

May 2020

# Report on the Regulatory Flexibility Act, FY 2019

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. Regional and national advocates around the country and an office in Washington, D.C., support the chief counsel's efforts.

This report covers Regulatory Flexibility Act compliance for FY 2019, from October 1, 2018, through September 31, 2019. To learn more, visit the Regulatory Flexibility Act webpage at <https://advocacy.sba.gov/category/resources/annual-report-on-the-rfa/>.

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 LinkedIn, Twitter, and Facebook.



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May 2020

To: The White House  
The Senate Committee on Small Business and Entrepreneurship  
The House Committee on Small Business

The Regulatory Flexibility Act (RFA) is the statutory basis of small entity consideration in federal rulemaking. The RFA assigns the Office of Advocacy official responsibility in rulemaking. Advocacy monitors whether regulations take small entities into account and informs agencies of small businesses' concerns in order to improve regulations.

The RFA directs the Chief Counsel for Advocacy to monitor and report on federal agencies' compliance with the law. This report fulfills that mandate, covering fiscal year 2019: from October 1, 2018, to September 30, 2019. In addition, Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," also imposes certain requirements on federal agency rulemaking and requires Advocacy to report on agency compliance with that executive order. Chapter 2 reports on their compliance with the statute and the executive order in FY 2019.

Under the administration of President Donald J. Trump, private-sector deregulation has been a top priority. Two executive orders have formed the basis of deregulatory action for federal agencies. Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs," required that every new federal regulation be balanced by the elimination of at least two other regulations and required any costs imposed by new regulations be offset by eliminating the costs of existing regulations. Executive Order 13777 provided a framework for federal agencies to comply with the President's regulatory reform agenda.

Advocacy has worked to maximize the impact these executive orders have on small business. Advocacy's Regional Regulatory Roundtable initiative has provided small businesses an avenue to discuss the regulatory concerns they face with federal agencies and their representatives. Additionally, Advocacy has worked with federal agencies to relieve regulatory burdens faced by small business and continues to work with them to identify policies that can be modified to benefit small businesses.

Advocacy's overall efforts to promote federal agency compliance with the RFA resulted in \$773 million in regulatory cost savings for small entities in FY 2019. Ten rules were modified by six agencies. Seven of these were deregulatory actions, which were taken by five agencies.

- The largest compliance cost saving resulted from changes to the "white collar" exemption from overtime rules under the Fair Labor Standards Act. Thanks to Advocacy's work and comment letters from small businesses, the Department of Labor set the minimum salary threshold for salaried workers at \$35,568. Advocacy estimates that this change will result in a cost savings of \$204.6 million.

- Advocacy also secured another major regulatory cost savings through the elimination of the Center for Medicare and Medicaid Services 25 percent rule, which reduced overall Medicare reimbursement rates for long-term care hospitals. Thanks to Advocacy's suggestions, the elimination of the rule resulted in cost savings of \$72 million to small entities.
- Another cost savings comes from the Environmental Protection Agency's repeal of the 2015 Waters of the US Rule. Small businesses will receive regulatory relief from the change to a less confusing definition and more regulatory certainty so that they can more easily comply with the law. The result is an estimated savings of \$75.7 million.

Advocacy also won other, less quantifiable, battles for small businesses.

- Advocacy also acted on behalf of small businesses involved in the Takata airbag recall process. Thanks to concerns raised by Advocacy, the Environmental Protection Agency clarified the regulatory status of waste from recalled airbags, ensuring that the requirements for small businesses involved in airbag disposal were clear.
- The Department of the Interior's Fish and Wildlife Services and the Department of Commerce's National Marine Fisheries Service issued three rules related to the Endangered Species Act. The finalized rules incorporate Advocacy's feedback to clarify the procedures used by the federal agencies to administer the Endangered Species Act, creating an environment in which small businesses have more certainty about their regulatory burden.

Chapter 2 reports on agencies' compliance with Executive Order 13272. Advocacy provided training in RFA compliance to 113 officials at seven agencies. Advocacy confirmed whether agencies had posted their RFA procedures on their websites. Table 2.2 provides these links.

Also of note in FY 2019:

- In FY 2019, Advocacy submitted 22 formal comment letters to 10 regulatory agencies. These letters expressed Advocacy's concerns about how new rules and regulations would harm small businesses.
- In FY 2019, Advocacy held 17 issue roundtables. These roundtables are helpful tools to mediate conversations between small business owners and federal regulators and allow Advocacy to participate in conversations about federal rulemaking.
- In FY 2019, Advocacy held 10 regional roundtables in 10 different states. The regional roundtables help Advocacy staff learn about the biggest concerns facing small businesses. Small business owners use these meetings to tell Advocacy stories about how federal regulations drain their businesses of resources, and staff use them to gather more detailed information to help in regulatory reform efforts.

I am pleased to present you this report on federal agency compliance with the Regulatory Flexibility Act. Advocacy looks forward to further achievements in reducing small businesses' regulatory burdens.

Sincerely,



Major L. Clark, III  
Acting Chief Counsel for Advocacy

# Contents

Chapter 1 Small Business, the Regulatory Flexibility Act, and the Era of Deregulation .....	1
The RFA, Its Requirements, and Efforts to Strengthen It .....	3
Chapter 2 Compliance with Executive Order 13272 and the Small Business JOBS Act of 2010 ..	5
RFA Training .....	5
Table 2.1 RFA Training at Federal Agencies in FY 2019.....	5
RFA Compliance Guide.....	6
Agency Compliance with E.O. 13272 .....	7
Table 2.2 Compliance with Rule-Writing Requirements .....	8
Chapter 3 Communication with Federal Agencies and Small Businesses .....	10
Communication With Federal Agencies .....	10
Interagency Communications .....	10
E.O. 12866 and Interagency Review of Upcoming Rules.....	10
SBREFA Panels.....	11
Regulatory Agendas.....	11
Retrospective Review of Existing Regulations.....	12
Outreach To Small Business .....	13
Issue Roundtables .....	13
Consumer Financial Protection Bureau .....	13
Department of Justice.....	14
Department of Labor.....	14
Department of Labor, OSHA; MSHA.....	14
Environmental Protection Agency.....	15
Food and Drug Administration .....	16
Table 3.1 Regulatory Roundtables Hosted by the Office of Advocacy.....	17
Regional Regulatory Reform Roundtables and Site Visits .....	18
Table 3.2 Regional Regulatory Reform Roundtable Dates and Locations in FY 2019 ...	18
Table 3.3. Locations of Regulatory Reform Site Visits in FY 2019.....	19
Chapter 4 Advocacy’s Public Comments to Federal Agencies in FY 2019.....	21
Table 4.1 Regulatory Comment Letters Filed by the Office of Advocacy, FY 2019 .....	22
Summaries of Advocacy’s Official Public Comments .....	23
Consumer Financial Protection Bureau .....	23
Payday, Vehicle Title, and Certain High-Cost Installment Loans.....	24
Debt Collection .....	24
Department of Agriculture, Food and Nutritional Services.....	25

Administrative Actions Pending Freedom of Information Act Processing .....	25
Providing Regulatory Flexibility for Retailers in the SNAP .....	26
Department of Defense .....	26
Prompt Payments of Small Business Contractors .....	26
Draft Cyber Certification Model.....	26
Department of Education .....	27
Nondiscrimination on the Basis of Sex in Education Programs .....	27
Department of Energy .....	27
Test Procedure Interim Waiver Process.....	27
Department of Homeland Security, United States Citizenship and Immigration Service ....	28
Registration Requirement for Petitioners Seeking to File H-1B Petitions.....	28
Department of Labor.....	29
Overtime Rules under Fair Labor Standards Act .....	29
Department of Transportation, Federal Motor Carrier Safety Administration .....	30
Hours of Service of Drivers .....	30
Department of the Treasury, Tax and Trade Bureau .....	30
Modernization of Labeling and Advertising Regulations .....	30
Environmental Protection Agency.....	31
Residential Heaters.....	31
Renewable Fuel Standard Credit Market Regulations .....	31
Municipal Solid Waste Landfills .....	31
Environmental Protection Agency/ U.S. Army Corps of Engineers .....	32
Revised Definition of “Waters of the United States” .....	32
Federal Trade Commission .....	32
Standards for Safeguarding Customer Information .....	32
Small Business Administration.....	33
Calculation of Annual Average Receipts for Small Business Size Standards.....	33
Express Loans; Affiliation Standards .....	33
Chapter 5 Small Business Regulatory Cost Savings and Success Stories.....	35
Descriptions of Small Business Regulatory Cost Savings .....	36
Table 5.1 Summary of Small Business Regulatory Cost Savings, FY 2019.....	36
Consumer Financial Protection Bureau .....	37
Delay of Payday Lending Rule Compliance Date.....	37
Department of Education .....	37
Repeal of the Gainful Employment Rule.....	37
Department of Health & Human Services, Centers for Medicare and Medicaid Services.....	38
Withdrawal of Safe Harbor Protection for Rebates Involving Pharmaceuticals Rule ...	38
Elimination of the 25 Percent Rule.....	38
Department of the Interior, Bureau of Safety and Environmental Enforcement .....	38



Well Control Provisions .....	38
Department of Labor, Wage and Hour Division .....	39
Overtime Rules under FLSA.....	39
Environmental Protection Agency.....	39
Toxic Substances Control Act Fees Rule .....	39
Resource Conservation and Recovery Act (RCRA) Pharmaceuticals .....	39
Methylene Chloride; Regulation of Paint and Coating Removal for Consumer Use .....	40
Environmental Protection Agency and U.S. Army Corps of Engineers.....	40
Repeal of the 2015 Waters of the United States Rule .....	40
Small Business Regulatory Success Stories .....	41
Table 5.2 Summary of Small Business Regulatory Success Stories, FY 2019 .....	41
Department of the Interior and Department of Commerce .....	42
Endangered Species Act Mitigation .....	42
Department of Homeland Security, United States Citizenship and Immigration Services...	42
H-1B Visa Registration Delay .....	42
Environmental Protection Agency.....	43
Facilitating Safe Management of Recalled Airbags .....	43
Federal Communications Commission .....	43
Limitations on USTelecom’s Grant of Forbearance .....	43
Adoption of New One-Touch-Make-Ready Policies.....	44
Appendix A	
The Regulatory Flexibility Act.....	45
Appendix B	
Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking .....	55
Appendix C	
Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs .....	57
Executive Order 13777: Enforcing the Regulatory Reform Agenda .....	59
Appendix D	
RFA Training, Case Law, and SBREFA Panels.....	62
Appendix E	
Sample of Letters to Agency Heads .....	69
Appendix F	
History of the Regulatory Flexibility Act.....	73
Appendix G	
Abbreviations.....	79

# Chapter 1

## Small Business, the Regulatory Flexibility Act, and the Era of Deregulation

The Office of Advocacy has pursued regulatory reform since its inception. No law after Advocacy's basic charter has had more influence on the office's activities than the Regulatory Flexibility Act (RFA), first enacted in 1980<sup>1</sup> and strengthened in 1996<sup>2</sup> and 2010.<sup>3</sup> It established in law the principle that government agencies must consider the effects of their regulatory actions on small entities and mitigate them where possible. The RFA arose from years of frustration with ever-increasing federal regulation that disproportionately harmed large numbers of smaller entities. From the RFA's section titled "Congressional Findings and Declaration of Purpose":

It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.<sup>4</sup>

The RFA includes procedures for agencies to accomplish this purpose and provides Advocacy,

whom a Florida federal court called the "watchdog of the RFA," with tools to help promote compliance. The 1996 amendments to the RFA provided judicial review for many of its provisions, and since then a significant body of RFA case law has developed, including instances in which rules or their impact analyses have been remanded by the courts due to RFA problems.<sup>5</sup>

In addition to RFA legislation, several executive orders have given Advocacy additional responsibilities to assist agencies in meeting their RFA responsibilities. One of these, Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking*,<sup>6</sup> requires Advocacy to report annually on agencies' compliance with the RFA, included in this Annual Report on the RFA.

Executive Order 13272 also requires Advocacy to provide RFA compliance training to federal regulatory officials, which the office does through live classroom training. Advocacy customizes RFA training to each individual agency or multi-agency group receiving the training. Better-trained regulatory and policy staff can better assess the potential need for both deregulation and regulation, and when regulation is necessary, develop smarter rules that have reduced impacts on small entities. Additionally, RFA training provides federal regulators with a better

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

<sup>2</sup> The Small Business Regulatory Enforcement Fairness Act, Public Law 104-121, Title II (March 29, 1996).

<sup>3</sup> The Small Business Jobs Act of 2010, Public Law 111-240, title I, § 1601 (September 27, 2010) and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, title X, § 1100G(a) (July 21, 2010).

<sup>4</sup> 5 U.S.C. § 601 note.

<sup>5</sup> E.g., *Southern Offshore Fishing Association v. Daley*, 55 F. Supp. 2d 1336 (M.D. Fla. 1999), and *Northwest Mining Assoc. v. Babbitt*, 5 F. Supp. 2d 9 (D.D.C. 1998), in which Advocacy filed an *amicus* brief.

<sup>6</sup> Executive Order 13272 (August 13, 2002), 67 Fed. Reg. 53461.



understanding of how the RFA is a positive tool for regulatory compliance. Fully RFA-compliant rules also result in better small business compliance and reduced litigation.

Since the enactment of the RFA in 1980, Advocacy has sought to help agencies develop a regulatory culture that internalizes the Act's purposes. Advocacy shows regulatory and policy officials how considering the potential effects of their proposals on small entities and adopting mitigation strategies can improve their regulations, both by reducing costs to small entities and the economy as a whole, and by improving compliance by those regulated. Since 2003, when Advocacy began its ongoing RFA compliance training program, through FY 2019, live classroom training has been provided to officials in 19 cabinet-level departments and agencies, 78 separate component agencies and offices within these departments, 23 independent agencies, and various special groups including congressional staff, business organizations, and trade associations.

Shortly after his inauguration in January 2017, President Donald J. Trump issued two new executive orders aimed at reducing the regulatory burden faced by the private sector. The first, Executive Order 13771, *Reducing Regulation and Controlling Regulatory Costs*,<sup>7</sup> commonly known as "one-in, two-out," required that any new regulations be balanced by the elimination of at least two other regulations. It also required that the incremental cost of new regulations be entirely offset by elimination of existing costs of other regulations. The second, Executive Order 13777, *Enforcing the Regulatory Reform Agenda*,<sup>8</sup> set a framework for implementing this vision of

regulatory reform, requiring that each agency appoint a regulatory reform officer to supervise the process of regulatory reform going forward.

Advocacy determined that these measures presented an opportunity to reduce the federal regulatory impact on small business. The requirements of the RFA play a role in this process because in most cases agencies would implement the regulatory reform executive orders through notice-and-comment rulemaking.

To maximize this opportunity for small business regulatory reform, Advocacy has continued its successful Regional Regulatory Reform Roundtable initiative, launched in 2017. Advocacy staff and regional advocates have hosted small business roundtables around the country in order to identify small business regulatory issues and to assist agencies with regulatory reform and reduction in compliance with Executive Orders 13771 and 13777. Advocacy has invited federal agencies to send representatives to these roundtables to hear directly from stakeholders on specific recommendations for regulatory changes. In FY 2019, these regulatory review and reform roundtables were held in 10 cities. This is in addition to the 17 roundtables held by Advocacy's legal team on proposed regulations and related issues.

Agencies' implementation of these executive orders offer significant opportunities for regulatory relief targeted to small businesses. The RFA requires agencies to analyze their deregulatory actions to maximize small business benefits in the marketplace. This report includes descriptions of success stories of small business burden reduction

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<sup>7</sup> Executive Order 13771 (January 30, 2017), 82 Fed. Reg. 9339.

<sup>8</sup> Executive Order 13777 (March 1, 2017), 82 Fed. Reg. 12285.

achieved by federal agencies and Advocacy working together under the RFA.

Since its passage in 1980, the RFA has helped establish small business consideration as a necessary part of federal rulemaking. In 2017, Advocacy sent a memorandum to federal agencies recommending that agencies consider small entity interests in implementing Executive Order 13771 and in subsequent deregulatory actions. (See Appendix C.) The memo also reminded agencies of their obligations under the RFA and of the assistance Advocacy could offer to conduct small entity outreach. In the past, Advocacy has made regulatory reform recommendations directly to agencies based on a review of rules subject to the requirements of Section 610 of the RFA and based on outreach to small entity representatives. In addition, once agencies designated Regulatory Reform Officers and established the Regulatory Reform Task Forces required under Executive Order 13777, Advocacy offered its recommendations and other assistance and views to agencies, as suggested by Section 3(e) of the order. Since then, Advocacy has engaged in a longer-term effort to make specific recommendations to agencies and the Office of Management and Budget about regulations and regulatory policies that could be modified to lower small entities' compliance costs.

### **The RFA, Its Requirements, and Efforts to Strengthen It**

Congress passed the RFA in 1980 to address the disproportionate impact of federal regulations on small businesses. 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>9</sup> When the final rule is published, it must be accompanied by a final regulatory flexibility analysis (FRFA).<sup>10</sup> Alternatively, if a federal agency determines that a proposed rule would not have a significant impact on small entities, the head of that agency may “certify” the rule and bypass the IRFA and FRFA requirements.<sup>11</sup>

In order to produce an IRFA, the agency must consider less burdensome alternatives to its own rule, and in the FRFA the agency must explain why it chose among the alternatives in the IRFA.<sup>12</sup> Applying the RFA to deregulatory actions is the latest development in the enforcement of the RFA.

In 1996 Congress enacted the Small Business Regulatory Enforcement Fairness Act (SBREFA). The amendments to the RFA under SBREFA emphasized federal agency compliance with the RFA, imposing specific procedures addressing small business concerns regarding environmental and occupational safety and health regulations. Additionally, the amendments made compliance with certain sections of the RFA judicially reviewable, meaning petitioners could challenge regulations based on the agency's failure to comply with those sections of the statute.

The Small Business Jobs Act of 2010 codified some of the procedures introduced in Executive Order 13272. That same year, the Dodd-Frank Wall Street Reform and Consumer Protection Act created the Consumer Financial Protection Bureau and made

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<sup>9</sup> 5 U.S.C. § 603.

<sup>10</sup> 5 U.S.C. § 604.

<sup>11</sup> 5 U.S.C. § 605(b).

<sup>12</sup> 5 U.S.C. § 604.

the agency's major rules subject to the RFA's SBREFA panel provisions.

In 2011, Executive Order 13563, *Improving Regulation and Regulatory Review*,<sup>13</sup> directed agencies to heighten public participation in rulemaking, consider overlapping regulatory requirements and flexible approaches, and conduct ongoing regulatory review. A memorandum to all federal agencies was issued concurrently with the order, reminding them of the importance of the RFA and of reducing the regulatory burden on small businesses through regulatory flexibility. In this memorandum, the president directed agencies to increase transparency by providing written explanations of any decision not to adopt flexible approaches in their regulations.

In 2012, Executive Order 13610, *Identifying and Reducing Regulatory Burdens*,<sup>14</sup> provided that "...further steps should be taken...to promote public participation in retrospective review, to modernize our regulatory system, and to institutionalize regular assessment of significant regulations." This comports with key provision of the RFA's Section 610 "look-back" provision mandating the periodic review of existing regulations. The executive order also called for greater focus on initiatives aimed at reducing

unnecessary regulatory burdens, simplifying regulations, and harmonizing regulatory requirements imposed on small businesses.

