U.S. Small Business Administration
Office of Advocacy

Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act, Calendar Year 1997

The Office of Advocacy of the U.S. Small Business Administration was established in 1976 by Congress under Public Law 94-305 to advocate the views of small business before federal agencies and the Congress. The Chief Counsel for Advocacy is charged with monitoring agency compliance with the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) and reporting annually to the President and Congress on its implementation. This report addresses regulatory flexibility activity in calendar year 1997.

As background to this report, the Office of Advocacy's 1997 communications with federal agencies on their compliance with the Regulatory Flexibility Act can be viewed on the office's site on the Internet's World Wide Web at *http://www.sba.gov/ADVO/*.

Copies of this report, as well as a companion report, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies*, can be obtained at the home page or by writing to the Office of Advocacy at 409 Third Street S.W., Washington, DC 20416.

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Office of Advocacy
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To the President and Congress of the United States:

The Regulatory Flexibility Act of 1980 (RFA) requires federal agencies to consider the effects of their regulatory actions on small businesses and other small entities and to minimize any undue burden. As the U.S. Small Business Administration's Chief Counsel for Advocacy charged with monitoring federal agency compliance with the act, I am pleased to submit to you this report covering activities undertaken in calendar year 1997.

In 1997, the Office of Advocacy worked on nearly 60 new rulemakings to assess their impact on small entities and work with federal agencies to minimize regulatory burdens. The reviews involved many agencies with regulations affecting a wide range of industries.

The implementation of the act became more effective with the passage of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). Among other provisions, the SBREFA amended the RFA by allowing small businesses, appealing from an agency's final rulemaking action, to seek judicial review of an agency's compliance with the RFA. As a result, in 1997 many lawsuits were filed in federal courts. A special chapter in this report discusses these early rulings.

Active outreach through seminars and publications continues to be a key component of ensuring that the RFA is implemented properly. To enhance access to information on the RFA, the Office of Advocacy makes available to the public its publications, regulatory comments, and testimony on its Internet home page at *http://www.sba.gov/ADVO/*.

We have witnessed many positive results from the SBREFA amendments, but continue to experience non-compliance with the RFA from some agencies. The Office of Advocacy will vigorously pursue compliance with the law by educating small entities and federal agencies about the Regulatory Flexibility Act.

Jere W. Glover
Chief Counsel for Advocacy
U.S. Small Business Administration

Contents

Abbreviations

AMS	Agricultural Marketing Service
APA	Administrative Procedures Act
BLM	Bureau of Land Management
CALEA	Communications Assistance to Law Enforcement Act
CFR	Code of Federal Regulations
DEA	Drug Enforcement Administration
DOT	U.S. Department of Transportation
EAS	Emergency Alert System
EPA	Environmental Protection Agency
EPCRA	Emergency Planning and Community Right-to-Know Act
ESA	Employment Standards Administration
FAA	Federal Aviation Administration
FAR	Federal Acquisition Regulation
FBI	Federal Bureau of Investigation
FCC	Federal Communications Commission
FDA	Food and Drug Administration
FERC	Federal Energy Regulatory Commission
FR	Federal Register
FRA	Federal Railroad Administration
FRFA	final regulatory flexibility analysis
FSIS	Food Safety and Inspection Service
FTC	Federal Trade Commission
GSA	General Services Administration
HCFA	Health Care Financing Administration
IRFA	initial regulatory flexibility analysis
IRS	Internal Revenue Service
ITA	International Trade Administration
IXC	interexchange carrier
MMS	Minerals Management Service
MSHA	Mine Safety and Health Administration
NAAQS	National Ambient Air Quality Standards
NIST	National Institute of Standards and Technology
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
NPRM	notice of proposed rulemaking

OFPP	Office of Federal Procurement Policy
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
PCS	personal communications services
PEL	permissible exposure limit
PICC	presubscriber interexchange carrier charge
PL	Public Law
POTW	publically owned treatment works
RFA	Regulatory Flexibility Act
SAC	standards advisory committee
SBA	U.S. Small Business Administration
SBREFA	Small Business Regulatory Enforcement Fairness Act
SEC	Securities and Exchange Commission
TRI	toxic release inventory
USC	United States Code

Executive Summary

The Chief Counsel for Advocacy's annual report to Congress and the President on implementation of the Regulatory Flexibility Act (RFA) provides a report on federal agencies' compliance with the act. The RFA was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). This is the first report covering an entire calendar year of regulatory activities to which the amendments apply. The report also discusses litigation brought since enactment of the SBREFA amendments that allow judicial review of agency compliance with the RFA. In addition, there is discussion of increased experience with the SBREFA Small Business Advocacy Review Panel process applicable to regulations of the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) that have significant small business impacts.

