

July 2021

Report on the Regulatory Flexibility Act, FY 2020

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



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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July 2021

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

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

The RFA directs the Chief Counsel for Advocacy to monitor and report on federal agencies' compliance with the law. This report fulfills that mandate, covering fiscal year 2020: from October 1, 2019 to September 30, 2020. In addition, Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," also imposes certain requirements on federal agency rulemaking and requires Advocacy to report on agency compliance with that executive order.

FY 2020 was a difficult year for small businesses in the United States. The COVID-19 pandemic, which began in early 2020, ground the U.S. economy to a halt. Throughout the pandemic, the Office of Advocacy has maintained its mission of being an independent voice for small businesses within the federal government by continuing to focus on regulatory solutions that can help struggling businesses and educating regulators who craft regulations that could disproportionately impact small business. Despite not having face-to-face meetings, federal agencies found ways to keep government working, and Advocacy still produced important gains for America's small businesses.

While Advocacy has enforced the RFA for over 40 years, safeguards on the regulatory process are even more important for small businesses in these unprecedented times. Advocacy has remained attuned to regulatory changes and continues to monitor new rules and regulations for impacts on small business.

Advocacy's overall efforts to promote federal agency compliance with the RFA resulted in modifications to several rules, including eight that represent \$2.259 billion in cost savings for small entities in FY 2020.

One cost savings concerned a rescinded rule on payday lending proposed by the Consumer Financial Protection Bureau. The final rule rescinds the mandatory underwriting provisions of its 2017 rule after re-evaluating the legal and evidentiary bases for these provisions and finding them to be insufficient. CFPB's decision to rescind the rule resulted in total cost savings of \$1.88 billion.

Another cost savings highlighted this year came from the Small Business Administration's interim final rule amending various regulations regarding its loan programs. Advocacy recommended that SBA consider less burdensome alternatives to the proposed rate cap and the personal resources requirement and to clarify the requirements of the affiliation rules. Cost savings from the final rule totaled \$7.9 million annually for small businesses.

Cost savings also occurred because of the Environmental Protection Agency's decision to revise its risk evaluation for methylene chloride under the Toxic Substance Control Act (TSCA). After engaging with Advocacy, EPA agreed to exclude the use of methylene chloride in pharmaceutical manufacturing from the evaluation as a non-TSCA use. This exclusion resulted in regulatory cost savings of \$133.8 million for small businesses.

Advocacy also won other, unquantifiable battles for small businesses:

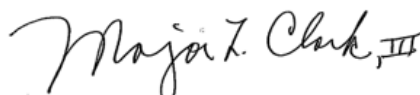
- On February 27, 2020, USDA's Agricultural Marketing Service delayed a policy requiring hemp farmers to test samples of their product in certified DEA labs, citing public comments as their justification. Advocacy's letter argued for the delay on the grounds that there were not enough certified labs.
- In another case, the Mine Safety and Health Administration (MSHA) issued a direct final rule allowing the use of safe electronic detonators for explosives in metal and nonmetal mines. Advocacy had fought for this change since its 2008 Small Business Regulatory Review and Reform initiative.

Chapter 2 reports on agencies' compliance with Executive Order 13272. In FY 2020, Advocacy provided training in RFA compliance in 8 training sessions for 224 federal officials. While RFA training is normally held in person, the pandemic caused Advocacy to move its sessions online. Advocacy also confirmed whether agencies had posted their RFA procedures on their websites. Table 2.2 provides these links.

Also of note in FY 2020:

- In FY 2020, Advocacy submitted 19 formal comment letters to 15 regulatory agencies. These letters expressed Advocacy's concerns and input about how new rules and regulations would impact small businesses.
- In FY 2020, Advocacy held 11 issue roundtables. These roundtables are helpful tools to mediate conversations between small business owners and federal regulators and allow Advocacy to participate in conversations about federal rulemaking. During the pandemic, these roundtables were moved online for safety and convenience.

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



Major L. Clark, III
Acting Chief Counsel for Advocacy

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Chapter 1

The Regulatory Flexibility Act, Small Business, and Regulation During the Pandemic

FY 2020 was a difficult year for small businesses in the United States. The COVID-19 pandemic, which began in early 2020, dramatically impacted the U.S. economy.¹ The health crisis resulted in strict quarantines, lockdown orders, and business closures, endangering small businesses across the United States. Federal aid in the form of the Paycheck Protection Program and Economic Injury Disaster Loan program mitigated some of the damages, but small businesses found themselves in a precarious position thanks to the pandemic.

Throughout the pandemic, the Office of Advocacy maintained its mission of being an independent voice for small businesses within the federal government by producing timely research on the impact of the pandemic and continuing to focus on both regulatory reform that can help struggling businesses and educating regulators who craft rules and regulations that could disproportionately impact small business. Even though face-to-face meetings were not available, the federal agencies, Advocacy included, found ways to maintain the regulatory process, and Advocacy produced important gains for America's small businesses.

This chapter documents the Regulatory Flexibility Act (RFA) and the other laws Advocacy uses to help protect small businesses against burdensome regulatory action. While Advocacy has enforced the RFA for over 40 years, safeguards on the regulatory process are even more important for small businesses in

1 Advocacy engaged in research on the impact of the COVID-19 pandemic on small businesses throughout the pandemic. For an example, see "The Effects Of The COVID-19 Pandemic on Small Businesses," published in March 2021. The Issue Brief can be found on the web here: <https://advocacy.sba.gov/2021/03/02/the-effects-of-the-covid-19-pandemic-on-small-businesses/>

these unprecedented times. While the pandemic has harmed small businesses, Advocacy has remained attuned to regulatory changes and continues to monitor new rules and regulations for impacts on small business. In the case of deregulatory actions, Advocacy monitored potential benefits to ensure maximum benefits for small entities.

The Regulatory Flexibility Act

Advocacy has pursued regulatory reform since its inception. No law after Advocacy's basic charter has had more influence on the office's activities than the RFA, first enacted in 1980² and strengthened in 1996³ and 2010.⁴ It established in law the principle that government agencies must consider the effects of their regulatory actions on small entities and mitigate them where possible. The RFA arose from years of frustration with ever-increasing federal regulation that disproportionately harmed large numbers of smaller entities. From the RFA's section titled "Congressional Findings and Declaration of Purpose":

It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and

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

3. The Small Business Regulatory Enforcement Fairness Act, Public Law 104-121, Title II (March 29, 1996).

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

consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.⁵

The RFA includes procedures for agencies to accomplish this purpose and provides Advocacy, whom a Florida federal court called the “watchdog of the RFA,” with tools to help promote compliance. The 1996 amendments to the RFA provided judicial review for many of its provisions, and since then a significant body of RFA case law has developed, including instances in which rules or their impact analyses have been remanded by the courts due to RFA problems.⁶

In addition to RFA legislation, several executive orders have given Advocacy additional responsibilities to assist agencies in meeting their RFA responsibilities. One of these, Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking,⁷ requires Advocacy to report annually on agencies’ compliance with the RFA. That report is included in this Annual Report on the RFA.

Executive Order 13272 also requires Advocacy to provide RFA compliance training to federal regulatory officials, which ordinarily occurs through live classroom training. Because of the pandemic and the resulting widespread use of telework arrangements, training during much of FY 2020 was conducted online through meeting software. Advocacy continues to customize RFA training to each individual agency or multi-agency group receiving the training. Better-trained regulatory and policy staff can better assess the potential need for both deregulation and regulation, and when regulation is necessary, develop smarter rules that have reduced impacts on small entities. Additionally, RFA training provides federal regulators with a better understanding of how the RFA is a positive tool for regulatory compliance. Fully

RFA-compliant rules can result in better small business compliance and reduced litigation.

Since the enactment of the RFA in 1980, Advocacy has sought to help agencies develop a regulatory culture that internalizes the Act’s purposes. Advocacy shows regulatory and policy officials how considering the potential effects of their proposals on small entities and adopting mitigation strategies can improve their regulations, both by reducing costs to small entities and the economy as a whole, and by improving compliance by those regulated. Since 2003, when Advocacy began its ongoing RFA compliance training program, through FY 2020, training has been provided to officials in 18 cabinet-level departments and agencies, 80 separate component agencies and offices within these departments, 24 independent agencies, and various special groups including congressional staff, business organizations, and trade associations.

Shortly after his inauguration in January 2017, President Donald J. Trump issued two executive orders aimed at reducing the regulatory burden faced by the private sector. The first, Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs,⁸ commonly known as “one-in, two-out,” required that any new regulations be balanced by the elimination of at least two other regulations. It also required that the incremental cost of new regulations be entirely offset by elimination of existing costs of other regulations. The second, Executive Order 13777, Enforcing the Regulatory Reform Agenda,⁹ set a framework for implementing regulatory reform, requiring that each agency appoint a regulatory reform officer to supervise the process of regulatory reform going forward. Advocacy determined that these measures presented an opportunity to reduce the federal regulatory impact on small businesses. In 2017, Advocacy sent a memorandum to federal agencies recommending that agencies consider small entity interests in implementing Executive Order 13771 and in subsequent deregulatory actions.¹⁰ The memo also reminded

5. 5 U.S.C. § 601 note.

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

7. Executive Order 13272 (August 13, 2002), 67 Fed. Reg. 53461.

8. Executive Order 13771 (January 30, 2017), 82 Fed. Reg. 9339.

9. Executive Order 13777 (March 1, 2017), 82 Fed. Reg. 12285.

10. See Appendix C.

agencies of their obligations under the RFA and of the assistance Advocacy could offer to conduct small entity outreach. To maximize this opportunity for small business regulatory reform, Advocacy launched its successful Regional Regulatory Reform Roundtable initiative in 2017. Advocacy staff and regional advocates hosted small business roundtables around the country to identify small business regulatory issues and to assist agencies with regulatory reform and reduction in compliance with Executive Orders 13771 and 13777. Advocacy invited federal agencies to send representatives to these roundtables to hear directly from stakeholders on specific recommendations for regulatory changes.

Agencies' implementation of these executive orders offered significant opportunities for regulatory relief targeted to small businesses. The RFA requires agencies to analyze their deregulatory actions to maximize small business benefits in the marketplace. This report includes descriptions of success stories of small business burden reduction achieved by federal agencies and Advocacy working together under the RFA.



Advocacy staff often participate in speaking engagements to share the work of the office. In January 2020, Advocacy staff met with students at American University College of Law to talk about the office's mission.

Since its passage in 1980, the RFA has helped establish small business consideration as a necessary part of federal rulemaking. In the past, Advocacy has made regulatory reform recommendations directly to agencies based on a review of rules subject to the requirements of Section 610 of the RFA and based on outreach to small entity representatives. In addition to recommendations under Section 610, and after agencies had designated Regulatory Reform Officers and established the Regulatory Reform Task Forces required under Executive Order 13777, Advocacy offered its recommendations and other assistance and views to agencies, as suggested by Section 3(e) of the order. Since then, Advocacy has engaged in a longer-term effort to make specific recommendations to agencies and the Office of Management and Budget about regulations and regulatory policies that could be modified to lower small entities' compliance costs.

The RFA, Its Requirements, and Efforts to Strengthen It

Congress passed the RFA in 1980 to address the disproportionate impact of federal regulations on small businesses. Under the RFA, when an agency proposes a rule that would have a “significant economic impact on a substantial number of small entities,” the rule must be accompanied by an impact analysis, known as an initial regulatory flexibility analysis (IRFA), when it is published for public comment.¹¹ When the final rule is published, it must be accompanied by a final regulatory flexibility analysis (FRFA).¹² Alternatively, if a federal agency determines that a proposed rule would not have a significant impact on small entities, the head of that agency may “certify” the rule and bypass the IRFA and FRFA requirements.¹³

In order to produce an IRFA, the agency must consider less burdensome alternatives to its own rule, and in the FRFA the agency must explain why it chose among the alternatives in the IRFA.¹⁴ Applying the RFA

11. 5 U.S.C. § 603.

12. 5 U.S.C. § 604.

13. 5 U.S.C. §605(b).

14. 5 U.S.C. § 604.

to deregulatory actions is the latest development in the enforcement of the RFA.

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

The Small Business Jobs Act of 2010 codified some of the procedures introduced in Executive Order 13272. That same year, the Dodd-Frank Wall Street Reform and Consumer Protection Act created the Consumer Financial Protection Bureau and made the agency's major rules subject to the RFA's SBREFA panel provisions.

In 2011, President Barack Obama issued Executive Order 13563, Improving Regulation and Regulatory Review,¹⁵ which directed agencies to heighten public participation in rulemaking, consider overlapping regulatory requirements and flexible approaches, and conduct ongoing regulatory review. Concurrently, the president issued a memorandum to all federal agencies, reminding them of the importance of the RFA and of reducing the regulatory burden on small businesses through regulatory flexibility. In this memorandum, the president directed agencies to increase transparency by providing written explanations of any decision not to adopt flexible approaches in their regulations.

In 2012, Executive Order 13610, Identifying and Reducing Regulatory Burdens,¹⁶ provided that "... further steps should be taken...to promote public participation in retrospective review, to modernize our regulatory system, and to institutionalize regular assessment of significant regulations." This comports

with the RFA's Section 610 "look-back" provision mandating the periodic review of existing regulations. The executive order also called for greater focus on initiatives aimed at reducing unnecessary regulatory burdens, simplifying regulations, and harmonizing regulatory requirements imposed on small businesses.

Conclusion

Since its passage in 1980, the RFA has demonstrated remarkable results. It has helped establish small business consideration as a necessary part of federal rulemaking. The careful tailoring of regulation to business size has made better regulations with improved compliance in pursuit of safety, health, and other public goods. The subsequent regulatory and legislative improvements have solidified Advocacy's participation in rulemakings affecting small businesses. What these regulatory reform initiatives all have in common is agreement that the regulatory burden on small businesses must be minimized. Over its 41-year history, the RFA has provided federal agencies with the framework to accomplish this goal, which is especially important in times of disruption like the COVID-19 pandemic. With Advocacy's ongoing monitoring, this important tool will continue to remind agencies that are writing new rules or reviewing existing ones to guard against "significant economic impacts on a substantial number of small entities."¹⁷

15. Executive Order 13563 (January 18, 2011), 76 Fed. Reg. 3821.

16. Executive Order 13610 (May 10, 2012), 77 Fed. Reg. 28469.

17. 5 U.S.C. § 601.

Chapter 2

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

Federal agencies' compliance with the Regulatory Flexibility Act improved markedly after President George W. Bush signed Executive Order (E.O.) 13272, Proper Consideration of Small Entities in Agency Rulemaking, in 2002. The executive order established new responsibilities for Advocacy and federal agencies to facilitate greater consideration of small businesses in regulatory development. Portions of it have been codified in the Small Business Jobs Act of 2010.¹

E.O. 13272 requires Advocacy to educate federal agency officials on compliance with the Regulatory Flexibility Act (RFA), to provide resources to facilitate

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

RFA Training

Advocacy launched its RFA training program in 2003. Since then, the office has offered RFA training sessions to every rule-writing agency in the federal government. These training sessions are attended by the agencies' attorneys, economists, and policy-makers. While RFA training is normally held in person, the COVID-19 pandemic caused Advocacy to move its sessions online. In FY 2020, Advocacy held eight training sessions for 224 federal officials (see **Table 2.1**). The entire list of agencies trained since FY 2003 appears in Appendix D.

