



# **Background Paper Office of Advocacy 2017-2020**



The mission, activities, and accomplishments  
of the Office of Advocacy from 2017 to 2020

Release Date: January 2021

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

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



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# Foreword

The Office of Advocacy takes great pride in presenting to its many stakeholders this *Background Paper on the Office of Advocacy: 2017 – 2020*. This resource is intended to help the new administration's transition team understand the mission, responsibilities, and activities of our office. It includes a history of Advocacy and extensive reference materials that make it the most comprehensive single publication on Advocacy ever published. Although the paper is designed to be of special use to the transition team and new staff, we are again making the entire paper available to the general public and posting it on our website.

This document updates the last edition of the background paper, published in 2016. Much has happened since then that will be covered in this report, including important new Executive Orders and special initiatives. Advocacy has accomplished a lot in the last four years, and in the pages that follow we have summarized these accomplishments. The report is organized so that its various chapters can be used as freestanding reference sources for specific areas such as Advocacy history, economic research, or regulatory issues. It is exhaustively documented and includes 23 appendices with reference materials.

Since 2017, Advocacy has reviewed annually from 1200 to 1500 public regulatory notices. Through its electronic e-notify system, Advocacy also annually receives from agencies about 600 notifications of regulatory activity. More than 500 regulatory proposals are annually reviewed in confidential interagency consultations prior to their publication. From FY 2017 through FY 2020, Advocacy hosted 54 regulatory roundtables on a wide variety of issues at which public stakeholders and agency officials could share information in an informal setting. In addition, Advocacy held another 43 Regional Regulatory Reform Roundtables in 31 states in connection with its Regulatory Reform Initiative in furtherance of the purposes of Executive Orders 13771 and 13777. During the same period, Advocacy submitted 86 formal public comment letters to 33 agencies throughout government. Advocacy also provided Regulatory Flexibility Act training 664 policymakers and regulatory development officials in these agencies. From FY 2017 through FY 2020, the office's regulatory advocacy resulted in one-time cost savings of \$4.2 billion, with annually recurring savings of \$3.8 billion.

Since 2017, Advocacy published 81 research or data products, and it introduced a variety of new products in more user-friendly formats. The electronic circulation of our monthly newsletter, *The Small Business Advocate*, reached 36,000. Advocacy's data, statistics, and reports listserv had more than 31,000 subscribers; while its regulatory alert and comment letter listserv included more than 28,000 subscribers. Advocacy's regional advocates participated in more than 2,000 outreach events and brought Advocacy's work to communities throughout the country, including visits by Advocacy staff to all 50 states. Advocacy devoted substantial resources to its Regulatory Reform Initiative, and the office now formally participates in U.S. trade negotiations with reports to Congress, using its regulatory

experience to advance the interests of American small businesses and reduce regulatory trade barriers to large new markets.

Advocacy's whole team made this record possible, and I am very proud of the work that they do. With around 50 staff members, Advocacy is a relatively small office, with the advantage that everyone works very closely with each other. In the last four years, the office saw the retirement of several long-time professional staff members, but we have been fortunate in recruiting exceptionally qualified professionals to fill positions opened by these retirements. Our multi-generational team now includes members ranging from new hires to staff with more than 40 years of federal service. The new look of some Advocacy products, and our increasing use of social media, reflect the fresh ideas that Advocacy's changing staff have brought to our mission.

The last four years have presented their challenges, especially the COVID pandemic that has affected us all. Like other government and private sector offices, Advocacy has adapted to these new circumstances. Meetings on Zoom and Teams have replaced more traditional face-to-face conversations. Travel is no longer a routine part of our outreach efforts, especially affecting our regional advocates whose activities rely on contact with stakeholders throughout the areas they serve. But as the statistics cited above show, we have continued to carry out our responsibilities, and we have made a difference for small business.

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

A handwritten signature in black ink that reads "Major T. Clark, III". The signature is written in a cursive, flowing style.

Major Clark, III

Acting Chief Counsel for Advocacy

December 14, 2020

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# Chapter 1 – Introduction

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

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

At the end of each administration, the Office of Advocacy compiles a document to help the new transition team understand the mission, responsibilities, and activities of the office. This *Background Paper on the Office of Advocacy: 2017 – 2020* includes a history of the office and a wealth of reference materials that make it the most comprehensive single publication on Advocacy’s mission, history, and activities ever published.<sup>1</sup>

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

Since its inception, Advocacy has taken its direction from its small entity stakeholders. Advocacy actively solicits input from small businesses and small business trade associations; members of Congress and their staffs; officials in executive branch agencies throughout the federal government, including the White House; state and local governments; economists and other researchers; organizations supporting women, minority, and veteran entrepreneurship; the nationwide network of SBA resource partners; and, of course, some 31.7 million small businesses. All of these are Advocacy “customers.” The Office of Advocacy strives in all of its work to listen to its customers and, consistent with its statutory mission, to provide them with the best possible economic research, regulatory advocacy, and counsel on small business issues.

## Advocacy Background and Mission.

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

- There was early recognition by Congress of the importance of competition to our economy, and that small business is a major source of competition, innovation, technological change and

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<sup>1</sup> The last edition of this paper is available online. See *Background Paper on the Office of Advocacy: 2009 – 2016* (October 2016) at <https://advocacy.sba.gov/about/>.

productivity growth. Small business is also the vehicle by which millions enter the economic and social mainstream of American society.

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

*The mission of Advocacy.* So what is Advocacy's mission? The simple answer to that question is to be an independent voice for small businesses inside the government in the formulation of public policy and to encourage policies that support their start-up, development, and growth. We will elaborate on the "nuts and bolts" of how Advocacy carries out that mission in succeeding chapters, but where did this mission originate and why is it important?

Though the answer may seem obvious, one question that is frequently asked is: "Are small firms important?" This was the title of a collection of studies on the economic contributions of small business which was published with Advocacy support in 1999.<sup>2</sup> Its editor summarized two key findings in his own introductory essay:

- Small firms are an integral part of the renewal process that pervades and defines market economies. New and small firms play a crucial role in experimentation and innovation, which

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

lead to technological change and productivity growth. *In short, small firms are about change and competition because they change market structure.* The U.S. economy is a dynamic organization always in the process of becoming, not an established one that has arrived.

- Small firms are the essential mechanism by which millions enter the economic and social mainstream of American society. Small business is the vehicle by which millions access the American dream by creating opportunities for women, minorities, and immigrants....The American economy is a democratic system, as well as an economic system, that invites change and participation.<sup>3</sup>

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

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

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

The free market economy provides an extraordinarily fertile “seedbed” for small businesses to start, grow, and thrive; but market imperfections often weigh disproportionately on smaller firms. These market imperfections include such classic problems as poor market information, unequal access to financing, and unfair trade practices. But they can also result from unwarranted or excessive government regulation, inequitable taxation, paperwork burdens imposed by all levels of government, and other policies that act as barriers to small business formation and growth.

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

The Small Business Act of 1942 created the Smaller War Plants Corporation (SWPC) to assist small firms in the vital role they played as part of the defense industrial base during World War II. The SWPC was a temporary wartime agency; and it was terminated in 1946, its functions reverting to the RFC and to an

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

Office of Small Business within the Department of Commerce. In 1944, the Servicemen's Readjustment Act gave the Veterans Administration authority to guarantee loans to veterans for the purpose of starting or expanding a business. With the Korean War, another wartime agency, the Small Defense Plants Administration (SDPA), was established in 1950. The SDPA worked closely with the RFC, the former primarily providing procurement and counseling services, while the latter retained financial services.<sup>4</sup>

*The Small Business Act.* President Eisenhower signed the Small Business Act of 1953<sup>5</sup> in July of that year. It clearly recognized the keystone importance of competition to the U.S. economy and the critical role small business plays in ensuring that competition. The Small Business Act created a new Small Business Administration (SBA) in which were centralized a variety of programs and services aimed directly at smaller firms. Many of these programs and services had resided in SBA's various predecessor agencies, including notably the RFC and the SDPA (which were terminated) and in the Department of Commerce; but now for the first time a single agency had for its primary mission the promotion and protection of small business. The Small Business Act's preamble includes an eloquent statement of congressional intent:

The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect insofar as is possible the interests of small business concerns in order to preserve free competitive enterprise ... and to maintain and strengthen the overall economy of the Nation.<sup>6</sup>

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

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

<sup>5</sup> The Small Business Act was originally enacted as Title II of Public Law 83-163 (July 30, 1953), 67 Stat. 232. This law terminated the prior Reconstruction Finance Corporation and created the Small Business Administration. Its Title II was made a separate Act by Public Law 85-536 (July 18, 1958), 72 Stat. 384, 15 U.S.C. § 631 *et seq.*

<sup>6</sup> 15 U.S.C. § 631(a).

In the 1960s, business organizations and trade associations increased their attention to the problems small businesses faced with government, especially in comparison with larger firms that could afford their own representatives in Washington. This growing concern for the health of small business was embraced by President Nixon, who in March 1970 signed Executive Order 11518, “providing for the increased representation of the interests of small business concerns before departments and agencies of the United States Government.”<sup>7</sup> The preamble to Executive Order 11518 noted that:

- ...the existence of a strong and healthy free enterprise system is directly related to the well being and competitive strength of small business concerns and their opportunities for free entry into business, growth, and expansion;
- ...the departments and agencies of the United States Government exercise, through their regulatory and other programs and practices, a significant influence on the well being and competitive strength of business concerns...and their opportunities for free entry into business, growth and expansion;
- ...the policy of the Executive Branch of the United States Government continues to be, as was described by President Dwight D. Eisenhower, “to strive to eliminate obstacles to the growth of small business;” and
- ...the Small Business Administration is the agency within the Executive Branch of the United States Government especially responsible for and with an established program of advocacy in matters relating to small business...<sup>8</sup>

The executive order directed that SBA “...as the spokesman for and advocate of the small business community, shall advise and counsel small business concerns in their dealings with the departments and agencies of the United States Government to the end that the views of small business concerns will be fully heard, their rights fully protected, and their valid interests fully advanced.”<sup>9</sup> The order further provided that agencies:

...shall call upon the Small Business Administration for advice, guidance, and assistance when considering matters which can be construed as materially affecting the well being or competitive strength of small business concerns or their opportunities for free entry into business, growth, or expansion. In taking action on such matters, these departments and agencies shall act in a manner calculated to advance the valid interests of small business concerns.<sup>10</sup>

Executive Order 11518 also authorized SBA’s active participation in investigations, hearings and other proceedings before departments and agencies and to ensure that the views of small business were presented on “matters affecting the well being or competitive strength of small business concerns.”<sup>11</sup>

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<sup>7</sup> Executive Order 11518, 35 Fed. Reg. 4939 (March 20, 1970).

<sup>8</sup> Ibid.

<sup>9</sup> Ibid., § 1.

<sup>10</sup> Ibid., § 2.

<sup>11</sup> Ibid., § 3.

*Public Law 93-386.* In 1973, several business organizations, including notably the Smaller Business Association of New England (SBANE), began an effort to strengthen SBA's advocacy role and to have it assigned to a special office dedicated for that purpose. It was Rep. Margaret Heckler (R-Mass.) who, with the endorsement of former Congressman and then-SBA Administrator Thomas S. Kleppe, drafted legislation to establish the first statutory Chief Counsel for Advocacy. This legislation was adopted as part of a regular SBA authorization bill then under consideration; and in August 1974, President Ford signed it as Public Law 93-386.<sup>12</sup>

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

- develop proposals for changes in the policies and activities of any agency...and communicate such proposals to the appropriate Federal agencies;<sup>13</sup> and
- represent the views and interests of small businesses before other Federal agencies whose policies and activities may affect small businesses.<sup>14</sup>

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

*Public Law 94-305.* Although Public Law 93-386 had established a Chief Counsel for Advocacy within SBA, it did not explicitly provide for staffing or administrative powers for this function. While SBA administrators had been supportive and did provide some staffing for Advocacy, there were questions about where the new office should fit in SBA's organizational structure, and the effectiveness of the new position remained limited.<sup>15</sup> By 1976, it was apparent that the role of the Chief Counsel should be clarified and strengthened, and Congress was again encouraged by private sector business organizations to consider new legislation. At a hearing conducted by the Senate Select Committee on Small Business,

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

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

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

<sup>15</sup> In 1976, the Office of Advocacy employed twelve, including the Chief Counsel. SBA's advisory councils were under Advocacy, and a plan was under consideration to place Advocacy under an Assistant Administrator also responsible for public affairs and communications. (Testimony of SBA Administrator Mitchell P. Kobelinski, Hearing before the Senate Select Committee on Small Business, "Oversight of the Small Business Administration: The Office of the Chief Counsel for Advocacy and How it Can be Strengthened" (March 29, 1976), pp. 10 and 27.)

chaired by Sen. Gaylord Nelson (D-Wisc.), John Lewis, executive vice president of the National Small Business Association, addressed the need for a small business advocate within government:

The question will occur, why do not the National Small Business Association or other small business associations do the job? Why look for a Government agency? The National Small Business Association does effectively represent the interests of small business, but neither it nor any other small business organization can get behind the closed doors of Government before decisions are made...Even if the small business organizations of the country were organized into one cohesive and powerful force, advocacy within Government and by Government would still be essential to do the infighting for small business.<sup>16</sup>

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

NFIB believes that Advocacy will be the watchword of the future and that the Small Business Administration has no program that will be more important to the small business community...Advocacy should be one of the primary functions of the Agency and it should be expanded and given the power necessary to represent the small business community within the Federal Government and before Congress...[The Chief Counsel for Advocacy] must have the freedom to speak out on issues of importance and to represent the interests of small business within the Administration and before Congress.<sup>17</sup>

As the Senate Small Business Committee hearing was being conducted, a major SBA reauthorization bill had just gone into conference to resolve differences between the House and Senate versions of the legislation. The final bill agreed upon included a title that reflected many of the recommendations made at this hearing and that became the Office of Advocacy’s basic charter when Public Law 94-305 was signed by President Ford on June 4, 1976.<sup>18</sup>

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

*Presidential appointment with Senate confirmation.* The Chief Counsel was now to be appointed from civilian life by the President and confirmed by the Senate.<sup>19</sup> In 1976, the only other Senate-confirmed presidential appointee at SBA was the Administrator; and subsequently the Congress has conferred this

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

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

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

<sup>19</sup> 15 U.S.C. § 634a.

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

*Public law hiring authority.* In addition to direct appointment by the President, Public Law 94-305 gave the Chief Counsel special hiring authorities outside of normal civil service procedures to ensure that the Advocacy staff has the skills to represent small business on any public policy issue.<sup>22</sup> This flexibility allows the Chief Counsel to rapidly change the professional mix of the staff as dictated by trends in the economy or changes in regulatory or legislative priorities, as well as to consult with outside experts and authorities. Although the use of this “public law hiring authority” was at first in consultation with the Administrator, the Congress explicitly removed the consultative requirement in 1994, giving the Chief Counsel full independence in hiring decisions.<sup>23</sup>

*No prior clearance on Advocacy work products.* Public Law 94-305 authorized the Chief Counsel to prepare and publish such reports as he or she deems appropriate. Further, it stipulates that such reports “shall not be submitted to the Office of Management and Budget or to any other Federal agency or executive department for any purpose prior to transmittal to the Congress and the President.”<sup>24</sup> Accordingly, the Office of Advocacy does not circulate its work products for clearance with the SBA Administrator, the Office of Management and Budget, or any other federal agency prior to publication. These include testimony, reports to Congress, economic research, comments on regulatory proposals, comments on legislation, publications, press releases, and website content.

*Assistance from government agencies.* Public Law 94-305 provided that “Each department, agency, and instrumentality of the Federal Government is authorized and directed to furnish to the Chief Counsel for Advocacy such reports and other information as he deems necessary to carry out his functions...”<sup>25</sup>

*Duties of the Chief Counsel for Advocacy.* Public Law 94-305 enumerated the duties of the upgraded Chief Counsel for Advocacy in two sections. One restated the exact duties specified in the prior Public Law 93-386.<sup>26</sup> These duties related primarily to communicating with small businesses and organizations representing them and, importantly, to representing the views and interests of small businesses before

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<sup>20</sup> Public Law 95-452, Inspector General Act of 1978 (October 12, 1978), 92 Stat. 1101, 5 U.S.C. App.

<sup>21</sup> § 222, Public Law 101-574, Small Business Administration Reauthorization and Amendments Act of 1990 (November 15, 1990), 104 Stat. 2823, 15 U.S.C. § 633(b)(1).

<sup>22</sup> 15 U.S.C. § 634d.

<sup>23</sup> § 610(1), Public Law 103-403, Small Business Administration Reauthorization and Amendments Act of 1994 (October 22, 1994), 108 Stat. 4204, 15 U.S.C. § 634d.

<sup>24</sup> 15 U.S.C. § 634f.

<sup>25</sup> 15 U.S.C. § 634e.

<sup>26</sup> § 203, Public Law 94-305, 15 U.S.C. § 634c, restated those duties previously set forth in § 5(e) of the Small Business Act, which was repealed by § 208 of Public Law 94-305.



other federal agencies whose policies and activities may affect them. We will look more closely at these aspects of Advocacy's work in Chapters 3, 4, and 5 of this paper.

The other section in Public Law 94-305 relating to the Chief Counsel's duties was entirely new.<sup>27</sup> It authorized a major economic research component in Advocacy's activities, a function that had not been part of the previous Chief Counsel's duties.<sup>28</sup> The legislation specified a wide range of topics for examination, including the role and contributions of small business in the American economy, the direct costs and other effects of government regulation on small business, the impact of the tax structure on small business, the ability of financial markets and institutions to meet small business credit needs, the financial and other needs of minority-owned enterprises, the reasons for small business successes and failures, and other specified topics.<sup>29</sup> We will look at the economic research activities of today's Advocacy in Chapter 2.

***Additional duties.*** Public Law 94-305 has remained Advocacy's statutory charter for more than 40 years now, and it has proved remarkably durable through numerous changes in the leadership of both the executive and legislative branches of government. But even though relatively few technical changes have been made to Advocacy's basic charter over the years,<sup>30</sup> a number of important additional responsibilities have still accrued to the office. The first Chief Counsel of the new Office of Advocacy, Milton D. Stewart, was confirmed by the Senate in July 1978. Even as he was organizing his new office, the first of these new duties arrived.

*White House Conference on Small Business.* Executive Order 12061, signed by President Carter in May 1978, created a White House Commission on Small Business whose principal duty was to organize the first White House Conference on Small Business.<sup>31</sup> The Conference was preceded by state and regional conferences across the country in which more than 25,000 participants met to discuss and debate issues and problems of concern to the small business community. They developed recommendations on a wide variety of topics and elected from their own numbers 1,682 delegates to go to Washington in January 1980 to draft an "Agenda for Action" comprising 60 recommendations for the President and the Congress to consider.<sup>32</sup>

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

<sup>28</sup> SBA did have a Chief Economist and an Office of Economic Research and Statistics prior to Public Law 94-305, but these functions were not under the direction of the Chief Counsel for Advocacy. Also, SBA's economic research activities were ancillary to agency program administration.

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

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

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

<sup>32</sup> *America's Small Business Economy: Agenda for Action*; Report to the President by the White House Commission on Small Business; April 1980. One measure of the intense interest this conference elicited was the fact that, in addition to the almost 1,700 elected delegates who came to Washington, nearly 3,600 other participants and observers attended.

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

The enduring importance of the 1980 White House Conference on Small Business is difficult to overstate. Its recommendations led directly to the enactment of key small business legislation during both the Carter and Reagan administrations, including notably the Regulatory Flexibility Act of 1980,<sup>33</sup> the Equal Access to Justice Act of 1980,<sup>34</sup> the Paperwork Reduction Act of 1980,<sup>35</sup> the Prompt Payment Act of 1982,<sup>36</sup> and the Small Business Innovation Development Act of 1982.<sup>37</sup> All of these laws have been amended and strengthened over the years. Many of the top conference recommendations related to tax reform, and a number of these were also enacted in 1981 and 1982, including reductions in the personal and corporate tax rates, estate tax relief, and simplified and increased depreciation provisions.<sup>38</sup>

That so much landmark legislation could be approved in such a short time span shows what can be done when the small business community itself speaks with one voice, is supported by informed policymakers within government (keeping them informed is an important role for Advocacy), and has the legislative leadership of key members of Congress.<sup>39</sup> More than two-thirds of the recommendations of the 1980 White House Conference on Small Business were adopted in whole or in part, either through legislative or administrative action.<sup>40</sup> This watershed event and the action agenda it produced could not have been as successful as they were without the full engagement and support of Advocacy. Similar support was provided in the subsequent White House Conferences on Small Business held in 1986 and 1995.

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

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

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

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

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

<sup>38</sup> These provisions are to be found in the Economic Recovery Tax Act of 1981 (Public Law 97-34 (July 13, 1981), 95 Stat. 172) and in the Tax Equity and Fiscal Responsibility Act of 1982 (Public Law 97-248 (September 3, 1982), 96 Stat. 324).

<sup>39</sup> Many Members of Congress deserve special recognition for their efforts to enact recommendations of the 1980 White House Conference on Small Business, but perhaps none more so than the Chairmen and Ranking Members of the House and Senate Committees on Small Business during this period: Rep. Neal Smith (D-Iowa), Rep. Silvio Conte (R-Mass.), Rep. Parren Mitchell (D-Md.), Rep. Joseph McDade (R.-Pa.), Sen. Gaylord Nelson (D-Wisc.), and Sen. Lowell Weicker (R-Conn.).

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

*The State of Small Business*. Public Law 96-302 included a title designated the Small Business Economic Policy Act of 1980.<sup>41</sup> Its “Declaration of Small Business Economic Policy” reiterated the importance of small business for “the purpose of preserving and promoting a competitive free enterprise economic system” and stated that the federal government must

...foster the economic interests of small businesses; insure a competitive economic climate conducive to the development, growth and expansion of small businesses; establish incentives to assure that adequate capital and other resources at competitive prices are available to small businesses; reduce the concentration of economic resources and expand competition; and provide an opportunity for entrepreneurship, inventiveness, and the creation and growth of small businesses.<sup>42</sup>

Importantly for Advocacy, the Small Business Economic Policy Act of 1980 required the President to transmit to Congress an annual “Report on Small Business and Competition,” which was popularly known as *The State of Small Business*.<sup>43</sup> This report included a wide variety of information concerning the role of small firms in the economy; economic trends that affected the small business sector and competition; the composition of the small business sector, including data on firms owned by minorities and women; the effects on small business and competition of various government policies, programs, activities and regulations; procurement data; and other information.

Although the Office of Advocacy was not mentioned in the Economic Policy Act itself, from the first *State of Small Business* in 1982, the White House delegated to Advocacy the responsibility for the preparation of this report. *The State of Small Business* became Advocacy’s largest and most anticipated regular research product; it had a wide circulation and provided vital information to policymakers both in and out of government. The statutory requirement for the President’s “Report on Small Business and Competition” was terminated by the Federal Reports Elimination and Sunset Act of 1995,<sup>44</sup> which took effect in 2000, the final year in the series. The Chief Counsel elected to use his discretionary authority to continue the publication of a similar annual report, *The Small Business Economy*, whose first edition was for the year 2001. The former report from the President to the Congress became an Advocacy report to the President and the Congress. Publication of this report continued until 2012, when much of the information it included was being published in new Advocacy products and, importantly, was posted on Advocacy’s website for easier stakeholder access and more timely updating. More information on these economic research and data products will be presented in Chapter 2.

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<sup>41</sup> Title III, Public Law 96-302 (July 2, 1980), 94 Stat. 848, 15 U.S.C. §§ 631a, 631b.

<sup>42</sup> 15 U.S.C. § 631a(a).

<sup>43</sup> 15 U.S.C. § 631b.

<sup>44</sup> § 3003, Public Law 104-66 (December 21, 1995), 109 Stat. 734, 31 U.S.C. § 1113 note. *See also*, House Document 103-7, A List of Reports Pursuant to Clause 2, Rule III of the Rules of the House of Representatives (January 5, 1993).

*Equal Access to Justice Act.* Public Law 96-481, the Equal Access to Justice Act of 1980 (EAJA),<sup>45</sup> as amended, is a federal fee shifting statute which provides for the award of attorney fees and other expenses to eligible individuals and small entities that are parties to litigation against the government. An eligible party may receive an award when it prevails over the government unless the government's position was "substantially justified" or special circumstances make an award unjust. It was intended to encourage those who had a good case in a dispute with a government agency to pursue their case without the fear that they would bear an unreasonable financial burden even if they did win. It was also intended to act as a disincentive for agencies to initiate adversarial actions of questionable merit. The Chairman of the Administrative Conference of the United States was required to submit an annual report to Congress on various matters relating to the implementation of EAJA, after consultation with the Chief Counsel for Advocacy. This function ended for Advocacy when this report was terminated by the Federal Reports Elimination and Sunset Act of 1995.<sup>46</sup> However, Advocacy continues to maintain a close working relationship with the Administrative Conference.

*Other new initiatives.* As we have seen, the new Office of Advocacy was from its inception given a variety of new tasks other than those specifically referenced in its standing charter, Public Law 94-305. Advocacy also responded proactively to new areas of interest such as women's business advocacy. The Chief Counsel had had a designated specialist in women's business enterprise issues, but this function was upgraded with the establishment within Advocacy of an Office of Women in Business in response to the 1978 Executive Order 12050 (Establishing a National Advisory Committee for Women)<sup>47</sup> and its 1979 successor, Executive Order 12135 (The President's Advisory Committee for Women).<sup>48</sup> Both orders promoted equality for women in all aspects of American life, including full participation in the economy. An Interagency Committee on Women's Business Enterprise, also originally headquartered at Advocacy, coordinated the efforts of other departments and agencies in this area.<sup>49</sup>

Similarly, the Chief Counsel had a designated specialist in veterans business advocacy; and in May 1982, plans were announced to create an upgraded Office of Veterans Business Enterprise within Advocacy.<sup>50</sup> An SBA reorganization plan subsequently transferred both the Office of Veterans Business Enterprise and the Office of Women in Business out of Advocacy and into a new SBA Office of Associate Deputy Administrator for Special Programs.<sup>51</sup> Although the forerunners of both SBA's current Office of Women's

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<sup>45</sup> 5 U.S.C. § 504.

<sup>46</sup> § 3003, Public Law 104-66 (December 21, 1995), 109 Stat. 734, 31 U.S.C. § 1113 note. *See also*, House Document 103-7, A List of Reports Pursuant to Clause 2, Rule III of the Rules of the House of Representatives (January 5, 1993).

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

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

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

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

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

Business Ownership and its Office of Veterans Business Development began in Advocacy, each appropriately received its own legislative charter later.<sup>52</sup>

*The Regulatory Flexibility Act.* Perhaps no other single law after Advocacy's basic charter has had more influence on the office's mission and activities than the Regulatory Flexibility Act (RFA).<sup>53</sup> We will return to a more detailed discussion of the RFA in Chapter 3, but because of its importance in Advocacy's work, a few introductory remarks are in order here. Enacted in 1980, the RFA established in law the principle that government agencies must consider the effects of their regulatory actions on small entities and where possible mitigate them. It arose from years of frustration with ever-increasing federal regulation that often had disproportionate adverse consequences for large numbers of smaller entities. Jim Morrison, a congressional staff member for both the House and Senate Small Business Committees who worked on the original legislation, recalled that:

New agencies had been given sweeping grants of authority to address national concerns like the environment, worker safety, and pension security. Older agencies had been handed new mandates. Coordination and guidance on how to regulate were lacking. It was a regulatory Wild West. Congress was recoiling from thunderous protests by regulated businesses, communities, and nonprofit organizations.<sup>54</sup>

Often, agencies can achieve their statutory or other public policy objectives with a more focused and informed regulatory approach, rather than the imposition of top-down, one-size-fits-all rules.<sup>55</sup> One of the top five recommendations of the 1980 White House Conference on Small Business included the sunset review and economic impact analysis of regulations, and RFA legislation incorporating these features moved swiftly through Congress after the Conference.<sup>56</sup>

The RFA directed agencies to analyze the impact of their regulatory actions and to review existing rules, planned regulatory actions, and actual proposed rules for their impacts on small entities in particular. Depending on a proposed rule's expected impact, agencies were required by the RFA to certify that

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<sup>52</sup> SBA's Office of Women's Business Ownership was authorized by § 412, Public Law 103-403 (October 22, 1994), 108 Stat. 4193, 15 U.S.C. § 656(g). SBA's Office of Veterans Business Development was authorized by §201(b)(2), Public Law 106-50 (August 17, 1999), 113 Stat. 235, 15 U.S.C. § 657b.

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

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

<sup>55</sup> Advocacy has sponsored significant research relating to regulation and its disproportionate burden on small business, dating back to 1980. Information on these economic research studies can be accessed on Advocacy's website at <https://advocacy.sba.gov/category/research/economic-reports/economic-studies/> and at <http://webarchive.loc.gov/all/20100617185001/http://www.sba.gov/advo/research/regulation.html> for older archived studies.

<sup>56</sup> *America's Small Business Economy: Agenda for Action*; Report to the President by the White House Commission on Small Business; April 1980. Public Law 96-354 (September 19, 1980), 5 U.S.C. § 601 *et seq.* See Appendix B.

there would not be a significant economic impact on a substantial number of small entities, or to prepare an initial regulatory flexibility analysis (IRFA) if such an impact was expected. A final regulatory flexibility analysis (FRFA) was also required for final rules with significant impacts.

The Office of Advocacy was from the beginning closely involved with this new regulatory review process. Agencies were required to transmit to the Chief Counsel their regulatory agendas,<sup>57</sup> their initial regulatory flexibility analyses,<sup>58</sup> and their certifications of rules without significant effects.<sup>59</sup> Additionally, the Chief Counsel was tasked to report annually to the President and the Congress on agency compliance with the RFA,<sup>60</sup> and was authorized to appear as *amicus curiae* in any action brought in a court of the United States to review a rule.<sup>61</sup> Unfortunately, the original 1980 RFA legislation did not provide for judicial review of agency RFA compliance.

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

One of the top ten recommendations of the 1986 White House Conference on Small Business called for RFA judicial review for all agencies.<sup>62</sup> But a new act of Congress would be required for that, and consensus remained elusive. Evidence continued to mount that the RFA needed to be strengthened. Chief Counsel for Advocacy Frank Swain testified before the Senate Committee on Small Business in 1989 that "agency compliance with the RFA runs the gamut from near total compliance to near total disregard for this Act."<sup>63</sup>

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<sup>57</sup> 5 U.S.C. § 602.

<sup>58</sup> 5 U.S.C. § 603.

<sup>59</sup> 5 U.S.C. § 605.

<sup>60</sup> 5 U.S.C. § 612(a).

<sup>61</sup> 5 U.S.C. §§ 612(b), 612(c).

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

<sup>63</sup> Hearing before the Senate Committee on Small Business, "The Regulatory Flexibility Act of 1980: An Essential Protection for Small Business;" October 17, 1989; p. 49.

In 1993, the top small business recommendation in the first report of the Vice-President's National Performance Review (NPR) was to allow judicial review of agency RFA compliance.<sup>64</sup> The report observed that:

While SBA's Office of Advocacy can ask agencies to follow the RFA, no mechanism for enforcing compliance exists. As a result, federal agency compliance is spotty at best.... For the RFA to succeed at its goal of avoiding needless government regulatory burdens on small entities, sanctions for non-compliance with the RFA must be created.<sup>65</sup>

In April 1994, the General Accounting Office released a report reviewing Advocacy's annual reports on RFA compliance which found that they indicated agencies' compliance with the RFA varied widely from one agency to another.<sup>66</sup> It also noted that "the RFA does not authorize SBA or any other entity to compel rulemaking agencies to comply with the act's provisions."<sup>67</sup>

In June 1995, the third White House Conference on Small Business met in Washington. It had been preceded by 59 state-level and six regional conferences to develop recommendations and elect delegates for the final Washington conference. Of the 60 recommendations made to the President and the Congress in its final National Conference Recommendation Agenda, the highest number of votes went to a recommendation to strengthen the Regulatory Flexibility Act, including the establishment of RFA judicial review and direct small business participation in the rulemaking process.<sup>68</sup>

With such strong support from so many quarters in both the private sector and government, the time was at last right for enactment of RFA judicial review, which became law when President Clinton signed the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).<sup>69</sup> The new legislation included a variety of provisions of major importance to small business, including amendments to the

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<sup>64</sup> Recommendation SBA01, The National Performance Review, *From Red Tape to Results: Creating a Government that Works Better and Costs Less*; September 7, 1993. The National Performance Review (NPR) was established in March 1993. It was an interagency task force with the mission of reforming government operations and was directed by Vice-President Gore during the Clinton Administration. In 1998, it was renamed the National Partnership for Reinventing Government. The NPR also noted that RFA judicial review was supported by a wide spectrum of major business associations, including the American Small Business Association, the American Trucking Association, the National Association for the Self-Employed, the National Association of Manufacturers, the National Federation of Independent Business, National Small Business United, the National Society of Public Accountants, the Small Business Legislative Council, and the U.S. Chamber of Commerce.

<sup>65</sup> Ibid.

<sup>66</sup> United States General Accounting Office, "Regulatory Flexibility Act: Status of Agencies' Compliance;" GGD-94-105 (April 27, 1994). Available at <http://www.gao.gov/products/GGD-94-105>.

<sup>67</sup> Ibid., p. 18.

<sup>68</sup> NCRA #183, The Regulatory Flexibility Act; *Foundation for a New Century*, A Report to the President and Congress by the White House Conference on Small Business Commission (September 1995), pp. 27 and 36.

<sup>69</sup> Title II, Public Law 104-121, Contract with America Advancement Act of 1996 (March 29, 1996), 110 Stat. 857.

Regulatory Flexibility Act to permit judicial review based on RFA compliance.<sup>70</sup> This long-sought authority finally set in place an RFA enforcement mechanism, and it was to greatly affect Advocacy's work with other agencies as we shall see in Chapter 3.

SBREFA also established for the first time a formal procedure for the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to solicit direct input from small entities on the effects of their proposals *prior* to the beginning of the normal notice and comment periods for these rules. Under SBREFA, these agencies must notify Advocacy when they are preparing to publish an initial regulatory flexibility analysis (IRFA) and provide Advocacy with information on the potential impacts of the proposed rule. In most cases, a SBREFA review panel is then convened, on which sit representatives of the Chief Counsel for Advocacy, OMB's Office of Information and Regulatory Affairs, and the agency proposing the rule.<sup>71</sup> The panel reviews materials related to the proposal and, importantly, the advice and recommendations of small entity representatives (SERs) on the rule's potential effects and possible mitigation strategies. The panel then issues a report on the comments of the SERs and on its own findings related to RFA issues. SBREFA requires the rulemaking agency to consider the panel report findings and, where appropriate, modify the proposed rule or its IRFA.<sup>72</sup> Although SBREFA's review panel process originally applied specifically to proposals of EPA and OSHA, its coverage was extended by the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010 to the new Consumer Finance Protection Bureau.<sup>73</sup>

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

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

Since the enactment of the RFA in 1980, Advocacy has sought to help agencies develop a regulatory culture that internalizes the RFA's purposes. Advocacy takes every opportunity to show regulatory

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<sup>70</sup> Ibid., § 242, 110 Stat. 865, 5 U.S.C. § 611.

<sup>71</sup> The Chief Counsel may in certain circumstances waive the requirement for a SBREFA panel.

<sup>72</sup> Ibid., § 244, 110 Stat. 867, 5 U.S.C. § 609.

<sup>73</sup> Public Law 111–203, title X, § 1100G(a) (July 21, 2010), 124 Stat. 2112.



officials how consideration of the potential effects of their proposals on small entities and the adoption of mitigation strategies can actually improve their regulations, both by reducing costs to small entities and the economy as a whole, and by improving compliance with such rules by those regulated, all while still achieving agencies' regulatory objectives.

Recognizing the importance of Advocacy's participation early in the regulatory process and the need for improved RFA compliance among some agencies, President George W. Bush in August 2002 signed Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking).<sup>74</sup> The order provided that:

Each agency shall establish procedures and policies to promote compliance with the Regulatory Flexibility Act, as amended...Agencies shall thoroughly review draft rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations.<sup>75</sup>

Executive Order 13272 further mandated that agencies:

- Issue written procedures and policies, consistent with the Regulatory Flexibility Act, to ensure that the potential impacts of agencies' draft rules on small businesses, small governmental jurisdictions, and small organizations are properly considered during the rulemaking process. These procedures and policies are to be submitted to Advocacy for comment prior to adoption and made public when finalized.<sup>76</sup>
- Notify Advocacy of any draft rules that may have a significant economic impact on a substantial number of small entities under the Act.<sup>77</sup>
- Give every appropriate consideration to any comments provided by Advocacy regarding a draft rule. In most cases, an agency must provide in its explanation or discussion accompanying publication of a final rule its response to any written comments from Advocacy on the proposed rule that preceded it.<sup>78</sup>

The order also specifically provided that Advocacy could provide comments on draft rules to both the agency that has proposed or intends to propose the rules and to OMB's Office of Information and Regulatory Affairs (OIRA), with which Advocacy works closely.<sup>79</sup> Advocacy was also mandated to provide

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

<sup>75</sup> *Ibid.*, § 1.

<sup>76</sup> *Ibid.*, § 3(a).

<sup>77</sup> *Ibid.*, § 3(b).

<sup>78</sup> *Ibid.*, § 3(c).

<sup>79</sup> *Ibid.*, § 2(c).

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

Executive Order 13272 formally integrated Advocacy into the White House’s review process of significant regulations, a process overseen by OMB’s Office of Information and Regulatory Affairs. The requirement for agencies to notify Advocacy in advance of significant rulemakings, to give consideration to any Advocacy comments, and to respond to such comments with the publication of a final rule have all strengthened Advocacy’s working relationship with many agencies and federal policymakers. It has also encouraged better RFA analyses. The requirement for consideration of and response to Advocacy comments was subsequently codified in the RFA itself, an important outcome of the Executive Order.<sup>82</sup>

*The Small Business Jobs Act of 2010.* As just noted, Executive Order 13272 required that agencies notify Advocacy of proposed significant rulemakings, consider Advocacy comments on such proposed rules, and provide appropriate responses to those comments in the explanatory statement or discussion accompanying the publication of a final rule resulting from such proposals. These requirements were subsequently codified in the RFA, one of two important provisions affecting Advocacy in the Small Business Jobs Act of 2010.<sup>83</sup>

The 2010 Jobs Act also included an extremely important provision concerning Advocacy’s budgetary independence. Since the enactment of its charter in 1980, Advocacy operated with a great degree of independence from the Small Business Administration in which it was housed, a subject to which we will return in Chapter 6. However, Advocacy was still very much attached to SBA with respect to the budget process. Prior to the Jobs Act, for budgetary purposes, the Office of Advocacy was treated in much the same way as any SBA program office, in fact with less independence than certain other functions which had their own statutory budget accounts.<sup>84</sup> Advocacy participated in every step of the budget process in the same way as most other SBA offices and programs. This meant the preparation of annual budget requests and justifications that “competed” with those of other SBA offices and programs for a share of the agency’s annual request to Congress.

The Jobs Act amended Advocacy’s statutory authority to require that each budget submitted by the President shall include a separate statement of the amount of appropriations requested for Advocacy, and that these funds be designated in a separate Treasury account. The Act also requires SBA to provide

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<sup>80</sup> Ibid., § 2(b).

<sup>81</sup> Ibid., § 6.

<sup>82</sup> Public Law 111–240, title I, § 1601(a) (September 27, 2010), 124 Stat. 2551, 5 U.S.C. § 604(a).

<sup>83</sup> Ibid.

<sup>84</sup> Notably, the Office of the Inspector General and disaster operations.

Advocacy with office space, equipment, an operating budget, and communications support, including the maintenance of such equipment and facilities.<sup>85</sup>

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

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

*Trade Facilitation and Trade Enforcement Act of 2015.* Public Law 114-125, the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA),<sup>86</sup> amended Advocacy's charter and established a new role for Advocacy to facilitate greater consideration of small business issues during international trade negotiations.<sup>87</sup> Under TFTEA, the Chief Counsel for Advocacy must convene an Interagency Working Group (IWG) whenever the President notifies Congress that the Administration intends to enter into trade negotiations with another country, including re-negotiations of existing treaties. The purpose of the IWG is to conduct small business outreach in the manufacturing, services, and agriculture sectors and to receive input from small businesses on the potential economic effects of a trade agreement on these sectors. From these efforts, the IWG is charged with identifying in a report to Congress the most important priorities, opportunities, and challenges affecting these industry sectors. This report must also provide an analysis of the economic impact on various industries, information on state-owned enterprises, recommendations to create a level playing field for U.S. small businesses, and information on Federal regulations that should be modified in compliance with the potential trade agreement.

On May 18, 2017, the Administration formally notified Congress of its intent to renegotiate the North American Free Trade Agreement (NAFTA). This triggered Advocacy's first ever convening of an Interagency Working Group (IWG) under TFTEA. Additional information on this IWG and others that have been convened under TFTEA can be found in Chapter 3.

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<sup>85</sup> Public Law 111-240, title I, § 1601(b) (Sept. 27, 2010), 124 Stat. 2551, 15 U.S.C. § 634g.

<sup>86</sup> Public Law 114-125, title V, § 502, (February 24, 2016), 130 Stat. 172.

<sup>87</sup> TFTEA amended 15 U.S.C. § 634c in Advocacy's charter.

**Conclusion.** This completes our survey of Advocacy’s background and the development of its mission.<sup>88</sup> We began this section by noting that Advocacy’s mission was to be an independent voice for small businesses inside the government in the formulation of public policy and to encourage policies that support their startup, development, and growth. Its creation was premised on the belief that small business needs representation in the legislative, regulatory, and administrative processes of government which profoundly affect them, and that good policy requires good information.

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

We will examine how today’s Office of Advocacy carries out its mission in the next four chapters, which are broadly organized by the responsibilities of Advocacy’s four main operating divisions, its Office of Economic Research, Office of Interagency Affairs, Office of Information, and Office of Regional Affairs. But first, we should cover one more important base. Who are these small businesses whose interests Advocacy represents? What role do they play in our economy today? Just how important are they?

## The Small Business Constituency

Advocacy’s Office of Economic Research prepares a number of publications that summarize important small business statistics that can help us answer the questions just posed.<sup>89</sup> First, what is a small business? For general research purposes, Advocacy defines a small business as an independent firm having fewer than 500 employees.<sup>90</sup> With this in mind, small firms:

- represent 99.9 percent of all U.S. firms and 99.7 percent of all employers;
- employ 61 million or 47.1 percent of all private sector employees;
- account for 40.3 percent of the private sector payroll;
- generated 65.1 percent of net new jobs between 2000 and 2019;
- were awarded 25.8 percent of eligible federal prime contracting dollars in FY 2019; and
- are 97.5 % of all exporters.

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<sup>88</sup> For additional information on the history of Advocacy and reflections from those who helped shape the office, see: *The Small Business Advocate*, June 1996. This special edition of Advocacy’s monthly newsletter, which marked the 20<sup>th</sup> anniversary of the Office of Advocacy, is reprinted in its entirety in Appendix T. A special 40<sup>th</sup> anniversary edition of *The Small Business Advocate* is also reprinted as Appendix W.

<sup>89</sup> Office of Advocacy, *Frequently Asked Questions about Small Business*, 2020, can be accessed at <https://advocacy.sba.gov/2020/10/22/frequently-asked-questions-about-small-business-2020/>

<sup>90</sup> This definition is not the same as the “size standards” used to determine eligibility for various government financial and procurement assistance programs. These are established by SBA and vary industry by industry. For more information, see <http://www.sba.gov/size>.

*How many small businesses are there?* In 2017 there were 31.7 million small businesses in the U.S., including 6.0 million employers (or 19 percent of all firms) and 25.7 million non-employers (or 81 percent of all firms).

*How many new jobs do small firms create?* From 2000 through 2019, small businesses created 65.1 percent of net new jobs. In the same period, small businesses created 10.5 million net new jobs while large businesses created 5.6 million.

*How many businesses do minorities own?* In 2017, the latest year for which data is available, 17.7 percent of employer firms were minority-owned, totaling about 1 million businesses. Of employer firms, 5.6 percent were Hispanic-owned, 2.2 percent were African American owned, 9.7 percent were Asian-American owned, 0.4 percent were owned by American Indians and Alaska Natives, and 0.1 percent were owned by Native Hawaiians and other Pacific Islanders.

*How many businesses do women own?* Women owned 10.1 million non-employer firms in 2016, or 41 percent of all non-employers. However, their 1.1 million employer firms in 2017 represented 18 percent of all employers.

*How many businesses do veterans own?* In 2017, veterans owned over 351,000 employer businesses, or 6.1 percent of all U.S. employer firms.

*How are most small businesses legally organized?* 86.6 percent of non-employers are sole proprietorships, while only 14 percent of small employer firms are sole proprietorships. More than half of small employer firms are S-corporations.

*What percent of business owners are immigrants?* In 2017, about one in six (17 percent) of business owners with employees were immigrants. The industry sectors with the greatest shares of immigrant owners were Accommodation and Food Services (37 percent) and Retail Trade (23 percent).

*What percent of firms are home-based?* About a quarter of employer firms (24 percent), were home-based in 2016. By industry, almost half of construction firms (47 percent) and business services (45 percent) were home-based. The share of home-based employer firms decreases as the firm age increases (for example, 32 percent for firms 2 years or younger vs. 17 percent for firms 16 years old and over). According to older data, when including businesses without employees, about half of all businesses were home-based.

*What percent of firms are franchises?* In 2016, about one in 20 firms with employees (5 percent) were franchises.

*What percent of firms are family-owned?* About one in three firms with employees (31 percent) were family-owned in 2017. Family-owned firms averaged 14 employees per firm, making them slightly larger than non-family-owned firms which averaged 10 employees per firm.

These impressive statistics leave no doubt as to the vital importance of small business to our economy. As we have noted before, small business is a major source of competition, innovation, technological

change and productivity growth. It is also the vehicle by which millions enter the economic and social mainstream of American society. The data in this section confirm both the quantitative and qualitative contributions which small business makes every day to our nation.

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

## Chapter 2 – The Role of Data and Research

As we have seen in Chapter One, small businesses are a vital component of the American economy. Data from the U.S. Census Bureau show that there were almost 32 million businesses in the United States in 2017, of which 99.9 percent were small, with fewer than 500 employees.<sup>91</sup> Small firms employ about half of all workers in the private sector<sup>92</sup> and account for almost half of private, nonfarm gross domestic product.<sup>93</sup> Small businesses provided nearly two-thirds of net new jobs over the last two decades.<sup>94</sup> It is for these reasons that there is such interest in the small business sector among policymakers, business leaders, and academics.

### Advocacy's Research Mandate

Public Law 94-305 made economic research a core mission of the Office of Advocacy.<sup>95</sup> This mission includes the documentation of the role of entrepreneurship in the economy and the examination of various issues of relevance to small business owners. More specifically, Advocacy is charged to:

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

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<sup>91</sup> Office of Advocacy, *Frequently Asked Questions*, October 2020. This annually updated resource can be accessed at <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/11/05122043/Small-Business-FAQ-2020.pdf>.

<sup>92</sup> Ibid.

<sup>93</sup> Office of Advocacy research by Katherine Kobe and Richard Schwinn, *The Small Business Share of GDP, 1998-2014*, December 2018, <https://cdn.advocacy.sba.gov/wp-content/uploads/2018/12/21102039/rs444-Small-Business-GDP-1998-20141.pdf> for summary; full report, <https://cdn.advocacy.sba.gov/wp-content/uploads/2018/12/21060437/Small-Business-GDP-1998-2014.pdf>.

<sup>94</sup> Office of Advocacy, *Frequently Asked Questions*, October 2020.

<sup>95</sup> § 202, Public Law 94-305 (June 4, 1976), 15 U.S.C. § 634b.

These elements of Advocacy’s mission are the primary responsibility of its Office of Economic Research (OER). In 2020, OER was authorized ten positions, which included eight staff economists designated as research or regulatory economists, a research fellow, and the Director of Economic Research. The current economics team specializes in the following areas: the small business economy, small firm dynamics, small business finance, regulatory policy, business owner demographics, and international trade. OER economists work with other agencies to acquire and analyze data, conduct in-house research, coordinate extramural contract research projects, and work closely with the legal team in Advocacy’s Office of Interagency Affairs to assess the costs of proposed federal rules and associated mitigation strategies. OER also encourages its economists to present Advocacy research at academic and policy conferences, and whenever possible to publish the research in professional peer-reviewed journals. Reports written by Advocacy staff are posted on Advocacy’s website. To facilitate research efforts, Advocacy economists have access to STATA statistical software,<sup>96</sup> Tableau data visualization software, RStudio,<sup>97</sup> and the American Economic Association’s electronic bibliography, EconLit.<sup>98</sup>

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

In the early years of Advocacy, the research mandate of Public Law 94-305 was ambitious. Statistics on small businesses themselves, let alone more derivative topics, were hard to find. The Small Business Economic Policy Act of 1980 and its requirement for an annual report from the President, which was popularly known as *The State of Small Business*, crystallized the need for reliable and periodically updated statistics on small firms.<sup>99</sup> Congress recognized this problem and provided resources for Advocacy to begin to fill this knowledge gap. Since then, a significant portion of the office’s operating budget has been dedicated to economic research activities. Since FY 2000, approximately \$350,000 - \$1 million has been allocated annually for economic research and data products. Final spending totals can fluctuate for various reasons, including the availability of resources, the timing of the procurement process for contract research projects, and the number of qualified respondents to solicitations for proposals to conduct such research.<sup>100</sup>

Advocacy uses its economic research funds for two primary purposes: 1) to purchase special data tabulations and otherwise support the development of small firm data at various government agencies; and 2) to fund contract research by private-sector researchers on more specialized issues. In each

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<sup>96</sup> For more information, see: <http://www.stata.com/>.

<sup>97</sup> For more information, see: <https://rstudio.com/>

<sup>98</sup> For more information, see: <http://www.econlit.org/>. The provider of this service for the Office of Advocacy is EBSCO Publishing.

<sup>99</sup> Title III, Public Law 96-302 (July 2, 1980), 94 Stat. 848, 15 U.S.C. §§ 631a, 631b.

<sup>100</sup> Funds for Advocacy’s economic research function, excluding salaries and expenses, were prior to FY 2006 set by a specific line item in SBA’s annual budget request and appropriations. Since FY 2006, Advocacy research has been included within a general amount for Advocacy as a whole.



instance, OER strives to produce current and relevant research products that are useful for policymakers and other Advocacy stakeholders.

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

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

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

## **Advocacy Economic Research Products**

From FY 2017 through FY 2020, Advocacy released 81 research and data products,<sup>101</sup> which cumulatively continue to document the importance of entrepreneurship to the American economy and provide new insight on various issues of importance to small business owners, policymakers, and researchers.

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<sup>101</sup> These include: 20 reports in FY 2017, 2018, 2019, and 21 reports in FY 2020.

OER releases at least 20 economic research reports annually.<sup>102</sup> These are produced by the professional OER staff and by contract researchers, subject to the availability of funding. Those released from FY 2017 through FY 2020, as well as reports going back to FY 2012, are available on Advocacy's website and catalogued annually.<sup>103</sup> Products released before FY 2012 can be accessed at an archive site.<sup>104</sup>

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

*Periodic reports.* Advocacy staff produce a variety of periodic reports that enjoy a wide audience. Most of the following are standard releases.<sup>105</sup>

- **Annual Report.** This annual publication provides a brief summary of all the research products released by Advocacy in any given year, organized by various categories. It serves as a year-end report on the research accomplishments of the previous year.<sup>106</sup>
- **Frequently Asked Questions (FAQs).** Designed for a general audience, the small business and finance FAQs summarize information and data from many resources. These documents provide a series of quick, easy-to-recite facts that recognize the importance of small business in the economy and small business finance issues. Revised as new data becomes available, the FAQs are an excellent introduction to Advocacy research and data.<sup>107</sup>
- **Small Business Economic Bulletins.** These periodic publications gather data from a variety of sources to highlight current economic trends relevant to small businesses as well as current small business capital access trends.<sup>108</sup>
- **Small Business Data Resources.** This product provides comprehensive information on small business data. It contains a detailed list of data programs provided by both the federal and

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<sup>102</sup> For listings see: <https://advocacy.sba.gov/category/research/>.

<sup>103</sup> Ibid.

<sup>104</sup> <https://webarchive.loc.gov/all/20100713173336/http://www.sba.gov/advo/research>

<sup>105</sup> <https://advocacy.sba.gov/category/research/>.

<sup>106</sup> For the most recent and past editions of *Office of Economic Research: Research Publications*, see <https://advocacy.sba.gov/category/research/economic-reports/annual-reports-office-economic-research/>.

<sup>107</sup> For the most recent *Frequently Asked Questions*, see <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/11/05122043/Small-Business-FAQ-2020.pdf>. For the most recent *Frequently Asked Questions about Small Business Finance*, see <https://cdn.advocacy.sba.gov/wp-content/uploads/2011/10/22175146/SB-FAQ-2016-FINANCE.pdf>.

<sup>108</sup> For recent and past *Small Business Economic Bulletins*, see <https://advocacy.sba.gov/category/research/facts-about-small-businesses/economic-bulletins/>.

private sectors and is categorized by topic. Links to databases and data release frequency are also provided. This product is periodically updated on the Advocacy website.<sup>109</sup>

- **Small Business Lending in the United States.** This is an annual study that analyzes the most recent data available on small business loans and on the lending institutions that provide them. The study uses data reported by lenders to their regulators in their Consolidated Reports of Condition and Income (“call reports”) and in reports required by the Community Reinvestment Act (CRA). Because data are available only by size of loan, small business loans are defined as those smaller than \$1 million.<sup>110</sup>
- **Small Business Profiles for States and Territories.** This report pulls together data from multiple sources to profile the economic conditions of small businesses in the United States, and in each of the 50 states, the District of Columbia, and the U.S. territories. Each profile covers the following from a small business perspective: employment, income and finance, business owner demographics, business turnover, international trade, and industry composition by firm and employment size.<sup>111</sup> The 2020 State Profiles were updated to be fully transparent and reproducible by public users. The profiles included new and improved data visualizations and graphics intended to be accessible to a wide audience.
- **Small Business Profiles for Congressional Districts.** This new report assembles data from numerous sources to provide small business statistics for each of the 435 state congressional districts and the District of Columbia.<sup>112</sup>
- **Issue briefs.** OER economists produce issue briefs to provide timely and concise information on small business economic issues. These briefs are of use to the small business community, including policymakers, researchers, and other stakeholders involved in small business advocacy and program development. This product line has proved useful for addressing time-sensitive issues that appeal to an audience beyond academic researchers, or where data limits preclude more in-depth empirical analysis. Issue brief topics have included: alternative finance, entrepreneurship trends, rural internet access, business owner demographics, international trade, and small business impacts in regulatory analysis.<sup>113</sup>
- **Small business facts.** Publications in this series focus on one specific small business issue and provide a quick, digestible summary on relevant, timely, and sometimes data-intensive issues in the small business environment. This series has been used recently to cover the evolving impacts of COVID-19 pandemic on small businesses. Past fact sheet topics include: *Spotlight on Minority-Owned Employer Businesses*, *Finding Qualified Workers*, *Spotlight on Nonprofits*, and *Pandemic Pressures City Businesses*.<sup>114</sup>

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<sup>109</sup> See <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/08/23105248/Small-Business-Data-Resources-August-2019.pdf>

<sup>110</sup> For the most recent and past banking studies, see <https://advocacy.sba.gov/tag/small-business-lending/>.

<sup>111</sup> For the most recent, see <https://advocacy.sba.gov/2020/05/20/2020-small-business-profiles-for-the-states-and-territories>. For previous versions, see <https://advocacy.sba.gov/category/research/state-profiles>.

<sup>112</sup> For the most recent, see <https://advocacy.sba.gov/2020/08/25/2020-small-business-profiles-for-congressional-districts>.

<sup>113</sup> <https://advocacy.sba.gov/category/research/economic-reports/issue-briefs>.

<sup>114</sup> For recent Small Business Facts and Infographics, see <https://advocacy.sba.gov/category/research/facts-about-small-businesses>.

- **Small business infographics.** These periodic data visualizations provide visual representations of data via a combination of figures, charts, and graphics, allowing for easy translation of the policy relevance found in minutely detailed data. One popular annual infographic is *What's New with Small Business?* which summarizes facts from the FAQ.<sup>115</sup>
- **Economic research series.** These series link multiple products under a broader research topic umbrella. This bundling of research allows stakeholders to track topics that are highly policy relevant and cover a wide scope of issues. Series topics include: entrepreneurship trends, with reports on millennial and encore entrepreneurs; international trade, including a related issue brief; and alternative finance, with an issue brief defining alternative finance.<sup>116</sup>

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

Almost all of Advocacy’s contract research solicitations are in the form of requests for quotations (RFQs) that are posted on Contract Opportunities, the federal government’s electronic portal for posting contracting opportunities.<sup>117</sup> They are typically small business set-asides. The proposals received in response to Advocacy RFQs are evaluated on their technical merit and past performance record, and awards are usually made prior to the end of the fiscal year.

Although most Advocacy contract research is awarded competitively, from time to time the office may award a sole source contract under special circumstances allowed under federal contracting rules (for example, to update a previous study or where a contractor is the holder or originator of a unique and relevant dataset).<sup>118</sup> Each Advocacy contract research project is monitored by an Advocacy staff member serving as the contracting officer representative (COR) or technical expert for the project.

All Advocacy issue-specific research reports from FY 2012 through FY 2020 are posted on Advocacy’s website and catalogued annually.<sup>119</sup> Products from the mid-1990s through FY 2012 can be accessed at

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<sup>115</sup> Ibid.

<sup>116</sup> For more on Advocacy’s *Economic Research Series*, see <https://advocacy.sba.gov/category/research/economic-reports/issue-briefs>.

<sup>117</sup> See <https://beta.sam.gov/>. Contract Opportunities replaces the prior FedBizOpps.

<sup>118</sup> Unsolicited proposals must meet the conditions of the Federal Acquisition Regulations (FAR) Subpart 15.6. See <https://www.acquisition.gov/far/subpart-15.6>.

<sup>119</sup> <https://advocacy.sba.gov/category/research/economic-reports/economic-studies/>

an archive site,<sup>120</sup> along with listings of earlier studies that are available from the National Technical Information Service.<sup>121</sup> Each Advocacy study includes a Research Summary – an easily digestible version of the overall findings, which is typically written by the Advocacy economist who was the COR for the study.

## Data Sources

Advocacy co-funds government data sources and relies upon many other government data sources to address part of its mission to show the status and role of small businesses in the economy. Advocacy also provides a quick guide matrix, *Small Business Data Sources*,<sup>122</sup> on public and private small business data with links as a guide for others to better utilize small business information. The following is a listing of some the data sources used by Advocacy.

*Statistics of U.S. Businesses (SUSB).* Given Advocacy’s economic research mandate, it is essential to have the most accurate and current data possible by firm size. Advocacy partially funds the U.S. Census Bureau’s Statistics of U.S. Businesses (SUSB). This dataset provides static and dynamic firm size data by North American Industrial Classification System (NAICS) codes,<sup>123</sup> by states, and by metropolitan statistical areas (MSAs).<sup>124</sup> This annual data is the source of many Advocacy statistics on the number of small businesses in the United States and includes figures on employment, payroll and receipts by employment size of firm (for data years ending in 2 and 7). Talking points that are regularly referred to in materials as varied as articles in the press and the speeches of elected and other public officials frequently come from this source. In addition, breakouts by industry group in these data facilitate greater knowledge by policymakers of the effects on small firms of particular regulatory or legislative proposals. This dataset is currently available from 1988 to 2017, providing a sufficient time series for analysis.

SUSB also serves Advocacy’s regulatory mission as it allows small business stakeholders and policymakers to better access data on small businesses that will be impacted by draft regulations. For example, the SUSB provides statistics by which agencies can address whether a substantial number of small businesses will be impacted by proposed regulations. Essentially, without SUSB we would not know the number of employer businesses by detailed industry and geographic location. Recently, Advocacy provided additional funds to create congressional district firm counts for SUSB and has released these figures.

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<sup>120</sup> <https://webarchive.loc.gov/all/20100713173336/http://www.sba.gov/advo/research/>

<sup>121</sup> For more information, see: <http://www.ntis.gov/>.

<sup>122</sup> <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/08/23105248/Small-Business-Data-Resources-August-2019.pdf>

<sup>123</sup> Data before 1998 are available using the prior U.S. Standard Industrial Classification (SIC) system codes.

<sup>124</sup> See <https://advocacy.sba.gov/data-on-small-business/> for more information on firm size data.

*Annual Business Survey (ABS).* For key research products regarding owner demographics and business and characteristics, Advocacy relies upon the Census Bureau's Annual Business Survey which is a survey of businesses with employees. This dataset was first published in the spring of 2020 and surveyed businesses for the data year 2017. Census plans to offer annual ABS releases in the future. Business characteristics in the ABS include sources of startup capital, number of owners in business, etc. Business owner information in the ABS includes characteristics such as gender, ethnicity, race, and veteran status. Additional information about business owners includes owner age, highest degree attained by business owner, and other characteristics. Note that the ABS can be viewed as an extension of the Census Bureau's pilot business survey, the Annual Survey of Entrepreneurs, which is available for the data years 2014 to 2016.<sup>125</sup>

*Nonemployer Statistics.* The Census Bureau's nonemployer statistics produce annual data on the number of businesses without employees by receipts, industry, geographic location and legal form of organization. Essentially based on business records where no payroll is listed, nonemployer statistics are available from 1997 to 2018.<sup>126</sup> Advocacy adds nonemployer statistics to SUSB figures to calculate the total number of businesses (employers and nonemployers).

*Nonemployer Statistics by Demographics (NES-D).* Advocacy is co-funding the Census Bureau's new business owner characteristic program on businesses without employees, or nonemployer businesses. Using administrative data (government records instead of a survey), NES-D will report on an annual basis the number of nonemployers by owner gender, race, ethnicity, and veteran status and by industry, geographic location, and receipts for each of these groups. There are also plans to release data by the number of owners in nonemployer businesses, owner age, foreign-born status and legal form of organization. The first data release is planned for mid-December 2020, and Advocacy will assist in promoting the new program. Advocacy was an early supporter of NES-D, as the Census Bureau's discontinuance of its prior Survey of Business Owners meant that the number of businesses (both employer and nonemployer businesses) owned by women, minorities and veterans would not be available unless a replacement was created. NES-D and ABS could be added together to find the total number of women, minority and veteran-owned businesses on an annual basis.

