

## **Advocacy Supports OMB Effort to Require Greater Public Involvement When Agencies Issue Guidance Documents**

On January 6, 2006, the Office of Advocacy (Advocacy) sent a comment letter to the Office of Management and Budget (OMB) in response to OMB's proposed "Bulletin for Good Guidance Practices" (70 Fed. Reg. 71866 (November 30, 2005)). The proposed Bulletin is designed to bring more transparency and consistency to Federal agencies' issuance of guidance documents. Advocacy shares OMB's goal of ensuring that agencies do not attempt to impose substantive new regulatory requirements through guidance documents, and that agencies have the benefit of public comments (particularly the comments of small businesses) when new guidance is developed. A complete copy of Advocacy's letter to OMB may be accessed at <http://www.sba.gov/advo/laws/comments>.

- Small businesses are concerned that Federal agencies issue informal guidance documents that can have the effect of expanding regulatory burdens – instead of promulgating rules under the Administrative Procedure Act (APA) – in order to avoid the procedural requirements of the APA. One of the most important procedural protections that are bypassed when agencies issue guidance instead of rules is the small business review required by the Regulatory Flexibility Act (RFA).
- OMB's proposed Bulletin would apply to "significant guidance documents" (guidance that involves controversial issues, sets forth initial or changed interpretations of statutes or regulations, deals with novel or complex scientific or technical issues, or is reasonably anticipated to lead to an annual economic impact of \$100 million or more o). Agencies would have to make significant guidance documents available to the public on agency websites and allow comments on draft guidance. "Economically significant guidance documents" (guidance reasonably anticipated to lead to an annual economic impact of \$100 million or more) would have to go through a process that is similar to notice and comment rulemaking.
- Advocacy recommended that OMB expand the definition of "significant guidance document" to include guidance documents relied upon by an agency to manage the regulatory process. Advocacy also recommended that OMB require agencies to include a specific finding that a guidance document is appropriately guidance rather than a rule, and the facts that support that finding.

For more information, visit Advocacy's Webpage at <http://www.sba.gov/advo>, or contact Assistant Chief Counsel Keith Holman by email at [keith.holman@sba.gov](mailto:keith.holman@sba.gov) or by phone at (202) 205-6533.