1. Small Business Jobs Act, Pub. L. No. 111-240, 124 Stat. 2504 (2010).

Table 2.1 RFA Training at Federal Agencies in FY 2020

Date	Agency	Number Trained
10/28/19	Chemical Safety and Hazard Investigation Board (CSB)	4
02/20/20	Department of Veterans Affairs (VA)	22
03/24/20	Centers for Medicare and Medicaid Services (CMS)	54
04/23/20	Department of Agriculture (USDA), Agricultural Marketing Service (AMS), Specialty Crop Program	7
05/06/20	Department of Agriculture, Agricultural Marketing Service (AMS), Livestock and Poultry Program	12
05/12/20	Securities Exchange Commission	46
06/12/20	Department of Agriculture, Food Safety and Inspection Service (FSIS)	33
07/22/20	Department of Labor, Employee Benefits Security Administration	46
	Total	224

RFA Compliance Guide

To provide clear directions on RFA compliance, Advocacy publishes a manual called “A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act.” The hands-on guide has been updated to include Executive Orders 13771 and 13777 on reducing and reforming federal regulations.²

Agency Compliance with E.O. 13272

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

- **Written RFA Procedures.** Agencies are required to show publicly how they take small business concerns and the RFA into account when creating regulations. Most agencies have posted their RFA policies and procedures on their websites.
- **Notify Advocacy.** Agencies are required to

2. The most recent edition can be found at <https://advocacy.sba.gov/resources/the-regulatory-flexibility-act/a-guide-for-government-agencies-how-to-comply-with-the-regulatory-flexibility-act/>



engage with Advocacy during the rulemaking process to ensure small business voices are being heard. If a draft regulation may have a significant impact on a substantial number of small entities, the agency must notify Advocacy by sending copies of the draft regulation to the office.

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

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

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

In 2019, Advocacy spoke with several state Departments of Agriculture to learn about their state domestic hemp production programs. These conversations helped inform comments sent to USDA regarding its federal hemp production programs.

Table 2.2 Federal Agency Compliance with Rule-Writing Requirements under E.O. 13272 and the JOBS Act, 2020

Agency	Written Procedures on Website	URL of Agency’s RFA Procedures	Notifies Advocacy	Responds to Comments
Cabinet Agencies				
Agriculture	√	www.ocio.usda.gov/policy-directives-records-forms/guidelines-quality-information/regulatory	√	√
Commerce (a)	√	www.fisheries.noaa.gov/national/laws-and-policies/guidance-conducting-economic-and-social-analyses-regulatory-actions	√	√
Defense	X		√	n.a.
Education	X		√	√
Energy	√	https://www.energy.gov/sites/prod/files/gcprod/documents/eo13272.pdf	√	√
Environmental Protection Agency	√	https://www.epa.gov/sites/production/files/2015-06/documents/guidance-regflexact.pdf	√	√
General Services Admin	X		√	n.a.
Health and Human Services	n.a.	FDA: https://www.fda.gov/industry/small-business-assistance/letter-proper-consideration-small-entities-agency-rulemaking CMS: https://www.cms.gov/About-CMS/Contracting-With-CMS/ContractingGeneralInformation	√	n.a.
Homeland Security	√	www.dhs.gov/publication/signed-regulatory-flexibility-act-executive-order-13272-memo-2004	√	√
Housing and Urban Development	√	www.hud.gov/program_offices/sdb/policy/sbrefa	n.a.	n.a.
Interior	√	www.doi.gov/sites/doi.gov/files/migrated/ppa/upload/Interim-Guidance-UMRA-and-EO-12866-C3-APP3.pdf	√	√
Justice	X		√	n.a.

Agency	Written Procedures on Website	URL of Agency's RFA Procedures	Notifies Advocacy	Responds to Comments
Labor	√	www.dol.gov/general/regs/guidelines	√	√
Small Business Administration	X		√	√
State	X		√	n.a.
Transportation	√	www.transportation.gov/sites/dot.dev/files/docs/1979%20Regulatory%20Policies%20and%20Procedures.doc	√	n.a.
Treasury (b)	√	Treasury: www.treasury.gov/about/role-of-treasury/orders-directives/Pages/td28-03.aspx Internal Revenue Service: www.irs.gov/irm/part32/irm_32-001-005#idm140712272166000	√	√
Veterans Affairs	√	https://www.va.gov/orpm/regulations_management.asp#three	√	n.a.
Independent Agencies				
Commodity Futures Trading Commission	n.a.	n.a.	X	n.a.
Consumer Financial Protection Bureau (c)	n.a.	n.a.	√	√
Consumer Product Safety Commission	√	https://www.cpsc.gov/Regulations-Laws--Standards/Rulemaking%23The%20Regulatory%20Flexibility%20Act	√	n.a.
Equal Employment Opportunity Commission	√	https://www.eeoc.gov/regulatory-flexibility-act-procedures	√	n.a.
Federal Acquisition Regulation Council	X		√	n.a.
Federal Communications Commission	√	www.fcc.gov/sites/default/files/fcc-directive-1158.2.pdf	√	√
Federal Reserve Board (c)	n.a.	n.a.		

Agency	Written Procedures on Website	URL of Agency's RFA Procedures	Notifies Advocacy	Responds to Comments
Federal Retirement Thrift Investment Board	n.a.	n.a.	√	n.a.
National Labor Relations Board (c)	n.a.	n.a.	√	n.a.
Pension Benefit Guarantee Corporation	n.a.	n.a.	√	n.a.
Securities and Exchange Commission (c)	n.a.	n.a.	√	n.a.
<p>Notes: √ = Agency complied with the requirement. X = Agency did not comply with the requirement. n.a. = Not applicable because Advocacy did not publish a comment letter in response to an agency rule in FY 2020 or because the agency is not required to do so. a. NOAA drafts most regulations the Commerce Department releases. b. On April 11, 2018, Treasury and the Office of Management and Budget signed a Memorandum of Agreement stating that tax regulations would be reviewed under Executive Order 12866. c. Independent agencies are not subject to the E.O. requiring written procedures.</p>				

Chapter 3

Communication With Small Business and Federal Agencies

Communication with Federal Agencies

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

Interagency Communications

Advocacy uses numerous methods of communication to present the concerns of small businesses and other small entities to federal officials promulgating new regulations. Meetings with officials, comment letters to agency directors, and training sessions on RFA compliance lead to meaningful participation by all interested parties and produce more effective federal regulation. In FY 2020, Advocacy's communications with federal agencies included 19 public comment letters and RFA compliance training sessions for 224 federal officials. **Table 2.1** lists the agencies where training was held this year, and Appendix D contains a list of all agencies that have participated in RFA training since 2003.

As noted in Chapter One, in response to Executive Orders 13771 and 13777, Advocacy launched an initiative to ensure that agencies consider small entities' priorities for regulatory relief. The office received considerable input from small businesses through regional regulatory reform roundtables and an online comment form. This input formed the basis of 26 letters to the heads of federal agencies conveying

small businesses' experiences with federal regulatory compliance and their top priorities for reform.

Additionally, Advocacy's regional advocates participate in the regulatory reform process. By reaching out to local businesses, the regional advocates obtain valuable input directly from small businesses across the country. In turn, the regional advocates referred regulatory issues to Advocacy attorneys for review.

E.O. 12866 and Interagency Review of Upcoming Rules

Executive Order (E.O.) 12866, Regulatory Planning and Review, celebrated its 27th anniversary in FY 2020.¹ E.O. 12866's goals are to enhance planning and coordination of new and existing regulations, reaffirm the primacy of federal agencies in the regulatory decision-making process, restore the integrity and legitimacy of regulatory review and oversight, and make the process more accessible and open to the public.

Under E.O. 12866, the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) reviews all significant executive agency regulations. OIRA will also meet with interested parties to discuss any issues with a rule under its review in what are called "12866 meetings." Advocacy attends these meetings when the regulation will affect small businesses.

SBREFA Panels

In 1996, the Small Business Regulatory Enforcement Fairness Act (SBREFA) amended the RFA to require certain agencies to convene review panels whenever

1. Executive Order 12866 (September 30, 1993), 58 Fed. Reg. 51735.

a potential regulation is expected to have a significant economic impact on a substantial number of small entities. These are commonly called SBREFA or Small Business Advocacy Review (SBAR) panels. These panels provide for small business input at the earliest stage of rulemaking—when a topic is still being studied, before a proposed rule sees the light of day.

Three agencies are covered by this requirement: the Consumer Financial Protection Bureau (CFPB), Environmental Protection Agency (EPA), and Occupational Safety and Health Administration (OSHA). In FY 2020, one SBREFA panel was initiated: OSHA convened a panel on tree care operations in March 2020. The list of SBREFA panels convened since 1996 can be found in Appendix D.

Regulatory Agendas

Each spring and fall federal agencies, including independent regulatory agencies, prepare an agenda of all the regulatory actions under development or review for the fiscal year. Each agency, including independent regulatory agencies, must also create a regulatory plan containing the most important proposed or final regulations the agency expects to release that fiscal year or thereafter. In addition to the regulatory agendas, agencies are also required by Section 602 of the RFA to publish a regulatory flexibility agenda that specifically addresses regulatory actions that will affect small businesses. These also must be published in the Federal Register each spring and fall. The agendas facilitate public participation, specify the subjects of upcoming proposed rules, and indicate whether these rules are likely to have a significant economic impact on a substantial number of small entities. Agencies are specifically required to provide these agendas to the Chief Counsel for Advocacy and make them available to small businesses and their representatives. Often, the agendas alert Advocacy and other interested parties to forthcoming regulations of interest.

OIRA then publishes these as the Unified Regulatory Agenda. The Fall 2019 regulatory agendas were published on December 26, 2019 and the Spring

2020 agendas were published on August 26, 2020. They are a key component of the regulatory planning mechanism prescribed in Executive Orders 12866 (Regulatory Planning and Review) and 13771 (Reducing Regulation and Controlling Regulatory Costs). The full regulatory agendas can be found on [reginfo.gov](https://www.reginfo.gov), while the introductions to the regulatory agendas can be found here:

- Fall 2019: <https://www.federalregister.gov/documents/2019/12/26/2019-26533/introduction-to-the-fall-2019-regulatory-plan>
- Spring 2020: <https://www.federalregister.gov/documents/2020/08/26/2020-16754/introduction-to-the-unified-agenda-of-federal-regulatory-and-deregulatory-actions>

Retrospective Review of Existing Regulations

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

The Department of Transportation’s regulatory review process is one useful example of how agencies can incorporate Section 610 reviews into their semiannual retrospective reviews of all existing regulations.² Advocacy continues to monitor retrospective review plans and their implementation and accepts feedback from small entities regarding any rules needing review.

Outreach to Small Business

In the Congressional Findings and Declaration of Purpose section of the RFA, Congress states, “The process by which Federal regulations are developed

2. U.S. Department of Transportation’s Review Process (Jan. 20, 2015). www.transportation.gov/regulations/dots-review-process.

and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions....”³

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

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

Throughout its history, Advocacy has met regularly with small entities, both informally through in-person meetings and teleconferences, and at more structured events. Those events have included stakeholder conferences to present specific regulatory topics, where Advocacy can work to inform small business stakeholders about the federal rulemaking process and how to write effective comment letters. One of Advocacy’s most effective outreach strategies has been roundtable events in Washington, DC at which specific regulatory issues are discussed by small businesses and their representatives, in almost all cases with the federal agency present. Advocacy also hosts roundtables around the country as needed. These roundtables are often Advocacy’s principal means of gathering extensive small business input. After February 2020, in response to the COVID-19

pandemic, Advocacy staff has moved roundtables online for safety and convenience.

Issue Roundtables by Agency and Date

Department of Agriculture; Animal and Plant Health Inspection Service

APHIS Implementation of Revised Lacey Act Provisions Phase VI

June 24, 2020

On March 31, 2020, the U.S. Department of Agriculture’s Animal and Plant Health Inspection Service (APHIS) published a notice of enforcement schedule for Phase VI of the import declaration requirements under the Lacey Act, scheduled to take effect October 1, 2020. Among the products covered were essential oils; trunks, cases, and suitcases; wood and wood articles; musical instruments; and miscellaneous manufactured articles. During this roundtable, small entities presented data, information, and comments on APHIS’ notice including asking the agency to delay the compliance date and citing various places where the agency should consider exemptions. The agency attended the roundtable but did not present.

Department of the Interior; Fish and Wildlife Service

Roundtable to Discuss Migratory Bird Permit Conflicts Management Proposal for the Double-Crested Cormorant

July 8, 2020

On June 5, 2020, the U.S. Department of the Interior’s Fish and Wildlife Service published a proposed rule and draft environmental impact statement establishing a new permit for State and federally recognized Tribal wildlife agencies for the management of double-crested cormorants. During this roundtable, Advocacy heard presentations of data, information, and comments on the Service’s proposed rule from aquaculture industry members and aquaculture

3. Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. § 601).

research facilities. FWS attended the roundtable, but did not present.

Department of Labor, Employee Benefits Security Administration

Employee Benefits Roundtable

November 21, 2019

Advocacy held a roundtable to discuss cafeteria plans, which allow employees to choose from a variety of pre-tax benefits, and changes the SECURE Act would make to multiple employer plans (MEPs). The SECURE Act, which was passed in December 2019, ended the commonality requirement for MEPs and removed the “one bad apple” disqualification rule. Additionally, there was a discussion on including annuities as an option for benefit plan participants. Representatives of the Department of the Treasury and the Department of Labor’s Employee Benefits Security Administration attended both in person and remotely.



Advocacy staff listen to William Perry, Director of Standards and Guidance at OSHA, during an Advocacy roundtable in Washington, D.C, held prior to the COVID-19 pandemic. Roundtables provide an opportunity for Advocacy staff to facilitate conversations between federal regulators and small businesses.

Department of Labor, Occupational Safety and Health Administration (OSHA) and Mine Safety and Health Administration

Beryllium Exposure in Construction and Shipyards, MSHA Update, Silica

November 15, 2019

Advocacy’s November 15, 2019 roundtable focused on three issues. First, OSHA provided an overview on proposed revisions to its occupational exposure to beryllium rule for the construction and shipyard sectors. Next, the Mine Safety and Health Administration (MSHA) provided a briefing on several ongoing regulatory activities, including respirable crystalline silica (quartz), a recent court decision on refuge alternatives for underground coal mines, and a retrospective study of respirable coal mine dust. Finally, a representative from the construction industry provided the industry’s perspective on OSHA’s Request for Information on Table 1 of its occupational exposure to crystalline silica rule.

Tree Care Operations, Accidental Chemical Release Reporting

January 24, 2020

This roundtable focused on OSHA’s upcoming tree care operations SBREFA panel. First, OSHA provided an overview of what a potential tree care standard might cover, including new safety rules for employees who perform tree care operations. Next, a representative from the tree care industry discussed the ANSI Z133 industry consensus standard for safe arboricultural operations and the industry’s desire that OSHA closely follow this standard in any new rule. Finally, two attorneys discussed the Chemical Safety and Hazard Investigation Board’s (CSB) proposed rule defining when an owner or operator of a chemical facility is required to report an accidental chemical release into the ambient air.

Tree Care Operations, MSHA Update, COVID-19
May 22, 2020

This roundtable began with an update on OSHA's tree care operations SBREFA panel that was formally convened on March 23, 2020 and could lead to new OSHA safety rules for employees who perform tree care operations. Next, there were a series of presentations on the COVID-19 pandemic and its impact on small businesses. These included presentations from MSHA, the House Education and Labor Committee, and legal practitioners who represent small businesses seeking to protect their employees and visitors to their facilities. Finally, the Chair of the Occupational Safety and Health Review Commission provided an update on the Commission's work, including several recent decisions of interest to small business.

