#); EPA does not plan to issue a final rule.
3. Proposed Rule withdrawn [April 26, 2004](#), EPA does not plan to issue a final rule.

**Summary of the Occupational Health and Safety Administration (OSHA)  
[Small Business Advocacy Review Panels](#)**

<b>Rule Title</b>	<b>Date Convened</b>	<b>Date Completed</b>	<b>Published NPRM<sup>1/</sup></b>	<b>Final rule Published</b>
<u><a href="#">Tuberculosis 2/</a></u>	09/10/96	11/12/96	<u><a href="#">10/17/97</a></u>	
<u><a href="#">Safety &amp; Health Program Rule</a></u>	10/20/98	12/19/98		
<u><a href="#">Ergonomics Program Standard</a></u>	03/02/99	04/30/99	<u><a href="#">11/23/99</a></u>	<u><a href="#">11/14/00</a></u>
<u><a href="#">Confined Spaces in Construction</a></u>	09/26/03	11/24/03	<u><a href="#">11/28/07</a></u>	
<u><a href="#">Electric Power Generation, Transmission, and Distribution</a></u>	04/01/03	06/30/03	<u><a href="#">06/15/05</a></u>	
<u><a href="#">Occupational Exposure to Crystalline Silica</a></u>	10/20/03	12/19/03		
<u><a href="#">Occupational Exposure to Hexavalent Chromium</a></u>	01/30/04	04/20/04	<u><a href="#">10/04/04</a></u>	<u><a href="#">02/28/06</a></u>
<u><a href="#">Cranes and Derricks in Construction</a></u>	08/18/06	10/17/06		
<u><a href="#">Occupational Exposure to Beryllium</a></u>	09/17/07	01/15/08		

1. Notice of Proposed Rulemaking (NPRM) published in the *Federal Register*.
2. Proposed Rule [withdrawn December 31, 2003](#), OSHA does not plan to issue a final rule.

## Appendix N

### Regulatory Cost Savings: 2001 – 2007

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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 not been made. Cost savings are not claimed unless the methodologies and sources for their calculation can be well 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 the tables below show, 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.

The following tables depict cost savings on rules on which Advocacy has actively worked. The first table summarizes savings from FY 2001 through the FY 2007. This is followed with a table breaking out specific rules on which savings are claimed. Advocacy's annual RFA reports at <http://www.sba.gov/advo/laws/flex/> have additional information on each rule. Those reports also have information on rules on which Advocacy has worked and savings were achieved but on which estimates of those cost savings could not be made. Those rules are not included in the tables below, but are listed in the annual RFA reports.

#### Summary of Regulatory Cost Savings from Advocacy Interventions

FY 2001 – FY 2007

Fiscal Year	First Year Savings (\$)	Recurring Annual Savings (\$)
2001	4.402 billion	1.381 billion
2002	21.106 billion	10.200 billion
2003	6.362 billion	5.762 billion
2004	17.064 billion	2.806 billion
2005	6.623 billion	.996 billion
2006	7.253 billion	.117 billion
2007	2.570 billion	.285 billion
<b>Total</b>	<b>65.380 billion</b>	<b>21.547 billion</b>

## Regulatory Cost Savings from Advocacy Interventions by Year and Agency

FY 2001 – FY 2007

Agency	Rule	First Year Savings (million \$)	Recurring Annual Savings (million \$)
<b>Fiscal Year 2007</b>			
CPSC	Mattress flammability standards	0.2	
EPA	Toxic release inventory (TRI) final rule	5.9	5.9
EPA	SPCC – Spill prevention, controls, and countermeasures I – final rule	128.0	128.0
EPA	Definition of solid waste	107.0	107.0
EPA	Area source standards for gasoline distribution	117.2	
EPA	Halogenated solvent cleaning residual risk standard	50.0	
EPA	Emissions control from nonroad spark-ignition engines and equipment	36.4	5.6
EPA	Clean Air Act, pollution controls, iron and steel foundries	13.9	2.8
EPA	Clean Air Act, particulate matter	1.0	1.0
EPA	Permit fee incentive for Clean Water Act grant allotments	5.7	
FAA	National air tour safety standards	127.3	
FCC	Customer proprietary network information	6.2	
FDA	Dietary supplement rule	364.6	
FWS	Canada lynx critical habitat designation	919.0	
FWS	Alabama beach mouse critical habitat designation	31.6	
FWS	Spikedace and loach minnow critical habitat designation	46.9	
HHS	Medicare HCAHPS survey	11.6	11.6
HHS	Medicare and Medicaid Programs one-hour rule	0.8	0.8
PHMSA	Lithium battery rule	13.2	
SEC	Management guidance for periodic reports	561.0	
Dept. of State	Exchange visitor program (J-1 visas)	22.2	22.2
<b>Fiscal Year 2006</b>			
CMS	Outcome and Information Assessment Set (OASIS)	334.0	47.7
DOE	Energy conservation standards for distribution transformers	5.0	
EPA	Clean Water Act Phase III cooling water intake structures	74.0	
EPA	SPCC – Spill prevention, controls, and countermeasures I – proposal	46.0	46.0
EPA	Toxics Release Inventory (TRI) Phase II burden reduction – proposal	7.4	7.4
EPA	Clean Air Act requirements to control mobile source air toxics	12.0	12.0
EPA	Resource Conservation and Recovery Act burden reduction rule	3.0	3.0
FAA	Thermal/acoustic insulation installed on transport category planes – final	149.0	
FWS	Canada lynx critical habitat designation	6.0	
FWS	Red legged frog critical habitat designation	396.0	

Agency	Rule	First Year Savings (million \$)	Recurring Annual Savings (million \$)
NHTSA	Federal motor vehicle safety standard no. 139	1.6	
NPS	Personal watercraft rule	1.0	
OSHA	Occupational exposure to hexavalent chromium	519.9	
PHMSA	External product piping (wetlines) on cargo tank motor vehicles	39.4	1.1
SEC	Sarbanes-Oxley Act Section 404 – 17 month compliance extension	5,529.0	
TSA	Transportation worker identification credential	129.2	
<b>Fiscal Year 2005</b>			
APHIS	Mexican avocado import program	34.6	34.6
EPA	Cooling water intake structures - Phase III	10.5	10.5
EPA	Solid waste incinerators	7.6	7.6
DoD	Radio frequency identification tags	62.0	
FCC	Do Not Fax rule	3,556.4	711.3
NARA	Records center facility standards	63.0	
MSHA	Diesel particulate matter	9.3	1.6
FMCSA	Hours of service rule	200.0	200.0
SEC	One year extension for compliance with Sarbanes-Oxley requirements	2,680.0	
<b>Fiscal Year 2004</b>			
HUD	Rules implementing the Real Estate Settlement Procedures Act (RESPA)	10,300.0	
DoT	Computer reservation systems	438.0	438.0
EPA	Water pollution rules for centralized waste treatment facilities	75.0	75.0
EPA	Industrial, commercial, & institutional boiler and process heater air toxics	3,750.0	144.2
EPA	Plywood manufacturing air toxics rule	500.0	150.0
EPA	Water quality requirements for construction and development activities	585.0	585.0
EPA	Aquaculture effluent limitations guidelines	5.0	5.0
EPA	Meat processing effluent limitations guideline	25.0	25.0
EPA	Nonroad diesel engines and fuels rule	1,386.3	1,386.3
<b>Fiscal Year 2003</b>			
EPA	Metal products and machinery effluent guidelines	1,000.0	1,000.0
EPA	Toxic Substance Control Act inventory update rule amendments	4.9	4.9
EPA	Spray and pour polyurethane foam allocation rule	75.0	50.0
EPA	Industrial boilers and process heaters air toxics rule	354.2	18.2
NPS	Snowmobile use in certain areas of the National Park System	15.0	
NMFS	New England groundfish management plan amendment 13	51.2	
INS	Rule limiting the period of admission to the U.S. for nonimmigrant aliens	2,100.0	2,100.0
IRS	End of exemption from highway use excise taxes for mobile machines	460.0	460.0
FWS	Rule limiting the construction of docks in Florida	102.0	102.0
FWS	Rule designating critical habitat in California and Oregon	141.0	141.0

Agency	Rule	First Year Savings (million \$)	Recurring Annual Savings (million \$)
EPA	Miscellaneous coating manufacturing air toxics rule	22.5	12.0
EPA	Construction general permits	200.0	200.0
EPA	Lime manufacturing air toxics rule	0.8	0.8
EPA	Reinforced plastics air toxics rule	4.0	4.0
EPA	Miscellaneous plastic parts air toxics rule	20.0	20.0
FCC	Triennial review – unbundled network elements	1,600.0	1,600.0
FMCSA	Hours of service rule	180.0	18.0
SEC	Sole source procurement revision	0.1	
DoD	Procurement action	0.4	0.4
FTC	Telemarketing sales rule	31.0	31.0
<b>Fiscal Year 2002</b>			
CMS	Revisions to physicians fee schedule	1.4	
EPA	Concentrated animal feeding operation effluent guidelines	645.0	645.0
EPA	Aquaculture effluent guidelines	350.0	350.0
DoE	Energy efficiency standards for air conditioners and heat pumps	130.0	
IRS	Cash accounting rules	250.0	
EPA	Meat processing effluent guidelines	50.0	50.0
DoD	Procurement action	100.0	
DoD	SBIR program	73.8	
EPA	Cross media electronic reporting and record-keeping rule	18,000.0	7,650.0
EPA	Construction and development effluent guidelines	1,500.0	1,500.0
EPA	National emissions standards for lime manufacturing plants	5.0	5.0
DLA	Federal prison procurement action	0.1	
USAID	Agency intervention	0.3	
<b>Fiscal Year 2001</b>			
BLM	Hardrock mining reclamation bond rule	877.0	877.0
EPA	Toxic Release Inventory (TRI) reporting of lead and lead compounds	41.0	20.0
EPA	Control of sulfur in highway diesel fuel	35.0	35.0
EPA	Control of air toxics from mobile sources	190.0	190.0
FAR Council	Contractor responsibility, labor relations and legal costs	28.0	28.0
USFS	Roadless conservation rule	231.3	231.3
OSHA	Ergonomics standard	3000.0	

## Appendix O

### RFA Court Decisions <sup>1</sup>

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#### 1997

**Assoc'd Fisheries of Maine v. Daley**, 127 F.3d 104 (1st Cir. 1997).

The National Marine Fisheries Service (NMFS) adopted a rule to eliminate overfishing of cod, haddock, and yellowtail flounder. Although the NMFS prepared an IRFA and a FRFA for the action, the FRFA consisted of the IRFA plus answers to the submitted comments. The Associated Fisheries of Maine brought suit challenging the action and the NMFS's compliance with the RFA.

The court held that the FRFA prepared by the NMFS, pursuant the RFA, was not facially inadequate, notwithstanding the plaintiff's claim that the FRFA could not consist simply of an IRFA with responses to submitted comments attached. The court opined that an agency can satisfy provisions of the RFA by setting forth the requirements for the FRFA, as long as it compiles a meaningful, easily understood analysis that covers each requisite component dictated by the statute and makes the end product, in whatever form it reasonably may take, readily available to the public. The court further stated that the Secretary of Commerce complied with the FRFA requirements because the Secretary explicitly considered numerous alternatives, exhibited a fair degree of sensitivity concerning the need to alleviate the regulatory burden on small entities within the fishing industry, adopted some salutary measures designed to ease that burden, and satisfactorily explained reasons for rejecting others.

*Positively examined in A.M.L. Intern., Inc. v. Daley, 107 F. Supp. 2d 90 (D.Mass. 2000), *infra*.* The court cited Associated Fisheries for the proposition that administrative actions under the APA should be afforded deference and be overturned only if the regulations were not created pursuant to statute, not reasonable, or unsupported by evidence in the record. Specifically, a rule is "arbitrary and capricious if the agency lacks a rational basis for adopting it." *Id.* at 97 (quoting Associated Fisheries at 109). The court also used Associated Fisheries to support its contention that the RFA did not impose any substantive obligations on an agency, nor did it require an agency to undermine other legislative goals.

*Positively examined in Little Bay Lobster Co. v. Evans, 2002 WL 1005105 (D.N.H. May 16, 2002), *infra*.* The court here also adopted the rational basis definition of arbitrary and capricious, which the court characterized as a reasonableness standard. The court agreed with the Associated Fisheries court that an RFA did not need to have a specific format so long as it included every statutory component and was available to the public. Lastly, this court agreed that an agency need only discuss significant alternatives in an RFA, not every possible alternative.

*Affirmed in Little Bay Lobster Co. v. Evans, 352 F.3d 462 (1st Cir. 2003).*

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<sup>1</sup> Shepardized as of June 9, 2008.

**Sw. Pa. Growth Alliance v. Browner**, 121 F.3d 106 (3d Cir. 1997).

Advanced Manufacturing Network (AMN) intervened and argued that the EPA's final rule denying Pennsylvania's redesignation request was invalid because the EPA did not comply with the RFA. The court concluded that the intervener may not raise its RFA argument because it was not adequately presented to the EPA during the rulemaking process.

Although the court ultimately ruled against the intervener, the court addressed other issues that are relevant to RFA litigation. In the case, EPA argued that the SBREFA amendments did not apply because EPA published the final rule before the effective date of the SBREFA amendments. The court held that the provisions of SBREFA that amended the RFA to provide for judicial review of agency action under RFA applies to legislative rules that were promulgated before the effective date of SBREFA amendments.

The EPA also argued that the intervener could not raise the issue because it was not raised in the plaintiff's brief. While the court acknowledged that generally arguments cannot be raised that were not raised in the parties brief, the court held that when a principal party adopts by reference an argument that an intervener fully briefs, the intervener may argue the question just as if the principal party had fully briefed the issue.

*Positively discussed in W.R. Grace & Co. v. U.S. v. EPA, 261 F.3d 330 (1st Cir. 2001).*

In applying an arbitrary and capricious standard, the court stated that its "only task was to determine whether [the EPA] considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Id.* at 338 (quoting Browner at 111).

**Associated Builders and Contractors, Inc. v. Herman**, 976 F. Supp. 1 (D.D.C. 1997).

The Department of Labor suspended a revised class of employees called "helpers" on federal construction sites in 1993 and reinstated former helper regulations pursuant to a congressional mandate. The regulations expired in April 1996. When the Department of Labor did not implement the revised helper regulations after the expiration, the plaintiffs sought to have the Department of Labor re-implement and enforce the revised helper regulations. The plaintiff alleged that the failure to implement the revised regulations violated the Administrative Procedures Act (APA), the Davis-Bacon Act, the Unfunded Mandates Act, and the Regulatory Flexibility Act (RFA).

With regard to the RFA, the Department of Labor certified that it would not have a significant economic impact on a substantial number of small entities. Although the agency did not prepare a FRFA, the court held that the Department of Labor had met the requirements of the RFA. It had published a certification in the *Federal Register* along with a statement of reasons. *Id.* at 15.

**N.C. Fisheries v. Daley**, 16 F. Supp. 2d 647 (E.D. Va. 1997).

The NMFS maintained a quota on the amount that could be fished in the flounder fishery. The NMFS did not perform a regulatory flexibility analysis. Instead, the NMFS certified that the rule would not have a significant impact on a substantial number of small businesses because the quota remained the same from 1996 to 1997. There was no indication that the NMFS did any comparison of the conditions in 1996 and 1997.

The United States District Court for the Eastern District of Virginia remanded the quota issue to the Department of Commerce after finding that the Department of Commerce violated the RFA and failed to provide an economic analysis sufficient to comply with National Standard 8 of the Magnuson-Stevens Act. The basis of the decision was that the Department failed to provide a proper factual statement to

support its certification that maintaining the quota in the flounder fishery would not have a significant economic effect on a substantial number of small entities.

To address the Department's noncompliance, the court ordered the Department of Commerce to "undertake enough analysis to determine whether the quota had a significant economic impact on the North Carolina Fishery." N.C. Fisheries Ass'n v. Daley, 16 F. Supp. 2d 647, 652. The court further ordered the Department to "include in ... [the] analysis whether the adjusted quota will have a significant economic impact on a small entities in North Carolina." Id.

*Distinguished by Oregon Trollers Ass'n v. Gutierrez*, 452 F.3d 1104 (9th Cir. 2006), *infra*. This case distinguished itself from 16 F. Supp. 2d 647. Unlike that case, the plaintiff here could not show that the agency's analysis fell short of that required by the Magnuson-Stevens Act. Therefore, the court held that if an agency assessed its measure under National Standard 8 in the previous year, it could base the next year's measure on the previous year's measure, provided it updated its National Standard 8 assessment. Accordingly, the court ruled that NMFS did not abuse its discretion in adopting the 2005 measures.

*Distinguished by N.C. Fisheries Ass'n v. Gutierrez*, 518 F. Supp. 2d 62 (D.D.C. 2007), *infra*. Plaintiff argued that the Secretary's dismissal without further consideration of a proposal to allocate fishing privileges based on historical shares violated National Standard 4. The court distinguished its case from 16 F. Supp. 2d 647 because that case did not address at what point a fisherman's share become excessive. Therefore, the Secretary's rejection of the proposal was not arbitrary and capricious, as using historical shares could have given all fishing rights to one or two fisheries.

**N.C. Fisheries Ass'n v. Daley**, 27 F. Supp. 2d 650 (E.D. Va. 1998).

On remand, the main issue before the court was whether the Secretary of Commerce had discharged his responsibilities under the RFA and under National Standard 8 of the Magnuson Act with regard to the requirements for undertaking an economic analysis. The court granted the plaintiffs' renewed motion for summary judgment and denied the defendant Secretary of Commerce's renewed motion for summary judgment. In doing so, the court stated:

"After review of the Secretary's so-called Economic Analysis and the independent expert's comments, the Court finds that the Secretary of Commerce acted arbitrarily and capriciously in failing to give any meaningful consideration to the economic impact of the 1997 quota regulations on North Carolina fishing communities. Instead, the Secretary has produced a so-called economic report that obviously is designed to justify a prior determination." 27 F. Supp. 2d at 650 (1998).

The plaintiffs also moved for the Secretary of Commerce to be held in contempt of the court's October 10, 1997 order that the Secretary "fix each year's fishing quota including adjustments, within a reasonable period of time." The court found that the Secretary of Commerce failed to submit an economic analysis demonstrating the economic impacts of his quota regulations on small entities and on the sustained participation of North Carolina's fishing communities. Moreover, the court determined that the administrative record in the matter clearly revealed that the Secretary utterly failed to make quota adjustments based on 1997 overages within a reasonable time period. In both respects, the Secretary and his agency wholly neglected to follow the order of the court and violated both the Magnuson Act and the RFA. Because the Secretary and his agency did not uphold their responsibilities to the court and to Congress, the court set aside the 1997 summer flounder quota and imposed a penalty against the NMFS.

*Distinguished by Nat'l Coal. for Marine Conservation v. Evans*, 231 F. Supp. 2d 119 (D.D.C. 2002), *infra*. The court found its fact pattern to differ from *Daley* in that the NMFS did not consciously ignore its own data or apply flawed methodology in its FRFA analysis. Accordingly, the court dismissed Plaintiff's RFA claim.

*Distinguished by N.C. Fisheries Ass'n v. Gutierrez*, 518 F. Supp. 2d 62 (D.D.C. 2007), *infra*. The court believed that unlike in *Daley*, where the Secretary "conscious[ly] refus[ed] to recognize the economic impact of his regulatory actions," the Secretary publicly explained the potentially harmful consequences of the proposed rule.

## **1998**

### **Grand Canyon Air Tour Coal. v. F.A.A.**, 154 F.3d 455 (D.C. Cir. 1998).

The FAA sought to restrict access to the Grand Canyon by small aircraft tour operators. The FAA promulgated a rule that limited the tour operators' access to certain areas, the time for flying, and the frequency of flights. The FAA published the final rule on December 31, 1996, "Special Flight Rules in the Vicinity of Grand Canyon National Park" (61 Fed. Reg. 69,302) in which the FAA certified that the rule would not have a significant impact on a substantial number of small entities.

The Office of Advocacy filed comments on the NPRM and filed a "Notice of Intent to File and Amicus Curiae Brief," pursuant to its authority under 5 U.S.C. § 612(b), in the referenced case to address the FAA's non-compliance with the Regulatory Flexibility Act (RFA). The Office of Advocacy withdrew its Notice of Intent in exchange for an agreement with the U. S. Department of Transportation, in which the Department agreed that the FAA would:

"submit to the court a statement detailing the new data regarding the number of aircraft subject to the regulation,...[and] include in their communication to the court a statement that the agency erroneously certified under the Regulatory Flexibility Act that the final rule would not have a significant economic impact on a substantial number of small entities...."

On September 4, 1998, the court issued an opinion in the case. The court stated that the FAA performed a lengthy analysis. It found that the FAA satisfied the requirements necessary to demonstrate a rational decision-making process that it responded to relevant comments, and considered reasonable alternatives. 1998 WL 55805, \*13.

### **Motor & Equipment Manufacturers Ass'n v. Nichols**, 142 F.3d 449 (D.C. Cir. 1998).

The plaintiffs argued that the EPA failed to comply with the RFA because it did not perform an analysis of the effects of the rule on certain small entities such as businesses. The plaintiffs represented businesses that manufacture, rebuild, and sell car parts in the automobile "aftermarket." The EPA concluded that the rule would not have a significant economic effect on a substantial number of small businesses and therefore did not conduct a regulatory flexibility analysis on those entities. In making its determination, the EPA only considered the impact on "large and small volume automobile manufacturers," which did not include the businesses that the plaintiffs represented.

The court found that because the deemed-to-comply rule did not subject any aftermarket businesses to the regulation, the EPA was not required to conduct a flexibility analysis as to the effects of the rule on small aftermarket businesses. The EPA was only obliged to consider the impact of the rule on small automobile manufacturers subject to the rule. Because the EPA concluded that the rule would not have a significant

economic impact on a substantial number of small automobile manufacturers, it had met its obligation under the RFA.

*Distinguished by* Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ., 263 F. Supp. 2d 82 (D.D.C. 2003). The Nat'l Wrestling Coaches Ass'n attempted to use 142 F. 3d 449 to prevent summary judgment for failing to meet the redressability requirement for standing. Here, the court found that the Nat'l Wrestling Coaches Ass'n did not prove that educational institutions had uniformly responded to Title IX by cutting men's teams, capping men's teams, or otherwise disadvantaging male athletes. Accordingly, the court held that repeal of Title IX would not result in the restoration of men's wrestling teams at Bucknell and Marquette and that Nat'l Wrestling Coaches Ass'n did not meet the redressability requirement for standing.

*Affirmed in* Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ., 366 F.3d 930 (D.C. Cir. 2004).

**Greater Dallas Home Care Alliance, Metro Home Health, Inc. v. U.S.**, 1998 WL 355465 (N.D. Tex. June 22, 1998).

The plaintiffs sought a preliminary injunction alleging that Congress had acted irrationally and unconstitutionally in adopting legislation in 1997 changing the method of payment and reimbursement to providers of home health care. The plaintiffs further alleged that the Health Care Financing Administration (HCFA) failed to abide by the RFA in implementing the legislation. Specifically, Plaintiffs asserted that HCFA violated 5 U.S.C. § 604(a)(5) because it did not assess the costs and benefits of available regulatory alternatives and select approaches to maximize these net benefits, including more cost effective options for regulatory relief for small businesses. *Id.* at 8.

The court ruled that the HCFA had acted correctly and denied the plaintiffs' request for preliminary injunction. With regard to the RFA, the court stated that the underlying statute set forth in detail the formula for the new cost limits:

“If uniform requirements are mandated by statute, as in the IPS, a statement to that effect by the implementing agency, i.e., HCFA, obviates the need to solicit or consider proposals which include differing compliance standards. Since the January 2, 1998, and March 31, 1998, regulations were merely the implementation of the Congressional mandate embodied in the IPS, HCFA made the appropriate statements in its regulations. See 63 Fed. Reg. 15, 717 (1998)(“...the statute does not allow for any exceptions to the aggregate per beneficiary limitation based on the size of the entity. Therefore, we are unable to provide any regulatory relief for small entities.”).” *Id.*

Accordingly, the court found that HCFA was merely implementing Congress's directives and was therefore not required to conduct a regulatory flexibility analysis.

**Nw. Mining Ass'n v. Babbitt**, 5 F. Supp. 2d 9 (D.D.C. 1998).

The Bureau of Land Management published a final rule on Feb. 28, 1997 that would impose a bonding requirement on hardrock mining. The rule was originally proposed in 1991. The BLM certified that the rule would not have a significant economic impact on a substantial number of small entities.

The Chief Counsel for Advocacy filed as *amicus curiae* in support of a group of small businesses that brought suit against the BLM to enjoin enforcement of a new regulation that they contend will have a detrimental effect on them. Specifically, Advocacy challenged the agency's use of a small business size

standard that was not in compliance with the SBA standards published in the CFR under the mandate of the Small Business Act, and the brief raised concerns about the substance of the economic analysis put on record by the BLM.

On May 13, 1998, the United States District Court for the District of Columbia rendered a decision in this matter. The court held that:

- 1) The association had standing to challenge the final rule;
- 2) The final rule's certification violated the RFA by failing to incorporate correct definition of "small entity"; and,
- 3) Remand for further proceedings was the appropriate remedy.

In finding that remand was the appropriate remedy, the court stated:

"While recognizing the public interest in preserving the environment, the Court also recognizes the public interest in preserving the right of parties which are affected by government regulation to be adequately informed when their interests are at stake and participate in the regulatory process as directed by Congress." *Id.* at 14-15.

*Distinguished by* Envtl. Def. Ctr. v. U.S. E.P.A., 319 F.3d 398 (9th Cir. 2003), *infra*.

Petitioners argued that the EPA failed to perform the necessary analysis under the RFA and falsely certified that the rule will not have a significant impact on a substantial number of small businesses. Specifically, citing Babbitt, Petitioners claimed that the EPA failed to analyze impact of the rule on a significant segment of small entities. However, Petitioner based its claim on aggregate numbers, which are irrelevant to an RFA analysis, instead of numbers for small businesses. The court held that the EPA's certification was legitimate, and even if it were not, the error was harmless, as the EPA had already performed an economic analysis that would satisfy the RFA.

*Opinion vacated and superceded by* Envtl. Def. Ctr. v. U.S. E.P.A., 344 F.3d 832 (9th Cir. 2003). The court vacated the opinion in the earlier case, but ruled the same way on the issues surrounding Babbitt.

**S. Offshore Fishing Ass'n v. Daley**, 995 F. Supp. 1411 (M.D. Fla. 1998).

Initially, the Office of Advocacy filed to intervene as *amicus curiae* in this matter. Advocacy withdrew from the case after it was able to obtain an agreement from the Department of Justice that the proper standard of review is "arbitrary and capricious."

The plaintiffs questioned the National Marine Fisheries Service's (NMFS) decision to reduce the quota for the shark fishery by 50%. The plaintiffs alleged that the NMFS failed to comply with the requirements of the Regulatory Flexibility Act (RFA) by failing to prepare an IRFA, solicit comments on the IRFA, prepare a FRFA incorporating the public comments on the FRFA, and prepare a FRFA in compliance with § 604.

On February 24, 1998, the United States District Court for the Middle District of Florida, Tampa Division, Judge Steven D. Merryday presiding, rendered a decision in S. Offshore Fishing Ass'n v. Daley.

In reviewing the NMFS's decision to reduce the quota by 50%, the court ruled that the Secretary did not act in a manner that was arbitrary and capricious. The court stated that:

“Under the circumstances, the Secretary’s actions (including the 50 percent cut in commercial quotas for LCS) are not arbitrary and capricious. The quotas seem reasonable given the congressional mandate to rebuild overfished stocks, the centerpiece of the Sustained Fisheries Act....” Slip op. at p.34.

However, in determining whether NMFS complied with the RFA, the court found that the Secretary’s determination of “no significant economic impact” certification and the FRFA failed to satisfy APA standards and RFA requirements. The court criticized the agency’s economic analyses and failure to comply with the law. It stated:

“NMFS prepared a FRFA lacking procedural or rational compliance with the requirements of the RFA. Section 604 requires that any FRFA contain “a summary of the significant issues raised by public comments in response to the initial regulatory flexibility analysis, 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.” 5 USC § 604 (a)(2). NMFS could not possibly have complied with § 604 by summarizing and considering comments on an IRFA that NMFS never prepared. NMFS’s refusal to recognize the economic impacts of its regulations on small business also raises serious question about its efforts to minimize those impacts through less drastic alternatives. NMFS may not have rationally considered whether and how to minimize the 1997 quotas’ economic impacts because the agency fundamentally misapprehended the unraveling economic effect of its regulations on small business.” Slip op. at p. 47.

The court remanded the agency’s RFA determinations to the Secretary with instructions to undertake a rational analysis of the economic effects and potential alternatives. The court retained jurisdiction over the case to review the economic analysis. Because of the delicate status of the Atlantic sharks, the court ruled that the public interest requires maintenance of the 1997 Atlantic shark quotas pending remand and further review of the court.

*Distinguished by Nat’l Coal. for Marine Conservation v. Evans*, 231 F. Supp. 2d 119 (D.D.C. 2002). Plaintiff claimed that NMFS violated the RFA. However, NMFS prepared both an IRFA and FRFA. The court seized on that fact to distinguish this case from 995 F. Supp. 1411, where NMFS did not prepare an IRFA and therefore could not respond to comments on it in the FRFA as required by RFA § 604. Thus, the court held that NMFS did not violate the RFA.

*Distinguished by N.C. Fisheries Ass’n, Inc. v. Gutierrez*, 518 F.Supp. 2d 62 (D.D.C. 2007), *infra*. In determining the redressability requirement for standing, the court adhered to the D.C. Circuit’s order that the court should assume the relief sought would be granted. Accordingly, the court could not assume that the relief granted would be anything less than a repeal of Amendment 13C, unlike in 995 F. Supp. 1411, where the court allowed the problematic rule to remain in force while NMFS created another. NMFS satisfied the requirements of the RFA when promulgating the rule. 995 F. Supp. 1411 was not applicable because NMFS prepared both an IRFA and FRFA.

*Subsequent Determination in N.C. Fisheries Ass’n, Inc. v. Gutierrez*, 518 F.Supp. 2d 15 (D.D.C. 2007). The court accepted the defendant’s remedy plan.

### **S. Offshore Fishery Ass’n v. Daley on Remand.**

On October 17, 1998, the United States District Court for the Middle District of Florida issued an order in S. Offshore Fishing Association v. Daley. In the order, the court addressed the insufficiency of the court-

ordered economic analysis of the effects of the reduction in the shark quota submitted by National Marine Fisheries Services (NMFS).

The court found that “the 1997 quota visited on shark fishermen a tangible and significant economic hardship.” In making the determination, the court criticized NMFS for relying on a pool of 2,000 plus individuals who hold shark fishery permits as the universe of fisherman potentially affected by the quotas, even though three-fourths of the permittees are not even expected to land one shark. It stated that relying on the 2,000 plus permit holders as the operative universe enabled NMFS to disperse arithmetically the statistical impact of the quotas on shark fishermen. Slip op. at 4.

The court also found that “NMFS inadequately considered, and perhaps overlooked altogether, feasible alternatives or adjustments to the 1997 quotas that may mitigate the quotas’ pecuniary injury to the directed shark fisherman.” Slip op. at 7. In doing so, the court stated that “the defendant affords minimal treatment to more realistic and constructive alternatives....” Slip op. at 5.

To assist the court in reviewing the issue of NMFS’s consideration of alternatives, the court appointed a special master for the purpose of analyzing the bona fides of the defendant’s remand submission with respect to the availability of workable alternatives, regulatory and otherwise, to the 1997 shark quota. The parties and amicus curiae had until October 21, 1998 to submit objections to the selection of Steven Rubin as the special master and to show cause why the defendant ought not absorb the costs incurred in the employment of the special master. Slip op. at 7-8.

#### **S. Offshore Fishing Ass’n v. Daley, 55 F. Supp. 2d 1336 (M.D. Fla. 1999).**

In June 1999, the plaintiff filed a "Notice of Quota Reduction Contrary to Court Order," alerting the court that NMFS had promulgated new regulations, to become effective July 1, 1999, which substantially reduce the Atlantic shark quotas from operative 1997 levels and implements new, more restrictive fish management and counting methods.

The court then issued an order requiring the parties to show cause why "preventative relief and contempt sanctions (including injunctive relief and fines, if appropriate)" should not issue against the defendant agency for its "imminent violation" of the court’s earlier order requiring that the 1997 Atlantic shark quotas be maintained "pending remand and until further order of the Court." Following written responses, the court held a hearing on this new issue. The next day, on June 25, 1999, the plaintiffs filed a new lawsuit, challenging the newly issued regulations. This new lawsuit was consolidated with the instant matter.

On this new issue, NMFS took the position that the newly issued regulations are consistent with the court’s previous orders because they representing merely a required step in the agency’s ongoing obligation to manage and preserve fish stocks. The plaintiffs argued that the agency cannot effectuate these new regulations until the court relinquished jurisdiction over the ongoing remand proceedings and entered a final order. In its ruling on June 30, 1999, the court agreed with the plaintiffs that the defendant has violated both the spirit and letter of the court’s earlier rulings in this case by implementing the new regulations. The court harshly criticized the agency’s behavior and stated:

Having observed NMFS’s conduct in this litigation, as well as in North Carolina Fisheries Ass’n v. Daley, 27 F. Supp. 2d 650 (E.D. Va. 1998, Doumar, J.) and Atlantic Fish Spotters Ass’n v. Daley, 8 F. Supp. 2d 113 (D. Mass. 1998, Tauro, C.J.), I reluctantly conclude that in this instance NMFS is an agency willing to pursue its institutional objectives without acknowledging applicable Congressional and judicial

limitations. The Court has found in this case that the agency illegally instituted the 1997 quotas by failing to minimize and account for the socio-economic impact of the quotas on small business, precisely in defiance of the Congressional mandate that NMFS wisely balance shark interests against human interests. Although the preservation of Atlantic shark species is a benevolent, laudatory goal, conservation does not justify government lawlessness. According to Congress, NMFS cannot act to preserve sharks heedless of the human costs. The Magnuson Act and the RFA place on the agency an affirmative and significant statutory obligation to protect the interests of fishers by pursuing feasible and less restrictive alternatives to monolithic regulatory measures that adversely and materially affect small business. See 16 U.S.C. § 1855(f) and 5 U.S.C. § 611(a)(1). From the time that the Plaintiffs instituted this action on May 2, 1997, over two years ago, the Court has yet to find that NMFS complied with the law. Although empowered to regulate, NMFS is not empowered to regulate in any manner it chooses, regardless of cost, lawfully or unlawfully.

The court then issued an injunction to NMFS from enforcing the new regulations until the agency can establish bona fide compliance with the court's earlier orders. The court emphasized that the injunction is not "punishment for governmental misconduct." Rather, the court's "intention is merely to enforce the will of Congress as expressed in the RFA in which consideration of the economic damage to fishers became a condition precedent to lawful regulation of the fishery by NMFS."

On October 1, 1999, the special master submitted his findings and recommendations to the court, finding that NMFS's failure to collect meaningful economic data was arbitrary and capricious. Additionally, the special master found that NMFS's failure to give any consideration to alternatives to the quota was a wanton repudiation of the court's instruction on remand, and that the agency's conduct constituted bad faith and a lack of candor to the court. The agency filed objections to these findings. The court has scheduled a hearing for March 2, 2000 to determine whether the special master's findings should be adopted by the court.

*Vacated by S. Offshore Fishing Ass'n v. Mineta*, 2000 WL 33171005 (M.D.Fla. Dec 2, 2000). The court vacated the order in 55 F. Supp. 2d 1336, granting the parties' "Joint Motion to Adopt Settlement Agreement and Stipulation for Dismissal" and dismissing both parties' claims with prejudice.

