

January 2017

# Report on the Regulatory Flexibility Act, FY 2016

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



The Office of Advocacy of the U.S. Small Business Administration was created by Congress in 1976 to be an independent voice for small business within the federal government. The office is led by the Chief Counsel for Advocacy who is appointed by the President and confirmed by the U.S. Senate. The chief counsel advances the views, concerns, and interests of small business before the White House, Congress, federal agencies, federal courts, and state policymakers. The office relies on economic research, policy analyses, and small business outreach to identify issues of small business concern. Ten regional advocates around the country and an office in Washington, D.C., support the chief counsel's efforts.

This annual report on federal agency compliance with the Regulatory Flexibility Act is mandated under Section 612 of the Regulatory Flexibility Act. It is available on Advocacy's website, [www.sba.gov/advocacy/regulatory-flexibility-act-annual-reports](http://www.sba.gov/advocacy/regulatory-flexibility-act-annual-reports). Reports from previous years are available there as well.

Information about Advocacy's initiatives on behalf of small businesses is accessible via the website; three Listservs (regulatory communications, news, and research); and social media including a blog, Twitter feed, and Facebook page.

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U.S. SMALL BUSINESS ADMINISTRATION  
OFFICE OF ADVOCACY  
WASHINGTON, D.C. 20410

## To the President and the U.S. Congress:

The Office of Advocacy is pleased to present this report on federal agency compliance with the Regulatory Flexibility Act. This law is the key tool allowing small businesses to participate in regulatory decisions that affect them. The RFA also enables Advocacy to fulfill its role as the voice of small business in the federal government.

The year 2016 was a milestone in Advocacy's history. It marked 40 years since the office's founding, 36 years since the Regulatory Flexibility Act was enacted, 20 years since the passage of the Small Business Regulatory Enforcement Fairness Act, and 15 years of carrying out the duties of Executive Order 13272. In FY 2016, Advocacy's intervention on behalf of small business in the federal rulemaking process resulted in foregone regulatory cost savings of almost \$1.4 billion. Since the office first began to track regulatory cost savings in 1998, Advocacy's work on behalf of small business has resulted in cumulative small business cost savings of \$130 billion.

The United States' 28.8 million small businesses inject the U.S. economy with diversity and innovation, and they project an optimistic, risk-taking spirit that is unsurpassed worldwide. But being small is expensive. While economics textbooks praise economies of scale, small businesses get by without these advantages. They do without volume discounts, reduced unit costs, and preferred credit rates. Small businesses operate within market niches, providing specialized services in response to local needs or opportunities. Their operating margins are small as well. It does not take a whole lot of economic disruption to make them uncompetitive.

The ideas behind the RFA are common sense: (1) to consider all the alternatives when a proposed regulation will have a significant economic impact on small businesses; and (2) to let small businesses participate in shaping a rule, providing real-world perspective on how small businesses operate in different industries and regions. The execution of these ideas is more complicated, since the subject matter of a regulation is often technical and detailed. The Office of Advocacy's attorneys and economists spend untold hours reading, interpreting, and analyzing volumes of complex regulatory proposals.



Darryl L. DePriest, the seventh chief counsel for advocacy, hosts the Office of Advocacy's 40th anniversary symposium in June 2016.

In monitoring the RFA during FY 2016, Advocacy hosted 27 small business roundtables, filed 20 public comment letters with federal agencies, and participated in seven SBREFA panels. Advocacy's attorneys and economists trained 157 federal agency officials in RFA compliance. Key areas of success this year were in workplace retirement plans (definition of "fiduciary"), the commercial applications of drones (unmanned aerial vehicles), crowdfunding, and mortgage lending.

While the Office of Advocacy's RFA activities are not without challenges, its successes are the result of collaboration and education. Advocacy's milestone year was recognized in an anniversary symposium in June 2016. Participants from the White House Office of Information and Regulatory Affairs, Congress and federal agencies surveyed the regulatory landscape and its challenges. Along with Advocacy's experts, they outlined paths to keep small businesses in the game and on a more level playing field. The RFA remains at the foundation of these robust efforts. The careful tailoring of regulation to business size has helped make better regulations with improved compliance in pursuit of safety, health and other public goods.

Darryl L. DePriest  
January 2017



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## Chapter 1

# The Regulatory Flexibility Act—Putting Small Businesses in the Rulemaking Process



In 1976, Congress created the Office of Advocacy with the mission of providing small businesses across the United States with an independent advocate inside the federal government. Led by a presidentially appointed, Senate-confirmed chief counsel for advocacy, the office would assess the effects of government regulations and act as a credible voice for small business in the regulatory process. This was initially accomplished through studies on the impacts of government regulation on small business, as well as planning the first White House Conference on Small Business, a high-profile event that engaged small business representatives from across the United States.

### *The RFA's Origins*

Despite these efforts, small business representatives continued to express concerns that one-size-fits-all regulations made it difficult for them to compete in U.S. markets. President Jimmy Carter, a one-time small business owner himself, understood the necessity for greater protections for small businesses in the regulatory process and helped facilitate administrative and legislative changes. In 1979, President Carter issued a memorandum to the heads of all executive agencies, instructing them to “make sure that federal regulations [would] not place unnecessary burdens on small businesses and organizations,” and more specifically, to apply regulations “in a flexible manner, taking into account the size and nature of the regulated businesses.”<sup>1</sup> He asked Advocacy to ensure that the agencies’ implementation would be consistent with government-wide regulatory reform.

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1. Jimmy Carter, *Regulation of Small Businesses and Organizations Memorandum from the President, (Nov. 16, 1979)*, [www.presidency.ucsb.edu/ws/?pid=31709](http://www.presidency.ucsb.edu/ws/?pid=31709).

In 1980, Congress enacted the Regulatory Flexibility Act (RFA).<sup>2</sup> The new law mandated that agencies consider the impact of their regulatory proposals on small businesses, analyze equally effective alternatives, and make their analyses available for public comment. This new approach to federal rulemaking was viewed as a remedy for the disproportionate burden placed on small businesses by one-size-fits-all regulation, “without undermining the goals of our social and economic programs.”<sup>3</sup>

### *RFA Requirements*

Under the RFA, when an agency proposes a rule that would have a “significant economic impact on a substantial number of small entities,” the rule must be accompanied by an impact analysis, known as an initial regulatory flexibility analysis (IRFA), when it is published for public comment.<sup>4</sup> The agency must publish a final regulatory flexibility analysis (FRFA) with the final rule.<sup>5</sup> Alternatively, if a federal agency determines that a proposed rule would not have such an impact on small entities, the head of that agency may “certify” the rule and bypass the IRFA and FRFA requirements.<sup>6</sup>

During a November 2015 interview, Frank Swain, chief counsel for advocacy from 1981 to 1989, noted that “The RFA is the only regulatory reform that is statutorily required. Most of the regulatory reforms are largely executive orders.” Executive orders frequently expire at the end of a president’s term. “The RFA, because of its statutory basis, is going to be around indefinitely,” Swain said.

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2. 5 U.S.C. § 601 *et seq.*

3. Carter, *supra* note 1.

4. 5 U.S.C. § 603.

5. 5 U.S.C. § 604.

6. 5 U.S.C. § 605(b).

## Interpreting the RFA and the Need To Strengthen It

During the first half of the 1980s, the federal courts were influential in developing the RFA's role in the regulatory process. One question that required the courts' intervention was whether a federal agency had to consider a proposed rule's indirect effects on small businesses, in addition to its direct effects. In *Mid-Tex Electric Cooperative, Inc. v. Federal Energy Regulatory Commission (FERC)*, the D.C. Circuit found that "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."<sup>7</sup> This interpretation—that federal agencies must only consider the direct effects on small businesses within the jurisdiction of the rule—has continued, even after subsequent amendments to the RFA.<sup>8</sup>

In the run-up to the second White House Conference on Small Business in 1986, conference planners noted that "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."<sup>9</sup> They also voiced concern that "the courts' ability to review agency compliance with the law is limited." Eight years later, the Government Accounting Office reported that agency compliance with the RFA varied widely across the federal government, a condition that likely impaired efforts to address the disproportionate effect of federal regulation on small business.

While Advocacy was statutorily required to report annually on federal agency compliance, compliance with the RFA was not itself reviewable by the courts at the time. The RFA did allow the chief counsel for advocacy to appear as *amicus curiae* (friend of the court) in any action to review a rule, expanding the chief counsel's role in representing small business interests in policy development. However, the courts' inability to judicially review compliance with the RFA left petitioners and the chief counsel to challenge the regulation primarily under the Administrative Procedure Act.

7. *Mid-Tex Elec. Coop. v. FERC*, 773 F.2d 327, 341 (D.C. Cir. 1985).

8. *See American Trucking Ass'ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999).

9. The Small Business Advocate newsletter, *U.S. Small Business Administration, Office of Advocacy*, September 2005.



Six of the seven chief counsels for advocacy attended Advocacy's 40th anniversary symposium. Pictured, left to right: Darryl L. DePriest, Frank S. Swain, Thomas P. Kerester, Jere W. Glover, Thomas M. Sullivan, and Winslow L. Sargeant. The first chief counsel, Milton D. Stewart, is deceased.

After the third White House Conference on Small Business in 1995 renewed the call for strengthening the RFA, Congress and President Bill Clinton enacted the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). The amendments to the RFA under SBREFA provided new checks on federal agency compliance with the RFA's requirements, as well as additional procedures specifically addressing small business concerns regarding environmental and occupational safety and health regulations. The SBREFA amendments also made a federal agency's compliance with certain sections of the RFA judicially reviewable, meaning petitioners could challenge regulations based on the agency's failure to supply a FRFA or sufficient reason for certification.

After amending the RFA to allow for judicial review of agency compliance, the courts again provided assistance in delineating the RFA's requirements on federal agencies. In *Southern Offshore Fishing Associations v. Daley*, the court held that the National Marine Fisheries Service failed to make a "reasonable, good-faith effort" to inform the public about the potential impacts of a proposed rule imposing fishing quotas and to consider less harmful alternatives.<sup>10</sup> The agency had published a final regulatory flexibility analysis (FRFA) with its final rule, but had not published an initial regulatory flexibility analysis (IRFA) when the rule was proposed. The court's holding established that an IRFA must precede a FRFA for an agency to have "undertak[en] a rational consideration

10. *Southern Offshore Fishing Ass'ns v. Daley*, 995 F.Supp 1411, 1437 (M.D. Fla. 1998).

of the economic effects and potential [regulatory] alternatives.”<sup>11</sup>

## **SBREFA Panels**

The SBREFA amendments also required the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to convene small business advocacy review panels whenever the agency proposes a rule that may have a significant impact on a substantial number of small entities. These panels consist of officials from the promulgating agency, the Office of Information and Regulatory Affairs, and the Office of Advocacy. Their task is to consult with small business representatives on the agency’s regulatory proposals to ensure that the agency has identified and considered regulatory alternatives that could attain the policy objectives while minimizing the impacts on small businesses. After each collaborative panel has concluded, the panel issues a report of its findings and any recommendations for providing flexibility for small entities.

SBREFA panels have introduced specific small business alternatives into federal rules. Jere Glover, chief counsel for advocacy during the passage of SBREFA, made two key observations about the rulemaking process. First, “If you get to the agency early in the process, they are more likely to change their mind.” And second, the mission of these efforts is to “make the regulation work for the industry,” not to “kill the regulation.” Glover’s perspective comes not only from his tenure as chief counsel from 1994 to 2001; he was also present at the creation of the RFA as deputy to Milton Stewart, the first chief counsel for advocacy.

## **Executive Order 13272**

As the George W. Bush Administration began to consider small business priorities, improved RFA compliance was one key goal. To this end, President Bush issued Executive Order (E.O.) 13272, “Proper Consideration of Small Entities in Agency Rulemaking” in 2002.<sup>12</sup> This E.O. tasked Advocacy with training federal agencies and other stakeholders on the RFA. The training sessions helped apprise agencies of their responsibilities under the RFA

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11. *Id.*

12. E.O. 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” [www.gpo.gov/fdsys/pkg/FR-2002-08-16/pdf/02-21056.pdf](http://www.gpo.gov/fdsys/pkg/FR-2002-08-16/pdf/02-21056.pdf), (Aug. 13, 2002).

and educated agency officials on the best RFA compliance practices. In addition, E.O. 13272 required Advocacy to track agency compliance with these requirements and report on them annually to the White House Office of Management and Budget.



Representative Steve Chabot, chairman of the House Small Business Committee, speaks at the 40th anniversary symposium. The committee works toward legislative solutions to strengthen the RFA and the Office of Advocacy.

E.O. 13272 instituted new procedures to help facilitate a collaborative relationship between agencies and the Office of Advocacy. First, the E.O. required agencies to notify Advocacy of any draft proposed rule that would impose a significant impact on a substantial number of small entities. Second, it required agencies to provide a response in the *Federal Register* to any written comment on the proposed rule from the Office of Advocacy when the final rule was published.

Thomas M. Sullivan, chief counsel for advocacy during the Bush Administration, discussed E.O. 13272’s pivotal role in furthering RFA compliance. Above all, because of the executive order, Sullivan said, “Advocacy became a part of the fabric of federal rulemaking.” The aspect most responsible for this evolution in Sullivan’s view was federal agency training. “Training really helped accomplish this,” he said. “The goal is to create regulations that meet the regulatory purpose and are sensitive to small business requirements.” Sullivan added that “The biggest misperception is how hard it is to work with an agency for a win-win solution as opposed to just being critical of regulation.”

Eight years and one presidential administration later, Congress and President Barack Obama enacted the Small

Business Jobs Act of 2010,<sup>13</sup> which codified some of the procedures introduced in E.O. 13272. That same year, the Dodd-Frank Wall Street Reform and Consumer Protection Act became law.<sup>14</sup> The new law created the Consumer Financial Protection Bureau and required that the new agency's major rules come under the SBREFA panel provisions of the RFA.



Senator David Vitter, chairman of the Senate Small Business and Entrepreneurship Committee, speaks at the 40th anniversary symposium. The Office of Advocacy often works with Senator Vitter and the committee regarding small business legislation.

As the Obama Administration took office in the midst of the Great Recession, it looked to Advocacy for ways of encouraging economic activity. Again, the RFA was an important part of the answer. Executive Order 13563, "Improving Regulation and Regulatory Review,"<sup>15</sup> signed in 2011, directed agencies to heighten public participation in rulemaking, consider overlapping regulatory requirements and flexible approaches, and conduct ongoing regulatory review. President Obama concurrently issued a memorandum to all federal agencies, reminding them of the importance of the RFA and of reducing the regulatory burden on small businesses through regulatory flexibility. In this memorandum, President Obama directed agencies to increase transparency by providing written explanations of any decision not to adopt flexible approaches in their regulations. The following year, President Obama further attempted to reduce regulatory

burdens with Executive Order 13610, "Identifying and Reducing Regulatory Burdens,"<sup>16</sup> which placed greater focus on initiatives aimed at reducing unnecessary regulatory burdens, simplifying regulations, and harmonizing regulatory requirements imposed on small businesses.

Executive Orders 13563 and 13610 bolstered the retrospective review requirements of the RFA by requiring all executive agencies to conduct periodic retrospective review of existing rules. President Obama also issued an administrative action, Executive Order 13579, which recommended that all independent agencies do the same.<sup>17</sup> This emphasis on the principles of regulatory review and the sensitivity to small business concerns in the federal rulemaking process further increased federal agency compliance.

Dr. Winslow Sargeant, chief counsel for advocacy from 2010 to 2015, stressed that these executive orders sought to "make federal regulation more clear, predictable, and transparent." Sargeant identified two key areas, "retrospective review of existing regulation and deregulation when rules are no longer needed," as important future challenges for regulatory improvement.

### ***New Horizons: Small Business and International Trade***

One important area of rulemaking from which small businesses have historically been absent is international trade negotiations. With the enactment of the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), which President Obama signed on February 24, 2016, Advocacy acquired new duties on behalf of small businesses. Under TFTEA, the chief counsel for advocacy must convene an interagency working group (IWG) whenever the President notifies Congress that the Administration intends to enter into trade negotiations with another country.

The purpose of the IWG is to conduct small business outreach in manufacturing, services, and agriculture sectors and gather input on trade agreement's potential

13. *Small Business Jobs Act*, Pub. L. 111-240 (2010).

14. *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. 111-203 (2010).

15. E.O. 13563, "Improving Regulation and Regulatory Review," [www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf](http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf) (Jan. 18, 2011).