The Office of Advocacy is pleased to report that positive changes have occurred as a direct result of the 1996 amendments. Unfortunately, agency non-compliance still persists.

The RFA was enacted in 1980 to correct regulatory processes that Congress found harmful to small business. Congress was concerned that regulations designed for large entities were applied uniformly to small businesses, resulting in disproportionate burdens and compliance costs on small business. Congress was also concerned that regulations often erected barriers to competition. Federal regulatory agencies were not, as a matter of routine, considering less onerous and, arguably, equally effective regulatory alternatives as part of the regulatory development process.

To address these findings, Congress enacted the RFA, requiring federal agencies to: (1) assess and publish information on the impact of regulatory proposals on small entities; (2) analyze regulatory alternatives that could achieve an agency's objectives without imposing undue burdens on small entities; and (3) justify the regulatory option selected. SBREFA amended the RFA significantly by expanding the jurisdiction of the courts to review agency compliance with the RFA in conjunction with regulatory appeals brought by small entities. It also established a process that requires the EPA and OSHA to consult with small businesses before publishing proposed rules. Finally, SBREFA reaffirmed the Chief Counsel for Advocacy's right to file as *amicus curiae* (friend of the court) in regulatory appeals.

During 1997, the Office of Advocacy reviewed approximately 1,300 regulations, and worked in depth on nearly 60 rules, achieving some notable successes effecting changes to regulations both prior to and after publication of proposed rules. More agencies evidenced very specific interest in the RFA's provisions and sought the Office of Advocacy's advice in the earliest stages of regulatory development. Federal agencies are increasingly consulting the Office of Advocacy's economic research statistics on numbers and sizes of firms by industry (which have been made available both on CD-ROM and the Internet) for inclusion in their economic impact analyses of regulatory proposals. The Office of Advocacy continued to work closely with the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) to review executive agencies' compliance with the RFA.

Because of the SBREFA amendments, the Chief Counsel for Advocacy worked with agencies and the Department of Justice in an effort to resolve RFA disputes prior to and during appellate litigation. Consultations have also been held with senior officials of several regulatory agencies to discuss procedures that agencies could institute to ensure compliance with the RFA before rules are finalized. The potential for litigation on RFA issues unquestionably has provided a major incentive for agencies to ensure compliance with the act. Despite such efforts, however, the Chief Counsel for Advocacy filed the office's first motion to intervene as *amicus curiae* in a case brought by small entities appealing an agency's final regulatory action (*Northwest Mining Assn. v. Babbitt, et al.*).

Finally, the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) implemented the Small Business Advocacy Review Panel process as mandated by SBREFA. In 1997, OSHA did preliminary work with the Office of Advocacy on several regulations that were expected to go through the panel process. The EPA has been the more active of the two agencies, completing work on five panels during 1997. The Office of Advocacy testified before the Small Business Committee in the U.S. House of Representatives on the value of the panel process. In the Office of Advocacy's assessment, the process has accomplished three things:

1. the early involvement of small entities in the development of rules, an involvement that has been clearly beneficial to regulatory development;
2. the identification of the kind of data needed to document the causes and scope of problems and the comparative contribution to the problem made by different sized firms within an industry; and

3. on balance, recommendations for regulatory provisions that accomplish important agency objectives without overburdening small business.

Similar findings were made by the General Accounting Office in a March 1998 report.[1]

Although noticeable progress has been made, in large part due to the SBREFA amendments to the RFA, significant work remains to be done to bring all federal agencies into compliance. Several agencies still have much to learn about the importance of small business to the U.S. economy and the underlying rationale of the RFA. To address this problem, the Office of Advocacy conducts training sessions for agency personnel, as well as small business representatives, to enhance their effectiveness in the regulatory process. To further this end, the Office of Advocacy has developed guidance materials on the RFA for federal agencies and small businesses.[2] Deficiencies in compliance with the RFA nevertheless persist.

This report is divided into four parts. The first part provides an overview of the RFA as amended by SBREFA. The overview describes the purpose of the law, how it must be implemented by agencies, and why it is important to small businesses. The second part of the report describes the role of the Office of Advocacy in rulemaking under the RFA. The third part covers RFA litigation in 1997. The fourth part profiles specific agency compliance as experienced by the Office of Advocacy in 1997.