*Business Dynamics Statistics (BDS).* Building upon SUSB and internal database development, Census created BDS to create firm and establishment statistics by age of business. Annual figures are available from 1978 to 2018. Recently, Census re-released BDS to update industry codes (from SIC to NAICS). BDS can be used to track firm cohorts by age, survival, births and job levels/creation/destruction. Data is available by major industry and down to the metro area and county level.<sup>127</sup>

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<sup>125</sup> See <https://www.census.gov/programs-surveys/ase.html>.

<sup>126</sup> See <https://www.census.gov/programs-surveys/nonemployer-statistics.html>.

<sup>127</sup> See <https://www.census.gov/programs-surveys/bds.html>.



*The Economic Census.* Every five years (for years ending in 2 and 7), Census conducts an Economic Census required by law, in which many types of highly specific data are collected using large scientifically selected survey samples. The Economic Census helps Census produce information that other data programs use, and it is the source of the receipts data in the SUSB. In years past, Advocacy used one part of the Economic Census, the discontinued *Survey of Business Owners (SBO)*,<sup>128</sup> as the basis for reports on business ownership by women, individuals belonging to minority groups, and veterans, including service-disabled veterans. The most recent release of the SBO is for data year 2012.

*Business Employment Dynamics Series.* The Office of Advocacy worked with the Department of Labor’s Bureau of Labor Statistics (BLS) to encourage the production of employment statistics by firm size. Although no funding or special tabulations took place, the result of this collaboration has been the BLS Business Employment Dynamics (BED) data series. BED has tracked establishments (with some firm data) and their employment on a quarterly basis for the data period 1992 to 2020.<sup>129</sup> The significance of BED is twofold. First, it allows researchers and policymakers to ascertain employment dynamics sooner with greater precision than would be possible with other data sources, as the BED database has a three-quarter lag and is available quarterly versus the three-year lag for Census Bureau’s annual SUSB data. Second, BED data allow job creation analysis. For example, BLS researchers have shown that 63.7 percent of the net new jobs between June 1990 and September 2005 came from small businesses – a figure that is consistent with Advocacy findings using Census data.<sup>130</sup> Advocacy relies upon BED for small business job creation and business survival figures.

*Finance Data.* Advocacy studies on small business lending utilize a number of datasets and surveys. The Federal Reserve issued its initial Small Business Credit Survey in 2016, which annually surveys small businesses regarding a variety of aspects of obtaining credit.<sup>131</sup> There are employer and nonemployer versions of this report to analyze the particular financing demands by type of small business. The Federal Reserve produced its *Survey of Small Business Finances (SSBF)* for the data years 1987 to 2003. The SSBF was valuable for examining how and from whom small firms used financial services.<sup>132</sup> Another major Federal Reserve data source is its *Survey of Consumer Finances (SCF)*,<sup>133</sup> a triennial survey of the balance sheet, pension, income, and other demographic characteristics of U.S. families. The SCF has been very useful to investigate trends in the income and wealth of business owners. Advocacy also uses

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<sup>128</sup> For more information on the Survey of Business Owners, see <http://www.census.gov/programs-surveys/sbo.html>.

<sup>129</sup> For more information on BED data, see <http://www.bls.gov/bdm/>.

<sup>130</sup> See Jessica Helfand, Akbar Sadeghi, and David Talan; “Employment dynamics: small and large firms over the business cycle,” Bureau of Labor Statistics, *Monthly Labor Review*, March 2007, pp. 39-50, <http://www.bls.gov/opub/mlr/2007/03/art3full.pdf>.

<sup>131</sup> See <https://www.fedsmallbusiness.org>.

<sup>132</sup> The Federal Reserve Board discontinued the SSBF after the 2003 survey. For more information on past SSBF surveys, see <http://www.federalreserve.gov/pubs/oss/oss3/nssbftoc.htm>.

<sup>133</sup> For more information, see <http://www.federalreserve.gov/pubs/oss/oss2/scfindex.html>.

the Federal Reserve’s quarterly *Senior Loan Officer Opinion Survey on Bank Lending Practices* to track small firm commercial and industrial lending standards and demand.<sup>134</sup> Finally, Advocacy’s annual examination of the lending activities of commercial banks and other depository institutions<sup>135</sup> uses data from two types of reports that these institutions make to their regulatory agencies: Community Reinvestment Act (CRA) reports<sup>136</sup> and lenders’ Consolidated Reports of Condition and Income, often referred to as “call reports.”<sup>137</sup> The Office of Advocacy contracts annually for special tabulations of CRA and call report data.

***Additional Data Sources.*** In addition to the data sources just outlined, OER uses a variety of other data sources. These include but are not limited to the Census/BLS Current Population Survey,<sup>138</sup> the Census Bureau’s American Community Survey,<sup>139</sup> the Census Bureau’s Survey of Income and Program Participation,<sup>140</sup> the Bureau of Economic Analysis’ Proprietors’ Information<sup>141</sup> and the International Trade Administration’s Exporter Database.<sup>142</sup>

## Data Quality and Peer Review

The Office of Advocacy adheres to data quality and peer review guidelines issued by the Office of Management and Budget.<sup>143</sup> The analyses for all internal products are checked and verified by a second economist. Contract reports, including those deemed “influential” under data quality guidelines, undergo an external peer review process. In recent years, Advocacy has formalized and strengthened the peer review process for external research products.

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<sup>134</sup> For more information, see: <http://www.federalreserve.gov/boarddocs/SnLoanSurvey/>.

<sup>135</sup> For example, see <https://advocacy.sba.gov/2020/09/10/small-business-lending-in-the-united-states-2019>. Both call report and CRA data provide loan size data that Advocacy uses as a measure of small firm lending because borrower size is not available.

<sup>136</sup> For more information about the CRA and its associated reports, see: <http://www.ffiec.gov/cra/>.

<sup>137</sup> For more information on call reports, see: <https://cdr.ffiec.gov/public/>.

<sup>138</sup> The *Current Population Survey* (CPS) is a monthly survey of about 60,000 households conducted by the Bureau of the Census for the Bureau of Labor Statistics. The survey has been conducted for more than 60 years and is the primary source of information on the labor force characteristics of the U.S. population. For more information on the CPS, see: <http://www.census.gov/cps/>.

<sup>139</sup> See <https://www.census.gov/programs-surveys/acs>.

<sup>140</sup> The Census Bureau’s *Survey of Income and Program Participation* (SIPP) is a survey of national samples of households conducted in “waves” to track household finances over time. SIPP offers detailed information on cash and noncash income and also collects data on taxes, assets, liabilities, and participation in government transfer programs. For more information on SIPP, see <https://www.census.gov/programs-surveys/sipp.html>.

<sup>141</sup> See <https://apps.bea.gov/itable/index.cfm>.

<sup>142</sup> See <https://www.trade.gov/>.

<sup>143</sup> See [R2-59.pdf \(govinfo.gov\)](#).



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

Should an external reader believe that they have found an error in an Advocacy research or data product, they are encouraged to contact the office. Simple typos or errors might be corrected informally. With larger issues, individuals may file a formal correction request with SBA's Office of the Chief Information Officer (OCIO), and a process has been established to assess such requests in a timely manner.<sup>144</sup> To date, no such request for corrective action has ever been filed with the OCIO on an Office of Advocacy product.

## Transparency and Reproducibility in Research

OER's transparency commitment empowers researchers and small business stakeholders to build on OER's research by providing raw statistics, detailed citations for research products, interactive data tools, and completely reproducible analyses. Interactive tools, such as the Small Business Data Sources page provide a clear look into the nuances of frequently cited datasets of Advocacy publications. For both contracted and in-house research products, Advocacy provides detailed citations. This helps inform the public for not only where certain facts and figures were cited from, but also to increase the transparency of the reproducibility process.

In addition, a select number of OER publications now incorporate reproducibility techniques. *Research reproducibility* refers to analyses published so that experts and non-experts alike can easily reproduce the findings and build upon them. Advocacy's 2020 *Small Business Profiles for the States and U.S. Territories* as well as the 2020 *Small Business Profiles for Congressional Districts* demonstrate the efficiencies of a transparent workflow. In lieu of redesigning and editing dozens of reports, one at a time, reproducibility techniques allow OER economists to focus on attaining the highest standards in aesthetics, publication quality, and analysis for just one region. Next, the optimized report is replicated across regions while incorporating adaptive language, layouts, and figures.

Additional reproducible research products involving large public datasets and sophisticated computations are in the works. These reproducible analyses allow outside researchers to precisely track each detail of the complex relationships underlying our findings so they could arrive at the same estimates.

## Counsel on Economic Issues for Policymakers, Media, and Researchers

The entire economics team and all Advocacy staff make themselves available as a resource to those seeking assistance in areas where the office has expertise. Requests often come from policymakers in

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<sup>144</sup> See <https://www.sba.gov/about-sba/sba-performance/open-government/information-quality/information-quality-guidelines>.

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

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

## Outreach

***Presentations.*** In fulfillment of its statutory mission to conduct and share its economic research, Advocacy economists actively seek out opportunities to present at academic conferences, small business stakeholder roundtables, to congressional staff, and to the media. Advocacy economists often work closely with Advocacy's regional advocates, the Office of Information team, and attorneys in Advocacy's Office of Interagency Affairs to coordinate these events. In recent years, Advocacy economists have presented at premier academic conferences such as the Joint Statistical Meetings and the Society of Benefit Cost Analysis, and policy events and conferences held by the National Association for Business Economics, the JP Morgan Chase Institute, and the OECD. Advocacy economists have presented research at numerous regulatory roundtables; to stakeholders across SBA's ten regions, including Advocacy's Regional Regulatory Reform Roundtable series and to congressional committee staff. Since FY 2017, Advocacy economists have presented at over 80 events, including academic research events, media interviews, policy conferences, and policymaker briefings.

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

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

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

*Small Business Economic Research Forum.* As part of Advocacy's research outreach, the economic team created a new forum for sharing small business research. The Small Business Economic Research Forum provides an opportunity for academic, government, and private sector researchers to present and share thoughts on current small business research. Past presenters include economists from the Federal Reserve Bank of New York, the Organization for Economic Co-operation and Development, the Census Bureau, the Bureau of Economic Analysis, the George Washington University, and George Mason University. OER research economists themselves have also presented at these forums.

## **The Role of Research in Regulatory Review**

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

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

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

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

In addition to reviewing regulations, regulatory economists also translate their policy knowledge and experience into timely research products that inform policymakers on key small business issues such as community bank lending, small business economic data for policy analysis, and entrepreneurial demographics. For example, a 2018 Advocacy issue brief showed that agencies should conduct detailed analysis of small businesses by different size categories when developing new regulations.<sup>145</sup> Additionally, the smallest small businesses (firms with less than 20 employees) deserve special attention since they are the most common type of business in most industries, and the revenue they generate is much smaller compared to other businesses in their industry which make them less likely to be able to absorb new compliance costs.

Advocacy regulatory economists help inform regulatory decisions by:

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

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<sup>145</sup> See <https://cdn.advocacy.sba.gov/wp-content/uploads/2018/08/07142051/Examining-Small-Business-Impacts-in-Reg-Dev.pdf>.

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

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



## Chapter 3 – Advocacy and the Regulatory Flexibility Act

In this chapter, we will examine one of Advocacy’s most important core missions, the representation of small entities before federal agencies and the closely related task of monitoring those agencies’ compliance with the federal Regulatory Flexibility Act (RFA).<sup>146</sup> In Chapter 1, we saw how this mission had its beginnings even before the modern Office of Advocacy was established in 1976 by Public Law 94-305, and how it since has been strengthened by the RFA in 1980, the Small Business Regulatory Enforcement Fairness Act (SBREFA) in 1996, Executive Order 13272 in 2002, the Small Business Jobs Act of 2010, and the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA).

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

- to serve as a focal point for the receipt of complaints, criticisms, and suggestions concerning the policies and activities of federal agencies which affect small businesses;
- to develop proposals for changes in the policies and activities of any agency of the federal government which will better fulfill the purposes of the Small Business Act (*inter alia*, to aid, counsel, assist and protect the interests of small business concerns) and to communicate such proposals to the appropriate federal agencies; and
- to represent the views and interests of small businesses before other federal agencies whose policies and activities may affect small business.<sup>147</sup>

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

These elements of Advocacy’s mission are the primary responsibility of its Office of Interagency Affairs (Interagency). Interagency is Advocacy’s largest operational division in terms of staff, with 16 positions authorized in 2020, 15 of whom were attorneys. The legal team monitors federal regulatory and other activity with potential small entity impacts; and it works with agencies to help them develop better rules, both by soliciting small entity input early in the regulatory process and by crafting rules that mitigate adverse small entity effects where practicable, while still achieving agencies’ regulatory goals.

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<sup>146</sup> Public Law 96-354 (September 19, 1980), 5 U.S.C. § 601 *et seq.* See Appendix B.

<sup>147</sup> These points are included in 15 U.S.C. § 634c.

Since 2017, Interagency has reviewed annually from 1200 to 1500 regulatory proposals, notices of regulatory activity, or final rules, as published in the *Federal Register*. Through its electronic e-notify system and pursuant to Executive Order 13272, Advocacy also annually receives from agencies about 600 notifications of regulatory activity. More than 500 regulatory proposals are annually reviewed in confidential interagency consultations prior to their publication, whether in the context of SBREFA panels, requests from promulgating agencies for technical assistance, Advocacy participation in interagency policy groups, or internal clearance of SBA rules. From FY 2017 through FY 2020, Interagency hosted 54 regulatory roundtables on a wide variety of issues at which public stakeholders and agency officials could share information in an informal setting. Of these, 49 were held in Washington or electronically after the onset of the COVID pandemic in 2020; 5 others were held outside of Washington. During the same period, Advocacy held 43 Regional Regulatory Reform Roundtables in 31 states in connection with its Regulatory Reform Initiative that will be discussed in this chapter. Also from FY 2017 through FY 2020, Advocacy submitted 86 formal public comment letters to 33 agencies throughout government at an average rate of 22 per year. Breakdowns of these letters by year, agency, and key RFA compliance issue are presented later in this chapter.<sup>148</sup>

Advocacy clearly spends a lot of effort looking at rules and working with the agencies that propose them. So why is this important? One major reason is that regulations impose significant costs on the economy and on small businesses in particular. As we will discuss later in this chapter, Advocacy conservatively estimates that its regulatory advocacy from FY 2017 through FY 2020 resulted in a minimum of \$ 4.2 billion in one-time regulatory cost savings for small businesses, \$3.8 billion of which will be annually recurring cost savings.

## The Cost of Regulation on Small Businesses

Since Advocacy's inception, one of the most important recurring themes in its work has been the cost of regulation to small businesses. The office released its first study on the cost of regulation in 1980, and since then has sponsored a significant body of research on this issue, an effort that continues today. Although it is difficult to measure regulatory costs with precision, a central conclusion has consistently been that small businesses bear a disproportionate share of the cost of regulation as economies of scale and a lack of resources make regulations more expensive for smaller firms than their larger counterparts.

In June 2016 at Advocacy's 40<sup>th</sup> Anniversary Symposium, a special panel entitled *Accounting for Small Business: The Challenge of Measuring the Cost of Regulation* featured a discussion of this issue by distinguished government and academic experts.<sup>149</sup> Those experts examined how government sources can be used to estimate the number of small businesses in specific industries that may be affected by a regulation in most cases, but, because of limited data, it can be difficult to estimate the extent to which

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<sup>148</sup> Some rules come to Advocacy through multiple channels, and some rules come more than once (e.g., for pre-proposal consultation, as a proposed rule, as a final rule, etc.).

<sup>149</sup> See [www.sba.gov/advocacy/office-advocacys-anniversary-symposium](http://www.sba.gov/advocacy/office-advocacys-anniversary-symposium).



regulatory changes will impact affected small businesses of different sizes and characteristics. In 2018, the Census Bureau released statistics from the 2016 Annual Survey of Entrepreneurs on the impacts of regulations by age of business. Young businesses of less than two years old, generally small firms, reported in the survey that health insurance, workers compensation, hiring, and licensing regulations were the most burdensome to them.<sup>150</sup> relative to older firms, young firms were more likely to be impacted negatively by business registration, building permits, licensing, and financial regulations.<sup>151</sup> Understanding how a proposed regulation may impact small businesses is important for policymakers in achieving their objectives without imposing unnecessary burdens and potentially deterring important sources of economic growth and community development.

## The Regulatory Flexibility Act

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

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

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

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<sup>150</sup> Census Bureau 2016 Annual Survey of Entrepreneurs.

<sup>151</sup> Ibid.

(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.<sup>152</sup>

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

It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.<sup>153</sup>

The RFA directs agencies to analyze the impact of their regulatory proposals and to review existing rules, planned regulatory actions, and actual proposed rules for their anticipated effects on small entities. The RFA requires agencies to prepare an initial regulatory flexibility analysis (IRFA) unless they can certify that there will not be a significant economic impact on a substantial number of small entities. A final regulatory flexibility analysis (FRFA) is also required for final rules with significant impacts.<sup>154</sup>

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<sup>152</sup> 5 U.S.C. § 601 note.

<sup>153</sup> Ibid.

<sup>154</sup> For a detailed discussion of the RFA, agency responsibilities under it, and guidance on RFA compliance procedures and issues, see Advocacy's *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* (August 2017), <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/06/21110349/How-to-Comply-with-the-RFA.pdf>.

*Scope of RFA.* Not all rules are subject to the RFA. The RFA applies to any rule of general applicability that is subject to notice and comment rulemaking under the Administrative Procedure Act (APA)<sup>155</sup> or any other law.<sup>156</sup> Generally exempt from the APA, and thus from the RFA, are 1) rules involving a military or foreign affairs function of the United States; and 2) rules relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.<sup>157</sup> Also, except where notice or hearing is required by statute, the APA does not apply 1) to interpretive rules, general statements of policy, or rules of agency organization, procedure or practice; or 2) when an agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.<sup>158</sup>

Although interpretive rules are generally exempt from APA requirements, and thus from the RFA as well, the Small Business Regulatory Enforcement Fairness Act (SBREFA) amended the RFA to bring certain interpretative rulemakings of the Internal Revenue Service (IRS) within the RFA's scope, namely those IRS rules published in the *Federal Register* that would impose a "collection of information" requirement on small entities.<sup>159</sup>

*Regulatory agendas.* The RFA requires agencies to publish semiannual regulatory flexibility agendas that include a brief description of the subject area of any rule that the agency expects to propose that is likely to have a significant economic impact on a substantial number of small entities; a summary of the nature of any such rule under consideration for each subject area listed in the agenda; the objectives and legal basis for the issuance of the rule; an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking; and the name and telephone number of an agency official knowledgeable concerning these matters.<sup>160</sup>

*Initial RFA analyses.* Unless an agency promulgating a proposed rule within the scope of the RFA certifies that the rule will not have a significant economic impact on a substantial number of small

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<sup>155</sup> 5 U.S.C. § 553(b).

<sup>156</sup> 5 U.S.C. § 601(2).

<sup>157</sup> 5 U.S.C. § 553(a). Because there are separate statutes governing federal procurement which themselves require notice-and-comment rulemaking, such procurement regulations of general applicability are generally subject to the RFA.

<sup>158</sup> 5 U.S.C. § 553(b).

<sup>159</sup> Public Law 104-121 (March 29, 1996), § 241, 110 Stat. 864, 5 U.S.C. § 603(a). Congress made it clear that the term "collection of information" has the same meaning as that employed in the Paperwork Reduction Act (5 U.S.C. § 3501 *et seq.*), generally the gathering of facts or opinions by the use of identical questions posed to, or recordkeeping requirements imposed on, ten or more persons, regardless of the form or format used in such a collection (5 U.S.C. § 601(7)).

<sup>160</sup> 5 U.S.C. § 602.

entities,<sup>161</sup> the RFA requires that it prepare and make available for public comment an IRFA for that rule that includes:

- (1) a description of the reasons why action by the agency is being considered;
- (2) a succinct statement of the objectives of, and legal basis for, the proposed rule;
- (3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- (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; and
- (5) an identification, to the extent practicable, of all relevant federal rules which may duplicate, overlap, or conflict with the proposed rule.<sup>162</sup>

Each IRFA should also include a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis should discuss significant alternatives such as:

- (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
- (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
- (3) the use of performance rather than design standards; and
- (4) an exemption from coverage of the rule, or any part thereof, for such small entities.<sup>163</sup>

The RFA also includes a provision for the Consumer Financial Protection Bureau that requires it to include in its IRFAs a description of any projected increase in the cost of credit for small entities, as well as a description of significant alternatives which, while accomplishing the rule's stated objectives, minimize any such increase, and the advice and recommendations of small entities with respect to these cost-of-credit issues.<sup>164</sup> The CFPB is also required to identify small entity representatives in consultation

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<sup>161</sup> 5 U.S.C. § 605.

<sup>162</sup> 5 U.S.C. § 603(a).

<sup>163</sup> 5 U.S.C. § 603(b).

<sup>164</sup> 5 U.S.C. § 603(d). These provisions were added to the RFA by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111–203 (July 21, 2010), title X, § 1100G(b), 124 Stat. 2112, 2113.

with Advocacy and obtain advice and recommendations about these cost-of-credit issues in addition to the issues raised by the proposed regulation.<sup>165</sup>

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

*Final RFA analyses.* Unless an agency certifies that a final rule within the scope of the RFA will not have a significant economic impact on a substantial number of small entities,<sup>166</sup> the RFA requires that it prepare and make available to the public a FRFA for that rule that includes:

- (1) a statement of the need for, and objectives of, the rule;
- (2) a statement of the significant issues raised by public comments in response to the rule's IRFA, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- (3) the response of the agency to any comments filed by the Chief Counsel for Advocacy in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;<sup>167</sup>
- (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; and

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<sup>165</sup> Ibid.

<sup>166</sup> 5 U.S.C. § 605.

<sup>167</sup> This provision was added to the RFA by the Small Business Jobs Act of 2010, Public Law 111–240 (September 27, 2010), title I, § 1601(a), 124 Stat. 2551, 5 U.S.C. § 604(a).

(7) for the Consumer Financial Protection Bureau, a description of the steps the agency has taken to minimize any additional cost of credit for small entities.<sup>168</sup>

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

*Periodic review of existing rules.* Section 610 of the RFA requires agencies to review all regulations that have a significant economic impact on a substantial number of small entities within 10 years of their adoption as final rules.<sup>169</sup> The purpose of the review is to assess the impact of existing rules on small entities and to determine whether the rules should be continued without change, amended, or rescinded to minimize impacts on small entities in a manner consistent with the stated objectives of applicable statutes. In its review of such rules, agencies are directed to consider the following factors:

- (1) the continued need for the rule, consistent with the objectives of applicable statutes;
- (2) the nature of complaints or comments received concerning the rule from the public;
- (3) the complexity of the rule;
- (4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and
- (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.<sup>170</sup>

Each year, agencies must publish in the *Federal Register* and solicit public comments on a list of rules that the agency will review under section 610 over the next 12 months. The list must briefly describe each rule, including the need and legal basis for it. Public comment is also to be solicited on each such rule.<sup>171</sup> We will return later to section 610 compliance issues.

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

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<sup>168</sup> 5 U.S.C. § 604.

<sup>169</sup> 5 U.S.C. § 610.

<sup>170</sup> 5 U.S.C. § 610(b).

<sup>171</sup> 5 U.S.C. § 610(c).

provided in 1996 by SBREFA.<sup>172</sup> Since then, a growing body of case law has informed agency RFA compliance efforts.

## RFA Compliance and Advocacy's Role

From the initial enactment of the RFA in 1980, the Office of Advocacy was closely involved with its regulatory review process. Agencies are required to transmit to the Chief Counsel their regulatory agendas,<sup>173</sup> their initial regulatory flexibility analyses,<sup>174</sup> and their certifications of rules without significant effects.<sup>175</sup> They must respond to any comments from the Chief Counsel on rules with FRFAs.<sup>176</sup> Additionally, the Chief Counsel was tasked to report annually to the President and the Congress on agency compliance with the RFA,<sup>177</sup> and was authorized to appear as *amicus curiae* or “friend of the court” in any action brought in a court of the United States to review a rule.<sup>178</sup> In this section we will review in greater detail some of the many ways in which Advocacy works with agencies to achieve better RFA compliance, and in so doing pursues its own statutory mission of representing small business interests within the federal government.

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

It was difficult to change longstanding regulatory cultures at some agencies; and in the absence of judicial review, efforts to achieve RFA compliance met with limited success. After SBREFA, the development of case law based on RFA compliance issues has, as expected, helped focus many agencies’ attention on the need to consider small entity impacts early in their rulemakings. Small entities have used judicial review to seek RFA compliance, and a number of court decisions have remanded rules to agencies for failure to comply with the RFA. It is important to note that most challenges to agency rules based on RFA compliance issues are made without Advocacy involvement. However, in certain cases,

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<sup>172</sup> Public Law 104-121 (March 29, 1996), § 242, 110 Stat. 865, 5 U.S.C. § 611.

<sup>173</sup> 5 U.S.C. § 602.

<sup>174</sup> 5 U.S.C. § 603.

<sup>175</sup> 5 U.S.C. § 605.

<sup>176</sup> 5 U.S.C. § 604.

<sup>177</sup> 5 U.S.C. § 612(a).

<sup>178</sup> 5 U.S.C. §§ 612(b), 612(c).

the Chief Counsel has elected to join such actions as *amicus curiae* under the authority granted by section 612 of the RFA.<sup>179</sup>

Although RFA compliance issues were not directly reviewable by the courts under the original RFA, Congress did authorize the Chief Counsel to file as *amicus curiae* “in any action brought in a court of the United States to review a rule. In any such action, the Chief Counsel is authorized to present his views with respect to the effect of the rule on small entities.”<sup>180</sup> In 1986, the Chief Counsel filed the first such *amicus curiae* brief in *Lehigh Valley Farmers v. Block*,<sup>181</sup> but later withdrew it after it was challenged by the Department of Justice (DOJ). The DOJ maintained that the Chief Counsel’s *amicus curiae* authority was unconstitutional on the grounds that it would impair the ability of the executive branch to fulfill its constitutional functions. DOJ cited § 1-402 of Executive Order 12146,<sup>182</sup> which states that legal disputes between two agencies are to be resolved by the Attorney General. The Chief Counsel argued that an executive order could not override a statute, namely the RFA, but nevertheless withdrew the brief.

In September 1994, the Chief Counsel decided to file as *amicus curiae* in *Time Warner Entertainment Co., L.P., et. al., v. Federal Communications Commission*.<sup>183</sup> The brief was prepared, but the issue was resolved with the Commission (FCC) before the filing deadline. During discussions with the FCC, DOJ attempted to object to the filing, arguing that the Chief Counsel’s authority was narrow and could not address the merits of the rule. The issue was mooted by the out-of-court resolution of the dispute.

Advocacy’s pre-SBREFA *amicus* filings were generally limited to arguing that failure to comply with the RFA was arbitrary and capricious under the APA. With the enactment of SBREFA in 1996, the Chief Counsel was specifically authorized to present his or her views as *amicus curiae* on: 1) agency compliance with the RFA; 2) the adequacy of an agency’s rulemaking with respect to small entities; and 3) the effect of a rule on small entities.<sup>184</sup> This important clarification complemented the new authority to allow judicial review of RFA compliance issues and gave the Chief Counsel an important new tool to encourage agencies to take their RFA responsibilities seriously.

In 1997, Advocacy filed a motion to intervene as *amicus curiae* in *Southern Offshore Fishing Association v. Daley*.<sup>185</sup> Advocacy withdrew its motion when DOJ stipulated that the standard of review for RFA cases should be whether the regulation was “arbitrary and capricious.” Before Advocacy withdrew, the court noted that Advocacy is the “watchdog of the RFA,” and quoted from Advocacy’s comment on the regulation during the proposed rule stage. Ultimately, the court held that the National Marine Fisheries

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<sup>179</sup> 5 U.S.C. § 612(b).

<sup>180</sup> Public Law 96-354, 94 Stat. 1170. This language in § 612 of the RFA was subsequently amended by SBREFA.

<sup>181</sup> 829 F.2d 409 (3<sup>rd</sup> Cir. 1987).

<sup>182</sup> Executive Order 12146 (July 18, 1979), 44 Fed. Reg. 42657.

<sup>183</sup> 56 F.3d 151 (D.C. Cir. 1995).

<sup>184</sup> Public Law 104-121 (March 29, 1996), § 243(b), 110 Stat. 866, 5 U.S.C. § 612.

<sup>185</sup> 55 F. Supp. 2d 1336 (M.D. Fla. 1999).



Service had not complied with the RFA and remanded the regulation to the agency with instructions to undertake a new RFA analysis.

In 1998, Advocacy's first post-SBREFA *amicus* brief was filed in *Northwest Mining Assoc. v. Babbitt*.<sup>186</sup> The court agreed with the issues raised by Advocacy and remanded the rule to the Department of the Interior for further analysis. The Department of Justice did not file formal objections to the filing of Advocacy's brief with the court.

Also in 1998, Advocacy filed a Notice of Intent to file an *amicus curiae* brief in *Grand Canyon Air Tour Coalition v. FAA*.<sup>187</sup> During the notice and comment stage, Advocacy had pointed out flaws in the Federal Aviation Administration's (FAA) regulatory flexibility analysis. Advocacy withdrew its Notice of Intent when the Department of Transportation agreed to notify the court that it was in error when it certified the final rule as having no significant economic impact on a substantial number of small entities. FAA also agreed to detail for the court data on the impact of the regulation.

In 2004, Advocacy again filed a Notice of Intent to file a brief in *United States Telecom Association, et al., v. Federal Communications Commission*,<sup>188</sup> challenging an FCC order imposing new rules regarding local number portability. The FCC had stated that its order "clarified" an earlier final rule and did not require notice and comment or an analysis under the RFA. Advocacy withdrew its notice when the FCC agreed to consider more fully impacts on small businesses and to urge state regulators to consider the concerns of small rural telecom providers that would be seeking waivers of the new rule. Ultimately, the petitioners prevailed in this lawsuit.

While infrequently invoked, the Office of Advocacy's *amicus* authority is an important tool to prod agencies into better compliance with the RFA when more collaborative efforts have failed. It has produced important agreements with otherwise recalcitrant agencies to perform appropriate RFA analyses. The Chief Counsel's willingness to use the *amicus* authority remains a "big stick" that can be wielded in support of small business when agencies ultimately are called to account for their actions by the courts. Of course, Advocacy does everything possible to help agencies avoid litigation over RFA compliance problems, and the key to this effort is early intervention.<sup>189</sup>

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

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<sup>186</sup> 5 F. Supp. 2d 9 (D.D.C. 1998).

<sup>187</sup> 154 F.3d 455 (D.C. Cir. 1998).

<sup>188</sup> 400 F.3d 29 (D.C. Cir. 2005).

<sup>189</sup> For additional information on the referenced cases, see the 2005 edition of Advocacy's annual RFA report at <https://www.sba.gov/sites/default/files/files/05regflx.pdf>, pp. 10-11.

normal notice-and-comment periods for these rules in what are called small business advocacy review (or SBREFA) panels. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 later extended the SBREFA panel provisions to the new Consumer Financial Protection Bureau.<sup>190</sup>

SBREFA provided that these agencies must notify Advocacy prior to the publication of an IRFA and provide information on the potential impacts of the proposed rule. In most cases, a SBREFA review panel is then convened, on which sit representatives of the Chief Counsel for Advocacy, the Administrator of OMB's Office of Information and Regulatory Affairs (OIRA), and the agency proposing the rule.<sup>191</sup> The panel reviews materials related to the proposal and, importantly, the advice and recommendations of small entity representatives (SERs) on the rule's potential effects and possible mitigation strategies. The panel then issues a report on the comments of the SERs and on its own findings related to RFA issues. SBREFA requires the rulemaking agency to consider the panel report findings and, where appropriate, modify the proposed rule or its IRFA.<sup>192</sup>

Since SBREFA established the review panel process in 1996, Advocacy has participated in 56 EPA panels, 14 OSHA panels, and 7 CFPB panels.<sup>193</sup> Each of these panels closely examined a regulatory proposal expected to have significant economic impacts on a substantial number of small entities. The findings of their respective panel reports helped rule makers improve their draft proposals *before* they entered the normal notice-and-comment process. In some cases, a proposal was actually withdrawn after its impacts, costs, and benefits were better understood as a result of the panel process. In other cases, revisions were made to a draft rule that mitigated its potentially adverse effects on small entities but did not compromise the rule's public policy objective.

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

Good policy requires good information, and the value of sound economic data and robust regulatory flexibility analyses has been demonstrated time and again in the SBREFA review panel process. The panel experience has confirmed that credible economic and scientific data, as well as sound analytical

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<sup>190</sup> Public Law 111-203 (July 21, 2010), title X, § 1100G(a), 124 Stat. 2112.

<sup>191</sup> The Chief Counsel may in certain limited circumstances waive the requirement for a SBREFA panel.

<sup>192</sup> Public Law 104-121 (March 29, 1996), § 244; 110 Stat. 867, 5 U.S.C. § 609.

<sup>193</sup> Through August 30, 2016. EPA panels and the disposition of their rules are posted at <https://www.sba.gov/category/advocacy-navigation-structure/regulatory-affairs/small-business-statutes/sbrefa/epa-sbrefa-panels>. OSHA panels and the disposition of their rules are posted at <https://www.sba.gov/category/advocacy-navigation-structure/regulatory-affairs/small-business-statutes/sbrefa/osha-sbrefa-panels>. CFPB panels and the disposition of their rules are posted at <https://www.sba.gov/category/advocacy-navigation-structure/cfpb-sbrefa-panels>.

methods, are crucial to rational decision-making in regulatory matters, and that information provided by small entities themselves on real-world impacts is invaluable in identifying equally effective regulatory alternatives.

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

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

Recognizing the importance of Advocacy’s participation *early* in the regulatory process and the need for improved RFA compliance by the agencies, President George W. Bush in 2002 signed Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking*.<sup>194</sup> The order provides that:

Each agency shall establish procedures and policies to promote compliance with the Regulatory Flexibility Act, as amended...Agencies shall thoroughly review draft rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations. The Chief Counsel for Advocacy ...shall remain available to advise agencies in performing that review.<sup>195</sup>

Executive Order 13272 further mandates that agencies:

- Issue written procedures and policies, consistent with the Regulatory Flexibility Act, to ensure that the potential impacts of agencies’ draft rules on small businesses, small governmental jurisdictions, and small organizations are properly considered during the rulemaking process. These procedures and policies are to be submitted to Advocacy for comment prior to adoption and made public when finalized.<sup>196</sup>
- Notify Advocacy of any draft rules that may have a significant economic impact on a substantial number of small entities under the Act.<sup>197</sup>
- Give every appropriate consideration to any comments provided by Advocacy regarding a draft rule. In most cases, an agency must provide in its explanation or discussion accompanying

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<sup>194</sup> Executive Order 13272 (August 13, 2002), 67 Fed. Reg. 53461. See Appendix C.

<sup>195</sup> *Ibid.*, § 1.

<sup>196</sup> *Ibid.*, § 3(a).

<sup>197</sup> *Ibid.*, § 3(b).

publication of a final rule its response to any written comments from Advocacy on the proposed rule that preceded it.<sup>198</sup>

Advocacy is also mandated to provide RFA compliance training to agencies,<sup>199</sup> and to report annually to OIRA on agencies' compliance with the executive order.<sup>200</sup> The order specifically provides that Advocacy may provide comments on draft rules to both the agency that has proposed or intends to propose the rules and to OMB's Office of Information and Regulatory Affairs, with which Advocacy works closely.<sup>201</sup>

The language of Executive Order 13272 is clear. Advocacy has a central role in helping agencies comply with the RFA and in monitoring that compliance. The Chief Counsel issued a series of memoranda to agency general counsels and regulatory staff in 2002 and 2003 concerning their responsibilities under Executive Order 13272, and in 2003 Advocacy made its first annual report under the order.<sup>202</sup> In subsequent years, Advocacy has consolidated its annual report under Executive Order 13272 with its annual Regulatory Flexibility Act report.<sup>203</sup>

*Executive Order 12866.* One important way in which Advocacy works with OMB's Office of Information and Regulatory Affairs (OIRA) is through the regulatory review process established by Executive Order 12866, *Regulatory Planning and Review*,<sup>204</sup> which is coordinated by OIRA. The order sets forth principles of regulation for executive branch agencies and establishes a centralized review process for "significant" rules and guidance documents, as defined in the order.<sup>205</sup> This process is separate from that required by the RFA, but both share a number of objectives, and they often occur in tandem.

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

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<sup>198</sup> Ibid., § 3(c). As noted above, the Small Business Jobs Act of 2010 included a provision that an agency must include in a final rule's FRFA its response to any comments filed by the Chief Counsel for Advocacy in response to its proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments. Public Law 111-240 (September 27, 2010), title I, § 1601(a), 124 Stat. 2551, 5 U.S.C. §604(a).

<sup>199</sup> Ibid., § 2(b).

<sup>200</sup> Ibid., § 6.

<sup>201</sup> Ibid., § 2(c).

<sup>202</sup> Both the memoranda and the 2003 report can be accessed at [http://webarchive.loc.gov/all/20100617185809/http://www.sba.gov/advo/laws/law\\_lib.html](http://webarchive.loc.gov/all/20100617185809/http://www.sba.gov/advo/laws/law_lib.html).

<sup>203</sup> These reports are available at <https://advocacy.sba.gov/category/resources/annual-report-on-the-rfa/>

<sup>204</sup> Executive Order 12866 (September 30, 1993), 58 Fed. Reg. 51735. See Appendix D.

<sup>205</sup> Ibid., § 3(f).

Importantly, Executive Order 12866 provides that “Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.”<sup>206</sup> Advocacy staff members frequently participate in 12866 reviews and assist OIRA in soliciting input from small entities. Advocacy’s own Executive Order 13272 specifically states that its mandates are consistent with those of Executive Order 12866.<sup>207</sup>

*Executive Order 13563.* In January 2011, President Barack Obama issued Executive Order 13563, *Improving Regulation and Regulatory Review*, which is supplemental to and reaffirms the principles, structures, and definitions established in Executive Order 12866.<sup>208</sup> The order provides that each agency must:

- propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify);
- tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations;
- select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);
- to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and
- identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.<sup>209</sup>

Executive Order 13563 further directs federal regulatory agencies to promote the coordination, simplification and harmonization of regulations that are redundant, inconsistent or overlapping across agencies. It also directs agencies to consider regulatory flexibility whenever possible, to ensure scientific and technological objectivity in regulatory development, and to identify means to achieve regulatory goals that are designed to promote innovation. The order and related guidance documents also direct agencies to review existing significant regulations and consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Public participation in this process is encouraged and an accountability framework through agency reporting to OMB was established.

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<sup>206</sup> Ibid., § 1(b)(11).

<sup>207</sup> Executive Order 13272, § 2.

<sup>208</sup> Executive Order 13563 (January 18, 2011), 76 Fed. Reg. 3821. See Appendix E.

<sup>209</sup> Ibid. § 1.

This important regulatory initiative is very much in keeping with Advocacy’s mission, the RFA and the prior Executive Order 13272. In fact, both Advocacy and the RFA are mentioned by name in a memorandum from the President to the heads of executive branch departments and agencies, *Regulatory Flexibility, Small Business, and Job Creation*,<sup>210</sup> which was issued at the same time as the order, together with another memorandum, *Regulatory Compliance*.<sup>211</sup> In the former memorandum, the President emphasized the importance of agency compliance with the RFA and its purposes; in the latter, the emphasis is on greater public disclosure of regulatory compliance and enforcement activities.

*Executive Order 13579.* In July 2011, President Barack Obama issued Executive Order 13579,<sup>212</sup> *Regulation and Independent Regulatory Agencies*, which encouraged independent regulatory agencies to comply with the goals of the prior Executive Order 13563.<sup>213</sup> The order reiterates provisions of Executive Order 13563 concerning public participation, integration and innovation, flexible approaches, and science. It provides that regulatory decisions should be made only after consideration of their costs and benefits, and that “To the extent permitted by law, independent regulatory agencies should comply with these provisions as well.”<sup>214</sup>

Executive Order 13579 also provided that “...independent regulatory agencies should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data and evaluations, should be released online whenever possible.”<sup>215</sup>

*Executive Order 13610.* In May 2012, President Barack Obama issued Executive Order 13610,<sup>216</sup> *Identifying and Reducing Regulatory Burdens*, which further developed provisions in both Executive Orders 12866 and 13563 relating to the retrospective review of regulations, also a directive included in

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<sup>210</sup> See Appendix F.

<sup>211</sup> See Appendix G.

<sup>212</sup> Executive Order 13579 (July 11, 2011), 76 Fed. Reg. 41587. See Appendix H.

<sup>213</sup> Executive Order 13563 applies to agencies as defined in §3(b) of Executive Order 12866, which itself refers to the definition of an agency in 44 U.S.C. § 3502(1) which explicitly excludes independent regulatory agencies. Executive Order 13579 provides that the term “independent regulatory agency” shall have the meaning set forth in 44 U.S.C. §3502(5) which provides that “the term ‘independent regulatory agency means the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Board, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Rate Commission, the Securities and Exchange Commission, and any other similar agency designated by statute as a Federal independent regulatory agency or commission...”

<sup>214</sup> Executive Order 13579, § 1(c).

<sup>215</sup> Ibid. § 2(a).

<sup>216</sup> Executive Order 13610 (May 10, 2012), 77 Fed. Reg. 28469. See Appendix J.

Executive Order 13579. The new order recognized progress that had been made under the prior orders, but noted that “...further steps should be taken...to promote public participation in retrospective review, to modernize our regulatory system, and to institutionalize regular assessment of significant regulations.”<sup>217</sup>

A key provision of the RFA is its Section 610 “look-back” provision mandating the periodic review of existing regulations. Accordingly, Executive Order 13610 and the support of the White House in implementing this important RFA provision was most welcome. The order directs agencies to give priority in their reviews “...to those initiatives that will produce significant quantifiable monetary savings or significant quantifiable reductions in paperwork burdens...” and, importantly, it provides that “...agencies shall also give special consideration to initiatives that would reduce unjustified regulatory burdens or simplify or harmonize regulatory requirements imposed on small businesses.”<sup>218</sup>

*Executive Order 13771.* In January 2017, President Donald Trump issued Executive Order 13771,<sup>219</sup> *Reducing Regulation and Controlling Regulatory Costs*, which requires Federal agencies to take more aggressive steps to alleviate unnecessary regulatory burdens. These steps include better management of 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.”<sup>220</sup> The order also requires that the costs of any new regulation be offset by reductions in the cost of prior regulations.<sup>221</sup> It further requires that the OMB 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.” These costs cannot be exceeded unless required by law or approved by OMB.<sup>222</sup>

*Executive Order 13777.* In February 2017, President Donald Trump issued Executive Order 13777,<sup>223</sup> *Enforcing the Regulatory Reform Agenda*, which further strengthens efforts to require agencies to reduce regulatory burdens. Regulatory agencies must appoint a Regulatory Reform Officer (RRO) to oversee regulatory reform efforts and who reports directly to the agency head.<sup>224</sup> Each agency must also establish a Regulatory Reform Task Force, chaired by the RRO, to identify regulations that eliminate jobs or inhibit job creation; are outdated, unnecessary, or ineffective; impose costs that

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<sup>217</sup> Ibid. § 1.

<sup>218</sup> Ibid. § 3.

<sup>219</sup> Executive Order 13771 (January 30, 2017), 82 Fed. Reg. 9339. See Appendix K.

<sup>220</sup> Ibid. § 1.

<sup>221</sup> Ibid. § 2.

<sup>222</sup> Ibid. § 3.

<sup>223</sup> Executive Order 13777 (February 24, 2017). 82 Fed. Reg. 12285. See Appendix L.

<sup>224</sup> Ibid. § 2.



exceed benefits; interfere with regulatory reform initiatives and policies; or that rely on questionable data, information or methods.<sup>225</sup> The Task Force must report to its agency head progress made towards identifying regulations for repeal, replacement or modification, and agencies must incorporate into their annual performance plans indicators that measure progress towards these goals.<sup>226</sup>

Both Executive Orders 13771 and 13777 are intended to work in tandem with and strengthen the earlier Executive Orders 12866 and 13563, which are both mentioned by name in Executive Order 13777 and through which Advocacy has for years provided counsel to the Administration and Federal agencies on regulatory issues affecting small businesses. This new regulatory initiative is very much in keeping with Advocacy's mission, the RFA and Executive Order 13272. Advocacy continues to examine rules that agencies determined should be reviewed, and the office continues to provide counsel on which rules would likely lead to regulatory burden reduction for small business.

*Advocacy Regulatory Reform Initiative.* Shortly after Executive Orders 13771 and 13777 were issued by President Trump, Advocacy began a special outreach effort to help agencies identify issues of most concern to small businesses and what should be done to address these concerns. In April 2020, Advocacy released the second progress report on this initiative, entitled Reforming Regulations and Listening to Small Business (available at <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/04/20141200/2nd-Progress-Report-on-Reg-Reform-Roundtables.pdf>).

Between June 2017 and December 2019, Advocacy held 43 Regional Regulatory Reform Roundtables in 31 states. While traveling to these events, Advocacy staff made at least 100 site visits in 26 states. In addition, the office's regional and national advocates held small business forums in hundreds of cities, and small business owners submitted hundreds of comments through an online portal. Through these outreach efforts, Advocacy received input from small businesses in the 50 states and the District of Columbia. The above report includes information on these activities and Advocacy's follow-up with agencies. The information developed has also helped inform Advocacy's own in-house regulatory activities.

*RFA compliance training program.* A major provision of Executive Order 13272 is its requirement that Advocacy provide RFA compliance training to federal regulatory agencies.<sup>227</sup> When this task was given to Advocacy in 2002, it established training teams including attorneys in the Office of Interagency Affairs and regulatory economists from Advocacy's Office of Economic Research. From FY 2017 through FY 2020, Advocacy has provided RFA compliance training to 664 rule development and policy professionals. Since the training program's inception, most federal agencies have received RFA training, including 18 cabinet level departments, 80 separate component agencies and offices within these departments, and 24 independent agencies. Various special groups, including congressional staff, business organizations and trade associations, have also received training.

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<sup>225</sup> Ibid. § 3.

<sup>226</sup> Ibid. § 4.

<sup>227</sup> Executive Order 13272, § 2(b).



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

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

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

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

*[RFA compliance guide](#)*. Following enactment of SBREFA in 1996, Advocacy published an 18-page document titled *A Guide to the Regulatory Flexibility Act*, which provided a general overview of the RFA and its amendments. In 1998 that document was updated with more detailed information informed by Advocacy’s experience with the RFA as amended by SBREFA, resulting in a much expanded resource

which has been periodically revised to reflect the most current legislation, executive orders, case law, and Advocacy experience.

Advocacy's current RFA compliance guide, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, was updated in 2017.<sup>228</sup> This guide also implements a provision of Executive Order 13272 which mandates that Advocacy should notify agencies of the requirements of the RFA.<sup>229</sup> In preparing this guide, the Office of Advocacy received input from regulatory agencies, the Office of Management and Budget, congressional committees, and small business and trade associations. It reflects Advocacy's 40 years of experience with the RFA and is written in a spirit of interagency cooperation and recognition of small businesses' vital importance to the economy. This 200-page guide provides a step-by-step, detailed procedural outline of what the RFA requires agencies to do when promulgating regulations. It also details relevant case law, provides Advocacy policy decisions on some of the finer points of the law, and includes examples of actual regulations where an agency did a good job on their RFA analysis. The RFA itself and applicable and executive orders and memoranda relating to regulatory review are also reprinted.

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

*Confidential Interagency communications.* One of the most important duties of Advocacy is to "represent the views and interests of small businesses before other Federal agencies whose policies and activities may affect small business."<sup>230</sup> The fact is that a considerable amount of preparation goes into rule development before regulatory agencies formally promulgate rules and their public notice-and-

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<sup>228</sup> See <https://advocacy.sba.gov/2017/08/31/a-guide-for-government-agencies-how-to-comply-with-the-regulatory-flexibility-act/>

<sup>229</sup> Op. cit., § 2(a).

<sup>230</sup> 15 U.S.C. § 634c(4). We have seen in Chapter 1 how small business association representatives testifying before Congress as Advocacy's charter legislation was being considered made the point that, no matter how effective they were in representing their own members, "advocacy within Government and by Government would still be essential to do the infighting for small business." Hearing before the Senate Select Committee on Small Business, "Oversight of the Small Business Administration: The Office of the Chief Counsel for Advocacy and How it Can be Strengthened" (March 29, 1976), p. 82.

comment process begins. It is Advocacy's goal to participate in this regulatory development process as early as possible, both to counsel agencies on potential effects of their actions on small business and to provide RFA compliance expertise as needed.

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

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

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

While Advocacy is extremely proud of its expert pre-proposal technical assistance to regulatory agencies, and of the significant improvements in regulations that result, it is frustrating that because of the confidential nature of most such communications, Advocacy is unable to document the cost savings that flow from this important work. However, there is another category of interagency communications

that Advocacy is careful to document and post on its website - formal Advocacy communications to agencies, including but not limited to comments on rules during their formal notice-and-comment process.

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

Advocacy has since its inception made extensive use of the public notice-and-comment process to make known the concerns of small businesses to agencies promulgating rules with potentially adverse effects or RFA compliance problems. Before RFA judicial review, SBREFA panels, and Executive Order 13272, Advocacy’s opportunities for pre-proposal technical assistance to regulatory agencies were often limited. But Advocacy was able to make small business concerns known, together with appropriate legal and RFA compliance analyses, by filing public comments. Breakdowns of 86 public filings by year, agency, and compliance issues follow:

**Chart 1: Advocacy Formal Regulatory Comments by Year, FY 2017 – FY 2020**

Year	#
FY 2017	25
FY 2018	20
FY 2019	22
FY 2020	19

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

**Chart 2: Advocacy Comments by Key RFA Compliance Issues, FY 2017 – FY 2020**

Percent of all issues noted in Advocacy regulatory comment letters				
Issues	FY 2017	FY 2018	FY 2019	FY 2020
Inadequate economic analysis of SB impacts	29%	41%	32%	37%
Small business outreach needed	38%	29%	-	5%
Deficiencies in RFA analysis	17%	6%	5%	5%
Improper certification	13%	6%	18%	11%
Significant alternatives not considered	38%	41%	23%	47%
Comment period should be lengthened	13%	6%	5%	11%
Other*	17%	-	23%	58%
* These included suggesting internal agency procedures include greater consideration of small entity impacts, commending the agency for small business consideration, the appearance of denial of the constitutional right to due process, and commending the agency for withdrawing a rule or eliminating conflicting laws and regulations. Also, Advocacy suggested specific regulatory alternatives in some instances.				

As the agency distribution table below shows, formal Advocacy regulatory comments have gone to a large number of agencies with remarkably diverse missions, 33 in all. The number of communications to any given agency should not be taken as a measure of its sensitivity to small business or RFA concerns. Some agencies' activities by their nature affect more small entities than others. The establishment of the SBREFA review panel process for EPA, OSHA, and CFPB rules reflects this, contributing to the relatively larger number of comments to these agencies. Also, major issues can generate multiple communications on the same proposals. All Advocacy comment letters have been posted on Advocacy's website since 2002.<sup>231</sup>

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<sup>231</sup> For a detailed listing of letters since 2017, see <https://www.sba.gov/category/advocacy-navigation-structure/legislative-actions/regulatory-comment-letters>.

**Chart 3: Regulatory Comment Letters, FY 2017 thru FY 2020**

<b>Regulatory Comment Letters - FY 2017 thru FY 2020 *</b>			
<b>Agency</b>		<b>#</b>	
<b>Agency</b>		<b>#</b>	
Environmental Protection Agency	18	Small Business Administration	2
Consumer Financial Protection Bureau	10	Department of State	2
Federal Communications Commission	4	U.S. Citizenship and Immigration Services	2
Fish and Wildlife Service	4	Animal and Plant Health Inspection Service	1
Consumer Product Safety Commission	4	Bureau of Ocean Energy Management	1
Department of Labor	3	Bureau Of the Census	1
Food and Drug Administration	3	Department of Energy	1
Food and Nutrition Service	3	Department of Homeland Security	1
Agricultural Marketing Service	2	Board of Governors of the Federal Reserve	1
Army Corps of Engineers	2	Federal Trade Commission	1
Department of Defense	2	Internal Revenue Service	1
Department of Education	2	National Marine Fisheries Service	1
Department of the Interior	2	National Park Service	1
Federal Deposit Insurance Corporation	2	National Research Council	1
Federal Motor Carrier Safety Administration	2	Alcohol and Tobacco Tax and Trade Bureau	1
Office of the Comptroller of the Currency	2	U.S. Department of Agriculture	1
Occupational Safety and Health Administration	2		
* Data derived from RFA Annual Reports thru FY 2019 and Advocacy website postings through FY 2020. A total of 86 letters were sent to 33 agencies. Average number of letters per full year: 22.			

*Periodic review and reform – the RFA’s Section 610.* Section 610 of the RFA requires agencies to periodically review their existing rules that have or will have a significant economic impact upon a substantial number of small entities.<sup>232</sup> The purpose of the review is to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. Section 610 reviews are supposed to take place within ten years of the publication of such rules as final. During a 610 review agencies should consider the following factors:

<sup>232</sup> 5 § U.S.C. § 610.

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

A report issued by the Government Accountability Office (GAO) in July 2007 examined agency reviews to evaluate the effectiveness of their existing regulations, including the periodic reviews required by Section 610.<sup>233</sup> GAO found that agencies often did a poor job of involving the public in the review process and explaining what they look at when they evaluate their rules. As a result, GAO concluded that agencies' reviews of their current rules, including reviews required under Section 610, were not as effective as they could be. In a follow-up report prepared in connection with congressional testimony in March 2014, GAO found that, while the administration's issuance of Executive Orders 13563, 13579, and 13610 were helpful, problems remained for many agencies in the effectiveness of their efforts at regulatory review.<sup>234</sup>

Advocacy refocused its retrospective review efforts with the issuance of Executive Orders 13563, 13579, and 13610, and accompanying guidance to agencies from OMB. These orders formalized procedures to institutionalize the goals of an earlier Advocacy's retrospective review effort, the so-called "r3" initiative, and those of a similar effort by OMB's Office of Information and Regulatory Affairs.<sup>235</sup>

This concludes our review of the various ways in which Advocacy, and especially its legal team, advances the purposes of the Regulatory Flexibility Act. We have looked at judicial review and the Chief Counsel's *amicus curiae* authority; the SBREFA review panel process; Executive Orders 13272, 12866, 13563, 13579, 13610, 13771 and 13777; Advocacy's Regulatory Reform Initiative; Advocacy's RFA compliance training program and its RFA compliance guide; confidential interagency communications; Advocacy

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<sup>233</sup> U.S. Government Accountability Office, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews* (July 2007), GAO-07-791, <http://www.gao.gov/products/GAO-07-791>.

<sup>234</sup> U.S. Government Accountability Office, *Federal Rulemaking: Regulatory Review Processes Could Be Enhanced* (March 2014), GAO-14-423T, <http://www.gao.gov/assets/670/661540.pdf>.

<sup>235</sup> Partially in response to the 2007 GAO report, and recognizing a need for improvements in Section 610 compliance, Advocacy launched its Small Business Regulatory Review and Reform (or r3) initiative in that year. For more information, see <http://webarchive.loc.gov/all/20100619022216/http://www.sba.gov/advo/r3/>. Advocacy also published a best practices document to help federal agencies know when and how they should conduct a Section 610 review of an existing rule. See: *Section 610 of the Regulatory Flexibility Act: Best Practices for Federal Agencies* (October 2007), [http://webarchive.loc.gov/all/20100730124403/http://www.sba.gov/advo/r3/r3\\_section610.pdf](http://webarchive.loc.gov/all/20100730124403/http://www.sba.gov/advo/r3/r3_section610.pdf).

formal comments; and periodic regulatory review under the RFA’s Section 610. The effects of all these efforts are often difficult to measure, but where possible Advocacy does try to quantify the results of its activities. One important such measure is that of cost savings flowing from Advocacy interventions in the rulemaking process.

## Cost Savings from Advocacy Interventions in the Rulemaking Process

As the Office of Advocacy works with federal agencies during the rulemaking process, it seeks to measure the savings of its actions in terms of the compliance costs that small firms would have had to bear if changes to regulations had not been made. Cost savings are not claimed unless the methodologies and sources for their calculation can be documented, and Advocacy is conservative in these calculations. Advocacy generally bases its cost savings on agency estimates, though additional research and sources may be used and documented as needed. Cost savings for a given rule are reported in the fiscal year in which the agency agrees to changes in a rule as a result of Advocacy’s intervention.

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

**Chart 4: Regulatory Cost Savings from Advocacy Interventions,  
FY 2017 – FY 2020** <sup>236</sup>

<b>Fiscal Year</b>	<b>First Year Savings (\$)</b>	<b>Recurring Annual Savings (\$)</b>
2017	.913 billion	.515 billion
2018	.255 billion	.254 billion
2019	.773 billion	.773 billion
2020	2.259 billion.	2.259 billion
<b>Total</b>	<b>4.200 billion</b>	<b>3.801 billion</b>

Historically, Advocacy has measured its achievements under the RFA through a calculation of regulatory cost savings. However, the cost savings figure does not begin to capture the totality of Advocacy’s involvement in the rulemaking process. Advocacy’s efforts pursuant to Executive Order 13272 have proven increasingly successful, and more agencies are doing a better job in their analyses of a rule’s

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<sup>236</sup> More detailed information on cost savings and the specific rules from which they result is available in Advocacy’s annual RFA reports at <https://advocacy.sba.gov/category/resources/annual-report-on-the-rfa/>.



impact on small entities before the regulation is made public in the *Federal Register*. Many of Advocacy's greatest successes cannot be explained or quantified publicly because of the importance of maintaining the confidentiality of interagency communication. Pre-proposal oral and written communications between Advocacy and agencies are kept confidential, and that encourages the pre-publication exchange of information between them. Often, pre-proposal communications are where the greatest benefits are achieved in agency compliance with the RFA and in the choice of alternatives that lessen a rule's impact on small businesses. Advocacy continues to measure its accomplishments through cost savings that can be claimed publicly, but the fact is that the real savings are much higher.

The success of Advocacy's early intervention in the rulemaking process and its agency training program under Executive Order 13272 has presented Advocacy with an interesting conundrum. How can Advocacy modernize the measurement of its effectiveness to encompass its ongoing regulatory interventions, determine the benefits of earlier intervention in the rulemaking process, and evaluate the success of agency training under the executive order? Theoretically, as Advocacy achieves its goals in utilizing these tools, and agencies become more proficient in complying with the RFA and institutionalizing consideration of small entities in the rulemaking process, cost savings between the first public proposal of a rule and its finalization should diminish, and this may be a major reason why annual cost savings publicly claimed are not as high as they were a decade ago.

Cost savings rely on factors over which Advocacy has no control, including regulatory agencies' decisions on cost-reducing modifications to their proposed rules and the timing of those decisions. As a result, significant variations from Advocacy's established goals can and do occur. Since FY 2017, the Administration's aggressive government-wide efforts to reduce regulatory costs have been very successful. Administration initiatives have reduced the number of new regulations, required off-setting cost reductions when regulations are proposed, mandated the review of existing regulations for potential simplification or elimination, and generally required regulatory agencies to be more sensitive to the costs that their actions impose. Advocacy is fully supportive of these efforts and welcomes all resulting reductions in regulatory costs for small entities.

As agencies across government have responded to these new Administration initiatives, not only have there been fewer new regulations, but agencies are doing a better job of examining the potential costs of their actions before they decide to publish a regulation, a practice that Advocacy has promoted for many years. One result of this is that Advocacy has had fewer opportunities to have a cost-reducing impact between the publication of agencies' proposed rules and their finalization, the period during which Advocacy scores any regulatory cost savings in its own performance metrics.

Advocacy is reviewing how to improve its regulatory advocacy performance metrics to measure its efforts and their effects more accurately, and to reduce its reliance on the actions and data of other agencies over which it has no control. As agencies see for themselves the importance of implementing the RFA early in the rulemaking process, cost savings will be more difficult to calculate, and other measures of the law's effectiveness may be needed. As a result, Advocacy continues to analyze various alternative methods of quantifying the effectiveness of its regulatory advocacy. Advocacy is also now publishing in its annual RFA reports examples of instances in which the office's efforts resulted in a

regulatory outcome that was beneficial to small concerns, but which could not be quantified in terms of cost savings.

## Advocacy Roundtables

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

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

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

All of these sessions contributed directly to Advocacy's and the attendees' working knowledge of topics that were currently the subject of new regulations, legislation, or court decisions. They also helped the regulatory agencies that made presentations at or attended such roundtables better understand the views of stakeholders about their proposals. As we have said before, Advocacy believes that good policy requires good information, and the goal of Advocacy roundtables is to improve the information that

policymakers have about the potential effects of their proposals. From FY 2017 through FY 2020, Advocacy hosted 54 regulatory roundtables as noted below.

**Chart 5: Advocacy Roundtables, FY 2017 thru FY 2020**

Advocacy Roundtables	
FY 2017	14
FY 2018	12
FY 2019	17
FY 2020	11

In addition to these 54 regulatory roundtables, between June 2017 and December 2019 Advocacy held another 43 Regional Regulatory Reform Roundtables in 31 states in connection with its Regulatory Reform Initiative referenced earlier in this chapter.

## International Trade

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

Since 2012, Advocacy has participated in a number of international regulatory cooperation (IRC) and international trade initiatives that will impact U.S. small businesses. Although IRC is not a new concern, President Obama's Executive Order 13609, *Promoting International Regulatory Cooperation*, impresses upon executive agencies the importance of cooperating with their foreign counterparts.<sup>237</sup> IRC has become a subject of negotiations in recent trade agreements, as have the disproportionate burdens that small businesses may face in international trade.

Advocacy has been invited by the Office of the United States Trade Representative (USTR) to participate in high-level meetings of various international working groups on regulatory cooperation, and Advocacy has received positive feedback from its involvement in these meetings. The office anticipates continuing participation in future IRC efforts, and has dedicated staff for this purpose. Because of the experience and contacts that Advocacy has gained through these activities, the office is now actively involved in international regulatory matters that affect U.S. small businesses, including participation in the official U.S. delegations to trade negotiations.