16. E.O. 13610, "Identifying and Reducing Regulatory Burdens," [www.whitehouse.gov/sites/default/files/docs/microsites/omb/eo\\_13610\\_identifying\\_and\\_reducing\\_regulatory\\_burdens.pdf](http://www.whitehouse.gov/sites/default/files/docs/microsites/omb/eo_13610_identifying_and_reducing_regulatory_burdens.pdf) (May 10, 2012).

17. E.O. 13579, "Regulation and Independent Regulatory Agencies," [www.gpo.gov/fdsys/pkg/FR-2011-07-14/pdf/2011-17953.pdf](http://www.gpo.gov/fdsys/pkg/FR-2011-07-14/pdf/2011-17953.pdf) (July 11, 2011).



economic effects. Informed by these efforts, the IWG is charged with identifying the most important priorities, opportunities, and challenges affecting these industry sectors in a report to Congress. This report must also provide (1) an analysis of the economic impact on various industries, (2) information on state-owned enterprises, (3) recommendations to create a level playing field for U.S. small businesses, and (4) information on federal regulations that should be modified in compliance with the potential trade agreement.

Congress's decision to entrust Advocacy with this additional responsibility and make Advocacy a player on the international stage is proof of the esteem in which Advocacy is held on Capitol Hill and throughout the small business community—as the independent agency within the federal government that speaks for small business.

### *Future Perspective*

Since its passage in 1980, the RFA has demonstrated remarkable staying power. It has helped establish small business consideration as a necessary part of federal rulemaking. Darryl L. DePriest, who served as chief counsel for advocacy when the office celebrated its 40<sup>th</sup> anniversary in 2016, likened the RFA's watershed effect to the iconic scene in the Wizard of Oz. DePriest observed that the RFA is “the cyclone that swept small entities out of the black-and-white world of ‘one-size-fits-all’ regulations, and took them to a world of color where the effects of regulation on small businesses are examined and efforts are made to lessen their economic impact.” The careful tailoring of regulation to business size has helped make better regulations with improved compliance in pursuit of safety, health and other public goods.

Over its 36-year history, federal agency compliance with the RFA has evolved. With Advocacy's ongoing monitoring, this important tool will continue to help agencies write effective rules that guard against “significant economic impacts on a substantial number of small entities.”



## Chapter 2

# Implementation and Compliance with Executive Order 13272 and the Small Business JOBS Act of 2010



In August 2002, President George W. Bush signed Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking.” Fourteen years later, Advocacy continues to find that E.O. 13272 has improved its relationship with federal agencies and overall compliance with the Regulatory Flexibility Act.

E.O. 13272 altered the terrain of federal rulemaking, establishing new responsibilities for both federal agencies and Advocacy to level the playing field for small businesses across the United States. Under this directive, federal agencies and Advocacy each have specific duties for facilitating greater regulatory cooperation.

Two of Advocacy’s primary duties under E.O. 13272 are to educate federal agency officials on compliance with the RFA and to provide resources to support their continued compliance. Over the past 14 years, Advocacy has offered RFA training sessions to every rule-writing agency in the federal government, in most cases multiple times. These training sessions are often attended by the federal agency’s attorneys, economists, and policymakers. A list of the agencies trained as of FY 2016 appears in Appendix A.

In addition, Advocacy has provided federal agencies with updated guidance on how to comply with the RFA. The office publishes a practical manual called *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*. This document is periodically updated based on legislative amendments and important cases.<sup>18</sup>

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18. The most recent edition of this publication can be found at [www.sba.gov/advocacy/guide-government-agencies-how-comply-regulatory-flexibility-act](http://www.sba.gov/advocacy/guide-government-agencies-how-comply-regulatory-flexibility-act).

Federal agencies’ primary duties of under E.O. 13272 are meant to boost procedural transparency and ensure small business concerns are represented in the federal rulemaking process. Foremost, federal agencies are required to show publicly how they take small business concerns and the RFA into account when creating regulations. Shortly after E.O. 13272 was signed, most agencies made their RFA policies and procedures available on their websites.

To ensure small business voices are being heard, agencies are also required to engage Advocacy during the rulemaking process. If a draft regulation may have a significant impact on a substantial number of small entities, including small businesses, the promulgating agency must send copies of the draft regulation to Advocacy.

In addition, if Advocacy submits written comments on a proposed rule, the agency must consider these comments and address them in the final rule published in the *Federal Register*. This requirement was codified in 2010 as an amendment to the RFA by the Small Business Jobs Act.

Another of Advocacy’s duties under E.O. 13272 is to report annually to the director of the Office of Management and Budget on agency compliance with these requirements. A summary of federal agency compliance can be found in Table 2.1.

As federal agencies have become more familiar with the RFA and have established cooperative relationships with Advocacy, the regulatory environment under E.O. 13272 and the Small Business Jobs Act has led to more successful and less burdensome federal regulation. In FY 2016, this more transparent and cooperative approach yielded almost \$1.4 billion in foregone regulatory costs, as well as many other regulatory success stories. Detailed information on these cost savings and success stories can be found in Chapter 5.

**Table 2.1 Agency Compliance with the Small Business JOBS Act of 2010 and E.O. 13272, FY 2016**

Department	Written Procedures	Notify Advocacy	Response to Comments	Comments
<b>Cabinet Agencies</b>				
Agriculture	√	√	√	
Commerce	√	√	√	
Defense	√	√	√	
Education	√	√	n.a.	
Energy	√	√	√	
Environmental Protection Agency	√	√	√	
General Services Administration	√	√	√	
Health and Human Services	√	√	√	
Homeland Security	√	√	√	
Housing and Urban Development	√	√	n.a.	
Interior	√	X	X	The Fish and Wildlife Service does not notify Advocacy of its rules and consistently fails to respond adequately to Advocacy comments.*
Justice	√	√	n.a.	
Labor	√	√	√	
Small Business Administration	√	√	√	
State	X	√	n.a.	State is required to publish its written procedures, but it has not done so.
Transportation	√	√	√	
Treasury	√	√	n.a.	
Veterans Affairs	√	√	n.a.	
<b>Other Agencies with Regulatory Powers</b>				
Consumer Financial Protection Bureau	n.a.	√	√	
Consumer Product Safety Commission	√	√	n.a.	
Equal Employment Opportunity Commission	√	n.a.	n.a.	
Federal Acquisition Regulation Council	√	√	√	
Federal Communications Commission	√	√	√	
Federal Reserve Board	X	n.a.	n.a.	As an independent agency, the Federal Reserve Board is not subject to the E.O. requiring written procedures.
National Labor Relations Board	n.a.	n.a.	n.a.	
Securities and Exchange Commission	√	√	√	

Key: √ = Agency complied with the requirement. n.a. = Not applicable because Advocacy did not publish a public comment letter in response to an agency rule or because the agency is not required to do so.  
X = Agency did not comply with the requirement.

\*Advocacy continues to have concerns about the way that the Department of Interior’s Fish and Wildlife Service (FWS) avoids consideration of the small business impacts of critical habitat designations for species listed under the Endangered Species Act. FWS distinguishes between the economic impacts of a listing decision and the economic impacts of a critical habitat designation. By assigning all the costs to the listing of a species, there are few, if any, costs left over to be assigned to the critical habitat designation. Because FWS is statutorily prohibited from considering economic impacts in its listing decision, it applies the requirements of the RFA only to the designation of critical habitat. Since under this scheme there are no costs, FWS does not produce any initial or final regulatory flexibility analyses under sections 403 and 404 of the RFA, no matter how extensive the impact of the FWS action.



## Chapter 3

# Bridging the Gap: Advocacy's Communication with Small Businesses and Federal Agencies



The Office of Advocacy is the voice of small business in the federal government. The RFA is a key reason that Advocacy's lawyers have a seat at the rulemaking table. As a result of the RFA, there are numerous forms of two-way communication between federal agencies and Advocacy.

### Regulatory Agendas

Section 602 of the Regulatory Flexibility Act facilitates greater participation from the public, especially small business owners, by requiring agencies to publish their regulatory flexibility agendas twice a year in the *Federal Register*. These agendas must specify the subjects of upcoming proposed rules and whether these rules are likely to have a significant economic impact on a substantial number of small entities, including small businesses. Agencies are specifically required to provide these agendas to the chief counsel for advocacy and make them available to small businesses and their representatives. Often, these agendas alert Advocacy and interested parties to forthcoming regulations, and they are sometimes discussed in Advocacy's roundtables.

The regulatory flexibility agendas for FY 2016 were published December 15, 2015, and June 9, 2016, as part of the *Biennial Unified Agenda of Regulatory and Deregulatory Actions*. A compilation of current regulatory flexibility agendas can be found at [www.reginfo.gov](http://www.reginfo.gov).

### SBREFA Panels

The Small Business Regulatory Enforcement Fairness Act (SBREFA) amended the RFA to require certain agencies to convene review panels whenever a potential regulation is expected to have a significant economic impact on a substantial number of small entities.<sup>19</sup> These are com-

monly called SBREFA or SBAR panels (for small business advocacy review). These panels provide for small business input at the earliest stage of rulemaking—when a topic is still being studied, before a proposed rule sees the light of day.

Today, three agencies are covered by this requirement—the Environmental Protection Agency (EPA), Occupational Safety and Health Administration (OSHA), and Consumer Financial Protection Bureau (CFPB). A complete list of SBREFA panels since 1996 can be found in Appendix B, Table B.1. In FY 2016, EPA initiated four new panels, CFPB convened two new panels, and OSHA convened one new panel (Table 3.1).

Advocacy has become concerned about EPA's compliance with the spirit of the panel requirement. Small entity representatives (SERs) have not been given enough information on which to provide advice to the agency on the impacts of the regulation. In some cases, EPA did not provide enough detail about the rulemakings that were the subjects of the panels. In other cases, EPA had not provided important supporting analyses. Second, Advocacy and SERs have noted that EPA has moved some rulemakings on a schedule that does not allow EPA to revise the draft proposed rules or analyses, to review small business concerns, or to consider alternatives to reduce burden.

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*passed in July 2010, established the CFPB to supervise certain activities of financial institutions. Section 1100G, entitled "Small Business Fairness and Regulatory Transparency," amends 5 U.S.C. § 609(d), to require the CFPB to comply with the SBREFA panel process, making it the third agency with this responsibility, joining EPA and OSHA.*

19. *The Dodd-Frank Wall Street Reform and Consumer Protection Act*.

**Table 3.1 SBREFA Panels Convened in FY 2016**

Agency	Regulatory Topic	Convened	Completed	Notice of Proposed Rulemaking
EPA	Risk Management Program Modernization	11/04/15	02/19/16	03/14/16
	Regulation of N-Methylpyrrolidone and Methylene Chloride in Paint and Coating Removal under Section 6(a) of the Toxic Substances Control Act	06/01/16	09/26/16	
	Regulation of Trichloroethylene (TCE) for Vapor Degreasers under Section 6(a) of the Toxic Substances Control Act	06/01/16	09/26/16	
	Financial Responsibility Requirements for Hard Rock Mining	08/24/16		
OSHA	Process Safety Management Standard	06/02/16	08/01/16	
CFPB	Arbitration Clauses	10/20/15	12/11/15	05/24/16
	Debt Collection	08/25/16	10/19/16	

***Retrospective Review of Existing Regulations***

Under section 610 of the RFA, agencies are required to conduct a retrospective review of existing regulations to examine their impact on small entities, including small businesses. President Obama bolstered this mandate through Executive Orders 13563 and 13610, requiring all executive agencies to conduct periodic retrospective reviews of all existing regulations. Executive Order 13579 provides additional support for periodic retrospective review by recommending independent agencies also meet these regulatory goals. As a result, agencies publish retrospective review plans in the *Unified Agenda of Regulatory and Deregulatory Actions* semiannually. Advocacy monitors these retrospective review plans and their implementation, and accepts input from small entities regarding any rules needing review. Overall agency compliance with this provision has been improving, but still needs work.

***Interagency Communications***

Advocacy utilizes numerous methods of communication to present the concerns of small businesses and other small entities to federal officials promulgating new regulations. Meetings with officials, comment letters to agency directors, and training sessions on RFA compliance help facilitate meaningful participation by all interested parties and produce more effective federal regulation. In FY 2016, Advocacy’s communications with federal agencies included 20 comment letters (listed in Table 4.1) and RFA compliance training sessions for 157 federal officials from a variety of agencies. (Appendix A contains a list

of all agencies that have participated in RFA training). Both of these methods of communication have helped avoid excessive burdens on small business through more effective federal compliance with the RFA.

***Small Business Roundtables***

One of the most important means for Advocacy to gather small business input is to host issue-specific roundtables. Participants may include small business owners, federal officials or congressional staff. The usefulness of roundtables is further enhanced when agency officials participate, either as presenters or simply to hear input firsthand. These roundtables present a unique opportunity for those involved in promulgating federal regulations to hear directly from the public as Advocacy facilitates an open discussion.

In FY 2016, Advocacy held 27 roundtables on proposed rules and regulatory topics from seven agencies. Most took place in Washington, D.C. Table 3.2 lists the FY 2016 roundtables, and descriptions of them follow. They are also listed on Advocacy’s website at [www.sba.gov/category/advocacy-navigation-structure/regulatory-roundtables](http://www.sba.gov/category/advocacy-navigation-structure/regulatory-roundtables).

**Table 3.2: Regulatory Roundtables Hosted by the Office of Advocacy, FY 2016**

Agency	Issue	Date	Location
Consumer Financial Protection Bureau	Payday, Vehicle Title, and Certain High-Cost Installment Loans	09/14/16	London, Ky.
		09/16/16	Madison, Wisc.
		09/22/16	Washington, D.C.
Department of Homeland Security, U.S. Citizenship and Immigration Services	International Entrepreneur Rule	09/30/16	Washington, D.C.
Department of Labor	Paid Sick Leave for Federal Contractors	03/14/16	Washington, D.C.
	Overtime Regulations	08/09/16	Denver, Colo.
		08/10/16	Boulder, Colo.
08/11/16*		Denver, Colo.*	
Department of Labor, Occupational Safety and Health Administration and Mine Safety and Health Administration	Chemical Safety and Security, OSHA Revisions to Process Safety Management; Other OSHA Initiatives	11/13/16	Washington, D.C.
	Chemical Safety and Security; OSHA's Regulatory Agendas	01/22/16	Washington, D.C.
	Weight of Evidence Guidance; Chemical Safety and Security	03/18/16	Washington, D.C.
	Process Safety Management; Electronic Reporting	05/20/16	Washington, D.C.
	Process Safety Management; Penalties Inflation Adjustment	07/15/16	Washington, D.C.
	Fair Pay and Safe Workplaces, RAGAGEP Enforcement; Communication Tower Safety	09/16/16	Washington, D.C.
Department of Transportation, Federal Motor Carrier Safety Administration	Carrier Safety Fitness Determination	05/05/16	Washington, D.C.
Department of the Treasury, Internal Revenue Service	Nondiscrimination Rules Applicable to Certain Qualified Retirement Plan Benefit Formulas	03/24/16	Washington, D.C.
	Tax Reform Proposals Affecting Small Business Owners	07/13/16	Washington, D.C.
Environmental Protection Agency	Certification of Pesticide Applicators; Medium- and Long-Chain Chlorinated Paraffins	10/28/15	Washington, D.C.
	Refrigerant Management Requirements Under the Clean Air Act; Small Business Impacts of EPA Regulation in 2016	12/04/15	Washington, D.C.
	Steam Electric Power Generating Effluent Guidelines	01/08/16	Washington, D.C.
	Groundwater Standards for In Situ Uranium Recovery Operations	02/26/16	Washington, D.C.
	Significant New Alternatives Program (SNAP); Risk Management Program	04/22/16	Washington, D.C.
	Air Pollution Standards for Oil and Natural Gas Production	06/03/16	Washington, D.C.
	2017 Draft General Permit for Stormwater Discharges from Construction Sites	07/13/16	Washington, D.C.
	The Frank R. Lautenberg Chemical Safety for the 21st Century Act: TSCA Reform and Small Businesses	08/19/16	Washington, D.C.
	Section 610 Review of Lead-Based Paint Activities; Requirements for Training and Certification for Renovation and Remodeling	08/24/16	Washington, D.C.

\*Two roundtables held.

## **Consumer Financial Protection Bureau**

### **Payday, Vehicle Title, and Certain High-Cost Installment Loans**

*September 14, 2016, London, Ky.*

*September 16, 2016, Madison, Wis.*

*September 22, 2016, Washington, D.C.*

In FY 2016, Advocacy held three roundtables on the CFPB's proposed rule, Payday, Vehicle Title, and Certain High-Cost Installment Loans. This area of regulation was the subject of a 2015 SBREFA panel. One of the panel recommendations was to do outreach in rural areas to determine how regulations might affect lenders and borrowers there. Three roundtables were held to gather this input.

