

# Report on the Regulatory Flexibility Act, FY2022

*April 2023*



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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April 2023

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 consider small entities 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 2022: from October 1, 2021, to September 30, 2022. In addition, Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," also imposes certain requirements on federal agency rulemaking and requires Advocacy to report on agency compliance with that executive order. Chapter 2 reports on their compliance in FY 2022.

As the United States moved toward the end of the COVID-19 pandemic, Advocacy took stock of the past several years. Advocacy used new processes to ensure that, despite being unable to meet small businesses face-to-face, stakeholders were involved in the regulatory process. These processes included online roundtables, events, and trainings for federal regulators, all of which allowed for more voices to become involved in Advocacy's work. New channels of communication established in the pandemic allow Advocacy to better track small business needs and focus on new burdens, including issues of equity and fairness.

While Advocacy has enforced the RFA for over 40 years, safeguards on the regulatory process continue to be important as the number of small businesses continues to skyrocket. Advocacy has remained attuned to regulatory changes and continues to monitor new rules and regulations for impacts on small business.

Advocacy's efforts to monitor federal regulatory compliance with the Regulatory Flexibility Act included the following actions in FY 2022:

- Advocacy submitted 37 formal comment letters to regulatory agencies. These letters pointed out RFA issues the agencies needed to correct.
- Advocacy held 30 regulatory roundtables. These roundtables (which Advocacy continued to hold online) are held so Advocacy can discuss with small businesses the impact of upcoming rules. Agency officials often attend these roundtables.
- Advocacy provided training on RFA compliance in 10 training sessions for 257 federal officials via online communication platforms.

- In FY 2022, Advocacy convened four SBREFA panels, three with the Environmental Protection Agency (EPA) and one with the Consumer Financial Protection Bureau.

Advocacy's overall efforts to promote federal agency compliance also resulted in a series of victories. Some of the most prominent changes are listed here:

- One success surrounded the Department of Defense's (DOD) Cybersecurity Maturity Model Certification. After Advocacy contacted DOD with concerns about the model, DOD announced in November 2021 that the original framework for the model would not be implemented.
- Advocacy commented on the Environmental Protection Agency (EPA) allowance allocation and trading program for hydrofluorocarbons (HFC). During the public comment period, Advocacy raised concerns about the cost and feasibility of the proposed ban on disposable HFC cylinders and a new HFC reporting and tracking system.
- Another rule change was related to the EPA's Fifth Revisions to the Unregulated Contaminant Monitoring Rule (UCMR 5). EPA's original language would have required all small public water systems participate in UCMR 5 regardless of whether EPA would pay for their non-labor costs of compliance. After Advocacy encouraged the agency to comply with the America's Water Infrastructure Act of 2018, EPA modified the rule.
- Advocacy requested the EPA conduct a small business advocacy review panel regarding reporting requirements for perfluoroalkyl and polyfluoroalkyl substances. The EPA agreed to convene a panel to solicit feedback from impacted small businesses. The panel was completed on August 2, 2022, and EPA plans to issue an initial regulatory flexibility analysis for public comment.
- Advocacy commented on a Federal Communications Commission rule regarding improving broadband competition in multi-tenant environments. Advocacy's letter suggested specific policies for reducing barriers to entry for broadband providers. The Commission adopted these suggestions, citing Advocacy's comments in the final proceeding.

Chapter 2 reports on agencies' compliance with Executive Order 13272. Additionally, Advocacy confirmed whether agencies had posted their RFA procedures on their websites. Table 2.2 provides these links.

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

Sincerely,



Major L. Clark, III  
Deputy Chief Counsel

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# Chapter 1

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

Over the course of the COVID-19 pandemic, the Office of Advocacy (Advocacy) maintained its mission of being an independent voice for small businesses within the federal government. Advocacy produced timely research on the impact of the pandemic<sup>1</sup> and focused on both regulatory reform to help struggling businesses and educating regulators who craft rules and regulations that could disproportionately impact small business.

In FY 2022, as the United States moved toward the end of the pandemic, Advocacy took stock of the past several years. Processes developed by Advocacy and federal agencies in 2020 ensured that, despite being unable to meet small businesses face-to-face, stakeholders were involved in the regulatory process. These processes became part of the new normal for Advocacy. Online roundtables and events reached stakeholders across the country, and online trainings for federal regulators allowed for more convenient ways to reach the people who write federal rulemakings. New channels of communication allow Advocacy to better track small business needs and focus on new burdens in the post-pandemic age, including issues of equity and fairness.

This chapter documents the Regulatory Flexibility Act (RFA) and other laws Advocacy uses to help protect small businesses against burdensome regulatory action. While Advocacy has monitored compliance the RFA for over 40 years, safeguards on the regulatory process are important as the number of small businesses continues to skyrocket. Advocacy has remained attuned to regulatory changes and continues to monitor new rules and regulations for burdensome impacts on small businesses. In the case

1. Advocacy's research on pandemic effects can be found online at <https://advocacy.sba.gov/tag/covid-19/>.

of deregulatory actions, Advocacy has monitored potential outcomes to ensure maximum benefits for small entities.

### The Regulatory Flexibility Act

No law after Advocacy's basic charter has had more influence on the office's activities than the RFA, first enacted in 1980<sup>2</sup> and strengthened in 1996<sup>3</sup> and 2010.<sup>4</sup> It established into law the principle that government agencies must consider the effects of their regulatory actions on small entities and mitigate them where possible. The RFA arose from years of frustration with ever-increasing federal regulation that disproportionately harmed large numbers of smaller entities. From the RFA's section titled "Congressional Findings and Declaration of Purpose":

It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.<sup>5</sup>

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).

5. 5 U.S.C. § 601 note.

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

In addition to RFA legislation, several executive orders have given Advocacy additional responsibilities to assist agencies in meeting their RFA obligations. One of these, Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking*,<sup>7</sup> 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. As the federal government continued a high-telework policy because of COVID-19 and changing norms, training during FY 2022 was mostly conducted online through meeting software. 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 reduce 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 rules, 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 broader economy, and by improving compliance by those regulated. Since 2003, when Advocacy began its ongoing RFA compliance training program, through 2022, 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.

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 to agencies, as suggested by that order. Since then, Advocacy has continued to engage 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

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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.

public comment.<sup>8</sup> When the final rule is published, it must be accompanied by a final regulatory flexibility analysis (FRFA).<sup>9</sup> Alternatively, if a federal agency determines that a proposed rule would not have a significant impact on small entities, the head of that agency may “certify” the rule and bypass the IRFA and FRFA requirements.<sup>10</sup>

In an IRFA, the agency must consider less burdensome alternatives to its own rule, and in the FRFA the agency must explain why the final rule was chosen from among the alternatives in the IRFA.<sup>11</sup>

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 rules subject to the RFA’s SBREFA panel provisions.

In 2011, President Obama issued Executive Order 13563, *Improving Regulation and Regulatory Review*,<sup>12</sup> 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*,<sup>13</sup> provided that “... further steps should be taken...to promote public participation in retrospective review, to modernize our regulatory system, and to institutionalize regular assessment of significant regulations.” This aligns 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 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.”<sup>14</sup>

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8. 5 U.S.C. § 603.

9. 5 U.S.C. § 604.

10. 5 U.S.C. § 605(b).

11. 5 U.S.C. § 604.

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

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

14. 5 U.S.C. § 601.

## Chapter 2

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

Federal agencies' compliance with the Regulatory Flexibility Act (RFA) improved markedly after President George W. Bush signed Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking*, in 2002. The executive order established new responsibilities for the Office of Advocacy (Advocacy) and federal agencies to facilitate greater consideration of small businesses in regulatory development. Portions of it have been codified in the Small Business Jobs Act of 2010.<sup>1</sup>

Executive Order 13272 requires Advocacy to educate federal agency officials on compliance with the RFA, to provide resources to facilitate continued compliance, and to report to the Office of Management and Budget on agency compliance with the executive order.

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

### 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 policymakers. While RFA training is normally held in person, the COVID-19 pandemic caused Advocacy to move its sessions online. In FY 2022, Advocacy held 10 training sessions for 257 federal officials (see Table 2.1). The entire list of agencies trained since FY 2003 appears in Appendix D.

**Table 2.1: RFA Training at Federal Agencies in FY 2022**

Date	Agency	Number Trained
10/26/21	Federal Communications Commission	6
03/02/22	National Labor Relations Board	37
03/03/22	U.S. Army Corps of Engineers	5
04/19/22	Federal Communications Commission	41
04/26/22	Securities and Exchange Commission	50
05/05/22	Mine Safety and Health Administration	18
06/29/22	Employee Benefits Security Administration	13
07/21/22	Department of Education	15
09/13/22	Small Business Administration	25
09/22/22	Federal Aviation Administration	47
	Total	257

## 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.” Versions of the manual can be found on the Advocacy website and are provided to agencies during training.<sup>2</sup>

### Agency Compliance with Executive Order 13272

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

*Written RFA Procedures.* Agencies are required to 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 engage 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 send copies of the draft notification to Advocacy.

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

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

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

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/>.



**Table 2.2 Federal Agency Compliance with Rule-Writing Requirements under Executive Order 13272 and the JOBS Act, FY 2022**

Agency	Written Procedures on Website	URL of Agency's RFA Procedures	Notifies Advocacy	Responds to Comments
Cabinet Agencies				
Department of Agriculture	√	<a href="https://www.usda.gov/directives/dr-1512-001">https://www.usda.gov/directives/dr-1512-001</a>	√	√
Department of Commerce(a)	√	<a href="http://www.fisheries.noaa.gov/national/laws-and-policies/guidance-conducting-economic-and-social-analyses-regulatory-actions">www.fisheries.noaa.gov/national/laws-and-policies/guidance-conducting-economic-and-social-analyses-regulatory-actions</a>	√	√
Department of Defense	√	<a href="https://www.acquisition.gov/node/28713/printable/print">https://www.acquisition.gov/node/28713/printable/print</a>	√	√
Department of Education	X		√	n.a.
Department of Energy	√	<a href="http://www.energy.gov/sites/prod/files/gcprod/documents/eo13272.pdf">www.energy.gov/sites/prod/files/gcprod/documents/eo13272.pdf</a>	√	√
Department of Health and Human Services	√	FDA: <a href="https://www.fda.gov/industry/small-business-assistance/letter-proper-consideration-small-entities-agency-rulemaking">https://www.fda.gov/industry/small-business-assistance/letter-proper-consideration-small-entities-agency-rulemaking</a> CMS: <a href="https://www.cms.gov/Regulations-and-Guidance/Guidance/CMSSmallBusAdminOmbuds">https://www.cms.gov/Regulations-and-Guidance/Guidance/CMSSmallBusAdminOmbuds</a>	√	√
Department of Homeland Security	√	<a href="http://www.dhs.gov/publication/signed-regulatory-flexibility-act-executive-order-13272-memo-2004">www.dhs.gov/publication/signed-regulatory-flexibility-act-executive-order-13272-memo-2004</a>	√	n.a.
Department of Housing and Urban Development	√	<a href="http://www.hud.gov/program_offices/sdb/policy/sbrefa">www.hud.gov/program_offices/sdb/policy/sbrefa</a>	n.a.	n.a.
Department of the Interior	√	<a href="https://www.fws.gov/policy/library/rgeo12372.pdf">https://www.fws.gov/policy/library/rgeo12372.pdf</a>	√	x
Department of Justice	X		√	n.a.
Department of Labor	√	<a href="http://www.dol.gov/general/regs/guidelines">www.dol.gov/general/regs/guidelines</a>	√	√
Department of State	X		√	n.a.
Department of Transportation	√	<a href="http://www.transportation.gov/sites/dot.dev/files/docs/1979%20Regulatory%20Policies%20and%20Procedures.doc">www.transportation.gov/sites/dot.dev/files/docs/1979%20Regulatory%20Policies%20and%20Procedures.doc</a>	√	n.a.



Department of the Treasury (b)	√	Treasury: <a href="https://home.treasury.gov/about/general-information/orders-and-directives/td28-03">https://home.treasury.gov/about/general-information/orders-and-directives/td28-03</a> Internal Revenue Service: <a href="http://www.irs.gov/irm/part32/irm_32-001-005#idm140712272166000">www.irs.gov/irm/part32/irm_32-001-005#idm140712272166000</a>	√	√
Department of Veterans Affairs	√	<a href="http://www.va.gov/ORPM/Regulatory_Flexibility_Act_EO_13272_Compliance.asp">www.va.gov/ORPM/Regulatory_Flexibility_Act_EO_13272_Compliance.asp</a>	√	n.a.
Environmental Protection Agency	√	<a href="http://www.epa.gov/sites/production/files/2015-06/documents/guidance-regflexact.pdf">www.epa.gov/sites/production/files/2015-06/documents/guidance-regflexact.pdf</a>	√	√
Small Business Administration	X		√	n.a.
Noncabinet Agencies				
Commodity Futures Trading Commission	n.a.	n.a.	X	n.a.
Consumer Financial Protection Bureau (c)	n.a.	n.a.	√	n.a.
Consumer Product Safety Commission	√	<a href="http://www.cpsc.gov/Regulations-Laws--Standards/Rulemaking#The_Regulatory_Flexibility_Act">www.cpsc.gov/Regulations-Laws--Standards/Rulemaking#The_Regulatory_Flexibility_Act</a>	√	√
Equal Employment Opportunity Commission	√	<a href="http://www.eeoc.gov/eeoc/plan/regflexibilityact.cfm">www.eeoc.gov/eeoc/plan/regflexibilityact.cfm</a>	√	n.a.
Federal Acquisition Regulation Council	X	<a href="https://www.acquisition.gov/node/28713/printable/print">https://www.acquisition.gov/node/28713/printable/print</a>	√	n.a.
Federal Communications Commission	√	<a href="http://www.fcc.gov/sites/default/files/fcc-directive-1158.2.pdf">www.fcc.gov/sites/default/files/fcc-directive-1158.2.pdf</a>	√	√
Federal Reserve Board (c)	n.a.	n.a.		n.a.
Federal Retirement Thrift Investment Board	n.a.	n.a.	√	n.a.
General Services Administration	X		√	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.

Notes: √ = Agency complied with the requirement. X = Agency did not comply with the requirement.  
n.a. = Not applicable because Advocacy did not submit a comment letter in response to an agency rule in FY 2022 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. However, some independent agencies do have written procedures available on their websites.

# Chapter 3

## Communication with Small Business and Federal Agencies

### Communication with Federal Agencies

The principal goal of the Regulatory Flexibility Act (RFA) is to reduce regulatory burdens on small businesses. Advocacy accomplishes this in large part by communicating small business concerns to federal agencies as they craft regulations. The RFA requires federal agencies to engage with small businesses in specific ways. These communications form the basis of federal small business regulatory analysis and regulatory burden reduction.

#### Direct Communications

The Office of Advocacy (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 agencies, and training sessions on RFA compliance provide meaningful participation by all interested parties and produce more effective federal regulation. In addition, Advocacy roundtables often feature agency officials interested in small business input. In FY 2022, Advocacy's communications with federal agencies included 35 public comment letters and 10 RFA compliance training sessions for 257 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.

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

### Executive Order 12866 and Interagency Review of Upcoming Rules

Executive Order 12866, Regulatory Planning and Review, celebrated its 29th anniversary in FY 2022.<sup>1</sup> The executive order'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 Executive Order 12866, the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) reviews all significant executive agency regulations. Interested parties can request a meeting with OIRA to discuss any issues with a rule under its review. These are known as 12866 meetings. Advocacy attends these meetings when invited.

#### SBREFA Panels

In 1996, the Small Business Regulatory Enforcement Fairness Act (SBREFA) amended the RFA to require certain agencies to convene review panels whenever a potential regulation is expected to have a significant economic impact on a substantial number of small entities. These are commonly called SBREFA or Small Business Advocacy Review (SBAR) panels. These panels provide for small business input before the proposed rule is published. The list of SBREFA panels convened since 1996 can be found in Appendix D.

Three agencies are covered by this requirement: the Consumer Financial Protection Bureau (CFPB),

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1. Executive Order 12866, Regulatory Planning and Review, September 30, 1993. [https://www.reginfo.gov/public/jsp/Utilities/EO\\_12866.pdf](https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf).

Environmental Protection Agency (EPA), and Occupational Safety and Health Administration (OSHA). Four panels were convened in FY 2022:

- The EPA convened a panel on cyclic aliphatic bromide cluster Risk Management Rulemaking under the Toxic Substances Control Act in January 2022.
- The CFPB convened a panel on the automated valuation model in March 2022.
- The EPA convened a panel on reporting and recordkeeping requirements for perfluoroalkyl and polyfluoroalkyl substances under the Toxic Substances Control Act (TSCA) Section 8(a)(7) in April 2022.
- The EPA convened a panel on per- and polyfluoroalkyl substances related to the National Primary Drinking Water Regulation (NPDWR) in May 2022.