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<sup>237</sup> Executive Order 13609, *Promoting International Regulatory Cooperation* (May 1, 2012), 77 Fed. Reg. 26413. See Appendix I.

Public Law 114-125, the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA),<sup>238</sup> amended Advocacy's charter and established a new role for Advocacy to facilitate greater consideration of small business issues during international trade negotiations.<sup>239</sup> Under TFTEA, the Chief Counsel for Advocacy must convene an Interagency Working Group (IWG) whenever the President notifies Congress that the Administration intends to enter into trade negotiations with another country, including re-negotiations of existing treaties.

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

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

On May 18, 2017, the Administration formally notified Congress of its intent to renegotiate the North American Free Trade Agreement (NAFTA). This triggered Advocacy's first ever convening of an Interagency Working Group (IWG) under TFTEA. Advocacy's first report under TFTEA, "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)" is available on Advocacy's website.<sup>240</sup> Additional IWGs have been convened subsequent to President Trump's notification to Congress on October 16, 2018 of his intent to negotiate trade agreements with Japan, the European Union and the United Kingdom. Advocacy has conducted outreach meetings to gather feedback on those trade agreements and is in the process of drafting reports to Congress, which will be published in the event a signed trade agreement results under Trade Promotion Authority.<sup>241</sup>

On March 17, 2020, the Administration notified Congress of its intent to negotiate a trade agreement with Kenya. The Acting Chief Counsel convened Advocacy's IWG in April 2020. In August 2020, Advocacy was asked to participate in a formal dialogue between the Office of the International Trade Representative, the U.S. Agency for International Development, SBA and officials representing Kenya to

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<sup>238</sup> Public Law 114-125, title V, § 502, (February 24, 2016), 130 Stat. 172.

<sup>239</sup> TFTEA amended 15 U.S.C. § 634c in Advocacy's charter.

<sup>240</sup> <https://advocacy.sba.gov/2018/12/21/advocacy-releases-trade-report/>

<sup>241</sup> Public Law 114-26, §§ 105-106.

discuss the development of a Small Business Development Center Program in Kenya. Discussions on that project are expected to continue.

Advocacy will continue to use its resources and regulatory experience to help small businesses participate in international trade with a more level playing field. Advocacy continues to explore how it can represent U.S. small businesses both in dealing with foreign regulations and those U.S. regulations that impede small business involvement in international trade. Lowering such regulatory barriers could open vast new markets to smaller firms.

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

From time to time, agencies with a commonality of interests choose to formalize certain aspects of their relationships with a memorandum of understanding (MOU). Such an agreement sets forth responsibilities within its scope to which the leadership of each party to the agreement commits their agencies or offices. It also makes clear to both the staff of those offices and to the public the nature of the cooperation contemplated between the offices. In recent years, Advocacy has entered into two MOUs of special interest, one with OMB's Office of Information and Regulatory Affairs (OIRA), and one with SBA's Office of the National Ombudsman.

**MOU with OIRA.** In March 2002, Advocacy and OIRA signed an MOU that prefigured important elements of Executive Order 13272, which was to follow in August of that year.<sup>242</sup> The agreement noted that both offices recognized “that small entities...often face a disproportionate share of the Federal regulatory burden compared with their larger counterparts. Advocacy and OIRA further recognize that the best way to prevent unnecessary regulatory burden is to participate in the rulemaking process at the earliest stage possible and to coordinate both offices to identify draft regulations that likely will impact small entities.” The MOU continued that “Inasmuch as Advocacy and OIRA share similar goals, the two agencies intend to enhance their working relationship by establishing protocols for sharing information and providing training for regulatory agencies on compliance with the Regulatory Flexibility Act (RFA) and various other statutes and Executive orders that require an economic analysis of proposed regulations.”<sup>243</sup>

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

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<sup>242</sup> For the MOU between Advocacy and OIRA, see <https://advocacy.sba.gov/memorandums-of-understanding>. The MOU is also reprinted in Appendix R.

<sup>243</sup> Ibid., § 1.

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

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

***MOU with the Office of the National Ombudsman.*** Among its many other provisions, SBREFA established within the SBA the position of Small Business and Agriculture Regulatory Enforcement Ombudsman (Ombudsman).<sup>244</sup> The Ombudsman's duties include: 1) monitoring the regulatory enforcement activities of federal agencies; 2) working with agencies to establish means of communication for small businesses affected by such activities to comment on their experiences, both to the agencies themselves and to the Ombudsman; 3) coordination of the activities of regional Small Business Regulatory Fairness Boards comprised of private-sector representatives who through hearings and other means collect information on the government agency enforcement activities in their own areas; 4) and the preparation of an annual report to Congress and affected agencies concerning these enforcement activities, comments from affected small firms and regional boards, and the results of resolution efforts by the Ombudsman on behalf of small firms with substantiated problems with excessive enforcement efforts.<sup>245</sup>

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

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<sup>244</sup> § 222, Public Law 104-121 (March 29, 1996), 110 Stat. 860, 15 U.S.C. § 657.

<sup>245</sup> For additional information on SBA's Office of the National Ombudsman and its activities, see <https://www.sba.gov/ombudsman>.

Owens signed a MOU in November 2006. This MOU was updated and renewed by Acting Chief Counsel Major Clark and National Ombudsman Stephanie Wehagen in December 2019.<sup>246</sup>

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

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<sup>246</sup> For the MOU between Advocacy and the Ombudsman, see <https://advocacy.sba.gov/memorandums-of-understanding/>. The MOU is also reprinted in Appendix S.





# Chapter 4 - The Public Face of Advocacy:

## Outreach to Stakeholders

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

- to serve as a focal point for the receipt of complaints, criticisms, and suggestions concerning the policies and activities of federal agencies which affect small businesses; and
- to enlist the cooperation and assistance of public and private agencies, businesses, and other organizations in disseminating information about the programs and services provided by the federal government which are of benefit to small businesses, and information on how small businesses can participate in or make use of such programs and services.<sup>247</sup>

For example, Public Law 94-305 authorizes the Chief Counsel to prepare and publish such reports as he or she deems appropriate,<sup>248</sup> and we have seen how a variety of additional duties involving periodic reports have accrued to Advocacy, including major annual reports on the RFA, Executive Order 13272, and the *Small Business Profiles*. Although all of Advocacy's operational divisions are very much involved in these activities, it is the special duty of its Office of Information to facilitate the exchange of information between Advocacy and its stakeholders, an exchange that is essential for the successful accomplishment of Advocacy's varied duties.

The Office of Information was authorized five positions in 2020. The role of the Office of Information staff continues to evolve with the ever-changing avenues of communication through the Internet, social media, and computer graphics. The independence of Advocacy, the highly technical nature of much of its economic research and legal work products, the high-level communications of the office, both in and out of government, and the sensitivity of many of these communications, all require a professional staff of uncommon ability.

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

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<sup>247</sup> These points are adapted from 15 U.S.C. § 634c.

<sup>248</sup> 15 U.S.C. § 634f.

work products to stakeholders. While Advocacy's congressional relations position officially reports to the Chief Counsel, it is still an important component of Advocacy's outreach.

## Congressional Outreach: Testimony and Other Assistance

One of the primary responsibilities of the Office of Advocacy is listening to small businesses and ensuring that their views and concerns are heard by Congress, both formally and informally. Advocacy is frequently asked by members and committees of Congress for its views on legislation and policy issues of importance to small business. These issues are amazingly diverse, ranging from agency compliance with the Regulatory Flexibility Act to food and drug regulations. Formal responses may be delivered either as legislative comment letters or as testimony before a congressional committee by the Chief Counsel or another designated Advocacy staff member. From 2017 to 2020, Advocacy did not submit any formal legislative comment letters. Following is testimony delivered by Acting Chief Counsel Major Clark and Director of Interagency Affairs Charles Maresca on subjects of major importance to small business from 2017 to 2020.

- *Reauthorization of The SBA Office Of Advocacy.* In a May 2019 joint hearing before the Senate Committee on Small Business and Entrepreneurship and the Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Regulatory Affairs and Federal Management, Acting Chief Counsel Major Clark described the Office of Advocacy and its role in the federal rulemaking process. Clark noted the need for an independent voice for small businesses within the federal government, but that Advocacy still encounters challenges with maintaining its independence. He also described Advocacy's small business research produced by its Office of Economic Research. Acting Chief Counsel Clark also described agency compliance with the Regulatory Flexibility Act (RFA) and the role of Advocacy in the federal rulemaking process. Finally, he explained Advocacy's regulatory reform efforts and legislative proposals to amend the RFA. The full testimony can be read on Advocacy's website at <https://advocacy.sba.gov/2019/05/22/may-22-2019-testimony-reauthorization-of-the-sba-office-of-advocacy/>.
- *Keeping Small Premium Cigar Businesses Rolling.* In April 2019 testimony before the Senate Committee on Small Business and Entrepreneurship, Director of Interagency Affairs Charles Maresca described Advocacy's involvement in the regulation of premium cigars at the Food and Drug Administration (FDA), commonly referred to as the Deeming Rule, and how the regulation impacted the premium cigar industry. Director Maresca noted that while the FDA stated the objectives of the Deeming Rule under the authorizing statute, it was still required by the Regulatory Flexibility Act to consider significant alternatives to the rule that would minimize the impact on small businesses. Advocacy and small businesses were extremely concerned about the Deeming Rule's effects on small premium cigar businesses. Indeed, Advocacy made its concerns known to the FDA in 2014 in public comments, and those concerns have not changed. Director Maresca stressed that FDA must conduct a more robust economic analysis on the rule's impacts on small businesses, specific to the affected premium cigar industry, and consider significant alternatives to those impacts to accomplish the agency's stated objective while keeping small premium cigar manufacturers and retailers in business. The full testimony can be read on Advocacy's website at <https://advocacy.sba.gov/2019/04/05/april-5-2019-testimony-keeping-small-premium-cigar-businesses-rolling/>

Advocacy may also answer formal inquiries by Members of Congress and their staff through other means. For example, in 2019, the Senate Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations was investigating matters related to the rise in youth e-cigarette use and the popularity of e-cigarette products. As part of its investigation, the Subcommittee requested a meeting with Advocacy staff involved in the FDA Tobacco Deeming Rule. Advocacy staff met with staff from the Subcommittee and provided public documents related to Advocacy's work on the rule, including Advocacy's public comment letters. The Subcommittee followed up with a formal request for documents and communications involving Advocacy staff and the Deeming Rule. After a thorough review of Advocacy records, Advocacy provided the documents and communications responsive to the Subcommittee's request.

Advocacy also answers many informal inquiries by Members of Congress and their staff and provides technical assistance in areas in which the office has expertise. This can range from helping craft legislation in furtherance of small business interests to interpreting information generated in Advocacy's economic research products. Advocacy economists are frequently asked for data relating to small firms in states or localities, and Advocacy has actually initiated several regular reports based on such popular demand. A popular research product that Advocacy's economic research office began producing in 2019 is the state profiles for the congressional districts, based on popular demand by congressional offices for small business data by congressional district.<sup>249</sup> Additionally, Advocacy's legal team is often asked how a bill or regulation will affect small business, or perhaps an industrial sector. During the COVID-19 pandemic, Advocacy has received hundreds of inquiries from congressional offices regarding how the pandemic has impacted small businesses and requesting information on SBA's programs in response to the pandemic, including the Paycheck Protection Program and the Economic Injury Disaster Loan program. Because of Advocacy's close relationship with SBA's Congressional and Legislative Affairs Office on congressional work, Advocacy was able to connect congressional staff with the appropriate SBA contacts to help resolve issues and responses to inquiries in a timely manner.

Occasionally, Congress will request a report from Advocacy through legislation. The Regulatory Flexibility Act requires the Office of Advocacy to monitor and report on how well federal agencies are complying with the law. In addition, Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," which was signed by President George W. Bush in 2002, requires Advocacy to educate federal agency officials on compliance with the RFA, to provide resources to facilitate continued compliance, and to report to OMB on agency compliance with it.<sup>250</sup> Every year, Advocacy reports to Congress and OMB on agencies' compliance with the RFA and E.O. 13272. Advocacy's reports on the RFA can be found on Advocacy's website at <https://advocacy.sba.gov/category/resources/annual-report-on-the-rfa/>.

Additionally, Senate Report 116-111 accompanying appropriations for FY 2020 required the Office of Advocacy to submit "a report to the House and Senate Appropriations Committee, the Senate

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<sup>249</sup> <https://advocacy.sba.gov/2019/09/11/2019-congressional-district-profiles/>

<sup>250</sup> Executive Order 13272, 67 Fed. Reg. 53461 (Aug. 13, 2002).

Committee on Small Business and Entrepreneurship, and the House Committee on Small Business within 45 days of the end of the fiscal year on all trips taken by Advocacy employees that did not entail conducting a roundtable, or similar small business forum, related to regulations that impose a potentially significant impact on a substantial number of small entities. This report should include a justification for the travel, dates of travel, list of activities, and total cost to the agency.” Advocacy submitted this report to the relevant agencies in November 2020.

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

From 2017 to 2020, Advocacy has focused on aggressively marketing the office to congressional offices through briefings, a monthly small business alert, and other updates to congressional staff through email communications. During this period, Advocacy held 3 formal briefings with House and Senate staff introducing the Office of Advocacy and how Advocacy can work with congressional offices on small business issues. One of these briefings included a meet-and-greet with Advocacy’s regional advocates and congressional staff, giving them an opportunity to connect with the regional advocates working in their states and districts. Advocacy also holds individual briefings and calls with congressional staff to provide a more personal introduction to the office, which includes informational documents and recent research products that may be of interest to congressional staff, including state and congressional small business profiles. In one instance, Advocacy briefed an entire House Member’s staff during a staff retreat in June 2019.

Advocacy’s congressional liaison also sends a monthly Small Business Alert to all congressional staff who handle small business issues and other staff who have requested to receive updates from Advocacy. Advocacy’s congressional liaison also sends updates to congressional staff on new research, publications, or information from Advocacy’s stakeholders that may be of interest.

Advocacy has also been invited to participate in roundtables and other events put together by congressional offices. For example, in March 2019, Advocacy was invited by House Small Business Committee Chairwoman Nydia Velázquez to participate in a roundtable in her district in New York to discuss Americans with Disabilities Act (ADA) regulations with small business owners and the disabled community. Similarly, in November 2019, Advocacy was invited by Senate Small Business and Entrepreneurship Committee Chair Marco Rubio to participate in a roundtable in Orlando, Florida regarding how ADA website accessibility requirements have impacted small businesses, local government, and the disabled community and related compliance challenges. Advocacy was also invited to speak before the House Freshmen Democratic Caucus in March 2020 to introduce the Office of Advocacy and how Members of Congress can work with federal agencies. This briefing included a member from SBA’s Congressional & Legislative Affairs Office.

Advocacy has proactively established legislative priorities after consultation with congressional committees, business organizations, trade associations, and other stakeholders.<sup>251</sup> Such outreach to private-sector stakeholders is another important mission for the Office of Information.

## **Trade Association Liaison and the “Chief Counsel’s Leadership Group”**

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

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

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

## **Advocacy’s Presence on the Web**

Prior to 2001, the Office of Advocacy provided its work products and other information to its many stakeholders and the public at large through traditional outreach tools: face-to-face contact, telephone, mail, email, conferences, and print media – including hard copies of letters, newsletters, brochures, conference notebooks, and publications printed through the Government Printing Office or SBA’s own internal print shop. Over the 2001-2008 period, Advocacy accomplished a major modernization of its outreach operations through extensive use of electronic media, and especially through the development of its presence on the Internet. Beginning in 2017, Advocacy modernized its website and moved from a Weebly platform to a WordPress platform with a new address: <https://advocacy.sba.gov/>. This new platform is much more interactive and searchable than Advocacy’s previous website and provides new features such as blog articles and a new Regulatory Reform section.

Advocacy’s extensive website and associated listservs continue to be an indispensable part of Advocacy’s communications efforts. Advocacy continues to expand its outreach campaign by using

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<sup>251</sup> For Advocacy’s legislative priorities document, see Appendix M. We will return to this subject in Chapter 7.

online platforms, including the Advocacy blog and through social media vehicles such as Facebook, Twitter, and LinkedIn. With the exception of confidential interagency documents and confidential communications with Congress, all of Advocacy's research reports, comment letters, news releases, and other documents are posted to its website, and new content is highlighted at the top of Advocacy's homepage.

**Publications.** The web is currently Advocacy's primary daily outreach tool, with all new publications posted upon their release and publicized through listservs to all who sign up. Newsletters can be found in the News section on Advocacy's website. Contract research reports, issue briefs, *Frequently Asked Questions*, and *Small Business Economic Bulletins* can be found in the Research section of the website. Advocacy's annual data products, *Small Business Profiles for the States and Territories* and *Small Business Profiles for the Congressional Districts*, are web "bestsellers" and are found along with hundreds of other research studies and publications at <https://advocacy.sba.gov/category/research/>. Browsers will also find a variety of information related to Advocacy's regulatory mission at <https://advocacy.sba.gov/category/regulation/>, including the annual report on agency compliance with the RFA, which can be accessed directly at <https://advocacy.sba.gov/category/resources/annual-report-on-the-rfa/>.

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

- Advocacy posts its formal comment letters to regulatory agencies and related correspondence at <https://advocacy.sba.gov/category/regulation/letters-to-agencies/>.
- Advocacy's regulatory comment letters from 2002 to January 2017 are archived on the Library of Congress website at <https://advocacy.sba.gov/2017/01/10/archived-regulatory-comment-letters/>.
- Legislative comments from 2002 forward are posted at <https://advocacy.sba.gov/category/legislative-correspondence/>.
- Advocacy congressional testimony 2008 forward is posted at <https://advocacy.sba.gov/category/congressional/>.
- In addition, Advocacy communicates through online platforms such as its blog, which is now incorporated into Advocacy's website rather than a separate website at <https://advocacy.sba.gov/category/news-articles/>. This blog includes posts from every division within Advocacy. News articles prior to 2017 are archived at <https://advocacy.sba.gov/category/news-archive/>.
- The Information team also uses Advocacy's Facebook page located at <https://www.facebook.com/AdvocacySBA>, Twitter at <https://twitter.com/AdvocacySBA>, and LinkedIn at <https://www.linkedin.com/company/u-s-small-business-administration-office-of-advocacy/>. These social media platforms are used to disseminate information and interact with small business stakeholders. On Twitter, small business stakeholders can tweet Advocacy using @AdvocacySBA.

**Regulatory Alerts.** Advocacy has developed a useful site for small businesses interested in current regulatory developments. Regulatory Alerts at <https://advocacy.sba.gov/category/regulation/regulatory-alerts/> lists regulatory notices published in the *Federal Register* that may significantly affect small businesses and that are open for comment. Advocacy encourages small firms to provide the issuing federal agency with comments on the proposed action and on the agency's analysis of potential impacts on small business. Firms are also encouraged to share their comments with Advocacy on these and other regulatory proposals of importance to them. Regulatory Alerts also links to Regulations.gov, the federal government's one-stop site at <http://www.regulations.gov> for commenting on regulations published in the *Federal Register*. Advocacy's Regulatory Alerts page is updated frequently with the assistance of its Office of Interagency Affairs, and new alerts are sent to more than 28,000 subscribers on Advocacy's listserv.

**Listservs.** Advocacy maintains three major listservs for distribution of its monthly newsletter: news releases, research reports, and regulatory comments, respectively. At the end of FY 2020, the news release listserv included more than 36,000 subscribers; the data, statistics, and reports listserv had more than 31,000 subscribers; and the regulatory alert and comment letter listserv included more than 28,000 subscribers. Users can sign on to one or more of these email listservs at <https://advocacy.sba.gov/subscribe/>. The use of these listservs ensures targeted delivery of information to tens of thousands of recipients across the world at an extremely low cost. Advocacy actively encourages the use of its listservs as a convenient way for its stakeholders to keep abreast of the office's activities and to alert them of regulatory developments of interest.

**Small Business Alerts Newsletter.** To ensure that Advocacy's publications, research, and regulatory affairs efforts reach a broad audience, Advocacy's information team developed a Small Business Alerts Newsletter. It is a monthly newsletter that is sent to the small business congressional staff, small business trade organizations, and is distributed across the nation to small business stakeholders through Advocacy's regional advocates. The newsletter includes information on Advocacy's activities during the month, including any comment letters, regulatory alerts, upcoming Advocacy events, new research, blog posts, and other relevant information. It also links to *The Small Business Advocate*, Advocacy's monthly newsletter.

### ***The Small Business Advocate Newsletter***

*The Small Business Advocate*, Advocacy's monthly newsletter, chronicles the office's important achievements and provides ongoing news about Advocacy research, important regulatory topics, and regional activities. The newsletter is currently in its 39<sup>th</sup> year of publication. Its production and distribution have continuously evolved to take advantage of current technologies. Currently, the newsletter is in a paperless format and available on Advocacy's website. At the end of FY 2020, *The Advocate* was reaching over 36,000 subscribers.

Occasionally, a special issue of *The Small Business Advocate* will be dedicated to a single topic. For example, Advocacy's June 2017 edition was dedicated to Advocacy's Louisiana Regional Regulatory



Reform Roundtable.<sup>252</sup> The July 2017 edition was dedicated to Advocacy's Idaho and Washington Regional Regulatory Reform Roundtables.<sup>253</sup> The August 2017 edition was dedicated to Advocacy's Kentucky and Ohio Regional Regulatory Reform Roundtables.<sup>254</sup> The May/June 2016 edition was dedicated to Advocacy's 40<sup>th</sup> Anniversary.<sup>255</sup> Past issues of *The Small Business Advocate* from March 2017 forward are available online at <https://advocacy.sba.gov/category/news-articles/news/newsletter/>. Older editions of *The Small Business Advocate* can be found on the Library of Congress's Web Archives at <https://webarchive.loc.gov/all/20170211132727/http://www.sba.gov/category/advocacy-navigation-structure/newsroom/advocacy-newsletter>.

## Regulatory Reform

In response to the Trump Administration's commitment to regulatory reform and burden reduction, Advocacy has worked to ensure that small businesses are included in the regulatory reform effort by conducting small business outreach at roundtables to gather small business regulatory reform priorities to channel back to federal agencies. Advocacy's Office of Information team played a vital role in outreach and marketing for these roundtables.

Advocacy's Regional Regulatory Reform Roundtables have been a means of gathering practical input on small business burdens around the country. These roundtables were open to the public, and small businesses from around the country were invited to participate. Advocacy conducted substantial outreach to small businesses, trade associations, congressional offices, and the media to promote these events. Advocacy also invited federal agency officials to attend, so that they could hear feedback and suggestions firsthand, and provide agency perspectives, if they so desired. Congressional representatives also attended these roundtables to hear their constituents' regulatory issues. Between June 2017 and December 2019, Advocacy held 43 Regional Regulatory Reform Roundtables in 31 states.

Advocacy dedicated significant resources to the regulatory reform effort, including an online comment form. A new Regulatory Reform tab was added to the website where stakeholders could learn about Advocacy's efforts on regulatory reform and how Advocacy is involved in the process. Advocacy posted an online comment form on its website for input by individuals who could not attend a roundtable or who wanted to provide additional detail. Individuals in 41 states and the District of Columbia submitted more than 350 comments through this form. Each issue was assigned to the assistant chief counsel who

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<sup>252</sup> The June 2017 special edition can be found on Advocacy's website at <https://advocacy.sba.gov/2017/06/28/special-june-2017-louisiana-edition-small-business-advocate-released/>

<sup>253</sup> The July 2017 special edition can be found on Advocacy's website at <https://advocacy.sba.gov/2017/07/29/special-july-2017-idahowashington-edition-small-business-advocate-released/>

<sup>254</sup> The August 2017 special edition can be found on Advocacy's website at <https://advocacy.sba.gov/2017/08/22/special-edition-august-2017-small-business-advocate-released/>

<sup>255</sup> The special edition is reprinted in its entirety in Appendix W.



specializes in the area. Advocacy followed up directly with federal agencies to bring these issues to the fore and help solve regulatory problems.

## Media Presence

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

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

Advocacy's Interagency team of attorneys also host their own listservs of small businesses with issues in their portfolios. They use those listservs to reach out to stakeholders about regulatory issues, and they rely on stakeholder input to inform public comment letters and other communications with agencies. Advocacy attorneys also communicate with trade associations to see how their small businesses are affected on certain issues. The trade association can help the attorneys set up meetings with small businesses that they would have not had the means to contact otherwise. Advocacy hosts roundtables on issues that are affecting small businesses. The attorneys take that feedback directly to agencies who can use the information to craft their regulations to help small business rather than impede growth.

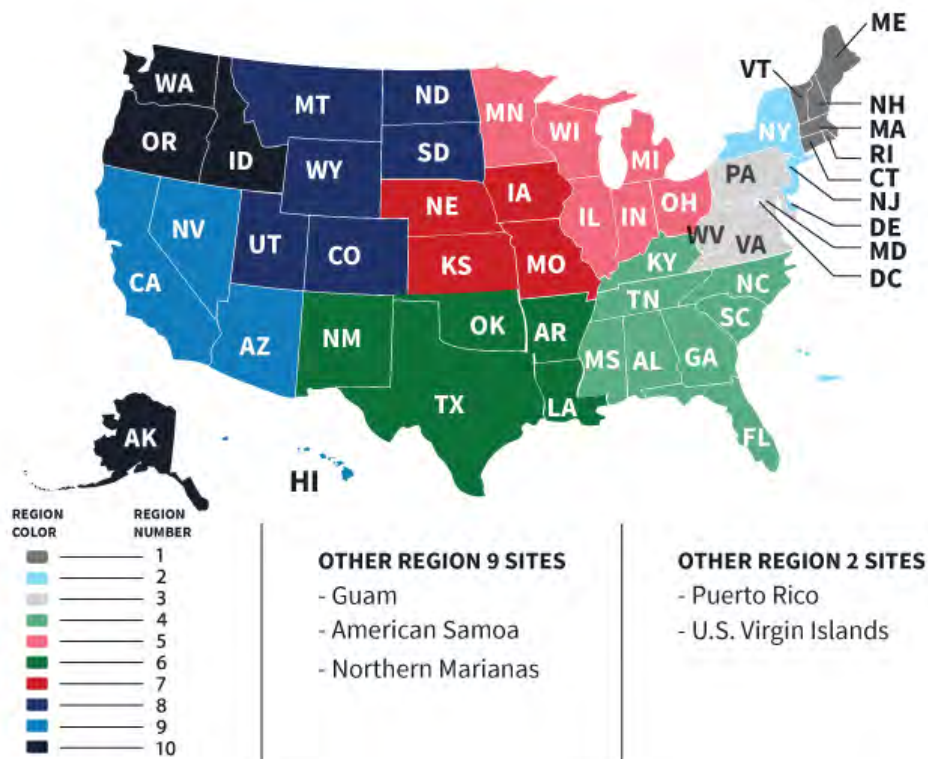
Advocacy also relies on its regional advocates to distribute news releases to their own regional lists. Advocacy's regional advocates are a vital component of its media, stakeholder, and public outreach strategies. They are responsible for local and regional media relations and maintaining extensive media lists, stakeholder outreach, and participation in public events. As part of this effort, the regional advocates also send the Small Business Alert to their own listserv of people they have met who would benefit from Advocacy products or alerts. In the next chapter, we will look more closely at regional advocacy.



## Chapter 5 – Regional Advocacy

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

**Chart 6: The Office of Advocacy's Ten Regions**



The Office of Regional Affairs, the operational division within Advocacy that carries out the office's mission at the regional, state, and local levels, in 2020 included its Director, two national advocates, and ten regional advocates who are located in the ten SBA regions around the country. The two national

advocates were added to the Office of Regional Affairs in 2017 to concentrate on the unique issues that arise in rural America and in the manufacturing and technology sectors. Advocacy's regional advocates are the office's eyes and ears outside Washington and are on the front line in carrying out Advocacy's mission. Although Advocacy is well known in D.C., this is not necessarily the case outside the beltway. For many small businesses and stakeholders, meeting their regional advocate is their first introduction to the mission of the office and how Advocacy's work can help them address their concerns regarding federal government actions that affect them.

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

Regional advocates have been critical in the office's Regulatory Reform initiative described below, reaching out to small business stakeholders and local officials to invite them to participate in the Regional Regulatory Reform Roundtables and share their regulatory concerns with Advocacy. Regional advocates are vital for the two-way communication that Advocacy needs from the vast majority of small entities that operate outside of the Washington area.

Regional advocates are not political appointees. However, historically the expectation is that regional advocates that serve during a particular administration will leave at the end of that administration.

## The Role of Regional Advocates

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

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

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

## Regional Approach to Outreach

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

The other general approach to regional outreach is the use of networks that help small businesses amplify their voices, resulting in better information for Advocacy and the federal government as a whole. To this end, the regional advocates focus on creating and fostering locally based entrepreneurial ecosystems and in strengthening communication with key economic sectors. By facilitating such connections, the regional advocates help create opportunities for various stakeholders to engage more effectively with the government and forge stronger public-private relationships. Although many of these networks are local, the regional advocates have also worked on cross-regional initiatives that bring together stakeholders across the country to engage in a broader dialogue. One of the major regional accomplishments has been the fostering of such functional sector-specific networks, including with the national advocates focusing on rural affairs and manufacturing and technology. One of the powerful results of this approach to outreach is that the local networks, in many cases, continue to sustain themselves independently beyond their interactions with Advocacy.

The regional advocates have one performance objective in furtherance of Advocacy's Strategic Goal #2 relating to outreach, which is included as part of the office's annual performance report which appears together with the President's annual congressional budget justification. Advocacy's goal is that the regional advocates each year participate in at least 360 outreach events with at least five small business stakeholders where Advocacy research or data products or regulatory and policy issues are discussed. This objective was significantly exceeded in three of the four years from FY 2017 to FY 2020. Because there was a new group of regional advocates in FY 2017, and many did not start with Advocacy until the

second half of FY 2017 or later, fewer outreach meetings took place. During their tenure, the current group of regional advocates have collectively convened or participated in over 2,000 events that meet the objective's criteria. The regional advocates have also participated in many more meetings that did not meet the criteria of the objective but have been equally important in supporting their small business constituencies.

**Chart 7: Number of Regional Advocate Outreach Events**

Regional Advocate Outreach Events			
FY17	FY18	FY19	FY20
141	523	852	552

Advocacy makes every effort to ensure that its research and data products provide information that is both timely and actionable. It is also important that stakeholders are aware of the availability of Advocacy's work and how to access it. Additionally, it is critical that regional stakeholders are connected to Advocacy's Washington-based staff to provide input on regulatory issues and other federal actions. This effort has encouraged all divisions of the office to develop better connections to small business stakeholders outside of Washington.

## Regional Regulatory Engagement

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

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

Examples of regional advocate activities on regulatory issues include:

- Advocacy's Region 5 advocate and Rural Affairs National Advocate met with Michigan Arborists during their 2020 Arborcon trade show in Lansing, Michigan. They addressed the convention and answered questions about an upcoming SBREFA panel for OSHA's Potential Tree Care Operations Standard. They also met with the certified arborists and vendors and were given demonstrations of state-of-the-art safety equipment and best practices potentially addressed by

a Tree Care Operations Standard. They learned that there is universal support for a Tree Care Operations Standard among these certified professionals and shared their findings with Advocacy's Washington staff who worked on the SBREFA panel.

- As the Department of Agriculture began to explore a domestic hemp program after being authorized under the 2018 Farm Bill, Advocacy embarked on an ambitious and lengthy outreach effort to hear from small businesses in the industry. The regional advocates played a key role in Advocacy's outreach, which informed multiple comment letters to the agency on the small business considerations that should be addressed in a domestic hemp program. Many regional advocates held forums on hemp-related issues in their regions, attended symposiums and conferences to meet small business owners, and participated in site visits to small businesses to better understand the issues they face in the hemp industry.
- The Manufacturing and Technology and Rural Affairs national advocates met with small business trucking companies who raised concerns about two motor carrier safety regulations: the electronic logging device (ELD) mandate and the hours of service of drivers (HOS) rules. These small businesses sought repeal or exemptions from the ELD mandate and greater flexibility in the HOS rules. While the ELD mandate has gone into effect, the Federal Motor Carrier Safety Administration recently revised the HOS rules to provide greater flexibility and cost savings. The regional advocates worked with Advocacy's Washington staff to relay small business concerns that informed Advocacy's comments on the proposed rule, which commended the agency's review of the HOS rules and recommended maximum flexibility for small businesses consistent with safety and health considerations. In another instance, the Region 9 advocate was introduced to Farm Service Agency personnel, who advised that the ELD regulations endangered livestock and raised concerns for the drivers. The Transporting Livestock Across America Safety Act became a bipartisan bill that would help alleviate the strain of transportation laws for truckers hauling livestock.
- In 2018, Advocacy's Region 3 advocate held a forum with the premium cigar industry on how FDA regulations (commonly referred to as the Deeming Rule) impact the premium cigar manufacturers and retailers. Small business owners had an opportunity to directly discuss their concerns and make suggestions on how to address these issues. Advocacy continues to be engaged with the industry and policymakers on this issue, and even testified on this issue before the Senate Small Business and Entrepreneurship Committee in a field hearing in Tampa, Florida in 2019.<sup>256</sup>
- When new FDA guidance declared homeopathic medicines to be "new drugs," the future of the homeopathy community became threatened. Since the industry is driven by small businesses and creates jobs for manufacturers, pharmacists, practitioners, and educators, the Region 9 advocate worked closely with the Americans for Homeopathy Choice along with other organizations and small businesses to assist them with submitting comments regarding the draft guidance.
- During the initial phase of the response to the COVID-19 pandemic, the Region 6 advocate was contacted by a firm that was seeking relaxation of rules governing acquisition of quaternary ammonium compounds used to make EPA-registered disinfectants. Advocacy contacted EPA, which made modifications because of the concern.

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<sup>256</sup> Advocacy's testimony can be found at <https://advocacy.sba.gov/2019/04/05/april-5-2019-testimony-keeping-small-premium-cigar-businesses-rolling/>.



- Regional advocates were instrumental in assisting with Advocacy’s outreach effort to small business stakeholders affected by international trade for input to Advocacy’s report on small business trade impacts of USMCA, as well as pending trade agreements with the UK, Japan, and the EU.

## Regional Research Engagement

Advocacy’s economic research, as has been discussed in previous chapters, provides policymakers and small business stakeholders with the critical analyses and accessible statistics to allow them to understand the state of the small business economy. Access to and awareness of this information is important for policymakers and stakeholders inside and outside the Washington beltway. Because of this, regional advocates help Advocacy’s Office of Economic Research disseminate and discuss Advocacy data and research products. Regional advocates are primarily responsible for ensuring that SBA field personnel understand the resources available to them from Advocacy and for encouraging SBA and other regional government staff to use them. Additionally, regional advocates assist Advocacy economists in reaching their objective of making research presentations by creating opportunities for them to meet with regional stakeholders. Regional advocates routinely distribute Advocacy products, such as the *State Profiles*, *Frequently Asked Questions*, and a variety of specific reports at events with small business stakeholders.<sup>257</sup>

The regional advocates work closely with Advocacy economists to provide suggestions on areas of future research. One such effort is possible research concerning the employment number threshold for complying with the Affordable Care Act (ACA) and the Family Medical Leave Act (FMLA). Advocacy’s Region 5 Advocate, National Rural Affairs Advocate, and National Manufacturing and Technology Advocate had met with a defense contractor and a regional manufacturing association in Dayton, Ohio to discuss their concerns with federal regulations establishing a 50-employee threshold as a requirement to comply with the ACA and the FMLA. They learned that many companies keep their employee rosters below 50 employees until revenue generated by additional employees is sufficient to overcome the significant added costs of compliance before expanding their workforce beyond the 50-employee threshold. The regional advocates took this issue to Advocacy’s Office of Economic Research for further analysis and ongoing research.

## Regional Regulatory Reform Initiative

In response to the Trump Administration’s commitment to regulatory reform and burden reduction, Advocacy has worked to ensure that small businesses are included in the regulatory reform effort by conducting small business outreach at roundtables to gather small business regulatory reform priorities to channel back to federal agencies. The regional advocates played a vital role in outreach and logistical support for these roundtables.

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<sup>257</sup> See <https://advocacy.sba.gov/category/research/>.



The regional advocates work out of SBA's district offices, and they assisted with meeting setup, local small business input, and publicity for Advocacy regional regulatory reform roundtables. Their networks of local small business contacts were crucial in ensuring small business owners attended the roundtables so Advocacy could hear directly from small business owners about their regulatory concerns outside of the beltway. The regional advocates attended every regional regulatory reform roundtable that took place in their regions. They also set up site visits and meetings with local small business owners who could not attend the roundtables while Advocacy's Washington staff were in their regions to discuss their specific regulatory concerns and see firsthand the challenges they face. Advocacy staff made at least 100 site visits in 26 states between June 2017 and December 2019 as part of its regulatory reform outreach efforts.

The regional advocates also assisted the regulatory reform effort by hosting small business forums to discuss the impact of federal regulations on small businesses in their respective regions and industry areas. To date, thousands of small business owners and stakeholders have attended small business forums in hundreds of cities and towns. These small business forums provide valuable insight into small businesses' federal regulatory challenges and help supplement the information gathered through roundtables and online input. Advocacy's April 2020 report shows that the regional advocates held forums in 549 cities located in 46 states and 2 territories as part of Advocacy's regulatory reform effort.<sup>258</sup>

## Regional Initiatives with Other Agencies and Regional Stakeholders

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

Examples include:

- The Region 1 advocate worked closely with local Bureau of Ocean Energy Management officials to participate in several public forums on Vineyard Winds, an offshore wind project off the coast of Cape Cod. The regional advocate participated in public forums in Rhode Island and Massachusetts, where he heard concerns from the fishing industry on how the project would impact small fishing operations. The project has since been delayed.
- The Region 2 advocate and the New York District SBA Office coordinated several classes on intellectual property, trademark, copyright, and patents. More than 200 small businesses from the manufacturing, food, music, and technology industries learned about the processes, regulations, benefits, and challenges of obtaining appropriate protection for their intellectual property.

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<sup>258</sup> Advocacy's outreach efforts on the Regional Regulatory Reform Roundtables, including the locations of site visits and forums, can be found in Chapter 3 of the report, *Reforming Regulations and Listening to Small Business*, at <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/04/20141200/2nd-Progress-Report-on-Reg-Reform-Roundtables.pdf>.

- Cybersecurity is a challenge for all businesses, but specifically for small, non-technical companies and startups. The Region 2 advocate worked with congressional offices and the Region 2 SBA Administrator to host small business forums on cybersecurity. These forums provided the opportunity for small businesses to share their challenges, confusion, and concerns regarding cyber threats and the cost to protect themselves.
- The Region 5 advocate met with the EPA's Small Business Environmental Assistance Program (SBEAP) office in Ohio. With common goals in outreach to small businesses affected by federal regulations, the advocate was invited to address the SBEAP Region 5 annual training and was successful in forming an ongoing partnership with the SBEAP offices in all 6 of the states in Region 5. He also partnered with the SBEAP National Steering Committee in efforts to further the partnership with the other Advocacy regional and national advocates. In 2019, he was joined by Advocacy's Rural Affairs National Advocate, the Manufacturing and Technology National Advocate, and staff from Advocacy's Office of Interagency Affairs and Office of Economic Research to address the SBEAP National Training and discuss how the SBEAP program can use economic data to showcase the success of their program.
- The inventor of a safety device designed to solve the hazard of dropped objects from mobile elevated work platforms contacted the Region 6 advocate, seeking relief from OSHA regulations which were effectively preventing the sale of his product. This contact resulted in the introduction of the inventor to an OSHA official who could address the issue directly.
- In 2019, the Region 10 advocate worked with congressional officials, local elected and port officials, as well as businesses and other citizens in Pomeroy, Washington to discuss potential solutions to rural broadband connections. This meeting kicked off a regional group that had not worked together previously to solve this issue locally.
- In 2019, all of the regional advocates, along with Advocacy staff from the Washington office, met with the White House Opportunity and Revitalization Council to discuss Opportunity Zones and how they can impact small businesses. Since that meeting, several regional advocates have traveled with federal agencies and local officials, including the Housing and Urban Development and Small Business Administration, to visit small businesses that have been impacted by Opportunity Zones. One such event was with the Region 3 advocate and Manufacturing and Technology National Advocate, who worked with many agencies and the Vice President's Office of Public Policy to visit a small farm in an Opportunity Zone that takes formerly incarcerated individuals and teaches them how to come entrepreneurs through vertical farming.

## Regional Interaction with the Office of the National Ombudsman

We have seen in Chapter 3 how SBA's Office of the National Ombudsman assists small businesses with unfair and excessive federal regulatory enforcement, such as repetitive audits or investigations, excessive fines and penalties, retaliation, or other unfair regulatory enforcement actions by a federal agency. Advocacy's regional advocates serve as liaison to the Office of the National Ombudsman (ONO) headquarters staff to receive and make individual small business case referrals as provided for in the Memorandum of Understanding between the ONO and the Office of Advocacy.<sup>259</sup>

The regional advocates work with the ONO in advance of hearings conducted by the regional Regulatory Fairness Boards in their respective regions. They work with the ONO and the private-sector Fairness

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<sup>259</sup> See Appendix S.

Board members, both to ensure that small business owners are aware of these hearings and to keep Advocacy's leadership in Washington informed of issues that are raised.

Both Advocacy and the ONO refer information, regulatory complaints, and other issues to each other or other appropriate offices to ensure that small business owners are receiving helpful and timely responses to their inquiries. Additional information on the ONO can be accessed at <https://www.sba.gov/about-sba/oversight-advocacy/office-national-ombudsman>.

**Chart 8: Ombudsman Referrals by Regional Advocates**

Ombudsman Referrals by Regional Advocates			
FY 17	FY 18	FY 19	FY 20
10	58	24	41

An example of how Advocacy works with the ONO on specific issues that involve both offices' responsibilities was the Region 5 advocate's participation with the ONO, along with the SBA Wisconsin District Director and members of his staff, for a small business forum sponsored by the Eau Claire Chamber of Commerce. Advocacy, the Ombudsman, and SBA addressed the forum and heard small business concerns on various issues, including the Waters of the United States rule, proposed tax relief, and rural broadband issues, which are issues that Advocacy continues to bring to the attention of policymakers in DC.

In another example, the Region 10 advocate was contacted by a small business in Oregon that provided labor for tree farms, and its business license was set to expire in 4 days due to an inability to receive a form from the IRS. The regional advocate connected the small business with the ONO, and within 36 hours the small business had received the necessary documents from the IRS and were able to deploy employees that weekend to cut trees for the holiday season.

## Regional Engagement During the COVID-19 Pandemic

Advocacy's regional advocates, who primarily rely on travel and face-to-face meetings with small business owners, had to adapt during a period of teleworking and virtual meetings as the COVID-19 pandemic led to lockdowns and travel restrictions across the country. In FY 2020, when the pandemic began, the regional advocates still exceeded their strategic goal of holding outreach meetings, despite financial constraints and teleworking due to the pandemic. These outreach efforts were primarily accomplished through virtual meetings.

Because of the regional advocates' extensive networks, small businesses began contacting the regional advocates in higher-than-normal volumes seeking assistance during the pandemic. While some issues concerned regulatory problems, most small business concerns during this time surrounded financial assistance to keep their small businesses from failing. While Advocacy is not directly involved in SBA

programs, the regional advocates worked with their local SBA contacts and SBA headquarter offices to assist these small businesses.

In the 4<sup>th</sup> quarter of FY 2020, Advocacy began tracking the number of referrals that regional advocates sent to SBA offices outside of the National Ombudsman's Office. The majority of these referrals were sent to local SBA district offices, SBA's Office of Disaster Assistance, and SBA's Office of Capital Access regarding financial assistance under the Paycheck Protection Program and Economic Injury Disaster Loan program as part of the CARES Act. In that quarter, the regional advocates had 110 referrals to these SBA offices. These referrals do not include the numerous requests that the regional advocates responded to with basic information on SBA pandemic assistance and inquiries from Congressional offices on behalf of small business constituents.

In instances where the regional advocates heard about regulatory issues and opportunities for agencies and Congress to make policy changes that would help small businesses, the regional advocates worked with Advocacy's Washington staff to ensure that these issues were shared with federal agencies and Congress. These issues included, but were not limited to, the excise tax on alcohol distilleries making hand sanitizer, qualifications for SBA funds under the CARES Act, business interruption insurance, procurement issues, and the tax implications of financial assistance under the CARES Act.

## Chapter 6 - Advocacy Authority, Organization, and Budget

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

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

### Advocacy's Statutory Authority

In this section, we will outline provisions of Advocacy's basic statutory authority, Title II of Public Law 94-305, and those provisions of Public Law 96-354, the Regulatory Flexibility Act, which confer additional responsibilities and authorities on Advocacy. Both of these laws are standing, non-expiring legislation, and both have been amended over the years. This section will refer to both laws as amended, i.e., as they are in 2020. In the next section on legislative history, we will look back on amendments to the original laws.

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

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

*Public Law 94-305, as amended.* Advocacy's basic statutory charter is Title II of Public Law 94-305, approved on June 4, 1976.<sup>260</sup> We have seen in Chapter 1 how this legislation superseded Public Law 93-386, which had established the first statutory Chief Counsel for Advocacy.<sup>261</sup> The prior Chief Counsel's activities were authorized under the Small Business Act,<sup>262</sup> and he or she operated under the supervision of the SBA Administrator. Title II of Public Law 94-305 repealed the Small Business Act references to the Chief Counsel,<sup>263</sup> and re-established the position with a new, freestanding charter *outside* of the Small Business Act. The new charter upgraded the position of Chief Counsel, expanded Advocacy's duties, and provided important new tools to allow the Chief Counsel to carry out these duties with flexibility and independence.

*Section 201. Establishment of Chief Counsel.* Section 201 establishes the position of Chief Counsel for Advocacy "who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate."<sup>264</sup> Direct appointment by the President, together with a separate statutory charter (i.e., outside of the Small Business Act), are important elements of the Chief Counsel's independence.

*Section 202. Duties related to economic research.* Section 202 sets forth "primary functions" relating to economic research.<sup>265</sup> Among these, Advocacy is to:

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

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<sup>260</sup> Public Law 94-305 (June 4, 1976), Title II, 15 § U.S.C. 634a *et seq.* See Appendix A for full text as amended.

<sup>261</sup> Public Law 93-386 (August 23, 1974), Small Business Amendments of 1974, 88 Stat. 742. Section 10 established the position of Chief Counsel for Advocacy and enumerated his or her duties.

<sup>262</sup> Public Law 85-536 (July 18, 1958), 72 Stat. 384, 15 U.S.C. § 631 *et seq.*

<sup>263</sup> § 208, Public Law 94-305, 90 Stat. 671.

<sup>264</sup> *Ibid.*, § 201, 15 U.S.C. § 634a.

<sup>265</sup> *Ibid.*, § 202, 15 U.S.C. § 634b.

*Section 203. Additional duties.* Section 203<sup>266</sup> sets forth additional duties for Advocacy that include the same duties of the earlier P.L. 93-386 Chief Counsel, as enumerated in the prior §5(e) of the Small Business Act (repealed by §208 of Public Law 94-305), and a new responsibility added by Public Law 114-125, the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA),<sup>267</sup> Advocacy is to:

- serve as a focal point for the receipt of complaints, criticisms, and suggestions concerning the policies and activities of federal agencies which affect small businesses;
- counsel small businesses on how to resolve questions and problems concerning their relationship to the federal government;
- develop proposals for changes in the policies and activities of any agency of the federal government which will better fulfill the purposes of the Small Business Act (*inter alia*, to aid, counsel, assist and protect the interests of small business concerns) and to communicate such proposals to the appropriate federal agencies;
- represent the views and interests of small businesses before other federal agencies whose policies and activities may affect small business;
- enlist the cooperation and assistance of public and private agencies, businesses, and other organizations in disseminating information about the programs and services provided by the federal government which are of benefit to small businesses, and information on how small businesses can participate in or make use of such programs and services; and
- facilitate greater consideration of small business issues during international trade negotiations through the convening of Interagency Working Groups to analyze the economic impact of proposed trade agreements on various industries; identify small business priorities, challenges, and opportunities; and to provide to Congress a report on such proposals with information on state-owned enterprises, recommendations to create a level playing field for U.S. small businesses, and information on Federal regulations that should be modified in compliance with the potential trade agreement.

*Section 204. Staff and powers of the Office of Advocacy.* This section gives the Chief Counsel one of his or her most important tools to ensure that Advocacy has the flexibility to respond to rapidly changing needs in its regulatory, legislative, research, and policy work. The Chief Counsel may “employ and fix the compensation” of such personnel as he or she deems necessary without regard to civil service competitive requirements or standard classification and pay schedules.<sup>268</sup> The statute sets Advocacy’s highest allowable pay level under this authority to the equivalent of the highest level in the federal “General Schedule.” A limit is also established for the number of positions at that level. Most Advocacy professionals serve at the pleasure of the Chief Counsel under this “public law hiring authority,” typically for one-year renewable appointments. Advocacy’s public law appointments are generally subject to the same screening and security requirements as those for all federal employees. They are not political appointments such as those made under Schedule C or non-career SES authorities.

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<sup>266</sup> Ibid., § 203, 15 U.S.C. § 634c.

<sup>267</sup> Public Law 114-125, title V, § 502, (February 24, 2016), 130 Stat. 172.

<sup>268</sup> Op. cit., § 204(1), 15 U.S.C. § 634d(1).

Section 204 also permits the Chief Counsel to procure temporary and intermittent services,<sup>269</sup> to consult with experts and other authorities,<sup>270</sup> to utilize the services of SBA's National Advisory Council or to appoint other advisory boards or committees,<sup>271</sup> and to "hold hearings and sit and act at such times and places as he may deem advisable."<sup>272</sup>

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

*Section 205. Assistance of other government agencies.* This section simply provides that "Each department, agency, and instrumentality of the Federal Government is authorized and directed to furnish to the Chief Counsel for Advocacy such reports and other information as he deems necessary to carry out his functions..."<sup>273</sup>

*Section 206. Reports.* The Chief Counsel is authorized to prepare and publish such reports as he or she deems appropriate. Importantly for Advocacy's independence, this section provides that such "reports shall not be submitted to the Office of Management and Budget or to any other Federal agency or executive department for any purpose prior to transmittal to the Congress and the President."<sup>274</sup> Accordingly, the Office of Advocacy does not circulate its work products for clearance with the SBA Administrator, OMB, or any other federal agency prior to publication. These work products include testimony, reports to Congress, economic research, comments on regulatory proposals, comments on legislation, publications, press releases, and website content.

*Section 207. Authorization of appropriations.* Advocacy has its own statutory line-item account in the Treasury, separate from other SBA accounts, a subject to which we will return later in this chapter.<sup>275</sup> This section also provides that:

The Administrator of the Small Business Administration shall provide the Office of Advocacy with appropriate and adequate office space at central and field office locations, together with such equipment, operating budget, and communications facilities and services as may be necessary, and shall provide necessary maintenance services for such offices and the equipment and facilities located in such offices.<sup>276</sup>

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<sup>269</sup> Ibid., § 204(2), 15 U.S.C. § 634d(2).

<sup>270</sup> Ibid., § 204(3), 15 U.S.C. § 634d(3).

<sup>271</sup> Ibid., § 204(4), 15 U.S.C. § 634d(4).

<sup>272</sup> Ibid., § 204(5), 15 U.S.C. § 634d(5).

<sup>273</sup> Ibid., § 205, 15 U.S.C. § 634e.

<sup>274</sup> Ibid., § 206, 15 U.S.C. § 634f.

<sup>275</sup> Ibid., § 207(a), 15 U.S.C. § 634g(a).

<sup>276</sup> Ibid., § 207(b), 15 U.S.C. § 634g(b).



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

Such sums as are necessary to carry out Advocacy's functions are permanently authorized, and these sums are to remain available until expended, without fiscal year limitation.<sup>277</sup>

*Public Law 96-354, as amended - the Regulatory Flexibility Act.* In Chapter 3, we saw the important role that Public Law 96-354, the Regulatory Flexibility Act (RFA), plays in Advocacy's activities.<sup>278</sup> Section 3(a) of the RFA added a new Chapter 6 to Title 5 of the United States Code, titled "The Analysis of Regulatory Functions."<sup>279</sup> Those sections of the new title with references to Advocacy are here summarized.

*Section 601. Definitions.* This section provides that, for the purposes of the RFA, a small business shall be defined in the same way SBA defines small business concerns under the Small Business Act, "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."<sup>280</sup> From time to time, with appropriate justification, Advocacy may concur with a rulemaking agency's request to adopt a different definition of "small business" for RFA purposes than that provided in SBA's published size standards.

*Section 602. Regulatory agenda.* Each October and April, federal agencies must publish in the Federal Register a regulatory flexibility agenda which includes: 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, the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking; and 3) the name and telephone number of an agency official knowledgeable concerning the rule. Each regulatory flexibility agenda must be transmitted to the Chief Counsel for Advocacy for comment.<sup>281</sup>

*Section 603. Initial regulatory flexibility analysis.* This section provides that whenever an agency is required to publish an initial regulatory flexibility analysis (IRFA) for a proposed rule describing the

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<sup>277</sup> Ibid., § 207(c), 15 U.S.C. § 634g(c).

<sup>278</sup> Public Law 96-354 (September 19, 1980), 5 U.S.C. § 601 *et seq.* See Appendix B for full text as amended.

<sup>279</sup> § 3, Public Law 96-354, 94 Stat. 1165.

<sup>280</sup> 5 U.S.C. § 601(3).

<sup>281</sup> 5 U.S.C. § 602(b).

impact of that rule on small entities, the IRFA shall be transmitted to the Chief Counsel for Advocacy.<sup>282</sup> This requirement is one important method by which Advocacy is alerted to new regulatory proposals that merit additional scrutiny for potential revisions to reduce small business impacts.

*Section 604. Final regulatory flexibility analysis.* This section provides that whenever an agency is required to publish a final regulatory flexibility analysis (FRFA), that FRFA shall include the response of the agency to any comments filed by the Chief Counsel for Advocacy in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments.<sup>283</sup> This provision helps both Advocacy and the general public better understand to what extent Advocacy's comments affected the agency's decision making.

*Section 605. Avoidance of duplicative or unnecessary analyses.* The RFA's requirement for an IRFA or FRFA can be waived if the agency head certifies that a proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. Such a certification must be published in the *Federal Register*, along with a statement providing the factual basis for such certification. This section of the RFA also provides that the agency must provide such a certification and statement to the Chief Counsel for Advocacy.<sup>284</sup> This notification requirement serves as an important flag for Advocacy to review such rule certifications to ensure that they are justifiable.

*Section 609. Procedures for gathering comments - SBREFA panels.* This section sets forth procedures for gathering comments on proposed rules expected to have a significant economic impact on a substantial number of small entities. The Small Business Regulatory Enforcement Fairness Act (SBREFA) amended the original RFA to create a new "panel process" through which two agencies, the Environmental Protection Agency and the Occupational Safety and Health Administration, must solicit *prior to the beginning of the normal notice and comment periods* direct input from small entities on the effects of those proposals that require IRFAs.<sup>285</sup> Although SBREFA's review panel process originally applied specifically to proposals of EPA and OSHA, its coverage was extended by the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010 to the new Consumer Finance Protection Bureau.<sup>286</sup>

For most such rules, a SBREFA review panel is convened, on which sit representatives of the Chief Counsel, OMB's Office of Information and Regulatory Affairs, and the agency proposing the rule.<sup>287</sup> The panel reviews materials related to the proposal and, importantly, the advice and recommendations of small entity representatives (SERs) on the rule's potential effects and possible mitigation strategies. The panel then issues a report on the comments of the SERs and on its own findings related to RFA issues.

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<sup>282</sup> 5 U.S.C. § 603(a).

<sup>283</sup> 5 U.S.C. § 604(a)(3).

<sup>284</sup> 5 U.S.C. § 605(b).

<sup>285</sup> 5 U.S.C. § 609(b).

<sup>286</sup> Public Law 111–203, title X, § 1100G(a) (July 21, 2010), 124 Stat. 2112.

<sup>287</sup> The Chief Counsel may in certain limited circumstances waive the requirement for a SBREFA panel.

The rulemaking agency is required to consider the panel report findings and, where appropriate, modify the proposed rule or its IRFA.

*Section 612. Reports and intervention rights.* This section of the RFA has three important provisions relating to Advocacy. The first is self-explanatory: “The Chief Counsel for Advocacy of the Small Business Administration shall monitor agency compliance with this chapter and shall report at least annually thereon to the President and to the Committees on the Judiciary and Small Business of the Senate and House of Representatives.”<sup>288</sup> Advocacy’s annual RFA reports are posted at <https://advocacy.sba.gov/category/resources/annual-report-on-the-rfa/>.

A second provision in § 612 is the clarification of the Chief Counsel’s authority to appear as *amicus curiae* in cases involving RFA compliance: “The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as amicus curiae in any action brought in a court of the United States to review a rule. In any such action, the Chief Counsel is authorized to present his or her views with respect to compliance with this chapter, the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities.”<sup>289</sup> A third provision in § 612 directs the courts to allow the Chief Counsel to appear in such actions.<sup>290</sup>

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

## Legislative History

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

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

### HOUSE REPORTS:

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

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<sup>288</sup> 5 U.S.C. § 612(a).

<sup>289</sup> 5 U.S.C. § 612(b).

<sup>290</sup> 5 U.S.C. § 612(c).

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

SENATE REPORTS:

Senate Report 94-420 to accompany S. 2498; October 8, 1975  
(Committee on Banking, Housing and Urban Affairs)

Senate Report 94-501 to accompany S. 2498; November 26, 1975  
(Committee on Commerce)

CONGRESSIONAL RECORD:

Volume 121 (1975): October 6, H.R. 9056 considered and  
passed in House

December 12,  
considered and passed in Senate

December 17, S. 2498  
considered and passed in House,

amended in lieu of H.R. 9056

Volume 122 (1976): May 13, House agreed to conference  
report

May 20, Senate agreed  
to conference report

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS:

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

*Public Law 96-302 (July 2, 1980)*. Public Law 96-302 was multi-title SBA reauthorization legislation that included in its Title IV two provisions relating to Advocacy.<sup>291</sup> Also, its Title III, known as the Small Business Economic Policy Act of 1980,<sup>292</sup> though not an amendment to either Advocacy's charter or the Small Business Act, did require the President to prepare an annual "Report on Small Business and Competition," a responsibility that was delegated to Advocacy by the White House from

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<sup>291</sup> 94 Stat. 850.

<sup>292</sup> 94 Stat. 848.

the first edition in 1982 until the statutory requirement was terminated in 2000. Additional information on this report was presented in Chapter 1.

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

Section 403 of Public Law 96-302 placed the position of Chief Counsel for Advocacy at Level IV of the Executive Schedule, confirming its rank at a very high level, generally equivalent to assistant secretaries and general counsels at cabinet-level departments.<sup>293</sup> This rank was conferred as a measure of the importance with which the Congress holds the position, and to facilitate interaction between Advocacy and high-level policymakers in other executive branch agencies.

#### HOUSE REPORTS:

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

(Committee on Small Business)

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

(Conference Committee)

#### SENATE REPORT:

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

(Committee on Small Business)

#### CONGRESSIONAL RECORD:

Volume 126 (1980):	May 28, S. 2698 considered and passed
in Senate	
	June 3, H.R. 7297
considered and passed in House; passage	
	vacated & S. 2698, amended, passed in lieu
	June 17, Senate agreed
to conference report	

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<sup>293</sup> The position of Chief Counsel for Advocacy was added to the list of ES-4 positions set forth at 5 U.S.C. § 5315.

to conference report

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS:

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

*Public Law 96-481 (October 21, 1980).* Public Law 96-481 was multi-title legislation including various SBA authorizations and a Title II also known as the Equal Access to Justice Act.<sup>294</sup> This act included two provisions relating to Advocacy. Section 203(a) added a new 5 U.S.C. § 504 that included a provision requiring the Chairman of the Administrative Conference of the United States to submit, after consultation with the Chief Counsel for Advocacy, an annual report to Congress on various matters relating to the implementation of the Equal Access to Justice Act.<sup>295</sup> This function ended for Advocacy when the requirement for this report was terminated in 2000.<sup>296</sup>

Section 203(b) of Public Law 96-481 also added a related duty to Advocacy's ongoing functions, as iterated in its permanent charter at 5 U.S.C. § 634b. Advocacy was to "advise, cooperate with, and consult with, the Chairman of the Administrative Conference of the United States" with respect to the Equal Access to Justice Act.<sup>297</sup> Advocacy maintains a strong working relationship with the Administrative Conference.

HOUSE REPORTS:

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

(Committee on Small Business)

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

(Conference Committee)

SENATE REPORT:

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

(Committee on Small Business)

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<sup>294</sup> 94 Stat. 2325. The Equal Access to Justice Act, as amended, is codified at 5 U.S.C. § 504.

<sup>295</sup> 5 U.S.C. § 504(e), as added by § 203(a) of Public Law 96-481.

<sup>296</sup> § 3003, Public Law 104-66 (December 21, 1995), 109 Stat. 734, 31 U.S.C. § 1113 note. *See also*, House Document 103-7, A List of Reports Pursuant to Clause 2, Rule III of the Rules of the House of Representatives (January 5, 1993).

<sup>297</sup> This duty remains codified at 5 U.S.C. § 634b(11).

CONGRESSIONAL RECORD:

passed in House	Volume 126 (1980):	June 9-10, H.R. 5612 considered and
		September 26,
considered and passed in Senate, amended		
		September 30, Senate
agreed to conference report		
		October 1, House
receded and concurred in Senate		
		amendment; Senate concurred in
House amendment		

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS:

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

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

Section 610(1) of Public Law 103-403 deleted a requirement in prior law that the Chief Counsel consult with and obtain the approval of the SBA Administrator before exercising the special authorities in Section 204 of Public Law 94-305.<sup>298</sup> These included the Chief Counsel's important public law hiring authority,<sup>299</sup> and authorities to procure temporary and intermittent services,<sup>300</sup> to consult with experts and other authorities,<sup>301</sup> to utilize the services of SBA's National Advisory Council or to appoint other advisory boards or committees,<sup>302</sup> and to hold hearings and sit and act at such times and places as he may deem advisable.<sup>303</sup> The conference report to accompany this legislation was clear and explicit in stating the intent of Congress: the legislation modified "the authority of the Chief Counsel for Advocacy

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<sup>298</sup> 108 Stat. 4204.

