

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

REPORT ON THE
REGULATORY FLEXIBILITY ACT
FY2023



JUNE 2024

Created by Congress in 1976, the Office of Advocacy of the U.S. Small Business Administration (SBA) is an independent voice for small businesses 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 businesses 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.



Advocacy Website: <https://advocacy.sba.gov>



Email Advocacy: advocacy@sba.gov



Facebook: <https://www.facebook.com/AdvocacySBA>



LinkedIn: <https://www.linkedin.com/company/u-s-small-business-administration-office-of-advocacy/>



Twitter: <https://www.twitter.com/AdvocacySBA>



June 2024

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 (Advocacy) official responsibility in rulemaking. Advocacy monitors whether regulations consider small entities and informs agencies of their 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 2023: from October 1, 2022, to September 30, 2023. 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 2023.

Over the past few years, Advocacy has ensured small businesses remain an integral part of the rulemaking process by developing novel ways for their voices to be heard. Thanks to the increased uptake in online communications channels, Advocacy has revamped its outreach efforts to American small businesses. This has led Advocacy to address more rules and issues than before. Advocacy's goal is to ensure that as many small businesses as possible feel able to participate in the federal regulatory process so that we can appropriately serve as their voice in Washington, D.C.

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 grow. Advocacy has remained attuned to regulatory changes and continues to monitor new regulations for impacts on small business.

Advocacy's overall efforts to promote federal agency compliance with the RFA resulted in \$91.3 million in estimated regulatory cost savings for small entities in FY 2023. Cost savings of note include:

- One cost savings concerned a Food and Drug Administration (FDA) regulation on the traceability recordkeeping requirements for some categories of foods. After Advocacy made recommendations to explore alternatives that would make compliance easier for small businesses, the FDA changed the effective date of the rule and expanded the exemption for small retail food establishments. This led to \$39.3 million in estimated cost savings.

- Another cost savings came from the Consumer Financial Protection Bureau (CFPB), which sought to require financial institutions to collect and report data regarding applications for credit for small businesses, including those that are owned by women and minorities. The CFPB planned to require all financial institutions making at least 25 small business loans to comply. After considering Advocacy's comments, the CFPB raised the threshold to 100 small business loans, saving \$37.2 million in compliance costs.

Advocacy also won one other, less quantifiable, battle for small businesses:

- When the Environmental Protection Agency finalized its Clean Water Act Water Quality Certification rule, Advocacy raised concerns with a requirement to include a draft federal permit and/or license to a Certifying Authority when making a water quality certification request. The final rule did not include the requirement for individual permit applications.

Chapter 2 reports on agencies' compliance with Executive Order 13272. In FY 2023, Advocacy provided training on RFA compliance in 9 training sessions for 139 federal officials. Advocacy continued to hold these training sessions online. Additionally, Advocacy confirmed whether agencies had posted their RFA procedures on their websites. Table 2.2 provides these links.

Also of note in FY 2023:

- In FY 2023, Advocacy submitted 46 formal comment letters to regulatory agencies. These letters expressed Advocacy's concerns about how new regulatory actions would impact small businesses.
- In FY 2023, Advocacy held 28 issue roundtables. These roundtables, which Advocacy continued to hold online, are helpful tools to mediate conversations between small business owners and federal regulators and allow Advocacy to participate in conversations about federal rulemaking.

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

Table of Contents

Chapter 1	1
The Regulatory Flexibility Act, Small Business, and Regulation.....	1
The Regulatory Flexibility Act	1
The RFA, Its Requirements, and Efforts to Strengthen It	3
Conclusion	4
Chapter 2	5
Compliance with Executive Order 13272 and the Small Business Jobs Act of 2010	5
RFA Training	5
Table 2.1 RFA Training at Federal Agencies in FY 2023	5
RFA Compliance Guide	6
Agency Compliance with Executive Order 13272	6
Table 2.2 Federal Agency Compliance with Rule-Writing Requirements FY 2023	7
Chapter 3	9
Communication with Small Businesses and Federal Agencies.....	9
Communication with Federal Agencies.....	9
Direct Communications	9
Executive Order 12866 and Interagency Review of Upcoming Rules	9
SBREFA Panels.....	10
Confidential Interagency Dialogue.....	10
Retrospective Review of Existing Regulations	11
Outreach to Small Business	11
Table 3.1 Regulatory Roundtables Hosted by the Office of Advocacy, FY 2023	13
Issue Roundtables	14
Regional Advocate Outreach.....	21
Chapter 4	22
Advocacy’s Public Comments to Federal Agencies in FY 2023	22
Figure 4.1 Number of Specific Issues of Concern in Agency Comment Letters, FY 2023.....	22
Table 4.1 Regulatory Comment Letters Filed by the Office of Advocacy, FY 2023	23
Summaries of Advocacy’s Public Comments to Federal Agencies.....	26
Alcohol Tax and Trade Bureau	26
Issue: Implementation of Refund Procedures for Craft Beverage Modernization Act Federal Excise Tax Benefits Applicable to Imported Alcohol.....	26

Issue: Consideration of Updates to Trade Practice Regulations	26
Consumer Financial Protection Bureau	26
Issue: Residential Property Assessed Clean Energy Financing (Regulation Z)	26
Issue: Credit Card Penalty Fees.....	27
Issue: Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions that Seek to Waiver or Limit Consumer Legal Protections.....	27
Issue: Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders....	28
Consumer Product Safety Commission	28
Issue: Safety Standard for Portable Generators	28
Council on Environmental Quality	28
Issue: National Environmental Policy Act Implementing Regulations Revisions Phase 2	28
Issue: Environmental Justice Scorecard Feedback.....	29
Department of Commerce, National Marine Fisheries Service.....	29
Issue: Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule	29
Department of Commerce, National Marine Fisheries Service; Department of the Interior, Fish and Wildlife Service.....	29
Issue: Revision of Regulations for Interagency Cooperation; Regulations Pertaining to Endangered and Threatened Wildlife and Plants Extension of Comment Letter	29
Issue: Revision of Regulations for Interagency Cooperation; Regulations Pertaining to Endangered and Threatened Wildlife and Plants	29
Department of Energy.....	30
Issue: Energy Conservation Program: Energy Conservation Standards for Distribution Transformers	30
Department of the Interior, Bureau of Land Management	30
Issue: Conservation and Landscape Health	30
Department of the Interior, Bureau of Ocean Energy Management.....	30
Issue: Risk Management and Financial Assurance for OCS Lease and Grant Obligations	30
Issue: Renewable Energy Modernization Rule	30
Department of Labor	30
Issue: Independent Contractor Definition	30
Department of Labor, Mine Safety and Health Administration	31
Issue: Lowering Miners' Exposure to Respirable Crystalline Silica and Improving Respiratory Protection	31
Department of Transportation, Federal Railroad Administration	31
Issue: Proposed Train Crew Size Safety Requirements	31

Department of the Treasury, Financial Crimes Enforcement Network	32
Issue: Ownership Information Access and Safeguards and Use of FinCEN Identifiers.....	32
Department of the Treasury, Office of the Comptroller of the Currency; Federal Reserve; Federal Deposit Insurance Corporation; National Credit Union Administration; Consumer Financial Protection Bureau; Federal Housing Finance Agency	32
Issue: Quality Control Standards for Automated Valuation Models.....	32
Environmental Protection Agency	33
Issue: New Source Performance Standards for Greenhouse Gas Emissions and Repeal of the Affordable Clean Energy Rule	33
Issue: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review	33
Issue: Commercial Ethylene Oxide Sterilization Technology Review & Ethylene Oxide Proposed Interim Registration Review Decision.....	33
Issue: National Emission Standards for Hazardous Air Pollutants for Lime Manufacturing Plants; Residual Risk and Technology Review	34
Issue: Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review	34
Issue: Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category.....	34
Issue: Perchloroethylene; Regulation Under the Toxic Substances Control Act	35
Issue: Updates to New Chemicals Regulations Under the Toxic Substances Control Act	35
Issue: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments.....	35
Issue: Methylene Chloride; Regulation Under the Toxic Substances Control Act	36
Issue: PFAS National Primary Drinking Water Regulation Rulemaking	36
Issue: Designation of Perfluorooctanoic Acid and Perfluorooctanesulfonic Acid as CERCLA Hazardous Substances.....	36
Issue: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention.....	36
Issue: PFAS National Primary Drinking Water Regulation Rulemaking	37
Issue: TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances; Data Availability and Request for Comment	37
Federal Acquisition Regulation Council	37
Issue: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk	37
Federal Trade Commission	38
Issue: Non-Compete Clause Rule.....	38
Food and Drug Administration	38

Issue: Requirements for Tobacco Product Manufacturing Practice	38
Internal Revenue Service	39
Issue: Prevailing Wage and Apprenticeship Initial Guidance Under Section 45(b)(6)(B)(ii) and Other Substantially Similar Provisions	39
Issue: Elective Payment of Advanced Manufacturing Investment Credit	39
National Labor Relations Board	40
Issue: Standard for Determining Joint-Employer Status	40
Office of Information and Regulatory Affairs	40
Issue: Implementation of Executive Order 14094, Modernizing Regulatory Review	40
Securities and Exchange Commission	40
Issue: Safeguarding Advisory Client Assets	40
United States Citizenship and Immigration Services	41
Issue: Increased Immigration Fees	41
Chapter 5	42
Small Business Regulatory Cost Savings and Success Stories	42
Table 5.1 Summary of Small Business Regulatory Cost Savings, FY 2023	43
Descriptions of Small Business Regulatory Cost Savings	43
Consumer Financial Protection Bureau	43
Issue: Small Business Lending Data Collection	43
Environmental Protection Agency	44
Issue: Reporting and Recordkeeping Requirements for Asbestos under Section 8(a) of the Toxic Substance Control Act	44
Food and Drug Administration	45
Issue: Requirements for Additional Traceability Records for Certain Foods	45
Securities and Exchange Commission	45
Issue: Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure	45
Table 5.2 Summary of Small Business Regulatory Success Stories, FY 2023	46
Small Business Regulatory Success Stories	46
Environmental Protection Agency	46
Clean Water Act Water Quality Certification Improvement Rule	46
Appendix A	47
The Regulatory Flexibility Act	47
Appendix B	56
Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking	56
Appendix C	58

RFA Training, Case Law, and SBREFA Panels.....	58
RFA Case Law, FY 2023	60
Appendix D	70
History of the Regulatory Flexibility Act.....	70
Appendix E	74
Abbreviations	74

Chapter 1

The Regulatory Flexibility Act, Small Business, and Regulation

The Office of Advocacy (Advocacy) has ensured small businesses have remained an integral part of the rulemaking process by developing novel ways for their voices to be heard. Thanks to the increased uptake in online communications channels, Advocacy has revamped its outreach efforts to American small businesses. Advocacy’s goal is to ensure that as many small businesses as possible feel able to participate in the federal regulatory process so that we can appropriately serve as their voice in Washington, D.C.

In FY 2023, Advocacy updated processes to add more stakeholders into conversations surrounding federal rulemaking. Online roundtables and events, a change due to the COVID-19 pandemic, became Advocacy’s default way to reach stakeholders across the country. These online events allow Advocacy to hear from a more diverse pool of businesses, including rural and minority-owners, who may not have been able to attend an in-person event before. In addition, online trainings for federal regulators allowed for more convenient ways to reach the people who write federal rulemakings.

Our increased outreach efforts have led Advocacy to address more rules than before. In FY 2023, Advocacy filed 46 official letters with federal regulators and discussed countless other rules with small businesses. The increased volume and efficiency are in large part thanks to modernized practices, and Advocacy looks forward to using the tools of the future while returning to more in-person engagements as they fit the office’s overall agenda.

This chapter documents the Regulatory Flexibility Act (RFA) and the other laws Advocacy uses to help protect small businesses against burdensome regulatory actions. While Advocacy has enforced 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 regulations for burdensome impacts on small businesses. In the case of deregulatory actions, Advocacy has monitored potential outcomes to ensure maximum benefits for small businesses.

The Regulatory Flexibility Act

Advocacy has pursued regulatory reform since its inception. No law after Advocacy’s basic charter has had more influence on the office’s activities than the RFA, first enacted in 1980¹ and strengthened in 1996² and 2010.³ It established into law the principle that government agencies must consider the effects of their regulatory actions on small businesses and mitigate them where possible. The RFA arose from years of frustration with ever-increasing federal regulation that disproportionately harmed large numbers of small businesses. From the RFA’s section titled “Congressional Findings and Declaration of Purpose”:

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

² The Small Business Regulatory Enforcement Fairness Act, Public Law 104-121, title II (March 29, 1996).

³ 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).

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.⁴

The RFA includes procedures for agencies to accomplish this purpose. It 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.⁵

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*,⁶ 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 2023 was mostly conducted online through meeting

⁴ 5 U.S.C. § 601 note.

⁵ 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.

⁶ Executive Order 13272 (August 13, 2002), 67 Fed. Reg. 53461.

Since the enactment of the RFA in 1980, Advocacy has sought to help agencies develop a regulatory culture that internalizes the Act’s purposes.

software. Advocacy continues to customize RFA training to each individual agency receiving the training. Better-trained regulatory and policy staff can better assess the potential need for both deregulation and regulation, and when regulation is necessary, develop smarter rules that reduce impacts on small businesses. 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 businesses and adopting mitigation strategies can improve their regulations, both by reducing costs to small businesses and the broader economy, and by improving compliance by those regulated. Since 2003, when Advocacy began its ongoing RFA compliance training program, through 2023, 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.

On January 20, 2021, President Biden issued Executive Order 13992, *Revocation of Certain Executive Orders Concerning Federal Regulation*,⁷ citing the need “to confront the urgent challenges

⁷ Executive Order 13992 (January 20, 2021), 86 Fed. Reg. 7049.

facing the Nation, including the coronavirus disease 2019 (COVID-19) pandemic, economic recovery, racial justice, and climate change.” President Trump’s Executive Orders 13771, *Reducing Regulation and Controlling Regulatory Costs*, and 13777, *Enforcing the Regulatory Agenda*, were among those revoked.

At the same time, President Biden issued a Memorandum for the Heads of Executive Departments and Agencies on Modernizing Regulatory Review,⁸ setting as a goal the modernization of regulatory review and reaffirming previous executive orders establishing a process reviewing pending regulations by the Office of Management and Budget. These presidential actions set the ground rules for the agencies that engage in rulemaking and for Advocacy as it pursues its statutory goals. This report includes descriptions of success stories of small business burden reduction achieved by federal agencies and Advocacy working together under the RFA.

Since its passage in 1980, the RFA has helped establish small business consideration as a necessary part of federal rulemaking. In 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 business representatives. 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 businesses’ 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

⁸ Modernizing Regulatory Review (January 20, 2021), 86 Fed. Reg. 7223.

an impact analysis, known as an initial regulatory flexibility analysis (IRFA), when it is published for public comment.⁹ When the final rule is published, it must be accompanied by a final regulatory flexibility analysis (FRFA).¹⁰ 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.¹¹ 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.¹²

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*,¹³ 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

⁹ 5 U.S.C. § 603.

¹⁰ 5 U.S.C. § 604.

¹¹ 5 U.S.C. § 604.

¹² 5 U.S.C. § 605(b).

¹³ Executive Order 13563 (January 18, 2011), 76 Fed. Reg. 3821.

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*,¹⁴ 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.

On April 6, 2023, President Biden issued Executive Order 14094, *Modernizing Regulatory Review*,¹⁵ which narrowed the scope of the existing Executive Order 12866 regulatory review process and includes directives for strengthening public participation in the rulemaking process. The executive order directs federal agencies to evaluate ways to make public participation in the rulemaking process more accessible, engage with interested parties when developing regulatory agendas, and offer additional transparency regarding petitions for rulemakings. It also instructed the Office of Management and Budget to update Circular A-4, the guidelines for regulatory analysis. On April 7, 2023, OMB published a draft revision of Circular A-4, which proposed greater emphasis on distributional analyses and changes to discount rates used in regulatory analysis.¹⁶

Conclusion

Since its passage in 1980, the RFA has demonstrated remarkable results. It has helped establish small business consideration as a necessary part of federal rulemaking. The careful tailoring of regulation to business size has made better regulations with improved compliance in pursuit of safety, health, and other public goods. The subsequent regulatory and legislative improvements have solidified Advocacy’s participation in rulemakings affecting small businesses. What these regulatory reform initiatives all have in common is agreement that the regulatory burden on small businesses must be minimized. Over its 44-year history, the RFA has provided federal agencies with the framework to accomplish this goal, which is especially important in times of disruption like the COVID-19 pandemic. With Advocacy’s ongoing monitoring, this important tool will continue to remind agencies that are writing new rules or reviewing existing ones to guard against “significant economic impacts on a substantial number of small entities.”¹⁷

¹⁴ Executive Order 13610 (May 10, 2012), 77 Fed. Reg. 28469.