## Conclusion

Since its passage in 1980, the RFA has demonstrated remarkable results. It has helped establish small business consideration as a necessary part of federal rulemaking. The careful tailoring of regulation to business size has made better regulations with improved compliance in pursuit of safety, health, and other public goods. The subsequent regulatory and legislative improvements have solidified Advocacy's participation in rulemakings affecting small business. What these regulatory reform initiatives all have in common is agreement that the regulatory burden on small business must be minimized. Over its 40-year history, the RFA has provided federal agencies with the framework to accomplish this goal. With Advocacy's ongoing monitoring, this important tool will continue to remind agencies that are writing new rules or reviewing existing ones to guard against "significant economic impacts on a substantial number of small entities."<sup>15</sup>

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<sup>13</sup> Executive Order 13563 (January 18, 2011), 76 Fed. Reg. 3821.

<sup>14</sup> Executive Order 13610 (May 10, 2012), 77 Fed. Reg. 28469.

<sup>15</sup> 5 U.S.C. § 601.

## Chapter 2

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

Federal agencies' compliance with the Regulatory Flexibility Act (RFA) improved markedly after President George W. Bush signed Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking*, in 2002. The executive order established new responsibilities for the Office of Advocacy and federal agencies to facilitate greater consideration of small businesses in regulatory development. Portions of it have been codified in the Small Business Jobs Act of 2010.<sup>16</sup>

E.O. 13272 requires Advocacy to educate federal agency officials on compliance with the RFA, to provide resources to facilitate continued

compliance, and to report to the Office of Management and Budget on agency compliance with it.

### RFA Training

Advocacy launched its RFA training program in 2003, and since then has offered RFA training sessions to every rule-writing agency in the federal government. These training sessions are attended by the agencies' attorneys, economists, and policy-makers. In FY 2019, Advocacy held eight training sessions for 113 federal officials (see **Table 2.1**). The entire list of agencies trained since FY 2003 appears in Appendix D.

**Table 2.1 RFA Training at Federal Agencies in FY 2019**

Date	Agency	Number Trained
11/14/18	U.S. Coast Guard	16
11/15/18	U.S. Coast Guard	10
11/27/18	National Labor Relations Board	19
03/20/19	Federal Emergency Management Agency	9
03/28/19	U.S. Department of Treasury	23
04/11/19	U.S. Department of Transportation, Federal Railroad Administration	10
05/15/19	U.S. Department of the Interior, Forest Service	14
09/09/19	U.S. Department of Veterans Affairs	12
	Total	113

<sup>16</sup> Small Business Jobs Act, Pub. L. No. 111-240, 124 Stat. 2504 (2010).

The impact of Advocacy’s training programs can be seen with the Department of Veterans Affairs (VA), which showed marked improvement in RFA compliance during FY 2019. The secretary’s Office of Regulation Policy and Management ([www.va.gov/orpm/](http://www.va.gov/orpm/)) strengthened its relationship with Advocacy, coordinating RFA compliance with VA program offices throughout one of the government’s largest agencies. VA now routinely consults with Advocacy for guidance on RFA legal issues and technical assistance in determining the costs of its proposals. VA has also hired an



economist to develop in-house expertise on regulatory cost calculation. Advocacy conducted RFA compliance training at VA headquarters during FY 2019 and has scheduled another session during 2020. Advocacy staff will continue to assist VA in developing its RFA compliance expertise.

## RFA Compliance Guide

To provide clear directions on RFA compliance, Advocacy publishes a practical manual called “A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act.” The hands-on guide has been updated to include Executive Orders 13771 and 13777 on reducing and reforming federal regulations.<sup>17</sup>

Advocacy staff met with commercial fishermen at a small business outreach meeting in New Jersey to discuss how federal regulations affected commercial fishing on the Eastern seaboard.

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<sup>17</sup>The most recent edition can be found at [advocacy.sba.gov/resources/the-regulatory-](http://advocacy.sba.gov/resources/the-regulatory-)

[flexibility-act/a-guide-for-government-agencies-how-to-comply-with-the-regulatory-flexibility-act/](http://flexibility-act/a-guide-for-government-agencies-how-to-comply-with-the-regulatory-flexibility-act/).

## Agency Compliance with E.O. 13272

Executive Order 13272 requires federal agencies to take certain steps to boost transparency and ensure small business concerns are represented in the rulemaking process. These steps include the following:

- **Written RFA Procedures.** Agencies are required to publicly show how they take small business concerns and the RFA into account when creating regulations. Most agencies have posted their RFA policies and procedures on their websites.
- **Notify Advocacy.** To ensure small business voices are being heard, agencies are required to engage Advocacy during the rulemaking process. If a draft regulation may have a significant impact on a substantial number of small entities, the agency must notify Advocacy by sending copies of the draft regulation to the office.

- **Respond to Comments.** If Advocacy submits written comments on a proposed rule, the agency must consider these comments and provide a response to them in the final rule published in the Federal Register. The Small Business Jobs Act of 2010 codified this as an amendment to the RFA.

A summary of federal agencies' compliance with these three requirements is shown in **Table 2.2**.

As federal agencies have become more familiar with the RFA and have established cooperative relationships with Advocacy, the regulatory environment under Executive Order 13272 and the Small Business Jobs Act has led to less burdensome federal regulation. In addition to improving compliance with the RFA, Advocacy finds that Executive Order 13272 has improved the office's overall relationship with federal agencies.



Advocacy's Regional Regulatory Roundtables, like this one in Jackson, Mississippi, bring together small business owners, trade associations, and government officials to discuss the challenges small entities face with regulatory compliance.



Table 2.2 Federal Agency Compliance with Rule-Writing Requirements under Executive Order 13272 and the JOBS Act, FY 2019

Agency	Written Procedures on Website	Url of Agency's RFA Procedures	Notifies Advocacy	Responds to Comments
Cabinet Agencies				
Agriculture	√	<a href="http://www.ocio.usda.gov/policy-directives-records-forms/guidelines-quality-information/regulatory">www.ocio.usda.gov/policy-directives-records-forms/guidelines-quality-information/regulatory</a>	√	√
Commerce(a)	√	<a href="http://www.fisheries.noaa.gov/national/laws-and-policies/guidance-conducting-economic-and-social-analyses-regulatory-actions">www.fisheries.noaa.gov/national/laws-and-policies/guidance-conducting-economic-and-social-analyses-regulatory-actions</a>	√	√
Defense	X		√	n.a.
Education	X		√	√
Energy	√	<a href="http://www.energy.gov/sites/prod/files/gcprod/documents/eo13272.pdf">www.energy.gov/sites/prod/files/gcprod/documents/eo13272.pdf</a>	√	n.a.
Environmental Protection Agency	√	<a href="http://www.epa.gov/sites/production/files/2015-06/documents/guidance-regflexact.pdf">www.epa.gov/sites/production/files/2015-06/documents/guidance-regflexact.pdf</a>	√	√
General Services Admin	X		√	n.a.
Health and Human Services	√	<a href="http://www.fda.gov/ForIndustry/SmallBusinessAssistance/ucm167644.htm">www.fda.gov/ForIndustry/SmallBusinessAssistance/ucm167644.htm</a>	√	n.a.
Homeland Security	√	<a href="http://www.dhs.gov/publication/signed-regulatory-flexibility-act-executive-order-13272-memo-2004">www.dhs.gov/publication/signed-regulatory-flexibility-act-executive-order-13272-memo-2004</a>	√	√
Housing and Urban Development	√	<a href="http://www.hud.gov/program_offices/sdb/policy/sbrefa">www.hud.gov/program_offices/sdb/policy/sbrefa</a>	n.a.	n.a.
Interior	√	<a href="http://www.doi.gov/sites/doi.gov/files/migrated/ppa/upload/Interim-Guidance-UMRA-and-EO-12866-C3_APP3.pdf">www.doi.gov/sites/doi.gov/files/migrated/ppa/upload/Interim-Guidance-UMRA-and-EO-12866-C3_APP3.pdf</a>	√	√
Justice	X		√	n.a.
Labor	√	<a href="http://www.dol.gov/general/regs/guidelines">www.dol.gov/general/regs/guidelines</a>	√	√
Small Business Administration	X		√	n.a.
State	X		√	n.a.

Agency	Written Procedures on Website	Url of Agency's RFA Procedures	Notifies Advocacy	Responds to Comments
Transportation	√	<a href="http://www.transportation.gov/sites/dot.dev/files/docs/1979%20Regulatory%20Policies%20and%20Procedures.doc">www.transportation.gov/sites/dot.dev/files/docs/1979%20Regulatory%20Policies%20and%20Procedures.doc</a>	√	n.a.
Treasury (b)	√	Treasury: <a href="http://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/td28-03.aspx">www.treasury.gov/about/role-of-treasury/orders-directives/Pages/td28-03.aspx</a> Internal Revenue Service: <a href="http://www.irs.gov/irm/part32/irm_32-001-005#idm140712272166000">www.irs.gov/irm/part32/irm_32-001-005#idm140712272166000</a>	√	n.a.
Veterans Affairs	√	<a href="http://www.va.gov/ORPM/Regulatory_Flexibility_Act_EO_13272_Compliance.asp">www.va.gov/ORPM/Regulatory_Flexibility_Act_EO_13272_Compliance.asp</a>	√	n.a.
Independent Agencies				
Consumer Financial Protection Bureau (c)	n.a.	n.a.	√	√
Consumer Product Safety Commission	√	<a href="http://www.cpsc.gov/Regulations-Laws--Standards/Rulemaking#TheRegulatoryFlexibilityAct">www.cpsc.gov/Regulations-Laws--Standards/Rulemaking#TheRegulatoryFlexibilityAct</a>	√	n.a.
Equal Employment Opportunity Commission	√	<a href="http://www.eeoc.gov/eeoc/plan/regflexibilityact.cfm">www.eeoc.gov/eeoc/plan/regflexibilityact.cfm</a>	√	n.a.
Federal Acquisition Regulation Council	X		√	n.a.
Federal Communications Commission	√	<a href="http://www.fcc.gov/sites/default/files/fcc-directive-1158.2.pdf">www.fcc.gov/sites/default/files/fcc-directive-1158.2.pdf</a>	√	√
Federal Reserve Board (c)	n.a.	n.a.		
National Labor Relations Board (c)	n.a.	n.a.	√	n.a.
Securities and Exchange Commission (c)	n.a.	n.a.	√	n.a.
<p>Notes: √ = Agency complied with the requirement. X = Agency did not comply with the requirement.  n.a. = Not applicable because Advocacy did not publish a comment letter in response to an agency rule in FY 2019 or because the agency is not required to do so.  a. NOAA drafts most regulations the Commerce Department releases.  b. On April 11, 2018, Treasury and the Office of Management and Budget signed a Memorandum of Agreement stating that tax regulations would be reviewed under Executive Order 12866.  c. Independent agencies are not subject to the E.O. requiring written procedures.</p>				

# Chapter 3

## Communication with Federal Agencies and Small Businesses

### COMMUNICATION WITH FEDERAL AGENCIES

The essential goal of the Regulatory Flexibility Act (RFA) is to communicate the special concerns of small business to federal agencies as they go about their rulemaking business. The RFA requires of the agencies some specific forms of engagement with small business. These communications form the basis of federal small business regulatory analysis and regulatory burden reduction.

#### Interagency Communications

The Office of 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 2019, Advocacy's communications with federal agencies included 22 formal comment letters and RFA compliance training sessions for 113 federal officials. **Table 2.1** lists the agencies where training was held this year, and Appendix D contains a list of all agencies that have participated in RFA training since 2003.

AS noted earlier, in response to President Trump's executive orders on private sector deregulation,

Advocacy launched an initiative to ensure that agencies consider small entities' priorities for regulatory relief. The office has received considerable input from small businesses through regional regulatory reform roundtables and an online comment form. This input is the basis of 26 letters to the heads of federal agencies conveying small businesses' experiences with federal regulatory compliance and their top priorities for reform.

#### *E.O. 12866 and Interagency Review of Upcoming Rules*

Executive Order 12866, *Regulatory Planning and Review*, celebrated its 25th anniversary in FY 2018.<sup>18</sup> The stated objectives of EO 12866 are to enhance planning and coordination of new and existing regulations, reaffirm the primacy of federal agencies in the regulatory decision-making process, restore the integrity and legitimacy of regulatory review and oversight, and make the process more accessible and open to the public.

Under Executive Order 12866, the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) reviews all significant executive agency regulations. Additionally, each regulatory agency, including independent ones, prepares an agenda of all the regulatory actions under development or review for the fiscal year. OIRA then publishes these as the Unified Regulatory

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<sup>18</sup> Executive Order 12866, *Regulatory Planning and Review*, September 30, 1993.  
[www.reginfo.gov/public/jsp/Utilities/EO\\_12866.pdf](http://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf)

Agenda. Each regulatory agency, including independent ones, must also create a regulatory plan containing the most important proposed or final regulations the agency expects to release that fiscal year or thereafter. OIRA will also meet with interested parties to discuss any issues with a rule under its review in what are called “12866 meetings.” Advocacy attends these meetings when the regulation will affect small businesses.

One change to the interagency review process occurred on April 11, 2018, when the Office of Management and Budget and the Department of the Treasury signed a Memorandum of Agreement for the Office of Information and Regulatory Affairs’ (OIRA) review of tax regulations under Executive Order 12866. The Memorandum of Agreement took effect immediately but contained a provision affecting the analytical requirements applicable to economically significant regulations, which have an annual non-revenue effect on the economy of \$100 million or more. These regulations would not take effect until the earlier of either 12 months from the date of the Memorandum of Agreement or when Treasury obtained reasonably sufficient resources to perform the required analyses. Beginning on April 11, 2019, economically significant tax regulations were required to include the analysis under section 6(a)(3)(C) of Executive Order 12866.

The Internal Revenue Service (IRS) sends all economically significant tax regulations to OIRA for review. For almost all those regulations, the agency certifies that the rules will not have a significant economic impact on a substantial number of small entities for purposes of the RFA. While the IRS’s threshold analyses to determine whether its regulations can be certified under the RFA are better than they were last year, there is room for improvement. Advocacy held an RFA training for Treasury employees in 2019 and has met with

Treasury and IRS employees several times to discuss SBA size standards and how best to determine what small entities may be affected by certain tax regulations. If a tax regulation is not economically significant and Treasury does not send the regulation to OIRA for review, it does not send the regulation to Advocacy.

### **SBREFA Panels**

In 1996, 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. These are commonly called SBREFA or Small Business Advocacy Review (SBAR) panels. 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.

Three agencies are covered by this requirement: The Consumer Financial Protection Bureau (CFPB), Environmental Protection Agency (EPA), and Occupational Safety and Health Administration (OSHA). In FY 2019, one SBREFA panel was initiated: EPA convened a panel on methylene chloride in March 2019. The list of SBREFA panels convened since 1996 can be found in Appendix D.

### **Regulatory Agendas**

Each spring and fall, federal agencies are required to publish a list of regulatory and deregulatory actions under development throughout the federal government. These plans are known as the Unified Agenda and Regulatory Plan, and they include all regulations that agencies plan to propose or issue in coming months and beyond.

In addition to the Regulatory Agendas, agencies are also required by Section 602 of the RFA to publish a

regulatory flexibility agenda that specifically addresses regulatory actions that will affect small businesses. These also must be published in the Federal Register each spring and fall. The agendas facilitate public participation, specify the subjects of upcoming proposed rules, and indicate whether these rules are likely to have a significant economic impact on a substantial number of small entities. 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, the agendas alert Advocacy and interested parties to forthcoming regulations of interest. The FY 2019 regulatory agendas were published on November 16, 2018, and June 24, 2019. They are a key component of the regulatory planning mechanism prescribed in Executive Orders 12866 (*Regulatory Planning and Review*) and 13771 (*Reducing Regulation and Controlling Regulatory Costs*). The regulatory agendas can be found here:

- Fall 2018:  
[www.federalregister.gov/documents/2018/11/16/2018-24084/introduction-to-the-unified-](http://www.federalregister.gov/documents/2018/11/16/2018-24084/introduction-to-the-unified-)

[agenda-of-federal-regulatory-and-deregulatory-actions-fall-2018](http://www.federalregister.gov/documents/2018/11/16/2018-24084/introduction-to-the-unified-)

- Spring 2019:  
[www.federalregister.gov/documents/2019/06/24/2019-12557/introduction-to-the-unified-agenda-of-federal-regulatory-and-deregulatory-actions](http://www.federalregister.gov/documents/2019/06/24/2019-12557/introduction-to-the-unified-agenda-of-federal-regulatory-and-deregulatory-actions)

### *Retrospective Review of Existing Regulations*

Under Section 610 of the RFA, agencies are required to conduct a retrospective review of existing regulations that have a significant economic impact on small entities. Executive Orders 13563 and 13610, requiring all executive agencies to conduct periodic retrospective reviews of all existing regulations, bolster the mandate of RFA Section 610. As a result, agencies publish retrospective review plans in the Unified Agenda of Regulatory and Deregulatory Actions semiannually.

The Department of Transportation's regulatory review process is one useful example of how agencies can incorporate section 610 reviews into their semiannual retrospective reviews of all



Advocacy engages with small business owners in regional settings to better understand the regulatory issues they face. Here, Advocacy staff meets with small business owners in Anchorage, Alaska, to better understand the burdens their businesses face.

existing regulations.<sup>19</sup> Advocacy continues to monitor retrospective review plans and their implementation and accepts feedback from small entities regarding any rules needing review.

## OUTREACH TO SMALL BUSINESS

In the Congressional Findings and Declaration of Purpose section of the RFA, Congress states, “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....”<sup>20</sup>

To help fulfill this purpose, Advocacy assists governmental agencies by conducting outreach to small entities, relaying information from one to the other. In most instances, Advocacy encourages agencies to participate in these outreach efforts, and most agencies are very receptive to the invitation.

Advocacy engages with small business stakeholders through a variety of mechanisms, ensuring that lines of communication remain open and that small business concerns are heard by the appropriate contacts within the federal agencies. For example, Advocacy publishes regulatory alerts that are emailed to various small entity lists. In addition, staff direct targeted email notices to stakeholders who may be affected by rulemaking. These alerts allow small businesses to stay informed of regulatory developments without having to conduct searches of their own.

Advocacy regularly meets with small entities, both informally through in-person meetings and

teleconferences, and at more structured events. Those events include stakeholder conferences to present specific regulatory topics, where Advocacy works to inform small business stakeholders about the federal rulemaking process and how to write effective comment letters. Advocacy also hosts roundtables around the country as its principal means of gathering extensive small business input. Two kinds of roundtables were held in FY 2019: issue roundtables and regional roundtables.

## Issue Roundtables — Roundtables by Agency and Date

**Consumer Financial Protection Bureau**  
*CFPB’s Semi-Annual Regulatory Agenda; SBA’s Express Loans Proposed Rule*  
November 8, 2018

At this roundtable, participants discussed the rulemakings listed in the CFPB Semi-Annual Regulatory Agenda, the Small Business Administration’s (SBA) proposed rulemaking on Express Loans and the financial agencies’ proposed rulemaking on Regulatory Capital Treatment for High Volatility Commercial Real Estate Exposures.