The first roundtable was held on September 14, 2016, in London, Ky. Small business owners from Kentucky, Missouri, Tennessee, Ohio, Louisiana, Florida and Georgia attended. The payday lenders described the proposed rule's detrimental impact on their businesses, employees and customers. Many voiced concerns that the rules would put them out of business, leaving their customers with nowhere to go for funds. They were particularly concerned about income verification requirements and

the amount of time that it would take to issue a small dollar loan.

The second roundtable was held in Madison, Wis., on September 16, 2016. Small businesses expressed similar concerns. In addition, credit union representatives and small bankers said that the proposed regulations might cause them to stop offering small loans to their customers.

The third roundtable was held on September 22, 2016, in Washington, D.C. Many participants felt that the proposed rule was too complex for a simple product. One participant opined that the steps to obtain a \$500 loan were more complicated than the requirements for a \$500,000 mortgage. A representative from a Native American tribe spoke about the negative impact that the proposal would have on economic development in tribal communities.

## **Department of Homeland Security, U.S. Citizenship and Immigration Services**

### **International Entrepreneur Rule**

*September 30, 2016*

This roundtable focused on a U.S. Citizenship and Immigration Services rule that would allow international entrepreneurs to use an immigration program called "parole" to gain temporary entry in the United States

to work, expand their startup business, and create jobs. Under this proposed rule, entrepreneurs may be granted an initial stay of two years and seek a subsequent request for re-parole for up to three additional years.

## **Department of Labor**

### **Paid Sick Leave for Federal Contractors**

*March 14, 2016*

On March 14, 2016, Advocacy hosted a roundtable on a proposed rule implementing Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors. The rule would require certain parties that contract with the federal government to provide their employees with up

to seven days of paid sick leave annually, including paid leave allowing for family care. DOL gave a briefing and answered questions.

## Overtime Regulations

*August 9, 2016, Denver, CO*

*August 10, 2016, Boulder, CO*

*August 11, 2016, Denver, CO (two roundtables)*

On August 9-11, 2016 Advocacy hosted four roundtables in Boulder and Denver, Colo., on the Department of Labor's final rule amending the overtime regulations under the Fair Labor Standards Act. The proposal would amend

the "white collar" exemption from overtime pay for executive, administrative, and professional employees. A DOL official was present at one of the roundtables and gave a briefing on the regulation and answered questions.

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

### Chemical Safety and Security; Process Safety Management; Other OSHA Initiatives

*November 13, 2015*

This roundtable covered several occupational safety and health topics: (1) SBREFA panels on chemical facility safety (EPA's Risk Management Program, or RMP, and OSHA's Process Safety Management, or PSM); (2) changes to PSM standards pertaining to chemical mixtures, RA-GAGEP (recognized and generally accepted good engineering practices), and the "retail exemption" from the rule, which could result in significant economic impacts

without a public rulemaking process; (3) OSHA's request for information on chemical permissible exposure limits (PELs), its proposed rule to require certain employers to submit their employee injury and illness records to OSHA electronically, and its proposed rule to overturn the D.C. Circuit Court of Appeals decision in the so-called "Volks II" case through rulemaking.

### Chemical Safety and Security; OSHA's Regulatory Agendas

*January 22, 2016*

This roundtable included an update on EPA's RMP and OSHA's PSM SBREFA panels. Both panels emanated from Executive Order 13650, Improving Chemical Facility Safety and Security, issued by President Obama on August 1, 2013. In addition, the deputy assistant secretary of labor of occupational safety and health discussed OSHA's

newly released Regulatory Agenda, the agency's priorities for 2016, and their potential impact on small businesses. Finally, there was general discussion and open forum to discuss other current events and regulatory topics of specific interest to small business.

### Weight of Evidence Guidance; Chemical Safety and Security

*March 18, 2016*

This roundtable focused on OSHA's draft "Weight of Evidence" guidance document. Two officials from OSHA's Directorate of Standards and Guidance gave a detailed overview of it. The guidance is intended to help employers evaluate scientific studies on potential chemical health hazards to determine what information must be disclosed on the product labels and safety data sheets. The roundtable also included an update on EPA's RMP and OSHA's PSM SBREFA panels, including observations from small entity representatives to EPA's RMP panel, and a recap of the American Bar Association's annual Occupational

Safety and Health Law Conference. The conference covered key small business issues such as the solicitor of labor's legal and policy priorities, OSHA enforcement, contingent employees (or "fissured" workplaces), OSHA recordkeeping, workplace violence, PSM, and criminal penalties.

## Process Safety Management; Electronic Reporting

May 20, 2016

This roundtable included (1) an overview of OSHA's SBREFA panel on PSM by an official in OSHA's Directorate of Standards and Guidance; (2) a presentation by an industry labor and employment attorney on the effect of these regulatory changes on small business, in terms of

regulatory compliance, technical complexity, costs, and safety; (3) a discussion of OSHA's new electronic reporting rule (formally titled "Improve Tracking of Workplace Injuries and Illnesses"); and (4) a general discussion and open forum.

## Process Safety Management; Penalties Inflation Adjustment

July 15, 2016

This roundtable began with a recap by Advocacy of OSHA's PSM SBREFA panel. The panel had recently concluded a series of five teleconferences with the small entity representatives (SERs) from the chemical sector who reviewed the background materials and provided advice and recommendations to the panel. The panel was at the time in the process of completing the report on its findings to submit the head of OSHA. Next, two

labor law attorneys discussed the Department of Labor's new interim final rules implementing the Federal Civil Penalties Inflation Adjustment Improvements Act, a law that requires federal agencies to adjust their penalties for inflation. The meeting concluded with a review of OSHA and MSHA's spring 2016 Regulatory Agendas and an open discussion.

## Fair Pay and Safe Workplaces; RAGAGEP Enforcement; Communication Tower Safety

September 16, 2016

This roundtable began with a presentation on new DOL guidance and FAR Council regulations on Fair Pay and Safe Workplaces by DOL's senior labor compliance advisor. These new requirements require companies competing for federal contracts to disclose labor law citations and direct agencies on how to consider these when awarding federal contracts. Next an official from OSHA's Office of Chemical Process Safety and Enforcement Initiatives discussed OSHA's recently updated enforcement memorandum on using RAGAGEP (recognized and generally accepted good engineering practices) in OSHA

PSM-regulated facilities. Finally, two OSHA officials discussed the agency's contemplated new regulations on communication tower safety. They would address occupational hazards to workers who install and maintain electronic equipment (such as antennas for wireless, cellular, radio, or broadcast television communications) on communication towers and other structures. Two industry representatives also provided an overview on new industry consensus standards that address these communication tower hazards.

### Department of Transportation, Federal Motor Carrier Safety Administration

## Carrier Safety Fitness Determination

May 5, 2016

This roundtable focused on FMCSA's proposed Carrier Safety Fitness Determination rule that was published on January 21, 2016. FMCSA's proposed rule would implement a new statistical measuring program designed to determine which motor carriers are "fit" to operate based on roadside inspection and other compliance data. FMCSA's director of the Office of Enforcement and Compliance

provided an overview of the proposed rule and answered questions about it. Next, a panel of industry representatives discussed their concerns with it, specifically with respect to potential inaccuracies and biases in the data that could detrimentally affect small carriers. Another industry representative discussed recent legislation pertaining to the proposed rule as well as ongoing efforts for



legislative action to correct perceived problems with the program. Finally, there was a general discussion and open forum to discuss the proposed rule and consider

regulatory alternatives that would meet FMCSA's statutory objectives while minimizing the costs to small business.

## Department of the Treasury, Internal Revenue Service

### Nondiscrimination Rules Applicable to Certain Qualified Retirement Plan Benefit Formulas

*March 24, 2016*

This roundtable focused on the Internal Revenue Service (IRS) proposed rules that, among other things, would have added a "reasonable business" classification requirement for a nondiscrimination test on retirement plans. At the roundtable, small business owners and representatives expressed concern to Department of Treasury staff in attendance that the reasonable business classification test would impose such a significant burden on small business owners who sponsor retirement plans that it would ultimately discourage them from offering plans.

### Tax Reform Proposals Affecting Small Business Owners

*July 13, 2016*

This roundtable gave small business owners an opportunity to discuss IRS guidance on cafeteria plans. Small business stakeholders made presentations to Department



Advocacy staff in attendance at the 40th anniversary symposium in June 2016. The office's five teams handle administrative, economic, legal, regional, and public affairs.

of Treasury staff in attendance regarding IRS guidance that was complicating small employers' ability to sponsor cafeteria plans.

## Environmental Protection Agency

### Certification of Restricted Use Pesticide Applicators; Medium- and Long-Chain Chlorinated Paraffins

*October 28, 2015*

This roundtable focused on two EPA regulatory actions. First, EPA officials presented and discussed its proposed changes to the existing requirements for the certification of applicators of restricted use pesticides. This rulemaking was the subject of a SBREFA panel in 2008. The proposal's new provisions include adding a minimum age requirement. Second, agency officials explained its approach to the review of medium- and long-chain chlorinated paraffins under its premanufacture notices process for new chemicals under Section 5 of the Toxic Substances Control Act (TSCA). Small businesses in the industry, in

particular the downstream users, were concerned about the agency's use of a non-public review process for chemicals that have been in commerce for decades and whether the proposed time frame was adequate to develop alternatives or substitutes.

## Refrigerant Management Requirements; Small Business Impact of EPA's 2016 Regulations

December 4, 2015

At this roundtable, EPA officials first presented on a proposed regulation to strengthen the requirements on handling ozone-depleting chemicals and their substitutes to minimize unintentional releases to the atmosphere

during servicing, repair, or disposal of refrigeration appliances. Second, Advocacy staff presented on EPA's plans for upcoming regulations as published in the fall 2015 Unified Agenda of Regulatory and Deregulatory Actions.

## Steam Electric Power Generating Effluent Guidelines

January 8, 2016

EPA presented on its revisions to the Clean Water Act's Effluent Limitations Guidelines and Standards (ELGs) for the Steam Electric Power Generating industry. The rule governs the quantity of pollutants that can be discharged

into waters of the United States in certain wastewaters from coal-fired power plants. These standards affect numerous small entities, including small rural electric cooperatives and small municipalities.

## Groundwater Standards for In Situ Uranium Recovery Operations

February 26, 2016

This roundtable discussed EPA's proposal on new groundwater standards for in situ uranium recovery operations. EPA officials presented on this proposal, which is intended to protect groundwater that could be a drinking water source.

## Significant New Alternatives Program (SNAP); Changes to the Risk Management Program

April 22, 2016

This roundtable discussed two EPA proposed rules. First, EPA officials presented the agency's proposal to prohibit the use of certain hydrofluorocarbons (HFCs) and perfluorinated chemicals (PFCs) with high global warming potential under Section 612 of the Clean Air Act. Small businesses affected by the rule include manufacturers of chillers, household refrigerators and freezers, cold storage warehouses, and commercial food refrigeration



In a panel at the 40th anniversary symposium, congressional staff members focus on ways to improve the RFA and to help small businesses thrive in today's economy.

processing and dispensing equipment, as well as users of HFCs as foam blowing agents for rigid polyurethane spray foam and PFCs for fire suppression. Second, EPA officials discussed proposed additions to its Risk Management Program under Section 112(r) of the Clean Air Act. This rulemaking was the subject of a SBREFA panel in 2015.

## Oil and Natural Gas Production Air Pollution Standards

June 3, 2016

At this roundtable, EPA officials presented on two regulatory actions related to air emission standards for oil and natural gas production: (1) EPA's final rule updating

air emission standards for methane and volatile organic compound (VOC) emissions from new sources in the industry, from production to downstream processing,



under Clean Air Act Section 111(b); and EPA's proposed collection of information from the industry to support

a planned rulemaking for methane and VOC emissions from existing sources under Clean Air Act Section 111(d).

## 2017 Draft General Permit for Construction Site Stormwater Discharges

*July 13, 2016*

EPA officials presented on its draft general permit covering construction sites around the country, which is proposed to replace the existing permit which expires early in 2017. EPA has proposed changes from the existing

general permit, including recently revised effluent limitations guidelines for construction and development sites.

## The Frank R. Lautenberg Chemical Safety for the 21st Century Act: TSCA Reform and Small Business

*August 19, 2016*

At this roundtable, EPA officials presented on and discussed the new Frank R. Lautenberg Chemical Safety for the 21st Century Act, which was signed into law on June 22, 2016. This Act represents the first significant change to the Toxic Substances Control Act in 40 years, and the first major revision to a core environmental statute in

25 years. There was also a second presentation by a small business representative to highlight and educate the agency on issues of importance to small businesses that manufacture, process or formulate chemicals, as well as to small businesses that use chemical mixtures in their manufacturing processes.

## Section 610 Review of Lead-Based Paint Activities; Training and Certification for Renovation and Remodeling

*August 24, 2016*

This roundtable focused on EPA's review of its 2008 rule, Lead Renovation, Repair and Painting Program, under Section 610 of the RFA. Agency officials provided a background and overview of its existing regulations in

addition to discussing the scope of the review. Small business stakeholders in attendance discussed their concerns with the existing regulations.



## Chapter 4

# Advocacy's Public Comments to Federal Agencies in FY 2016



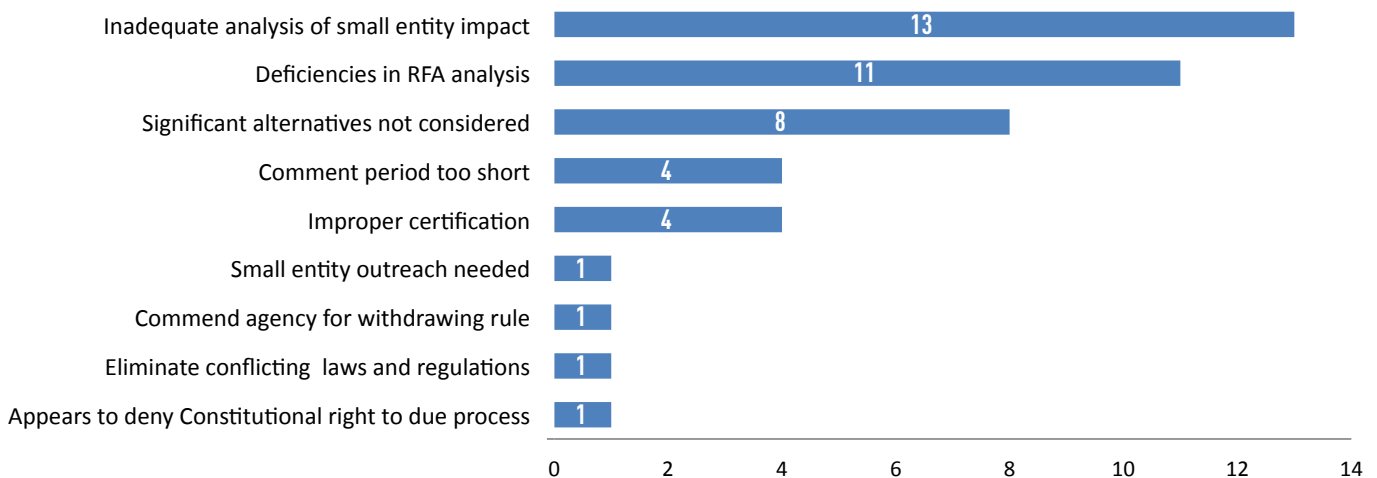
This chapter summarizes Advocacy's formal input into agency rulemaking. Advocacy's comments reflect: (1) the input of small entities gathered at roundtables, (2) outreach by the 10 regional advocates, (3) contacts by small business industry associations, and (4) direct contacts by individual small business owners.

Advocacy filed 20 public comment letters in FY 2016. Chart 4.1 shows the primary issues raised in these letters. The most frequent purpose of Advocacy's letters was to

notify an agency of its inadequate analysis of a proposed rule's small business impact. The second most frequent concern was advocating for a regulatory alternative that would minimize the impact on small entities.

Advocacy's formal comment letters are listed in Table 4.1 in chronological order. They are described in the following sections, where they are listed by agency, then by date. All of these comment letters are available online on Advocacy's website, [www.sba.gov/category/advocacy-navigation-structure/legislative-actions/regulatory-comment-letters](http://www.sba.gov/category/advocacy-navigation-structure/legislative-actions/regulatory-comment-letters).