¹⁵ Executive Order 14094 (April 6, 2023), 88 Fed. Reg. 21879.

¹⁶ [Request for Comments on Guidance Implementing Section 2\(e\) of the Executive Order of April 6, 2023 \(Modernizing Regulatory Review\)](#) (April 7, 2023), 88 Fed. Reg. 20916

¹⁷ 5 U.S.C. § 601.

Chapter 2

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

Federal agencies' compliance with the Regulatory Flexibility Act (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 the executive order have been codified in the Small Business Jobs Act of 2010.¹

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).

“Advocacy offers RFA training sessions to rule-writing agencies in the federal government. In FY 2023, Advocacy held 9 training sessions for 139 federal officials.”

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 2023, Advocacy held 9 training sessions for 139 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 2023

Date	Agency	Number Trained
10/04/2022	U.S. Department of State	19
10/12/2022	Federal Trade Commission	11
11/08/2022	Alcohol and Tobacco Tax and Trade Bureau	13
01/24/2023	Animal and Plant Health Inspection Service	19
02/23/2023	Federal Energy Regulatory Commission	16
03/02/2023	Federal Railroad Administration	7
03/30/2023	U.S. Coast Guard	24
04/06/2023	U.S. Coast Guard	18
09/06/2023	Federal Energy Regulatory Commission	12
Total		139



Region 6 Advocate Janea Jamison talks with the owner of Estralita's Café/ Carryout, Westwego, LA.

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.²

Agency Compliance with Executive Order 13272

Executive Order 13272 requires federal agencies to take certain steps to boost transparency and ensure small

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/>.

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. If 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.

Table 2.2 Federal Agency Compliance with Rule-Writing Requirements under Executive Order 13272 and the Small Business Jobs Act, FY 2023

Agency	Written Procedures on Website	URL of Agency's RFA Procedures	Notifies Advocacy	Responds to Comments
Cabinet Agencies				
Department of Agriculture	√	https://www.usda.gov/directives/dr-1512-001	√	√
Department of Commerce	√	NOAA: www.fisheries.noaa.gov/national/laws-and-policies/guidance-conducting-economic-and-social-analyses-regulatory-actions	√	√
Department of Defense	√	https://www.acquisition.gov/node/28713/printable/print	√	√
Department of Education	X		√	N/A
Department of Energy	√	www.energy.gov/sites/prod/files/gcprod/documents/eo13272.pdf	√	√
Environmental Protection Agency	√	https://www.epa.gov/sites/default/files/2015-06/documents/guidance-regflexact.pdf	√	√
Department of Health and Human Services	√	FDA: https://www.fda.gov/industry/small-business-assistance/letter-proper-consideration-small-entities-agency-rulemaking CMS: https://www.cms.gov/Regulations-and-Guidance/Guidance/CMSSmallBusAdminOmbuds	√	√
Department of Homeland Security	√	https://www.dhs.gov/publication/signed-regulatory-flexibility-act-executive-order-13272-memo-2004	√	N/A
Department of Housing and Urban Development	√	www.hud.gov/program_offices/sdb/policy/sbrefa	N/A	N/A
Department of the Interior	√	https://www.fws.gov/policy/library/rgeo12372.pdf	√	√
Department of Justice	X		√	N/A
Department of Labor	√	www.dol.gov/general/regs/guidelines	√	√
Small Business Administration	√		√	N/A
Department of State	X		√	N/A
Department of Transportation	√	https://www.transportation.gov/sites/dot.gov/files/2022-05/2022-DOT-Reg-Handbook.pdf	√	N/A

Table 2.2 Federal Agency Compliance with Rule-Writing Requirements under Executive Order 13272 and the Small Business Jobs Act, FY 2023

Agency	Written Procedures on Website	URL of Agency's RFA Procedures	Notifies Advocacy	Responds to Comments
Department of the Treasury (a)	√	Treasury: https://home.treasury.gov/about/general-information/orders-and-directives/td28-03 Internal Revenue Service: www.irs.gov/irm/part32/irm_32-001-005#idm140712272166000	√	√
Department of Veterans Affairs	√	www.va.gov/ORPM/Regulatory_Flexibility_Act_EO_13272_Compliance.asp	√	N/A
Noncabinet Agencies (b)				
Commodity Futures Trading Commission	N/A	N/A	X	N/A
Consumer Financial Protection Bureau	√	https://files.consumerfinance.gov/f/documents/cfpb_rfi_regulatory-flexibility-act.pdf	√	N/A
Consumer Product Safety Commission	√	www.cpsc.gov/Regulations-Laws--Standards/Rulemaking#The_Regulatory_Flexibility_Act	√	√
Equal Employment Opportunity Commission	√	www.eeoc.gov/eeoc/plan/regflexibilityact.cfm	√	N/A
Federal Acquisition Regulation Council	√	https://www.acquisition.gov/node/28713/printable/print	√	N/A
Federal Communications Commission	√	www.fcc.gov/sites/default/files/fcc-directive-1158.2.pdf	√	√
Federal Reserve Board	N/A	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	N/A	N/A	√	N/A
Pension Benefit Guarantee Corporation	N/A	N/A	√	N/A
Securities and Exchange Commission	N/A	N/A	√	N/A

Notes: (a) On June 9, 2023, Treasury and the Office of Management and Budget signed a Memorandum of Agreement stating that tax regulations would not be reviewed under Executive Order 12866. (b) Independent agencies are not subject to the E.O. requiring written procedures. However, some independent agencies do have written procedures available on their websites. √ = Agency complied with the requirement. X = Agency did not comply with the requirement. N/A = Not applicable because Advocacy did not publish a comment letter in response to an agency rule in FY 2023 or because the agency is not required to do so.

Chapter 3

Communication with Small Businesses and Federal Agencies

Communication with Federal Agencies

The principal goal of the Regulatory Flexibility Act (RFA) is to communicate 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 agency directors, and training sessions on RFA compliance provide meaningful participation by all interested parties and produce more effective and fair federal regulations. In addition, Advocacy roundtables often feature agency officials interested in small business input. In FY 2023, Advocacy's communications with federal agencies included 46 public comment letters and 9 RFA compliance training sessions for 139 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 participate in the regulatory 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.



In FY 2023, Advocacy's communications with federal agencies included 46 public comment letters and 9 RFA compliance training sessions for 139 federal officials.

Executive Order 12866 and Interagency Review of Upcoming Rules

Executive Order 12866, *Regulatory Planning and Review*, celebrated its 30th anniversary in FY 2023.¹ 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. OIRA will also meet with interested parties to discuss any issues with a rule under its review in what are called "12866 meetings." Advocacy attends these meetings when the regulation will affect small businesses.

¹Executive Order 12866, *Regulatory Planning and Review*, September 30, 1993. https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf

SBREFA Panels

In 1996, the Small Business Regulatory Enforcement Fairness Act (SBREFA) amended the RFA to require certain agencies to convene review panels whenever a potential regulation is expected to have a significant economic impact on a substantial number of small entities. These are commonly called SBREFA or Small Business Advocacy Review (SBAR) panels. These panels provide for small business input at the earliest stage of rulemaking—when a topic is still being studied, before a proposed rule sees the light of day. 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), Environmental Protection Agency (EPA), and Occupational Safety and Health Administration (OSHA). 10 panels were convened in FY 2023:

- EPA convened a panel on air emissions on October 6, 2022.
- EPA convened a panel on perchloroethylene on October 27, 2022.
- EPA convened a panel on lead and copper on January 15, 2023.
- EPA convened a panel on trichloroethylene on January 17, 2023.
- CFPB convened a panel on personal financial data rights on February 1, 2023.
- OSHA convened a panel on workplace violence on March 1, 2023.
- EPA convened a panel on n-Methylpyrrolidone on May 10, 2023.
- EPA convened a panel on meat and poultry products on July 3, 2023.
- EPA convened a panel on greenhouse emissions on July 27, 2023.
- OSHA convened a panel on heat injury on August 23, 2023.

Confidential Interagency Dialogue

While Advocacy uses tools like 12866 meetings and SBREFA panels to publicly 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 staff. 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 upcoming 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 2022 regulatory agendas were published on February 22, 2023, and the Spring 2023 agendas were published on July 27, 2023. The Unified Regulatory Agendas are a key component of the regulatory planning mechanism prescribed in Executive Order 12866, *Regulatory Planning and Review*. 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 2022: <https://www.federalregister.gov/documents/2023/02/22/2023-02113/introduction-to-the-unified-agenda-of-federal-regulatory-and-deregulatory-actions-fall-2022>
- Spring 2023: <https://www.federalregister.gov/documents/2023/07/27/2023-14540/introduction-to-the-unified-agenda-of-federal-regulatory-and-deregulatory-actions-spring-2023>

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.

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.² Advocacy continues to monitor retrospective review plans and their implementation and accepts feedback from small businesses 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...”³

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

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). 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).

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 posted on social media and distributed to attorney contact lists. In addition, Advocacy directs targeted email notices to stakeholders who may be affected by rulemaking. These alerts allow small businesses to stay informed of regulatory developments without having to conduct searches of their own. Regional advocates serve as a daily point of contact for small businesses throughout the country.

Throughout its history, Advocacy has met regularly with small businesses, 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. A full list of roundtables for FY 2023 can be found in Table 3.1.

During the pandemic, Advocacy staff 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 continuing to offer online roundtables, in large part thanks to these unforeseen benefits.

In addition, Advocacy staff perform site visits to small businesses to learn specifically of their interactions with federal regulations. These visits provide Advocacy the opportunity to learn about 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 staff to talk through their regulatory concerns. Advocacy encourages the small business hosting the site visit to invite their peers, allowing Advocacy staff to learn from others facing similar regulatory burdens.

Advocacy staff also stay up to date on the changes in administrative law through attendance at American Bar Association conferences and 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 the sharpest 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 issues in their regulatory portfolios so that they have a stronger understanding of how businesses in their areas of expertise function and the attendees better understand the impact of federal regulations on small businesses.

Table 3.1 Regulatory Roundtables Hosted by the Office of Advocacy, FY 2023

Agency	Purpose	Date
Consumer Financial Protection Bureau	Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders	02/06/23
Council on Environmental Quality	CEQ Environmental Justice Screening Tool Demonstration & Overview	02/01/23
	Proposed NEPA Regulations Revisions Phase 2	09/13/23
Department of Commerce, Fish and Wildlife Service; Department of the Interior, National Marine Fisheries Service	Proposed Regulations Governing Interagency Cooperation, Listing and Designation of Critical Habitat, and Regulations Pertaining to Endangered and Threatened Wildlife and Plants	08/01/23
Department of Energy	Energy Conservation Standards for Distribution Transformers	03/14/23
	Small Business Commercial Refrigeration Roundtable	10/28/22
Department of the Interior, Bureau of Land Management	Conservation as a Land Use Activity Under the Federal Land Policy and Management Act	05/17/23
Department of the Interior, Bureau of Ocean Energy Management	Renewable Energy Activities	02/28/23
Department of Justice	Americans with Disabilities Act Accessibility Proposed Rule for State and Local Governments	09/14/23
Department of Labor	Proposed Rule on Independent Contractor Classification Under the Fair Labor Standards Act	11/09/22
	Proposed Overtime Rule	09/26/23 09/27/23
Department of Labor, Mine Safety and Health Administration	Lowering Miners' Exposure to Respirable Crystalline Silica and Improving Respiratory Protection	08/30/23
Department of Labor, Occupational Safety and Health Administration	Small Business Advocacy Review Panel on Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings	08/11/23
Department of Labor, Occupational Safety and Health Administration/Mine Safety and Health Administration	Small Business Labor Safety Roundtable	11/18/22 01/20/23 03/24/23 05/19/23
Environmental Protection Agency	EPA's Proposed Revisions for the Risk Management Program Regulations Under the Clean Air Act	10/07/22
	EPA's Supplemental Notice of Proposed Changes to its Fees for the Administration of the Toxic Substances Control Act	01/06/23
	EPA Proposed Rule on Restrictions on Certain Uses of HFCs	01/20/23
	Proposed NESHAP for Ethylene Oxide Emissions Standards for Commercial Sterilization Operations: Residual Risk and Technology Review; Ethylene Oxide Proposed Interim Registration Review Decision	04/25/23
	Proposed PFAS National Primary Drinking Water Regulations	05/11/23
	EPA's Proposed Risk Management of Methylene Chloride Under the Toxic Substance Control Act	06/21/23
	EPA's Proposed Risk Management of Perchloroethylene Under the Toxic Substance Control Act	08/02/23
Federal Railroad Administration	Train Crew Safety Size Standards	12/12/22
Federal Trade Commission	Non-Compete Clause Rule	02/28/23
Department of Labor, National Labor Relations Board	NLRB Proposed Rule on Joint Employer Status	10/20/22

Issue Roundtables

Consumer Financial Protection Bureau

Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders

February 6, 2023

On February 6, 2023, Advocacy hosted a roundtable on financial issues. The participants discussed the CFPB credit card fees rulemaking, its registry of nonbank covered person, and its guidance documents. The participants also discussed Financial Crime Enforcement Network's (FinCEN) proposed rulemaking on beneficial ownership. FinCEN briefly explained that the proposal was the second of three proposed rules on the issue. The CFPB attended and listened to the concerns of the participants.

Council on Environmental Quality

CEQ Environmental Justice Screening Tool Demonstration and Overview

February 1, 2023

On November 22, 2022, the Council on Environmental Quality (CEQ) released version 1.0 of its Environmental Justice Screening Tool. The tool is meant to help federal agencies better identify communities that can benefit from Justice40 initiatives. Justice40 initiatives aim to ensure that the benefits of federal programs reach communities that are overly burdened by pollution and historic underinvestment. CEQ offered a demonstration of how to use the screening tool and answered questions about its functions. Roundtable participants also commented and gave CEQ feedback on the tool.



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.

Proposed NEPA Regulations Revisions

Phase 2

September 13, 2023

On July 29, 2023, the CEQ proposed a second round of revisions to the National Environmental Policy Act (NEPA). The proposed rule both amends and removes changes to NEPA made in 2020 and directs agencies to consider climate change and environmental justice issues during environmental reviews. CEQ presented an overview of the rule and answered questions from roundtable participants. After CEQ left the call, the discussion continued, and participants voiced additional concerns over the proposal.

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

Proposed Regulations Governing Interagency Cooperation, Listing and Designation of Critical Habitat, and Regulations Pertaining to Endangered and Threatened Wildlife and Plants

August 1, 2023

On June 22, 2023, the Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS; together the Services) published a series of three proposed rules modifying various areas of the Endangered Species Act (ESA). The proposals covered multiple areas under the ESA, including mitigation requirements, determination of critical habitat, and the listing of endangered and threatened species. Tyson Kade, an attorney with the National Endangered Species Act Reform Coalition, presented an overview of the proposals and roundtable participants shared issues of concern. Neither FWS nor NMFS attended the roundtable.

Department of Energy

Small Business Commercial Refrigeration Roundtable

October 28, 2022

The Department of Energy (DOE) is responsible for setting energy efficiency standards for appliances. DOE recently updated its procedures by which it would gather data and update these standards. It is currently developing new standards for commercial refrigeration installations. Simultaneously, the EPA regulates the use of refrigerants, most recently under the American Innovation and Manufacturing Act, which requires a phase-down in the use of hydrofluorocarbons. This raises the concern that DOE's efforts will be based on refrigerants that will not be readily available in the future. On October 28, 2022, Advocacy held a roundtable to discuss DOE's efforts, including its future plans and the manner in which DOE would coordinate its efforts with EPA. The agencies did not attend the teleconference.