*Proposed Rule on Debt Collection Practices; Proposed Changes to Safeguards Rule*  
June 26, 2019

At this roundtable, participants discussed the CFPB proposed rule on Debt Collection Practices and the Federal Trade Commission’s proposed changes to the Safeguards Rule.

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<sup>19</sup>U.S. Department of Transportation’s Review Process (Jan. 20, 2015).  
[www.transportation.gov/regulations/dots-review-process](http://www.transportation.gov/regulations/dots-review-process).

<sup>20</sup> Regulatory Flexibility Act, Pub. L. No. 96-3554, 94 Stat. 1164 (codified at 5 U.S.C. § 601).



## **Department of Justice**

### *Americans with Disabilities Act Accessibility Requirements for Websites, Buildings, and Guide Animals*

*December 3, 2018*

Advocacy held a roundtable with the Department of Justice's Civil Rights Division to discuss the current Americans with Disabilities Act (ADA) accessibility requirements for websites, buildings, and guide animals. At this session, many small businesses expressed concerns about ADA website accessibility. Plaintiffs have sued small businesses alleging technical violations of website accessibility. Small businesses commented that these lawsuits have cost them tens of thousands of dollars to litigate or settle, and additional thousands of dollars to fix their websites. Small businesses at this forum recommended that the Department of Justice issue regulations for website accessibility under Title III of the ADA to provide certainty in this area.

## **Department of Labor**

### *White Collar Exemptions from Overtime Regulations*

*April 4, 2019 | April 11, 2019 | April 30, 2019*

In March 2019, Department of Labor released a proposed rule that set the minimum salary for the "white collar" exemption from overtime pay under the Fair Labor Standards Act at \$35,308. In April 2019, Advocacy held Small Business Roundtables in Tampa, Florida; Washington, D.C; and Mobile, Alabama, to discuss this rule. Most small businesses commented that this lower threshold would have a much smaller impact on them than DOL's 2016 final rule, which had set this minimum salary threshold at \$47,476. (This rule was overturned in federal court in 2017.) Some small businesses in rural communities and in retail industries still expressed concerns over costs of the DOL minimum salary threshold and suggested further tailored

alternatives to this proposal. Additionally, some were concerned about how regional differences between pay scales would change the impact of the regulation.

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

### *Emergency Response and Preparedness Regulatory Reform*

*November 16, 2018*

Advocacy held a roundtable with OSHA to discuss emergency response and preparedness standards. This roundtable began with a detailed discussion of OSHA's existing emergency response and preparedness standards by OSHA's deputy director of standards and guidance. Because OSHA standards were implemented decades ago and not designed as comprehensive emergency response standards, the agency is preparing to convene a SBREFA panel on emergency response and preparedness to consider new regulations that reflect modern safety and health practices accepted by the emergency response community and incorporated into current industry consensus standards. The discussion then moved to recent business regulatory decisions and an update from Advocacy on its series of regional regulatory roundtables.

### *SBREFA Panel on Emergency Response; Workplace Violence in Healthcare*

*March 15, 2019*

Advocacy held a roundtable with OSHA to discuss emergency response and preparedness standards. This roundtable featured an overview of OSHA's planned SBREFA panel on emergency response and how it could impact small entities, such as small emergency responders, fire departments, and private sector entities that respond to emergency incident scenes or disaster sites. The possible rulemaking would replace OSHA's existing

regulations with a new comprehensive standard for emergency response activities. Additionally, a representative from the House Subcommittee on Workplace Protections discussed pending legislation on workplace violence prevention for health care and social service workers that would compel OSHA to issue interim final regulations in this area. Finally, an attorney who represents small businesses provided an overview of the American Bar Association's recent annual occupational safety and health conference.

#### ***Powered Industrial Trucks; Snow and Ice Removal Hazards***

*May 17, 2019*

Advocacy held a roundtable with OSHA to discuss industrial truck and ice removal standards. OSHA seeks data on whether existing standards for powered industrial trucks and other specialized vehicles, that date to the 1970s should be revised and updated to reflect current technologies and safer work practices. Additionally, a representative from the small business transportation sector discussed a growing trend in states and localities to require the removal of snow and ice from trucks and other commercial vehicles before driving on public roads and highways. Given that snow and ice removal present significant injury risks for drivers, he advocated for innovative methods to remove snow and ice from commercial vehicles. Finally, Advocacy provided an update on the status of OSHA's planned SBREFA panel on emergency response.

#### ***Environmental Protection Agency Proposed Revised Definition of Waters of the United States***

*February 27, 2019 | March 27, 2019 | April 4, 2019*

At these roundtables, Advocacy provided an overview of key features of the EPA and Army Corps of Engineers proposed rule to revise the definition of Waters of the United States. Advocacy also

discussed how the rule differs from the 2015 final Waters of the United States rule that was the subject numerous court challenges and was ultimately rescinded by EPA and the Army Corps. Participants were then given an opportunity to share their comments on the proposal and to provide suggested alternatives. EPA and the Army Corps were invited to attend each of the three roundtables, but only attended the first roundtable held in Kansas City, Missouri. The second roundtable was held in Tampa, Florida, and the third in Denver, Colorado.

#### ***Risk Evaluations under the Toxic Substances Control Act; Safe Management of Airbag Waste***

*March 22, 2019*

Advocacy held a roundtable with the EPA to discuss risk evaluation of chemicals under the Toxic Substances Control Act (TSCA). EPA officials provided a presentation on its risk evaluation process of existing chemicals under the amended TSCA. EPA also announced 40 new chemicals that the agency intended to prioritize for its upcoming risk evaluations. EPA officials also discussed the agency's recently published interim final rule for airbag waste. As part of this presentation, the agency provided an overview of issues pertaining to the regulation of some hazardous wastes and materials under the Resource Conservation and Recovery Act.

#### ***Meet the New EPA Assistant Administrator for the Office of Chemical Safety and Pollution Prevention***

*April 26, 2019*

At this roundtable, small business stakeholders met with EPA's new assistant administrator for the Office of Chemical Safety and Pollution Prevention, who discussed the agency's upcoming regulatory developments and actions under both the TSCA and the Federal Insecticide, Fungicide, and Rodenticide Act. The assistant administrator

highlighted EPA's outreach efforts with small entities. The Administrator also answered questions from the small business stakeholders towards the end of her presentation.

#### ***Chemical Data Reporting Revisions and Small Manufacturer Definition Update under TSCA Section 8(a)***

*May 30, 2019*

At this roundtable, EPA discussed its recent proposal to revise its chemical data reporting requirements under Section 8(a) of TSCA. EPA also presented an update to its small manufacturer definition for Section 8(a) requirements by proposing to adjust the existing small manufacturer definition for inflation. Sites that meet the small manufacturer definition are generally exempt from reporting.

#### ***Proposed Regulation of Persistent, Bioaccumulative, and Toxic Chemicals under TSCA Section 6(h)***

*August 30, 2019*

At this roundtable, EPA presented its proposed rulemaking for five chemicals that it identified as persistent, bioaccumulative and toxic (PBT) under Section 6(h) of the TSCA. The chemicals are decabromodiphenyl ether (DecaBDE); phenol, isopropylated phosphate (PIP 3:1), also known as

tris (4-isopropylphenyl) phosphate; 2,4,6-tris(tert-butyl)phenol (2,4,6 TTBP); hexachlorobutadiene (HCBD); and pentachlorothiophenol (PCTP). The agency provided background information on PBT chemicals and the agency's obligation to regulate them as mandated by TSCA. In addition, the agency highlighted its existing knowledge on the uses, hazards, and exposure information for the five chemicals.

#### ***Food and Drug Administration***

##### ***Regulation of Premium Cigars***

*September 12, 2019*

Advocacy held a roundtable to discuss the Food and Drug Administration's (FDA) regulation of premium cigars, which have been under the FDA's regulatory authority since the passage of the Family Smoking Prevention and Tobacco Control Act. In its "Deeming Rule," the FDA determined that the rule would impose significant costs on small businesses in the cigar industry and would likely cause some businesses to exit the market. On March 26, 2018, the FDA published an advanced notice of proposed rulemaking seeking comments, data, research results, and other information related to the following: the definition of premium cigars, the use patterns of premium cigars, and public health considerations associated with premium cigars. Over 8,700 comments were submitted. At the roundtable, participants discussed how the FDA's regulation of premium cigars would affect their businesses. Agency officials attended the roundtable remotely.

A small manufacturing business owner shows Advocacy staff a product his company produces for commercial and military aircraft engine industries.



Table 3.1 Regulatory Roundtables Hosted by the Office of Advocacy

Agency	Purpose	Date
Consumer Financial Protection Bureau	CFPB's Semi-Annual Regulatory Agenda; SBA Express Loans Proposed Rule	11/08/18
	Proposed Rule on Debt Collection Practices; Proposed Changes to Safeguards Rule	06/26/19
Department of Justice	ADA Presentation and Listening Session	12/03/19
Department of Labor	Department of Labor's Proposed Rule on Overtime Regulations under the Fair Labor Standards Act	04/04/19 04/11/19 04/30/19
Department of Labor/ Occupational Safety and Health Administration/Mine Safety and Health Administration	Emergency Response and Preparedness Regulatory Reform	11/16/18
	SBREFA Panel on Emergency Response; Workplace Violence in Healthcare	03/15/19
	Powered Industrial Trucks; Snow and Ice Removal Hazards	05/17/19
Environmental Protection Agency	Proposed Revised Definition of Waters of the United States	02/27/19 03/27/19 04/04/19
	Risk Evaluations under the Toxic Substances Control Act; Safe Management of Airbag Waste	03/22/19
	Meet the New EPA Assistant Administrator for the Office of Chemical Safety and Pollution Prevention	04/26/19
	Chemical Data Reporting Revisions and Small Manufacturer Definition Update under TSCA Section 8(a)	05/30/19
	Proposed Regulation of Persistent, Bioaccumulative, and Toxic Chemicals under TSCA Section 6(h)	08/30/19
Food & Drug Administration	Regulation of Premium Cigars	9/12/19

### Regional Regulatory Reform Roundtables

In June 2017, Advocacy launched the Regional Regulatory Reform Roundtable initiative to provide small businesses around the country an opportunity to discuss the unique challenges they face with regulatory implementation and compliance. This initiative is meant to help relieve the private sector regulatory burden as directed by Executive Orders 13771 and 13777. Advocacy is working with federal agencies to ensure that small businesses’ priorities for relief are addressed.

Regional roundtables bring together local small businesses, trade associations, congressional leaders, and federal regulatory agencies to identify regulatory barriers and challenges in each region. The meetings also explore small entities’ suggestions for regulatory streamlining and savings, and participants discuss ways to improve small business participation in agencies’ rulemakings. These discussions inform Advocacy’s ongoing and future recommendations to the federal agencies tasked with reducing the number of regulations. This initiative began in June 2017 and continues to the present.<sup>21</sup>

In FY 2019, Advocacy held 10 Regional Regulatory Reform Roundtables in 10 states. The locations spanned rural and urban areas, geographic regions, and a range of industries. The geographical diversity provides an up-close perspective of how a single federal rule can have varying economic impacts on different types of small businesses based upon the practices, economic conditions, and other factors specific to their region. **Table 3.2** shows the roundtable dates and locations.



Regional roundtables, like this one in Maine, are one of the tools Advocacy uses to communicate with the public. Here, a local small business owner discusses how federal regulations affect his business.

**Table 3.2 Regional Regulatory Reform Roundtable Dates and Locations in FY 2019**

Date	Location
4/29/19	Tulsa, Oklahoma
5/1/19	Phoenix, Arizona
5/2/19	Summerlin, Nevada
6/4/19	Jonesboro, Arkansas
6/5/19	Memphis, Tennessee
6/6/19	Jackson, Mississippi
7/10/19	Anchorage, Alaska
7/16/19	Bangor, Maine
7/17/19	North Conway, New Hampshire
7/18/19	Burlington, Vermont

<sup>21</sup> For a detailed report on this effort, see *What Small Businesses Are Saying and What Advocacy Is Doing About It, Progress Report on the Office of Advocacy’s Regional Regulatory Reform Roundtables*, found at

<https://cdn.advocacy.sba.gov/wp-content/uploads/2020/04/20141200/2nd-Progress-Report-on-Reg-Reform-Roundtables.pdf>



## Site Visits

To maximize Advocacy’s resources, roundtable trips may include site visits to nearby small businesses to discuss their specific regulatory concerns, which are valuable and informative experiences for Advocacy staff. Small business owners greatly appreciate Advocacy’s site visits, which serve as an opportunity to meet one-on-one with Advocacy staff to demonstrate how their business functions and talk through their regulatory concerns.

Advocacy encourages the small business hosting the site visit to invite their peers, and Advocacy staff learns from others facing similar regulatory burdens. These personal meetings are an important method to collect more detailed information to help in the regulatory reform effort. Advocacy staff made 16 site visits in 4 states during FY 2019. The list of business locations appears in **Table 3.3**.

**Table 3.3. Locations of Regulatory Reform Site Visits in FY 2019**

Date of Visit	Location	Company
05/02/19	Las Vegas, Nevada	The Hydrant Club
06/04/19	Jonesboro, Arkansas	Food Bank of Northeast Arkansas
07/08/19	Anchorage, Alaska	Salmonberry Tours
07/08/19	Anchorage, Alaska	Blue & Gold Board Shop
07/08/19	Anchorage, Alaska	Wild Scoops
07/08/19	Anchorage, Alaska	Ted Stevens Anchorage International Airport
07/08/19	Anchorage, Alaska	Caffe D’Arte
07/09/19	Fairbanks, Alaska	Cold Climate Housing Research Center
07/09/19	Fairbanks, Alaska	Fairbanks & Steese Fire Departments
07/09/19	Fairbanks, Alaska	Trax Outdoor
07/09/19	Fairbanks, Alaska	East Ramp Pizza
07/09/19	Fairbanks, Alaska	Alaska Center for Energy and Power
07/09/19	Fairbanks, Alaska	Fairbanks International Airport
07/10/19	Palmer, Alaska	Williams Reindeer Farm
07/10/19	Palmer, Alaska	Northern Industrial Training
07/17/19	Cabot, Vermont	Goodrich’s Maple Farm

## Examples of Regulatory Concerns

Roundtables help Advocacy staff learn firsthand the current and most pressing challenges small businesses across the country face and how government can assist them. In these face-to-face meetings, small businesses have relayed stories

that exemplify how federal regulations drain their resources, energy, and even their desire to stay in business. The following two examples highlight recurring themes that small business owners raised:



- A small health practitioner and owner of a health clinic in Oklahoma City was concerned with the unintended consequences of high-deductible insurance plans. He explained that the Internal Revenue Code disqualifies those that have one of these plans from using health savings account dollars if they have any other kind of health plan. He felt strongly that IRS regulations do not fit with the new health-care industry and that changes need to be made to keep up with the evolving marketplace.
- A small ice cream company in Cleveland, Ohio, told Advocacy that Food and Drug Administration regulations enforcing the Food Safety Management Act (FSMA) have caused her an exponential increase in paperwork and costs. Specifically, she is concerned that the rules will require her to re-label dozens of products and redo all associated packaging, adding significant costs for her business.

These are some of the practical consequences of federal regulations enacted without the full consideration of their impact on small businesses. The stories are numerous and the effects on businesses across the country are varied. But the



message is clear: small businesses do not oppose regulation but want certainty, clarity, and regulations that reflect the world in which they operate.

### *Follow Up*

Advocacy has provided feedback to the federal agencies responsible for the rules with the most complaints. In FY 2019, Advocacy sent 10 follow-up letters to the heads of agencies, enumerating small business concerns and suggesting fixes for specific rules. A sample letter appears as Appendix E. All of the letters sent since 2017 are available on Advocacy's website, <http://advocacy.sba.gov/regulation/regulatory-reform>.

Advocacy also engages in meetings, conference calls, and detailed discussions with federal regulatory officials. Advocacy presents small business feedback from the various roundtables and works with the agencies on potential solutions and burden reductions as their regulatory reform task forces are making decisions. These contacts help Advocacy amplify the voice of the small businesses who have participated in Regional Regulatory Reform activities.

Advocacy staff visited a reindeer farm in Palmer, Alaska, and learned about the unique regulatory and environmental challenges that Alaska businesses face. The visit also included a chance for Advocacy staff to feed the reindeer.

# Chapter 4

## Advocacy's Public Comments to Federal Agencies in FY 2019

In FY 2019, the Office of Advocacy submitted 22 formal comment letters to 10 regulatory agencies. The most frequent concerns were that agencies needed to give more consideration to the impact of their proposed rules on small business (seven letters) and that they had not considered significant alternatives (five letters). Agencies also improperly certified that a rule would not have a

significant impact on a substantial number of small entities (four letters).

**Figure 4.1** summarizes Advocacy's issues of concern. **Table 4.1** lists all the comment letters submitted in FY 2019 in chronological order. Each letter is summarized in the following section, arranged by agency.