<sup>299</sup> Public Law 94-305, § 204(1), 15 U.S.C. § 634d(1).

<sup>300</sup> Ibid., § 204(2), 15 U.S.C. § 634d(2).

<sup>301</sup> Ibid., § 204(3), 15 U.S.C. § 634d(3).

<sup>302</sup> Ibid., § 204(4), 15 U.S.C. § 634d(4).

<sup>303</sup> Ibid., § 204(5), 15 U.S.C. § 634d(5).

to hire the employees provided for under 15 U.S.C. § 634d by eliminating the requirement that the Chief Counsel obtain the approval of the SBA Administrator.”<sup>304</sup>

Section 610(2) increased from 10 to 14 the number of Advocacy staff members who at any one time could be compensated at Advocacy’s highest allowable pay level, a rate not in excess of GS-15, step 10, of the federal government’s General Schedule.<sup>305</sup>

#### HOUSE REPORTS:

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

(Committee on Small Business)

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

(Conference Committee)

#### SENATE REPORT:

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

(Committee on Small Business)

#### CONGRESSIONAL RECORD:

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

September 21, H.R. 4801 considered and passed in House,

S. 2060 amended and then passed in lieu

October 4, House agreed to conference report

October 5, Senate agreed to conference report

#### WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS:

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

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<sup>304</sup> House Conference Report 103-824 to accompany S. 2060 (October 3, 1994), p. 54.

<sup>305</sup> 108 Stat. 4204.



*Public Law 106-50 (August 17, 1999).* Section 702 of Public Law 106-50, also known as the Veterans Entrepreneurship and Small Business Development Act of 1999, added a new paragraph (12) to the listing of Advocacy’s ongoing functions, as iterated in its permanent charter at 5 U.S.C. § 634b.<sup>306</sup> The new provision relating to veterans authorized Advocacy to “evaluate the efforts of each department and agency of the United States, and of private industry, to assist small business concerns owned and controlled by veterans...and service-disabled veterans..., and to provide statistical information on the utilization of such programs by such small business concerns and to make recommendations to the Administrator of the Small Business Administration and to the Congress in order to promote the establishment and growth of those small business concerns.”<sup>307</sup>

HOUSE REPORT:

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

(Committee on Small Business)

SENATE REPORT:

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

(Committee on Small Business)

CONGRESSIONAL RECORD:

Volume 145 (1999):	June 29, H.R. 1568 considered and
passed in House	
	August 5, considered
and passed in Senate with	
	amendment
	August 5, House
concurred in Senate amendment	

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS:

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

*Public Law 111-240 (September 27, 2010).* The Small Business Jobs Act of 2010 included an extremely important provision concerning Advocacy’s budgetary independence. Since the enactment of its charter in 1980, Advocacy operated with a great degree of independence from the Small Business Administration in which it was housed. However, Advocacy was still very much attached to SBA with

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<sup>306</sup> 113 Stat. 250.

<sup>307</sup> 15 U.S.C. 634b(12).

respect to the budget process. Prior to the Jobs Act, the Office of Advocacy was treated for budgetary purposes in much the same way as any SBA program office, in fact with less independence than certain other functions which had their own statutory budget accounts.<sup>308</sup> Advocacy participated in every step of the budget process in the same way as most other SBA offices and programs. This meant the preparation of annual budget requests and justifications that “competed” with those of other SBA offices and programs for a share of the agency’s annual request to Congress.

The Jobs Act amended Advocacy’s statutory authority to require that each budget submitted by the President shall include a separate statement of the amount of appropriations requested for Advocacy, and that these funds be designated in a separate Treasury account. The Act also requires SBA to provide Advocacy with office space, equipment, an operating budget, and communications support, including the maintenance of such equipment and facilities.<sup>309</sup>

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

In addition to the Jobs Act budgetary provisions, the legislation also included a codification of a provision of the 2002 Executive Order 13272 that requires agencies to include in their final regulatory flexibility analyses the response of the agency to any comments filed by the Chief Counsel for Advocacy in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of those comments.<sup>310</sup>

#### HOUSE REPORT:

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

(Committee on Financial Services)

#### CONGRESSIONAL RECORD:

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

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

September 23, House concurred in Senate amendment

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<sup>308</sup> Notably, the Office of the Office of the Inspector General and disaster operations.

<sup>309</sup> Public Law 111–240, title I, § 1601(b) (Sept. 27, 2010), 124 Stat. 2551, 15 U.S.C. § 634g. See Appendix N for a history of prior congressional efforts to provide budgetary independence for Advocacy.

<sup>310</sup> *Ibid.*, § 1601(a)

## DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS:

DCPD-201000804: September 27, Presidential remarks

*Public Law 114-125 (February 24, 2016).* Section 502 of Public Law 114-125, also known as the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), added a new subsection (b) to the section on additional duties of Advocacy's ongoing functions, as iterated in its permanent charter at 5 U.S.C. § 634c.<sup>311</sup>

TFTEA established a new role for Advocacy to facilitate greater consideration of small business issues during international trade negotiations. Under TFTEA, the Chief Counsel for Advocacy must convene an Interagency Working Group (IWG) whenever the President notifies Congress that the Administration intends to enter into trade negotiations with another country, including re-negotiations of existing treaties.

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

TFTEA requires that an IWG convened by Advocacy must include a representative from the U.S. Department of Commerce, the Office of U.S. Trade Representative and the U.S. Department of Agriculture. Each individual will represent their agency during the IWG's discussions and outreach to small business and other small entities.

## HOUSE REPORTS:

House Report 114–376 to accompany H.R. 644; December 9, 2015

(Committee of Conference).

## CONGRESSIONAL RECORD:

Volume 162 (2016): February 12, 2016, considered and passed House.

May 14, considered and passed Senate, amended.

June 12, House concurred in Senate amendments with an amendment.

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<sup>311</sup> Public Law 114-125, title V, § 502, (February 24, 2016), 130 Stat. 172.

December 11, House agreed to conference report.

February 9 and 11, Senate considered and agreed to conference report.

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

*Public Law 96-354 (September 19, 1980)*. This is the original Regulatory Flexibility Act (RFA) that we have already seen in Chapters 1, 3, and earlier in this chapter.<sup>312</sup> The Office of Advocacy has been closely involved with the RFA regulatory review process from its inception. Under the original act, agencies were required to transmit to the Chief Counsel their regulatory agendas,<sup>313</sup> their initial regulatory flexibility analyses,<sup>314</sup> and their certifications of rules without significant effects.<sup>315</sup> Additionally, the Chief Counsel reports annually to the President and the Congress on agency compliance with the RFA,<sup>316</sup> and is authorized to appear as *amicus curiae* in any action brought in a court of the United States to review a rule.<sup>317</sup>

#### SENATE REPORT:

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

(Committee on the Judiciary)

#### HOUSE REPORT:

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

(Committee on Small Business)

#### CONGRESSIONAL RECORD:

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

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<sup>312</sup> 94 Stat. 1164.

<sup>313</sup> 5 U.S.C. § 602.

<sup>314</sup> 5 U.S.C. § 603.

<sup>315</sup> 5 U.S.C. § 605.

<sup>316</sup> 5 U.S.C. § 612(a).

<sup>317</sup> 5 U.S.C. §§ 612(b), 612(c).

September 9,

considered and passed in House

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS:

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

*Public Law 104-121 (March 29, 1996).* Public Law 104-121, the Contract with America Advancement Act of 1996, included a Title II that is known separately as the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).<sup>318</sup> As we have seen, among its many other provisions, SBREFA significantly strengthened the RFA, especially by providing judicial review of RFA compliance issues,<sup>319</sup> by establishing a special regulatory panel review process to gather early comments on proposals from EPA and OSHA,<sup>320</sup> and by clarifying the Chief Counsel's authority to appear as *amicus curiae* in cases involving RFA compliance.<sup>321</sup>

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

HOUSE REPORTS:

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

(Committee on Government Reform and Oversight)

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

(Committee on the Judiciary)

SENATE REPORTS:

No Senate reports.

CONGRESSIONAL RECORD:

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<sup>318</sup> 110 Stat. 857.

<sup>319</sup> 5 U.S.C. § 611.

<sup>320</sup> 5 U.S.C. § 609(b). The process was subsequently extended to the Consumer Financial Protection Bureau.

<sup>321</sup> 5 U.S.C. § 612(b).

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

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

#### WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS:

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

*Public Law 111-203 (July 21, 2010).* Public Law 111-203, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, included a provision to extend the SBREFA regulatory review panel process to the new Consumer Financial Protection Bureau (CFPB).<sup>322</sup> The legislation also amended the RFA to require that that agency's initial regulatory flexibility analyses include a description of any increased cost of credit for small entities, significant alternatives that minimize any such increase, and the advice of small entity representatives on these subjects.<sup>323</sup> Final regulatory flexibility analyses must also include a description of the steps that CFPB has taken to minimize any additional cost of credit for small entities.<sup>324</sup>

#### HOUSE REPORTS:

House Report 111–517, conference report to accompany H.R. 4173  
(Conference Committee)

#### SENATE REPORT:

Senate Report 111–176 to accompany S. 3217

Committee on Banking, Housing, and Urban Affairs

#### CONGRESSIONAL RECORD:

Vol. 155 (2009):	December 9–11, considered and passed House
Vol. 156 (2010):	May 20, considered and passed Senate, amended, in lieu of
	S. 3217

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<sup>322</sup> Public Law 111–203 (July 21, 2010), title X, § 1100G(a), 124 Stat. 2112.

<sup>323</sup> Ibid., § 1100G(b), 124 Stat. 2112.

<sup>324</sup> Ibid., § 1100G(c), 124 Stat. 2113.

June 30, House agreed to conference report.

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

DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS:

DCPD-201000617: July 21, Presidential remarks

## Independence and Relationship with SBA

Independence and flexibility are what former Chief Counsel Tom Sullivan called the “bedrock principles that underlie the Office of Advocacy’s ability to represent small businesses effectively.”<sup>325</sup> We have seen in Chapter 1 how Advocacy and its mission came to be, and an important theme that ran through the steps leading to Public Law 94-305 was the need for an *independent* voice within government to represent the interests of small business.

*How independence began.* Although Public Law 93-386 amended the Small Business Act in 1974 to establish a Chief Counsel for Advocacy within SBA, it did not explicitly provide for staffing or administrative powers for this function. Advocacy was clearly under the direction of the SBA Administrator, and the office was viewed as one of many other agency program offices, certainly not independent from it. While SBA Administrators had been supportive and did provide some staffing for Advocacy, there were questions about where the new office should fit in SBA’s organizational structure, and the effectiveness of the new position remained limited.<sup>326</sup>

Small business organizations and the small business community at large that they represent have always been among the most vocal supporters of a strong Office of Advocacy. They had been closely involved with the creation of the original office and were disappointed that in 1976 it had not yet reached the potential that they had envisioned for it. It was apparent that the role of the Chief Counsel should be clarified and strengthened, and Congress was again encouraged by private sector small business organizations to consider new legislation. At a 1976 hearing conducted by the Senate Select Committee on Small Business, John Lewis, executive vice president of the National Small Business Association, had the following exchange with Sen. Thomas McIntyre (D-N.H.):

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<sup>325</sup> Hearing before the House Committee on Small Business, “Strengthening the Office of Advocacy,” March 20, 2002.

<sup>326</sup> In 1976, the Office of Advocacy employed twelve, including the Chief Counsel. SBA’s advisory councils were under Advocacy, and a plan was under consideration to place Advocacy under an Assistant Administrator who would also be responsible for public affairs and communications. Source: Testimony of SBA Administrator Mitchell P. Kobelinski, Hearing before the Senate Select Committee on Small Business, “Oversight of the Small Business Administration: The Office of the Chief Counsel for Advocacy and How it Can be Strengthened,” March 29, 1976; pp. 10 and 27.

MR. LEWIS. It is unfortunately true that advocacy for small business in Government has mostly come from Congress...and not from the SBA.

SEN. MCINTYRE. What are some of the reasons you have that feeling on SBA? ... If he [the SBA Administrator] gets too strong, talks too big, does that not get him into difficulty with Commerce?

MR. LEWIS. No, not with Commerce but with the White House. Inherently, he must be a team player. His agency is not independent, does not have the independence of a Federal Reserve Board that can tell the Administration to go fly a kite.<sup>327</sup>

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

Mr. Chairman, ...you indicated that you were interested in determining the role and effectiveness of the Agency’s Advocacy Office. NFIB feels that this effort is simply too little, too late and that there is a pressing need to revamp the program before the small business community is turned off by its ineffectiveness. NFIB believes that Advocacy will be the watchword of the future and that the Small Business Administration has no program that will be more important to the small business community...Advocacy should be one of the primary functions of the Agency and it should be expanded and given the power necessary to represent the small business community within the Federal Government and before Congress...To accomplish this we would recommend that the Advocacy program and the person who runs it be significantly upgraded ... and while we still believe that the head of the advocacy program should be highly placed within the Small Business Administration, we are also convinced that he or she must have the freedom to speak out on issues of importance and to represent the interests of small business within the Administration and before Congress...Without this freedom, we would not have an advocate, but just another spokesman for the Administration.<sup>328</sup>

These and other witnesses were persuasive, and the Congress responded positively to their call for an upgraded Chief Counsel with the ability to speak independently on behalf of small businesses. As we have seen, a new charter for Advocacy followed only two months after this hearing, and it reflected many of the witnesses’ recommendations.<sup>329</sup>

Advocacy’s new charter, Title II of Public Law 94-305, was a major step forward in establishing the independent office envisioned by its authors and the small business community itself. Although the term

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<sup>327</sup> Ibid., pp. 82-83.

<sup>328</sup> Ibid., pp. 121-122.

<sup>329</sup> Title II, Public Law 94-305 (June 4, 1976), 15 § U.S.C. 634a *et seq.* See Appendix A.



“independent” does not actually appear in the statute, a number of indicia of independence are apparent.

*Separate statutory charter.* The first thing to note about Advocacy’s new charter is that it was not in the form of amendments to the Small Business Act, the generic legislation creating SBA and its Administrator, as well as authorizing the agency’s various programs. Instead, Advocacy’s legislation is freestanding, and it is codified separately at 15 U.S.C. §§ 634a – 634g. The prior Chief Counsel for Advocacy, who had worked under the direction of the Administrator, was authorized by provisions in the Small Business Act that were repealed by Public Law 94-305.<sup>330</sup>

*Senate-confirmed status.* Although Public Law 94-305 established the new Office of Advocacy “within the Small Business Administration,” it also provides that the Chief Counsel is to be appointed by the President with the advice and consent of the Senate. In 1976, the only other Senate-confirmed appointee at SBA was the Administrator.<sup>331</sup> The Congress conferred this special status on the Chief Counsel both to make clear the importance with which it held the position and its duties, and to facilitate interaction between Advocacy and high-level policymakers in other executive branch agencies. Concerning this provision, former Chief Counsel Frank Swain testified:

The fact of the matter is that when somebody from the SBA is negotiating with the IRS or with the EPA on a proposed regulation, they can get to a lot higher and more influential level of the office at EPA or IRS or Treasury because the Chief Counsel is appointed by the same President that appointed them and confirmed by the Senate, and is in one sense, on the President’s team, trying to do better by that administration for small business.<sup>332</sup>

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

That becomes very important because the ability to communicate and understand what small business is saying can only be learned through that experience of having been on the outside and having been involved in business. I think that’s one of the important things that Congress did when they set up this office.<sup>333</sup>

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<sup>330</sup> Prior § 5(e) of the Small Business Act, which was repealed by § 208 of Public Law 94-305.

<sup>331</sup> Ibid., § 201, 15 U.S.C. 634a. Subsequently, the SBA Inspector General was given Senate-confirmed status in 1978 (Public Law 95-452, Inspector General Act of 1978 (October 12, 1978), 92 Stat. 1101, 5 U.S.C. App.), and the SBA Deputy Administrator was given Senate-confirmed status in 1990 (§ 222, Public Law 101-574, Small Business Administration Reauthorization and Amendments Act of 1990 (November 15, 1990), 104 Stat. 2823, 15 U.S.C. § 633(b)(1)).

<sup>332</sup> Hearing before the House Committee on Small Business, “SBA Office of Advocacy,” April 4, 1995; p. 7.

<sup>333</sup> Ibid., p. 3.

*No clearance for Advocacy work products.* Yet another clear indication of the Chief Counsel's independence was Public Law 94-305's provision that the Chief Counsel is authorized to prepare and publish such reports as he or she deems appropriate. Importantly for Advocacy's independence, this section provides that such "reports shall not be submitted to the Office of Management and Budget or to any other Federal agency or executive department for any purpose prior to transmittal to the Congress and the President."<sup>334</sup> Accordingly, the Office of Advocacy does not circulate its work products for clearance with the SBA Administrator, OMB, or any other federal agency prior to publication. These work products include testimony, reports to Congress, economic research, comments on regulatory proposals, comments on legislation, publications, press releases, and website content. Concerning this provision, former Chief Counsel Frank Swain observed:

...the Congress, I think, wisely designed the Chief Counsel's job to have a significant aspect of independence that other Federal appointed officials don't have. That is, to testify in front of this and other congressional committees without clearing one's testimony with OMB and to attempt...to make its voice heard in judicial proceedings as well as in *amicus*.<sup>335</sup>

*1980 statement of congressional intent.* In 1980, Public Law 96-302 placed the position of Chief Counsel for Advocacy at Level IV of the Executive Schedule, confirming his or her rank at a very high level, generally equivalent to assistant secretaries and general counsels at cabinet-level departments.<sup>336</sup> The Senate report to accompany this legislation included remarks illuminating congressional intent with respect to the Chief Counsel's relationship with other SBA officials and the independence of his mission generally.

In establishing the Chief Counsel for Advocacy at executive level IV, the committee notes that the administration expressed concern because this level is the same as SBA's Deputy Administrator and above that of the Associate Administrators. The Committee does not see that this should create any internal problems at SBA.

By agreeing to this provision, the committee does not intend to alter or interfere with the internal line of authority of either the Administrator or Deputy Administrator of the Small Business Administration. The change is intended simply to give the Chief Counsel for Advocacy proper standing within the executive branch and thereby enable him to better carry out the responsibilities imposed upon him by Congress in Public Law 94-305.

The Chief Counsel for Advocacy is not in the SBA chain of command: he is a Presidentially appointed official with Senate confirmation. His mandate is to represent the views of small business. In carrying out this mission, he is expected to present and fight for the views of the

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<sup>334</sup> § 206, Public Law 94-305, 15 U.S.C. § 634f.

<sup>335</sup> Hearing before the House Committee on Small Business, "SBA Office of Advocacy," April 4, 1995; p. 7.

<sup>336</sup> § 403, Public Law 96-302 (July 2, 1980), 94 Stat. 850. The position of Chief Counsel for Advocacy was added to the list of ES-4 positions that is set forth at 5 U.S.C. § 5315.

small business sector of the economy; the views will not always be the same as those expressed by the SBA on behalf of the administration. He is much like an attorney representing a client and just as the attorney presents his client's position, the Chief Counsel for Advocacy presents his client's position which is that of the small business community.

Viewed in this role, the position of the advocate cannot be equated with that of the Deputy Administrator or the Associate Administrators. He has a different mission than that assigned to the rest of SBA and since he is a separate part of the SBA team, there should not be any comparison of positions between him and other officials in the SBA hierarchy. The advocate may not necessarily represent the administration's position or that of SBA; however, the SBA and other Federal departments and agencies are required to cooperate fully with him.<sup>337</sup>

*1994 statutory confirmation of independent authorities.* Public Law 103-403 deleted a requirement in prior law that the Chief Counsel consult with and obtain the approval of the SBA Administrator before exercising a variety of special authorities in Public Law 94-305,<sup>338</sup> including the Chief Counsel's public law hiring authority,<sup>339</sup> and authorities to procure temporary and intermittent services,<sup>340</sup> to consult with experts and other authorities,<sup>341</sup> to utilize the services of SBA's National Advisory Council or to appoint other advisory boards or committees,<sup>342</sup> and to "hold hearings and sit and act at such times and places as he may deem advisable."<sup>343</sup>

The conference report to accompany this legislation was clear in stating the intent of Congress: the legislation modified "the authority of the Chief Counsel for Advocacy to hire the employees provided for under 15 U.S.C. 634d by eliminating the requirement that the Chief Counsel obtain the approval of the SBA Administrator."<sup>344</sup> By removing the Administrator's ability to intervene in the use of these § 204 authorities, the action by Congress to give the Chief Counsel sole discretion over their use should be viewed as enhancing the office's independence.

*The Regulatory Flexibility Act.* Another indication of Advocacy's independence is the fact that the RFA as amended has conferred additional authorities and duties on the Chief Counsel apart from those specified in Public Law 94-305. These do not run to the SBA Administrator, but solely to the Chief Counsel. We have reviewed these in earlier chapters in more detail, but to summarize here, agencies are

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<sup>337</sup> Senate Report 96-703 to accompany S. 2698 (subsequently enacted as Public Law 96-302), Senate Committee on Small Business; May 14, 1980; pp. 15-16.

<sup>338</sup> § 610(1), Public Law 103-403 (October 22, 1994), 108 Stat. 4204.

<sup>339</sup> Public Law 94-305, § 204(1), 15 U.S.C. § 634d(1).

<sup>340</sup> *Ibid.*, § 204(2), 15 U.S.C. § 634d(2).

<sup>341</sup> *Ibid.*, § 204(3), 15 U.S.C. § 634d(3).

<sup>342</sup> *Ibid.*, § 204(4), 15 U.S.C. § 634d(4).

<sup>343</sup> *Ibid.*, § 204(5), 15 U.S.C. § 634d(5).

<sup>344</sup> House Conference Report 103-824 to accompany S. 2060; October 3, 1994; p. 54.

required to transmit to the Chief Counsel their regulatory agendas,<sup>345</sup> their initial regulatory flexibility analyses,<sup>346</sup> in their final regulatory flexibility analyses their responses to Advocacy comments and any actions taken as a result of such comments,<sup>347</sup> and their certifications of rules without significant effects.<sup>348</sup> Additionally, the Chief Counsel participates in SBREFA regulatory review panels for certain EPA, OSHA, and CFPB rules,<sup>349</sup> is tasked to report annually to the President and the Congress on agency compliance with the RFA,<sup>350</sup> and is authorized to appear as *amicus curiae* in any action brought in a court of the United States to review a rule, including those based on RFA compliance issues.<sup>351</sup>

*Separate appropriations account.* As discussed earlier in this chapter, the Small Business Jobs Act of 2010 provided that Advocacy would henceforth have its own separate line-item in the President's budget request and a separate account for its appropriations in the Treasury. Also, these funds are to remain available until expended.<sup>352</sup> These provisions became operational with Advocacy's budget request for Fiscal Year 2012, and beginning with the Fiscal Year 2013 request, Advocacy's annual Congressional Budget Justification and its accompanying Annual Performance Report have appeared in a separate budget appendix following the main SBA budget request, much as the request for the Inspector General's office appears. Since the establishment of Advocacy's separate appropriations account, its funds are no longer comingled with those of the SBA, and the ability to transfer funds between SBA and Advocacy is strictly limited by the reprogramming procedures set forth in appropriations law. Advocacy now submits its own draft budget requests to OMB for review, without approval or editing by SBA. Advocacy also has established its own strategic goals and performance metrics.

*Independent, yes; detached, no.* We have just reviewed some of the many indications that the Chief Counsel's duties and authorities are implemented independently from SBA and the SBA Administrator, who directs neither the office's activities, personnel, nor budget. The entire evolution of Advocacy has been a journey that began in 1974 under the authority of the Small Business Act and the direction of the Administrator, and then progressed through a series of legislative refinements that increasingly enhanced and confirmed the office's independence under its own statutory charter, appropriations account, and administrative authorities.

But in important ways, Advocacy is still very much a part of the agency in which it is housed. Although its mission is different from that of SBA—except in the largest sense of serving the small business

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<sup>345</sup> 5 U.S.C. § 602.

<sup>346</sup> 5 U.S.C. § 603.

<sup>347</sup> 5 U.S.C. § 604.

<sup>348</sup> 5 U.S.C. § 605.

<sup>349</sup> 5 U.S.C. § 609(b)

<sup>350</sup> 5 U.S.C. § 612(a).

<sup>351</sup> 5 U.S.C. §§ 612(b), 612(c).

<sup>352</sup> Public Law 111–240, title I, § 1601(b) (Sept. 27, 2010), 124 Stat. 2551, 15 U.S.C. § 634g.

community—Advocacy is a relatively small operation. In fact, it is too small to efficiently deal with the myriad administrative chores that beset all federal offices. Advocacy relies on SBA for a variety of administrative support services, ranging from office space and equipment to IT and communications support; from printing to the purchase of goods and services; from training and travel to payroll, benefit, and other personnel administration services (though not classification and selection). Advocacy's own small administrative support staff are professionals who "plug in" to SBA's systems to keep Advocacy functioning at a high level of productivity. Advocacy could not accomplish what it does without the support of SBA.

There are many other ways in which Advocacy and the rest of SBA interact. Of special importance is the work of Advocacy's economic research team that is widely used by SBA offices throughout the country and by SBA officials at all levels in Washington. Advocacy economists are a valuable resource for SBA in understanding the latest small business statistics and economic research and assist SBA in answering media and information requests on small business economic trends. Advocacy also works closely with the National Ombudsman and prides itself on the level of cooperation and assistance that its professionals provide to all SBA program and policy staff whenever required.

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

I had no problems...I do think it helps if the Administrator and the Chief Counsel are known to the President as a team. If the Chief Counsel is pushed on an issue where he has to depart from the administration in his own right, obviously, he's got to let [the Administrator] know and let him know why...The once or twice that I went off the reservation, I think aside from a couple of catcalls and raised eyebrows, nobody made any trouble for us.<sup>353</sup>

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

...the drafters of the [Advocacy] legislation basically tried to design an office that was both an inside player and an outside player. Each of the four Chief Counsels has attempted to fulfill that mandate in their own way. I think that there is set up an inherent conflict there, but it's a conflict that has been responsible for many of our victories... They ought to be independent when the situation demands. I think that it is a balancing act for every Chief Counsel and for the Office of Advocacy. I think that it's really unique...it's a tribute to our system that it's been done.<sup>354</sup>

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<sup>353</sup> From "Walking a Fine Line: The Independence of the Office of Advocacy," *The Small Business Advocate*, June 1996, p. A-14. This special edition of Advocacy's monthly newsletter, which commemorated Advocacy's 20<sup>th</sup> anniversary, is reprinted in its entirety in Appendix T.

<sup>354</sup> Hearing before the House Committee on Small Business, "SBA Office of Advocacy," April 4, 1995; pp. 7-8.

Tom Kerester, the third Chief Counsel, recalled:

Former Administrator Pat Saiki...encouraged me to be independent. She said, “that’s your role and that’s the role you should carry out.” I did, as a courtesy matter, try to keep her advised ahead of time so that she wasn’t blindsided by some questions – she knew exactly where I was coming from.<sup>355</sup>

Jere Glover, the fourth Chief Counsel, testified that:

...the Chief Counsel can, and on occasion does, take a position contrary to that of the administration when it comes to a policy affecting small business...Congress wanted a small business advocate who could honestly and directly put forth the small business point of view. By not requiring the Office of Advocacy to deliver the exact same message as the Administration, Congress could obtain information that was free from many political considerations and would have credibility with the small business community outside of Washington.<sup>356</sup>

Tom Sullivan, the fifth Chief Counsel, testified that:

One of the original ideas behind the Office of Advocacy was that small businesses needed a voice both to articulate their contributions to the economy and to represent their unique needs to policymakers in Washington. To be effective, the office had to have the ability to speak within the Administration in a voice that did not always echo Administration policy, hence the need for independence. At the same time, the wisdom of putting the Chief Counsel in the Executive Branch, where the Chief Counsel could insert the “small business voice” into discussions with policymakers on the same team – before proposed policy became law – has been borne out over the years.<sup>357</sup>

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

Advocacy’s independence allows us to take strong positions in our comment letters, publications, testimony and other work, without going through clearance within the executive branch. While such review and coordination are certainly appropriate for most agencies, in our case it is not. That is because it is the job of each Chief Counsel to transmit directly to policymakers the unfiltered views of our small entity stakeholders...When I speak of independence, I want to emphasize that Advocacy only makes decisions based on what we believe is best for small business... I know from

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<sup>355</sup> From “Walking a Fine Line: The Independence of the Office of Advocacy,” *The Small Business Advocate*, June 1996, p. A-15.

<sup>356</sup> Hearing before the House Committee on Small Business, “SBA Office of Advocacy,” April 4, 1995; pp. 50-51.

<sup>357</sup> Hearing before the House Committee on Small Business, “Strengthening the Office of Advocacy,” March 20, 2002.

my conversations with past Chief Counsels that Advocacy’s independence has been a constant through the years, and it remains the bedrock of Advocacy’s ability to be effective.<sup>358</sup>

Darryl DePriest, the seventh Chief Counsel, observed that:

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

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

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

## Organization and Staffing

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

The seven professionals in ASB provide critical support in everything that Advocacy does. Their duties include the coordination of the many ways in which Advocacy “plugs in” to SBA’s administrative support functions such as payroll and benefits, purchasing, training, travel, IT and other communications, etc. ASB staff also assists in organizing many of Advocacy’s outreach events, answers the phones, directs public inquiries, keeps records, and generally manages the countless chores that keep the office running smoothly.

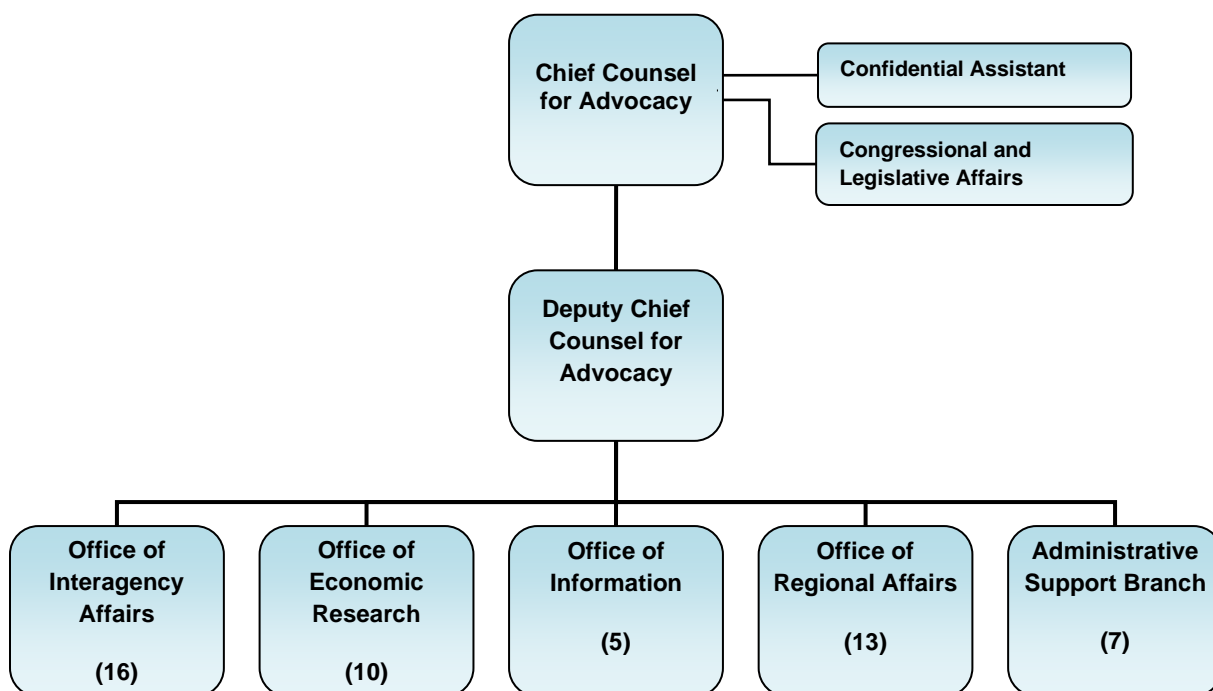
The chart below depicts Advocacy’s organization and authorized staffing levels by division in 2020. Its largest operating division, the Office of Interagency Affairs (Advocacy’s legal team), has the primary

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<sup>358</sup> Hearing before the Senate Committee on Small Business and Entrepreneurship, “Office of Advocacy Fiscal Year 2012 Budget,” March 31, 2011.

responsibility for one of Advocacy’s two primary legislative mandates, regulatory advocacy. The Office of Economic Research is responsible for the other key mandate of economic research. Advocacy maintains the flexibility to shift resources among its division as needed, subject to the availability of resources.

**Chart 9: Office of Advocacy Organization Chart**



## Budget History and Current Levels

The term “budget” is often used with bewildering inconsistency by those not familiar with the federal budget process. This is understandable because that process is quite complex, and through its many stages an amount specified for any given project, program, or activity (PPA in budget parlance) can change many times. There are at least four types of “final” numbers that are commonly, if sometimes incorrectly, cited as the “budget” for a given PPA: 1) the congressional authorization or “program level” that is sometimes in place before the annual funding process commences; 2) the administration’s “request” level for the PPA; 3) the program level authorized by an appropriation, including those levels set in the report language in committee reports to accompany appropriations laws; and 4) the final “actuals” or dollars eventually spent on the PPA. Many PPA’s, including Advocacy’s, may not be the subject of one or more of these types of budget numbers, or their treatment in the budget may change from year to year.

To simplify this section, we will deal with three types of budget numbers for Advocacy, authorized program levels in the office’s early years, appropriations for those years after Congress gave Advocacy



its own Treasury account and appropriations line-item, and the amount of funds obligated (actuals) throughout the entire history of the office.

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

**Chart 10: Advocacy Authorized Program Levels, FY 1978 thru FY 1984**

<b>Advocacy authorized program levels: FY 1978 – FY 1984</b>			
<b>Fiscal Year</b>	<b>Program level</b>	<b>Authorizing law</b>	<b>Enactment</b>
Fiscal Year 1978	\$6.0 million	Public Law 95-89 <sup>359</sup>	August 4, 1977
Fiscal Year 1979	\$6.6 million	Public Law 95-89	August 4, 1977
Fiscal Year 1981	\$8.8 million	Public Law 96-302 <sup>360</sup>	July 2, 1980
Fiscal Year 1982	\$9.68 million	Public Law 96-302	July 2, 1980
Fiscal Year 1982	\$8.0 million	Public Law 97-35 <sup>361</sup>	August 13, 1981
Fiscal Year 1983	\$9.68 million	Public Law 96-302	July 2, 1980
Fiscal Year 1983	\$8.0 million	Public Law 97-35	August 13, 1981
Fiscal Year 1984	\$9.68 million	Public Law 96-302	July 2, 1980
Fiscal Year 1984	\$8.0 million	Public Law 97-35	August 13, 1981

***Advocacy appropriations.*** As noted earlier in this chapter, Congress in 2010 provided Advocacy with its own appropriations account and line-item in the budget. These provisions became operational with the administration’s budget request and the subsequent final appropriation for Fiscal Year 2012. The table below depicts Advocacy’s budget request and appropriation (in new budget authority, or BA) for each year these provisions have been in effect, in addition to the office’s final obligations (actuals) for those years. The pronounced drop in FY 2013 was due to government-wide budget sequestration

<sup>359</sup> Public Law 95-89 (August 4, 1977), 91 Stat. 553.

<sup>360</sup> Public Law 96-302 (July 2, 1980), 94 Stat. 833.

<sup>361</sup> Public Law 97-35, Title XIX, § 1905 (August 13, 1981), 95 Stat. 772.

provisions enacted in that year which adjusted Advocacy’s FY 2012 baseline of \$9.12 million downward as described in the footnote to the table.

Advocacy actuals can sometimes exceed the appropriation of new funds in a given year because of the availability of "carryover" funds from prior years. Advocacy’s authorizing legislation specifically provides that funds appropriated to it remain available until expended, a very useful provision due to uncertainties that sometimes arise in the contracting process for economic research projects and for other reasons.

**Chart 11: Advocacy Budgets Since Establishment of Separate Treasury Account**

<b>Advocacy budgets since establishment of separate Treasury account</b> <i>Dollars in millions</i>			
<b>Fiscal Year</b>	<b>Request (New BA)</b>	<b>Enacted (New BA) *</b>	<b>Obligated (Actuals)</b>
FY 2012	9.120	9.120	8.440
FY 2013	8.900	8.643	8.811
FY 2014	8.455	8.750	8.628
FY 2015	8.455	9.120	9.264
FY 2016	9.120	9.120	9.157
FY 2017	9.320	9.220	8.113
FY 2018	9.120	9.120	9.344
FY 2019	9.120	9.120	10.698
FY 2020	9.120	9.120	9.306
FY 2021	9.190	9.190	
* Enacted amounts include only new budget authority. Carryover from prior fiscal years and other available funds are not reflected in these amounts, and obligated levels can exceed new BA for a given year. The FY 2013 enacted level of \$8.643 million is the post-sequestration level. It includes \$8,642,969 in new BA after: 1) a 5 percent sequestration reduction from FY 2012 enacted baseline of \$9.12 million; 2) a 0.2 percent across-the-board rescission; and 3) a further OMB-approved adjustment to resolve technical assumption differences between OMB and CBO, all provided for in the FY 2013 continuing resolution.			

Prior to FY 2006, Advocacy’s “budget” appeared as two items in SBA’s formal congressional budget request and in the agency’s appropriations legislation. One item (often referred to as “salaries and expenses” or S&E) related to Advocacy’s operating expenses, including employee compensation and benefits, travel, printing and all other direct expenses except for economic research contracts. The second item related to Advocacy’s economic research program and included funds for contracts with other government agencies for data and with private sector researchers for specialized projects. From FY 2006 through FY 2011, economic research funding was included with all other Advocacy expenses, so that the office’s budget appeared as a single item in SBA’s congressional budget submission under the agency’s “Executive Direction” budget heading.

Since FY 2012, Advocacy has had its own line-item in the budget which includes all direct Advocacy expenses, including economic research, but not various overhead costs which, pursuant to Section 1602(b) of Public Law 111-240, SBA must provide to Advocacy, including office space and equipment, communications and IT services, and maintenance of equipment and facilities. The costs for these services, as well as centralized indirect expenses shared with other SBA offices, are not charged to Advocacy's appropriation. Advocacy and SBA have executed a Memorandum of Understanding setting forth what expenses are charged to Advocacy's appropriation and what services SBA will provide to Advocacy without charge to that account.<sup>362</sup>

*Advocacy actuals.* The table below depicts Advocacy actual obligations from FY 1978, the first year in which Advocacy as chartered by Public Law 94-305 was operational, through FY 2020. Advocacy's appropriation in new budget authority for FY 2021 is also provided.

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<sup>362</sup> See Appendix Q.

**Chart 12: Advocacy Actual Obligations, FY 1978 thru FY 2020**

Fiscal Year	Advocacy Actuals	Fiscal Year	Advocacy Actuals
FY 1978	1,930	FY 2000	5,620
FY 1979	2,836	FY 2001	5,443
FY 1980	6,050 <sup>B</sup>	FY 2002	5,019
FY 1981	7,264 <sup>B</sup>	FY 2003	8,680 <sup>E</sup>
FY 1982	5,755	FY 2004	9,360 <sup>E</sup>
FY 1983	6,281	FY 2005	9,439 <sup>E</sup>
FY 1984	5,654	FY 2006	9,364 <sup>E</sup>
FY 1985	5,701	FY 2007	9,858 <sup>E</sup>
FY 1986	5,546	FY 2008	9,133 <sup>E</sup>
FY 1987	6,018	FY 2009	10,660 <sup>E</sup>
FY 1988	6,043	FY 2010	9,318 <sup>E</sup>
FY 1989	5,769	FY 2011	8,309
FY 1990	5,645	FY 2012	8,440
FY 1991	5,647	FY 2013	8,811
FY 1992	5,764	FY 2014	8,628
FY 1993	5,362	FY 2015	9,264
FY 1994	6,090 <sup>C</sup>	FY 2016	9,157
FY 1995	7,956 <sup>D</sup>	FY 2017	8,113
FY 1996	4,617	FY 2018	9,344
FY 1997	4,762	FY 2019	10,698
FY 1998	4,869	FY 2020	9,306
FY 1999	5,134	FY 2021	9,190 <sup>F</sup>

- A Source: Expenses are derived from "salary and expense" (S&E) data from the appendices of OMB's annual congressional budget submissions. From the 1997 submission forward, SBA's own more detailed congressional budget submission documents were used to refine the OMB budget numbers, which were rounded to millions beginning in that year. Advocacy totals include economic research.
- B During 1980 and 1981, Advocacy provided extensive staff support to the 1980 White House Conference on Small Business. Also, Congress provided unusually high funding for directed economic research during this period.
- C \$1,507,000 of this amount was expended for the 1995 White House Conference on Small Business.
- D \$2,157,000 of this amount was expended for the 1995 White House Conference on Small Business.
- E Dollars include an agency overhead charge representing Advocacy's share of services and facilities shared in common with all SBA offices and programs. An analogous charge is not included in years prior to FY 2003 or from FY 2011 forward.
- F Amount enacted in Advocacy's FY 2021 appropriation.

## General Accountability Office 2014 Performance Audit

Federal government offices and programs are subject to review and audit, both with respect to general performance and more specific topics. Several different offices conduct such reviews, including agencies' Inspector General offices and the General Accountability Office (GAO), a congressional agency which examines the use of public funds, evaluates federal programs and policies, and provides analyses and recommendations to Congress to help it make more informed decisions. Such reviews and audits are a normal part of the operation of the federal government, and they provide not just the Congress, but also the offices subject to their scrutiny, with valuable insights on how to improve program and office performance.

GAO audits are typically triggered by a request from a congressional committee of jurisdiction over the subject office or program. In 2013, the Senate Appropriations Subcommittee on Financial Services and General Government requested that GAO conduct a performance audit of the Office of Advocacy. The audit was very thorough and lasted for nearly one year. It focused on three main areas: 1) research activities; 2) regulatory activities, including the applicability of the Federal Advisory Committee Act's (FACA) requirements to Advocacy roundtables; and 3) workforce planning efforts.

GAO released its report on Advocacy in July 2014.<sup>363</sup> It identified several areas in which GAO made recommendations for Advocacy to improve its operations. These were all non-financial in nature, and included recommendations to:

- improve guidance in the selection of peer reviewers for Advocacy's research products, and improve documentation of the peer review process;
- strengthen procedures related to federal information quality guidelines;
- strengthen documentation of sources of input for comment letters and roundtable discussions;
- coordinate with SBA officials who oversee website administration to comply with Advocacy's roundtable policy to make information on the events—agendas, presentation materials—publicly available on its website; and
- improve Advocacy's workforce planning efforts by incorporating succession planning.

Advocacy concurred with GAO's recommendations and took action on all immediately after the report was received. Importantly, GAO concurred with Advocacy's longstanding position that its regulatory roundtables were not "advisory committees" within the meaning of FACA. Its summary of this performance audit stated that:

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<sup>363</sup> United States Government Accountability Office, *Office of Advocacy Needs to Improve Controls over Research, Regulatory, and Workforce Planning Activities* (GAO-14-525), <http://www.gao.gov/products/GAO-14-525>.

GAO also found that the Federal Advisory Committee Act’s transparency and other requirements do not apply to Advocacy’s meetings with stakeholders to get input on regulations (roundtables).<sup>364</sup>

## Conclusion

This concludes our survey of Advocacy’s legal authority, organization and budget. We have described in detail Advocacy’s basic charter, Title II of Public Law 94-305, and Public Law 96-354, the Regulatory Flexibility Act, which conferred additional responsibilities on the Chief Counsel, along with authorities to implement those new duties. Each of these core statutes was amended a number of times over the years, and a legislative history of both the original statutes and all substantive amendments appears in this chapter. We traced in detail how Advocacy’s independence from SBA developed incrementally from 1974 forward.

Advocacy’s current organization and authorized staffing levels were then described, followed by treatments of the office’s past authorizations, appropriations since the establishment of a separate Treasury account, and actual obligations from Fiscal Year 1978 through Fiscal Year 2020. We concluded the chapter with the findings of a 2014 GAO performance audit of Advocacy.

We now turn to issues pending for Advocacy as we prepare for the transition in administrations following the 2020 election.

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<sup>364</sup> Ibid., Highlights preface to full report.

## Chapter 7 – Pending Issues

In this chapter, we will review a number of pending issues of which the transition team and next Chief Counsel should be aware. Some of the items mentioned in this chapter will resolve themselves in the normal course of time. Pending economic research projects sponsored by Advocacy will be completed, and regulations will be finalized or withdrawn. Other concerns have and probably will persist over longer periods. We cannot predict every new issue of importance to the small business community that will arise in the future, but many of the concerns with which Advocacy has dealt in the past will continue to be on the agenda in 2020 and beyond. This chapter is divided into three main sections relating respectively to research, regulatory development, and other Advocacy issues.

### Research

In Chapter 2, we examined the vital role of data and research in Advocacy's activities. In order to fulfill our research mandate, a significant portion of the office's operating budget has been dedicated to economic research. Since Fiscal Year 2000, approximately \$350,000 - \$1 million has been allocated annually to Advocacy for economic research and data products.<sup>365</sup> Advocacy uses its economic research funds for two primary purposes: 1) to purchase special data tabulations from government agencies and to otherwise support the development of small firm data at these agencies; and 2) to fund contract research by private-sector vendors on specialized issues. In each instance, Advocacy strives to produce current and relevant research products that are useful for policymakers and other Advocacy stakeholders.

*Data acquisition from other government agencies.* It may come as a surprise to some that government agencies charge each other for their services. But it is a long-established principle in government accounting that users of government work products and services should bear at least some of the costs of their production. Just like other users, Advocacy, with the support of appropriations from Congress, must compensate other government agencies for the extra work involved in creating various types of products from the massive data at their disposal that are not published in the normal course of their own activities. These special data tabulations from other government agencies are essential to many Advocacy research endeavors. In using them, Advocacy adds value to existing government resources, while at the same time reducing the need for new or duplicative data collection from small entities. Also, because of the statutorily confidential nature of the microdata that certain agencies are authorized to collect and maintain, often the only way to derive useful, and disclosable, macrodata from

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<sup>365</sup> Funds for Advocacy's economic research function, excluding salaries and expenses, were for many years set by a specific line item in SBA's annual budget request and appropriations. Since FY 2006, however, Advocacy research has been included within a general amount for Advocacy as a whole.

these sources is to let the “custodians” of the data do the analyses requested. That is what Advocacy is doing when it purchases many of the special tabulations that it uses.

*Improving small business data availability.* In Chapter 2, we reviewed government sources of data that Advocacy routinely uses. There are several gaps in small business data that Advocacy works to close, including business closures, international trade, and the availability of high-frequency real time data. Advocacy’s current small business data projects and uses follow.

- **U.S. Census Bureau, Statistics of U.S. Businesses (SUSB).** Each year, the Office of Advocacy purchases special tabulations of firm size data. This information is available by North American Industrial Classification System (NAICS) codes, by state, county, congressional district, and for the top 50 metropolitan statistical areas (MSA). These data are the main source for many Advocacy statistics used in Advocacy’s small business profiles and the popular *Frequently Asked Questions* publication, and is a key component in calculating the total number of small businesses in the U.S. (Total annual cost: \$125,000)
- **U.S. Census Bureau, Non-employer Statistics by Demographics (NES-D).** While statistics on business owner demographics of employer businesses are available annually from Census Bureau’s Annual Business Survey, business owner demographic statistics of nonemployer businesses have not been updated since 2012 data was released in 2016. NES-D provides annual data on the number of business owners of nonemployer businesses by sex, ethnicity, race, and veteran status. With NES-D the public will have annual counts of the number of women-owned, minority-owned, and veteran-owned businesses in the U.S and by state and sector. Advocacy worked with the Census Bureau to launch the data series and provided funding during its first three years of development. Advocacy plans to continue to support the data series to monitor the state of minority-owned, women-owned, and veteran-owned businesses, and provide timely statistics of these businesses to policymakers and stakeholders. (Total annual cost: \$185,000)
- **U.S. Census Bureau, special tabulations.** From time to time, Advocacy requests special data tabulations from Census. Past tabulations have included specialized data from the Bureau’s quinquennial Economic Census, its Survey of Business Owners, and additional data on non-employer firms. In FY 2015, Advocacy requested a special tabulation of economic data from the Census Bureau on entrepreneurship by age categories and other business characteristics. In FY 2020, Advocacy requested a special tabulation of business characteristics data by firm size and sector related to questions asked about impacts of regulations in their 2016 Annual Survey of Entrepreneurs. (FY 2020 ASE special tabulation: \$10,000)

*Outstanding research contracts.* Much of Advocacy’s independent economic research is conducted through contracts awarded competitively to private sector vendors. Advocacy sponsors contract research on a wide variety of specific topics and other issues of general interest to Advocacy stakeholders. Each year, subject to the availability of funding, Advocacy solicits research proposals from small business contractors using normal federal procurement procedures. Ideas for solicitation topics come from many sources, including input from congressional offices, business organizations and other advocacy groups, and small businesses themselves. Internal discussions among Advocacy staff and leadership also seek to identify areas where new research is needed. The most relevant and feasible topics are typically selected, with at least one being general enough to encourage interested parties to “think outside the box” and submit proposals on topics not specified in the solicitation.



Most Advocacy contract research solicitations are in the form of requests for quotations (RFQs) that are posted on Contract Opportunities, the federal government’s electronic portal for posting contracting opportunities.<sup>366</sup> They are typically small business set-asides (only small firms can compete), and Advocacy has also used a special authority to allow competition to be reserved for firms owned by service-disabled veterans. The proposals received in response to Advocacy RFQs are evaluated on their technical merit and past performance, and awards are made prior to the end of the fiscal year.

Listed below are projects that were outstanding as this report was being finalized. Although Advocacy expects that each of these projects will be completed satisfactorily, each must pass through peer review and meet government-wide information quality standards before publication. Occasionally, contractors are unable to complete a project for various reasons, or problems arise as part of the information quality review process that are insurmountable. Although such instances are rare, it is possible that a project on the list below may not result in a final product. The titles for these “in the pipeline” projects are working titles only and may change before release.

**Recent contracts awarded in progress:**

- Research on African American Entrepreneurship, by Xopolis
- Small business lending banking data, by George Haynes

**Contracts awarded with remaining work prior to release:**

- Research on Millennial Veteran Entrepreneurship, by Insight Policy Research
- Research on the Effects of Small Business Loans on Bank and Small Business Growth, by Intelligent Analytics
- Research on the Role of Distance in Small Business Lending, by Rebel Cole
- Research on Occupational Licensing Stringency and Online Reviews, by Intelligent Analytics

*Understanding the regulatory landscape for small business.*

Advocacy continues to pursue research that can shine a light on the disproportionate regulatory burden small businesses face relative to large businesses. In FY 2018, Advocacy started using its issue brief series to address important analytical issues in small business regulatory analysis with its report, *Examining Small Business Impacts in the Regulatory Development Process: The Drawbacks of Averaging*. Advocacy is currently assessing the 2016 Annual Survey of Entrepreneurs data and other sources for important insights about the impacts of different types of regulations on small businesses of varying sizes, characteristics, and sectors to include in future relevant fact sheets and issue briefs. Additionally, Advocacy is engaged with experts of regulatory analysis in federal agencies researching potential tools to model small business impacts of proposed regulations. Because of limited existing data on regulatory impacts by size of business, new data collections, such as surveys or novel data, are needed to continue to provide policymakers with insight to how regulatory burden affects small businesses.

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<sup>366</sup> See <https://beta.sam.gov/>. Contract Opportunities replaces the prior FedBizOpps.

## Regulatory Development

In this chapter on pending issues, we are attempting to identify issues that should be on the radar screen of the transition team and new staff that will join SBA and Advocacy in the next administration. It is difficult to identify regulatory issues and specific rules that may or may not be under consideration in the next year and beyond. Administration and agency priorities could change, and some issues from past years will continue to be of interest. Advocacy will need to be especially attentive to its regulatory work in progress. In this section, we will briefly list pending regulations on which Advocacy has engaged publicly and other anticipated regulatory issues.

*Pending regulatory issues.* Following are specific regulatory issues that Advocacy was following as this paper was being finalized. They are organized alphabetically by agency.

- **Army Corps of Engineers.** On November 16, 2020, Advocacy submitted a comment letter in response to the Army Corps of Engineers' proposed rule, *Proposal to Reissue and Modify Nationwide Permits*.<sup>367</sup> Advocacy suggested modifications to the section on Nationwide Permit 48 to add additional clarity and justification for the rulemaking.
- **U.S. Department of Agriculture.** On October 8, 2020, Advocacy submitted comments in response to the reopening of the public comment period for the U.S. Department of Agriculture's Agricultural Marketing Service interim final rule, *Establishment of a Domestic Hemp Production Program*.<sup>368</sup> Advocacy is concerned about the potential effects the rule will have on small businesses if it is finalized without modifications. Advocacy urged the agency to reconsider certain requirements of the rule, and to consider regulatory alternatives.
- **Environmental Protection Agency.** In August 2020, Advocacy filed comments on EPA's proposed rule *Increasing Consistency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process*.<sup>369</sup> EPA's proposal would require Benefit-Cost Analyses for all significant rulemakings under the Clean Air Act. Advocacy suggested that EPA require greater consideration of small business impacts. The final rule was under OMB review as this paper was being finalized.
- **Federal Communications Commission.** At its December 10, 2020 open meeting, the FCC considered a draft Report and Order that would require Eligible Telecommunications Carriers to remove equipment and services that pose an unacceptable risk to national security, establish the Secure and Trusted Communications Networks Reimbursement Program, and establish criteria for covered communications equipment and services that must be removed. Advocacy has raised concerns about the impact replacing equipment would have on small telecommunications carriers. The FCC has been working to establish a reimbursement program that would offset the costs, subject to appropriations.

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<sup>367</sup> <https://advocacy.sba.gov/2020/11/19/advocacy-submits-comment-letter-to-army-corps-on-proposal-to-reissue-and-modify-nationwide-permits/>

<sup>368</sup> <https://advocacy.sba.gov/2020/10/09/advocacy-comments-on-usdas-reopened-comment-period-for-interim-final-rule-to-establish-a-domestic-hemp-production-program/>

<sup>369</sup> <https://advocacy.sba.gov/2020/08/03/advocacy-submits-comments-on-increasing-consistency-in-considering-benefits-and-costs-in-the-clean-air-act-rulemaking-process-to-epa/>

- **The Federal Reserve.** In April 2020, Advocacy submitted comments on the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation's (FDIC) joint proposed *Notice of Proposed Rulemaking on the Community Reinvestment Act*.<sup>370</sup> Advocacy encouraged the agencies to exempt small banks from certain potentially costly requirements of this proposal. The Board of Governors of the Federal Reserve System has published an Advance Notice of Proposed Rulemaking to solicit public input regarding modernizing the Board's Community Reinvestment Act (CRA) regulatory and supervisory framework.
- **Food and Drug Administration.** On October 14, 2020, Advocacy submitted a comment letter on FDA's *Premarket Tobacco Product Application (PMTA)*.<sup>371</sup> Advocacy supported the vaping industry's citizen petition to the FDA requesting a 180-day extension of the PMTA compliance date.
- **Department of Labor.** On November 9, 2020, Advocacy submitted a comment letter to DOL on the department's Interim Final Rule (IFR) on its *H-1B Visa rule*, which increases the prevailing wages for H-1B visas and similar high-skilled visas.<sup>372</sup> Advocacy cited concern that this IFR, which will cost employers over \$198 billion dollars over a 10-year period according to DOL's own analysis, will have a disproportionate impact on small businesses. Advocacy recommended that DOL delay implementation of this IFR by a minimum of 30 days to receive comments from small businesses on the impacts of this regulation and to develop less burdensome regulatory alternatives. This rule is the subject of several lawsuits.
- **Department of Health and Human Services.** An HHS *Proposed Rule on Retrospective Regulatory Review* would require the department to assess its regulations every ten years to determine whether they are subject to review under the Regulatory Flexibility Act. Regulations would expire if the department did not assess and (if required) review them in a timely manner.
- **Department of the Treasury and the Internal Revenue Service.** IRS has published a proposed rule, *Section 42 Low-Income Housing Credit Average Income Test Regulations*, which provides for an additional method – the average income test – to determine eligibility for the section 42 low-income housing credit.

**SBREFA panels.** As explained in Chapter 3, Section 609 of the Regulatory Flexibility Act requires three agencies – OSHA, EPA, and the CFPB – to convene special outreach panels to hear specifically from small entities who will be subject to certain upcoming rules. This requirement was originally enacted by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, as amended by the Jobs Act of 2010. As this report was being finalized, two SBREFA panels had been convened on which Advocacy was participating.

**Consumer Financial Protection Bureau. Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.** This panel was convened by CFPB in October 2020. Section 1071 of the

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<sup>370</sup> <https://advocacy.sba.gov/2020/04/09/advocacy-submits-comments-on-the-office-of-the-comptroller-of-the-currency-and-the-federal-deposit-insurance-commissions-joint-proposed-rule-on-the-community-reinvestment-act/>

<sup>371</sup> <https://advocacy.sba.gov/2020/10/14/advocacy-submits-comments-on-the-vaping-industrys-fda-citizen-petition/>

<sup>372</sup> <https://advocacy.sba.gov/2020/11/10/advocacy-submits-comment-letter-to-recommend-that-dol-delay-implementation-of-ifr-increasing-wages-for-h-1b-visas/>

Dodd-Frank Act amended the Equal Credit Opportunity Act to require financial institutions to compile, maintain, and submit to the Bureau certain data on applications for credit for women-owned, minority-owned, and small businesses.

**Environmental Protection Agency. National Emission Standards for Hazardous Air Pollutants:**

**Ethylene Oxide Commercial Sterilization and Fumigation Operations.** This panel was convened on November 25, 2020; the panel outreach meeting with small entities was held on December 10, 2020. A panel report is due on January 14, 2021. This rule would apply to facilities that use Ethylene Oxide (EtO) to sterilize medical devices and fumigate spices. EPA updated its risk assessments for EtO emissions in 2014, with a rather large increase in the risks to populations near these facilities. It has been under pressure to update its regulations since then.

Advocacy anticipates that in early 2021 EPA will convene SBREFA panels for most or all of 10 high priority chemicals reviewed under the Toxic Substances Control Act. EPA is now required to have 20 chemicals in the process of risk evaluation at all times, and the scope of the next 20 risk evaluations was published in August 2020. These risk evaluations must be complete by the end of 2022, after which more SBREFA panels will likely follow.

Chemical Name	Status
Methylene Chloride	Panel announced, pre-panel outreach meeting held on 11/4. Panel not yet convened
1-Bromopropane	Panel announced, pre-panel outreach meeting held on 11/5. Panel not yet convened
HBCD	Panel announced, awaiting pre-panel outreach meeting
Carbon Tetrachloride	Panel announced; SER recruitment underway
Trichloroethylene (TCE)	Panel announced; SER recruitment underway
Perchloroethylene	Awaiting final risk evaluation
NMP	Awaiting final risk evaluation
Asbestos	Awaiting final risk evaluation
Pigment Violet 29	Risk evaluation out for supplemental public comment
1,4-dioxane	Risk evaluation out for supplemental public comment

*Institutionalizing relationships with regulatory agencies.* In Chapter 3 we explained the many ways in which Advocacy interacts with other federal agencies in the rule development process. In

the past, Advocacy often found itself in a largely reactive posture, responding to initiatives from other agencies as they appeared in the formal notice and comment period. In such circumstances, Advocacy usually had little warning of a rule's appearance and limited time to prepare its comments representing the interests of small entities.

Fortunately, as more and more agencies have been considering small entity effects early in the rule-writing process, Advocacy has been developing strong working relations with many agencies, and it is now not uncommon for regulatory development officials in those agencies to seek Advocacy input and technical assistance before their rules are in the home stretch. These agencies are learning that early consideration of the potential effects of their proposals on those to be regulated results in better rules – rules that impose fewer unnecessary burdens on the public, have better compliance experience and lower litigation risk, and still meet the regulatory and public policy objectives of the agency.

This shift to greater institutionalization of small business awareness in many regulatory agencies is the result of a number of factors. The legislative framework of the RFA, as amended by SBREFA, is certainly of special importance, particularly its provisions relating to judicial review and early notification to Advocacy about rules with potentially significant effects on substantial numbers of small entities. Executive Order 13272 and the series of executive orders we outlined in Chapter 3, with their emphasis on small business concerns, built on these provisions, and made it clear they had the strong support of the Executive Office of the President and that they applied throughout government.

But as important as these institutional mandates are, it is the responsibility of individuals within regulatory agencies and within Advocacy to make their promise become reality. Advocacy's own professionals work every day with their counterparts in other agencies to make this happen. We have seen how its Office of Interagency Affairs provides RFA compliance training to agencies throughout government. Advocacy attorneys and economists always stand ready to respond to the most routine or most complex inquiry on the RFA or small business effects, or to provide any appropriate technical assistance requested. And, of course, Advocacy works with small business organizations and trade associations to develop information that can help agencies write better rules by understanding their effects on small entities. Advocacy has encouraged agencies to seek out the opinions of small businesses early in the regulatory development process. Many agencies routinely participate in Advocacy roundtables both in DC and elsewhere in advance of rule development.

Through the years, strong relationships have been built between the professional staffs at Advocacy, regulatory agencies, and OMB's Office of Information and Regulatory Affairs. These relationships have served the small business community well, and Advocacy works hard to keep them strong. Advocacy's outreach efforts, combined with a greater willingness on the part of many agencies to participate in these efforts, give small businesses greater access to the regulatory process. Advocacy will continue its efforts to build new relationships with regulatory agencies and to strengthen old ones.

## Other Advocacy Issues

In addition to the pending research and regulatory issues outlined above, we will conclude this chapter with other issues pending as we prepare for the 2020 transition including: the challenge of measuring effectiveness and outcomes, Advocacy's legislative priorities, and other legislative issues.

*The challenge of measuring effectiveness and outcomes.* As part of the annual federal budget process, agencies are required to prepare plans for performance in future years and to report on whether the goals set in their past plans have been met. Each agency has its own primary "strategic" goals, and its various offices and programs contribute to achieving the strategic goals. These component activities establish their own indicators to measure whether they are meeting internal goals which assist their agency achieve its overall strategic goals.