Energy Conservation Standards for Distribution Transformers

March 14, 2023

On December 22, 2022, the Department of Energy (DOE) proposed energy efficiency standards for distribution transformers. A distribution transformer is a device used to change the voltage of electrical power and is a critical element of the electrical grid. Purchasers of distribution transformers are primarily electric utilities and commercial or industrial entities. On March 14, 2023, Advocacy hosted a small business roundtable to discuss this proposed rule. The agency did not present.

Department of the Interior, Bureau of Land Management

Conservation as a Land Use Activity Under the Federal Land Policy and Management Act

May 17, 2023

On April 3, 2023, the Department of the Interior published a proposed rule to add conservation as a

land use activity within the framework of the Federal Land and Policy Management Act (FLPMA). Small businesses expressed concern that this action would elevate conservation above other uses envisioned by Congress in FLPMA. On May 17, 2023, Advocacy hosted a roundtable to solicit small business views. The agency did not present at this roundtable.

Department of the Interior, Bureau of Ocean Energy Management

Renewable Energy Activities

February 28, 2023

On January 30, 2023, the U.S. Department of the Interior's Bureau of Ocean Energy Management (BOEM) published a proposed renewable energy modernization rule. BOEM's regulations have not been updated since 2009. The proposed rule aims to address the modern renewable energy climate. BOEM stated the rulemaking will streamline the leasing process. Advocacy hosted a roundtable to discuss this proposed rule on February 28, 2023. The agency did not present at this roundtable.

Department of Justice

Americans with Disabilities Act Accessibility

Proposed Rule for State and Local Governments

September 14, 2023

On August 4, 2023, the United States Department of Justice (DOJ) Civil Rights Division published a proposed rule that would require state and local government entities make their websites and mobile devices accessible under Title II of the Americans with Disabilities Act (ADA). On September 14, 2023, Advocacy held a virtual roundtable with the DOJ officials. Over 200 small governments from 31 states, including counties, cities, townships, parishes, and community colleges participated. Small governments commented that they seek to provide accessibility for their constituents but have limited revenues and a lack of internal technical staff to meet the high technical standard proposed by the agency. Roundtable participants also commented that the

DOJ has underestimated the compliance costs and burden hours of this rule for small entities, particularly the smallest government jurisdictions.

Department of Labor

National Labor Relations Board Joint Employer Rule

October 20, 2022

On September 7, 2022, the National Labor Relations Board (NLRB) proposed a rule that would expand the joint-employer definition under the National Labor Relations Act. On October 20, 2022, Advocacy held a small business roundtable with NLRB officials and over 115 small businesses and their representatives. These small businesses represented a variety of industries including construction, finance, hospitality, and transportation.

Small businesses at Advocacy's roundtable expressed concern that the NLRB's expanded joint employer standard is too broad. Franchisees, federal contractors, and other small businesses discussed how this rule may hamper their staffing and third-party contractual relationships. Roundtable participants commented that the NLRB has underestimated the cost of this rule at under \$150 per small business. Construction representatives cited concern that this rule would make them liable for every subcontractor.

Proposed Rule on Independent Contractor Classification Under the Fair Labor Standards Act *November 9, 2022*

On October 13, 2022, the Department of Labor (DOL) proposed a rule that would determine whether a worker is an independent contractor or employee under the Fair Labor Standards Act. With this new rule, DOL is returning to the traditional multi-factor economic reality test that analyzes the totality-of-the-circumstances in a business.

On November 9, 2022, Advocacy held a small business roundtable with the DOL officials and

over 250 small businesses, nonprofits, and their representatives. Small businesses commented that the agency underestimated the compliance costs of this rule at less than \$25 per business. The DOL did not estimate any costs for small businesses and independent contractors to reclassify workers as independent contractors, for lost work, and for business disruptions.

Overtime Rule

September 26 and 27, 2023

On September 8, 2023, the DOL published a proposed rule that will increase the standard salary threshold for the executive, administrative, and professional overtime exemption under the Fair Labor Standards Act from \$35,568 to \$55,068 annually. This threshold was expected to be increased in the final rule, up to \$60,209.

On September 26 and 27, 2023, Advocacy held virtual roundtables with the DOL officials and over 300 small entities from across the country. Roundtable participants commented that the DOL underestimates the economic impact of the rule on small entities at only \$4,323 per small entity. Participants at Advocacy's roundtables reported much higher first year cost estimates at \$20,000 to over \$200,000 per small entity. Small entities commented about the detrimental impacts to their operations, particularly during the current difficult business environment of inflation, supply chain disruptions, shutdowns, and tighter labor markets.

Department of Labor, Mine Safety and Health Administration

Labor Safety Roundtable on MSHA's Proposed Respirable Crystalline Silica Rule

August 30, 2023

On August 30, 2023, Advocacy hosted a small business regulatory roundtable on Mine Safety and Health Administration's proposed Lowering Miners' Exposure to Respirable Crystalline Silica and Improving Respiratory Protection (Respirable Crystalline Silica)

rule. The proposed rule would amend MSHA's existing standards for occupational exposure to respirable crystalline silica and improve respiratory protection for all airborne hazards. Christopher J. Williamson, Assistant Secretary of Labor for Mine Safety and Health, provided an overview of the proposed rule and answered questions about its content.

Next, a private sector industrial hygienist and safety consultant provided an assessment and analysis of MSHA's proposal from the small business perspective, including its potential economic impact, differences between metal/nonmetal and coal hazards, and possible regulatory alternatives. This roundtable followed three MSHA informal public hearings on the proposed rule that Advocacy also attended.

Department of Labor, Mine Safety and Health Administration; Department of Labor, Occupational Safety and Health Administration
Small Business Labor Safety Roundtable
November 18, 2022

This roundtable discussed the Occupational Safety and Health Administration's October 22, 2022, public stakeholder meeting on possible changes to its Process Safety Management standard for highly hazardous chemicals. It included an overview of the OSHA hearing from the highly regulated fuel and petrochemical sector and discussed Advocacy's recent comment letter on EPA's related Risk Management Program. Next, Patrick Showalter, director of the Office of Small Business Assistance in OSHA's Directorate of Cooperative and State Programs, discussed OSHA's On-Site Consultation program and how it can benefit small business participants. He was joined by a small community health care company that participates in the On-Site Consultation program and has been awarded OSHA's Safety & Health Achievement Recognition Program distinction. Finally, a representative from the essential minerals industry discussed new applications and utilizing rare earth elements in far-reaching products and technologies, from lithium

batteries/EVs, medicine, agriculture, electronics, construction, transportation, manufacturing, energy, and food.

Small Business Labor Safety Roundtable
January 20, 2023

This roundtable focused on OSHA's notice Advocacy that it intends to convene a SBREFA panel on a possible Prevention of Workplace Violence in Healthcare and Social Assistance rule in the next 60 days. OSHA's potential rule would apply to employers whose employees face an increased risk of workplace violence resulting primarily from violent behavior of their patients, clients, residents, and/or visitors in their workplaces. Ryan Tremain from OSHA's Office of Physical Hazards in the Directorate of Standards and Guidance discussed the SBREFA panel process, the scope of a possible OSHA rule, and the role of small entity representatives in the panel process. The roundtable also included a review of OSHA and MSHA's most recent regulatory agendas of regulatory and deregulatory actions to help identify priority issues from the small business perspective.

Small Business Labor Safety Roundtable
March 24, 2023

This roundtable examined the American Bar Association's annual Workplace Safety and Health Law conference, including its day-long program on MSHA-related issues (such as the Federal Mine Safety and Health Review Commission, MSHA injury/fatality and enforcement statistics, regulatory priorities such as silica, litigation, and other topics) as well as its focus on OSHA priority issues. Advocacy provided an update on the OSHA SBREFA panel on a possible Prevention of Workplace Violence in Healthcare and Social Assistance rule, that was formally convened on March 1, 2023. OSHA's possible rule would apply to employers whose employees face an increased risk of workplace violence in facilities providing medical, emergency, behavioral, mental health, memory care, home, and social assistance. Finally, a litigation attorney provided an overview and analysis

of OSHA’s use of industry “consensus standards” in enforcement actions under the OSHA General Duty Clause.

Small Business Labor Safety Roundtable

May 19, 2023

Lisa Long, deputy director of OSHA’s Directorate of Standards and Guidance, spoke on OSHA’s activities concerning heat-related hazards in both the indoor and outdoor work environments, including in general industry, construction, agriculture, and maritime. This included a discussion of OSHA’s enforcement initiative on heat-related hazards, National Emphasis Program on heat inspections, the advance notice of proposed rulemaking, stakeholder engagement, National Advisory Committee on Occupational Safety and Health’s Heat Workgroup, upcoming SBREFA panel, and possible rulemaking process during Advocacy’s roundtable.

Next, Andrew Levinson, director of OSHA’s Directorate of Standards and Guidance, discussed several new OSHA initiatives designed to better engage stakeholders. Finally, Advocacy hosted a retrospective discussion with several of the small entities who worked on the recently completed small business panel on Workplace Violence in Healthcare and Social Assistance. They discussed their experience with the panel, whether the final report accurately captures the discussions and their advice and recommendations, and their thoughts for improving the SBREFA panel process going forward.

Department of Labor, Occupational Safety and Health Administration

Labor Safety Roundtable on OSHA’s Heat Injury and Illness SBAR/SBREFA Panel

August 11, 2023

On August 11, 2023, Advocacy hosted a small business regulatory roundtable to discuss the upcoming SBREFA panel on OSHA’s possible Heat Injury and Illness Prevention in Indoor and Outdoor Work Settings rulemaking. Dr. Stephen R. Schayer, director

During roundtables, specific regulatory issues are discussed by small businesses and their representatives, in almost all cases with the federal agency present.

of the Office of Physical Hazards in OSHA’s Directorate of Standards and Guidance, provided an update on the status and timing of the panel and the ongoing efforts by Advocacy and OSHA to identify small entity representatives to participate in the panel process and provide their advice and recommendations to the panel. OSHA’s possible rule would apply to employers whose employees are exposed to hazardous heat in the workplace and could cover outdoor and indoor work in general industry, construction, maritime, and agriculture. The panel sought participation from a wide range of sectors and welcomes small businesses from any industry that might be affected.

Department of Transportation, Federal Railroad Administration

Transportation Safety Roundtable on FRA’s Proposed Train Crew Staffing Rule

December 12, 2022

On December 12, 2022, Advocacy hosted a small business regulatory roundtable to discuss the FRA’s proposed Train Crew Staffing rule. The proposed rule would establish minimum requirements for the size of train crews depending on the type of operation, including a minimum requirement of two crewmembers for all railroad operations. Senior Attorney Alan H. Nagler and Economist Mark Anderson from FRA provided an overview of the proposed rule and discussed the agency’s economic and Regulatory Flexibility Act analyses. Next, the president of the American Short Line and Regional Railroad Association discussed their members’ concerns with the proposed rule. He also discussed results of a recent, detailed member survey about the rule and their member’s perspectives of the cost and challenges of potential compliance.

Environmental Protection Agency ***EPA's Proposed Revisions for the Risk Management Program Regulations Under the Clean Air Act***

October 7, 2022

On October 7, 2022, Advocacy held a roundtable to discuss two proposed rulemakings from the EPA. The first topic of discussion was EPA's proposal, published on August 31, 2022, to revise its Risk Management Program regulations under the Clean Air Act.

The second topic discussed was the agency's proposal, published on September 6, 2022, to designate perfluorooctanoic acid and perfluorooctanesulfonic acid as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act. EPA speakers presented an overview of each rulemaking. Roundtable participants asked EPA questions and shared comments and information responses to both proposed actions.

EPA's Supplemental Notice of Proposed Changes to its Fees for the Administration of the Toxic Substances Control Act

January 6, 2023

On November 16, 2022, EPA published a proposal to modify and supplement its previously proposed updates and adjustments to its 2018 final rule for fees under the Toxic Substances Control Act. In this action, the agency is proposing to increase the fee amounts significantly. This is based on the agency's change in the estimates of its total costs for administering Toxic Substances Control Act.

Advocacy held a roundtable on January 6, 2023 to discuss this rulemaking. EPA presented an overview of its proposal. Roundtable participants shared comments and asked EPA questions.

EPA Proposed Rule on Restrictions on Certain Uses of HFCs

January 20, 2023

On December 27, 2020, the President signed the Consolidated Appropriations Act, 2021, which includes the American Innovation and Manufacturing Act of 2020 (AIM Act). The AIM Act directs EPA to establish a regulatory framework for phasing down the production and consumption of hydrofluorocarbons (HFCs) over a fifteen-year period.

In addition, as a statutory phase-down, the AIM Act gave EPA authority to restrict uses of HFCs. On December 15, 2022, EPA proposed to restrict the use of certain higher-GWP HFCs in aerosols, foams, refrigeration, air conditioning, and heat pump products and equipment. The proposed rule would prohibit the manufacture and import of products containing restricted HFCs by January 1, 2025, in most cases. It would also prohibit the sale, distribution, and export of products containing restricted HFCs a year later, which in most cases would be January 1, 2026. On January 20, 2023, Advocacy hosted a roundtable on this rule, at which EPA presented.

Proposed NESHAP for Ethylene Oxide Emissions Standards for Commercial Sterilization Operations: Residual Risk and Technology Review; Ethylene Oxide Proposed Interim Registration Review Decision

April 25, 2023

Ethylene oxide (EtO) is used on half of the sterilized medical devices in the United States. However, since 2016, when EPA updated its Integrated Risk Information System classification EtO as a carcinogen, EPA has been considering more stringent standards for the use of EtO and emissions of EtO from a range of industrial facilities. On April 13, 2023, EPA published proposals under two separate programs that would significantly impact the use of EtO in commercial sterilization operations: emission standards under the Clean Air Act and restrictions on use under the Federal Insecticide, Fungicide, and Rodenticide Act. Advocacy hosted a roundtable on April 25, 2023, at which EPA presented on these two actions.

Proposed PFAS National Primary Drinking Water Regulations

May 11, 2023

On March 29, 2023, EPA published its proposed National Primary Drinking Water Regulations to establish legally enforceable levels, called Maximum Contaminant Levels, for six per- and polyfluoroalkyl substances. The maximum contaminant levels include perfluorooctanoic acid and perfluorooctanesulfonic acid, perfluorohexanesulfonic acid, hexafluoropropylene oxide dimer acid and its ammonium salt (also known as GenX chemicals), perfluorononanoic acid, and perfluorobutanesulfonic acid. Advocacy held a roundtable on May 11, 2023, to discuss this rulemaking. First, EPA presented on the proposed rule. Next, the American Water Works Association presented on issues of the proposal relevant to small systems. Roundtable participants asked EPA questions and shared comments and concerns.

EPA's Proposed Risk Management of Methylene Chloride Under the Toxic Substance Control Act

June 21, 2023

On May 3, 2023, EPA published a proposed rule to restrict the use of methylene chloride under the Toxic Substance Control Act. EPA proposed to prohibit the manufacture, processing, and distribution in commerce of methylene chloride for consumer use. EPA also proposed to prohibit most industrial and commercial uses of methylene chloride. For the remaining uses, EPA also proposed to require a workplace chemical protection program, which would include a chemical exposure limit, set by EPA, and exposure monitoring.

Advocacy held a roundtable on June 21, 2023, to discuss this rulemaking. A representative from the Halogenated Solvents Industry Alliance presented an overview of the proposed rule and discussed issues relevant to small businesses. Roundtable participants asked questions and shared comments and concerns. The agency attended the roundtable but did not present.



Advocacy will continue to offer online roundtables to further improve attendance and reach distant stakeholders.

EPA's Proposed Risk Management of Perchloroethylene Under the Toxic Substance Control Act

August 2, 2023

On June 16, 2023, EPA published a proposed rule to restrict the use of perchloroethylene (PCE) under the Toxic Substance Control Act. EPA proposed to prohibit most industrial and commercial uses of PCE, as well as its use in dry cleaning through a 10-year phaseout. EPA also proposed to ban PCE for consumer use. For the remaining uses, EPA proposed to require a workplace chemical protection program, which would include a requirement to meet an existing chemical exposure limit set by EPA, and to prevent direct skin contact.

Advocacy held a roundtable on August 2, 2023, to discuss this rulemaking. A representative from the Halogenated Solvents Industry Alliance presented an overview of the proposed rule and discussed issues relevant to small businesses. Roundtable participants asked questions, shared comments, and concerns. The agency attended the teleconference but did not present.