Figure 4.1 Number of Specific Issues of Concern in Agency Comment Letters, FY 2019

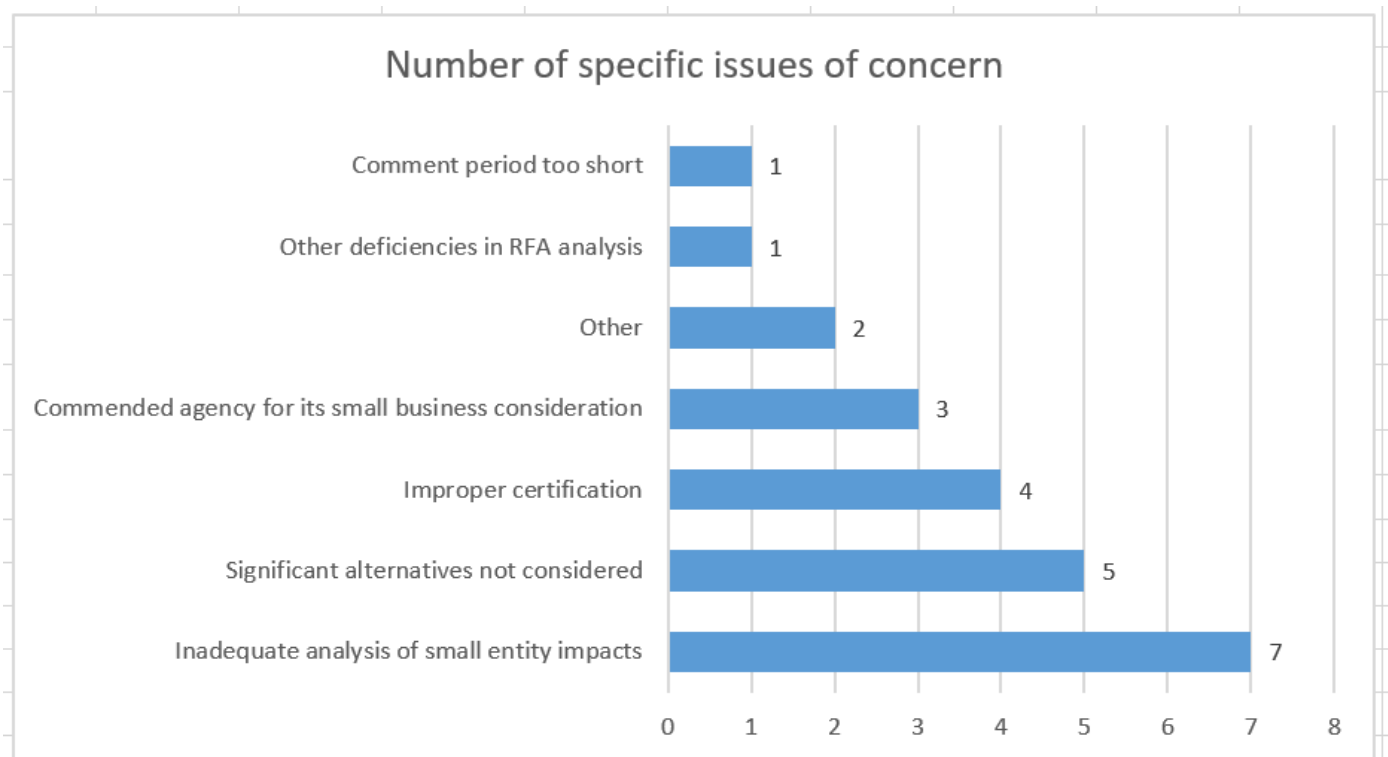


Table 4.1 Regulatory Comment Letters Filed by the Office of Advocacy, FY 2019

Date Filed	Agency*	Topic	Citation to Rule
12/18/18	SBA	Notice of Proposed Rulemaking on Express Loans; Affiliation Standards	83 Fed. Reg. 49001 (03/09/18)
12/20/18	DHS, USCIS	Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens	83 Fed. Reg. 62406 (12/03/18)
02/12/19	EPA	Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces.	83 Fed. Reg. 61574 (11/30/18)
02/15/19	EDUC	Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance	83 Fed. Reg. 61462 (11/29/18)
03/07/19	DOT, FMCSA	Hours of Service of Drivers	84 Fed. Reg. 2304 (02/06/19)
03/15/19	CFPB	Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance Date	84 Fed. Reg. 4298 (02/14/19)
04/11/19	EPA, USACE	Revised Definition of “Waters of the United States”	84 Fed. Reg. 4154 (02/14/19)
4/22/19	USDA, FNS	Administrative Actions Pending Freedom of Information Act Processing	84 Fed. Reg. 4739 (02/19/19)
4/29/19	EPA	Modifications to Fuel Regulations	84 Fed. Reg. 10584 (03/21/19)
05/15/19	CFPB	Payday, Vehicle Title, and Certain High-Cost Installment Loans	84 Fed. Reg. 4252 (02/14/19)
5/20/19	DOL	Overtime Rules under the Fair Labor Standards Act	84 Fed. Reg. 10901 (3/22/19)
05/28/19	USDA, FNS	Providing Regulatory Flexibility for Retailers in the Supplemental Nutrition Assistance Program (SNAP)	84 Fed. Reg. 13555 (04/05/19)
06/19/19	USDA, FNS	Supplemental Comments on the USDA’s Proposed Rule Providing Regulatory Flexibility in the SNAP Program	84 Fed. Reg. 13555 (04/05/19)
07/15/19	DOE	Test Procedure Interim Waiver Process	84 Fed. Reg. 18414 (05/01/19)
07/30/19	DOD	Prompt Payments of Small Business Contractors	84 Fed. Reg. 25226 (05/31/19)
07/31/19	FTC	Standards for Safeguarding Customer Information	84 Fed. Reg. 13158 (04/04/19)
08/06/19	TREAS, TTB	Modernization of Labeling and Advertising Regulations	94 Fed. Reg. 9990 (03/19/19)
08/22/19	SBA	Calculation of Annual Average Receipts for the Determination of Small Business Size Standard	84 Fed. Reg. 29412 (06/24/19)

Date Filed	Agency*	Topic	Citation to Rule																																				
09/11/19	EPA	Municipal Solid Waste Landfills	84 Fed. Reg. 36670 (07/29/19)																																				
09/18/19	CFPB	Debt Collection	84 Fed. Reg. 23274 (05/21/19)																																				
09/25/19	DOD	Draft Cyber Certification Model	Draft Cybersecurity Maturity Model Certification (CMMC) Model Rev. 0.4 Release & Request for Feedback, 09/26/19, available at <a href="http://www.acq.osd.mil/cmmc/docs/cmmc-overview-brief-30aug19.pdf">www.acq.osd.mil/cmmc/docs/cmmc-overview-brief-30aug19.pdf</a>																																				
<p>*Abbreviations:</p> <table> <tr> <td>CFPB</td><td>Consumer Financial Protection Bureau</td><td>FMSCA</td><td>Federal Motor Carrier Safety Administration</td></tr> <tr> <td>DHS</td><td>Department of Homeland Security</td><td>FNS</td><td>Food and Nutrition Services</td></tr> <tr> <td>DOD</td><td>Department of Defense</td><td>FTC</td><td>Federal Trade Commission</td></tr> <tr> <td>DOE</td><td>Department of Energy</td><td>SBA</td><td>Small Business Administration</td></tr> <tr> <td>DOL</td><td>Department of Labor</td><td>TTB</td><td>Alcohol and Tobacco Tax and Trade Bureau</td></tr> <tr> <td>DOT</td><td>Department of Transportation</td><td>USACE</td><td>Army Corps of Engineers</td></tr> <tr> <td>EDUC</td><td>Department of Education</td><td>USCIS</td><td>Citizenship and Immigration Services</td></tr> <tr> <td>EPA</td><td>Environmental Protection Agency</td><td>USDA</td><td>Department of Agriculture</td></tr> <tr> <td></td><td></td><td>TREAS</td><td>Department of the Treasury</td></tr> </table>				CFPB	Consumer Financial Protection Bureau	FMSCA	Federal Motor Carrier Safety Administration	DHS	Department of Homeland Security	FNS	Food and Nutrition Services	DOD	Department of Defense	FTC	Federal Trade Commission	DOE	Department of Energy	SBA	Small Business Administration	DOL	Department of Labor	TTB	Alcohol and Tobacco Tax and Trade Bureau	DOT	Department of Transportation	USACE	Army Corps of Engineers	EDUC	Department of Education	USCIS	Citizenship and Immigration Services	EPA	Environmental Protection Agency	USDA	Department of Agriculture			TREAS	Department of the Treasury
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## Summaries of Advocacy's Official Public Comments

### Consumer Financial Protection Bureau

#### *Issue: Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance Date*

In February 2019, the Consumer Financial Protection Bureau (CFPB) issued a proposed rule governing Payday, Vehicle Title, and Certain High-Cost Installment Loans. This rule would grant a 15-month compliance date delay for the mandatory underwriting provisions of the regulation promulgated by the CFPB in 2017. On March 15,

2019, Advocacy submitted a comment letter commending the agency for delaying the comment period and arguing that the other provisions of the 2017 final rule should be included in the delay as well. The CFPB proposed a compliance date delay due to its concerns that industry participants would expend significant costs to comply with the 2017 final rule, which would cause substantial revenue disruptions.

Advocacy agreed that the compliance date delay would reduce financial burdens on small entities by giving them more time to access resources to conform their management systems to the 2017

final rule, in addition to later enacted state laws that were not anticipated in 2017. Also, small credit unions would benefit from the 15-month delay by having ample time for the CFPB to review the National Credit Union Administration's changes to Payday Alternative Loan programs. However, Advocacy urged the CFPB to also grant the 15-month delay to the payment provisions in the 2017 final rule. These payment provisions require small entities to provide several notices to customers regarding their account information. Design and implementation of a payment system that complies with the 2017 payment provisions is costly and time consuming for small entities. As a result, Advocacy urged the CFPB to extend the delay to these provisions in addition to the mandatory underwriting provisions. On June 17, 2019, the Bureau issued a final rule delaying the August 19, 2019 compliance date for the mandatory underwriting provisions of the regulation until November 19, 2020.

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

On February 14, 2019, the CFPB published a proposed rule to rescind the mandatory underwriting provisions and the registered information system (RISes) provisions of the 2017 final rule governing Payday, Vehicle Title, and Certain High-Cost Installment Loans. On May 15, 2019, Advocacy submitted a letter commending the Bureau for proposing to rescind the mandatory underwriting provisions of the 2017 final rule because they overburden small entities. In some rural communities, payday lenders may be the only option for consumers, and regulations may deprive these consumers of the only means of addressing a dire financial situation. Additionally, the RISes

provisions could cause small businesses to incur significant paperwork burden and costs connecting with a registered information system. Advocacy encouraged the CFPB to rescind the rule.

Additionally, the National Credit Union Administration (NCUA) Payday Alternative Loan program allows credit unions to provide short-term, small dollar loans to their members. The 2017 final rule addressed the NCUA's Payday Alternative Loan program by allowing certain exemptions. In 2018, NCUA amended the program. Advocacy encouraged the bureau to take the necessary steps to identify inconsistencies and resolve problems that were not considered in 2017.

Finally, the 2017 final rule payment provisions require small entities to provide notice prior to initiating the first payment transfer from a customer's account and ensure that no more than two unsuccessful payment attempts are made to the customer's account without obtaining a new authorization from the customer. It also requires a lender to provide a consumer rights notice after two consecutive failed payment withdrawals. Designing and implementing a system that complies with the payment provisions is costly and time consuming for small entities. Advocacy encouraged the Bureau to rescind the payment provisions of the rule.

#### ***Issue: Debt Collection***

On May 21, 2019, the CFPB published a proposed rule on Debt Collection (Regulation F), which implements the Fair Debt Collection Practices Act (FDCPA) and addresses communications in connection with debt collection. It also interprets and applies prohibitions on harassment or abuse, false or misleading representations, and unfair

practices in debt collection. Additionally, it clarifies requirements for debt collection disclosures. On September 18, 2019, Advocacy submitted a letter to the Bureau regarding this rule.

The rule was issued pursuant to the FDCPA, as well as the Dodd-Frank Act's prohibitions on unfair, deceptive, or abusive acts or practices. These provisions create uncertainty for first party creditors who are not supposed to be regulated by the proposal. Advocacy encouraged the Bureau to limit the rule to the FDCPA.

The rule also imposed a limit on the frequency of debt collection calls and provides a safe harbor for debt collectors who comply with the limits on the number of times a debt collector can call a consumer. Because small entities rarely make calls that exceed the limits in the proposal, Advocacy encouraged the Bureau to exempt small debt collectors from the call limit caps.

Additionally, several provisions of the rule will be difficult for small debt collectors to comply with, and require consideration of alternatives. These include the requirement of compliance with the E-Sign Act for electronic disclosures, the requirement of an itemized validation notice, liability for an attempt to collect a debt that is time-barred, and requirements for retention of records. The initial regulatory flexibility analysis stated that larger collectors may already have some of the proposed provisions in place while small debt collectors may not. Some of the provisions may require additional training and expensive changes to technology. Advocacy encouraged the CFPB to give small entities additional time to comply, if they cannot be exempted from the requirements of the proposed

rule. As of September 30, 2019, the rule had not been finalized.

## **Department of Agriculture, Food and Nutritional Services**

### *Issue: Administrative Actions Pending Freedom of Information Act Processing*

On February 19, 2019, the U.S. Department of Agriculture's Food and Nutrition Service (FNS) published a proposed rule entitled "Taking Administrative Actions Pending Freedom of Information Act (FOIA) Processing." In the proposed regulation, FNS suggests that Supplemental Nutrition Assistance Program authorized firms delay agency administrative action, such as disqualification or civil monetary penalties, through submission of FOIA requests or appeals. This rulemaking seeks to ensure that retail food stores can no longer use the FOIA process to delay FNS's administrative actions by proposing that FOIA requests and FOIA appeals be processed separately from administrative actions. Small businesses assert that, if finalized, this rule will effectively shift the burden of proof from FNS onto them by prejudicing the retailer's ability to obtain the information necessary to defend the administrative action until an administrative appeal has been filed.

Advocacy urged FNS to consider the impacts of this rule on small food retailers and to improve the factual basis underlying the agency's certification of no significant impact on a substantial number of small entities as required under the RFA. This was especially important given the agency's conclusion that the rule may have some impact on small retail food stores, compared to the small food retailers' belief that the rule would have considerable impact on their businesses. Given the discrepancy in



opinion about the rule's impacts, Advocacy suggested that FNS should provide greater transparency supporting its decision to certify the rule. This could include the number of retail food establishments expected to be covered by the rule, a cost determination of the rule on covered small businesses' revenues or through the use of another economic impact metric, and a quantitative explanation of FNS's definition of what constitutes a significant impact on covered entities. As of September 30, 2019, the final rule has not been published.

***Issue: Providing Regulatory Flexibility for Retailers in the Supplemental Nutrition Assistance Program***

On April 22, 2019, Advocacy filed comments on a FNS proposed rule entitled "Providing Regulatory Flexibility for Retailers in the Supplemental Nutrition Assistance Program." Advocacy noted that FNS could make the rule more transparent by providing the public with its regulatory impact and regulatory flexibility analyses, which were unintentionally omitted from the proposed rule's docket. Because of this oversight, FNS published them on June 14, 2019, and extended the comment period to June 20, 2019.

On June 19, 2019, upon reviewing the analyses, Advocacy filed a supplemental comment letter providing FNS with its thoughts on two concerns with them. First, most of the assumptions in the analyses were based on data taken from the 2016 final rule. As a result, Advocacy encouraged FNS to recalculate its regulatory baseline by using 2019 data. This would provide the public with a more current snapshot of any costs or savings inherent in the proposed rule. Second, FNS did not entertain significant alternatives. Stakeholders told Advocacy

that they met with FNS and offered the agency a reasonable alternative that would simplify the breadth of stock provisions contained in the rule. Advocacy commented that FNS should have discussed this alternative. As of September 30, 2019, the final rule has not been published by FNS.

**Department of Defense**

***Issue: Prompt Payments of Small Business Contractors***

On May 31, 2019, the Department of Defense (DOD) published a proposed regulation to implement section 652 of the National Defense Authorization Act for FY 2019. Section 652 provided accelerated payments to small business prime and subcontractors with a goal of 15 days after receipt of a proper invoice.

On July 30, 2019, Advocacy submitted a formal comment urging the DOD to revisit this rule and to re-publish for comment a supplemental Initial Regulatory Flexibility Analysis. Advocacy was concerned that the original Initial Regulatory Flexibility Analysis lacked required elements that would provide small businesses with an adequate amount of information to determine the impact of the proposed rule, and that the proposed rule seemed to be in conflict with an existing Federal Acquisition Regulation. Further proposed rules indicated that DOD would not be able to provide accelerated payments to approximately one percent of eligible small businesses. The final rule has not been published.

***Issue: Draft Cyber Certification Model***

On August 26, 2019, the DOD published a model certification program. This model was not published as a proposed rule, but DOD did seek comments. If implemented, this model would

impose a mandatory compliance requirement on every DOD supplier and contractor, including small businesses, prime and subcontractors. It was estimated that at least 300,000 companies would have to comply with this certification requirement. DOD is suggesting a five-level certification model. Advocacy is concerned that significant gaps in the levels of certification will potentially exclude small business contractors. Advocacy submitted a formal comment letter on September 25, 2019. This proposal is still under review.

### **Department of Education**

#### *Issue: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*

On February 15, 2019, Advocacy filed public comments in response to the Department of Education's (DOE) November 29, 2018 notice of proposed rulemaking entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance."

The DOE stated that the proposed regulations would specify how educational institutions covered by Title IX must respond to incidents of sexual harassment consistent with Title IX's prohibition against sex discrimination. The regulation would also clarify and modify Title IX regulatory requirements pertaining to the availability of remedies for violations, the designation of a coordinator to address sex discrimination issues, and the adoption of grievance procedures.

Small entities and their representatives expressed three concerns to Advocacy: 1) the uncalculated cost of supportive measures that they will need to offer to students that are unable or unwilling to file a formal sexual harassment complaint, 2) the expense that will be incurred to comply with the

new procedural requirements, which will include conducting court-like proceedings such as live hearings, and 3) the cost of retaining up to three attorneys for each sexual harassment complaint due to the requirement that the investigator, advisor, and decision maker for a sexual harassment case be separate individuals. Small entities' concerns indicated that there could potentially be significant costs to a substantial number of small institutions as a result of the proposed regulation. In its comments, Advocacy recommended that the department publish an IRFA for public comment that includes analyses that measures and considers the regulatory impacts of the proposed rule on small entities, as well as significant alternatives. The department must also consult with Advocacy on its different size standard before proceeding with this rulemaking. As of September 30, 2019, a final rule has not been published.

### **Department of Energy**

#### *Issue: Test Procedure Interim Waiver Process*

On May 1, 2019, the U.S. Department of Energy (DOE) published a proposed rule entitled "Test Procedure Interim Waiver Process." This proposed rule would require that DOE notify interim waiver applicants of a disposition of a request within 30 business days of receipt of the application. If the agency fails to render a decision within this timeframe, the waiver would be deemed granted based on applicable criteria.

On July 15, 2019, Advocacy filed a comment letter urging the agency to act quickly to finalize the rule to ensure that small businesses receive a decision on their applications in a timely manner. Advocacy noted that this proposed rule would merely correct a flaw in an existing regulation, whereby the

existing 30-day requirement is met either through the agency rendering its decision, or, if the agency does not do so, automatically granting the petition for interim waiver until the agency renders a decision on the full waiver application. Advocacy believes that addressing delays in decisions for interim waiver applications will eliminate the burden to small manufacturers who in some instances must wait several months to a year before receiving a decision. As of September 30, 2019, no final rule has been issued by the agency.

**Department of Homeland Security, United States Citizenship and Immigration Service**

*Issue: Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens*

In December 2018, the United States Citizenship and Immigration Services (USCIS) released a proposed rule that would create an early registration and lottery system for petitioners trying to obtain an H-1B visa for cap-subject individuals. The H-1B program allows companies in the United States to temporarily employ foreign workers in occupations of highly specialized knowledge. There is a congressionally mandated cap of 65,000 H-1B visas, and an extra 20,000 visas for beneficiaries with a U.S. master's degree or higher. USCIS proposed a similar registration system for the H-1B program in 2011, but the rule was never finalized due to concerns raised by Advocacy and small businesses. On December 20, 2018, Advocacy submitted a comment letter to USCIS based on small business feedback. Small businesses were concerned that the proposed registration requirement may make it more difficult for small businesses to obtain H-1B visas. For example, the requirement may encourage large companies to submit many applications to increase

their chances of obtaining H-1B workers. Small businesses were also concerned that USCIS had not tested this new electronic system against potential fraud and abuse. The proposed rule would also perform the lottery to benefit those with a U.S. master's degree or higher, which may be detrimental to small businesses.

On January 31, 2019, USCIS released a final rule which suspended the registration requirement for the FY 2020 cap to complete user testing to ensure that the system and process are operable. The agency adopted changes to benefit beneficiaries with a U.S. master's degree or higher. On December 6, 2019, USCIS completed user testing and will implement the early registration and lottery system for FY 2021.