**Valuevision Int'l, Inc. v. F.C.C.**, 1998 WL 412483 (D.C. Cir. 1998).

Plaintiff contended that the Federal Communications Commission (FCC) violated § 604 of the RFA. Although the FCC performed an analysis, it only focused on the effect of the rule on small cable operators. Plaintiff argued that the FCC violated the RFA because it did not consider the interests of leased access programmers, most of whom were small businesses.

The FCC argued that Plaintiff was barred from raising the RFA issue because it failed to argue the point below. The FCC issued an IRFA with the proposed rule but Plaintiff did not comment on the fact that the FCC's finding gave too much attention to small cable operators and too little to small leased access programmers.

The court stated that, arguably, the fact that the FCC addressed the issue of small leased access programmers in the FRFA preserved the question of whether its discussion was sufficient. The court held, however, that the FCC fulfilled its obligations under the RFA. The court stated that the FCC's primary focus on small cable operators was understandable since that was the group that was directly affected by the new rule. It also stated that the FCC's conclusion that the revised rules would have only a

“positive” effect on programmers because they lowered the maximum rates for leased access service, permitted resale, granted access to highly penetrated tiers, and required part-time rates to be pro-rated was sufficient to satisfy the obligations of the RFA. *Id.* at 14-15.

It is important to note that although § 604 of the RFA is neutral as to the need to perform an analysis on positive or negative effects, the court interprets the RFA as only applying to negative impact of rules on small businesses. Specifically, the court stated that the Regulatory Flexibility Act “provides that an agency shall accompany the promulgation of new rules with a ‘final regulatory flexibility analysis’ assessing the negative impact of the rules on small businesses.” *Id.* at 14.

## **1999**

**Am. Trucking Ass’n v. E.P.A.**, 175 F.3d 1027 (D.C. Cir. 1999).

The Clean Air Act requires the EPA to promulgate and periodically revise national ambient air quality standards (NAAQS) for each air pollutant identified by the agency as meeting certain statutory criteria. In 1997, the EPA issued final rules revising the primary and secondary NAAQS for particulate matter and ozone. At the time of the rulemaking, the EPA certified the rule pursuant to the RFA as not having any impact on small entities. The basis of the certification was that the EPA concluded that small entities were not directly subject to the rule because NAAQS regulate small entities only indirectly through state implementation plans.

Plaintiff argued that the EPA improperly certified NAAQS under the RFA, asserting that if the EPA had complied with the RFA, it would likely have promulgated less stringent NAAQS than those actually chosen, which would have reduced the burden upon small entities.

The court agreed with the agency and ruled that the EPA adequately complied with the RFA when it certified small entities are not subject to the proposed regulation. The court also rejected other arguments raised by the plaintiff. For example, relying on a letter from the Office of Advocacy to the EPA stating that NAAQS do impose requirements upon small entities, the plaintiff argued that the court must defer to the SBA’s interpretation of the RFA. The court ruled, however, that the SBA “neither administers nor has any policymaking role under the RFA; at most its role is advisory. Therefore, we do not defer to the SBA’s interpretation of the RFA.”

*Overruled by* Whitman v. Am. Trucking Ass’n, 531 U.S. 457 (2001). The Supreme Court overruled Am. Trucking Ass’n with regard to its holding on the non-delegation doctrine.

**Tex. Office of Public Utility Counsel v. F.C.C.**, 183 F.3d 393 (5th Cir. 1999).

State agencies and telecommunications service providers challenged various aspects of the universal service order issued by the FCC to implement the Telecommunications Act of 1996, including rules developed to modify the existing system of support for high-cost service areas and creation of new support programs for schools, libraries, and health care facilities. Intervener American Cable Television Association challenged the FCC for failing to meet the requirements of RFA before promulgating the order. However, because none of the plaintiffs raised the RFA issue, and the FCC did not respond to it, the court did not consider the matter in this case.

**Washington v. Daley**, 173 F.3d 1158 (9th Cir. 1999).

The State of Washington, the Midwater Trawlers Cooperative, West Coast Seafood Processors Association, and Fisherman's Marketing Association appealed the district court's dismissal of their petitions seeking to overturn regulations allocating groundfish catches of whiting off the Washington coast to four Northwest Indian tribes. They also sought review of the court's decision to grant summary judgment in favor of the Secretary of Commerce on the allegations that challenged the Secretary's compliance with the Magnuson Fishery Conservation and Management Act, the Endangered Species Act, and the RFA.

The court upheld the lower court's decision. In granting summary judgment on the RFA issue, the district court found that the Department of Commerce's decision that the agency action would not have a significant economic impact on a substantial number of small entities was valid. The district court specifically noted that the agency concluded that the seven percent tribal allocation of whiting would result in a one to three percent reduction in annual gross revenue for Midwater. Midwater had argued that the court erred in considering the overall effect on its revenues, rather than the effect only on revenue earned from the sale of whiting. The appeals court found that the RFA only requires an agency to consider the economic effect on the entity, not the effect on revenue earned for a particular harvest.

*Discussed positively in Midwater Trawlers Coop. v. Dep't of Commerce, 393 F.3d 994 (9th Cir. 2004), *infra*. The court stated that "the arbitrary and capricious standard is narrow, and we may not substitute our judgment for that of the agency." *Id.* at 1102 (quoting Daley at 1169).*

**Greater Dallas Home Care Alliance v. United States**, 36 F. Supp. 2d 765 (N.D. Tex. 1999).

In 1998, the plaintiff sought a preliminary injunction alleging that Congress had acted irrationally and unconstitutionally in passing those portions of the Balanced Budget Act of 1997 which changed the method of payment and reimbursement to home health care providers. The plaintiff further alleged that the Health Care Financing Administration (HCFA) failed to comply with the RFA in implementing the legislation because it did not assess the costs and benefits of available regulatory alternatives and select approaches to maximize these net benefits, including more cost effective options for regulatory relief for small businesses.

In June 1998, the court denied the plaintiff's request for preliminary injunction and ruled that HCFA acted properly. On the RFA issue, the court stated that because the underlying statute set forth in detail the formula for the new cost limit, it found that HCFA was merely implementing Congress' directives and was, therefore, not required to conduct a regulatory flexibility analysis.

In a subsequent motion to reopen the case, the plaintiff sought to include a letter written by the Office of Advocacy, dated June 15, 1998, as new evidence. Advocacy's letter criticized HCFA's procedure in promulgating the regulations. The court denied the motion, stating that the letter is a legal opinion on issues fully presented and argued during the hearing already held. The court also found that, even if the letter contained factual information, it was cumulative and duplicative of evidence presented by witnesses and that admitting it into evidence would be prejudicial and disruptive because the defendants would be allowed to cross-examine the authors of the letter and call witnesses in opposition.

Finally, in February 1999, the court dismissed the entire proceeding through a motion for summary judgment granted to the defendant government agencies.

*Cited positively in Nat'l Ass'n for Home Care v. Shalala*, 135 F. Supp. 2d 161 (D.D.C. 2001), *infra*. The court believed its fact pattern to be similar to the one in Greater Dallas. The court here also found the regulation at issue to be interpretive, and thus not subject to the RFA. Citing Greater Dallas, in such cases the court maintained that the regulation should be reviewed under the APA's arbitrary and capricious standard.

**Tutein v. Daley**, 43 F. Supp. 2d 113 (D. Mass. 1999).

In 1998, New England commercial fishermen of Atlantic Bluefin Tuna filed suit against the Secretary of Commerce, asserting that the Secretary acted in an arbitrary and capricious manner in issuing an advisory guideline for defining "overfished" and by declaring the Atlantic Bluefin Tuna as overfished based on stock size rather than fish mortality rates. In addition to the plaintiffs' arguments under the Magnuson Fishery Conservation and Management Act, they also claimed that the Secretary violated the RFA by failing to prepare regulatory flexibility analysis for the guideline. The Department certified under the RFA that the guideline would not have a significant impact upon a substantial number of small entities.

The court dismissed one of the plaintiffs' claims by ruling that Congress did not intend to allow for judicial review of an advisory guideline under the APA and the Magnuson Act. As for the RFA argument, the court deferred its ruling by accepting the agency's argument that the issue is not ripe for decision by the court at this time. The court did find that the issue could be reviewed within the Fisheries Management Program and the implementation of final regulations for consistency with National Standards and other laws such as the RFA.

**Nat'l Propane Gas Ass'n v. Dep't of Transp.**, 43 F. Supp. 2d 665 (N.D. Tex. 1999).

In 1997, the Department of Transportation's Research and Special Programs Administration (RSPA) instituted an emergency interim final rule to address concerns about the transportation of compressed gas on highways. RSPA later modified and adopted the interim final rule as the emergency discharge control regulation for the loading or unloading of cargo tank motor vehicles. The regulation required vehicle operators to shut down immediately if they learned of a gas leakage.

Gas companies brought suit alleging various violations of the APA and RFA. Plaintiff challenged the rule on the ground that Defendant failed to prepare a FRFA as required by the RFA. RSPA argued that the rule was not subject to the RFA because the RFA applies only to the rules for which an agency is required to publish a notice of proposed rulemaking pursuant to Section 553 of the APA. RSPA asserted that the APA did not require a notice of proposed rulemaking here due to the emergency nature of the rule. Nevertheless, RSPA claimed that in preparing preliminary and final regulatory evaluations under Executive Order 12866, the agency did analyze the impact of the interim final rule and the final rule on all affected parties, including small businesses.

The court agreed and found that although the agency did not prepare a FRFA, all of the elements of a FRFA were available throughout their summary of such analysis published in the *Federal Register*. As such, the court found that RSPA complied with each of the requirements found in the RFA, including responding to comments and consideration of alternatives. The court asserted that a preliminary regulatory evaluation was available in the docket for the public to provide comment, and it also found that to require an additional analysis by the agency would be duplicative.

## 2000

### Alenco Commc'ns v. F.C.C., 201 F.3d 608 (5th Cir. 2000).

Local exchange carriers (LECs) serving predominately small towns and rural areas sought review of the FCC rule that made various changes to the universal telecommunications service program. Plaintiffs argued that the FCC's FRFA did not meet the requirements of the RFA and the FCC did not perform a full economic analysis of the actions.

Citing Assoc'd Fisheries of Maine v. Daley, 127 F.3d 104 (1st Cir. 1997), the court stated that the RFA was a procedural mandate rather than a substantive mandate and that review of an agency's RFA compliance was to determine whether an agency has made a reasonable good faith effort to carry out the mandate of the RFA. The court found that the FCC's orders contained a substantial discussion, including a reasoned rejection of alternatives, which was all that the RFA required.

With regard to the plaintiff's claim that the FCC had failed to perform an economic analysis, the court found that the RFA does not require a cost-benefit analysis or economic modeling. It only requires the agency to provide the steps it has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes. The court further stated that the RFA specifically allows for an agency to provide either a quantifiable or numerical description of the effects of the rule and alternatives or a more descriptive statement if quantification is not practicable or reliable. The court concluded that the FCC had reasonably complied with the requirements of the RFA.

*Positively examined in Grocery Services, Inc. v. USDA Food & Nutrition Servs., 2007 WL 2872876 (S.D. Tex. Sep. 7, 2007). The court relied on Alenco in reasoning that when reviewing agency interpretation, it must defer to the agency if the agency's rule is based on a permissible reading of the statute authorizing the regulation. The court cited Alenco statement that courts can only consider whether an agency made a "reasonable, good-faith effort" to comply with the RFA. Id. at 10 (citing Alenco at 625). Finally, the court cites Alenco for the proposition that economic modeling is not required to comply with the RFA.*

### Allied Local and Regional Mfrs. Caucus v. E.P.A., 215 F. 3d 61 (D.C. Cir. 2000).

Paint manufacturers and an association of manufacturers and distributors of architectural coatings petitioned for review of the EPA's regulations limiting content of volatile organic compounds (VOCs) such as architectural coatings, which included paints. Plaintiff alleged that the EPA failed to comply with the RFA. The basis of the allegation was that the EPA failed to discuss the economic impact of "stigmatic harm" arising from the agency's suggestion that it may impose more stringent VOCs in the future and from asset devaluation, as the coatings rule allegedly will render existing product formulas valueless.

The court ruled that RFA § 603, which discusses initial regulatory flexibility analyses, was not subject to judicial review pursuant to § 611(c). However, the court did have jurisdiction to determine whether the agency had met the overall requirement that the decision-making not be arbitrary and capricious. The court found that the EPA examined alternatives to product reformulation when creating regulations limiting content of VOCs in consumer and commercial products and that its decisions were neither arbitrary nor capricious. The court, therefore, found that EPA had met its challenges under the RFA.

*Positively discussed in Blue Water Fisherman's Assn. v. Mineta, 122 F. Supp 2d 150 (D.D.C. 2000), *infra*. The court cited Allied Local when it stated that an IFRA was not subject to judicial review. When listing the requirements for rational decision making, the court stated that "the agency must respond to significant points raised during the public comment period" and*

“consider significant alternatives to the course it ultimately chooses.” Id. at 159 (quoting at Allied Local at 80).

**Mich. v. E.P.A.**, 213 F.3d 663 (D.C. Cir. 2000).

EPA issued a rule mandating that 22 states revise their state implementation plans (SIPs) to reduce nitrogen oxide emissions (Nox). In promulgating the rule, EPA certified that the rule would not have a significant economic impact on a substantial number of small entities. The basis of the certification was that the Nox SIP regulation did not establish requirements applicable to small entities. EPA asserted that the States established the requirements and, therefore, the States were responsible for determining the impact of the requirements on small entities that they regulate. The plaintiffs asserted that the certification was improper and in violation of the RFA.

The court rejected the plaintiffs’ argument and found that the SIP regulating Nox does not directly regulate individual sources of emissions. The court concluded that EPA’s certification was justified.

**Mich. Dep’t of Env’tl. Quality v. Browner**, 230 F.3d 181 (6th Cir. 2000).

The Michigan Department of Environmental Quality and a manufacturers’ association sought review of modifications to the state implementation plan under the Clean Air Act, Plaintiffs argued that the EPA’s rulemaking violated the RFA. Plaintiff failed to raise the issue during the comment period. The court held that they waived the RFA issues for the purposes of appellate review.

**Transmission Access Policy Study Group v. FERC**, 225 F.3d 667 (D.C. Cir. 2000).

The Federal Energy Regulatory Commission (FERC) issued Orders 888 and 889 in an effort to end discriminatory and anticompetitive practices in the national electricity market and to ensure that electricity customers pay the lowest prices possible. The orders required utilities to provide access to their transmission lines to anyone purchasing or selling electricity in the interstate market on the same terms and conditions as they use their own lines. FERC certified that the rule would not have a significant economic impact on a substantial number of small entities.

Plaintiff argued that FERC failed to consider the economic impact of the orders on nonjurisdictional entities that may have to provide open access transmissions and file open access tariffs under the orders’ reciprocity provisions. The court held that it would not question FERC’s decision. FERC looked at the potential impact of Order 888, and included in the order a provision allowing an exemption from compliance with the reciprocity conditions. The court ruled that nothing in the reciprocity conditions was unreasonable.<sup>2</sup>

The parties agreed that pre-SBREFEA version of the RFA applied in this case. The court stated that under that version, its review was quite narrow. The reviewing court was limited to considering the RFA analysis as part of its overall judgment as to whether a rule is reasonable.

**Am. Moving & Storage Ass’n v. U.S. Dep’t of Def.**, 91 F. Supp. 2d 132 (D.D.C. 2000).

The Department of Defense (DOD) published a notice in the *Federal Register* announcing a significant change in distance calculations for payments and audits in its transportation procurement programs,

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<sup>2</sup> The parties agreed that preamendment version of the RFA applied in this case. The court stated that under that version, its review was quite narrow. The reviewing court was limited to considering the RFA analysis as part of its overall judgment as to whether a rule is reasonable.

switching from the previously used official mileage table to a new computer software program, PC\*Miler. Plaintiffs asserted that the change would have a significant economic impact on small carriers, requiring RFA compliance. The DOD asserted that the policy change was not a “rule” as defined by the RFA. Therefore, it did not have to comply with the RFA. The court agreed with the DOD and held that the procurement policy change was not a “rule” for RFA purposes. As a result, the RFA did not apply.

**A.M.L. Int’l, Inc. v. Daley**, 107 F. Supp. 2d 90 (D. Mass. 2000).

The National Marine Fisheries Service (NMFS) implemented a management plan for the spiny dogfish industry that imposed quotas that effectively shut down the industry for the next 5 years. Plaintiffs asserted that the NMFS failed to comply with the RFA because it did not perform a regulatory flexibility analysis in implementing the interim final rule. Plaintiffs also argued that NMFS failed to consider alternatives.

The court found that the NMFS had met its RFA obligations because it had published an RFA analysis prior to the final rule. Regarding the lack of notice for the interim final rule, the court found that the NMFS had good cause for bypassing the notice and comment provisions of the APA. Therefore, the NMFS was not required to perform an RFA analysis.

The court also found that the consideration of alternatives was sufficient. It opined that the agency is not required to address all alternatives, only the significant ones. The court found that alternatives were considered and rejected because they did not meet the mandate of the Magnuson-Stevens Act or provide long term economic benefits greater than those of the proposed action.

Finally, the court found that the RFA must be consistent with the conservation requirements of the Magnuson Act. Accordingly, the requirements of the RFA pertaining to adverse impacts are to be applied to the extent practicable given the conservation objectives of the Magnuson Act.

*Positively discussed in Ace Lobster Co., Inc. v. Evans, 165 F. Supp. 2d 148 (D.R.I. 2001), *infra*.* The court based its standard of review for RFA on A.M.L. Int’l, stating it would review only whether the agency completed an IRFA and a FRFA that describe the economic impact of the rule on small entities and whether the rejection of alternatives was reasonable.

*Positively discussed in Hall v. Evans, 165 F. Supp. 2d 114 (D.R.I. 2001), *infra*.* The court cited A.M.L. Int’l for the proposition that the RFA does not require any substantive action of agencies, but requires only that they consider less burdensome options.

**Blue Water Fisherman’s Ass’n v. Mineta**, 122 F. Supp. 2d 150 (D.D.C. 2000).

The NMFS promulgated the final 1999 Highly Migratory Species Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks. Plaintiff asserted that the provisions of the plan placed limits on the amount of Atlantic bluefin tuna (ABT) that could be caught and kept per fishing trip, banned fishing during the month of June, placed annual quotas on blue sharks and subquotas for porbeagle sharks, and required all pelagic longline fishers to install a VMS unit on their vessels violated the Magnuson-Stevens Act and the RFA.

Regarding the RFA, the plaintiff argued that the NMFS did not prepare an IRFA or FRFA for the pelagic shark quotas and the ABT trip limits. The court dismissed the claim, stating that the IRFA was in the record and the information for the FRFA was included in the Final Regulatory Impact Review. The court stated that there was nothing improper about an agency performing its IRFA and FRFA in connection with another regulatory analysis required by law.

Plaintiff also argued that the NMFS failed to define the relevant universe of fishers who depend on revenue only from pelagic shark or ABT. The court found that the NMFS identified several different possible universes for sharks and evaluated the impacts on each universe. The court reasoned that since shark permits allow holders to catch pelagic, large, and small coastal sharks, it would be nearly impossible to identify the universe of fishers who catch only pelagic sharks. Likewise, the court found that the NMFS identified several relevant universes of fishers that depend on revenue from ABT and evaluated the impact of trip limits on each of those groups.

Moreover, the plaintiffs argued that NMFS failed to consider the alternatives that would lessen the impact on fishers. The court disagreed, stating that NMFS did consider alternatives and, in fact, adopted an alternative based in part on Plaintiff's comments. The court further stated that while the NMFS clearly did not give in-depth consideration to each alternative, the RFA only requires the agency to consider alternatives that would accomplish the stated objectives to the rule.

Finally, it should be noted that the court stated that the proper standard of review for an RFA case is arbitrary and capricious.

**Cmtys. for a Great Nw., LTD. v. Clinton**, 112 F. Supp. 2d 29 (D.D.C. 2000).

Agricultural and environmental organizations challenged the validity of a draft environmental impact statement (DEIS) prepared for a federal land management plan. Plaintiff alleged that the Department of Agriculture and the Bureau of Land Management had violated the APA and the RFA. The court found that the APA and RFA only allow judicial review of final agency actions. Since a DEIS is not a final agency action, the plaintiff did not have standing to sue.

**Nat'l Ass'n of Psychiatric Health Sys. v. Shalala**, 120 F. Supp. 2d 33 (D.D.C. 2000).

The Department of Health and Human Services (HHS) promulgated an interim final rule that required a physician or other licensed independent practitioner to evaluate a patient, face-to-face, within one hour after the patient has been placed in restraints or in seclusion. The rule was a condition of participation (COP) in the Medicare program. The one-hour rule was not a part of the proposed rulemaking. It was published as a part of the interim final rule without opportunity for notice and comment.

Private psychiatric hospitals and organizations that represent private psychiatric hospitals and psychiatric units in acute care hospitals challenged the rule. Plaintiff alleged that HHS failed to comply with the requirements of the APA and the RFA in promulgating the rule. The court found that HHS had complied with the APA, but not the RFA.

Regarding the RFA, HHS certified the rule at the time of the proposal. Plaintiff did not object to that certification. However, Plaintiff argued that because the final rule was dramatically different from the proposed rule, HHS was required to perform an adequate FRFA or certify that the rule would not have a significant economic impact. Plaintiff argued that HHS's conclusory statement that it did not "anticipate...a substantial economic impact on most Medicare-participating hospitals" did neither. Specifically, Plaintiff argued that HHS had not met the requirements of §§ 604(a)(2),(4), and (5).

Section 604(a)(2) requires an agency to provide comments in response to the IRFA. HHS argued that an IRFA was not needed at the time of the proposed rule because it had certified that there was no significant

economic impact. Therefore, there were no IRFA related issues to be discussed in the FRFA. The court agreed with HHS.<sup>3</sup>

Likewise, the court agreed that HHS had met the requirements of § 604(a)(4). Section 604(a)(4) requires the agency to describe reporting, recordkeeping, or other compliance requirements and to estimate the classes of small entities which will be subject to the requirement and the professional skills necessary for preparation of those compliance requirements. The court found that Defendant's statement that the only new recordkeeping requirement was a telephone call to HCFA to report deaths from restraint or seclusion was sufficient.

However, the court found that HHS failed to comply with § 604(a)(5) of the RFA. § 604(a)(5) requires the agency to describe the steps that it has taken to minimize the significant economic impact on small businesses; to include a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule; and explain why each of the other significant alternatives was rejected. The court found that since there was no discussion of alternatives, HHS had not met its obligations under the RFA. The court remanded the matter to HHS for completion of a compliant FRFA. However, the rule remained in effect because Plaintiff was unable to show irreparable harm and that the public interest would be best served by enjoining the enforcement of the rule.

## **2001**

### **Cement Kiln Recyc. Coal. v. EPA, 255 F.3d 855 (D.C. Cir. 2001).**

The EPA issued standards for limiting emissions from three types of hazardous waste combustors (HWCs). In seeking to determine whether the regulation would have a significant economic impact on a substantial number of small entities, the EPA examined the hazardous waste combustion facilities, the industry that the EPA believed would be directly impacted by the rule. In doing so, the EPA concluded that only six of the HWC facilities met the definition of a "small business" and that only two would experience compliance costs in excess of one percent of annual sales. The EPA, therefore, certified the rule in lieu of preparing an IRFA. The EPA also considered the impact that the rule would have on businesses that generate and blend the hazardous waste consumed in the HWCs, even though it did not believe that it was required to do so.

The plaintiff challenged the EPA emission standard for hazardous waste combustors, arguing that the EPA should have considered each category of HWCs separately in conducting its direct impact analysis. Plaintiff also asserted that the EPA had to certify that there would be no substantial effect on generators of hazardous waste in order to meet the requirements of the RFA.

The court declined to consider Plaintiff's argument that EPA should have given separate consideration to each category of HWCs, because Plaintiff's "opening brief contains only a single conclusory sentence stating this point, and its reply brief does nothing to expand on the subject." Furthermore, the court held that even if there were a legal basis to raise the issue, "it certainly is not persuasive enough to carry the burden of showing that the agency's analysis was arbitrary and capricious." *Id.* at 869

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<sup>3</sup> It should be noted that this case is distinguishable from Southern Offshore Fisheries v. Daley where the court found that NMFS could not perform a proper FRFA because it had not performed an IRFA. In S. Offshore Fisheries, Plaintiffs argued that the initial certification was incorrect. The court agreed that the certification was improper and found that a proper FRFA could not be prepared without comments on the IRFA. Here, Plaintiffs did not object to the certification in the proposed rule because the objectionable portion, the one-hour rule, was not a part of the proposal.

The court also rejected Plaintiff's second argument that the EPA had to certify that there would be no substantial effect on generators of hazardous waste, stating that the court has consistently held that the RFA does not require an agency to consider small businesses that will only be indirectly affected by a rule. Although Plaintiff pointed to evidence that the EPA specifically intended to "target" generators of hazardous waste, the agency is only required to "certify 'no impact' for those small businesses that 'are subject to' the regulation, that is, those to which the regulation 'will apply.'" *Id.* at 869.

Note: The court remanded the case because the standards failed to meet the requirements of the Clean Air Act.

*Distinguished by Aero. Repair Station Ass'n, Inc. v. F.A.A.*, 494 F.3d 161 (D.C. Cir. 2007), *infra*. The court ruled that Plaintiffs were directly affected by the regulation. Unlike in *Cement Kiln*, the rule here imposed obligations directly on contractors and subcontractors, even though the regulations were directed at air carriers.

*Positively examined in Nat'l Women, Infants, and Children Grocer Ass'n v. Food and Nutr. Serv.*, 416 F. Supp. 2d 92 (D.D.C. 2006), *infra*. The court cites *Cement Kiln* for the proposition that failure to comply with the RFA is grounds for overturning a rule but does not require the overturning of a rule. If an agency certifies that a rule will not have a significant impact on a substantial number of small entities, it is not under an obligation to perform an impact analysis: "Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy." *Cement Kiln*, 255 F.3d at 109.

**Small Bus. in Telecomm. v. F.C.C.**, 251 F.3d 1015 (D.C. Cir. 2001).

The Federal Communications Commission (FCC) adopted its own definition of "small business" for its Lower Channel Report and Order concerning a regulatory scheme for specialized mobile radio (SMR) service in the 800 to 900 MHz range. The court held that although the FCC failed to seek initial approval from the SBA for its definition, the omission did not nullify the entire rulemaking since the SBA ultimately approved the definition prior to commencement of the lower channel auction. Plaintiff also questioned the adequacy of the FCC's FRFA analysis of its lower channel orders, but the court held that Plaintiff waived its right to challenge the adequacy of the analysis by failing to raise the issue during the rulemaking.

**U.S. Cellular Corp. v. F.C.C.**, 254 F.3d 78 (D.C. Cir. 2001).

The FCC adopted an order requiring wireless carriers to bear financial responsibility for enhanced 911 implementation, rather than local governments. Plaintiff argued that the FCC failed to issue an IRFA and that the FRFA did not contain a description of the steps that the agency took to minimize the impact on small businesses, as required by the RFA.

The court held that the RFA expressly prohibits courts from considering claims of non-compliance with RFA § 603 requirement to issue an IRFA. Moreover, since the argument was not raised until the reply briefs, Plaintiff waived its right to challenge compliance. The court also held that the FCC properly complied with the RFA, as its analysis of the impact on small rural carriers and its reasons for dismissing alternatives were entirely reasonable. In issuing its opinion, the court cited *Alenco Comm. v. FCC*, 201 F.3d 608 (5th Cir. 2000) and stated that the "RFA is purely procedural, however, RFA § 604 requires nothing more than that the agency file a FRFA demonstrating a "reasonable, good-faith effort to carry out [RFA's] mandate." *Id.* at 88.

*Positively discussed in N.C. Fisheries Ass'n v. Gutierrez, 518 F. Supp. 2d 62 (D.D.C. 2007), *infra*. The court cited U.S. Cellular when declining to review the substance of an RFA analysis. Instead of determining whether the analysis was correct, the court needed only to make sure the agency followed the procedural steps laid out in the RFA statute. The court also used the “reasonable, good-faith” standard articulated U.S. Cellular to hold that an attempt at step-by-step compliance with the RFA met the standard.*

**Ace Lobster v. Evans**, 165 F. Supp. 2d 148 (D.R.I. 2001).

The Department of Commerce imposed limitations on the number of lobster traps that could be used in a particular area. Lobster fisherman and business owners alleged that the Department of Commerce implemented the regulations violation of the APA, the Magnuson-Stevens Act, and the RFA.

During the comment period, numerous commentators submitted information about an alternative plan for the lobster fishery, which was approved by the Lobster Conservation and Management Team and submitted for consideration as an alternative. The defendant rejected the alternative because it would likely increase the number of lobster traps in offshore waters and increase the lobster mortality rate. The defendant also asserted that it was difficult to predict how well the approach would succeed in the absence of an accurate industry accepted way to certify previous levels of fishing efforts on a vessel by vessel basis. Plaintiff alleged that Defendant did not adequately analyze the selected alternative, that Defendants did not adequately consider the alternative that would mitigate the negative economic impacts on offshore fishing fleets, and that Defendant’s concern for verification of prior fishing fleets was unfounded.

The court stated that under the standard for judicial review of compliance with the RFA, the court reviews only whether the agency conducted a complete IRFA and FRFA, in which the defendant described steps to minimize the economic impact of its regulations on small entities, discussed alternatives, and provided a reasonable explanation for rejections. The RFA permits the defendant to select an alternative that is more economically burdensome if there is evidence that other alternatives would not have accomplished the stated objectives of the applicable statutes. Because the defendant examined the alternative and decided that, while less onerous, it did not achieve the conservation goals, the defendant met its obligations under the RFA. The court further found that there was sufficient analysis and explanation of the other rejected alternatives.

**Hall v. Evans**, 165 F. Supp. 2d 114 (D.R.I. 2001).

Defendant determined that monkfish were overfished. To address the problem, Defendant implemented a Fishery Management Plan to prescribe landing limits for vessels holding limited access monkfish permits. The limits allowed Category A and C vessels using trawl gear to land up to 1,500 pounds of monkfish tailweight per day at sea, while vessels using any gear other than trawl or “mobile” gear may land up to 300 pounds of monkfish tailweight per day at sea. Plaintiff filed suit asserting that the regulations violated the Magnuson Act and the RFA.

Plaintiff asserted that Defendant’s RFA analysis: 1) failed to recognize the costs of forcing closures of the directed monkfishing industry within 4 years, supposedly to allow the industry to receive positive revenue benefits after 20 years; 2) forced particularly harsh consequences on small businesses; and 3) failed to conduct an assessment of meaningful, and more gradual, restrictions in order to avoid severe costs to small businesses. The plaintiff asserted that neither the IRFA nor the FRFA provided an assessment of the real economic impact on small entities in that the IRFA failed to assess the number and quality of vessels affected by the regulations and failed to address the disparity in landing allocations between different gear types.

Although the matter regulations were set aside for violation of the Magnuson Act, the court found no violation of the RFA. With regard to the RFA allegations, the court found that there was enough evidence in the IRFA to show that the defendants considered the economic effect of the fishery plan as a whole upon small entities and that the defendants considered less onerous alternatives. In doing so, the court stated that the court only reviews whether the agency considered other alternatives less onerous to small businesses as a whole; the court cannot require the agency to give explicit consideration to certain classes of small businesses that are affected more gravely than other small businesses.

Note: The court agreed with Plaintiff that the gear differential violated National Standards 2 (best available science) and 5 (regulations shall consider efficiency in fishing standards) of the Magnuson-Stevens Act. The court also found that there was no documentation that the gear differential resulted in an equitable proportional reduction for each category and that Defendant did not use the best scientific information available in establishing the 300 pound limit for non-trawlers.

**Harlan Land Co. v. U.S. Dep't of Agric.**, 186 F. Supp. 2d 1076 (E.D. Cal. 2001).

On June 15, 2000, the Administrator of Animal and Plant Health Inspection Services (APHIS) published a final rule allowing the importation of lemons, grapefruit and oranges from various areas in Argentina. APHIS prepared an economic analysis of the rule and determined that the rule would not have a significant economic impact on a substantial number of small entities, despite the fact that approximately 97 percent of U.S. citrus farms are considered to be small entities.

Citrus growers brought suit against the USDA and APHIS, arguing that the APHIS violated both the APA and RFA in issuing the rule. The economic analysis in the final rule focused on the impact that the Argentine imports would have on the supply and prices of citrus fruit in the US and the resulting costs and benefits to domestic growers. The analysis failed to consider what the costs would be if Argentine plant pests were introduced into US citrus orchards. APHIS's determination that the final rule would not have a significant economic impact on a substantial number of small entities was based on its conclusion that there was a negligible risk of pest introduction. Because the court found the Risk Assessment to be flawed, it remanded the final rule to the defendants for consideration of the economic impact that the importation of Argentine citrus will have on small businesses.

*Declined to extend in Cactus Corner, LLC v. U.S. Dep't of Agric.*, 450 F.3d 428 (9th Cir. 2006). The court declined to overturn a similar rule under the APA even though APHIS had failed to determine a threshold below which the risk from Medflies would be negligible, holding that the agency did not need to determine a threshold and had broad discretion regarding the importation of plants and animals.

**Nat'l Ass'n for Home Care v. Shalala**, 135 F. Supp.2d 161 (D.D.C. 2001).

Under the Balanced Budget Act (BBA), Congress directed the Health Care Financing Administration (HCFA) to modify the Medicare payment system by implementing a prospective payment system (PPS) and an interim payment system (IPS). The plaintiff argued that the HCFA failed to consider alternatives when issuing regulations regarding the per-visit and per-beneficiary limits of the IPS as required by the RFA. The court held that the BBA was an interpretive rather than substantive rule, given its high degree of specificity regarding the implementation of the IPS. As an interpretive rule, the BBA need not comply with the RFA. The court also held that to the extent that the BBA did leave room for discretion, the relevant standard of review for determination of compliance with the RFA is "arbitrary and capricious." The HCFA's interpretation of the five specific areas of the BBA in which HCFA allegedly had discretion was not arbitrary or capricious.

**Nat'l Min. Ass'n v. Chao**, 160 F. Supp. 2d 47 (D.D.C. 2001)

The defendant implemented several rules under the Black Lung Benefits Act, which provides benefits to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease. The plaintiff filed suit alleging that, among other things, the defendant violated the APA and the RFA in implementing the rule. The plaintiff asserted that the defendant's use of a report by a consulting economist violated the rulemaking requirements of the RFA. The court found that any use of consultants that is permissible under the APA is permissible under the RFA.

*Affirmed in part and reversed in part by Nat'l Min. Ass'n v. Chao, 292 F.3d 849 (D.C. Cir. 2002).* The court reversed the case but on grounds other than the RFA. In fact, the opinion did not discuss the RFA issue at all.

**Rec. Fishing Alliance v. Evans**, 172 F. Supp. 2d 35 (D.D.C. 2001).

The recreational fishing industry challenged the Department of Commerce's regulation implementing the final 1999 Highly Migratory Species Fishery Management Plan for Tuna, Swordfish, and Sharks. The regulation placed recreational retention limits on large coastal, small coastal and pelagic sharks and on yellowfin tuna. The plaintiffs asserted that the regulations were arbitrary and capricious and that the defendants violated the RFA by failing to evaluate adequately the effects of the regulations on small business.

The plaintiffs argued that the NMFS failed to comply with the RFA because it failed to analyze the economic impacts on recreational fishers. The basis of the assertion was that the NMFS failed to define an appropriate universe of recreational fishers. The court found that the NMFS has broad discretion in defining the relevant universe for the purposes of the RFA and that the NMFS used the best evidence available to identify the universe as fishers having permits in the Atlantic tuna fishery. Thus, the plaintiff failed to demonstrate that NMFS had violated the RFA.

Note: The court also found that use of ten-year old data regarding small coastal shark population in setting recreational shark retention limits did not violate the Magnuson-Stevens Act requirement that the best available science be used if more recent science is not available.