### Confidential Interagency Dialogue

While Advocacy uses tools like 12866 meetings and SBREFA panels to directly talk about regulatory issues with federal agencies seeking to promulgate rules, a significant amount of work is done behind the scenes through confidential interagency communications. Advocacy's goal is to participate in the regulatory development process as early as possible, both to counsel agencies on the effects of their actions on small businesses and to provide RFA compliance expertise as needed. Many of the formal processes support these goals, but assistant chief counsels spend most of their time working with counterparts at agencies to perform better analysis, propose more and better alternatives, disclose their thinking, and explain their ultimate rationale.

Advocacy encourages agency policymakers and regulatory development staff to share pre-proposal information with Advocacy. During these reviews, federal regulators can ask Advocacy for guidance early in the pre-proposal phase of the regulatory process and are able to avoid issues while rules are still in a development phase.

### 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 both 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 2021 regulatory agendas were published on January 31, 2022, and the Spring 2022 agendas were published on August 8, 2022. The Unified Regulatory Agendas are a key component of the regulatory planning mechanism prescribed in Executive Order 12866. 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 2021: <https://www.federalregister.gov/documents/2022/01/31/2022-00702/introduction-to-the-unified-agenda-of-federal-regulatory-and-deregulatory-actions-fall-2021>

Spring 2022: <https://www.federalregister.gov/documents/2022/08/08/2022-14654/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 a substantial number of small entities. Executive Orders 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 of Section 610, 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.<sup>2</sup> Advocacy continues to monitor retrospective review plans and their implementation and accepts feedback from small entities regarding any rules needing review.

## Outreach to Small Business

In the Congressional Findings and Declaration of Purpose section of the RFA, Congress states, "The process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions...."<sup>3</sup>

To help fulfill this purpose, Advocacy assists governmental agencies by conducting outreach to small entities, relaying information from one to the other. In most instances, Advocacy encourages

agencies to participate in these outreach efforts, and most agencies are 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 federal agencies. For example, Advocacy publishes regulatory alerts that are emailed to lists of small entities. 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 through roundtable events. In these roundtables, specific regulatory issues are discussed by small businesses and their representatives, in almost all cases with the federal agency present. Historically, Advocacy has mostly hosted these roundtables in Washington, D.C., with other roundtables around the country as needed. These roundtables are often Advocacy's principal means of gathering extensive small business input.

During the pandemic, Advocacy staff have moved roundtables online for safety and convenience. As online communication has become more prevalent, Advocacy has been able to include stakeholders that otherwise may have gone unnoticed. The result has been greater participation by stakeholders, including those from distant locations. Advocacy plans on

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2. DOT divides its rules into ten groups, and analyzes one group each year, checking to determine whether any rule has a significant economic impact on a substantial number of small entities. If a rule is found to do so, DOT reviews it in accordance with Section 610. U.S. Department of Transportation's Review Process (Jan. 20, 2015). <https://www.transportation.gov/regulations/dots-review-process>

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

continuing to offer online roundtables, in large part thanks to these unforeseen benefits.

In addition, Advocacy performs site visits to small businesses to learn specifically about their interactions with federal regulations. These visits provide Advocacy the opportunity to learn how industries work first-hand, which can help staff better articulate small business concerns. Small business owners, meanwhile, appreciate the opportunity to meet one-on-one with Advocacy to talk through their regulatory concerns. Advocacy encourages the small business hosting the site visit to invite their peers, allowing Advocacy to learn from others facing similar regulatory burdens. While the pandemic has limited Advocacy's opportunities to perform site visits, we look forward to increasing the number in subsequent years.

Advocacy also participates as a liaison member Administrative Conference of the United States events. Advocacy has often been called upon to present regulatory issues from the small business perspective. These provide Advocacy attorneys the opportunity to engage in high-level conversations on administrative law with leading minds in the legal field, ensuring that Advocacy is up-to-date in understanding the law and that small business concerns are brought into those conversations. Advocacy attorneys also attend industry events and conferences for the agencies in their regulatory profiles so that they have a stronger understanding of how businesses in their areas of expertise function and the attendees have a better understanding of the impact of federal regulations on small businesses.

**Table 3.1 Regulatory Roundtables Hosted by the Office of Advocacy, FY 2022**

Agency	Purpose	Date
Consumer Financial Protection Bureau	Roundtable on Financial Issues	11/09/21
Consumer Product Safety Commission	Safety Standards for Clothing Storage Units Roundtable	02/16/22
Department of Agriculture, Animal and Plant Health Inspection Service	Birds Not Bred for Research Roundtable	04/19/22
Department of Agriculture, Forest Service	Alaska Roadless Rule Roundtable	01/18/22
Department of Commerce	Technology and Trade Council Digital Tools Roundtables	06/17/22
Department of Commerce, National Marine Fisheries Service	North Atlantic Right Whale Roundtable	09/15/22
Department of Energy	Energy Conservation for Appliances Roundtable	02/11/22
Department of the Interior	Working Group on Mining Regulations Roundtable	07/21/22
Department of the Interior, Bureau of Ocean Energy Management	Offshore Wind Development and Fisheries Roundtable	12/14/21
	BOEM Morro Bay Environmental Assessment Roundtable	04/20/22
	Outer Continental Shelf Lands Act Renewable Energy Roundtable	08/04/22
Department of the Interior, Fish and Wildlife Service	Incidental Take of Migratory Birds Roundtable	11/16/21
	Endangered Species Experimental Populations Roundtable	07/20/22

Department of Labor	FLSA Minimum Wage and Overtime Roundtable	03/25/22
	Davis-Bacon Act Regulations Roundtable	04/05/22
Environmental Protection Agency	Waters of the United States Roundtables	01/06/22 01/10/22
	Draft TSCA Risks to Fenceline Communities Roundtable	02/18/22
	Petition to Revise the Non-Hazardous Secondary Material Standard Roundtable	03/11/22
	Clean Truck Plan and Heavy-Duty Vehicle NOx Emissions Roundtable	04/08/22
	Chrysotile Asbestos Under Section 6(a) of the Toxic Substances Control Act Roundtable	05/26/22
	EPA's Proposed Reporting and Recordkeeping Requirements for Asbestos Roundtable	06/17/22
Federal Acquisition Regulatory Council	Project Labor Agreements Roundtable	09/29/22
Federal Energy Regulatory Commission	Interconnection Procedures Roundtable	09/29/22
Occupational Safety and Health Administration	Regulatory Update from OSHA Assistant Secretary, Heat Stress, COVID-19 Roundtable	11/19/21
	COVID-19, Heat Stress, Surface Mobile Mining Equipment Safety Roundtable	01/28/22
	COVID-19 Inspections, Heat Stress, ABA OSH Law Meeting Roundtable	03/18/22
	OSHA Electronic Reporting, Heat Injury and Illness Reporting, COVID-19 in Healthcare Settings Roundtable	05/20/22
	Blood Lead Level for Medical Removal, OSHRC Update, Cal/ OSHA Roundtable	09/16/22
White House Office of Science and Technology Policy	Sustainable Chemistry Roundtable	05/06/22

## Roundtables by Agency and Date

### Consumer Financial Protection Bureau

#### *Roundtable on Financial Issues*

November 9, 2022

On November 9, 2021, Advocacy held a roundtable on financial issues. The primary focus of the roundtable was the Consumer Financial Protection Bureau's notice of proposed rulemaking on small business lending data collection or section 1071 of the Dodd Frank Act. Section 1071 of the Dodd-Frank Act requires the collection and reporting of credit application data for small businesses, including women-owned and minority-owned small businesses. Small banks, credit unions, and other

types of credit issuing institutions attended the roundtable. The information garnered was used in Advocacy's subsequent comment letter on the issue.

### Consumer Product Safety Commission

#### *Safety Standards for Clothing Storage Units Roundtable*

February 16, 2022

On February 3, 2022, the U.S. Consumer Product Safety Commission (CPSC) published a proposed rule to establish safety standards for clothing storage units. Specifically, the CPSC required that clothing storage units be tested and exceed minimum stability requirements and be labeled with safety information and a hangtag. The CPSC prepared an initial



regulatory flexibility analysis for the rulemaking outlining the costs and impacts to small business. The analysis showed that a substantial number of manufacturers are considered small businesses and would be impacted by this rulemaking. The CPSC requested comments on the rule, and small businesses were encouraged to provide detailed information on the direct cost implications as well as whether there were any regulatory alternatives that would minimize the impact on small entities.

On February 16, 2022, Advocacy hosted a roundtable to gather comments and feedback from small entities on the rulemaking. Attendees shared comments regarding the impacts the rule would have to their small businesses, updates on the voluntary standards deliberations, and potential alternatives to the proposed rule.

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

### ***Birds Not Bred for Research Roundtable***

*April 19, 2022*

On February 22, 2022, the Department of Agriculture's Animal and Plant Health Inspection Service published a proposed rule establishing standards to govern the humane handling, care, treatment, and transportation of birds not bred for research. The agency sought comments on requirements for enclosures, sanitation, lighting, climate, feeding and watering, veterinary care, and several other practices. On April 19, 2022, Advocacy held a roundtable to discuss the proposed rule and gather small entity feedback.

## **Department of Agriculture, Forest Service**

### ***Alaska Roadless Rule Roundtable***

*January 18, 2022*

On November 23, 2021, the U.S. Department of Agriculture's Forest Service published a proposed rule to repeal its 2020 final Alaska roadless rule. The agency took this action under the direction of Executive Order 13990, which directs agencies to review and revise policies that conflict with protecting the environment. The 2020 final rule exempted the Tongass National Forest from the requirements of the 2001 Roadless Rule. The 2001 rule prohibited timber harvest and road construction in designated areas within Alaska. On January 18, 2022, Advocacy held a roundtable with interested small entity stakeholders. Attendees shared comments and feedback on the proposed rule as well as information about the potential impacts the rule would have on small businesses.

## **Department of Commerce**

### ***Technology and Trade Council Digital Tools Roundtables***

*June 17, 2022*

In September 2021, the United States (U.S.)-European Union (E.U) Trade and Technology Council (TTC) was formed to reaffirm U.S-E.U. objectives. The Department of Commerce leads the Small and Medium-sized Enterprises (SME) Working Group, which focuses on promoting SME access to and use of digital technologies. At the request of the Department of Commerce, Advocacy conducted outreach on behalf of the TTC SME working group that will culminate in a report.

The purpose of the listening sessions was to develop recommendations for U.S. and E.U. policymakers to implement in order to help accelerate SME access to and the uptake of digital technologies.



## Department of Commerce, National Marine Fisheries Service

### ***North Atlantic Right Whale Roundtable***

*September 15, 2022*

On August 1, 2022, the U.S. Department of Commerce's National Marine Fisheries Service published a proposed rule to restrict vessel speeds in areas where the North Atlantic Right Whale is known to be present. The proposed rule is intended to reduce the risk of harm to the species caused by strikes from vessels traveling at high speeds. In 2021, the National Marine Fisheries Service published an assessment of the effectiveness of a previous vessel speed rule. The assessment stated that, while the rule had made progress, additional action was needed to reduce the rate of mortality of the species. On September 15, 2022, Advocacy held a roundtable to discuss the proposed rule and gather small entity feedback.

## Department of Energy

### ***Energy Conservation for Appliances Roundtable***

*February 11, 2022*

On December 13, 2021, the U.S. Department of Energy (DOE) finalized a rule entitled, "Energy Conservation Program for Appliance Standards: Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment." This rule repealed several provisions of a 2020 final rule that revised procedures for establishing energy efficiency standards for covered products. DOE also published a second proposed rule with the same title on April 12, 2021 that proposed additional revisions to the process rule. DOE accepted comments on that proposed rule until September 13, 2021 and has not finalized the rule yet.

Also, in 2021, the National Academies of Sciences, Engineering, and Medicine released a report entitled,

"Review of Methods Used by the U.S. Department of Energy in Setting Appliance and Equipment Standards." The report outlined several findings and recommendations for revising DOE's process rule. On February 11, 2022, Advocacy hosted a roundtable to discuss whether DOE should reopen the comment dockets for its process rules, and what (if any) comments small entities have on the report.

## Department of the Interior

### ***Working Group on Mining Regulations Roundtable***

*July 21, 2022*

On July 21, 2022, Advocacy hosted a roundtable to discuss the United States Department of the Interior's Request for Information to Inform Working Group on Mining Regulations, Laws, and Permitting. Attendees discussed ongoing challenges facing the industry as well as regulations that are not in need of any updates.

## Department of the Interior, Bureau of Ocean Energy Management

### ***Offshore Wind Development and Fisheries Roundtable***

*December 14, 2021*

On November 22, 2021, the U.S. Department of the Interior's Bureau of Ocean Energy Management (BOEM) published a request for information to aid its development of agency guidance for mitigating the impacts of offshore wind development on fisheries. BOEM also announced a series of public listening sessions to gather information and feedback from interested parties. Roundtable attendees shared comments and information about various shortcomings with the current wind leasing process and how it excludes fisheries and other small entity ocean users from the decision-making process. They also shared additional comments regarding how the process could be improved.

## ***BOEM Morro Bay Environmental Assessment Roundtable***

*April 20, 2022*

On April 6, 2022, BOEM announced the availability of a draft environmental assessment for the Morro Bay Wind Energy Area located off the coast of San Luis Obispo County, California. On April 20, 2022, Advocacy hosted a roundtable to gather specific small entity input and presentations on BOEM's request for comments. Attendees shared comments on the draft assessment and what if any impacts wind energy development projects may have on other ocean users.

## ***Outer Continental Shelf Lands Act Renewable Energy Roundtable***

*August 4, 2022*

On June 23, 2022, BOEM published a draft fisheries mitigation guidance. Renewable energy lessees are required by the Outer Continental Shelf Lands Act to submit information on potential impacts their projects may have on commercial fishing. They must also provide mitigation measures for avoiding, minimizing, reducing, eliminating, and monitoring environmental impacts. The purpose of BOEM's draft guidance was to recommend an approach for developing mitigation measures, including but not limited to safety measures, compensation, monitoring, and the duration of the mitigation period. On August 4, 2022, Advocacy held a roundtable to discuss the draft guidance and gather small entity feedback.

## ***Department of the Interior, Fish and Wildlife Service***

### ***Incidental Take of Migratory Birds Roundtable***

*November 16, 2021*

On October 4, 2021, the U.S. Department of the Interior's Fish and Wildlife Service (FWS) published an advance notice of proposed rulemaking to develop regulations that authorize incidental take of migratory birds under certain conditions. FWS proposed three mechanisms by which it will authorize take under the Migratory Bird Treaty Act. These include exceptions to the prohibition on incidental take, general permits, and specific or individualized permits. On November 16, 2021, Advocacy held a roundtable to discuss this rulemaking. Roundtable participants shared comments and information on current regulatory impacts under the Migratory Bird Treaty Act and potential impacts of the three proposed alternatives. FWS attended the teleconference but did not present.

### ***Endangered Species Experimental Populations Roundtable***

*July 20, 2022*

On June 7, 2022, FWS published a proposed rule to update regulations concerning experimental populations of endangered and threatened species. FWS proposed to remove "historical range" from the regulatory language to allow for the introduction of populations into habitat outside of their historical range for conservation purposes. FWS stated that the rule change was necessary for instances in which little to no habitat remains in the historical range of a species. FWS also proposed several additional regulatory text edits. On July 20, 2022, Advocacy held a roundtable to allow small businesses the opportunity to share comments and feedback on the proposed rule.

## Department of Labor

### ***FLSA Minimum Wage and Overtime Roundtable***

*March 25, 2022*

On March 25, 2022, Advocacy held a roundtable on the Department of Labor's (DOL) upcoming changes to regulations that implement the Fair Labor Standards Act's (FLSA) minimum wage and overtime exemptions for bona fide executive, administrative, and professional employees. The current salary level for this exemption is \$684 a week, or \$35,568 annualized. Participants expressed concern that DOL's new regulations may significantly increase the salary level for this exemption, increasing administrative burdens and adding costs for small businesses. Small businesses recommended that DOL's regulations should reflect regional and industry differences in salaries. Participants also recommended that DOL consider significant regulatory alternatives that would minimize the economic impact of this rule on small entities.

### ***Davis-Bacon Act Regulations Roundtable***

*April 25, 2022*

On March 18, 2022, the DOL's Wage and Hour Division published a proposed rule updating the Davis-Bacon Act and Related Acts regulations, the first comprehensive review of federal construction regulations in over forty years. On April 25, 2022, Advocacy held a small business roundtable with the officials from the DOL and over 100 small businesses and their representatives on this proposed rule. The provisions of most interest to the small businesses in attendance included the provisions expanding industry coverage, changes to the calculation of the prevailing wage, and updated enforcement provisions. Small businesses also commented that the agency underestimated the costs of this regulation, at only at only \$100 per small business in first year costs.