## Department of Labor

### *Issue: Overtime Rules under Fair Labor Standards Act*

On March 22, 2019, the Department of Labor (DOL) issued a proposed rule under the Fair Labor Standards Act which implemented an exemption from minimum wage and overtime pay for executive, administrative, professional, outside sales, and computer employees at a minimum salary threshold of \$35,308. This minimum salary threshold was decreased from a 2016 final rule, which had set the threshold at \$47,476. On May 20, 2019, Advocacy wrote a comment letter to DOL that addressed this proposed rule's impacts on small businesses based on multiple roundtables across the country. In the letter, Advocacy commended DOL for adopting many recommendations the agency had received. However, Advocacy advised DOL to consider outstanding comments from small businesses and requested consideration of these concerns in a final rule.

Advocacy supported decreasing the minimum salary threshold from \$47,476 to \$35,308 and reviewing the minimum salary threshold every four years, but also encouraged DOL to reconsider its estimated compliance costs from the proposed rule. Small businesses told Advocacy that it could take them many hours over several weeks to understand and implement this rule in their operations. In contrast, DOL estimated one hour to read and implement the rule, one hour and fifteen minutes per affected worker in adjustment costs, and a weekly five-minute burden to schedule and monitor each affected worker. Advocacy also recommended the option for nonprofit entities to renegotiate their government contracts and grants to reflect higher, unanticipated costs of the new overtime requirements. Lastly, Advocacy recommended that DOL provide 12 to 18 months for small entities to comply with the new regulations.

On September 27, 2019, DOL issued the final rule in which the agency finalized the minimum salary



Regulatory staff tour a facility belonging to a small maple syrup producer in Vermont, who used the opportunity to share her regulatory issues with Advocacy.

threshold at \$35,568. The agency also declined yearly updates to the salary threshold and instead adopted potential increases every four years with a notice and comment period.

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

#### *Issue: Hours of Service of Drivers*

On February 6, 2019, the Federal Motor Carrier Safety Administration (FMCSA) published a request for comments on a notice of application for exemption from certain provisions of the hours of service of drivers rule. The application was made on behalf of drivers who transport livestock, insects, and aquatic animals with special transportation needs. The applicants requested approval of a 16-hour on-duty period during which these drivers would be permitted to drive up to 15 hours and would only commence after 10 consecutive hours off duty. Other aspects of the hours of service of drivers rules would remain unchanged. This issue had been raised at a number of Advocacy's regional regulatory reform roundtables hosted around the country.

On March 7, 2019, Advocacy submitted comments to FMCSA noting that many small trucking and transportation companies have expressed the need for greater flexibility under the hours of service regulations, particularly from industries that transport sensitive items such as livestock, perishable agricultural and aquaculture products, explosives, fireworks, and hazardous materials and waste. As such, Advocacy recommended that FMCSA provide these and similarly situated drivers with maximum flexibility and approve the application if it will achieve an equivalent or greater level of safety and is consistent with the agency's statutory safety objectives.

### **Department of the Treasury, Tax and Trade Bureau**

#### *Issue: Modernization of Labeling and Advertising Regulations*

On November 26, 2018, the Alcohol and Tobacco Tax and Trade Bureau (TTB) published a proposed rule entitled "Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages." In the proposed rule, the TTB defined "oak barrel" as a "cylindrical oak drum of approximately 50 gallons used to age bulk spirits." Many small distilleries use oak barrels of varying sizes, including 25 or 30 gallons, and shapes, such as squares, to age whiskey. The proposed rule did not address issues related to the labeling and advertising concerns of meaderies. Currently, mead cannot be labeled and advertised simply as "mead," but must be labeled and advertised as a mead with an additional flavor, such as "mead with vanilla." The TTB certified that the rule would not have a significant economic impact on a substantial number of small entities.

On August 6, 2019, Advocacy published a comment letter expressing concerns that the proposed rule was improperly certified, communicating small distillers' concerns with the agency's definition of "oak barrel" and meaderies' labeling and advertising concerns. Advocacy suggested that the agency either withdraw the oak barrel definition from the rule or publish a supplemental IRFA to more accurately describe the definition's effect on small entities. Advocacy also recommended that the TTB follow the mead industry's suggestion and create a new class and type designation for mead. As of September 30, 2019, the agency had not published a final rule.



## **Environmental Protection Agency**

### ***Issue: Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces***

The EPA issued a New Source Performance Standard (NSPS) for this industry in 2015, with new requirements on all products sold after May 2020. Unlike most NSPS regulations, this rule imposes requirements on products sold to individuals rather than installed by businesses. As the deadline approached, retailers decreased their purchases of older stoves more quickly than EPA or the manufacturers anticipated, leaving manufacturers with a significant inventory of products that cannot be sold after May 2020.

In November 2018, EPA proposed a temporary sell-through for a small segment of this market, allowing retailers to sell the older products longer, even as manufacturers transitioned to the newer products. On February 21, 2019, Advocacy filed a public comment encouraging expansion of the sell-through to more products to reduce the burdens of stranded inventory. At the same time as the proposal, EPA published an advanced notice of proposed rulemaking requesting comment on ways to improve the NSPS. Advocacy suggested three areas in which EPA could make improvements that would reduce the burden on small entities.

As of September 30, 2019, EPA has taken no further action on these revisions.

### ***Issue: Renewable Fuel Standard Credit Market Regulations***

Under the Renewable Fuel Standard, part of the Clean Air Act, petroleum refineries are responsible for the blending of ethanol or other renewable fuels into transportation fuels. Since refineries themselves generally do not blend ethanol into gasoline, Congress instructed EPA to create a

tradeable credit that would be generated by businesses that blend fuel and could be sold to refineries for compliance.

On March 21, 2019, EPA proposed a series of measures to restrict trading of this credit, responding to allegations of fraud and market manipulation to the disadvantage of some refiners. However, EPA did not consider the impact these revisions would have on the blenders or on the small businesses that buy, sell, and hold credits. On April 29, 2019, Advocacy filed public comments asking EPA to consider the impacts on all small businesses that would be directly affected by changes to the market regulations. Advocacy suggested that a blanket exemption for all small entities would be consistent with the stated intent of the rule.

EPA issued this rule as final on June 10, 2019. The rule imposed additional paperwork on small entities but did not limit their ability to operate, avoiding the worst of the potential impacts.

### ***Issue: Municipal Solid Waste Landfills***

In 2016 EPA issued a final rule revising part of the air emission standards for municipal solid waste landfills. Advocacy engaged with small businesses during the development of this rule, and recommended numerous flexibilities, some of which EPA adopted. However, these changes created inconsistencies with other parts of EPA regulations that limited their effectiveness. On July 29, 2019, EPA published a proposed rule revising these other parts to bring them into alignment and create an alternative compliance pathway for landfills.



On September 11, 2019, Advocacy filed public comment recommending additional flexibilities for small entities that would improve landfill management and emissions performance. As of September 30, 2019, EPA had taken no further action on this rule.

### **Environmental Protection Agency/ U.S. Army Corps of Engineers**

#### ***Issue: Revised Definition of “Waters of the United States”***

On February 14, 2019, the EPA and the Army Corps of Engineers published a proposed rule titled: “Revised Definition of ‘Waters of the United States’.” This proposed rule defines the scope of waters subject to federal jurisdiction and regulation under the Clean Water Act. This proposed rule is the second step in a two-step process to both rescind the previous definition and to revise the existing definition.

On April 11, 2019, Advocacy filed a comment letter applauding the agencies’ effort to revise the definition while suggesting additional points of clarification and possible modification to give greater certainty to regulated entities as to the current definition. In addition, Advocacy expressed concern that the agencies improperly certified the rule by stating that it will not have a significant economic impact on a substantial number of small entities without a factual basis for doing so as required by statute. Advocacy suggested that EPA and the Corps provide a sound factual basis for certification in addition to addressing other small entity concerns.

### **Federal Trade Commission**

#### ***Issue: Standards for Safeguarding Customer Information***

On April 4, 2019, the FTC published a notice of proposed rulemaking on “Standards for Safeguarding Customer Information” (Safeguards Rule). The proposal contains five main modifications to the existing rule. It adds provisions designed to provide covered financial institutions with more guidance on how to develop and implement specific aspects of an overall information security program, adds provisions designed to improve the accountability of financial institutions’ information security programs, exempts small businesses from certain requirements, expands the definition of “financial institution” to include entities engaged in activities that the Federal Reserve Board determines to be incidental to financial activities, and includes the definition of “financial institution.” On July 31, 2019, Advocacy submitted comments the Safeguards Rule.

Small business representatives told Advocacy that the proposal was overly prescriptive and created a high burden for small entities without any data on how it will lower risks to consumers. They also argued that the rule imposed data security standards on companies with only a few offices. Advocacy expressed concerns about the lack of data on the potential impact to smaller firms typical of national banks.

Although the FTC has exempted some small entities from a portion of the proposed rule, Advocacy expressed concerns that the proposal would be unduly burdensome for small entities. Advocacy explained that the best alternative for assuring that the action will not be unduly burdensome is to

maintain the status quo for small entities, as defined by the SBA size standards, until FTC can ascertain the potential impact. Another alternative would be to establish a safe harbor for small entities. As of September 30, 2019, the rule had not been finalized.

### **Small Business Administration**

#### ***Issue: Calculation of Annual Average Receipts for the Determination of Small Business Size Standards***

On June 24, 2019, the SBA published a proposed rule that would change the method of calculation of annual receipts for size standards. This rule proposed modifying SBA's method for calculating annual size standards for service-industry firms from the average of gross receipts over a period of three years to an average over five years. On August 22, 2019, Advocacy submitted a formal comment letter to SBA on this proposed rule change. Among other things Advocacy's comment letter discussed SBA's failure to provide alternatives for businesses that may be negatively impacted by the rule. Advocacy suggested a phase-in approach as an alternative. The rule went final with an effective date of January 6, 2020. SBA accepted Advocacy's recommendation and provided a phase-in for small businesses.

#### ***Issue: Express Loans; Affiliation Standards***

On September 28, 2018, SBA published a notice of proposed rulemaking on "Express Loan Programs; Affiliation Programs." Advocacy submitted a comment letter on the notice on December 18, 2019. The proposed rule would cap the fees that lenders can charge at \$2,500 for loans of \$350,000 or less and \$5,000 for loans over \$350,000. The proposed rule would also reduce the fee that loan application agents may charge to 2.5 percent of the

loan or a maximum of \$7,000. Although they would reduce the fees that small businesses pay to obtain a loan, the proposed caps would hurt small banks and possibly eliminate their incentives to facilitate small SBA loans. Advocacy encouraged SBA to consider other alternatives that may be less burdensome to small banks.

In addition, the proposed rule would require certain small business owners to inject excess liquid assets into the business to reduce the amount of SBA-guaranteed funds. Small banking representatives are concerned the requirement will limit the resources that a small business owner may have in an emergency. Moreover, the requirement may eliminate potential borrowers and be difficult to include in the current underwriting practices of small financial institutions. Advocacy encouraged SBA to consider a contribution level that will provide small businesses a buffer in emergencies and to work with small financial institutions to determine the least disruptive way to implement the changes.

SBA also proposed several ways to determine affiliation. The proposed rule defined affiliation based on identity of interest if they are economically dependent through contractual or other relationships, common investments where the same individuals or firms own a substantial portion of multiple concerns, or economic dependence if the concern derives more than 85 percent of its receipts from another concern over the previous three years. Under the proposed rule, affiliation may also arise based on a newly organized concern, a franchise agreement, or the totality of the circumstances.

Advocacy argued that these proposed modes of determining affiliation could be vague and confusing to small entities. In addition, the changes may be problematic in small rural communities that rely on contracts with large companies or integrators to buy agricultural goods. Advocacy encouraged SBA to clarify the proposed rule to address the concerns of small entities. Advocacy also encouraged SBA to perform additional

business outreach with the industries that may be affected by the proposal to determine the best way to achieve SBA's goals without being unduly burdensome. As of September 30, 2019, the rule was not finalized.



During a visit to Anchorage, Alaska for a regional roundtable, Advocacy visited an ice cream shop to learn about some of the challenges faced by Alaskan small business owners.

## Chapter 5

# Small Business Regulatory Cost Savings and Success Stories

In FY 2019, the Office of Advocacy's actions led to changes in 15 rules from 10 different agencies. Advocacy estimates small businesses saved \$773 million in estimated forgone regulatory cost savings because of 10 changes under the Regulatory Flexibility Act and Advocacy's efforts to promote federal agency compliance. There were five additional regulatory successes whose impacts are not quantifiable, described in the Small Business Regulatory Success Stories section of this chapter.

In FY 2019, small businesses benefited from Advocacy's RFA activities through seven deregulatory actions. Compliance cost savings for small businesses that resulted from deregulatory actions arose from the withdrawal or delay of final and proposed regulations.

One of this year's cost savings involved the Department of Health and Human Services, Center for Medicare and Medicaid Services' (CMS) elimination of the "25 percent rule," which reduced Medicare reimbursement rates by 50 percent to 60 percent for long-term care hospitals if more than a quarter of their patients came from a single acute-care hospital. In communications to CMS, Advocacy noted that the rule as proposed harmed small long-term care facilities because they received a reduced Medicare reimbursement even when providing care to patients that met statutory requirements for a full payment rate. Thanks to Advocacy and small

business input, CMS eliminated the 25 percent rule, saving small facilities \$72.0 million.

Another cost saving highlighted this year was the Department of Labor's (DOL) revision of Overtime Rules under the Fair Labor Standards Act. In 2015, the DOL proposed a minimum salary for the "white collar" overtime pay exemption at \$50,440. After gathering feedback through several national roundtables, Advocacy recommended that DOL consider the salary threshold's impact on small business, especially in the South and in industries with small profit margins. In 2016, DOL released a final rule with a salary threshold of \$47,476. That rule was overturned in federal court. In September 2019, DOL released a final rule that set the minimum salary threshold at \$35,568, resulting in a \$204.6 million cost savings for small businesses.

Other success stories occurred in FY 2019 whose effects were more difficult to quantify. For example, the Environmental Protection Agency (EPA) issued a memo in 2017 about how recalled Takata airbag material would be covered under the Resource Conservation and Recovery Act (RCRA). However, small businesses notified Advocacy at a regional roundtable that EPA's guidelines were confusing. Advocacy informed EPA of the confusion, and EPA issued two clarifications. First, EPA issued a memo outlining the RCRA regulatory status of recalled airbags. Second, EPA published an interim final rule providing an exemption under RCRA that prevented

businesses involved in airbag removal from moving up to a “larger quantity generator” category. Advocacy’s intervention led to clearer requirements

for small businesses involved in the Takata airbag recall.

## Descriptions of Small Business Regulatory Cost Savings

*Table 5.1 Summary of Small Business Regulatory Cost Savings, FY 2019*

(Deregulatory actions shown in bold.)

Agency	Rule	Initial cost savings (\$million)	Recurring cost savings (\$million)
Consumer Finance Protection Bureau	Delay of Payday Lending Rule Compliance Date <sup>1</sup>	203.0	203.0
Department of Education	<b>Repeal of the Gainful Employment Rule<sup>2</sup></b>	119.3	119.3
Department of Health & Human Services, Centers for Medicare and Medicaid Services	<b>Withdrawal of Safe Harbor Protections for Rebates Involving Prescription Pharmaceuticals Rule<sup>3</sup></b>	16.0	16.0
	<b>Elimination of the 25 Percent Rule<sup>4</sup></b>	<b>72.0</b>	<b>72.0</b>
Department of the Interior, Bureau of Safety and Environmental Enforcement	<b>Bureau of Safety and Environmental Enforcement (BSEE) Well Control Provisions<sup>5</sup></b>	<b>38.0</b>	<b>38.0</b>
Department of Labor, Wage and Hour Division	<b>Overtime Rules under the Fair Labor Standards Act<sup>6</sup></b>	<b>204.6</b>	<b>204.6</b>
Environmental Protection Agency	Toxic Substance Control Act Fees Rule <sup>7</sup>	0.2	0.2
	<b>Resource Conservation and Recovery Act (RCRA) Pharmaceuticals<sup>8</sup></b>	<b>19.7</b>	<b>19.7</b>
	Methylene Chloride; Regulation of Paint and Coating Removal for Consumer Use Under TSCA Section 6(a) <sup>9</sup>	24.5	24.5
Environmental Protection Agency and U.S. Army Corps of Engineers	<b>Repeal of the 2015 Waters of the United States Rule<sup>10</sup></b>	<b>75.7</b>	<b>75.7</b>
Total Foregone Regulatory Cost Savings, FY 2019		773	773

Note: Advocacy generally bases its cost savings estimates on agency estimates. Cost savings estimates are derived independently for each rule from the agency's data, and accounting methods and analytical assumptions for calculating costs may vary by agency. Cost savings for a given rule are captured in the fiscal year in which the agency finalizes changes in the rule. These are best estimates to illustrate reductions in regulatory costs to small businesses as a result of Advocacy's intervention. Initial cost savings consist of capital or recurring costs foregone that may have been incurred in the rule's first year of implementation by small businesses. Recurring cost savings are listed where applicable as annual or annualized values as presented by the agency. The actions listed in this table include deregulatory actions such as delays and rule withdrawals.

Sources:

1. 84 Fed. Reg. 27907 (June 17, 2019).
2. 84 Fed. Reg. 31392 (July 1, 2019).
3. 84 Fed. Reg. 2340 (Feb. 6, 2019).
4. 83 Fed. Reg. 41144 (Aug. 17, 2018).
5. 84 Fed. Reg. 21908 (May 15, 2019).
6. 84 Fed. Reg. 51230 (Sept. 27, 2019).
7. 83 Fed. Reg. 52694 (Oct. 17, 2018).
8. 84 Fed. Reg. 5816 (Feb. 2, 2019).
9. 84 Fed. Reg. 11420 (Mar. 27, 2019).
10. 84 Fed. Reg. 56626 (Oct. 22, 2019).

## Descriptions of Cost Savings

### Consumer Financial Protection Bureau

#### *Delay of Payday Lending Rule Compliance Date*

On February 14, 2019, the Consumer Financial Protection Bureau (CFPB) published a proposed rule to delay the compliance date of the Mandatory Underwriting Provisions of the CFPB's 2017 Final Rule establishing consumer protection regulations for payday loans, vehicle title loans, and certain high-cost installment loans. On March 15, 2019, Advocacy submitted a letter commending the CFPB for delaying the compliance date for the mandatory underwriting provisions and for proposing a rule to rescind them. Advocacy also argued that a fifteen-month delay would be helpful for small credit unions and would allow ample time for the CFPB to review the National Credit Union Administration

changes to the Payday Alternative Loans, and to identify inconsistencies and resolve problems that were not considered in 2017. Advocacy further contended that the delay should also apply to the payment provisions in the 2017 final rule. On June 17, 2019, the Bureau published a final rule delaying the compliance date from August 19, 2019 to November 19, 2020. **The delay resulted in \$203 million in cost savings.**

### Department of Education

#### *Repeal of the Gainful Employment Rule*

The Department of Education's "Program Integrity: Gainful Employment rule" was rescinded on July 1, 2019, with the exception of subpart Q of the Student Assistance General Provisions. The rescinded rule was put in place to evaluate educational institutions' effectiveness in preparing students for gainful employment after program



completion through various metrics like debt-to-earnings ratios and student loan default rates. The regulation also set requirements for institutions to make certain performance and outcomes data available to the public, including program costs, earnings information, and completion rates. Advocacy recommended that the department analyze small business alternatives or consider exempting small entities from compliance. **The rescinded rule will result in \$119.3 million in annual savings for small educational institutions.**

#### **Department of Health & Human Services, Centers for Medicare and Medicaid Services** *Withdrawal of Safe Harbor Protection for Rebates Involving Prescription Pharmaceuticals Rule*

In July 2019, the CMS withdrew the proposed rule “Fraud and Abuse; Removal of Safe Harbor Protection for Rebates Involving Prescription Pharmaceuticals and Creation of New Safe Harbor Protection for Certain Point-of-Sale Reductions in Price on Prescription Pharmaceuticals and Certain Pharmacy Benefit Manager Service Fees.” Had the proposed rule been finalized, it could have imposed costs on small pharmacies to read and understand the rule and to adjust their business processes.