**Teledyne v. United States**, 50 Fed. Cl. 155 (2001).

Plaintiff Teledyne and its subsidiaries appealed from decisions of contracting officers asserting claims for surplus pension assets that the contractor retained after sale of two of its divisions. The plaintiff argued that the defendant had not complied with the RFA when it promulgated its Cost Accounting Standard. The court dismissed Plaintiff's RFA claim because Plaintiff was not a small entity as defined by the RFA.

## **2002**

**U.S. Air Tour Ass'n v. F.A.A.**, 298 F.3d 997 (D.C. Cir. 2002).

Defendant, as a part of an ongoing effort to reduce aircraft noise in Grand Canyon National Park, issued a regulation limiting the number of air tours permitted to fly over the Park. The USATA challenged the rule on five grounds, one of which was that the rule's promulgation violated the RFA. Intervener Defendant Grand Canyon Trust (GCT) also challenged the rule, asserting that the FAA had greatly overestimated the progress that the rule makes toward restoring natural quiet.

The USATA contended the FAA underestimated the burden of the regulation on small tour operators and failed to consider significant alternatives that would minimize impact on small entities. The court held that the FAA did consider alternatives and used the most accurate and current data available during the rules drafting period and therefore the USATA's claims were not warranted.

The GCT argued that the FAA altered the definition of "substantial restoration of the natural quiet," *Id.* at 1001, and the FAA's noise methodology was flawed because it only accounted for noise from commercial air tours while ignoring noise from other crafts. The court stated that the FAA does not have the authority to change definitions of terms that are defined by another agency, namely the National Park Service. In addition, the court held that the FAA did not have substantial documented information for showing that non-commercial craft had an "insignificant" impact on the noise levels in the park. For those reasons and others further enumerated in the case, the court rejected all challenges by the USATA and remanded the GCT's challenges to the FAA for proceedings.

**Am. Lithotripsy Soc'y v. HHS**, 215 F. Supp 2d 23 (D.D.C. 2002).

The plaintiffs, various medical associations filed an action against the defendant, Centers for Medicare and Medicaid Services (CMMS), contending that 66 Fed. Reg. 856 promulgated under 42 U.S.C.S. § 1395nn(a), was unlawful as applied to the kidney stone medical procedure known as lithotripsy. The plaintiffs argued that the regulation violated 5 U.S.C.S. § 706(2)(A) of the Administrative Procedure Act. Cross-motions for summary judgment were filed.

Because of severe sanctions resulting in potential financial ruin that would have been imposed if the regulations were challenged administratively, 42 U.S.C.S. § 405(h) did not preclude the court from exercising federal question jurisdiction. The issue was a purely legal question of statutory construction. The fact that urologists had to have "under arrangement" contracts with hospitals to provide lithotripsy to Medicare patients did not convert lithotripsy into an inpatient or outpatient hospital service. When 42 U.S.C.S. § 1395nn (amended) was narrowed in committee, prior to its passage in 1989, to clinical laboratory services, there was no need for the lithotripsy exception originally placed in the bill because lithotripsy was not a clinical laboratory service. The lack of any mention of lithotripsy in 42 U.S.C.S. § 1395nn(a) as it was amended in 1993, the legislative history, and the statute's purpose demonstrated a clear congressional intent not to subject lithotripsy to the ban on self-referrals by including it in "inpatient and outpatient hospital services." Missing Citation Thus, the court did not have to determine if 66 Fed. Reg. 856 was a reasonable interpretation. Because the plaintiffs received full relief under the APA, the court did not elucidate on possible claims under the RFA.

The plaintiff's motion for summary judgment was granted. CMMS's motion for summary judgment was denied.

**Ashley County Med. Ctr. v. Thompson**, 205 F. Supp. 2d 1026 (E.D. Ark. 2002).

The Department of Health and Human Services (HHS) imposed Upper Payment Limit (UPL) regulations which would reduce the upper limit on what states could reimburse locally-owned public hospitals for services to Medicaid beneficiaries.

Hospitals and hospital associations brought action against the Secretary, alleging that the 2002 UPL Rule violated the RFA because HHS's final regulatory impact analysis assessed only factors that will mitigate the harm to hospitals, not the harm itself. The defendant asserted that the final regulatory flexibility analysis does not require economic analysis, but only requires the agency to describe the steps it took to

minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes.

The plaintiff also argued that the final regulatory analysis failed to describe the steps the agency had taken to minimize the significant economic impact on hospitals and failed to discuss any affirmative steps that HHS had taken or intended to take to mitigate the injury that the 2002 UPL Rule will cause to public hospitals. Defendant responded that the increased availability of DSH payments mitigated the impact. In the alternative, Defendant asserted that the RFA does not require an agency to take any particular steps to minimize the economic impact of a regulation on a small business. Rather, the RFA requires 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.

The court, finding for the defendant, agreed that the RFA requires only a description of the steps taken to minimize the significant economic impact on small entities, and does not require an economic modeling. The defendant, in proposing, processing, and adopting the 2002 150 Percent UPL Rule followed and complied with the RFA.

**Ass'n of Am. Physicians & Surgeons v. H.H.S.**, 224 F. Supp 2d 1115 (S.D. Tex. 2002).

The defendants, the United States Department of Health and Human Services (HHS) and the Secretary of HHS, filed a motion to dismiss an action filed by Plaintiffs, an association of physicians and surgeons and other interested individuals, challenging the privacy regulations (Privacy Rule) promulgated by HHS under Title II, Subtitle F, §§ 261-64 of the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.

Plaintiff claimed, inter alia, that the Privacy Rule violated the U.S. Const. amend. IV prohibition against unreasonable government searches and seizures and specifically argued that the Rule simultaneously gave the government "virtually unrestricted access" to the medical records without a warrant. Plaintiffs also challenged the Privacy Rule under U.S. Const. amends. I and X alleging that the Rule had a chilling effect on patient-physician communications and that the regulations went beyond Congress's commerce power by intruding into local, private activities involving physicians and patients that lack any nexus to interstate commerce. The district court found that because the plaintiffs suffered no actual or imminent injury due to enforcement of the Privacy Rule, their Fourth and First Amendment claims were not ripe for judicial review, and they lacked standing to pursue the claims. Similarly, the court held that because only states could properly assert claims under the Tenth Amendment, Plaintiffs had no standing to pursue such claims.

Plaintiffs also claimed that the Privacy Rule violated the RFA because HHS failed to take into account the administrative burden that compliance with the Rule would place on small entities. However, the plaintiffs acknowledged that HHS complied with its statutory obligation under the RFA to publish a FRFA regarding the final Privacy Rule. Because the RFA is a procedural rather than substantive agency mandate, and the plaintiffs failed to articulate any specific procedural flaws in HHS's promulgation of the Privacy Rule, the court held that it failed to state a claim under the RFA.

Defendant's motion to dismiss was granted and Plaintiff's constitutional claims were dismissed. Likewise, Plaintiff's statutory claims were dismissed with prejudice.

**Atlantic Fish Spotters Ass'n. v. Evans**, 206 F. Supp. 2d 81 (D. Mass. 2002).

Section 634 of the 2001 appropriations bill for the Department of Commerce mandated "The Permit Condition," which requires the permit holder to agree not to use spotter planes when fishing for bluefin.

The Atlantic Fish Spotters Association argued that the ban on fishing with spotter planes was intended to apply only during fiscal year 2001. According to the Association, conditions contained in appropriations bills presumptively apply only to the fiscal year in which they are passed, absent language indicating futurity or other explicit indicia of Congressional intent that the legislation be permanent. It further contended that no such language or intent could be found here. The Association contended that the decision of the Secretary to extend the ban beyond fiscal year 2001 amounted to agency rulemaking that did not satisfy the notice and public comments requirement of the APA. Another consequence was that the Secretary was required to conduct a regulatory flexibility analysis to analyze the impact of this putative rulemaking on small businesses affected, and to discuss ameliorative measures and alternatives as required under the RFA.

The Secretary contended that this was a law that had already been implemented and he thus was not required to comply with either the APA or the RFA.

The court regarded § 634 to be permanent legislation and not rulemaking. As such, the court did not address the arguments of the Association regarding the APA and the RFA.

*Reversed and remanded by Atlantic Fish Spotters Ass'n v. Evans, 321 F.3d 220 (1st Cir. 2003).*  
The court reversed on a ground unrelated to the RFA.

**Kern County Farm Bureau v. Badgley**, 2002 U.S. Dist. LEXIS 24125, 2002 WL 34236869, slip op. (E.D. Cal. Oct. 10, 2002).

On March 6, 2002, the United States Fish and Wildlife Service (FWS) published the final rule listing the Buena Vista Lake shrew as an endangered species (see 67 Fed. Reg. 10101). Plaintiff filed their complaint for declaratory and injunctive relief on April 9, 2002, presenting twelve claims for relief, six of which allege that the final rule violates the Endangered Species Act (ESA) and one which alleges that the final rule violates the Regulatory Flexibility Act (RFA). On June 17, 2002, the Center for Biological Diversity, Inc. (CBD), filed a motion to intervene in the action as a defendant. On August 22, 2002, the CBD filed a motion to dismiss Plaintiff's Claim 12 of the complaint (the RFA claim) for failure to state a claim, while FWS filed a motion to dismiss Plaintiff's claims 1, 2, 5, 6, 8, and 9 for lack of subject matter jurisdiction.

In the FWS's motion to dismiss, they contended that the plaintiff failed to comply with the 60 day notice requirement prior to filing a claim against the FWS under the citizen suit provision of the ESA (16 USC 1531-44). The plaintiff's notice of intent to sue was submitted January 25, 2002, before the final rule was issued, which FWS contended did not satisfy the ESA notice provision. The court ruled in favor of the defendant and dismissed claims 1, 2, 5, 6, 8, and 9 without prejudice to the "[p]laintiff's right to file a properly noticed motion before the magistrate judge for permission to file a second amended complaint."

The CBD's motion to dismiss contended that the plaintiff had failed to state an RFA claim. First, it maintained that the plaintiff's claim was premised on review of a proposed rule under § 603 and § 603 actions are not subject to judicial review under the RFA (see 5 USC § 611(c)). Second, the CBD contended that even if the plaintiff's claim was correctly premised on a final rule under § 604, it lacked standing because the RFA as a whole does not apply to decisions listing species under the ESA.

The plaintiff argued that its RFA claim was based on FWS's failure to prepare a final regulatory flexibility analysis pursuant to § 604. Although it relied solely on § 603 in its complaint, the plaintiff incorporated into its amended complaint the sixty-day notice sent to FWS, which informed it of a violation of § 604.

The court held that the complaint set forth a claim for relief under § 603 and Claim 12 must be dismissed. However, the court noted that the CBD's assertion that the RFA did not apply to an ESA listing was unconvincing. The ESA requires that a species be listed and a critical habitat be designated contemporaneously. Because critical habitat designations are subject to RFA analysis, and because the FRFA by FWS may not have included such analysis, the court opined that claim was ripe for review. Therefore, the court dismissed Claim 12 without prejudice "to Plaintiff's right to file a properly noticed motion before the magistrate judge to file a second amended complaint to pursue claim for relief based on § 604."

**Little Bay Lobster Co. v. Evans**, 2002 WL 1005105 (D.N.H. May 16, 2002), *not for publication*.

In establishing eight lobster management areas, the Department of Commerce extended the fishing boundary line approximately 20 miles to a new boundary line 50 miles offshore. Lobster fisherman and business owners alleged that the Department of Commerce implemented the regulations in violation of the APA, the Atlantic Coastal Fisheries Cooperative Management Act and the RFA.

The basis of the assertion was that no analysis was conducted to determine whether an alternative boundary line would have minimized the significant economic impact being dealt to the plaintiff. The court noted that the boundary line regulation could not have a disproportionate impact on small entities, *vis a vis* large-scale entities because the change only affected small entities (all lobster fishers are considered small). Further, while the RFA specifically requires a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule, nowhere does it require cost-benefit analysis or economic modeling.

The court stated that as the defendant adequately responded to public comments and was under no obligation to conduct an analysis of the economic effect of the new boundary line on the plaintiff, the defendant met its obligations under the RFA. The court further found that there was sufficient analysis and explanation of all significant alternatives.

*Affirmed by* Little Lobster Bay v. Evans, 352 F.3d 462 (1st Cir. 2003).

**Nat'l Ass'n. of Home Builders v. Evans**, 2002 WL 1205743 (D.D.C. Apr. 30, 2002).

A proposed consent decree was before the court in which Plaintiff voluntarily dismissed without prejudice all counts of the lawsuit against Defendant, including the claim that an unlawfully designated essential fish habitat violated the Magnuson-Stevens Act and the RFA (The Agency agreed to withdraw the disputed critical habitat designation, remanding it for economic analysis and new rulemaking).

The court approved the consent decree, noting that the underlying issue regarding the problem with the current process by which a habitat is designated "critical" is something which the Agency must remedy. The court reasoned that the proposed consent decree was in the public interest and thus in this case vacating the rule at issue was permissible.

**Nat'l Coal. for Marine Conservation v. Evans**, 231 F. Supp. 2d 119 (D.D.C. 2002).

In this consolidated case, the plaintiffs non-profit and others involved in marine conservation or recreational and commercial fishing challenged Department of Commerce (DOC) regulations implementing the Highly Migratory Species Fish Management Plan for Atlantic Tunas, Swordfish and Sharks (Plan). The plaintiffs argued that the Plan was arbitrary and capricious in that it failed to minimize blue and white marlin bycatch to the extent practicable, violating National Standards and other

regulations set forth in the Magnuson-Stevens Act. Plaintiff challenged the Plan's closure rules and asserted that the promulgation of the Plan violated the RFA. The DOC filed motion for summary judgment.

The Plan enacted closure rules to prevent fishers from landing certain overfished species in specific areas during all or part of the calendar year. The plaintiffs alleged that these closure regulations fail to protect marlins and minimize bycatch and are therefore arbitrary and capricious. Plaintiff argued that the Florida Closure imposed economic and social harms on Florida fishers because these fishers owned small vessels that could not safely travel to waters outside of the closure area thereby shutting down Florida's east coast fishing industry. The court held that the DOC used proper logbook data and analysis and therefore the Plan's closure rules were not arbitrary and capricious.

Plaintiff claimed that the Florida Closure violated the RFA, alleging that the DOC's analysis of the economic, social and environmental effects of the closure as well as alternatives to minimize harm impacts Florida's fishing communities was flawed or superficial. The court held that the DOC considered alternatives, and granted the DOC's motion for summary judgment.

**Sugar Cane Growers Coop. of FL. v. Veneman**, 289 F.3d 89 (D.D.C. 2002).

The Department of Agriculture implemented a payment-in-kind program for the 2001 sugar crop, whereby sugar producers were to enter bids offering to destroy or divert a certain amount of their crops in return for sugar from USDA storage. This program was announced by press release and done without using APA rulemaking. In the 2001 program, the Department set a 200,000 ton limit in order to encourage more competitive bidding and made both beet and sugar producers eligible. However, a statutory restriction limiting payments to \$20,000 per producer effectively eliminated appellants' opportunity to participate because of their size.

Sugar cane growers, processors, refiners and marketers sued the Secretary of the Department of Agriculture, arguing that the Department did not comply with the APA because it promulgated a rule without notice-and-comment rulemaking, that it violated the Food Security Act of 1985 by not making required findings, and that the Department violated the RFA because it did not consider the impact of the program on small businesses.

On appeal, appellants failed to raise their RFA claim, and as such, this claim was not addressed.

*Distinguished by* AFL-CIO v. Chao, 496 F. Supp. 2d 76 (D.D.C. 2007). In deciding whether to vacate a rule that violated the APA or remand the rule without vacatur, the court distinguished its situation from that of Sugar Cane Growers. Here, vacating the rule would have the effect of preserving the status quo, while in Sugar Cane Growers it did not.

## **2003**

**Envtl Def. Ctr. v. E.P.A.**, 344 F.3d 832 (9th Cir. 2003).

The EPA issued a rule, pursuant to the Clean Water Act, to control pollutants introduced into the nation's waters by storm sewers. The rule mandated that discharges from small municipal storm sewers and construction sites sized 1-5 acres be subject to the permitting requirements of the National Pollutant Discharge Elimination System (NPDES). The EPA certified that the Rule would not yield "significant impacts."

Plaintiffs American Forest & Paper Association and the National Association of Home Builders (“Petitioners”) asserted that promulgation of the rule was procedurally defective and violated the RFA. The petitioners argued that the EPA’s certification was erroneous because the EPA mislabeled significant costs as “not significant,” the EPA failed to account for the costs of all affected small entities, and the EPA failed to account for all significant costs to small entities.

The Ninth Circuit determined that the EPA complied with the RFA and reasonably certified that the rule would not have a significant economic impact. The court held that petitioners were incorrect as a matter of law because the aggregated data they proposed was inconsistent with the plain language test of § 605(b) of the RFA.

The court also noted that any procedural defect was harmless error because the EPA already conducted the economic analyses the petitioners sought when they convened a “Small Business Advocacy Review Panel” before publishing notice of the proposed rule. The EPA had followed the advice and recommendations of the Panel and included provisions designed to minimize impacts on such entities, such as alternative compliance and reporting mechanisms responsive to the resources of small entities, simplified procedures, performance rather than design standards, and waivers. The court noted, “. . . the analyses required by RFA are essentially procedural hurdles; after considering the relevant impacts and alternatives, an administrative agency remains free to regulate as it sees fit.” 344 F.3d at 879.

*Declined to extend by* Nw. Env'tl. Def. Ctr v. Brown, 476 F. Supp. 2d 1188 (D. Or. 2007). An Environmental organization sought to a bar timber company from discharging rainwater in ditches along logging roads without a permit. Plaintiff alleged permits were required because of the holding in Env'tl. Def. Ctr., but the court found that because EPA had yet to implement Phase II even after remand, the rule was not yet in affect.

*Questioned by* Tx. Indep. Prods. & Royalty Owners Assoc. v. E.P.A., 410 F.3d 964 (7th Cir. 2005). Court examined whether the Phase II Rule at issue in Env'tl. Def. Ctr. caused an actual injury to Plaintiff. Without legally cognizable injury, the plaintiff in Env'tl. lacked standing to challenge permit rule.

**Hosp. Corp. of Am. v. Comm’r of Internal Revenue**, 348 F.3d 136 (6th Cir. 2003).

The plaintiffs challenged an interpretation of a revised regulation in the tax code by the Treasury. The Treasury had general interpretive authority of the Internal Revenue Code to issue the revised regulation in question, thus making the regulation an interpretive regulation exempt from the notice and comment procedure and therefore exempt from the RFA.

The plaintiffs did not address whether the regulation fell under the RFA. Instead, Plaintiff argued that *Chevron* deference should not be accorded to the Treasury because, according to Plaintiff, the regulation in question was not issued pursuant to an express or implicit delegation of legislative rulemaking power. The court concluded that the fact that the temporary regulation was not subject to notice and comment, eschewing *Chevron* deference was not required 348 F.3d at 144.

**Kaiser v. Blue Cross of Cal.**, 347 F.3d 1107 (9th Cir. 2003).

The plaintiffs owned and operated a home health agency which was a Medicare provider. HFCA (now CMS) oversaw the Medicare program. Pursuant to the Balanced Budget Act of 1997, HFCA promulgated new rules on the allowable costs of home health agencies on January 2 and March 31, 1998. Plaintiff claimed that the delay between the passage of the law and the issuance of the regulations left it unable to determine for the first quarter of 1998 what costs Medicare would cover, ultimately leading to its

bankruptcy. It also claimed, *inter alia*, that the HFCA violated the RFA in its issuance of the new home health care regulations.

The district court dismissed Plaintiff's claim for lack of subject matter jurisdiction and Plaintiff appealed. The court of appeals affirmed the district court's decision, finding (1) the plaintiffs' claims arose under Medicare, requiring them to exhaust administrative remedies, which it had not done as it did not face irreparable harm; (2) the transfer to the Court of Federal Claims was inappropriate; and (3) any claims not subject to exhaustion requirement were barred by sovereign immunity.

**Little Bay Lobster Co. v. Evans**, 352 F.3d 462 (1st Cir. 2003).

In December 1999, the National Marine Fisheries Service ("NMFS"), under the authority of the Department of Commerce, issued final regulations implementing stricter lobster trap limits and the shift of the Dick Allen line, which separates two management areas in federal waters. Little Bay asserted that the NMFS did not comply with the requirements of the RFA and argued that separate attention should have been given to comments regarding the change in the area boundary line as well as to the determination of whether an alternative boundary line would have minimized the economic impact upon Little Bay or others similarly situated.

The final Environmental Impact Statement completed by the NMFS included a final regulatory flexibility analysis, as required by the RFA, concluding that those using lobster traps would be impacted in the short-run, but the benefits of rebuilding stocks outweighed the harm. In compliance with the RFA, the final statement described the range of small businesses affected and the estimated magnitude of the effects, summarized comments on the proposed rule and the response of the agency to the comments, addressed record-keeping burdens incident to the new regime, and discussed the reasons for the regime adopted and the reasons for preferring it to other alternatives.

The court found that there is no requirement as to the amount of detail with which specific comments need to be discussed and no obligation to treat every element of a plan as a separate alternative. A rule of reason applies to the agency's obligation. So long as a reasonable good faith effort to address the comments and alternatives has been made, then the burden is upon the critic to show why a brief response on one set of comments, or the failure to analyze one element as a separate alternative, condemns the effort. Because Little Bay did not show a dramatic impact of the boundary line shift or how the agency's response was inadequate, the court affirmed the grant of summary judgment to the agency. 352 F.3d at 471.

**Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs**, 297 F. Supp. 2d 74 (D.D.C. 2003).

The plaintiffs challenged nationwide permits issued under the Clean Water Act by the Corps as violating, *inter alia*, the RFA, because the Corps did not conduct a flexibility analysis as required by the RFA.

Under the APA, courts can only exercise judicial review if the action consummates the agency's decision-making process and is one where rights or obligations have been determined or from which legal consequences will flow. The plaintiffs must meet the same "final agency action" requirement that applies to the APA in order to assert a claim under the RFA.

By setting a threshold for permitting purposes, the Corps did not necessarily prohibit any party from moving forward with construction or any activity that would involve discharging pollutants. Until an enforcement action is initiated, or denial of an individual permit occurs, no legally binding decision had taken place. Thus, the court ruled that the action by the Corps was not a final agency action and not fit for

judicial review under the RFA or APA. 297 F. Supp. at 81. The district court, granted summary judgment for the Corps.

*Reversed in Part by* Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272 (D.C. Cir. 2005). The court found that the action of the Corps was reviewable under the RFA. Each NWP fits within the APA's definition of a rule, and thus is a rule subject to the RFA.

*On Remand:* Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 453 F.3d 116. The RFA was not discussed on remand.

**Navajo Refining Co. v. United States**, 58 Fed. Cl. 200 (2003).

The plaintiff refiners, Navajo Refining Co. and Montana Refining Co., affiliated as subsidiaries of the same parent, which challenged the legality of an economic price adjustment clause in their fuel supply contracts with the Defense Energy Support Center. The plaintiffs have a combined refining capacity of approximately 67,000 barrels per day. The court declined to address the plaintiffs' arguments concerning the defendant's alleged violation of the RFA because the defendants were not small businesses and lacked standing to challenge the defendant's compliance with the RFA. 58 Fed. Cl. at 206.

**Ocean Conservancy v. Evans**, 260 F. Supp. 2d 1162 (M.D. Fla. 2003).

In reviewing the history of LCS quotas, the court described the order to remand from the prior 1998 lawsuit where the district judge found that although the quotas placed on the shark fishing industry complied with National Standards, the NMFS was ordered to reconsider the possible socioeconomic effects of the quotas according to the provisions of the RFA as amended by the SBREFA. See S. Offshore Fishing Ass'n v. Daley, 995 F. Supp. 1411, 1432-33 (M.D. Fla. 1998). The NMFS completed the requisite analysis before May 15, 1998, providing a brief public comment period on the draft of the economic analysis and submitting the analysis to the court and to industry Plaintiffs. In the analysis, the NMFS concluded that while the quotas in contention in the 1998 case could have had a significant economic effect on a substantial number of fishery participants, the quotas "were the only viable alternative to ensure that the LCS stocks would not decline further." 260 F.Supp.2d at 1171. The NMFS continued to look at alternatives after complying with the deadlines of the order to remand.

In the present case, Plaintiff challenged the decision by the NMFS to increase the annual fishing quota for the 2003 fishing season, suspend the minimum size requirements for ridgeback sharks, and extend the close of the spring season. Plaintiff did not assert claims under the RFA.

**Roche v. Evans**, 249 F. Supp. 2d 47 (D. Mass. 2003).

The New England Fishery Management Council ("Council") adopted an adjustment to the existing Northeast Multispecies Fisheries Management Plan ("FMP") mandating that certain fishing areas would be closed to fishing for varying lengths of time. Petitioners argued that this adjustment was invalid because no regulatory flexibility analysis was prepared in accordance with the RFA.

Council is authorized under the Magnuson-Stevens Fishery Conservation and Management Act to make adjustments to the FMP to protect the northeast fishing region. The RFA does not apply to the adoption of such a framework adjustment to an FMP because, under the abbreviated framework adjustment procedure permitted under 50 C.F.R. § 648.90, there is no requirement that the Council "publish a general notice of proposed rulemaking." The court noted, "the whole purpose of the framework adjustment procedure is to

dispense with that requirement.” 249 F.Supp.2d at 57. With the trigger of notice and comment lacking, the court granted summary judgment in favor of the agency.

**Williams Alaska Petroleum v. United States**, 57 Fed. Cl. 789 (2003).

The plaintiff challenged the legality of market-based pricing mechanism included in a series of fuel supply contracts entered into with the Defense Energy Support Center (“DESC”). The court found that the plaintiff was precluded from asserting a claim under the RFA because the plaintiff was not a small entity.

The plaintiff did not contest that it was not a small entity, but argued instead that its suit “does not challenge the DESC’s substantive determination” but rather the agency’s “absence of compliance with procedural restrictions.” 57 Fed.Cl. at 802. The court noted that while Plaintiff was correct that courts have jurisdiction to review for procedural error agency determinations whose substantive content may otherwise be beyond reach of judicial scrutiny, review cannot be invoked where Plaintiff lacks the standing necessary to contest the agency’s action and where, in addition, the statute reinforces its constraints on judicial review.

**Tesoro Hawaii Corp. v. United States**, 58 Fed. Cl. 65 (2003).

The court found that because Plaintiff’s claim was invalid, there was no need to address Plaintiff’s arguments that Defendant’s deviations violated the RFA.

*Reversed by Tesoro Hawaii Corp. v. United States*, 405 F.3d 1339 (Fed. Cir. 2005), though the court did not examine Plaintiff’s RFA claims on appeal.

**Wyo. v. U.S. Dep’t of Agric.**, 277 F. Supp. 2d 1197 (D. Wyo. 2003).

Wyoming argued that the Roadless Rule promulgated by the USDA violated the RFA and other acts. However, Wyoming had waived its claim under the RFA because the state failed to cite any authority in support of those claims in its opening brief.

*Vacated and Remanded by Wyo. v. U.S. Dept. of Agr.*, 414 F.3d 1207 (10th Cir. 2005). However, there was no discussion of Wyoming’s RFA claim.

*Distinguished by Utah Ass’n of Counties v. Bush*, 316 F. Supp. 2d 1172 (D. Utah 2004). Plaintiffs sought to enjoin President and others from designating land in Utah as a national monument. Wyo. concerned a rule promulgated solely within and pursuant to the authority of an executive branch department. However, this case concerned not the rule-making authority of a lower-level department, but the authority President as specifically designated by an act of Congress. The court noted that the Wyo. court provided, “statutory framework [which] necessarily acts as a limitation on *agency* action.” 316 F. Supp. 2d at 1194 (quoting Wyo. at 1233). The court distinguished the reasoning in Wyo., noting that such framework would never be applied to presidential action.

**Calcasieu Refining Co. v. United States**, 2003 WL 22049528 (Fed. Cl. 2003).

A supplier of jet fuel brought suit against the United States, contending that an economic price adjustment in the supply contracts was illegal and set prices for fuel below fair market value. The court held that the clause was not valid and that individual deviation or exemption from the clause was invalid and illegal. In footnote, the court stated, “Because the court concludes that the deviation was invalid, it . . . need not

address Plaintiff's argument that the deviation violates... the Regulatory Flexibility Act." 2003 WL 22049528 at n.10.

**La Gloria Oil & Gas Co. v. United States**, 56 Fed. Cl. 211 (2003).

The court declined to address Plaintiff's arguments concerning alleged violation of the RFA because only "a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements [of certain statutory provisions]" and "it is the view of the court that because Plaintiff is not a small business, it lacks standing to challenge Defendant's compliance with the requirements of the RFA." 56 Fed.Cl. at 217.

*Appealed as La Gloria Oil and Gas Co. v. U.S.*, 72 Fed. Cl. 544 (Fed. Cl. 2006). Although it did not address the plaintiff's RFA claims specifically, the court held that it lacked jurisdiction over its small business claims.

**2004**

**Cactus Corner v. U.S.D.A.**, 346 F. Supp. 2d 1075 (E.D. Cal. 2004).

The USDA promulgated a rule allowing and setting conditions for resumption of the importation of Spanish clementines, following a ban after the discovery of live Mediterranean fruit fly (Medfly) larvae. Domestic fruit growers and packers sought declaratory and injunctive relief to set aside and hold the rule unlawful, claiming, *inter alia*, that the rule violated the RFA because the agency had failed to prepare an initial or final regulatory flexibility analysis. It also sought to enjoin Defendant from implementing the rule or otherwise allowing the importation of clementines from Spain, and an award of costs, disbursements, and reasonable attorney's fees.

The USDA had conducted a Regulatory Impact Analysis (RIA), dated October 15, 2002, which concluded that the regulatory benefits outweighed the regulatory costs associated with implementation of the rule. Based on the RIA, the agency determined that the proposed rule would not have a significant economic impact on a substantial number of small entities.

The court stated that, because the agency certified that the rule would "likely not have a significant economic impact on a substantial number of small Medfly host crop producers in the United States" 346 F.Supp.2d at 1087, initial and final regulatory flexibility analyses were not needed. It stated that the certification was supported by an analytical statement including factors such as the relatively low percentage of income derived by small wholesalers from clementine sales, and that small importers and wholesalers would likely be "better off" under the proposed regulations when compared to their status under the current ban on the importation of clementines as well as compared to the less strict conditions imposed before the ban. *Id.* at 1115. The court stated:

The agency relies on other analyses supporting its overall conclusion that the rule itself will result in a sufficiently high probability that Medfly infestation will not occur to conclude that any impact the new rule will have on small entities will be positive rather than negative, negating the need for a regulatory flexibility analysis. *Id.* at 1116.

The court also rejected the plaintiff's assertion that the USDA's Risk Management Analysis (RMA) had discrepancies with the RIA. Both the RMA and the RIA provided realistic analyses of the cost and benefits of importing clementines, but the RMA utilized a risk minimization review based on

conservative values to assess risk, whereas the RIA looked at worst case analysis to measure costs and benefits. The court rejected Plaintiff's projection of a \$1.5 billion catastrophe, calling it:

Hyperbole premised on a no-action hypothesis. No such catastrophe occurred in 2001 in an actual Medfly 'outbreak.' The cost of the successful 2001 Medfly eradication programs was about \$14 million. No other potential harm or cost to Plaintiffs is suggested except the risk of competition, a risk Plaintiffs have accommodated through the years clementines have been imported. *Id.* at 1117.

**Hemp Indus. Ass'n. v. Drug Enforcement Admin.**, 357 F.3d 1012 (9th Cir. 2004).

The court did not address alleged violation of the RFA because it found that the DEA did not use proper procedure in adopting two regulations that would ban the sale or possession of items containing only non-psychoactive amounts of THC.

**Midwater Trawlers Coop. v. Dep't of Commerce**, 393 F.3d 994 (9th Cir. 2004).

Reference made in opinion to former claim under the RFA made by Plaintiff from case decided in 1996 which was dismissed on summary judgment for failure to join parties.

**Sunoco v. United States**, 59 Fed. Cl. 390 (2004).

The issue whether Defendant's failure to conduct a regulatory flexibility analysis violated the RFA was irrelevant. Having found that the class deviation in question was unauthorized and unenforceable, the court saw no reason to further analyze issues spawning from that deviation.

**Fezekas v. Fed. Motor Carrier Safety Admin.**, 2004 WL 551214 (E.D. La. 2004).

The complaint was dismissed for lack of subject matter jurisdiction. The issue of whether the agency's new HOS rule violated, *inter alia*, the RFA, was not addressed.

**In re: Operation of the Mo. River Sys. Litigation**, 363 F. Supp. 2d 1145 (D. Minn. 2004).

The RFA and SBREFA issues were collateral claims to a suit seeking (1) declaration that federal management of the Missouri River pursuant to the Flood Control Act of 1944 violated environmental standards, and (2) injunctive relief requiring that agencies comply with such standards.

The court found that the FWS's certification that the critical habitat designation would not have a significant impact on a substantial number of small entities set forth a rationale for its conclusion and was based on economic analysis that was not flawed. 363 F.Supp.2d at 1173.

The court also found that the designation of the plover's critical habitat was not a "major rule" under § 804(2) and therefore was not subject to judicial review under SBREFA. The court stated, "[e]ven so, there is no evidence that the FWS's decision was arbitrary and capricious. Plaintiff's claims under RFA and SBREFA fail." *Id.* at 1173.

*Affirmed in part; vacated in part by* **In re: Operation of Mo. River Sys. Litigation**, 421 F.3d 618 (8th Cir. 2005) on matters unrelated to RFA or SBREFA.

*Discussed in* **Ams. for Safe Access v. U.S. Dept. of Health and Human Services**, 2007 WL 2141289 (N.D. Cal. 2007). **Safe Access** noted that **Mo. River** held that the Information Quality

Act (“IQA”) provided no meaningful standard of review for APA claims when the plain language of the legislation fails to define crucial terms. Additionally, since "the history of the legislation fails to provide any indication of the scope of these terms," and "absent any 'meaningful standard' against which to evaluate the agency's discretion," the court held Congress did not intend to permit judicial review of IQA information correction requests. 2007 WL 2141289 at 3 (quoting 363 F.Supp.2d at 1174-5). Despite this, Mo. River concluded that since the IQA was "drawn in such broad terms," "there is no law to apply," and the "agency action is committed to agency discretion." Id. Safe Access took issue with this discrepancy, but did not mention its treatment of RFA nor SBREFA.

**Rock Creek Pack Station v. U.S. Forest Serv.**, 344 F. Supp. 2d 192 (D.D.C. 2004).

The court concluded that Plaintiff lacked standing to bring its claims, as it had not established an injury in fact based on alleged economic damage to Rock Creek and granted Defendant’s motion to dismiss and motion for summary judgment. High Sierra’s assertion that the court had jurisdiction pursuant to the RFA was moot and the court did not address it.

**Teva Pharm. Indus. v. F.D.A.**, 355 F. Supp. 2d 111 (D.D.C. 2004).

The court compared its *Chevron* deference to a case in which the court refused to address an RFA claim because the plain language of the statute controlled.

*Affirmed by* Teva Pharm. Indus. v. F.D.A., 410 F.3d 51 (D.C. Cir. 2005).

**Theiss v. Principi**, 18 Vet. App. 204 (2004).

The Veteran’s Administration promulgated an amendment to define “educational institution,” excluding home schools. The court determined that this was a substantive, legislative rule and was invalid for failure to comply with notice-and-comment procedures under the APA. The court warned that any future amendment should comply with the APA as well as with the provisions of the RFA and that a “bare certification” like the one in this case would likely be insufficient because it was not accompanied by a “statement providing the factual basis for such certification.” 18 Vet. App. at 214.

## **2005**

**Cent. Tex. Tel. Coop. v. F.C.C.**, 402 F.3d 205 (D.C. Cir. 2005).

The petitioners, who are rural telephone carriers, sought review of an order by the Federal Communications Commission (“FCC”), known as the *October Order*, which implemented wireless porting rules. The petitioners claimed that the *October Order* constituted a substantial legislative rule and as such was not promulgated in accordance with the requirements of the APA and RFA.