## Environmental Protection Agency

### ***Waters of the United States Roundtables***

*January 6 and January 10, 2022*

On December 7, 2021, the Environmental Protection Agency (EPA) and the Department of the Army (Army) published a notice of proposed rulemaking defining "the waters of the United States" under the Clean Water Act. On January 6 and 10, 2022, Advocacy held roundtables with interested small entity stakeholders to discuss the proposed rule. Attendees offered comments and feedback on the proposal as well as concerns about EPA and the Department of the Army's lack of a proper Regulatory Flexibility Act analysis.

### ***Draft TSCA Risks to Fenceline Communities Roundtable***

*February 18, 2022*

Advocacy held a roundtable to discuss EPA's draft rule "TSCA Screening Level Approach for Assessing Ambient Air and Water Exposures to Fenceline Communities." EPA plans to use the screening level methodology to evaluate potential chemical exposures and associated potential risks to fenceline communities in its Toxic Substances Control Act (TSCA) risk evaluations. The agency intends to apply the screening level methodology to seven of the "first 10" chemicals undergoing risk evaluation under TSCA Section 6. This methodology will also be employed by the agency for all future chemicals undergoing the risk evaluation process under TSCA. At this roundtable, EPA provided an overview of its proposed methodology. The American Composites Manufacturers Association also presented at this roundtable to provide the perspective of small businesses producing fiber reinforced polymer composite products.

### ***Petition to Revise the Non-Hazardous Secondary Material Standard Roundtable***

*March 11, 2022*

Advocacy held a roundtable to discuss EPA's proposed response to an industry petition to revise the Non-Hazardous Secondary Material (NHSM) regulations. The NHSM requirements consists of standards and procedures that are used to identify whether non-hazardous secondary materials are solid wastes when used as fuels or ingredients in combustion units. The petitioners requested various changes. At this roundtable, EPA discussed its proposed response, in which the agency denied the requested revisions. EPA explained that the requested changes would negatively affect the NHSM program by increasing the levels of contaminants that could be burned in units that are not appropriately designed to burn them. Watco, a small single source transportation and supply chain services company, also presented at this roundtable to discuss the perspective of shortline railroads and the impacts of the agency's proposed decision on its ability to manage railroad ties.

### ***Clean Truck Plan and Heavy-Duty Vehicle NOx Emissions Roundtable***

*April 8, 2022*

In August 2021, EPA announced the Clean Trucks Plan, which included a series of rulemakings to reduce emissions from commercial highway traffic. As part of this plan, in March 2022, EPA published the first rule, which would set new, more stringent standards to reduce pollution from heavy-duty vehicles and engines starting in model year 2027. The proposed standards would significantly reduce emissions of smog- and soot-forming nitrogen oxides (NOx) from heavy-duty gasoline and diesel engines and set more stringent greenhouse gas standards for certain commercial vehicle categories.

At this roundtable, EPA presented on the Clean Trucks Plan and this first proposed rule.

### ***Chrysotile Asbestos Under Section 6(a) of the Toxic Substances Control Act Roundtable***

*May 26, 2022*

Advocacy held a roundtable to discuss EPA's proposed rule to ban ongoing uses of chrysotile asbestos based on its unreasonable risk determination under TSCA. To address the agency's identified unreasonable risks for the uses of chrysotile asbestos, EPA issued a proposal on April 12, 2022, to prohibit the manufacture (including import), processing, distribution in commerce, and commercial use of chrysotile asbestos in various products. At this roundtable, EPA presented an overview of the final risk determinations for chrysotile asbestos, proposed risk management requirements, alternative risk management options, and cost impacts of its proposed action.

### ***EPA's Proposed Reporting and Recordkeeping Requirements for Asbestos Roundtable***

*June 17, 2022*

Advocacy held a roundtable to discuss EPA's proposal to require a one-time reporting and recordkeeping requirements for asbestos under TSCA. The agency issued the proposed rule on May 6, 2022. Although TSCA Section 8(a) provides an exemption for small manufacturers (including importers) or processors, EPA is imposing these requirements on all small businesses for all forms of asbestos, except for Libby Amphibole. While EPA is using its existing definition for small manufacturer, the agency is proposing to establish a definition of small processors in this rulemaking. EPA is consulting with the Small Business Administration on the new definition, as required by statute. At this roundtable, the agency provided an overview of its proposal including reporting requirements, data elements required to be reported, and small business impacts of the rule.

## Federal Acquisition Regulatory Council

### ***Project Labor Agreements Roundtable***

*September 29, 2022*

On September 29, 2022, Advocacy held a roundtable on the Federal Acquisition Regulatory Council's (FAR Council) proposed rule to implement project labor agreements in federal construction contracts where the estimated cost is \$35 million or more. Participants commented that the FAR Council's proposal would result in higher compliance costs than estimated and would deter small businesses from bidding on federal contracts. Small businesses also commented that the rule's estimate of two affected small business subcontractors per project is too low and minimizes compliance costs. Small businesses also recommended that the FAR Council remove the mandatory requirement that small businesses join a union to participate in these federal construction contracts.

## Federal Energy Regulatory Commission

### ***Interconnection Procedures Roundtable***

*September 29, 2022*

On July 5, 2022, the Federal Energy Regulatory Commission published a proposed rule to amend and reform interconnection procedures. Currently, the Federal Energy Regulatory Commission requires that all public utilities that operate facilities used for the transmission of electric energy in interstate commerce have standard procedures and a standard agreement for interconnecting generating facilities. On September 29, 2022, Advocacy held a roundtable to discuss the proposed rule and gather small entity feedback.

## Occupational Safety and Health Administration

### ***Regulatory Update from OSHA Assistant Secretary, Heat Stress, COVID-19 Roundtable***

*November 19, 2021*

On November 19, 2021, Advocacy hosted a small business labor safety roundtable that featured remarks from the newly confirmed Assistant Secretary of Labor for Occupational Safety and Health (OSHA). His remarks focused on OSHA's regulatory priorities, including COVID-19, emergency response, heat stress, workplace violence, and personal protective equipment in construction. Next, a senior director from OSHA's Directorate of Standards and Guidance provided an overview of OSHA's Advance Notice of Proposed Rulemaking on "Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings," including the 100-plus questions on which OSHA seeks public comment and data. Finally, an OSHA law practitioner provided a detailed overview of the various OSHA actions on COVID-19, including OSHA's recent Emergency Temporary Standard (ETS) on mandatory COVID-19 Vaccination and Testing that is the subject of ongoing, broad-based litigation.

### ***COVID-19, Heat Stress, Surface Mobile Mining Equipment Safety Roundtable***

*January 28, 2022*

This roundtable focused on the U.S. Supreme Court's recent decision remanding OSHA's COVID-19 Vaccination and Testing ETS to the U.S. 6th Circuit Court of Appeals. Two attorneys discussed the case's merits and the high Court's refusal to lift the 6th Circuit's preliminary determination that the ETS likely exceeds OSHA's statutory authority. Next, another attorney discussed business planning in the aftermath of the Supreme Court's COVID-19 holding, including policies, procedures, and practices that prudent small businesses might follow to protect themselves from legal and regulatory risks going forward. Third, several small business representatives

from the manufacturing and construction sectors discussed OSHA's advanced notice of proposed rulemaking on indoor and outdoor heat stress and some of their concerns about this issue. Finally, representatives from the Mine Safety Health Administration (MSHA) provided an overview of their decision to reopen the rulemaking record and hold its recent public hearing on their proposed Safety Program for Surface Mobile Equipment rule.

### ***COVID-19 Inspections, Heat Stress, ABA OSH Law Meeting Roundtable***

*March 18, 2022*

On March 19, 2022, Advocacy hosted a small business labor safety roundtable. It began with a discussion of OSHA's new COVID-19 inspection initiative in the healthcare sector. The initiative seeks to use highly targeted, focused inspections to mitigate the spread of COVID-19 and future variants to protect healthcare workers. Next, OSHA provided an update on its newly formed work group on heat injury and illness prevention in indoor and outdoor activities. The group, which includes representatives from various sectors such as agriculture, manufacturing, construction, and defense, is tasked with considering various strategies and methods to mitigate and control hazardous heat exposure in the workplace. Finally, two participants in the American Bar Association's annual Occupational, Safety, and Health Law section meeting provided an update on key OSHA and MSHA regulatory, policy, enforcement, and litigation topics raised during the conference.

### ***OSHA Electronic Reporting, Heat Injury and Illness Reporting, COVID-19 in Healthcare Settings Roundtable***

*May 20, 2022*

This roundtable included a presentation by OSHA on its proposal to amend and re-instate its Electronic Injury and Illness Reporting rule, which would require, among other things, certain

employers to electronically submit injury and illness information annually to OSHA. Next, a small business representative and participants on OSHA's newly formed heat stress work group discussed OSHA's recent listening session on "Initiatives to Protect Workers from Heat-Related Hazards" and the activities of the work group to consider various strategies and methods to mitigate and control hazardous heat exposure in the workplace. Finally, a panel of healthcare sector experts discussed OSHA's recent four-day public hearing on possibly finalizing its Emergency Temporary Standard on COVID-19 in Healthcare. The hearings included scores of witnesses from labor, healthcare, manufacturing, retail, and construction industries concerning employee exposure and injury and illness impacts from COVID-19.

### ***Blood Lead Level for Medical Removal, OSHRC Update, Cal/OSHA Roundtable***

*September 16, 2022*

On September 16, 2022, Advocacy hosted a roundtable that included a presentation by OSHA on its advance notice of proposed rulemaking on Blood Lead Level for Medical Removal. The notice seeks data and public comment on OSHA's possible plan to revise its standards for medical removal and return to work provisions under its occupational exposure to lead rules. Next, a Commissioner from the Occupational Safety and Health Review Commission (OSHRC), which hears appeals of OSHA citations or penalties, provided an overview of the OSHRC and discussed several recent decisions of particular interest to small business. Finally, a pair of occupational safety and health attorneys from California provided an overview of Cal/OSHA, which is known for its aggressive regulatory and enforcement postures. They discussed some of the key issues Cal/OSHA is working on, what these actions and priorities portend for federal and state OSHA's, and their potential impact on small businesses going forward.

## White House Office of Science and Technology Policy

### ***Sustainable Chemistry Roundtable***

*May 6, 2022*

The 2021 National Defense Authorization Act requires the White House Office of Science and Technology Policy (OSTP) to lead an interagency group that will report to Congress on Sustainable Chemistry. Advocacy is a participant in this interagency group. In April 2022, OSTP issued a notice in the Federal Register seeking public input on the definition of Sustainable Chemistry, federal regulations impacting Sustainable Chemistry, and other issues. Advocacy hosted a roundtable, in coordination with the interagency group, to raise awareness of the notice and solicit small business feedback on these questions.

## Regional Advocate Outreach

Advocacy's regional advocates reach out directly to small businesses in their respective regions to inform them of the role Advocacy plays in the regulatory process and to hear directly from them on issues affecting their business operations. 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. The Office of the National Ombudsman is primarily concerned with helping small businesses when they experience excessive or unfair federal regulatory enforcement actions.

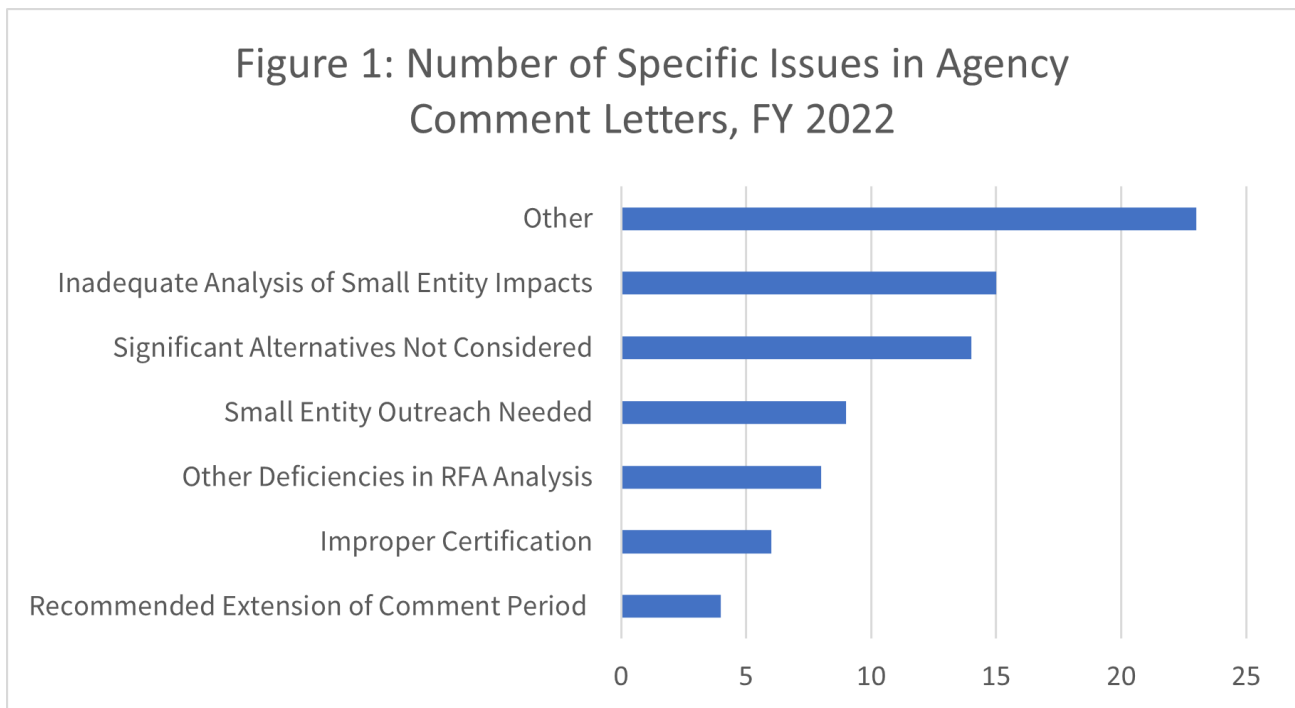
## Chapter 4

### Advocacy's Public Comments to Federal Agencies in FY 2022

In FY 2022, Advocacy submitted 37 comment letters to regulatory agencies. The most frequent concerns were inadequate analysis of small entity impacts (15 letters), significant alternatives not considered (14 letters), and the agencies needed to reach out to small entities (9 letters). Several letters (23 letters)

referenced other issues not categorized. Figure 4.1 summarizes Advocacy's issues of concern. Table 4.1 lists all the comment letters submitted in FY 2022 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 2022**





**Table 4.1 Regulatory Comment Letters Filed by the Office of Advocacy, FY 2022**

Date Filed	Agency*	Topic	Citation to Rule
11/18/21	DOI	Advancing Racial Equity and Support for Underserved Communities Through Recreation Opportunities	86 Fed. Reg. 57848
11/23/21	FWS, NMFS	Regulations for Designating Critical Habitat	86 Fed. Reg. 59346; 86 Fed. Reg. 59353
12/15/21	EPA	Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources- Extension	86 Fed. Reg. 63110
12/17/21	EPA	Addition of Certain Chemicals; Community Right-to-Know Toxic Chemical Release Reporting	86 Fed. Reg. 57614
01/06/22	CFPB	Small Business Lending Data Collection	86 Fed. Reg. 56356
01/07/22	BOEM	Mitigating the Impacts of Offshore Wind Development on Fisheries	<a href="https://www.boem.gov/sites/default/files/documents/renewable-energy/BOEM-2021-0083-0001.pdf">https://www.boem.gov/sites/default/files/documents/renewable-energy/BOEM-2021-0083-0001.pdf</a>
01/20/22	FCC	Improving Competitive Broadband Access to Multiple Tenant Environment	86 Fed. Reg. 52120
01/24/22	FS	Roadless Area Conservation; National Forest System Lands in Alaska	86 Fed. Reg. 66498
01/31/22	DOL	Revising Wage Methodology for Agricultural Guest Workers	86 Fed. Reg. 68174
01/31/22	EPA	Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources	86 Fed. Reg. 63110
02/04/22	FinCEN	Beneficial Ownership Information Reporting Requirements	86 Fed. Reg. 69920
02/07/22	EPA, CORPS	Revised Definition of “Waters of the United States”	86 Fed. Reg. 69372
03/03/22	NMFS	Atlantic Large Whale Take Reduction Plan	86 Fed. Reg. 51970
03/07/22	CMS	Contract Year 2023 Policy and Technical Changes to the Medicare Advantage and Medicare Prescription Drug Benefit Programs	87 Fed Reg. 1842
03/11/22	DOE	Inputs to Inform Social Science Research Related to Offshore Wind	<a href="https://www.energy.gov/eere/wind/articles/doe-requests-inputs-inform-social-science-research-related-offshore-wind">https://www.energy.gov/eere/wind/articles/doe-requests-inputs-inform-social-science-research-related-offshore-wind</a>
03/23/22	CPSC	Consumer Safety Standard for Operating Cords on Custom Window Coverings	87 Fed. Reg. 1014
03/29/22	EPA	Petition to Revise the Non-Hazardous Secondary Material Standard	87 Fed. Reg. 4536
04/14/22	CORPS	Approved Jurisdictional Determinations Under the Navigable Waters Protection Rule	88 Fed. Reg. 3004
04/18/22	CPSC	Safety Standard for Clothing Storage Units	87 Fed. Reg. 6246