**Advocacy estimated annualized cost savings of about \$16.0 million total for 21,909 small pharmacies that would have been affected by the rule.**

#### *Elimination of the 25 Percent Rule*

The 25 percent rule was first introduced in the CMS 2004 inpatient pay rule and has been delayed frequently by both the CMS and Congress. Under the original 25 percent rule, if more than a quarter of a long-term care hospital's patients came from a single acute-care hospital, the long-term care

hospital would receive a reduced Medicare reimbursement rate for patients exceeding that threshold. The reduced rate would be 50 percent to 60 percent less than what they would have received otherwise. As part of Advocacy’s regulatory reform initiative, Advocacy included the 25 percent rule in its submission to CMS on rules in need of reform. Advocacy noted that the 25 percent rule continued to adversely affect long-term care facilities because they would receive a reduced Medicare reimbursement rate even when care was provided to patients who met the statutory criteria for a full long-term care hospital prospective payment system rate. On August 17, 2018, CMS published a final rule eliminating the 25 percent rule, which took effect on October 1, 2018. **As a result of Advocacy’s suggestions, the changes contained in the CMS final rule resulted in cost savings of \$72.0 million.**

#### **Department of the Interior, Bureau of Safety and Environmental Enforcement** *Well Control Provisions*

On May 15, 2019, the U.S. Department of the Interior’s Bureau of Safety and Environmental Enforcement issued a final rule entitled “Oil and Gas and Sulfur Operations in the Outer Continental Shelf Blowout Prevent Systems and Well Control Revisions.” The rule aimed to revise requirements for well design, control, casing, cementing, and real-time monitoring, as well as subsea containment. The rule intended to maintain the same level of safety and environmental protection while reducing unnecessary regulatory burdens by correcting errors and reducing certain requirements imposed by existing regulation. **The agency estimates a total small business cost saving of approximately \$38.0 million annualized.**

## Department of Labor, Wage and Hour Division

### *Overtime Rules under FLSA*

Advocacy has been involved with DOL's Overtime rule since 2015. The rule sets the minimum salary for the "white collar" exemption from overtime pay under the Fair Labor Standards Act. DOL's proposed rule in 2015 set the minimum salary threshold at \$50,440. Based on roundtables held across the country, Advocacy recommended that DOL consider the impact of the rule on small businesses, especially in low-wage regions in the South and in industries such as retail where profit margins are thin, and to reconsider yearly updates to the salary threshold. When DOL released the 2016 final rule, the agency set the minimum salary threshold at \$47,476. The 2016 final rule never became effective due to legal challenges.

In March 2019, DOL released a proposed rule that set the minimum salary threshold at \$35,308. Advocacy held roundtables in Tampa, Washington, D.C. and Alabama, and submitted a comment letter to DOL on May 20, 2019 based on this feedback. Most small businesses commented that this lower threshold would have a much smaller impact on them, while some small businesses in rural communities and in retail industries were still concerned with the costs of this threshold and suggested further tailored alternatives to this proposal. DOL finalized the minimum salary threshold at \$35,568. The agency declined yearly updates to the salary threshold and instead adopted potential increases every four years with a notice and comment period. DOL estimates that lowering the overtime threshold and rejecting an automatic updating mechanism will save the U.S. economy \$534.8 million. **By assessing what**

**percent of the affected workforce is employed by small business, Advocacy estimates that this change will result in an annualized cost savings of \$204.6 million for small businesses.**

## Environmental Protection Agency

### *Toxic Substances Control Act Fees Rule*

On October 17, 2018, EPA signed its final rule on the fee collecting rule under the Toxic Substance Control Act (TSCA). The rule established a fee schedule for a business that is required to submit information to EPA under several sections of TSCA. In this rule, EPA revised its small business definition to align with the Small Business Administration's (SBA) small business standards. Small businesses expressed concerns about inconsistent small business definitions among federal agencies. Specifically, small businesses noted that EPA's definition for small manufacturers under TSCA was outdated and did not capture small businesses as they exist today. To address these concerns, Advocacy engaged with the EPA and SBA to revise EPA's small business size standards under TSCA. The new definition will qualify more small businesses for a reduced fee. **As a result, the total annual cost savings for small businesses is approximately \$196,223.**

### *Resource Conservation and Recovery Act (RCRA) Pharmaceuticals*

EPA finalized its new standards for managing pharmaceutical hazardous waste under its Resource Conservation and Recovery Act on February 22, 2019. The final rule provides sector-specific standards instead of the existing hazardous waste generator regulations for healthcare facilities and reverse distributors. Among the many changes, EPA ended the dual regulations for pharmaceutical hazardous waste that was also regulated by the

Drug Enforcement Agency as controlled substances. EPA also provided an exemption for certain over-the-counter nicotine replacement therapies from regulation as a hazardous waste. Finally, the agency provided regulatory certainty by clarifying that non-prescription pharmaceuticals, as opposed to prescription pharmaceuticals, will not be considered solid waste when there is a reasonable expectation of those products being used/reused or legitimately reclaimed. For prescription pharmaceuticals, the agency provided less burdensome requirements for their management through the reverse distributors. **As a result, the cost savings for small businesses in this rule were approximately \$19.7 million.**

#### *Methylene Chloride; Regulation of Paint and Coating Removal for Consumer Use Under TSCA Section 6(a)*

On March 27, 2019, EPA published its final rule to manage the risk in methylene chloride for paint and coating removal under TSCA. EPA initially proposed banning the manufacture, processing, and sale of methylene chloride for both commercial and consumer use. However, in its final rule, after public comment including comment from Advocacy, EPA only chose to prohibit the use of methylene

chloride in paint and coating removal for consumer use. **As a result, the total annual cost savings for small businesses is approximately \$24.5 million.**

#### **Environmental Protection Agency and U.S. Army Corps of Engineers**

##### *Repeal of the 2015 Waters of the United States Rule*

On September 12, 2019, the Environmental Protection Agency (EPA) announced that it would repeal the 2015 “Clean Water Rule: Definition of ‘Waters of the United States’” and restore the regulatory text that existed prior to its publication. The new final rule, entitled “Definition of ‘Waters of the United States’ Recodification of Pre Existing Rules” is part of a two-step process to first repeal the 2015 rule, and in a separate rulemaking, define “Waters of the United States.” The repeal is intended to reduce unnecessary regulatory burdens by restoring the previous, less-stringent definition of “Waters of the United States” and creating regulatory certainty nationwide until a new definition can be finalized. The agency estimates total cost savings for the rule to be \$94 million. **Based on Advocacy’s calculations this would amount to a small-business cost savings of \$75.7 million.**



Advocacy staff use site visits, like this one with a Minnesota small business, to learn how federal regulation affects their individual businesses.

## Small Business Regulatory Success Stories

*Table 5.2 Summary of Small Business Regulatory Success Stories, FY 2019*

Agency	Rule
Department of Interior, Fish and Wildlife Services and Department of Commerce, National Marine Fisheries Service	Endangered Species Act Revised Regulations for Listing Species and Designating Critical Habitat; Prohibitions to Threatened Wildlife and Plants; Interagency Cooperation <sup>1</sup>
Department of Homeland Security, United States Citizenship and Immigration Services	H-1B Visa Registration Delay <sup>2</sup>
Environmental Protection Agency	Facilitating Safe Management of Recalled Airbags <sup>3</sup>
Federal Communications Commission	Limitations on USTelecom's Grant of Forbearance <sup>4</sup>
	Adoption of New One-Touch Make-Ready (OTMR) Policies <sup>5</sup>

**Sources:**

1. 84 Fed. Reg. 45020 (Aug. 27, 2019)(effective Sept. 26, 2019). [www.federalregister.gov/documents/2019/08/27/2019-17518/endangered-and-threatened-wildlife-and-plants-regulations-for-listing-species-and-designating-critical-habitat](http://www.federalregister.gov/documents/2019/08/27/2019-17518/endangered-and-threatened-wildlife-and-plants-regulations-for-listing-species-and-designating-critical-habitat); 84 Fed. Reg. 44753 (Aug. 27, 2019) (effective Sept. 26, 2019), [www.federalregister.gov/documents/2019/08/27/2019-17519/endangered-and-threatened-wildlife-and-plants-regulations-for-prohibitions-to-threatened-wildlife](http://www.federalregister.gov/documents/2019/08/27/2019-17519/endangered-and-threatened-wildlife-and-plants-regulations-for-prohibitions-to-threatened-wildlife); 84 Fed. Reg. 44976 (Aug. 27, 2019)(effective Sept. 26, 2019). [www.federalregister.gov/documents/2019/08/27/2019-17517/endangered-and-threatened-wildlife-and-plants-regulations-for-interagency-cooperation](http://www.federalregister.gov/documents/2019/08/27/2019-17517/endangered-and-threatened-wildlife-and-plants-regulations-for-interagency-cooperation).
2. 84 Fed. Reg. 888 (Jan. 31, 2019) (effective Apr. 1, 2019). [www.federalregister.gov/documents/2019/01/31/2019-00302/registration-requirement-for-petitioners-seeking-to-file-h-1b-petitions-on-behalf-of-cap-subject](http://www.federalregister.gov/documents/2019/01/31/2019-00302/registration-requirement-for-petitioners-seeking-to-file-h-1b-petitions-on-behalf-of-cap-subject).
3. 84 Fed. Reg. 61552 (Nov. 30, 2019)(effective Nov. 30, 2018). [www.federalregister.gov/documents/2018/11/30/2018-25892/safe-management-of-recalled-airbags](http://www.federalregister.gov/documents/2018/11/30/2018-25892/safe-management-of-recalled-airbags).
4. Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. Section 160(c) to Accelerate Investment in Broadband and Next-Generation Networks, FCC-19-72 (Aug. 2, 2019). [docs.fcc.gov/public/attachments/FCC-19-72A1\\_Rcd.pdf](https://docs.fcc.gov/public/attachments/FCC-19-72A1_Rcd.pdf).
5. Wireline Competition Bureau Announces Effective Date of Order Instituting One-Touch-Make-Ready Regime for Pole Attachments, (DA-19-445) (May 20, 2019). [docs.fcc.gov/public/attachments/DA-19-445A1\\_Rcd.pdf](https://docs.fcc.gov/public/attachments/DA-19-445A1_Rcd.pdf).

## Success Story Descriptions

### Department of the Interior Fish and Wildlife Services and Department of Commerce National Marine Fisheries Service

#### *Endangered Species Act Mitigation*

On July 25, 2018, the Department of the Interior's Fish and Wildlife Service and the Department of Commerce's National Marine Fisheries Service issued two proposed rules related to policies and procedures under the Endangered Species Act. A third rule was issued on the same date solely by the Fish and Wildlife Service. The rules aimed to update policies and procedures under the Act to make them more streamlined and less burdensome. Advocacy wrote a lengthy comment letter on all three rules supporting the proposed revisions with some modifications.

On August 27, 2019, all three proposed rules were finalized, and many of Advocacy's suggestions were reflected in these final rules. The final rule for listing and designating critical habitat modifies several definitions that were otherwise unclear, including creating a regulatory framework for the term "foreseeable future." It also clarifies that the standards for listing and delisting of species are the same. The rule also clarifies when designation of a critical habitat may not be prudent and the definition of physical or biological feature and revises the processes and standards for the designation of unoccupied critical habitats. This clarification helps alleviate some of the uncertainty regarding how long in the future the agency can look when making a determination on species conservation.

The final rule for interagency cooperation revises the definition of adverse modification and effects of

the action, establishes a stand-alone definition of environmental baseline, and contains other policies to improve and shorten the consultation process so that businesses receive decisions in a timelier manner.

The final rule for prohibitions to threatened wildlife and plants issued solely by the Fish and Wildlife Service aims to add consistency to the procedure currently being used by the National Marine Fisheries Service. The rule rescinds regulations that automatically applied prohibitions for endangered species to threatened species, instead forcing the agency to determine protections for threatened species on a case-by-case basis.

### Department of Homeland Security, United States Citizenship and Immigration Services

#### *H-1B Visa Registration Delay*

In December 2018, the United States Citizenship and Immigration Services (USCIS) released a proposed rule that would create an early registration and lottery system for petitioners trying to obtain an H-1B visa for cap-subject individuals. The H-1B program allows U.S. companies to temporarily employ foreign workers in occupations of highly specialized knowledge. There is a congressionally mandated cap of 65,000 H-1B visas, and an extra 20,000 visas for beneficiaries with a U.S. master's degree or higher. USCIS proposed a similar registration system for the H-1B program in 2011, but the rule was never finalized due to concerns raised by Advocacy.

On December 20, 2018, Advocacy submitted a comment letter to USCIS. Small businesses were concerned that the proposed registration requirement may make it more difficult to obtain H-1B visas. They were also concerned that USCIS had



not tested this new electronic system against potential fraud and abuse. The proposed rule would also benefit beneficiaries with a U.S. master's degree or higher, which may be detrimental to small businesses.

On January 31, 2019, USCIS released a final rule which suspended the registration requirement for the FY 2020 cap to ensure that the system and process are operable. The agency adopted changes to benefit beneficiaries with a U.S. master's degree or higher. USCIS completed testing on December 6, 2019 and will implement the early registration and lottery system for fiscal year 2021.

### **Environmental Protection Agency** *Facilitating Safe Management of Recalled Airbags*

In June 2017, EPA issued a memo regarding recalled Takata airbags, which raised several questions among stakeholders about other types of airbag materials in different situations under the Resource Conservation and Recovery Act (RCRA). During Advocacy's regional regulatory roundtable in Georgia, a small business stakeholder expressed concerns about EPA's position as a cause for confusion among dealerships related to the safe removal of defective and recalled airbags from vehicles. Advocacy reached out EPA to clarify the issue. In response to inquiries, EPA issued another memo on July 19, 2018, outlining the RCRA regulatory status of airbags throughout their lifecycle. Next, on November 30, 2018, EPA published an interim final rule where the agency provided a conditional exemption from its hazardous waste regulations under RCRA for the collection of recalled airbag wastes. The exemption prevents those involved in removing or replacing the airbags from moving up to a "larger quantity generator" category which triggers additional

requirements. The issuance of both the July 2018 and November 2018 memos provided small business stakeholders with the necessary clarity and certainty.

### **Federal Communications Commission** *Limitations on USTelecom's Grant of Forbearance*

On May 4, 2018 USTelecom filed a petition with the FCC requesting a grant of nationwide forbearance from regulations regarding the unbundling and resale mandates imposed on incumbent local exchange carriers under the 1996 Telecommunications Act. Traditionally, these regulations have allowed small companies to purchase access to incumbent networks at regulated rates to provide competitive options to consumers and reinvest into building independent facilities to bring competition to the broadband market.

At its regulatory reform roundtables Advocacy staff encountered a number of concerned small businesses that purchase unbundled network elements, and conducted significant outreach to understand the impact that a grant of nationwide forbearance would have on small competitive carriers and the deployment of next generation broadband networks, particularly in rural areas. Advocacy forwarded these concerns to the FCC over many months in letters and conversations with FCC staff.

Ultimately, USTelecom withdrew some of the most problematic aspects of its request in summer of 2019. In September of 2019, the FCC made a much more limited grant of forbearance to USTelecom that minimized impacts to small entities.



### *Adoption of New One-Touch-Make-Ready Policies*

In meeting with FCC staff in July 2018, Advocacy expressed support for the FCC's efforts to streamline regulations that are impeding the build-out of next generation networks, including its proposal to adopt one-touch-make-ready pole attachment policies that would reduce barriers to entry for competitive telecommunications and broadband providers. Advocacy shared its

conversations with small businesses that deploy both fiber and wireless networks, who would benefit from these reforms. In August 2018, the FCC voted to adopt one-touch-make-ready policies which would allow new attachers to perform all work to prepare a pole for a new attachment, resulting in significant cost savings. The rules became effective May 20, 2019.



Advocacy's regulatory staff has multiple avenues for learning about regulatory burdens faced by small entities. In FY 2019, one opportunity came from the American Bar Association Environment, Energy, and Resources Section in Boston, Massachusetts, where two panels focused on regulatory reform.

# The Regulatory Flexibility Act

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

### Congressional Findings and Declaration of Purpose

(a) The Congress finds and declares that —

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

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

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

(4) the failure to recognize differences in the scale and resources of regulated entities has in numerous

instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;

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

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

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

(8) the process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions to examine the impact

of proposed and existing rules on such entities, and to review the continued need for existing rules.

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

## Regulatory Flexibility Act

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

### § 601. Definitions

For purposes of this chapter—

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

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

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

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

(5) the term “small governmental jurisdiction” means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more

definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register;

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

(7) the term “collection of information” —

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

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

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

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

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

## § 602. Regulatory agenda

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

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

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

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

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

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

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

## § 603. Initial regulatory flexibility analysis

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

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

- (1) a description of the reasons why action by the agency is being considered;
- (2) a succinct statement of the objectives of, and legal basis for, the proposed rule;
- (3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- (4) a description of the projected reporting, recordkeeping and other compliance requirements

of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

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

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

- (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
- (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
- (3) the use of performance rather than design standards; and
- (4) an exemption from coverage of the rule, or any part thereof, for such small entities.

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

- (A) any projected increase in the cost of credit for small entities;
- (B) any significant alternatives to the proposed rule which accomplish the stated objectives of



applicable statutes and which minimize any increase in the cost of credit for small entities; and

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

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

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

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

#### **§ 604. Final regulatory flexibility analysis**

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

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

(2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a

statement of any changes made in the proposed rule as a result of such comments;

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

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

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

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

(6)<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

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<sup>1</sup>. So in original. Two paragraphs (6) were enacted.



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 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).

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

### Executive Order of August 13, 2002

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:<sup>2</sup>

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

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<sup>2</sup> 67 FR 53461.  
[www.federalregister.gov/documents/2002/08/16/02-](http://www.federalregister.gov/documents/2002/08/16/02-)

21056/proper-consideration-of-small-entities-in-agency-rulemaking



be made (i) when the agency submits a draft rule to OIRA under Executive Order 12866 if that order requires such submission, or (ii) if no submission to OIRA is so required, at a reasonable time prior to publication of the rule by the agency; and

(c) Give every appropriate consideration to any comments provided by Advocacy regarding a draft rule. Consistent with applicable law and appropriate protection of executive deliberations and legal privileges, an agency shall include, in any explanation or discussion accompanying publication in the Federal Register of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule that preceded the final rule; provided, however, that such inclusion is not required if the head of the agency certifies that the public interest is not served thereby.

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

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

Sec. 5. Preservation of Authority. Nothing in this order shall be construed to impair or affect the authority of George W. Bush

THE WHITE HOUSE,

August 13, 2002.