COVID-19, Infectious Diseases, Tree Care Operations
July 17, 2020

On July 17, 2020, Advocacy hosted a roundtable that focused on the COVID-19 pandemic. The roundtable included presentations from the National Institute for Occupational Safety and Health and OSHA on the guidance they have published for small businesses and other entities seeking to remain open or reopen safely. Next, a legal practitioner discussed the recent D.C. Circuit Court of Appeals decision in *AFL-CIO v. OSHA* where the AFL-CIO unsuccessfully sought to compel OSHA to issue an emergency temporary standard on infectious diseases. Finally, several small entity representatives from OSHA's recently completed tree care operations SBREFA panel discussed their experience, the utility of the panel process, its value to the participants, and lessons learned to improve future panels going forward.

Construction, Occupational Exposure to Beryllium
September 18, 2020

This roundtable began with a regulatory update from OSHA's Directorate of Construction, including the Directorate's regulatory goals, the activities of

advisory committee workgroups, and fall protection efforts. Next, attorneys representing general industry and the construction and shipyards sectors, respectively, discussed recent litigation resolving several issues associated with OSHA's final rules on Occupational Exposure to Beryllium for General Industry and Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyards.

Environmental Protection Agency

Multi-Sector General Permit for Industrial Stormwater Discharges and Manufacturers' Fees under the Toxic Substances Control Act
February 28, 2020

Advocacy held a small business roundtable to discuss EPA's proposed National Pollutant Discharge Elimination System 2020 reissuance of the Multi-Sector General Permit (MSGP) for Industrial Stormwater Discharges. The proposed MSGP included significant new requirements. Additionally, the EPA presented its preliminary lists identifying manufacturers that may be subject to fee obligations under the Toxic Substance Control Act (TSCA) for EPA-initiated risk evaluations for its next 20 high-priority chemicals. Under TSCA's fees rule, EPA will collect payment from all the manufacturers who manufacture any of the 20 high-priority chemicals. The total fee is shared among all identified manufacturers, but small businesses are provided a discount on their fees. Small businesses expressed concerns on several issues, including the scope of the fee obligation and the process of self-reporting.

EPA's Final Risk Evaluations for Methylene Chloride and 1-bromopropane
September 11, 2020

Advocacy held a roundtable on its final risk evaluation for the first 2 of its 10 high-priority chemicals under the amended TSCA. On June 24, 2020, EPA published a risk evaluation for methylene chloride, finalizing determinations of unreasonable risk for 47 out of 53 evaluated conditions of uses. These uses range from consumer and commercial uses of

degreasers and automotive care products to paint removers. On August 11, 2020, EPA published a risk evaluation for 1-bromopropane finalizing determinations of unreasonable risk for 16 out of 25 evaluated conditions of uses including consumer cleaning products and commercial uses in vapor degreasers. A final determination that a condition of use presents an unreasonable risk of injury to health or the environment means that the agency will have to regulate those risks, which can include use-restrictions or bans, among other options.

Internal Revenue Service

Tax Roundtable

January 21, 2020

Participants at this roundtable discussed the benefits and complexities of Internal Revenue Code § 199A. Section 199A was created by the Tax Cuts and Jobs Act of 2017 to help bring some parity to passthrough entities that cannot take advantage of the significant corporate tax cut that was also included in the Act. Several Treasury employees and Capitol Hill staff were in attendance.

Table 3.2 Regulatory Roundtables Hosted by the Office of Advocacy

Agency	Purpose	Date
Department of Agriculture, Animal Plant Health Inspection Service	APHIS Implementation of Revised Lacey Act Provisions Phase VI	6/24/20
Department of Interior, Fish and Wildlife Services	Roundtable to Discuss Migratory Bird Permit Conflicts Management Proposal for the DoubleCrested Cormorant	7/8/20
Department of Labor, Employee Benefits Security Administration	Employee Benefits Roundtable	11/21/19
Department of Labor, Occupational Safety and Health Administration/ Mine Safety and Health Administration	Beryllium Exposure in Construction and Shipyards, MSHA Update, Silica	11/15/20
	Tree Care Operations, Accidental Chemical Release Reporting	1/24/20
	Tree Care Operations, MSHA Update, COVID-19	5/22/20
	COVID-19, Infectious Diseases, Tree Care Operations	7/17/20
	Construction, Occupational Exposure to Beryllium	9/18/20
Department of the Treasury/Internal Revenue Service	Tax Roundtable	2/21/20
Environmental Protection Agency	Multi-Sector General Permit for Industrial Stormwater Discharges and Manufacturers' Fees under the Toxic Substances Control Act	2/28/20
	EPA's Final Risk Evaluations for Methylene Chloride and 1-bromopropane	9/11/20

Site Visits

To maximize Advocacy’s resources, Advocacy attendance at out-of-town meetings and conferences often includes site visits to nearby small businesses to discuss their specific regulatory concerns. Small businesses appreciate the chance to show representatives of the federal government how their business functions, as well as the opportunity to meet one-on-one and talk through their concerns. Advocacy encourages the small business hosting the site visit to invite their peers to learn from others facing similar regulatory issues. These small personal meetings are an important way to collect more detailed information to help in the effort to reduce the regulatory burden on small businesses.

One Advocacy site visit before the pandemic involved a trip to a Kentucky hemp farm. The 2018 Farm Bill

made domestic hemp production legal, which led to an interim final rule published by the Department of Agriculture in 2019. The rule laid out requirements for all farmers who wished to grow hemp products, regardless of whether or not their production program was run by an individual state, an Indian tribe, or the Department of Agriculture itself. Advocacy heard concerns from many different farmers about the regulatory burden the interim final rule would impose on small entities, and in December 2019, made a site visit to a small hemp farm. There, Advocacy staff learned first-hand about the various non-CBD uses for hemp, and that the rule as written would stifle the ability of small producers to grow for purposes other than manufacturing CBD products. Details learned in the site visit became critical for Advocacy’s public comment letter seeking revisions to the interim final rule.



Although limited by the COVID-19 pandemic, Advocacy was able to do a limited number of site visits in FY 2020. In December 2019, Advocacy staff visited a small hemp farm in Virginia to learn more about their regulatory concerns.



Regional Advocate Outreach

Advocacy’s regional advocates reach out directly to small businesses in their respective regions to inform them of the role of Advocacy in the regulatory process and to hear directly from them on issues affecting their business operations. Over the course of FY 2020, regional advocates referred regulatory issues to Advocacy’s Interagency attorneys who routinely reach out directly to the affected small business stakeholders on topics that ranged from opportunity zones to banking regulations to highway construction to cell tower regulations.

The regional advocates also receive information from small businesses concerning the enforcement of agency actions. Advocacy forwards this information

to the Office of the National Ombudsman (ONO). ONO is primarily concerned with helping small businesses when they experience excessive or unfair federal regulatory enforcement actions. In FY 2020, Advocacy’s regional advocates sent 41 referrals to the Ombudsman’s office.

While visits to each state in the regional advocates’ regions were reduced due to both budgetary constraints and the pandemic, advocates still completed 950 meetings with small businesses stakeholders during FY 2020. As a result of in-person, on-the-ground meetings and Advocacy’s ability to adapt to online meetings, the regional advocates provided information on small business regulatory issues in each of the federal regions.

Table 3.2 Regional Advocate Meetings and Referrals Per Quarter

	Number of Meetings	SBA Ombudsman Referrals	Other SBA Referrals
Quarter 1 recorded	204	5	Not recorded
Quarter 2 recorded	29	13	Not recorded
Quarter 3 recorded	169	15	Not recorded
Quarter 4 recorded	150	8	110

Chapter 4

Advocacy’s Public Comments to Federal Agencies in FY 2020

In FY 2020, Advocacy submitted 19 formal comment letters to regulatory agencies. The most frequent concerns were that agencies did not consider significant alternatives (nine letters) and that they did not adequately analyze the impact on small entities (seven letters). In three cases, Advocacy commended

agencies for their consideration of small business concerns. **Figure 4.1** summarizes Advocacy’s issues of concern. **Table 4.1** lists all the comment letters submitted in FY 2020 in chronological order. Each letter is summarized in the following section, arranged by agency.

Figure 4.1 Number of Specific Issues of Concern in Agency Comment Letters, FY 2020

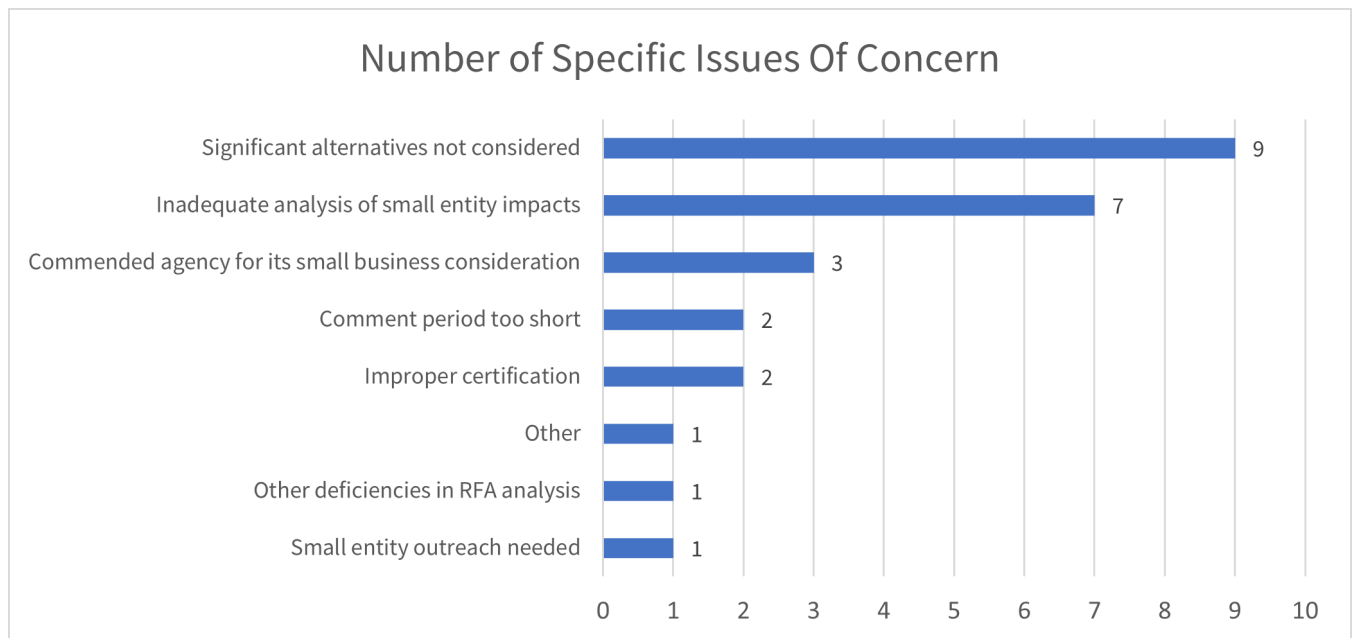


Table 4.1 Regulatory Comment Letters Filed by the Office of Advocacy, FY 2020

Date Filed	Agency*	Topic	Citation to Rule
10/16/19	DOT, FMCSA	FMCSA's Proposed Hours of Service of Drivers Amendments Rule	84 Fed. Reg. 44190 (08/22/19)
11/7/19	FDA	Extension of Comment Period on FDA's PMTA Proposed Rule	84 Fed. Reg. 50566 (09/25/19)
11/27/19	FDA	PMTA Proposed Rule	84 Fed. Reg. 50566 (09/25/19)
1/16/20	CFPB	Request For Information for the TILA RESPA Integrated Disclosure Assessment	84 Fed. Reg. 64436 (11/22/19)
1/21/20	EPA	Revisions to Wastewater Standards for Coal-Fired Power Plants	84 Fed. Reg. 64620 (11/22/19)
1/29/20	USDA, AMS	Interim Final Rule to Establish a Domestic Hemp Production Program	84 Fed. Reg. 58522 (10/31/19)
3/20/20	FCC	Modernizing Unbundling and Resale Rules in an Era of Next-Generation Networks and Services	85 Fed. Reg. 72 (01/06/20)
4/8/20	TREAS, OCC, FDIC	Joint Proposed Rule on the Community Reinvestment Act	85 Fed. Reg. 1204 (01/09/20)
6/1/20	EPA	Proposed Industrial Stormwater Multi-Sector General Permit	85 Fed. Reg. 12288 (03/02/20)
6/5/20	EPA	Economic Guidelines for the Consideration of the Science Advisory Board Review Panel	85 Fed. Reg. 25435 (05/012020).
6/29/20	DOI, FWS	Designation of Critical Habitat for the Northern Mexican Gartersnake and Narrow-Headed Gartersnake	85 Fed. Reg. 23608 (04/28/20)
7/1/20	USDA, APHIS	Implementation of Revised Lacey Act Provisions	85 Fed. Reg. 17849 (03/31/20)
7/20/20	DOI, FWS	Migratory Bird Permits	85 Fed. Reg. 34578 (06/05/20)
7/31/20	EPA	Increasing Consistency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process	85 Fed. Reg. 35612 (06/11/20)
7/31/20	CFPB	Supplemental Proposed Rule on Debt Collection (Regulation F)	85 Fed. Reg. 12672 (03/03/20)
9/5/20	DOI FWS; DOC NMFS	Proposed Rule to Define "Habitat" in Critical Habitat Designations	85 Fed. Reg. 47333 (08/05/20)
9/11/20	USDA, AMS	Extension of the Reopened Public Comment Period for Interim Final Rule on Domestic Hemp Production	84 Fed. Reg. 58522 (10/31/19)

*Abbreviations	
AMS	Agriculture Marketing Service
APHIS	Animal and Plant Health Inspection Service
CFPB	Consumer Financial Protection Bureau
DOC	Department of Commerce
DOI	Department of the Interior
DOT	Department of Transportation
EPA	Environmental Protection Agency
FCC	Federal Communications Commission
FDA	Food and Drug Administration
FDIC	Federal Deposit Insurance Corporation
FMCSA	Federal Motor Carrier Safety Administration
FWS	Fish and Wildlife Service
NMFS	National Marine Fisheries Service
OCC	Office of the Comptroller of the Currency
TREAS	Department of Treasury
USDA	Department of Agriculture

Summaries of Advocacy’s Public Comments

Consumer Financial Protection Bureau

Request for Information on Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act and Truth in Lending

On November 22, 2019, the Consumer Financial Protection Bureau (CFPB) published a Request for Information (RFI) Regarding the Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (RESPA)(Regulation X) and the Truth In Lending Act (TILA) (Regulation Z) Rule Assessment. The TILA RESPA Integrated Disclosure rule, which was the topic of the RFI, is often referred to as the TRID (TILA RESPA Integrated Disclosure) rule. On January 16, 2020, Advocacy submitted a letter to the CFPB regarding the Request for Information.