Prior to the establishment of Advocacy's separate appropriations account by the Small Business Jobs Act of 2010, Advocacy participated in SBA's overall performance plan that was submitted with the agency's official annual congressional budget submission. In recognition of the office's independent status and newly separate appropriations account, Advocacy's FY 2013 Congressional Budget Justification and FY 2011 Annual Performance Report were for the first time presented in a separate appendix to SBA's submission. The new format was intended to improve the transparency of Advocacy operations and costs, more clearly identify the resources available to Advocacy, and provide a basis for performance measurement.

Advocacy adopted two strategic goals that are specific to the office, and it revised the performance indicators that are associated with these goals. The two goals align closely with Advocacy's two primary statutory responsibilities, regulatory advocacy and economic research.

- **Advocacy Strategic Goal 1:** To be an independent voice for small businesses inside the government and to assist federal agencies in the development of regulations and policies that minimize burdens on small entities in order to support their start-up, development and growth.
- **Advocacy Strategic Goal 2:** To develop and disseminate research and data on small businesses and the role that they play in the economy, including the availability of credit, the effects of regulations and taxation, the role of firms owned by women, minority and veteran entrepreneurs, innovation, and factors that encourage or inhibit small business start-up, development and growth.

To measure progress in meeting these goals, three performance indicators and one efficiency measure from prior years were continued unchanged, two new indicators were added, and two other indicators which had proved of limited usefulness to managers were dropped. Advocacy has had since FY 2013 five performance indicators and one efficiency measure. The five annual performance goals are:<sup>373</sup>

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<sup>373</sup> These goals and performance metrics for past years are posted in Advocacy's annual congressional budget submissions on the office's performance and budget website at <https://www.sba.gov/advocacy/performance-budget>.

- To achieve at least \$6.5 billion in regulatory cost savings for small businesses;
- To provide RFA compliance training to at least 100 regulatory development officials;
- To publish at least 20 research or data products;
- To have regional advocates participate in at least 360 regional outreach events; and
- To have Advocacy economists participate in at least 12 outreach events.

Most of Advocacy's indicators are relatively straightforward and not difficult to measure. However, the measurement of regulatory cost savings is both difficult and complex, and it requires some explanation. We have already covered the basic principles of how cost savings are calculated in Chapter 3, but a number of points should be made here in the context of future challenges in the measurement of effectiveness and outcomes.

- There can be considerable variation from year to year in cost savings estimates. This arises from a number of factors beyond Advocacy's control, including the timing of agency proposals and the publication of final rules, the use of varying methodologies by different agencies in the calculation of cost savings, occasional "outliers" with unusually large savings, and the willingness of agencies to agree to Advocacy recommendations.
- Advocacy's official cost savings estimates reflect only those savings captured after a regulatory proposal is made public. Advocacy's efforts pursuant to Executive Orders 13272, 13563 and 13579 have proven increasingly successful, and more agencies are doing a better job in outreach to small entities and in their analyses of a rule's impact before the regulation is made public in the *Federal Register*, proposing less burdensome regulatory alternatives at the outset of the process. Part of Advocacy's role in the interagency process is to encourage agencies to use more accurate cost estimates and more realistic assumptions in both their Initial Regulatory Flexibility Analyses and Regulatory Impact Analyses. This means that cost estimates often increase and key assumptions (such as the number of affected small entities) may change. As a result, there are often improvements in the quality and accuracy of agencies' analyses, but a decrease in calculated cost savings after rules are actually proposed.
- As discussed in prior chapters, the 2017 Executive Orders 13771 and 13777 mandated aggressive new efforts to reduce regulatory costs, and these efforts have been very successful. Administration initiatives have reduced the number of new regulations, required off-setting cost reductions when regulations are proposed, mandated the review of existing regulations for potential simplification or elimination, and generally required regulatory agencies to be more sensitive to the costs that their actions impose. Advocacy is fully supportive of these efforts and welcomes all resulting reductions in regulatory costs for small entities, but as agencies across government have responded to these new initiatives, not only have there been fewer new regulations, but agencies are doing a better job of examining the potential costs of their actions before they decide to publish a regulation, a practice that Advocacy has promoted for many years. One result of this is that Advocacy has had fewer opportunities to have a cost-reducing impact between the publication of agencies' proposed rules and their finalization, the period during which Advocacy scores any regulatory cost savings in its own performance metrics.
- Many of Advocacy's greatest successes cannot be explained or quantified publicly because of the importance of maintaining the confidentiality of pre-proposal interagency communications. Advocacy measures its accomplishments through cost savings that can be claimed publicly, but actual savings are much higher.

The success of Advocacy's early intervention in the rulemaking process and its agency RFA training program under Executive Order 13272 has presented Advocacy with an interesting problem. How can Advocacy modernize the measurement of its effectiveness to encompass its ongoing regulatory interventions, determine the benefits of earlier intervention in the rulemaking process, and evaluate the success of agency training under the executive order?

Theoretically, as Advocacy achieves its goals in utilizing these tools and agencies become more proficient in complying with the RFA and institutionalizing consideration of small entities in the rulemaking process, cost savings between the first public proposal of a rule and its finalization should diminish. As agencies begin to see for themselves the importance of implementing the RFA early in the rulemaking process, cost savings will be more difficult to calculate, and other measures of the law's effectiveness may be needed.

In fact, this is exactly the experience that Advocacy has had in recent years. These factors, and increased rigor in the calculation of cost savings themselves, have resulted in lower annual cost savings from Advocacy's public interventions. Also, many Advocacy regulatory efforts in recent years have resulted in significant regulatory actions by agencies that cannot be quantified but are still of benefit to small entities. Advocacy publishes examples of such actions in its annual RFA reports, but they are still not reflected in the office's performance metrics.

An important pending issue for Advocacy is how better to measure the effectiveness of its efforts to reduce regulatory burdens on small entities, and how to integrate such metrics into the office's performance goaling and measurement requirements.

*Legislative priorities.* From time to time, Advocacy publishes a listing of its legislative priorities in order to provide to its stakeholders and the public at large basic information in a convenient format on matters that the Chief Counsel believes are most in need of legislative attention.<sup>374</sup> At the end of FY 2016, Advocacy's legislative priorities were focused on revisions to the Regulatory Flexibility Act, and these priorities have not changed since that time.

As detailed in prior chapters, Advocacy's experience with the implementation of the RFA is both long and deep. The RFA gives the Chief Counsel a variety of specific duties and authorities. Agencies are required to transmit to the Chief Counsel their regulatory agendas, both their initial and final regulatory flexibility analyses, and their certifications of rules without significant effects. The Chief Counsel participates in the SBREFA panels required for significant EPA, OSHA, and CFPB rules. The Chief Counsel reports annually to the President and the Congress on agency compliance with the RFA and is authorized to appear as *amicus curiae* in any action brought in a court of the United States to review a rule, including RFA compliance issues.

Advocacy has worked closely with agencies throughout the government in assisting them with RFA compliance. Executive Order 13272 requires Advocacy to provide RFA training to regulatory

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<sup>374</sup> The formatted Legislative Priorities document is reprinted in Appendix M.



development officials, and more than 1,700 have received such training from Advocacy attorneys and economists since this requirement went into effect in 2002, including officials in 18 cabinet level departments, 80 separate component agencies and offices within these departments, and 24 independent agencies. Advocacy publishes a comprehensive RFA compliance guide for agencies, and its professionals are always available to provide technical assistance to agencies' regulatory staff.

This broad experience with the RFA since its original enactment in 1980, together with a growing body of case law, give Advocacy a unique perspective on the legislation's implementation. Based on this experience and on input from its stakeholders, Advocacy has identified six areas which it believes need legislative attention if the RFA is to provide small entities with the full consideration which Congress originally intended.

**Indirect Effects.** Under the RFA, agencies are not currently required to consider the impact of a proposed rule on small businesses that are not directly regulated by the rule, even when the impacts are foreseeable and often significant. Advocacy believes that indirect effects should be part of the RFA analysis, but that the definition of indirect effects should be specific and limited so that the analytical requirements of the RFA remain reasonable.

**Advocacy recommendation:** Amend section 601 of the RFA to define "impact" as including the reasonably foreseeable effects on small entities that purchase products or services from, sell products or services to, or otherwise conduct business with entities directly regulated by the rule; are directly regulated by other governmental entities as a result of the rule; or are not directly regulated by the agency as a result of the rule but are otherwise subject to other agency regulations as a result of the rule.

**Scope of the RFA.** Currently, the requirements of the RFA are limited to those rulemakings that are subject to notice and comment. Section 553 of the Administrative Procedure Act (APA), which sets out the general requirements for rulemaking, does not require notice and comment for interim final rulemakings, so agencies may impose a significant economic burden on small entities through these rulemakings without conducting an Initial Regulatory Flexibility Analysis (IRFA) or Final Regulatory Flexibility Analysis (FRFA). Advocacy believes the definition of a rule needs to be expanded to include interim final rulemakings that have the potential to impose economic burden on small entities.

Further, the IRS regularly promulgates rules that are costly and complicated for small businesses. However, the IRS contends that it has no discretion in implementing legislation and that the agency has little authority to consider less costly alternatives under the RFA. Therefore, the IRS often does not analyze the cost of its rules to small business under the RFA.<sup>375</sup> In the absence of the IRS considering the

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<sup>375</sup> On April 11, 2018, the Department of the Treasury and OMB signed a Memorandum of Agreement outlining the general terms for OIRA within OMB to review tax regulatory actions under Executive Order 12866. The MOA went into immediate affect with the exception of the additional information required under section 6(a)(3)(C) of E.O. 12866 pertaining to tax regulatory actions that would have an annual non-revenue effect on the economy of \$100 million or more, measured against a no-action baseline, which went into effect in April 2019.

impact of its rules under the RFA, Congress should require the Congressional Budget Office (CBO) to provide small business cost and paperwork burden estimates for pending tax legislation. This would help ensure that tax writers and the public are aware of the compliance burden in addition to the fiscal consequences.

Finally, the RFA has its own definition of information collection. However, this definition is identical to the Paperwork Reduction Act (PRA) (35 § U.S.C. 3501, *et. seq.*). A cross-reference to the PRA would allow Advocacy to rely on OMB's existing implementing regulations (5 CFR 1320) and guidance.

**Advocacy recommendation:** Require RFA analysis for all interim final rulemakings with a significant economic impact on a substantial number of small entities. Require CBO to score proposed tax legislation for the estimated costs and paperwork burden to small business. Amend the conditions for IRS rulemakings to require an IRFA/FRFA to reference the PRA.

**Quality of Analysis.** The Office of Advocacy is concerned that some agencies are not providing the information required in the IRFA and FRFA in a transparent and easy-to-access manner. This hinders the ability of small entities and the public to comment meaningfully on the impacts on small entities and possible regulatory alternatives. Agencies should be required to include an estimate of the cost savings to small entities in the FRFA. In addition, agencies should have a single section in the preamble of the notice of proposed rulemaking and notice of final rulemaking that lays out clearly the substantive contents of the IRFA or FRFA, including a specific narrative for each of the required elements.

**Advocacy recommendation:** Require agencies to develop cost savings estimates.

Require a clearly delineated statement of the contents of the IRFA and FRFA in the preamble of the proposed and final rule.

**Quality of Certification.** Some agencies' improper certifications under the RFA have been based on a lack of information in the record about small entities, rather than data showing that there would not be a significant impact on a substantial number of small entities. A clear requirement for threshold analysis would be a stronger guarantee of the quality of certifications.

**Advocacy recommendation:** Require agencies to publish a threshold analysis, supported by data in the record, as part of the factual basis for the certification.

**SBREFA Panels.** The Department of Interior's Fish and Wildlife Service consistently promulgates regulations without proper economic analyses. Advocacy believes the rules promulgated by this agency would benefit from being added as a covered agency subject to Small Business Advocacy Review Panels.

Advocacy also believes that some recent SBREFA panels have been convened prematurely. SBREFA panels work best when small entity representatives have sufficient information to understand the purpose of the potential rule, likely impacts, and preliminary assessments of the costs and benefits of various alternatives. With this information small entities are better able to provide meaningful input on the ways in which an agency can minimize impacts on small entities consistent with the agency mission. Therefore the RFA should be amended to require that prior to convening a panel, agencies should be

required to provide, at a minimum, a clear description of the goals of the rulemaking, the type and number of affected small entities, a preferred alternative, a series of viable alternatives, and projected costs and benefits of compliance for each alternative.

**Advocacy recommendation:** Require SBREFA panels under RFA Section 609(b) for the Department of the Interior’s Fish and Wildlife Service. Require better disclosure of information including at a minimum, a clear description of the goals of the rulemaking, the type and number of affected small entities, a preferred alternative, a series of viable alternatives, and projected costs and benefits of compliance for each alternative to the small entity representatives.

**Retrospective Review.** In addition to the existing required periodic review, agencies should accept and prioritize petitions for review of final rules. They should be required to provide a timely and effective response in which they demonstrate that they have considered alternative means of achieving the regulatory objective while reducing the regulatory impact on small businesses. This demonstration should take the form of an analysis similar to a FRFA.

**Advocacy recommendation:** Strengthen section 610 retrospective review to prioritize petitions for review that seek to reduce the regulatory burden on small business and provide for more thorough consideration of alternatives.

**Advocacy’s Independence.** There was early recognition by Congress of the importance of small businesses to our nation’s economy. The Office of Advocacy was created by Congress in 1976 to be an independent voice for small business within the federal government. Title II of Public Law 94-305 and the Regulatory Flexibility Act confer responsibilities and authorities on Advocacy. Both laws are standing, non-expiring legislation and have been amended over the years.

As detailed in Chapters 1 and 6 of this paper, an important theme leading to Public Law 94-305 was the need for an independent voice within the federal government to represent the interests of small business. The law provides that the Chief Counsel is to be appointed from civilian life by the President with the advice and consent of the Senate, and Advocacy employees serve at the pleasure of the Chief Counsel. Further, the law authorized the Chief Counsel to prepare and publish reports as deemed appropriate and the reports “shall not be submitted to the Office of Management and Budget (OMB) or to any other Federal agency or executive department for any purpose prior to transmittal to the Congress and the President.” For this reason, Advocacy does not circulate its work product for clearance with the SBA Administrator, OMB, or any other federal agency prior to publication. Since 2010, Advocacy has also had independent budget authority.

However, Advocacy still encounters challenges with maintaining its independence from SBA. The fact that the words “Small Business Administration” remain a part of Advocacy’s name continues to confuse the public and even some federal agencies. To avoid this confusion, Congress might consider changing Advocacy’s name to clarify that Advocacy is not a program within the Small Business Administration, but rather a separate, independent office representing small businesses.

That said, Advocacy is a relatively small operation and, as provided in statute, continues to rely on SBA for a variety of administrative support services, ranging from office space, equipment, IT, and communications, human resources, and contracting support. A Memorandum of Understanding between SBA and Advocacy formalizes their respective responsibilities in providing this support.

***Advocacy and international trade.*** As discussed in Chapter 3, Advocacy began a special initiative relating to international trade in 2012. Advocacy's unique knowledge of how regulations affect small business gives the office the ability to help American small businesses have a place at the table during trade negotiations. Advocacy can be their voice encouraging policies that will allow them easier access to the 95 percent of the world's customers outside of our borders.

***U.S.-Canada Regulatory Cooperation Council.*** In FY 2012, Advocacy served as the U.S. government co-lead (along with the Department of Commerce) for developing the Regulatory Cooperation Council's Small Business Lens, one of the 29 action plans developed by the U.S. and Canadian governments to help better align regulations and regulatory actions. Advocacy worked closely with its Canadian counterparts to meet the deliverables which became the Small Business Lens section of the regulatory cooperation agreement. In that effort, Advocacy and its Canadian counterpart's goal continues to be that small businesses' concerns are at the forefront of all regulatory alignment efforts.

Advocacy was invited to participate in these activities by the Office of the United States Trade Representative (USTR) because it is the sole federal office that represents the interests of small business within the federal rulemaking process. Advocacy is the expert in small business regulatory coherence and reducing regulatory impacts to small business. The USTR subsequently invited Advocacy to join the interagency Small and Medium-sized Enterprises (SME) trade group and to participate in the Transatlantic Trade and Investment Partnership (TTIP) negotiations when they were announced in July 2013. As a result, Advocacy participated in the three rounds of TTIP negotiations and provided comments on written materials shared with the EU which were intended to become the basis for an SME Chapter in the TTIP. This work will help inform current negotiations on a new US-EU trade agreement.

***Good regulatory practice.*** Advocacy's role includes promotion of good regulatory practices in other countries for U.S. small businesses, especially exporters. In substantive discussion of regulations and small businesses, Advocacy has offered a unique view on regulatory impacts on small businesses. Advocacy's contribution was important to furthering the discussion of reducing barriers for U.S. companies to trade with the EU, particularly to better understand how regulations impact small businesses. Advocacy can be particularly helpful in providing information on regulatory flexibility for small businesses. While the U.S. regulatory process is open and online, other countries' systems can be opaque and non-participatory, especially for small businesses. Another Advocacy goal is to push for parallel access for U.S. small businesses. For this reason, Advocacy has been asked by U.S. negotiators to strategize on how to promote best regulatory practices.

***Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA).*** With the enactment of the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), Advocacy acquired new duties on behalf of

small businesses. Under TFTEA, the Chief Counsel for Advocacy must convene an interagency working group (IWG) whenever the President notifies Congress that the Administration intends to enter into trade negotiations with another country. The purpose of the IWG is to conduct small business outreach in manufacturing, services, and agriculture sectors and gather input on trade agreement's potential.

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

**Updating Advocacy's charter.** Public Law 94–305 established the Office of Advocacy and its statutory authority. Section 202 of the law sets forth the primary functions of the Office of Advocacy relating to the study of small business. Currently, it directs Advocacy to “examine the role of small business in the American economy and the contribution which small business can make in improving competition.” It is silent regarding Advocacy's ability to study the role of small business in international economies. As stated above, Advocacy is already charged with producing reports concerning international trade agreements under TFTEA, but this is not reflected in Advocacy's charter. Congress should amend Advocacy's charter to include international economies as part of its research functions.

Similarly, Section 203 of Advocacy's charter sets forth the duties of the Office of Advocacy that shall be performed on a continuing basis. One of these duties is to “represent the views and interests of small businesses before other Federal agencies whose policies and activities may affect small business.” It is silent regarding the Advocacy's authority to represent small business views and interests before foreign governments and international entities. As stated above, Advocacy is already frequently involved in international trade discussions on behalf of America's small businesses, but this is not reflected in Advocacy's charter. Congress should amend Advocacy's charter in Section 203 to clarify Advocacy's ability to represent small business views and interests before foreign governments and other international entities for the purpose of contributing to regulatory and trade initiatives.

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# Appendix A

## Public Law 94-305, Statutory Authority for the Office of Advocacy

Title II, Public Law 94-305, as amended (15 §§ U.S.C. 634a - 634g)

### Statutory Authority for the Office of Advocacy

(current through December 20, 2020)

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#### TITLE 15--COMMERCE AND TRADE CHAPTER 14A--AID TO SMALL BUSINESS

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<b>Sec. 634a.</b>	Office of Advocacy within Small Business Administration; Chief Counsel for Advocacy
<b>Sec. 634b.</b>	Primary functions of Office of Advocacy
<b>Sec. 634c.</b>	Additional duties of Office of Advocacy
<b>Sec. 634d.</b>	Staff and powers of Office of Advocacy
<b>Sec. 634e.</b>	Assistance of Government agencies
<b>Sec. 634f.</b>	Reports
<b>Sec. 634g.</b>	Authorization of appropriations

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#### Section 634a. Office of Advocacy within Small Business Administration; Chief Counsel for Advocacy

There is established within the Small Business Administration an Office of Advocacy. The management of the Office shall be vested in a Chief Counsel for Advocacy who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate.

SOURCE: Public Law 94-305, title II, Sec. 201, June 4, 1976, 90 Stat. 668.

#### Section 634b. Primary functions of Office of Advocacy

The primary functions of the Office of Advocacy shall be to -

- (1) examine the role of small business in the American economy and the contribution which small business can make in improving competition, encouraging economic and social mobility for all citizens, restraining inflation, spurring production, expanding employment opportunities, increasing productivity, promoting exports, stimulating innovation and entrepreneurship, and providing an avenue through which new and untested products and services can be brought to the marketplace;
- (2) assess the effectiveness of existing Federal subsidy and assistance programs for small business and the desirability of reducing the emphasis on such existing programs and increasing the emphasis on general assistance programs designed to benefit all small businesses;
- (3) measure the direct costs and other effects of government regulation on small businesses; and make legislative and nonlegislative proposals for eliminating excessive or unnecessary regulations of small businesses;

- (4) determine the impact of the tax structure on small businesses and make legislative and other proposals for altering the tax structure to enable all small businesses to realize their potential for contributing to the improvement of the Nation's economic well-being;
- (5) study the ability of financial markets and institutions to meet small business credit needs and determine the impact of government demands for credit on small businesses;
- (6) determine financial resource availability and to recommend methods for delivery of financial assistance to minority enterprises, including methods for securing equity capital, for generating markets for goods and services, for providing effective business education, more effective management and technical assistance, and training, and for assistance in complying with Federal, State, and local law;
- (7) evaluate the efforts of Federal agencies, business and industry to assist minority enterprises;
- (8) make such other recommendations as may be appropriate to assist the development and strengthening of minority and other small business enterprises;
- (9) recommend specific measures for creating an environment in which all businesses will have the opportunity to complete [\*] effectively and expand to their full potential, and to ascertain the common reasons, if any, for small business successes and failures;  
[\* So in original. Probably should be "compete".]
- (10) determine the desirability of developing a set of rational, objective criteria to be used to define small business, and to develop such criteria, if appropriate;
- (11) advise, cooperate with, and consult with, the Chairman of the Administrative Conference of the United States with respect to section 504(e) of title 5; and
- (12) evaluate the efforts of each department and agency of the United States, and of private industry, to assist small business concerns owned and controlled by veterans, as defined in section 632(q) of this title, and small business concerns owned and controlled by serviced-disabled [\*] veterans, as defined in such section 632(q) of this title, and to provide statistical information on the utilization of such programs by such small business concerns, and to make appropriate recommendations to the Administrator of the Small Business Administration and to the Congress in order to promote the establishment and growth of those small business concerns.

[\* So in the original. Probably should be "service-disabled"]

SOURCE: Public Law 94-305, title II, Sec. 202, June 4, 1976, 90 Stat. 668; Public Law 96-481, title II, Sec. 203(b), Oct. 21, 1980, 94 Stat. 2327; Public Law 106-50, title VII, Sec. 702, Aug. 17, 1999, 113 Stat. 250.

#### **Section 634c. Additional duties of Office of Advocacy**

- (a) **In general.** The Office of Advocacy shall also perform the following duties on a continuing basis:
  - (1) serve as a focal point for the receipt of complaints, criticisms, and suggestions concerning the policies and activities of the Administration and any other Federal agency which affects small businesses;
  - (2) counsel small businesses on how to resolve questions and problems concerning the relationship of the small business to the Federal Government;
  - (3) develop proposals for changes in the policies and activities of any agency of the Federal Government which will better fulfill the purposes of this chapter and communicate such proposals to the appropriate Federal agencies;
  - (4) represent the views and interests of small businesses before other Federal agencies whose policies and activities may affect small business; and
  - (5) enlist the cooperation and assistance of public and private agencies, businesses, and other organizations in disseminating information about the programs and services provided by the Federal Government which are of benefit to small businesses, and information on how small businesses can participate in or make use of such programs and services, and
  - (6) carry out the responsibilities of the Office of Advocacy under chapter 6 of title 5.



**(b) Outreach and input from small businesses on trade promotion authority**

**(1) Definitions.** In this subsection—

- (A) the term “agency” has the meaning given the term in section 551 of title 5;
- (B) the term “Chief Counsel for Advocacy” means the Chief Counsel for Advocacy of the Small Business Administration;
- (C) the term “covered trade agreement” means a trade agreement being negotiated pursuant to section 4202(b) of title 19; and
- (D) the term “Working Group” means the Interagency Working Group convened under paragraph (2)(A).

**(2) Working group**

- (A) **In general.** Not later than 30 days after the date on which the President submits the notification required under section 4204(a) of title 19, the Chief Counsel for Advocacy shall convene an Interagency Working Group, which shall consist of an employee from each of the following agencies, as selected by the head of the agency or an official delegated by the head of the agency:
  - (i) The Office of the United States Trade Representative.
  - (ii) The Department of Commerce.
  - (iii) The Department of Agriculture.
  - (iv) Any other agency that the Chief Counsel for Advocacy, in consultation with the United States Trade Representative, determines to be relevant with respect to the subject of the covered trade agreement.
- (B) **Views of small businesses.** Not later than 30 days after the date on which the Chief Counsel for Advocacy convenes the Working Group under subparagraph (A), the Chief Counsel for Advocacy shall identify a diverse group of small businesses, representatives of small businesses, or a combination thereof, to provide to the Working Group the views of small businesses in the manufacturing, services, and agriculture industries on the potential economic effects of the covered trade agreement.

**(3) Report**

- (A) **In general.** Not later than 180 days after the date on which the Chief Counsel for Advocacy convenes the Working Group under paragraph (2)(A), the Chief Counsel for Advocacy shall submit to the Committee on Small Business and Entrepreneurship and the Committee on Finance of the Senate and the Committee on Small Business and the Committee on Ways and Means of the House of Representatives a report on the economic impacts of the covered trade agreement on small businesses, which shall—
  - (i) identify the most important priorities, opportunities, and challenges to various industries from the covered trade agreement;
  - (ii) assess the impact for new small businesses to start exporting, or increase their exports, to markets in countries that are parties to the covered trade agreement;
  - (iii) analyze the competitive position of industries likely to be significantly affected by the covered trade agreement;
  - (iv) identify—
    - (I) any State-owned enterprises in each country participating in negotiations for the covered trade agreement that could pose a threat to small businesses; and
    - (II) any steps to take to create a level playing field for those small businesses;
  - (v) identify any rule of an agency that should be modified to become compliant with the covered trade agreement; and
  - (vi) include an overview of the methodology used to develop the report, including the number of

small business participants by industry, how those small businesses were selected, and any other factors that the Chief Counsel for Advocacy may determine appropriate.

- (B) **Delayed submission.** To ensure that negotiations for the covered trade agreement are not disrupted, the President may require that the Chief Counsel for Advocacy delay submission of the report under subparagraph (A) until after the negotiations for the covered trade agreement are concluded, provided that the delay allows the Chief Counsel for Advocacy to submit the report to Congress not later than 45 days before the Senate or the House of Representatives acts to approve or disapprove the covered trade agreement.
- (C) **Avoidance of duplication.** The Chief Counsel for Advocacy shall, to the extent practicable, coordinate the submission of the report under this paragraph with the United States International Trade Commission, the United States Trade Representative, other agencies, and trade advisory committees to avoid unnecessary duplication of reporting requirements.

SOURCE: Public Law 94–305, title II, Sec. 203, June 4, 1976, 90 Stat. 669; Public Law 111–240, title I, Sec. 1602(a), Sept. 27, 2010, 124 Stat. 2551; Public Law 114–125, title V, Sec. 502, Feb. 24, 2016, 130 Stat. 172.

#### **Section 634d. Staff and powers of Office of Advocacy**

In carrying out the provisions of sections 634a to 634g of this title, the Chief Counsel for Advocacy may—

- (1) employ and fix the compensation of such additional staff personnel as is deemed necessary, without regard to the provisions of title 5, governing appointments in the competitive service, and without regard to chapter 51, and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates but at rates not in excess of the lowest rate for GS-15 of the General Schedule: Provided, however, That not more than 14 staff personnel at any one time may be employed and compensated at a rate not in excess of GS-15, step 10, of the General Schedule;
- (2) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5;
- (3) consult with experts and authorities in the fields of small business investment, venture capital, investment and commercial banking and other comparable financial institutions involved in the financing of business, and with individuals with regulatory, legal, economic, or financial expertise, including members of the academic community, and individuals who generally represent the public interest;
- (4) utilize the services of the National Advisory Council established pursuant to the provisions of section 637(b)(13) of this title and in accordance with the provisions of such statute, also appoint such other advisory boards or committees as is reasonably appropriate and necessary to carry out the provisions of sections 634a to 634g of this title; and
- (5) hold hearings and sit and act at such times and places as he may deem advisable.

SOURCE: Public Law 94–305, title II, Sec. 204, June 4, 1976, 90 Stat. 669; Public Law 96–302, title IV, Sec. 402, July 2, 1980, 94 Stat. 850; Public Law 103–403, title VI, Secs. 605(b), 610, Oct. 22, 1994, 108 Stat. 4203, 4204.

#### **Section 634e. Assistance of Government agencies**

Each department, agency, and instrumentality of the Federal Government is authorized and directed to furnish to the Chief Counsel for Advocacy such reports and other information as he deems necessary to carry out his functions under sections 634a to 634g of this title.

SOURCE: Public Law 94–305, title II, Sec. 205, June 4, 1976, 90 Stat. 670.

#### **Section 634f. Reports**

The Chief Counsel may from time to time prepare and publish such reports as he deems appropriate. Not later than one year after June 4, 1976, he shall transmit to the Congress, the President and the Administration, a full report containing his findings and specific recommendations with respect to each of the functions referred to in section 634b of this title, including specific legislative proposals and recommendations for administration or other action. Not later than 6 months after June 4, 1976, he shall prepare and transmit a preliminary report on his activities. The reports shall not be submitted to the Office of Management and Budget or to any other Federal agency or executive department for any purpose prior to transmittal to the Congress and the President.

**Section 634g. Budgetary line item and authorization of appropriations**

- (a) **Appropriation requests.** Each budget of the United States Government submitted by the President under section 1105 of title 31 shall include a separate statement of the amount of appropriations requested for the Office of Advocacy of the Small Business Administration, which shall be designated in a separate account in the General Fund of the Treasury.
- (b) **Administrative operations.** The Administrator of the Small Business Administration shall provide the Office of Advocacy with appropriate and adequate office space at central and field office locations, together with such equipment, operating budget, and communications facilities and services as may be necessary, and shall provide necessary maintenance services for such offices and the equipment and facilities located in such offices.
- (c) **Authorization of appropriations.** There are authorized to be appropriated such sums as are necessary to carry out sections 634a to 634g of this title. Any amount appropriated under this subsection shall remain available, without fiscal year limitation, until expended.

SOURCE: Public Law 94–305, title II, Sec. 207, as added by Public Law 111–240, title I, Sec. 1602(b), Sept. 27, 2010, 124 Stat. 2551.

# Appendix B

## Public Law 96-354, The Regulatory Flexibility Act

**The Regulatory Flexibility Act, Public Law 96-354, as amended (5 §§ U.S.C. 601 - 612)**

(current through December 20, 2020)

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### **TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES**

#### **CHAPTER 6—THE ANALYSIS OF REGULATORY FUNCTIONS**

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#### **Congressional Findings and Declaration of Purpose** (§ 2 of Public Law 96-354, 5 U.S.C. § 601 note)

(a) The Congress finds and declares that –

- (1) when adopting regulations to protect the health, safety and economic welfare of the Nation, Federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public;
- (2) laws and regulations designed for application to large scale entities have been applied uniformly to small businesses, small organizations, and small governmental jurisdictions even though the problems that gave rise to government action may not have been caused by those smaller entities;
- (3) uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources;
- (4) the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;
- (5) unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;
- (6) the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation;
- (7) alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes may be available which minimize the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions;
- (8) the process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions

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

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

SOURCE: Public Law 96-354, Sec. 2, Sept. 19, 1980, 94 Stat. 1164.

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

## **Section 601. Definitions.**

For purposes of this chapter—

- (1) the term “agency” means an agency as defined in section 551(1) of this title;
- (2) the term “rule” means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law, including any rule of general applicability governing Federal grants to State and local governments for which the agency provides an opportunity for notice and public comment, except that the term “rule” does not include a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances;
- (3) the term “small business” has the same meaning as the term “small business concern” under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;
- (4) the term “small organization” means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;
- (5) the term “small governmental jurisdiction” means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register;
- (6) the term “small entity” shall have the same meaning as the terms “small business”, “small organization” and “small governmental jurisdiction” defined in paragraphs (3), (4) and (5) of this section; and

(7) the term “collection of information”—

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

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

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

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

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

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1165; amended by Public Law 104-121, title II, Sec. 241(a)(2), Mar. 29, 1996, 110 Stat. 864.

## **Section 602. Regulatory agenda**

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

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

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

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

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

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

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

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1166.

## **Section 603. Initial regulatory flexibility analysis**

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Adminis-



tration. 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).

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1166; amended by Public Law 104-121, title II, Sec. 241(a)(1), Mar. 29, 1996, 110 Stat. 864; Public Law 111-203, title X, Sec. 1100G(b), July 21, 2010, 124 Stat. 2112.

## Section 604. Final regulatory flexibility analysis

- (a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a), the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain –
  - (1) a 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 summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
  - (3) the response of the agency to any comments filed by the Chief Counsel for Advocacy 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; and
  - (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; and
- (6)\* for a covered agency, as defined in section 609(d)(2), a description of the steps the agency has taken to minimize any additional cost of credit for small entities.
- (b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register such analysis or a summary thereof.

\* So in the original. Two paragraph (6)s were enacted.

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1167; amended by Public Law 104-121, title II, Sec. 241(b), Mar. 29, 1996, 110 Stat. 864; Public Law 111-203, title X, § 1100G(c), July 21, 2010, 124 Stat. 2113; Public Law. 111-240, title I, § 1601, Sept. 27, 2010, 124 Stat. 2551.

## Section 605. Avoidance of duplicative or unnecessary analyses

- (a) Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.
- (b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.
- (c) In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the



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

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1167; amended by Public Law 104-121, title II, Sec. 243(a), Mar. 29, 1996, 110 Stat. 866.

#### **Section 606. Effect on other law**

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

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1168.

#### **Section 607. Preparation of analyses**

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

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1168.

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

- (a) An agency head may waive or delay the completion of some or all of the requirements of section 603 of this title by publishing in the Federal Register, not later than the date of publication of the final rule, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes compliance or timely compliance with the provisions of section 603 of this title impracticable.
- (b) Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the completion of the requirements of section 604 of this title for a period of not more than one hundred and eighty days after the date of publication in the Federal Register of a final rule by publishing in the Federal Register, not later than such date of publication, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes timely compliance with the provisions of section 604 of this title impracticable. If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days from the date of publication of the final rule, such rule shall lapse and have no effect. Such rule shall not be repromulgated until a final regulatory flexibility analysis has been completed by the agency.

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1168.

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

- (a) When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques such as—
  - (1) the inclusion in an advanced notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;
  - (2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;
  - (3) the direct notification of interested small entities;
  - (4) the conduct of open conferences or public hearings concerning the rule for small entities including soliciting and receiving comments over computer networks; and

- (5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.
- (b) Prior to publication of an initial regulatory flexibility analysis which a covered agency is required to conduct by this chapter—
- (1) a covered agency shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with information on the potential impacts of the proposed rule on small entities and the type of small entities that might be affected;
  - (2) not later than 15 days after the date of receipt of the materials described in paragraph (1), the Chief Counsel shall identify individuals representative of affected small entities for the purpose of obtaining advice and recommendations from those individuals about the potential impacts of the proposed rule;
  - (3) the agency shall convene a review panel for such rule consisting wholly of full time Federal employees of the office within the agency responsible for carrying out the proposed rule, the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel;
  - (4) the panel shall review any material the agency has prepared in connection with this chapter, including any draft proposed rule, collect advice and recommendations of each individual small entity representative identified by the agency after consultation with the Chief Counsel, on issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c);
  - (5) not later than 60 days after the date a covered agency convenes a review panel pursuant to paragraph (3), the review panel shall report on the comments of the small entity representatives and its findings as to issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c), provided that such report shall be made public as part of the rulemaking record; and
  - (6) where appropriate, the agency shall modify the proposed rule, the initial regulatory flexibility analysis or the decision on whether an initial regulatory flexibility analysis is required.
- (c) An agency may in its discretion apply subsection (b) to rules that the agency intends to certify under subsection 605(b), but the agency believes may have a greater than de minimis impact on a substantial number of small entities.
- (d) For purposes of this section, the term “covered agency” means –
- (1) the Environmental Protection Agency and the Occupational Safety and Health Administration of the Department of Labor;
  - (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.

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1168; amended by Public Law 104-121, title II, Sec. 244(a), Mar. 29, 1996, 110 Stat. 867; Public Law 111-203, title X, § 1100G(a), July 21, 2010, 124 Stat. 2112.

## **Section 610. Periodic review of rules**

- (a) Within one hundred and eighty days after the effective date of this chapter, each agency shall publish in the Federal Register a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities. Such plan may be amended by the agency at any time by publishing the revision in the Federal Register. The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. The plan shall provide for the review of all such agency rules existing on the effective date of this chapter within ten years of that date and for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, he shall so certify in a statement published in the Federal Register and may extend the completion date by one year at a time for a total of not more than five years.
- (b) In reviewing rules to minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes, the agency shall consider the following factors--
  - (1) the continued need for the rule;
  - (2) the nature of complaints or comments received concerning the rule from the public;
  - (3) the complexity of the rule;
  - (4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and
  - (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.
- (c) Each year, each agency shall publish in the Federal Register a list of the rules which have a significant economic impact on a substantial number of small entities, which are to be reviewed pursuant to this section during the succeeding twelve months. The list shall include a brief description of each rule and the need for and legal basis of such rule and shall invite public comment upon the rule.

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1169.

## **Section 611. Judicial review**

- (a) (1) For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.
- (2) Each court having jurisdiction to review such rule for compliance with section 553, or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.
- (3) (A) A small entity may seek such review during the period beginning on the date of final agency action and ending one year later, except that where a provision of law requires that an action challenging a final agency action be commenced before the expiration of one year, such lesser period shall apply to an

action for judicial review under this section.

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

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

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

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

(A) remanding the rule to the agency, and

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

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

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

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

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

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1169; amended by Public Law 104-121, title II, Sec. 242, Mar. 29, 1996, 110 Stat. 865.

## **Section 612. Reports and intervention rights**

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

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

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

SOURCE: Public Law 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1170; amended by Public Law 104-121, title II, Sec. 243(b), Mar. 29, 1996, 110 Stat. 866.

# Appendix C

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



88481

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Friday, August 18, 2002

### Presidential Documents

Title 3—

Executive Order 13272 of August 18, 2002

The President

Proper Consideration of Small Entities in Agency Rulemaking

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

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

**Sec. 2. Responsibilities of Advocacy.** Consistent with the requirements of the Act, other applicable law, and Executive Order 12886 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 90 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 notification shall be made (i) when the agency submits a draft rule to OIRA under Executive Order 12886 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 401 of title 5, United States Code, including the term "agency," shall have the same meaning in this order.

**Sec. 5. Preservation of Authority.** Nothing in this order shall be construed to impair or affect the authority of the Administrator of the Small Business Administration to supervise the Small Business Administration as provided in the first sentence of section 2(b)(1) of Public Law 85-09630 (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 OMB or the relevant rulemaking agency.

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



THE WHITE HOUSE,  
August 13, 2002.

[E.O. 13526-2002-08-13]  
[E.O. 13526-2002-08-13]  
[E.O. 13526-2002-08-13]



# Appendix D

## Executive Order 12866, Regulatory Planning and Review

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Federal Register  
Vol. 58, No. 190  
Monday, October 4, 1993

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### Presidential Documents

Title 3—

Executive Order 12866 of September 30, 1993

The President

Regulatory Planning and Review

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

With this Executive order, the Federal Government begins a program to reform and make more efficient the regulatory process. The objectives of this Executive order are to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public. In pursuing these objectives, the regulatory process shall be conducted so as to meet applicable statutory requirements and with due regard to the discretion that has been entrusted to the Federal agencies.

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

#### **Section 1. Statement of Regulatory Philosophy and Principles.**

(a) *The Regulatory Philosophy.* Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

(b) *The Principles of Regulation.* To ensure that the agencies' regulatory programs are consistent with the philosophy set forth above, agencies should adhere to the following principles, to the extent permitted by law and where applicable:

- (1) Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.
- (2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is

intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

(3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(4) In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.

(5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.

(6) Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

(7) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

(8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

(9) Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.

(10) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.

(11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

(12) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

**Sec. 2. Organization.** An efficient regulatory planning and review process is vital to ensure that the Federal Government's regulatory system best serves the American people.

(a) *The Agencies.* Because Federal agencies are the repositories of significant substantive expertise and experience, they are responsible for developing regulations and assuring that the regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order.



(b) *The Office of Management and Budget.* Coordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency. The Office of Management and Budget (OMB) shall carry out that review function. Within OMB, the Office of Information and Regulatory Affairs (OIRA) is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Executive order, and the President's regulatory policies. To the extent permitted by law, OMB shall provide guidance to agencies and assist the President, the Vice President, and other regulatory policy advisors to the President in regulatory planning and shall be the entity that reviews individual regulations, as provided by this Executive order.

(c) *The Vice President.* The Vice President is the principal advisor to the President on, and shall coordinate the development and presentation of recommendations concerning, regulatory policy, planning, and review, as set forth in this Executive order. In fulfilling their responsibilities under this Executive order, the President and the Vice President shall be assisted by the regulatory policy advisors within the Executive Office of the President and by such agency officials and personnel as the President and the Vice President may, from time to time, consult.

**Sec. 3. Definitions.** For purposes of this Executive order: (a) "Advisors" refers to such regulatory policy advisors to the President as the President and Vice President may from time to time consult, including, among others: (1) the Director of OMB; (2) the Chair (or another member) of the Council of Economic Advisers; (3) the Assistant to the President for Economic Policy; (4) the Assistant to the President for Domestic Policy; (5) the Assistant to the President for National Security Affairs; (6) the Assistant to the President for Science and Technology; (7) the Assistant to the President for Intergovernmental Affairs; (8) the Assistant to the President and Staff Secretary; (9) the Assistant to the President and Chief of Staff to the Vice President; (10) the Assistant to the President and Counsel to the President; (11) the Deputy Assistant to the President and Director of the White House Office on Environmental Policy; and (12) the Administrator of OIRA, who also shall coordinate communications relating to this Executive order among the agencies, OMB, the other Advisors, and the Office of the Vice President.

(b) "Agency," unless otherwise indicated, means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).

(c) "Director" means the Director of OMB.

(d) "Regulation" or "rule" means an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency. It does not, however, include:

- (1) Regulations or rules issued in accordance with the formal rulemaking provisions of 5 U.S.C. 556, 557;
- (2) Regulations or rules that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services;
- (3) Regulations or rules that are limited to agency organization, management, or personnel matters; or
- (4) Any other category of regulations exempted by the Administrator of OIRA.

(e) "Regulatory action" means any substantive action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices

of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.

(f) "Significant regulatory action" means any regulatory action that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

**Sec. 4. Planning Mechanism.** In order to have an effective regulatory program, to provide for coordination of regulations, to maximize consultation and the resolution of potential conflicts at an early stage, to involve the public and its State, local, and tribal officials in regulatory planning, and to ensure that new or revised regulations promote the President's priorities and the principles set forth in this Executive order, these procedures shall be followed, to the extent permitted by law:

(a) *Agencies' Policy Meeting.* Early in each year's planning cycle, the Vice President shall convene a meeting of the Advisors and the heads of agencies to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year.

(b) *Unified Regulatory Agenda.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). Each agency shall prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA. The description of each regulatory action shall contain, at a minimum, a regulation identifier number, a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable agency official. Agencies may incorporate the information required under 5 U.S.C. 602 and 41 U.S.C. 402 into these agendas.

(c) *The Regulatory Plan.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). (1) As part of the Unified Regulatory Agenda, beginning in 1994, each agency shall prepare a Regulatory Plan (Plan) of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter. The Plan shall be approved personally by the agency head and shall contain at a minimum:

- (A) A statement of the agency's regulatory objectives and priorities and how they relate to the President's priorities;
- (B) A summary of each planned significant regulatory action including, to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and benefits;
- (C) A summary of the legal basis for each such action, including whether any aspect of the action is required by statute or court order;
- (D) A statement of the need for each such action and, if applicable, how the action will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency;
- (E) The agency's schedule for action, including a statement of any applicable statutory or judicial deadlines; and

(F) The name, address, and telephone number of a person the public may contact for additional information about the planned regulatory action.

(2) Each agency shall forward its Plan to OIRA by June 1st of each year.

(3) Within 10 calendar days after OIRA has received an agency's Plan, OIRA shall circulate it to other affected agencies, the Advisors, and the Vice President.

(4) An agency head who believes that a planned regulatory action of another agency may conflict with its own policy or action taken or planned shall promptly notify, in writing, the Administrator of OIRA, who shall forward that communication to the issuing agency, the Advisors, and the Vice President.

(5) If the Administrator of OIRA believes that a planned regulatory action of an agency may be inconsistent with the President's priorities or the principles set forth in this Executive order or may be in conflict with any policy or action taken or planned by another agency, the Administrator of OIRA shall promptly notify, in writing, the affected agencies, the Advisors, and the Vice President.

(6) The Vice President, with the Advisors' assistance, may consult with the heads of agencies with respect to their Plans and, in appropriate instances, request further consideration or inter-agency coordination.

(7) The Plans developed by the issuing agency shall be published annually in the October publication of the Unified Regulatory Agenda. This publication shall be made available to the Congress; State, local, and tribal governments; and the public. Any views on any aspect of any agency Plan, including whether any planned regulatory action might conflict with any other planned or existing regulation, impose any unintended consequences on the public, or confer any unclaimed benefits on the public, should be directed to the issuing agency, with a copy to OIRA.

(d) *Regulatory Working Group.* Within 30 days of the date of this Executive order, the Administrator of OIRA shall convene a Regulatory Working Group ("Working Group"), which shall consist of representatives of the heads of each agency that the Administrator determines to have significant domestic regulatory responsibility, the Advisors, and the Vice President. The Administrator of OIRA shall chair the Working Group and shall periodically advise the Vice President on the activities of the Working Group. The Working Group shall serve as a forum to assist agencies in identifying and analyzing important regulatory issues (including, among others (1) the development of innovative regulatory techniques, (2) the methods, efficacy, and utility of comparative risk assessment in regulatory decision-making, and (3) the development of short forms and other streamlined regulatory approaches for small businesses and other entities). The Working Group shall meet at least quarterly and may meet as a whole or in subgroups of agencies with an interest in particular issues or subject areas. To inform its discussions, the Working Group may commission analytical studies and reports by OIRA, the Administrative Conference of the United States, or any other agency.

(e) *Conferences.* The Administrator of OIRA shall meet quarterly with representatives of State, local, and tribal governments to identify both existing and proposed regulations that may uniquely or significantly affect those governmental entities. The Administrator of OIRA shall also convene, from time to time, conferences with representatives of businesses, nongovernmental organizations, and the public to discuss regulatory issues of common concern.

**Sec. 5. Existing Regulations.** In order to reduce the regulatory burden on the American people, their families, their communities, their State, local, and tribal governments, and their industries; to determine whether regulations promulgated by the executive branch of the Federal Government have become unjustified or unnecessary as a result of changed circumstances; to confirm that regulations are both compatible with each other and not

uplicative or inappropriately burdensome in the aggregate; to ensure that all regulations are consistent with the President's priorities and the principles set forth in this Executive order, within applicable law; and to otherwise improve the effectiveness of existing regulations: (a) Within 90 days of the date of this Executive order, each agency shall submit to OIRA a program, consistent with its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities and the principles set forth in this Executive order. Any significant regulations selected for review shall be included in the agency's annual Plan. The agency shall also identify any legislative mandates that require the agency to promulgate or continue to impose regulations that the agency believes are unnecessary or outdated by reason of changed circumstances.

(b) The Administrator of OIRA shall work with the Regulatory Working Group and other interested entities to pursue the objectives of this section. State, local, and tribal governments are specifically encouraged to assist in the identification of regulations that impose significant or unique burdens on those governmental entities and that appear to have outlived their justification or be otherwise inconsistent with the public interest.

(c) The Vice President, in consultation with the Advisors, may identify for review by the appropriate agency or agencies other existing regulations of an agency or groups of regulations of more than one agency that affect a particular group, industry, or sector of the economy, or may identify legislative mandates that may be appropriate for reconsideration by the Congress.

**Sec. 6. Centralized Review of Regulations.** The guidelines set forth below shall apply to all regulatory actions, for both new and existing regulations, by agencies other than those agencies specifically exempted by the Administrator of OIRA:

(a) *Agency Responsibilities.* (1) Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

(2) Within 60 days of the date of this Executive order, each agency head shall designate a Regulatory Policy Officer who shall report to the agency head. The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order.

(3) In addition to adhering to its own rules and procedures and to the requirements of the Administrative Procedure Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, and other applicable law, each agency shall develop its regulatory actions in a timely fashion and adhere to the following procedures with respect to a regulatory action:

(A) Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with a list of its planned regulatory actions, indicating those which the agency believes are significant regulatory actions within the meaning of this Executive order. Absent a material change in the development of the planned regulatory action, those not designated as significant will not be subject to review under this section unless, within 10 working days of receipt

of the list, the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action within the meaning of this Executive order. The Administrator of OIRA may waive review of any planned regulatory action designated by the agency as significant, in which case the agency need not further comply with subsection (a)(3)(B) or subsection (a)(3)(C) of this section.

(B) For each matter identified as, or determined by the Administrator of OIRA to be, a significant regulatory action, the issuing agency shall provide to OIRA:

- (i) The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; and
- (ii) An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.

(C) For those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of section 3(f)(1), the agency shall also provide to OIRA the following additional information developed as part of the agency's decision-making process (unless prohibited by law):

- (i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;
- (ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and
- (iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

(D) In emergency situations or when an agency is obligated by law to act more quickly than normal review procedures allow, the agency shall notify OIRA as soon as possible and, to the extent practicable, comply with subsections (a)(3)(B) and (C) of this section. For those regulatory actions that are governed by a statutory or court-imposed deadline, the agency shall, to the extent practicable, schedule rule-making proceedings so as to permit sufficient time for OIRA to conduct its review, as set forth below in subsection (b)(2) through (4) of this section.

(E) After the regulatory action has been published in the **Federal Register** or otherwise issued to the public, the agency shall:

- (i) Make available to the public the information set forth in subsections (a)(3)(B) and (C);
- (ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and



(iii) Identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.

(F) All information provided to the public by the agency shall be in plain, understandable language.

(b) *OIRA Responsibilities.* The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order and do not conflict with the policies or actions of another agency. OIRA shall, to the extent permitted by law, adhere to the following guidelines:

(1) OIRA may review only actions identified by the agency or by OIRA as significant regulatory actions under subsection (a)(3)(A) of this section.

(2) OIRA shall waive review or notify the agency in writing of the results of its review within the following time periods:

(A) For any notices of inquiry, advance notices of proposed rulemaking, or other preliminary regulatory actions prior to a Notice of Proposed Rulemaking, within 10 working days after the date of submission of the draft action to OIRA;

(B) For all other regulatory actions, within 90 calendar days after the date of submission of the information set forth in subsections (a)(3)(B) and (C) of this section, unless OIRA has previously reviewed this information and, since that review, there has been no material change in the facts and circumstances upon which the regulatory action is based, in which case, OIRA shall complete its review within 45 days; and

(C) The review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head.

(3) For each regulatory action that the Administrator of OIRA returns to an agency for further consideration of some or all of its provisions, the Administrator of OIRA shall provide the issuing agency a written explanation for such return, setting forth the pertinent provision of this Executive order on which OIRA is relying. If the agency head disagrees with some or all of the bases for the return, the agency head shall so inform the Administrator of OIRA in writing.

(4) Except as otherwise provided by law or required by a Court, in order to ensure greater openness, accessibility, and accountability in the regulatory review process, OIRA shall be governed by the following disclosure requirements:

(A) Only the Administrator of OIRA (or a particular designee) shall receive oral communications initiated by persons not employed by the executive branch of the Federal Government regarding the substance of a regulatory action under OIRA review;

(B) All substantive communications between OIRA personnel and persons not employed by the executive branch of the Federal Government regarding a regulatory action under review shall be governed by the following guidelines: (i) A representative from the issuing agency shall be invited to any meeting between OIRA personnel and such person(s);

(ii) OIRA shall forward to the issuing agency, within 10 working days of receipt of the communication(s), all written communications, regardless of format, between OIRA personnel and any person who is not employed by the executive branch of the Federal Government, and the dates and names of individuals involved in all substantive oral communications (including meetings to which an agency representative was invited, but did not attend, and telephone conversations between OIRA personnel and any such persons); and (iii) OIRA shall publicly disclose relevant information about such communication(s), as set forth below in subsection (b)(4)(C) of this section.

(C) OIRA shall maintain a publicly available log that shall contain, at a minimum, the following information pertinent to regulatory actions under review:

(i) The status of all regulatory actions, including if (and if so, when and by whom) Vice Presidential and Presidential consideration was requested;

(ii) A notation of all written communications forwarded to an issuing agency under subsection (b)(4)(B)(ii) of this section; and

(iii) The dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications.

(D) After the regulatory action has been published in the **Federal Register** or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.

(5) All information provided to the public by OIRA shall be in plain, understandable language.

**Sec. 7. Resolution of Conflicts.** To the extent permitted by law, disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President, or by the Vice President acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials). Vice Presidential and Presidential consideration of such disagreements may be initiated only by the Director, by the head of the issuing agency, or by the head of an agency that has a significant interest in the regulatory action at issue. Such review will not be undertaken at the request of other persons, entities, or their agents.

Resolution of such conflicts shall be informed by recommendations developed by the Vice President, after consultation with the Advisors (and other executive branch officials or personnel whose responsibilities to the President include the subject matter at issue). The development of these recommendations shall be concluded within 60 days after review has been requested.

During the Vice Presidential and Presidential review period, communications with any person not employed by the Federal Government relating to the substance of the regulatory action under review and directed to the Advisors or their staffs or to the staff of the Vice President shall be in writing and shall be forwarded by the recipient to the affected agency(ies) for inclusion in the public docket(s). When the communication is not in writing, such Advisors or staff members shall inform the outside party that the matter is under review and that any comments should be submitted in writing.

At the end of this review process, the President, or the Vice President acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President's decision with respect to the matter.

**Sec. 8. Publication.** Except to the extent required by law, an agency shall not publish in the **Federal Register** or otherwise issue to the public any regulatory action that is subject to review under section 6 of this Executive order until (1) the Administrator of OIRA notifies the agency that OIRA has waived its review of the action or has completed its review without any requests for further consideration, or (2) the applicable time period in section 6(b)(2) expires without OIRA having notified the agency that it is returning the regulatory action for further consideration under section 6(b)(3), whichever occurs first. If the terms of the preceding sentence have not been satisfied and an agency wants to publish or otherwise issue a

regulatory action, the head of that agency may request Presidential consideration through the Vice President, as provided under section 7 of this order. Upon receipt of this request, the Vice President shall notify OIRA and the Advisors. The guidelines and time period set forth in section 7 shall apply to the publication of regulatory actions for which Presidential consideration has been sought.

**Sec. 9. Agency Authority.** Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law.

**Sec. 10. Judicial Review.** Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

**Sec. 11. Revocations.** Executive Orders Nos. 12291 and 12498; all amendments to those Executive orders; all guidelines issued under those orders; and any exemptions from those orders heretofore granted for any category of rule are revoked.



THE WHITE HOUSE,  
September 30, 1993.

[FR citation 58 FR 51735]



# Appendix E

## Executive Order 13563, Improving Regulation and Regulatory Review



3821

Federal Register

Vol. 76, No. 14

Friday, January 21, 2011

### Presidential Documents

Title 3—

Executive Order 13563 of January 18, 2011

The President

Improving Regulation and Regulatory Review

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

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

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

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

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

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

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

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

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

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

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

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

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

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

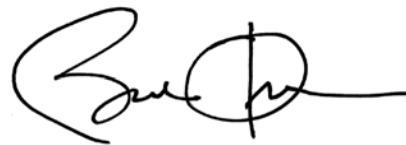
(b) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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



THE WHITE HOUSE,  
*January 18, 2011.*

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

# Appendix F

## Presidential Memorandum on Regulatory Flexibility, Small Business, and Job Creation



Federal Register / Vol. 76, No. 14 / Friday, January 21, 2011 / Presidential Documents

3827

### Presidential Documents

Memorandum of January 18, 2011

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A handwritten signature in black ink, appearing to be "S. M. Obama", written in a cursive style.

THE WHITE HOUSE,  
Washington, January 18, 2011

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

# Appendix G

## Presidential Memorandum on Regulatory Compliance



Federal Register / Vol. 76, No. 14 / Friday, January 21, 2011 / Presidential Documents

3825

### Presidential Documents

Memorandum of January 18, 2011

#### Regulatory Compliance

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

My Administration is committed to enhancing effectiveness and efficiency in Government. Pursuant to the Memorandum on Transparency and Open Government, issued on January 21, 2009, executive departments and agencies (agencies) have been working steadily to promote accountability, encourage collaboration, and provide information to Americans about their Government's activities.

To that end, much progress has been made toward strengthening our democracy and improving how Government operates. In the regulatory area, several agencies, such as the Department of Labor and the Environmental Protection Agency, have begun to post online (at [ogesdw.dol.gov](http://ogesdw.dol.gov) and [www.epa-echo.gov](http://www.epa-echo.gov)), and to make readily accessible to the public, information concerning their regulatory compliance and enforcement activities, such as information with respect to administrative inspections, examinations, reviews, warnings, citations, and revocations (but excluding law enforcement or otherwise sensitive information about ongoing enforcement actions).

Greater disclosure of regulatory compliance information fosters fair and consistent enforcement of important regulatory obligations. Such disclosure is a critical step in encouraging the public to hold the Government and regulated entities accountable. Sound regulatory enforcement promotes the welfare of Americans in many ways, by increasing public safety, improving working conditions, and protecting the air we breathe and the water we drink. Consistent regulatory enforcement also levels the playing field among regulated entities, ensuring that those that fail to comply with the law do not have an unfair advantage over their law-abiding competitors. Greater agency disclosure of compliance and enforcement data will provide Americans with information they need to make informed decisions. Such disclosure can lead the Government to hold itself more accountable, encouraging agencies to identify and address enforcement gaps.

Accordingly, I direct the following:

*First*, agencies with broad regulatory compliance and administrative enforcement responsibilities, within 120 days of this memorandum, to the extent feasible and permitted by law, shall develop plans to make public information concerning their regulatory compliance and enforcement activities accessible, downloadable, and searchable online. In so doing, agencies should prioritize making accessible information that is most useful to the general public and should consider the use of new technologies to allow the public to have access to real-time data. The independent agencies are encouraged to comply with this directive.

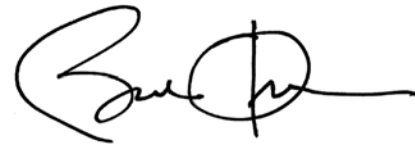
*Second*, the Federal Chief Information Officer and the Chief Technology Officer shall work with appropriate counterparts in each agency to make such data available online in searchable form, including on centralized platforms such as [data.gov](http://data.gov), in a manner that facilitates easy access, encourages cross-agency comparisons, and engages the public in new and creative ways of using the information.

*Third*, the Federal Chief Information Officer and the Chief Technology Officer, in coordination with the Director of the Office of Management and Budget (OMB) and their counterparts in each agency, shall work to explore how

best to generate and share enforcement and compliance information across the Government, consistent with law. Such data sharing can assist with agencies' risk-based approaches to enforcement: A lack of compliance in one area by a regulated entity may indicate a need for examination and closer attention by another agency. Efforts to share data across agencies, where appropriate and permitted by law, may help to promote flexible and coordinated enforcement regimes.

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

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



THE WHITE HOUSE,  
*Washington, January 18, 2011*

[FR Doc. 2011-1386  
Filed 1-20-11; 8:45 am]  
Billing code 3110-01-P



# Appendix H

## Executive Order 13579, Regulation and Independent Regulatory Agencies

41587

Federal Register

Vol. 76, No. 135

Thursday, July 14, 2011

### Presidential Documents

Title 3—

Executive Order 13579 of July 11, 2011

The President

### Regulation and Independent Regulatory Agencies

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

**Section 1. Policy.** (a) Wise regulatory decisions depend on public participation and on careful analysis of the likely consequences of regulation. Such decisions are informed and improved by allowing interested members of the public to have a meaningful opportunity to participate in rulemaking. To the extent permitted by law, such decisions should be made only after consideration of their costs and benefits (both quantitative and qualitative).

(b) Executive Order 13563 of January 18, 2011, “Improving Regulation and Regulatory Review,” directed to executive agencies, was meant to produce a regulatory system that protects “public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.” Independent regulatory agencies, no less than executive agencies, should promote that goal.

(c) Executive Order 13563 set out general requirements directed to executive agencies concerning public participation, integration and innovation, flexible approaches, and science. To the extent permitted by law, independent regulatory agencies should comply with these provisions as well.

**Sec. 2. Retrospective Analyses of Existing Rules.** (a) To facilitate the periodic review of existing significant regulations, independent regulatory agencies should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data and evaluations, should be released online whenever possible.

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

**Sec. 3. General Provisions.** (a) For purposes of this order, “executive agency” shall have the meaning set forth for the term “agency” in section 3(b) of Executive Order 12866 of September 30, 1993, and “independent regulatory agency” shall have the meaning set forth in 44 U.S.C. 3502(5).

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

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

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

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

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



THE WHITE HOUSE,  
*July 11, 2011.*

[FR Doc. 2011-17953  
Filed 7-13-11; 11:15 am]  
Billing code 3195-W1-P

# Appendix I

## Executive Order 13609, Promoting International Regulatory Cooperation



26413

Federal Register

Vol. 77, No. 87

Friday, May 4, 2012

### Presidential Documents

Title 3—

Executive Order 13609 of May 1, 2012

The President

### Promoting International Regulatory Cooperation

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

**Section 1. Policy.** Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review), states that our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. In an increasingly global economy, international regulatory cooperation, consistent with domestic law and prerogatives and U.S. trade policy, can be an important means of promoting the goals of Executive Order 13563.