05/06/22	SEC	Cybersecurity Risk Management and Incident Disclosure	87 Fed. Reg. 16590
05/13/22	DOE	Request to Reopen Comments on Energy Conservation Program for Appliance Standards	86 Fed. Reg. 18901
05/16/22	BOEM	Environmental Assessment for the Morro Bay Offshore Wind Energy Area	Docket No. BOEM-2021-0044
05/17/22	DOL	Updating Davis-Bacon Act for Federal Construction Contracts	87 Fed. Reg. 15698
05/23/22	IRS	Required Minimum Distributions	87 Fed. Reg. 10504
05/24/22	APHIS	Standards for Birds Not Bred for Use in Research Under the Animal Welfare Act	87 Fed. Reg. 9880
05/25/23	CEQ	Climate and Economic Justice Screening Tool	87 Fed. Reg. 10176
07/05/22	EPA	TSCA Asbestos Reporting Rule	87 Fed. Reg. 27060
07/25/22	EPA	Clean Water Act Hazardous Substance Worst Case Discharge Planning Rule	87 Fed. Reg. 17890
08/05/22	EPA	Water Quality Certification Improvement Rule	87 Fed. Reg. 35318
08/05/22	FTC	Extension of Implementation Period for the Standards for Safeguarding Customer Information	86 Fed. Reg. 70272
08/08/22	FWS	Endangered and Threatened Wildlife and Plants; Designation of Experimental Populations	87 Fed. Reg. 34625
08/22/22	BOEM	Mitigating the Impacts of Offshore Wind Development on Fisheries	<a href="https://www.boem.gov/sites/default/files/documents/renewable-energy/DRAFT%20Fisheries%20Mitigation%20Guidance%2006232022_0.pdf">https://www.boem.gov/sites/default/files/documents/renewable-energy/DRAFT%20Fisheries%20Mitigation%20Guidance%2006232022_0.pdf</a>
08/22/22	FTC	Motor Vehicle Trade Regulation Extension	87 Fed. Reg. 42012
08/29/22	FRA	Comment Period Extension on Proposed Train Crew Size Safety Requirements Rule	87 Fed. Reg. 45564
09/08/22	FTC	Motor Vehicle Trade Regulation	87 Fed. Reg. 42012
09/12/22	ED	Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Proposed Rule	87 Fed. Reg. 41390

\*Abbreviations:

APHIS Animal Plant and Health Inspection Service  
BOEM Bureau of Ocean Energy Management  
CEQ Council on Environmental Quality  
CFPB Consumer Financial Protection Bureau  
CMS Center for Medicare and Medicaid Services  
CORPS Army Corps of Engineers  
CPSC Consumer Product Safety Commission  
DOE Department of Energy  
DOI Department of the Interior  
DOL Department of Labor

ED Department of Education  
EPA Environmental Protection Agency  
FCC Federal Communications Commission  
FinCEN Financial Crimes Enforcement Network  
FRA Federal Railroad Administration  
FS Forest Service  
FTC Federal Trade Commission  
FWS Fish and Wildlife Service  
IRS Internal Revenue Service  
NMFS National Marine Fisheries Service  
SEC Securities and Exchange Commission

## Summaries of Advocacy's Public Comments to Federal Agencies

### Army Corps of Engineers

#### ***Issue: Approved Jurisdictional Determinations Under the Navigable Waters Protection Rule***

In response to confusion over whether certain water features are considered “waters of the United States” under the Clean Water Act, the Army Corps of Engineers (Corps) established a program for project proponents to obtain certainty about such status. Under this program, project proponents can obtain an approved jurisdictional determination (AJD) from the Corps, which is “a Corps document stating the presence or absence of waters of the United States on a parcel or written statement and map identifying the limits of waters of the United States on a parcel.” An AJD, generally valid for five years, is considered a final agency action that prevents both the Environmental Protection Agency (EPA) as well as the Corps from taking any action contrary to the AJD. The time and resources expended to obtain an AJD can be significant, ranging in time from weeks to several months and in cost from tens of thousands to hundreds of thousands of dollars.

On January 5, 2022, in response to a federal court decision vacating the regulatory definition of “waters of the United States,” the Corps made an announcement on its website that it would not be reconsidering past AJDs, but that it also would not rely on these AJDs when making new permit decisions, including enforcement actions against projects started in reliance on an AJD that found that no permit was required.

On April 14, 2022, Advocacy wrote to the Corps, expressing a concern that the new policy will have a direct and potentially costly impact on small entities. Advocacy recommended that the Corps revise the policy to provide a clear safe harbor for small entities relying on past AJDs and to directly communicate its new policies to all affected small entities.

### Army Corps of Engineers; Environmental Protection Agency

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

On December 7, 2021, EPA and the Department of the Army published a notice of proposed rulemaking defining “the waters of the United States” under the Clean Water Act. Advocacy commented that the agencies improperly certified the proposed rule under the RFA and that the rule would have a direct and potentially costly impact on small entities. Because of the limited economic analysis which the agencies submitted with the proposed rule and the lack of data on the impacts to small entities, Advocacy advised the agencies to hold the proposed rule in abeyance for the purpose of convening a Small Business Advocacy Review panel.

### Center For Medicare and Medicaid Services

#### ***Issue: Contract Year 2023 Policy and Technical Changes to the Medicare Advantage and Medicare Prescription Drug Benefit Programs***

On January 12, 2022, the U.S. Department of Health and Human Services' Centers for Medicare and Medicaid Services (CMS) published a proposed rule revising the Medicare Advantage (Part C) program and the Medicare Prescription Drug Benefit (Part D) program. CMS justified their modification by arguing that the current regulatory process regarding pharmacy price concessions may have had a negative effect on competition. Prior to the proposed rule, under Medicare Part D, small pharmacies contracted with a pharmacy benefit manager (PBM). These PBMs manage contracts between both the pharmacy and the prescription drug manufacturers and process and pay prescription drug claims. One way that these PBMs generated revenue was by charging fees to the small pharmacies, known as Direct and Indirect Remuneration. These fees include administrative fees, price concessions, performance adjustments, and more. CMS stated that the proposed change was

meant to eliminate any unknowns by the PBM at the point-of-sale so that the transaction is inclusive of all price concessions.

On March 7, 2022, Advocacy submitted comments on the Prescription Drug Benefit (Part D) program. Advocacy and small businesses generally supported CMS' proposed rule. However, Advocacy suggested that further clarity was required to ensure that the revised regulatory policy would have the intended effect.

### Consumer Product Safety Commission

#### ***Issue: Consumer Safety Standard for Operating Cords on Custom Window Coverings***

On March 23, 2022, Advocacy submitted comments on a proposed rule published on January 7, 2022 by the U.S. Consumer Product Safety Commission (CPSC) regarding the need to establish safety standards for operating cords on custom window coverings. Advocacy commented that CPSC's initial regulatory flexibility analysis relies on incomplete information and the CPSC should publish an updated analysis for comment. Advocacy encouraged CPSC to consider alternatives that reduce the burden to small businesses while still meeting the stated objectives of increased child safety. Advocacy also asked CPSC to consider exceptions in situations where corded window coverings are a necessity, such as under the Americans with Disabilities Act.



#### ***Issue: Safety Standard for Clothing Storage Units***

On February 3, 2022, the U.S. Consumer Product Safety Commission (CPSC) published a proposed rule establishing safety standards for clothing storage units (CSUs). The proposed rule requires that CSUs be tested and exceed minimum stability requirements, be marked and labeled with safety information, and bear a hang tag providing data about the unit's stability. Advocacy commented that CPSC's initial regulatory flexibility analysis underestimates the impact the proposed rule will have on small businesses. Advocacy made five requests of CPSC.

Advocacy encouraged CPSC to consider alternatives that reduce the burden to small businesses while still meeting the stated objectives of increased child safety.

Advocacy asked CPSC to consider a later effective date for the rulemaking, and in the interim require small businesses to educate and assist consumers with existing product safety options.

Advocacy asked CPSC to reconsider its two proposed testing methods, as they produce different results that may be confusing for consumers and small businesses alike.

Advocacy suggested CPSC should consider updating existing voluntary standards if it is appropriate to do so.

Advocacy recommended CPSC should also clarify that once a product has been tested and certified, small importers and retailers may rely on that certification without incurring additional testing costs.

## Consumer Financial Protection Bureau

### ***Issue: Small Business Lending Data Collection***

On October 8, 2021, the Consumer Financial Protection Bureau (CFPB) published a notice of proposed rulemaking (NPRM) in the Federal Register entitled Small Business Lending Data Collection under the Equal Credit Opportunity Act. The CFPB's proposal would require financial institutions to collect and report data regarding applications for credit for small businesses, including those that are owned by women and minorities but not women-owned and minority-owned businesses that are not small.

The CFPB estimated that the overall market impact of one-time costs would be between \$143 million and \$153 million for small depository institutions and \$63 million for small non-depository institutions. For ongoing costs, CFPB estimated the overall market impact would be between \$112 million and \$126 million per year for small institutions. Advocacy argued that these costs may be underestimated under the RFA.

The NPRM defined "covered credit transactions" to determine which financial institutions fell within the scope of the rule. In addition, instead of using the Small Business Administration's size standards, the NPRM defined "small" as any businesses that had \$5 million or less in gross annual revenue in the preceding fiscal year. Advocacy encouraged the CFPB to analyze whether setting the definition at a lower level would still garner sufficient data because smaller institutions could decide not to make business loans if it is too burdensome.

## Council on Environmental Quality

### ***Issue: Climate and Economic Justice Screening Tool***

On May 25, 2022, Advocacy submitted public comments to the Council on Environmental Quality (CEQ) on the beta version of its Climate and Economic Justice Screening Tool (CEJS Tool). The CEJS Tool identifies which communities are disadvantaged under the Justice40 Initiative. The Justice40 Initiative instructs federal agencies to direct "40 percent of the overall benefits" from certain Federal investments to bolster clean energy and economic mobility to "disadvantaged communities." Advocacy encouraged CEQ to ensure that the beta version of the CEJS Tool considers additional indicators that identify the diverse types of disadvantaged communities. Advocacy recommended CEQ include additional socioeconomic indicators in the CEJS Tool and that CEQ directly engage with small governmental jurisdictions and their residents to understand what makes a community disadvantaged.

## Department of Agriculture, Forest Service

### ***Issue: Roadless Area Conservation; National Forest System Lands in Alaska***

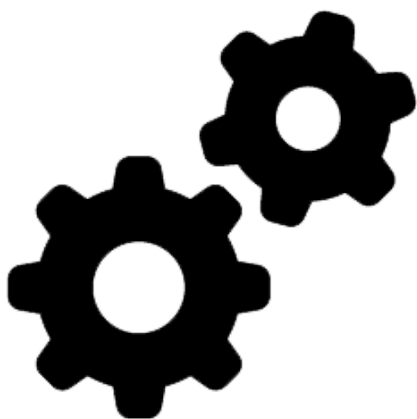
On November 23, 2021, the U.S. Department of Agriculture's Forest Service published a notice of proposed rulemaking to repeal the 2020 final Alaska Roadless Rule. The 2020 final rule exempted the Tongass National Forest from the requirements of the 2001 Roadless Rule, which prohibited timber harvest and road construction within designated areas within Alaska. Advocacy commented that the Forest Service should consider the comments of small businesses, which make up the predominate number of firms in the affected Alaskan industries. Advocacy also encouraged the Forest Service to weigh the impacts of all affected small entities and decide on an approach that minimizes overall small entity impacts while still meeting its stated conservation goals. Advocacy requested that the Forest Service make

the language within the regulatory text consistent with the findings presented in its initial regulatory flexibility analysis. Finally, Advocacy argued the Forest Service should seek comment on regulatory alternatives that will minimize the impact on small businesses while still accomplishing the statutory objective.

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

#### ***Issue: Standards for Birds Not Bred for Use in Research Under the Animal Welfare Act***

On February 22, 2022, the U.S. Department of Agriculture’s Animal Plant and Health Inspection Service (APHIS) published a proposed rule to establish animal welfare standards in birds not bred for research. The proposed rule creates new recordkeeping, licensing, and operational requirements for bird breeders, dealers, and exhibitors. On May 24, 2022, Advocacy filed a public comment letter on the proposed rule. Advocacy and small businesses agree that care should be taken to ensure the health and safety of birds. Advocacy supported the use of performance-based standards in the rulemaking but suggested modifications to minimize the burden to small entities while still meeting the rule’s stated objectives.



As of September 30, 2022, APHIS sent a draft final rule to the Office of Information and Regulatory Affairs for review. That rule was published on February 1, 2023.

### **Department of Commerce, National Marine Fisheries Service**

#### ***Issue: Comments on the Atlantic Large Whale Take Reduction Plan***

On September 17, 2021, the U.S. Department of Commerce’s National Marine Fisheries Service (NMFS) published a final rule implementing the Atlantic Large Whale Take reduction plan. The plan aims to reduce incidental mortality and serious injury to three species of whales in the northeast United States. Advocacy asked NMFS to grant a 60-day delay of the May 1, 2022 implementation deadline for the final rule to allow small businesses additional time to procure gear necessary for compliance with the rule. Advocacy cited significant manufacturing and supply chain delays and noted that many small fishermen struggled to obtain the necessary gear to comply with the requirements of the rule.

As of the time of this report, NMFS did not extend the compliance deadline but said it would relax enforcement of the requirements until the necessary gear was more readily available. The agency did not specify how it would relax such enforcement.

### **Department of Commerce, National Marine Fisheries Service; Department of the Interior, Fish and Wildlife Service**

#### ***Issue: Regulations for Designating Critical Habitat***

On October 27, 2021, the U.S. Department of the Interior’s Fish and Wildlife Service (FWS), along with the NMFS, published a proposed rule rescinding the 2020 final rule that added a definition of “habitat” to regulations implementing Section 4 of the Endangered Species Act. On the same date, FWS published a proposed rule rescinding its 2020 final rule that revised policies and procedures



for implementing exclusionary analysis when designating critical habitats.

Advocacy suggested that rather than completely rescinding both 2020 rules, the agencies should instead revise the rules to address agency concerns but retain provisions for regulatory transparency and certainty. Advocacy asked that the agencies extend the comment periods for both rules, and further argued that the agencies should not resort to a case-by-case analysis for determining whether an unoccupied area is habitat of the species. Advocacy was concerned that this would lead to more unoccupied areas being designated despite those areas not being actual habitat of the species and despite a Supreme Court decision. Finally, Advocacy asked the agencies not to remove provisions of its 2020 final rule pertaining to exclusionary analysis and should instead modify the language within the rule to address concerns raised by the agency.

As of the time of publication of this report, the agencies finalized both rules with few if any changes.

## Department of Education

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

On September 12, 2022, the Office of Advocacy filed public comments in response to the Department of Education's (ED) proposed rulemaking on "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance." The proposed rule would ban all forms of sex discrimination. The rule would also expand the definition of sex discrimination to encompass discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. The proposal will no longer require live hearings for Title IX investigations and reverts the definition of sexual harassment back to "unwelcome sex-based conduct that creates a hostile environment by denying or limiting" a person's ability to participate in a school's

education program or activity. The current rule prohibits unwelcome sex-based misconduct only if it is "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."

ED published an IRFA that failed to define and analyze economic impacts to small entities outside of the education sector that will be subject to Title IX, such as libraries, museums, and nonprofits. In comments, Advocacy recommended that ED use the SBA size standards to analyze small entity impacts or provide additional detailed analysis supporting continuing the use of an enrollment-based standard. Advocacy also recommended ED publish for public comment an IRFA that considers significant alternatives and includes sufficient analyses to measure and consider the regulatory impacts of the proposed rule on all affected small entities. The IRFA should also give interested parties enough information to file meaningful comments.

## Department of Energy

### ***Issue: Request for Information on Social Science Research Related to Offshore Wind***

On February 9, 2022, the U.S. Department of Energy's (DOE) Office of Energy Efficiency and Renewable Energy, Wind Energy Technologies Office published a request for information on research needs related to community effects from offshore wind energy development. Advocacy asked DOE to analyze the impacts of offshore wind development on small businesses including small coastal communities. This research will assist developers in understanding the impacts of their activities on the existing community. The research will also show how they can better engage with these stakeholders prior to development to ensure that both are able to co-exist.