The FCC argued that the *October Order* was an interpretive rule of the *First Portability Order* which was issued pursuant to the Telecommunications Act of 1996. The *First Order* implemented deployment schedules for local telephone carriers to offer number portability to customers who wanted to retain their number at the same location. The *October Order* was issued in response to comments made during the notice and comment period of the *First Order*.

The court categorized an interpretive rule as a rule which must derive a proposition from an existing document whose meaning compels or logically justifies the proposition. In this case, the court found that

the FCC furthered the purpose of the *First Order* by issuing the *October Order* which explained the reasons underlying the regulatory language of the *First Order* in order to respond to comments received from the petitioners. Because the *October Order* was an interpretive rule, the RFA did not apply and the petition for judicial review was denied. 402 F.3d at 212-13.

*Positively discussed by U.S. Telecom. Ass'n. v. F.C.C.*, 400 F.3d 29 (D.C. Cir. 2005), *infra*, though on matters unrelated to the RFA.

**Arcadia v. E.P.A.**, 2005 WL 1403006 (9th Cir. Jun. 15, 2005).

Cities brought an action challenging the Environmental Protection Agency's (EPA) authority to approve total maximum daily load (TMDL) for trash discharged into river or to approve a state's superseding TMDL and asserting additional claims. The United States District Court for the Northern District of California dismissed the complaint and the cities appealed. The Court of Appeals held that the cities' claim against the EPA for improperly approving TMDL was not ripe for review, nor was the RFA claim.

**Nat'l Ass'n of Home Builders v. Army Corps of Eng'rs**, 417 F.3d 1272 (D.C. Cir. 2005).

The plaintiffs challenged nationwide permits issued under the Clean Water Act by the Corps as violating, *inter alia*, the RFA, because the Corps did not conduct a flexibility analysis as required by the RFA. The Army Corps of Engineers argued that its permitting action did not constitute a "rule." It was an "order" because "order" included a "licensing" disposition and a "license" included a "permit." The court considered the argument an "elaborate statutory construction" and rejected it for a more straightforward one. The court found that the permitting action fit within the APA's definition of "rule" because each permit was a legal prescription of general and prospective applicability which the Corps issued to implement permitting authority that Congress entrusted to it pursuant to the Clean Water Act. As such, the action constituted a rule because it was an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.

In addition, the court found that the Army Corps of Engineers action was a legislative rule because the permits authorized the discharge of certain materials, the permits granted rights, imposed obligations, and produced other significant effects on private interests. Accordingly, it was subject to the notice and comment requirements of the APA and to the requirements of the RFA.

*Distinguished by Norton Const. Co. v. U.S. Army Corps of Eng'rs*, 2006 WL 3526789 (N.D. Ohio Dec. 6, 2006). Norton noted that the Home Builders court did not hold that a plaintiff could not simultaneously challenge a failure to act and the merits of the decision not to act. Instead, court held that on the facts of the case the plaintiff had alleged an "oppose action" claim that was reviewable under § 706(2) without regard to the "compel action" requirements. Because a § 706(1) claim was not alleged, the court did not address the issue of incompatible claims. The Home Builders court also noted that an action under § 706(1) is similar to a petition for mandamus, therefore requiring a different substantive standard than a § 706(2) action. The Norton court concluded that the fact that the claims are governed by differing legal standards does not mean that they are mutually exclusive.

*Ripeness standard questioned by Nat'l Fed'n of Indep. Bus. v. Arch. & Transp.*, 461 F. Supp. 2d 19 (D.D.C. 2006), *infra*.

**U.S. Telecom. Ass'n. v. F.C.C.**, 400 F.3d 29 (D.C. Cir. 2005).

The court granted the petition challenging an order known as the *Intermodel Order* by the FCC for not following the procedures set forth in the RFA. The *Intermodel Order* set forth the conditions under which wireline telecommunications carriers must transfer telephone numbers to wireless carriers. The petitioners argued that the FCC's order was a legislative rule that required notice and comment under the APA and a regulatory flexibility analysis under the RFA.

The court found that the order was a legislative rule and not an interpretative one because it constituted a substantive change in a prior rule known as the *First Order* which is subject to the requirements of the APA and RFA. While the FCC satisfied the requirements of the APA, the court agreed with petitioners that the agency had failed to comply with the RFA's requirements to prepare a final regulatory flexibility analysis. 400 F.3d at 35.

In its defense, the FCC argued that its failure was harmless and would not have affected the final order. The court rejected this argument, as it was impossible to determine whether or not the order was harmless without the final regulatory flexibility analysis and remanded the order to the FCC to prepare to correct its procedural errors under the RFA. 400 F.3d at 42.

**Rancher's Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S.D.A.**, 359 F. Supp. 2d 1058 (D. Mont. 2005).

The court issued a preliminary injunction to block a rule allowing for resumption of the importation of Canadian beef and cattle, following ban caused by concern over BSE (Mad Cow Disease). The court found that the injunction was necessary to prevent irreparable loss of rights and that Plaintiff had a substantial likelihood of success on the merits. In addition to other defects, the agency had failed to satisfy the requirements of the RFA.

The court stated that the USDA admitted that the Final Rule would primarily affect small businesses but that the USDA had considered only two alternatives: leaving the regulations unchanged, or modifying the import requirements by either requiring that imported beef come from cattle slaughtered at less than 30 months of age or continuing to prohibit the entry of live ruminants. The court noted that § 604 of the RFA commands an agency to give explicit consideration to less onerous options, and stated, "[b]y offering only two alternatives, the USDA did not make a good-faith effort to assess all significant alternatives. Because of this, there is probable success of Plaintiff in their argument that the USDA failed to comply with the Regulatory Flexibility Act" 359 F.Supp.2d at 1073.

The court suggested two alternatives that could have mitigated the adverse effects of the Final Rule on small businesses: (1) labeling edible bovine products derived from Canadian cattle or imported from Canada so that consumers could make informed choices, and (2) allowing slaughter facilities to voluntarily test cattle for BSE.

**Rancher's Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S.D.A.**, 415 F.3d 1078 (9th Cir. 2005).

On appeal, the 9th Circuit Court of Appeals concluded that the district court erred in finding USDA failed to comply with the RFA. The court stated that the RFA imposes no substantive requirements on an agency; rather, its requirements are "purely procedural" in nature. The court found that the alternatives identified by the district court would not necessarily ease the burden on small businesses; rather, they would reallocate the rule's burden to small businesses in different sectors of the beef industry. More importantly, the specific concerns the district court raised were considered by USDA in its response to comments on the rule. USDA rejected the first alternative--the implementation of a country-of-origin labeling program-- because it did not consider such a program to concern food safety or animal health.

USDA rejected the second alternative, voluntary BSE testing, because it did not consider such testing reliable enough to be used as a food safety measure. Given that USDA discussed and rejected these alternatives in the body of its final rule, the court concluded that the agency did not err in failing to consider them as alternatives in its final regulatory flexibility analysis.

**Oceana v. Evans**, 2005 WL 555416 (D.D.C. March 9, 2005).

The plaintiffs alleged that the Secretary acted improperly in approving Amendment 13 to the Northeast Multispecies Fishery Management Plan, which governs groundfish fishing in the waters off of New England. The plaintiff Trawler's Survival Fund ("TSF"), which represented several groups of fishermen, challenged the Secretary for failing to authorize enough fishing. The plaintiff Conservation Law Foundation and the Natural Resources Defense Council challenged the Secretary for not limiting fishing enough.

TSF also claimed the rule violated the RFA because the implemented version of the rule had more severe economic impacts on fishing communities and was different from the version that the Council used in assessing the financial and social impacts of the proposed measures. TSF alleged that the Final Regulatory Flexibility Analysis did not comply with the RFA because it "rejects economically ameliorative alternatives without rational bases and it predicates its economic and social impact assumptions, analyses and comparisons on fishing effort" that Amendment 13, as implemented by the Secretary, inhibits." 2005 WL at \*22.

The court did not address this issue, finding first that TSF's claims were moot because Plaintiff had no current injury that could be remedied. "Framework 40-A has eliminated the economic injury Plaintiff relied on in [the RFA claim]... and therefore, [it] must be dismissed as moot" (2005 WL at \*23). The court dismissed the RFA claim with prejudice.

**Oceana v. Evans**, 384 F. Supp. 2d 203 (D.D.C. 2005).

An environmental organization brought an action challenging the Secretary of Commerce's approval of amendment to Atlantic Sea Scallop Fishery Management Plan (FMP) and of regulations authorized by amendment. The plaintiff alleged that the Secretary failed to protect loggerhead sea turtles under Endangered Species Act (ESA), failed to establish adequate system for observing and reporting bycatch under Magnuson-Stevens Act (MSA), and failed to consider reasonable alternatives proposed by an organization to protect essential fish habitat (EFH) from destructive effects of scallop dredges under National Environmental Policy Act (NEPA). Furthermore, the plaintiff claimed that the amendment deferred key decisions about fishery management in contravention of MSA by establishing framework adjustment procedure for future management measures. The plaintiff moved for summary judgment. This is not really an RFA case. The RFA is only mentioned in terms of stating which laws are not applicable to framework adjustments.

**Oregon Trollers Ass'n v. Gutierrez**, 2005 WL 2211084 (D. Ore. Sept. 8, 2005).

In January 2005, the Salmon Technical Team ("STT") and the Council's staff economist met to develop the *Review of 2004 Ocean Salmon Fisheries*, a document which summarized the 2004 seasons, quotas, harvest, escapement, socioeconomic statistics, management goals and achievements, and impacts on Endangered Species Act-listed species. The preliminary report reflected the failure of the 2004 measures to accomplish the required management objectives. The Klamath River Technical Advisory Team ("TAT") prepared and released two documents examining the 2004 Klamath River fall chinook run and

projecting the abundance and prospective harvest levels of Klamath River fall chinook for the 2005 seasons. The management council met and considered reports submitted by the public.

The NMFS regional administrator forwarded the 2005 management measures as approved by the Council to the National Oceanic and Atmospheric Administration (“NOAA”) Assistant Administrator for Fisheries, with a request that the measures be approved. The administrator included recommendations that the NOAA Assistant Administrator found that good cause existed to waive the APA's notice and comment requirement, on various bases, but primarily on the basis that the additional two months of notice and comment required by the APA would force the regulations to be prepared before the scientific data needed to make the regulations could be collected and analyzed. The NOAA Assistant Administrator adopted the recommended measures, and on May 4, 2005, they were published as final regulations in the *Federal Register*, and went into immediate effect.

The plaintiffs, who were members of the southern Oregon and/or northern California chinook salmon fishery, brought an action to challenge the 2005 management measures for the Pacific Coast ocean salmon fishery. The plaintiffs alleged that in the promulgation of such measures, the defendants violated the Magnuson Act, the APA, and the RFA. The plaintiffs alleged that the defendants violated the RFA when they failed to perform a threshold analysis or to certify, pursuant to the RFA, the harvest regulations. The court found that the defendants properly invoked the “good cause” exception to the APA's notice and comment provisions, and therefore were exempt from the requirements of the RFA. Overall, the annual population dynamics of the various salmon stocks required managers to vary the season structure of the various West Coast area fisheries to protect weaker stocks and give fishers access to stronger salmon stocks, particularly hatchery produced fish. Failure to implement these measures immediately could compromise the status of certain stocks or result in forgoing opportunity to harvest stocks whose abundance has increased relative to the previous year, thereby undermining the purpose of this agency action.

**Nat'l Ass'n of Home Builders v. Army Corps of Eng'rs**, 417 F.3d 1272 (D.C. Cir. 2005).

The plaintiffs challenged nationwide permits issued under the Clean Water Act by the Corps as violating, *inter alia*, the RFA, because the Corps did not conduct a flexibility analysis as required by the RFA. The Army Corps of Engineers argued that its permitting action did not constitute a “rule.” It was an “order” because “order” included a “licensing” disposition and a “license” included a “permit.” The court considered the argument an “elaborate statutory construction” and rejected it for a more straightforward one. The court found that the permitting action fit within the APA’s definition of “rule” because each permit was a legal prescription of general and prospective applicability which the Corps issued to implement permitting authority that Congress entrusted to it pursuant to the Clean Water Act. As such, the action constituted a rule because it was an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.

In addition, the court found that the Army Corps of Engineers action was a legislative rule because the permits authorized the discharge of certain materials, granted rights, imposed obligations, produced other significant effects on private interests. Accordingly, it was subject to the notice and comment requirements of the APA and to the requirements of the RFA.

*Distinguished by* Norton Const. Co. v. U.S. Army Corps of Eng'rs, 2006 WL 3526789 (N.D. Ohio 2006). Norton noted that the Home Builders court did not hold that a plaintiff could not simultaneously challenge a failure to act and the merits of the decision not to act. Instead, court held that on the facts of the case the plaintiff had alleged an "oppose action" claim that was reviewable under § 706(2) without regard to the "compel action" requirements. Because a §

706(1) claim was not alleged, the court did not address the issue of incompatible claims. The Home Builders court also noted that an action under § 706(1) is similar to a petition for mandamus, therefore requiring a different substantive standard than a § 706(2) action. The Norton court concluded that the fact that the claims are governed by differing legal standards does not mean that they are mutually exclusive.

*Ripeness standard questioned by Nat'l Fed'n of Indep. Bus.s v. Architectural and Transp.*, 461 F. Supp. 2d 19 (D.D.C. 2006), *infra*.

## **2006**

**Nat'l Women, Infants, & Children Grocers Ass'n v. Food & Nutr. Serv.**, 416 F. Supp. 2d 92 (D.D.C. 2006).

Pursuant to the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), the Food Nutrition Service (FNS), a USDA agency, promulgated an interim rule requiring state agencies to neutralize the pricing differentials between stores that accepted both WIC vouchers and other forms of payment for goods and stores that only accepted WIC vouchers as payment. The plaintiffs are WIC-only small businesses and a trade organization that oppose the interim rule and argue that FNS should have conducted an RFA analysis instead of certification.

The court granted summary judgment to Defendant and denied Plaintiffs' motion for summary judgment, holding the FNS certification proper because the interim rule regulated state agencies—the impact on small businesses was indirect. Furthermore, the court bolstered its reasoning by citing the fact that FNS stated in the *Federal Register* that it planned to use data collected from the interim rule to strengthen its ultimate FRFA.

**Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs**, 453 F. Supp. 2d 116 (D.D.C. 2006).

Plaintiffs challenged Defendant's issuance of permits that allow discharges otherwise prohibited by the Clean Water Act. Initially, the district court granted summary judgment for Defendant. See Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 297 F. Supp. 2d 74 (D.D.C. 2003). The D.C. Circuit reversed in part, and remanded. See Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272 (D.C. Cir. 2005). On remand, Defendant brought a motion for summary judgment. Ultimately, the court granted Defendant's cross-motions for summary judgment, denied Plaintiff's motions, and dismissed the case.

In this opinion, the court did not deal with the RFA issue and dismissed the case on other grounds. Footnote 6 of this opinion states that both sides submitted a joint motion for partial consent judgment on the RFA claims on January 5, 2006. Unfortunately, the opinion does not indicate what the parties stipulated, and the docket is not accessible on Westlaw.

**Nat'l Fed'n of Indep. Bus. v. Architectural & Transp. Barriers Compliance Bd.**, 461 F. Supp. 2d 19 (D.D.C. 2006)

The court granted Defendant's 12(b)(1) motion to dismiss because the dispute was not ripe. Plaintiff, an association of small business owners, brought suit, alleging that Defendant's revision of the Americans with Disabilities Act violated the RFA. Specifically, Plaintiff argued that Defendant's certification of the rule was prepared with insufficient data and lacked the required factual basis.

The court ruled in favor of Defendant because individual members of Plaintiff-association were only required to comply with rules set forth by the DOJ. In this case, the DOJ had not incorporated Defendant's revisions into its standards, and the DOJ planned to conduct RFA analyses before adoption of the revisions. The court further reasoned that dismissal was appropriate because judicial intervention could interfere with planned DOJ action, further factual development would be beneficial, and the harm to Plaintiff would be minimal because Defendant's rules were not enforceable against Plaintiff.

**United Boatmen v. Gutierrez**, 429 F. Supp. 2d 543 (E.D.N.Y. 2006).

The plaintiff-fishermen sued the National Marine Fisheries Service (NMFS) because the agency set a quota of 23.59 million pounds of Atlantic summer flounder (fluke) for the 2006 season. Previous season quotas were set at 26 million pounds. The plaintiffs sought declaratory judgment stating defendants failed to comply with the RFA and Executive Order 12866. The court denied Plaintiffs' motion for summary judgment, granted Defendants' motion for summary judgment, and refused to decide the RFA claim because the Defendant agencies acted appropriately.

## **2007**

**Aero. Repair Station Ass'n v. F.A.A.** 494 F.3d 161 (D.C. Cir. 2007).

The plaintiff challenged a final rule (2006 Final Rule or Rule) of the Federal Aviation Administration (FAA) which amended its drug and alcohol testing regulations to expressly mandate that air carriers require drug and alcohol tests of all employees of its contractors, including employees of subcontractors at any tier, who perform safety-related functions such as aircraft maintenance. The plaintiff challenged the Rule on the grounds that it impermissibly expanded the scope of employees tested in violation of the unambiguous statutory language of § 45102(a)(1), the Administrative Procedure Act, 5 U.S.C. §§ 701-06, and the Fourth and Fifth Amendments to the United States Constitution. In addition, it challenged the FAA's conclusion that it was not required to conduct a regulatory flexibility analysis under the Regulatory Flexibility Act (RFA) because the Rule does not have a significant adverse effect on small entities. The court upheld the substance of the Rule but rejected the FAA's RFA determination.

In the NPRM, the FAA performed a tentative RFA analysis and counted among RFA small entities both air carriers and Part 145 repair stations but because it could not determine how many of the 2,412 Part 145 repair stations are considered small entities. In the second NPRM, the FAA determined that the small entity group is considered to be Part 145 repair stations, but it still could not determine how many of the Part 145 repair stations and their subcontractors were considered small entities. The FAA concluded that most, if not all of the non-certificated maintenance contractors would be considered small entities. Based on its calculation of annualized costs of less than 1% of annual median revenue, the FAA certified that the proposed action would not have a significant economic impact on a substantial number of small entities.

Although commentators raised RFA issues, in the final rule FAA disagreed and asserted that contractors were not among entities regulated under the testing regulations for the purpose of the RFA. The FAA noted that the directly regulated employers were: air carriers operating under 14 CFR Parts 121 and 135, § 135.1(c) operators, and air traffic control facilities not operated by the FAA or by or under contract to the U.S. military, who must conduct drug and alcohol testing under the FAA regulations. For drug and alcohol testing purposes, certificated repair stations were contractors, and contractors were not regulated employers. Accordingly, the FAA concluded it was not required to conduct an RFA analysis, including considering significant alternatives, because contractors (including subcontractors at any tier) were indirectly regulated entities.

In making its determination, the FAA relied on the Mid-Tex case and other cases that held that under the RFA the regulating agency need consider only the economic impact of agencies directly affected and regulated by the subject regulations. The plaintiffs asserted that the FAA's determination was incorrect. The court found that, unlike the parties claiming economic injury in the cited cases, the contractors and subcontractors were directly affected and therefore regulated by the challenged regulations. Although the regulations immediately addressed the employer air carriers which were in fact the parties certified to operate aircraft, the regulations expressly required that the employees of contractors and subcontractors be tested. Thus, the contractors and subcontractors (at whatever tier) were entities subject to the proposed regulation.

The FAA also asserted that it had substantially complied with the RFA because it conducted initial evaluations and a final economic evaluation of the effects on the industry, responding to comments following the proposal. The court found that the final evaluation was not a FRFA because the FAA determined that contractors and subcontractors are not regulated entities for the purpose of the RFA. In addition, the FAA did not consider alternatives as required by the RFA. The court upheld the substance of the FAA's 2006 Final Rule and remanded for the limited purpose of conducting the analysis required under the RFA, treating the contractors and subcontractors as regulated entities.

**Natural Res. Def. Council v. E.P.A.**, No. 04-1385, 04-1386, 05-1302, 05-1434, 06-1065, 2007 WL 1651831 (D.C. Cir. June 8, 2007).

The EPA promulgated two rules regarding emissions from boilers and incinerators (“boiler rule” and “incinerator rule”). The plaintiffs challenged the definitions of incineration units used in both rules, and some the plaintiffs challenged the EPA’s certification of the boiler rule.

The court vacated and remanded both rules after determining that the definitions in the incinerator rule and in the boiler rule needed to be revised. For this reason, the court deemed all other issues, including RFA noncompliance, moot.

*Positively discussed by AFL-CIO v. Chao, 496 F.Supp.2d 76 (D.D.C. 2007). The AFL court commended other D.C. circuit judges, including those concurring in Nat’l Res., for “vigorously disput[ing] the relative virtues and vices of vacating versus remanding unlawful agency actions, an inexplicable waste of ink (or toner) if the distinction between the two is as inconsequential...” 496 F.Supp.2d at 85.*

**Or. Trollers Ass’n v. Gutierrez**, 452 F.3d 1104 (9th Cir. 2006).

Pursuant to a 1989 conservation regulation that sets a floor on the population of adult spawning Klamath chinook salmon, the National Marine Fisheries Service (NMFS) adopted fishery management measures each year. The 2005 management measures placed greater hardship on fisheries than the regulations promulgated in prior years by significantly limiting commercial and recreational fishing in response to projected shortfalls in salmon (likely caused by parasites and low water levels). The plaintiff (fisheries) brought suit in district court to challenge the 2005 management measures and appealed that court’s decision to grant summary judgment to the NMFS.<sup>4</sup> The Ninth Circuit affirmed the lower court’s holdings.

The plaintiffs argued that the NMFS failed to prepare the economic analyses required by the RFA. The RFA applies to any rule requiring notice and comment under section 553(b) of the APA. Here, the court held that the NMFS’ invocation of the “good cause” exception to the RFA requirement was valid because the NMFS gave season specific reasons for the exception. NMFS explained that management measures

are based on data from the prior season, which is not available until January. Because the new season opens on May 1, the sixty day comment period is infeasible. The court added that as long as the NMFS provides fresh reasoning related to the season in which the exception applies, repeated invocation of the exception is not a problem.

*Plaintiff relied on Or. Trollers in **Gulf Fishermen's Ass'n v. Gutierrez**, 484 F. Supp. 2d 1264 (M.D. Fla. 2007) to its detriment. Plaintiff attempted to have 30-day judicial review period reopened based on the Or. Trollers precedent. The Fishermen's court was not persuaded by this, noting that the holding in Or. Trollers was not binding.*

**Cook v. United States**, No. Civ. 06CV909-L(JMA), 2007 WL 642953 (S.D. Cal. Feb. 20, 2007).

The plaintiff challenged certain withholding regulations promulgated by the IRS on the grounds that the IRS failed to comply with the RFA. Because the IRS defined the regulations as interpretive rather than substantive, they stated that the RFA did not apply. The plaintiff argued that the regulations are substantive and therefore void because the IRS did not prepare any economic analyses. The district court for the southern district of California did not reach this issue. The court dismissed the complaint because Plaintiff sought relief, in the form of a tax refund, prematurely.

**Legacy Fishing v. Gutierrez**, No. 06-0835 (JR), 2007 WL 861143 (D.D.C. March 20, 2007).

The plaintiffs (Alaskan fishing companies) claimed that the National Marine Fisheries Service (NMFS) publication of Amendment 79 to the Bering Sea/Aleutian Islands Groundfish Fishery Management Plan violated the RFA, APA, and Magnuson-Stevens Act. The amendment at issue dealt with minimizing the bycatch rates in this industry. Plaintiffs specifically argued that the NMFS's FRFA was incomplete because it utilized an improper size classification and failed to sufficiently analyze alternatives.

Under the RFA, the rulemaking agency is required to use SBA size definitions of what constitutes a small business. In this case, SBA's standards did not include a classification for ships that both harvest and process fish. In making the choice between the classification for "floating factory ships" and "fish harvesters," the NMFS eschewed Advocacy's recommendation that they use the factory ships classification and defined the regulated companies as harvesters. Under this size standard, none of the companies qualified as small businesses.

In granting Defendant's motion for summary judgment, the court highlighted the fact that the NMFS had, in fact, treated regulated vessels as small businesses in the RFA analysis because of the problems with classification. Furthermore, the court held that Plaintiffs' charge of inadequate analysis of alternatives lacked the specificity required for the court to make a finding that NMFS' actions were "arbitrary" or "capricious."

*Reversed by Fishing Co. of Alaska, Inc. v. Gutierrez, 510 F.3d 328 (D.C. Cir. 2007). Court of Appeals held that the Secretary failed to comply with his duty to review the rule at time it was proposed for consistency with applicable law.*

**Gulf Fishermen's Ass'n v. Gutierrez**, No. 8:06 CV 2313 T 26TBM, 2007 WL 1219577 (M.D. Fla. Apr. 24, 2007).

The National Marine Fisheries Service (NMFS) published a final rule in the *Federal Register* on August 9, 2006, requiring any boats with commercial vessel permits for Gulf reef fish to be equipped with an operating Vessel Monitoring System approved by the NMFS. The plaintiff, a commercial fishing

advocacy group, brought suit on December 15, 2006 seeking declaratory and injunctive relief for NMFS' failure to comply with the RFA.

Lacking jurisdiction, the court granted Defendant's motion for summary judgment because Plaintiff failed to file suit within 30 days of publication of the final rule as required by the Magnuson-Stevens Act.

**Natural Resources Def. Council v. E.P.A.**, 489 F.3d 1250 (D.C. Cir. 2007).

The Environmental Protection Agency (EPA) promulgated two rules on emissions standards for boilers, heaters, and industrial incinerators. Several groups petitioned for judicial review of the rules, including a group of municipalities arguing that EPA had violated the RFA. The Court of Appeals for the District of Columbia vacated the rules for reasons unrelated to the RFA.

*Positively discussed by AFL-CIO v. Chao, 496 F.Supp.2d 76 (D.D.C. 2007). The AFL court commended other D.C. circuit judges, including those concurring in Nat'l Res., for "vigorously disput[ing] the relative virtues and vices of vacating versus remanding unlawful agency actions, an inexplicable waste of ink (or toner) if the distinction between the two is as inconsequential..." 496 F.Supp.2d at 85.*

**Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Dep't of Agri.**, 499 F.3d 1108 (9th Cir. 2007).

The Department of Agriculture (DOA) issued a rule relaxing restrictions on imported beef. A cattlemen's association challenged the rule, alleging, among other things, that the DOA violated the RFA. The case was decided on an unrelated matter.

**Council Tree Commc'ns v. F.C.C.**, 503 F.3d 284 (3rd Cir. 2007).

Several companies sued the Federal Communications Commission (FCC) over a proposed rule affecting bidding for wireless spectrum licenses. The companies claimed, among other things, that FCC did not comply with the RFA. The court dismissed the case for lack of jurisdiction.

**White Eagle Coop. Assoc. v. Johanns**, 508 F. Supp. 2d 664 (N.D. Ind. 2007).

This case involved milk market orders. Plaintiff milk producers brought action claiming that it suffered harm due to Defendant's regulation, stating that the regulation made it more difficult for member dairy producers to qualify their milk as producer milk. Among other claims, Plaintiff alleged that Defendant violated the RFA by failing to complete Regulatory Flexibility Analysis, and failed to provide adequate support for its certification with a statement providing the factual basis.

In response, Defendant argued that because Plaintiff was a producer, rather than a handler, and that the regulation in question specifically affected handlers of milk. Defendant also argued that the certification it did in compliance with the exception in the RFA was sufficient, and therefore further analysis was unnecessary.

The court was not persuaded by Defendant's contention that Plaintiff's motion was improper due to the intricacies of the milk industry. However, the court granted Defendant's motion to for summary judgment, reasoning that the factual support offered that this regulation would not have a significant economic impact on small entities was sufficient.

**Parkdale Int'l Ltd. v. United States**, 508 F. Supp. 2d 1338 (Ct. Int'l Trade 2007).

Plaintiffs were importers and exporters of Canadian steel. Plaintiffs challenged the Department of Commerce's interpretation of a regulation which mandated anti-dumping duties on merchandise entered into the United States. Under the regulation, upon importation of product, Customs assessed duties, rather than assessing the antidumping duties after the opportunity for an administrative review of the antidumping duty order.

Plaintiffs alleged that this practice violated the RFA specifically that the proposed regulation was labeled as "clarification" when it was actually a proposed rule. However, Plaintiffs did not state that this failure had any impact. In finding for Defendant, the court concluded that the error was, "admittedly harmless" and could not be the basis for invalidating the rule. 508 F. Supp. 2d at 1358.

**Newport Aero. Sales v. Dep't. of the Air Force**, 2007 WL 2007966 (D.D.C. July 11, 2007).

Plaintiff sought a declaratory judgment finding the new Air Force Instruction (AFI) 61-204 unlawful. Because of the instruction, plaintiff argued that the Air Force quit responding to requests for information pursuant to Defense Directive 5230.25 upon which plaintiff relied to operate its business as a commercial data library. Plaintiff alleged that the AFI violated the RFA, as the Air Force did not prepare a Small Business Impact Statement under § 603 or § 604.

The court ruled, however, that Plaintiff did not have standing. To have standing to claim a violation of a procedural right, the government must violate a procedural right designed to protect the plaintiff's "threatened concrete interest" and must result in an injury to that "concrete, particularized interest." Ctr. for Law and Educ. v. Dep't of Educ., 396 F.3d 1152, 1157 (D.C. Cir. 2005). For the failure to prepare an RFA to threaten Plaintiff's concrete interest, Plaintiff had to be a small business. The court did not decide the issue, as it found that even if Plaintiff were a small business, it did not prove that Defendant's failure to follow the RFA resulted in injury to a concrete, particularized interest.

**Valentine Props. Assoc. v. U.S. Dep't of Housing & Urban Dev.**, No. 05 Civ.2033(SCR), 2007 WL 3146698 (S.D.N.Y. Oct. 12, 2007).

Plaintiff owned two apartment complexes with "Section 8" subsidy contracts with HUD originating in 1978. When the contracts were signed, each unit was required to meet "decent, safe and sanitary conditions," however, these conditions were not defined in the United States Housing Act of 1937. HUD performed annual inspections to ensure that these undefined requirements were met. In 1998, HUD updated the Act to include a specific definition of these conditions, and formed the Real Estate Assessment Center (REAC) to carry out these inspections. In 2003, Plaintiff's properties failed inspection, and HUD attempted to terminate the contracts.

Plaintiff sought a declaratory judgment that the use of REAC to pre-existing contracts and termination of these contracts violated the terms of the contracts and the Fifth Amendment. Plaintiff asserted that the REAC regulations contradicted the requirements contained in E.O. 12866 and RFA. Defendant filed 12(b)(1), (6) motions, which the court granted. However, the court found that HUD's effort to terminate the contracts after adoption of the new definition of the disputed terms violated the terms within the contracts, and the REAC regulations violated the requirements contained in RFA.

**Am. Fed'n of Labor v. Chertoff**, No. C 07-04472 CRB, 2007 WL 2972952 (N.D. Cal. Oct. 10, 2007).

The Department of Homeland Security (DHS) promulgated a final rule entitled "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter." See 72 Fed.Reg. 45611 (Aug. 15, 2007). Under the

rule, an employer received a “no-match letter” if an employee’s name and social security number did not match.

Plaintiff union and business group sought a preliminary injunction to bar enforcement of the rule under several theories, asserting that it was arbitrary and capricious in violation of APA, and that promulgation of the rule violated RFA for failure to conduct Final Rule Flexibility Analysis. This analysis requires, in pertinent part:

A summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, [and] the steps the agency has taken to minimize the significant economic impact on small entities. 5 U.S.C. § 604(a).

In promulgating the rule, DHS claimed an exception permitted in the RFA, which allows for an agency to certify that the rule will not have a significant economic effect on small entities. 5 U.S.C. § 605(b). At first, DHS asserted that the rule merely provided clarification of terms. However, in briefing, DHS claimed that FRFA was unnecessary because RFA does not apply to interpretive rules. The court was unable to consider the second explanation, focusing instead on DHS’s first argument, which was that there would not be significant economic impact on small entities. The court was persuaded by Plaintiff’s declarations that the rule would have significant impact, noting the potential significance of the costs of hiring human resources staff to track and solve mismatches within the timeframe allotted in the rule, the costs of hiring legal services help, and the costs or training current staff. The court found discrepancies in DHS’s arguments, and granted Plaintiff’s motion for preliminary injunction.

## **2008**

**Tafas v. Dudas**, 530 F. Supp. 2d 786 (E.D. Va. 2008).

Plaintiff, an inventor brought action an action against the Patent and Trademark Office (PTO) under Administrative Procedure Act (APA) challenging newly-adopted rules that limited number of continuing applications, requests for continued examination (RCE), and claims that applicant could make.

Plaintiff made a claim for discovery on the ground that the PTO made an erroneous and bad faith judgment under the RFA that the new rules would not have a substantial economic impact on a significant number of small entities. The PTO argues that the notice published in the *Federal Register*, in addition to the 1,110 pages in the administrative record regarding the RFA, are sufficient to decide whether the PTO put forth a “reasonable, good-faith effort.” 530 F.Supp. 2d at 799 (quoting *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001)). The court affirmed the decision of the magistrate to deny Plaintiff’s discovery request because it found that Plaintiff had failed to make a sufficiently strong showing of bad faith.

**Tafas v. Dudas**, 541 F. Supp. 2d 805 (E.D. Va. 2008).

Plaintiffs, a pharmaceutical company and an inventor, brought an action against the Patent and Trademark Office (PTO) challenging newly-adopted rules that limited number of continuing applications, requests for continued examination (RCE), and claims that applicant could make. Plaintiffs argued that the new rules violated the Constitution, the Patent Act, the APA, and the RFA and sought an injunction against the implementation of the rules.

The court ruled that 35 U.S.C.A. § 2(b)(2) does not give the PTO the ability to make substantive rules, even though the PTO is required to have notice and comment. Instead, the PTO’s ability is limited to procedural rules. Though the PTO argued its rule is procedural, it is not, as it “[a]ffects individual rights

and obligations.” 541 F. Supp. 2d at 814 (quoting [Chrysler Corp. v. Brown](#), 441 U.S. 281, 302). For example, the new rules shift the examination burden from the PTO to the applicants and limit the number of patent applications. Accordingly, the plaintiff’s motion for summary judgment was granted. The court did not address the merits of the RFA claim.

**Nat’l Mining Ass’n v. Mine Safety and Health Admin.**, 512 F.3d 696 (D.C. Cir. 2008).

The Mine Safety and Health Administration (MSHA) proposed a rule amending the Federal Mine Health and Safety Act of 1977. The Association challenged the proposed rule, arguing, among other things, that the MSHA failed to comply with the RFA by not analyzing the economic impact of the proposed rule. The Court of Appeals for the District of Columbia rejected this claim, finding that MSHA had met the RFA requirements by certifying that the rule would not have a significant economic impact on small businesses.

**Am. Forest Res. Council v. Hall**, 533 F. Supp. 2d 84 (D.D.C. 2008).

Plaintiff, a forest products trade association, brought an action alleging that the United States Fish and Wildlife Service’s (FWS) decision, after conducting a five-year status review, to maintain threatened species listing for a species of seabird violated the Endangered Species Act (ESA), the Administrative Procedure Act (APA), the Regulatory Flexibility Act (RFA), the Unfunded Mandates Reform Act, and the National Environmental Policy Act (NEPA). Parties filed cross-motions for summary judgment.

Because the NEPA statute did not create a cause of action, the defendant’s action must be “a final agency action for which there is no other adequate remedy in court.” 533 F.Supp. 2d at 90. The Supreme Court developed a two-part test to determine finality: “First, the action must mark the ‘consummation’ of the agency’s decisionmaking process ...-it must not be of a merely tentative or interlocutory nature....second, the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” [Bennett v. Spear](#), 520 U.S. 154, 177 (1997).