Section 1022(d) of the Dodd-Frank Act requires the CFPB to review each significant rule or order they adopt within five years after they take effect. These formal reviews are called assessments. In November 2013, the CFPB issued the TRID final rule, which took effect on October 3, 2015. TRID combined certain

disclosures that consumers received under the Truth in Lending Act and RESPA in connection with applying for and closing a loan; required creditors to use standardized forms; reallocated to creditors the legal responsibility to provide disclosures and reallocated some of the risks of liability for regulatory violations; revised the regulatory definition of “application”; required a creditor to provide a Loan Estimate to the consumer within three days of receiving the application and generally required consumers to receive Closing Disclosures no later than three business days before consummation; and subjected a larger category of charges to a “zero tolerance” prohibition on cost increases.

Dodd-Frank’s goal was to increase consumer understanding of the mortgage process. The documents at settlement are extensive and overwhelming to consumers who, according to the mortgage industry, are not reading them. If consumers do not read the disclosure documents, it defeats the purpose of the Dodd-Frank Act.

TRID was an extremely costly regulation to implement because small entities had to completely replace the mortgage origination system, understand the new compliance requirements, and train staffers on the

new requirements. Advocacy encouraged the Bureau to review the problematic portions of TRID, such as tolerances and required redisclosures as part of the assessment process, and determine if there is a less burdensome way to achieve Dodd-Frank's goals. Advocacy also encouraged the Bureau to consider exemptions for second mortgages, construction loans, and loans that are less than \$100,000.

Debt Collection Time-Barred Debt

On March 3, 2020, the CFPB published a supplemental proposed rule on Debt Collection (Regulation F) in the Federal Register. The proposal would amend Regulation F to require debt collectors to make certain disclosures when collecting time-barred debts. The CFPB also proposed model language and forms that debt collectors could use to comply with the proposed disclosure requirements. On July 31, 2020, Advocacy submitted comments on the rule.

The CFPB prepared an initial regulatory flexibility analysis (IRFA) for the supplemental proposed rule, but it lacked quantitative information about the potential economic impact of the rule. Since some states implemented similar disclosures, Advocacy encouraged the CFPB to contact the states to obtain information about the quantitative impact, and encouraged the Bureau to estimate the potential legal fees, training costs, and other implementation costs of the supplemental proposed rule.

Advocacy also argued that it can be difficult to determine if a debt is time-barred. Advocacy encouraged the CFPB to maintain the status quo and not require debt collectors to make disclosures about time-barred debt. Alternatively, Advocacy encouraged the CFPB to take the necessary steps to make the provisions as least burdensome as possible. For example, the CFPB could create a safe harbor for small entities that make a good faith effort to comply with the provisions. Advocacy further encouraged the CFPB to perform additional outreach with small entities to develop less burdensome alternatives and to clarify any disclosures that the CFPB may decide to adopt.

As of the end of FY 2020, the rule had not been finalized.

Department of Agriculture; Agricultural Marketing Services

Interim Final Rule to Establish A Domestic Hemp Production Program

On October 31, 2019, the U.S. Department of Agriculture's Agricultural Marketing Service (AMS) published an interim final rule outlining the policies and procedures by which states, Indian tribes, and AMS itself will administer programs for the production of hemp in the United States. The interim final rule outlined several requirements that plan administrators and producers alike must meet to engage in approved



Advocacy staff frequently engage in education efforts surrounding regulation and small entities. In FY 2020, Advocacy attorneys spoke at the American Bar Association Administrative Law conference on the Regulatory Flexibility Act.

production activities. Advocacy was concerned about the effects the interim final rule would have on small domestic hemp producers. Several of the provisions of the rule impose unnecessary burdens on small entities as written. Many of the sampling and testing requirements needed revision. AMS should have considered alternatives to minimize the burden to small producers. Specifically, Advocacy asked AMS to find a consistent method for testing THC levels that aligns with the statute, does not create additional burdens, and that uses reliable testing methodology. Advocacy also asked AMS to revise its requirements for Drug Enforcement Administration-registered labs, and to lengthen the 15-day harvest window. In addition, Advocacy asked AMS to establish an acceptable margin of error for testing THC concentrations rather than relying solely on a lab's measure of uncertainty. Finally, Advocacy asked AMS to test a larger portion of the plant and to allow for remediation prior to destruction of crops. Following the end of the public comment period, AMS issued additional sampling and testing guidelines temporarily lifting some of the requirements outlined in the interim final rule. As of the end of FY 2020, the agency had not yet published a final rule.

Extension of Reopened Public Comment Period for Interim Final Rule on Domestic Hemp Production

On September 8, 2020, AMS published a notice in the Federal Register reopening the comment period for the interim final rule establishing a domestic hemp production program in the United States. The agency had solicited public comments on the interim final rule until January 29, 2020. The notice outlined several key features and policies within the rule for which AMS was seeking additional comments and information. Advocacy urged AMS to extend the public comment period for a minimum of 30 additional days to allow for small businesses and their representatives to fully and meaningfully participate in this important rulemaking, citing that it was the middle of the harvest season for much of the country and that post-harvest information would be useful in

answering the agency's questions. The agency did not extend the public comment period.

Department of Agriculture; Animal and Plant Health Inspection Service

Issue: Implementation of Revised Lacey Act Provisions

On March 31, 2020, the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) published a notice of enforcement schedule for Phase VI of the import declaration requirements under the Lacey Act. The recent notice was scheduled to take effect October 1, 2020, and covered essential oils; trunks, cases, and suitcases; wood and articles of wood; musical instruments; and miscellaneous manufactured articles. Advocacy asked that APHIS extend the compliance deadline for the notice so that small entities were not overly burdened in trying to comply with the specific requirements of this import declaration. Additionally, Advocacy asked that APHIS consider exemptions for products that may already be covered under other statutes or may have been previously inspected under the Lacey Act itself. APHIS notified stakeholders and Advocacy that it intends to delay the compliance deadline and review the schedule. However, the final notice had not been published in the Federal Register at the end of FY 2020.

Department of the Interior; Fish and Wildlife Service

Designation of Critical Habitat for the Northern Mexican Gartersnake and Narrow-Headed Gartersnake

On April 28, 2020, the U.S. Department of the Interior's Fish and Wildlife Service (FWS) published a revised proposed rule to designate critical habitat for the northern Mexican gartersnake and narrow-headed gartersnake, taking into consideration both public comments that had been submitted in 2013 and updated scientific data for the species. The revised designations would reduce the previously proposed

critical habitats to approximately 27,784 acres for the northern Mexican gartersnake, and 18,701 acres for the narrow-headed gartersnake. Advocacy commended FWS in its efforts to revise its previously proposed critical habitat designation, taking into consideration updated scientific data and public comment. Advocacy further urged FWS to consider the full scope of economic impacts and to conduct a proper and thorough Regulatory Flexibility Act analysis for its critical habitat rulemakings. The agency had not yet published a final rule at the end of FY 2020.

Migratory Bird Permits for the Double-Crested Cormorant

On June 5, 2020, FWS published a proposed rule and draft environmental impact statement establishing a new permit for state and federally recognized Tribal wildlife agencies for the management of double-crested cormorants. In response to damage to aquaculture facilities, FWS issued a series of regulations aimed at providing conflict management for the species, including aquaculture depredation orders, which allowed for the taking of cormorants at aquaculture facilities including via lethal methods, and without the requirement of an individual permit in several states. These orders were subsequently vacated in 2016 by the U.S. District Court for the District of Columbia, which found that FWS had failed to consider the effects of depredation orders on cormorant populations and failed to consider a reasonable range of alternatives within its Environmental Assessment (EA).

In 2017, FWS prepared a new EA that addressed the continuing conflicts with cormorants but did not reinstate the aquaculture depredation order. As a result of the findings in the 2017 EA, FWS decided that it would make all decisions regarding taking of cormorants on an individual basis and that aquaculture facilities would be required to pursue individual depredation permits.

On January 22, 2020, FWS published an advance notice of proposed rulemaking, which listed several

possible regulatory alternatives the Service considered, including reinstating an aquaculture depredation order. In the proposed rule, FWS proposed to adopt permits for states and Tribes only. Advocacy encouraged FWS to adopt the alternative C discussed in the rule's draft environmental impact statement that would establish a general depredation order and better address FWS' stated objectives for the rulemaking while minimizing the impact on small businesses.

Proposed Rule to Define "Habitat" in Critical Habitat Designations

On August 5, 2020, FWS, along with the U.S. Department of Commerce's National Marine Fisheries Service (NMFS) published a proposed rule to add a definition of "habitat" to regulations implementing Section 4 of the Endangered Species Act. That section requires the FWS and NMFS to designate critical habitat when a determination is made that a species is endangered or threatened. The proposed rule offered two definitions for consideration and public comment. The first definition defined habitat as "[t]he physical places that individuals of a species depend upon to carry out one or more life processes. Habitat includes areas with existing attributes that have the capacity to support individuals of the species." In its alternate definition, FWS and NMFS changed "depend upon" to "use," and in the second sentence changed the language to read, "Habitat includes areas where individuals of the species do not presently exist but have the capacity to support such individuals, only where the necessary attributes to support the species presently exist." FWS and NMFS sought comment on both definitions.

Advocacy asked that the two agencies clarify that the regulatory definition only applies to Section 4 critical habitat designations. Advocacy also suggested that the two agencies consider whether an area is "habitat" before determining whether the area should be designated as occupied or unoccupied critical habitat. Advocacy also asked the agencies to limit the definition of "habitat" to areas where the species

exists or where specific features necessary for species existence are found. Finally, Advocacy asked the two agencies to consider comments from small entities regarding both the substance of the definitions proposed and suggested implementation measures. A final rule had not yet been published at the end of FY 2020.

Department of Transportation, Federal Motor Carrier Safety Administration

Hours of Service of Drivers

On August 22, 2019, the Federal Motor Carrier Safety Administration (FMCSA) proposed five changes to its Hours of Service of Drivers (HOS) regulations to provide greater flexibility for commercial drivers without adversely affecting safety. The proposed changes related to short-haul drivers, adverse driving conditions, the 30-minute break, split-sleeper berth, and a pause in the 14-hour driving window. The issue of providing greater flexibility under the HOS rules had been raised at a number of Advocacy's small business regulatory reform roundtables conducted around the country between 2017 and 2019, particularly for drivers that experience unforeseeable driving conditions or wait times or that transport sensitive items such as livestock, perishable agricultural and aquaculture products, explosives, fireworks, and hazardous materials and waste. Accordingly, on October 16, 2019, Advocacy filed a public comment letter on the proposed rule commending FMCSA for its retrospective review of the HOS regulations and supporting increased flexibility and cost savings for small carriers so long as they did not diminish safety or the health of drivers.

Department of Treasury, Office of the Comptroller of the Currency; Federal Deposit Insurance Corporation

Community Reinvestment Act

On January 9, 2020, the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation published a joint proposal updating the

rules implementing the Community Reinvestment Act (CRA). The proposal changes the definition of "small" to include banks that have less than \$500 million in assets in each of the prior four calendar quarters, unless the banks opt into being evaluated under the general performance standards. A small bank may choose to opt out once. The proposal also allows for a delayed compliance date for small banks.

On April 8, 2020, Advocacy submitted a comment letter on the proposal. Advocacy argued that the agencies should use the Small Business Administration (SBA) size standard for small banks. Using a different definition will exclude a significant number of small banks, requiring them to incur 7 to 10 times more in costs. Advocacy also contended that there may be less burdensome alternatives that the agencies should consider. Advocacy further argued that there should not be a limit on the number of times that a small bank can opt in and out of the general standard. Being able to opt in and opt out will allow small banks more flexibility in deciding the best strategy for their business plans.

Under the proposal, small banks would also be required to collect and maintain information on depositors necessary for the designation of deposit-based assessment areas. Advocacy noted that this requirement will be expensive for small banks to implement because they will incur new paperwork burdens. Advocacy encouraged the agencies to exempt small banks from this potentially costly requirement and also encouraged the agencies to allow small banks sufficient time to comply with the changes to the CRA.

As of the end of FY 2020, the rule had not been finalized.

Environmental Protection Agency

Water Standards for Coal-Fired Power Plants

On January 21, 2020, Advocacy submitted comments to the Environmental Protection Agency (EPA) on its proposed rule revising the Steam Electric Effluent Limitation Guidelines. The regulation imposes

technology-based standards on power plants operating as utilities to control wastewater under the Clean Water Act. Following up on its petition to EPA's final Steam Electric Effluent Limitation Guidelines, issued in 2015, Advocacy commended the work EPA had done in this reconsideration of the rule. However, Advocacy also encouraged EPA to consider additional regulatory alternatives that could be more cost-effective for each affected power plant rather than on an industry-wide basis. Advocacy also noted that the proposed rule did not resolve the problems with RFA compliance in the 2015 rule, which Advocacy identified in previous comment letters.

Multi-Sector General Permits for Industrial Stormwater Discharges

On March 2, 2020, EPA announced a public comment period for its proposed 2020 National Pollutant Discharge Elimination System general permit for stormwater discharges associated with industrial activity, also referred to as the 2020 Multi-Sector General Permit (MSGP). This general permit, an update of the 2015 MSGP, gives conditional permission for the discharge of pollutants in stormwater runoff into the waters of the United States.

On June 1, 2020, Advocacy filed public comments on the proposed 2020 MSGP. Advocacy commented that the EPA must fully comply with the Regulatory Flexibility Act when promulgating the MSGP and better evaluate the economic impacts of the proposed revisions to the MSGP on small entities. To move forward without conducting a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel or IRFA, EPA would need to reconsider the elements of the proposed 2020 MSGP that create new burdens for small entities. Advocacy also commented that EPA had not identified affected small entities, fully accounted for the cost to small entities of the proposed MSGP, and failed to consider significant regulatory alternatives, better supported by the science, that would reduce the cost of the MSGP on small entities. Advocacy recommended that EPA adopt a tiered approach to benchmark monitoring, with a focus on

gathering high quality data for future rulemakings rather than burdensome regulatory requirements.

Guidelines for the Preparation of Economic Analyses in Support of EPA Rules

EPA is preparing internal guidelines on economic analyses it prepares in support of its rulemakings. At part of this work, EPA requested peer review of the draft guidelines by its Scientific Advisory Board. During its deliberations, Advocacy provided public comments to the Scientific Advisory Board on the Regulatory Flexibility Act and consideration of small entity impacts.

Benefit-Cost Analysis in Clean Air Act Rulemakings

On June 11, 2020, the EPA published a proposed rule titled "Increasing Consistency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process." This proposed rule would require Benefit-Cost Analysis (BCA) for all significant Clean Air Act rulemakings as a way of increasing consistency across Clean Air Act rules and transparency in the factors that EPA considers in rulemaking decisions.

On August 3, 2020, Advocacy submitted a public comment letter recommending that EPA incorporate into this proposed rule elements of its statutory obligations under the Regulatory Flexibility Act. This would provide the public with a clearer picture of how EPA considers the impacts on small entities in Clean Air Act rulemaking. Advocacy suggested three changes. First, EPA should conduct a BCA when it must conduct analyses under the Regulatory Flexibility Act, even if it would otherwise not be significant. Second, EPA should include a description of the small entities affected by a rule, and, where feasible, numbers of small entities in the BCA. Third, EPA should present the costs and benefits of regulating small entities separately from aggregate economic impacts to show the consideration of alternatives that minimize the impacts on small entities.