1. U.S. General Accounting Office, *Regulatory Reform: Implementation of the Small Business Advocacy Review Panel Requirements*, report no. GAO/GGD-98-36 (Washington, D.C.: U.S. General Accounting Office, March 1998).

2. See, for example, U.S. Small Business Administration, Office of Advocacy, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies*, report no. PB98-137250 (Springfield, Va.: National Technical Information Service, 1998).

The Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires each federal agency to review its regulatory proposals to determine if a new rule will have a significant impact on a substantial number of small businesses and other small entities and identify regulatory alternatives that may minimize the economic impact, such as paperwork burdens, capital investment, costs related to compliance, etc.[3] The major goals of the act are to ensure that federal agencies analyze the impact of regulations on small business and competition, communicate and explain their findings to the public, and provide appropriate regulatory relief to small entities without sacrificing related public policy objectives.

The Regulatory Flexibility Act was enacted in 1980 and amended by the Small Business Regulatory Enforcement Fairness Act of 1996.[4] Congress made several findings, namely that regulations often:

- adversely affect competition, discourage innovation, and restrict improvements in productivity;
- create entry barriers in many industries and discourage entrepreneurs from introducing beneficial products and processes;
- apply the same provisions to small entities even though they may not be the major cause of the problem being addressed by government action; and
- impose unnecessary burdens on the small entities.

Recognizing that small business is a major source of competition and economic growth, Congress established with the RFA a process for federal agencies to follow so that they can design regulations that will help them achieve their statutory and regulatory goals efficiently without harming or imposing undue burdens on small businesses.

Research performed by the Office of Advocacy and others has repeatedly demonstrated the contributions that small businesses make to the economy. They create most new jobs, hire a more diverse work force, account for the bulk of U.S. gross domestic

3. Section 601 of the Regulatory Flexibility Act defines "small entities" as small businesses, small organizations, and small governmental jurisdictions; therefore most of the references in this report apply equally to small organizations and small governments. The definition of small business for each standard industrial classification is located at 13 CFR Part 121.

4. P.L. 104-121. For the full text of the act, see Appendix B, page 56.

product, and contribute most new commercial innovations. The dominant players in today's economy, therefore, are not the so-called Fortune 500 companies; rather, they are the emerging and fast growing small businesses.

Yet independent research funded by the Office of Advocacy has documented that small firms are disproportionately burdened by the cost of regulations. Firms with 20 to 49 employees reported spending nearly 20 cents of every revenue dollar to pay for the paperwork and compliance costs attributable to regulations. The very smallest firms, those with one to four employees, spend annually as much as $32,000 per employee on regulatory compliance. These burdens do not include the cost of initial capital investments required for compliance.[5] In fact, the burden of compliance is as much as 50 percent more for small businesses than for their larger counterparts.[6]

The RFA does not seek preferential treatment for small businesses. Nor does it mandate that agencies adopt regulations that impose the least burden on small entities, nor require exemptions for small entities. Rather, it establishes an analytical process for determining how public policy issues can best be resolved without erecting barriers to competition. The law seeks a level playing field for small business, not an unfair advantage. It calls for regulations that are "right-sized" — that is, regulations that require small business compliance only to the extent to which small businesses contribute to the problems that a given regulation is designed to eliminate or control. To this end, agencies must analyze the impact of proposed regulations on different-sized entities in various industry sectors and the comparative effectiveness of regulatory alternatives in resolving public policy concerns while minimizing adverse impacts on competition and undue burdens on small businesses.

The 1996 SBREFA amendments to the RFA:

- allow aggrieved small businesses, appealing from agency final actions, to seek judicial review of agency compliance with the RFA;
- reaffirm the authority of the SBA's Chief Counsel for Advocacy to file *amicus curiae* (friend of the court) briefs in regulatory appeals brought by small entities;

5. Thomas D. Hopkins, *A Survey of Regulatory Burdens*, report no. PB95-263190, prepared by Diversified Research, Inc., for the U.S. Small Business Administration, Office of Advocacy (Springfield, Va.: National Technical information Service, 1995).

6. U.S. Small Business Administration, Office of Advocacy, *The Changing Burden of Regulation, Paperwork, and Tax Compliance on Small Business: A Report to Congress*, report no. PB96-113642 (Springfield, Va.: National Technical Information Service, 1996).