Filed 08-15-02; 8:45 am]

[FR Doc. 02-21056

Billing code 3195-01-P

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.

## Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

### Executive Order of January 30, 2017

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Budget and Accounting Act of 1921, as amended (31 U.S.C. 1101 et seq.), section 1105 of title 31, United States Code, and section 301 of title 3, United States Code, it is hereby ordered as follows:<sup>3</sup>

Section 1. Purpose. It is the policy of the executive branch to be prudent and financially responsible in the expenditure of funds, from both public and private sources. In addition to the management of the direct expenditure of taxpayer dollars through the budgeting process, it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations. Toward that end, it is important that for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.

Sec. 2. Regulatory Cap for Fiscal Year 2017. (a) Unless prohibited by law, whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed.

(b) For fiscal year 2017, which is in progress, the heads of all agencies are directed that the total incremental cost of all new regulations, including repealed

regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the Director of the Office of Management and Budget (Director).

(c) In furtherance of the requirement of subsection (a) of this section, any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. Any agency eliminating existing costs associated with prior regulations under this subsection shall do so in accordance with the Administrative Procedure Act and other applicable law.

(d) The Director shall provide the heads of agencies with guidance on the implementation of this section. Such guidance shall address, among other things, processes for standardizing the measurement and estimation of regulatory costs; standards for determining what qualifies as new and offsetting regulations; standards for determining the costs of existing regulations that are considered for elimination; processes for accounting for costs in different fiscal years; methods to oversee the issuance of rules with costs offset by savings at different times or different agencies; and emergencies and other circumstances that might justify individual waivers of the requirements of this section. The Director shall consider phasing in and updating these requirements.

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<sup>3</sup> 82 FR 9339.

[www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs](http://www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs)

Sec. 3. Annual Regulatory Cost Submissions to the Office of Management and Budget. (a) Beginning with the Regulatory Plans (required under Executive Order 12866 of September 30, 1993, as amended, or any successor order) for fiscal year 2018, and for each fiscal year thereafter, the head of each agency shall identify, for each regulation that increases incremental cost, the offsetting regulations described in section 2(c) of this order, and provide the agency's best approximation of the total costs or savings associated with each new regulation or repealed regulation.

(b) Each regulation approved by the Director during the Presidential budget process shall be included in the Unified Regulatory Agenda required under Executive Order 12866, as amended, or any successor order.

(c) Unless otherwise required by law, no regulation shall be issued by an agency if it was not included on the most recent version or update of the published Unified Regulatory Agenda as required under Executive Order 12866, as amended, or any successor order, unless the issuance of such regulation was approved in advance in writing by the Director.

(d) During the Presidential budget process, the Director shall identify to agencies a total amount of incremental costs that will be allowed for each agency in issuing new regulations and repealing regulations for the next fiscal year. No regulations exceeding the agency's total incremental cost allowance will be permitted in that fiscal year, unless required by law or approved in writing by the Director. The total incremental cost allowance may allow an increase or require a reduction in total regulatory cost.

Donald J. Trump  
THE WHITE HOUSE,  
January 30, 2017.  
Filed 2-2-17; 11:15 am]

(e) The Director shall provide the heads of agencies with guidance on the implementation of the requirements in this section.

Sec. 4. Definition. For purposes of this order the term "regulation" or "rule" means an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency, but does not include:

(a) regulations issued with respect to a military, national security, or foreign affairs function of the United States;

(b) regulations related to agency organization, management, or personnel; or

(c) any other category of regulations exempted by the Director.

Sec. 5. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

(c) 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.

[FR Doc. 2017-02451  
Billing code 3295-F7-P

# Executive Order 13777: Enforcing the Regulatory Reform Agenda

## Executive Order of February 24, 2017

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to lower regulatory burdens on the American people by implementing and enforcing regulatory reform, it is hereby ordered as follows:<sup>4</sup>

Section 1. Policy. It is the policy of the United States to alleviate unnecessary regulatory burdens placed on the American people.

Sec. 2. Regulatory Reform Officers. (a) Within 60 days of the date of this order, the head of each agency, except the heads of agencies receiving waivers under section 5 of this order, shall designate an agency official as its Regulatory Reform Officer (RRO). Each RRO shall oversee the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law. These initiatives and policies include:

(i) Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs), regarding offsetting the number and cost of new regulations;

(ii) Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), as amended, regarding regulatory planning and review;

(iii) section 6 of Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review), regarding retrospective review; and

(iv) the termination, consistent with applicable law, of programs and activities that derive from or implement Executive Orders, guidance documents, policy memoranda, rule interpretations, and similar documents, or relevant portions thereof, that have been rescinded.

(b) Each agency RRO shall periodically report to the agency head and regularly consult with agency leadership.

Sec. 3. Regulatory Reform Task Forces. (a) Each agency shall establish a Regulatory Reform Task Force composed of:

(i) the agency RRO;

(ii) the agency Regulatory Policy Officer designated under section 6(a)(2) of Executive Order 12866;

(iii) a representative from the agency's central policy office or equivalent central office; and

(iv) for agencies listed in section 901(b)(1) of title 31, United States Code, at least three additional senior agency officials as determined by the agency head.

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<sup>4</sup> 82 FR 12285.

[www.federalregister.gov/documents/2017/03/01/2017-04107/enforcing-the-regulatory-reform-agenda](http://www.federalregister.gov/documents/2017/03/01/2017-04107/enforcing-the-regulatory-reform-agenda)

(b) Unless otherwise designated by the agency head, the agency RRO shall chair the agency's Regulatory Reform Task Force.

(c) Each entity staffed by officials of multiple agencies, such as the Chief Acquisition Officers Council, shall form a joint Regulatory Reform Task Force composed of at least one official described in subsection (a) of this section from each constituent agency's Regulatory Reform Task Force. Joint Regulatory Reform Task Forces shall implement this order in coordination with the Regulatory Reform Task Forces of their members' respective agencies.

(d) Each Regulatory Reform Task Force shall evaluate existing regulations (as defined in section 4 of Executive Order 13771) and make recommendations to the agency head regarding their repeal, replacement, or modification, consistent with applicable law. At a minimum, each Regulatory Reform Task Force shall attempt to identify regulations that:

(i) eliminate jobs, or inhibit job creation;

(ii) are outdated, unnecessary, or ineffective;

(iii) impose costs that exceed benefits;

(iv) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;

(v) are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note), or the guidance issued pursuant to that provision, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or

(vi) derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

(e) In performing the evaluation described in subsection (d) of this section, each Regulatory Reform Task Force shall seek input and other assistance, as permitted by law, from entities significantly affected by Federal regulations, including State, local, and tribal governments, small businesses, consumers, non-governmental organizations, and trade associations.

(f) When implementing the regulatory offsets required by Executive Order 13771, each agency head should prioritize, to the extent permitted by law, those regulations that the agency's Regulatory Reform Task Force has identified as being outdated, unnecessary, or ineffective pursuant to subsection (d)(ii) of this section.

(g) Within 90 days of the date of this order, and on a schedule determined by the agency head thereafter, each Regulatory Reform Task Force shall provide a report to the agency head detailing the agency's progress toward the following goals:

(i) improving implementation of regulatory reform initiatives and policies pursuant to section 2 of this order; and

(ii) identifying regulations for repeal, replacement, or modification.

Sec. 4. Accountability. Consistent with the policy set forth in section 1 of this order, each agency should measure its progress in performing the tasks outlined in section 3 of this order.

(a) Agencies listed in section 901(b)(1) of title 31, United States Code, shall incorporate in their annual performance plans (required under the Government Performance and Results Act, as amended (see 31 U.S.C. 1115(b))), performance indicators that measure progress toward the two goals listed in section 3(g) of this order. Within 60 days of the date of this order, the Director of the Office of Management and Budget (Director) shall issue guidance regarding the

implementation of this subsection. Such guidance may also address how agencies not otherwise covered under this subsection should be held accountable for compliance with this order.

(b) The head of each agency shall consider the progress toward the two goals listed in section 3(g) of this order in assessing the performance of the Regulatory Reform Task Force and, to the extent permitted by law, those individuals responsible for developing and issuing agency regulations.

**Sec. 5. Waiver.** Upon the request of an agency head, the Director may waive compliance with this order if the Director determines that the agency generally issues very few or no regulations (as defined in section 4 of Executive Order 13771). The Director may revoke a waiver at any time. The Director shall publish, at least once every 3 months, a list of agencies with current waivers.

Donald J. Trump  
THE WHITE HOUSE,  
February 24, 2017.  
Filed 2-28-17; 11:15 am]  
[FR Doc. 2017-04107  
Billing code 3295-F7-P

**Sec. 6. General Provisions.** (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

(c) 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.



## RFA Training, Case Law, and SBREFA Panels

### Federal Agencies Trained in RFA Compliance, 2003–2019

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, 79 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 since its inception in 2003.

#### Cabinet Agencies

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Department of Agriculture	Department of Energy
Animal and Plant Health Inspection Service	Department of Health and Human Services
Agricultural Marketing Service	Center for Disease Control and Prevention
Forest Service	Center for Medicare and Medicaid Services
Grain Inspection, Packers, and Stockyards Administration	Center for Tobacco Products
Livestock, Poultry, and Seed Program	Food and Drug Administration
National Organic Program	Indian Health Service
Rural Utilities Service	Office of Policy
Office of Budget and Program Analysis	Office of Regulations
Office of the General Counsel	Department of Homeland Security
Department of Commerce	Federal Emergency Management Agency
Bureau of Industry and Security	National Protection and Programs Directorate
National Oceanic and Atmospheric Administration	Office of the Chief Procurement Officer
National Telecommunications and Information Administration	Office of the General Counsel
Office of Manufacturing Services	Office of Small and Disadvantaged Business Utilization
Patent and Trademark Office	Transportation Security Administration
Department of Defense	U.S. Citizenship and Immigration Service
Defense Acquisition Regulations System	U.S. Coast Guard
Defense Logistics Agency	U.S. Customs and Border Protection
Department of the Air Force	U.S. Immigration and Customs Enforcement
Department of the Army, Training and Doctrine Command	Department of Housing and Urban Development
U.S. Strategic Command	Office of Community Planning and Development
Department of Education	Office of Fair Housing and Equal Opportunity
Office of Elementary and Secondary Education	Office of Manufactured Housing
Office of Post-Secondary Education	Office of Public and Indian Housing
Office of Special Education and Rehabilitative Services	Department of the Interior
Office of the General Counsel	Bureau of Indian Affairs
	Bureau of Land Management
	Bureau of Ocean Energy Management, Regulation and Enforcement

- Fish and Wildlife Service
- National Park Service
- Office of Surface Mining Reclamation and Enforcement
- Department of Justice
  - Bureau of Alcohol, Tobacco, and Firearms
  - Drug Enforcement Administration
  - Federal Bureau of Prisons
- Department of Labor
  - Employee Benefits Security Administration
  - Employment and Training Administration
  - Employment Standards Administration
  - Mine Safety and Health Administration
  - Occupational Safety and Health Administration
  - Office of Federal Contract Compliance Programs
- Department of State
- Department of Transportation
  - Federal Aviation Administration
  - Federal Highway Administration
  - Federal Motor Carrier Safety Administration
  - Federal Railroad Administration
  - Federal Transit Administration

- Maritime Administration
- National Highway Traffic Safety Administration
- Pipeline and Hazardous Materials Safety Administration
- Research and Special Programs Administration
- Department of the Treasury
  - Alcohol, Tobacco, Tax, and Trade Bureau
  - Bureau of Fiscal Services
  - Financial Crimes Enforcement Network
  - Financial Management Service
  - Internal Revenue Service
  - Office of the Comptroller of the Currency
  - Office of the General Counsel
  - 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

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<ul style="list-style-type: none"> <li>Access Board</li> <li>Consumer Financial Protection Bureau</li> <li>Consumer Product Safety Commission</li> <li>Commodity Futures Trading Commission</li> <li>Environmental Protection Agency</li> <li>Farm Credit Administration</li> <li>Federal Communications Commission</li> <li>Federal Deposit Insurance Corporation</li> <li>Federal Election Commission</li> <li>Federal Energy Regulatory Commission</li> <li>Federal Housing Finance Agency</li> <li>Federal Maritime Commission</li> </ul>	<ul style="list-style-type: none"> <li>Federal Reserve System</li> <li>Federal Trade Commission</li> <li>General Services Administration / FAR Council</li> <li>National Aeronautics and Space Administration</li> <li>National Credit Union Administration</li> <li>National Endowment for the Arts</li> <li>National Endowment for the Humanities</li> <li>Nuclear Regulatory Commission</li> <li>Pension Benefit Guaranty Corporation</li> <li>Securities and Exchange Commission</li> <li>Trade and Development Agency</li> </ul>
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## RFA Case Law, FY 2019

As mentioned in Chapter 1, FY 2019 was a continuation of President Donald J. Trump's focus on reducing regulatory burdens. Given that E.O. 13771 required that new regulations be offset by eliminating at least two existing regulations, it is unsurprising that RFA-related case law was scarce in FY 2019; in fact, there were no substantive RFA judgments entered. However, the U.S. District Court for the District of Columbia entered a procedural

ruling that serves as an update to a case listed in FY 2018 RFA Report, *California Cattlemen's Association v. United States Fish and Wildlife Service*.<sup>5</sup>

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 2019.

### Cal. Cattlemen's Ass'n v. United States Fish and Wildlife Service<sup>6</sup>

At the release of the FY 2018 Regulatory Flexibility Act report, the outcome of *California Cattlemen's Association v. United States Fish and Wildlife Service* was still pending the court's adjudication of both parties' motions for summary judgement. The final rule at issue in this case designated acreage in California as critical habitat, thereby requiring consultation between federal agencies concerning the impact of the critical habitat designation on surrounding land use. While Fish and Wildlife Service argued that no RFA analysis was necessary because the required consultation only regulated federal agencies, the court recognized that small entities would feel the "ultimate impact" of said consultation.<sup>7</sup> The court denied the Fish and Wildlife Service's motion to dismiss, recognizing that the California Cattlemen's Association, the California Wood Grower's Association, and the California Farm Bureau Federation (collectively, the "Cattlemen") were the type of small entities that

the RFA was designed to protect. In March 2019, the U.S. District Court for the District of Columbia heard cross-motions for summary judgement filed by the Fish and Wildlife Service and the Cattlemen. The court determined that the Cattlemen failed to establish that any of their members suffered an injury-in-fact traceable to the Final Rule, as opposed to the pre-existing requirements. The Cattlemen's primary complaints were costs and time spent participating in Section 7 consultations and delays in receiving grazing permits. The court noted that the Cattlemen participations in Section 7 consultations, though prudent, were completely voluntarily. Secondly, the Cattlemen did not demonstrate that the Section 7 consultations were the cause of permitting delays and even if they had, the grazing permits were ultimately granted. For these reasons, the court determined that the Cattlemen only had an injury traceable to preexisting requirements and not the final rule

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<sup>5</sup> Cal. Cattlemen's Ass'n v. U.S. Fish and Wildlife Serv., 315 F. Supp. 3d 282 (D.D.C., May 29, 2018).

<sup>6</sup> Cal. Cattlemen's Ass'n v. U.S. Fish and Wildlife Serv., 369 F. Supp. 3d 141 (D.D.C., March 27, 2019).

<sup>7</sup> Cal. Cattlemen's Ass'n, 315 F. Supp. 3d 282, 288 (D.D.C., May 29, 2018).

itself. Because the Cattlemen’s members lacked standing to challenge the Final Rule, the court

determined that it lacked jurisdiction to hear the case on its merits.

**Table D.1 SBREFA Panels Convened Through FY 2019**

SBREFA Panel Rule	Date Convened	Date Completed	Notice of Proposed Rulemaking	Final Rule Published
<b>Consumer Financial Protection Bureau</b>				
Debt Collection	08/25/16	10/19/16		
Arbitration Clauses	10/20/15	12/11/15	05/24/16	Rule published 07/19/17. Repealed via Congr. Review Act, 10/24/17
Limit Certain Practices for Payday, Vehicle Title, and Similar Loans	04/27/15	06/25/15	07/22/16	11/17/17
Home Mortgage Disclosure Act	02/27/14	04/24/14	08/29/14	10/15/15
Loan Originator Compensation Requirements under Regulation Z	05/09/12	07/12/12	09/07/12	02/15/13
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
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
<b>Department of Labor, Occupational Safety and Health Administration</b>				
Telecommunications Towers	08/15/18	10/11/18		
Process Safety Management Standard	06/02/16	08/01/16		
Occupational Exposure to Infectious Diseases in Healthcare and Other Related Work Settings	10/14/14	12/22/14		
Occupational Exposure to Diacetyl and Food Flavorings Containing Diacetyl	05/05/09	07/02/09		
Occupational Exposure to Beryllium	09/17/07	01/15/08	08/07/15	
Cranes and Derricks in Construction	08/18/06	10/17/06	10/09/08	08/09/10
Occupational Exposure to Hexavalent Chromium	01/30/04	04/20/04	10/04/04	02/28/06

Occupational Exposure to Crystalline Silica	10/20/03	12/19/03	09/12/13	03/25/16
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
Ergonomics Program Standard	03/02/99	04/30/99	11/23/99	11/14/00
Safety and Health Program Rule	10/20/98	12/19/98		
Tuberculosis	09/10/96	11/12/96	10/17/97	Withdrawn 12/31/03
<b>Environmental Protection Agency</b>				
Financial Responsibility Requirements for Hard Rock Mining	08/24/16	12/01/16	12/01/16	Withdrawn December 2017
Regulation of Trichloroethylene for Vapor Degreasers under Section 6(a) of the Toxic Substances Control Act	06/01/16	09/26/16	01/19/17	
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	01/19/17	03/27/19
Risk Management Program Modernization	11/04/15	02/19/16	03/14/16	01/13/17
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
Federal Plan for Regulating Greenhouse Gas Emissions from Electric Generating Units	04/30/15	07/28/15	10/23/15	Withdrawn 04/03/17
Greenhouse Gas Emissions Standards for Medium- and Heavy-Duty Vehicles	10/22/14	01/15/15	07/13/15	10/25/2016
PCB (Polychlorinated Biphenyls) Use Authorizations Update Rule	02/07/14	04/07/14		
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
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
Long Term Revisions to the Lead and Copper Rule	08/14/12	08/16/13	-	-
Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards	08/04/11	Rule proposed rule w/o completion of SBREFA panel report	06/30/14	12/01/15