Federal Communications Commission

Modernizing Unbundling and Resale Rules In An Era Of Next-Generation Networks And Services

On November 25, 2019, the Federal Communications Commission (FCC) proposed to remove network unbundling requirements for incumbent local exchange carrier networks. On March 20, 2020, Advocacy filed public comments on the rule. The FCC did not publish an adequate analysis of potential small entity impacts as required by the Regulatory Flexibility Act (RFA) and did not publish a cost-benefit analysis for public comment. Advocacy recommended that the FCC publish both analyses for an additional public comment period before moving forward with a final rule. Advocacy highlighted evidence in the FCC record that showed the harm that the proposal would have on small competitive local exchange carriers and asked that the FCC refrain from updating its rules unless the record showed compelling evidence that there is a need to do so.

Food and Drug Administration

Request for Extension of Comment Period for Premarket Tobacco Product Applications and Recordkeeping Requirements Proposed Rule

On September 25, 2019, the Food and Drug Administration (FDA) issued the proposed rule “Premarket Tobacco Product Applications and Recordkeeping Requirements,” which had a comment period ending on November 25, 2019. On October 28-29, 2019, the FDA held a public meeting to discuss the premarket tobacco product application (PMTA) process. The agency stated that a meeting transcript and presentation slides would be made available to the public 30 to 60 days after the meeting. However, the release of the public meeting materials would not occur until after the comment period for the PMTA proposed rule had closed. On November 7, 2019, Advocacy submitted a letter commending the FDA for holding the public meeting and requesting a 60-day extension of the comment period for the PMTA proposed rule

so that small businesses could review the public meeting materials and use the information from the meeting to submit sound PMTAs. The FDA reopened the comment period for the PMTA proposed rule for 20 days.

Premarket Tobacco Product Applications and Recordkeeping Requirements Proposed Rule

On September 25, 2019, the FDA issued the proposed rule “Premarket Tobacco Product Applications and Recordkeeping Requirements.” The proposed rule sets out the form of and content for a PMTA. It also describes the FDA’s PMTA review process and the recordkeeping requirements for those who submit a PMTA for review. For the purposes of the Regulatory Flexibility Act, the FDA certified that the proposed rule will not have a significant economic impact on a substantial number of small entities. The agency’s stated basis for its certification is that the rule will have negligible costs for small entities that manufacture or import deemed tobacco products because the PMTA costs were already accounted for in the final regulatory flexibility analysis (FRFA) accompanying FDA’s 2016 final rule deeming e-cigarettes and other products to be subject to its regulations. On November 27, 2019, Advocacy submitted a letter to the FDA asserting that the agency had improperly certified the PMTA proposed rule. Advocacy cautioned the FDA that its certification lacked a factual basis for support because PMTA costs are not negligible and the 2016 Deeming Rule’s FRFA was inadequate and not a proper basis for certification of the PMTA proposed rule. Advocacy recommended that the FDA prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) and consider significant alternatives for small entities in the industry. As of September 30, 2020, the PMTA proposed rule had not been finalized.

Chapter 5

Small Business Regulatory Cost Savings and Success Stories

In FY 2020, small businesses saved \$2.259 billion in estimated forgone regulatory cost savings because of the Regulatory Flexibility Act and Advocacy's efforts to promote federal agency compliance. There were additional regulatory successes whose impacts are not quantifiable. These are described in the Small Business Regulatory Success Stories section of this chapter.

Small businesses benefited from Advocacy's Regulatory Flexibility Act (RFA) activities through 8 deregulatory actions. Compliance cost savings for small businesses that resulted from deregulatory actions arose from the withdrawal or delay of final and proposed regulations.

One of this year's deregulatory cost savings concerned a rescinded rule on payday lending proposed by the Consumer Financial Protection Bureau (CFPB). The final rule rescinds the mandatory underwriting provisions of its 2017 rule after re-evaluating the legal and evidentiary bases for these provisions and finding them to be insufficient. CFPB's decision to rescind the rule resulted in total cost savings of \$1.88 billion for small entities.

Another deregulatory cost savings highlighted this year came from the Small Business Administration's interim final rule amending various regulations regarding its Small Business Administration (SBA) Express and Export Express Loan Programs and the Microloan and Development Company (504) Loan Programs. During the comment period for the notice of proposed rulemaking, Advocacy recommended that SBA consider less burdensome alternatives to the proposed rate cap and the personal resources requirement and to clarify the requirements of the

affiliation rules. Cost savings from the final rule totaled \$7.9 million annually.

Cost savings also occurred as a result of the Environmental Protection Agency's decision to revise its risk evaluation for methylene chloride. Originally, the Environmental Protection Agency (EPA) evaluated and determined that the use of methylene chloride in pharmaceutical manufacturing posed an unreasonable risk under the Toxic Substances Control Act (TSCA). However, after engaging with Advocacy, EPA agreed to exclude the use of methylene chloride in pharmaceutical manufacturing from the evaluation as a non-TSCA use. This exclusion resulted in an estimated cost savings of \$133.8 million.

Table 5.1 summarizes the cost savings from eight final actions at five federal agencies in FY 2018.

There were also successes throughout FY 2020 that were not quantifiable. On February 27, 2020, USDA's Agriculture Marketing Service (AMS) AMS delayed a policy requiring hemp farmers to test samples of their product in certified Drug Enforcement Administration (DEA) labs, citing public comments as their justification. Advocacy's letter argued for the delay on the grounds that there were not enough certified labs.

In another case, the Mine Safety and Health Administration (MSHA) issued a direct final rule allowing the use of electronic detonators for explosives in metal and nonmetal mines. Advocacy had advocated for this change since its 2008 Small Business Regulatory Review and Reform initiative.

Table 5.2 summarizes the regulatory success stories that could not be quantified in FY 2020.

Table 5.1 Summary of Small Business Regulatory Cost Savings, FY 2020

(Deregulatory actions shown in bold.)

Agency	Rule	Initial cost savings (\$million)	Recurring cost savings (\$million)
Consumer Financial Protection Bureau	Payday, Vehicle Title, and Certain High-Cost Installment Loans¹	\$1880	\$1880
Department of Labor, Employee Benefits Security Administration	Retirement Plan Electronic Disclosures²	\$34.4	\$34.4
Department of Labor, Occupational Safety and Health Administration	Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors Rule³	\$1.6	\$1.6
Department of Transportation, Federal Motor Carrier Safety Administration	Hours of Service of Drivers⁴	\$136	\$136
Environmental Protection Agency	Methylene Chloride Final Risk Evaluation ⁵	\$133.8	\$133.8
	Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act⁶	\$40.3	\$40.3
Small Business Administration	Express Loans Interim Final Rule ⁷	\$7.9	\$7.9
	Runway Extension Act ⁸	\$24.7	\$24.7
Total Foregone Regulatory Cost Savings, FY 2020		\$2259.0	\$2259.0

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

Sources:

1. 85 Fed. Reg. 44382 (July 22, 2020).
2. 85 Fed. Reg. 31884 (May 27, 2020).
3. 85 Fed. Reg. 53910 (August 31, 2020).
4. 85 Fed. Reg. 33396 (June 6, 2020).
5. 85 Fed. Reg. 37942 (May 24, 2020).
6. 84 Fed Reg. 69834 (December 19, 2019).
7. 85 Fed. Reg. 7622 (February 10, 2020).
8. 84 Fed. Reg. 66561 (Dec. 5, 2019).

Descriptions of Cost Savings

Consumer Financial Protection Bureau

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

In April 2015, the CFPB convened a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel for a rulemaking on payday, vehicle title, and certain high-cost installment loans. As a result of the SBREFA panel, the 60-day cooling off period between loans that the small entity representatives considered was reduced to a 30-day cooling off period in the proposed rule. In July 2016, the CFPB issued a proposed rulemaking which projected that the cooling off period alone could result in a 55-62 percent reduction in loan volume and a 71-76 percent reduction in revenue.

After the proposal was published, Advocacy held roundtables on the rulemaking. Participants suggested that they may experience revenue reductions of greater than 70 percent and be forced to exit the market. In a comment letter on the original rulemaking, Advocacy argued that the ability to repay provisions and the cooling off period would force small business out of business. Advocacy also argued that the rule was unnecessary for credit unions because the National Credit Union Administration was addressing the issue. It was also unnecessary because several states had laws to address the issue. Advocacy encouraged the CFPB to perform further research on the impact of the rule, implored the CFPB not to go forward with the rule in states that were already addressing the problem, reconsider whether going forward in the states who did not address the problem was in the best interests of businesses and consumers, and requested that the CFPB allow for emergencies and change the length of time for the cooling off period.

In February 2019, the CFPB issued a proposal to rescind the rule and a proposal to delay the implementation of the rule. In March 2019, Advocacy submitted a comment letter supporting the delay in

implementation. In May 2020, Advocacy submitted a comment letter on the rescission of the rule, arguing that the rule should be rescinded because it was unduly burdensome and unnecessary.

On July 7, 2020, the CFPB issued a final rule concerning small dollar lending/payday lending. The final rule rescinds the mandatory underwriting provisions of its 2017 rule after re-evaluating the legal and evidentiary bases for these provisions and finding them to be insufficient. By rescinding the rule, small dollar lenders will be able to continue to provide consumer access to needed credit.

Based on the removal of underwriting provisions of the 2017 CFPB rule, small businesses will realize an estimated \$1.88 billion in annualized cost savings from the final rule published in July 2020.

Department of Labor, Employee Benefits Security Administration

Retirement Plan Electronic Disclosures

On May 27, 2020, the Employee Benefits Security Administration (EBSA) finalized a rule allowing retirement plans to send certain disclosures electronically by default. On behalf of small entities, Advocacy engaged extensively with the EBSA on the drafting of the agency's Initial Regulatory Flexibility Analysis and the use of an alternative size standard for this rule. This rule reduced the overall regulatory burden and therefore provided a cost savings for small entities. According to the Department of Labor's 2017 Private Pension Plan Bulletin, plans with fewer than 100 participants (the statutory small business definition for the Employee Retirement Income Security Act of 1974) have 12,473,000 participants out of a total 137,400,000 participants, or 9.08 percent.

Using figures supplied by EBSA, this change results in \$34.4 million annualized cost savings for small entities.

Department of Labor, Occupational Safety and Health Administration

Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors Rule

On January 9, 2017, the Occupational Safety and Health Administration (OSHA) published a final rule that established three comprehensive health standards to protect workers from occupational exposure to beryllium and beryllium compounds in the general industry, construction, and shipyards sectors. OSHA concluded that employees exposed to beryllium and beryllium compounds in the construction and shipyard sectors were at significant risk of material impairment of health, and adopted a permissible exposure limit, a short-term exposure limit, an action level, and several ancillary provisions intended to protect employees. The 2017 final rule went into effect on May 20, 2017, and OSHA began enforcing the permissible exposure limit and short-term exposure limit in the construction and shipyard sectors on May 11, 2018.

Following publication of the final rule, various industry sectors filed lawsuits against OSHA contesting the rule. OSHA engaged in a series of rulemakings designed to clarify and tailor the rule but left the bulk of the standards in place. On August 28, 2017, Advocacy submitted comments on OSHA's June 27, 2017 proposed rule on Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors, which would have removed the ancillary provisions for construction and shipyards from the final beryllium rule.

On August 31, 2020, OSHA issued a final rule on Occupational Exposure to Beryllium and Beryllium Compounds that significantly limits its 2017 final rule for construction and shipyards, largely by eliminating most of the ancillary provisions in the earlier rule as Advocacy had suggested. OSHA determined that the limited exposures in the construction and shipyards sectors and the partial overlap between the beryllium standards and other OSHA standards made revisions to both the construction and shipyards beryllium standards appropriate.

This deregulatory action is estimated to result in annualized cost savings of \$1.6 million for small entities.



Advocacy staff use varied methods to reach out to small businesses in order to better understand their concerns. That includes professional associations such as the American Immigration Lawyers Association.

Department of Transportation, Federal Motor Carrier Safety Administration

Hours of Service of Drivers

On August 22, 2019, the Federal Motor Carrier Safety Administration (FMCSA) proposed five changes to its Hours of Service of Drivers (HOS) regulations to provide greater flexibility for commercial drivers without adversely affecting safety. The proposed changes related to short-haul drivers, adverse driving conditions, the 30-minute break, split-sleeper berth, and a pause in the 14-hour driving window. The issue of providing greater flexibility under the HOS rules had been raised at several of Advocacy's small business regulatory reform roundtables between 2017 and 2019, particularly for drivers that experience unforeseeable driving conditions or wait times or that transport sensitive items such as livestock, perishable agricultural and aquaculture products, explosives, fireworks, and hazardous materials and waste. Accordingly, on October 16, 2019, Advocacy filed a public comment letter on the proposed rule commending FMCSA for its retrospective review of the HOS regulations and supporting increased flexibility and cost savings for small carriers so long as they did not diminish safety or the health of drivers. FMCSA's final rule, published on June 1, 2020, adopted four of the five proposed changes related to short-haul drivers, adverse driving conditions, the 30-minute break, and sleeper berths. The agency decided not to include the proposed pause in the 14-hour driving window but may address that issue in a future rulemaking.

The 30-minute break provision is estimated to result in first year and annually recurring cost savings for small business of \$136 million for small business. The other provisions resulted in other cost savings that the agency did not quantify.

Environmental Protection Agency

Methylene Chloride Final Risk Evaluation

On June 24, 2020, the EPA published its final risk evaluation for methylene chloride. A final determination

that a condition of use presents an unreasonable risk of injury to health or the environment means that the agency will have to regulate those risks, which can include use-restrictions or bans. In its draft risk evaluation, the agency determined that the use of methylene chloride in pharmaceutical manufacturing posed an unreasonable risk under the Toxic Substances Control Act (TSCA). Advocacy engaged with the agency on behalf of small entities to exclude the use of methylene chloride in pharmaceutical manufacturing from the evaluation as a non-TSCA use. Consequently, EPA removed this use from its final risk evaluation as a non-TSCA use. Advocacy estimated cost savings for affected small entities associated with this removal based on best available data.

As a result of EPA's decision not to include the evaluation of the methylene chloride use in pharmaceutical manufacturing, small businesses have potentially saved an estimated \$133.8 million.

Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act

On December 19, 2019, the Environmental Protection Agency rescinded recent amendments to its Risk Management Plan under the Clean Air Act of its 2017 final rule for facilities that store hazardous chemicals. Small facilities that use and handle chemicals expressed concern that some of the 2017 rule's requirements added unnecessary burdens and substantial costs without improving safety. These concerns were first aired by small businesses during the SBERFA panel for the 2017 rulemaking. Subsequently, Advocacy echoed the small business concerns in a public comment letter. During EPA's reconsideration review of the 2017 final rule, Advocacy engaged with the agency on behalf of the small entities to emphasize our previous recommendations to remove some of the costliest provisions. As a result of finalizing these changes, the total cost savings for small businesses is approximately \$40.3 million.

Small Business Administration

Express Loans Interim Final Rule

On February 10, 2020, the Small Business Administration issued an interim final rule amending various regulations regarding its SBA Express and Export Express Loan Programs and the Microloan and Development Company (504) Loan Programs. Advocacy submitted comments during the comment period on the notice of proposed rulemaking. Advocacy encouraged SBA to consider less burdensome alternatives to the proposed rate cap and the personal resources requirement and to clarify the requirements of the affiliation rules.

To calculate cost savings for small entities subject to this rulemaking, Advocacy used the agency stated cost savings for the rule and identified the small entity share of that cost savings by identifying the share of small lenders of the total affected lenders. Total small entities affected are 2,393. There were cost savings in this rulemaking for small entities associated with personal resources tests and sureties from modified principles of affiliation. The total cost

savings for this rule is the sum of the small business share of the agency-reported cost savings.