The court found that the five-year status review qualified as a consummation of the decisionmaking process, as the defendant determined that the species would remain protected. The likelihood of revision of the rule sometime in the future was considered irrelevant. However, the court ruled that legal consequences did not flow from the five-year review as the defendant is not required to change the species status based on it. Accordingly, the court granted the defendant’s motion, holding that decisions to maintain threatened species listings are not subject to judicial review. The court did not address the RFA issue.

**Atlantic Urology Assoc. v. Leavitt**, No. 08-141, 2008 WL 1931443 (D.D.C. May 5, 2008).

To counteract the practice of physician groups using offsite laboratories for lab work, and then claiming that doctors in both locations “shared a practice” for purposes of billing, HHS created the “Anti-Markup Rule.” This rule permitted billing Medicare only for lab work performed in a “centralized building.” Plaintiff urology physicians’ group challenged the rule. It asserted arbitrary and capricious violation of the APA, as well as violation of RFA, stating that Defendant failed to prepare a final regulatory flexibility analysis.

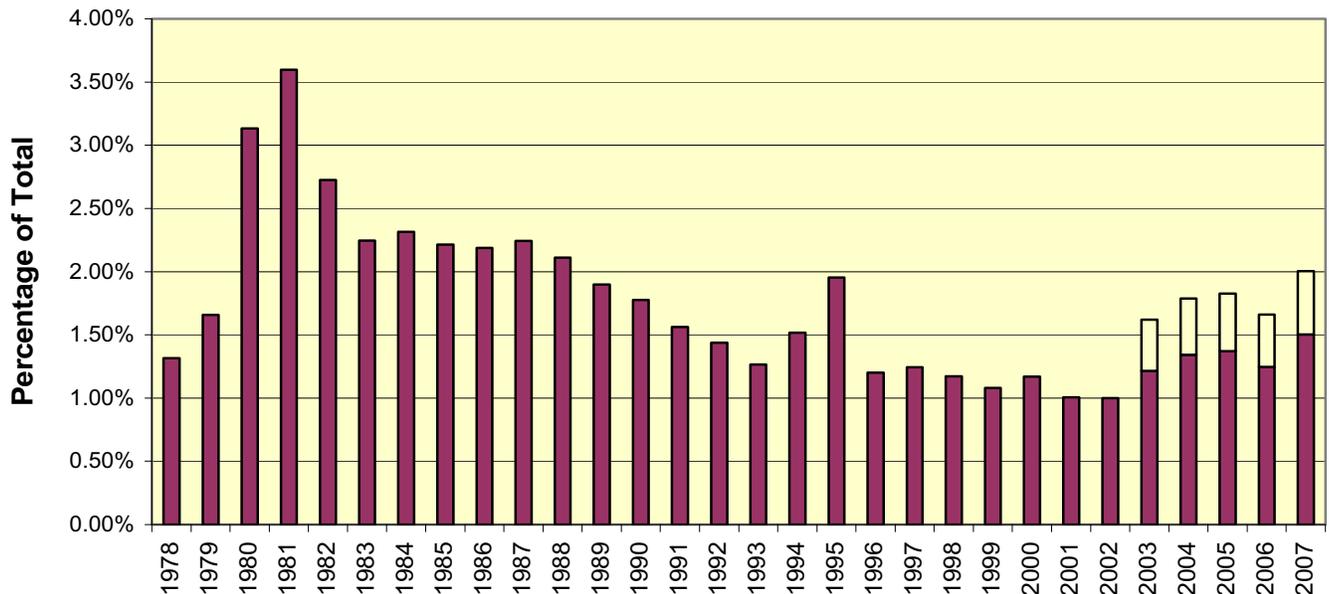
The court granted Defendant’s motion to dismiss for lack of standing and jurisdiction, and did not address the alleged APA and RFA violations.

## Appendix P: Advocacy Actual Expenses (1978 – 2007)

### Advocacy's % of Total SBA Actuals for Non-Disaster, Non-Credit Expenses <sup>A</sup> Fiscal Years 1978 - 2007 (dollars in thousands)

Fiscal Year	Advocacy Expenses	Total SBA Expenses	Advocacy % of Total	Fiscal Year	Advocacy Expenses	Total SBA Expenses	Advocacy % of Total
FY 1978	1,930	146,634	1.32%	FY 1993	5,362	423,414	1.27%
FY 1979	2,836	170,978	1.66%	FY 1994	6,090 <sup>C</sup>	401,700	1.52%
FY 1980	6,050 <sup>B</sup>	193,162	3.13%	FY 1995	7,956 <sup>D</sup>	407,547	1.95%
FY 1981	7,264 <sup>B</sup>	201,944	3.60%	FY 1996	4,617	384,494	1.20%
FY 1982	5,755	211,131	2.73%	FY 1997	4,762	383,005	1.24%
FY 1983	6,281	279,837	2.24%	FY 1998	4,869	415,208	1.17%
FY 1984	5,654	244,202	2.32%	FY 1999	5,134	475,442	1.08%
FY 1985	5,701	257,396	2.21%	FY 2000	5,620	480,824	1.17%
FY 1986	5,546	253,472	2.19%	FY 2001	5,443	540,547	1.01%
FY 1987	6,018	268,213	2.24%	FY 2002	5,019	502,619	1.00%
FY 1988	6,043	286,314	2.11%	FY 2003	8,680 <sup>E</sup>	535,511	1.62%
FY 1989	5,769	303,758	1.90%	FY 2004	9,360 <sup>E</sup>	523,226	1.79%
FY 1990	5,645	317,844	1.78%	FY 2005	9,439 <sup>E</sup>	516,753	1.83%
FY 1991	5,647	361,504	1.56%	FY 2006	9,364 <sup>E</sup>	563,556	1.66%
FY 1992	5,764	401,147	1.44%	FY 2007	9,858 <sup>E</sup>	491,732	2.00%

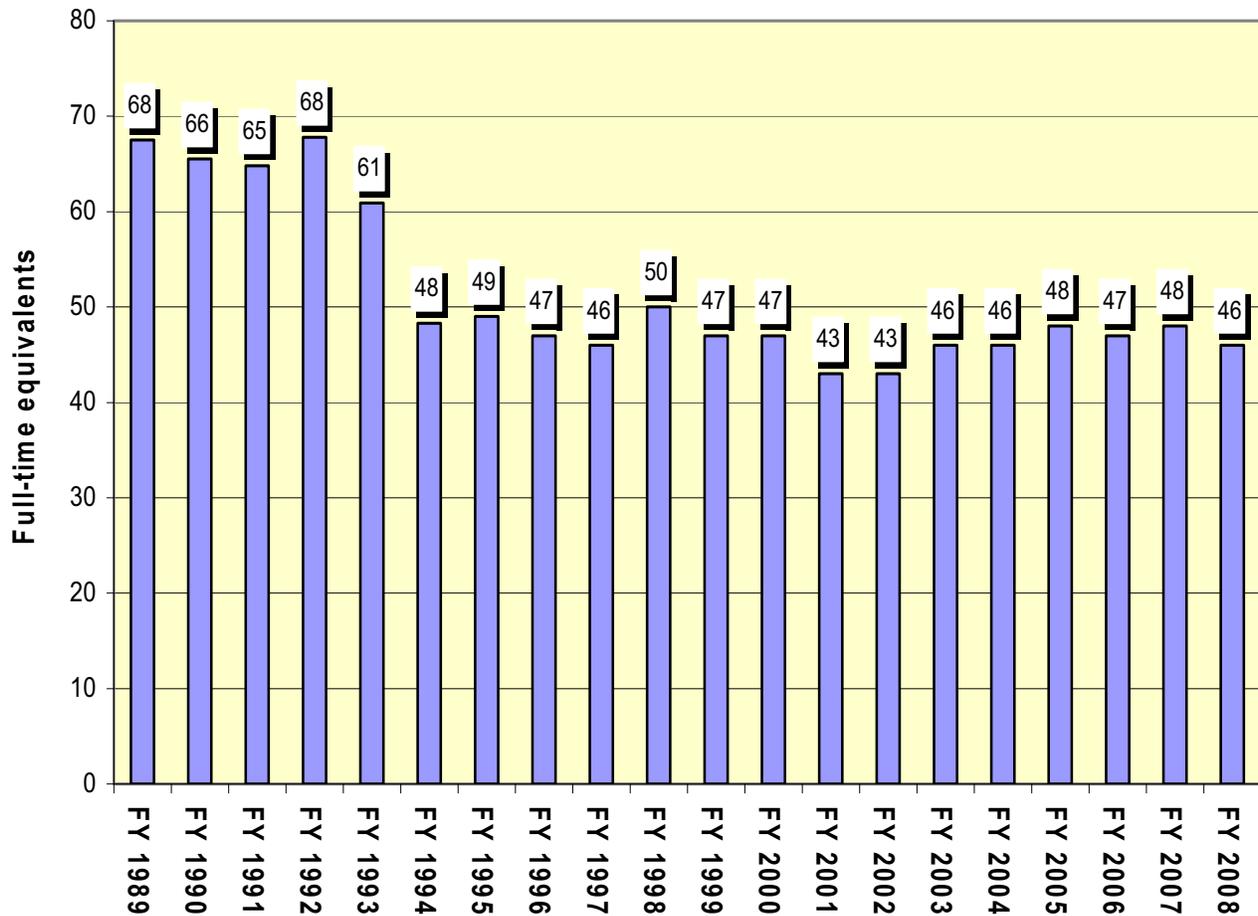
**Advocacy % of Total SBA Non-Disaster, Non-Credit Expense Actuals**



- <sup>A</sup> Source: Expenses are derived from non-disaster "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 appendices' numbers, which were rounded to millions beginning in that year. SBA S&E totals exclude the highly variable disaster actuals, but include Inspector General S&E, which from 1990 on appears in a separate account in budget documents. Advocacy totals include economic research.
- <sup>B</sup> 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.
- <sup>C</sup> \$1,507,000 of this amount was expended for the 1995 White House Conference on Small Business.
- <sup>D</sup> \$2,157,000 of this amount was expended for the 1995 White House Conference on Small Business.
- <sup>E</sup> Dollars include an agency overhead charge representing Advocacy's share of agency 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 prior years (solid in chart), vary from year to year, but are here estimated to be 75 percent of total costs under the new accounting.

## Appendix Q: Advocacy Staffing (1989 – 2008)

### Office of Advocacy Full-Time Equivalents <sup>A</sup> Fiscal Years 1989 - 2008



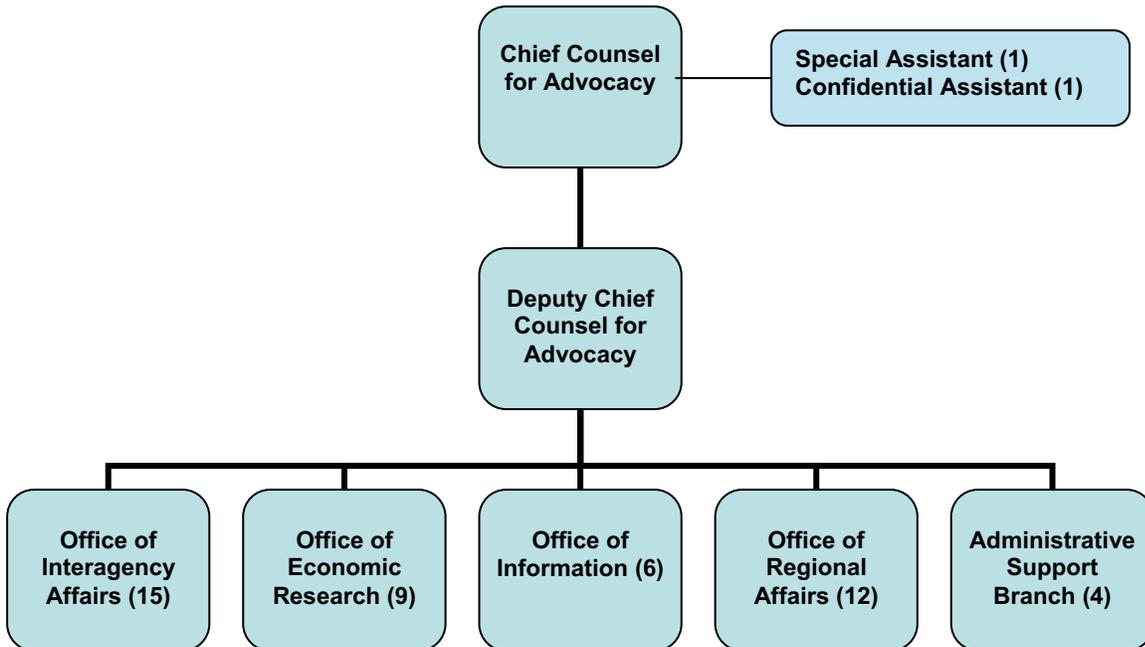
<sup>A</sup> Data from 1989 - 2001 is derived from SBA's annual congressional budget submission documents. Data for Fiscal Years 2002 through 2008 are derived from internal Advocacy records and represent the highest level during the year. Normal fluctuations due to vacancies are not accounted for.

## Appendix R: 2008 Advocacy Staffing and Organization Chart

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The following chart depicts Advocacy's organization and authorized staffing levels in 2008.

### Office of Advocacy Organization Chart



## Appendix S: 2008 Advocacy Staff by Issue with Contact Information

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### Office of Advocacy (202) 205-6533

visit us at [www.sba.gov/advo](http://www.sba.gov/advo)  
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# **Appendix T**

## **MEMORANDUM OF UNDERSTANDING**

### **BETWEEN**

**THE OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION**

### **AND**

**THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS,  
OFFICE OF MANAGEMENT AND BUDGET**

#### **I. BACKGROUND**

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) and the Office of Information and Regulatory Affairs of the Office of Management and Budget (OIRA) recognize that small entities (including small businesses, non-profit organizations and small governmental jurisdictions), as defined in 5 U.S.C. § 601, 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.

Inasmuch as Advocacy and OIRA share similar goals, the two agencies intend to enhance their working relationship by establishing certain 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.

#### **II. PURPOSE**

The purpose of this Memorandum of Understanding (MOU) between Advocacy and OIRA is to achieve a reduction in unnecessary regulatory burden for small entities. This initiative also is intended to generate better agency compliance with the RFA and other statutes and Executive orders requiring an economic analysis of proposed regulations.

#### **III. AUTHORITY**

This agreement is under the authority of 15 U.S.C. § 634(a) et seq., 5 U.S.C. § 601 et seq., Executive Order 12866, as amended, and other relevant provisions of law.

#### **IV. OBJECTIVES**

To the extent consistent with Advocacy and OIRA authority, Advocacy and OIRA agree to accomplish the following objectives:

- a. Establish an information sharing process between Advocacy and OIRA when a draft rulemaking is likely to impact small entities.
- b. Establish Advocacy guidance for Federal agencies on the requirements of the RFA.
- c. Establish training for Federal agencies on compliance with the RFA.

## V. SCOPE

Nothing in this MOU shall be construed to limit or otherwise affect the authority of the Office of Advocacy as established in 15 U.S.C. § 634a et seq. or the authority, management or policies of OIRA.

## VI. RESPONSIBILITIES

- a. **Advocacy**
  1. During OIRA's review of an agency's rule under Executive Order 12866, OIRA may consult with Advocacy regarding whether an agency should have prepared a regulatory flexibility analysis. Advocacy will designate staff by issue and/or agency to facilitate such discussions. If OIRA is uncertain as to small business impact or RFA compliance, OIRA may send a copy of the draft rule to Advocacy for evaluation.
  2. If Advocacy's discussions with an issuing agency do not result in an acceptable accommodation, Advocacy may seek the assistance of OIRA during the regulatory review process under Executive Order 12866 and may recommend that OIRA return the rule to the agency for further consideration.
  3. Advocacy will monitor agency compliance with the RFA by reviewing the semi-annual regulatory agenda and the analyses that agencies publish in the *Federal Register*. Similarly, Advocacy will review the regulatory flexibility analyses that agencies provide directly to Advocacy. If Advocacy finds that a rule does not comply with the RFA, Advocacy will raise these concerns with OIRA.
  4. Advocacy shall provide OIRA with a copy of any correspondence or formal comments that Advocacy files with an agency concerning RFA compliance.

5. Advocacy will develop guidance for agencies to follow on how to comply with the RFA.
6. Advocacy will organize training sessions for Federal agencies on how to comply with the analytical requirements of the RFA.

b. **OIRA**

Consistent with OIRA's responsibility to ensure adequate interagency coordination, OIRA shall endeavor to do the following:

1. During OIRA's prepublication review of an agency's rule pursuant to Executive Order 12866, OIRA will consider whether the agency should have prepared a regulatory flexibility analysis. If Advocacy has a concern in this regard, OIRA will provide a copy of the draft rule to Advocacy. In addition, upon request, OIRA may, as appropriate, provide Advocacy with draft proposals and accompanying regulatory analyses.
2. If, in the judgment of Advocacy or OIRA, an agency provides an inadequate regulatory flexibility analysis, or if an agency provides a rule with an inadequate certification pursuant to section 605 of the RFA, OIRA may discuss and resolve the matter with the agency in the context of the regulatory review process under Executive Order 12866. Where OIRA deems it appropriate, OIRA may return a rule to the agency for further consideration.
3. If Advocacy or OIRA are concerned about an information collection requirement contained in a rule which OIRA is reviewing under the Paperwork Reduction Act, OIRA may discuss and resolve the matter with the agency.
4. OIRA will endeavor to provide assistance, as appropriate, at the request of Advocacy in support of its development of guidance for agencies to follow in complying with the RFA and its training sessions on the analytical requirements of the RFA.

c. **Joint Advocacy-OIRA Responsibilities**

For rulemakings and information collection requests related to urgent health, safety, environmental, and homeland security matters, Advocacy and OIRA shall endeavor to cooperate and discuss their concerns in an expeditious manner.

## **VII. TERM**

This MOU shall take effect on the date of signature of both parties, and will remain in effect for three years, at which time it may be renewed by mutual agreement of Advocacy and OIRA.

## **VIII. AMENDMENT**

This MOU may be amended in writing and at any time by mutual agreement of Advocacy's Chief Counsel or his/her designee and the Administrator of OIRA or his/her designee.

## **XI. TERMINATION**

Either Advocacy or OIRA may terminate this MOU upon 90 days advance written notice.

## **X. POINTS OF CONTACT**

Points of contact for this MOU are as follows:

### **For Advocacy:**

Thomas M. Sullivan  
Chief Counsel  
Office of Advocacy  
U.S. Small Business Administration  
409 Third Street, SW  
Suite 7800  
Washington, DC 20416  
(202) 205-6533  
(202) 205-6928 (fax)

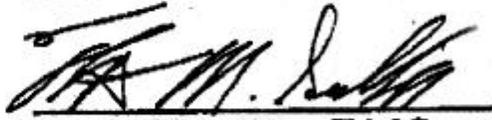
### **For OIRA:**

Dr. John D. Graham  
Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
262 Old Executive Office Building  
Washington, DC 20503  
(202) 395-4852  
(202) 395-3047 (fax)

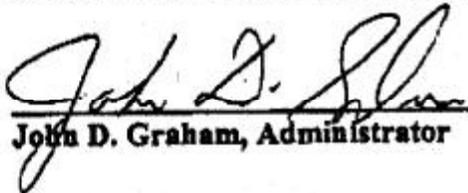
**XI. ACCEPTANCE**

The undersigned parties hereby accept the terms of this MOU:

FOR THE OFFICE OF ADVOCACY:

 3/19/02  
Thomas M. Sullivan, Chief Counsel

FOR THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS:

 3/19/02  
John D. Graham, Administrator

## Appendix U

MEMORANDUM OF UNDERSTANDING  
BETWEEN  
THE OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION  
AND  
THE OFFICE OF THE NATIONAL OMBUDSMAN, U.S. SMALL BUSINESS  
ADMINISTRATION

### PURPOSE

The purpose of this Memorandum of Understanding (“MOU”) between the Office of Advocacy of the U.S. Small Business Administration (“Advocacy”) and the Office of the Small Business and Agriculture Regulatory Enforcement Ombudsman of the U.S. Small Business Administration (“ONO”) is to foster increased cooperation between the offices as they both work to provide a more small business friendly regulatory environment.

This MOU is consistent with Advocacy’s statutory independence under 15 U.S.C. § 634a et seq. and Executive Order 13272 and ONO’s duties pursuant to 15 U.S.C. § 657.

### I. BACKGROUND

Advocacy and ONO recognize that small business concerns face a disproportionately higher share of Federal regulatory burden than their larger counterparts. Advocacy and ONO further recognize that regulatory burden can result both during the rulemaking process and in the enforcement of existing regulations. Inasmuch as Advocacy and ONO share similar goals, the two offices intend to enhance their working relationship by establishing certain protocols for sharing information in support of the mission of each office and to avoid conflicts of interest and duplicative efforts.

### II. AUTHORITY

This agreement is under the authority of 15 U.S.C. § 634a et seq.; 5 U.S.C. § 601 et seq.; 15 U.S.C. § 657 and Executive Order 13272.

### IV. OBJECTIVES

To the extent consistent with the statutory authority granting powers to the two offices, Advocacy and ONO agree to pursue the following objectives together.

- a. Establish an information sharing process to ensure that small business complaints, comments or concerns are handled by the appropriate office.
- b. Establish guidance for dissemination of information to small businesses and Federal agencies explaining the statutory responsibilities of both offices.

## V. RESPONSIBILITIES

### a. ONO

1. ONO, through its National presence, the SBA field offices and Regional Small Business Regulatory Fairness Boards, will receive comments and concerns regarding the impact of regulations on small business and the burden of regulatory compliance and federal regulatory enforcement.
2. Where appropriate ONO shall forward such comments to Advocacy and will provide information and materials generated through ONO that are more appropriately within Advocacy's jurisdiction.
3. ONO will promote the SBA's programs and services, including the regulatory and research role of Advocacy, through its RegFair Hearings and Roundtables and will include the Office of Advocacy Regional Advocates in the planning and implementation of those activities as appropriate.

### b. Advocacy

1. Advocacy will use its regional presence to assist ONO in the implementation of its Regulatory Fairness Program. Regional Advocates serve as the primary communications link between the Chief Counsel for Advocacy and local small business owners, trade and business associations, and state and local governments. Part of their responsibility is to enroll small business owners for participation in roundtables and rulemaking panels. To assist ONO, Advocacy will:
  - a. Provide material from Advocacy that may be distributed to participants in the Regulatory Fairness Program.
  - b. Provide ONO with regulatory complaints and other information generated by small business interests that are more appropriately within ONO's jurisdiction.

## VI. TERM

This MOU shall take effect on the date of signature of both parties, and will remain in effect for three years, at which time it may be renewed by mutual agreement of Advocacy and ONO.

## VII. AMENDMENT

This MOU may be amended in writing at any time by written mutual agreement of the Chief Counsel for Advocacy or his/her designee and the National Ombudsman or his/her designee.

## VIII. TERMINATION

Either Advocacy or ONO may terminate this MOU upon 90 calendar days advance written notice.

IX. SCOPE

Nothing in this MOU shall be construed to limit or otherwise affect the independent powers of Advocacy and ONO as established in 15 U.S.C. § 634a et seq. or 15 U.S.C. § 657.

X. POINTS OF CONTACT

Points of contact for this MOU are as follows:

For Advocacy:

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Chief Counsel for Advocacy  
Office of Advocacy  
U.S. Small Business Administration  
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Washington, D.C. 20416  
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(202) 205-6928 (fax)

For ONO:

Nicholas N. Owens  
National Ombudsman  
Office of the National Ombudsman  
U.S. Small Business Administration  
409 Third Street, SW  
Suite 7000  
Washington, D.C. 20416  
(202) 205-6657  
(202) 481-5719 (fax)

XI. SIGNATURE

The undersigned parties hereby accept the terms of this MOU:

  
\_\_\_\_\_  
Thomas M. Sullivan  
Chief Counsel for Advocacy  
Office of Advocacy

11.17.06  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Nicholas N. Owens  
National Ombudsman  
Office of the Small Business and Agriculture Regulatory Enforcement Ombudsman

11/17/06  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Carol I. Littell  
(A) Associate Administrator  
Office of Strategic Alliances

11-17-06  
\_\_\_\_\_  
Date

20<sup>TH</sup> ANNIVERSARYUnited States  
Small Business  
Administration

Office of Advocacy

## SPECIAL EDITION

June 1996

Special Issue

**20 Years of Speaking Out for Small Business:  
The SBA's Office of Advocacy Celebrates an Anniversary**

Once upon a time—some 20 years ago—there was no Office of Advocacy in the U.S. Small Business Administration. There were almost no small business advocates anywhere, in fact, and little or no consideration of small business in the legislative or regulatory process, few small business statistics or small business columnists, and no *Inc.* magazine. Almost no one talked very much about small business, in spite of the fact that some 14 million small business tax returns were filed annually.

Twenty years later, there are reporters and columnists who specialize in small business issues, small business training and assistance programs at all levels of government, a whole body of research and much talk on the airwaves about the contributions and concerns of small business, hundreds of books and how-to guides and even whole magazines devoted to small business and entrepreneurship. More than 22 million business tax returns are filed annually, and new legislation and regulations are often judged for their effects on small firms. Small business people have voiced their concerns to Congress and the Administration at three White House Conferences on Small Business. Everyone from the President of the United States to the 7-year-old lemonade stand entrepreneur down the street takes it as an article of faith that when the small business community sneezes, the economy catches a cold.

And, coincidentally, the SBA's Office of Advocacy is celebrating its 20th official birthday. What follows in this special section of *The*



September 19, 1980: President Jimmy Carter signs the Regulatory Flexibility Act (P.L. 96-354), which gave the Office of Advocacy vastly expanded powers to act on behalf of small business before federal regulatory agencies.

*Small Business Advocate* is a narrative of the history of the Office of Advocacy and a look at some of the changes that have come about in the small business world since 1976.

### Inside this special supplement to *The Small Business Advocate*:

- The Past:** A Look at the Office of Advocacy's History ..... A-3
- The Present:** What the Office of Advocacy Is Doing Today ..... A-8
- The Future:** Advocating for Small Business in the 21st Century ..... A-10

## A Message from the Chief Counsel for Advocacy

Dear Friends of Small Business,

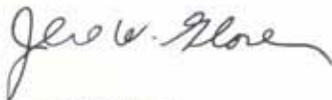
As I look back on the history of the Office of Advocacy over the past 20 years, I'm tempted to paraphrase Winston Churchill: seldom has so much been hoped for by so many from so few.

As technology changes, as the economy grows, the nation's problems change—and so do the needs of small business. The political dynamics also change, and there is an ongoing need to remind public policymakers that the "multitude of small undertakings"—small businesses—continue to be the source of America's unique vitality, as de Tocqueville observed 150 years ago. They need to be nurtured—not guaranteed success, but rather guaranteed the right to succeed or fail depending on their own decisions.

Small businesses create most of the new jobs, are more innovative per employee, train most of the new workers, empower minorities and women, and make important contributions to community life. Perhaps most important, they are flexible enough to create whole new industries built on real markets—not markets engineered or subsidized by governments, but markets for innovative products and services generated by the ingenuity of people. They are key in creating the high standard of living that we enjoy.

And our society has rightly instituted laws and regulations to strengthen that high standard—to ensure that we have safe homes and workplaces, clean air, fair employment standards, and so on. The problems occur when the laws and regulations become too cumbersome or outdated.

So I think we will continue to see a need for an Office of Advocacy to act as a kind of watchdog—okay, a junkyard dog—for small business within the government—to make sure that small businesses remain free to be America's economic powerhouses.



Jere W. Glover  
Chief Counsel for Advocacy  
U.S. Small Business Administration

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## From the Editor:

A sincere "thank you" to all who contributed to this 20th anniversary special edition of *The Small Business Advocate*—former and current Advocacy employees, past chief counsels, legislators, and many other old friends.

A note of special appreciation is due Kathryn Tobias, an Office of Advocacy employee for 14 years, whose writing talent—and heart—made this Advocacy feature possible. Also, many thanks to John Ward, whose dedication and graphic-design skills make every issue of *The Small Business Advocate* so special.

## The Past: The History of the Office of Advocacy

### A Bit of Prehistory: In the 1960s and 1970s, the Advocacy Idea Is Born

The Office of Advocacy did not spring full-blown from the head of Zeus or materialize Topsy-like one fine day in 1976.

A dozen years before its creation, in 1964, *The Businessman's Guide to Washington* had this to say about the role of small businessmen (most business owners *were* men back then) in the legislative process:

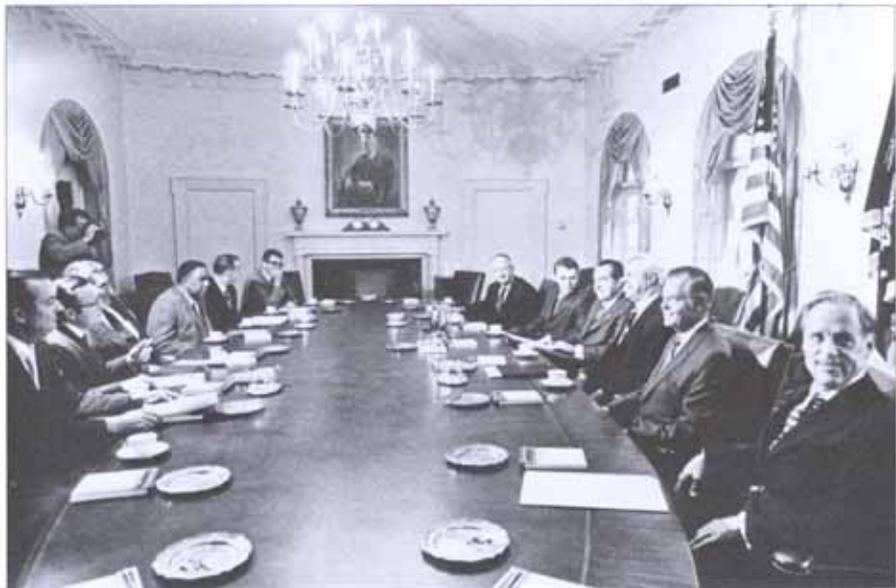
Often, businessmen come down to Washington when they are almost purple with apoplexy. A particular piece of legislation or an administrative ruling has been either passed or under consideration for weeks, months or perhaps a year. When it is about to be finalized—or even after it has been passed—the businessman shows up in Washington for a “last-ditch effort.”

The only advice the 250-page guide had for the businessman in that situation was to make himself known to people in the government in advance of trouble. The practicality—or impracticality—of every business owner getting to know every agency of the government was scarcely acknowledged. The guide did caution that, while “great powers are wielded” by some parts of the government, “there will be few occasions for the businessman to deal with them.”

The underlying problem was this: small business' vital interests were being profoundly affected by—but almost never represented in—the legislative, regulatory and administrative processes of government. The extent of the problem became more widely recognized in the ensuing years, as new laws and regulations governed more and more aspects of American life.

#### Business Organizations Take Up the Advocacy Banner

By the late 1960s, a number of business organizations and trade associ-



September 10, 1970: President Richard Nixon meets with small business representatives in the Cabinet Room of the White House. Six months earlier, Nixon had issued Executive Order 11518, which directed federal agencies to cooperate with the SBA in its advocacy efforts on behalf of small businesses. (Photo courtesy of the National Archives.)

ations had begun paying attention to the problems small businesses faced with government, especially in comparison with their larger counterparts who could afford to keep representatives in Washington. And the growing concern for small business caught the attention of President Richard Nixon.

In March 1970, President Nixon issued Executive Order 11518, “providing for the increased representation of the interests of small business concerns before departments and agencies of the United States Government.” The executive order described the U.S. Small Business Administration as having “an established program of advocacy in matters relating to small business.” And it called on the SBA, “as the spokesman for and advocate of the small business community, [to] 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.”

The executive order further authorized the SBA to become an activist on behalf of small business in “investigations, hearings or other procedures pending anywhere in the government” and it directed agencies, without waiting for SBA’s initiative, to consult with the SBA on a wide range of “matters which reasonably can be construed as materially affecting” small business.

In September 1970, recalls Lew Shattuck, then of the Smaller Business Association of New England

*Continued on page A-4*

## A Garbage Strike and An Ugly Red Sofa: Ah, the Good Old Days!

by David Voight

My first encounter with the concept of an Office of Advocacy occurred more than 20 years ago when the legislation was first before Congress. At the time I was the chief Senate-side lobbyist for the National Federation of Independent Business (NFIB). Since this was one of our priorities, I worked closely with the Senate Small Business Committee—then chaired by Sen. Gaylord Nelson (D-Wisc.)—and staff, notably Allen Neece and Tom Cator.

An event that is much more strongly embossed in my memory occurred about two years later when President Carter submitted the name of one Milton D. Stewart to be the first nominee as chief counsel for advocacy confirmed by the U.S. Senate. (There had been previous chief counsels, but Milt was the first to go before the Senate.) Since NFIB remained strongly in support of the office, I got involved in the confirmation process. I spent many nights working overtime with the same Senate Small Business Committee staff in a building that no longer exists on a site across from the Hart Senate Office Building, which did not exist at the time.

It is not surprising that I, like so many others, fell under the spell of Milt's driving energy, commitment to small business, and general charisma. It was surprising, however, that he apparently thought that I might not be such a bad sort and asked me to join the staff of the new Office of Advocacy. Initially, I was his executive assistant and toward the end of his tenure became deputy chief counsel for advocacy.

Our first tasks were to simply staff up and organize the office. There was a rudimentary structure in place from the time the law was signed under President Ford through the time the new Carter Administration made this particu-

lar appointment. I do remember that one of the particularly difficult tasks was finding a way to get rid of an exceptionally ugly red velvet sofa that the previous acting chief counsel for advocacy had chosen as part of the official furniture.

Finding issues to work on was never a problem with Milt around. I can remember the occasion that he came into the office with a small two-inch newspaper story about a garbage strike in Los Angeles. He gathered his staff around him and said, "There is an important issue here for small business. I just don't know what it is yet." For two days you could see his mind working away and when he gathered us again he stated what the issue was—and as usual he was right.

The problem, however, was that every day every newspaper had countless numbers of two-inch stories that were important for small business. My job seemed increasingly to be that of a juggler who had to keep dozens of apples, oranges, knives, and flaming torches in the air at the same time—and whenever I saw Milt reading a newspaper, I just knew that he was going to throw an anvil into the mix.

An alternative view of my job was that of the man who came along at the end of the parade with a broom and a dustpan to pick up the pieces of the grand and glorious show that went on ahead. In either case it was the greatest show on earth. The Office of Advocacy at that time did not find itself dragged down with a lot of precedent or bureaucratic hurdles. We had the sense of being on the cutting edge of a new and exciting opportunity for small business.

*David Voight is director of the U.S. Chamber of Commerce's Small Business Center.*

### Prehistory, from page A-3

(SBANE), President Nixon invited representatives of five business groups—SBANE, the National Federation of Independent Business (NFIB), the National Small Business Association (NSBA), the National Association of Small Business Investment Companies (NASBIC), and the National Business League (NBL) to the White House. He told the business leaders that if he wanted to know what was going on in the automotive industry, he had only to call one or two of the big automotive companies, but he had trouble finding the pulse of small business. The President asked the business leaders to be his eyes and ears on the small business community and then he asked them what they would like to do. "We said we'd like to meet with the Cabinet," Shattuck recalls, and so they found themselves for the first time meeting with the people with "real clout."

Three years later, in 1973, several business organizations including SBANE began to recommend in their Washington presentations that the SBA's advocacy role be strengthened and assigned to a particular office. It was Rep. Margaret Heckler (R-Mass.) who, with the endorsement of former Congressman and then-SBA Administrator Thomas S. Kleppe, drew up the first piece of legislation mentioning an Office of Advocacy. The support of Administrator Kleppe, who was a friend of Rep. Heckler from their Capitol Hill days together, was crucial in the passage of the initial law, Rep. Heckler recalls.