Federal Trade Commission

Non-Compete Clause Rule

February 28, 2023

On February 28, 2023, Advocacy hosted a roundtable on the Federal Trade Commission's notice of proposed rulemaking on the Non-Compete Clause rule. The participants discussed their concerns about the rulemaking. The Federal Trade Commission attended and listened to their concerns.

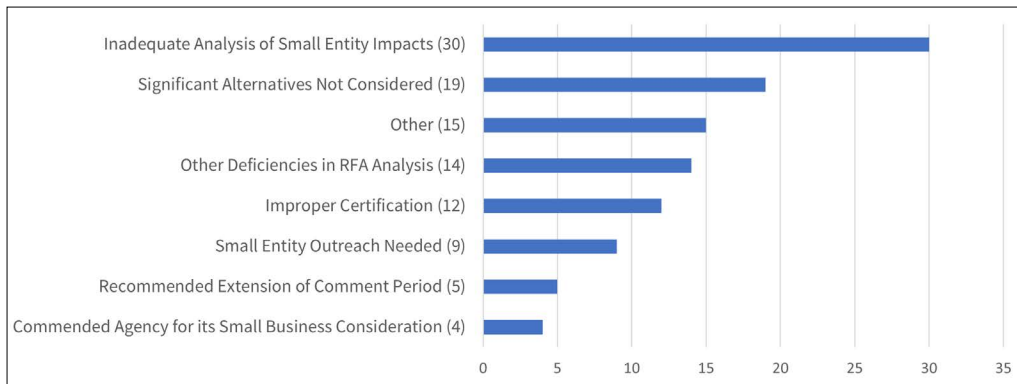
Regional Advocate Outreach

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 sometimes 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 2023

Figure 4.1 Number of Specific Issues of Concern in Agency Comment Letters, FY 2023



In FY 2023, Advocacy submitted 46 formal comment letters to regulatory agencies. The most frequent concerns were inadequate analysis of small entity impacts (30 letters), significant alternatives not considered (19 letters), and other deficiencies in the RFA analysis (14 letters). Several letters (15 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 2023 in chronological order. Each letter is summarized in the following section, arranged by agency.



On May 17, Region 1 Advocate Louis Luchini visited Brodis Blueberries in Hope, Maine. The Brodis family has farmed wild Maine blueberries for over 150 years. From Left to Right: Maine SBA District Director Diane Sturgeon, Gwen Brodis, Sonja Brodis Howard, Ron Howard, Region 1 Advocate Louis Luchini, Maine SBA Deputy Director Tim Hobbs.

Table 4.1 Regulatory Comment Letters Filed by the Office of Advocacy, FY 2023

Date Filed	Agency*	Topic	Citation to Rule
10/03/22	CEQ	Development of an Environmental Justice Scorecard	87 Fed. Reg. 47397
10/18/22	FAR	Mandatory Project Labor Agreement for Federal Construction Projects of \$35 Million or More	87 Fed. Reg. 51044
10/28/22	EPA	Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention	87 Fed. Reg. 53556
10/31/22	NMFS	Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule	87 Fed. Reg. 56925
11/07/22	EPA	Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances	87 Fed. Reg. 54415
11/18/22	TTB	Implementation of Refund Procedures for Craft Beverage Modernization Act Federal Excise Tax Benefits Applicable to Imported Alcohol	87 Fed. Reg. 58043
11/29/22	NLRB	Standard for Determining Joint-Employer Status	87 Fed. Reg. 54641
12/12/22	DOL	Employee or Independent Contractor Under the Fair Labor Standards Act	87 Fed. Reg. 62218
12/19/22	EPA	TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances; Notice of Data Availability and Request for Comment	87 Fed. Reg. 72439
12/21/22	FRA	Proposed Train Crew Size Safety Requirements Rule	87 Fed. Reg. 66638
01/13/23	IRS	Prevailing Wage and Apprenticeship Initial Guidance Under Section 45(b)(6)(B)(ii) and Other Substantially Similar Provisions	87 Fed. Reg. 73580
02/10/23	FAR	Case 2021-015, Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk	87 Fed. Reg. 78910
02/13/23	EPA	Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review	87 Fed. Reg. 74702
02/14/23	FINCEN	Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities	87 Fed. Reg. 77404
02/16/23	EPA	National Emission Standards for Hazardous Air Pollutants for Lime Manufacturing Plants; Residual Risk and Technology Review	88 Fed. Reg. 805
03/10/23	USCIS	Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements	88 Fed. Reg. 402
03/20/23	FTC	Non-Compete Clause Rule	88 Fed. Reg. 20442
03/27/23	DOE	Energy Conservation Program: Energy Conservation Standards for Distribution Transformers	88 Fed. Reg. 1722
03/28/23	CFPB	Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders	88 Fed. Reg. 6088

Date Filed	Agency*	Topic	Citation to Rule
03/30/23	CFPB	Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions that Seek to Waive or Limit Consumer Legal Protections	88 Fed. Reg. 6906
03/30/23	DOI	Renewable Energy Modernization Rule	88 Fed. Reg. 19578
04/18/23	EPA	PFAS National Primary Drinking Water Regulation Rulemaking	88 Fed. Reg. 18638
05/03/23	CFPB	Credit Card Penalty Fees (Regulation Z)	88 Fed. Reg. 18906
05/05/23	SEC	Safeguarding Advisory Client Assets	88 Fed. Reg. 14672
05/30/23	EPA	Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category	88 Fed. Reg. 18824
05/30/23	EPA	PFAS National Primary Drinking Water Regulation Rulemaking	88 Fed. Reg. 18638
06/06/23	OIRA	Implementation of Executive Order 14094, Modernizing Regulatory Review	88 Fed. Reg. 21879
06/13/23	DOI	Conservation and Landscape Health	88 Fed. Reg. 19583
06/17/23	CPSC	Safety Standard for Portable Generators	88 Fed. Reg. 24346
06/23/23	EPA	National Emission Standards for Hazardous Air Pollutants: Commercial Ethylene Oxide Sterilization Technology Review & Ethylene Oxide Proposed Interim Registration Review Decision	88 Fed. Reg. 22790
06/23/23	EPA	National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review	88 Fed. Reg. 24854
07/03/23	EPA	Methylene Chloride; Regulation Under the Toxic Substances Control Act	88 Fed. Reg. 28284
07/05/23	TTB	Consideration of Updates to Trade Practice Regulations	87 Fed. Reg. 67612
07/14/23	FWS, NMFS	Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation; Endangered and Threatened Wildlife and Plants: Listing Endangered and Threatened Species and Designating Critical Habitat; Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants	88 Fed. Reg. 40742
07/17/23	EPA	Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments	88 Fed. Reg. 31982
07/24/23	CFPB	Residential Property Assessed Clean Energy Financing (Regulation Z)	88 Fed. Reg. 30388

Date Filed	Agency*	Topic	Citation to Rule
08/02/23	MSHA	Recommend Extension of Comment Period for Proposed “Lowering Miners’ Exposure to Respirable Crystalline Silica and Improving Respiratory Protection” (Respirable Crystalline Silica) Rule	88 Fed. Reg. 48146
08/08/23	EPA	New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule	88 Fed. Reg. 39390
08/08/23	EPA	Updates to New Chemicals Regulations Under the Toxic Substances Control Act	88 Fed. Reg. 34100
08/14/23	IRS	Elective Payment of Advanced Manufacturing Investment Credit	88 Fed. Reg. 40123
08/15/23	EPA	Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act	88 Fed. Reg. 39652
08/21/23	FWS, NMFS	Endangered and Threatened Wildlife and Plants, Revision of Regulations for Interagency Cooperation; Endangered and Threatened Wildlife and Plants, Listing Endangered and Threatened Species and Designating Critical Habitat; and Endangered and Threatened Wildlife and Plants, Regulations Pertaining to Endangered and Threatened Wildlife and Plants	88 Fed. Reg. 40753
08/21/23	CFPB, OCC, FDIC, FED, NCUA, FHFA	Quality Control Standards for Automated Valuation Models	88 Fed. Reg. 40638
08/28/23	BOEM	Risk Management and Financial Assurance for OCS Lease and Grant Obligations	88 Fed. Reg. 58173
09/27/23	FDA	Requirements for Tobacco Product Manufacturing Practice	88 Fed. Reg. 15174
09/29/23	CEQ	National Environmental Policy Act Implementing Regulations Revisions Phase 2	88 Fed. Reg. 49924

*Abbreviations:

BOEM Bureau of Ocean Energy Management
 CFPB Consumer Financial Protection Bureau
 CPSC Consumer Product Safety Commission
 DOE Department of Energy
 DOI Department of the Interior
 DOL Department of Labor

EPA Environmental Protection Agency
 FRA Federal Railroad Administration
 FINCEN Financial Crimes Enforcement Network
 FTC Federal Trade Commission
 FWS Fish and Wildlife Service
 NMFS National Marine Fisheries Service
 SEC Securities and Exchange Commission

Summaries of Advocacy’s Public Comments to Federal Agencies

Alcohol Tax and Trade Bureau

Issue: Implementation of Refund Procedures for Craft Beverage Modernization Act Federal Excise Tax Benefits Applicable to Imported Alcohol

On September 23, 2022, the Alcohol and Tobacco Tax and Trade Bureau (TTB) published temporary and proposed rules implementing amendments to the Craft Beverage Modernization Act provisions of the Internal Revenue Code. The rules reflect amendments to the Internal Revenue Code found in the Taxpayer Certainty and Disaster Tax Relief Act of 2020. The rules establish refund procedures that will allow importers to take advantage of tax benefits applicable to imported alcohol products on a quarterly basis.

On November 18, 2022, Advocacy filed a comment letter encouraging TTB to publish either a supplemental Regulatory Flexibility Act (RFA) assessment or an initial regulatory flexibility analysis (IRFA), allowing additional time for public comment. Advocacy expressed concern that the proposed rules lack the substantive information necessary to establish a factual basis for certification under the RFA. To fix this, Advocacy suggested that the agency perform a threshold economic impact analysis to identify small entities that will be affected by the regulation and describe the costs of the rulemaking to those small entities. Depending on the outcome of the analysis, Advocacy suggested that the TTB publish for public comment either a supplemental RFA assessment with a valid factual basis in support of a certification or an IRFA before proceeding with the rulemaking. If TTB cannot certify, Advocacy suggested that the IRFA should consider regulatory alternatives which accomplish the agency’s stated objectives. Those alternatives should include an examination of more frequent refund periods. In addition, Advocacy also suggested that TTB should extend the comment period.

Issue: Consideration of Updates to Trade Practice Regulations

On November 9, 2022, TTB published an advance notice of proposed rulemaking (ANPRM) titled, “Consideration of Updates to Trade Practice Regulations.” In the ANPRM, TTB solicited input on possible improvements to the agency’s trade practice regulations related to the Federal Alcohol Administration Act’s exclusive outlet, tied house, commercial bribery, and consignment sales prohibitions. On July 5, 2023, Advocacy filed a comment letter on the ANPRM. In that letter, Advocacy commended the agency for allowing small business stakeholders the opportunity to provide input early in the regulatory process. Advocacy made the following recommendations to the agency based upon input from small alcohol producers:

- TTB should modernize its trade practice regulations to increase the competitiveness of small alcohol producers.
- TTB should specifically update its trade practice regulations in response to certain anticompetitive category management, slotting fee, and tied house practices that are common in the industry.
- TTB should also consider consistent enforcement as an alternative to regulation. Effective enforcement should focus on large industry players with greater market power.

Consumer Financial Protection Bureau

Issue: Residential Property Assessed Clean Energy Financing (Regulation Z)

On May 11, 2023, the Consumer Financial Protection Bureau published a notice of proposed rulemaking on Residential Property Assessed Clean Energy Financing (PACE). PACE financing covers the costs of home improvements, which results in a tax assessment on the homeowner’s property. Borrowers pay the loans through increased property tax

payments over time. PACE lending is authorized by local governments.

Advocacy questioned the factual basis for the CFPB's certification under the Regulatory Flexibility Act. Specifically, Advocacy questioned the CFPB's inability to provide information about the number of small entities that may be impacted by the proposal and the estimated costs of the proposal. Advocacy asserted that the CFPB understated the percentage of small entities that may be impacted by the rulemaking because it was based on all home improvement contractors rather than limiting it to the businesses that participate in the PACE program. Likewise, the CFPB analyzed all small governmental entities that are in PACE jurisdictions rather than only those that participate in the PACE program. The CFPB also provided no information about the potential costs.

Advocacy recommended that the agency analyze potential costs to determine the economic impact of the rulemaking and to perform a threshold analysis on the impact of the rulemaking to provide a factual basis for a certification, if appropriate. If a certification was not appropriate, Advocacy recommended that the CFPB convene a small business advocacy review panel (commonly referred to as a SBREFA panel) and perform an initial regulatory flexibility analysis before preparing a final regulatory flexibility analysis for the final rule. Advocacy encouraged the CFPB to provide guidance to assist small entities in complying with the requirements of the rulemaking.

Issue: Credit Card Penalty Fees

On March 29, 2023, the CFPB published a notice of proposed rulemaking on Credit Card Penalty Fees. The proposed rulemaking would adjust the safe harbor dollar amount for late fees to \$8 and eliminate a higher safe harbor dollar amount for late fees for subsequent violations of the same type. It also eliminates annual inflation adjustments for the safe harbor dollar amounts and provides that late fee amounts must not exceed 25 percent of the required



IRFA:

Initial regulatory flexibility analysis

payment. The CFPB prepared a certification in lieu of an initial regulatory flexibility analysis.

On May 3, 2023, Advocacy submitted comments on the proposal. Advocacy questioned the CFPB's lack of data to support its conclusion that the rule will not have a significant economic impact on a substantial number of small entities. In addition, Advocacy asserted that the CFPB should have used a more granular analysis of impacts. Advocacy also questioned the CFPB's lack of data about small depository institutions. Advocacy further asserted that the reasonableness test, which allows small depository institutions to establish late fees so long as they are reasonable, is not a viable option for small depository institutions. It is less risky for such businesses to rely on a safe harbor. Advocacy also stated that the rulemaking may be harmful to consumers, including small businesses, who rely on small depositories, should small depositories decide to exit the credit card market. Advocacy recommended that the CFPB maintain the status quo until it has sufficient data to ascertain the economic impact of this action on small entities.

Issue: Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions that Seek to Waiver or Limit Consumer Legal Protections

On February 1, 2023, the CFPB published a notice of proposed rulemaking for the Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions that Seek to Waive or Limit Consumer Legal Protections. The proposed rule would establish a CFPB system for registration of nonbanks that use covered terms or conditions that seek to waive

consumer rights or other legal protections or limit the ability of consumers to enforce or exercise their rights.

On March 30, 2023, Advocacy submitted comments on the proposed rule. Advocacy questioned the CFPB's failure to provide information about the number of small businesses that may be impacted by the proposal and its estimated costs. The RFA requires the CFPB to provide information about the number of small businesses that will be impacted using the appropriate SBA size standards. Although the CFPB's 1022(b)(4) analysis proposed an exemption threshold of one million dollars, that is not the size standard for the relevant industries. Many more small businesses may be impacted by this rule than CFPB's analysis describes. Advocacy encouraged the CFPB to consult Census data to obtain more information about the nature of the impact to small businesses. Advocacy further encouraged the CFPB to provide guidance to assist small businesses in complying with the requirements of the rulemaking.

Issue: Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders

On January 30, 2023, the CFPB published a notice of proposed rulemaking for the Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders. The proposed rule has three provisions. The first proposed provision would require nonbank covered persons that are subject to agency and court orders to register and submit copies of the orders to the CFPB. The provision includes consent and stipulated orders and judgments. The second proposed provision would require nonbank covered persons to prepare and submit an annual written statement, signed by a designated individual, regarding compliance with each covered public order. The third proposed provision describes the registration information the CFPB would make publicly available.

On March 28, 2023, the Advocacy submitted comments on the proposed rulemaking. Advocacy questioned the factual basis for the CFPB's

certification. Specifically, Advocacy questioned the CFPB's inability to provide information about the number of small entities that may be impacted by the proposal and the estimated costs. Advocacy encouraged the CFPB not to require consent orders and other stipulated orders to be included in the registry. Advocacy encouraged the CFPB to limit the effective term to the effective term of the covered order. Advocacy questioned whether the rulemaking was needed because most of the information that the CFPB wants to collect is collected by the Conference of State Bank Supervisors' National Multistate Licensing System. Advocacy encouraged the CFPB to provide guidance to assist small entities in complying with the requirements of the rulemaking.