The regulatory approaches taken by foreign governments may differ from those taken by U.S. regulatory agencies to address similar issues. In some cases, the differences between the regulatory approaches of U.S. agencies and those of their foreign counterparts might not be necessary and might impair the ability of American businesses to export and compete internationally. In meeting shared challenges involving health, safety, labor, security, environmental, and other issues, international regulatory cooperation can identify approaches that are at least as protective as those that are or would be adopted in the absence of such cooperation. International regulatory cooperation can also reduce, eliminate, or prevent unnecessary differences in regulatory requirements.

**Sec. 2. Coordination of International Regulatory Cooperation.** (a) The Regulatory Working Group (Working Group) established by Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), which was reaffirmed by Executive Order 13563, shall, as appropriate:

(i) serve as a forum to discuss, coordinate, and develop a common understanding among agencies of U.S. Government positions and priorities with respect to:

(A) international regulatory cooperation activities that are reasonably anticipated to lead to significant regulatory actions;

(B) efforts across the Federal Government to support significant, cross-cutting international regulatory cooperation activities, such as the work of regulatory cooperation councils; and

(C) the promotion of good regulatory practices internationally, as well as the promotion of U.S. regulatory approaches, as appropriate; and

(ii) examine, among other things:

(A) appropriate strategies for engaging in the development of regulatory approaches through international regulatory cooperation, particularly in emerging technology areas, when consistent with section 1 of this order;

(B) best practices for international regulatory cooperation with respect to regulatory development, and, where appropriate, information exchange and other regulatory tools; and

(C) factors that agencies should take into account when determining whether and how to consider other regulatory approaches under section 3(d) of this order.

(b) As Chair of the Working Group, the Administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management

and Budget (OMB) shall convene the Working Group as necessary to discuss international regulatory cooperation issues as described above, and the Working Group shall include a representative from the Office of the United States Trade Representative and, as appropriate, representatives from other agencies and offices.

(c) The activities of the Working Group, consistent with law, shall not duplicate the efforts of existing interagency bodies and coordination mechanisms. The Working Group shall consult with existing interagency bodies when appropriate.

(d) To inform its discussions, and pursuant to section 4 of Executive Order 12866, the Working Group may commission analytical reports and studies by OIRA, the Administrative Conference of the United States, or any other relevant agency, and the Administrator of OIRA may solicit input, from time to time, from representatives of business, nongovernmental organizations, and the public.

(e) The Working Group shall develop and issue guidelines on the applicability and implementation of sections 2 through 4 of this order.

(f) For purposes of this order, the Working Group shall operate by consensus.

**Sec. 3. Responsibilities of Federal Agencies.** To the extent permitted by law, and consistent with the principles and requirements of Executive Order 13563 and Executive Order 12866, each agency shall:

(a) if required to submit a Regulatory Plan pursuant to Executive Order 12866, include in that plan a summary of its international regulatory cooperation activities that are reasonably anticipated to lead to significant regulations, with an explanation of how these activities advance the purposes of Executive Order 13563 and this order;

(b) ensure that significant regulations that the agency identifies as having significant international impacts are designated as such in the Unified Agenda of Federal Regulatory and Deregulatory Actions, on RegInfo.gov, and on Regulations.gov;

(c) in selecting which regulations to include in its retrospective review plan, as required by Executive Order 13563, consider:

(i) reforms to existing significant regulations that address unnecessary differences in regulatory requirements between the United States and its major trading partners, consistent with section 1 of this order, when stakeholders provide adequate information to the agency establishing that the differences are unnecessary; and

(ii) such reforms in other circumstances as the agency deems appropriate; and

(d) for significant regulations that the agency identifies as having significant international impacts, consider, to the extent feasible, appropriate, and consistent with law, any regulatory approaches by a foreign government that the United States has agreed to consider under a regulatory cooperation council work plan.

**Sec. 4. Definitions.** For purposes of this order:

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

(b) “International impact” is a direct effect that a proposed or final regulation is expected to have on international trade and investment, or that otherwise may be of significant interest to the trading partners of the United States.

(c) “International regulatory cooperation” refers to a bilateral, regional, or multilateral process, other than processes that are covered by section 6(a)(ii), (iii), and (v) of this order, in which national governments engage in various forms of collaboration and communication with respect to regulations, in particular a process that is reasonably anticipated to lead to the development of significant regulations.

(d) “Regulation” shall have the same meaning as “regulation” or “rule” in section 3(d) of Executive Order 12866.

(e) “Significant regulation” is a proposed or final regulation that constitutes a significant regulatory action.

(f) “Significant regulatory action” shall have the same meaning as in section 3(f) of Executive Order 12866.

**Sec. 5. *Independent Agencies.*** Independent regulatory agencies are encouraged to comply with the provisions of this order.

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

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

(ii) the coordination and development of international trade policy and negotiations pursuant to section 411 of the Trade Agreements Act of 1979 (19 U.S.C. 2451) and section 141 of the Trade Act of 1974 (19 U.S.C. 2171);

(iii) international trade activities undertaken pursuant to section 3 of the Act of February 14, 1903 (15 U.S.C. 1512), subtitle C of the Export Enhancement Act of 1988, as amended (15 U.S.C. 4721 *et seq.*), and Reorganization Plan No. 3 of 1979 (19 U.S.C. 2171 note);

(iv) the authorization process for the negotiation and conclusion of international agreements pursuant to 1 U.S.C. 112b(c) and its implementing regulations (22 C.F.R. 181.4) and implementing procedures (11 FAM 720);

(v) activities in connection with subchapter II of chapter 53 of title 31 of the United States Code, title 26 of the United States Code, or Public Law 111–203 and other laws relating to financial regulation; or (vi) the functions of the Director of OMB 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.



THE WHITE HOUSE,  
May 1, 2012.

[FR Doc. 2012–10968  
Filed 5–3–12; 8:45 am]  
Billing code 3295–F2–P

# Appendix J

## Executive Order 13610, Identifying and Reducing Regulatory Burdens



28469

Federal Register

Vol. 77, No. 93

Monday, May 14, 2012

### Presidential Documents

Title 3—

Executive Order 13610 of May 10, 2012

The President

Identifying and Reducing Regulatory Burdens

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

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

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

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

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

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

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

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

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

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

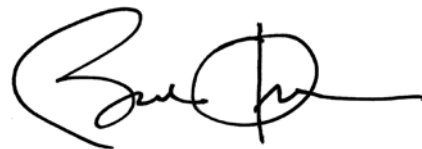
(b) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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



THE WHITE HOUSE,  
May 10, 2012.

[FR Doc. 2012-11798  
Filed 5-11-12; 11:15 am]  
Billing code 3295-F2-P



# Appendix K

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



Federal Register / Vol. 82, No. 22 / Friday, February 3, 2017 / Presidential Documents

9339

### Presidential Documents

Executive Order 13771 of January 30, 2017

#### Reducing Regulation and Controlling Regulatory Costs

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:

**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.

**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.

(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.

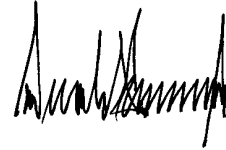
**Sec. 5. General Provisions.** (a) Nothing in this order shall be construed to impair or otherwise affect:

(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.



THE WHITE HOUSE,  
*January 30, 2017.*

[FR Doc. 2017-02451  
Filed 2-2-17; 11:15 am]  
Billing code 3295-F7-P

# Appendix L

## Executive Order 13777, Enforcing the Regulatory Reform Agenda



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### Presidential Documents

Title 3—

Executive Order 13777 of February 24, 2017

The President

Enforcing the Regulatory Reform Agenda

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:

**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.

(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.

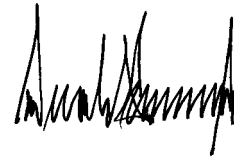
**Sec. 6. General Provisions.** (a) Nothing in this order shall be construed to impair or otherwise affect:

(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.



THE WHITE HOUSE,  
February 24, 2017.

[FR Doc. 2017-04107  
Filed 2-28-17; 11:15 am]  
Billing code 3295-F7-P

Text version available at: DCPD-201700139—Executive Order 13777—Enforcing the Regulatory Reform Agenda, U.S. GOV'T PUBL'G OFFICE (February 24, 2017), <https://www.govinfo.gov/content/pkg/DCPD-201700139/html/DCPD-201700139.htm>.

# Appendix M

## Office of Advocacy's 2016 Legislative Priorities



### Office of Advocacy Legislative Priorities for Chief Counsel Darryl L. DePriest

#### Indirect Effects

Under the RFA, agencies are not currently required to consider the impact of a proposed rule on small businesses that are not directly regulated by the rule, even when the impacts are foreseeable and often significant. Advocacy believes that indirect effects should be part of the RFA analysis, but that the definition of indirect effects should be specific and limited so that the analytical requirements of the RFA remain reasonable.

- Amend section 601 of the RFA to define “impact” as including the reasonably foreseeable effects on small entities that purchase products or services from, sell products or services to, or otherwise conduct business with entities directly regulated by the rule; are directly regulated by other governmental entities as a result of the rule; or are not directly regulated by the agency as a result of the rule but are otherwise subject to other agency regulations as a result of the rule.

#### Scope of the RFA

Currently, the requirements of the RFA are limited to those rulemakings that are subject to notice and comment. Section 553 of the Administrative Procedure Act (APA), which sets out the general requirements for rulemaking, does not require notice and comment for interim final rulemakings, so agencies may impose a significant economic burden on small entities through these rulemakings without conducting an Initial Regulatory Flexibility Analysis (IRFA) or Final Regulatory Flexibility Analysis (FRFA). Advocacy believes the definition of a rule needs to be expanded to include interim final rulemakings that have the potential to impose economic burden on small entities.

Further, the IRS regularly promulgates rules that are costly and complicated for small businesses. However, the IRS contends that it has no discretion in implementing legislation and that the agency has little authority to consider less costly alternatives under the RFA. Therefore, the IRS often does not analyze the cost of its rules to small business under the RFA. In the absence of the IRS considering the impact of its rules under the RFA, Congress should require the Congressional Budget Office (CBO) to provide small business cost and paperwork burden estimates for pending tax legislation. This would help ensure that tax writers and the public are aware of the compliance burden in addition to the fiscal consequences.

Finally, the RFA has its own definition of information collection. However, this definition is identical to the Paperwork Reduction Act (PRA) (35 USC 3501, et. seq.). A cross-reference to the PRA would allow Advocacy to rely on OMB's existing implementing regulations (5 CFR 1320) and guidance.

- Require RFA analysis for all interim final rulemakings with a significant economic impact on a substantial number of small entities.

- Require CBO to score proposed tax legislation for the estimated costs and paperwork burden to small business.
- Amend the conditions for IRS rulemakings to require an IRFA/FRFA to reference the PRA.

### **Quality of Analysis**

The Office of Advocacy is concerned that some agencies are not providing the information required in the IRFA and FRFA in a transparent and easy-to-access manner. This hinders the ability of small entities and the public to comment meaningfully on the impacts on small entities and possible regulatory alternatives. Agencies should be required to include an estimate of the cost savings to small entities in the FRFA. In addition, agencies should have a single section in the preamble of the notice of proposed rulemaking and notice of final rulemaking that lays out clearly the substantive contents of the IRFA or FRFA, including a specific narrative for each of the required elements.

- Require agencies to develop cost savings estimates.
- Require a clearly delineated statement of the contents of the IRFA and FRFA in the preamble of the proposed and final rule.

### **Quality of Certification**

Some agencies' improper certifications under the RFA have been based on a lack of information in the record about small entities, rather than data showing that there would not be a significant impact on a substantial number of small entities. A clear requirement for threshold analysis would be a stronger guarantee of the quality of certifications.

- Require agencies to publish a threshold analysis, supported by data in the record, as part of the factual basis for the certification.

### **SBREFA Panels**

The Department of Interior's Fish and Wildlife Service consistently promulgates regulations without proper economic analyses. Advocacy believes the rules promulgated by this agency would benefit from being added as a covered agency subject to Small Business Advocacy Review Panels.

Advocacy also believes that some recent SBREFA panels have been convened prematurely. SBREFA panels work best when small entity representatives have sufficient information to understand the purpose of the potential rule, likely impacts, and preliminary assessments of the costs and benefits of various alternatives. With this information small entities are better able to provide meaningful input on the ways in which an agency can minimize impacts on small entities consistent with the agency mission. Therefore the RFA should be amended to require that prior to convening a panel, agencies should be required to provide, at a minimum, a clear description of the goals of the rulemaking, the type and number of affected small entities, a preferred alternative, a series of viable alternatives, and projected costs and benefits of compliance for each alternative.

- Require SBREFA panels under RFA Section 609(b) for the Department of the Interior's Fish and Wildlife Service.
- Require better disclosure of information including at a minimum, a clear description of the goals of the rulemaking, the type and number of affected small entities, a preferred alternative, a series of viable alternatives, and projected costs and benefits of compliance for each alternative to the small entity representatives.

### **Retrospective Review**

In addition to the existing required periodic review, agencies should accept and prioritize petitions for review of final rules. They should be required to provide a timely and effective response in which they demonstrate that they have considered alternative means of achieving the regulatory objective while reducing the regulatory impact on small businesses. This demonstration should take the form of an analysis similar to a FRFA.

- Strengthen section 610 retrospective review to prioritize petitions for review that seek to reduce the regulatory burden on small business and provide for more thorough consideration of alternatives.

*The Office of Advocacy was established by Public Law 94-305 to represent the views of small businesses before federal agencies and the U.S. Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.*



# Appendix N

## Legislation Leading to Office of Advocacy's Budgetary Independence

The Small Business Jobs Act of 2010 amended Advocacy's statutory authority to require that each budget submitted by the President shall include a separate statement of the amount of appropriations requested for Advocacy, and that these funds be designated in a separate Treasury account. The Act also requires SBA to provide Advocacy with office space, equipment, an operating budget, and communications support, including the maintenance of such equipment and facilities.<sup>1</sup>

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

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

It is important to note that Advocacy's budgetary independence from SBA had been under consideration for some time before the Job Act's eventual enactment in 2010. The Jobs Act budgetary provisions were a top legislative priority for Advocacy before they were enacted, and the office's 2008 background paper discussed this subject at length in its Chapter 7, including various plans that had been under consideration by Congress in the years preceding its publication.<sup>2</sup>

Although both the Senate and the House of Representatives had previously approved in their own bills several versions of budgetary independence for Advocacy, enactment of a final plan proved elusive because of disagreements over other provisions in the legislation that included the budget provisions. This history is difficult to research, and the purpose of this appendix is to record in one place the various legislative efforts of both houses of Congress before the Jobs Act of 2010 made Advocacy budget independence a reality. This legislation is described below chronologically.

**107<sup>th</sup> Congress (2001 – 2002).** During the 107<sup>th</sup> Congress, both the Senate and the House of Representatives approved bills that included a variety of provisions intended to strengthen Advocacy and its independence. In the Senate, Sen. Christopher Bond, Chairman of the Committee on Small Business, introduced S. 395, the Independent Office of Advocacy Act of 2001, which was approved with amendments by unanimous consent in the Senate on March 26, 2001. This legislation included a statement of findings and purposes; provisions relating to Advocacy functions, personnel, and reports; requirements for administrative support from SBA; authorization

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

2 *Background Paper on the Office of Advocacy: 2001 – 2008* (October 24, 2008), pp. 119-122. See: <http://webarchive.loc.gov/all/20100616132855/http://www.sba.gov/advo/backgr08.pdf>.

of appropriations; and, importantly, the establishment of a separate budget request for Advocacy as part of the uniform annual budget submitted to Congress by the President.<sup>3</sup>

Also during the 107<sup>th</sup> Congress, Rep. Donald Manzullo, Chairman of the House Committee on Small Business, introduced H.R. 4231, the Small Business Advocacy Improvement Act of 2002, which was approved with amendments by a voice vote in the House on May 21, 2002. This bill was similar to the Senate legislation. It included a statement of findings and purposes; provisions relating to Advocacy functions, personnel, and reports; requirements for administrative support from SBA; authorization of appropriations; and, again, the establishment of a separate line-item for Advocacy in the annual unified budget of the President.<sup>4</sup>

There were, however, a variety of technical differences between the House and Senate bills, and these differences were not resolved before the end of the 107<sup>th</sup> Congress, when both bills died without further action.

**108<sup>th</sup> Congress (2003 – 2004).** Early in the 108<sup>th</sup> Congress, new Advocacy legislation was introduced in both the House and the Senate that closely resembled the bills considered in each respective body during the previous Congress. In the House of Representatives, Reps. Todd Akin and Ed Schrock, both subcommittee chairmen in the Committee on Small Business, introduced a new bill, H.R. 1772, the Small Business Advocacy Improvement Act of 2003, which was similar in most respects to H.R. 4231 in the 107<sup>th</sup> Congress. The new legislation was approved by a voice vote in the House on June 24, 2003, and it again called for a separate statement on Advocacy in the unified annual budget request.<sup>5</sup>

In the Senate, Sen. Olympia Snowe introduced S. 818, the Independent Office of Advocacy Act of 2003. As S. 395 had provided in 2001, the new bill called for a separate line-item statement for Advocacy in the President's unified budget, but it also went further and provided for a separate account for Advocacy funds, similar to the Office of the Inspector General's account. No further action was taken in the Senate on this legislation.<sup>6</sup>

Again, both the House and Senate versions of Advocacy legislation died at the end of the 108<sup>th</sup> Congress.

**110<sup>th</sup> Congress (2007 – 2008).** During the 110<sup>th</sup> Congress, Senators Olympia Snowe and Mark Pryor introduced S. 2902, the Independent Office of Advocacy and Small Business Regulatory Reform Act of 2008. This bill was a departure from the prior Advocacy independence legislation outlined above in that it retained from the earlier bills only basic provisions relating to Advocacy authorizations, administrative support from SBA, and most importantly, a separate line-item budget request statement and account for Advocacy. The bill also clarified in Advocacy's basic charter, Public Law 94-305, its duty to carry out responsibilities relating to the RFA, and it would have codified important elements of Executive Order 13272, a legislative priority for Advocacy.<sup>7</sup>

Chief Counsel for Advocacy Tom Sullivan expressed Advocacy's strong support for S. 2902. In a letter to Senators Snowe and Pryor upon the introduction of the bill, he commented that:

The Office of Advocacy's ability to impact the regulatory process for the benefit of small entities depends

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3 For additional information, see Senate Report 107-5 to accompany S. 395 and *Congressional Record*, Vol. 147, pp. S2913 – S2918; March 26, 2001.

4 For additional information, see House Report 107-433 to accompany H.R. 4231 and *Congressional Record*, Vol. 148, pp. H2784 – H2787; May 21, 2002.

5 For additional information, see House Report 108-162 to accompany H.R. 1772 and the *Congressional Record*, Vol. 149, pp. H5720 – H5724; June 24, 2003.

6 For additional information, see S. 818 and *Congressional Record*, Vol. 149, pp. S4964 – S4965; April 8, 2003.

7 For additional information, see S. 2902 and *Congressional Record*, Vol. 154, pp. S3307 – S3308; April 23, 2008.

greatly on the office's independence. Congress, the President, and policy leaders throughout the country value comments, opinions, and research from the Office of Advocacy because they know those views represent an unfiltered perspective. I was sworn in as Chief Counsel in February of 2002, and my ability to advocate for small business honestly and independently has never been compromised. However, as long as the Office of Advocacy remains merged within SBA's overall budget, the temptation remains for SBA leadership to influence the views of the Office of Advocacy by controlling its budget.<sup>8</sup>

No action was taken in the Senate on S. 2902, and it died at the end of the 110<sup>th</sup> Congress.

**Conclusion.** The key feature that is present in each of the five "Advocacy independence" bills just described is a separate line-item statement for Advocacy in the President's unified budget request. Both the House and Senate had approved this in the past (twice in the House), and Advocacy leadership strongly endorsed it.

Advocacy made budgetary independence a top legislative priority, and as noted above a strong provision was eventually enacted when President Obama signed the Small Business Jobs Act of 2010.

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8 Letter from Chief Counsel Sullivan to Senators Olympia Snowe and Mark Pryor; April 24, 2008.

# Appendix O

## Advocacy Expenditures, FY1978–FY2021

Advocacy Actual Obligations: FY 1978 - FY 2021 <sup>A</sup> (dollars in thousands)			
Fiscal Year	Advocacy Actuals	Fiscal Year	Advocacy Actuals
FY 1978	1,930	FY 2000	5,620
FY 1979	2,836	FY 2001	5,443
FY 1980	6,050 <sup>B</sup>	FY 2002	5,019
FY 1981	7,264 <sup>B</sup>	FY 2003	8,680 <sup>E</sup>
FY 1982	5,755	FY 2004	9,360 <sup>E</sup>
FY 1983	6,281	FY 2005	9,439 <sup>E</sup>
FY 1984	5,654	FY 2006	9,364 <sup>E</sup>
FY 1985	5,701	FY 2007	9,858 <sup>E</sup>
FY 1986	5,546	FY 2008	9,133 <sup>E</sup>
FY 1987	6,018	FY 2009	10,660 <sup>E</sup>
FY 1988	6,043	FY 2010	9,318 <sup>E</sup>
FY 1989	5,769	FY 2011	8,309
FY 1990	5,645	FY 2012	8,440
FY 1991	5,647	FY 2013	8,811
FY 1992	5,764	FY 2014	8,628
FY 1993	5,362	FY 2015	9,264
FY 1994	6,090 <sup>C</sup>	FY 2016	9,157
FY 1995	7,956 <sup>D</sup>	FY 2017	8,113
FY 1996	4,617	FY 2018	9,344
FY 1997	4,762	FY 2019	10,698
FY 1998	4,869	FY 2020	9,306
FY 1999	5,134	FY 2021	9,190 <sup>F</sup>

<sup>A</sup> Source: Expenses are derived from "salary and expense" (S&E) data from the appendices of OMB's annual congressional budget submissions. From the 1997 submission forward, SBA's own more detailed congressional budget submission documents were used to refine the OMB budget numbers, which were rounded to millions beginning in that year. Advocacy totals include economic research.

<sup>B</sup> During 1980 and 1981, Advocacy provided extensive staff support to the 1980 White House Conference on Small Business. Also, Congress provided unusually high funding for directed economic research during this period.

<sup>C</sup> \$1,507,000 of this amount was expended for the 1995 White House Conference on Small Business.

<sup>D</sup> \$2,157,000 of this amount was expended for the 1995 White House Conference on Small Business.

<sup>E</sup> Dollars include an agency overhead charge representing Advocacy's share of services and facilities shared in common with all SBA offices and programs. An analogous charge is not included in years prior to FY 2003 or from FY 2011 forward.

<sup>F</sup> Amount enacted in Advocacy's FY 2021 appropriation.

# Appendix P

## Comparison Chart: The Small Business Administration and the Office of Advocacy



### SBA VS. OFFICE OF ADVOCACY COMPARISON CHART

#### U.S. Small Business Administration



<b>MISSION</b>	<p>The U.S. Small Business Administration (SBA) is one of the federal government agencies under the Executive Branch.</p> <ul style="list-style-type: none"> <li>- SBA assists small businesses through financial assistance, disaster assistance and counseling to preserve free competitive enterprise and to maintain and strengthen the overall economy of our nation.</li> </ul>	<p>Advocacy is an independent office in the federal government housed within SBA.</p> <ul style="list-style-type: none"> <li>- The office advocates on behalf of small business by ensuring their concerns with proposed regulations are heard and considered by the White House, Congress, and Federal agencies.</li> <li>- In addition, the office provides the public and lawmakers with sound economic research to facilitate small business growth.</li> </ul>
<b>BUDGET</b>	Responsible for its own budget while also providing Advocacy with the necessary tools for standard operations.	Responsible for its own budget which underscores its independence and indicates that Congress intends to clearly identify the resources available to Advocacy. SBA provides office space and equipment.
<b>OUTREACH</b>	10 Regional Administrators, 50+ Regional Offices, and 4 Disaster Assistance Offices further the mission of the SBA by providing development services and training along with counseling and financial help and guidance.	10 Regional Advocates gain first-hand knowledge about the regulatory barriers impeding small business success and bring back to Washington, D.C. the best practices of America's small businesses. Advocacy staff hosts roundtables and visits small businesses to hear feedback on proposed rules.
<b>ASSISTANCE WITH REGULATORY PROCESS</b>	<p>- <b>SBA Ombudsman</b> -</p> <p>Post Regulation- Assist small businesses with complaints about final federal practices and actions.</p>	<p>- <b>Advocacy Interagency</b> -</p> <p>Pre-Regulation- Find and suggest alternatives to proposed federal rules.</p>
<b>FEDERAL REGULATIONS</b>	Establish SBA regulations and participate in the Office of Management and Budget approval process.	Works directly with all federal agencies to suggest solutions or alternatives that achieve the agency's goals while easing the burden on small business.
<b>LEGAL</b>	Office of the General Counsel assists SBA in legal matters.	Advocacy's Chief Counsel, the head of the Office of Advocacy, is not involved in SBA litigation.
<b>RESEARCH</b>	Report on SBA program data.	<p>Advocacy's Office of Economic Research is the only unit of the federal government to develop and maintain data exclusively on small business and to study the impact of federal policy on small businesses.</p> <p>The research provides policymakers with the knowledge to write sound legislation that will build a strong US economy.</p>
<b>LOANS</b>	Provide various small business loans. (7(a) loans, 504 loans, SBIR grants)	N/A



# Appendix Q

## Memorandum of Understanding between the Small Business Administration and the Office of Advocacy

### Memorandum of Understanding between the

### Small Business Administration and the

### Small Business Administration's Office of Advocacy

#### I. PURPOSE

The purpose of the Memorandum of Understanding ("MOU" or "Agreement") is to document the relationship and sharing of administrative support services between the Small Business Administration's Office of Advocacy ("Advocacy") and the Small Business Administration ("SBA"). This MOU outlines the budget and expenses and services that will be managed and paid for by SBA and those that will be managed and paid for by Advocacy.

#### II. BACKGROUND AND AUTHORITY

SBA's Office of Advocacy was created in 1976 (see 15 U.S.C. 634a *et seq.*) in order to protect the interests of small businesses across federal programs and services. Advocacy advances the views and concerns of small business before Congress, the White House, the federal agencies, the federal courts and state policymakers. This includes examining the challenges and contributions of small business in the U.S. economy. Economic research, policy analyses, and small business outreach help identify issues of concern. Additional duties and powers were conferred upon the Chief Counsel for Advocacy of the SBA by the Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. 601 *et seq.*), as amended, and Executive Order 13272, including the monitoring of federal agency compliance with the RFA, assisting regulatory agencies in all stages of the rule development process to mitigate the potential impact of rules on small entities while still achieving regulatory objectives, and providing RFA compliance training to regulatory officials.

The Small Business Jobs Act of 2010 (Pub. L. 111-240) recently amended the Office of Advocacy's statutory authority to require that each budget submitted by the President shall include a separate statement of the amount of appropriations requested for Advocacy, designated in a separate Treasury account. The Small Business Jobs Act also requires SBA to provide Advocacy with office space, equipment, operating budget, communications facilities as necessary, including maintenance for such equipment and facilities (15 U.S.C. 634g(b)). SBA and Advocacy executed the Memorandum of Understanding regarding their respective responsibilities in March of 2011.

This MOU will outline what expenses and services SBA will provide specifically to Advocacy and which expenses and services Advocacy will be responsible for within its own line-item budget.

For purposes of this Agreement, operating budget includes all overhead expenses such as utilities and rent, equipment (including copiers and fax machines) and administrative support services including but not limited to human resources, legal counsel, security and safety preparation, computer support services, web services and access to the health unit.

### **III. ROLES AND RESPONSIBILITIES**

SBA's Office of the Chief Financial Officer (OCFO) established for Advocacy a separate account within the General Fund of the Treasury to make funds available to Advocacy through appropriate allotments. The Advocacy appropriation account funds all Advocacy expenses as outlined in this Agreement.

#### **A. Expenses**

1. Advocacy, through its line-item budget, will be responsible for paying all costs associated with:
  - a) Compensation and benefits of all Advocacy employees (contracted, detailed or otherwise), including overtime and awards,
  - b) All contracts supporting Advocacy research and other projects,
  - c) Training for Advocacy employees,
  - d) Travel for Advocacy employees,
  - e) Office supplies, and
  - f) Office furniture.
2. Pursuant to the Small Business Act and this Agreement, SBA will continue to pay for the following which are used to support the Advocacy function:
  - a) Rent for office space within SBA headquarters in Washington DC and 10 regional office locations (so long as the Agency maintains regional office locations), including office "remodeling" build out,
  - b) Utilities for such office space including electric, water, heat, and telecommunications,
  - c) Equipment, including copiers, fax machines, standard computer hardware for employees, mobile phones and the associated maintenance costs, and
  - d) Administrative support services for which SBA has centralized functions including: human resources management/payroll services, legal counsel, facilities management, procurement, security and emergency planning, health unit, employee assistance/counseling programs, computer technical support, web services and use of mail room and delivery services.

#### **B. Annual Budget Process**

SBA will include Advocacy as part of its annual budgeting process with Advocacy being represented as a separate line-item within SBA's overall budget request. Advocacy will appear in SBA's annual Congressional Budget Justification document, including as an appendix to such document.. Advocacy will be responsible for preparing its budget estimates and supporting justification/narrative and providing them to the OCFO within the proper timeframe designated by the OCFO. The OCFO will provide Advocacy with the relevant documents relating to budget preparation and appropriate technical assistance upon request.



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Advocacy will be responsible for managing its activities and resources within the appropriation provided by Congress. If a need arises for additional funds, Advocacy will coordinate with OCFO to initiate appropriate administrative or legislative actions.

#### **C. Expenditure of Funds and Account Reconciliation**

The OCFO will continue to process all purchase orders and contracts and pay all invoices and travel vouchers submitted. Advocacy will continue to have access to Oracle to process all other documents. The OCFO will continue to provide information on a regular basis concerning the amount charged to the Advocacy appropriation. The OCFO will continue to provide staff support and technical assistance regarding budget execution.

Upon request, the OCFO will provide Advocacy with financial reports pertaining to Advocacy activities, including a quarterly report on obligations by budget object code. Should either the OCFO or Advocacy notice any discrepancies in the accounting records, the other party will be promptly notified and assist with finding a resolution.

#### **D. Other Reports and Government-wide Initiatives**

SBA will continue to include Advocacy in any required reports such as the strategic and performance plans, building security and continuity of operations plans, and other statutorily required or OMB mandated reports.

#### **E. SBA Administration and Support Functions**

SBA will continue to provide support to Advocacy, at no cost, for the functions as outlined in A(2)(d) above through the Office of the Chief Financial Officer and Performance Management, the Office of Administrative Services, the Office of Executive Secretariat, the Office of Human Resources Solutions, the Office of Communications and Public Liaison, and the Office of the General Counsel.

#### **F. SBA Policies and Procedures**

Advocacy employees will continue to remain bound by all SBA SOPs and other policy directives, including those relating to the administrative support services listed above. Additionally, Advocacy shall be subject to SBA's Office of Inspector General inquiries and audits.

### **IV. POINTS OF CONTACT**

The following positions will serve as the primary points of contact for implementing this Agreement and will meet at least every five years to review this Agreement and determine whether any changes should be made.



**For Advocacy**

Name Luckie Wren  
Title Director, Administrative Support Branch  
Phone 202-205-7749  
Email [Luciette.wren@sba.gov](mailto:Luciette.wren@sba.gov)

**For SBA**

Name Emily J. Knickerbocker  
Title Director of Planning and Budget  
Phone 202-205-6975  
Email [Emily.Knickerbocker@sba.gov](mailto:Emily.Knickerbocker@sba.gov)

**V. TERM, TERMINATION AND AMENDMENT**

This Agreement will take effect when signed by both parties and remain in effect for five (5) years, unless otherwise terminated. The Agreement will be reviewed by the points of contact identified in section IV at least every five (5) years and considered to be automatically renewed for another five (5) years unless otherwise amended or terminated. Either party may terminate this Agreement with at least thirty (30) calendar days written notice to the other party. This Agreement may be amended upon mutual written consent of both parties.

**VI. GENERAL TERMS**

As required by the Antideficiency Act, 31 U.S.C. 1341, 1342, and 1514(a), all commitments made by any party to this Agreement are subject to the availability of appropriated funds and budget restrictions. Nothing in this Agreement, in and of itself, obligates any party to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations without the necessary funds or authority.

**VII. SIGNATURE**

The following individuals are authorized to sign this Agreement on behalf of their respective parties.

Office of Advocacy

Small Business Administration

  
\_\_\_\_\_ 7/8/16

Darryl L. DePriest  
Chief Counsel for Advocacy

Date

  
\_\_\_\_\_ 7/5/16

Maria Contreras-Sweet  
Administrator

Date

Or

Douglas J. Kramer  
Deputy Administrator

# Appendix R

## Memorandum of Understanding between the Office of Information and Regulatory Affairs and the Office of Advocacy

### MEMORANDUM OF UNDERSTANDING

### BETWEEN

THE OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION

### AND

THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS,  
OFFICE OF MANAGEMENT AND BUDGET

#### I. BACKGROUND

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) and the Office of Information and Regulatory Affairs of the Office of Management and Budget (OIRA) recognize that small entities (including small businesses, non-profit organizations and small governmental jurisdictions), as defined in 5 U.S.C. § 601, often face a disproportionate share of the Federal regulatory burden compared with their larger counterparts. Advocacy and OIRA further recognize that the best way to prevent unnecessary regulatory burden is to participate in the rulemaking process at the earliest stage possible and to coordinate both offices to identify draft regulations that likely will impact small entities.

Inasmuch as Advocacy and OIRA share similar goals, the two agencies intend to enhance their working relationship by establishing certain protocols for sharing information and providing training for regulatory agencies on compliance with the Regulatory Flexibility Act (RFA) and various other statutes and Executive orders that require an economic analysis of proposed regulations.

#### II. PURPOSE

The purpose of this Memorandum of Understanding (MOU) between Advocacy and OIRA is to achieve a reduction in unnecessary regulatory burden for small entities. This initiative also is intended to generate better agency compliance with the RFA and other statutes and Executive orders requiring an economic analysis of proposed regulations.

#### III. AUTHORITY

This agreement is under the authority of 15 U.S.C. § 634(a) et seq., 5 U.S.C. § 601 et seq., Executive Order 12866, as amended, and other relevant provisions of law.

#### IV. OBJECTIVES

To the extent consistent with Advocacy and OIRA authority, Advocacy and OIRA agree to accomplish the following objectives:

- a. Establish an information sharing process between Advocacy and OIRA when a draft rulemaking is likely to impact small entities.
- b. Establish Advocacy guidance for Federal agencies on the requirements of the RFA.
- c. Establish training for Federal agencies on compliance with the RFA.

## **V. SCOPE**

Nothing in this MOU shall be construed to limit or otherwise affect the authority of the Office of Advocacy as established in 15 U.S.C. § 634a et seq. or the authority, management or policies of OIRA.

## **VI. RESPONSIBILITIES**

- a. **Advocacy**
  - 1. During OIRA's review of an agency's rule under Executive Order 12866, OIRA may consult with Advocacy regarding whether an agency should have prepared a regulatory flexibility analysis. Advocacy will designate staff by issue and/or agency to facilitate such discussions. If OIRA is uncertain as to small business impact or RFA compliance, OIRA may send a copy of the draft rule to Advocacy for evaluation.
  - 2. If Advocacy's discussions with an issuing agency do not result in an acceptable accommodation, Advocacy may seek the assistance of OIRA during the regulatory review process under Executive Order 12866 and may recommend that OIRA return the rule to the agency for further consideration.
  - 3. Advocacy will monitor agency compliance with the RFA by reviewing the semi-annual regulatory agenda and the analyses that agencies publish in the *Federal Register*. Similarly, Advocacy will review the regulatory flexibility analyses that agencies provide directly to Advocacy. If Advocacy finds that a rule does not comply with the RFA, Advocacy will raise these concerns with OIRA.
  - 4. Advocacy shall provide OIRA with a copy of any correspondence or formal comments that Advocacy files with an agency concerning RFA compliance.

5. Advocacy will develop guidance for agencies to follow on how to comply with the RFA.
6. Advocacy will organize training sessions for Federal agencies on how to comply with the analytical requirements of the RFA.

**b. OIRA**

Consistent with OIRA's responsibility to ensure adequate interagency coordination, OIRA shall endeavor to do the following:

1. During OIRA's prepublication review of an agency's rule pursuant to Executive Order 12866, OIRA will consider whether the agency should have prepared a regulatory flexibility analysis. If Advocacy has a concern in this regard, OIRA will provide a copy of the draft rule to Advocacy. In addition, upon request, OIRA may, as appropriate, provide Advocacy with draft proposals and accompanying regulatory analyses.
2. If, in the judgment of Advocacy or OIRA, an agency provides an inadequate regulatory flexibility analysis, or if an agency provides a rule with an inadequate certification pursuant to section 605 of the RFA, OIRA may discuss and resolve the matter with the agency in the context of the regulatory review process under Executive Order 12866. Where OIRA deems it appropriate, OIRA may return a rule to the agency for further consideration.
3. If Advocacy or OIRA are concerned about an information collection requirement contained in a rule which OIRA is reviewing under the Paperwork Reduction Act, OIRA may discuss and resolve the matter with the agency.
4. OIRA will endeavor to provide assistance, as appropriate, at the request of Advocacy in support of its development of guidance for agencies to follow in complying with the RFA and its training sessions on the analytical requirements of the RFA.

**c. Joint Advocacy-OIRA Responsibilities**

For rulemakings and information collection requests related to urgent health, safety, environmental, and homeland security matters, Advocacy and OIRA shall endeavor to cooperate and discuss their concerns in an expeditious manner.

## **VII. TERM**

This MOU shall take effect on the date of signature of both parties, and will remain in effect for three years, at which time it may be renewed by mutual agreement of Advocacy and OIRA.

## **VIII. AMENDMENT**

This MOU may be amended in writing and at any time by mutual agreement of Advocacy's Chief Counsel or his/her designee and the Administrator of OIRA or his/her designee.

## **XI. TERMINATION**

Either Advocacy or OIRA may terminate this MOU upon 90 days advance written notice.

## **X. POINTS OF CONTACT**

Points of contact for this MOU are as follows:

### **For Advocacy:**

Thomas M. Sullivan  
Chief Counsel  
Office of Advocacy  
U.S. Small Business Administration  
409 Third Street, SW  
Suite 7800  
Washington, DC 20416  
(202) 205-6533  
(202) 205-6928 (fax)

### **For OIRA:**

Dr. John D. Graham  
Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
262 Old Executive Office Building  
Washington, DC 20503  
(202) 395-4852  
(202) 395-3047 (fax)

## **XI. ACCEPTANCE**

The undersigned parties hereby accept the terms of this MOU:

**FOR THE OFFICE OF ADVOCACY:**

 3/19/02  
Thomas M. Sullivan, Chief Counsel

**FOR THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS:**

 3/19/02  
John D. Graham, Administrator

# Appendix S

## Memorandum of Understanding between the SBA Office of National Ombudsman and the Office of Advocacy

**MEMORANDUM OF UNDERSTANDING  
BETWEEN  
THE OFFICE OF ADVOCACY,  
U.S. SMALL BUSINESS ADMINISTRATION  
AND  
THE OFFICE OF THE NATIONAL OMBUDSMAN,  
U.S. SMALL BUSINESS ADMINISTRATION**

### **I. PURPOSE**

The purpose of this Memorandum of Understanding (“MOU”) between the Office of Advocacy of the U.S. Small Business Administration (“Advocacy”) and the Office of the National Ombudsman (“ONO”) of the U.S. Small Business Administration is to foster increased cooperation between the offices as they both work to create a more small business-friendly regulatory environment.

This MOU is consistent with Advocacy’s statutory independence under 15 U.S.C. section 634a et seq. and Executive Order 13272 and ONO’s duties pursuant to 15 U.S.C. section 657.

### **II. BACKGROUND**

Advocacy and ONO recognize that small business concerns face a disproportionately higher share of federal regulatory burden than their larger counterparts. Advocacy and ONO further recognize that regulatory burden can result both during the rulemaking process and in the enforcement of existing regulations. Inasmuch as Advocacy and ONO share similar goals, the two offices intend to enhance their working relationship by establishing certain protocols for sharing information in support of the mission of each office and to avoid conflicts of interest and duplicative efforts.

### **III. AUTHORITY**

This agreement is under the authority of 15 U.S.C. section 634a et seq.; 5 U.S.C. section 601 et seq.; 15 U.S.C. section 657, and Executive Order 13272.

### **IV. OBJECTIVES**

To the extent consistent with the statutory authority granting powers to the two offices, Advocacy and ONO agree to pursue the following objectives together.



- a. Establish an information sharing process to ensure that small business complaints, comments, or concerns are handled by the appropriate office.
- b. Establish guidance for dissemination of information to small businesses and federal agencies explaining the statutory responsibilities of both offices.

## **V. RESPONSIBILITIES**

### **a. ONO**

1. ONO, through its national presence, the SBA field offices, and Regional Regulatory Fairness Boards, will receive comments and concerns regarding the impact of regulations on small businesses and the burden of regulatory compliance and federal regulatory enforcement.
2. Where appropriate, ONO shall forward such comments to Advocacy and will provide information and materials generated through ONO that are more appropriately within Advocacy's jurisdiction.
3. ONO will promote the SBA's programs and services, including the regulatory and research role of Advocacy, through its RegFair Hearings and Roundtables, and will include the Office of Advocacy Regional Advocates in the planning and implementation of those activities, as appropriate.
4. Provide material from ONO that may be distributed to participants of roundtables and other outreach events hosted by Advocacy.
5. Invite Advocacy to deliver updates to RegFair Board members (a) at ONO's Annual Meeting of the Regional Regulatory Fairness Boards and (b) on periodic ONO conference calls with Board members, as appropriate.
6. Invite Advocacy to attend ONO-sponsored National Hearings.
7. Solicit Regional Regulatory Fairness Board nominations from Advocacy to fill existing / projected vacancies.
8. Share key take-aways emerging from roundtables and public hearings hosted by ONO with Advocacy, flagging issues requiring Advocacy to take action.



**b. Advocacy**

1. Advocacy will use its regional presence to assist ONO in the implementation of its Regulatory Fairness Program. Regional Advocates serve as the primary communication link between the Chief Counsel for Advocacy and local small business owners, trade and business associations, and state and local governments. Part of their responsibility is to enroll small business owners for participation in roundtables and rulemaking panels. To assist ONO, Advocacy will:
  - a. Provide material from Advocacy that may be distributed to participants in the Regulatory Fairness Program.
  - b. Provide ONO with regulatory complaints and other information generated by small business interests that are more appropriately within ONO's jurisdiction.
  - c. Invite ONO to participate in Advocacy-sponsored outreach events.
  - d. Share key take-aways emerging from roundtables and public hearings hosted by Advocacy with ONO, flagging issues requiring ONO to take action.
  - e. Encourage small business owners and operators who may be ideally suited for service on ONO's Regional Regulatory Fairness Boards to apply and be considered when vacancies arise. Nominate individuals to serve.

**VI. TERM**

This MOU shall take effect on the date of signature of both parties, and will remain in effect for three years, at which time it may be renewed by mutual agreement of Advocacy and ONO.

**VII. AMENDMENT**

This MOU may be amended in writing at any time by written mutual agreement of the Chief Counsel for Advocacy and his/ her designee and the National Ombudsman or his/ her designee.

## **VIII. TERMINATION**

Either Advocacy or ONO may terminate this MOU upon 90 calendar days' advance written notice.

## **IX. SCOPE**

Nothing in this MOU shall be construed to limit or otherwise affect the independent powers of Advocacy and ONO as established in 15 U.S.C. section 634a et seq. or 15 U.S.C. section 657.

## **X. POINTS OF CONTACT**

Points of contact for this MOU are as follows:

For Advocacy:

Major L. Clark III  
Chief Counsel for Advocacy (Acting)  
Office of Advocacy  
U.S. Small Business Administration  
409 Third Street, SW  
Washington, D.C. 20416

For ONO:

Stefanie Baker Wehagen  
National Ombudsman and  
Assistant Administrator for Regulatory Enforcement Fairness  
Office of the National Ombudsman  
U.S. Small Business Administration  
409 Third Street, SW  
Washington D.C. 20416

## **XI. GENERAL TERMS**

- A. This MOU is neither a fiscal nor a funds obligation document. Nothing in this Agreement authorizes or is intended to obligate the parties to expend, exchange, or reimburse funds, services, or supplies, or transfer or receive anything of value.

- B. This MOU in no way restricts either of the parties from participating in any activity with other public or private agencies, organizations or individuals.
- C. This MOU is strictly for internal management purposes for each of the parties. This Agreement shall not be construed to provide a private right or cause of action for or by any person or entity.
- D. Nothing in this Agreement is intended to conflict with current law(s), regulation(s), or the directives of SBA. If a provision in this Agreement is found to be inconsistent with such authority, then that provision shall be reviewed and modified or annulled as agreed to by Advocacy and ONO in writing, but the remaining provisions of this Agreement shall remain in force and effect unless otherwise noted.

## XII. SIGNATURES

This MOU may be executed in counterparts, which when signed by both parties shall constitute a single binding agreement. The following individuals are authorized to sign this MOU on behalf of their respective organizations.

Major L. Clark III  
Chief Counsel for Advocacy (Acting)  
Office of Advocacy

Stefanie B. Wehagen 12/5/19  
Stefanie Baker Wehagen Date  
National Ombudsman and  
Assistant Administrator for Regulatory Enforcement Fairness  
Office of the National Ombudsman

# Appendix T

## The Small Business Advocate newsletter, June 1996, 20th Anniversary of the Office of Advocacy

United States  
Small Business  
Administration

Office of Advocacy

# 20<sup>TH</sup> ANNIVERSARY SPECIAL EDITION

June 1996

Special Issue

### 20 Years of Speaking Out for Small Business: The SBA's Office of Advocacy Celebrates an Anniversary

Once upon a time—some 20 years ago—there was no Office of Advocacy in the U.S. Small Business Administration. There were almost no small business advocates anywhere, in fact, and little or no consideration of small business in the legislative or regulatory process, few small business statistics or small business columnists, and no *Inc.* magazine. Almost no one talked very much about small business, in spite of the fact that some 14 million small business tax returns were filed annually.

Twenty years later, there are reporters and columnists who specialize in small business issues, small business training and assistance programs at all levels of government, a whole body of research and much talk on the airwaves about the contributions and concerns of small business, hundreds of books and how-to guides and even whole magazines devoted to small business and entrepreneurship. More than 22 million business tax returns are filed annually, and new legislation and regulations are often judged for their effects on small firms. Small business people have voiced their concerns to Congress and the Administration at three White House Conferences on Small Business. Everyone from the President of the United States to the 7-year-old lemonade stand entrepreneur down the street takes it as an article of faith that when the small business community sneezes, the economy catches a cold.

And, coincidentally, the SBA's Office of Advocacy is celebrating its 20th official birthday. What follows in this special section of *The*



September 19, 1980: President Jimmy Carter signs the Regulatory Flexibility Act (P.L. 96-354), which gave the Office of Advocacy vastly expanded powers to act on behalf of small business before federal regulatory agencies.

*Small Business Advocate* is a narrative of the history of the Office of Advocacy and a look at some the changes that have come about in the small business world since 1976.

#### Inside this special supplement to *The Small Business Advocate*:

**The Past:** A Look at the  
Office of Advocacy's  
History ..... A-3

**The Present:** What the  
Office of Advocacy Is  
Doing Today ..... A-8

**The Future:** Advocating  
for Small Business in  
the 21st Century ..... A-10



## A Message from the Chief Counsel for Advocacy

Dear Friends of Small Business,

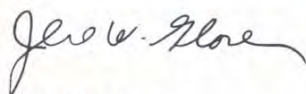
As I look back on the history of the Office of Advocacy over the past 20 years, I'm tempted to paraphrase Winston Churchill: seldom has so much been hoped for by so many from so few.

As technology changes, as the economy grows, the nation's problems change—and so do the needs of small business. The political dynamics also change, and there is an ongoing need to remind public policymakers that the “multitude of small undertakings”—small businesses—continue to be the source of America's unique vitality, as de Tocqueville observed 150 years ago. They need to be nurtured—not guaranteed success, but rather guaranteed the right to succeed or fail depending on their own decisions.

Small businesses create most of the new jobs, are more innovative per employee, train most of the new workers, empower minorities and women, and make important contributions to community life. Perhaps most important, they are flexible enough to create whole new industries built on real markets—not markets engineered or subsidized by governments, but markets for innovative products and services generated by the ingenuity of people. They are key in creating the high standard of living that we enjoy.

And our society has rightly instituted laws and regulations to strengthen that high standard—to ensure that we have safe homes and workplaces, clean air, fair employment standards, and so on. The problems occur when the laws and regulations become too cumbersome or outdated.

So I think we will continue to see a need for an Office of Advocacy to act as a kind of watchdog—okay, a junkyard dog—for small business within the government—to make sure that small businesses remain free to be America's economic powerhouses.



Jere W. Glover  
Chief Counsel for Advocacy  
U.S. Small Business Administration

## The Small Business Advocate

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**Director, Office of Information**  
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## From the Editor:

A sincere “thank you” to all who contributed to this 20th anniversary special edition of *The Small Business Advocate*—former and current Advocacy employees, past chief counsels, legislators, and many other old friends.

A note of special appreciation is due Kathryn Tobias, an Office of Advocacy employee for 14 years, whose writing talent—and heart—made this Advocacy feature possible. Also, many thanks to John Ward, whose dedication and graphic-design skills make every issue of *The Small Business Advocate* so special.



## The Past: The History of the Office of Advocacy

### A Bit of Prehistory: In the 1960s and 1970s, the Advocacy Idea Is Born

**T**he Office of Advocacy did not spring full-blown from the head of Zeus or materialize Topsy-like one fine day in 1976.

A dozen years before its creation, in 1964, *The Businessman's Guide to Washington* had this to say about the role of small businessmen (most business owners *were* men back then) in the legislative process:

Often, businessmen come down to Washington when they are almost purple with apoplexy. A particular piece of legislation or an administrative ruling has been either passed or under consideration for weeks, months or perhaps a year. When it is about to be finalized—or even after it has been passed—the businessman shows up in Washington for a “last-ditch effort.”

The only advice the 250-page guide had for the businessman in that situation was to make himself known to people in the government in advance of trouble. The practicality—or impracticality—of every business owner getting to know every agency of the government was scarcely acknowledged. The guide did caution that, while “great powers are wielded” by some parts of the government, “there will be few occasions for the businessman to deal with them.”

The underlying problem was this: small business’ vital interests were being profoundly affected by—but almost never represented in—the legislative, regulatory and administrative processes of government. The extent of the problem became more widely recognized in the ensuing years, as new laws and regulations governed more and more aspects of American life.

#### Business Organizations Take Up the Advocacy Banner

By the late 1960s, a number of business organizations and trade associ-



September 10, 1970: President Richard Nixon meets with small business representatives in the Cabinet Room of the White House. Six months earlier, Nixon had issued Executive Order 11518, which directed federal agencies to cooperate with the SBA in its advocacy efforts on behalf of small businesses. (Photo courtesy of the National Archives.)

ations had begun paying attention to the problems small businesses faced with government, especially in comparison with their larger counterparts who could afford to keep representatives in Washington. And the growing concern for small business caught the attention of President Richard Nixon.

In March 1970, President Nixon issued Executive Order 11518, “providing for the increased representation of the interests of small business concerns before departments and agencies of the United States Government.” The executive order described the U.S. Small Business Administration as having “an established program of advocacy in matters relating to small business.” And it called on the SBA, “as the spokesman for and advocate of the small business community, [to] advise and counsel

small business concerns in their dealings with the departments and agencies of the United States Government to the end that the views of small business concerns will be fully heard, their rights fully protected, and their valid interests fully advanced.”

The executive order further authorized the SBA to become an activist on behalf of small business in “investigations, hearings or other procedures pending anywhere in the government” and it directed agencies, without waiting for SBA’s initiative, to consult with the SBA on a wide range of “matters which reasonably can be construed as materially affecting” small business.

In September 1970, recalls Lew Shattuck, then of the Smaller Business Association of New England

*Continued on page A-4*



## A Garbage Strike and An Ugly Red Sofa: Ah, the Good Old Days!

by David Voight

My first encounter with the concept of an Office of Advocacy occurred more than 20 years ago when the legislation was first before Congress. At the time I was the chief Senate-side lobbyist for the National Federation of Independent Business (NFIB). Since this was one of our priorities, I worked closely with the Senate Small Business Committee—then chaired by Sen. Gaylord Nelson (D-Wisc.)—and staff, notably Allen Neece and Tom Cator.

An event that is much more strongly embossed in my memory occurred about two years later when President Carter submitted the name of one Milton D. Stewart to be the first nominee as chief counsel for advocacy confirmed by the U.S. Senate. (There had been previous chief counsels, but Milt was the first to go before the Senate.) Since NFIB remained strongly in support of the office, I got involved in the confirmation process. I spent many nights working overtime with the same Senate Small Business Committee staff in a building that no longer exists on a site across from the Hart Senate Office Building, which did not exist at the time.

It is not surprising that I, like so many others, fell under the spell of Milt's driving energy, commitment to small business, and general charisma. It was surprising, however, that he apparently thought that I might not be such a bad sort and asked me to join the staff of the new Office of Advocacy. Initially, I was his executive assistant and toward the end of his tenure became deputy chief counsel for advocacy.

Our first tasks were to simply staff up and organize the office. There was a rudimentary structure in place from the time the law was signed under President Ford through the time the new Carter Administration made this particu-

lar appointment. I do remember that one of the particularly difficult tasks was finding a way to get rid of an exceptionally ugly red velvet sofa that the previous acting chief counsel for advocacy had chosen as part of the official furniture.

Finding issues to work on was never a problem with Milt around. I can remember the occasion that he came into the office with a small two-inch newspaper story about a garbage strike in Los Angeles. He gathered his staff around him and said, "There is an important issue here for small business. I just don't know what it is yet." For two days you could see his mind working away and when he gathered us again he stated what the issue was—and as usual he was right.

The problem, however, was that every day every newspaper had countless numbers of two-inch stories that were important for small business. My job seemed increasingly to be that of a juggler who had to keep dozens of apples, oranges, knives, and flaming torches in the air at the same time—and whenever I saw Milt reading a newspaper, I just knew that he was going to throw an anvil into the mix.

An alternative view of my job was that of the man who came along at the end of the parade with a broom and a dustpan to pick up the pieces of the grand and glorious show that went on ahead. In either case it was the greatest show on earth. The Office of Advocacy at that time did not find itself dragged down with a lot of precedent or bureaucratic hurdles. We had the sense of being on the cutting edge of a new and exciting opportunity for small business.

*David Voight is director of the U.S. Chamber of Commerce's Small Business Center.*

**Prehistory**, from page A-3 (SBANE), President Nixon invited representatives of five business groups—SBANE, the National Federation of Independent Business (NFIB), the National Small Business Association (NSBA), the National Association of Small Business Investment Companies (NASBIC), and the National Business League (NBL) to the White House. He told the business leaders that if he wanted to know what was going on in the automotive industry, he had only to call one or two of the big automotive companies, but he had trouble finding the pulse of small business. The President asked the business leaders to be his eyes and ears on the small business community and then he asked them what they would like to do. "We said we'd like to meet with the Cabinet," Shattuck recalls, and so they found themselves for the first time meeting with the people with "real clout."

Three years later, in 1973, several business organizations including SBANE began to recommend in their Washington presentations that the SBA's advocacy role be strengthened and assigned to a particular office. It was Rep. Margaret Heckler (R-Mass.) who, with the endorsement of former Congressman and then-SBA Administrator Thomas S. Kleppe, drew up the first piece of legislation mentioning an Office of Advocacy. The support of Administrator Kleppe, who was a friend of Rep. Heckler from their Capitol Hill days together, was crucial in the passage of the initial law, Rep. Heckler recalls.

On August 23, 1974, among his first presidential acts, President Gerald Ford signed Public Law 93-386, amending the Small Business Act to further spell out an advocacy role within the SBA. But aside from an advocate and a few staff members, little provision was made for staffing the advocacy office. By 1976, it was clear that the role of the "chief counsel for advocacy" needed to be clearly laid out and strengthened.






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**In 1973,  
Rep. Margaret Heckler  
(left), along with  
former Congressman  
(and then-SBA  
Administrator)  
Thomas S. Kleppe,  
drew up the first piece  
of legislation mentioning  
an Office of Advocacy.**

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### **Building a Solid Foundation**

It was then that the Senate Select Committee on Small Business, chaired by Sen. Gaylord Nelson (D-Wisc.), took the rudimentary advocacy office and built on it a solid foundation for the present-day Office of Advocacy. At the committee's hearings on March 29, 1976, small business owners like Herman Williams, president of Williams Steel and Supply Company in Milwaukee, Wisconsin, spoke with passion about the need for a strong voice for small business within the government.

There are laws on ecology, laws to preserve nature, birds, natural lands, landmarks, scenic views; but where are the laws to preserve the human resources created by the small businessman? Small business needs a constant representative on the President's cabinet and before Congress at all times. There should be a Small Business Advocate on every federal commission, agency, department, panel, advisory committee and task force. . . . The Advocate should also be responsible for gathering in one place the necessary statistics and data relating to . . . small business.

But why should the small business advocate be a public servant? John Lewis, executive vice president of the National Small Business Association, addressed the question:

The question will occur, why do not

the National Small Business Association or other small business associations do the job [of small business advocacy]? Why look for a Government agency? The National Small Business Association does effectively represent the interests of small business, but neither it nor any other small business organization can get behind the closed doors of Government before decisions are made. . . . Even if the small business organizations of the country were organized into one cohesive and powerful force, advocacy within Government and by Government would still be essential to do the infighting for the small business.

Herb Liebenson of the National Small Business Association spoke

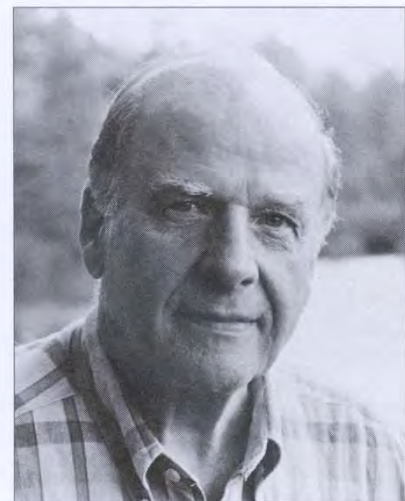
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**In 1976,  
Sen. Gaylord Nelson  
(right) held hearings on  
legislation that created  
the present-day Office  
of Advocacy.**

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about the effects that paperwork burdens, mushrooming product liability claims and laws like the Occupational Safety and Health Act were having on small firms. He noted that Senator Nelson had introduced a bill to ensure fair and equitable representation for smaller and medium-sized businesses on federal advisory committees. Liebenson pushed for a strong advocacy office in the SBA. "Advocacy begins within government," he said.

On June 4, 1976, President Gerald Ford signed Public Law 94-305, establishing "within the Small Business Administration an Office of Advocacy. The management of the Office shall be vested in a Chief Counsel for Advocacy who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate."





## An Advocacy Chronology

Some milestones in the history of the Office of Advocacy

**1953** The Small Business Act establishes the Small Business Administration.

**1970** President Nixon issues Executive Order 11518.

**1974** Congress passes P.L. 93-386, further spelling out an advocacy role in the SBA. Anthony Stasio acts as SBA's small business advocate.

**1976** President Ford signs P.L. 94-305, establishing the Office of Advocacy.

**1978** Milton Stewart becomes the first chief counsel for advocacy.

**1979** Advocacy holds its first national legislative conference to encourage small business initiatives at the state and local levels of government.

**1980** The Office of Advocacy spearheads efforts for the first White House Conference on Small Business.

**1981** Frank Swain is confirmed by the Senate as the second chief counsel for advocacy.

**1986** Advocacy covers the issues for the second National White House Conference on Small Business.

**1992** Thomas P. Kerester sworn in as Advocacy's third chief counsel.

**1994** Jere W. Glover is confirmed as fourth chief counsel for advocacy.

**1995** The third White House Conference on Small Business convenes in Washington, D.C.

**1996** The Office of Advocacy celebrates its 20th birthday.

## Advocacy Speaks Out for Small Business: A Thumbnail History

In July 1978, Milton D. Stewart was the first to be confirmed by the U.S. Senate as chief counsel for advocacy in the U.S. Small Business Administration. His visibility as an appointee of President Jimmy Carter, combined with his forthright personal style, gave Stewart a high profile as SBA's new small business advocate.

Shortly after assuming his new role, the chief counsel began testifying before various congressional committees—the Joint Economic Committee, the House and Senate Small Business Committees, and many others—on issues ranging from the nation's energy crisis and its effects on small firms to economic concerns and the overall climate for small business. In 1979, Stewart instituted the first national conference for state and local officials concerned about the future of small business.

Milt Stewart and the Office of Advocacy had a strong hand in the 1980 White House Conference on Small Business, the first in recent history. Attended by 1,682 small business delegates and 3,600 other participants, the national conference convened Jan. 13, 1980. The final report of the conference quoted the 19th-century French philosopher Alexis de Tocqueville, who ascribed the unique vitality of American life to its "multitude of small undertakings." The report continued:

... small companies are aggrieved by a policy of neglect that has inadvertently imposed obstacles and inequities that seem to thwart efficient business operations at every turn. The single most important message of the Conference is that government must eliminate those obstacles and inequities. . . .

Several key small-business-friendly laws were enacted as a direct result of the conference recommendations, including the Regulatory Flexibility Act of 1980, the Equal Access to Justice Act of

1980, the Prompt Payment Act of 1982 and the Small Business Innovation Development Act of 1982 (SBIDA). The Small Business Innovation Research program, created by SBIDA, continues today as a highly successful program, producing many useful small business innovations.

With the 1980 election of President Ronald Reagan, Frank S. Swain, a former general counsel to the National Federation of Independent Business, took over the reins of the Office of Advocacy. Whereas Stewart had approached small business problems in a head-on, take-the-bull-by-the-horns manner, Swain's style was to negotiate forcefully, but quietly, often behind the scenes, obtaining important concessions for small business. His style translated effectively to Advocacy staff members and from them to their counterparts in other branches of government, who were able to make changes on behalf of small business.