**Figure 4.1. Number of Specific Issues of Concern in Agency Comment Letters, FY 2016**



**Table 4.1 Regulatory Comment Letters Filed by the Office of Advocacy, FY 2016**

Date	Agency*	Topic	Citation to Rule
10/23/15	EPA	Standards of Performance and Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills	80 Fed. Reg. 52162 (08/27/15) 80 Fed. Reg. 52099 (08/27/15)
11/20/15	DOD	Detection and Avoidance of Counterfeit Electronic Parts	80 Fed. Reg. 56939 (09/21/15)
11/23/15	DOE	Conservation Standards for Refrigerated Bottled or Canned Beverage Machines	80 Fed. Reg. 50461 (08/19/15)
12/08/15	EPA	Certification of Pesticide Applicators	80 Fed. Reg. 72029 (11/22/15)
12/21/15	EPA	Federal Plan Requirements for Greenhouse Gas Emissions from Electricity Utility Generating Units; Model Trading Rules	80 Fed. Reg. 64966 (10/23/15)
01/04/16	VA	Veteran-Owned Small Business Verification Program Guidelines	80 Fed. Reg. 68795 (11/06/15)
02/29/16	DOD	Network Penetration Reporting and Contracting for Cloud Services	80 Fed. Reg. 81472 (12/30/15)
03/01/16	DOL	Establishing Paid Sick Leave for Federal Contractors (Request to extend comment period)	81 Fed. Reg. 9592 (02/25/16)
03/02/16	FWS	Listing Salamanders Due to Risk of Salamander Chytrid Fungus	81 Fed. Reg. 1534 (01/13/16)
04/6/16	DOL	Establishing Paid Sick Leave for Federal Contractors	81 Fed. Reg. 9592 (02/25/16)
04/12/16	NOAA	Magnuson-Stevens Fishery Conservation and Management Act; Seafood Import Monitoring	81 Fed. Reg. 6210 (02/05/16)
04/27/16	IRS	Withdrawal of Proposed Nondiscrimination Rules Applicable to Certain Retirement Plan Benefit Formulas	81 Fed. Reg. 4976 (01/29/16)
05/13/16	EPA	Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act	81 Fed. Reg. 13638 (03/14/16)
05/17/16	FNS	Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)	81 Fed. Reg. 8015 (02/17/16)
05/19/16	FMCSA	Carrier Safety Fitness Determination	81 Fed. Reg. 3562 (01/21/16)
06/06/16	FCC	Expanding Consumers' Video Navigation Choices	MB Docket No. 16-42
06/23/16	IRS	Excise Tax; Tractors, Trailers, Trucks, and Tires; Definition of Highway Vehicle	81 Fed. Reg. 18544 (04/18/16)
06/27/16	FCC	Response to Initial Regulatory Analysis; Protecting Privacy of Customers of Broadband and Other Telecommunications Services	WC Docket No. 16-106
08/16/16	DOE	Energy Conservation Standards for Manufactured Housing	81 Fed. Reg. 39756 (06/17/16)
09/07/16	APHIS	Horse Protection; Licensing of Designated Qualified Persons and Other Amendments (Request to extend comment period)	81 Fed. Reg. 49112 (07/26/16)

\*Agency Abbreviations:

APHIS	Animal and Plant Health Inspection Service	FMCSA	Federal Motor Carrier Safety Administration
DOD	Department of Defense	FNS	Food and Nutrition Services
DOE	Department of Energy	FWS	Fish and Wildlife Service
DOL	Department of Labor	IRS	Internal Revenue Service
EPA	Environmental Protection Agency	NOAA	National Oceanic and Atmospheric Administration
FCC	Federal Communications Commission	VA	Department of Veterans Affairs

## Department of Agriculture, Animal and Plant Health Inspection Service

### Horse Protection; Licensing Designated Qualified Persons and Other Amendments

On July 26, 2016, the Animal and Plant Health Inspection Service (APHIS) published a proposed rule that would amend Horse Protection Act regulations concerning horse inspections at horse shows, exhibitions, sales, and auctions. Under the proposed rule, APHIS would assume responsibility for training, licensing, and monitoring third-party, independent inspectors (known as “designated qualified persons” or DQPs) as well as adding licensing eligibility requirements for DQPs. In addition, APHIS would prohibit use of pads, substances,

and action devices on horses at horse shows, exhibitions, sales, and auctions.

On September 7, 2016, Advocacy submitted a comment letter to APHIS requesting a 60-day extension of the public comment period to allow small businesses to fully and meaningfully participate in the rulemaking and to allow enough time for interested parties to compile pertinent information and economic data. On September 16, 2016, APHIS granted a 30-day extension of the public comment period to October 26, 2016.

## Department of Agriculture, Food and Nutrition Service

### Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)

On February 17, 2016, the Food and Nutrition Service (FNS) published a proposed rule titled Enhancing Retailers Standards in the Supplemental Nutrition Assistance Program (SNAP). The proposed rule increased the requirements for retail food stores to participate in SNAP. The changes were the result of amendments made to the Food and Nutrition Act of 2008 by the Agricultural Act of 2014 (the Farm Bill). The amendments required certain SNAP-authorized retail food stores to offer at least three varieties of items in each of four staple food categories, and they increased the minimum number of categories in which perishable foods were required from two to three. The proposed rule served to codify these mandatory legislative requirements.

Using its own existing authority, FNS added several more changes in the proposed rule that affected retailers seeking to be authorized retailers under the SNAP. The modifications addressed depth of stock requirements, and amended the definitions of “staple foods,” “accessory foods” and “retail food store.” The rulemaking also proposed that FNS begin making information public about retailers who have violated SNAP rules.

Advocacy heard from a number of individual convenience store owners, their food suppliers and convenience store industry representatives who were concerned

about many of the requirements. They believed that the rule would impose a significant economic impact on their businesses. The definitional changes in the rule would require them to increase their product categories, significantly change their business practices, and require them to invest additional sums to increase floor space and refrigeration.

Advocacy’s comment letter conveyed these industry concerns and suggested ways that the agency could improve its initial regulatory flexibility analysis. Advocacy believed that the FNS could do a better job identifying and analyzing small retailers’ costs and revenues against the rule’s new requirements. Advocacy also suggested that FNS consider reasonable alternatives that would reduce the regulation’s economic burden. As a result of Advocacy’s comments and those filed by the public, FNS published a notice in the *Federal Register* clarifying certain aspects of the proposed rule, including certain definitions that were problematic for small businesses.

The final rule had not been published as of September 30, 2016.

## Seafood Import Monitoring Program

On February 5, 2016, the National Oceanic and Atmospheric Administration (NOAA) published a proposed rule to establish filing and recordkeeping procedures for certain imported fish and fish products. The proposed rule was intended to implement the Magnuson-Stevens Fishery Conservation and Management Act's prohibition on importing and trading fish that were taken, possessed, transported, or sold in violation of foreign laws or regulations.

In the proposed rule, NOAA sought to integrate catch and landing information and documents for certain fish and fish products within the International Trade Data System and require electronic data collection through the Automated Commercial Environment maintained by the Department of Homeland Security and Customs and Border Protection. Under these procedures, NOAA would require an annually renewable International Fisheries Trade Permit and specific data for certain fish and fish products to be filed and retained as a condition of import. These would enable the United States to keep products of illegal fishing activities from being sold. NOAA asserted

that the information would help authorities verify that the fish were lawfully acquired by tracing these products from harvest to entry into commerce. NOAA estimated that some 2,000 importers and 600 commodities declarations filers would be subject to the new reporting requirements.

On April 12, 2016, Advocacy submitted a letter to NOAA on this issue. Advocacy expressed concerns that NOAA underestimated of the costs of complying with the proposal. NOAA asserted that the only new cost would be an industry-wide cost of \$60,000 due to permitting fees. Advocacy asserted that the additional reporting requirements were far more extensive than the current ones. Advocacy encouraged NOAA to perform a full economic analysis of the potential costs. Advocacy also encouraged NOAA to analyze all of the viable alternatives including third-party certifications, a trusted trader program and the European Union's catch certification scheme.

The final rule had not been published as of September 30, 2016.

## Department of Defense

### Detection and Avoidance of Counterfeit Electronic Parts in DOD Contracting

On September 21, 2015, the Department of Defense (DOD) issued a rule to supplement its Defense Acquisition Regulations (DFAR) regarding companies that supply counterfeit electronic parts. The proposed rule would require contractors, both large and small, who are not the original manufacturer to have a risk-based system to trace electronic parts from the original manufacturer to product acceptance by the government. If traceability is not feasible for a particular part, the contractor system must provide for the consideration of an alternative part or utilization of tests and inspections in order to avoid counterfeit electronic parts. The contractor must also notify the contracting officer if the part cannot be obtained from a trusted supplier and assumes responsibility for inspection, testing, and authentication, in accordance with industry standards. In general, commercially off-the-shelf items (COTS) are not bound by these acquisition regulations, but DOD determined that this regulation would in fact apply to them. Finally the proposed rule

would require that the contractor assume responsibility for the authenticity of parts provided by suppliers.

On November 20, 2015, Advocacy filed formal comments requesting an extension of the comment period and urging DOD to explore reasonable alternatives for small businesses to comply with a rule that would appear to have a significant economic impact on a substantial number of small businesses. Advocacy asked DOD to reexamine and recalculate the number of small businesses affected by the rule, including the number of small business subcontractors. Advocacy also asked DOD to provide clear data as to the impact of the removing, for the first time, the compliance exemption for small businesses that provide COTS parts.

On August 2, 2016, DOD issued a final rule without making the changes as proposed by Advocacy.

## Defense Federal Acquisition Regulation Supplement: Network Penetration Reporting and Contracting for Cloud Services

On December 30, 2015, the DOD's DFAR Council amended its regulation on cybersecurity regarding network penetration and the use of cloud services (DFARS Case 2013-D018). On February 29, 2016, Advocacy submitted a public comment letter on the rule's potential negative impact on small businesses. Among other things Advocacy recommended that DOD consider alternatives to ameliorate these impacts, such as collaborating with universities or other organizations to provide low-cost cybersecurity services to small businesses, or providing a one-time subsidy to small businesses to help cover the cost of initial consultations with third-party vendors. DOD stated in the final rule that it did not have resources to utilize third parties to help small businesses. However, the chairman of the Senate Small Business Committee and several members of the House of Representatives agreed



The Office of Advocacy's interagency team works with all federal agencies to reduce the regulatory burden on small businesses.

with Advocacy's comment letter and passed legislation that would require the SBA Small Business Development Centers to provide cybersecurity services to small businesses.

### Department of Energy

## Energy Conservation Standards for Refrigerated Beverage Vending Machines

On August 19, 2015, the Department of Energy (DOE) issued the proposed rule, Energy Conservation Standards for Refrigerated Bottled or Canned Beverage Vending Machines. On November 23, 2015, Advocacy filed public comments with DOE stating that the proposed rule would have a significant economic impact on small manufacturers of beverage vending machines. While DOE estimated the conversion costs at \$217,000 per manufacturer, small businesses estimated these costs at \$1 million or more. Advocacy identified several key concerns with DOE's analysis. The baseline for certain product classes of beverage vending machines did not capture the current state of technology; DOE constructed the baseline from the most inefficient technology choices, which could lead to inaccurate cost estimates. In addition, EPA's Significant New Alternatives Program will require that manufacturers

use new refrigerants like carbon dioxide or propane to achieve the proposed efficiency levels. Small businesses are concerned that the proposed standards are neither technically nor economically feasible within the three-year period prescribed by DOE. Advocacy recommended that DOE use its discretion to adopt a feasible alternative to the proposed standard.

In response to Advocacy's comment and stakeholder feedback, DOE revised its engineering analysis and standards in the January 8, 2016, final rule. This resulted in less burdensome energy efficiency standard levels for small manufacturers of beverage vending machines relative to the proposed rule. DOE's changes due to Advocacy's efforts saved small manufacturers \$520,000.

## Energy Conservation Standards for Manufactured Housing

On August 16, 2016, Advocacy filed public comments in response to the DOE rulemaking, Energy Conservation Standards for Manufactured Housing. The proposed rule would establish energy conservation standards for

manufactured housing based on the most recent version of the International Energy Conservation Code. DOE published an initial regulatory flexibility analysis with its proposed rule, but it failed to comply with the



RFA's requirement to quantify or describe the potential economic impact of the proposed regulation on small entities. Small manufacturers of manufactured housing and their representatives expressed concerns to Advocacy that the proposed regulations would have a disproportionate impact on their business. In comments, Advocacy recommended that DOE (1) present and discuss regulatory alternatives in their final regulatory flexibility analysis and

explain its reasoning for adopting or declining to adopt each alternative; (2) adopt delayed compliance schedules for small manufacturers; (3) provide waivers and exemptions for small manufacturers wherever possible; and (4) adopt a standard that would achieve energy savings without imposing serious harm on small manufacturers.

As of September 30, 2016, no final rule had been proposed.

## Department of the Interior, Fish and Wildlife Service

### Listing Salamanders Due to Risk of Salamander Chytrid Fungus

On March 2, 2016, Advocacy filed a comment letter with the U.S. Fish and Wildlife Service regarding the proposed interim rule, Injurious Wildlife Species Listing Salamanders Due to Risk of Salamander Chytrid Fungus. The interim rule proposed listing over 200 species of salamanders under the Lacey Act in order to protect the interests of wildlife from the introduction and spread of the chytrid fungus *Batrachochytrium salamandrivorans* (Bsal) into ecosystems of the United States. The fungus affects salamanders, but is not currently found in the United States. Small businesses generally support efforts to keep Bsal from entering the United States. The point of contention between the agency and the industry revolves around the Lacey Act's ban on commercial interstate transport as well as import and export. There have not been any instances of salamanders with Bsal in the

United States, so prohibition of interstate transport is not necessary to control the spread of Bsal. Advocacy pointed out that the issue of whether the Lacey Act can be applied to prohibit interstate transport is currently in litigation elsewhere, and an injunction issued in that case was based in part on the fact that the plaintiffs are likely to succeed at oral argument on the issue of the Lacey Act's applicability to interstate transport. Prohibiting importation but allowing interstate transportation of salamanders appears to be an alternative that would still prevent the spread of the fungus in the United States, and Advocacy encouraged the agency to adopt this alternative.

The agency had not issued a final rule as of September 30, 2016.

## Department of Labor

### Paid Sick Leave for Federal Contractors

On April 6, 2016, Advocacy filed a comment letter with DOL regarding its proposed rule implementing Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors. The E.O. requires certain parties that contract with the federal government to provide their employees with up to seven days of paid sick leave annually, including paid leave allowing for family care. Advocacy also filed a comment letter with DOL on March 1, 2016, to ask for an extension of the comment period, and DOL extended it by 15 days.

The proposed rule applies to businesses entering into any new contract, subcontract, or contract-like instrument with the federal government, provided that it is a procurement contract for construction covered by the

Davis-Bacon Act; a contract for services covered by the Service Contract Act; a contract for concessions; or a contract in connection with federal property and lands and related to offering services for federal employees, their dependents or the general public. Advocacy held a small businesses roundtable on the rule on March 14, 2016. Advocacy's comment letter cited concerns that the rule's initial regulatory flexibility analysis underestimated the number of businesses affected. DOL may have overlooked thousands of small businesses such as restaurants, retail establishments, and outdoor recreation companies operating on federal lands, in federal buildings, and on military bases. Advocacy also expressed concern that DOL underestimated the costs of this rule for small businesses, and recommended exempting some small



businesses from this rulemaking. On September 30, 2016, DOL released a final rule. It included an updated analysis, which added these extra small businesses and compliance

costs, but DOL did not exempt any small businesses in this final rule.

## Department of Transportation, Federal Motor Carrier Safety Administration

### Carrier Safety Fitness Determination

On January 21, 2016, the Federal Motor Carrier Safety Administration (FMCSA) issued its proposed Carrier Safety Fitness Determination (SFD) rule. The rule would implement a new statistical measuring program designed to determine the fitness of motor carriers to operate in interstate commerce. Because of significant small business interest in the proposed rule, Advocacy hosted a roundtable on May 5, 2016. Representatives from FMCSA also attended the roundtable to provide an overview and answer questions.

The proposed SFD rule is designed to replace FMCSA's current program, called Compliance, Safety, Accountability or CSA. CSA is a statistical tool that ranks carriers and drivers on safety. The worst ranked carriers can be ordered out of service. There are some 503,000 small business motor carriers representing nearly 99 percent of the motor carrier industry.

Advocacy filed public comments and raised several issues. First, while praising FMCSA's effort to develop a simple, reliable methodology to identify and remove unfit carriers from the nation's roadways, Advocacy raised concerns about the FMCSA's methodologies and data. Second, Advocacy raised concerns about FMCSA's regulatory evaluation and RFA analysis, and recommended that the agency consider preparing and publishing revised analyses for additional public comment. Third, Advocacy recommended that FMCSA consider significant alternatives that would meet the agency's objectives while minimizing the costs on small carriers. Finally, Advocacy recommended that FMCSA await the conclusion of a congressionally mandated study by the National Academies of Science on the underlying SFD methodologies before finalizing a new rule. The agency had not published a final rule as of September 30, 2016.