Consumer Product Safety Commission

Issue: Safety Standard for Portable Generators

On April 20, 2023, the Consumer Product Safety Commission published a supplemental proposed rule titled, "Safety Standard for Portable Generators." The supplemental proposed rule's performance standards build upon, but are more restrictive than, two voluntary industry standards that include carbon monoxide hazard mitigation requirements. On June 17, 2023, Advocacy submitted a comment letter to the agency requesting a 60-day comment period extension. Advocacy requested the extension because the supplemental proposed rule included considerable substantive changes to the previously issued notice of proposed rulemaking on portable generators. Given the complexity of the rule, Advocacy was concerned that the comment period would not give small business stakeholders sufficient time to provide meaningful feedback.

Council on Environmental Quality

Issue: National Environmental Policy Act Implementing Regulations Revisions Phase 2

On July 29, 2023, the Council on Environmental Quality (CEQ) proposed a second round of revisions to the National Environmental Policy Act (NEPA).

Advocacy commented that the proposal would impact small entities by increasing costs and delay for their projects by improperly expanding NEPA's scope while also making it more difficult to achieve time and page limits for NEPA reviews mandated by the Fiscal Responsibility Act. Advocacy also noted the proposal duplicated mitigation requirements found in the Clean Water Act and Endangered Species Act. Advocacy recommended CEQ reconsider the rule and focus on complying with the limits of NEPA's procedural nature.

Issue: Environmental Justice Scorecard Feedback

On August 3, 2022, the CEQ published a request for information to solicit feedback on its Environmental Justice (Scorecard). The Scorecard is used to evaluate how federal agencies are achieving environmental justice goals. Because business ownership can increase wealth equality, Advocacy encouraged CEQ to evaluate federal agencies' success in reducing barriers experienced by small businesses in disadvantaged communities in the Scorecard. Advocacy also recommended CEQ engage directly with small businesses in disadvantaged communities to understand the unique burdens they face.

Department of Commerce, National Marine Fisheries Service

Issue: Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule

On August 1, 2022, the National Marine Fisheries Service (NMFS) published a proposed rule imposing vessel speed restrictions for vessels 35 to 65 feet in length both during certain times of the year when whales may be present, and within specific boundaries along the Atlantic coast. Advocacy commented that the proposed rule would further restrict an already heavily regulated and compliant maritime industry. Advocacy encouraged NMFS to consider alternatives to the proposed rule that would meet the stated objectives of conserving whales while minimizing the burden to affected small businesses.

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

Issue: Endangered and Threatened Wildlife and Plants: Revision of Regulations for Interagency Cooperation; Endangered and Threatened Wildlife and Plants: Listing Endangered and Threatened Species and Designating Critical Habitat; and Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants Extension of Comment Letter

On June 22, 2023, the Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) published a series of three proposed rules modifying various areas of the Endangered Species Act. Advocacy expressed concerns that a single comment period of 60 days for all three proposed rules would not be enough time for small businesses to adequately prepare comments and requested an extension. FWS and NMFS did not grant an extension.

Issue: Endangered and Threatened Wildlife and Plants: Revision of Regulations for Interagency Cooperation; Endangered and Threatened Wildlife and Plants: Listing Endangered and Threatened Species and Designating Critical Habitat; and Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants

On June 22, 2023, the Fish and Wildlife Service and NMFS (together the Services) published a series of three proposed rules modifying various areas of the Endangered Species Act. Advocacy is concerned that these modifications will result in increased compliance costs and delays for projects involving small businesses. Additionally, Advocacy reiterated its long-standing recommendation for the Services to provide a Regulatory Impact Analysis as part of any critical habitat proposal.



FRFA:

Final regulatory flexibility analysis

Department of Energy

Issue: Energy Conservation Program: Energy Conservation Standards for Distribution Transformers

On January 11, 2023, the U.S. Department of Energy (DOE) published a proposed rule titled, “Energy Conservation Program: Energy Conservation Standards for Distribution Transformers.” Advocacy submitted comments on March 27, 2023, arguing that the proposal would create significant competition and supply chain issues. Further, Advocacy argued that the DOE had not considered the impacts on small entities that would be directly impacted by the rule or fully considered the overall economic impact of the rule, as required by the Energy Policy Conservation Act. Advocacy recommended the DOE consider all the impacts the rule will have on small entities, the comments received from small entities on the proposed rule, and reconsider whether the rule meets the stated objectives of the Energy Policy Conservation Act.

Department of the Interior, Bureau of Land Management

Issue: Conservation and Landscape Health

On April 3, 2023, the U.S. Department of the Interior’s Bureau of Land Management (BLM) published a proposed rule titled, “Conservation and Landscape Health,” in which the BLM proposed significant changes to land management practices to emphasize conservation uses. Advocacy submitted public comments on June 13, 2023, raising concerns that the BLM would be elevating conservation purposes above the named multiple uses Congress identified in the Federal Land Policy and Management Act. Advocacy also raised concerns with the way the BLM demonstrated compliance with the RFA.

Department of the Interior, Bureau of Ocean Energy Management

Issue: Risk Management and Financial Assurance for OCS Lease and Grant Obligations

On June 29, 2023, the Department of Interior’s Bureau of Ocean Energy Management (BOEM) published a proposed rule titled, “Risk Management and Financial Assurance for Outer Continental Shelf (OCS) Lease and Grant Obligations.” This proposed rule would modify its criteria for determining when oil and gas lessees in the OCS would be required to provide bonds or other financial assurances to ensure their ability to comply with lease conditions, including decommissioning. BOEM issued this proposal in response to concerns about bankruptcies by leaseholders, exposing taxpayers to potentially significant unfunded liabilities for the decommissioning of OCS operations. Advocacy raised the concern that, where small businesses are holding leases that they purchased from other businesses, they are already paying to provide bonds to protect those predecessor leaseholders.

Issue: Renewable Energy Modernization Rule

On January 30, 2023, BOEM published a proposed rule titled, “Renewable Energy Modernization.” The proposed rule updates provisions related to leasing and development of offshore energy activities. On March 31, 2023, Advocacy filed a public comment letter on the proposed rule and asked BOEM to ensure that any updates to the leasing process consider the impacts to all ocean users and in particular small businesses.

Department of Labor

Issue: Independent Contractor Definition

On October 13, 2022, the Department of Labor (DOL) proposed a rule that would determine whether a worker is an independent contractor or employee under the Fair Labor Standards Act. The proposed rule would rescind a 2021 final rule which highlighted two core factors that were more

probative and carried more weight in the analysis: the nature and degree of control over the work and a worker’s opportunity for profit or loss. With this new rule, DOL is returning to the traditional multi-factor economic reality test that analyzes the totality-of-the-circumstances in a business.

On December 12, 2022, Advocacy submitted a comment letter to DOL on this proposed rule. Advocacy recommended that DOL clarify certain factors in this proposed test and resolve any conflicts with existing federal requirements.

Advocacy expressed concern that DOL’s IRFA is deficient and severely underestimates the economic impacts of this rule on small businesses and independent contractors at under \$25 per small business. DOL’s proposed rule may be detrimental and disruptive to millions of small businesses that rely on independent contractors as part of their workforce.

Advocacy recommended that DOL reassess the compliance costs from this regulation in a supplemental IRFA and consider significant alternatives. Advocacy also recommended that DOL publish a small business compliance guide and complete more small business outreach, marketing, education, and training for small businesses and independent contractors regarding this rule to help with compliance.

Department of Labor, Mine Safety and Health Administration

Issue: Lowering Miners’ Exposure to Respirable Crystalline Silica and Improving Respiratory Protection

On July 13, 2023, the Mine Safety and Health Administration (MSHA) published a proposed rule in the Federal Register on Lowering Miners’ Exposure to Respirable Crystalline Silica and Improving Respiratory Protection. The MSHA’s proposed rule would lower the permissible exposure limit for respirable crystalline silica and include various other requirements to protect miner health. The comment

period for the proposed rule was set for 45 days and was scheduled to close on August 28, 2023. Based on input from small business representatives in the mining and related sectors, Advocacy recommended that the MSHA extend the public comment period by at least 60 days. The extension request was intended to give small businesses more time to comment and allow small business representatives time to consult their membership to provide more meaningful comments on this highly complex and technical proposed rule.

Department of Transportation, Federal Railroad Administration

Issue: Proposed Train Crew Size Safety Requirements

On December 21, 2022, Advocacy filed comments on the Federal Railroad Administration’s Proposed Train Crew Size Safety Requirements rule. The proposed rule would establish minimum requirements for the size of train crews depending on the type of operation, including a minimum requirement of two crewmembers for all railroad operations, with exceptions for operations that do not pose significant risks to railroad employees, the public, or the environment. It would also establish minimum requirements for the location of crewmembers on a moving train, permit special approval procedures to allow railroads to petition FRA to continue “legacy operations” with one-person train crews, and allow railroads to petition FRA for approval to “initiate a new train operation” with fewer than two crewmembers.

In addition to hosting a roundtable on this topic, Advocacy argued that the FRA appears to have significantly understated the cost and number of small businesses that would be impacted by the proposed rule. Advocacy recommended that the FRA reassess its initial regulatory flexibility analysis to fully count the number of and economic impact to small businesses. Advocacy also recommended FRA republish the analysis, including a further consideration of significant regulatory alternatives

that would achieve the agency’s objectives while minimizing costs to small businesses, for additional public comment before proceeding.

Department of the Treasury, Financial Crimes Enforcement Network

Issue: Beneficial Ownership Information Access and Safeguards and Use of FinCEN Identifiers for Entities

On December 16, 2022, Financial Crimes Enforcement Network published a proposed rulemaking on access to beneficial ownership information (BOI) by authorized recipients. BOI must be reported to FinCEN pursuant to Section 6403 of the Corporate Transparency Act. The proposed regulation would implement the strict protocols on security and confidentiality required by the Corporate Transparency Act to protect sensitive personally identifiable information reported to FinCEN. The notice of proposed rulemaking explained the circumstances in which specified recipients would have access to BOI and outlines data protection protocols and oversight mechanisms applicable to each recipient category. This rulemaking is the second of three rulemakings that FinCEN is planning to publish.

On February 8, 2023, Advocacy submitted comments on the proposed rulemaking. FinCEN prepared an initial regulatory flexibility analysis for the notice of proposed rulemaking. Advocacy argued that small entities are concerned about the lack of clarity of the proposal. Advocacy encouraged FinCEN to clarify the requirements of the rulemaking and to produce a small entity compliance guide.



SBREFA:

Small Business Regulatory Enforcement Fairness Act

Department of the Treasury, Office of the Comptroller of the Currency; Federal Reserve; Federal Deposit Insurance Corporation; National Credit Union Administration; Consumer Financial Protection Bureau; Federal Housing Finance Agency

Issue: Quality Control Standards for Automated Valuation Models

On June 21, 2023, the Office of the Comptroller of the Currency Federal Reserve, Federal Deposit Insurance Corporation, National Credit Union Administration, Consumer Financial Protection Bureau, and Federal Housing Finance Agency (the agencies) published a joint rulemaking on the quality control standards for automated valuation models (AVMs) by mortgage originators and secondary market issuers. AVMs are computerized models used to determine the collateral worth of certain mortgages. Under the proposal, the agencies would require institutions that engage in certain credit decisions or securitization determinations to adopt policies, practices, procedures, and control systems to ensure that AVMs used in these transactions to determine the value of mortgage collateral adhere to quality control standards designed to ensure a high level of confidence in the estimates produced by AVMs, protect against the manipulation of data, avoid conflicts of interest, require random sample testing and reviews, and comply with applicable nondiscrimination laws.

Since small entities do not control the data that is used in the AVM, they do not have the ability to quality control the data or the algorithms used by AVM vendors. Advocacy recommended that small entities be exempt from the rule since they do not control the activities of the AVMs. As an alternative, Advocacy recommended that the agencies consider a safe harbor and oversight by a standard setting organization. Advocacy also argued that the nondiscriminatory language was not necessary because small entities already comply

with nondiscriminatory housing laws. Advocacy encouraged the agencies to provide guidance to assist small entities in complying with the requirements of the rulemaking.

Environmental Protection Agency

Issue: New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule

On May 23, 2023, the Environmental Protection Agency (EPA) published a proposed rule titled, “New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule.” This rule would establish limits on the greenhouse gas emissions from new and existing fossil-fueled power plants. In many cases, these limits would require power plants to install carbon capture and sequestration systems or co-fire natural gas with low-GHG hydrogen. On August 8, 2023, Advocacy filed public comments, raising issues with the EPA’s cost estimates for this proposal and the EPA’s findings that the costs of these controls are reasonable under the Clean Air Act. Advocacy believes that the EPA significantly underestimates the costs of carbon capture and sequestration and low-GHG hydrogen systems by minimizing the challenges of the availability and transportation.

Based on these issues, Advocacy stated the EPA lacks the factual basis necessary to certify this proposed rule would not have a significant economic impact on a substantial number of small entities. The EPA later convened a SBREFA panel under the Regulatory Flexibility Act to consult with small entities on this and other issues.

Issue: National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review

On April 24, 2023, the EPA published a proposed rule titled, “National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units (EGU) Review of the Residual Risk and Technology Review.” As part of this proposal, the EPA would require Continuous Emissions Monitoring Systems for particulate matter for all coal- and oil-fired EGUs. On June 23, 2023, Advocacy filed public comments, recommending that the EPA not move forward with this requirement. By their actions, EGU operators demonstrated that it is more costly than the EPA estimates. Further, by proposing to lower the emission standards, the EPA undermines the data used to support the requirement.

Issue: National Emission Standards for Hazardous Air Pollutants: Commercial Ethylene Oxide Sterilization Technology Review & Ethylene Oxide Proposed Interim Registration Review Decision

On April 13, 2023, the EPA published two proposed actions that would restrict use of Ethylene Oxide for sterilization. The actions were a proposed rule titled, “National Emission Standards for Hazardous Air Pollutants: Ethylene Oxide Emissions Standards for Sterilization Facilities Residual Risk and Technology Review and a notice of availability for Pesticide Registration Review; Proposed Interim Decision and Draft Risk Assessment Addendum for Ethylene Oxide.”

On June 23, 2023, Advocacy filed public comments on these two actions, raising significant concerns about the economic impacts on small entities. These proposed actions would lead to a significant number of small entities leaving the market for commercial sterilization, harming small medical device manufacturers, and causing significant supply chain disruptions and harming patients needing sterilized medical devices. The EPA has the discretion under the

Clean Air Act to consider the costs and consequences of these actions. Advocacy recommended the EPA reconsider these policies to minimize the impact on small entities and reduce the likelihood they will leave the market.

Issue: National Emission Standards for Hazardous Air Pollutants for Lime Manufacturing Plants; Residual Risk and Technology Review

On January 5, 2023, the EPA published a proposed rule titled, “National Emission Standards for Hazardous Air Pollutants for Lime Manufacturing Plants: Residual Risk and Technology Review.” This rule establishes emission standards for pollutants from lime manufacturing facilities that have not been regulated previously and which the EPA has found do not pose an unreasonable risk to the public. Advocacy filed a public comment on this rule on February 16, 2023. The EPA certified that this rule will not have a significant economic impact on a substantial number of small entities. However, after consultation with all three small businesses in this industry, Advocacy believes that the EPA significantly underestimated the costs of compliance and recommended the EPA convene a SBREFA panel and prepare an initial regulatory flexibility analysis for public notice and comment. In response, the EPA convened a SBREFA panel in July 2023.

Issue: Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review

On December 6, 2022, the EPA published a supplemental proposed rule as a follow-up to its November 15, 2021, proposed rule that would revise and update the New Source Performance Standards for Oil and Gas production under Clean Air Act Section 111(b) and Emissions Guidelines for existing Oil and Natural Gas production sources under Clean Air Act Section 111(d). These proposed rules would directly regulate methane emissions from new and modified sources and establish

standards for state regulation of methane emissions from existing sources. The supplemental proposal provides missing details from the proposed rule and proposes further restrictions on methane emissions. This supplemental proposal expands on third-party monitoring for “super-emitter” events and includes proposed implementing regulations the state plans required under Section 111(d).