### ***Issue: Request to Reopen Comments on Energy Conservation Program for Appliance Standards***

On April 12, 2021, DOE published a proposed rule to update policies for consideration in new or revised energy conservation standards and test procedures for consumer products and commercial and industrial equipment (2021 Process Rule). In December 2021, the National Academies of Sciences published a report entitled, “Review of Methods Used by the U.S. Department of Energy in Setting Appliance and Equipment Standards,” recommending improvements that Advocacy believes should be properly considered in the 2021 Process Rule. The National Academies of Science report also includes useful findings that may inform future DOE energy efficiency rulemakings. Considering the report’s findings, Advocacy requested that DOE reopen the public comment period on its final rulemaking and the concurrent proposed rulemaking to give the public the opportunity to review and provide comments on the findings of the report as they pertain to the rules.

## **Department of the Interior**

### ***Issue: Advancing Racial Equity and Support for Underserved Communities Through Recreation Opportunities***

On October 19, 2021, the U.S. Department of the Interior (DOI) published a request for comment regarding implementation of Executive Order 13985 on advancing equity in underserved communities. On November 18, 2021, Advocacy filed a comment letter encouraging DOI to revise its policies to ensure greater equity for small businesses, small governmental jurisdictions, and small organizations. Advocacy also encouraged DOI to adopt permanent strategies by which the agency will measure and increase equity within its policies and rulemakings.

Advocacy asked DOI to offer opportunities for virtual participation in meetings and a variety of scheduling options including different times and days to accommodate schedules of commenters. In addition, Advocacy recommended that DOI

lengthen the time for written public comments so that all interested stakeholders have a chance to submit meaningful substantive comments. Advocacy also made additional recommendations to various programs and policies including under the Historical Preservation Act, concessions contract bidding process, user and special use fees, permitting for special events, and impacts of critical habitat designations.

As of the time of this report, DOI published an agency equity action plan that addressed some but not all of Advocacy’s concerns. Advocacy wrote a summary of DOI’s responses, available online at <https://advocacy.sba.gov/2022/04/27/interior-equity-action-plan-addresses-small-business-concerns/>.

## **Department of the Interior, Bureau of Ocean Energy Management**

### ***Issue: Mitigating the Impacts of Offshore Wind Development on Fisheries***

On November 22, 2021, the U.S. Department of the Interior’s Bureau of Ocean Energy Management (BOEM) published a Request for Information on Reducing or Avoiding Impacts of Offshore Wind Energy on Fisheries. Advocacy made the following comments on the request for information. First, BOEM’s guidance documents should not be “one and done.” Rather, the agency should conduct ongoing outreach and outline plans for regular updates. Second, BOEM should publish small business impact analyses within its draft environmental impact statements.



### ***Issue: Environmental Assessment for the Morro Bay Offshore Wind Energy Area***

On April 6, 2022, BOEM published a draft environmental assessment for the Morro Bay Wind Energy Area. On May 16, 2022, Advocacy filed a public comment letter on the assessment. In its letter, Advocacy suggested that BOEM should conduct and include a small business impact analysis in its final environmental assessment for the call area. The analysis will provide greater transparency to impacted small entities and ensure that they are considered throughout the leasing process.

As of the time of this report, BOEM has committed to earlier opportunities for input in the leasing process including allowing public comments on call area notices and other proposals. BOEM will also release the rationale for the specific areas chosen.

### ***Issue: Mitigating the Impacts of Offshore Wind Development on Fisheries***

On June 7, 2022, BOEM published a proposed guidance for mitigating the impacts of offshore wind energy on fisheries. On August 22, 2022, Advocacy filed public comments on the proposal. While Advocacy noted BOEM's attempts to ensure that offshore wind developers are mitigating the impacts of their actions on small businesses, the guidance lacked specificity and adequate data regarding the actual impacts of these activities. Advocacy requested that BOEM conduct a Regulatory Flexibility Act analysis in its draft Environmental Assessments and Environmental Impact Statements to ensure that the agency and developers are properly considering the impacts of offshore wind development projects on small businesses. Advocacy also asked BOEM to commit to updating its guidance on a regular basis and find ways to incentivize mitigation measures for developers.

## **Department of the Interior, Fish and Wildlife Service**

### ***Issue: Endangered and Threatened Wildlife and Plants; Designation of Experimental Populations***

On June 7, 2022, FWS proposed a rule to remove language that restricts the introduction of experimental populations of endangered and threatened species outside of the species' "historical range." Advocacy commented that it does not believe the rule is necessary to accomplish FWS's intended objectives, as these provisions already exist within the statute. If, however, FWS wishes to proceed, the agency must conduct a proper Regulatory Flexibility Act analysis of the proposed rule that considers the impacts on small entities. FWS should also consider modifications to the proposed rule that would eliminate uncertainty and ambiguity for regulated entities.

## **Department of Labor**

### ***Issue: Revising Wage Methodology for Agricultural Guest Workers***

On December 1, 2021, the U.S. Department of Labor (DOL) Employment and Training Administration proposed a rule to revise the wage methodology of temporary agricultural guest workers in the H-2A visa program. DOL determines the Adverse Effect Wage Rate or the rate that will not adversely affect the wages and working conditions of workers in the United States. Small businesses use the H-2A visa program to obtain a vital supply of foreign agricultural guest workers for temporary and seasonal needs due to the shortage of local U.S. workers.

On January 31, 2022, Advocacy submitted a public comment letter to DOL on this rule, arguing that DOL's certification is improper and lacks an adequate factual basis. Additionally, DOL significantly underestimated the economic impacts of this rule, such as significant wage increases and administrative costs from extra petitions for multiple job categories.

Advocacy recommended that DOL prepare and make available for public comment an initial regulatory flexibility analysis that adequately assesses the small business compliance costs from this regulation and consider significant alternatives that would accomplish the objectives of the statute while minimizing the economic impacts to small entities.

#### ***Issue: Updating Davis-Bacon Act for Federal Construction Contracts***

On March 18, 2022, the DOL's Wage and Hour Division published a proposed rule updating the Davis-Bacon Act and Related Acts (DBRA). The Davis-Bacon Act applies to federal contracts that are over \$2,000 for the construction, alteration, or repair of public buildings or public works. Under the DBRA, DOL determines wage rates that are prevailing for each classification of covered laborers and mechanics, as determined by voluntary wage surveys of contractors.

On May 17, 2022, Advocacy filed a comment letter recommending that DOL reassess the impact of this rule on small entities in a new IRFA. Advocacy commented that DOL's IRFA as published does not adequately estimate the number of small businesses affected by this rule and their compliance costs. Small businesses were concerned that the rule's definitions expand coverage of the DBRA to businesses including prefabrication businesses, material suppliers, truck drivers, demolition companies, flaggers, surveyors, and green technology businesses. DOL also underestimated the administrative burdens and compliance costs of this complicated regulation at only \$100 per small business in first year costs. Advocacy recommended that DOL consider significant alternatives that would accomplish the objectives of the statute while minimizing the economic impacts to small entities.

## **Department of Transportation, Federal Railroad Administration**

#### ***Issue: Comment Period Extension on Proposed Train Crew Size Safety Requirements Rule***

On July 28, 2022, the Federal Railroad Administration (FRA) published a proposed rule on train crew size safety requirements. The proposed rule would require a minimum of two crewmembers for all railroad operations, with exceptions for operations that do not pose significant safety risks to railroad employees, the public, or the environment; minimum requirements for the location of crewmembers on moving trains to promote safe and effective teamwork; and a special approval procedure to allow railroads to petition FRA to continue legacy operations with one-person train crews and allow any railroad to petition FRA for approval to initiate a new train operation with fewer than two crewmembers.

The comment period for the proposed rule was scheduled to close on September 26, 2022. However, based on input from small business representatives in the short line and regional railroad sector, Advocacy recommended that FRA extend the public comment period by at least 60 days to give small businesses more time to assess the impact and provide more meaningful comments on the proposed rule.



## Department of Treasury, Financial Crimes Enforcement Network (FinCEN)

### ***Issue: Beneficial Ownership Information Reporting Requirements***

On December 8, 2021, the Department of Treasury, Financial Crimes Enforcement Network (FinCEN) published a notice of proposed rulemaking on Beneficial Ownership Information Reporting Requirements in the Federal Register. The proposed regulations would implement Section 6403 of the Corporate Transparency Act, which was enacted into law as part of the National Defense Authorization Act.

The proposed rule is to help prevent and combat money laundering, terrorist financing, tax fraud, and other illicit activity. It prescribes: (1) who must file, (2) when they must file, and (3) what information must be provided. For the purpose of the IRFA, FinCEN assumed that all entities estimated to be reporting companies were small.

Congress allowed for more flexibility than FinCEN proposed. Advocacy encouraged FinCEN to allow for the maximum flexibility allowed in the statute and extend the compliance requirements accordingly. Section 212 of SBREFA requires agencies to provide a compliance guide for each rule (or related series of rules) that requires a final regulatory flexibility analysis. Advocacy encouraged FinCEN to provide a clear and concise compliance guide that provides information about the requirements of the rule.

FinCEN finalized the rule on September 30, 2022, retaining the reporting timelines. With respect to corrected reports, FinCEN extended the filing deadline from 14 to 30 days to provide reporting companies with adequate time to obtain and report the correct information. FinCEN also agreed to publish a compliance guide as required by statute.

## Environmental Protection Agency

### ***Issue: Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Methane Emissions***

On November 15, 2021, EPA published a proposed rule to set new requirements for methane emissions from sources in the oil and natural gas sectors of the economy. These requirements included work practices, monitoring requirements, and equipment bans. The rule would have provisions covering new sources (those sources established as of November 15, 2021) and existing sources. This notice of proposed rulemaking, however, did not include the text or analysis of the costs of the regulation. Instead, EPA committed to publishing a supplemental notice of proposed rulemaking.

EPA convened a SBREFA panel on this rule in summer 2021 to consult with small entities that would be affected by the new source standards. Small entities were generally concerned about the significant cost of frequent monitoring, particularly for low-producing or inactive small wells. They were particularly concerned about the cost of Optical Gas Imaging (OGI). EPA believes that OGI is a lower-cost alternative to current monitoring techniques, but small businesses were concerned that EPA underestimated the cost of OGI and the ease of getting the contractors and equipment to perform it.

On December 15, 2021, Advocacy filed a public comment requesting an extension of the comment period due to the length and complexity of the proposed rule, which was not granted.

On January 31, 2022, Advocacy filed a public comment letter on this proposed rule. Advocacy expressed concerns that EPA had not fully considered the impact of the proposed rule on small businesses. Advocacy recommended EPA analyze the costs of every provision of its proposal, recognize that small entities often face disproportionate costs for similar regulatory requirements, and consider a broader

range of regulatory flexibilities to reduce the cost to small businesses.

***Issue: Addition of Certain Chemicals; Community Right-to-Know Toxic Chemical Release Reporting***

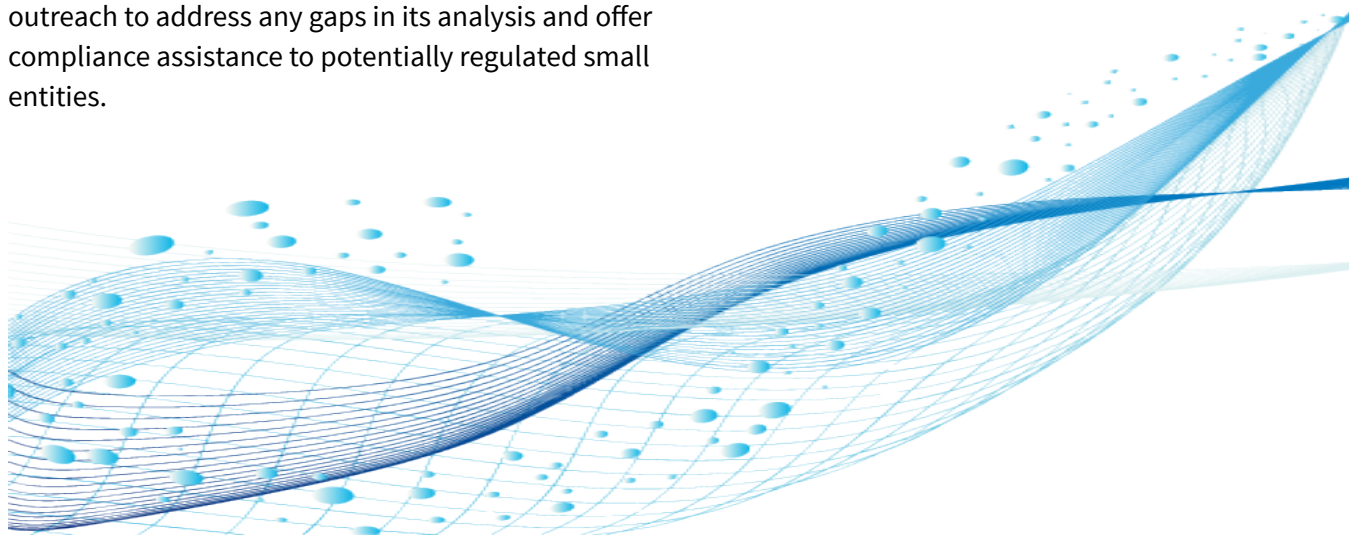
On October 18, 2021, EPA proposed to add 1,3,4,6,7,8-hexahydro-4,6,6,7,8,8-hexamethylcyclopenta[g]-2-benzopyran (HHCB), along with 11 other chemicals, to the list of toxic chemicals subject to the reporting requirements under the Emergency Planning and Community Right-To-Know Act and the Pollution Prevention Act, which will require reporting in the Toxic Release Inventory publicly available database. Moreover, EPA proposed adding HHCB to the list of chemicals of special concern as a persistent, bioaccumulative, and toxic chemical with the lower, 100-pound reporting threshold. HHCB is primarily used as a fragrance additive in several consumer products.

On December 17, 2021, Advocacy filed public comments to express its concerns about the impact of this rule given the extremely low threshold for reporting and the multiple downstream users of HHCB who would be subject to the rule's requirements. Advocacy recommended the agency assess the number of small entities that could be subject to the proposed requirements using the most recently available information. Advocacy also recommended the agency engage in targeted outreach to address any gaps in its analysis and offer compliance assistance to potentially regulated small entities.

***Issue: Petition to Revise the Non-Hazardous Secondary Material Standard***

On January 28, 2022, EPA published its proposed response denying an industry petition to revise the Non-Hazardous Secondary Material regulations. These regulations consist of standards and procedures that are used to identify whether non-hazardous secondary materials are solid wastes when used as fuels or ingredients in combustion units. The denied requests included removing the mandatory "contaminant comparison" in the rule's legitimacy criteria and removing associated "designed to burn" and other limitations for creosote-treated railroad ties (CTRTs).

On March 29, 2022, Advocacy filed public comments to express its concern that EPA overlooked important relevant factors in its proposed decision to retain the limitation on the use of CTRTs. Advocacy explained that the agency has the discretion to increase the capacity to use CTRTs as a fuel source. As a result, Advocacy recommended that EPA take the necessary actions to promote the productive and less impactful use of CTRTs as a fuel source. Advocacy also recommended that EPA address the one-year railroad tie storage timeframe by providing compliance flexibilities for the affected small entities.



***Issue: TSCA Asbestos Reporting Rule***

On May 6, 2022, EPA published a proposed rulemaking on reporting and recordkeeping requirements for asbestos under the Toxic Substance Control Act. The proposed rule imposes a one-time electronic reporting requirement for information regarding asbestos. It applies to entities that manufactured (including imported) or processed asbestos and asbestos containing articles (including as an impurity) in the four years prior to the date of publication of the final rule.

On July 5, 2022, Advocacy submitted public comments to express concerns highlighting the agency's improper certification under the RFA, small businesses' ability to comply with the rule, and the lack of public notice about EPA's SBA consultation for the proposed definition for small processors. Advocacy recommended EPA address its concerns by improving its analysis to support its RFA certification or conducting a SBREFA panel. Advocacy also recommended that the agency clarify the scope of the rule and consider burden-reducing compliance flexibilities for small businesses, including an exemption for reporting for the presence of asbestos as an impurity. Finally, Advocacy recommended that the agency reopen the docket to solicit feedback from small entities on its SBA consultation.

***Issue: Clean Water Act Hazardous Substance Worst Case Discharge Planning Rule***

On March 28, 2022, EPA published a proposed rule that would require certain facilities to plan and prepare for a worst-case discharge of a hazardous substance into navigable waters. The proposal set a threshold for compliance based on the capacity of a facility.

On July 25, 2022, Advocacy filed public comments raising a concern about the burden on facilities owned or operated by small entities that do not pose a risk of substantial harm to the environment. Advocacy recommended that EPA modify its threshold by requiring facilities to comply with the

planning and preparation requirements only if the facility has an amount of the hazardous substance on site to pose a substantial harm to the environment.