## Department of the Treasury, Internal Revenue Service

### Proposed Rulemaking Excise Tax; Tractors, Trailers, Trucks, and Tires; Definition of Highway Vehicle (REG-103380-05)

On April 18, 2016, the Internal Revenue Service (IRS) published proposed regulations that would update the agency's requirements related to the Highway Revenue Act of 1982 by revising the definition of "highway vehicle" and establishing recordkeeping requirements for gross vehicle weight (GVW) and gross combined weight (GCW). Additionally, the proposed regulations provided model certificates to be used to establish tax-free status with respect to certain sales of taxable vehicles and taxable tires. The IRS certified that the collection of information imposed by the proposed regulations would not have a significant economic impact on a substantial number of small entities and supported this certification based on the observation that "the time required to secure and maintain the required information is minimal."

Small business stakeholders reported to Advocacy that the proposed rules, if finalized, would impose a significant paperwork and economic burden that exceeds the IRS estimate. On June 23, 2016, Advocacy submitted a public comment letter to the IRS recommending that the proposed rules receive a full RFA analysis, and that the IRS publish for public comment either a supplemental RFA assessment with valid factual basis in support of a certification or an initial regulatory flexibility analysis. Advocacy also encouraged the IRS to extend the comment period for the proposed regulations by 60 days to allow small businesses more time to consider the impact of the proposed regulations and potentially recommend less burdensome alternatives to the IRS. As of September 30, 2016, the proposed rule had not yet been finalized.

## Department of Veteran Affairs

### Veteran-Owned Small Business Verification Program Guidelines

On November 6, 2015, the Department of Veterans Affairs (VA) issued a proposed regulation that would make major revisions to its Veteran-Owned Business Verification program. The proposed rule would add and revise definitions, reorder requirements and redefine the definition of “control.” It would introduce changes to community property restrictions, “unconditional” ownership, and day-to-day management requirements, and it would remove and revise the current full-time requirements. It would amend the statutory definition for the Office of Small and Disadvantaged Business Utilization. Finally, it would create a new structure for permanent caregiver by defining it and removing the reference to personal caregiver. The VA certified that the rule would not have a significant economic impact on a substantial number of small entities, and did not perform a regulatory flexibility analysis.

After several meetings with veteran-owned business groups, Advocacy submitted a formal comment letter on January 4, 2016. Advocacy’s letter said that the VA’s certification of the rule lacked a factual basis. After the comment period closed, VA officials met with Advocacy



At the 40th anniversary symposium, government and private-sector experts discuss reducing the regulatory burden and making better policies for small businesses.

regarding the agency’s attempt to certify the rule under the Regulatory Flexibility Act. As of September 30, 2016, the VA had not issued a final rule and no date had been proposed for the rule to become final.

### Nondiscrimination Rules Applicable to Certain Qualified Retirement Plan Benefit Formulas

On January 29, 2016, the IRS issued proposed rules that, among other things, would have added a “reasonable business” classification requirement for a nondiscrimination test on retirement plans. At a small business roundtable hosted by Advocacy on March 24, 2016, small business owners and representatives expressed concern to Department of Treasury staff in attendance that the reasonable business classification test contained in the proposed regulations would have imposed burdens on small business owners who sponsor retirement plans and

that these burdens would ultimately discourage small business owners from offering plans.

On April 14, 2016, the IRS published an announcement that withdrew the portion of the proposed rules relating to the new reasonable business classification test. On April 27, 2016, Advocacy submitted a public letter to the IRS commending the agency for listening to the small business concerns raised at Advocacy’s roundtable.

## Environmental Protection Agency

### Emission Standards for New and Existing Municipal Solid Waste Landfills

On August 27, 2015, EPA published proposed emission standards for new and existing municipal solid waste landfills under Section 111 of the Clean Air Act. The affected industry had been consulted as part of a

SBREFA panel that had concluded less than a month before the proposed rules were published. On October 23, 2015, Advocacy filed public comments on the proposal. Advocacy challenged EPA’s certification that the new

source proposal would not have a significant impact on a substantial number of small entities. Advocacy also made specific recommendations about implementing the SBREFA panel's recommendations to ensure small entities would be able to exercise them to reduce burdens.

EPA published final new and existing source emissions standards on August 29, 2016.

## Certification Requirements of Restricted Use Pesticide Applicators

On December 8, 2015, Advocacy submitted a comment letter to EPA on the proposed rule, Pesticides; Certification of Pesticide Applicators. In its proposal, the agency sought to increase the competency standards for private and commercial pesticide applicators and added new requirements for noncertified applicators working under the direct supervision of a certified applicator. The agency also proposed to require applicators to renew their certification every three years (requiring that half of the credits be obtained within 18 months) and to establish a minimum age requirement of 18 for certified applicators and for persons working under their direct supervision.

Advocacy was concerned that the rule would result in unnecessary and unjustified burdens and substantial costs for small businesses. Advocacy urged EPA to consider small businesses' recommendations to address their concerns by following the SBREFA panel recommendations for the minimum age requirement, the number of continuing education units required for recertification, and eliminating the requirement that half the credits be obtained within 18 months. At the end of FY 2016, the final rule had been submitted for review by the Office of Management and Budget's Office of Information and Regulatory Affairs under E.O. 12866.

## Federal Plan and Model Rules to Implement the Clean Power Plan

On December 21, 2015, Advocacy filed public comments on EPA's proposed Federal Plan and Model Rules to implement the Clean Power Plan. The rules were issued under Section 111(d) of the Clean Air Act to reduce greenhouse gas emissions from electricity generation. This rulemaking was the subject of a SBREFA panel in 2015, which Advocacy criticized at the time as lacking the information necessary to inform the participating

small entities of likely impacts. Advocacy reiterated these concerns in its public comment, stating that the proposal and economic analyses could not adequately inform the public of likely impacts on small entities as required by the RFA. Advocacy strongly recommended that EPA re-propose and re-analyze the Federal Plans on a state-by-state basis as necessary to comply with the Clean Air Act.

## Accidental Release Prevention Requirements for the Risk Management Program

On May 13, 2016, Advocacy submitted a comment letter to EPA on the proposed rule, Accidental Release Prevention Requirements for the Risk Management Programs under the Clean Air Act. The proposal included several far-reaching requirements: (1) third-party audits and incident investigation root cause analyses for certain processes; (2) additional analysis of safer technology and alternatives for the process hazard analyses in selected industries; (3) development of responding capacity for facilities that lack a local emergency response agency; (4) and increased information disclosure requirements to the public and responding agencies, including public meetings. Advocacy was concerned that the rule would result in unnecessary burdens and substantial costs for small businesses without improving safety at facilities that use

and handle chemicals. Advocacy urged EPA to carefully address the concerns expressed during the SBREFA panel by the small entity representatives, and to provide flexibility based on these concerns. At the end of FY 2016, EPA was reviewing comments in advance of issuing its final regulations.

## Expanding Consumers' Video Navigation Choices

On June 6, 2016, Advocacy submitted an *ex parte* letter to the Federal Communications Commission (FCC), asking the agency to further analyze the small business impact of its proposed rules under Section 629 of the Communications Act. The proposed rules would require multi-channel video programming distributors (MVPDs) to supply certain programming information in formats that conform to specifications set by open standards bodies. The FCC published an initial regulatory flexibility analysis with its proposal, but did not attempt to quantify the impact that the rule would have on small MVPDs. Numerous commenters, including small MVPDs, as well as public interest groups and technology companies supporting the rule, indicated to the FCC that the proposed rule would disproportionately affect small MVPDs. These stakeholders also suggested that the FCC could exempt

small MVPDs from the regulations while still achieving its Section 629 goals.

In comments, Advocacy noted that the FCC's proposal would have a significantly disproportionate impact on small MVPDs that must be analyzed under the RFA. Given the proposal's significant impact on small entities, Advocacy asked the FCC to analyze the extent to which any regulatory alternatives to the proposal could mitigate those costs. Specifically, Advocacy requested that the FCC exempt small MVPDs from the regulations, and that it explain its rationale for either adopting or rejecting that alternative in its final regulatory flexibility analysis. Advocacy highlighted numerous comments in the docket that provide factual and legal support for a decision to exempt small MVPDs. The FCC has not yet finalized any rules related to this proposal.

## Protecting Privacy of Customers of Broadband and Other Telecommunications Services

On June 27, 2016, Advocacy submitted reply comments to the FCC, asking the FCC to further analyze the small business impact of its proposed rules regarding broadband internet access service (BIAS) providers' obligations to protect consumer proprietary information (PI). The FCC specifically sought comment on several regulations that could affect small providers, including (1) the provision of meaningful notice of privacy policies; (2) customer approval requirements for the use and disclosure of customer PI; (3) the use and disclosure of aggregate customer PI; (4) the security of customer PI; (5) data breach notification; (6) other practices implicating privacy; and (7) dispute resolution.

The FCC published an initial regulatory flexibility analysis with its proposal, but did not quantify or describe the impact that the rule would have on small BIAS providers. Small BIAS providers and their representatives expressed concerns to the FCC and Advocacy regarding the proposed regulations' disproportionate impact on their operations. They described heavy compliance burdens and offered a number of suggestions to the FCC to ease the compliance burden, such as delayed compliance schedules for small entities, small business exemptions from specific provisions, safe harbor provisions, grandfathering of customer consent, and best practices to give small entities more certainty in the compliance process.

In comments, Advocacy noted that the FCC's proposal would have a significantly disproportionate impact on small BIAS providers which must be analyzed under the RFA. Given the significant impact, Advocacy asked the FCC to analyze the extent to which any regulatory alternatives could mitigate those costs. Specifically, Advocacy requested that the FCC adopt extended compliance schedules for small BIAS providers, as well as any appropriate exemptions. Advocacy also asked the agency to include its rationale for either adopting or rejecting any alternatives suggested by small business stakeholders in its final regulatory flexibility analysis. Advocacy highlighted numerous comments in the docket that provide factual and legal support for a decision to give small BIAS providers regulatory flexibility.

The agency had not issued a final rule as of September 30, 2016.

## Chapter 5

# Small Business Cost Savings and Success Stories



In FY 2016, federal agencies finalized seven rules where Advocacy staff had represented small business concerns on RFA grounds. As a result of small business involvement, these rules contained flexibilities resulting in significant quantifiable cost savings, while still meeting their regulatory intent. As a result of Advocacy's RFA activities, FY 2016 regulatory cost savings on behalf of small businesses amounted to almost \$1.4 billion. These final rules included a conflict-of-interest rule that affected small retirement plans, a regulation of new kinds of tobacco products, and the overtime rule's cost basis for indexing. The Employee Benefits Security Administration's response to Advocacy comments illustrates the effectiveness of Advocacy and the RFA in the rulemaking process. In the final rule, the agency stated, "Significant changes were made to the rule and exemptions in response to information received from public comments, the hearings, and discussions with the regulated community."

Table 5.1 summarizes the cost savings from seven rules on which Advocacy intervened on behalf of small businesses and that yielded quantifiable savings. Several of these regulatory actions represent the conclusion of processes that stretched over many years. For example, EBSA's final rule on the definition of "fiduciary" for investment advisers concluded a rulemaking process that dates to 2010 when the first proposed rule was issued. EPA's Agricultural Worker Protection standards concluded a rulemaking process that dates to 2008, when a SBREFA panel was held on the topic.

Agencies' compliance with the RFA yields other successful results that are not easy to quantify. These small and large successes apply to key issue areas in today's world, for instance safer bank lending practices, unmanned aircraft systems (or drones), and crowdfunding (an alternative way of raising capital for small businesses). All of these rules are voluminous and extremely complex. Over lengthy timeframes, Advocacy staff has bridged the gulf between regulators and small enterprises to balance regulatory goals and new burdens on businesses. For instance, in the case of sanitary food transport, some smaller entities were exempted from certain requirements, and the effective compliance date was extended for others. Table 5.2 lists nine small business regulatory success stories resulting from Advocacy's efforts at monitoring the RFA.

**Table 5.1: Summary of Small Business Regulatory Cost Savings, FY 2016**

Agency	Rule	First-year Costs	Annual Costs
Department of Energy	Energy Conservation Program: Energy Conservation Standards for Refrigerated Bottled or Canned Beverage Vending Machines <sup>1</sup>	\$520,000	
Department of Labor	Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (Overtime Rule) <sup>2</sup>	\$45,638,000 <sup>3</sup>	
Department of Labor	Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Range in the United States <sup>4</sup>	\$3,784,588	\$3,784,588
Department of Labor, Employee Benefits Security Administration	Definition of the Term “Fiduciary”; Conflict of Interest Rule— Retirement Investment Advice <sup>5</sup>	\$1,169,550,584	\$332,093,669
Environmental Protection Agency	Pesticides, Agricultural Worker Protection Standard Revisions <sup>6</sup>	\$10,300,000	\$10,300,000
Federal Acquisition Regulatory Council	Federal Acquisitions Regulation; Fair Pay and Safe Workplaces <sup>7</sup>	\$18,700,000	
Department of Health and Human Services, Food and Drug Administration	Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act <sup>8</sup>	\$145,000,000	
<b>Total Regulatory Cost Savings, FY 2016</b>		<b>\$1,393,493,172</b>	<b>\$346,178,257</b>

Note: The Office of Advocacy generally bases its cost savings estimates on agency estimates. Cost savings for a given rule are captured in the fiscal year in which the agency agrees to changes in the rule as a result of Advocacy’s intervention. Where possible, we limit the savings to those attributable to small business. These are best estimates. First-year cost savings consist of either capital or annual costs that would be incurred in the rule’s first year of implementation. Recurring annual cost savings are listed where applicable.

1. Final Rulemaking, 81 Fed. Reg. 1,028 (Jan. 8, 2016).
2. Final Rulemaking, 81 Fed. Reg. 32,391 (May 23, 2016).
3. Includes transfer costs.
4. Final Rulemaking, 80 Fed. Reg. 62,958 (Oct. 16, 2015).
5. Final Rulemaking, 81 Fed. Reg. 20,946 (Apr. 8, 2016).
6. Final Rulemaking, 80 Fed. Reg. 67,496 (Nov. 2, 2015).
7. Final Rulemaking, 81 Fed. Reg. 58,562 (Aug. 25, 2016).
8. Final Rulemaking, 81 Fed. Reg. 28,974 (May 10, 2016).



## Department of Energy

### Energy Conservation Standards for Refrigerated Beverage Vending Machines

On November 23, 2015, the Office of Advocacy filed a public comment letter on the Department of Energy's (DOE) Energy Conservation Standards proposed rule for Refrigerated Bottled or Canned Beverage Vending Machines. In response to Advocacy's comment and stakeholder feedback relating to the proposed rule, DOE revised its engineering analysis and standard efficiency levels for

the January 8, 2016 final rule, which resulted in less burdensome energy efficiency standard levels for small manufacturers of beverage vending machines relative to the proposed rule. **DOE's changes due to Advocacy's efforts saved small manufacturers \$520,000 in first-year cost savings.**

## Department of Health and Human Services, Food and Drug Administration

### Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Tobacco Control Act

On April 24, 2014, the Food and Drug Administration (FDA) issued a proposed rule to implement the Tobacco Control Act. The proposed rule would deem formerly unregulated or uncovered products subject to FDA regulation, including premium cigars, e-cigarettes, and hookah tobacco, and it would subject these products to regulatory requirements currently only applicable to cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco. Among other requirements, the proposed rule would have required manufacturers of newly deemed tobacco products to submit an application for premarket approval with 24 months of the effective date of the rule. Additionally, the proposed rule would have banned from the market flavored tobacco products, including flavored e-cigarettes.

Small business owners and representatives had been in contact with Advocacy to express concern over the impact of this rulemaking. Based on input from small business stakeholders, Advocacy filed a public comment letter on June 11, 2014. Advocacy's comment letter noted that the initial regulatory flexibility analysis contained in the proposed rule lacked essential information required under the RFA. Advocacy encouraged the FDA to revise the IRFA to provide a more accurate description of the costs of the proposed rule. Advocacy also recommended that the FDA take into consideration small business stakeholders' suggested alternatives to minimize the proposed rule's potential impact.