Advocacy filed public comments on the November 2021 proposed rule, in which Advocacy commented on the EPA’s compliance with the RFA, on the disproportionate impact the proposed rule would have on small businesses, and suggested additional flexibilities that the EPA should consider in this supplemental proposed rule. On February 13, 2023, Advocacy filed public comments on the supplemental proposed rule. In its comments, Advocacy reiterated some of the points in its previous comment letter and suggested additional regulatory flexibilities to reduce the burden on small businesses consistent with the purpose of the rule.

Issue: Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category

On March 29, 2023, the EPA published proposed Effluent Limitation Guidelines for the Steam Electric Power Generating Point Source Category. This rule would require significant new wastewater treatment investments for coal-fired power plants that intend to continue operating past 2028. The EPA proposed to require compliance “as soon as possible” after promulgation of a final rule, but no later than December 31, 2029.

On May 30, 2023, Advocacy submitted a public comment letter, stating that the proposed rule would impose a disproportionate burden on small entities that want to continue providing their ratepayers and owners with electricity using the assets they currently own and operate, including coal-fired power plants. Advocacy recommended the EPA should allow small entities to continue to operate for a more reasonable

period of time the equipment in which they have invested or will soon invest to comply with the Effluent Limitation Guidelines rule issued in 2020 and for which compliance is required no later than December 31, 2025. Advocacy also recommended the EPA consult with the small entities that will continue operating after 2028.

Issue: Perchloroethylene; Regulation Under the Toxic Substances Control Act

On June 16, 2023, the EPA published a proposed rule to restrict the use of perchloroethylene (PCE) under the Toxic Substance Control Act. Advocacy commented that the agency's proposal exceeds its statutory authority by prohibiting most commercial and industrial uses of PCE. Furthermore, Advocacy highlighted the absence of regulatory flexibilities for the use of PCE by small businesses. Additionally, Advocacy expressed concerns that the EPA does not satisfy the statutory requirements to consult and coordinate with OSHA to avoid duplicative and overlapping requirements. Lastly, Advocacy strongly recommended that the agency address concerns pertaining to the proposed exposure limits and consider all potential adverse impacts of the proposed rule. Advocacy urged the agency to consider feedback from small businesses on these important issues.

Issue: Updates to New Chemicals Regulations Under the Toxic Substances Control Act

On May 16, 2023, the EPA published a proposal to update its new chemical procedural regulations under the Toxic Substance Control Act. Advocacy commented that the EPA's RFA certification lacks an adequate factual basis because the agency did not adequately capture the impact of the rule on small entities. In addition, Advocacy expressed concerns about the agency's use of conservative data and default values instead of using the submitted data. Advocacy also expressed concerns about the agency's proposal to restart the review process when a submitter provides new data to counter the agency's conservative assumptions and default values.

Report on the Regulatory Flexibility Act, FY 2023

Advocacy recommended that the EPA provide an adequate factual basis for its RFA certification that accurately takes into consideration all direct impacts of the proposed requirements on small entities. Advocacy further recommended that the agency address concerns related to its use of conservative assumptions and consider additional data provided to address those assumptions. Finally, Advocacy urged the EPA to consider feedback from small entities on these issues.

Issue: Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments

On May 18, 2023, the EPA proposed to establish regulatory requirements for legacy coal combustion residuals (CCR) surface impoundments. The EPA also proposed to define legacy CCR surface impoundments to be those located at coal-fired power plants that ceased operations before October 19, 2015, and were not subject to the requirements of the 2015 CCR rule governing CCR impoundments at active power plants. In addition, the EPA proposed similar requirements for a new category the agency refers to as CCR Management Units.

Advocacy commented that the EPA improperly certified two unrelated regulations as one proposed rulemaking under the RFA. Advocacy also expressed concerns that the proposed compliance timeframes do not provide flexibility for small entities based on their ability to comply with the proposed requirements. In addition, Advocacy expressed concerns that EPA's 2014 risk assessment does not support the proposed requirements for inactive sites in this proposal.

Advocacy recommended that the agency pursue its regulation of legacy CCR surface impoundments and CCRMUs in separate rulemakings each with its own RFA analysis, including either a certification supported with a factual basis or an IRFA (followed by a SBREFA panel), if necessary. Advocacy urged

the agency to consider flexibilities for small entities to provide reasonable timelines for compliance. Finally, Advocacy recommended that the agency provide an appropriate risk assessment that supports the regulation of inactive CCR units to support its proposed actions. Advocacy also urged the EPA to consider feedback from small entities on these issues.

Issue: Methylene Chloride; Regulation Under the Toxic Substances Control Act

On May 3, 2023, the EPA published a proposed rule to restrict the use of methylene chloride under the Toxic Substance Control Act. Advocacy commented that the agency's proposal exceeds its statutory authority by prohibiting most commercial and industrial uses of methylene chloride. Furthermore, Advocacy highlighted the absence of regulatory flexibilities for the use of methylene chloride by small businesses that do not have feasible alternatives. Additionally, Advocacy expressed concerns that the EPA did not satisfy the statutory requirements to consult and coordinate with OSHA to avoid duplicative and overlapping requirements. Lastly, Advocacy strongly recommended that the agency accept additional data after the public comment period, address concerns pertaining to the proposed action level, and establish a de minimis threshold to mitigate unintended consequences. Advocacy also urged the agency to consider feedback from small businesses on these important issues.

Issue: PFAS National Primary Drinking Water Regulation Rulemaking

On March 29, 2023, the EPA published its proposed National Primary Drinking Water Regulations to establish legally enforceable levels, called Maximum Contaminant Levels, for six per- and polyfluoroalkyl substances. These MCLs include perfluorooctanoic acid and perfluorooctanesulfonic acid, perfluorohexanesulfonic acid, hexafluoropropylene oxide dimer acid and its ammonium salt (also known as GenX chemicals), perfluorononanoic acid, and perfluorobutane sulfonic acid. Advocacy commented

that EPA's comment deadline provided stakeholders with only 62 days to review its proposed actions, and over 1,000 dense supporting materials replete with complex, technical analyses. Advocacy urged EPA to extend the public comment period by at least 30 days to allow small entities to participate more meaningfully in this rulemaking process.

Issue: Designation of Perfluorooctanoic Acid and Perfluorooctanesulfonic Acid as CERCLA Hazardous Substances

On September 6, 2022, the EPA proposed the designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act. Advocacy commented that the EPA did not provide an adequate factual basis to support its certification under the RFA because it did not include all the costs associated with direct impacts of the rule. Based on feedback from small entities, Advocacy expressed concerns that those impacts will likely pose a significant economic burden on a substantial number of small entities. Therefore, Advocacy recommended that the EPA convene a SBREFA panel to assess all direct costs, including those the agency misidentifies as indirect costs of the rule on small entities and to consider less burdensome alternatives.

Issue: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention

On August 31, 2022, the EPA published proposed revisions to its Risk Management Program (RMP) regulations under the Clean Air Act. Advocacy commented that Advocacy is concerned that the EPA's proposal adds costly requirements to its existing regulations without providing any quantitative benefits. Advocacy also expressed concerns that the agency does not provide an adequate factual basis to support its certification, under the RFA, that the rule will not have a significant economic impact on

a substantial number of small entities. In addition, Advocacy expressed concern that the EPA's proposed requirements may be inconsistent, duplicate, and overlap with other existing federal requirements.

As a result, Advocacy recommended that the EPA should withdraw the rule and expend its resources on compliance assistance and enforce the existing RMP requirements instead of imposing additional requirements to the RMP regulations. Advocacy also commented that the EPA must improve its analysis to support the factual basis for its RFA certification by providing a more granular analysis. Advocacy further urged EPA to address underestimated and missing costs. Lastly, Advocacy recommended the EPA consult and coordinate with relevant federal agencies such as OSHA, the Department of Transportation, and other EPA program offices to ensure that the proposed regulations do not impose duplicative, overlapping, or inconsistent requirements on regulated entities.

Issue: PFAS National Primary Drinking Water Regulation Rulemaking

On March 29, 2023, the EPA published its proposed National Primary Drinking Water Regulations to establish legally enforceable levels, called Maximum Contaminant Levels, for six per- and polyfluoroalkyl substances. These MCLs include include perfluorooctanoic acid and perfluorooctanesulfonic acid, perfluorohexanesulfonic acid, hexafluoropropylene oxide dimer acid and its ammonium salt (also known as GenX chemicals), perfluorononanoic acid, and perfluorobutane sulfonic acid.

Advocacy commented that small water systems will not have the adequate funds to ensure a timely compliance with EPA's proposed requirements. Therefore, Advocacy recommended that the agency consider alternatives standards and provide regulatory flexibilities to reduce the compliance burden on small water systems. Advocacy also urged the EPA to address small entity concerns with its proposed actions for perfluorohexanesulfonic

acid, GenX chemicals, perfluorononanoic acid, and perfluorobutane sulfonic acid by issuing regulations in accordance with the Safe Drinking Water Act.

Issue: TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances; Notice of Data Availability and Request for Comment

On November 25, 2022, EPA announced the available IRFA and updated economic analysis, after completing a SBREFA panel for its previously proposed rule on reporting and recordkeeping requirements for per- and polyfluoroalkyl substances under the Toxic Substance Control Act.

Advocacy commented that the compliance costs included in the IRFA are underestimated. In addition, Advocacy expressed concern that the EPA did not identify whether it will consider the regulatory flexibility alternatives discussed in the IRFA as viable policy options to address small business compliance concerns. As a result, Advocacy recommended that the EPA provide less burdensome alternatives to address the disproportionate impact on small businesses in the final rule. This impact includes small manufacturer exemptions, extended compliance timelines, and other flexibilities discussed in the IRFA.

Federal Acquisition Regulation Council

Issue: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk

On November 14, 2022, the Federal Acquisition Regulation (FAR) Council published a proposed rule that would require federal contractors that meet certain contract obligation thresholds to disclose greenhouse gas (GHG) emissions and climate-related financial risks. FAR would also be required to set science-based targets to reduce emissions. On February 10, 2023, Advocacy filed a comment letter encouraging the FAR Council to reexamine the costs of the proposed rule to small businesses and explore additional alternatives that would achieve the goals of the regulation.

Advocacy recommended that the FAR Council consider whether it would be more effective to require major federal suppliers to disclose GHG emissions and other climate-related financial risk metrics on a contract basis. This would ensure that small contractors would not face compliance costs unless they are awarded a contract.

Advocacy further recommended that the FAR Council carefully reexamine costs of the proposed rule to all impacted small businesses. Following this examination, the FAR Council should modify the contract obligation thresholds associated with the terms “significant contractor” and “major contractor” to lower the burden on small businesses.

Finally, the FAR Council should consider exempting certain industries or federal activities from the reporting requirements where climate metrics can be easily determined based on average risk or GHG emissions intensity. Such activities might include office-based support and professional services. As an alternative, the FAR Council should allow certain industries or federal activities to report climate metrics using average risk or GHG emissions intensity figures provided by the FAR Council.

Federal Trade Commission

Issue: Non-Compete Clause Rule

On January 19, 2023, the Federal Trade Commission (FTC) published a notice of proposed rulemaking for the Non-Compete Clause Rule. The proposed rule would make it an unfair method of competition for an employer to enter into or attempt to enter a non-compete clause with a worker; to maintain with a worker a non-compete clause; or, under certain circumstances, to represent to a worker that the worker is subject to a non-compete clause. The proposed rule will require employers to rescind current non-compete clauses and will not apply to franchisees.

On March 23, 2023, Advocacy submitted comments on the proposed rule. The FTC estimates that 2.94 million small firms, comprising of 3.08 million small

establishments, will be impacted by the proposed rule. Advocacy argued that the proposed rule could be detrimental to small firms that use non-compete clauses to protect things such as client lists, businesses practices, teaching techniques, and technology. Businesses in the medical profession argue that non-compete clauses prevent them from working in their fields. Similarly, franchisees stated that non-compete clauses are problematic when their franchise agreement ends because the franchisor may make unreasonable demands when renegotiating their contract.

Advocacy argued that, because of differing concerns among small businesses, an outright ban of non-compete clauses is inappropriate. Advocacy encouraged the FTC to adopt an approach that addresses the different concerns of small businesses in the marketplace, estimates the full impacts of changes to non-compete clauses, and consider and analyze alternative approaches.

Food and Drug Administration

Issue: Requirements for Tobacco Product Manufacturing Practice

On March 10, 2023, the Food and Drug Administration (FDA) published a proposed rule that would establish tobacco product manufacturing practice requirements for manufacturers of finished and bulk tobacco products. The FDA’s expansive tobacco product manufacturing practice proposal would provide an “umbrella” procedural framework related to the manufacture, preproduction design validation, packing, and storage of all types of tobacco and deemed tobacco products.

On September 27, 2023, Advocacy filed a comment letter recommending FDA publish a supplemental IRFA. Advocacy advised that the FDA must adequately describe the regulated small businesses and estimate potential impacts to those businesses. Advocacy further advised that the FDA should use detailed information to analyze the relative impact of the costs of the proposed rules to small businesses

based on their size. Additionally, the FDA should analyze costs borne by industry segments where the regulation would require novel or complex compliance measures. Advocacy noted that FDA's supplemental IRFA must include a description of significant alternatives to the proposed rules which accomplish its objectives for the rulemaking. The agency should provide a detailed analysis of each significant alternative and discuss how it may reduce the economic burden on small businesses.

Internal Revenue Service

Issue: Prevailing Wage and Apprenticeship Initial Guidance Under Section 45(b)(6)(B)(ii) and Other Substantially Similar Provisions

On November 30, 2022, the Internal Revenue Service (IRS) published a notice of initial guidance (Notice 2022-61) regarding prevailing wage and apprenticeship (PW&A) requirements applicable to certain energy tax incentives found in the Internal Revenue Code, as amended by the Inflation Reduction Act of 2022 (IRA). Notice 2022-61 established that prevailing wage rates will be determined using information published by the Department of Labor and that the required apprentices must be participating in a registered apprenticeship program, among other provisions.

On January 13, 2023, Advocacy sent a comment letter to the Department of the Treasury and the IRS, encouraging the withdrawal of Notice 2022-61. Advocacy recommended that the IRS issue a notice of proposed rulemaking related to the IRA's PW&A requirements. Advocacy commented that Notice 2022-61 would disproportionately affect small businesses working on clean energy projects. Advocacy further commented that the notice was incomplete and did not answer stakeholder questions that the IRS received after requesting public comment on the IRA's PW&A provisions in October 2022. Finally, Advocacy expressed the legal opinion that Notice 2022-61 was a legislative rulemaking. Therefore, it should have followed the notice and comment procedures required by the Administrative Procedure Act.

Issue: Elective Payment of Advanced Manufacturing Investment Credit

On June 21, 2023, the IRS proposed regulations regarding the implementation of the elective payment provisions of the advanced manufacturing investment credit. The credit was added to the Internal Revenue Code under the CHIPS Act of 2022 (Pub. L. 117-167) to incentivize semiconductor and semiconductor equipment manufacturing in the United States.

On August 14, 2023, Advocacy filed a comment letter related to the proposed rule. Advocacy's comment letter asserted that the certification statement included in the proposed rule pursuant to the RFA lacked a factual basis and was therefore invalid. The letter also questioned why the IRS failed to provide necessary information about the number of small entities that may be impacted by the proposal and the estimated costs of the proposal. Advocacy recommended that the IRS conduct a threshold economic analysis to determine whether the proposed rule will have a significant economic impact on a substantial number of small entities. The agency could then use the information garnered from the threshold analysis to develop and publish either a supplemental RFA assessment with a valid factual basis in support of a certification or an IRFA. If the agency determined an IRFA was necessary, Advocacy noted that the agency would need to include a discussion of regulatory alternatives that would minimize any impact of the proposal on small entities.

National Labor Relations Board

Issue: Standard for Determining Joint-Employer Status

On September 7, 2022, the National Labor Relations Board (NLRB) proposed a rule that would expand the joint-employer definition under the National Labor Relations Act. The rule would extend liability to employers that have indirect and reserved control over one or more employees' essential terms and conditions of employment. The proposed rule rescinds a 2020 final rule on the joint-employer standard. To find joint employer liability under that rule, an employer was required to have substantial direct and immediate control over one of more essential terms and conditions of employment.