***Issue: Water Quality Certification Improvement Rule***

On June 9, 2022, EPA published a notice of proposed rulemaking on the Water Quality Certification Improvement Rule under the Clean Water Act. This proposal would require applicants for water quality certifications to provide more information to the states and tribes that make these certifications. This additional information would include draft federal permits and licenses.

On August 5, 2022, Advocacy filed public comments stating that the proposed rule had been improperly certified under the Regulatory Flexibility Act because EPA had not considered the burden on small entities of obtaining and submitting draft federal permits and licenses. Advocacy further believes that project proponents should not be required to submit draft federal permits and licenses. Federal agencies do not generally make draft permits available to applicants and, in some cases, do not prepare draft permits until after the water quality certification is being considered by the state or tribe.

**Federal Communications Commission*****Issue: Improving Competitive Broadband Access to Multiple Tenant Environment***

On January 20, 2022, Advocacy filed a letter with the Federal Communications Commission (FCC) regarding its proceeding to improve competitive broadband access in multi-tenant environments (MTEs). In the letter, Advocacy shared the importance of a competitive broadband market to small businesses and highlighted the comments of competitive broadband providers regarding possible barriers to competition in MTEs. Advocacy also recommended that the FCC consider if there are ways to overcome obstacles to greater broadband deployment other than allowing broadband providers



to create monopolies in individual MTEs. Specifically, Advocacy pointed to the broadband grant programs funded under the 2021 Infrastructure Investment and Jobs Act.

The FCC voted to adopt several of Advocacy's recommendations in February 2022. These included rules to prohibit broadband providers from entering into certain revenue sharing agreements with building owners, rules requiring providers to inform tenants about the existence of exclusive marketing arrangements with building owners, and a Declaratory Ruling, clarifying that the FCC's existing cable inside wiring rules prohibit sale-and-leaseback arrangements that block competitive access to alternative providers.

## Federal Trade Commission

### ***Issue: Extension of Implementation Period for the Standards for Safeguarding Customer Information***

On April 4, 2019, the Federal Trade Commission (FTC) published a notice of proposed rulemaking on Standards for Safeguarding Customer Information (Safeguards Rule). The proposal contains modifications to the existing rule. On July 31, 2019, Advocacy submitted a letter to the FTC regarding the Safeguards Rule.

Trade associations told Advocacy that the proposal was overly prescriptive and created a high burden for small entities without any data on how it will lower risks to consumers. Advocacy expressed concerns about the lack of data on the potential impact. Data would allow the FTC to thoroughly assess the impact of this action on small entities.

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

by the SBA size standards, until FTC can ascertain the potential impact.

On December 9, 2021, the FTC published a final rule to amend the Safeguards Rule. The final rule adds provisions designed to provide covered financial institutions with more guidance on how to develop and implement specific aspects of an overall information security program. Because of the shortage of labor, lack of external resources, and necessary equipment, small entities were concerned that they would not be able to comply with the requirements of the rule by the effective date of December 9, 2022.

On August 5, 2022, Advocacy submitted a letter requesting that the implementation date be extended to December 9, 2023.

### ***Issue: Motor Vehicle Trade Regulation and Recommendation that the Comment Period Be Extended***

On July 13, 2022, the FTC published a NPRM related to the sale, financing, and leasing of motor vehicles by motor vehicle dealers. The NPRM would prohibit motor vehicle dealers from making certain misrepresentations, require accurate pricing disclosures in dealers' advertising and sales discussions, require dealers to obtain consumers' express consent, require informed consent for charges, prohibit the sale of any add-on product or service that confers no benefit to the consumer, and require dealers to keep records of advertisements and customer transactions.

On August 22, 2022, Advocacy recommended an extension of the comment period for a NPRM related to the sale, financing, and leasing of motor vehicles by motor vehicle dealers. The proposed rule contained 49 questions that required extensive research by the industry. Advocacy argued that the small entities that would be required to comply with the regulation were in the best position to provide the FTC with information about the potential costs associated with the proposal, but the amount of time

provided for the comments was insufficient. This information was crucial for determining the economic impact of the rule and for considering less costly alternatives as required by the Regulatory Flexibility Act.

The comment period closed without an extension.

### ***Issue: Motor Vehicle Trade Regulation***

On September 8, 2022, Advocacy submitted a comment letter on the FTC's notice of proposed rulemaking on the Motor Vehicle Trade Regulation. In the NPRM, the FTC stated that the rulemaking would not have a significant economic impact on small entities. However, the FTC did not provide a description of the impact of the rule as required by the Regulatory Flexibility Act. Since the FTC did not consider alternatives, the document is not an Initial Regulatory Flexibility Analysis, and the FTC's certification is not supported by a factual basis. Advocacy encouraged the FTC to perform threshold analyses to determine whether the costs associated with the proposal are significant. If the threshold analysis indicates that there is a significant economic impact, Advocacy encouraged the FTC to prepare and publish an IRFA outlining the costs associated with the rulemaking.

## **Internal Revenue Service**

### ***Issue: Required Minimum Distributions***

On February 24, 2022, the Internal Revenue Service (IRS) published a notice of proposed rulemaking to amend the income tax regulations on required minimum distributions (RMDs) from qualified retirement plans. The proposal would modify the RMD requirements for plans qualified under section 401(a) of the Internal Revenue Code of 1986 to reflect the amendments made by sections 114 and 401 of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act).

In addition, the SECURE Act established new distribution rules for the designated beneficiaries (who are not eligible designated beneficiaries) of

defined contribution plans and IRAs whose owners die after December 31, 2019. The new rules require that balances inherited by those beneficiaries be distributed by the end of the 10th year after the original account owner or plan participant dies, regardless of whether the deceased retirement saver had begun required distributions. In many cases, this 10-year rule shortened the required distribution period from the lifetime of the designated beneficiary to 10 years. The proposed rulemaking would modify the existing RMD regulations in accordance with the SECURE Act for calendar years beginning on or after January 1, 2022.

On May 23, 2022, Advocacy submitted a public comment letter to IRS about the proposed RMD regulation amendments. In the letter, Advocacy voiced multiple concerns about the proposed rulemaking. First, in accordance with feedback from small business representatives in the tax and employee benefits industries, Advocacy expressed concerns about the proposal's interpretation of the 10-year rule. Second, Advocacy relayed stakeholder concerns about the effective date and compliance deadlines found in the proposed rulemaking given that many practitioners' good-faith interpretations of the 10-year rule differed from the proposed regulations. Finally, Advocacy expressed concerns that IRS's certification that the proposed rules will not have a significant economic impact on a substantial number of small entities lacked an adequate factual basis.

## Securities and Exchange Commission

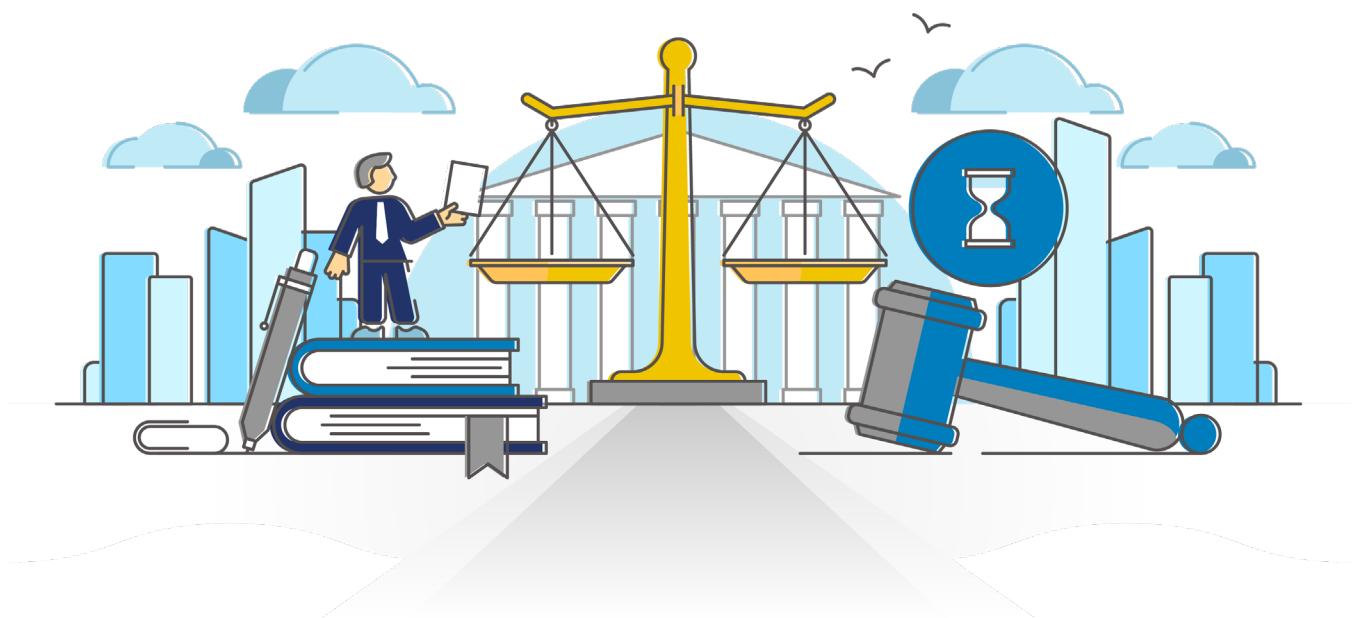
### ***Issue: Cybersecurity Risk Management , Strategy, Governance, and Incident Disclosure***

On March 23, 2022, the Securities and Exchange Commission (SEC) published proposed rules that would enhance and standardize disclosures regarding cybersecurity risk management, strategy, governance, and cybersecurity incident reporting by public companies subject to the reporting requirements of the Securities Exchange Act of 1934 (Exchange Act). The proposed rules were intended to provide investors with additional information about cybersecurity risks by amending Regulation S-K, Regulation S-T, the Securities Act of 1933, and the Exchange Act. The amendments would require registrants to provide current and periodic reporting of material cybersecurity incidents and periodic disclosures about a registrant's policies and procedures to identify and manage cybersecurity risks.

On May 6, 2022, Advocacy submitted comments on the proposed rules. Advocacy was concerned that the IRFA published with the proposed rules did not adequately describe the regulated small entities or the costs of the proposed amendments to

those entities. SEC also did not analyze significant alternatives that would accomplish its stated objectives while minimizing the significant economic impact of the proposal on small entities.

Advocacy was particularly concerned that the IRFA did not adequately analyze the relative impact of costs to small entities, given that the rules would impose similar costs on large and small businesses. To help SEC understand the cost burden faced by small entities, Advocacy recommended that it further analyze the impact of the proposed rules on small entities and consider regulatory alternatives in a supplemental IRFA. Advocacy recommended that the supplemental IRFA should include a detailed analysis of each potential alternative and discuss how that alternative might reduce the economic burden on small entities.





### ***Issue: Enhancement and Standardization of Climate-Related Disclosures***

On April 11, 2022, SEC published a notice of proposed rulemaking that would require public companies to provide detailed disclosures about climate-related risks and climate-related financial metrics in their registration statements and annual reports. Among other requirements, a major component of the proposed climate disclosures is the requirement that registrants disclose greenhouse gas (GHG) emissions. The SEC based its proposed emissions disclosure rules on the Greenhouse Gas Protocol, which uses the concept of “scopes” of emissions to delineate emissions that are directly attributable or indirectly attributable to a given company. Companies would be required to disclose information about direct GHG emissions (Scope 1) and indirect GHG emissions from purchased electricity or other forms of energy (Scope 2). Small entities would be exempt from rules requiring additional disclosure of GHG emissions from upstream and downstream activities in a company’s value chain (Scope 3), but not from the proposed Scope 1 or Scope 2 emissions disclosure requirements.

On June 17, 2022, Advocacy submitted public comments to SEC. Those comments supported SEC’s commitment to ensure that investors have consistent and reliable information, including information about companies’ climate-related risks and metrics. Nevertheless, the office expressed concerns that the climate disclosure rules would impose fixed costs that would fall disproportionately on small entities.

Advocacy expressed concerns about the widespread economic impacts of the proposed climate disclosure rules on both public and privately owned small businesses. First, Advocacy stated that the IRFA in the proposed rules lacked essential information required by the RFA. Second, despite potentially vast effects on the broader economy due to the proposed rules’ Scope 3 emissions requirements, the proposal did not consider indirect impacts to privately owned businesses that are not generally subject to SEC regulation.

For these reasons, Advocacy recommended that SEC publish a supplemental IRFA for public comment before proceeding with the rulemaking. Advocacy further recommended that SEC reconsider its requirements for the Scope 3 GHG emissions disclosure when considering the impacts these rules could have on the small business community.

## Chapter 5

# Small Business Regulatory Cost Savings and Success Stories

In FY 2022, small businesses saved \$73.5 million in estimated forgone regulatory cost savings because of the Regulatory Flexibility Act and the Office of Advocacy's (Advocacy) 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 three actions. Compliance cost savings for small businesses that resulted from these actions arose from the modification, withdrawal, or delay of final and proposed regulations.

One of this year's cost savings surrounded the Department of Defense's (DOD) Cybersecurity Maturity Model Certification. After Advocacy contacted DOD with concerns about the draft model, DOD announced in November 2021 that the original framework for the model would not be implemented. These led to roughly \$62.7 million in estimated cost savings.

Another cost savings involved the Environmental Protection Agency (EPA) allowance allocation and trading program for hydrofluorocarbons (HFC). During the public comment procedure, Advocacy raised concerns about the cost and feasibility of the proposed ban on disposable HFC cylinders and a new HFC reporting and tracking system. This change led to \$7.9 million in cost savings.

A third cost savings was related to the EPA's Fifth Revisions to the Unregulated Contaminant Monitoring Rule (UCMR 5). Originally, EPA proposed regulatory language that would have required all small public

water systems participate in UCMR 5 regardless of whether EPA would pay for their non-labor costs of compliance. After Advocacy encouraged the agency to comply with the America's Water Infrastructure Act of 2018, EPA modified the rule to comply with the Act's appropriations limitations. This led to roughly \$2.9 million in cost savings.

Table 5.1 summarizes the cost savings from three final actions at three federal agencies in FY 2022.

There were also eight successes throughout FY 2022 that were not quantifiable. One success came from the Department of Interior, which prepared an Equity Action Plan in response to an Advocacy letter encouraging the agency to better comply with Executive Order 13985. The plan outlines DOI's efforts to remove barriers to access in agency programs, and per Advocacy's request, directly provides revisions targeted toward ensuring greater equity for small entities.



In another case, Advocacy requested the EPA conduct a small business advocacy review panel regarding reporting requirements for perfluoroalkyl and polyfluoroalkyl substances. The EPA agreed to convene a panel to solicit feedback from impacted small businesses. The panel was completed on August 2, 2022, and the agency plans to issue an initial regulatory flexibility analysis for public comment.

In addition, Advocacy commented on a Federal Communications Commission rule regarding improving broadband competition in multi-tenant environments. Advocacy's letter shared the importance of a competitive broadband market to small businesses and suggested specific policies for reducing barriers to entry for broadband providers. The Federal Communications Commission adopted these suggestions, citing Advocacy's comments in the final proceeding.

**Table 5.1 Summary of Small Business Regulatory Cost Savings, FY 2022**

Agency	Rule	Initial cost savings (\$million)	Recurring cost savings (\$million)
Department of Defense	Cybersecurity Maturity Model Certification <sup>1</sup>	62.7	62.7
Environmental Protection Agency	Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act <sup>2</sup>	7.9	7.9
	Unregulated Contaminant Monitoring Rule 5 (UCMR 5) <sup>3</sup>	2.9	2.9
Total Foregone Regulatory Cost Savings, FY 2022		73.5	73.5
<p>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 because 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.</p> <p>Sources:</p> <p>1. 87 Fed. Reg. 16590 (March 23, 2022).</p> <p>2. 86 Fed. Reg. 27150 (May 19, 2021).</p> <p>3. 86 Fed. Reg. 13846 (March 11, 2021).</p>			

## Descriptions of Cost Savings

### Department of Defense

#### ***Issue: Cybersecurity Maturity Model Certification***

In September 2019, the Department of Defense (DOD) released its new Cybersecurity Maturity Model Certification, designed to bring its entire industrial base up to date with the latest cybersecurity protections. Advocacy responded to the DOD on September 25, 2019 with concerns about the draft model. Following the completion of an internal assessment, the DOD announced in November 2021 that the original CMMC framework would not be implemented.

Based on DOD's analysis of the Cybersecurity Maturity Model Certification program, Advocacy's actions contributed to annual cost savings of \$62.7 million annualized over 10 years at a 7 percent discount rate through the removal of the final rule.