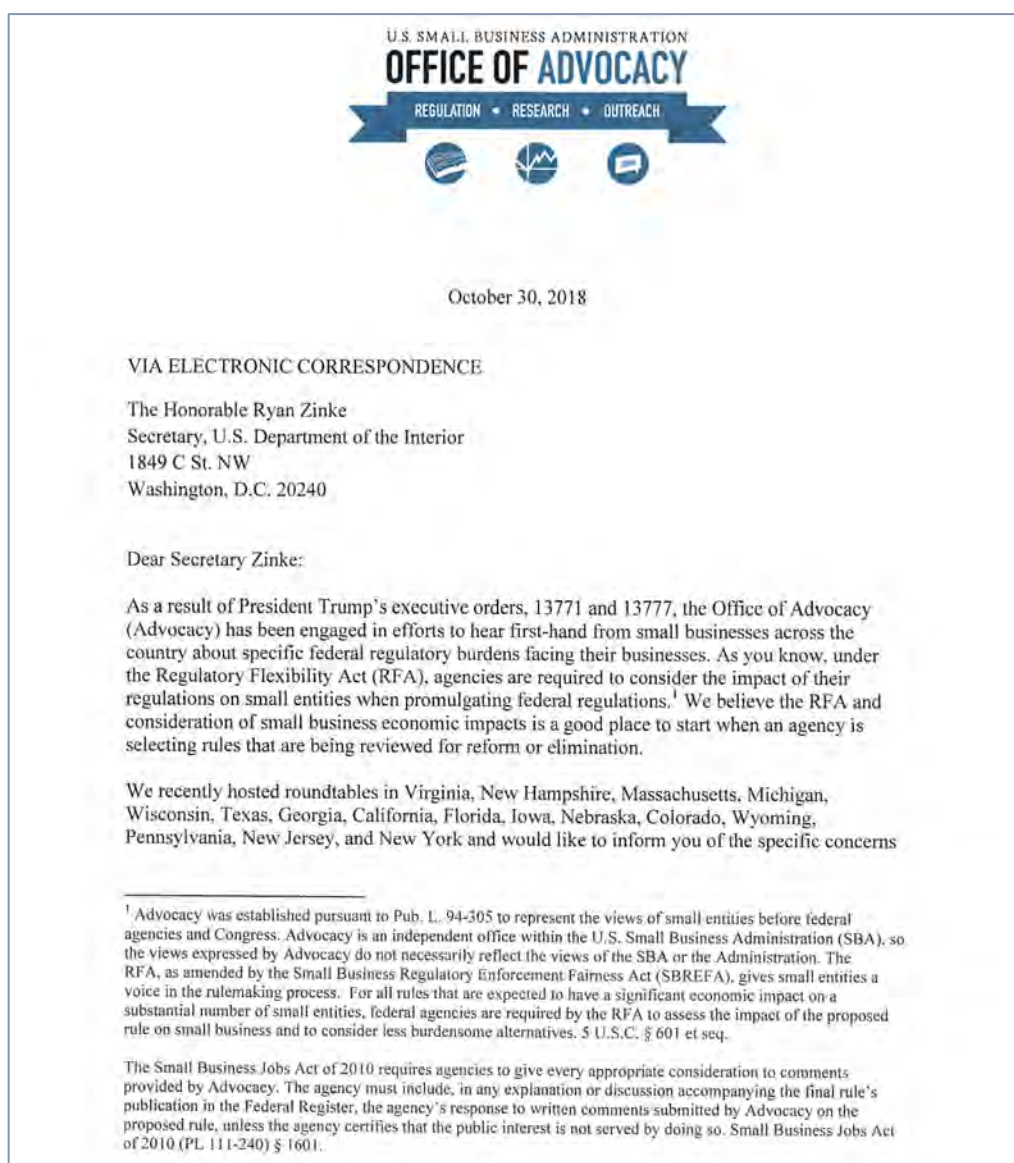
Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards	08/04/11	10/14/11	05/21/13	04/28/14
Greenhouse Gas Emissions from Electric Utility Steam Generating Units	06/09/11	Rule proposed rule w/o completion of SBREFA panel report	04/14/13	04/13/12 01/08/14 06/02/14
National Emission Standards for Hazardous Air Pollutants (NESHAP) Risk and Technology Review for the Mineral Wool and Wool Fiberglass Industries	06/02/11	10/26/11	11/12/11	07/29/15
Formaldehyde Emissions from Pressed Wood Products	02/03/11	04/04/11	06/10/13	07/27/16
Stormwater Regulations Revision to Address Discharges from Developed Sites	12/06/10	10/04/11	-	Withdrawn 07/06/17
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
Revision of New Source Performance Standards for New Residential Wood Heaters	08/04/10	10/26/11	02/03/14	03/16/15
Pesticides; Reconsideration of Exemptions for Insect Repellents	11/16/09	01/15/10		
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; Certification of Pesticide Applicators (Revisions)	09/04/08	11/03/08	08/24/15	01/04/17
Pesticides; Agricultural Worker Protection Standard Revisions	09/04/08	11/03/08	03/19/14	09/28/15
Renewable Fuel Standards 2	07/09/08	09/05/08	05/26/09	03/26/10
Total Coliform Monitoring	01/31/08	01/31/08	07/14/10	
Non-Road Spark-Ignition Engines/Equipment	08/17/06	10/17/06	05/18/07	10/08/08
Mobile Source Air Toxics	09/07/05	11/08/05	03/29/06	02/26/07
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
Section 126 Petition (2005 Clean Air Interstate Rule)	04/27/05	06/27/05	08/24/05	04/28/06
Cooling Water Intake Structures Phase III Facilities	02/27/04	04/27/04	11/24/04	06/15/06
Nonroad Diesel Engines – Tier IV	10/24/02	12/23/02	05/23/03	06/29/04
Lime Industry – Air Pollution	01/22/02	03/25/02	12/20/02	01/05/04
Aquatic Animal Production Industry	01/22/02	06/19/02	09/12/02	08/23/04



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

### Sample of Letters to Agency Heads

Advocacy sent 26 letters to the heads of federal agencies reflecting the input received at the Regional Regulatory Reform Roundtables. A sample of these letters is reproduced here. These letters are online on Advocacy's webpage: <https://advocacy.sba.gov/regulatory-reform/regulatory-reform-follow-up>. See Chapter 3 to learn more.



and regulations that we heard about from small businesses in that region. In addition, Advocacy solicited online comments from stakeholders.

#### Summary of Concerns from Roundtables and Online Comments

- **Fish and Wildlife Service Endangered Species Act (ESA) Reform**
  - Small entities are encouraged that the Agency has proposed three rules regarding revisions to definitions and procedures under the ESA. They and Advocacy are hopeful that the agency will consider the public comments, paying close attention to the interests and considerations of small business. In addition, small entities would like Advocacy to remind the agency that when the rules are finalized the agency should issue implementation guidance documents either simultaneously with the final rule or within a specified period of time. Additionally, Advocacy would encourage the agencies to consider further revising mitigation policies once the rules are finalized.
  - Small entities mentioned that they want the agency to reconsider listings for certain species including:
    - Sage Grouse
    - Lesser Prairie Chicken
    - Long Nose Bat (especially those with white nose syndrome)
    - Beluga sturgeon that are farmed and not imported
- **National Park Service Commercial Use Authorization Fees**

Advocacy has heard from several small entities that the new fee structure for commercial use authorizations is cost-prohibitive to small operators. They have stated that in some instances their costs will increase anywhere from 600-900 percent. They are asking for further relief for small operators by allowing for exemptions or reduced rates. Some have stated that they will have to discontinue their tours or only operate in certain areas until and unless the fees are reduced.
- **Candidate Conservation Agreements (CCA)**

Small entities stated that they want to encourage the agency to consider all affected parties when putting together candidate conservation agreements with assurances (CCAA). They specifically mentioned ensuring that other agencies such as U.S. Department of Agriculture's Rural Utilities Service are included in initial meetings rather than being added later on so that all parties can confer simultaneously. They further stated that the agency should allow for more time for entities to finalize CCA and CCAA's before a listing is finalized so that they are not immediately subject to the implications of the listing.
- **National Park Service and Bureau of Land Management Permits**
  - Some small entities mentioned that the requirements for insurance for recreational activity and special use permits are too high and make it cost prohibitive for small businesses to operate within the parks. They stated the agencies should consult with the public and set a threshold that is reasonable and accurate.



- They also mentioned that the agencies should provide their field offices with uniform guidance on the issuance of permits and what is considered a prohibited activity or a reason for denial of a permit application. Several small entities stated that such determinations by regional staff are often inconsistent from one office to another.
  - Advocacy recommends the agencies review and revise their agency guidance on these issues to ensure standardized implementation, and to provide transparency to the public on the practices and procedures.
- **Bureau of Land Management Mineral Trespass**  
Stakeholders indicated that current agency guidance is too stringent, misinterprets the regulation and is confusing. They have stated that the agency should publish a new guidance clarifying (1) What use of sand and gravel (or ordinary soils) will constitute an “unauthorized use”; (2) Does the use result in a fine; (3) What is the amount of the fine, and are there additional fees? In addition, stakeholders are requesting that the agency define commercial vs. personal use of mineral material and define “minimal.”
  - **Fish and Wildlife Service Habitat Conservation Plans**  
Small entities have indicated that the draft handbook creates a series of obstacles for applicants. They stated the imposition of mitigation requirements mandating a “no net benefit” goal and “no net loss” standard that creates an untenable situation and impacts manufacturing and devalues private property. Stakeholders have requested the agency re-write the handbook with less stringent requirements in consultation with industry so that they may understand the contents.

#### Summary of Regulatory Reform Agency Efforts

Advocacy applauds DOI for its ongoing regulatory reform efforts that have reduced the regulatory burden to small entities:

- Withdrawal of the final rule entitled “Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule.”
- Withdrawal of the 2016 Fish and Wildlife Service mitigation policy.<sup>2</sup>
- Withdrawal of the 2016 Endangered Species Act (ESA) Compensatory Mitigation Policy.<sup>3</sup>
- Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements.<sup>4</sup>

The Office of Advocacy looks forward to working with your agency to continue to reduce the burden of federal regulations on behalf of the small businesses that have asked us to be their

<sup>2</sup> U.S. Fish and Wildlife Service Mitigation Policy, 83 Fed. Reg. 36472 (July 30, 2018).

<sup>3</sup> Endangered and Threatened Wildlife and Plants; Endangered Species Act Compensatory Mitigation Policy, 83 Fed. Reg. 32469 (July 30, 2018).

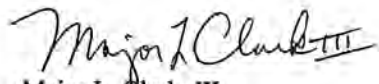
<sup>4</sup> Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 49184 (September 28, 2018).

voice in this regulatory reform process. We hope that you will include these specific rules when you compile your list of rules to review. Advocacy would be happy to meet with you or your representative so that we may detail the concerns and help suggest less burdensome alternatives for small business as rules are being considered for revision. I have provided the contact information for Assistant Chief Counsel **Prianka Sharma** below.

As we continue to hear from small businesses across the country at our regional regulatory reform roundtables or through our outreach from our regulatory reform website, we will update you with additional summaries from those locations.

Thank you for considering small business impacts as a vital part of your regulatory reform efforts and for including the Office of Advocacy as an important part of the process.

Sincerely,

A handwritten signature in black ink that reads "Major L. Clark, III". The signature is fluid and cursive, with the last name "Clark" being the most prominent part.

Major L. Clark, III  
Acting Chief Counsel for Advocacy

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# History of the Regulatory Flexibility Act

Shortly after the Office of Advocacy was founded in 1976, the first White House Conference on Small Business engaged small business representatives from across the United States in national brainstorming sessions. One recurring concern was the difficulty that “one-size-fits-all” regulations created for small businesses trying 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>8</sup> He asked Advocacy to ensure that the agencies’ implementation would be consistent with government-wide regulatory reform.

In 1980, Congress enacted the Regulatory Flexibility Act (RFA), which elevated aspects of this memorandum to the level of federal statute.<sup>9</sup> The new law mandated that agencies consider the

impact of their regulatory proposals on small businesses, analyze proposed regulations for equally effective alternatives, and make their analyses of equally effective alternatives 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>10</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 (an initial regulatory flexibility analysis or IRFA) when it is published for public comment.<sup>11</sup> Following that, should the agency publish a final rule, that agency must publish a final regulatory flexibility analysis (FRFA) as well.<sup>12</sup> If a federal agency determines that a proposed rule would not have a “significant economic impact on a substantial number of small entities,” the head of that agency may “certify” the rule and bypass the IRFA and FRFA requirements.<sup>13</sup>

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

9. 5 U.S.C. § 601 et seq.

10. Carter, *supra* note 1.

11. 5 U.S.C. § 603.

12. 5 U.S.C. § 604.

13. 5 U.S.C. § 605(b).



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. As such, the RFA continues to be an important check on burdensome regulation in an era where regulatory reform is an Administration priority.

### Interpreting and Strengthening the RFA

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>14</sup> This interpretation—that federal agencies must only consider the direct effects on small businesses within the jurisdiction of the rule—has continued to be the judicial interpretation of the RFA, even after subsequent amendments.<sup>15</sup>

The following year, 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>16</sup> They also voiced concern that at the time “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.

Advocacy was statutorily required to report annually on federal agency compliance, but given that compliance with the RFA was not itself reviewable by the courts at the time, the effectiveness of such reporting was limited. 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, given that Courts did not review compliance with the RFA, any challenge to regulation would need to be primarily under the Administrative Procedure Act.

After the third White House Conference on Small Business in 1995 renewed the call for strengthening the RFA, Congress and President Bill Clinton did so by enacting the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). 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

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

15. See *American Trucking Ass’n v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999).

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

occupational safety and health regulations. The SBREFA amendments also made a federal agency's compliance with certain sections of the RFA judicially reviewable, allowing challenges to 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 guidance regarding the RFA's requirements for 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>17</sup> The agency had published a FRFA with its final rule, but had not published an 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 of the economic effects and potential [regulatory] alternatives."<sup>18</sup>

## SBREFA Panels

The SBREFA amendments also required the Environmental Protection Agency and the Occupational Safety and Health Administration 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.

The innovation of SBREFA panels has allowed for greater consideration of small business alternatives for federal rules. Jere W. 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 President George W. Bush's administration began to consider small business priorities, improved RFA compliance was one key goal. To this end, President Bush issued Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking" in 2002.<sup>19</sup> This order tasked Advocacy with training federal agencies and other

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

18. *Id.*

19. 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).

stakeholders on the RFA. The training sessions helped apprise agencies of their responsibilities under the RFA and educated agency officials on the best RFA compliance practices. In addition, E.O. 13272 required Advocacy to track agency compliance with these education requirements and report on them annually to the White House Office of Management and Budget.

E.O. 13272 also instituted new procedures to help facilitate a collaborative relationship between agencies and the Office of Advocacy. First, it 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. He noted that, because of the executive order, "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>20</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>21</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.

The Obama administration 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>22</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>23</sup>

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

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

22. 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).

23. E.O. 13610, "Identifying and Reducing Regulatory Burdens," [www.whitehouse.gov/sites/default/files/docs/microsites](http://www.whitehouse.gov/sites/default/files/docs/microsites)

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>24</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**

With the enactment of the Trade Facilitation and Trade Enforcement Act of 2015, Advocacy’s duties to small business expanded beyond our borders.

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/omb/eo\_13610\_identifying\_and\_reducing\_regulatory\_burdens.pdf (May 10, 2012).

24. 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).

<sup>25</sup> U.S. Small Business Administration, Office of Advocacy, Section 503 Small Business Report on the Modernization of the North American Free Trade

Under the Act, the chief counsel for advocacy must convene an interagency working group whenever the president notifies Congress that the administration intends to enter into trade negotiations with another country. The working group conducts small business outreach in manufacturing, services, and agriculture sectors and gather input on the trade agreement’s potential economic effects. Informed by these efforts, the working group is charged with identifying the most important priorities, opportunities, and challenges affecting these industry sectors in a report to Congress. In December of 2018, pursuant to section 502 of the Trade Facilitation and Trade Enforcement Act (TFTEA), Advocacy released the Section 502 Small Business Report on the Modernization of the North American Free Trade Agreement (NAFTA): Prepared for the Consideration of the United States-Mexico-Canada Agreement (USMCA).<sup>25</sup>

## **Deregulation and Executive Orders 13771 and 13777**

With the inauguration of President Donald J. Trump in January 2017, the regulatory process would see its most dramatic reform yet. Shortly after the beginning of his administration, President Trump issued two executive orders aimed at substantially ameliorating the regulatory burden faced by the private sector. The first, E.O. 13771, “Reducing Regulation and Controlling Regulatory Costs,”

Agreement (NAFTA): Prepared for Consideration of the United States-Mexico-Canada Agreement (USMCA) (Dec. 2018), available at <https://cdn.advocacy.sba.gov/wp-content/uploads/2018/12/20094150/Section-502-Small-Business-Report-on-the-Modernization-of-the-North-American-Free-Trade-Agreement-NAFTA.pdf>

commonly known as “one-in, two-out,” required that any new regulations be balanced by the reduction of at least two other regulations—and that the incremental cost of new regulations be entirely offset by elimination of existing costs of other regulations. The second, E.O. 13777, “Enforcing the Regulatory Reform Agenda,” set a framework for implementing this vision of regulatory reform, requiring inter alia each agency appoint a Regulatory Reform Officer to supervise the process of regulatory reform going forward. These measures are another opportunity for small business regulatory reform, and the challenge to

Advocacy going forward is to match both the letter and spirit of these measures with vigor. Agency implementation of these executive orders offers significant opportunities for regulatory relief targeted to small businesses. FY 2017 offers the first instance of how the RFA functions in a deregulatory environment.

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.

## Abbreviations

RFA	Regulatory Flexibility Act		
SBREFA	Small Business Regulatory Enforcement Fairness Act		
SBAR	small business advocacy review		
IRFA	initial regulatory flexibility analysis		
FRFA	final regulatory flexibility analysis		
2,4,6 TTBP	2,4,6-tris(tert-butyl)phenol	IRFA	initial regulatory flexibility analysis
ADA	Americans with Disabilities Act	IRS	Internal Revenue Service
BSSE	Bureau of Safety and Environmental Enforcement	JOBS Act	Jumpstart Our Business Startups
CFPB	Consumer Financial Protection Bureau	NCUA	National Credit Union Administration
CMS	Center for Medicare and Medicaid Services'	NSPS	New Source Performance Standard
CORPS	Army Corps of Engineers	OIRA	Office of Information and Regulatory Affairs
CPSC	Consumer Product Safety Commission	OMB	Office of Management and Budget
DecaBDE	decabromodiphenyl ethers	OSHA	Occupational Safety and Health Administration
DHS	Department of Homeland Security	PCTP	pentachlorothiophenol
DOD	Department of Defense	PIP 3:1	isopropylated phosphate
DOE	Department of Energy	RCRA	Resource Conservation and Recovery Act
DOL	Department of Labor		
DOT	Department of Transportation	RFA	Regulatory Flexibility Act
ED	Department of Education	RISes	registered information system
E.O.	executive order	SBA	Small Business Administration
EPA	Environmental Protection Agency	SBREFA	Small Business Regulatory Enforcement Fairness Act
FCC	Federal Communications Commission		
FDA	Food and Drug Administration	TILA	Truth in Lending Act
FDCPA	Fair Debt Collection Practices Act	TSCA	Toxic Substances Control Act
Fed. Reg.	Federal Register	TTB	Alcohol and Tobacco Tax and Trade Bureau
FLSA	Fair Labor Standards Act		
FMSCA	Federal Motor Carrier Safety Administration	USACE	Army Corps of Engineers
FNS	Food and Nutrition Services	U.S.C.	United States Code
FOIA	Freedom of Information Act	USCIS	U.S. Citizenship and Immigration Services
FRFA	final regulatory flexibility analysis		
FTC	Federal Trade Commission	USDA	Department of Agriculture
		TREAS	Department of the Treasury
		VA	Department of Veteran's Affairs
HCBD	hexachlorobutadiene		