On November 29, 2022, Advocacy filed a comment letter to the NLRB expressing concern that the new joint employer standard is too ambiguous and broad, providing no guidance for contracting parties on how to comply or avoid liability. Advocacy recommended that the NLRB clarify and limit the types and degrees of indirect and reserved control that would now trigger joint-employment liability. Additionally, Advocacy recommended that the NLRB should resolve any conflicts with existing federal requirements. Advocacy encouraged the NLRB to reassess the compliance costs from this regulation and consider significant alternatives that would accomplish the objectives of the statute while minimizing the economic impacts to small businesses.

Office of Information and Regulatory Affairs

Issue: Implementation of Executive Order 14094, Modernizing Regulatory Review

On April 6, 2023, President Joe Biden signed Executive Order (EO) 14094 entitled, "Modernizing Regulatory Review." This EO changes the scope of the existing EO 12866 regulatory review process conducted by the Office of Information and Regulatory Affairs (OIRA), calls for measures to promote inclusivity in regulatory policy, and requires OIRA to revise OMB

Circular A-4 on regulatory analysis. Advocacy seeks to ensure that OIRA remains aware of the impacts of regulations on small businesses as it implements the requirements of EO 14094. On June 6, 2023, Advocacy filed comments with the following recommendations to ensure that the voice of small business is heard in the rulemaking process.

- (1) OIRA should continue to conduct interagency reviews of regulations that are likely to significantly impact small businesses.
- (2) Meetings held under EO 12866 should be welcoming for small businesses and considerate of their time and effort to attend.
- (3) Economic analyses in support of regulations should provide as clear a picture of the costs imposed on small businesses and the trade-offs.

Securities and Exchange Commission

Issue: Safeguarding Advisory Client Assets

On March 9, 2023, the U.S. Securities and Exchange Commission (SEC) published proposed rules that would amend and redesignate Rule 206(4)-2 (Custody Rule) under the Investment Advisers Act of 1940. SEC's proposal would replace the Custody Rule with a comprehensive set of new requirements affecting registered investment advisers, qualified custodians, and their clients.

On May 5, 2023, Advocacy filed a comment letter recommending that the SEC publish a supplemental IRFA. Advocacy advised that the SEC must revise its IRFA to provide information that would better identify and describe the distribution of regulated small entities and consider significant alternatives. Advocacy also recommended the SEC use detailed information to analyze the relative impact of the costs of the proposed rules to small entities based on their size. This would help SEC understand the cost burden faced by small entities. Advocacy further recommended that the SEC include a description of significant alternatives to the proposed rules which accomplish its objectives

for the rulemaking. In that effort, the SEC should provide a detailed analysis of each potential alternative and discuss how that alternative may reduce the economic burden on small entities.

United States Citizenship and Immigration Services

Issue: Increased Immigration Fees

On January 4, 2023, the United States Citizenship and Immigration Services (USCIS) proposed a rule that would increase the immigration and naturalization fees for business visas. The proposed rule increases temporary visas by 150 to 330 percent. The rule also increases petitions for permanent immigration visas by 88 percent. This fee increase includes a new fee of \$600 per visa petition to be paid by businesses to fund the separate U.S. Asylum Program.

On March 10, 2023, Advocacy submitted a comment letter to the USCIS on this proposed rule. Advocacy expressed concern that the USCIS's IRFA severely underestimates the economic impacts of this rule

on small businesses. The small business analysis is based on a sample size that is too small and may miss the economic impact on certain industries. The USCIS's IRFA also uses average revenues of all small businesses, which may hide the economic impact of this rule on many small businesses. The IRFA also undercounts the numbers of petitions that small businesses will file.

Advocacy recommended the USCIS reassess the compliance costs from this rule in a supplemental IRFA. Other recommendations were that the USCIS should establish tiered general fees and asylum fees for certain small businesses and nonprofits, based on small business revenue size, numbers of employees, or type of visas. Additionally, Advocacy recommended that the USCIS should limit the frequency and number of asylum fee payments per worker in a season or for the lifetime of their employment with an employer. The USCIS should limit the number of named workers per petition to 50 to minimize the impact on small businesses.

Chapter 5

Small Business Regulatory Cost Savings and Success Stories



Region 3 Advocate Ngozi Bell (right) serves as a panelist at the June 27 Medium Small and Micro Enterprise Day, held at UN Headquarters in New York.

In FY 2023, small businesses saved \$91.3 million in estimated regulatory cost savings because of the RFA and the Office of Advocacy’s (Advocacy) efforts to promote small business relief and considerations in federal rulemaking. 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 directly benefited from Advocacy’s RFA activities through four actions. Compliance cost savings for small businesses that resulted from these actions arose from the modification of final and proposed regulations.

One cost savings concerned a Food and Drug Administration (FDA) regulation on the traceability recordkeeping requirements for some categories of foods. The FDA’s rule sought to improve the agency’s ability to quickly and efficiently trace the movement of food identified as causing illness through the supply chain and identify and remove contaminated

“ **\$91.3M**
 Total Regulatory Cost Savings
 to Small Entities, FY 2023 ”

foods from the marketplace. After Advocacy made recommendations to explore alternatives that would make compliance easier for small business, the FDA changed the effective date of the rule and expanded the exemption for small retail food establishments. This led to \$39.3 million in estimated cost savings.

Another cost savings came from the Consumer Financial Protection Bureau (CFPB), who sought to require financial institutions to collect and report data regarding credit applications for small businesses, including those that are owned by women and minorities. The CFPB planned to require all financial institutions making at least 25 small business loans to comply. After considering

Table 5.1 Summary of Small Business Regulatory Cost Savings, FY 2023

Agency	Rule	Initial cost savings (\$million)	Recurring cost savings (\$million)
Consumer Financial Protection Bureau	Small Business Lending Data Collection ¹	\$32.0	\$32.0
Environmental Protection Agency	Reporting and Recordkeeping Requirements for Asbestos under Section 8(a) of the Toxic Substance Control Act ²	\$19.2	\$19.2
Food and Drug Administration	Requirements for Additional Traceability Records for Certain Foods ³	\$39.3	\$39.3
Securities and Exchange Commission	Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure ⁴	\$0.8	\$0.8
Total Foregone Regulatory Cost Savings, FY 2023		\$91.3	\$91.3

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.

Sources:

1. 88 Fed. Reg. 35150 (May 31, 2023).
2. 88 Fed. Reg. 47782 (July 25, 2023).
3. 87 Fed. Reg. 70910 (Nov. 21, 2022).
4. 88 Fed. Reg. 51896 (Aug. 4, 2023).

Advocacy's comments, the CFPB raised the threshold to 100 small business loans, saving \$37.2 million in compliance costs.

Table 5.1 summarizes the cost savings from four final actions at four federal agencies in FY 2023.

There was also a success in FY 2023 that was not quantifiable. When the Environmental Protection Agency (EPA) finalized its Clean Water Act Water Quality Certification rule, Advocacy raised concerns with a requirement to include a draft federal permit and/or license to a Certifying Authority when making a water quality certification request. The final rule did not include the requirement for individual permit applications.

Descriptions of Small Business Regulatory Cost Savings

Consumer Financial Protection Bureau

Issue: Small Business Lending Data Collection

On October 8, 2021, the Bureau of Consumer Financial Protection (CFPB) published a notice of proposed rulemaking in the Federal Register titled 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 credit applications for small businesses, including those that are owned by

women and minorities. The CFPB published the final rule on May 31, 2023.

In the proposed rule, the CFPB planned to require all financial institutions making at least 25 small business loans to collect and report information to the CFPB. Advocacy submitted a comment letter on January 6, 2022. Advocacy argued that this threshold was too low and would create a large burden on the smallest lenders, while providing little additional data. After consideration, the CFPB agreed with this assessment and raised the threshold to 100 small business loans before reporting was required. This change will lead to 2,210 fewer small businesses having to comply with the reporting requirement.

Each newly exempted small business is expected to save \$16,842 in annualized cost savings over 10 years, for a cumulative total savings of \$32 million per year.

Environmental Protection Agency

Issue: Reporting and Recordkeeping Requirements for Asbestos under Section 8(a) of the Toxic Substance Control Act

On July 25, 2023, the EPA published a final rule titled Asbestos; Reporting and Recordkeeping Requirements Under the Toxic Substances Control Act. The rule imposes a one-time requirement to electronically report information regarding quantity of asbestos, types of use, and employee data. On July 5, 2022, Advocacy wrote a comment letter raising concerns about the EPA's improper certification of the rule under the RFA and about small businesses' ability to comply with the rule due to the uncertainty in the scope and applicability of the rule. Advocacy recommended the EPA consider burden-reducing compliance flexibilities for the affected small businesses such as an exemption for businesses who are not likely to provide any responsive information.

In the final rule, the EPA provides an exemption to businesses with an annual sales threshold of \$500,000 or less, in any calendar year from 2019 to 2022. The EPA acknowledged that imposing a



Region 7 Advocate Darcella Craven presenting to small business owners in Wichita, KS during the Small Business Marketing Meetup Wednesday, July 19 at the Wichita State University Metro Complex hosted by the KS SBDC and WSU.

burden on these small businesses was not warranted because they are not likely to provide any information under the rule. Approximately 33,000 to 34,000 otherwise potentially affected businesses are below the \$500,000 sales volume threshold and therefore exempt from the reporting and recordkeeping requirement. As a result of the \$500,000 reporting threshold, small businesses are expected to save \$144.4 million in upfront costs.

Annualized over 10 years at a 7% discount rate, this amounts to an annualized savings of \$19.2 million.

Food and Drug Administration

Issue: Requirements for Additional Traceability Records for Certain Foods

On November 21, 2022, the FDA published a final rule titled Requirements for Additional Traceability Records for Certain Foods. The Food Safety Modernization Act instructed the FDA to establish additional traceability recordkeeping requirements for persons who manufacture, process, pack, or hold foods for which the agency has determined these additional requirements are appropriate and necessary to protect the public health. The final rule sought to improve the FDA's ability to trace the movement of food identified as causing illness quickly and efficiently through the supply chain to identify and remove contaminated foods from the marketplace.

Advocacy encouraged the FDA to explore feasible alternatives to the rule that would better ensure stakeholder compliance with the complex rule while minimizing the costs to small business. The FDA made several modifications to the food traceability rule between the proposed and final rule, including a change in effective date from two to three years after publication and an expanded exemption for small retail food establishments from less than 10 employees to less than \$250,000 in food sold or provided annually.

As a result of these changes, small business regulatory cost savings were \$39.3 million annualized at 7% over 20 years.

Securities and Exchange Commission

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

On March 23, 2022, the Securities and Exchange Commission (SEC) published a proposed rule titled Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure. The rule sought to enhance and standardize disclosures regarding

public companies' cybersecurity risk governance incident reporting. The proposed rule would require public companies to report cybersecurity incidents to the SEC on a Form 8-K within four business days of determining the incident is material. The SEC also proposed requiring periodic disclosure of material cybersecurity incidents on a firm's quarterly or annual reports. The SEC also proposed to require disclosure about the cybersecurity expertise, if any, of a public company's board members.

On May 6, 2022, Advocacy wrote a comment letter raising concerns that the SEC did not adequately describe the costs of the proposed rule to small businesses or adequately set forth significant alternatives. Advocacy recommended the SEC publish a supplemental initial regulatory flexibility analysis for public comment before proceeding. Advocacy recommended that the SEC consider alternatives which would minimize the economic burden on small businesses.

On August 4, 2023, the SEC made several changes to the rule, but did not publish a supplemental IRFA prior to issuing the final rule. The SEC acknowledged, however, that smaller reporting companies would benefit from additional time to comply with the disclosure requirements. The SEC gave small firms an additional 180 days to comply with the reporting requirement. This delay will save small firms nearly \$5,000 in annualized savings when discounted at 7 percent. Between the proposed and final rule, the SEC dropped two reporting requirements for all companies: The SEC removed the proposed Forms 10-K and 10-Q periodic reporting requirements and removed the requirement to disclose board member cybersecurity expertise. Together these dropped reporting requirements will save small businesses almost \$750,000 in total annualized costs over 10 years.

In summary, the changes made to the rule will save small businesses \$0.8 million in annualized costs over a 10-year period when discounted at 7%.

Table 5.2 Summary of Small Business Regulatory Success Stories, FY 2023

Agency	Rule
Environmental Protection Agency	Clean Water Act Water Quality Certification Improvement Rule ¹

Sources:

1. 88 Fed. Reg. 66558 (Sep. 27, 2023).

Small Business Regulatory Success Stories

Environmental Protection Agency

Clean Water Act Water Quality Certification Improvement Rule

The EPA finalized its Clean Water Act Water Quality Certification Improvement rule on September 27, 2023. The rule updates the Clean Water Act’s certification process for states, territories, and tribes potentially impacted by discharges from federally permitted projects. In its comment letter dated

August 5, 2022, Advocacy raised concerns with a requirement in the proposed rule for permittees to include a draft federal permit and/or license to a Certifying Authority when making a water quality certification request. Advocacy stated that this requirement “is largely unfeasible and will lead to unnecessary permitting delays” because many federal agencies are not able to prepare individual draft permits or licenses until after a Certifying Authority has made its decision. In the final rule, the EPA removed the requirement for individual permit applications, making the new process easier for small entities to comply with.

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

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

§ 605. Avoidance of duplicative or unnecessary analyses

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

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

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

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

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

§ 606. Effect on other law

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

§ 607. Preparation of analyses

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

§ 608. Procedure for waiver or delay of completion

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

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

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

§ 609. Procedures for gathering comments

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

- (1) the inclusion in an advance notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;
- (2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;
- (3) the direct notification of interested small entities;
- (4) the conduct of open conferences or public hearings concerning the rule for small entities including soliciting and receiving comments over computer networks; and

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

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

- (1) a covered agency shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with information on the potential impacts of the proposed rule on small entities and the type of small entities that might be affected;
- (2) not later than 15 days after the date of receipt of the materials described in paragraph (1), the Chief Counsel shall identify individuals representative of affected small entities for the purpose of obtaining advice and recommendations from those individuals about the potential impacts of the proposed rule;
- (3) the agency shall convene a review panel for such rule consisting wholly of full time Federal employees of the office within the agency responsible for carrying out the proposed rule, the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel;
- (4) the panel shall review any material the agency has prepared in connection with this chapter, including any draft proposed rule, collect advice and recommendations of each individual small entity representative identified by the agency after consultation with the Chief Counsel, on issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c);
- (5) not later than 60 days after the date a covered agency convenes a review panel pursuant to paragraph (3), the review panel shall report on the comments of the small entity representatives and its findings as to issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c), provided that such report shall be made public as part of the rulemaking record; and

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

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

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

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

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

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

with a competitive advantage relative to other small entities.

§ 610. Periodic review of rules

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

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

- (1) the continued need for the rule;
- (2) the nature of complaints or comments received concerning the rule from the public;
- (3) the complexity of the rule;
- (4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and

(5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

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

§ 611. Judicial review

(a)

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

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

(3)

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

(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to

section 608(b) of this chapter, an action for judicial review under this section shall be filed not later than—

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

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

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

(A) remanding the rule to the agency, and

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

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

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

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

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

§ 612. Reports and intervention rights

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

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

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

Appendix B

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

Executive Order of August 13, 2002²

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

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

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

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

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

(c) may provide comment on draft rules to the agency that has proposed or intends to propose the rules and to the Office of Information and Regulatory Affairs of the Office of Management and Budget (OIRA).

Sec. 3. Responsibilities of Federal Agencies.

Consistent with the requirements of the Act and applicable law, agencies shall:

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

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

(c) Give every appropriate consideration to any comments provided by Advocacy regarding a draft rule. Consistent with applicable law and appropriate protection of executive deliberations and legal privileges, an agency shall include, in any explanation or discussion accompanying publication in the

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

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

RFA Training, Case Law, and SBREFA Panels

Federal Agencies Trained in RFA Compliance, 2003–2023

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 2023

Courts across the country have decided various issues regarding the RFA 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 2023.