On May 10, 2016, the FDA issued the final rule. Under the final rule, manufacturers of all newly deemed tobacco products will have a 12-, 18- or 24-month initial compliance period (depending on the type of premarket application) in which to prepare applications for marketing authorization, plus a 12-month continued compliance period after those dates in which to obtain authorization from FDA (resulting in total compliance periods of 24, 30, or 36 months). Additionally, FDA's compliance policy for premarket review will permit products to remain on the market while manufacturers seek review. FDA also extended this compliance approach to flavored tobacco products. This revised compliance approach in the final rule will ease the compliance burden for small business stakeholders, particularly for manufacturers of flavored tobacco products. **As a result of Advocacy's intervention, it is estimated that this revised compliance approach will result in a total cost savings for small firms of \$145 million.**

## Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees (Overtime Rule)

In 2015, the Department of Labor proposed regulations amending the Fair Labor Standards Act (FLSA) overtime regulations, and specifically the “white collar” exemption from overtime pay for executive, administrative, and professional employees. The proposed rule implements a 2014 presidential memorandum that directed DOL to update and modernize these overtime regulations. DOL proposed to change the salary threshold for employees who are eligible for overtime pay from \$23,660 to \$50,440. The agency also proposed a mechanism to automatically update the salary threshold annually, and sought comment on whether to change the test for the duties of exempt employees. Advocacy held small business roundtables attended by DOL officials on the presidential memorandum, and later, the proposed rule in Washington, D.C.; Louisville, Ky.; and New Orleans, La. Advocacy also heard directly from small businesses and their representatives, and small businesses conveyed concerns through Advocacy’s 10 regional advocates. Small businesses told Advocacy that increasing the salary threshold and the number of workers eligible for overtime pay would add significant compliance costs and paperwork burdens. Small businesses were also concerned that this salary threshold would be updated on a yearly basis.

On September 4, 2015, Advocacy submitted a formal comment letter to the Department of Labor. Advocacy expressed concern that the agency’s IRFA underestimated the number of small businesses affected by the rule and these entities’ compliance costs. Advocacy recommended that DOL consider adopting a regional wage rate to reflect low-wage regions, provide more compliance time for small businesses, not adopt changes to the duties test under the FLSA, and to reconsider yearly updates to the salary threshold. In the final rule, DOL adopted the standard salary level on earnings in the lowest-wage census region, which is currently the South. This change will provide relief not only to small businesses and others in low-wage industries and regions, but also to small nonprofit entities and small governmental jurisdictions. DOL also provided extra compliance time for all businesses, did not include changes to the duties test, and will make changes to the salary threshold every three years instead of yearly. **The first-year cost savings for small entities from DOL changing its salary threshold methodology to a regional wage rate are \$34.6 million in adjustment and managerial costs and \$11 million in transfers, for a total savings of \$45.6 million for small businesses.**

## Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Open Range in the United States

On May 22, 2015, Advocacy sent a letter to the Department of Labor on its proposed rule amending the H-2A visa program procedures for hiring temporary agricultural foreign workers in sheepherding, goat herding, and production of livestock on the open range. The rulemaking was undertaken as a result of a court decision that DOL’s guidance documents on this issue were subject to the notice and comment requirements of the Administrative Procedure Act. This proposed rule changes the wage methodology for H-2A workers in these special occupations. It increased the wage rate for these workers two- or three-fold over a five-year period. Based on feedback from owners of small herding operations, Advocacy expressed concern that these wage increases may significantly reduce or eliminate the profitability of these small enterprises, causing them to reduce operations or close. Based on small business feedback, DOL released a proposed

rule in October 2015 which set the monthly wage for these occupations based on a calculation of \$7.25 per hour multiplied by 48 hours per week and adjusted annually for inflation. **Advocacy estimates total small business cost savings amount to \$3.8 million in first-year and annual cost savings.**



## Definition of “Fiduciary”; Conflict of Interest Rule, Retirement Investment Advice

On October 22, 2010, the Employee Benefits Security Administration (EBSA) issued a proposed rule that would have expanded the scope of the definition of “fiduciary” to subject investment advisers to fiduciary requirements and to prohibit advisers from engaging in certain transactions. In 2011, in response to numerous public comment letters, EBSA announced that it planned to withdraw the proposed rule. On April 14, 2015, EBSA re-issued the proposed rule to expand the definition of fiduciary of an employee benefit plan. The 2015 proposal extended the fiduciary standard of care to all advisers of workplace retirement plans and individual retirement accounts. The proposed rule required these advisers to disclose any potential conflicts of interests and prohibited advisers from engaging in certain transactions.

Advocacy has been involved with this rulemaking for many years. Advocacy held small business roundtables

with small entities and EBSA staff in August 2011 and June 2015. Based on small business feedback, Advocacy submitted public comments July 17, 2015, to encourage EBSA to better estimate the costs associated with this rulemaking and to consider ways to decrease the potential small business burdens. On April 8, 2016, EBSA issued the final rule. The agency incorporated changes suggested by Advocacy and raised during Advocacy’s roundtables. In its response to comments filed by Advocacy in the final rule, EBSA notes that “significant changes were made to the rule and exemptions in response to information received from public comments, the hearings, and discussions with the regulated community.” **As a result of Advocacy’s intervention, total first-year cost savings for small firms are estimated at \$1.2 billion and total ongoing cost savings for small firms at \$332 million.**

## Environmental Protection Agency

### Agricultural Worker Protection Standards

EPA’s final revisions for its agricultural worker protection standards apply stricter standards to existing pesticide safety rules. The additional requirements include training, notification, posting, recordkeeping, pesticide safety and hazard communication information, use of personal protective equipment and supplies for routine washing and emergency contamination. The proposed

rule had included a requirement that farmers retain the pesticide label as part of the hazard communication requirements and that they collect and retain information about early entry workers. **In the final rule, EPA eliminated both of these requirements, saving small farms up to \$10.3 million annually.**

## Federal Acquisition Regulatory Council

### Fair Pay and Safe Workplaces

As a result of Advocacy’s comments, the Federal Acquisition Regulatory (FAR) Council delayed the implementation of its rule on Fair Pay and Safe Workplaces for subcontractors. The small entity costs savings are difficult to calculate because subcontractors’ costs are not clearly delineated. Advocacy has calculated the savings in the following manner. Prime and subcontractors are assumed to face similar costs on a per-firm basis, hence any cost incurred by a prime contractor but not a subcontractor due to the implementation delay can be treated as cost savings. According to the FRFA, all prime contractors

will face costs of around \$25.1 million where implementation is delayed for subcontractors. According to the FRFA there are 13,866 prime contractors and 10,317 subcontractors affected by the rule, or around three subcontractors for every four prime contractors. Using this proportion of subcontractors to prime contractors to scale the total per firm cost of the rule, **Advocacy estimates the cost savings of this rule at \$18.7 million. Furthermore, since the FAR Council assumes that all subcontractors qualify as small entities under the RFA, all of these cost savings are expected to accrue to small entities.**

**Table 5.2 Summary of Small Business Regulatory Successes, FY 2016**

Agency	Rule
Consumer Financial Protection Bureau	Home Mortgage Disclosure (Regulation C) <sup>1</sup>
Department of Health and Human Services, Food and Drug Administration	Sanitary Transportation of Human and Animal Food <sup>2</sup>
Department of Labor, Occupational Safety and Health Administration	Occupational Exposure to Respirable Crystalline Silica <sup>3</sup>
Department of Transportation, Federal Aviation Administration	Small Unmanned Aircraft Systems (Small Drones) <sup>4</sup>
Department of Treasury, Internal Revenue Service	Nondiscrimination Rules Applicable to Certain Qualified Retirement Plan Benefit Formulas <sup>5</sup>
Department of Treasury, Internal Revenue Service	Repair Regulations <sup>6</sup>
Environmental Protection Agency	Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills <sup>7</sup>
	Standards of Performance for Municipal Solid Waste Landfills <sup>8</sup>
General Services Administration	General Services Administration Acquisition Regulation (GSAR); Transactional Data Reporting <sup>9</sup>
Securities and Exchange Commission	Crowdfunding <sup>10</sup>

Note: Table 5.2 lists regulatory successes that do not have quantifiable cost savings. In contrast, Table 5.1 lists regulatory successes with quantifiable cost savings.

1. Final Rulemaking, 80 Fed. Reg. 66,128 (Oct. 28, 2015).
2. Final Rulemaking, 81 Fed. Reg. 20,092 (Apr. 6, 2016).
3. Final Rulemaking, 81 Fed. Reg. 16,286 (Mar. 25, 2016).
4. Final Rulemaking, 81 Fed. Reg. 42,064 (June 28, 2016).
5. Internal Revenue Serv., Announcement 2016-16: Withdrawal of Proposed Nondiscrimination Rules Applicable to Certain Qualified Retirement Plan Benefit Formulas, irs.gov (Apr. 14, 2016), [www.irs.gov/pub/irs-drop/a-16-16.pdf](http://www.irs.gov/pub/irs-drop/a-16-16.pdf).
6. Internal Revenue Serv., Notice 2015-82: Increase in De Minimis Safe Harbor Limit for Taxpayers Without an Applicable Financial Statement, irs.gov (Nov. 24, 2016), [www.irs.gov/pub/irs-drop/n-15-82.pdf](http://www.irs.gov/pub/irs-drop/n-15-82.pdf).
7. Final Rulemaking, 81 Fed. Reg. 59,276 (Aug. 29, 2016).
8. Final Rulemaking, 81 Fed. Reg. 59,332 (Aug. 29, 2016).
9. Final Rulemaking, 81 Fed. Reg. 41,104 (June 23, 2016).
10. Final Rulemaking, 80 Fed. Reg. 71,388 (Nov. 16, 2015).

## Consumer Financial Protection Bureau

### Home Mortgage Disclosure (Regulation C)

The Home Mortgage Disclosure Act (HMDA) requires certain lenders to report information about mortgage applications and loans. HMDA provides the public with information about how financial institutions are serving the housing needs of their communities and promotes access to fair credit in the housing market. The Dodd-Frank Wall Street Reform and Consumer Protection Act amended HMDA to require additional disclosures. In February 2014, the Consumer Financial Protection Bureau convened a SBREFA panel on home mortgage disclosure regulation, and on August 29, 2014, the agency published a proposed rule to implement the Dodd-Frank amendments to HMDA. The proposed rule required financial institutions to report all closed-end loans, open-end lines of credit, and reverse mortgages secured by dwellings. It eliminated the requirement to report unsecured home improvement loans.

On October 27, 2014, Advocacy submitted a comment letter to the CFPB on the proposed rules. Advocacy encouraged the CFPB not to include the additional loan types in the rule and to reconsider its reporting threshold. The proposed rule also set a loan volume reporting threshold of 25 loans, excluding open-end lines of credit. During the SBREFA panel, small entity representatives recommended thresholds ranging from 100 to 500 loans.

The Dodd-Frank amendments also required the collection of several new data points. The proposed rule included these statutorily mandated changes plus additional discretionary changes. Advocacy encouraged CFPB to exempt small entities from the discretionary data collection until the agency determined whether the additional information furthers the goals of HMDA.

The CFPB also sought comments on whether it should eliminate the requirement that the modified loan application (MLA) register be made available to the public. During the SBREFA panel process, the SERs stated that they rarely receive requests for their MLA registers. Advocacy encouraged the CFPB to eliminate this requirement for small entities.



At the 40th anniversary symposium, Advocacy's Chief Economist, Christine Kymn, led a panel of government and university economists. They examined how agencies measure regulatory cost to small businesses, the difficulties surrounding these analyses, and the importance of SBREFA panels.

In the final rule published on October 25, 2015, the CFPB withdrew most of the expanded coverage of commercial-purpose transactions. Reporting was limited to commercial purpose loans and lines of credit for home purchases, home improvement, or refinancing. The final rule instituted a separate reporting threshold of 100 open-end lines of credit for institutional coverage. Although the CFPB considered other thresholds for closed end mortgage loans, it maintained the 25-loan threshold. The CFPB did not exempt small financial institutions from the requirement to report some or all of the data points. However, the CFPB did agree with Advocacy's recommendation that small entities not be required to publish their MLA registers, since this information may be obtained on the CFPB's website.

## Department of Health and Human Services, Food and Drug Administration

### Sanitary Transport of Human and Animal Food

On February 5, 2014, the FDA published a rule that proposed to establish requirements for sanitary transport of human and animal food. The proposal applied to shippers, motor vehicle and rail carriers, and receivers engaged in the transportation of food for humans. FDA complied with the RFA by analyzing the impacts of the rule on small businesses. The analysis concluded that the rule would have a significant impact on covered small entities. Advocacy's comment letter asked the FDA to

consider alternatives designed to lessen this impact. In the final rule the FDA exempted shippers, receivers, or carriers engaged in food transportation operations that have less than \$500,000 in average annual revenue. Businesses other than motor carriers employing fewer than 500 persons and motor carriers having less than \$27.5 million in annual receipts would have to comply two years after the publication of the final rule.

## Department of Labor, Occupational Safety and Health Administration

### Occupational Exposure to Respirable Crystalline Silica

On March 25, 2016, the Occupational Safety and Health Administration (OSHA) issued its final rule on Occupational Exposure to Respirable Crystalline Silica. The final rule marked the culmination of a 13-year rulemaking process. Advocacy was a member of the Small Business Advocacy Review (SBAR or SBREFA) panel for this rulemaking in 2003, discussed this issue at several roundtables, filed public comments on the proposed rule, and testified at OSHA's public hearing on the rulemaking.

OSHA estimated that the silica standard would affect 646,000 small business or government entities employing 1.4 million employees. The agency's final rule lowered the permissible exposure limit (PEL) and action level (AL) for respirable crystalline silica in all industries covered by the rule. This meant that employers who exceed the PEL or AL must adopt measures to protect employees—such as requirements for exposure assessment, methods for controlling exposure, respiratory protection, medical surveillance, hazard communication, and recordkeeping. The rule contained separate standards for general industry and maritime, and for the construction industry.

Advocacy filed comments on OSHA's proposed rule, which was issued on September 12, 2013. Advocacy commended OSHA for making modifications based on the SBREFA panel report, but noted significant small business concerns with OSHA's risk assessment as well as the technological and economic feasibility of the proposed rule. Advocacy also advised OSHA to work with the construction industry to refine the proposed silica-safe work practices (i.e., Table 1) into a means of achieving compliance with the rule.

In its final rule, OSHA made a number of revisions to the construction industry's silica-safe work practices (Table 1) and offered some other exemptions and flexibilities, although these did not result in significant cost savings. OSHA's final rule left the proposed PEL and AL in place, and the agency declined Advocacy's recommendation to revisit its risk assessment and the technical and economic feasibility of the rule.

## Department of Transportation, Federal Aviation Administration

### Small Unmanned Aircraft Systems (Small Drones)

On February 23, 2015, the Federal Aviation Administration (FAA) proposed a rule on Small Unmanned Aircraft Systems (UAS) (also known as small drones). FAA's proposed rule sought to amend FAA's regulations to allow the commercial operation of small UASs (fewer than 55

lbs.) in the National Airspace System. The proposed rule specifically addressed the operation of small UASs, the testing and certification of operators, UAS registration, and the display of registration markings. While the proposed rule would have reduced barriers to small UAS

use for commercial, private, and research purposes, it also included significant operational restrictions.

Following publication of FAA's proposed rule, a number of small business representatives contacted Advocacy and expressed both support for, and concerns about, the proposed rule. Many or most of these small businesses and their representatives wanted the rulemaking to proceed, but believe the proposed rule was too restrictive and would preclude many beneficial UAS operations.

Advocacy hosted a small business roundtable on FAA's proposed rule on April 9, 2015. Representatives from FAA and the Department of Transportation also attended the roundtable to provide an overview of the proposed rule and answer questions about it. Small businesses and their representatives stated that they would like FAA to issue a final rule as quickly as possible in order to allow some commercial UAS operations that are currently prohibited, and that FAA's approach should be risk-based and technology neutral so as not to lock in any particular

technology. Advocacy filed public comments on April 24, 2015, on the proposed rule. Advocacy comments raised three particular issues, (1) that FAA should articulate and quantify the framework or parameters for assessing risk going forward; (2) that FAA should reassess the alternatives to the proposed rule to determine whether some of the operational restrictions can be relaxed without a significant increase in risk; and (3) that FAA should provide timely mechanisms for approvals, waivers, or exemptions from the final rule where an operator can demonstrate adequate safety.

FAA finalized its Small UAS rule on June 28, 2016. The final rule made a number of changes to ease restrictions for small UAS operation such as easing training and certification requirements; however significant operational restrictions remained. FAA acknowledged small business concerns and Advocacy's comments, but made clear that the final rule was an initial step in integrating commercial UAS into the National Airspace System and that additional rulemakings would be forthcoming.