On August 23, 1974, among his first presidential acts, President Gerald Ford signed Public Law 93-386, amending the Small Business Act to further spell out an advocacy role within the SBA. But aside from an advocate and a few staff members, little provision was made for staffing the advocacy office. By 1976, it was clear that the role of the "chief counsel for advocacy" needed to be clearly laid out and strengthened.



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**In 1973,  
Rep. Margaret Heckler  
(left), along with  
former Congressman  
(and then-SBA  
Administrator)  
Thomas S. Kleppe,  
drew up the first piece  
of legislation mentioning  
an Office of Advocacy.**

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### **Building a Solid Foundation**

It was then that the Senate Select Committee on Small Business, chaired by Sen. Gaylord Nelson (D-Wisc.), took the rudimentary advocacy office and built on it a solid foundation for the present-day Office of Advocacy. At the committee's hearings on March 29, 1976, small business owners like Herman Williams, president of Williams Steel and Supply Company in Milwaukee, Wisconsin, spoke with passion about the need for a strong voice for small business within the government.

There are laws on ecology, laws to preserve nature, birds, natural lands, landmarks, scenic views; but where are the laws to preserve the human resources created by the small businessman? Small business needs a constant representative on the President's cabinet and before Congress at all times. There should be a Small Business Advocate on every federal commission, agency, department, panel, advisory committee and task force. . . . The Advocate should also be responsible for gathering in one place the necessary statistics and data relating to . . . small business.

But why should the small business advocate be a public servant? John Lewis, executive vice president of the National Small Business Association, addressed the question:

The question will occur, why do not

the National Small Business Association or other small business associations do the job [of small business advocacy]? 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 the small business.

Herb Liebenson of the National Small Business Association spoke

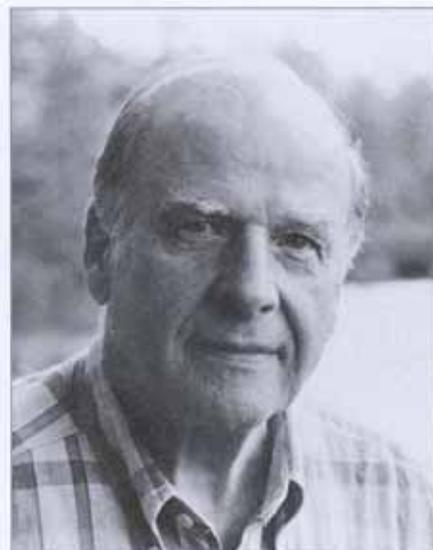
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**In 1976,  
Sen. Gaylord Nelson  
(right) held hearings on  
legislation that created  
the present-day Office  
of Advocacy.**

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about the effects that paperwork burdens, mushrooming product liability claims and laws like the Occupational Safety and Health Act were having on small firms. He noted that Senator Nelson had introduced a bill to ensure fair and equitable representation for smaller and medium-sized businesses on federal advisory committees. Liebenson pushed for a strong advocacy office in the SBA. "Advocacy begins within government," he said.

On June 4, 1976, President Gerald Ford signed Public Law 94-305, establishing "within the Small Business Administration an Office of Advocacy. The management of the Office shall be vested in a Chief Counsel for Advocacy who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate."



## An Advocacy Chronology

Some milestones in the history of the Office of Advocacy

- 1953** The Small Business Act establishes the Small Business Administration.
- 1970** President Nixon issues Executive Order 11518.
- 1974** Congress passes P.L. 93-386, further spelling out an advocacy role in the SBA. Anthony Stasio acts as SBA's small business advocate.
- 1976** President Ford signs P.L. 94-305, establishing the Office of Advocacy.
- 1978** Milton Stewart becomes the first chief counsel for advocacy.
- 1979** Advocacy holds its first national legislative conference to encourage small business initiatives at the state and local levels of government.
- 1980** The Office of Advocacy spearheads efforts for the first White House Conference on Small Business.
- 1981** Frank Swain is confirmed by the Senate as the second chief counsel for advocacy.
- 1986** Advocacy covers the issues for the second National White House Conference on Small Business.
- 1992** Thomas P. Kerester sworn in as Advocacy's third chief counsel.
- 1994** Jere W. Glover is confirmed as fourth chief counsel for advocacy.
- 1995** The third White House Conference on Small Business convenes in Washington, D.C.
- 1996** The Office of Advocacy celebrates its 20th birthday.

## Advocacy Speaks Out for Small Business: A Thumbnail History

In July 1978, Milton D. Stewart was the first to be confirmed by the U.S. Senate as chief counsel for advocacy in the U.S. Small Business Administration. His visibility as an appointee of President Jimmy Carter, combined with his forthright personal style, gave Stewart a high profile as SBA's new small business advocate.

Shortly after assuming his new role, the chief counsel began testifying before various congressional committees—the Joint Economic Committee, the House and Senate Small Business Committees, and many others—on issues ranging from the nation's energy crisis and its effects on small firms to economic concerns and the overall climate for small business. In 1979, Stewart instituted the first national conference for state and local officials concerned about the future of small business.

Milt Stewart and the Office of Advocacy had a strong hand in the 1980 White House Conference on Small Business, the first in recent history. Attended by 1,682 small business delegates and 3,600 other participants, the national conference convened Jan. 13, 1980. The final report of the conference quoted the 19th-century French philosopher Alexis de Tocqueville, who ascribed the unique vitality of American life to its "multitude of small undertakings." The report continued:

... small companies are aggrieved by a policy of neglect that has inadvertently imposed obstacles and inequities that seem to thwart efficient business operations at every turn. The single most important message of the Conference is that government must eliminate those obstacles and inequities. . . .

Several key small-business-friendly laws were enacted as a direct result of the conference recommendations, including the Regulatory Flexibility Act of 1980, the Equal Access to Justice Act of

1980, the Prompt Payment Act of 1982 and the Small Business Innovation Development Act of 1982 (SBIDA). The Small Business Innovation Research program, created by SBIDA, continues today as a highly successful program, producing many useful small business innovations.

With the 1980 election of President Ronald Reagan, Frank S. Swain, a former general counsel to the National Federation of Independent Business, took over the reins of the Office of Advocacy. Whereas Stewart had approached small business problems in a head-on, take-the-bull-by-the-horns manner, Swain's style was to negotiate forcefully, but quietly, often behind the scenes, obtaining important concessions for small business. His style translated effectively to Advocacy staff members and from them to their counterparts in other branches of government, who were able to make changes on behalf of small business.

Frank Swain's eight-year tenure (1981-1989) was the longest of any chief counsel before or since. Chas Cadwell, Swain's deputy, recently recalled some of the Office of Advocacy's key achievements during this period, including accomplishments of individual staff members:

- Patricia Powers launching research and a conference . . . [that opened] doors into the health policy debate for all small business;
- Kevin Bromberg singlehandedly convincing EPA to alter proposed rules for air and water effluents, saving small firms literally billions of dollars in regulatory costs;
- Barry Pineles taking on the government-protected California citrus cartel on behalf of small independent growers and processors;
- Daryl Jackson using the Advocacy tax model to convince Treasury to maintain graduated corporate rates in the 1986 tax reform;
- Frank Swain successfully

going nose-to-nose at a Cabinet Council meeting with the Department of Justice on proposed changes in antitrust laws. . . .

In 1986, the second White House Conference on Small Business was held in the midst of a storm of controversy over a proposal to abolish the Small Business Administration. Despite some diversion over that issue, the conference focused energy on moving the small business agenda ahead and making improvements to many of the initiatives already taken following the 1980 conference. At the top of the list of 1986 recommendations was a recommendation to reform the liability insurance system. Other high-priority recommendations included eliminating government-mandated employee benefits, prohibiting unfair nonprofit and government competition with for-profit firms, balancing the federal budget, and creating a Cabinet-level department of trade.

The results of the 1986 White House Conference were widely regarded by the small business community as less earth-shaking than those of the 1980 conference. Perhaps it was because small business had already come a long way since 1980, or perhaps the delegates had grown more sophisticated—and the issues more complicated.

With the arrival of the Bush administration in 1989, a succession of four acting chief counsels led the Office of Advocacy. The vision of Advocacy's mission—and the office's effectiveness—clearly waned, at least in the eyes of the small business community, during this three-year period.

On May 11, 1992, the Senate confirmed Thomas P. Kerester, a tax attorney, former small business person and former publisher of *Coopers and Lybrand's Emerging Business*, as chief counsel for advocacy. Kerester expressed his vision with respect to his new mission in an interview for *The Small Business Advocate*:

The White House was not looking for a "yes person." Where appropriate I will go to the president to de-

## Not the Three Tenors . . .



In December 1994, past and present chief counsels for advocacy met in Washington. From left to right: Thomas Kerester, Milton Stewart, Jere Glover, and Frank Swain.

fend small business, to the administrator to seek help and support for them, and to Congress to be a vocal, up-front, and strong voice in their behalf.

Kerester had scant opportunity to carry out his vision; he was in of-

fice only eight months. But in that period he talked with many small business owners about their concerns, and spoke out about issues ranging from product liability to the new Americans with Disabilities Act.

## 20 Years Ago: The More Things Change . . .

*From Herb Liebenson's testimony at the March 29, 1976, Senate hearings on the Office of Advocacy:*

Illustrative of the important governmental affairs issues now pending that can affect the profitability or survival of every small business enterprise in this country are:

1. Oil company divestiture of distribution function.
2. Job creation credit.
3. Small business tax reform and capital formation.
4. Minimum wage increases.
5. Unemployment compensation and workers' compensation reform.
6. Retention and enforcement of the Robinson-Patman Act.
7. Reform of pension, profit-sharing, and welfare fund rules and regulations (ERISA).
8. Reform of occupational safety and health regulations.
9. Product testing.
10. Product liability insurance.
11. National health insurance.
12. Consumer Product Safety Commission—controlling excesses.
13. Protection of the equities of franchisees.
14. Jurisdiction of government agencies to obtain data (affecting small business) from larger companies (line of business, corporate patterns, etc.).
15. Federal charters for giant corporations.

## The Present: The Office of Advocacy Today

### Meeting the Challenges: Regulatory Reform, Legislative Initiatives, and a White House Conference

A new administration arrived in Washington on Jan. 20, 1993, and a White House Conference on Small Business Commission would soon be appointed by the administration of Bill Clinton. Doris Freedman, an experienced and dedicated Advocacy staffer, was named SBA's acting chief counsel for advocacy while the SBA awaited appointment and confirmation of a permanent chief counsel.

SBA's new administrator, Erskine B. Bowles, also took an active interest in small business advocacy, raising the visibility of the role by appearing before the media with the president and vice president and discussing "the concerns and ideas of small business." Small business jargon had even entered the administration's lexicon: government was going to be more "entrepreneurial" by cutting red tape, putting customers first, empowering employees to get results, and producing better government for less.

On May 5, 1994—appropriately, during National Small Business Week—Jere W. Glover was sworn in as the Office of Advocacy's fourth presidentially appointed chief counsel. Glover had served under Milt Stewart, the first chief counsel for advocacy, and he was ready to hit the ground running. As he testified in his confirmation hearings, he was keenly aware of Advocacy's mission:

It is important to remember why the Office of Advocacy was originally created in 1976. The Congress felt that small business views were not adequately represented before the agencies and Congress. Furthermore, Congress and the agencies did not have adequate information to make proper decisions about small business . . .

The wisdom of Congress in creating the Office of Advocacy 18 years ago is more obvious than ever. The need

for the office is more urgent than ever.

In broad strokes, Glover outlined his new mission: to reduce the regulatory burden on small business; serve, with the administrator, as the president's eyes and ears on the small business community; help eliminate the credit crunch for small business; strengthen the Small Business Innovation Development Act and help new innovative companies grow; work to restore a sound antitrust policy with respect to small business; and work with federal agencies to develop

significant opportunities for small business.

But the first order of business was to prepare final issue information in time for the first state White House Conference on Small Business in Wilmington, Delaware, the month after Glover's confirmation. The next year's activity, in fact, centered around the state, regional, and national White House Conferences, as the Office of Advocacy provided a steady stream of background research on new issues and on the small business community in each state.

#### That Was Then . . . This Is Now

The small business sector as reflected in the statistics of 20 years ago and today.

	20 Years Ago	Today
■ Business tax returns	14.5 million	22.1 million
■ Incorporations	375,766	741,657
■ Bankruptcies	34,529	52,256
■ Small firm share of net new jobs	65%	virtually all
■ Small firm employment share	51%	53%
■ Small firm sales share	39%	47%
■ Federal prime contracts from small firms	\$14.8 billion	\$39.2 billion
■ Federal subcontracts from small firms	\$13.3 billion	\$20.8 billion

Note: Figures for 20 years ago represent 1976 or 1977 data, as available, except for procurement figures, which are for fiscal year 1980. Figures for "today" represent the latest data available.

At the same time, the new chief counsel, supported by SBA's new administrator, Phil Lader, began reaching out to small business organizations, testifying before Congress on small business issues, and looking for new and effective ways to carry out the Office of Advocacy's mission. By the end of Glover's first year, the Office of Advocacy had also, among other things:

- Organized and prepared a report for the White House Conference on a series of focus groups on the future of small business.
- Prepared a nationwide review of banks' "friendliness" to small business.
- Reviewed several thousand proposed regulations, commenting on and helping to change several of those most likely to disproportionately affect small firms (see, for example, the box on page A-11).
- Testified on significant new legislation, including bills affecting procurement and judicial review of regulatory flexibility actions.
- Reached out to the small business community through roundtables and working groups on concerns such as procurement, the environment, and small business innovation.
- Prepared data on small business for the president's annual report on *The State of Small Business* and for profiles of each of the states.
- Organized the SBA's annual observance of small business contributions during Small Business Week.

Despite its contributions, the Office of Advocacy has never been able to rest on its laurels. In July 1995, the office came under fire in the House of Representatives during the debate on appropriations (see box at right).

A proposal that "zeroed out" the Office of Advocacy from the SBA appropriations bill reached the House floor for a vote. Rep. Jan Meyers (R-Kans.), chair of the House Small Business Committee, and Rep. John LaFalce (D-N.Y.), ranking minority member, led a fight to restore funding.

## The Office of Advocacy in 1995: "Going Toe to Toe with All Other Agencies"

*From House Small Business Committee Chair Jan Meyers' (R-Kans.) July 26, 1995, testimony in support of restoring funding for the Office of Advocacy:*

When I first became chairman, a number of the small business groups said to me, the two most important things in the SBA were the loan program and the Office of Advocacy. . . .

This was stated on behalf of NFIB, the U.S. Chamber of Commerce, National Small Business United, the National Association for the Self-Employed, and the Small Business Council of America. They all strongly support the Office of Advocacy and they support this amendment [to restore Advocacy's funding.]

Some Members may not be familiar, Mr. Chairman, with what the Office of Advocacy does, but it is the advocate among other agencies of Government on behalf of small business, and it has performed extremely well. It is an independent office, appointed by the President, confirmed by the Senate so that it has the clout to go

toe to toe with all other agencies.

It has testified before Congress approximately 200 times and about 25 percent of that time it was either in opposition to administration policy or in the absence of administration policy on an issue.

It is also the linchpin, it is absolutely the central position for enforcing the Regulatory Flexibility Act. This is an act which we just strengthened in the Contract with America. . . .

I want to state strongly that this is a key vote for the NFIB, that all the small business groups supported it; that if Members voted for the Regulatory Flexibility Act in the Contract with America, it is absolutely counter to that if Members do not support the Office of Advocacy.

In a testimony to the Office of Advocacy's contributions—and the continuing belief in the need for such a small business voice within government—all the major national business organizations and the delegates to the 1995 White House Conference on Small Business took a strong stand in support of the office. On July 26, 1995, the full House of Representatives voted 368–57 to restore the Office of Advocacy's funding.

After the National White House Conference on Small Business in June 1995, the Office of Advocacy refocused its efforts toward implementing the conference recommendations, while continuing to carry out its other mandates. The office organized the 13th National

Legislative Conference on Small Business Issues—a decade and a half after the first such conference in 1979.

Advocacy has recently celebrated a number of successes, including passage of the Small Business Regulatory Enforcement Fairness Act, which strengthens enforcement of the Regulatory Flexibility Act and was signed by President Clinton on March 29, 1996 (see box on page A-13). By June 1996, on its 20th official birthday, the Office of Advocacy is well poised to speak out for small business for another score of years—and more.

## The Future: Advocating in the 21st Century

### Riding the Crest of the Wave: Will Small Business' Clout Continue into the 21st Century?

The Office of Advocacy's former chief counsels have on several occasions looked to the future of small business advocacy. Frank Swain, in a 1986 interview with *Business Age* magazine, noted that there have been many changes in the small business environment since the mid-1970s. For one thing, even in 1986, there were many, many more women going into business, evidenced by the surge in the number of women at the 1986 White House Conference. And researchers and the media were paying much more attention to the small business phenomenon. "I think the small business community is really riding the crest of a wave and has been for five or six years. It's all of a sudden the darling of the public media," said Swain.

He left the reporter with a hint of his vision for small business and the advocacy role. "After the lime-light is dimmed, where is that going to leave the small business community? We have to firm up the proper role between the federal government and business, which I think is quite good right now. However, I would hate to see it go back to where it was."

In 1994, in preparation for the 1995 White House Conference on Small Business, Jere Glover organized a series of focus groups to talk about the future of small business, including a focus group of former SBA administrators and chief counsels for advocacy. For the first time, all four chief counsels were together in a public forum. Frank Swain again spoke about small business' strengthened voice:

I think the small business community right now, today, has more power and clout in Washington than it's ever had. . . . And I also think it's worth noting that as you look at the *Wall Street Journal* . . . speculating as to who's going to absorb the bud-

#### Shape of Things to Come

Self-employment, 1963–2005  
(millions)



Source: SBA, Office of Advocacy, from U.S. Department of Labor data.

Sole proprietorship income, 1988–2005  
(billions of dollars)



Source: SBA, Office of Advocacy; projection for 2005 from Bureau of Labor Statistics.

get cuts, I predict that although there might be proposals from time to time to cut various SBA programs, there will be no proposals to cut the SBA, because small business has a lot of clout and both the Administration and Republicans up here know that.

Milt Stewart agreed that small businesses are stronger than they were in the late 1970s:

However, I think you have to make a balanced statement about it. We've got 14,000 companies with more than 500 employees. We've got more than 5 million with fewer than 500 employees. Now if you try to relate clout to that, I don't think small business is anywhere near where it ought to be in terms of influence on a wide range of issues that contribute to the climate for small business.

Tom Kerester took the discussion back to the original reasons for establishing small business advo-

cacy programs—the nation's productive, but often overburdened small business community:

It's the grass roots business person that doesn't have time to attend meetings, doesn't have time to attend seminars, doesn't have time to go to lectures—that has to hold his or her member of Congress accountable. And to the extent to which they can hold their members of Congress accountable, small businesses will be successful in the year 2005 and beyond.

Jere Glover and the Office of Advocacy prepared a report on the future visions of not only the chief counsels for advocacy, but all the focus groups, which included, among others, business organization representatives, women and minority business owners, young entrepreneurs, and experts in innovation and technology, and family-owned and microbusiness is-

sues. The report, *The Third Millennium: Small Business and Entrepreneurship in the 21st Century*, is available from both the Superintendent of Documents and the National Technical Information Service.

## Taking the Pulse: Advocacy's Regional Advocates

The Office of Advocacy's 11 regional advocates enhance communication between the small business community and the chief counsel for advocacy.

Covering the 10 federal regions (with a special regional advocate for rural development located in Region VI), these advocates are the chief counsel's direct link to local business owners, state and local government agencies, state legislatures, and small business organizations. They help identify emerging issues and problems of small business by monitoring the effects of federal and state regulations and policies on the local business communities within their respective regions.

Turn to page A-16 to find a chart that lists the names, addresses, and telephone numbers of these regional advocates.

## A Sampling of Regulatory Achievements

Here is a small sampling of recent Advocacy initiatives and achievements with respect to regulatory proposals.

- **Hydroelectric Fees:** The Federal Energy Regulatory Commission proposed fees for hydroelectric projects. Advocacy's position that the agency allow bonds instead of cash payments saved small hydroelectric developers about \$2.6 million.
- **Small Quantity Generator Hazardous Waste Tanks:** EPA proposed stringent hazardous waste tank regulations for small quantity generators of hazardous wastes (predominantly small businesses) in 1986. After Advocacy showed that existing regulations were adequate to cover the hazard, EPA abandoned this rulemaking, saving small quantity generators tens of millions of dollars annually.
- **Underground Storage Tanks:** A major EPA rulemaking affecting small businesses involved an initiative that imposed requirements on over 400,000 facilities. EPA adopted Advocacy's position that less expensive tanks were acceptable to meet tank technical standards. A more reasonable leak detection scheme was also promulgated. Savings are estimated at about \$1 billion annually.
- **Abatement Verification:** In 1995, Advocacy directly influenced OSHA's abatement verification standard requiring paperwork and other forms of material proof of workplace hazard corrections. OSHA's adoption of Advocacy's suggested changes to the proposal will save small businesses millions of dollars and burden hours.
- **Termination of Volume Control Regulations for Navel Oranges Grown in California and Arizona:** Advocacy's drive to deregulate markets for navel oranges led to the termination of the navel orange program in late 1992, resulting in sales increases to small businesses of more than \$50 million.
- **Regulatory Fees for Cable Systems:** Advocacy's proposed change—adopted by the FCC in 1994—to the method for calculating fees to be paid by cable operators will save small cable operators approximately \$3.5 million dollars per year.
- **Subscriber Line Charges Imposed by the FCC:** After the breakup of AT&T, subscriber line chargers imposed by the FCC were originally scheduled to cost small businesses \$6 per line per month. That was reduced to \$2 per line per month in 1985 after intervention by the Office of Advocacy, resulting in savings of roughly \$300 million dollars per year, for a total savings of nearly \$3 billion since the inception of the subscriber line charge.
- **Enhanced Poultry Inspection:** USDA withdrew this proposed rule consistent with the comments filed by Advocacy last year. According to industry estimates, this withdrawal saved the poultry processing industry—composed overwhelmingly of small businesses—at least \$60 million in up-front costs and at least \$185 million in annual recurring costs.
- **SEC Simplified Registration Requirements:** The Office of Advocacy has played a critical role in helping the SEC develop simplified registration requirements for small companies. The SEC changed the requirements for small companies. It is estimated that between 3,000 and 3,500 companies are eligible to register under the less costly and less burdensome SB system.

## The Funny Papers

In 1995, Blondie started her own business, and ran into some problems that many small business owners can relate to.



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## Quotable Quotes

### 28 Years Ago: Did We Really Think That Way?

From *The Small Business Administration*, by Addison W. Parris, published in 1968:

Within government small business circles, there is a faint uncomfortable awareness that many small businessmen have a very strong distaste for the government and very little understanding of it. . . . One bureaucrat, shortly after joining the SBA, encountered a small businessman by chance at a social gathering. For quite a while the SBA man listened with mounting impatience to the small businessman's complaints about the great Leviathan in Washington. "The government," the small businessman snorted. "The government doesn't give a damn about me!" The SBA official blurted: "I'm the government and I care about you." A sudden horrified shock of recognition was evident on the face of the small businessman as he realized that he had met one of the "Feds" face to face.

. . . [The small businessman's] kind of general negativism toward modern society does not provide very useful guidance to those attempting to formulate programs and policies in the small business area. As a result, attempts by rank-and-file small businessmen to influence SBA are of

minimal effectiveness unless they concern a very specific problem.

### 26 Years Ago: A Meeting with the President

From Lew Shattuck's account in the October 1970 edition of *New England Business* of a meeting on September 10, 1970, between President Nixon and representatives of five business groups:

Mr. Nixon responded favorably in support of the advocacy role for the SBA, stating that one of the reasons past Cabinet officers had sometimes historically received public criticism was that they were not responsive to the interest groups for which they were the spokesmen. He cited examples such as in the Department of Agriculture, where the Secretary has often been a spokesman for the White House. The President stated he had made it very clear to the Secretary of Agriculture that he was to be a spokesman *to* the White House *from* the farmer, not from the White House to the farmer.

He said he had already made it clear to the Secretary of Commerce, Maurice Stans, that small business is as much a part of his job as big business.

President Nixon feels that one of the

disadvantages of small business is that it is so fragmented and heterogeneous. Whereas if he wanted to feel the pulse of the auto industry, three men could provide the input and in the airlines, five . . . small business is so diffused it is difficult to get timely information.

He asked the associations present at the meeting to take a lead in collecting data and serving as a constant lobby for small business. He re-emphasized that he wanted to hear frequently from the group present.

### 20 Years Ago: The Little Engine That Could

Testimony of John Lewis, Executive Vice President, National Small Business Association, from hearings before the 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:

. . . We have nothing against the farmers of the United States, but there are only 2 3/4 million farms, contrasted with 10 1/2 million small business units.

The farmers have 3,900,000 workers, where there are 50 million employees of small business firms in

the United States.

Despite the overwhelming bulk of numbers on the small business side, the Department of Agriculture has a budget of \$2.9 billion, with 80,000 employees, and the congressional appropriation for them amounts to \$1,000 for every farm in the country.

Contrast that with the SBA. SBA only has \$110 million for administration, only 4,200 employees, and this is calculated out to be \$12 for each unit.

Compared with the resources that Mr. Stasio has had as Chief Counsel for Advocacy, he has done one heck of a job.

### 20 Years Ago: "Zip to Let it Rip"

From the testimony of James D. "Mike" McKeivitt, Washington Counsel, National Federation of Independent Business, at the March 29, 1976, hearing:

On the regulations, I cannot say enough how SBA has to grow up and has to get some guts and strength and somebody has to give us some zip to let it really rip.

## Some Recent Legislative Successes

The Office of Advocacy has also been available to help in shaping more small-business-friendly legislation. Here are some examples.

- **The Small Business Regulatory Enforcement Fairness Act (SBREFA):** The Office of Advocacy has long supported better vehicles for enforcement of the Regulatory Flexibility Act of 1980 (RFA). The SBREFA, signed into law March 29, 1996, allows for judicial review of agency decisions under the RFA and subjects additional regulations to RFA review.
- **The 1990 Clean Air Act Amendments:** In 1987, the Office of Advocacy objected to requiring more than one half million farmers to perform "hazard assessments" for ammonia fertilizers. The 1990 Clean Air Act Amendments exempted farmers from this provision, for a savings in excess of \$1 billion.
- **Americans with Disabilities Act:** In 1988 and 1989, Advocacy provided data on the number of businesses affected by employment provisions of the Americans with Disabilities Act at varying threshold levels. These data and suggested changes resulted in small firms being exempted from certain requirements and in the inclusion of limits on employer obligations based in part on the size of the business.
- **Fair Labor Standards Act:** In 1988, Advocacy provided data on the number of small businesses affected by increases in the minimum wage to various wage levels and the number of business affected by increasing the dollar volume test for enterprise coverage. Resulting changes created significant savings for covered small businesses.
- **Paperwork Reduction Act:** Advocacy took positions on the need to strengthen the Paperwork Reduction Act's protections for small businesses.
- **Subchapter 11 for Small Business Reorganization:** The Office of Advocacy championed the creation of a separate section in the Bankruptcy Code for small business reorganizations. Advocacy's perseverance helped lead to passage of the Bankruptcy Reform Act of 1994, which established a subchapter 11 for the reorganization of small businesses with less than \$2 million in debt.
- **Small Business Lending Data from Call Reports:** The Office of Advocacy played a significant role in the inclusion of a requirement that banks report small business lending data as part of the Federal Deposit Insurance Corporation Improvement Act of 1991.
- **Secondary Market for Small Business Loans:** The Office of Advocacy played a pivotal role in the establishment of a secondary market for small business loans. Advocacy recommended to the administration the adoption of the secondary market bill that Congress passed in 1994.
- **Procurement Reform:** More than half of the recommendations advanced by Advocacy, including procurement goals for women, the preservation of subcontracting plans for subcontracts and the extension of the DOD minority enterprise development (sec. 1207) program were incorporated in the Federal Acquisition Streamlining Act of 1994.

## Walking a Fine Line: The Independence of the Office of Advocacy

At various times in the Office of Advocacy's history, the chief counsel for advocacy has had to walk a fine line to fairly represent the views of small business without treading on the toes of the administration. Over the years, there has been considerable discussion about just how much "independence" was called for by the framers of Advocacy's role.

Twenty years ago, Senator Thomas J. McIntyre (D-N.H.) and John Lewis, Executive Vice President, National Small Business Association (NSBA), discussed the need for an "independent" small business advocate within the government in the hearings before the Select Committee on Small Business on March 29, 1976:

*Senator McIntyre:* . . . Does [the Commerce Department] have any dampening effect on how the SBA Administrator speaks out? If he 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.

Herb Liebenson, of NSBA testified at the same hearing:

Because of OMB, SBA can not take stands on all issues. But at the least it can warn Congress persuasively of the impact on small business, even if it is necessary to file a disclaimer that the SBA's views do not necessarily reflect the views of the Administration.

While the word "independent" appears nowhere in Advocacy's 1976 authorizing legislation (Public Law 94-305), there is an implied independence in Section 206:

The Chief Counsel may from time to time prepare and publish such reports as he deems appropriate. . . . The reports shall not be submitted to the Office of Management and Budget or to any other Federal agency or

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**Ombudsman,  
cheerleader,  
or thorn in  
the side:  
the idea of  
"independence"  
for the  
Office of Advocacy  
has often proven  
problematical.**

---

executive department for any purpose prior to transmittal to the Congress and the President.

This provision caught the attention of President Ford, who was not entirely pleased with it, as he noted in his signing ceremony: "I question the provision of S. 2498 which requires Presidential appointment with Senate confirmation of the Chief Counsel for Advocacy . . . and requires the Counsel to transmit reports to the President and Congress without prior review by any other Federal agencies." But he signed the bill anyway.

In 1978, Milt Stewart began testing the waters as Advocacy's first confirmed chief counsel. Asked at a 1995 focus group of former SBA administrators and chief counsels about his ability to speak independently on behalf of small business, he recalled:

I had no problems, really, because I was fortunate to have been [the SBA administrator's] candidate for the post. . . . 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.

Vernon Weaver, the SBA administrator at the time, joked:

Of course, we were in the position of not ever having had a chief counsel for advocacy when I got there, and some of the old political hands in the White House called me up and said, "Don't fill the post." But it's a human relationship—it's up to the administrator to pick somebody he can get along with and vice versa.

Gradually, in practice if not in law, the chief counsel's independence began to be clarified. The legislative history of the Small Business Economic Policy Act of 1980 (Public Law 94-305), which set the chief counsel's executive level classification, made brief reference to the chief counsel's separate role:

His mandate is to represent the views of small business. . . . the advocate may not necessarily represent the administration's position or that of SBA; however, SBA . . . [is] required to cooperate fully with him.

The small business community also weighed in on the question. Among "The 15 Top-Priority Recommendations" of the 1980 White House Conference on Small Business was priority no. 10, which received almost 600 votes: \*

The legislative mission of Advocacy must be considered the number one priority of SBA and the Office of Advocacy. The independence of that function of the Office of Advocacy must be protected so that it may continue to have the confidence of the small business community.

At the second White House Conference in 1986, priorities 13 and 45 talked about the "independence" of both the SBA and the Office of Advocacy:

13. (1,051 votes) Resolved that the SBA should be maintained as an agency independent of any other federal department. . . .

45. (484 votes) The SBA should be

retained and elevated to a Cabinet-level position whose mission should be to assist the small business community, with the private sector having a stronger partnership role.

a. The independent role of the Office of Advocacy must be maintained and strengthened. . . .

During the 1989-1992 period, following the tenure of Frank Swain, the Office of Advocacy was led by four acting chief counsels. By mid-1991, the effects of the constant transitions and the lack of a presidential appointment were becoming very clear to almost everyone involved, including the Office of Advocacy staff. According to an October 1991 SBA review of the office, morale was at a low, largely because of the lack of a permanent chief counsel:

Most of the staff members interviewed said that without a permanent head, the Office has lost most of its influence with other Government agencies, the small business community and Congress. In their view, the Acting Chief Counsels were not appointed by the President and, consequently, have lacked the independence to take public positions that differ from those of the SBA. Thus, they believe, the Office is not perceived by the small business community as an effective and independent advocate for small business.

When Tom Kerester was confirmed as Advocacy's third chief counsel in 1992, he brought with him a clear sense of the office's role. Kerester 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.

President Clinton's appointee as chief counsel, Jere Glover, strongly reaffirmed Advocacy's mandate to speak loudly—even to be a "junkyard dog" scrapping for small business. At his confirmation hearings

*Continued on page A-16*

## Disagreeing Agreeably: Frank Swain on Speaking Out

*In 1981, with the arrival of a new administration in Washington, Frank Swain took over as chief counsel for advocacy. A 1984 article about the new chief counsel in The New York Times described him as "going hammer and tongs for small business." Swain later recalled about the chief counsel's role:*

Jim Sanders came to be administrator just three or four months after I had become chief counsel, so he was pretty new at it and I was pretty new at it. I had learned early on that if I was not going to toe the party line, I should just tell the people at OMB . . . that I would give them a courtesy copy of the statement and say that it was not to be construed as administration policy.

The first time I did that after Jim came in, Jim called me the next morning and said, "Well, I got a call from Joe Wright"—who at the time was Stockman's deputy over at OMB—"and he's pretty hot and bothered about whatever you said yesterday." I explained to him the basis of the job and the statute and said my M.O. is to disagree agreeably. We weren't going to try to surprise the administration or make them look silly, but my responsibility was to try to reflect the views of small business. That happened two or three times and every time it happened, Jim would call Joe Wright back and say, "He's just doing the job that the President gave him to do." Pretty soon we stopped getting those calls and within a few years they were calling me up.

At one point I actually did an analysis of our statements. . . . Well over half started out with a disclaimer, which meant that they weren't in keeping with administration policy. We made it work, but it is a real dilemma.

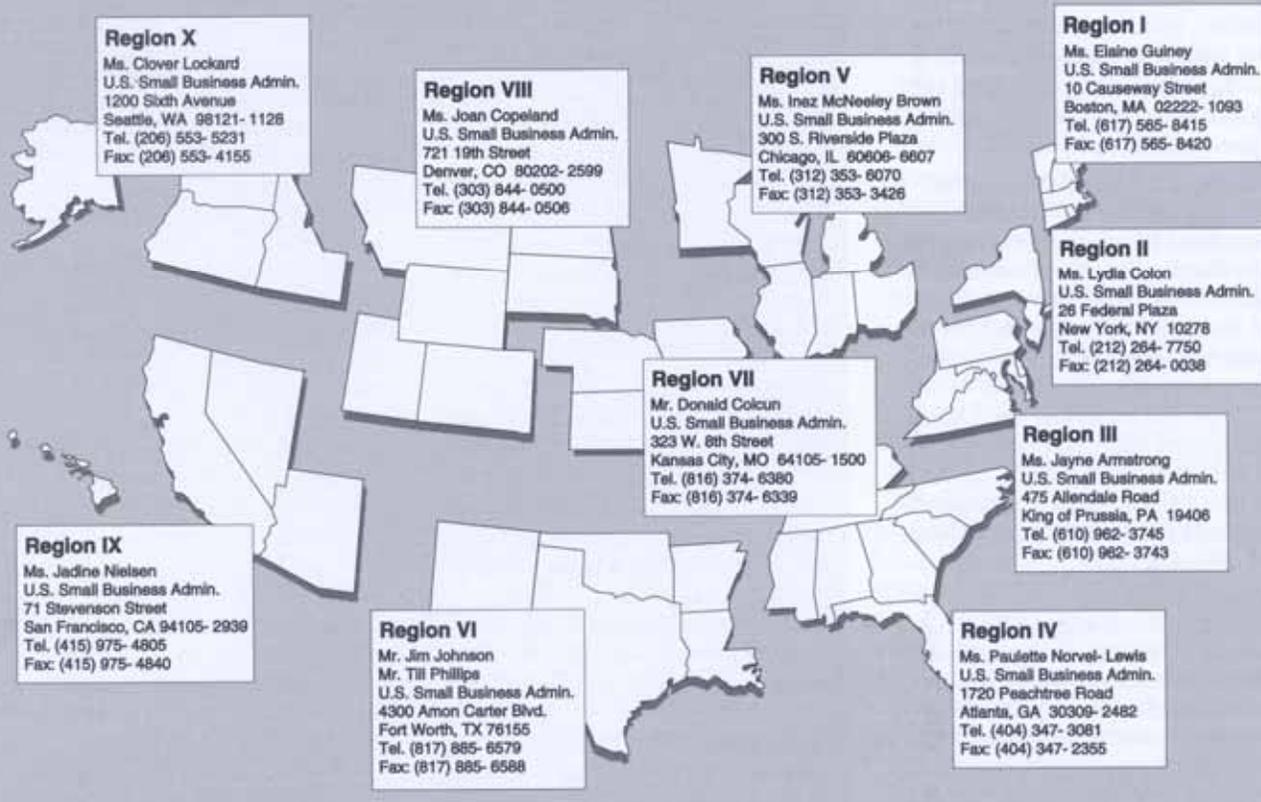
I once said to somebody, if the

Congress really wanted someone just to throw bombs, they really should have set up the Office of Advocacy as a branch of the General Accounting Office, responsible to and appointed by the Congress, not by the Executive.