Holston United Methodist Home for Child v. Becerra⁵

The U.S. Department of Health and Human Services (HHS) administers conditional grants of federal funds to states for foster-care programs. In 2016, HHS promulgated a rule modifying and adding regulatory language to the Comprehensive Grants Rules to provide additional guidance to regulated entities. The 2016 Grants Rule added nondiscrimination language regarding the treatment of LGBTQI+ individuals and accounted for recent Supreme Court decisions in *Windsor* and *Obergefell*. HHS promulgated the rule pursuant to its statutory authority under 5 U.S.C. §301, although that statute contains no provision regarding nondiscrimination. However, with the change in presidential administration in 2017, HHS noted itself that it did not take concerted steps to obtain compliance with the nonstatutory nondiscrimination provisions of the 2016 rule. HHS published a formal notification in the Federal Register in 2019 that it would not enforce the 2016 rule after deciding that the rulemaking raised "significant concerns about compliance with the Regulatory Flexibility Act (RFA)." HHS announced it was exercising discretion not to enforce the 2016 rule until the rules were re-promulgated with an impact analysis that met RFA standards.

The repromulgation process resulted in HHS issuing a final rule on Jan. 12, 2021, that removed the 2016 Grants Rule's language regarding gender-identity discrimination. Rather, the 2021 rule only incorporates protections from other sources of law. Eventually, the 2021 rule was challenged as arbitrary and capricious.

⁵ *Holston United Methodist Home for Child, Inc. v. Becerra*, No. 2:21-cv-185, 2022 U.S. Dist. LEXIS 209566 (E.D. Tenn. Nov. 18, 2022).

HHS voluntarily moved to vacate the rule, but at the same time asserted it would not enforce the 2016 rule before it had been repromulgated again, as it never enforced it before.

On June 15, 2022, President Biden issued E.O. 14,075 directing HHS to consider how to use their authorities to strengthen non-discrimination protections for LGBTQI+ individuals in the child-welfare system. Plaintiff, Holston, a Tennessee-based not-for-profit that cares for children, alleged that the 2016 Grants Rule violates Holston's rights under several theories.

The court, in deciding for the Administration, noted that HHS had explicitly stated it would not enforce the 2016 Grants Rule until a proper impact analysis had been completed. The court asserted that because the 2016 Grants Rule was essentially defunct given the HHS's own assertion that it violated the RFA, Holston Home faced no credible threat of prosecution for non-compliance.

Relentless, Inc. v. United States Department of Commerce⁶

The National Marine Fisheries Service (NMFS) is charged with promoting the sustainability of the nation's fisheries. Consequently, it promulgated a rule which requires vessels fishing for herring on certain fishing trips to carry monitors on board. Although the government trains and certifies these monitors, it does not always pay them for their work. Instead, the vessel owners must secure and pay for certain monitors by contracting with private entities. Owners of two fishing vessels that harvest herring challenged the agency's authority to promulgate the rule.

⁶ *Relentless, Inc. v. U.S. Dep't of Com.*, 62 F.4th 621 (1st Cir. 2023).

The U.S. District Court of Rhode Island granted summary judgment for the government, reasoning that the rule is a permissible exercise of agency authority under the statute governing fishery stocks and conservation, that its promulgation followed proper procedures, and that it does not violate the Constitution. Plaintiffs appealed, but U.S. Court of Appeals for the First Circuit affirmed the decision, holding that the rule is a “permissible exercise of the agency’s authority.”

Plaintiffs contended that the rule violates the Regulatory Flexibility Act, because the agency did not adequately consider the impact on small businesses. Plaintiffs argued the RFA was violated because the agency did not consider the effect of its action on, or include recommendations to assist, businesses who freeze catches at sea, like themselves. Plaintiffs also argue that NMFS did not adequately respond to comments in response to the RFA, did not consider data regarding a drop in fishermen, and did not plan to ensure monitors are allocated fairly across the fleet.

The First Circuit disagreed with the plaintiffs, finding that the rule does not violate the RFA because the agency issued a regulatory flexibility analysis that indicates it considered the plaintiffs’ concerns. The court held that the RFA “does not alter the substantive mission of the agencies” but creates “procedural obligations.” The court stated the agency met those obligations here. The agency explained potential impacts on small businesses and described how it mitigated those impacts, including by setting a monitoring coverage target at 50% and setting a weight threshold for monitored trips that would exempt many small businesses from the requirement to carry a monitor. The agency also explained why small businesses would not be forced out of fishing, and explained why it did not adopt the alternative measures the plaintiffs suggested. The court stated that “[T]he RFA only required the Agency to consider and respond to comments and to evaluate the impact of its action on small businesses. It did so here.”

United States v. Ramos-Guerra⁷

Defendant Ramos-Guerra and co-defendant Cuevas-Almonte were taken into custody by the U.S. Coast Guard after attempting to sink a vessel that was suspected of engaging in smuggling. The U.S. charged both defendants with a three-count indictment. Cuevas-Almonte filed a motion for witnesses to be provided in the omnibus hearing trial and the motion was denied twice. In response, Cuevas-Almonte filed a new motion arguing that the Department of Homeland Security’s Touhy Regulations are inapplicable, or in the alternative, 5 U.S.C. §301 is unconstitutional. As part of his motion, Cuevas-Almonte alleged that the service of summons procedure for Department of Homeland Security employees violated the RFA because there was not an RFA analysis or certification to accompany it. The government in response argued that the RFA did not apply to procedure, only to substantive rules. The Virgin Islands District Court ruled that the procedural rules were not substantive and therefore the rulemaking procedures of the Administrative Procedure Act, and therefore the RFA, did not apply.

West Virginia v. United States Environmental Protection Agency⁸

A coalition of twenty-four states brought an action for declaratory and injunctive relief, challenging an Environmental Protection Agency (EPA) rule which revised the definition of “waters of the United States” under the Clean Water Act (CWA) as violating the Administrative Procedure Act (APA) and various constitutional provisions. The District Court granted the states’ motion and held the states had standing to challenge the rule, that Chevron deference did not apply, and that the states were likely to succeed on their various claims.

As it pertains to the RFA, the court reiterated that the RFA requires agencies undergoing informal rulemaking to prepare and publish a regulatory flexibility analysis

⁷ U.S. v. Ramos-Guerra, 2023 U.S. Dist. LEXIS 24722 (D.V.I. Feb. 14, 2023).

⁸ West Virginia v. U.S. Env’t Prot. Agency, 669 F.Supp 3d 781 (D.N.D. 2023).

that details, among other items, whether the rule will have a “significant economic impact on small entities” and the steps the agency has taken or will take to minimize that impact. Agencies can only skip the analysis if the agency’s head certifies that the rule will not have a significant impact on a substantial number of small entities. The EPA certified that the rule would not have a significant economic impact on a substantial number of small entities because it will

not directly impact small entities. The court, however, disagreed, and asserted that from the declarations filed in this case by state officials, the rule appears to directly impact many states and landowners who find themselves now potentially subject to federal jurisdiction and permitting requirements. Such a new situation could result in expensive assessments by those states and landowners, or a result in them foregoing their activities.

Table C.1 SBREFA Panels Convened Through FY 2023

SBREFA Panel Rule	Date Convened	Date Completed	Notice of Proposed Rulemaking	Final Rule Published
Consumer Financial Protection Bureau				
Personal Financial Data Rights	02/01/23	03/30/23		
Automated Valuation Model (AVM)	03/14/22	05/13/22	06/21/23	
Small Business Lending Data Collection	10/15/20	12/14/20	10/08/21	05/31/23
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

SBREFA Panel Rule	Date Convened	Date Completed	Notice of Proposed Rulemaking	Final Rule Published
Department of Labor, Occupational Safety and Health Administration				
Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings	08/23/23			
Prevention of Workplace Violence in Healthcare and Social Assistance	03/01/23	05/01/23		
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		
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

SBREFA Panel Rule	Date Convened	Date Completed	Notice of Proposed Rulemaking	Final Rule Published
Environmental Protection Agency				
C.I. Pigment Violet 29(PV29) Risk Management Rulemaking Under the Toxic Substances Control Act	08/31/23			
N-Methylpyrrolidone (NMP); Rulemaking under TSCA §6(a)	05/10/23	09/14/23		
Proposed Amendments to the New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units	07/27/23		05/23/23	
National Emission Standards for Hazardous Air Pollutants: Lime Manufacturing Plants Amendments	07/21/23		01/05/23	
Meat and Poultry Products Effluent Limitations Guidelines Rulemaking Revisions	07/03/23	09/19/23		
Trichloroethylene (TCE) Risk Management Rulemaking Under the Toxic Substances Control Act	01/17/23	04/04/23		
National Primary Drinking Water Regulation: Lead and Copper Rule Improvements (LCRI)	11/15/23	05/31/23		
Perchloroethylene (PCE) Risk Management Rulemaking Under the Toxic Substances Control Act	10/27/22	02/01/23	06/16/23	
Revisions to the Air Emissions Reporting Requirements	10/06/22	01/03/23	08/09/23	
TSCA Section 8(a)(7) Rule: Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances	04/06/22	08/02/22	06/28/23	
Per- and Polyfluoroalkyl Substances (PFAS) National Primary Drinking Water Regulation (NPDWR)	05/24/22	08/01/22	03/29/23	

SBREFA Panel Rule	Date Convened	Date Completed	Notice of Proposed Rulemaking	Final Rule Published
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		
Methylene Chloride; Rulemaking under TSCA §6(a)	01/07/21	10/28/21	05/03/23	
National Emission Standards for Hazardous Air Pollutants: Ethylene Oxide Commercial Sterilization and Fumigation Operations	11/25/20	04/26/21	4/13/23	
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		

SBREFA Panel Rule	Date Convened	Date Completed	Notice of Proposed Rulemaking	Final Rule Published
Review of New Source Performance Standards and Amendments to Emission Guidelines for Municipal Solid Waste Landfills	12/05/13	07/21/15	07/17/14 08/27/15	08/29/16
National Emissions Standards for Hazardous Air Pollutants (NESHAP): Brick and Structural Clay Products and Clay Products	06/12/13	01/16/14	12/18/14	10/26/15
Long Term Revisions to the Lead and Copper Rule	08/14/12	08/16/13	-	-
Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards	08/04/11	Rule proposed rule w/o completion of SBREFA panel report	06/30/14	12/01/15
Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards	08/04/11	10/14/11	05/21/13	04/28/14
Greenhouse Gas Emissions from Electric Utility Steam Generating Units	06/09/11	Rule proposed rule w/o completion of SBREFA panel report	04/14/13	04/13/12 01/08/14 06/02/14
National Emission Standards for Hazardous Air Pollutants (NESHAP) Risk and Technology Review for the Mineral Wool and Wool Fiberglass Industries	06/02/11	10/26/11	11/12/11	07/29/15
Formaldehyde Emissions from Pressed Wood Products	02/03/11	04/04/11	06/10/13	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

SBREFA Panel Rule	Date Convened	Date Completed	Notice of Proposed Rulemaking	Final Rule Published
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
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

SBREFA Panel Rule	Date Convened	Date Completed	Notice of Proposed Rulemaking	Final Rule Published
Reinforced Plastics Composites	04/06/00	06/02/00	08/02/01	04/21/03
Concentrated Animal Feedlots	12/16/99	04/07/00	01/12/01	02/12/03
Metals Products and Machinery	12/09/99	03/03/00	01/03/01	05/13/03
Lead Renovation and Remodeling Rule	11/23/99	03/03/00	01/10/06	04/22/08
Diesel Fuel Sulfur Control Requirements	11/12/99	03/24/00	06/02/00	01/18/01
Recreational Marine Engines	06/07/99	08/25/99	10/05/01 08/14/02	11/08/02
Arsenic in Drinking Water	03/30/99	06/04/99	06/22/00	01/22/01
Light Duty Vehicles/Light Duty Trucks Emissions and Sulfur in Gas	08/27/98	10/26/98	05/13/99	02/10/00
Filter Backwash Recycling	08/21/98	10/19/98	04/10/00	06/08/01
Long Term 1 Enhanced Surface Water Treatment	08/21/98	10/19/98	04/10/00	01/14/02
Radon in Drinking Water	07/09/98	09/18/98	11/02/99	
Section 126 Petitions	06/23/98	08/21/98	09/30/98	05/25/99
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 E for abbreviations.

Appendix D

History of the Regulatory Flexibility Act

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

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

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

16. 5 U.S.C. § 603.

13. 5 U.S.C. § 601 et seq.

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

RFA Requirements

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

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

Interpreting and Strengthening the RFA

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

14. Carter, *supra* note 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*, the D.C. Circuit found that "Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy."¹⁸ This interpretation—that federal agencies must only consider the direct effects on small businesses within the jurisdiction of the rule—has continued to be the judicial interpretation of the RFA, even after subsequent amendments.¹⁹

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

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

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.

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 provide a FRFA or sufficient reason for certification.

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

SBREFA Panels

The SBREFA amendments also required the Environmental Protection Agency and the Occupational Safety and Health Administration to convene small business advocacy review panels whenever the agency proposes a rule that may have

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

22. *Id.*

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 2002.²³ This order tasked Advocacy with training federal agencies and other stakeholders on the RFA. The training sessions helped apprise agencies of their responsibilities under the RFA and educated agency officials on the best RFA compliance practices. In addition, E.O. 13272 required Advocacy to track agency compliance with these education

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

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 2010,²⁴ which codified some of the procedures introduced in E.O. 13272. That same year, the Dodd-Frank Wall Street Reform and Consumer Protection Act became law.²⁵ The new law created the Consumer Financial Protection Bureau and required that the new agency's rules come under the SBREFA panel provisions of the RFA.

The Obama administration looked to Advocacy for ways of encouraging economic activity. Again, the RFA was an important part of the answer. Executive Order 13563, "Improving Regulation and Regulatory

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).

Review,”²⁶ 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,”²⁷ which placed greater focus on initiatives aimed at reducing unnecessary regulatory burdens, simplifying regulations, and harmonizing regulatory requirements imposed on small businesses.

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

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

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.

Small Business and International Trade

With the enactment of the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), Advocacy’s duties to small businesses 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 TFTEA, Advocacy released the Section 502 Small Business Report on the Modernization of the North American Free Trade Agreement: Prepared for the Consideration of the United States-Mexico-Canada Agreement.²⁹

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

Appendix E

Abbreviations

RFA	Regulatory Flexibility Act		
SBREFA	Small Business Regulatory Enforcement Fairness Act		
SBAR	Small Business Advocacy review		
IRFA	Initial Regulatory Flexibility analysis		
FRFA	Final Regulatory Flexibility analysis		
Advocacy	Office of Advocacy	FTC	Federal Trade Commission
AIM Act	American Innovation and Manufacturing Act of 2020	FWS	Fish and Wildlife Service
ANPRM	advance notice of proposed rulemaking	GHG	greenhouse gas
APA	Administrative Procedure Act	HFCs	hydrofluorocarbons
AVM	automated valuation models	HHS	Health and Human Services
BLM	Bureau of Land Management	IRA	Inflation Reduction Act
BOEM	Bureau of Ocean Energy Management	IRS	Internal Revenue Service
BOI	beneficial ownership information	MSHA	Mine Safety and Health Administration
CCR	coal combustion residuals	NEPA	National Environmental Policy Act
CEQ	Council on Environmental Quality	NLRB	National Labor Relations Board
CFPB	Consumer Financial Protection Bureau	NMFS	National Marine Fisheries Service
COVID-19	coronavirus disease 2019	OCS	Outer Continental Shelf
CWA	Clean Water Act	OIRA	Office of Information and Regulatory Affairs
DOE	Department of Energy	OSHA	Occupational Safety and Health Administration
DOJ	Department of Justice		
DOL	Department of Labor	PACE	Residential Property Assessed Clean Energy Financing
EGU	Oil-Fired Electric Utility Steam Generating Units	PCE	perchloroethylene
EO	executive order	RMP	Risk Management Program
ESA	Endangered Species Act	SBA	Small Business Administration
EtO	ethylene oxide	SEC	Securities and Exchange Commission
EPA	Environmental Protection Agency	TTB	Alcohol and Tobacco Tax and Trade Bureau
FAR	Federal Acquisition Regulation		
FDA	Food and Drug Administration	USCIS	United States Citizenship and Immigration Services
FinCEN	Financial Crime Enforcement Network		
FLPMA	Federal Land and Policy Management Act		