## Department of the Treasury, Internal Revenue Service

### Nondiscrimination Rules Applicable to Certain Qualified Retirement Plan Benefit Formulas

On January 29, 2016, the Internal Revenue Service (IRS) issued proposed rules that, among other things, would have added a "reasonable business" classification requirement for a nondiscrimination test on retirement plans. At a small business roundtable hosted by Advocacy on March 24, 2016, small business owners and representatives expressed concern to Department of Treasury staff that the

reasonable business classification test would impose such significant burdens on small business owners who sponsor retirement plans that it would ultimately discourage them from offering plans. On April 14, 2016, the IRS published an announcement that withdrew the portion of the proposed rules relating to the new reasonable business classification test.

### Repair Regulations

On February 13, 2015, the IRS issued Revenue Procedure 2015-20 to provide guidance on accounting requirements, commonly referred to as the "repair regulations," related to the acquisition, production, or improvement of tangible property. The repair regulations direct when businesses must capitalize purchases of property and when businesses are permitted to deduct expenses in the year the businesses incur the expenditure. The revenue procedure was intended to make it easier for business owners to comply with the repair regulations. The agency also requested comment on whether the \$500 safe harbor threshold contained in the repair regulations should be raised. Advocacy organized roundtables with small entities on this

issue on February 14, 2013, and February 12, 2015. Based on feedback from small business owners and representatives, Advocacy submitted a public comment letter to the IRS on March 24, 2015, in which Advocacy encouraged the IRS to increase the \$500 safe harbor threshold. On November 24, 2015, the IRS issued guidance increasing the safe harbor limit from \$500 to \$2,500.



## Environmental Protection Agency

### Emission Guidelines, Compliance Times, and Standards of Performance for Municipal Solid Waste Landfills

In 2013, EPA initiated a series of consultations with small entities in anticipation of issuing new standards for new and existing municipal solid waste landfills. This outreach effort culminated in a SBREFA panel report issued just prior to publication of the proposed standards in 2015. Although EPA certified the new source standards and the existing source standards do not directly regulate landfills, EPA agreed that it would be appropriate to complete the panel recommendations, since most of the policy decisions that could minimize the impact on small entities would be made in the existing source standards rather than subsequent actions.

EPA proposed most of the panel recommendations, but stepped back from a few in the final rule, published on August 29, 2016. Industry has since raised some concerns about the flexibilities that EPA did adopt. If existing rules for other programs do not preclude exercise of the flexibilities, small business burden was reduced by the removal of oxygen and nitrogen wellhead standards requiring corrective action and an alternative method of determining when a gas collection and control system would be required to be in operation.

## General Services Administration

### Transactional Data Reporting

On March 4, 2015, the General Services Administration (GSA) published a proposed rule that would correct a transactional data clause that would require contractors to report prices paid for products and services delivered during the performance of a federal contract. The proposed rule would create a Common Acquisition Platform. On May 4, 2015, the Office of Advocacy submitted a formal public comment letter to GSA expressing concern with the increased cost of compliance by small businesses and other negative impacts.

On June 23, 2016, GSA published a final rule. The agency stated that “it will be mindful of Transactional Data Reporting’s small business impacts,” and as such it will phase in the initiative on a pilot basis. GSA’s senior

procurement executive will regularly evaluate progress against metrics, including small business participation, in consultation with the administrator for federal procurement policy and other interested stakeholders to determine whether to expand, limit, or discontinue the program. No expansion of the pilot or action to make Transactional Data Reporting a permanent fixture on the schedules will occur prior to the careful evaluation of at least one year of experience with the pilot.

While GSA did not accept the changes Advocacy proposed, the acknowledgment of small business concerns in the final regulation is important for small businesses and a success story.

## Securities and Exchange Commission

### Crowdfunding

On October 23, 2013, the Securities and Exchange Commission (SEC) issued a proposed rule to prescribe requirements governing the offer and sale of securities through crowdfunding. On December 16, 2013, and January 15, 2014, Advocacy hosted small business roundtables to receive feedback about the proposed rule. Based on feedback from small businesses, Advocacy submitted a public

comment letter on January 16, 2014. On October 30, 2015, the SEC voted to approve the final rule. The final rule permits non-accredited investors to participate in equity funding through crowdfunding provided that certain criteria are met, and it adopts several recommendations raised by Advocacy’s comment letter.



Under the final rule, companies making a crowdfunded offering of \$500,000 or more are required to provide expensive audited financial statements. If a company offers less than \$500,000 the company is permitted to provide reviewed rather than audited financial statements. In allowing non-audited financial statements, the SEC is directly addressing a small business concern raised in Advocacy's comment letter. Additionally, the final rule requires companies making a crowdfunded offering to make a number of public disclosures. However, as recommended by Advocacy, the SEC's final rule permits a more simplified non-financial disclosure in a question-and-answer format. Moreover, crowdfunded offerings must be made via broker-dealer or web portal intermediary. As recommended by Advocacy, the final rule allows web portals to "curate" listings, and the final rule clarifies that these intermediaries are not subject to the same potential liability as issuers.



# Appendix A

## RFA Training and Case Law

### Federal Agencies Trained in RFA Compliance, 2003–2016

Executive Order 13272 directed the Office of Advocacy to provide training to federal agencies in RFA compliance. RFA training began in 2003, and since that time Advocacy has conducted training for 18 cabinet-level departments and agencies, 69 separate component agencies and offices within these departments, 23 independent agencies, and various special groups including congressional staff, business organizations and trade associations. The following agencies have participated in RFA training.

#### Cabinet Agencies

Department of Agriculture	Office of the Chief Procurement Officer
Animal and Plant Health Inspection Service	Office of the General Counsel
Agricultural Marketing Service	Office of Small and Disadvantaged Business Utilization
Grain Inspection, Packers, and Stockyards	Transportation Security Administration
Administration	U.S. Citizenship and Immigration Service
Forest Service	U.S. Coast Guard
Rural Utilities Service	U.S. Customs and Border Protection
Office of Budget and Program Analysis	U.S. Immigration and Customs Enforcement
Department of Commerce	Department of Housing and Urban Development
National Oceanic and Atmospheric Administration	Office of Community Planning and Development
National Telecommunications and Information	Office of Fair Housing and Equal Opportunity
Administration	Office of Manufactured Housing
Office of Manufacturing Services	Office of Public and Indian Housing
Patent and Trademark Office	Department of the Interior
Department of Defense	Bureau of Indian Affairs
Defense Acquisition Regulations System	Bureau of Land Management
Defense Logistics Agency	Bureau of Ocean Energy Management, Regulation and
Department of the Air Force	Enforcement
Department of the Army, Training and Doctrine	Fish and Wildlife Service
Command	National Park Service
U.S. Strategic Command	Office of Surface Mining Reclamation and Enforcement
Department of Education	Department of Justice
Department of Energy	Bureau of Alcohol, Tobacco, and Firearms
Department of Health and Human Services	Drug Enforcement Administration
Center for Disease Control and Prevention	Federal Bureau of Prisons
Center for Medicare and Medicaid Services	Department of Labor
Center for Tobacco Products	Employee Benefits Security Administration
Food and Drug Administration	Employment and Training Administration
Indian Health Service	Employment Standards Administration
Office of Policy	Mine Safety and Health Administration
Office of Regulations	Occupational Safety and Health Administration
Department of Homeland Security	Office of Federal Contract Compliance Programs
Federal Emergency Management Agency	Department of State
National Protection and Programs Directorate	Department of Transportation

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

Department of the Treasury

Alcohol and Tobacco Tax and Trade Bureau  
Financial Crimes Enforcement Network  
Financial Management Service  
Internal Revenue Service  
Office of the Comptroller of the Currency  
Surface Transportation Board

Department of Veterans Affairs

National Cemetery Administration

Office of the Director of National Intelligence

Office of Management and Budget

Office of Federal Procurement Policy

Small Business Administration

Office of the General Counsel

**Independent Federal Agencies**

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

## RFA-Related Case Law, FY 2016

Courts across the country have decided various issues regarding the Regulatory Flexibility Act through litigation. This section notes pertinent cases in which the RFA was discussed by the courts. This section does not reflect the Office of Advocacy's opinion of the cases and is intended to provide the reader with information on what the courts have held regarding agency compliance with the RFA in FY 2016.

### *Florida Bankers Association v. U.S. Department of the Treasury*<sup>1</sup>

Two bankers' associations challenged a 2012 IRS tax-reporting regulation, which penalized banks that failed to report interest paid to certain foreign account holders, under the Administrative Procedure Act and RFA. The court ruled that the Anti-Injunction Act (AIA) barred the plaintiffs from challenging the regulation, so it did not rule on the APA and RFA violations.

The dissent in the case disagreed and stated that Supreme Court and Circuit Court precedent make it clear that the AIA did not apply in the case. The dissent also discussed the plaintiff's claim that the regulation violated the RFA. The Government had argued that the plaintiffs lacked standing to raise an RFA challenge, but the dissent disagreed, stating that because banks are the object of the regulation and their injuries would be redressed if the court granted relief, the plaintiffs had standing because they identified specific member banks from their associations that fit the definition of a small business under the RFA.

### *U.S. Telecom Association v. Federal Communications Commission*<sup>2</sup>

The plaintiff, U.S. Telecom Association, argued that the Federal Communications Commission violated the RFA by failing to conduct an adequate final regulatory flexibility analysis regarding the effects of its reclassification of broadband service as a telecommunications service on small business. The court ruled that it did not have jurisdiction to entertain the argument because the plaintiff was required to file a petition for reconsideration under the Communications Act if it wished to object to the analysis in the FRFA, which it had not done.

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1. Fla. Bankers Ass'n v. U.S. Dep't of the Treasury, 799 F.3d 1065 (D.C. Cir. 2015), cert denied, 136 S. Ct. 2429 (June 6, 2016).

2. U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016).

### *National Federation of Independent Business v. Perez*<sup>3</sup> and *Labnet, Inc. v. U.S. Department of Labor*<sup>4</sup>

Two federal courts arrived at opposite outcomes in challenges to a new "persuader" rule by the Department of Labor. "Persuader" activity pertains to labor-relations advice and services to influence employee unionizing and collective bargaining, and this rule expands the type of activity that must be reported by employers and their outside consultants. Both cases involved an RFA claim, but the courts made different rulings based on the potential harms to two sets of plaintiffs—employers and their labor consultants or attorneys.

In **National Federation of Independent Business v. Perez**, a federal district court in Texas issued a nationwide preliminary injunction or ban preventing the DOL from enforcing this proposed rule. In this case, the plaintiffs were employer associations and their members, who claimed that DOL's advice exemption interpretation violated the RFA because DOL failed to properly account for the costs of the new rule. Under the Labor-Management Reporting and Disclosure Act of 1959, persuader activity must be reported by employers and consultants in annual reports. However, there is an exemption from these reporting requirements for attorneys or consultants that provide advice to employers if they do not engage directly with employees.

DOL had certified that the rule would not have a significant impact on a substantial number of small entities. The court found that DOL's proposed rule would have expanded reporting and costs to the associations and their employer members as it also required disclosure of indirect persuader activity, such as attorneys developing personnel policies or employee communication materials

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3. Nat'l Fed'n of Indep. Bus. v. Perez, 2016 U.S. Dist. LEXIS 89694 (N.D. Tex. June 27, 2016).

4. Labnet, Inc. v. U.S. Dep't of Labor, 2016 U.S. Dist. LEXIS 81884 (D. Minn. June 22, 2016).

for employers. The court found that DOL underestimated the costs at \$100 each to comply, and it cited a study that put compliance costs at \$7 billion and \$10 billion, with more recurring costs. The court also found that the plaintiffs (associations and employers) will incur irreparable harms—such as reducing access to legal advice, trainings, and seminars. The court also noted that DOL failed to consider costs to certain law firms for complying with this rule and for filling out necessary forms. The court held that the plaintiffs made a substantial showing the DOL’s rule will impose a significant economic impact on a substantial number of small businesses and that DOL failed to conduct proper regulatory flexibility analyses.

In **Labnet, Inc., v. U.S. Department of Labor**, a federal district court in Minnesota rejected a request for a preliminary injunction by the plaintiffs, an association of law firms that represent management in labor and employment matters. Similar to *NFIB vs. Perez*, the court concluded that the plaintiffs have a strong likelihood on their claim that the new rule conflicts with the plain meaning of the statute and the advice exemption, as DOL categorizes conduct that clearly constitutes legal advice as reportable persuader activity.

However, the court did not think that the plaintiffs could succeed on the RFA claims. DOL certified the new rule under the RFA, and plaintiffs alleged that DOL’s certification was arbitrary and capricious because the agency did not consider a third party’s published analysis, nor did the agency account for the cost of filing the LM-21 form. The court rejected these arguments that were successful in the *NFIB* case, stating that the third-party analysis should be discounted because of the problematic assumptions it relied on. The court stated that the LM-21 challenge was premature in that it is the subject of a separate rulemaking. The court ultimately found that the plaintiffs (the law firms that represent employers), could not show irreparable harm other than filling out extra forms that they would normally be exempt from.

### *Goethel v. Pritzker*<sup>5</sup>

The plaintiffs claimed that the National Marine Fisheries Service (NMFS) requirement to have at-sea monitors (ASMs) on board fishing ships was illegal because NMFS lacked the legal authority to issue the rule. Plaintiffs claimed that even if that requirement to pay for the

monitors was permissible, the NMFS violated the RFA. Although NMFS prepared an IRFA and FRFA according to the RFA, the plaintiffs claimed that NMFS did not sufficiently analyze how the rule would economically impact fisheries. The court rejected this argument, however, because the RFA does not require agencies to consider various alternatives in a specific amount of detail. The court rejected the plaintiffs’ RFA argument entirely.

### *Zero Zone, Inc., v. U.S. Department of Energy*<sup>6</sup>

In 2009, the Department of Energy (DOE) published two final rules that prescribed energy efficiency standards and test procedures to implement the standards for commercial refrigeration equipment under the Energy Policy and Conservation Act (EPCA). Three groups of entities—Zero Zone, Inc. (a small business specializing in commercial refrigeration equipment), the Air-Conditioning, Heating and Refrigeration Institute, and the North American Association of Food Equipment Manufacturers—challenged the decision-making process and the substance of the two rules. The petitioners challenged the engineering analysis, the economic analysis, the assessment of the cumulative regulatory burden, and the regulatory flexibility analysis in the rules.

The petitioners argued that DOE’s final regulatory flexibility analysis failed to comply with the RFA. They noted the four significant alternatives that agencies should discuss in an IRFA under Section 603(c) of the RFA, and the petitioners argued that agencies must also consider all four of those alternatives in the final regulatory flexibility analysis. In the FRFA, DOE had noted several policy alternatives, but had stated that the alternatives would have made the energy savings significantly smaller than what was expected in the standards adopted in the final rules. The petitioners noted that DOE failed to consider an exemption for small businesses in the FRFA, which they argued constituted a significant alternative that must be considered.

The court examined the objectives of the EPCA, and noted that the statute contemplates exemptions for small manufacturers. The court, however, noted that exemptions were only allowed for short periods of time under the EPCA after consulting with the Attorney General. Because a blanket exemption would be inconsistent with the objectives of the EPCA, the court ruled that such an exemption for small businesses was not a significant

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5. *Goethel v. Pritzker*, No. 15-cv-497-JL, 2016 U.S. Dist. LEXIS 99515 (D.N.H. July 29, 2016).

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6. *Zero Zone, Inc., v. U.S. Dep’t of Energy*, 832 F.3d 654 (7th Cir. 2016).



alternative that DOE needed to consider.

As a result, the court determined that DOE had made a good-faith effort to describe the impact of the rule on small businesses and the significant alternatives it considered. Therefore, the court ruled that DOE's FRFA fully complied with the RFA.