Small business cost savings for this rule are estimated to be \$7.9 million annually.

Runway Extension Act

Pursuant to the Small Business Runway Extension Act of 2018, the Small Business Administration proposed changing the number of years of revenue history used to calculate a businesses' size from three to five. After public comment, including from Advocacy, SBA adopted Advocacy's recommendation for a transition period of two years during which either the three- or five-year standard could be used, meaning that no small businesses would lose "small" status because of the rule. This change produced cost savings for small entities in the form of preventing lost contract dollars.

As a result of SBA adopting Advocacy's recommendation, savings to small business, annualized at 7% discount rate over 10 years, are estimated to be \$24.7 million annually.



Events like Small Business Saturday provide another opportunity for Advocacy staff to meet with stakeholders about issues facing their business. Advocacy staff met with a small business owner in November 2019 and discussed their business and regulatory concerns.

Table 5.2 Summary of Small Business Regulatory Success Stories, FY 2020

Agency	Rule
Department of Agriculture, Agriculture Management Service	Domestic Hemp Production Program ¹
Chemical Safety and Hazard Investigation Board	Chemical Safety and Hazard Investigation Board Accidental Release Reporting Requirements ²
Department of Labor, Mine Safety and Health Administration	Electronic Detonators ³
Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau	Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages ⁴
Department of the Treasury, Office of the Comptroller of the Currency	Community Reinvestment Act Regulations ⁵
Environmental Protection Agency	EPA’s Significant New Use Rule for Long-Chain Perfluoroalkyl Carboxylate and Perfluoroalkyl Sulfonate Chemical Substances ⁶
	Regulation of Air Pollution from Municipal Solid Waste Landfills ⁷
<p>Sources:</p> <ol style="list-style-type: none"> 1. 84 Fed. Reg. 58522 (October 31, 2019). 2. 85 Fed. Reg. 10074 (February 21, 2020). 3. 85 Fed. Reg. 2064 (January 14, 2020). 4. 85 Fed. Reg. 18704 (April 2, 2020). 5. 85 Fed. Reg. 34734 (June 5, 2020). 6. 85 Fed. Reg. 45109 (June 27, 2020). 7. 85 Fed. Reg. 17244 (March 26, 2020). 	

Success Story Descriptions

Department of Agriculture; Agricultural Marketing Services

Domestic Hemp Production Program

On October 31, 2019, in response to the 2018 Agricultural Improvement Act, AMS published an interim final rule establishing a domestic hemp production program in the U.S. The agency solicited public comments on the interim final rule until January 29, 2020. Advocacy filed a public comment letter on the rulemaking on January 29, 2020, asking AMS to reconsider the requirement that hemp samples be tested at DEA certified labs due to a shortage of DEA registered labs in the country. DEA’s requirement

would create unnecessary hardship for small hemp farmers. On February 27, 2020, in response to public comment on this issue, AMS issued guidance delaying the requirement that samples only be tested at DEA registered labs. The agency cited public comments received on this issue as the reason for issuing the delay.

Chemical Safety and Hazard Investigation Board

Chemical Safety and Hazard Investigation Board Accidental Release Reporting Requirements

On February 2, 2020, the Chemical Safety and Hazard Investigation Board (CSB) published its final reporting requirements of accidental releases under the Clean

Air Act. The rule requires an owner or operator of a stationary source to report any accidental release resulting in a fatality, serious injury, or substantial property damages. Advocacy's outreach efforts with small business stakeholders on the proposal identified two key issues related to the scope of the "serious injury" definition and the deadline for reporting. To address these concerns, Advocacy engaged with CSB during the development of the final rule. As a result, CSB narrowed the definition of "serious injury" to align with OSHA's requirement for reporting. In addition, CSB also extended the deadline to submit a report for an accidental release from four to eight hours in the final rule.

Department of Labor, Mine Safety and Health Administration

Electronic Detonators

On January 14, 2020, MSHA issued a direct final rule that allows the use of electronic detonators for explosives in metal and nonmetal mines after determining they were safer and less expensive than existing electric and non-electronic detonators. This was a rulemaking change that Advocacy had sought since 2008 as part of its Small Business Regulatory Review and Reform Initiative, which was designed to identify existing federal rules that small business stakeholders believe should be reviewed and reformed. This particular reform was submitted to Advocacy by the Institute for Makers of Explosives, who argued that MSHA should update its existing explosive standards to be consistent with modern technology and mining industry standards, including explosive safety such as electronic detonation. Furthermore, on July 30, 2008, Advocacy's former Chief Counsel, Thomas M. Sullivan, testified before the House Committee on Small Business, Subcommittee on Regulations, Healthcare, and Trade on the importance of reviewing and reforming existing rules, such as MSHA's explosive safety rules.

Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau

Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages.

On November 26, 2018, the Alcohol and Tobacco Tax and Trade Bureau (TTB) published the proposed rule "Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages" in the Federal Register. In the proposed rule, the TTB defined an "oak barrel" as cylindrical with a 50-gallon capacity. Advocacy submitted a comment letter that addressed, among other topics, the detrimental effect the agency's oak barrel definition would have on small distillers that use a variety of sized and shaped oak barrels to age whiskey. On April 2, 2020, the TTB finalized a portion of the proposed rule and decided not to include its definition of "oak barrel" in the final rule. This will allow small distillers to continue to use oak barrels of various shapes and sizes to age whiskey.

Department of the Treasury, Office of the Comptroller of the Currency

Community Reinvestment Act Regulations

On June 5, 2020, the Office of the Comptroller of the Currency (OCC) published a final rule in the Federal Register, "Implementing the Community Reinvestment Act." In the final rule, the OCC addressed Advocacy's April 8, 2020 comment letter, which contained four arguments. First, Advocacy contended that OCC's definition of "small bank" was problematic, and that the rule needed to use SBA size standards. Second, Advocacy noted that banks would only receive credit for 25 percent of the origination value for loans sold within 90 days of origination. Third, Advocacy requested the OCC exempt small banks from the requirement to collect and maintain information on depositors necessary for the designation of deposit-based assessment areas. Finally, Advocacy objected to the proposed compliance dates, which were

confusing, and encouraged OCC to give small banks a consistent three years to comply.

OCC's final rule included answers to all four changes. First, OCC adopted SBA size standards for banks. Second, the final rule provides that retail loan originations sold at any time within 365 days of origination will receive credit for 100 percent of the origination value. Third, OCC disagreed with the requirement to exempt small banks, but clarified that retail domestic deposits must be geocoded to county rather than census tract level. Finally, the rule streamlined the transition period for most requirements and clarified that the new qualifying activities criteria section, qualifying activities confirmation process, and CRA desert confirmation process will be effective as of the effective date of the final rule.

Environmental Protection Agency

EPA's Significant New Use Rule for Long-Chain Perfluoroalkyl Carboxylate and Perfluoroalkyl Sulfonate Chemical Substances

On July 27, 2020, EPA finalized its significant new use rule for long-chain perfluoroalkyl carboxylate (LCPFAC) chemical substances. In the original proposal from January 2015, EPA made the import article exemption inapplicable for all articles containing LCPFAC substances. In March 2020, in response to the 2016 Toxic Substance Control Act amendments, EPA issued a supplemental proposal which narrowed the inapplicability of the article exemption to only those articles with surface coatings containing the LCPFAC chemicals. In response to both proposals, Advocacy raised concerns about compliance issues for small business importers who would not be able to expend the resources to determine if their products contained the LCPFAC chemicals. As a result, EPA included consideration of factors such as compliance certifications to obviate or mitigate penalties for violations with the import of articles.

Regulation of Air Pollution from Municipal Solid Waste Landfills

On March 26, 2020, EPA published a final rule revising the National Emission Standards for Hazardous Air Pollutants (NESHAP) from Municipal Solid Waste Landfills under section 112 of the Clean Air Act. This rule provided important flexibilities for small businesses and municipalities operating Municipal Solid Waste landfills and resolved conflicts with the New Source Performance Standards (NSPS) and Emission Guidelines (EG) EPA had issued in 2016 under section 111 of the Clean Air Act.

EPA convened a SBREFA panel on the NSPS in December 2013, and the panel issued its report in July 2015. The panel recommendations included removing operating limits for temperature and nitrogen/oxygen at the well-head and site-specific thresholds for the installation and removal of Gas Collection and Control Systems.

However, before the panel concluded its work, EPA published a proposed rule for the NSPS on July 17, 2014, and a proposed rule for EG soon after the report was completed on August 27, 2015. Advocacy filed public comments on both, asking the EPA to better analyze the impacts on small entities and provide them greater flexibilities. EPA issued final NSPS and EG on August 29, 2016 and adopted some, but not all, of these proposed flexibilities. However, small entities could not take advantage of these limited flexibilities because the existing NESHAP, which reflected the older rules, remained in effect.

EPA published a proposed rule to revise the NESHAP on July 29, 2019. In this proposed rule, EPA would provide additional flexibilities that it had declined to adopt in the NSPS and EG and gave an explicit choice for regulated entities to follow either the NSPS and EG or the NESHAP. Advocacy again filed public comment on September 11, 2019.

Appendix A

The Regulatory Flexibility Act

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

Congressional Findings and Declaration of Purpose

(a) The Congress finds and declares that —

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

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

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

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

(5) unnecessary regulations create entry barriers in many industries and discourage potential

entrepreneurs from introducing beneficial products and processes;

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

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

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

(b) It is the purpose of this Act [enacting this chapter and provisions set out as notes under this section] to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and

governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

Regulatory Flexibility Act

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

§ 601. Definitions

For purposes of this chapter—

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

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

(3) the term “small business” has the same meaning as the term “small business concern” under section 3 of the Small Business Act, unless an agency, after

consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

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

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

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

(7) the term “collection of information” —

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

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

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

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

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

§ 602. Regulatory agenda

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

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

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

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

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

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

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

§ 603. Initial regulatory flexibility analysis

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

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

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

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

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

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

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

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

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

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

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

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

(d)

(1) For a covered agency, as defined in section 609(d)

(2), each initial regulatory flexibility analysis shall include a description of—

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

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

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

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

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

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

§ 604. Final regulatory flexibility analysis

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

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

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

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

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

(5) a description of the projected reporting, record-keeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and

the type of professional skills necessary for preparation of the report or record;

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

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

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

§ 605. Avoidance of duplicative or unnecessary analyses

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

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

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

to the Chief Counsel for Advocacy of the Small Business Administration.

(c) In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of sections 602, 603, 604 and 610 of this title.

§ 606. Effect on other law

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

§ 607. Preparation of analyses

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

§ 608. Procedure for waiver or delay of completion

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

(b) Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the completion of the requirements of section 604 of this title for a period of not more than one hundred and eighty days after the date of publication in the Federal Register of a final rule by publishing in the Federal Register, not later than such date of publication, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes timely compliance with the provisions

of section 604 of this title impracticable. If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days from the date of publication of the final rule, such rule shall lapse and have no effect. Such rule shall not be repromulgated until a final regulatory flexibility analysis has been completed by the agency.

§ 609. Procedures for gathering comments

(a) When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques such as—

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

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

(3) the direct notification of interested small entities;

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

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

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

(1) a covered agency shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with information on

the potential impacts of the proposed rule on small entities and the type of small entities that might be affected;

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

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

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

(5) not later than 60 days after the date a covered agency convenes a review panel pursuant to paragraph (3), the review panel shall report on the comments of the small entity representatives and its findings as to issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c), provided that such report shall be made public as part of the rulemaking record; and

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

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

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

- (1) the Environmental Protection Agency,
- (2) the Consumer Financial Protection Bureau of the Federal Reserve System, and
- (3) the Occupational Safety and Health Administration of the Department of Labor.

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

- (1) In developing a proposed rule, the extent to which the covered agency consulted with individuals representative of affected small entities with respect to the potential impacts of the rule and took such concerns into consideration.
- (2) Special circumstances requiring prompt issuance of the rule.
- (3) Whether the requirements of subsection (b) would provide the individuals identified in subsection (b)(2) with a competitive advantage relative to other small entities.

§ 610. Periodic review of rules

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

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

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

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

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

need for and legal basis of such rule and shall invite public comment upon the rule.

§ 611. Judicial review

(a)

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

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

(3)

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

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

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

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

after the date the analysis is made available to the public.

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

(A) remanding the rule to the agency, and

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

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

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

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

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

§ 612. Reports and intervention rights

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

(b) The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as *amicus curiae* in any action brought in a court of the

United States to review a rule. In any such action, the Chief Counsel is authorized to present his or her views with respect to compliance with this chapter, the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities.

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

Appendix B

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

Executive Order of August 13, 2002

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:²

Section 1. General Requirements. Each agency shall establish procedures and policies to promote compliance with the Regulatory Flexibility Act, as amended (5 U.S.C. 601 et seq.) (the “Act”). Agencies shall thoroughly review draft rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the Act. The Chief Counsel for Advocacy of the Small Business Administration (Advocacy) shall remain available to advise agencies in performing that review consistent with the provisions of the Act.

Sec. 2. Responsibilities of Advocacy. Consistent with the requirements of the Act, other applicable law, and Executive Order 12866 of September 30, 1993, as amended, Advocacy:

(a) shall notify agency heads from time to time of the requirements of the Act, including by issuing notifications with respect to the basic requirements of the Act within 90 days of the date of this order;

(b) shall provide training to agencies on compliance with the Act; and

(c) may provide comment on draft rules to the agency that has proposed or intends to propose the rules and

to the Office of Information and Regulatory Affairs of the Office of Management and Budget (OIRA).

Sec. 3. Responsibilities of Federal Agencies. Consistent with the requirements of the Act and applicable law, agencies shall:

(a) Within 180 days of the date of this order, issue written procedures and policies, consistent with the Act, to ensure that the potential impacts of agencies’ draft rules on small businesses, small governmental jurisdictions, and small organizations are properly considered during the rulemaking process. Agency heads shall submit, no later than 90 days from the date of this order, their written procedures and policies to Advocacy for comment. Prior to issuing final procedures and policies, agencies shall consider any such comments received within 60 days from the date of the submission of the agencies’ procedures and policies to Advocacy. Except to the extent otherwise specifically provided by statute or Executive Order, agencies shall make the final procedures and policies available to the public through the Internet or other easily accessible means;

(b) Notify Advocacy of any draft rules that may have a significant economic impact on a substantial number of small entities under the Act. Such notifications shall be made (i) when the agency submits a draft rule to OIRA under Executive Order 12866 if that order requires such submission, or (ii) if no submission to OIRA is so required, at a reasonable time prior to publication of the rule by the agency; and

(c) Give every appropriate consideration to any comments provided by Advocacy regarding a draft rule. Consistent with applicable law and appropriate

2. Executive Order 13272 (August 13, 2002), 67 Fed. Reg. 53461.

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

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

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

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

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

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

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

George W. Bush

THE WHITE HOUSE,

August 13, 2002.

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

[FR Doc. 02-21056

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Appendix C

RFA Training, Case Law, and SBREFA Panels

Federal Agencies Trained in RFA Compliance, 2003-2020

Executive Order 13272 directed the Office of Advocacy to provide training to federal agencies in RFA compliance. RFA training began in 2003, and since that time Advocacy has conducted training for 18 cabinet-level departments and agencies, 80 separate component agencies and offices within these departments, 24 independent agencies, and various special groups including congressional staff, business organizations and trade associations. The following agencies have participated in RFA training since its inception in 2003.