### Environmental Protection Agency

#### ***Issue: Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act***

On October 5, 2021, EPA published a final rule entitled "Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act." The rule implemented the Hydrofluorocarbon (HFC) phase-down required by the American Innovations and Manufacturing Act. On July 6, 2021, Advocacy wrote a comment letter raising concerns about the cost and feasibility of the proposed ban on disposable HFC cylinders and a new HFC reporting and tracking system. In the final rule, EPA delayed implementation of these provisions by around two years.

The delay of the disposable cylinder ban will save small businesses \$4.9 million in annualized costs, and the delay of the HFC reporting and tracking system will save small businesses \$3.0 million in annualized

costs, totaling \$7.9 million in cost savings over 10 years at a 7 percent discount rate.

#### ***Issue: Unregulated Contaminant Monitoring Rule 5 (UCMR 5)***

On December 27, 2021, the Environmental Protection Agency (EPA) published its final Fifth Revisions to the Unregulated Contaminant Monitoring Rule (UCMR 5) for Public Water Systems (PWS) under the Safe Drinking Water Act. Under this law, no more than 30 qualifying unregulated contaminants can be selected by EPA for inclusion in the UCMR program. The unregulated contaminants listed in a UCMR are to be monitored by large public water systems and a representative sample of small public water systems, which serves between 25 and 10,000 people.

The America's Water Infrastructure Act of 2018 (AWIA) amended the Safe Drinking Water Act by requiring that EPA pay for all non-labor costs for all small PWS serving between 3,300 and 10,000 people to monitor for the unregulated contaminants in UCMR 5. In addition, AWIA requires that, subject to the availability of appropriations, EPA pay for all non-labor costs for a representative sample of small PWS serving between 25 and 3,300 people to monitor for the unregulated contaminants in UCMR 5.

EPA selected lithium as well as 29 per- and polyfluoroalkyl substances to be included in UCMR 5. In its proposed UCMR 5, EPA proposed regulatory language that would have required all small PWS to participate in UCMR 5 regardless of whether appropriations were available for EPA to pay for the non-labor costs of small PWS. Advocacy encouraged the agency to modify the regulatory text to clearly comply with the AWIA's appropriations limitation. In its final UCMR 5, EPA modified the rule such that the regulatory text comported with the AWIA's appropriations limitation for small PWS participation.

As a result, EPA's revisions to the final UCMR 5 have potentially saved small public water systems an estimated \$2.9 million annualized over ten years at a discount rate of 7%.

**Table 5.2 Summary of Small Business Regulatory Success Stories, FY 2022**

Agency	Rule
Department of Commerce	Atlantic Large Whale Take Reduction <sup>1</sup>
Department of the Interior	Equity Action Plan <sup>2</sup>
Department of the Treasury, Financial Crimes Enforcement Network	Beneficial Ownership <sup>3</sup>
Environmental Protection Agency	EPA's Proposed TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances <sup>4</sup>
Federal Communications Commission	Supply Chain Security—Equipment Authorization Rule <sup>5</sup>
	Small Provider Exception for STIR/SHAKEN <sup>6</sup>
	Broadband Competition in Multi-tenant Environments <sup>7</sup>
Internal Revenue Service	Required Minimum Distributions <sup>8</sup>
<p>Sources:</p> <ol style="list-style-type: none"> <li>1. 86 Fed. Reg. 51970 (September 17, 2021).</li> <li>2. 86 Fed. Reg. 57848 (October 19, 2021).</li> <li>3. 87 Fed. Reg. 59498 (September 30, 2022).</li> <li>4. 86 Fed. Reg. 33926 (June 28, 2021).</li> <li>5. 86 Fed. Reg. 46644 (September 19, 2021).</li> <li>6. 87 Fed. Reg. 3684 (January 25, 2022).</li> <li>7. 87 Fed. Reg. 17181 (March 28, 2022).</li> <li>8. 87 Fed. Reg. 10504 (February 24, 2022).</li> </ol>	

## Success Story Descriptions

### Department of Commerce

#### ***Issue: Atlantic Large Whale Take Reduction***

On September 17, 2021, the U.S. Department of Commerce's National Marine Fisheries Service (NMFS) published a final rule implementing the Atlantic Large Whale Take reduction plan. The plan aims to reduce incidental mortality and serious injury to three species of whales in the northeast United States. On March 3, 2022, Advocacy submitted comments to NMFS regarding the rule. Advocacy asked the agency to delay implementation of the

final rule by 60 days to allow small businesses time to comply. In its letter, Advocacy cited challenges with receiving manufactured gear in a timely manner due to shipping delays and a lack of available manufacturers of the equipment. Advocacy estimated that if fishermen were forced to cease operations due to gear shortages, they would lose approximately \$7.3 million per month in revenue during their busy seasons. In response to letters from Advocacy and other small business representatives, NMFS announced a graduated enforcement policy for the rulemaking to allow fishermen with good-faith efforts to receive additional time to secure necessary gear.

While NMFS did not provide specific details regarding how long it would provide enforcement leniency, this flexibility ensured that fishermen would not have to cease operations during the busy summer months.

## Department of the Interior

### *Issue: Equity Action Plan*

On January 25, 2021, President Joe Biden issued Executive Order 13985, which directs the heads of federal agencies to evaluate whether existing agency practices create barriers for public participation, specifically underserved populations. On November 18, 2021, Advocacy submitted a public comment letter to the Department of the Interior (DOI), encouraging DOI and its subagencies to review and revise certain policies and procedures to ensure greater equity for small businesses, small governmental jurisdictions, and small organizations. Advocacy also asked DOI to adopt permanent strategies by which the agency would measure and increase equity within its policies and rulemakings.

On April 14, 2022, DOI published an Equity Action Plan, which outlines its efforts to remove barriers to access in agency programs. DOI announced the following changes:

In response to concerns about comment opportunities, DOI changed its policies to ensure enough time for comments for all business types.

In response to requests for agency guidance and training by small businesses, DOI developed a counseling and education toolkit for small businesses. Additionally, they published a data acquisition tool to provide information about purchase history and a networking tool for new entrants into DOI contractor markets.

In response to requests for entry-level programs for new small businesses, DOI offered technical assistance and clear instructions for funding requests.

## Department of the Treasury, Financial Crimes Enforcement Network

### *Issue: Beneficial Ownership*

On December 8, 2021, the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) published a notice of proposed rulemaking on Beneficial Ownership Information Reporting Requirements in the Federal Register. The proposed regulations would implement Section 6403 of the Corporate Transparency Act, which was enacted into law as part of the National Defense Authorization Act. The proposed rule prescribed who must file, when they must file, and what information must be provided. The purpose of the rulemaking was to help prevent and combat money laundering, terrorist financing, tax fraud, and other illicit activity.

Advocacy submitted a comment letter on February 4, 2022. In the letter, Advocacy encouraged FinCEN to allow for the flexibility that Congress provided in the statute. Advocacy also encouraged FinCEN to provide a compliance guide as required by SBREFA.

FinCEN finalized the rule on September 30, 2022. FinCEN retained the reporting timelines. However, because of corrected reports, FinCEN extended the filing deadline from 14 to 30 days to provide reporting companies with adequate time to obtain and report the correct information. FinCEN also agreed to publish a compliance guide as required by the statute.

## Environmental Protection Agency

### *Issue: Proposed TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances*

On June 28, 2021, EPA proposed a rule to require all manufacturers of per- and polyfluoroalkyl substances, including article manufacturers and importers, to report certain information to EPA related to chemical identity, categories of use, volumes manufactured and processed, byproducts, environmental and health effects, worker exposure,



and disposal. Based on information available to EPA at the time, the agency certified that the proposed rule did not have a significant economic impact on a substantial number of small entities under the RFA.

On September 27, 2021, Advocacy submitted public comments urging the agency to conduct a small business advocacy review panel to remedy its improper certification under the RFA to accurately assess the impact of the proposed rule on small entities, and to consider less burdensome alternatives. Subsequently, the agency convened a SBREFA panel to solicit feedback from impacted small businesses. The panel was completed on August 2, 2022. The agency plans to issue an initial regulatory flexibility analysis for public comment.

## Federal Communications Commission

### ***Issue: Supply Chain Security—Equipment Authorization Rule***

In August 2021, the Federal Communications Commission (FCC) proposed to revise rules related to its equipment authorization processes to prohibit authorization of any “covered” equipment on the recently established Covered List. Advocacy conducted outreach with small carriers and forwarded concerns about the impact of various alternatives to the FCC, asking the agency to clarify the scope of the rule to reduce impacts to small entities. Ultimately, Congress passed legislation limiting the scope and applicability of the FCC’s proposals and minimizing small business impacts.

### ***Issue: Small Provider Exception for STIR/SHAKEN (Procedures for Addressing Caller ID Spoofing)***

In June 2021, the FCC sought comment on a proposal to shorten the STIR/SHAKEN implementation extension for small voice service providers. Advocacy conducted outreach with small carriers and forwarded concerns to the FCC about the compliance difficulties facilities-based carriers continued to face. This outreach resulted in final FCC action that only

required immediate compliance for non-facilities-based carriers.

### ***Issue: Broadband Competition in Multi-tenant Environments***

On September 7, 2021, the FCC opened a comment period seeking to refresh the record on its 2019 proceeding regarding improving broadband competition in multi-tenant environments. Advocacy conducted significant interagency discussions regarding proposed FCC policies and submitted a letter to the FCC recommending specific policies to reduce barriers to entry for broadband providers and increase choice for small business consumers in multi-tenant environments. In the letter, Advocacy shared the importance of a competitive broadband market to small businesses. In addition, Advocacy highlighted the comments of competitive broadband providers regarding possible barriers to competition in multi-tenant environments. The FCC ultimately adopted Advocacy’s recommendations, specifically referencing Advocacy’s comments in the final proceeding.

## Internal Revenue Service

### ***Issue: Required Minimum Distributions***

On December 20, 2019, the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) was signed into law. The SECURE Act included a new 10-year rule for required minimum distributions (RMDs) for the non-eligible designated beneficiaries of defined contribution plans and IRAs whose owners die after December 31, 2019. The new rule requires that balances inherited by those beneficiaries be distributed by the end of the 10th year after the original account owner or plan participant dies, regardless of whether the deceased retirement saver had begun required distributions.

Unfortunately, the Internal Revenue Service (IRS) did not release a notice of proposed rulemaking on RMDs until February 24, 2022. In the interim, many tax and retirement planning practitioners assumed

that the 10-year rule would work similarly to another provision in the Code that allows taxpayers to take distributions as a lump sum in the last year after the death of the original owner. Instead, IRS took a different position in its proposed RMD rules. IRS argued that beneficiaries subject to the new law and not otherwise excluded would have been required to take RMDs in the year after the death of the original account owner occurring after December 31, 2019.

In a comment letter, Advocacy recommended that IRS revise its proposal to simplify the application of the 10-year rule to match the plain language of the SECURE Act and the good-faith interpretation of practitioners. Advocacy recommended that the final regulations delay the regulatory effective date until 12 months following the date of publication in the Federal Register. Advocacy also requested IRS specify that there will be no penalties for good-faith interpretations of the SECURE Act until that date.

Taxpayers, practitioners, and Advocacy received a partial win related to the RMD rules in October 2022 with the release of IRS Notice 2022-53. That notice announced that IRS intends to issue final regulations related to RMDs that will apply no earlier than the 2023 distribution calendar year. The notice also provides that, to the extent a taxpayer did not take a RMD related to the rule in 2021 and 2022, the IRS will not impose a Section 4974 excise tax. If a taxpayer has already paid an excise tax for a missed RMD in 2021, the taxpayer may request a refund.



# 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 “recordkeeping requirement” means a requirement imposed by an agency on persons to maintain specified records.

## **§ 602. Regulatory agenda**

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

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

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

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

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

(c) Each agency shall endeavor to provide notice of each regulatory flexibility agenda to small entities or their representatives through direct notification or publication of the agenda in publications likely to

be obtained by such small entities and shall invite comments upon each subject area on the agenda.

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

## **§ 603. Initial regulatory flexibility analysis**

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

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

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

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

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

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

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

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

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

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

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

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

(d)

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

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

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

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

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

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

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

## **\$ 604. Final regulatory flexibility analysis**

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

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

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

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

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

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

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

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

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

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

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

(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number

of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

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

### **§ 606. Effect on other law**

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

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

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

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

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

(b) Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the

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



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:<sup>2</sup>

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

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

- (a) shall notify agency heads from time to time of the requirements of the Act, including by issuing notifications with respect to the basic requirements of the Act within 90 days of the date of this order;
- (b) shall provide training to agencies on compliance with the Act; and
- (c) may provide comment on draft rules to the agency that has proposed or intends to propose the rules and

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

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

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

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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 85-536 (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  
Billing code 3195-01-P

## Appendix C

# Executive Order 13992, Revocation of Certain Executive Orders Concerning Federal Regulation

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

Section 1. Policy. It is the policy of my Administration to use available tools to confront the urgent challenges facing the Nation, including the coronavirus disease 2019 (COVID-19) pandemic, economic recovery, racial justice, and climate change. To tackle these challenges effectively, executive departments and agencies (agencies) must be equipped with the flexibility to use robust regulatory action to address national priorities. This order revokes harmful policies and directives that threaten to frustrate the Federal Government's ability to confront these problems, and empowers agencies to use appropriate regulatory tools to achieve these goals.

Sec. 2. Revocation of Orders. Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs), Executive Order 13777 of February 24, 2017 (Enforcing the Regulatory Reform Agenda), Executive Order 13875 of June 14, 2019 (Evaluating and Improving the Utility of Federal Advisory Committees), Executive Order 13891 of October 9, 2019 (Promoting the Rule of Law Through Improved Agency Guidance Documents), Executive Order 13892 of October 9, 2019 (Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication), and Executive Order 13893 of October 10, 2019 (Increasing Government Accountability for Administrative Actions by Reinventing Administrative PAYGO), are hereby revoked.

Sec. 3. Implementation. The Director of the Office of Management and Budget and the heads of agencies shall promptly take steps to rescind any orders, rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing the Executive Orders identified in section 2 of this order, as appropriate and consistent with applicable law, including the Administrative Procedure Act, 5 U.S.C. 551 et seq. If in any case such rescission cannot be finalized immediately, the Director and the heads of agencies shall promptly take steps to provide all available exemptions authorized by any such orders, rules, regulations, guidelines, or policies, as appropriate and consistent with applicable law. In addition, any personnel positions, committees, task forces, or other entities established pursuant to the Executive Orders identified in section 2 of this order, including the regulatory reform officer positions and regulatory reform task forces established by sections 2 and 3 of Executive Order 13777, shall be abolished, as appropriate and consistent with applicable law.

Sec. 4. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

- (i) the authority granted by law to an executive department or agency, or the head thereof; or
- (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

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

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

JOSEPH R. BIDEN JR.

THE WHITE HOUSE,

January 20, 2021.

# Memorandum for the Heads of Executive Departments and Agencies on Modernizing Regulatory Review

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Modernizing Regulatory Review

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

Section 1. Background. For nearly four decades, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) has been charged by Presidents of both parties with reviewing significant executive branch regulatory actions. This process is largely governed by Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), as amended. This memorandum reaffirms the basic principles set forth in that order and in Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review), which took important steps towards modernizing the regulatory review process. When carried out properly, that process can help to advance regulatory policies that improve the lives of the American people.

Our Nation today faces serious challenges, including a massive global pandemic; a major economic downturn; systemic racial inequality; and the undeniable reality and accelerating threat of climate change. It is the policy of my Administration to mobilize the power of the Federal Government to rebuild our Nation and address these and other challenges. As we do so, it is important that we evaluate the processes and principles that govern regulatory review to ensure swift and effective Federal action. Regulations that promote the public interest are vital for tackling national priorities.

Sec. 2. Implementation. (a) I therefore direct the Director of OMB, in consultation with representatives of executive departments and agencies (agencies), as appropriate and as soon as practicable, to begin a process with the goal of producing a set of recommendations for improving and modernizing regulatory review. These recommendations should provide concrete suggestions on how the regulatory review process can promote public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations. The recommendations should also include proposals that would ensure that regulatory review serves as a tool to affirmatively promote regulations that advance these values. These recommendations should be informed by public engagement with relevant stakeholders.

(b) In particular, the recommendations should:

- (i) identify ways to modernize and improve the regulatory review process, including through revisions to OMB's Circular A-4, Regulatory Analysis, 68 Fed. Reg. 58,366 (Oct. 9, 2003), to ensure that the review process promotes policies that reflect new developments in scientific and economic understanding, fully accounts for regulatory benefits that are difficult or impossible to quantify, and does not have harmful anti-regulatory or deregulatory effects;
- (ii) propose procedures that take into account the distributional consequences of regulations, including as part of any quantitative or qualitative analysis of the costs and benefits of regulations, to ensure that regulatory initiatives appropriately benefit and do not

inappropriately burden disadvantaged, vulnerable, or marginalized communities;

(iii) consider ways that OIRA can play a more proactive role in partnering with agencies to explore, promote, and undertake regulatory initiatives that are likely to yield significant benefits; and

(iv) identify reforms that will promote the efficiency, transparency, and inclusiveness of the interagency review process, and determine an appropriate approach with respect to the review of guidance documents.