## Appendix B

# SBREFA Panels Convened Through FY 2016

Table B.1 SBREFA Panels Convened through FY 2016

Rule	Date Convened	Date Completed	NPRM	Final Rule Published
<b>Environmental Protection Agency</b>				
Nonroad Diesel Engines	03/25/97	05/23/97	09/24/97	10/23/98
Industrial Laundries Effluent Guidelines	06/06/97	08/08/97	12/17/97	Withdrawn 08/18/99
Stormwater Phase II	06/19/97	08/07/97	01/09/98	12/08/99
Transportation Equipment Cleaning Effluent Guidelines	07/16/97	09/23/97	06/25/98	08/14/00
Centralized Waste Treatment Effluent Guideline	11/06/97	01/23/98	09/10/03 01/13/99	12/22/00
Underground Injection Control (UIC) Class V Wells	02/17/98	04/17/98	07/29/98	12/07/99
Ground Water	04/10/98	06/09/98	05/10/00	11/08/06
Federal Action Plan for Regional Nitrogen Oxide Reductions	06/23/98	08/21/98	10/21/98	04/28/06
Section 126 Petitions	06/23/98	08/21/98	09/30/98	05/25/99
Radon in Drinking Water	07/09/98	09/18/98	11/02/99	
Long Term 1 Enhanced Surface Water Treatment	08/21/98	10/19/98	04/10/00	01/14/02
Filter Backwash Recycling	08/21/98	10/19/98	04/10/00	06/08/01
Arsenic in Drinking Water	03/30/99	06/04/99	06/22/00	01/22/01
Recreational Marine Engines	06/07/99	08/25/99	10/05/01 08/14/02	11/08/02
Light Duty Vehicles/Light Duty Trucks Emissions and Sulfur in Gas	08/27/98	10/26/98	05/13/99	02/10/00
Diesel Fuel Sulfur Control Requirements	11/12/99	03/24/00	06/02/00	01/18/01
Lead Renovation and Remodeling Rule	11/23/99	03/03/00	01/10/06	04/22/08
Metals Products and Machinery	12/09/99	03/03/00	01/03/01	05/13/03
Concentrated Animal Feedlots	12/16/99	04/07/00	01/12/01	02/12/03
Reinforced Plastics Composites	04/06/00	06/02/00	08/02/01	04/21/03

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

Rule	Date Convened	Date Completed	NPRM	Final Rule Published
Stage 2 Disinfectant Byproducts; Long Term 2 Enhanced Surface Water Treatment	04/25/00	06/23/00	08/11/03 08/18/03	01/04/06 01/05/06
Construction and Development Effluent Limitations Guidelines	07/16/01	10/12/01	06/24/02	Withdrawn 04/26/04
Nonroad Large Spark Ignition Engines, Recreation Land Engines, Recreation Marine Gas Tanks and Highway Motorcycles	05/03/01	07/17/01	10/05/01 08/14/02	11/08/02
Aquatic Animal Production Industry	01/22/02	06/19/02	09/12/02	08/23/04
Lime Industry – Air Pollution	01/22/02	03/25/02	12/20/02	01/05/04
Nonroad Diesel Engines – Tier IV	10/24/02	12/23/02	05/23/03	06/29/04
Cooling Water Intake Structures Phase III Facilities	02/27/04	04/27/04	11/24/04	06/15/06
Section 126 Petition (2005 Clean Air Interstate Rule)	04/27/05	06/27/05	08/24/05	04/28/06
Federal Action Plan for Regional Nitrogen Oxide/Sulfur Dioxide (2005 Clean Air Interstate Rule)	04/27/05	06/27/05	08/24/05	04/28/06
Mobile Source Air Toxics	09/07/05	11/08/05	03/29/06	02/26/07
Non-Road Spark-Ignition Engines/Equipment	08/17/06	10/17/06	05/18/07	10/08/08
Total Coliform Monitoring	01/31/08	01/31/08	07/14/10	
Renewable Fuel Standards 2	07/09/08	09/05/08	05/26/09	03/26/10
Pesticides; Agricultural Worker Protection Standard Revisions	09/04/08	11/03/08	03/19/14	09/28/15
Pesticides; Certification of Pesticide Applicators (Revisions)	09/04/08	11/03/08	08/24/15	
National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers: Major and Area Sources	01/22/09	03/23/09	06/04/10	03/21/11
Pesticides; Reconsideration of Exemptions for Insect Repellents	11/16/09	01/15/10		
Revision of New Source Performance Standards for New Residential Wood Heaters	08/04/10	10/26/11	02/03/14	03/16/15
National Emission Standards for Hazardous Air Pollutants for Coal- and Oil-fired Electric Utility Steam Generating Units	10/27/10	03/02/11	05/03/11	02/16/12
Stormwater Regulations Revision to Address Discharges from Developed Sites	12/06/10	10/04/11		

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

Rule	Date Convened	Date Completed	NPRM	Final Rule Published
Formaldehyde Emissions from Pressed Wood Products	02/03/11	04/04/11	06/10/13	07/27/16
National Emission Standards for Hazardous Air Pollutants (NESHAP) Risk and Technology Review (RTR) for the Mineral Wool and Wool Fiberglass Industries	06/02/11	10/26/11	11/12/11	07/29/15
Greenhouse Gas Emissions from Electric Utility Steam Generating Units	06/09/11	Proposed rule published without completion of the SBREFA panel report.	04/14/13	04/13/12 01/08/14 06/02/14
Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards	08/04/11	10/14/11	05/21/13	04/28/14
Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards	08/04/11	Proposed rule published without completion of the SBREFA panel report.	06/30/14	12/01/15
Long Term Revisions to the Lead and Copper Rule	08/14/12	08/16/13		
National Emissions Standards for Hazardous Air Pollutants (NESHAP): Brick and Structural Clay Products and Clay Products	06/12/13	01/16/14	12/18/14	10/26/15
Review of New Source Performance Standards and Amendments to Emission Guidelines for Municipal Solid Waste Landfills	12/05/13	07/21/15	07/17/14 08/27/15	08/29/16
PCB (Polychlorinated Biphenyls) Use Authorizations Update Rule	02/07/14	04/07/14		
Greenhouse Gas Emissions Standards for Medium- and Heavy-Duty Vehicles	10/22/14	01/15/15	07/13/15	
Federal Plan for Regulating Greenhouse Gas Emissions from Electric Generating Units	04/30/15	07/28/15	10/23/15	
Emission Standards for New and Modified Sources in the Oil and Natural Gas Sector	06/16/15	08/13/15	09/18/15	06/3/16
Risk Management Program Modernization	11/04/15	02/19/16	03/14/16	
Regulation of N-Methylpyrrolidone and Methylene Chloride in Paint and Coating Removal under Section 6(a) of the Toxic Substances Control Act	06/01/16	09/26/16		
Regulation of Trichloroethylene for Vapor Degreasers under Section 6(a) of the Toxic Substances Control Act	06/01/16	09/26/16		
Financial Responsibility Requirements for Hard Rock Mining	08/24/16			

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

Rule	Date Convened	Date Completed	NPRM	Final Rule Published
<b>Occupational Safety and Health Administration</b>				
Tuberculosis	09/10/96	11/12/96	10/17/97	Withdrawn 12/31/03
Safety and Health Program Rule	10/20/98	12/19/98		
Ergonomics Program Standard	03/02/99	04/30/99	11/23/99	11/14/00
Confined Spaces in Construction	09/26/03	11/24/03	11/28/07	
Electric Power Generation, Transmission, and Distribution	04/01/03	06/30/03	06/15/05	04/11/14
Occupational Exposure to Crystalline Silica	10/20/03	12/19/03	09/12/13	03/25/16
Occupational Exposure to Hexavalent Chromium	01/30/04	04/20/04	10/04/04	02/28/06
Cranes and Derricks in Construction	08/18/06	10/17/06	10/09/08	08/09/10
Occupational Exposure to Beryllium	09/17/07	01/15/08	08/07/15	
Occupational Exposure to Diacetyl and Food Flavorings Containing Diacetyl	05/05/09	07/02/09		
Occupational Exposure to Infectious Diseases in Healthcare and Other Related Work Settings	10/14/14	12/22/14		
Process Safety Management Standard	06/02/16	08/01/16		
<b>Consumer Financial Protection Bureau</b>				
Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (RESPA or Regulation X) and Truth in Lending Act (TILA or Regulation Z)	02/21/12	04/23/12	08/23/12	12/31/13
Mortgage Servicing under the Real Estate Settlement Procedures Act (RESPA or Regulation X) and Truth in Lending Act (TILA or Regulation Z)	04/09/12	06/11/12	09/17/12	02/14/13
Loan Originator Compensation Requirements under Regulation Z	05/09/12	07/12/12	09/07/12	02/15/13
Home Mortgage Disclosure Act	02/27/14	04/24/14	08/29/14	10/15/15
Limit Certain Practices for Payday, Vehicle Title, and Similar Loans	04/27/15	06/25/15	07/22/16	
Arbitration Clauses	10/20/15	12/11/15	05/24/16	
Debt Collection	08/25/16	10/19/16		

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



## Appendix C

# Text of the Regulatory Flexibility Act

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

### *Congressional Findings and Declaration of Purpose*

(a) The Congress finds and declares that –

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

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

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

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

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

(6) the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency

resources, enforcement problems and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation;

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

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

(b) It is the purpose of this Act [enacting this chapter and provisions set out as notes under this section] to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

### *Regulatory Flexibility Act*

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

## § 601. Definitions

For purposes of this chapter—

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

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

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

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

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

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

(7) the term “collection of information” —

(A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the

public, of facts or opinions by or for an agency, regardless of form or format, calling for either —

(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, 10 or more persons, other than agencies, instrumentalities, or employees of the United States; or

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

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

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

## § 602. Regulatory agenda

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

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

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

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

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

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

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

### § 603. Initial regulatory flexibility analysis

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

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

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

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

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

(4) a description of the projected reporting, 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.

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

(1) the establishment of differing compliance or reporting requirements or timetables that take into account

the resources available to small entities;

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

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

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

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

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

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

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

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

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

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

### § 604. Final regulatory flexibility analysis

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

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

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

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

rule in the final rule as a result of the comments;

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

(5) a description of the projected reporting, 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;

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

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

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

### ***§ 605. Avoidance of duplicative or unnecessary analyses***

(a) Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.

(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the *Federal Register* at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

(c) In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the

purposes of sections 602, 603, 604 and 610 of this title.

### ***§ 606. Effect on other law***

The requirements of sections 603 and 604 of this title do not alter in any manner standards otherwise applicable by law to agency action.

### ***§ 607. Preparation of analyses***

In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.

### ***§ 608. Procedure for waiver or delay of completion***

(a) An agency head may waive or delay the completion of some or all of the requirements of section 603 of this title by publishing in the *Federal Register*, not later than the date of publication of the final rule, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes compliance or timely compliance with the provisions of section 603 of this title impracticable.

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

### ***§ 609. Procedures for gathering comments***

(a) When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the

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



rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques such as—

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

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

(3) the direct notification of interested small entities;

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

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

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

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

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

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

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

(5) not later than 60 days after the date a covered agency convenes a review panel pursuant to paragraph (3), the review panel shall report on the comments of the small entity representatives and its findings as to issues related to subsections 603(b), paragraphs (3), (4) and (5)

and 603(c), provided that such report shall be made public as part of the rulemaking record; and

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

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

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

(1) the Environmental Protection Agency,

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

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

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

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

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

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

### § 610. Periodic review of rules

(a) Within one hundred and eighty days after the effective date of this chapter, each agency shall publish in the *Federal Register* a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities. Such plan may be amended by the agency at any time by publishing the revision in the *Federal Register*. The purpose of the review shall be to determine whether

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

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

- (1) the continued need for the rule;
- (2) the nature of complaints or comments received concerning the rule from the public;
- (3) the complexity of the rule;
- (4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and
- (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

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

### § 611. Judicial review

(a)

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

(2) Each court having jurisdiction to review such rule

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

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

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

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

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

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

(A) remanding the rule to the agency, and

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

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

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

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

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

## § 612. Reports and intervention rights

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

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

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





## Appendix D

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

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### Presidential Documents

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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

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final rule; provided, however, that such inclusion is not required if the head of the agency certifies that the public interest is not served thereby. Agencies and Advocacy may, to the extent permitted by law, engage in an exchange of data and research, as appropriate, to foster the purposes of the Act.

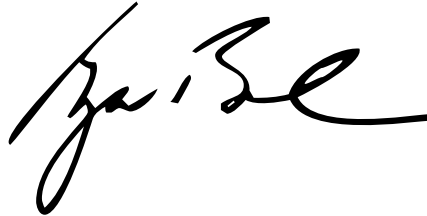
**Sec. 4. Definitions.** Terms defined in section 601 of title 5, United States Code, including the term “agency,” shall have the same meaning in this order.

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

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

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

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



THE WHITE HOUSE,  
August 13, 2002.

## Appendix E

# Executive Orders on Regulatory Review

Appendix E contains the text of three executive orders issued by President Barack Obama in 2011 and 2012 to strengthen federal agency compliance with the RFA.

E.O. 13563, Improving Regulation and Regulatory Review, and Memorandum on Regulatory Flexibility, Small Business and Job Creation;

E.O. 13579, Regulation and Independent Regulatory Agencies; and

E.O. 13610, Identifying and Reducing Regulatory Burdens

# Presidential Documents

Title 3—

Executive Order 13563 of January 18, 2011

The President

## Improving Regulation and Regulatory Review

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A handwritten signature in black ink, appearing to be Barack Obama's signature, consisting of a large 'B' followed by a circle and a vertical line through it, and a long horizontal stroke extending to the right.

THE WHITE HOUSE,  
*January 18, 2011.*

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



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## Presidential Documents

Memorandum of January 18, 2011

### Regulatory Flexibility, Small Business, and Job Creation

#### Memorandum for the Heads of Executive Departments and Agencies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A handwritten signature in black ink, appearing to be "Geoffrey" followed by a stylized flourish.

THE WHITE HOUSE,  
Washington, January 18, 2011

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

# Presidential Documents

Title 3—

Executive Order 13610 of May 10, 2012

The President

## Identifying and Reducing Regulatory Burdens

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

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

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

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

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

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

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

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

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

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

(b) Nothing in this order shall be construed to impair or otherwise affect:  
(i) the authority granted by law to a department or agency, or the head thereof; or

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

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

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



THE WHITE HOUSE,  
May 10, 2012.

# Appendix F

## Abbreviations

RFA	Regulatory Flexibility Act	FY	fiscal year
SBREFA	Small Business Regulatory Enforcement Fairness Act	GCW	gross combined weight
SBAR	small business advocacy review	GSA	General Services Administration
IRFA	initial regulatory flexibility analysis	GSAR	General Services Administration Acquisition Regulation
FRFA	final regulatory flexibility analysis	GVW	gross vehicle weight
AIA	Anti-Injunction Act	HFCs	hydrofluorocarbons
AL	action level	HHS	Department of Health and Human Services
APHIS	Animal and Plant Health Inspection Service	HMDA	Home Mortgage Disclosure Act
BIAS	broadband internet access service	ILEC	incumbent local exchange carriers
Bsal	batrachochytrium salamandrivorans	IRFA	initial regulatory flexibility analysis
CAP	common acquisition platform	IRS	Internal Revenue Service
CBI	confidential business information	JOBS Act	Jumpstart Our Business Startups
CFPB	Consumer Financial Protection Bureau	MLA	modified loan application
CGMP	current good manufacturing practice	MVPD	multi-channel video programming distributor
CORPS	Army Corps of Engineers	NESHAP	national emission standards for hazardous air pollutants
COTS	commercially off the shelf item	NIST	National Institute of Standards and Technology
CPSC	Consumer Product Safety Commission	NMFS	National Marine Fisheries Service
DE	designated entity	NOAA	National Oceanographic and Atmospheric Administration
DFAR	Defense Acquisition Regulations	NPRM	notice of proposed rulemaking
DOD	Department of Defense	OFPP	Office of Federal Procurement Policy
DOE	Department of Energy	OSHA	Occupational Safety and Health Administration
DOI	Department of the Interior	PEL	permissible exposure limit
DOJ	Department of Justice	PFC	perfluorinated chemical
DOL	Department of Labor	PI	proprietary information
DOT	Department of Transportation	PSM	process safety management
DQP	designated qualified person	RESPA	Real Estate Settlement Procedures Act
E.O.	executive order	RFA	Regulatory Flexibility Act
EBSA	Employee Benefits Security Administration	SBA	Small Business Administration
EBSA	Employee Benefits Security Administration	SBAR	small business advocacy review
ELG	effluent limitations guideline	SBREFA	Small Business Regulatory Enforcement Fairness Act
EPA	Environmental Protection Agency	SER	small entity representative
EPCA	Energy Policy and Conservation Act	SFD	Carrier Safety Fitness Determination
FAA	Federal Aviation Administration	SNAP	significant new alternative program
FAR	Federal Acquisition Regulatory Council	TILA	Truth in Lending Act
FCC	Federal Communications Commission	TSCA	Toxic Substance Control Act
FDA	Food and Drug Administration	U.S.C.	United States Code
FLSA	Fair Labor Standards Act	UAS	unmanned aircraft systems
FMCSA	Federal Motor Carrier Safety Administration	VA	Department of Veterans Affairs
FNS	Food and Nutrition Service	VOC	volatile organic compound
FRFA	final regulatory flexibility analysis		
FWS	Fish and Wildlife Service		

U.S. SMALL BUSINESS ADMINISTRATION

# OFFICE OF ADVOCACY

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