Cabinet Agencies

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

Bureau of Land Management	Federal Transit Administration
Bureau of Ocean Energy Management, Regulation and Enforcement	Maritime Administration
Fish and Wildlife Service	National Highway Traffic Safety Administration
National Park Service	Pipeline and Hazardous Materials Safety Administration
Office of Surface Mining Reclamation and Enforcement	Research and Special Programs Administration
Department of Justice	Department of the Treasury
Bureau of Alcohol, Tobacco, and Firearms	Alcohol, Tobacco, Tax, and Trade Bureau
Drug Enforcement Administration	Bureau of Fiscal Services
Federal Bureau of Prisons	Financial Crimes Enforcement Network
Department of Labor	Financial Management Service
Employee Benefits Security Administration	Internal Revenue Service
Employment and Training Administration	Office of the Comptroller of the Currency
Employment Standards Administration	Office of the General Counsel
Mine Safety and Health Administration	Surface Transportation Board
Occupational Safety and Health Administration	Department of Veterans Affairs
Office of Federal Contract Compliance Programs	National Cemetery Administration
Department of State	Office of the Director of National Intelligence
Department of Transportation	Office of Management and Budget
Federal Aviation Administration	Office of Federal Procurement Policy
Federal Highway Administration	Small Business Administration
Federal Motor Carrier Safety Administration	Office of the General Counsel
Federal Railroad Administration	

Independent Federal Agencies

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

RFA Case Law, FY 2020

Courts across the country have decided various issues regarding the Regulatory Flexibility Act through litigation. This section notes pertinent cases in which the courts discussed the RFA. The cases reach unique interpretations of the role of the RFA in court jurisdiction, plaintiff standing, and proper promulgation of a regulation. One case also discusses whether an agency properly certified a rule and provided a factual basis under the RFA. This section does not reflect the Office of Advocacy’s opinion of the cases and is intended to provide the reader with information on what the courts have held regarding agency compliance with the RFA in FY 2020.

Texas v. Azar⁵

The plaintiffs—the State of Texas (Texas) and the Archdiocese of Galveston-Houston (Archdiocese)—sued the Department of Health and Human Services (HHS) seeking injunctive, declaratory, and Administrative Procedure Act relief. The Archdiocese wanted to create a program for sponsoring foster-care services in partnership with the State of Texas. The Archdiocese contended that a 2016 Department of Health and Human Services’ regulation (45 C.F.R. § 75.300) governing child-welfare funding foreclosed that opportunity. Its nondiscrimination provisions would require the Archdiocese to either compromise its sincerely held religious beliefs or refrain from serving children in the foster-care system. The Archdiocese and Texas sued to challenge that regulation. HHS argued that it had not enforced the regulation and that it had also published a notification of proposed rulemaking to revise it. Further, HHS later sent Texas a letter stating that the regulation could not be used against Texas or the Archdiocese or any other similarly situated entities.

HHS published a notification in the Federal Register that “the regulatory actions, promulgated through the December 12, 2016 final rule that is the subject of this litigation would not be enforced pending repromulgation.” HHS explained, among other defenses, that the 2016 rule raised “significant concerns about compliance with the requirements of the Regulatory Flexibility Act (RFA).” HHS asserted that it had not

performed the statutorily required RFA analysis, nor expressly certified that the rule “would not have a significant economic impact on a substantial number of small entities” and provided a statement with the factual basis for such certification.

The rulemaking simply declared that it would “not have a significant economic impact beyond HHS’s current regulations,” without even mentioning small entities or grappling with the obvious interests of such entities that should have been protected by the RFA process. The Department is accordingly exercising its enforcement discretion and as such, these regulatory provisions will not be enforced, pending repromulgation.

The court agreed with HHS, without reaching the defendant’s RFA allegation, that the case was moot because there was no case or controversy, and the court has no jurisdiction. The court agreed that the plaintiffs’ claims are moot and that the case should be dismissed because they challenge a rule that HHS has never enforced, has made clear that it will not enforce, and is in the process of reconsidering.

Northport Health Services of Arkansas v. HHS⁶

In July 2015, the Centers for Medicare and Medicaid Services (CMS) published a proposed rule seeking to restructure Medicare and Medicaid requirements for long-term care (LTC) facilities following concerns

5. Texas v. Azar, 476 F. Supp. 3d 570 (S.D. Tex. Aug. 5, 2020).

6. Northport Health Servs. of Ark. v. HHS, 438 F. Supp. 3d 956 (W.D. Ark., Apr. 7, 2020).

about facilities' use of pre-dispute arbitration agreements which may have created barriers to patients learning of serious quality of care issues. On October 4, 2016, CMS published the final rule which was to go into effect in September 2019. Plaintiffs, comprised of dually certified Medicare and Medicaid LTC facilities, sought a preliminary injunction against the rule, which was granted. Rather than appeal the injunction, CMS revised the final rule proposing to withdraw its ban on pre-dispute arbitration agreements and instead place various conditions on their use. On September 4, 2019, plaintiffs filed a complaint and motion for preliminary injunction. Plaintiffs argued, among other things, that CMS violated the RFA by certifying the rule would not have a significant impact on a substantial number of small entities without analyzing the impacts of the rule, and by failing to provide an adequate factual basis for the certification. CMS asserted that the RFA certification requirement is a purely procedural mandate that requires a reasonable, good faith effort by the agency to comply but does not permit plaintiffs or the court to challenge the outcome of CMS' determination. CMS argued that it provided an extensive factual basis for its certification in promulgating the 2016 version of the rule. Since the final rule imposed fewer requirements on regulated parties, CMS could conclude that the analysis under the RFA would be unchanged, and therefore the procedural requirements were met.

The court agreed with CMS' argument. The Court found that it was appropriate to take into account the entire administrative record in evaluating whether CMS complied with the requirements of the RFA. The court found that CMS had analyzed the impacts in the 2016 proposed rule, and that the agency's finding that the rule would not amount to greater than 1% of LTC facilities' revenue fell below its economic significance threshold of 3-5% of revenue.

Oakbrook Land Holdings, LLC v. Commissioner⁷

In 2008, Oakbrook claimed a deduction for a conservation easement on 106 acres it granted to the Southeast Regional Land Conservancy. The IRS disallowed the deduction, and Oakbrook filed a petition with the United States Tax Court alleging that Treasury Regulation § 1.170A-14(g)(6) was procedurally defective under the Administrative Procedure Act (APA) because Treasury failed to consider all relevant public comments on the rule as required. A majority of the Tax Court held that the regulation was a legislative regulation that was properly promulgated under the APA because a federal agency does not have to address every issue or alternative proposed in public comments. The RFA was mentioned in a concurrence footnote, stating that Treasury did not conduct an RFA analysis for the rule because the agency erroneously claimed that the regulation was an interpretative one that was not subject to the RFA. Notably, Judge Holmes stated in his dissent that the regulation was not properly promulgated because Treasury failed to address significant public comments in its statement of the regulation's basis and purpose.

Silver v. IRS⁸

Plaintiff sued Treasury and the IRS (the agency) alleging that they failed to conduct required small-business impact evaluations under the RFA and the Paperwork Reduction Act for the section 965 "transition tax" regulation. The agency moved to have the suit dismissed arguing (1) plaintiff lacked standing because he failed the element of causation and (2) the Anti-Injunction Act and the tax exemption to the Declaratory Judgment Act prohibited the lawsuit. The United States District Court for the District of Columbia held that plaintiff did have standing because, at this stage of the proceedings, he properly alleged that the agency failed to publish an initial

7. Oakbrook Land Holdings, LLC v. Commissioner, 154 T.C. 180 (May 12, 2020).

8. Silver vs. IRS, No. 1:2019cv00247, 2019 U.S. Dist. LEXIS 220193 (D.D.C., Dec. 24, 2019).

and final regulatory flexibility analysis and undertake procedural measures to protect small businesses and that the alleged injuries were traceable to the statutory requirements for the regulations, not the statute created by the Tax Cuts and Jobs Act as the agency argued. The court also held that the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act did not bar the court's subject matter jurisdiction because plaintiff was challenging the agency's adoption of regulations without conducting statutorily mandated requirements to lessen regulatory burdens on small businesses, not seeking a refund or impeding revenue collection.

California v. Bernhardt⁹

This litigation stems from a Bureau of Land Management (BLM) 2018 final rule rescinding a 2016 final rule entitled, "Waste Prevention, Production Subject to Royalties, and Resource Conservation."¹⁰ The 2016 rule aimed to reduce waste from venting, flaring, and leaks during onshore oil and natural gas production activities. The 2018 rule did not rescind the entirety of the 2016 rule; rather it focused on eight key provisions. BLM justified recession of the 2016 rule on four grounds: "(a) the 2016 Rule imposed excessive regulatory burdens; (b) the costs of the 2016 Rule exceeded its benefits; (c) the 2016 Rule improperly monetized certain benefits; and (d) the 2016 Rule did not account for certain costs."

The agency first attempted to delay the effective date of the rule through two rulemakings that were the subjects of two cases. Both of those rulemakings were struck down by the U.S. District Court for the Northern District of California. In the first matter the court found that BLM's postponement was arbitrary and capricious, and that BLM had failed to comply with notice and comment procedures.¹¹ In the second

matter, the court stated that BLM failed to provide a reasoned analysis for the suspension of the rule.

In this matter, the court again ruled in favor of the Plaintiffs, stating that the rulemaking process by which BLM finalized the rule was inadequate, and that BLM ignored its statutory mandate under the Minerals Leasing Act, failed to justify policy decisions, and failed to consider scientific findings relied upon by previous policymakers. The court stated that BLM failed to justify its reversal and violated the APA in not providing the public with an opportunity to comment on its analysis as to why the 2016 rule created an excessive regulatory burden.

In arguing that BLM had provided an inadequate analysis of the regulatory burdens, Plaintiffs cited to BLM's RFA analysis in addition to the agency's overall economic justifications for the rule stating that the agency's reasoning was inadequate and unsupported. BLM challenged this argument stating that Plaintiffs did not have standing to challenge under the RFA. The court does not address the RFA arguments raised in this case, and instead states that the RFA is irrelevant to its overall determination that the rulemaking process and the opportunity for public comment were inadequate.

9. *Cal. v. Bernhardt*, 472 F. Supp. 3d 573 (N.D. Cal., Jul. 15, 2020).

10. Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83008 (Nov. 18, 2016). See also Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 84 Fed. Reg. 49184 (Sep. 28, 2018).

11. *Cal. v. BLM*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017).

Table D.1 SBREFA Panels Convened Through FY 2020

SBREFA Panel Rule	Date Convened	Date Completed	Notice of Proposed Rulemaking	Final Rule Published
Consumer Financial Protection Bureau				
Small Business Lending Data Collection	10/15/20	12/14/20		
Debt Collection	08/25/16	10/19/16	05/21/19. Supplemental rule published 03/03/20.	11/30/20
Arbitration Clauses	10/20/15	12/11/15	05/24/16	Rule published 07/19/17. Repealed via Congr. Review Act, 10/24/17.
Limit Certain Practices for Payday, Vehicle Title, and Similar Loans	04/27/15	06/25/15	07/22/16	11/17/17
Home Mortgage Disclosure Act	02/27/14	04/24/14	08/29/14	10/15/15
Loan Originator Compensation Requirements under Regulation Z	05/09/12	07/12/12	09/07/12	02/15/13
Mortgage Servicing under the Real Estate Settlement Procedures Act (RESPA or Regulation X) and Truth in Lending Act (TILA or Regulation Z)	04/09/12	06/11/12	09/17/12	02/14/13
Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (RESPA or Regulation X) and Truth in Lending Act (TILA or Regulation Z)	02/21/12	04/23/12	08/23/12	12/31/13
Department of Labor, Occupational Safety and Health Administration				
Tree Care Operations	03/23/20	05/22/20		
Telecommunications Towers	08/15/18	10/11/18		
Process Safety Management Standard	06/02/16	08/01/16		

Occupational Exposure to Infectious Diseases in Healthcare and Other Related Work Settings	10/14/14	12/22/14		
Occupational Exposure to Diacetyl and Food Flavorings Containing Diacetyl	05/05/09	07/02/09		
Occupational Exposure to Beryllium	09/17/07	01/15/08	08/07/15	
Cranes and Derricks in Construction	08/18/06	10/17/06	10/09/08	08/09/10
Occupational Exposure to Hexavalent Chromium	01/30/04	04/20/04	10/04/04	02/28/06
Occupational Exposure to Crystalline Silica	10/20/03	12/19/03	09/12/13	03/25/16
Confined Spaces in Construction	09/26/03	11/24/03	11/28/07	
Electric Power Generation, Transmission, and Distribution	04/01/03	06/30/03	06/15/05	04/11/14
Ergonomics Program Standard	03/02/99	04/30/99	11/23/99	11/14/00
Safety and Health Program Rule	10/20/98	12/19/98		
Tuberculosis	09/10/96	11/12/96	10/17/97	Withdrawn 12/31/03
Environmental Protection Agency				
Financial Responsibility Requirements for Hard Rock Mining	08/24/16	12/01/16	12/01/16	Withdrawn December 2017
Regulation of Trichloroethylene for Vapor Degreasers under Section 6(a) of the Toxic Substances Control Act	06/01/16	09/26/16	01/19/17	
Regulation of N-Methylpyrrolidone and Methylene Chloride in Paint and Coating Removal under Section 6(a) of the Toxic Substances Control Act	06/01/16	09/26/16	01/19/17	03/27/19
Risk Management Program Modernization	11/04/15	02/19/16	03/14/16	01/13/17
Emission Standards for New and Modified Sources in the Oil and Natural Gas Sector	06/16/15	08/13/15	09/18/15	06/3/16
Federal Plan for Regulating Greenhouse Gas Emissions from Electric Generating Units	04/30/15	07/28/15	10/23/15	Withdrawn 04/03/17

Greenhouse Gas Emissions Standards for Medium- and Heavy-Duty Vehicles	10/22/14	01/15/15	07/13/15	10/25/2016
PCB (Polychlorinated Biphenyls) Use Authorizations Update Rule	02/07/14	04/07/14		
Review of New Source Performance Standards and Amendments to Emission Guidelines for Municipal Solid Waste Landfills	12/05/13	07/21/15	07/17/14 08/27/15	08/29/16
National Emissions Standards for Hazardous Air Pollutants (NESHAP): Brick and Structural Clay Products and Clay Products	06/12/13	01/16/14	12/18/14	10/26/15
Long Term Revisions to the Lead and Copper Rule	08/14/12	08/16/13	-	-
Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards	08/04/11	Rule proposed rule w/o completion of SBREFA panel report	06/30/14	12/01/15
Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards	08/04/11	10/14/11	05/21/13	04/28/14
Greenhouse Gas Emissions from Electric Utility Steam Generating Units	06/09/11	Rule proposed rule w/o completion of SBREFA panel report	04/14/13	04/13/12 01/08/14 06/02/14
National Emission Standards for Hazardous Air Pollutants (NESHAP) Risk and Technology Review for the Mineral Wool and Wool Fiberglass Industries	06/02/11	10/26/11	11/12/11	07/29/15
Formaldehyde Emissions from Pressed Wood Products	02/03/11	04/04/11	06/10/13	07/27/16
Stormwater Regulations Revision to Address Discharges from Developed Sites	12/06/10	10/04/11	-	Withdrawn 07/06/17
National Emission Standards for Hazardous Air Pollutants for Coal- and Oil-fired Electric Utility Steam Generating Units	10/27/10	03/02/11	05/03/11	02/16/12
Revision of New Source Performance Standards for New Residential Wood Heaters	08/04/10	10/26/11	02/03/14	03/16/15