Frank Swain's eight-year tenure (1981–1989) was the longest of any chief counsel before or since. Chas Cadwell, Swain's deputy, recently recalled some of the Office of Advocacy's key achievements during this period, including accomplishments of individual staff members:

- Patricia Powers launching research and a conference . . . [that opened] doors into the health policy debate for all small business;
- Kevin Bromberg singlehandedly convincing EPA to alter proposed rules for air and water effluents, saving small firms literally billions of dollars in regulatory costs;
- Barry Pineles taking on the government-protected California citrus cartel on behalf of small independent growers and processors;
- Daryl Jackson using the Advocacy tax model to convince Treasury to maintain graduated corporate rates in the 1986 tax reform;
- Frank Swain successfully



going nose-to-nose at a Cabinet Council meeting with the Department of Justice on proposed changes in antitrust laws. . . .

In 1986, the second White House Conference on Small Business was held in the midst of a storm of controversy over a proposal to abolish the Small Business Administration. Despite some diversion over that issue, the conference focused energy on moving the small business agenda ahead and making improvements to many of the initiatives already taken following the 1980 conference. At the top of the list of 1986 recommendations was a recommendation to reform the liability insurance system. Other high-priority recommendations included eliminating government-mandated employee benefits, prohibiting unfair nonprofit and government competition with for-profit firms, balancing the federal budget, and creating a Cabinet-level department of trade.

The results of the 1986 White House Conference were widely regarded by the small business community as less earth-shaking than those of the 1980 conference. Perhaps it was because small business had already come a long way since 1980, or perhaps the delegates had grown more sophisticated—and the issues more complicated.

With the arrival of the Bush administration in 1989, a succession of four acting chief counsels led the Office of Advocacy. The vision of Advocacy's mission—and the office's effectiveness—clearly waned, at least in the eyes of the small business community, during this three-year period.

On May 11, 1992, the Senate confirmed Thomas P. Kerester, a tax attorney, former small business person and former publisher of *Coopers and Lybrand's Emerging Business*, as chief counsel for advocacy. Kerester expressed his vision with respect to his new mission in an interview for *The Small Business Advocate*:

The White House was not looking for a "yes person." Where appropriate I will go to the president to de-

## Not the Three Tenors . . .



In December 1994, past and present chief counsels for advocacy met in Washington. From left to right: Thomas Kerester, Milton Stewart, Jere Glover, and Frank Swain.

fend small business, to the administrator to seek help and support for them, and to Congress to be a vocal, up-front, and strong voice in their behalf.

Kerester had scant opportunity to carry out his vision; he was in of-

fice only eight months. But in that period he talked with many small business owners about their concerns, and spoke out about issues ranging from product liability to the new Americans with Disabilities Act.

## 20 Years Ago: The More Things Change . . .

*From Herb Liebensohn's testimony at the March 29, 1976, Senate hearings on the Office of Advocacy:*

Illustrative of the important governmental affairs issues now pending that can affect the profitability or survival of every small business enterprise in this country are:

1. Oil company divestiture of distribution function.
2. Job creation credit.
3. Small business tax reform and capital formation.
4. Minimum wage increases.
5. Unemployment compensation and workers' compensation reform.
6. Retention and enforcement of the Robinson-Patman Act.
7. Reform of pension, profit-sharing, and welfare fund rules and regulations (ERISA).
8. Reform of occupational safety and health regulations.
9. Product testing.
10. Product liability insurance.
11. National health insurance.
12. Consumer Product Safety Commission—controlling excesses.
13. Protection of the equities of franchisees.
14. Jurisdiction of government agencies to obtain data (affecting small business) from larger companies (line of business, corporate patterns, etc.).
15. Federal charters for giant corporations.



## The Present: The Office of Advocacy Today

### Meeting the Challenges: Regulatory Reform, Legislative Initiatives, and a White House Conference

A new administration arrived in Washington on Jan. 20, 1993, and a White House Conference on Small Business Commission would soon be appointed by the administration of Bill Clinton. Doris Freedman, an experienced and dedicated Advocacy staffer, was named SBA's acting chief counsel for advocacy while the SBA awaited appointment and confirmation of a permanent chief counsel.

SBA's new administrator, Erskine B. Bowles, also took an active interest in small business advocacy, raising the visibility of the role by appearing before the media with the president and vice president and discussing "the concerns and ideas of small business." Small business jargon had even entered the administration's lexicon: government was going to be more "entrepreneurial" by cutting red tape, putting customers first, empowering employees to get results, and producing better government for less.

On May 5, 1994—appropriately, during National Small Business Week—Jere W. Glover was sworn in as the Office of Advocacy's fourth presidentially appointed chief counsel. Glover had served under Milt Stewart, the first chief counsel for advocacy, and he was ready to hit the ground running. As he testified in his confirmation hearings, he was keenly aware of Advocacy's mission:

It is important to remember why the Office of Advocacy was originally created in 1976. The Congress felt that small business views were not adequately represented before the agencies and Congress. Furthermore, Congress and the agencies did not have adequate information to make proper decisions about small business . . .

The wisdom of Congress in creating the Office of Advocacy 18 years ago is more obvious than ever. The need

for the office is more urgent than ever.

In broad strokes, Glover outlined his new mission: to reduce the regulatory burden on small business; serve, with the administrator, as the president's eyes and ears on the small business community; help eliminate the credit crunch for small business; strengthen the Small Business Innovation Development Act and help new innovative companies grow; work to restore a sound antitrust policy with respect to small business; and work with federal agencies to develop

significant opportunities for small business.

But the first order of business was to prepare final issue information in time for the first state White House Conference on Small Business in Wilmington, Delaware, the month after Glover's confirmation. The next year's activity, in fact, centered around the state, regional, and national White House Conferences, as the Office of Advocacy provided a steady stream of background research on new issues and on the small business community in each state.

#### That Was Then . . . This Is Now

The small business sector as reflected in the statistics of 20 years ago and today.

	20 Years Ago	Today
■ Business tax returns	14.5 million	22.1 million
■ Incorporations	375,766	741,657
■ Bankruptcies	34,529	52,256
■ Small firm share of net new jobs	65%	virtually all
■ Small firm employment share	51%	53%
■ Small firm sales share	39%	47%
■ Federal prime contracts from small firms	\$14.8 billion	\$39.2 billion
■ Federal subcontracts from small firms	\$13.3 billion	\$20.8 billion

Note: Figures for 20 years ago represent 1976 or 1977 data, as available, except for procurement figures, which are for fiscal year 1980. Figures for "today" represent the latest data available.



At the same time, the new chief counsel, supported by SBA's new administrator, Phil Lader, began reaching out to small business organizations, testifying before Congress on small business issues, and looking for new and effective ways to carry out the Office of Advocacy's mission. By the end of Glover's first year, the Office of Advocacy had also, among other things:

- Organized and prepared a report for the White House Conference on a series of focus groups on the future of small business.
- Prepared a nationwide review of banks' "friendliness" to small business.
- Reviewed several thousand proposed regulations, commenting on and helping to change several of those most likely to disproportionately affect small firms (see, for example, the box on page A-11).
- Testified on significant new legislation, including bills affecting procurement and judicial review of regulatory flexibility actions.
- Reached out to the small business community through roundtables and working groups on concerns such as procurement, the environment, and small business innovation.
- Prepared data on small business for the president's annual report on *The State of Small Business* and for profiles of each of the states.
- Organized the SBA's annual observance of small business contributions during Small Business Week.

Despite its contributions, the Office of Advocacy has never been able to rest on its laurels. In July 1995, the office came under fire in the House of Representatives during the debate on appropriations (see box at right).

A proposal that "zeroed out" the Office of Advocacy from the SBA appropriations bill reached the House floor for a vote. Rep. Jan Meyers (R-Kans.), chair of the House Small Business Committee, and Rep. John LaFalce (D-N.Y.), ranking minority member, led a fight to restore funding.

## The Office of Advocacy in 1995: "Going Toe to Toe with All Other Agencies"

*From House Small Business Committee Chair Jan Meyers' (R-Kans.) July 26, 1995, testimony in support of restoring funding for the Office of Advocacy:*

When I first became chairman, a number of the small business groups said to me, the two most important things in the SBA were the loan program and the Office of Advocacy. . . .

This was stated on behalf of NFIB, the U.S. Chamber of Commerce, National Small Business United, the National Association for the Self-Employed, and the Small Business Council of America. They all strongly support the Office of Advocacy and they support this amendment [to restore Advocacy's funding.]

Some Members may not be familiar, Mr. Chairman, with what the Office of Advocacy does, but it is the advocate among other agencies of Government on behalf of small business, and it has performed extremely well. It is an independent office, appointed by the President, confirmed by the Senate so that it has the clout to go

toe to toe with all other agencies.

It has testified before Congress approximately 200 times and about 25 percent of that time it was either in opposition to administration policy or in the absence of administration policy on an issue.

It is also the linchpin, it is absolutely the central position for enforcing the Regulatory Flexibility Act. This is an act which we just strengthened in the Contract with America. . . .

I want to state strongly that this is a key vote for the NFIB, that all the small business groups supported it; that if Members voted for the Regulatory Flexibility Act in the Contract with America, it is absolutely counter to that if Members do not support the Office of Advocacy.

In a testimony to the Office of Advocacy's contributions—and the continuing belief in the need for such a small business voice within government—all the major national business organizations and the delegates to the 1995 White House Conference on Small Business took a strong stand in support of the office. On July 26, 1995, the full House of Representatives voted 368–57 to restore the Office of Advocacy's funding.

After the National White House Conference on Small Business in June 1995, the Office of Advocacy refocused its efforts toward implementing the conference recommendations, while continuing to carry out its other mandates. The office organized the 13th National

Legislative Conference on Small Business Issues—a decade and a half after the first such conference in 1979.

Advocacy has recently celebrated a number of successes, including passage of the Small Business Regulatory Enforcement Fairness Act, which strengthens enforcement of the Regulatory Flexibility Act and was signed by President Clinton on March 29, 1996 (see box on page A-13). By June 1996, on its 20th official birthday, the Office of Advocacy is well poised to speak out for small business for another score of years—and more.



## The Future: Advocating in the 21st Century

### Riding the Crest of the Wave: Will Small Business' Clout Continue into the 21st Century?

The Office of Advocacy's former chief counsels have on several occasions looked to the future of small business advocacy. Frank Swain, in a 1986 interview with *Business Age* magazine, noted that there have been many changes in the small business environment since the mid-1970s. For one thing, even in 1986, there were many, many more women going into business, evidenced by the surge in the number of women at the 1986 White House Conference. And researchers and the media were paying much more attention to the small business phenomenon. "I think the small business community is really riding the crest of a wave and has been for five or six years. It's all of a sudden the darling of the public media," said Swain.

He left the reporter with a hint of his vision for small business and the advocacy role. "After the lime-light is dimmed, where is that going to leave the small business community? We have to firm up the proper role between the federal government and business, which I think is quite good right now. However, I would hate to see it go back to where it was."

In 1994, in preparation for the 1995 White House Conference on Small Business, Jere Glover organized a series of focus groups to talk about the future of small business, including a focus group of former SBA administrators and chief counsels for advocacy. For the first time, all four chief counsels were together in a public forum. Frank Swain again spoke about small business' strengthened voice:

I think the small business community right now, today, has more power and clout in Washington than it's ever had. . . . And I also think it's worth noting that as you look at the *Wall Street Journal* . . . speculating as to who's going to absorb the bud-

#### Shape of Things to Come

Self-employment, 1963–2005  
(millions)



Source: SBA, Office of Advocacy, from U.S. Department of Labor data.

Sole proprietorship income, 1988–2005  
(billions of dollars)



Source: SBA, Office of Advocacy; projection for 2005 from Bureau of Labor Statistics.

get cuts, I predict that although there might be proposals from time to time to cut various SBA programs, there will be no proposals to cut the SBA, because small business has a lot of clout and both the Administration and Republicans up here know that.

Milt Stewart agreed that small businesses are stronger than they were in the late 1970s:

However, I think you have to make a balanced statement about it. We've got 14,000 companies with more than 500 employees. We've got more than 5 million with fewer than 500 employees. Now if you try to relate clout to that, I don't think small business is anywhere near where it ought to be in terms of influence on a wide range of issues that contribute to the climate for small business.

Tom Kerester took the discussion back to the original reasons for establishing small business advo-

cacy programs—the nation's productive, but often overburdened small business community:

It's the grass roots business person that doesn't have time to attend meetings, doesn't have time to attend seminars, doesn't have time to go to lectures—that has to hold his or her member of Congress accountable. And to the extent to which they can hold their members of Congress accountable, small businesses will be successful in the year 2005 and beyond.

Jere Glover and the Office of Advocacy prepared a report on the future visions of not only the chief counsels for advocacy, but all the focus groups, which included, among others, business organization representatives, women and minority business owners, young entrepreneurs, and experts in innovation and technology, and family-owned and microbusiness is-



sues. The report, *The Third Millennium: Small Business and Entrepreneurship in the 21st Century*, is available from both the Superintendent of Documents and the National Technical Information Service.

## Taking the Pulse: Advocacy's Regional Advocates

The Office of Advocacy's 11 regional advocates enhance communication between the small business community and the chief counsel for advocacy.

Covering the 10 federal regions (with a special regional advocate for rural development located in Region VI), these advocates are the chief counsel's direct link to local business owners, state and local government agencies, state legislatures, and small business organizations. They help identify emerging issues and problems of small business by monitoring the effects of federal and state regulations and policies on the local business communities within their respective regions.

Turn to page A-16 to find a chart that lists the names, addresses, and telephone numbers of these regional advocates.

## A Sampling of Regulatory Achievements

Here is a small sampling of recent Advocacy initiatives and achievements with respect to regulatory proposals.

- **Hydroelectric Fees:** The Federal Energy Regulatory Commission proposed fees for hydroelectric projects. Advocacy's position that the agency allow bonds instead of cash payments saved small hydroelectric developers about \$2.6 million.
- **Small Quantity Generator Hazardous Waste Tanks:** EPA proposed stringent hazardous waste tank regulations for small quantity generators of hazardous wastes (predominantly small businesses) in 1986. After Advocacy showed that existing regulations were adequate to cover the hazard, EPA abandoned this rulemaking, saving small quantity generators tens of millions of dollars annually.
- **Underground Storage Tanks:** A major EPA rulemaking affecting small businesses involved an initiative that imposed requirements on over 400,000 facilities. EPA adopted Advocacy's position that less expensive tanks were acceptable to meet tank technical standards. A more reasonable leak detection scheme was also promulgated. Savings are estimated at about \$1 billion annually.
- **Abatement Verification:** In 1995, Advocacy directly influenced OSHA's abatement verification standard requiring paperwork and other forms of material proof of workplace hazard corrections. OSHA's adoption of Advocacy's suggested changes to the proposal will save small businesses millions of dollars and burden hours.
- **Termination of Volume Control Regulations for Navel Oranges Grown in California and Arizona:** Advocacy's drive to deregulate markets for navel oranges led to the termination of the navel orange program in late 1992, resulting in sales increases to small businesses of more than \$50 million.
- **Regulatory Fees for Cable Systems:** Advocacy's proposed change—adopted by the FCC in 1994—to the method for calculating fees to be paid by cable operators will save small cable operators approximately \$3.5 million dollars per year.
- **Subscriber Line Charges Imposed by the FCC:** After the breakup of AT&T, subscriber line chargers imposed by the FCC were originally scheduled to cost small businesses \$6 per line per month. That was reduced to \$2 per line per month in 1985 after intervention by the Office of Advocacy, resulting in savings of roughly \$300 million dollars per year, for a total savings of nearly \$3 billion since the inception of the subscriber line charge.
- **Enhanced Poultry Inspection:** USDA withdrew this proposed rule consistent with the comments filed by Advocacy last year. According to industry estimates, this withdrawal saved the poultry processing industry—composed overwhelmingly of small businesses—at least \$60 million in up-front costs and at least \$185 million in annual recurring costs.
- **SEC Simplified Registration Requirements:** The Office of Advocacy has played a critical role in helping the SEC develop simplified registration requirements for small companies. The SEC changed the requirements for small companies. It is estimated that between 3,000 and 3,500 companies are eligible to register under the less costly and less burdensome SB system.



## The Funny Papers

In 1995, Blondie started her own business, and ran into some problems that many small business owners can relate to.



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## Quotable Quotes

### 28 Years Ago: Did We Really Think That Way?

From *The Small Business Administration*, by Addison W. Parris, published in 1968:

Within government small business circles, there is a faint uncomfortable awareness that many small businessmen have a very strong distaste for the government and very little understanding of it. . . . One bureaucrat, shortly after joining the SBA, encountered a small businessman by chance at a social gathering. For quite a while the SBA man listened with mounting impatience to the small businessman's complaints about the great Leviathan in Washington. "The government," the small businessman snorted. "The government doesn't give a damn about me!" The SBA official blurted: "I'm the government and I care about you." A sudden horrified shock of recognition was evident on the face of the small businessman as he realized that he had met one of the "Feds" face to face.

. . . [The small businessman's] kind of general negativism toward modern society does not provide very useful guidance to those attempting to formulate programs and policies in the small business area. As a result, attempts by rank-and-file small businessmen to influence SBA are of

minimal effectiveness unless they concern a very specific problem.

### 26 Years Ago: A Meeting with the President

From Lew Shattuck's account in the October 1970 edition of *New England Business* of a meeting on September 10, 1970, between President Nixon and representatives of five business groups:

Mr. Nixon responded favorably in support of the advocacy role for the SBA, stating that one of the reasons past Cabinet officers had sometimes historically received public criticism was that they were not responsive to the interest groups for which they were the spokesmen. He cited examples such as in the Department of Agriculture, where the Secretary has often been a spokesman for the White House. The President stated he had made it very clear to the Secretary of Agriculture that he was to be a spokesman *to* the White House *from* the farmer, not from the White House to the farmer.

He said he had already made it clear to the Secretary of Commerce, Maurice Stans, that small business is as much a part of his job as big business.

President Nixon feels that one of the

disadvantages of small business is that it is so fragmented and heterogeneous. Whereas if he wanted to feel the pulse of the auto industry, three men could provide the input and in the airlines, five . . . small business is so diffused it is difficult to get timely information.

He asked the associations present at the meeting to take a lead in collecting data and serving as a constant lobby for small business. He re-emphasized that he wanted to hear frequently from the group present.

### 20 Years Ago: The Little Engine That Could

Testimony of John Lewis, Executive Vice President, National Small Business Association, from hearings before the Select Committee on Small Business, *Oversight of the Small Business Administration: The Office of the Chief Counsel for Advocacy and How it Can Be Strengthened*, March 29, 1976:

. . . We have nothing against the farmers of the United States, but there are only 2 3/4 million farms, contrasted with 10 1/2 million small business units.

The farmers have 3,900,000 workers, where there are 50 million employees of small business firms in



the United States.

Despite the overwhelming bulk of numbers on the small business side, the Department of Agriculture has a budget of \$2.9 billion, with 80,000 employees, and the congressional appropriation for them amounts to \$1,000 for every farm in the country.

Contrast that with the SBA. SBA only has \$110 million for administration, only 4,200 employees, and this is calculated out to be \$12 for each unit.

Compared with the resources that Mr. Stasio has had as Chief Counsel for Advocacy, he has done one heck of a job.

### 20 Years Ago: "Zip to Let it Rip"

From the testimony of James D. "Mike" McKeivitt, Washington Counsel, National Federation of Independent Business, at the March 29, 1976, hearing:

On the regulations, I cannot say enough how SBA has to grow up and has to get some guts and strength and somebody has to give us some zip to let it really rip.

## Some Recent Legislative Successes

The Office of Advocacy has also been available to help in shaping more small-business-friendly legislation. Here are some examples.

- **The Small Business Regulatory Enforcement Fairness Act (SBREFA):** The Office of Advocacy has long supported better vehicles for enforcement of the Regulatory Flexibility Act of 1980 (RFA). The SBREFA, signed into law March 29, 1996, allows for judicial review of agency decisions under the RFA and subjects additional regulations to RFA review.
- **The 1990 Clean Air Act Amendments:** In 1987, the Office of Advocacy objected to requiring more than one half million farmers to perform "hazard assessments" for ammonia fertilizers. The 1990 Clean Air Act Amendments exempted farmers from this provision, for a savings in excess of \$1 billion.
- **Americans with Disabilities Act:** In 1988 and 1989, Advocacy provided data on the number of businesses affected by employment provisions of the Americans with Disabilities Act at varying threshold levels. These data and suggested changes resulted in small firms being exempted from certain requirements and in the inclusion of limits on employer obligations based in part on the size of the business.
- **Fair Labor Standards Act:** In 1988, Advocacy provided data on the number of small businesses affected by increases in the minimum wage to various wage levels and the number of business affected by increasing the dollar volume test for enterprise coverage. Resulting changes created significant savings for covered small businesses.
- **Paperwork Reduction Act:** Advocacy took positions on the need to strengthen the Paperwork Reduction Act's protections for small businesses.
- **Subchapter 11 for Small Business Reorganization:** The Office of Advocacy championed the creation of a separate section in the Bankruptcy Code for small business reorganizations. Advocacy's perseverance helped lead to passage of the Bankruptcy Reform Act of 1994, which established a subchapter 11 for the reorganization of small businesses with less than \$2 million in debt.
- **Small Business Lending Data from Call Reports:** The Office of Advocacy played a significant role in the inclusion of a requirement that banks report small business lending data as part of the Federal Deposit Insurance Corporation Improvement Act of 1991.
- **Secondary Market for Small Business Loans:** The Office of Advocacy played a pivotal role in the establishment of a secondary market for small business loans. Advocacy recommended to the administration the adoption of the secondary market bill that Congress passed in 1994.
- **Procurement Reform:** More than half of the recommendations advanced by Advocacy, including procurement goals for women, the preservation of subcontracting plans for subcontracts and the extension of the DOD minority enterprise development (sec. 1207) program were incorporated in the Federal Acquisition Streamlining Act of 1994.



## Walking a Fine Line: The Independence of the Office of Advocacy

At various times in the Office of Advocacy's history, the chief counsel for advocacy has had to walk a fine line to fairly represent the views of small business without treading on the toes of the administration. Over the years, there has been considerable discussion about just how much "independence" was called for by the framers of Advocacy's role.

Twenty years ago, Senator Thomas J. McIntyre (D-N.H.) and John Lewis, Executive Vice President, National Small Business Association (NSBA), discussed the need for an "independent" small business advocate within the government in the hearings before the Select Committee on Small Business on March 29, 1976:

*Senator McIntyre:* . . . Does [the Commerce Department] have any dampening effect on how the SBA Administrator speaks out? If he gets too strong, talks too big, does that not get him into difficulty with Commerce?

*Mr. Lewis:* No, not with Commerce, but with the White House. Inherently, he must be a team player. His agency is not independent, does not have the independence of a Federal Reserve Board that can tell the Administration to go fly a kite.

Herb Liebenson, of NSBA testified at the same hearing:

Because of OMB, SBA can not take stands on all issues. But at the least it can warn Congress persuasively of the impact on small business, even if it is necessary to file a disclaimer that the SBA's views do not necessarily reflect the views of the Administration.

While the word "independent" appears nowhere in Advocacy's 1976 authorizing legislation (Public Law 94-305), there is an implied independence in Section 206:

The Chief Counsel may from time to time prepare and publish such reports as he deems appropriate. . . . The reports shall not be submitted to the Office of Management and Budget or to any other Federal agency or

executive department for any purpose prior to transmittal to the Congress and the President.

This provision caught the attention of President Ford, who was not entirely pleased with it, as he noted in his signing ceremony: "I question the provision of S. 2498 which requires Presidential appointment with Senate confirmation of the Chief Counsel for Advocacy . . . and requires the Counsel to transmit reports to the President and Congress without prior review by any other Federal agencies." But he signed the bill anyway.

In 1978, Milt Stewart began testing the waters as Advocacy's first confirmed chief counsel. Asked at a 1995 focus group of former SBA administrators and chief counsels about his ability to speak independently on behalf of small business, he recalled:

I had no problems, really, because I was fortunate to have been [the SBA administrator's] candidate for the post. . . . I do think it helps if the administrator and the chief counsel are known to the President as a team. If the chief counsel is pushed on an issue where he has to depart from the administration in his own right, obviously, he's got to let [the administrator] know and let him know why. . . . The once or twice that I

went off the reservation, I think, aside from a couple of catcalls and raised eyebrows, nobody made any trouble for us.

Vernon Weaver, the SBA administrator at the time, joked:

Of course, we were in the position of not ever having had a chief counsel for advocacy when I got there, and some of the old political hands in the White House called me up and said, "Don't fill the post." But it's a human relationship—it's up to the administrator to pick somebody he can get along with and vice versa.

Gradually, in practice if not in law, the chief counsel's independence began to be clarified. The legislative history of the Small Business Economic Policy Act of 1980 (Public Law 94-305), which set the chief counsel's executive level classification, made brief reference to the chief counsel's separate role:

His mandate is to represent the views of small business. . . . the advocate may not necessarily represent the administration's position or that of SBA; however, SBA . . . [is] required to cooperate fully with him.

The small business community also weighed in on the question. Among "The 15 Top-Priority Recommendations" of the 1980 White House Conference on Small Business was priority no. 10, which received almost 600 votes: \*

The legislative mission of Advocacy must be considered the number one priority of SBA and the Office of Advocacy. The independence of that function of the Office of Advocacy must be protected so that it may continue to have the confidence of the small business community.

At the second White House Conference in 1986, priorities 13 and 45 talked about the "independence" of both the SBA and the Office of Advocacy:

13. (1,051 votes) Resolved that the SBA should be maintained as an agency independent of any other federal department. . . .

45. (484 votes) The SBA should be



retained and elevated to a Cabinet-level position whose mission should be to assist the small business community, with the private sector having a stronger partnership role.

a. The independent role of the Office of Advocacy must be maintained and strengthened. . . .

During the 1989-1992 period, following the tenure of Frank Swain, the Office of Advocacy was led by four acting chief counsels. By mid-1991, the effects of the constant transitions and the lack of a presidential appointment were becoming very clear to almost everyone involved, including the Office of Advocacy staff. According to an October 1991 SBA review of the office, morale was at a low, largely because of the lack of a permanent chief counsel:

Most of the staff members interviewed said that without a permanent head, the Office has lost most of its influence with other Government agencies, the small business community and Congress. In their view, the Acting Chief Counsels were not appointed by the President and, consequently, have lacked the independence to take public positions that differ from those of the SBA. Thus, they believe, the Office is not perceived by the small business community as an effective and independent advocate for small business.

When Tom Kerester was confirmed as Advocacy's third chief counsel in 1992, he brought with him a clear sense of the office's role. Kerester recalled:

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

President Clinton's appointee as chief counsel, Jere Glover, strongly reaffirmed Advocacy's mandate to speak loudly—even to be a "junkyard dog" scrapping for small business. At his confirmation hearings

*Continued on page A-16*

## Disagreeing Agreeably: Frank Swain on Speaking Out

*In 1981, with the arrival of a new administration in Washington, Frank Swain took over as chief counsel for advocacy. A 1984 article about the new chief counsel in The New York Times described him as "going hammer and tongs for small business." Swain later recalled about the chief counsel's role:*

Jim Sanders came to be administrator just three or four months after I had become chief counsel, so he was pretty new at it and I was pretty new at it. I had learned early on that if I was not going to toe the party line, I should just tell the people at OMB . . . that I would give them a courtesy copy of the statement and say that it was not to be construed as administration policy.

The first time I did that after Jim came in, Jim called me the next morning and said, "Well, I got a call from Joe Wright"—who at the time was Stockman's deputy over at OMB—"and he's pretty hot and bothered about whatever you said yesterday." I explained to him the basis of the job and the statute and said my M.O. is to disagree agreeably. We weren't going to try to surprise the administration or make them look silly, but my responsibility was to try to reflect the views of small business. That happened two or three times and every time it happened, Jim would call Joe Wright back and say, "He's just doing the job that the President gave him to do." Pretty soon we stopped getting those calls and within a few years *they* were calling *me* up.

At one point I actually did an analysis of our statements. . . . Well over half started out with a disclaimer, which meant that they weren't in keeping with administration policy. We made it work, but it is a real dilemma.

I once said to somebody, if the

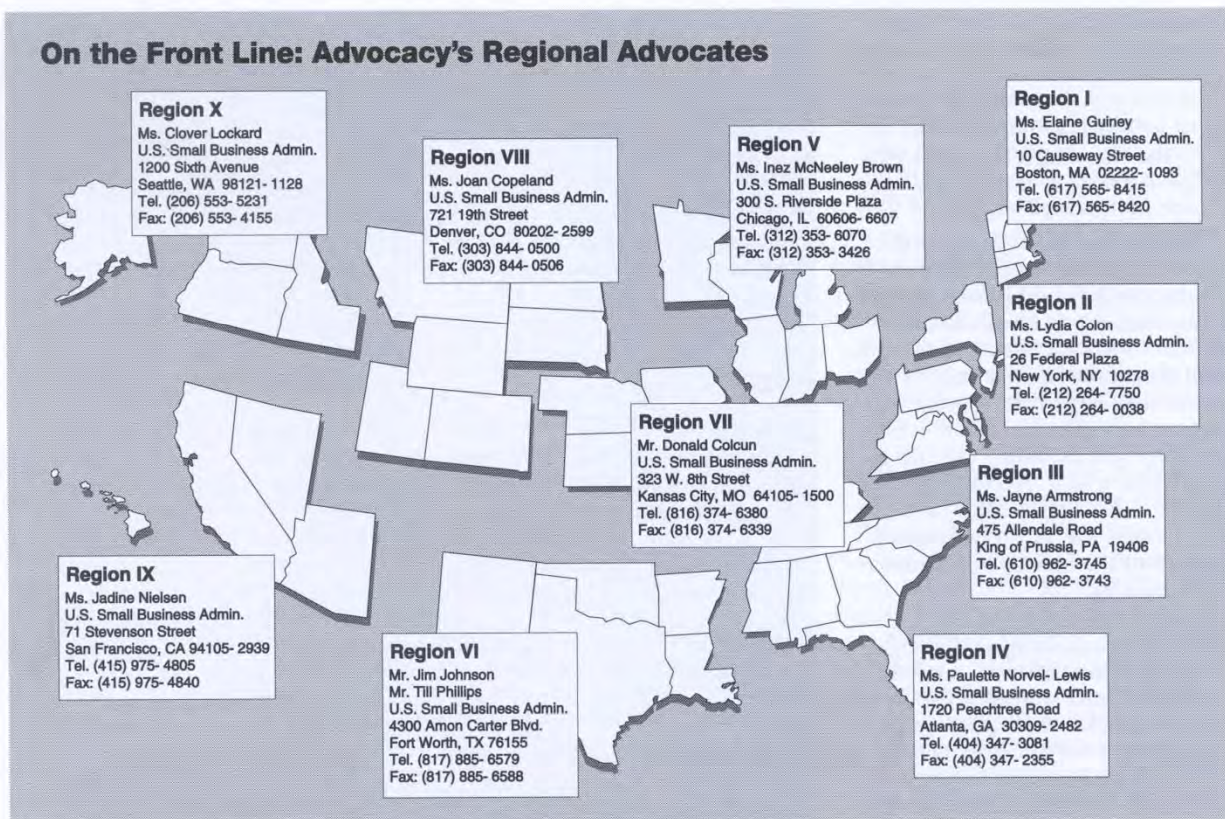
Congress really wanted someone just to throw bombs, they really should have set up the Office of Advocacy as a branch of the General Accounting Office, responsible to and appointed by the Congress, not by the Executive.

On the other hand, if it were a branch of the GAO, it might be a bigger bomb thrower, but it wouldn't cut any mustard with the administration at all. We wouldn't be able to call up assistant secretaries and commissioners and say "We want you to do this, we want you to do that." The one thing that made them take my calls was the fact that they knew that I was nominated by the same president that nominated them, that I was of equivalent Cabinet rank, that whatever political muster it took to be nominated, we were, in the broadest sense, on the same team.

So it's a conflicted assignment to be a bomb thrower within the administration team and I think every occupant of the office has to work it out for themselves.



## On the Front Line: Advocacy's Regional Advocates



**Independence**, from page A-15 before the Senate Judiciary Committee, Glover said:

As the small business community and Congress expect, and the law requires, if confirmed, I intend to be a strong independent voice for small business. Because of the President's strong commitment to small business, I believe I can be a strong and effective advocate for small business within the administration.

During Glover's tenure, the Office of Advocacy has provided an independent small business perspective in testimony before the Congress on a number of issues, including federal government procurement from small businesses, patent reform, product liability, and the health care deduction for the self-employed.

At the 1995 White House Conference on Small Business, the small business delegates again called for maintaining Advocacy's independence in priority no 19:

NCRA #286 (1,249 votes) Future of the Small Business Administration. The U.S. Small Business Administration is vital to the growth of small business in America. Efforts to make the SBA's programs more cost-effective and efficient should be continued and encouraged. The SBA's "independent" agency role as the primary supporter of small business within the federal government should be enhanced by: . . . Permanent maintenance of the "independent role" of the SBA's Office of Advocacy.

And during the debate in the House of Representatives on the continuation of the Office of Advocacy in July 1995, Rep. Roscoe G. Bartlett (R-Md.) was among many members of Congress who testified to the importance of the Office of Advocacy's independent role:

The Chief Counsel for Advocacy plays an important role by presenting and fighting for the views of the small business community. The

Chief Counsel has a very different role from other administrators in the SBA: he is the independent voice within the agency that represents the interests of small business. The advocate may not necessarily represent the President's Administration position or that of the SBA; however, the SBA and other Federal agencies are required to fully cooperate with the Chief Counsel.

While I personally may not agree with some of the positions taken by the Chief Counsel, I believe it is important to maintain the office which is the watchdog for small businesses.



# Appendix U

## The Small Business Advocate newsletter, September 2001, 25th Anniversary of the Office of Advocacy

United States  
Small Business  
Administration  
Office of Advocacy

# 25<sup>TH</sup> ANNIVERSARY SPECIAL EDITION

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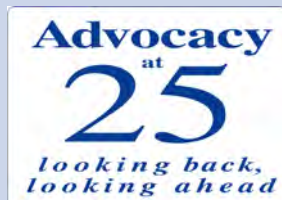
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### Four Chief Counsels Reflect on 25 Years Fighting for Small Business

*In its first quarter-century, Advocacy has been led by four Senate-confirmed chief counsels: Milton D. Stewart (1978-1981); Frank S. Swain (1981-1989); Thomas Kerester (1992-1993); and Jere W. Glover (1994-2001). In recent interviews, the four shared their thoughts on Advocacy's past, present, and future.*

*You were an active small business advocate even before you were tapped for the chief counsel job. What's special about small business that led to your career choice?*

**Milt Stewart:** I spent my youth in a family-owned small business begun and managed by my father



The man in the white hat: Advocacy's first chief counsel, Milt Stewart.



Chief Counsel Frank Swain served Advocacy from 1981 to 1989.

and mother. Most of our friends, relatives and neighbors were small business people. I acquired great respect for the skill and courage of small business entrepreneurs. As a result, it seemed to me that Thomas Jefferson's affection for rural agricultural people was misplaced: Urban small business people had replaced them as the bearers of economic virtue.

**Frank Swain:** My belief is that small business was underrepresented, so there was a need. And the small business position—in contrast to the government, labor, or large business view—was usually the right one in my opinion.

**Tom Kerester:** The basic reason that small business is special is that

*Continued on page 4*

## Advocacy and the White House Conferences on Small Business

The first White House Conference on Small Business was held in January 1980 and became the model for those that followed in 1986 and 1995. The idea for a national conference at which small business people could air their grievances and, more importantly, offer their constructive proposals for improving the small business climate, was the joint creation of both House and Senate Small Business Committees and President Jimmy Carter.

This was a great opportunity for the fledgling Office of Advocacy. Advocacy and the conference were gearing up at exactly the same time. This gave Advocacy the chance for much significant nationwide outreach and visibility. The conference created regular state meetings that became forums where Advocacy staff could find out what small business's real concerns were and start to think about solutions that would work.

The state and regional meetings culminated in the national conference at which a small business agenda was drawn up, and Advocacy was an integral part of all that went on. The small business community learned that Advocacy was a part of government whose unique mission was to help make the federal government work for it, and Advocacy learned the importance of listening to small businesses first. That first conference ended with a standing ovation for Milt Stewart in recognition of his hard work in making the conference a success.

And what a success it was! Not only were many of the 60 top recommendations adopted, but the small business community also learned the value of coming together and speaking out loudly in the policy-making process. The desire to make sure that the 1980 conference was not a flash in the pan led to the second conference held in August

1986. Again, a similar process was followed: management by a White House-appointed commission; state and regional meetings; and a final national conference making 60 important recommendations.

And, again, Advocacy was a vital part of that process.

Eight years later, Advocacy was again called on to help with the start-up of the third White House Conference on Small Business, which ultimately took place in June 1995. Advocacy functioned as the research and issue arm for the conference staff. Research began even before the first state meetings. Advocacy developed a series of task force meetings and issue focus groups to develop a comprehensive issue resource book for use by state meeting attendees. The regional staff of the Office of Advocacy also assisted the process with outreach and media support.

Post-conference, the chief counsel for advocacy convened implementation meetings to help the delegates establish a network to follow up on their recommendations. Advocacy also monitored and reported to the delegates on recommendations from the conference and on other important small business issues.

There have now been three conferences in the past 21 years. Each of them helped bring the small business community closer together and to articulate more clearly an agenda for a prosperous and successful small

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business economy in our great nation. Advocacy was fortunate to be in a position where it could be a vital part of all three conferences.

### Key Accomplishments of the White House Conferences

- 1980:** Regulatory Flexibility Act; Equal Access to Justice Act
- 1986:** Reauthorization of the Small Business Innovation Research program; SBA maintained as a separate agency
- 1995:** Small Business Regulatory Enforcement Fairness Act  
Health Insurance Portability and Accountability Act  
Taxpayer Relief Act



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## Message from the Acting Chief Counsel

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### Twenty-five Great Years . . . and Counting

by Susan M. Walthall, Acting Chief Counsel, Office of Advocacy

I love Advocacy. I've grown up with it, and I love it.

Twenty-five years ago, I was just out of school and interviewing around Washington. One of the first places I interviewed was here at the SBA. Advocacy was new then and the first chief counsel, the legendary Milt Stewart, was two years away from Senate confirmation. I was hired to work in the then-new Women's Business Ownership Office, which at that time fell under Advocacy.

Twenty-five years later and I am the acting chief counsel. I didn't know it then, but I know it now: This is the best job in the federal government. It is truly an honor to have been asked by President Bush to be the acting chief counsel.

The Office of Advocacy is one of the few federal offices that exist to encourage and support the hard working small business owners who are the backbone of America and drive our economic growth and job creation. And, it has a well-qualified, strong professional staff whose only goal is to support and defend small businesses. It's no wonder that I truly love this job, this place, and these people.

**Lessons Learned.** I have learned a lot along the way about small business, about politics and policy, and about leadership. I think one of the important lessons I've learned is that open communication, both to and from the small business community, is what makes Advocacy so effective and so special.

When I was first hired at the SBA, my father, who was a successful air conditioning contractor, asked, "The SBA? What has the SBA ever done for me?" But after I was hired, and after I had the chance to explain what the SBA, and espe-



Susan Walthall, acting chief counsel for Advocacy, 2001.

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**The chief counsel needs to really listen to the entire small business community: associations, academics, government officials, and most importantly, to small business owners and their employees.**

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cially Advocacy, does, he became quite proud of my work here.

I think of him a lot as I do this job. Because I realize that if the small business community doesn't know what we are doing for them, it's almost as if our efforts don't exist. And, if we don't know the needs and concerns of the community, we won't be effective advocates on their behalf. So, two-way communication has been, is, and will be, the key to our success.

I've also learned that no one person, and no one group, can do it all.

There is a cadre of strong leadership in the small business community, and relying on that leadership is the best way to influence public policy and public opinion.

This lesson is one of the many things I learned from Milt Stewart. He set the bar high, gave people the responsibility to meet the challenge, and set them loose to achieve the goal. We accomplished a lot that way, and I try to work the same way now with my staff.

People perform better when they are given the chance to take on real responsibility, and I think that is why the Advocacy staff has always been so effective.

**Advice for the Next Chief Counsel.** My 25 years at SBA have given me some perspective. I've seen our successes, and I've seen our failures. There is a lot to be learned from all of that, but three things stand out.

First, the chief counsel needs to really listen to the entire small business community: associations, academics, government officials, and most importantly, to small business owners and their employees. The next chief counsel must make it a point to visit small businesses across America.

Second, the chief counsel should rely on the Advocacy staff. It is the best there is: motivated, qualified, and professional.

Third, the chief counsel should believe in the job and believe in small business.

A final word of advice: Enjoy!

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## Four Chief Counsels Reflect on 25 Years Fighting for Small Business

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### Chief Counsels, from page 1

you're in complete control of your goals and objectives. Being in small business gives you a feeling of independence, pride, and achievement. It really makes you feel like you're part of that engine that drives the economy.

**Jere Glover:** Small business is special because it's what makes America work. In good times and in bad, small business is what makes things happen. In every economic downturn, small business is what's pulled us out, and quite frankly, small business has softened the impact of past economic downturns. Job creation, innovation, productivity, and efficiency—all of these things tend to flow from a vibrant small business community.

*It's probably safe to assume that, as a former chief counsel for advocacy, you believe the Office of Advocacy has an important mission. What do you see as the top reason for its existence?*

**Milt Stewart:** The top reason is to set out the unmet needs of small business. We made three specific efforts to spell out Advocacy's policy-related missions.

- The chief counsel named a National Task Force on Small Business and Innovation to spell out the advocacy mission requirements of small business as seen by 35 experienced venture capitalists and entrepreneurs. The task force's final report (July 1979) represented a helpful initial statement.

- We convened a national conference of state officials with economic development experience to express their views of priority needs.

- The first White House Conference on Small Business authorized by President Carter

brought together 2,000 small business delegates to review alternative policy recommendations.

These three efforts set out the priority policy concerns of the Office of Advocacy.

**Frank Swain:** The central reason is the same now as it was 25 years ago: small business is extremely important to the economic, political, and social fabric of the country. It is too often underrepresented in the corridors of government decision-making, and it's very appropri-

the adverse impact of proposed legislation and regulation in these two areas. The Office of Advocacy helps ease the burdens on small business and present their views.

**Jere Glover:** The top reason for the office's existence is to provide accurate and reliable information, data, and research. Decision-makers may differ about the conclusions, but the Office of Advocacy's critical function is to let them have the right information so they can make informed decisions.



Regional advocates with Chief Counsel Tom Kerester, 1992.

ate for government to have an in-house voice for small business. SBA programs such as the small business lending programs are important, but they require a lot of time and management. So it's smart to have the policy and regulatory issues analyzed in a specific office, such as Advocacy.

**Tom Kerester:** The chief counsel serves as the eyes, ears, and voice of small business in two areas: Congress and the federal departments and agencies. Small businesses have neither the expertise, the time, nor the money to present

*What was the most significant achievement of the Office of Advocacy during your tenure?*

**Milt Stewart:** The Small Business Innovation Development Act, enacted in 1982. Although it was not enacted until after my term of office, it was a direct result of the work done during my term. There were other significant achievements, but this was the most important, by far.

**Frank Swain:** Two general things and one specific thing.

- We really established a very

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strong presence as small business's voice in government. When I came in, there was a very new law that hadn't been fleshed out—the Regulatory Flexibility Act. Over the eight years I served as chief counsel, we filed about 400 comments, about one per week. So the office really became known for regulatory and legislative activity.

- I'm very proud of the fact that in the 1980s we became very well known as a center of expertise on health care issues and small business. We were the first group to oppose mandated health benefits for small business. We were so active on health care issues that I was named to the President's Commission on Long-Term Care in 1987. This was a recognition that the small business side needed to be included and that we'd established ourselves as the voice for it inside government.

- One specific accomplishment was the initiation of the *President's Report on the State of Small Business* in 1982. We started out small and made it into a very big deal.

**Tom Kerester:** I was only in a short time. My most significant achievement, which was strongly supported by Dale Bumpers, the chair of the Small Business Committee at the time, was to go beyond the Beltway and acquaint small business with the significant, crucial role of the Office of Advocacy. I was on the road five or six days a week. I never had the chance to testify before Congress but I did testify before a joint session of the Utah legislature.

**Jere Glover:** The 1995 White House Conference on Small Business and the Small Business Regulatory Fairness Act (SBREFA).

- The White House conferences

historically provide a new generation of small business leaders. The Office of Advocacy was critical in the White House conference, and even more so in the implementation phase. Over 90 percent of the recommendations had actions taken on them, and the conference sensitized the entire government to small business issues. As a result, every single agency identified things they could do for small business, and we helped make sure they followed through. Many of the recommenda-



Jere Glover, chief counsel for Advocacy from 1994 to 2001.

tions ended up in legislative changes that will forever change the way government deals with small business.

- The proof of SBREFA's effectiveness was \$3 billion in quantified savings for small business from regulatory changes. To quantify the efficiency of the agency in a regulatory manner was a huge undertaking, and to do it in a credible way was a real credit to the employees of the Office of Advocacy. Changing the culture of the government is something that only occurs in the rarest of circumstances. I take a good deal of pride

in that. This doesn't mean we've finished the job though.

**Where do you hope to see the Office of Advocacy in 5 to 10 years?**

**Milt Stewart:** The highest priority Advocacy program for the next five to 10 years will be contributing to the nation's response to the September 11, 2001, terrorist attack on the nation. The extreme wing of the Muslim effort must be met with an ideological challenge to terrorism. Small business will have its role to play in achieving the indispensable victory over terrorism and extremism. Before that, small business will still need the Office of Advocacy as the spokesman for small business's public policy needs to foster its unhampered growth.

**Frank Swain:** I'd simply say that Advocacy has more specific responsibilities now, especially with SBREFA. But it's important that Advocacy stay lean and on the cutting edge of issues and developments in small business and that it resist the temptation to become too bureaucratized.

**Tom Kerester:** I think we have to give more authority to the chief counsel to impact the proposed rules and regulations at the federal level. So when the chief counsel speaks, departments will listen. One thing that would help do that is to give more public recognition to the chief counsel, elevating the stature of the office.

**Jere Glover:** Still in existence! And that it will become a significant player in regulatory and economic policy in both the legislative and executive branches.

## Regulation in an Age of Entrepreneurship

by Kathryn J. Tobias, Senior Editor

Why is the U.S. economy the most dynamic in the world? Its dynamism, researchers agree, springs from the organic creativity and rapid growth of American small businesses, rooted in a free society. Nothing seems impossible in a culture that allows for constant experimentation and change. As one business owner told his employees, “Love our customers, love our values, but don’t love our structure, because it’s going to change every year.” (So Thomas Petzinger, Jr., reported in his book, *The New Pioneers*.)

Yet this culture of creativity and flexibility poses a paradox for a free society and for policymakers, namely, how do you encourage organic small business growth while regulating to protect important societal, environmental, and economic assets? The first regulatory agency in the United States was created in an era of top-down corporate management; if the government wanted something done, they told the business community exactly what to do, how and when. And that was that.

Now we live in an era where innovation and change emerge from the bottom up. One-size-fits-all regulations just don’t work anymore. Some regulation of business behavior is needed, but regulations also come down hardest on the smallest entities. When a sole proprietor devotes a morning to filling out paperwork, licenses, and other red tape, the firm’s productivity suffers. And paperwork is just the tip of the iceberg when it comes to regulations’ effects on small business. Too many heavy rules can put the brakes on small business creativity and economic growth.

**Advocacy’s Charge: Cutting Excess Regulation.** In 1976, Congress gave the Office of Advocacy the responsibility to

“measure the direct costs and other effects of federal regulation on small businesses; and make proposals for eliminating excessive or unnecessary regulation of small businesses.”

But trimming unnecessary regulation did not happen easily. By 1980, at the convening of the first White House Conference on Small Business, the need for small business participation in the regulatory process was still pressing. Among the conference’s top five recommendations was the call for economic impact analysis of newly proposed federal regulations.

**The RFA—The First Tool.** The White House Conference recommendation was a catalyst in the passage of the Regulatory Flexibility Act (RFA) in 1980. The RFA directed agencies to analyze the impact of their regulatory actions on small entities.

And the Office of Advocacy was charged to monitor agency compliance with the new law. Over the next 15 years, the office carried out this mandate, reporting annually on agency compliance to the president and the Congress. But Advocacy analysts recognized early on that there was almost nothing in the law’s enforcement provisions to prevent an agency from being sloppy in its compliance, or even outright ignoring the law.

Delegates to the 1986 White House Conference on Small Business thought the RFA should be strengthened by, among other things, requiring recalcitrant agencies to comply with its provisions and subjecting federal agencies’ failure to comply with the RFA to judicial review. But another decade would go by before the delegates’ recommendation bore fruit.

In preparation for the 1995 White House Conference on Small Business, the Office of Advocacy assembled leading thinkers on

small business topics in a series of 15 focus groups. All 15 cited regulatory burdens as a top barrier to entry for small businesses. The 1995 conference asked for specific legal provisions to give small firms a voice in the rulemaking process. The conference aftermath was unique: it included a concerted follow-up process to see to the implementation of its recommendations. As a result, the conference had a phenomenally high success rate: policymakers addressed more than 90 percent of its recommendations!

### **SBREFA—The RFA Gets**

**Teeth.** The regulatory reform recommendation was among the first. President Clinton signed the Small Business Regulatory Enforcement Fairness Act (SBREFA), on March 29, 1996. The new law gave the courts jurisdiction to review agency compliance with the RFA. It also required review panels to include small entities early in the process of drafting certain regulations. And it reaffirmed the chief counsel for advocacy’s authority to file friend of the court briefs in suits brought by small entities in response to an agency final regulatory action.

In 2000, on the 20th anniversary of the RFA, the Office of Advocacy reported that agency compliance was improving and that the RFA and SBREFA had saved small businesses some \$20.6 billion in new regulatory costs over the 1998-2000 period.

**Creative Entrepreneurs Take on Old Rules.** Meanwhile, entrepreneurial businesses are themselves developing creative ways to solve problems that rely less than ever on the top-down models of the past. For example, Petzinger notes, the Voluntary Hospitals of America is using principles called “min specs”—minimum critical specifications—and “self-organization” to

*Continued on page 7*



## Economic News

### Minority Business, Earnings Studies Released in October

Two economic studies will be released on Oct. 23, 2001, when the Office of Advocacy commemorates its 25th anniversary.

*Minorities in Business, 2001*, by Dr. Ying Lowrey, senior economist with Advocacy's Office of Economic Research, utilizes several sources from the U.S. Census Bureau, including the Current Population Survey and the Survey of Minority-Owned Business Enterprises (SMOBE). The study provides a comprehensive portrait of minority-owned businesses in the United States (see Table).

The Census Bureau's classification of firms by owners' demographic group varies between 1982 and 1997, making it difficult to compare data over time, Lowrey's

study makes adjustments to the SMOBE data to enable a comparison. Her study shows that the share of minority-owned firms rose from 6.84 percent in 1982 to 15.12 percent in 1997.

A second study to be released on Oct. 23, *Earnings Growth among Disadvantaged Business Owners*, was conducted by Robert Fairlee of the University of California at Santa Cruz. This study was funded by the Office of Advocacy. Fairlee studies the earnings histories of less educated and minority men and women using the 1979 National Longitudinal Survey of Youth (NLSY). Using annual data spanning 1979 through 1998, Fairlee finds that less-educated self-employed young men and women

tend to make more money than their wage-and-salary sector counterparts, other things being equal. He also finds that earnings growth is initially slower among self-employed men and women, but over time, it surpasses the earnings growth of wage-and-salary earners.

#### For More Information

Advocacy's senior economist, Dr. Ying Lowrey, can be reached at (202) 205-6947, or by e-mail at [ying.lowrey@sba.gov](mailto:ying.lowrey@sba.gov). Both reports are available on the Advocacy website at [www.sba.gov/advo](http://www.sba.gov/advo). Paper and microfiche copies of all Advocacy reports are also available for purchase from the National Technical Information Service at (800) 553-6847 or through the NTIS website at [www.ntis.gov](http://www.ntis.gov).

#### U.S. Firms by Ownership Category, 1997

	All Firms	Firms with Employees	Number of Employees	Total Payroll (\$million)
<b>Number of Firms</b>				
Total U.S. Firms	20,821,934	5,295,151	103,359,815	2,936,493
Non-Minority-Owned	17,782,901	4,679,929	98,845,116	2,840,964
All Minority-Owned	3,039,033	615,222	4,514,699	95,529
Black-Owned	823,499	93,235	718,341	14,322
Hispanic-Owned	1,199,896	211,885	1,388,746	29,830
Native American-Owned	197,300	33,277	298,661	6,624
Asian-Owned	912,959	290,000	2,203,080	46,179
<b>Share of Total U.S. Firms (Percent)*</b>				
Non-Minority-Owned	85.40	88.38	95.63	96.75
Minority-Owned	14.60	11.62	4.37	3.25
<b>Share of Total Minority-Owned Firms (Percent)*</b>				
Black-Owned	27.10	15.15	15.91	14.99
Hispanic-Owned	39.48	34.44	30.76	31.23
Native American-Owned	6.49	5.41	6.62	6.93
Asian-Owned	30.04	47.14	48.40	48.34

\* Percent shares may not total 100 because of duplication of some firms. Hispanics may be of any race, and therefore, may be included in more than one minority group.

Source: U.S. Department of Commerce, Bureau of the Census: Survey of Minority Owned Business Enterprises, 1997.

#### Regulation, from page 6

respond to problems in the health care system. More often than not, Petzinger observes, their solutions entail eradicating rules rather than creating new ones.

What of the future? Studies conducted for the Office of Advocacy find that the cost to business of government regulation continues to rise. Striking a balance between rules that protect such assets as the health of workers and the environment, while minimizing burdens imposed on fragile, often experimental, small businesses—must remain one of government's high priorities for the foreseeable future.

## Nominees Sought for 2002 Small Business Week Awards

National Small Business Week 2002 is tentatively scheduled for May 5-11, 2002. The highlight of the week is the presentation of awards spotlighting the outstanding contributions of small business persons and advocates at the district, state, and national levels. SBA needs your help to obtain a large pool of qualified nominations from which to select the Small Business Award winners. ***Nominations close Nov. 9, 2001.***

The complete nomination guidelines can be found at [www.sba.gov/opc/pubs/nominations2002.pdf](http://www.sba.gov/opc/pubs/nominations2002.pdf).

### To Submit Nominations

Nominations must be submitted to the nearest U.S. Small Business Administration district office in your state or territory. All nominations must be post-marked or hand delivered no later than Nov. 9, 2001.

### Award Categories

#### Small Business Advocate Awards

- Accountant Advocate of the Year
- Entrepreneurial Success
- Financial Services Advocate of the Year
- Home-Based Business Advocate of the Year
- Minority Small Business Advocate of the Year
- Small Business Exporter of the Year
- Small Business Journalist of the Year
- Veteran Small Business Advocate of the Year
- Women in Business Advocate of the Year
- Young Entrepreneur of the Year

#### Small Business Person Awards

- Small Business Person of the Year

#### Phoenix Awards

- Small Business Disaster Recovery
- Outstanding Contributions to Disaster Recovery

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# Appendix V

## The Small Business Advocate newsletter, September 2005, 25th Anniversary of the Regulatory Flexibility Act



# The Small Business Advocate

*Advocacy: the voice of small business in government*

September 2005

Vol. 24, No. 9

### Twenty-five Years of the Regulatory Flexibility Act

by Kathryn Tobias, Senior Editor

As soon as President Gerald Ford signed Public Law 94-305 creating the Office of Advocacy in June 1976, the important work of paying attention to regulations' effects on small firms came under the wing of the newly created independent office. Part of Advocacy's mandate was explicitly to "measure the direct costs and other effects of government regulation on small businesses; and make legislative and non-legislative proposals for eliminating excessive or unnecessary regulations of small businesses."

In fall of 1979, President Jimmy Carter added the Small Business Administration to his Regulatory Council and issued a memorandum to the heads of executive departments and agencies. He said, "I want you to make sure that federal regulations will not place unnecessary burdens on small businesses and organizations," and he directed agencies to apply regulations "in a flexible manner, taking into account the size and nature of the regulated businesses." Agencies were to report on their efforts to Advocacy.

Meanwhile, the House and Senate Small Business and Judiciary Committees had been holding hearings on the effects of regulation. Small business people cited evidence that uniform application of regulatory requirements made it difficult for smaller businesses to compete.

By 1980, when delegates assembled for the first of three

White House Conferences on Small Business, the conference report noted that "during the past decade, the growth of government regulation has been explosive, particularly in such areas as affirmative-action hiring, energy conservation, and protection for consumers, workers, and the environment. Small business people recognize that some government regulation is essential for maintaining an orderly society. But there are now 90 agencies issuing thousands of new rules each year."

Moreover, the report said the new Office of Advocacy had estimated that small firms spent \$12.7 billion annually on government paperwork. Among the conference recommendations, the fifth highest vote-getter was a recommendation calling for "sunset review" and economic impact analysis of regulations, as well as a regulatory review board with small business representation. The conference delegates recommended putting the onus of measuring regulatory costs on the regulatory agencies—to "require all federal agencies to analyze the cost and relevance of regulations to small businesses."

**1980: The Regulatory Flexibility Act.** The White House Conference recommendations helped form the impetus for the passage, in 1980, of the Regulatory Flexibility Act (RFA). The intent of the act was clearly stated:

*Continued on page 4*

## Special Edition: 25th Anniversary of the Regulatory Flexibility Act

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## The RFA at 25: Some Reflections

by James Morrison, President, Small Business Exporters Association of the United States

As a congressional staffer in the 1970s, I had the privilege to be “present at the creation” of the RFA. From the vantage point of 2005, it is hard to visualize the regulatory atmosphere of the mid-1970s. New agencies had been given sweeping grants of authority to address national concerns like the environment, worker safety, and pension security. Older agencies had been handed new mandates. Coordination and guidance on how to regulate were lacking.

It was a regulatory Wild West. Congress was recoiling from thunderous protests by regulated businesses, communities, and nonprofit organizations.

The RFA began as an informal conversation in April 1977 about a major part of this problem—small business regulatory burdens. It ended with a signing ceremony in the East Room of the White House three and a half years later.

The bill was introduced August 1, 1977. The debate was about what the law should require regulatory agencies to do. Change was needed in the regulatory culture. Agencies needed to stop viewing their rulemaking in terms of top-down, one-size-fits-all regulations. So the bill emphasized gathering input from the affected parties, both directly and through the Office of Advocacy, prior to rulemakings. Agencies should strive to “fit” their rules to the “scale” of the entities they were regulating, the law noted.

The bill’s procedures paralleled the then-new environmental law procedures contained in the National Environmental Policy Act (NEPA). Cosponsors Senator Gaylord Nelson of Wisconsin and Senator John Culver of Iowa advocated the consensus view—that NEPA offered a proven approach to sensitizing agencies to a set of external considerations, that it

was an understood quantity by the courts and the administrative law bar, and that it offered a way to successfully integrate legal innovations into the Administrative Procedure Act.

A major reservation was that if the law included a NEPA-type provision that permitted litigants to shut down a rulemaking process in mid-stride, the RFA would be abused. The RFA was always intended to re-orient rulemaking processes, not to pre-ordain particular substantive outcomes.

The effort to obtain the desired cultural changes at the agencies while restricting any potential misuse of the RFA led to some convoluted language on judicial review. The courts later interpreted the language very narrowly, virtually shutting off all judicial review of agency actions under the RFA. Within a few years of these judicial decisions, agency compliance with the RFA declined. Not until the RFA was amended by SBREFA in 1996 was this problem overcome.

The politics of passing the RFA was interesting. Senators and representatives from both parties and all political ideologies—as well as those from urban and rural areas and all geographic regions of the nation—put their shoulders into the bill’s passage. The very hard political work done by them and their staffs, as well as the small business community, led to this rather amazing fact: in three years of congressional actions on the RFA spanning two Congresses, there was never a single negative vote cast against it. House champions included Representatives Andy Ireland of Florida, Bob Kastenmeier of Wisconsin, and Joe McDade of Pennsylvania.

The executive branch was more skeptical. When Congress first solicited reactions to the bill from

federal agencies, the most common response was that while the law might be appropriate for other agencies, the respondent’s own agency should be exempted from it. Later, when passage seemed likely, agency general counsels jointly sought to have all agencies exempted.

An important ally of the bill within the executive branch was the Office of Advocacy and its chief counsel, Milton D. Stewart. Advocacy had the avid backing of the nation’s small business community, which made passage of the RFA a top recommendation of the 1980 White House Conference on Small Business.

By the middle of 1980, President Carter personally intervened, sending a top aide, Stuart Eizenstat, to Capitol Hill to clear the way for the RFA, which passed Congress soon thereafter and was signed into law.

### The Small Business Advocate

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## Message from the Chief Counsel

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### Listening To Small Business

by Thomas M. Sullivan, Chief Counsel for Advocacy

Too often government agencies appear to be a “black box.” What they do and how they do it is obscure at best. Even when agencies try to be open, they sound as if they are speaking a foreign language. That can even be true here at the Office of Advocacy.

I have just gone back and looked at some of our past newsletters. What do I see? “RFA,” “SBREFA,” “IRFA,” and “FRFA.” All of these acronyms actually mean something, and they are integral to Advocacy’s work. Yet they tend to hide the reality of what Advocacy is all about—listening to the voice of small business and making sure its voice is heard inside regulatory agencies, Congress, and the White House.

The Regulatory Flexibility Act (RFA), its amendments, and requirements are, in the end, just tools that allow us to bring that voice into the regulatory process.

But how do we know what that voice is saying? This challenge is met daily in our office.

Our 10 regional advocates are Advocacy’s “eyes and ears” across the country. It is their job to meet regularly with state and local trade organizations and small business owners. The insights they gather form the basis of our understanding of the small business agenda.

We also work quite closely with small business membership and trade organizations. I meet regularly with representatives from the largest organizations in “kitchen cabinet” style meetings where current issues are discussed and new opportunities explored.

Our regulatory attorneys also hold specific issue roundtables to gather information. In these open discussions, the practical details of legislative and regulatory proposals

are dissected and their impact on small business is closely examined. Some, like our environmental and safety roundtables, have regular meetings, while others are issue-driven. Whether ongoing or ad hoc, these roundtables with small

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**“By listening to small businesses, we are able to bring their agenda to the attention of policymakers in regulatory agencies, Congress, and the White House. ”**

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business owners and representatives give us clear insights into the effects of regulatory and legislative proposals.