On the other hand, if it were a branch of the GAO, it might be a bigger bomb thrower, but it wouldn't cut any mustard with the administration at all. We wouldn't be able to call up assistant secretaries and commissioners and say "We want you to do this, we want you to do that." The one thing that made them take my calls was the fact that they knew that I was nominated by the same president that nominated them, that I was of equivalent Cabinet rank, that whatever political muster it took to be nominated, we were, in the broadest sense, on the same team.

So it's a conflicted assignment to be a bomb thrower within the administration team and I think every occupant of the office has to work it out for themselves.

## On the Front Line: Advocacy's Regional Advocates



**Independence**, from page A-15 before the Senate Judiciary Committee, Glover said:

As the small business community and Congress expect, and the law requires, if confirmed, I intend to be a strong independent voice for small business. Because of the President's strong commitment to small business, I believe I can be a strong and effective advocate for small business within the administration.

During Glover's tenure, the Office of Advocacy has provided an independent small business perspective in testimony before the Congress on a number of issues, including federal government procurement from small businesses, patent reform, product liability, and the health care deduction for the self-employed.

At the 1995 White House Conference on Small Business, the small business delegates again called for maintaining Advocacy's independence in priority no 19:

NCRA #286 (1,249 votes) Future of the Small Business Administration. The U.S. Small Business Administration is vital to the growth of small business in America. Efforts to make the SBA's programs more cost-effective and efficient should be continued and encouraged. The SBA's "independent" agency role as the primary supporter of small business within the federal government should be enhanced by: . . .

Permanent maintenance of the "independent role" of the SBA's Office of Advocacy.

And during the debate in the House of Representatives on the continuation of the Office of Advocacy in July 1995, Rep. Roscoe G. Bartlett (R-Md.) was among many members of Congress who testified to the importance of the Office of Advocacy's independent role:

The Chief Counsel for Advocacy plays an important role by presenting and fighting for the views of the small business community. The

Chief Counsel has a very different role from other administrators in the SBA: he is the independent voice within the agency that represents the interests of small business. The advocate may not necessarily represent the President's Administration position or that of the SBA; however, the SBA and other Federal agencies are required to fully cooperate with the Chief Counsel.

While I personally may not agree with some of the positions taken by the Chief Counsel, I believe it is important to maintain the office which is the watchdog for small businesses.

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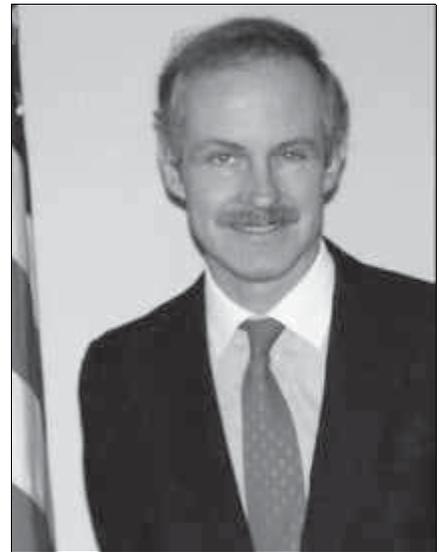


## Four Chief Counsels Reflect on 25 Years Fighting for Small Business

*In its first quarter-century, Advocacy has been led by four Senate-confirmed chief counsels: Milton D. Stewart (1978-1981); Frank S. Swain (1981-1989); Thomas Kerester (1992-1993); and Jere W. Glover (1994-2001). In recent interviews, the four shared their thoughts on Advocacy's past, present, and future.*

*You were an active small business advocate even before you were tapped for the chief counsel job. What's special about small business that led to your career choice?*

**Milt Stewart:** I spent my youth in a family-owned small business begun and managed by my father



Chief Counsel Frank Swain served Advocacy from 1981 to 1989.

and mother. Most of our friends, relatives and neighbors were small business people. I acquired great respect for the skill and courage of small business entrepreneurs. As a result, it seemed to me that Thomas Jefferson's affection for rural agricultural people was misplaced: Urban small business people had replaced them as the bearers of economic virtue.

**Frank Swain:** My belief is that small business was underrepresented, so there was a need. And the small business position—in contrast to the government, labor, or large business view—was usually the right one in my opinion.

**Tom Kerester:** The basic reason that small business is special is that



The man in the white hat: Advocacy's first chief counsel, Milt Stewart.

*Continued on page 4*

## Advocacy and the White House Conferences on Small Business

The first White House Conference on Small Business was held in January 1980 and became the model for those that followed in 1986 and 1995. The idea for a national conference at which small business people could air their grievances and, more importantly, offer their constructive proposals for improving the small business climate, was the joint creation of both House and Senate Small Business Committees and President Jimmy Carter.

This was a great opportunity for the fledgling Office of Advocacy. Advocacy and the conference were gearing up at exactly the same time. This gave Advocacy the chance for much significant nationwide outreach and visibility. The conference created regular state meetings that became forums where Advocacy staff could find out what small business's real concerns were and start to think about solutions that would work.

The state and regional meetings culminated in the national conference at which a small business agenda was drawn up, and Advocacy was an integral part of all that went on. The small business community learned that Advocacy was a part of government whose unique mission was to help make the federal government work for it, and Advocacy learned the importance of listening to small businesses first. That first conference ended with a standing ovation for Milt Stewart in recognition of his hard work in making the conference a success.

And what a success it was! Not only were many of the 60 top recommendations adopted, but the small business community also learned the value of coming together and speaking out loudly in the policy-making process. The desire to make sure that the 1980 conference was not a flash in the pan led to the second conference held in August

1986. Again, a similar process was followed: management by a White House-appointed commission; state and regional meetings; and a final national conference making 60 important recommendations.

And, again, Advocacy was a vital part of that process.

Eight years later, Advocacy was again called on to help with the start-up of the third White House Conference on Small Business, which ultimately took place in June 1995. Advocacy functioned as the research and issue arm for the conference staff. Research began even before the first state meetings. Advocacy developed a series of task force meetings and issue focus groups to develop a comprehensive issue resource book for use by state meeting attendees. The regional staff of the Office of Advocacy also assisted the process with outreach and media support.

Post-conference, the chief counsel for advocacy convened implementation meetings to help the delegates establish a network to follow up on their recommendations. Advocacy also monitored and reported to the delegates on recommendations from the conference and on other important small business issues.

There have now been three conferences in the past 21 years. Each of them helped bring the small business community closer together and to articulate more clearly an agenda for a prosperous and successful small

### The Small Business Advocate

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business economy in our great nation. Advocacy was fortunate to be in a position where it could be a vital part of all three conferences.

### Key Accomplishments of the White House Conferences

- 1980:** Regulatory Flexibility Act; Equal Access to Justice Act
- 1986:** Reauthorization of the Small Business Innovation Research program; SBA maintained as a separate agency
- 1995:** Small Business Regulatory Enforcement Fairness Act  
Health Insurance Portability and Accountability Act  
Taxpayer Relief Act

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## Message from the Acting Chief Counsel

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### Twenty-five Great Years . . . and Counting

by Susan M. Walthall, Acting Chief Counsel, Office of Advocacy

I love Advocacy. I've grown up with it, and I love it.

Twenty-five years ago, I was just out of school and interviewing around Washington. One of the first places I interviewed was here at the SBA. Advocacy was new then and the first chief counsel, the legendary Milt Stewart, was two years away from Senate confirmation. I was hired to work in the then-new Women's Business Ownership Office, which at that time fell under Advocacy.

Twenty-five years later and I am the acting chief counsel. I didn't know it then, but I know it now: This is the best job in the federal government. It is truly an honor to have been asked by President Bush to be the acting chief counsel.

The Office of Advocacy is one of the few federal offices that exist to encourage and support the hard working small business owners who are the backbone of America and drive our economic growth and job creation. And, it has a well-qualified, strong professional staff whose only goal is to support and defend small businesses. It's no wonder that I truly love this job, this place, and these people.

**Lessons Learned.** I have learned a lot along the way about small business, about politics and policy, and about leadership. I think one of the important lessons I've learned is that open communication, both to and from the small business community, is what makes Advocacy so effective and so special.

When I was first hired at the SBA, my father, who was a successful air conditioning contractor, asked, "The SBA? What has the SBA ever done for me?" But after I was hired, and after I had the chance to explain what the SBA, and espe-



Susan Walthall, acting chief counsel for Advocacy, 2001.

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**The chief counsel needs to really listen to the entire small business community: associations, academics, government officials, and most importantly, to small business owners and their employees.**

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cially Advocacy, does, he became quite proud of my work here.

I think of him a lot as I do this job. Because I realize that if the small business community doesn't know what we are doing for them, it's almost as if our efforts don't exist. And, if we don't know the needs and concerns of the community, we won't be effective advocates on their behalf. So, two-way communication has been, is, and will be, the key to our success.

I've also learned that no one person, and no one group, can do it all.

There is a cadre of strong leadership in the small business community, and relying on that leadership is the best way to influence public policy and public opinion.

This lesson is one of the many things I learned from Milt Stewart. He set the bar high, gave people the responsibility to meet the challenge, and set them loose to achieve the goal. We accomplished a lot that way, and I try to work the same way now with my staff.

People perform better when they are given the chance to take on real responsibility, and I think that is why the Advocacy staff has always been so effective.

**Advice for the Next Chief Counsel.** My 25 years at SBA have given me some perspective. I've seen our successes, and I've seen our failures. There is a lot to be learned from all of that, but three things stand out.

First, the chief counsel needs to really listen to the entire small business community: associations, academics, government officials, and most importantly, to small business owners and their employees. The next chief counsel must make it a point to visit small businesses across America.

Second, the chief counsel should rely on the Advocacy staff. It is the best there is: motivated, qualified, and professional.

Third, the chief counsel should believe in the job and believe in small business.

A final word of advice: Enjoy!

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## Four Chief Counsels Reflect on 25 Years Fighting for Small Business

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### **Chief Counsels**, *from page 1*

you're in complete control of your goals and objectives. Being in small business gives you a feeling of independence, pride, and achievement. It really makes you feel like you're part of that engine that drives the economy.

**Jere Glover:** Small business is special because it's what makes America work. In good times and in bad, small business is what makes things happen. In every economic downturn, small business is what's pulled us out, and quite frankly, small business has softened the impact of past economic downturns. Job creation, innovation, productivity, and efficiency—all of these things tend to flow from a vibrant small business community.

*It's probably safe to assume that, as a former chief counsel for advocacy, you believe the Office of Advocacy has an important mission. What do you see as the top reason for its existence?*

**Milt Stewart:** The top reason is to set out the unmet needs of small business. We made three specific efforts to spell out Advocacy's policy-related missions.

- The chief counsel named a National Task Force on Small Business and Innovation to spell out the advocacy mission requirements of small business as seen by 35 experienced venture capitalists and entrepreneurs. The task force's final report (July 1979) represented a helpful initial statement.

- We convened a national conference of state officials with economic development experience to express their views of priority needs.

- The first White House Conference on Small Business authorized by President Carter

brought together 2,000 small business delegates to review alternative policy recommendations.

These three efforts set out the priority policy concerns of the Office of Advocacy.

**Frank Swain:** The central reason is the same now as it was 25 years ago: small business is extremely important to the economic, political, and social fabric of the country. It is too often underrepresented in the corridors of government decision-making, and it's very appropri-

the adverse impact of proposed legislation and regulation in these two areas. The Office of Advocacy helps ease the burdens on small business and present their views.

**Jere Glover:** The top reason for the office's existence is to provide accurate and reliable information, data, and research. Decision-makers may differ about the conclusions, but the Office of Advocacy's critical function is to let them have the right information so they can make informed decisions.



Regional advocates with Chief Counsel Tom Kerester, 1992.

ate for government to have an in-house voice for small business. SBA programs such as the small business lending programs are important, but they require a lot of time and management. So it's smart to have the policy and regulatory issues analyzed in a specific office, such as Advocacy.

**Tom Kerester:** The chief counsel serves as the eyes, ears, and voice of small business in two areas: Congress and the federal departments and agencies. Small businesses have neither the expertise, the time, nor the money to present

*What was the most significant achievement of the Office of Advocacy during your tenure?*

**Milt Stewart:** The Small Business Innovation Development Act, enacted in 1982. Although it was not enacted until after my term of office, it was a direct result of the work done during my term. There were other significant achievements, but this was the most important, by far.

**Frank Swain:** Two general things and one specific thing.

- We really established a very

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strong presence as small business's voice in government. When I came in, there was a very new law that hadn't been fleshed out—the Regulatory Flexibility Act. Over the eight years I served as chief counsel, we filed about 400 comments, about one per week. So the office really became known for regulatory and legislative activity.

• I'm very proud of the fact that in the 1980s we became very well known as a center of expertise on health care issues and small business. We were the first group to oppose mandated health benefits for small business. We were so active on health care issues that I was named to the President's Commission on Long-Term Care in 1987. This was a recognition that the small business side needed to be included and that we'd established ourselves as the voice for it inside government.

• One specific accomplishment was the initiation of the *President's Report on the State of Small Business* in 1982. We started out small and made it into a very big deal.

**Tom Kerester:** I was only in a short time. My most significant achievement, which was strongly supported by Dale Bumpers, the chair of the Small Business Committee at the time, was to go beyond the Beltway and acquaint small business with the significant, crucial role of the Office of Advocacy. I was on the road five or six days a week. I never had the chance to testify before Congress but I did testify before a joint session of the Utah legislature.

**Jere Glover:** The 1995 White House Conference on Small Business and the Small Business Regulatory Fairness Act (SBREFA).

• The White House conferences

historically provide a new generation of small business leaders. The Office of Advocacy was critical in the White House conference, and even more so in the implementation phase. Over 90 percent of the recommendations had actions taken on them, and the conference sensitized the entire government to small business issues. As a result, every single agency identified things they could do for small business, and we helped make sure they followed through. Many of the recommenda-



Jere Glover, chief counsel for Advocacy from 1994 to 2001.

tions ended up in legislative changes that will forever change the way government deals with small business.

• The proof of SBREFA's effectiveness was \$3 billion in quantified savings for small business from regulatory changes. To quantify the efficiency of the agency in a regulatory manner was a huge undertaking, and to do it in a credible way was a real credit to the employees of the Office of Advocacy. Changing the culture of the government is something that only occurs in the rarest of circumstances. I take a good deal of pride

in that. This doesn't mean we've finished the job though.

**Where do you hope to see the Office of Advocacy in 5 to 10 years?**

**Milt Stewart:** The highest priority Advocacy program for the next five to 10 years will be contributing to the nation's response to the September 11, 2001, terrorist attack on the nation. The extreme wing of the Muslim effort must be met with an ideological challenge to terrorism. Small business will have its role to play in achieving the indispensable victory over terrorism and extremism. Before that, small business will still need the Office of Advocacy as the spokesman for small business's public policy needs to foster its unhampered growth.

**Frank Swain:** I'd simply say that Advocacy has more specific responsibilities now, especially with SBREFA. But it's important that Advocacy stay lean and on the cutting edge of issues and developments in small business and that it resist the temptation to become too bureaucratized.

**Tom Kerester:** I think we have to give more authority to the chief counsel to impact the proposed rules and regulations at the federal level. So when the chief counsel speaks, departments will listen. One thing that would help do that is to give more public recognition to the chief counsel, elevating the stature of the office.

**Jere Glover:** Still in existence! And that it will become a significant player in regulatory and economic policy in both the legislative and executive branches.

# Regulation in an Age of Entrepreneurship

by Kathryn J. Tobias, Senior Editor

Why is the U.S. economy the most dynamic in the world? Its dynamism, researchers agree, springs from the organic creativity and rapid growth of American small businesses, rooted in a free society. Nothing seems impossible in a culture that allows for constant experimentation and change. As one business owner told his employees, “Love our customers, love our values, but don’t love our structure, because it’s going to change every year.” (So Thomas Petzinger, Jr., reported in his book, *The New Pioneers*.)

Yet this culture of creativity and flexibility poses a paradox for a free society and for policymakers, namely, how do you encourage organic small business growth while regulating to protect important societal, environmental, and economic assets? The first regulatory agency in the United States was created in an era of top-down corporate management; if the government wanted something done, they told the business community exactly what to do, how and when. And that was that.

Now we live in an era where innovation and change emerge from the bottom up. One-size-fits-all regulations just don’t work anymore. Some regulation of business behavior is needed, but regulations also come down hardest on the smallest entities. When a sole proprietor devotes a morning to filling out paperwork, licenses, and other red tape, the firm’s productivity suffers. And paperwork is just the tip of the iceberg when it comes to regulations’ effects on small business. Too many heavy rules can put the brakes on small business creativity and economic growth.

**Advocacy’s Charge: Cutting Excess Regulation.** In 1976, Congress gave the Office of Advocacy the responsibility to

“measure the direct costs and other effects of federal regulation on small businesses; and make proposals for eliminating excessive or unnecessary regulation of small businesses.”

But trimming unnecessary regulation did not happen easily. By 1980, at the convening of the first White House Conference on Small Business, the need for small business participation in the regulatory process was still pressing. Among the conference’s top five recommendations was the call for economic impact analysis of newly proposed federal regulations.

**The RFA—The First Tool.** The White House Conference recommendation was a catalyst in the passage of the Regulatory Flexibility Act (RFA) in 1980. The RFA directed agencies to analyze the impact of their regulatory actions on small entities.

And the Office of Advocacy was charged to monitor agency compliance with the new law. Over the next 15 years, the office carried out this mandate, reporting annually on agency compliance to the president and the Congress. But Advocacy analysts recognized early on that there was almost nothing in the law’s enforcement provisions to prevent an agency from being sloppy in its compliance, or even outright ignoring the law.

Delegates to the 1986 White House Conference on Small Business thought the RFA should be strengthened by, among other things, requiring recalcitrant agencies to comply with its provisions and subjecting federal agencies’ failure to comply with the RFA to judicial review. But another decade would go by before the delegates’ recommendation bore fruit.

In preparation for the 1995 White House Conference on Small Business, the Office of Advocacy assembled leading thinkers on

small business topics in a series of 15 focus groups. All 15 cited regulatory burdens as a top barrier to entry for small businesses. The 1995 conference asked for specific legal provisions to give small firms a voice in the rulemaking process. The conference aftermath was unique: it included a concerted follow-up process to see to the implementation of its recommendations. As a result, the conference had a phenomenally high success rate: policymakers addressed more than 90 percent of its recommendations!

**SBREFA—The RFA Gets**

**Teeth.** The regulatory reform recommendation was among the first. President Clinton signed the Small Business Regulatory Enforcement Fairness Act (SBREFA), on March 29, 1996. The new law gave the courts jurisdiction to review agency compliance with the RFA. It also required review panels to include small entities early in the process of drafting certain regulations. And it reaffirmed the chief counsel for advocacy’s authority to file friend of the court briefs in suits brought by small entities in response to an agency final regulatory action.

In 2000, on the 20th anniversary of the RFA, the Office of Advocacy reported that agency compliance was improving and that the RFA and SBREFA had saved small businesses some \$20.6 billion in new regulatory costs over the 1998-2000 period.

**Creative Entrepreneurs Take on Old Rules.** Meanwhile, entrepreneurial businesses are themselves developing creative ways to solve problems that rely less than ever on the top-down models of the past. For example, Petzinger notes, the Voluntary Hospitals of America is using principles called “min specs”—minimum critical specifications—and “self-organization” to

*Continued on page 7*

## Economic News

### Minority Business, Earnings Studies Released in October

Two economic studies will be released on Oct. 23, 2001, when the Office of Advocacy commemorates its 25th anniversary.

*Minorities in Business, 2001*, by Dr. Ying Lowrey, senior economist with Advocacy's Office of Economic Research, utilizes several sources from the U.S. Census Bureau, including the Current Population Survey and the Survey of Minority-Owned Business Enterprises (SMOBE). The study provides a comprehensive portrait of minority-owned businesses in the United States (see Table).

The Census Bureau's classification of firms by owners' demographic group varies between 1982 and 1997, making it difficult to compare data over time, Lowrey's

study makes adjustments to the SMOBE data to enable a comparison. Her study shows that the share of minority-owned firms rose from 6.84 percent in 1982 to 15.12 percent in 1997.

A second study to be released on Oct. 23, *Earnings Growth among Disadvantaged Business Owners*, was conducted by Robert Fairlee of the University of California at Santa Cruz. This study was funded by the Office of Advocacy. Fairlee studies the earnings histories of less educated and minority men and women using the 1979 National Longitudinal Survey of Youth (NLSY). Using annual data spanning 1979 through 1998, Fairlee finds that less-educated self-employed young men and women

tend to make more money than their wage-and-salary sector counterparts, other things being equal. He also finds that earnings growth is initially slower among self-employed men and women, but over time, it surpasses the earnings growth of wage-and-salary earners.

#### For More Information

Advocacy's senior economist, Dr. Ying Lowrey, can be reached at (202) 205-6947, or by e-mail at [ying.lowrey@sba.gov](mailto:ying.lowrey@sba.gov). Both reports are available on the Advocacy website at [www.sba.gov/advo](http://www.sba.gov/advo). Paper and microfiche copies of all Advocacy reports are also available for purchase from the National Technical Information Service at (800) 553-6847 or through the NTIS website at [www.ntis.gov](http://www.ntis.gov).

#### U.S. Firms by Ownership Category, 1997

	All Firms	Firms with Employees	Number of Employees	Total Payroll (\$million)
<b>Number of Firms</b>				
Total U.S. Firms	20,821,934	5,295,151	103,359,815	2,936,493
Non-Minority-Owned	17,782,901	4,679,929	98,845,116	2,840,964
All Minority-Owned	3,039,033	615,222	4,514,699	95,529
Black-Owned	823,499	93,235	718,341	14,322
Hispanic-Owned	1,199,896	211,885	1,388,746	29,830
Native American-Owned	197,300	33,277	298,661	6,624
Asian-Owned	912,959	290,000	2,203,080	46,179
<b>Share of Total U.S. Firms (Percent)*</b>				
Non-Minority-Owned	85.40	88.38	95.63	96.75
Minority-Owned	14.60	11.62	4.37	3.25
<b>Share of Total Minority-Owned Firms (Percent)*</b>				
Black-Owned	27.10	15.15	15.91	14.99
Hispanic-Owned	39.48	34.44	30.76	31.23
Native American-Owned	6.49	5.41	6.62	6.93
Asian-Owned	30.04	47.14	48.40	48.34

\* Percent shares may not total 100 because of duplication of some firms. Hispanics may be of any race, and therefore, may be included in more than one minority group.

Source: U.S. Department of Commerce, Bureau of the Census: Survey of Minority Owned Business Enterprises, 1997.

#### Regulation, from page 6

respond to problems in the health care system. More often than not, Petzinger observes, their solutions entail eradicating rules rather than creating new ones.

What of the future? Studies conducted for the Office of Advocacy find that the cost to business of government regulation continues to rise. Striking a balance between rules that protect such assets as the health of workers and the environment, while minimizing burdens imposed on fragile, often experimental, small businesses—must remain one of government's high priorities for the foreseeable future.

## Nominees Sought for 2002 Small Business Week Awards

National Small Business Week 2002 is tentatively scheduled for May 5-11, 2002. The highlight of the week is the presentation of awards spotlighting the outstanding contributions of small business persons and advocates at the district, state, and national levels. SBA needs your help to obtain a large pool of qualified nominations from which to select the Small Business Award winners. ***Nominations close Nov. 9, 2001.***

The complete nomination guidelines can be found at [www.sba.gov/opc/pubs/nominations2002.pdf](http://www.sba.gov/opc/pubs/nominations2002.pdf).

### To Submit Nominations

Nominations must be submitted to the nearest U.S. Small Business Administration district office in your state or territory. All nominations must be post-marked or hand delivered no later than Nov. 9, 2001.

### Award Categories

#### Small Business Advocate Awards

- Accountant Advocate of the Year
- Entrepreneurial Success
- Financial Services Advocate of the Year
- Home-Based Business Advocate of the Year
- Minority Small Business Advocate of the Year
- Small Business Exporter of the Year
- Small Business Journalist of the Year
- Veteran Small Business Advocate of the Year
- Women in Business Advocate of the Year
- Young Entrepreneur of the Year

#### Small Business Person Awards

- Small Business Person of the Year

#### Phoenix Awards

- Small Business Disaster Recovery
- Outstanding Contributions to Disaster Recovery

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## Twenty-five Years of the Regulatory Flexibility Act

by Kathryn Tobias, Senior Editor

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

In fall of 1979, President Jimmy Carter added the Small Business Administration to his Regulatory Council and issued a memorandum to the heads of executive departments and agencies. He said, "I want you to make sure that federal regulations will not place unnecessary burdens on small businesses and organizations," and he directed agencies to apply regulations "in a flexible manner, taking into account the size and nature of the regulated businesses." Agencies were to report on their efforts to Advocacy.

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

By 1980, when delegates assembled for the first of three

White House Conferences on Small Business, the conference report noted that "during the past decade, the growth of government regulation has been explosive, particularly in such areas as affirmative-action hiring, energy conservation, and protection for consumers, workers, and the environment. Small business people recognize that some government regulation is essential for maintaining an orderly society. But there are now 90 agencies issuing thousands of new rules each year."

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

**1980: The Regulatory Flexibility Act.** The White House Conference recommendations helped form the impetus for the passage, in 1980, of the Regulatory Flexibility Act (RFA). The intent of the act was clearly stated:

*Continued on page 4*

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**Special Edition: 25th Anniversary  
of the Regulatory Flexibility Act**

# The RFA at 25: Some Reflections

by James Morrison, President, Small Business Exporters Association of the United States

As a congressional staffer in the 1970s, I had the privilege to be “present at the creation” of the RFA. From the vantage point of 2005, it is hard to visualize the regulatory atmosphere of the mid-1970s. 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.

The RFA began as an informal conversation in April 1977 about a major part of this problem—small business regulatory burdens. It ended with a signing ceremony in the East Room of the White House three and a half years later.

The bill was introduced August 1, 1977. The debate was about what the law should require regulatory agencies to do. Change was needed in the regulatory culture. Agencies needed to stop viewing their rulemaking in terms of top-down, one-size-fits-all regulations. So the bill emphasized gathering input from the affected parties, both directly and through the Office of Advocacy, prior to rulemakings. Agencies should strive to “fit” their rules to the “scale” of the entities they were regulating, the law noted.

The bill’s procedures paralleled the then-new environmental law procedures contained in the National Environmental Policy Act (NEPA). Cosponsors Senator Gaylord Nelson of Wisconsin and Senator John Culver of Iowa advocated the consensus view—that NEPA offered a proven approach to sensitizing agencies to a set of external considerations, that it

was an understood quantity by the courts and the administrative law bar, and that it offered a way to successfully integrate legal innovations into the Administrative Procedure Act.

A major reservation was that if the law included a NEPA-type provision that permitted litigants to shut down a rulemaking process in mid-stride, the RFA would be abused. The RFA was always intended to re-orient rulemaking processes, not to pre-ordain particular substantive outcomes.

The effort to obtain the desired cultural changes at the agencies while restricting any potential misuse of the RFA led to some convoluted language on judicial review. The courts later interpreted the language very narrowly, virtually shutting off all judicial review of agency actions under the RFA. Within a few years of these judicial decisions, agency compliance with the RFA declined. Not until the RFA was amended by SBREFA in 1996 was this problem overcome.

The politics of passing the RFA was interesting. Senators and representatives from both parties and all political ideologies—as well as those from urban and rural areas and all geographic regions of the nation—put their shoulders into the bill’s passage. The very hard political work done by them and their staffs, as well as the small business community, led to this rather amazing fact: in three years of congressional actions on the RFA spanning two Congresses, there was never a single negative vote cast against it. House champions included Representatives Andy Ireland of Florida, Bob Kastenmeier of Wisconsin, and Joe McDade of Pennsylvania.

The executive branch was more skeptical. When Congress first solicited reactions to the bill from

federal agencies, the most common response was that while the law might be appropriate for other agencies, the respondent’s own agency should be exempted from it. Later, when passage seemed likely, agency general counsels jointly sought to have all agencies exempted.

An important ally of the bill within the executive branch was the Office of Advocacy and its chief counsel, Milton D. Stewart. Advocacy had the avid backing of the nation’s small business community, which made passage of the RFA a top recommendation of the 1980 White House Conference on Small Business.

By the middle of 1980, President Carter personally intervened, sending a top aide, Stuart Eizenstat, to Capitol Hill to clear the way for the RFA, which passed Congress soon thereafter and was signed into law.

## The Small Business Advocate

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## Message from the Chief Counsel

### Listening To Small Business

by Thomas M. Sullivan, Chief Counsel for Advocacy

Too often government agencies appear to be a “black box.” What they do and how they do it is obscure at best. Even when agencies try to be open, they sound as if they are speaking a foreign language. That can even be true here at the Office of Advocacy.

I have just gone back and looked at some of our past newsletters. What do I see? “RFA,” “SBREFA,” “IRFA,” and “FRFA.” All of these acronyms actually mean something, and they are integral to Advocacy’s work. Yet they tend to hide the reality of what Advocacy is all about—listening to the voice of small business and making sure its voice is heard inside regulatory agencies, Congress, and the White House.

The Regulatory Flexibility Act (RFA), its amendments, and requirements are, in the end, just tools that allow us to bring that voice into the regulatory process.

But how do we know what that voice is saying? This challenge is met daily in our office.

Our 10 regional advocates are Advocacy’s “eyes and ears” across the country. It is their job to meet regularly with state and local trade organizations and small business owners. The insights they gather form the basis of our understanding of the small business agenda.

We also work quite closely with small business membership and trade organizations. I meet regularly with representatives from the largest organizations in “kitchen cabinet” style meetings where current issues are discussed and new opportunities explored.

Our regulatory attorneys also hold specific issue roundtables to gather information. In these open discussions, the practical details of legislative and regulatory proposals

are dissected and their impact on small business is closely examined. Some, like our environmental and safety roundtables, have regular meetings, while others are issue-driven. Whether ongoing or ad hoc, these roundtables with small

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**“By listening to small businesses, we are able to bring their agenda to the attention of policymakers in regulatory agencies, Congress, and the White House.”**

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business owners and representatives give us clear insights into the effects of regulatory and legislative proposals.

Another way we listen to the voice of small business is through my travels across the country. I am honored to be able to address meetings and conventions in all regions of the country and speak about this Administration’s commitment to tearing down barriers. At each stop

I make sure that I schedule time to speak with small business owners and visit local small businesses. These visits teach me how government policies actually affect real business owners and employees.

Finally, small business owners can comment on the impact of proposed regulations through our Regulatory Alerts webpage, located at [www.sba.gov/advo/laws/law\\_regalerts.html](http://www.sba.gov/advo/laws/law_regalerts.html). It gives anyone the ability to let federal agencies know the real world consequences of their actions.

Through all of these methods we gather the comments and concerns of small business owners. By listening to small businesses, we are able to bring their agenda to the attention of policymakers in regulatory agencies, Congress, and the White House. We do that through the RFA, SBREFA, Executive Order 13272, and other means. Although those tools may be outside of Main Street’s everyday vocabulary, they all aim toward one thing—making sure that America’s entrepreneurs can flourish in an environment that promotes and protects them.



Used with permission.

## 25 Years of RFA, from page 1

“It is the purpose of this act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives... of applicable statutes, to fit regulatory and informational requirements to the scale of businesses... To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.”

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



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

### Implementing the RFA.

Advocacy was charged to monitor agency compliance with the new law. Over the next decade and a half, the office carried out its mandate, reporting annually on agency compliance to the president and the Congress. But it was soon clear that the law wasn’t strong enough. A briefing paper prepared for the

1986 White House Conference on Small Business noted: “The effectiveness of the RFA largely depends on small business’ awareness of proposed regulations and [their] ability to effectively voice [their] concerns to regulatory agencies. In addition, the courts’ ability to review agency compliance with the law is limited.”

## The RFA Timeline

### June 1976

Congress enacts Public Law 94-305 creating an Office of Advocacy within the Small Business Administration charged, among other things, to “measure the direct costs and other effects of federal regulation on small businesses and make legislative and non-legislative proposals for eliminating excessive or unnecessary regulations of small businesses.”

### April 1980

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

### September 1980

Congress passes the Regulatory Flexibility Act (RFA), requiring agencies to review the impact of proposed rules and include in published regulatory agendas those likely to have a “significant economic impact on a substantial number of small entities.”

### October 1981

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

### February 1993

Advocacy publishes the first annual report on agency RFA compliance.

### November 1986

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

### September 1993

President issues Executive Order 12866, “Regulatory Planning and Review,” requiring each agency to “tailor its regulations to impose the least burden on society, including businesses of different sizes.”

### June 1995

The third White House Conference asks for specific provisions to strengthen the RFA—including the IRS under the law, granting judicial review of agency compliance,

The delegates recommended that the RFA be strengthened by requiring agencies to comply and by providing that agency action or inaction be subject to judicial review. President Ronald Reagan's 1987 report on small business noted: "Regulations and excessive paperwork place small businesses at a disadvantage in an increasingly competitive world marketplace... This Administration supports continued deregulation and other reforms to eliminate regulatory obstacles to open competition." But it would take an act of Congress to make judicial review law—and reaching that consensus needed more time.

Regulations' effects on the economic environment for competition also concerned President George H.W. Bush, whose 1992 message in the annual small business report noted: "My Administration this year instituted a moratorium on new federal regulations to give federal agencies a chance to review and revise their rules. And we are looking at ways to improve our regulatory process over the long term so that regulations will accom-

plish their original purpose without hindering economic growth." The scene was set for the regulatory logjam to move.

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

An April 1994 report by the General Accounting Office reviewed Advocacy's annual reports on agency compliance with the RFA and concluded: "The SBA annual reports indicated agencies' compliance with the RFA has varied widely from one agency to another. ...the RFA does not authorize SBA or any other agency to compel rulemaking agencies to comply with the act's provisions."

**The 1995 White House Conference and SBREFA.** In 1995, a third White House Conference on Small Business

examined the RFA's weaknesses. The Administration's National Performance Review had recommended that agency compliance with the RFA be subject to judicial review. Still it had not happened.

Once again, the White House Conference forcefully addressed the problem. One of its recommendations fine-tuned the regulatory policy recommendations of earlier conferences, asking for specific provisions that would include small firms in the rulemaking process.

In October, Advocacy issued a report, based on research by Thomas Hopkins, estimating the total costs of process, environmental, and other social and economic regulations at between \$420 billion and \$670 billion in 1995. The report estimated that the average cost of regulation was \$3,000 per employee for large firms (more than 500 employees) and \$5,500 per employee for small firms (fewer than 20 employees).