Pesticides; Reconsideration of Exemptions for Insect Repellents	11/16/09	01/15/10		
National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers: Major and Area Sources	01/22/09	03/23/09	06/04/10	03/21/11
Pesticides; Certification of Pesticide Applicators (Revisions)	09/04/08	11/03/08	08/24/15	01/04/17
Pesticides; Agricultural Worker Protection Standard Revisions	09/04/08	11/03/08	03/19/14	09/28/15
Renewable Fuel Standards 2	07/09/08	09/05/08	05/26/09	03/26/10
Total Coliform Monitoring	01/31/08	01/31/08	07/14/10	
Non-Road Spark-Ignition Engines/ Equipment	08/17/06	10/17/06	05/18/07	10/08/08
Mobile Source Air Toxics	09/07/05	11/08/05	03/29/06	02/26/07
Federal Action Plan for Regional Nitrogen Oxide/Sulfur Dioxide (2005 Clean Air Interstate Rule)	04/27/05	06/27/05	08/24/05	04/28/06
Section 126 Petition (2005 Clean Air Interstate Rule)	04/27/05	06/27/05	08/24/05	04/28/06
Cooling Water Intake Structures Phase III Facilities	02/27/04	04/27/04	11/24/04	06/15/06
Nonroad Diesel Engines – Tier IV	10/24/02	12/23/02	05/23/03	06/29/04
Lime Industry – Air Pollution	01/22/02	03/25/02	12/20/02	01/05/04
Aquatic Animal Production Industry	01/22/02	06/19/02	09/12/02	08/23/04
Construction and Development Effluent Limitations Guidelines	07/16/01	10/12/01	06/24/02	Withdrawn 04/26/04
Nonroad Large Spark Ignition Engines, Recreation Land Engines, Recreation Marine Gas Tanks and Highway Motorcycles	05/03/01	07/17/01	10/05/01 08/14/02	11/08/02
Stage 2 Disinfectant Byproducts; Long Term 2 Enhanced Surface Water Treatment	04/25/00	06/23/00	08/11/03 08/18/03	01/04/06 01/05/06
Reinforced Plastics Composites	04/06/00	06/02/00	08/02/01	04/21/03
Concentrated Animal Feedlots	12/16/99	04/07/00	01/12/01	02/12/03
Metals Products and Machinery	12/09/99	03/03/00	01/03/01	05/13/03

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

Appendix D

History of the Regulatory Flexibility Act

Shortly after the Office of Advocacy was founded in 1976, the first White House Conference on Small Business engaged small business representatives from across the United States in national brainstorming sessions. One recurring concern was the difficulty that “one-size-fits-all” regulations created for small businesses trying to compete in U.S. markets. President Jimmy Carter, a one-time small business owner himself, understood the necessity for greater protections for small businesses in the regulatory process and helped facilitate administrative and legislative changes. In 1979, President Carter issued a memorandum to the heads of all executive agencies, instructing them to “make sure that federal regulations [would] not place unnecessary burdens on small businesses and organizations,” and more specifically, to apply regulations “in a flexible manner, taking into account the size and nature of the regulated businesses.”¹² He asked Advocacy to ensure that the agencies’ implementation would be consistent with government-wide regulatory reform.

In 1980, Congress enacted the Regulatory Flexibility Act (RFA), which elevated aspects of this memorandum to the level of federal statute.¹³ The new law mandated that agencies consider the impact of their regulatory proposals on small businesses, analyze proposed regulations for equally effective alternatives, and make their analyses of equally effective alternatives available for public comment. This new approach to federal rulemaking was viewed as a remedy for the disproportionate burden placed on small businesses by one-size-fits-all regulation, “without

12. Jimmy Carter, Memorandum on Regulation of Small Businesses and Organizations, II Pub. Papers 2142 (Nov. 16, 1979), available at <https://www.presidency.ucsb.edu/documents/memorandum-from-the-president-regulation-small-businesses-and-organizations>.

13. 5 U.S.C. § 601 et seq.

undermining the goals of our social and economic programs.”¹⁴

RFA Requirements

Under the RFA, when an agency proposes a rule that would have a “significant economic impact on a substantial number of small entities,” the rule must be accompanied by an impact analysis (an initial regulatory flexibility analysis, or IRFA) when it is published for public comment.¹⁵ Following that, should the agency publish a final rule, that agency must publish a final regulatory flexibility analysis (FRFA) as well.¹⁶ If a federal agency determines that a proposed rule would not have a “significant economic impact on a substantial number of small entities,” the head of that agency may “certify” the rule and bypass the IRFA and FRFA requirements.¹⁷

During a November 2015 interview, Frank Swain, chief counsel for advocacy from 1981 to 1989, noted that “the RFA is the only regulatory reform that is statutorily required. Most of the regulatory reforms are largely executive orders.” Executive orders frequently expire at the end of a president’s term. “The RFA, because of its statutory basis, is going to be around indefinitely,” Swain said. As such, the RFA continues to be an important check on burdensome regulation in an era where regulatory reform is an Administration priority.

Interpreting and Strengthening the RFA

During the first half of the 1980s, the federal courts were influential in developing the RFA’s role in the

14. Carter, *supra* note 1.

15. 5 U.S.C. § 603.

16. 5 U.S.C. § 604.

17. 5 U.S.C. § 605(b).

regulatory process. One question that required the courts' intervention was whether a federal agency had to consider a proposed rule's indirect effects on small businesses, in addition to its direct effects. In *Mid-Tex Electric Cooperative, Inc. v. Federal Energy Regulatory Commission (FERC)*, the D.C. Circuit found that "Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy."¹⁸ This interpretation—that federal agencies must only consider the direct effects on small businesses within the jurisdiction of the rule—has continued to be the judicial interpretation of the RFA, even after subsequent amendments.¹⁹

The following year, in the run-up to the second White House Conference on Small Business in 1986, conference planners noted that "the effectiveness of the RFA largely depends on small business' awareness of proposed regulations and [their] ability to effectively voice [their] concerns to regulatory agencies."²⁰ They also voiced concern that at the time "the courts' ability to review agency compliance with the law is limited." Eight years later, the Government Accounting Office reported that agency compliance with the RFA varied widely across the federal government, a condition that likely impaired efforts to address the disproportionate effect of federal regulation on small business.

Advocacy was statutorily required to report annually on federal agency compliance, but given that compliance with the RFA was not itself reviewable by the courts at the time, the effectiveness of such reporting was limited. The RFA did allow the chief counsel for advocacy to appear as *amicus curiae* (friend of the court) in any action to review a rule, expanding the chief counsel's role in representing small business interests in policy development. However, given that courts did not review compliance with the RFA, any

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

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

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

challenge to regulation would need to be primarily under the Administrative Procedure Act.

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

After amending the RFA to allow for judicial review of agency compliance, the courts again provided guidance regarding the RFA's requirements for federal agencies. In *Southern Offshore Fishing Associations v. Daley*, the court held that the National Marine Fisheries Service failed to make a "reasonable, good-faith effort" to inform the public about the potential impacts of a proposed rule imposing fishing quotas and to consider less harmful alternatives.²¹ The agency had published a FRFA with its final rule, but had not published an IRFA when the rule was proposed. The court's holding established that an IRFA must precede a FRFA for an agency to have "undertak[en] a rational consideration of the economic effects and potential [regulatory] alternatives."²²

SBREFA Panels

The SBREFA amendments also required the Environmental Protection Agency and the Occupational Safety and Health Administration to convene small business advocacy review panels whenever the agency proposes a rule that may have a significant impact on a substantial number of small entities. These panels consist of officials from the promulgating agency, the

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

22. *Id.*

Office of Information and Regulatory Affairs, and the Office of Advocacy. Their task is to consult with small business representatives on the agency's regulatory proposals to ensure that the agency has identified and considered regulatory alternatives that could attain the policy objectives while minimizing the impacts on small businesses. After each collaborative panel has concluded, the panel issues a report of its findings and any recommendations for providing flexibility for small entities.

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

Executive Order 13272

As President George W. Bush's administration began to consider small business priorities, improved RFA compliance was one key goal. To this end, President Bush issued Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking" in 2002.²³ This order tasked Advocacy with training federal agencies and other stakeholders on the RFA. The training sessions helped apprise agencies of their responsibilities under the RFA and educated agency officials on the best RFA compliance practices. In addition, E.O. 13272 required Advocacy to track agency compliance with these education requirements and report on them annually to the White House Office of Management and Budget.

23. Executive Order 13272 (August 13, 2002), 67 Fed. Reg. 53461.

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

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

Eight years and one presidential administration later, Congress and President Barack Obama enacted the Small Business Jobs Act of 2010,²⁴ which codified some of the procedures introduced in E.O. 13272. That same year, the Dodd-Frank Wall Street Reform and Consumer Protection Act became law.²⁵ The new law created the Consumer Financial Protection Bureau and required that the new agency's major rules come under the SBREFA panel provisions of the RFA.

The Obama administration looked to Advocacy for ways of encouraging economic activity. Again, the RFA was an important part of the answer. Executive Order 13563, "Improving Regulation and Regulatory Review,"²⁶ signed in 2011, directed agencies to heighten public participation in rulemaking, consider overlapping regulatory requirements and flexible

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

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

26. Executive Order 13563 (January 18, 2011), 76 Fed. Reg. 3821.

approaches, and conduct ongoing regulatory review. President Obama concurrently issued a memorandum to all federal agencies, reminding them of the importance of the RFA and of reducing the regulatory burden on small businesses through regulatory flexibility. In this memorandum, President Obama directed agencies to increase transparency by providing written explanations of any decision not to adopt flexible approaches in their regulations. The following year, President Obama further attempted to reduce regulatory burdens with Executive Order 13610, “Identifying and Reducing Regulatory Burdens,”²⁷ which placed greater focus on initiatives aimed at reducing unnecessary regulatory burdens, simplifying regulations, and harmonizing regulatory requirements imposed on small businesses.

Executive Orders 13563 and 13610 bolstered the retrospective review requirements of the RFA by requiring all executive agencies to conduct periodic retrospective review of existing rules. President Obama also issued an administrative action, Executive Order 13579, which recommended that all independent agencies do the same.²⁸ This emphasis on the principles of regulatory review and the sensitivity to small business concerns in the federal rulemaking process further increased federal agency compliance.

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

New Horizons: Small Business and International Trade

With the enactment of the Trade Facilitation and Trade Enforcement Act of 2015, Advocacy’s duties to small business expanded beyond our borders. Under the Act, the chief counsel for advocacy must

27. Executive Order 13610 (May 10, 2012), 77 Fed. Reg. 28467.

28. Executive Order 13579 (July 11, 2011), 76 Fed. Reg. 41585.

convene an interagency working group whenever the president notifies Congress that the administration intends to enter into trade negotiations with another country. The working group conducts small business outreach in manufacturing, services, and agriculture sectors and gather input on the trade agreement’s potential economic effects. Informed by these efforts, the working group is charged with identifying the most important priorities, opportunities, and challenges affecting these industry sectors in a report to Congress. In December of 2018, pursuant to section 502 of the Trade Facilitation and Trade Enforcement Act (TFTEA), Advocacy released the Section 502 Small Business Report on the Modernization of the North American Free Trade Agreement (NAFTA): Prepared for the Consideration of the United States-Mexico-Canada Agreement (USMCA).²⁹

Deregulation and Executive Orders 13771 and 13777

With the inauguration of President Donald J. Trump in January 2017, the regulatory process would see dramatic reform. Shortly after the beginning of his administration, President Trump issued two executive orders aimed at substantially ameliorating the regulatory burden faced by the private sector. The first, E.O. 13771, “Reducing Regulation and Controlling Regulatory Costs,” commonly known as “one-in, two-out,” required that any new regulations be balanced by the reduction of at least two other regulations—and that the incremental cost of new regulations be entirely offset by elimination of existing costs of other regulations. The second, E.O. 13777, “Enforcing the Regulatory Reform Agenda,” set a framework for implementing this vision of regulatory reform, requiring inter alia each agency appoint a Regulatory Reform Officer to supervise the process

29. U.S. Small Business Administration, Office of Advocacy, Section 503 Small Business Report on the Modernization of the North American Free Trade Agreement (NAFTA): Prepared for Consideration of the United States-Mexico-Canada Agreement (USMCA) (Dec. 2018), available at <https://cdn.advocacy.sba.gov/wp-content/uploads/2018/12/20094150/Section-502-Small-Business-Report-on-the-Modernization-of-the-North-American-Free-Trade-Agreement-NAFTA.pdf>

of regulatory reform. These measures were another opportunity for small business regulatory reform. Agency implementation of these executive orders offered significant opportunities for regulatory relief targeted to small businesses.

Since its passage in 1980, the RFA has demonstrated remarkable staying power. It has helped establish small business consideration as a necessary part of federal rulemaking.

Appendix E

Abbreviations

RFA	Regulatory Flexibility Act		
SBREFA	Small Business Regulatory Enforcement Fairness Act		
SBAR	small business advocacy review		
IRFA	initial regulatory flexibility analysis		
FRFA	final regulatory flexibility analysis		
APA	Administrative Procedure Act	HHS	Department of Health and Human Services
AMS	Agriculture Marketing Service		
APHIS	Animal and Plant Health Inspection Service	HOS	Hours of Service of Drivers
BCA	Benefit-Cost Analysis	JOBS Act	Jumpstart Our Business Startups
BLM	Bureau of Land Management	LCPFAC	long-chain perfluoroalkyl carboxylate
CFPB	Consumer Financial Protection Bureau	LTC	long-term care
CMS	Center for Medicare and Medicaid Services	MEP	multiple employer plans
CRA	Community Reinvestment Act	MSGP	Multi-Sector General Permit
CSB	Chemical Safety and Hazard Investigation Board	MSHA	Mine Safety and Health Administration
DEA	Drug Enforcement Administration	NESHAP	National Emission Standards for Hazardous Air Pollutants
DOC	Department of Commerce	NMFS	National Marine Fisheries Service
DOI	Department of the Interior	NSPS	New Source Performance Standard
DOL	Department of Labor	OCC	Office of the Comptroller of the Currency
DOT	Department of Transportation	OIRA	Office of Information and Regulatory Affairs
EA	environmental assessment	ONO	Office of National Ombudsman
EBSA	Employee Benefits Security Administration	OSHA	Occupational Safety and Health Administration
EG	Emission Guidelines	PMTA	premarket tobacco application
E.O.	executive order	RESPA	Real Estate Settlement Procedures Act
EPA	Environmental Protection Agency	SBA	Small Business Administration
FCC	Federal Communications Commission	TILA	Truth in Lending Act
FDA	Food and Drug Administration	TREAS	Department of the Treasury
FDIC	Federal Deposit Insurance Corporation	TRID	TILA RESPA Integrated Disclosure
Fed. Reg.	Federal Register	TSCA	Toxic Substances Control Act
FMCSA	Federal Motor Carrier Safety Administration	TTB	Alcohol and Tobacco Tax and Trade Bureau
FSIS	Food Safety and Inspection Service	U.S.C.	United States Code
FWS	Fish and Wildlife Service	USDA	Department of Agriculture
		VA	Department of Veterans Affairs