Another way we listen to the voice of small business is through my travels across the country. I am honored to be able to address meetings and conventions in all regions of the country and speak about this Administration’s commitment to tearing down barriers. At each stop

I make sure that I schedule time to speak with small business owners and visit local small businesses. These visits teach me how government policies actually affect real business owners and employees.

Finally, small business owners can comment on the impact of proposed regulations through our Regulatory Alerts webpage, located at [www.sba.gov/advo/laws/law\\_regalerts.html](http://www.sba.gov/advo/laws/law_regalerts.html). It gives anyone the ability to let federal agencies know the real world consequences of their actions.

Through all of these methods we gather the comments and concerns of small business owners. By listening to small businesses, we are able to bring their agenda to the attention of policymakers in regulatory agencies, Congress, and the White House. We do that through the RFA, SBREFA, Executive Order 13272, and other means. Although those tools may be outside of Main Street’s everyday vocabulary, they all aim toward one thing—making sure that America’s entrepreneurs can flourish in an environment that promotes and protects them.



Used with permission.



## 25 Years of RFA, from page 1

“It is the purpose of this act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives... of applicable statutes, to fit regulatory and informational requirements to the scale of businesses... To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.”

The law directed agencies to analyze the impact of their regulatory actions and to review existing rules, planned regulatory actions, and actual proposed rules for their impacts on small entities. Depending on the proposed rule’s expected impact, agencies were required by the RFA to prepare an initial regulatory flexibility analysis, a certification, and/or a final regulatory flexibility analysis. Rules to be included in the agencies’ “regulatory agendas” were those likely to have a “significant economic impact on a substantial number of small entities.”



President Jimmy Carter signed the Regulatory Flexibility Act on September 19, 1980.  
*Courtesy Jimmy Carter Library.*

### Implementing the RFA.

Advocacy was charged to monitor agency compliance with the new law. Over the next decade and a half, the office carried out its mandate, reporting annually on agency compliance to the president and the Congress. But it was soon clear that the law wasn’t strong enough. A briefing paper prepared for the

1986 White House Conference on Small Business noted: “The effectiveness of the RFA largely depends on small business’ awareness of proposed regulations and [their] ability to effectively voice [their] concerns to regulatory agencies. In addition, the courts’ ability to review agency compliance with the law is limited.”

## The RFA Timeline

### June 1976

Congress enacts Public Law 94-305 creating an Office of Advocacy within the Small Business Administration charged, among other things, to “measure the direct costs and other effects of federal regulation on small businesses and make legislative and non-legislative proposals for eliminating excessive or unnecessary regulations of small businesses.”

### April 1980

The first White House Conference on Small Business calls for “sunset review” and economic impact analysis of regulations, and a regulatory review board that includes small business representation.

### September 1980

Congress passes the Regulatory Flexibility Act (RFA), requiring agencies to review the impact of proposed rules and include in published regulatory agendas those likely to have a “significant economic impact on a substantial number of small entities.”

### October 1981

Advocacy reports on the first year of RFA in testimony before the Subcommittee on Export Opportunities and Special Small Business Problems of the House Committee on Small Business.

### February 1993

Advocacy publishes the first annual report on agency RFA compliance.

### November 1986

Delegates to the second White House Conference on Small Business recommend strengthening the RFA by, among other things, subjecting agency compliance to judicial review.

### September 1993

President issues Executive Order 12866, “Regulatory Planning and Review,” requiring each agency to “tailor its regulations to impose the least burden on society, including businesses of different sizes.”

### June 1995

The third White House Conference asks for specific provisions to strengthen the RFA—including the IRS under the law, granting judicial review of agency compliance,

The delegates recommended that the RFA be strengthened by requiring agencies to comply and by providing that agency action or inaction be subject to judicial review. President Ronald Reagan's 1987 report on small business noted: "Regulations and excessive paper-work place small businesses at a disadvantage in an increasingly competitive world marketplace... This Administration supports continued deregulation and other reforms to eliminate regulatory obstacles to open competition." But it would take an act of Congress to make judicial review law—and reaching that consensus needed more time.

Regulations' effects on the economic environment for competition also concerned President George H.W. Bush, whose 1992 message in the annual small business report noted: "My Administration this year instituted a moratorium on new federal regulations to give federal agencies a chance to review and revise their rules. And we are looking at ways to improve our regulatory process over the long term so that regulations will accom-

plish their original purpose without hindering economic growth." The scene was set for the regulatory logjam to move.

In September 1993, President Bill Clinton issued Executive Order 12866, "Regulatory Planning and Review," designed, among other things, to ease the regulatory burden on small firms. The order required federal agencies to analyze their major regulatory undertakings and to ensure that these regulations achieved the desired results with minimal societal burden.

An April 1994 report by the General Accounting Office reviewed Advocacy's annual reports on agency compliance with the RFA and concluded: "The SBA annual reports indicated agencies' compliance with the RFA has varied widely from one agency to another. ...the RFA does not authorize SBA or any other agency to compel rulemaking agencies to comply with the act's provisions."

#### **The 1995 White House Conference and SBREFA.**

In 1995, a third White House Conference on Small Business

examined the RFA's weaknesses. The Administration's National Performance Review had recommended that agency compliance with the RFA be subject to judicial review. Still it had not happened.

Once again, the White House Conference forcefully addressed the problem. One of its recommendations fine-tuned the regulatory policy recommendations of earlier conferences, asking for specific provisions that would include small firms in the rulemaking process.

In October, Advocacy issued a report, based on research by Thomas Hopkins, estimating the total costs of process, environmental, and other social and economic regulations at between \$420 billion and \$670 billion in 1995. The report estimated that the average cost of regulation was \$3,000 per employee for large firms (more than 500 employees) and \$5,500 per employee for small firms (fewer than 20 employees).

In March 1996, President Clinton acted on the 1995 White House Conference recommendation

*Continued on page 6*

and including small businesses in the rulemaking process.

#### **March 1996**

President signs the Small Business Regulatory Enforcement Fairness Act, giving courts jurisdiction to review agency compliance with the RFA, requiring the Environmental Protection Agency and Occupational Safety and Health Administration to convene small business advocacy review panels, and affirming the chief counsel's authority to file *amicus curiae* briefs in appeals brought by small entities from final agency actions.

#### **March 2002**

President announces the Small Business Agenda, which promises to "tear down regulatory barriers to job creation for small businesses

and give small business owners a voice in the complex and confusing federal regulatory process."

#### **August 2002**

President issues Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," which requires federal agencies to establish written procedures to measure the impact of their regulatory proposals on small businesses, that they consider Advocacy comments on proposed rules and notify Advocacy when a draft rule may have a significant small business impact, and that Advocacy train agencies about the law.

#### **December 2002**

Advocacy presents draft state regulatory flexibility model legislation to the American Legislative

Exchange Council for consideration by state legislators, and states begin adopting legislation modeled on the federal law.

#### **September 2003**

Advocacy presents its first report on agency compliance with E.O. 13272, describing agency compliance and noting the start of Advocacy's agency training.

#### **2005**

In the 25th anniversary year of the RFA, Advocacy reports agency cost savings of more than \$17 billion in foregone regulatory costs to small business for FY 2004. Legislation is considered in Congress to strengthen the RFA.

## 25 Years of RFA, from page 5

by signing Public Law 104-121, the Small Business Regulatory Enforcement Fairness Act (SBREFA). The new law gave the courts jurisdiction to review agency compliance with the RFA. Second, it mandated that the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) convene small business advocacy review panels to consult with small entities on regulations expected to have a significant impact on them, before the regulations were published for public comment. Third, it broadened the authority of the chief counsel for advocacy to file *amicus curiae* (friend of the court) briefs in appeals brought by small entities from agency final actions.

**Executive Order 13272.** In March 2002, President George W. Bush announced his Small Business Agenda. The President gave a high priority to regulatory concerns, including the goal, “[to] tear down the regulatory barriers to job creation for small businesses and give small business owners a voice in the complex and confusing federal regulatory process.”

One key goal was to strengthen the Office of Advocacy by creating an executive order directing agencies to work closely with Advocacy in considering the impact of their regulations on small business.

In August 2002, President Bush issued Executive Order 13272. It requires federal agencies to establish written procedures and policies on how they would measure the impact of their regulatory proposals on small entities and to vet those policies with Advocacy; to notify Advocacy before publishing draft rules expected to have a significant small business impact; and to consider Advocacy’s written comments on proposed rules and publish a response with the final rule. The E.O. requires Advocacy to provide

notification as well as training to all agencies on how to comply with the RFA. These steps set the stage for agencies to work closely with Advocacy in considering their rules’ impact on small entities.

**Implementing E.O. 13272.** As part of its compliance with E.O. 13272, Advocacy reported to the Office of Management and Budget in September 2003. The report noted that Advocacy had spread the word about E.O. 13272 and instituted an email address (*notify.advocacy@sba.gov*) to make it easier for agencies to comply with notification requirements. Advocacy developed an RFA compliance guide, posted it on its website, prepared training materials, and began training federal agency staff.

Nearly all of the cabinet agencies submitted written plans for RFA compliance to Advocacy and made their RFA procedures publicly available. Independent regulatory agencies were initially less responsive; some argued that they were exempt from executive orders. Nevertheless, Advocacy continues to work to bring all agencies into compliance with the E.O. Advocacy has also developed a Regulatory Alerts webpage at [www.sba.gov/advo/laws/law\\_regalerts.html](http://www.sba.gov/advo/laws/law_regalerts.html) to call attention to important pending regulations.

The final chapter on how much small businesses are benefiting from the RFA as amended by SBREFA and supplemented by E.O. 13272 has yet to be written. Legislation has been introduced to further enhance the RFA. Advocacy believes that as agencies adjust their regulatory development processes to accommodate the RFA and E.O.’s requirements, the benefits will accrue to small firms. And agencies are making strides in that direction. The annual amount of additional regulatory burdens that are not loaded onto the backs of small businesses are counted cumu-

latively in the billions of dollars—over \$17 billion in first-year cost savings in fiscal year 2004 alone.

## RFA Recollections

“I came to Congress from the private sector and had had no prior political experience, so working on the RFA was a learning experience. As a community banker, I had seen how well-meaning regulations developed in the ivory tower had put small businesses at a disadvantage, so I got on the Small Business Committee to do something about it. The RFA passed on the last night of that Congress, near midnight. It came up for a vote and I made my speech and another congressman who opposed the bill jumped to his feet—but the chair banged the gavel to cut off discussion.

“After it passed on the House side, I carried it over to the Senate where, after about 45 minutes, I looked up and said, ‘What happened to my bill?’ and someone said, ‘Sir, they passed it a half hour ago!’ Well, what passed was a good law, but an imperfect one, without the judicial review provision that was added in SBREFA, for instance. But dedicated people nurtured the RFA and later helped fill in the gaps—one was Steve Lynch, a staff person who had a great impact and, sadly, died at age 51. The RFA is a great case study of what can be done legislatively if you don’t care who gets the credit and don’t try to do it all at once.”

*Congressman Andy Ireland  
U.S. Representative, 1977-93*



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## Rulemaking Success Stories

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### SBREFA Review Panels Improve Rulemaking

by Claudia Rayford Rodgers, Senior Counsel; Keith Holman and Kevin Bromberg, Assistant Chief Counsels

In 1996, Congress fortified the Regulatory Flexibility Act (RFA) with the Small Business Regulatory Fairness Act (SBREFA). Among other things, SBREFA directed the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to convene small business review panels for regulations expected to have a significant small business impact. These panels occur before the rule is published for public comment. Significant rulemaking improvements have resulted from the SBREFA panel process.

SBREFA review panels consist of representatives from the agency, Advocacy, and the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB). The panel reaches out to small entities likely to be affected by the proposal, seeks their input, and prepares a report with recommendations for reducing the potential impact on small businesses. The agency may modify its proposal in response to the panel report.

**OSHA Panels.** OSHA has convened seven panels since 1996. Two of the most significant were on the Safety and Health Program rule and the Ergonomics Program Standard. They demonstrate how small business input early in the regulatory process can help agencies see new ways to solve a problem through regulation—by looking at equally effective alternatives that minimize the harm to small business.

**The Safety and Health Program Rule.** In August 1998, OSHA notified Advocacy of its intent to propose a safety and health program rule. The proposal required employers to establish a workplace safety and health program to ensure compliance with

OSHA standards and the “general duty” clause of the Occupational Safety and Health Act.

Because the proposal covered nearly all employers, a SBREFA panel was convened which included 19 small entity representative advisors. It found that OSHA had underestimated the \$3 billion cost of the proposed rule.

The panel report sent the message loud and clear to OSHA, OMB, and other federal agencies that realistic costs and accurate data must be used when promulgating regulations. As a result, this overly burdensome rule never moved forward, and it was eventually removed from OSHA’s regulatory agenda, saving small businesses billions in regulatory compliance costs.

**The Ergonomics Standard.** In March 1999, OSHA released a draft ergonomics standard and announced its intention to convene a SBREFA panel to discuss the potential impact on small businesses. The draft proposal covered nearly every industry and business in the United States. Twenty small entity representatives (including 13 recommended by Advocacy) advised the panel.

During the panel’s deliberations, the small entities expressed a number of concerns, especially regarding OSHA’s estimates of the time and money required to comply. They provided OSHA with types of costs that they felt were omitted from the calculations and suggested that OSHA provide the public with its assumptions when it proposed the standard in the *Federal Register*. The panel completed the report in April 1999.

Although proposed in November 1999, Congress, under the Congressional Review Act, eventu-

ally repealed the ergonomics rule in March 2001. OSHA’s subsequent decision to issue guidelines instead of creating a new ergonomics rule showed that the SBREFA panel process works. Because of this process and Advocacy’s input throughout the entire progress of the ergonomics issue, the cost to small business has been drastically reduced. Advocacy estimated in 2001 that rescinding the ergonomics standard saved small businesses \$3 billion. Other observers have estimated that the actual cost would have been 15 times higher.

**EPA Panels.** EPA has convened 29 SBREFA panels since 1996. These panels have improved the cost-effectiveness of planned environmental rules and limited the adverse impact on small entities, including small communities. Two recent successes are the panels on Nonroad Diesel Engines and Construction and Development Runoff.

**Nonroad Diesel Engines and Fuel Rule.** In summer 2002, EPA notified Advocacy that it would propose further limits on emissions of nitrogen oxides and particulate matter from diesel-powered nonroad engines. These engines are used extensively in construction, agriculture, and other off-road applications. EPA also planned to dramatically reduce the allowable level of sulfur in diesel fuel used by nonroad engines. The rule was anticipated to have significant economic impacts on small equipment manufacturers who use diesel engines, and on small oil refiners and oil distributors.

EPA convened a SBREFA panel with 20 small entity representative advisors who raised concerns about the technical and cost feasibility of

*Continued on page 8*

### **SBREFA Works**, from page 7

the proposed rule. The panel concluded that equipment manufacturers should be allowed to purchase current engines for several additional years, while redesigning their products to accommodate the newer engines. The panel also advised that expensive aftertreatment devices should not be required on engines with less than 25 horsepower.

The SBREFA panel report recommendations, which were adopted by EPA in the final rule, allowed many small equipment manufacturers to stay in business and gave them valuable time to redesign their products to comply with the new requirements.

**Construction and Development Site Runoff.** In June 2002, EPA proposed a rule to reduce storm water runoff from construction and development sites of one acre or more. The original proposal carried a price tag of almost \$4 billion per year, and its requirements overlapped with existing state and local storm water programs. Fortunately, small business had a voice in the rulemaking process through the SBREFA panel process. Small businesses provided information about the rule's potential impact and offered other options. The panel concluded that the rule's requirements would add substantial complexity and cost to current storm water requirements without a corresponding benefit to water quality. The panel recommended that EPA not impose the requirements, and focus instead on improving public outreach and education about existing storm water rules.

In March 2004, EPA announced that it would not impose new requirements for construction sites. EPA found that a flexible scheme would permit state and local governments to improve water quality without an additional layer of federal requirements and without unduly harming small construction

firms. In addition to the cost savings for small businesses, rescinding the original proposal saved new homebuyers about \$3,500 in additional costs per house.

**SBREFA Panels Work.** These panels illustrate that the SBREFA panel process indeed works to reduce the burdens on small entities. Because agencies are required to convene these panels, small businesses are able to shed light on agencies' underlying assumptions, rationale, and data behind their draft rulemaking. In the absence of SBREFA panels, these rules would have been promulgated in forms costing small businesses millions

in unnecessary regulatory costs. The panel reports allowed EPA and OSHA to examine alternatives and weigh options that accomplished their regulatory objectives while at the same time protecting small businesses, their owners, and employees.

### **SHARKS!!! An RFA Success Story**

On December 20, 1996, the National Marine Fisheries Service (NMFS) of the Department of Commerce published a proposal to reduce the existing shark fishing quota by 50 percent, certifying that the reduction would have no significant impact on a substantial number of small entities. In January 1997, Advocacy questioned NMFS's decision to certify rather than perform an initial regulatory flexibility analysis. In its March 1997 final rule, NMFS upheld its original decision, but prepared a final regulatory flexibility analysis rather than certifying the rule.

In May 1997, the Southern Offshore Fishing Association brought suit against the Secretary of Commerce, challenging the quotas pursuant to judicial review provisions of laws including the RFA. Advocacy filed to intervene as *amicus curiae*, but withdrew after the Department of Justice stipulated that the standard of review for RFA cases should be "arbitrary and capricious," a higher standard than originally requested.

In February 1998, the United States District Court for the Middle District of Florida ruled that NMFS's certification of "no significant economic impact" and the FRFA failed to meet the requirements of the Administrative Procedures Act and the RFA. The court noted Advocacy's role as "watchdog of the RFA," remanded the rule, and instructed the agency to analyze the economic effects and potential alternatives.

After reviewing NMFS's subsequent analysis, Advocacy again concluded it did not comply with the RFA. Further steps culminated in the court issuing an injunction to NMFS from enforcing new regulations until the agency could establish bona fide compliance with the court's earlier orders.

Later, a settlement between the plaintiff and NMFS involved a delay in any decisions on new shark fishing quotas pending a review of current and future shark stocks by a group of independent scientists. In November 2001 that study was released, indicating that NMFS had significantly underestimated the number of sharks in the Atlantic Ocean.

—Jennifer Smith, Assistant Chief Counsel

## The State RFA Model Initiative

### Regulatory Flexibility Arrives in the State House

by Sarah Wickham, Regulatory and Legislative Counsel for Regional Affairs

While there are federal measures in place to reduce regulatory burdens on small businesses, the burden does not stop at the federal level. More than 92 percent of businesses in every state are small businesses and they bear a disproportionate share of regulatory costs and burdens. However, sometimes because of their size, the aggregate importance of small businesses to the economy can be overlooked. Because of this, it is very easy to fail to notice the negative impact of regulatory activities on them. Recognizing that state and local governments can also be a source of onerous regulations on small business, in 2002 Advocacy drafted model regulatory flexibility legislation for the states based on the federal Regulatory Flexibility Act.

Advocacy's model legislation is designed to foster a climate for entrepreneurial success in the states so that small businesses will continue to create jobs, produce innovative new products and services, and bring more Americans into the economic mainstream. Excessive regulation can be reduced and the economy improved without sacrificing important regulatory goals

such as environmental protection, travel safety, safe workplaces, and financial security.

Many states have some form of regulatory flexibility laws on the books. However, many of these laws do not contain all of the five critical elements addressed in Advocacy's model legislation. Recognizing that some laws are missing key components that give regulatory flexibility its effectiveness, legislators continue to introduce legislation to strengthen their current system.

Since 2002, 15 states have signed regulatory flexibility legislation into law, 33 state legislatures have considered legislation, and four governors have signed executive orders implementing regulatory flexibility.

In 2005, 18 states introduced regulatory flexibility legislation (Alabama, Alaska, Hawaii, Indiana, Iowa, Mississippi, Missouri, Montana, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington). Alaska Governor Frank Murkowski, Indiana Governor Mitch Daniels, Missouri Governor Matt Blunt,

#### Five Points of Law

Effective state regulatory flexibility laws have five elements:

- A small business definition that is consistent with state practices and permitting authorities;
- A requirement that state agencies perform an economic impact analysis on the effect of a proposed rule on small business before they regulate;
- A requirement that state agencies consider less burdensome alternatives for small businesses that still meet the agency's regulatory goals;
- A provision that forces state governments to review all of its regulations periodically; and
- Judicial review to give the law "teeth."

New Mexico Governor Bill Richardson, Oregon Governor Ted Kulongoski, and Virginia Governor Mark Warner signed regulatory flexibility legislation into law. And Arkansas Governor Mike Huckabee implemented regulatory flexibility through an executive order.

A vibrant and growing small business sector is critical to creating jobs in a dynamic economy. Small businesses are 99.7 percent of all businesses, employ half of the work force, produce 52 percent of the private sector output, and provide significant ownership opportunities for women, minorities, and immigrants. Advocacy welcomes the opportunity to work with state leaders on their regulatory issues.

The text of Advocacy's model legislation and the most recent map of state legislative activity can be found at [www.sba.gov/advo/laws/law\\_modelleg.html](http://www.sba.gov/advo/laws/law_modelleg.html).

#### State Progress Since 2002

**Regulatory flexibility laws enacted (15):** Alaska; Colorado; Connecticut; Indiana; Kentucky; Missouri (two laws); North Dakota; New Mexico; Oregon; Rhode Island; South Carolina; South Dakota; Virginia; and Wisconsin.

**Regulatory flexibility legislation introduced (33):** Alabama; Alaska; California; Colorado; Connecticut; Georgia; Hawaii; Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Mississippi; Missouri; Montana; Nebraska; New Jersey; New Mexico; North Carolina; North Dakota; Ohio; Oregon; Pennsylvania; Rhode Island; South Carolina; South Dakota; Tennessee; Texas; Utah; Virginia; Washington and Wisconsin.

**Executive orders signed (4):** Arkansas; Massachusetts; Missouri; and West Virginia.

## The Economics of the RFA

### Office of Advocacy Indicators over the Years

by Chad Moutray, Chief Economist

When the Regulatory Flexibility Act (RFA) was passed in 1980, the cost of regulation was very much on the mind of economists and policymakers. Cost studies from this time period show a general consensus that small firms were being saddled with a disproportionate share of the federal regulatory burden. (Some of these studies were commissioned by the newly created Office of Advocacy.) Then as now, an important tool for redressing the bias against small firms is through implementation of the RFA.

As the Office of Advocacy works with federal agencies during the rulemaking process, it seeks to measure the savings of its actions in terms of the compliance costs that small firms would have had to bear if changes to regulations had not been made. The first year in which cost savings were documented was 1998. Changes to rules in that year were estimated to have saved small businesses \$3.2 billion. In 2004, Advocacy actions saved small businesses over \$17 billion in cost savings. Moving forward, Advocacy will continue to measure its accomplishments through cost savings. Yet, ultimately, if

federal agencies institutionalize consideration of small entities in the rulemaking process, the goals of the regulatory flexibility process and Executive Order 13272 will be realized to a large degree, and the amount of foregone regulatory costs would actually diminish.

Economics has provided a framework for regulatory actions and for other public policy initiatives. What has Advocacy's impact been on influencing public policy and furthering research? One does not have to be an expert in economics to recognize that our research and the research of others over the past couple decades has advanced the recognition that small firms are crucial to the U.S. economy. This has not always been the case.

The economy of 1980 and today differ greatly. Real GDP and the number of nonfarm business tax returns have more than doubled since 1980, the unemployment rate and interest rate are much improved, and prices are higher (although inflation is significantly lower). One constant, though, is the lack of timely, relevant data on small businesses. The Office of Advocacy struggled throughout

much of its early existence to accurately measure the number of small firms. The good news is that the Census Bureau now has credible firm size data beginning in 1988, in part because of funding from the Office of Advocacy.

Despite the data obstacles, Advocacy research shows that more women and minorities have become business owners since 1980. Small businesses are now recognized to be job generators and the source of growth and innovation. Not only are more than 99 percent of all employers small businesses, but small firms are responsible for 60 to 80 percent of all new jobs, and they are more innovative than larger firms, producing 13.5 times as many patents per employee.

Research on small entities has gained more prominence, and entrepreneurs are widely acknowledged as engines of change in their regions and industries. The Office of Advocacy will continue to document the contributions and challenges of small business owners. Armed with these data, policymakers will be able to work to ease their tasks, both through better regulation and other endeavors.

#### Then and Now: Small Business Economic Indicators Over 25 Years

	1980	1985	1990	1995	2000	Today
Real gross domestic product (\$trillion)	5.2	6.1	7.1	8.0	9.8	11.1
Unemployment rate (percent)	7.2	7.2	5.6	5.6	4.0	5.2
Consumer price index (1982=100)	82.4	107.6	130.7	152.4	172.2	193.4
Prime bank loan rate (percent)	15.3	9.9	10.0	8.8	9.2	5.8
Employer firms (million)	—	—	5.1	5.4	5.7	5.7 (e)
Nonemployer firms (million)	—	—	—	—	16.5	18.3 (e)
Self-employment, unincorporated (million)	8.6	9.3	10.1	10.5	10.2	10.6
Nonfarm business tax returns (million)	13.0	17.0	20.2	22.6	25.1	29.3

Note: All figures seasonally adjusted. Data for "today" are latest available; 2005 data are year-to-date; e = estimate

Source: Federal Reserve Board; U.S. Department of the Treasury, Internal Revenue Service; U.S. Department of Commerce, Bureau of the Census, Bureau of Economic Analysis; U.S. Department of Labor, Bureau of Labor Statistics



## The Importance of Data to Good Policy

by Joe Johnson, *Regulatory Economist*

Regulatory policy involves difficult choices about costs and benefits. Accurate data on costs and benefits are essential to a complete understanding of the tradeoffs involved. Even though the Regulatory Flexibility Act (RFA) first required agencies to separately consider small business impacts 25 years ago, dependable cost estimates have often been hard to come by.

While measuring the costs of new regulations is a prerequisite for improving regulatory policy, compliance with the sum of all past regulations also places a heavy burden on small businesses. Over the past 25 years, significant gains have been made in measuring the impact of regulatory compliance on small firms. During that time, the Office of Advocacy has produced a series of research reports on this topic, and the findings have been consistent: compliance costs small firms more than large firms. The most significant series of analyses began in the 1990s when Thomas Hopkins first estimated the costs of regulatory compliance for small firms. This research was refined by

Mark Crain and Thomas Hopkins in 2001, and most recently by Crain in the 2005 study, *The Impact of Regulatory Costs on Small Firms*. Crain's latest estimate shows that federal regulations cost small firms nearly 1.5 times more per employee to comply with than large firms.

Despite much progress since passage of the RFA 25 years ago, significant work remains. These hurdles include determining the total burden of rules on firms in specific industries or imposed by specific federal agencies. Estimates of these costs would help show policymakers the marginal cost of adding new rules or modifying existing ones; they would also help show the effects of repealing rules that are no longer relevant yet still cost small business every year. Such analyses will become crucial as the mountain of federal regulations continues to rise. The future of small business depends upon federal rulemaking that uses the best data available to balance the costs and benefits of regulation, while considering how additional rules will affect small business.

### Impact of Regulatory Costs on Small Firms

Mark Crain's 2005 report, *The Impact of Regulatory Costs on Small Firms*, updates the Advocacy sponsored report issued in 2001. These studies estimate the total burden imposed by federal regulations. The 2005 report distinguishes itself from previous research by adopting a more rigorous methodology for its estimate on economic regulation, and it brings the information in the 2001 study up to date.

The research finds that the total costs of federal regulations have increased from the level established in the 2001 study. Specifically, the cost of federal regulations totals \$1.1 trillion, while the updated cost per employee is now \$7,647 for firms with fewer than 20 employees. The 2001 study showed small business with 60 percent greater regulatory burden than their larger business counterparts. The 2005 report shows that disproportionate burden shrinking to 45 percent.

While the true costs of federal regulation have yet to be calculated, Advocacy research has repeatedly and consistently attempted to uncover an estimate of the burden in general, and how it affects small businesses, in particular. —Radwan Saade, *Regulatory Economist*

### RFA Recollections

"The most memorable event with respect to the history of the RFA was the enactment of SBREFA. Obtaining Vice President Gore's support for judicial review was critical—and of course SBREFA would never have been enacted into law without Senator Bond's leadership.

"The RFA's biggest benefit to the small business environment is the panel process for EPA and OSHA regulations. The panels force the agencies to think through the problems in a rational way rather than using the RFA to find a rationale to support foregone conclusions. If the RFA is an analytical tool for helping the agencies comply with the reasoned decision-making requirements of the Administrative Procedure Act, then agencies must undertake an internal dialogue on the best approaches to resolving a regulatory problem. The panel process, by providing alternative thinking, moves that process along by having an outside party as a sort of referee.

"Probably the best use of the RFA ever by a federal agency was the Food and Drug Administration's final regulatory flexibility analysis for implementing the Nutrition Labeling Education Act (NLEA). The agency noted the impact on small business and would have adopted less burdensome alternatives but could not because of the strictures in the statute. FDA's analysis helped lead to the enactment of 1993 amendments to the NLEA that provided the agency with greater flexibility in providing small business alternatives."

Barry Pineles

Regulatory Counsel, House Small Business Committee



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## Implementing Executive Order 13272

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### Federal Rule Writers Learn the Ps and Qs of Small Business Impacts

by Claudia Rodgers, Senior Counsel

One key aspect of Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” is to educate federal rulemakers in the specifics of small business impacts—how to comply with the Regulatory Flexibility Act (RFA). Since President Bush signed E.O. 13272 in August 2002, staff at over 40 agencies have been trained.

Agency staff—attorneys, economists, policymakers, and other

employees involved in the regulation writing process—come to RFA training with varying levels of familiarity with the RFA, even though it has been in existence for 25 years. Some are well versed in the law’s requirements, while others are completely unaware of what it requires an agency to do when promulgating a regulation.

The three-and-a-half hour session consists of discussion, group

assignments (where participants review fictitious regulations for small business impact), and a question and answer session. Agency employees receive a hands-on approach on how to comply with the RFA and are able to see how the law’s many requirements work in a real-life regulatory setting. By the end of the course there are always many revelations and

*Continued on page 13*

### Federal Agencies Participating in RFA Training Since December 2002

*Regulatory staff from the following agencies have participated in Advocacy’s RFA training, as directed by E.O. 13272.*

Department of Agriculture  
Animal and Plant Health Inspection Service  
Department of Commerce  
National Oceanic and Atmospheric Administration  
Manufacturing and Services  
Patent and Trademark Office  
Department of Education  
Department of Energy  
Department of Health and Human Services  
Centers for Medicare and Medicaid Services  
Food and Drug Administration  
Department of Homeland Security  
Bureau of Citizenship and Immigration Services  
Bureau of Customs and Border Protection  
Transportation Security Administration  
United States Coast Guard  
Department of Housing and Urban Development  
Community Planning and Development  
Fair Housing and Equal Opportunity  
Manufactured Housing  
Public and Indian Housing  
Department of the Interior  
Bureau of Indian Affairs  
Bureau of Land Management  
Fish and Wildlife Service  
Minerals Management Service  
National Park Service  
Office of Surface Mining, Reclamation and Enforcement

Department of Justice  
Bureau of Alcohol, Tobacco, and Firearms  
Department of Labor  
Employee Benefits Security Administration  
Employment and Training Administration  
Employment Standards Administration  
Mine Safety and Health Administration  
Occupational Safety and Health Administration  
Department of Transportation  
Federal Aviation Administration  
Federal Highway Administration  
Federal Motor Carrier Safety Administration  
Federal Railroad Administration  
National Highway Traffic Safety Administration  
Research and Special Programs Administration  
Department of the Treasury  
Financial Crime Enforcement Network  
Financial Management Service  
Internal Revenue Service  
Office of the Comptroller of the Currency  
Tax and Trade Bureau  
Department of Veterans Affairs  
Independent Federal Agencies  
Access Board  
Environmental Protection Agency  
Federal Communications Commission  
Federal Deposit Insurance Corporation  
Federal Election Commission  
General Services Administration / FAR Council  
Securities and Exchange Commission  
Small Business Administration

### RFA Training, from page 12

excited faces as agency staff realize what they have to do to comply with the RFA and that Advocacy is here to help them along the way.

One of the most important themes throughout the course is that the agency should bring Advocacy into the rule development process early in the creation of a regulation. Advocacy encourages agencies to work closely with us to help them determine whether a potential rule will have a significant economic impact on a substantial number of small entities. Making this determination is frequently where agencies make their initial mistakes under the RFA. The training session helps to explain the steps rule writers need to take to make this decision accurately. By considering the impact of their regulations on small business from the beginning, agencies are more likely to promulgate a rule that is less burdensome on small businesses with more effective compliance. By “doing it right on the front end,” agencies avoid legal hassles

and delays for noncompliance with the RFA.

While changing the culture of agency rule writers is a tall order, Advocacy’s RFA training is already having quite an impact on the way agencies approach rule development. Those agencies that have been through training are now calling Advocacy earlier in the process, sending us draft documents, and recognizing that if they don’t have the information they need, Advocacy can help point them in the right direction for small business data.

Advocacy has trained over 40 federal agencies, independent commissions and departments. Training is expected to be enhanced in the near future with a web-based training module for employees who missed the initial sessions. With continued RFA training sessions for all 66 of the agencies and departments on Advocacy’s priority list, the number of regulations written with an eye toward their small entity impact will continue to grow.



Chief Counsel for Advocacy Thomas M. Sullivan kicks off an RFA training session at the Environmental Protection Agency in 2003.

### RFA Recollections

“I remember when the concept of ‘regulatory flexibility’ was just that—a concept. In 1978-1981, the Office of Advocacy tried with limited success to educate agencies to make regulations more flexible for small business in ways that would not compromise public policy objectives.

“Congress intervened in 1980 with the enactment of the Regulatory Flexibility Act and again in 1996 with two major amendments to the act—judicial review of agency RFA compliance and the creation of regulatory review panels for EPA and OSHA regulations. Much was expected of judicial review, but over the past 10 years, court after court refused to enforce the law. This may now change with the decision in *National Telecommunications Cooperative v. FCC*, in which I participated as counsel. The court ordered the FCC to comply with the law—a legal breakthrough for RFA. As for the EPA and OSHA regulatory review panels, they have been a total success in my view. I participated in 20 panels as chief counsel. In almost every instance, the panel process produced regulatory proposals that achieved their regulatory objective while significantly reducing the burden on small business—a win-win for all.

“RFA compliance diligently pursued by a strong Office of Advocacy, I am confident, will continue to enhance our country’s regulatory framework.”

*Jere W. Glover*  
Chief Counsel for Advocacy  
1994-2001

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## Future Directions for the RFA

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### Legislative Solutions to RFA Weaknesses

*by Shawne Carter McGibbon, Deputy Chief Counsel*

Federal agency compliance with the Regulatory Flexibility Act (RFA) has meant billions of dollars saved for small businesses. It has been a gradual process as some agencies have moved from completely ignoring the requirements of the RFA to realizing that the law is a tool for crafting smarter and less costly rules. It has not been an easy journey and it is worthwhile to take a brief look back and then look forward to where future improvements are needed.

Prior to the Small Business Regulatory Enforcement Act (SBREFA) of 1996 there was no judicial review provision that enabled small businesses to hold agencies' feet to the fire when it came to compliance with the RFA. After SBREFA was enacted, agencies took their obligations a bit more seriously, although compliance was still far from perfect. Executive Order 13272, signed in 2002, encouraged agencies to share more information on draft rules with the Office of Advocacy and acknowledge Advocacy's comments when any final rule is published. This was an important step forward because it meant that small business concerns would be addressed in the early stages of rulemaking, rather than late in the process when most decisions have already been made. Even though SBREFA and the executive order have been successful in boosting agency attention to unique small business issues and reducing unnecessary burden, there is still room for improvement.

Some detractors of the SBREFA amendments believed that judicial review would open a floodgate of lawsuits. In fact, this has not happened—an average of 12.5 lawsuits

per year have been filed, despite 4,000 final rules being published annually. Some detractors of the executive order believed that sharing early drafts of rules with Advocacy would result in leaks of pre-decisional information to the public. Those detractors failed to realize that Advocacy is subject to the same interagency confidentiality rules as any other federal agency. Of course, one basic criticism over the years has been that the RFA is intended to roll back necessary health and safety regulations. To the contrary, the RFA has only caused agencies to assess the impact of their regulations on small entities and analyze less burdensome alternatives where feasible.

Recently, legislation has been introduced to plug some of the remaining loopholes in the RFA. The legislation represents an unprecedented opportunity to realize fully the intentions of the original drafters of the RFA. The Office of Advocacy crafted a legislative agenda for the 109th Congress. The concepts outlined in the agenda include clarifying and strengthening the regulatory look-back provisions in the RFA to ensure that agencies periodically review existing regulations for their impact on small entities. It also includes codifying Executive Order 13272, so that its requirements will be made permanent and so that it is certain to apply to independent agencies. And it includes expanding economic impact analyses to include an assessment of foreseeable indirect effects. Currently, agencies can avoid the analytical requirements of the RFA if a rule has only a direct impact on large businesses or if general standards are promulgated

for states to implement through state-level rulemakings. However, Advocacy's experience has shown that the trickle down (indirect) effects of these types of rules can greatly affect small entities.

Legislation has been introduced in both the House of Representatives and the Senate which would accomplish the goals set out in Advocacy's legislative agenda. As with earlier reform successes, nothing in the proposed legislation would undermine vital health and safety regulations. The reforms are targeted in a way that will only promote a better rulemaking process and smarter, less burdensome rules. Let's hope that RFA reform can become a reality during this Congress.

### RFA Recollections

"When the RFA was under consideration, some believed the effort required to analyze small business impacts would unduly delay regulatory efforts—a myth that was soon dispelled. In hindsight, I wish we had closed the loophole that allowed many tax-related regulations to escape the scrutiny of the RFA process. As good as the RFA was, not having that arrow in the quiver made the development of reasonable tax regulations all the more difficult.

"I believe the mere existence of the RFA has produced better regulations, even when a specific small business solution was not obvious. Any time options are explored, whether implemented or not, small business wins."

*John Satagaj  
President, Small Business  
Legislative Council*



# Technology Transforms Small Business Role in Rulemaking

by Bruce Lundegren, Assistant Chief Counsel

Think back 25 years to the time when the Regulatory Flexibility Act (RFA) was passed. The rulemaking process was much less friendly and less accessible to small business. Things are very different, and in many respects, much better today.

Congress passed the RFA in 1980 because “one-size-fits-all” regulations were imposing disproportionate burdens on small business. The RFA ensures that federal agencies consider the impact of regulations on small business. Congress supplemented the RFA in 1996 with the Small Business Regulatory Enforcement Fairness Act (SBREFA), which gave small business a stronger voice in the rulemaking process.

But another important factor has been at work in improving small business access to the rulemaking process: technology. Twenty-five years ago desktop computers were a futurist’s dream. To learn about new regulations, you had to go to the library to search the *Federal Register* for regulations that might affect your business. Regulatory dockets full of paper files were housed in remote government offices—often in distant cities. And does anyone recall having to make 5¢ copies of regulatory documents on those old photocopy machines? It was a costly, difficult, and time-consuming process.

Now, in 2005, the *Federal Register* is available online, and it’s searchable. You can have it delivered to your desktop every morning, and federal agencies have established email lists to deliver timely regulatory announcements. Agencies have also established electronic dockets for their new regulations, where every study, report, or public comment used in the decisionmaking process can be accessed with a click of the mouse.

Technological advancement to enhance the regulatory process can be traced to the Electronic Government (or eGovernment) Initiative. Congress launched this initiative in 2002, and it has been a priority for this Administration. The initiative seeks to use advanced technology and the Internet to deliver better government services to the public at lower costs and to create citizen-focused services that improve government’s value to the public. The trick now is for federal agencies to use these new technologies to create new and dynamic models of government. Small business should benefit from these efforts.

While the eGovernment Initiative consists of 24 separate projects, some of the most important to small business include:

- **E-Rulemaking.** This includes creating electronic dockets at each agency and creating a single site ([www.regulations.gov](http://www.regulations.gov)) for proposed federal regulations. These will help small businesses and the public participate in the regulatory process;
- **The Business Gateway.** This is a single portal ([www.business.gov](http://www.business.gov)) for government regulations, services, and information to help business with their operations; and
- **E-Grants.** This is a single site ([www.grants.gov](http://www.grants.gov)) to find and apply for federal grants online.

These eGovernment projects should improve public access to information and services, reduce paperwork and reporting requirements, and allow small business to more effectively participate in the regulatory process. These advances, combined with new requirements to improve the quality and transparency of scientific information that underlies federal regulations, are a giant step in making government more accountable to small business.

## RFA Recollections

“Small businesses are well understood to be a driving force behind U.S. economic growth and prosperity. It is therefore critical that any unnecessary regulatory burdens on small businesses be identified and removed. Since its passage 25 years ago, the Regulatory Flexibility Act (RFA) has helped federal regulatory agencies conduct the analysis that is essential to understanding the impact proposed regulations have on small firms. The analysis required by the RFA can alert policymakers that a regulation will have a disproportionately costly impact on small entities and help them craft regulatory alternatives that reduce this impact.

“The RFA also requires agencies to conduct periodic reviews of existing regulations, an activity that is as important as assessing the consequences of new proposed regulations. OMB has recently engaged the public and federal agencies in a number of regulatory reform initiatives that seek to reduce unnecessary costs and increase flexibility through the reform of existing regulations, guidance documents, and paperwork requirements. The regulatory reviews required by the RFA are a natural complement to regulatory reform initiatives that take into consideration the regulatory burdens and complexities confronting America’s small businesses.”

John D. Graham  
Administrator  
Office of Information and  
Regulatory Affairs



Advocacy staff at the 25th anniversary of the office in 2001. Many of the staffers who worked on the original Regulatory Flexibility Act still enthusiastically administer it now.

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# Appendix W

## The Small Business Advocate newsletter, July-August 2016, 40th Anniversary of the Office of Advocacy

### THE SMALL BUSINESS ADVOCATE OFFICE OF ADVOCACY

REGULATION • RESEARCH • OUTREACH

July–August 2016

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### 40th Anniversary Symposium Edition



The Office of Advocacy held its Anniversary Symposium on June 22, 2016 to mark a number of important milestones for small business. The year 2016 marks the 40th anniversary of the creation of the Office of Advocacy, the 35th anniversary of the signing of the Regulatory Flexibility Act, the 20th anniversary of the Small Business Regulatory Enforcement Fairness Act, and the 15th anniversary of the signing of Executive Order 13272.

To celebrate these significant anniversaries Advocacy hosted an all-day event that brought together congressional leaders, small business trade associations, federal agency regulatory staff, think tanks, universities, attorneys,

economists, policymakers, and small business stakeholders. The historic celebration included panels on regulatory progress for small business, ways to properly assess the costs of regulations on small business, discussions of historical changes to Advocacy and the laws it oversees, ways to improve agency regulatory compliance, and potential changes to these laws which would be best for small business.

The event highlighted various congressional leaders' perspectives on all of these topics and looked for new ways to assist the Office of Advocacy to complete its important mission in the next 40 years.



Advocacy staff at the 40th Anniversary Symposium on June 22, 2016.

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## Chairman David Vitter Congratulates Advocacy for 40 Years of Serving Small Businesses

By Katie Moore, Legal Intern

Senator David Vitter, chairman of the Senate Small Business and Entrepreneurship Committee (SBC), delivered the keynote speech at the Office of Advocacy's 40th Anniversary Symposium.

Chairman Vitter congratulated Advocacy on 40 years of serving small entities and expressed his own commitment to the important agenda of addressing small businesses' needs. He listed his three top priorities before completing his chairmanship of the SBC. First, he plans to make his bill S.2992, entitled the Small Business Lending Oversight Act of 2016, into law. He stated that this will give needed strength and support to the SBA's 7(a) loan program because, "Access to capital is a small business' lifeline, and as that business grows, so do jobs and the economy."

Second, he plans to reauthorize the Small Business Innovation Research (SBIR) and the Small Business Technology Transfer

(STTR) programs this year.

Chairman Vitter said this "will help ensure long-term stability and foster an environment of innovative entrepreneurship by directing more than \$2 billion annually in already-existing federal R&D funding to the nation's small firms that are most likely to innovate and help create jobs in this way."

Third, he wants the SBC's central focus to continue to be regulatory reform. Chairman Vitter stressed that small businesses have been hit by "this Administration's regulatory onslaught," causing owners to spend a "staggering" number of hours in order to comply. Chairman Vitter contrasted the resources of larger entities to the "far heavier compliance costs for small businesses." Therefore, Chairman Vitter stressed that "the Office of Advocacy and the Regulatory Flexibility Act (RFA) are so vital in holding agencies accountable in the rulemaking process." Chairman Vitter emphasized



Chairman David Vitter speaking to the crowd at Advocacy's Anniversary Symposium.

the valuable role the Office of Advocacy serves as "the independent voice for small businesses" and stated agency compliance with Advocacy's comments is essential.

He concluded his speech by once again congratulating the Office of Advocacy on its 40th Anniversary, and said that he looks forward to continuing to work together to "continue to implement common-sense reforms."

## Chairman Steve Chabot: Small, But Mighty Job Creators

By Elle Patout, Congressional Affairs and Public Relations Manager



Chairman Steve Chabot delivering remarks on fighting for small business.

Congressman Steve Chabot, chairman of the House Small Business Committee, took time out of his busy schedule to address the audience during Advocacy's Anniversary Symposium, a day that recognized pivotal events in the office's history. However, the event was a day of celebration not only for the Office of Advocacy, but also, for the Chairman himself. Wednesday, June 22, 2016, marked 43 years of marriage for Chairman Chabot and his wife Donna. Instead of

spending the day in his hometown of Cincinnati, Ohio, the Chairman came to the conference to speak with small businesses.

His remarks focused on the continued fight on behalf of small businesses—the small, but mighty job creators. Chairman Chabot outlined his belief that, "The devastating impact of new regulations on small businesses continues to grow even though small businesses are more engaged and better represented in the rule-making

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# The Great Compromise: The Capitol Hill Outlook on Regulatory Reform

By Elle Patout, Congressional Affairs and Public Relations Manager

The first panel of the day, “Congressional Perspectives: Views from the Hill on the Importance of Small Business,” focused on a multitude of ways to productively reform the Regulatory Flexibility Act. President of the National Small Business Association Todd McCracken moderated the discussion.

The four panelists were:

- Eric Bursch, Minority Staff Director, Senate Regulatory Affairs and Federal Management Subcommittee, Homeland Security and Governmental Affairs Committee;
- Susan Eckerly, Director of Regulatory Review, Senate Budget Committee;
- Ami Sanchez, General Counsel, Senate Small Business and Entrepreneurship Committee;
- Viktoria Seale, Counsel, House Small Business Committee.

A couple topics on the forefront of the day’s discussion included retrospective review and indirect effects. Panelists on both sides of the aisle agreed that with the ever-changing nature of today’s world many rules are becoming counterproductive and reviewing old regulations is no longer important, it is imperative for America to remain a vibrant economy. In addition, participants stated that

legislation where retrospective review is ingrained would be beneficial. Similar to the Office of Advocacy’s legislative priorities, it seems there is common belief that agencies should prepare periodic reviews demonstrating that they have considered alternative means of achieving the regulatory objective while reducing the regulatory impact on small businesses. In addition to making some executive orders part of the statute, panelist Viktoria Seale expressed the belief that RFA reforms should better clarify the law as opposed to only making changes to the law.

One topic that got all the Congressional staff involved and the dialogue flowing was the indirect effect of regulation. There was consensus among the panelists that indirect effects would not be the easiest to define and compute. Susan Eckerly addressed how there is widespread disagreement among economists, academics, and policymakers on how to calculate indirect effects. Fellow panelist Eric Bursch made a sports’ comparison to drive the point home. Bursch explained how Congress does not make many 50-yard touchdown passes, instead they gain three yards here and there before they cross the goal line. However, Ami Sanchez and Viktoria Seale agreed there

are reasonable and tangible ways to address this goal. In the end, Eckerly recommended that Advocacy work together with the Office of Information and Regulatory Affairs to put together some agreed upon language that would move the ball forward in this arena.

Beyond certain niche topics, the overall message that participants underscored was the need for policymakers to frame the discussion correctly. Most importantly, if lawmakers want to make changes to improve the regulatory environment, they cannot take political sides forcing people to choose between two different ends of the spectrum. Panelist Ami Sanchez phrased it well by saying, “On one hand, it really can’t be about ‘all regulations are burdensome and therefore bad.’ And on the other, it can’t be ‘any attempt to evaluate or reform the system is going to undermine public health and safety.’” As Advocacy continues to be the independent voice for small business, our efforts and conversations with policymakers will continue, and we hope to improve legislation to help advance regulatory consideration for our nation’s small businesses in the 40 years to come.



The Congressional panel discussing reforming the Regulatory Flexibility Act.



## Leading the Charge: A Conversation with Former Chief Counsels

By Daniel Kane, Law Clerk

To celebrate 40 years of service and reflect on many watershed moments, the Office of Advocacy invited five former chief counsels for advocacy to describe how the office navigated the ebbs and flows of federal regulation under their leadership. Former Chief Counsels Frank Swain, Thomas Kerester, Jere Glover, Thomas Sullivan, and Winslow Sargeant each recounted their time at the helm of Advocacy and some of the successes they—and Advocacy’s staff—achieved for small businesses.

However, before any stories could be shared, Director of Regional Affairs Michael Landweber reminded all in attendance that Advocacy’s anniversary

celebration would not be complete without remembering the late Milton “Milt” Stewart, the first chief counsel for Advocacy. Reading from Advocacy’s tribute to the late leader, Landweber said “Many of [Advocacy’s] accomplishments are the fruit of seed planted by Milt and the team he assembled to form the Office of Advocacy.” Many of the chief counsels present for the 40th anniversary recalled their interactions with Milt, his unwavering passion for small businesses, and his lasting impact on both Advocacy and the small business advocates he inspired.

Landweber then turned the discussion over to Frank Swain, who served as chief counsel

from 1981 to 1989. Swain, currently a partner at Faegre Baker Daniels in Washington, D.C., began advocating for small businesses at the National Federation of Independent Business and came to Advocacy during the “golden era” of government agencies, which, he explained, was “when there weren’t so many.” Swain recalled the first time he testified before Congress as chief counsel and how his actions emphasized Advocacy’s independence from the Reagan Administration. Hours before Swain was to testify to the Senate Small Business Committee on the impact of the Davis-Bacon threshold, he received a call from the White House asking him not to testify as they had not yet issued an opinion on the matter. Swain, recognizing the importance of Advocacy’s role as an independent voice, told the White House that he was still going to testify, but would stress that his testimony represented the views of the chief counsel and not the White House or the Small Business Administration.

Thomas Kerester, who served as chief counsel from 1992–1993, echoed Swain’s regard for

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Former Chief Counsels discussing their time in Advocacy.

### Chabot, *from page 2*

process than ever before.” For this reason, he discussed the committee’s extensive oversight of agency compliance with the RFA. Moreover, he explained how the committee has been identifying weaknesses and loopholes in the law and working on legislative solutions to strengthen the RFA and the Office of Advocacy. He underscored this effort by sharing details of his recent legislation that focused on modernizing

and strengthening the RFA. Some specific topics he chose to highlight were reasonably foreseeable indirect effects, new opportunities through SBREFA panels, and giving Advocacy more authority in the rule writing process. He also addressed regulations that he believed were impeding small business success such as the Environmental Protection Agency’s Waters of the United States and the Department of

Labor’s Overtime rule.

In the end, the Chairman re-emphasized the importance of fighting on behalf of the small, but mighty job creators. His remarks charmed the audience through his various anecdotes of working on behalf of small business and his 20 years of tireless work on the House Small Business Committee.

## Former Chief Counsels

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Advocacy's independence in government. According to Kerester, during his confirmation as chief counsel, the chairman of the Senate Small Business Committee said "when you get approved, take [Advocacy's] message outside the Beltway." As requested, Kerester recounted zigzagging across the country, enjoying his time meeting small businesses—"the backbone of the economy."

Jere Glover, chief counsel from 1994-2001, began by recalling his earlier tenure at Advocacy under the late Milt Stewart. Glover described Milt's knack for working with the White House and people, including government officials. Glover said that Milt's "tricks" included getting permission from President Jimmy Carter to compile a list of accomplishments on behalf of small businesses, a task that allowed Stewart and Glover to gain access to the regulatory process with each agency and advocate for small businesses within the government. "I learned a lot from Milt," Glover said, and he used this knowledge

later as chief counsel working for the passage of the Small Business Regulatory Enforcement and Fairness Act (SBREFA) in 1996. According to Glover, Advocacy works best when working with an agency who wants to help the small businesses understand the regulation. The key is getting both sides to work together.

Tom Sullivan, chief counsel from 2001-2008, recounted Advocacy's successes with implementing Executive Order 13272 and advancing state-level regulatory reform with the regional advocates. Sullivan also expressed his immense gratitude to the office's staff for their work and support during his tenure. When asked, "What worked the best when you were serving as chief counsel," Sullivan replied, "the staff worked the best." Sullivan, who was the named author of the aforementioned tribute to Milt Stewart, said "I didn't write that. Jody [former director of information] or someone else wrote it and I believed it. The same is true for many comment letters and testimony."

Winslow Sargeant, who served as chief counsel from 2010-2015, echoed Sullivan's gratitude to Advocacy's staff, especially when referring to the "bump in the road," referencing his tumultuous 2009 confirmation process. Sargeant then described his "introduction" to Advocacy, which included a congressional request for legislative priorities, a letter from Congress questioning Advocacy's independence from the White House regarding the Affordable Care Act (ACA), and testimony on the Form 1099 provisions of the ACA on which he broke from the Obama Administration. Despite these difficulties "I had good staff and support from our stakeholders," Sargeant said.

Advocacy became what it is today under the leadership of these individuals and has accomplished a lot on behalf of small business. As Sullivan suggested, "If you get to step back, you'll see you make a positive impact for small businesses—you're making an incredible difference."

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## Admiral Gay speaks to Advocacy Symposium about Office Differences

*By Jennifer Smith, Assistant Chief Counsel*

SBA's National Ombudsman and Assistant Administrator for Regulatory Enforcement Fairness Earl L. Gay, a U.S. Navy Rear Admiral (Retired), joined SBA following a distinguished career as a naval officer and aviator. Admiral Gay matriculated at the U.S. Naval Academy in 1976—the same year that the country celebrated the Bicentennial, US military service academies admitted women and Congress created the Office of Advocacy.

Admiral Gay spoke about the collaboration that the Ombudsman has had with Advocacy and the

difference between the two offices. Whereas Advocacy listens to small businesses, submits comments and works with the agencies before the final rules have been promulgated, the Ombudsman's office comes into play after the rules and regulations have been enacted. The Ombudsman receives comments from small business owners regarding any kind of federal burden or regulation that impedes a small business owner's ability to operate their business. This includes leveling of fines or penalties, excessive audits or any kind of compliance issues that the

business owner might have. The Ombudsman reviews the issue and refers the issue to the particular agency and expects a high-level response within 30 days. Advocacy has a strong relationship with the Ombudsman's office and the regional advocates are very active in the Ombudsman's regulatory fairness board meetings across the country. Admiral Gay thanked the regionals for all of their hard work and for helping his office be successful by helping small businesses find them.



## Estimating Small Business Burdens: Challenges and Opportunities

By Michael McManus, Regulatory Economist

The Symposium's third panel commenced in a surprisingly light hearted fashion; with panelists' favorite economist jokes. The panel focused on how agencies measure regulatory costs to small businesses, the difficulties surrounding these analyses, and the importance of SBREFA panels. Moderated by the Office of Advocacy's Chief Economist, Christine Kymn, the panel contained four individuals with expertise in regulatory economic analysis. Adam Finkel, currently a senior fellow at the University of Pennsylvania Law School and previously the director of Occupational Safety and Health Administration's health standards programs, and Alexei Alexandrov, senior economist at the Consumer Financial Protection Bureau, provided insight from within rule writing agencies and academia. Joining them were Mary Fitzpatrick and Jim Laity from the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) who review federal agencies' economic analysis of significant regulations.

To begin, the panel noted the importance of analyzing the costs and benefits of regulations to specific groups like small businesses. Performing this analysis, called distributional analysis, for small businesses can help lower costs and is a key aspect of the Regulatory Flexibility Act. Finkel stressed that the distributional analysis should not be "secondary" to a main economic analysis, but be part of the same process and given equal weight. The other panelists agreed that small business distribution analyses improve policy decisions and should not be considered merely ancillary.



Economists on the cost of regulation panel all spoke on understanding how the cost of regulations can affect small businesses.

The panel also discussed the issues agencies face when estimating the costs of regulations on small businesses. Understanding the uncertainties around cost and benefit estimates was a key aspect that Finkel felt agencies and government economists could improve. Fitzpatrick noted that agencies sometimes miss or are unable to estimate some types of effect, such as the possibility of business closings, employment changes, and the loss of product variety. Laity commented that regulatory costs should be compared against businesses' profits to understand their true burden. However, all of these deeper analyses would require better data which is often unavailable. For example, Alexandrov agreed that comparing costs to profit may be the best practice, but said he rarely sees representative data on business profits.

Every panelist spoke about data availability issues. Alexandrov noted that agencies often want to gather more data from businesses, but must weigh that desire against the added costs on businesses of additional forms or surveys. Further, he said that small

businesses tend to be exempt from some paperwork requirements, which adds to the difficulty in estimating small business regulatory costs. Many panelists talked about the SBREFA process as an important tool that can alleviate this issue. While they usually do not provide a large amount of hard data, the small business representatives (SERs) often call attention to the regulatory provisions that will be the most burdensome to small business. Further, as Laity mentioned, the SERs know how their business practices will interact with an agency's regulatory proposals and often suggest more efficient alternatives.

The panel's discussion was far reaching and underscored the importance of economic analysis in the regulatory process. Regulatory economic analyses are a critical tool to ensure governmental agencies are not only hearing from small business, but also accounting for them in their policy. While this panel highlighted the improvements still to be made, it also showed the amazing progress that has occurred since the passage of the RFA and SBREFA.

# How to Reduce the Small Business Impact: a Panel of Government and Private Sector Professionals

By Rebecca Krafft, Senior Editor

The fourth panel, Reducing the Burdens: Making Better Policies for Small Business, consisted of experts with background in government and the private sector discussing regulations in the financial, transportation, environmental, and telecommunications sectors. The panelists were:

- Jane Luxton, a partner at Clark Hill, PLC, and former general counsel for the National Oceanic and Atmospheric Administration (NOAA);
- Jonathan Moss, assistant general counsel for regulation at the Department of Transportation (DOT);
- Bill Wehrum, partner at Hunton & Williams, and former acting assistant administrator and chief counselor in the Environmental Protection Agency's Office of Air and Radiation; and
- S. Jenell Trigg, a member of Lerman Senter, PLLC, former assistant chief counsel at the Office of Advocacy and also former staff at the Federal Communications Commission (FCC).

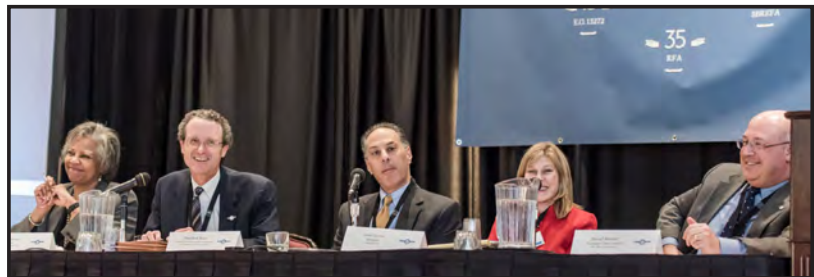
The moderator, Office of Advocacy Assistant Chief Counsel David Rostker, asked them to consider whether the RFA has lived up to its purpose—requiring federal agencies to consider the impact of their regulations on small entities. Each speaker brought their own significant experiences to the question.

Luxton discussed the SBREFA panel process as applied to the Consumer Finance Protection Bureau. “The CFPB considers itself an agency designed to protect consumers. . . . Some of those small businesses are the people who consumers say aren’t treating them right. . . . the SBREFA

panels are the only recourse some small businesses may have to make their views known.” For that reason, she stated that SBREFA panels at CFPB “might be more important than ever.”

Moss discussed DOT’s experience with the RFA, stating that “The RFA has lived up to its purpose. It has had and will continue to have a significant impact on

way of doing what it is that they do. And when they’re required to do what they do in a somewhat different way, then it’s a catalyst for bringing in new ideas and new energy, and new creativity into the process.” Fourth, the RFA brings a different group of people into the discussion, from small businesses themselves to the Office of Advocacy.



The final panel discussed the RFA and SBREFA panels in depth.

rulemaking at DOT.” Moss stated that “Small entities are at the core of each of the business sectors that we regulate. And we are sensitive of the impact the regulations have on their viability, as well as on the U.S. economy. Consideration for small business impacts is embedded throughout our rulemaking process. We strive to ensure that small businesses are aware of, and know how to engage in our rule-making process.”

Wehrum identified a number of important benefits of the RFA. First, the RFA forces agencies to consider small business impacts through “analyses that might not otherwise be done.” Second, the RFA tends to make agencies seriously consider the regulatory approach with the least impact on small entities. Third, the RFA creates a venue for exploration of new ideas. He explained this by saying, “In my experience the regulators get into a particular

Trigg discussed the importance of the RFA and expressed concerns about FCC’s compliance with the RFA in some recent high-profile rulings, noting its lack of economic analysis. She discussed some specific RFA cases that she has litigated, expressing hope that the courts would take FCC to task for its lack of analysis. However, she also noted a recent case that served to undermine the RFA by allowing the FCC to make major changes in policy without rule-making.

The panelists agreed that the RFA works by getting agencies to consider small business impacts in their rulemakings. Although each of the panelists named examples in which small business concerns weren’t fully resolved, they generally agreed that the RFA process works and that federal rules are better thanks to agencies RFA compliance.



Assistant Chief Counsel Major Clark (left) and Director of Regional Affairs Michael Landweber (right) posing for a photo with Small Business and Entrepreneurship Council President Karen Kerrigan (middle).



Chief Counsel for Advocacy Darryl L. DePriest (right) welcoming Admiral Earl L. Gay (Ret.) (left) to the stage to speak.



Former Chief Counsels Winslow Sargeant (left) and Thomas Sullivan (right) enjoying their panel discussion.



Advocacy employees taking advantage of a good photo opportunity.

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