Sec. 3. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

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

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

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

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

(d) The Director of OMB is authorized and directed to publish this memorandum in the Federal Register.

JOSEPH R. BIDEN JR.

January 20, 2021

# Appendix D

## 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 every cabinet level agency, 84 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	Centers for Disease Control and Prevention
Grain Inspection, Packers, and Stockyards Administration	Centers 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 Railroad Administration
Bureau of Ocean Energy Management, Regulation and Enforcement	Federal Transit Administration
Fish and Wildlife Service	Maritime Administration
National Park Service	National Highway Traffic Safety Administration
Office of Surface Mining Reclamation and Enforcement	Pipeline and Hazardous Materials Safety Administration
Department of Justice	Research and Special Programs Administration
Bureau of Alcohol, Tobacco, and Firearms	Department of the Treasury
Civil Rights Division	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
Wage and Hour Division	Office of the Director of National Intelligence
Department of State	Office of Management and Budget
Department of Transportation	Office of Federal Procurement Policy
Federal Aviation Administration	Environmental Protection Agency
Federal Highway Administration	Small Business Administration
Federal Motor Carrier Safety Administration	Office of the General Counsel

### Independent Federal Agencies

Access Board	Federal Reserve System
Chemical Safety and Hazard Investigation Board	Federal Trade Commission
Consumer Financial Protection Bureau	General Services Administration / FAR Council
Consumer Product Safety Commission	National Aeronautics and Space Administration
Commodity Futures Trading Commission	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
Federal Maritime Commission	

## RFA Case Law, FY 2022

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. 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 2022.

### **Northport Health Services of Arkansas v. Health & Human Services<sup>5</sup>**

Northport Health Services appealed the District Court's grant of summary judgment in favor of the U.S. Department of Health and Human Services. Northport claimed that a regulation promulgated by the Centers for Medicare and Medicaid Services (CMS) and the government collectively violated the APA, FAA, and the procedural requirements of the RFA. The court found that CMS failed to comply with the procedural requirements of the RFA. However, the Court found this lack of compliance was harmless, citing precedent demonstrating that failure to comply with the RFA may be, but does not have to be, grounds for overturning a rule. Furthermore, the Court argued that relief for a violation of RFA may be overturning a rule or taking corrective actions, including remanding the rule to the agency to conduct a RFA analysis. The court found these corrective measures to be unnecessary because the revised rule had a smaller economic impact than the original. The court affirmed the district court's grant of summary judgment in favor of HHS and CMS.

### **Mexican Gulf Fishing Co. v. Department of Commerce<sup>6</sup>**

Plaintiffs included charter boat captains and owners that took clients fishing in the Gulf of Mexico. The defendants were federal government agencies and employees, including the United States Department of Commerce, the National Oceanic Atmospheric

5. *Northport Health Servs. of Ark. v. Health & Human Servs.*, 14 F.4th 856 (8th Cir. Oct. 1, 2021).

6. *Mexican Gulf Fishing Co. v. Dept. of Commerce*, 587 F.Supp.3d 428 (E.D. La. Feb. 28, 2022).

Administration, and the National Marine Fisheries Service (NMFS). The government published a final rule that required Gulf for-hire owners and operators to submit electronic fishing reports before taking any fish off the boat, or if fish were not caught, to submit a fishing report upon completion of the trip to NMFS. The report was to contain all fish harvested or discarded, and any other information request by the agency. The rule also required vessels to have NMFS approved hardware capable of archiving GPS locations. Plaintiffs challenged the inclusion of unspecified "other requirements" to be reported and mandatory tracking.

Plaintiffs argued that the final rule's FRFA was unreasonable and not in good faith because it did not consider alternatives to the tracking requirement that would not require the purchase of tracking equipment. Additionally, plaintiffs argued that the cost analysis was flawed because it was based on quotes from vendors of equipment that NMFS was testing for eventual approval.

The court found that the FRFA was reasonable and in good faith. NMFS did consider an alternative that would not have required the purchasing of tracking equipment but rejected it because it would not provide the same information as would equipment fixed to the vessel. The court found that the RFA only required NMFS to consider the no-action alternative, which it did. Regarding the cost analysis, the court found that the reliance on the quotes were not unreasonable or in bad faith.

The court granted the defendants' motion for summary judgment.

## **Texas General Land Office v. Biden<sup>7</sup>**

This case challenged the Biden administration's southwest border policies. The court dismissed the plaintiffs' RFA claim that DHS failed to publish an IRFA following DHS publication of the policies as nonreviewable under the RFA. The court found that none of the plaintiffs were small entities and thus lacked standing to bring any claims under the RFA and dismissed the claim that the defendants failed to publish a final regulatory flexibility analysis.

## **Cigar Association of America v. Food and Drug Administration<sup>8</sup>**

As part of a rulemaking referred to as the "Final Deeming Rule," the FDA "deemed" premium cigars subject to the Family Smoking Prevention and Tobacco Control Act of 2009. The Cigar Manufacturers Association of America contested the FDA's deeming rule, asserting that the FDA's decision not to exempt premium cigars altogether from regulation under the Final Deeming Rule was arbitrary and capricious. Plaintiffs also maintained that the FDA failed to reasonably consider the costs and benefits of subjecting small businesses within the premium cigar industry to regulation, as required by the RFA. D.C. Circuit Court precedent confirmed that the FDA was not required to perform a separate RFA analysis. The court also said that the FDA's analysis was not required to "take a particular form." There is no legal support for the proposition that every product or industry affected by a rulemaking is entitled to a separate cost-benefit analysis, according to the court. As a result, the D.C. Circuit's ruling forecloses the Cigar Manufacturers Association of America's contention that the agency was required to conduct a separate RFA analysis with respect to the deeming of premium cigars.

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7. Tex. Gen. Land Office v. Biden, 2022 U.S. Dist. LEXIS 145737 (S.D. Tex. Aug. 3, 2022).

8. Cigar Ass'n of Am. v. Food & Drug Admin., 2022 U.S. Dist. LEXIS 117364 (July 5, 2022).

## Table D.1 SBREFA Panels Convened Through FY 2022

SBREFA Panel Rule	Date Convened	Date Completed	Notice of Proposed Rulemaking	Final Rule Published
<b>Consumer Financial Protection Bureau</b>				
Automated Valuation Model (AVM)	03/14/22	05/13/22		
Small Business Lending Data Collection	10/15/20	12/14/20	10/08/21	
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
<b>Department of Labor, Occupational Safety and Health Administration</b>				
Emergency Response	10/04/21	12/02/21		
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		

SBREFA Panel Rule	Date Convened	Date Completed	Notice of Proposed Rulemaking	Final Rule Published
Occupational Exposure to Infectious Diseases in Healthcare and Other Related Work Settings	10/14/14	12/22/14		
Occupational Exposure to Diacetyl and Food Flavorings Containing Diacetyl	05/05/09	07/02/09		
Occupational Exposure to Beryllium	09/17/07	01/15/08	08/07/15	
Cranes and Derricks in Construction	08/18/06	10/17/06	10/09/08	08/09/10
Occupational Exposure to Hexavalent Chromium	01/30/04	04/20/04	10/04/04	02/28/06
Occupational Exposure to Crystalline Silica	10/20/03	12/19/03	09/12/13	03/25/16
Confined Spaces in Construction	09/26/03	11/24/03	11/28/07	
Electric Power Generation, Transmission, and Distribution	04/01/03	06/30/03	06/15/05	04/11/14
Ergonomics Program Standard	03/02/99	04/30/99	11/23/99	11/14/00
Safety and Health Program Rule	10/20/98	12/19/98		
Tuberculosis	09/10/96	11/12/96	10/17/97	Withdrawn 12/31/03
<b>Environmental Protection Agency</b>				
TSCA Section 8(a)(7) Rule: Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances	04/06/22	08/02/22		
Per- and Polyfluoroalkyl Substances (PFAS) National Primary Drinking Water Regulation (NPDWR)	05/24/22	08/01/22		
Cyclic Aliphatic Bromide Cluster (HBCD) Risk Management Rulemaking Under the Toxic Substances Control Act	01/06/22	09/09/22		
Standards of Performance for New, Reconstituted, and Modified Sources: Oil and Natural Gas Sector Review	07/15/21	09/20/21	11/15/21	
1-Bromopropane; Rulemaking under TSCA §6(a)	04/27/21	12/16/21		

SBREFA Panel Rule	Date Convened	Date Completed	Notice of Proposed Rulemaking	Final Rule Published
Methylene Chloride; Rulemaking under TSCA §6(a)	01/07/21	10/28/21		
National Emission Standards for Hazardous Air Pollutants: Ethylene Oxide Commercial Sterilization and Fumigation Operations	11/25/20	04/26/21		
Financial Responsibility Requirements for Hard Rock Mining	08/24/16	12/01/16	12/01/16	Withdrawn 02/21/18
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	-	-

SBREFA Panel Rule	Date Convened	Date Completed	Notice of Proposed Rulemaking	Final Rule Published
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	12/16/16
Stormwater Regulations Revision to Address Discharges from Developed Sites	12/06/10	10/04/11	-	Withdrawn 06/06/17
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	11/02/15



<b>SBREFA Panel Rule</b>	<b>Date Convened</b>	<b>Date Completed</b>	<b>Notice of Proposed Rulemaking</b>	<b>Final Rule Published</b>
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	06/16/06
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	08/18/03	01/04/06
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

<b>SBREFA Panel Rule</b>	<b>Date Convened</b>	<b>Date Completed</b>	<b>Notice of Proposed Rulemaking</b>	<b>Final Rule Published</b>
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
Phase I (FIP) To Reduce the Regional Transport of Ozone in the Eastern United States	06/23/98	08/21/98	10/21/98	05/06/05
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 E

## History of the Regulatory Flexibility Act

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

In 1980, Congress enacted the Regulatory Flexibility Act (RFA), which elevated aspects of this memorandum to the level of federal statute.<sup>13</sup> The new law mandated that agencies consider the impact of their regulatory proposals on small businesses, analyze proposed regulations for equally effective alternatives, and make their analyses of equally effective alternatives available for public comment. This new approach to federal rulemaking was viewed as a remedy for the disproportionate burden placed

on small businesses by one-size-fits-all regulation, “without undermining the goals of our social and economic programs.”<sup>14</sup>

### RFA Requirements

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

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

### 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

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.

14. Carter, *supra* note 12..

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."<sup>18</sup> This interpretation—that federal agencies must only consider the direct effects on small businesses within the jurisdiction of the rule—has continued to be the judicial interpretation of the RFA, even after subsequent amendments.<sup>19</sup>

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

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

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.

with the RFA, any challenge to regulation would need to be primarily under the Administrative Procedure Act.

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

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

## SBREFA Panels

The SBREFA amendments also required the Environmental Protection Agency and the Occupational Safety and Health Administration to convene small business advocacy review panels

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

22. *Id.*

whenever the agency proposes a rule that may have a significant impact on a substantial number of small entities. These panels consist of officials from the promulgating agency, the Office of Information and Regulatory Affairs, and the Office of Advocacy. Their task is to consult with small business representatives on the agency's regulatory proposals to ensure that the agency has identified and considered regulatory alternatives that could attain the policy objectives while minimizing the impacts on small businesses. After each collaborative panel has concluded, the panel issues a report of its findings and any recommendations for providing flexibility for small entities.

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

## Executive Order 13272

As President George W. Bush's administration began to consider small business priorities, improved RFA compliance was one key goal. To this end, President Bush issued Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking" in 2002.<sup>23</sup> 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.

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

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

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

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

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).

The Obama administration looked to Advocacy for ways of encouraging economic activity. Again, the RFA was an important part of the answer. Executive Order 13563, “Improving Regulation and Regulatory Review,”<sup>26</sup> signed in 2011, directed agencies to heighten public participation in rulemaking, consider overlapping regulatory requirements and flexible approaches, and conduct ongoing regulatory review. President Obama concurrently issued a memorandum to all federal agencies, reminding them of the importance of the RFA and of reducing the regulatory burden on small businesses through regulatory flexibility. In this memorandum, President Obama directed agencies to increase transparency by providing written explanations of any decision not to adopt flexible approaches in their regulations. The following year, President Obama further attempted to reduce regulatory burdens with Executive Order 13610, “Identifying and Reducing Regulatory Burdens,”<sup>27</sup> which placed greater focus on initiatives aimed at reducing unnecessary regulatory burdens, simplifying regulations, and harmonizing regulatory requirements imposed on small businesses.

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

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

longer needed,” as important future challenges for regulatory improvement.

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

With the enactment of the Trade Facilitation and Trade Enforcement Act of 2015, Advocacy’s duties to small business expanded beyond our borders. Under the Act, the chief counsel for advocacy must convene an interagency working group whenever the president notifies Congress that the administration intends to enter into trade negotiations with another country. The working group conducts small business outreach in manufacturing, services, and agriculture sectors and gathers input on the trade agreement’s potential economic effects. Informed by these efforts, the working group is charged with identifying the most important priorities, opportunities, and challenges affecting these industry sectors in a report to Congress. In December of 2018, pursuant to section 502 of the Trade Facilitation and Trade Enforcement Act (TFTEA), Advocacy released the Section 502 Small Business Report on the Modernization of the North American Free Trade Agreement (NAFTA): Prepared for the Consideration of the United States-Mexico-Canada Agreement (USMCA).<sup>29</sup>

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

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

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

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

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

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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://advocacy.sba.gov/2018/12/21/advocacy-releases-trade-report/>.

entirely offset by elimination of existing costs of other regulations. The second, E.O. 13777, “Enforcing the Regulatory Reform Agenda,” set a framework for implementing this vision of regulatory reform, requiring inter alia each agency appoint a Regulatory Reform Officer to supervise the process of regulatory reform. 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. Both executive orders were repealed by President Joe Biden in 2021.



# Appendix F

## Abbreviations

RFA	Regulatory Flexibility Act	FWS	Fishing and Wildlife Service
SBREFA	Small Business Regulatory Enforcement Fairness Act	GHG	Greenhouse Gas
SBAR	small business advocacy review	HFC	Hydrofluorocarbons
IRFA	initial regulatory flexibility analysis	HHCB	hexamethylcyclopenta[g]-2-benzopyran
FRFA	final regulatory flexibility analysis	IRS	Internal Revenue Service
		MSHA	Mine Safety and Health Administration
		MTEs	Multi-tenant Environments
AJD	Approved Jurisdictional Determination	NHSM	Non-Hazardous Secondary Material
APHIS	Animal Plant and Health Inspection Service	NMFM	National Marine Fisheries Service
Army	Department of the Army	NOx	Nitrogen Oxides
AWIA	America's Water Infrastructure Act of 2018	NPDWR	National Primary Drinking Water Regulation
BOEM	Bureau of Ocean Energy Management	NPRM	Notice of Proposed Rulemaking
CEQ	Council on Environmental Quality	OGI	Optical Gas Imaging
CEJS tool	Climate and Economic Justice Screening Tool	OIRA	Office of Information and Regulatory Affairs
CFPB	Consumer Financial Protection Bureau	OSHA	Occupational Safety and Health Administration
CMMC	Cybersecurity Maturity Model Certification	OSHRC	Occupational Safety and Health Review Commission
CMS	Centers for Medicare and Medicaid Services	OSTP	Office of Science and Technology Policy
Corps	Army Corps of Engineers	PBM	Pharmacy Benefit Manager
COVID-19	coronavirus disease 2019	PWS	Public Water Systems
CPSC	Consumer Product Safety Commission	RMDs	Required Minimum Distributions
CSUs	Clothing Storage Units	SEC	Securities and Exchange Commission
CTRTs	Creosote-treated Railroad Ties	Secure Act	Setting Every Community Up for Retirement Enhancement Act of 2019
DBRA	Davis-Bacon Act and Related Acts	SME	Small and Medium Sized Enterprises
DOD	Department of Defense	TSCA	Toxic Substances Control Act
DOE	Department of Energy	TTC	Trade and Technology Council
DOI	Department of the Interior	UCMR	Unregulated Contaminant Monitoring Rule
DOL	Department of Labor	UCMR 5	Fifth Revisions to the Unregulated Contaminant Monitoring Rule
ED	Department of Education		
ETS	Emergency Temporary Standard		
E.U.	European Union		
EPA	Environmental Protection Agency		
FCC	Federal Communications Commission		
FinCEN	Financial Crimes Enforcement Network		
FRA	Federal Railroad Administration		
FTC	Federal Trade Commission		