In March 1996, President Clinton acted on the 1995 White House Conference recommendation

*Continued on page 6*

and including small businesses in the rulemaking process.

#### **March 1996**

President signs the Small Business Regulatory Enforcement Fairness Act, giving courts jurisdiction to review agency compliance with the RFA, requiring the Environmental Protection Agency and Occupational Safety and Health Administration to convene small business advocacy review panels, and affirming the chief counsel's authority to file *amicus curiae* briefs in appeals brought by small entities from final agency actions.

#### **March 2002**

President announces the Small Business Agenda, which promises to "tear down regulatory barriers to job creation for small businesses

and give small business owners a voice in the complex and confusing federal regulatory process."

#### **August 2002**

President issues Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," which requires federal agencies to establish written procedures to measure the impact of their regulatory proposals on small businesses, that they consider Advocacy comments on proposed rules and notify Advocacy when a draft rule may have a significant small business impact, and that Advocacy train agencies about the law.

#### **December 2002**

Advocacy presents draft state regulatory flexibility model legislation to the American Legislative

Exchange Council for consideration by state legislators, and states begin adopting legislation modeled on the federal law.

#### **September 2003**

Advocacy presents its first report on agency compliance with E.O. 13272, describing agency compliance and noting the start of Advocacy's agency training.

#### **2005**

In the 25th anniversary year of the RFA, Advocacy reports agency cost savings of more than \$17 billion in foregone regulatory costs to small business for FY 2004. Legislation is considered in Congress to strengthen the RFA.

## 25 Years of RFA, from page 5

by signing Public Law 104-121, the Small Business Regulatory Enforcement Fairness Act (SBREFA). The new law gave the courts jurisdiction to review agency compliance with the RFA. Second, it mandated that the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) convene small business advocacy review panels to consult with small entities on regulations expected to have a significant impact on them, before the regulations were published for public comment. Third, it broadened the authority of the chief counsel for advocacy to file *amicus curiae* (friend of the court) briefs in appeals brought by small entities from agency final actions.

**Executive Order 13272.** In March 2002, President George W. Bush announced his Small Business Agenda. The President gave a high priority to regulatory concerns, including the goal, “[to] tear down the regulatory barriers to job creation for small businesses and give small business owners a voice in the complex and confusing federal regulatory process.”

One key goal was to strengthen the Office of Advocacy by creating an executive order directing agencies to work closely with Advocacy in considering the impact of their regulations on small business.

In August 2002, President Bush issued Executive Order 13272. It requires federal agencies to establish written procedures and policies on how they would measure the impact of their regulatory proposals on small entities and to vet those policies with Advocacy; to notify Advocacy before publishing draft rules expected to have a significant small business impact; and to consider Advocacy’s written comments on proposed rules and publish a response with the final rule. The E.O. requires Advocacy to provide

notification as well as training to all agencies on how to comply with the RFA. These steps set the stage for agencies to work closely with Advocacy in considering their rules’ impact on small entities.

**Implementing E.O. 13272.** As part of its compliance with E.O. 13272, Advocacy reported to the Office of Management and Budget in September 2003. The report noted that Advocacy had spread the word about E.O. 13272 and instituted an email address (*notify.advocacy@sba.gov*) to make it easier for agencies to comply with notification requirements. Advocacy developed an RFA compliance guide, posted it on its website, prepared training materials, and began training federal agency staff.

Nearly all of the cabinet agencies submitted written plans for RFA compliance to Advocacy and made their RFA procedures publicly available. Independent regulatory agencies were initially less responsive; some argued that they were exempt from executive orders. Nevertheless, Advocacy continues to work to bring all agencies into compliance with the E.O. Advocacy has also developed a Regulatory Alerts webpage at [www.sba.gov/advo/laws/law\\_regalerts.html](http://www.sba.gov/advo/laws/law_regalerts.html) to call attention to important pending regulations.

The final chapter on how much small businesses are benefiting from the RFA as amended by SBREFA and supplemented by E.O. 13272 has yet to be written. Legislation has been introduced to further enhance the RFA. Advocacy believes that as agencies adjust their regulatory development processes to accommodate the RFA and E.O.’s requirements, the benefits will accrue to small firms. And agencies are making strides in that direction. The annual amount of additional regulatory burdens that are not loaded onto the backs of small businesses are counted cumu-

latively in the billions of dollars—over \$17 billion in first-year cost savings in fiscal year 2004 alone.

## RFA Recollections

“I came to Congress from the private sector and had had no prior political experience, so working on the RFA was a learning experience. As a community banker, I had seen how well-meaning regulations developed in the ivory tower had put small businesses at a disadvantage, so I got on the Small Business Committee to do something about it. The RFA passed on the last night of that Congress, near midnight. It came up for a vote and I made my speech and another congressman who opposed the bill jumped to his feet—but the chair banged the gavel to cut off discussion.

“After it passed on the House side, I carried it over to the Senate where, after about 45 minutes, I looked up and said, ‘What happened to my bill?’ and someone said, ‘Sir, they passed it a half hour ago!’ Well, what passed was a good law, but an imperfect one, without the judicial review provision that was added in SBREFA, for instance. But dedicated people nurtured the RFA and later helped fill in the gaps—one was Steve Lynch, a staff person who had a great impact and, sadly, died at age 51. The RFA is a great case study of what can be done legislatively if you don’t care who gets the credit and don’t try to do it all at once.”

*Congressman Andy Ireland  
U.S. Representative, 1977-93*

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## Rulemaking Success Stories

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### SBREFA Review Panels Improve Rulemaking

by Claudia Rayford Rodgers, Senior Counsel; Keith Holman and Kevin Bromberg, Assistant Chief Counsels

In 1996, Congress fortified the Regulatory Flexibility Act (RFA) with the Small Business Regulatory Fairness Act (SBREFA). Among other things, SBREFA directed the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to convene small business review panels for regulations expected to have a significant small business impact. These panels occur before the rule is published for public comment. Significant rulemaking improvements have resulted from the SBREFA panel process.

SBREFA review panels consist of representatives from the agency, Advocacy, and the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB). The panel reaches out to small entities likely to be affected by the proposal, seeks their input, and prepares a report with recommendations for reducing the potential impact on small businesses. The agency may modify its proposal in response to the panel report.

**OSHA Panels.** OSHA has convened seven panels since 1996. Two of the most significant were on the Safety and Health Program rule and the Ergonomics Program Standard. They demonstrate how small business input early in the regulatory process can help agencies see new ways to solve a problem through regulation—by looking at equally effective alternatives that minimize the harm to small business.

**The Safety and Health Program Rule.** In August 1998, OSHA notified Advocacy of its intent to propose a safety and health program rule. The proposal required employers to establish a workplace safety and health program to ensure compliance with

OSHA standards and the “general duty” clause of the Occupational Safety and Health Act.

Because the proposal covered nearly all employers, a SBREFA panel was convened which included 19 small entity representative advisors. It found that OSHA had underestimated the \$3 billion cost of the proposed rule.

The panel report sent the message loud and clear to OSHA, OMB, and other federal agencies that realistic costs and accurate data must be used when promulgating regulations. As a result, this overly burdensome rule never moved forward, and it was eventually removed from OSHA’s regulatory agenda, saving small businesses billions in regulatory compliance costs.

**The Ergonomics Standard.** In March 1999, OSHA released a draft ergonomics standard and announced its intention to convene a SBREFA panel to discuss the potential impact on small businesses. The draft proposal covered nearly every industry and business in the United States. Twenty small entity representatives (including 13 recommended by Advocacy) advised the panel.

During the panel’s deliberations, the small entities expressed a number of concerns, especially regarding OSHA’s estimates of the time and money required to comply. They provided OSHA with types of costs that they felt were omitted from the calculations and suggested that OSHA provide the public with its assumptions when it proposed the standard in the *Federal Register*. The panel completed the report in April 1999.

Although proposed in November 1999, Congress, under the Congressional Review Act, eventu-

ally repealed the ergonomics rule in March 2001. OSHA’s subsequent decision to issue guidelines instead of creating a new ergonomics rule showed that the SBREFA panel process works. Because of this process and Advocacy’s input throughout the entire progress of the ergonomics issue, the cost to small business has been drastically reduced. Advocacy estimated in 2001 that rescinding the ergonomics standard saved small businesses \$3 billion. Other observers have estimated that the actual cost would have been 15 times higher.

**EPA Panels.** EPA has convened 29 SBREFA panels since 1996. These panels have improved the cost-effectiveness of planned environmental rules and limited the adverse impact on small entities, including small communities. Two recent successes are the panels on Nonroad Diesel Engines and Construction and Development Runoff.

**Nonroad Diesel Engines and Fuel Rule.** In summer 2002, EPA notified Advocacy that it would propose further limits on emissions of nitrogen oxides and particulate matter from diesel-powered nonroad engines. These engines are used extensively in construction, agriculture, and other off-road applications. EPA also planned to dramatically reduce the allowable level of sulfur in diesel fuel used by nonroad engines. The rule was anticipated to have significant economic impacts on small equipment manufacturers who use diesel engines, and on small oil refiners and oil distributors.

EPA convened a SBREFA panel with 20 small entity representative advisors who raised concerns about the technical and cost feasibility of

*Continued on page 8*

### **SBREFA Works**, from page 7

the proposed rule. The panel concluded that equipment manufacturers should be allowed to purchase current engines for several additional years, while redesigning their products to accommodate the newer engines. The panel also advised that expensive aftertreatment devices should not be required on engines with less than 25 horsepower.

The SBREFA panel report recommendations, which were adopted by EPA in the final rule, allowed many small equipment manufacturers to stay in business and gave them valuable time to redesign their products to comply with the new requirements.

**Construction and Development Site Runoff.** In June 2002, EPA proposed a rule to reduce storm water runoff from construction and development sites of one acre or more. The original proposal carried a price tag of almost \$4 billion per year, and its requirements overlapped with existing state and local storm water programs. Fortunately, small business had a voice in the rulemaking process through the SBREFA panel process. Small businesses provided information about the rule's potential impact and offered other options. The panel concluded that the rule's requirements would add substantial complexity and cost to current storm water requirements without a corresponding benefit to water quality. The panel recommended that EPA not impose the requirements, and focus instead on improving public outreach and education about existing storm water rules.

In March 2004, EPA announced that it would not impose new requirements for construction sites. EPA found that a flexible scheme would permit state and local governments to improve water quality without an additional layer of federal requirements and without unduly harming small construction

firms. In addition to the cost savings for small businesses, rescinding the original proposal saved new homebuyers about \$3,500 in additional costs per house.

**SBREFA Panels Work.** These panels illustrate that the SBREFA panel process indeed works to reduce the burdens on small entities. Because agencies are required to convene these panels, small businesses are able to shed light on agencies' underlying assumptions, rationale, and data behind their draft rulemaking. In the absence of SBREFA panels, these rules would have been promulgated in forms costing small businesses millions

in unnecessary regulatory costs. The panel reports allowed EPA and OSHA to examine alternatives and weigh options that accomplished their regulatory objectives while at the same time protecting small businesses, their owners, and employees.

### **SHARKS!!! An RFA Success Story**

On December 20, 1996, the National Marine Fisheries Service (NMFS) of the Department of Commerce published a proposal to reduce the existing shark fishing quota by 50 percent, certifying that the reduction would have no significant impact on a substantial number of small entities. In January 1997, Advocacy questioned NMFS's decision to certify rather than perform an initial regulatory flexibility analysis. In its March 1997 final rule, NMFS upheld its original decision, but prepared a final regulatory flexibility analysis rather than certifying the rule.

In May 1997, the Southern Offshore Fishing Association brought suit against the Secretary of Commerce, challenging the quotas pursuant to judicial review provisions of laws including the RFA. Advocacy filed to intervene as *amicus curiae*, but withdrew after the Department of Justice stipulated that the standard of review for RFA cases should be "arbitrary and capricious," a higher standard than originally requested.

In February 1998, the United States District Court for the Middle District of Florida ruled that NMFS's certification of "no significant economic impact" and the FRFA failed to meet the requirements of the Administrative Procedures Act and the RFA. The court noted Advocacy's role as "watchdog of the RFA," remanded the rule, and instructed the agency to analyze the economic effects and potential alternatives.

After reviewing NMFS's subsequent analysis, Advocacy again concluded it did not comply with the RFA. Further steps culminated in the court issuing an injunction to NMFS from enforcing new regulations until the agency could establish bona fide compliance with the court's earlier orders.

Later, a settlement between the plaintiff and NMFS involved a delay in any decisions on new shark fishing quotas pending a review of current and future shark stocks by a group of independent scientists. In November 2001 that study was released, indicating that NMFS had significantly underestimated the number of sharks in the Atlantic Ocean.

—Jennifer Smith, Assistant Chief Counsel

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## The State RFA Model Initiative

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### Regulatory Flexibility Arrives in the State House

by Sarah Wickham, Regulatory and Legislative Counsel for Regional Affairs

While there are federal measures in place to reduce regulatory burdens on small businesses, the burden does not stop at the federal level. More than 92 percent of businesses in every state are small businesses and they bear a disproportionate share of regulatory costs and burdens. However, sometimes because of their size, the aggregate importance of small businesses to the economy can be overlooked. Because of this, it is very easy to fail to notice the negative impact of regulatory activities on them. Recognizing that state and local governments can also be a source of onerous regulations on small business, in 2002 Advocacy drafted model regulatory flexibility legislation for the states based on the federal Regulatory Flexibility Act.

Advocacy's model legislation is designed to foster a climate for entrepreneurial success in the states so that small businesses will continue to create jobs, produce innovative new products and services, and bring more Americans into the economic mainstream. Excessive regulation can be reduced and the economy improved without sacrificing important regulatory goals

such as environmental protection, travel safety, safe workplaces, and financial security.

Many states have some form of regulatory flexibility laws on the books. However, many of these laws do not contain all of the five critical elements addressed in Advocacy's model legislation. Recognizing that some laws are missing key components that give regulatory flexibility its effectiveness, legislators continue to introduce legislation to strengthen their current system.

Since 2002, 15 states have signed regulatory flexibility legislation into law, 33 state legislatures have considered legislation, and four governors have signed executive orders implementing regulatory flexibility.

In 2005, 18 states introduced regulatory flexibility legislation (Alabama, Alaska, Hawaii, Indiana, Iowa, Mississippi, Missouri, Montana, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington). Alaska Governor Frank Murkowski, Indiana Governor Mitch Daniels, Missouri Governor Matt Blunt,

#### Five Points of Law

Effective state regulatory flexibility laws have five elements:

- A small business definition that is consistent with state practices and permitting authorities;
- A requirement that state agencies perform an economic impact analysis on the effect of a proposed rule on small business before they regulate;
- A requirement that state agencies consider less burdensome alternatives for small businesses that still meet the agency's regulatory goals;
- A provision that forces state governments to review all of its regulations periodically; and
- Judicial review to give the law "teeth."

New Mexico Governor Bill Richardson, Oregon Governor Ted Kulongoski, and Virginia Governor Mark Warner signed regulatory flexibility legislation into law. And Arkansas Governor Mike Huckabee implemented regulatory flexibility through an executive order.

A vibrant and growing small business sector is critical to creating jobs in a dynamic economy. Small businesses are 99.7 percent of all businesses, employ half of the work force, produce 52 percent of the private sector output, and provide significant ownership opportunities for women, minorities, and immigrants. Advocacy welcomes the opportunity to work with state leaders on their regulatory issues.

The text of Advocacy's model legislation and the most recent map of state legislative activity can be found at [www.sba.gov/advo/laws/law\\_modeleg.html](http://www.sba.gov/advo/laws/law_modeleg.html).

#### State Progress Since 2002

**Regulatory flexibility laws enacted (15):** Alaska; Colorado; Connecticut; Indiana; Kentucky; Missouri (two laws); North Dakota; New Mexico; Oregon; Rhode Island; South Carolina; South Dakota; Virginia; and Wisconsin.

**Regulatory flexibility legislation introduced (33):** Alabama; Alaska; California; Colorado; Connecticut; Georgia; Hawaii; Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Mississippi; Missouri; Montana; Nebraska; New Jersey; New Mexico; North Carolina; North Dakota; Ohio; Oregon; Pennsylvania; Rhode Island; South Carolina; South Dakota; Tennessee; Texas; Utah; Virginia; Washington and Wisconsin.

**Executive orders signed (4):** Arkansas; Massachusetts; Missouri; and West Virginia.

## The Economics of the RFA

### Office of Advocacy Indicators over the Years

by Chad Moutray, Chief Economist

When the Regulatory Flexibility Act (RFA) was passed in 1980, the cost of regulation was very much on the mind of economists and policymakers. Cost studies from this time period show a general consensus that small firms were being saddled with a disproportionate share of the federal regulatory burden. (Some of these studies were commissioned by the newly created Office of Advocacy.) Then as now, an important tool for redressing the bias against small firms is through implementation of the RFA.

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. The first year in which cost savings were documented was 1998. Changes to rules in that year were estimated to have saved small businesses \$3.2 billion. In 2004, Advocacy actions saved small businesses over \$17 billion in cost savings. Moving forward, Advocacy will continue to measure its accomplishments through cost savings. Yet, ultimately, if

federal agencies institutionalize consideration of small entities in the rulemaking process, the goals of the regulatory flexibility process and Executive Order 13272 will be realized to a large degree, and the amount of foregone regulatory costs would actually diminish.

Economics has provided a framework for regulatory actions and for other public policy initiatives. What has Advocacy's impact been on influencing public policy and furthering research? One does not have to be an expert in economics to recognize that our research and the research of others over the past couple decades has advanced the recognition that small firms are crucial to the U.S. economy. This has not always been the case.

The economy of 1980 and today differ greatly. Real GDP and the number of nonfarm business tax returns have more than doubled since 1980, the unemployment rate and interest rate are much improved, and prices are higher (although inflation is significantly lower). One constant, though, is the lack of timely, relevant data on small businesses. The Office of Advocacy struggled throughout

much of its early existence to accurately measure the number of small firms. The good news is that the Census Bureau now has credible firm size data beginning in 1988, in part because of funding from the Office of Advocacy.

Despite the data obstacles, Advocacy research shows that more women and minorities have become business owners since 1980. Small businesses are now recognized to be job generators and the source of growth and innovation. Not only are more than 99 percent of all employers small businesses, but small firms are responsible for 60 to 80 percent of all new jobs, and they are more innovative than larger firms, producing 13.5 times as many patents per employee.

Research on small entities has gained more prominence, and entrepreneurs are widely acknowledged as engines of change in their regions and industries. The Office of Advocacy will continue to document the contributions and challenges of small business owners. Armed with these data, policymakers will be able to work to ease their tasks, both through better regulation and other endeavors.

#### Then and Now: Small Business Economic Indicators Over 25 Years

	1980	1985	1990	1995	2000	Today
Real gross domestic product (\$trillion)	5.2	6.1	7.1	8.0	9.8	11.1
Unemployment rate (percent)	7.2	7.2	5.6	5.6	4.0	5.2
Consumer price index (1982=100)	82.4	107.6	130.7	152.4	172.2	193.4
Prime bank loan rate (percent)	15.3	9.9	10.0	8.8	9.2	5.8
Employer firms (million)	—	—	5.1	5.4	5.7	5.7 (e)
Nonemployer firms (million)	—	—	—	—	16.5	18.3 (e)
Self-employment, unincorporated (million)	8.6	9.3	10.1	10.5	10.2	10.6
Nonfarm business tax returns (million)	13.0	17.0	20.2	22.6	25.1	29.3

Note: All figures seasonally adjusted. Data for "today" are latest available; 2005 data are year-to-date; e = estimate

Source: Federal Reserve Board; U.S. Department of the Treasury, Internal Revenue Service; U.S. Department of Commerce, Bureau of the Census, Bureau of Economic Analysis; U.S. Department of Labor, Bureau of Labor Statistics

# The Importance of Data to Good Policy

by Joe Johnson, Regulatory Economist

Regulatory policy involves difficult choices about costs and benefits. Accurate data on costs and benefits are essential to a complete understanding of the tradeoffs involved. Even though the Regulatory Flexibility Act (RFA) first required agencies to separately consider small business impacts 25 years ago, dependable cost estimates have often been hard to come by.

While measuring the costs of new regulations is a prerequisite for improving regulatory policy, compliance with the sum of all past regulations also places a heavy burden on small businesses. Over the past 25 years, significant gains have been made in measuring the impact of regulatory compliance on small firms. During that time, the Office of Advocacy has produced a series of research reports on this topic, and the findings have been consistent: compliance costs small firms more than large firms. The most significant series of analyses began in the 1990s when Thomas Hopkins first estimated the costs of regulatory compliance for small firms. This research was refined by

Mark Crain and Thomas Hopkins in 2001, and most recently by Crain in the 2005 study, *The Impact of Regulatory Costs on Small Firms*. Crain's latest estimate shows that federal regulations cost small firms nearly 1.5 times more per employee to comply with than large firms.

Despite much progress since passage of the RFA 25 years ago, significant work remains. These hurdles include determining the total burden of rules on firms in specific industries or imposed by specific federal agencies. Estimates of these costs would help show policymakers the marginal cost of adding new rules or modifying existing ones; they would also help show the effects of repealing rules that are no longer relevant yet still cost small business every year. Such analyses will become crucial as the mountain of federal regulations continues to rise. The future of small business depends upon federal rulemaking that uses the best data available to balance the costs and benefits of regulation, while considering how additional rules will affect small business.

## Impact of Regulatory Costs on Small Firms

Mark Crain's 2005 report, *The Impact of Regulatory Costs on Small Firms*, updates the Advocacy sponsored report issued in 2001. These studies estimate the total burden imposed by federal regulations. The 2005 report distinguishes itself from previous research by adopting a more rigorous methodology for its estimate on economic regulation, and it brings the information in the 2001 study up to date.

The research finds that the total costs of federal regulations have increased from the level established in the 2001 study. Specifically, the cost of federal regulations totals \$1.1 trillion, while the updated cost per employee is now \$7,647 for firms with fewer than 20 employees. The 2001 study showed small business with 60 percent greater regulatory burden than their larger business counterparts. The 2005 report shows that disproportionate burden shrinking to 45 percent.

While the true costs of federal regulation have yet to be calculated, Advocacy research has repeatedly and consistently attempted to uncover an estimate of the burden in general, and how it affects small businesses, in particular. —Radwan Saade, Regulatory Economist

## RFA Recollections

“The most memorable event with respect to the history of the RFA was the enactment of SBREFA. Obtaining Vice President Gore's support for judicial review was critical—and of course SBREFA would never have been enacted into law without Senator Bond's leadership.

“The RFA's biggest benefit to the small business environment is the panel process for EPA and OSHA regulations. The panels force the agencies to think through the problems in a rational way rather than using the RFA to find a rationale to support foregone conclusions. If the RFA is an analytical tool for helping the agencies comply with the reasoned decision-making requirements of the Administrative Procedure Act, then agencies must undertake an internal dialogue on the best approaches to resolving a regulatory problem. The panel process, by providing alternative thinking, moves that process along by having an outside party as a sort of referee.

“Probably the best use of the RFA ever by a federal agency was the Food and Drug Administration's final regulatory flexibility analysis for implementing the Nutrition Labeling Education Act (NLEA). The agency noted the impact on small business and would have adopted less burdensome alternatives but could not because of the strictures in the statute. FDA's analysis helped lead to the enactment of 1993 amendments to the NLEA that provided the agency with greater flexibility in providing small business alternatives.”

Barry Pineles

Regulatory Counsel, House Small Business Committee

## Implementing Executive Order 13272

### Federal Rule Writers Learn the Ps and Qs of Small Business Impacts

by Claudia Rodgers, Senior Counsel

One key aspect of Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” is to educate federal rulemakers in the specifics of small business impacts—how to comply with the Regulatory Flexibility Act (RFA). Since President Bush signed E.O. 13272 in August 2002, staff at over 40 agencies have been trained.

Agency staff—attorneys, economists, policymakers, and other

employees involved in the regulation writing process—come to RFA training with varying levels of familiarity with the RFA, even though it has been in existence for 25 years. Some are well versed in the law’s requirements, while others are completely unaware of what it requires an agency to do when promulgating a regulation.

The three-and-a-half hour session consists of discussion, group

assignments (where participants review fictitious regulations for small business impact), and a question and answer session. Agency employees receive a hands-on approach on how to comply with the RFA and are able to see how the law’s many requirements work in a real-life regulatory setting. By the end of the course there are always many revelations and

*Continued on page 13*

#### Federal Agencies Participating in RFA Training Since December 2002

*Regulatory staff from the following agencies have participated in Advocacy’s RFA training, as directed by E.O. 13272.*

Department of Agriculture

Animal and Plant Health Inspection Service

Department of Commerce

National Oceanic and Atmospheric Administration

Manufacturing and Services

Patent and Trademark Office

Department of Education

Department of Energy

Department of Health and Human Services

Centers for Medicare and Medicaid Services

Food and Drug Administration

Department of Homeland Security

Bureau of Citizenship and Immigration Services

Bureau of Customs and Border Protection

Transportation Security Administration

United States Coast Guard

Department of Housing and Urban Development

Community Planning and Development

Fair Housing and Equal Opportunity

Manufactured Housing

Public and Indian Housing

Department of the Interior

Bureau of Indian Affairs

Bureau of Land Management

Fish and Wildlife Service

Minerals Management Service

National Park Service

Office of Surface Mining, Reclamation and Enforcement

Department of Justice

Bureau of Alcohol, Tobacco, and Firearms

Department of Labor

Employee Benefits Security Administration

Employment and Training Administration

Employment Standards Administration

Mine Safety and Health Administration

Occupational Safety and Health Administration

Department of Transportation

Federal Aviation Administration

Federal Highway Administration

Federal Motor Carrier Safety Administration

Federal Railroad Administration

National Highway Traffic Safety

Administration

Research and Special Programs Administration

Department of the Treasury

Financial Crime Enforcement Network

Financial Management Service

Internal Revenue Service

Office of the Comptroller of the Currency

Tax and Trade Bureau

Department of Veterans Affairs

Independent Federal Agencies

Access Board

Environmental Protection Agency

Federal Communications Commission

Federal Deposit Insurance Corporation

Federal Election Commission

General Services Administration / FAR Council

Securities and Exchange Commission

Small Business Administration

## RFA Training, from page 12

excited faces as agency staff realize what they have to do to comply with the RFA and that Advocacy is here to help them along the way.

One of the most important themes throughout the course is that the agency should bring Advocacy into the rule development process early in the creation of a regulation. Advocacy encourages agencies to work closely with us to help them determine whether a potential rule will have a significant economic impact on a substantial number of small entities. Making this determination is frequently where agencies make their initial mistakes under the RFA. The training session helps to explain the steps rule writers need to take to make this decision accurately. By considering the impact of their regulations on small business from the beginning, agencies are more likely to promulgate a rule that is less burdensome on small businesses with more effective compliance. By “doing it right on the front end,” agencies avoid legal hassles

and delays for noncompliance with the RFA.

While changing the culture of agency rule writers is a tall order, Advocacy’s RFA training is already having quite an impact on the way agencies approach rule development. Those agencies that have been through training are now calling Advocacy earlier in the process, sending us draft documents, and recognizing that if they don’t have the information they need, Advocacy can help point them in the right direction for small business data.

Advocacy has trained over 40 federal agencies, independent commissions and departments. Training is expected to be enhanced in the near future with a web-based training module for employees who missed the initial sessions. With continued RFA training sessions for all 66 of the agencies and departments on Advocacy’s priority list, the number of regulations written with an eye toward their small entity impact will continue to grow.



Chief Counsel for Advocacy Thomas M. Sullivan kicks off an RFA training session at the Environmental Protection Agency in 2003.

## RFA Recollections

“I remember when the concept of ‘regulatory flexibility’ was just that—a concept. In 1978-1981, the Office of Advocacy tried with limited success to educate agencies to make regulations more flexible for small business in ways that would not compromise public policy objectives.

“Congress intervened in 1980 with the enactment of the Regulatory Flexibility Act and again in 1996 with two major amendments to the act—judicial review of agency RFA compliance and the creation of regulatory review panels for EPA and OSHA regulations. Much was expected of judicial review, but over the past 10 years, court after court refused to enforce the law. This may now change with the decision in *National Telecommunications Cooperative v. FCC*, in which I participated as counsel. The court ordered the FCC to comply with the law—a legal breakthrough for RFA. As for the EPA and OSHA regulatory review panels, they have been a total success in my view. I participated in 20 panels as chief counsel. In almost every instance, the panel process produced regulatory proposals that achieved their regulatory objective while significantly reducing the burden on small business—a win-win for all.

“RFA compliance diligently pursued by a strong Office of Advocacy, I am confident, will continue to enhance our country’s regulatory framework.”

*Jere W. Glover*  
Chief Counsel for Advocacy  
1994-2001

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## Future Directions for the RFA

### Legislative Solutions to RFA Weaknesses

by Shawne Carter McGibbon, Deputy Chief Counsel

Federal agency compliance with the Regulatory Flexibility Act (RFA) has meant billions of dollars saved for small businesses. It has been a gradual process as some agencies have moved from completely ignoring the requirements of the RFA to realizing that the law is a tool for crafting smarter and less costly rules. It has not been an easy journey and it is worthwhile to take a brief look back and then look forward to where future improvements are needed.

Prior to the Small Business Regulatory Enforcement Act (SBREFA) of 1996 there was no judicial review provision that enabled small businesses to hold agencies' feet to the fire when it came to compliance with the RFA. After SBREFA was enacted, agencies took their obligations a bit more seriously, although compliance was still far from perfect. Executive Order 13272, signed in 2002, encouraged agencies to share more information on draft rules with the Office of Advocacy and acknowledge Advocacy's comments when any final rule is published. This was an important step forward because it meant that small business concerns would be addressed in the early stages of rulemaking, rather than late in the process when most decisions have already been made. Even though SBREFA and the executive order have been successful in boosting agency attention to unique small business issues and reducing unnecessary burden, there is still room for improvement.

Some detractors of the SBREFA amendments believed that judicial review would open a floodgate of lawsuits. In fact, this has not happened—an average of 12.5 lawsuits

per year have been filed, despite 4,000 final rules being published annually. Some detractors of the executive order believed that sharing early drafts of rules with Advocacy would result in leaks of pre-decisional information to the public. Those detractors failed to realize that Advocacy is subject to the same interagency confidentiality rules as any other federal agency. Of course, one basic criticism over the years has been that the RFA is intended to roll back necessary health and safety regulations. To the contrary, the RFA has only caused agencies to assess the impact of their regulations on small entities and analyze less burdensome alternatives where feasible.

Recently, legislation has been introduced to plug some of the remaining loopholes in the RFA. The legislation represents an unprecedented opportunity to realize fully the intentions of the original drafters of the RFA. The Office of Advocacy crafted a legislative agenda for the 109th Congress. The concepts outlined in the agenda include clarifying and strengthening the regulatory look-back provisions in the RFA to ensure that agencies periodically review existing regulations for their impact on small entities. It also includes codifying Executive Order 13272, so that its requirements will be made permanent and so that it is certain to apply to independent agencies. And it includes expanding economic impact analyses to include an assessment of foreseeable indirect effects. Currently, agencies can avoid the analytical requirements of the RFA if a rule has only a direct impact on large businesses or if general standards are promulgated

for states to implement through state-level rulemakings. However, Advocacy's experience has shown that the trickle down (indirect) effects of these types of rules can greatly affect small entities.

Legislation has been introduced in both the House of Representatives and the Senate which would accomplish the goals set out in Advocacy's legislative agenda. As with earlier reform successes, nothing in the proposed legislation would undermine vital health and safety regulations. The reforms are targeted in a way that will only promote a better rulemaking process and smarter, less burdensome rules. Let's hope that RFA reform can become a reality during this Congress.

#### RFA Recollections

“When the RFA was under consideration, some believed the effort required to analyze small business impacts would unduly delay regulatory efforts—a myth that was soon dispelled. In hindsight, I wish we had closed the loophole that allowed many tax-related regulations to escape the scrutiny of the RFA process. As good as the RFA was, not having that arrow in the quiver made the development of reasonable tax regulations all the more difficult.

“I believe the mere existence of the RFA has produced better regulations, even when a specific small business solution was not obvious. Any time options are explored, whether implemented or not, small business wins.”

*John Satagaj  
President, Small Business  
Legislative Council*

# Technology Transforms Small Business Role in Rulemaking

by Bruce Lundegren, Assistant Chief Counsel

Think back 25 years to the time when the Regulatory Flexibility Act (RFA) was passed. The rulemaking process was much less friendly and less accessible to small business. Things are very different, and in many respects, much better today.

Congress passed the RFA in 1980 because “one-size-fits-all” regulations were imposing disproportionate burdens on small business. The RFA ensures that federal agencies consider the impact of regulations on small business. Congress supplemented the RFA in 1996 with the Small Business Regulatory Enforcement Fairness Act (SBREFA), which gave small business a stronger voice in the rulemaking process.

But another important factor has been at work in improving small business access to the rulemaking process: technology. Twenty-five years ago desktop computers were a futurist’s dream. To learn about new regulations, you had to go to the library to search the *Federal Register* for regulations that might affect your business. Regulatory dockets full of paper files were housed in remote government offices—often in distant cities. And does anyone recall having to make 5¢ copies of regulatory documents on those old photocopy machines? It was a costly, difficult, and time-consuming process.

Now, in 2005, the *Federal Register* is available online, and it’s searchable. You can have it delivered to your desktop every morning, and federal agencies have established email lists to deliver timely regulatory announcements. Agencies have also established electronic dockets for their new regulations, where every study, report, or public comment used in the decisionmaking process can be accessed with a click of the mouse.

Technological advancement to enhance the regulatory process can be traced to the Electronic Government (or eGovernment) Initiative. Congress launched this initiative in 2002, and it has been a priority for this Administration. The initiative seeks to use advanced technology and the Internet to deliver better government services to the public at lower costs and to create citizen-focused services that improve government’s value to the public. The trick now is for federal agencies to use these new technologies to create new and dynamic models of government. Small business should benefit from these efforts.

While the eGovernment Initiative consists of 24 separate projects, some of the most important to small business include:

- **E-Rulemaking.** This includes creating electronic dockets at each agency and creating a single site ([www.regulations.gov](http://www.regulations.gov)) for proposed federal regulations. These will help small businesses and the public participate in the regulatory process;
- **The Business Gateway.** This is a single portal ([www.business.gov](http://www.business.gov)) for government regulations, services, and information to help business with their operations; and
- **E-Grants.** This is a single site ([www.grants.gov](http://www.grants.gov)) to find and apply for federal grants online.

These eGovernment projects should improve public access to information and services, reduce paperwork and reporting requirements, and allow small business to more effectively participate in the regulatory process. These advances, combined with new requirements to improve the quality and transparency of scientific information that underlies federal regulations, are a giant step in making government more accountable to small business.

## RFA Recollections

“Small businesses are well understood to be a driving force behind U.S. economic growth and prosperity. It is therefore critical that any unnecessary regulatory burdens on small businesses be identified and removed. Since its passage 25 years ago, the Regulatory Flexibility Act (RFA) has helped federal regulatory agencies conduct the analysis that is essential to understanding the impact proposed regulations have on small firms. The analysis required by the RFA can alert policymakers that a regulation will have a disproportionately costly impact on small entities and help them craft regulatory alternatives that reduce this impact.

“The RFA also requires agencies to conduct periodic reviews of existing regulations, an activity that is as important as assessing the consequences of new proposed regulations. OMB has recently engaged the public and federal agencies in a number of regulatory reform initiatives that seek to reduce unnecessary costs and increase flexibility through the reform of existing regulations, guidance documents, and paperwork requirements. The regulatory reviews required by the RFA are a natural complement to regulatory reform initiatives that take into consideration the regulatory burdens and complexities confronting America’s small businesses.”

John D. Graham  
Administrator  
Office of Information and  
Regulatory Affairs



Advocacy staff at the 25th anniversary of the office in 2001. Many of the staffers who worked on the original Regulatory Flexibility Act still enthusiastically administer it now.

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