- expand the application of the RFA to interpretive rules of the Internal Revenue Service that impose a collection of information requirement; and
- mandate a process for small business participation in the development of rules by the Environmental Protection Agency and the Occupational Safety and Health Administration.

Components of the Regulatory Flexibility Act

Federal agencies must comply with several basic requirements of the RFA. Agencies are required to determine and analyze the economic impact of new rules and regulatory alternatives on small entities. The Environmental Protection Agency and Occupational Safety and Health Administration have special mandates to include small businesses in the development of regulations. In addition to regulatory analyses, agencies must publish a semi-annual agenda of planned regulatory activities and review existing rules periodically. Under the RFA, an agency's compliance is subject to judicial review, and the SBA's Chief Counsel for Advocacy retains the authority to file *amicus curiae* briefs in appeals brought against agency final actions by small entities.

Agency Compliance Requirements

Economic Impact Analysis or Certification of New Rules

Federal agencies are required by the RFA either to certify that "the rule will not have a significant economic impact on a substantial number of small entities," and provide a factual basis for the determination, or prepare a regulatory flexibility analysis.

Initial Regulatory Flexibility Analysis

If a proposed rule is expected to have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis (IRFA) must be prepared and published in the *Federal Register* for public comment. If the analysis is lengthy, the agency may publish a summary and make the analysis available upon request. This initial analysis must describe the impact of the proposed rule on small entities.

The initial analysis must also contain a comparative analysis of alternatives to the proposed rule that would minimize the impact on small entities and document their comparative effectiveness in achieving the regulatory purpose.

Certification

If a regulation is found not to have a significant economic impact on a substantial number of small entities, the head of an agency may

certify to that effect, but must provide a factual basis for this determination. This certification must be published with the proposed rule in the *Federal Register* and is subject to public comment in order to ensure that the certification is warranted.

Final Regulatory Flexibility Analysis

When an agency issues a final rule, it must prepare a final regulatory flexibility analysis (FRFA) or certify that the rule will not have a significant impact on a substantial number of small entities and provide a statement of the factual basis for such certification. The final regulatory flexibility analysis must:

- provide a succinct statement of the need for, and objectives of, the rule;
- summarize the issues raised by public comments on the IRFA (or certification) and the agency's assessment of those issues;
- describe and estimate the number of small entities to which the rule will apply or explain why no such estimate is available;
- describe the compliance requirements of the rule, estimate the classes of entitities subject to them and the type of professional skills essential to compliance;
- describe the steps followed by the agency to minimize the economic impact on small entities consistent with the stated objectives of the applicable statutes; and
- give the factual, policy, and legal reasons for selecting the alternative(s) adopted in the final rule, explaining why other alternatives were rejected.

The FRFA may be summarized for publication with the final rule; however, the full text of the analysis must be available for review by the public.

Requirements for OSHA and EPA

The 1996 SBREFA amendments to the RFA require the Environmental Protection Agency and the Occupational Safety and Health Administration to take extra steps to include small businesses in the development of regulations. If either agency is preparing an initial regulatory flexibility analysis, it must first seek input from representatives of small entities prior to publication of the proposed rule. A Small Business Advocacy Review Panel, consisting of representatives from the rulemaking agency, the SBA's Chief Counsel for Advocacy, and the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) is to be convened to review any materials prepared in connection with a rule under consideration and to solicit small business views on the proposal. The panel has 60 days in which to submit a report on its

findings. This report becomes part of the public rulemaking record. The agency may reconsider the draft proposal and its economic analysis after receipt of the panel's report. The SBA's Chief Counsel for Advocacy may grant a waiver of the panel requirement under certain circumstances.

Semi-Annual Agendas

In April and October of each year, federal agencies are required to publish a regulatory agenda listing all rules expected to be published in the *Federal Register* during the coming year that will likely have a significant economic impact on a substantial number of small entities. Publication of these agendas is intended to increase the amount of time small entities will have to react to agency proposals.

Periodic Review

Federal agencies must review all regulations within 10 years of promulgation to reassess their impact on small entities and make a determination whether a rule should be revised or eliminated.

Judicial Review

The Small Business Regulatory Enforcement Fairness Act amended the RFA to permit judicial review of agency compliance with the law. Adversely affected or aggrieved small entities may appeal an agency's final action by seeking review of an agency's compliance with the RFA. Judicial review also applies to appeals from IRS interpretative rules that impose information collection requirements on small entities.

Amicus Authority. Congress reaffirmed the authority of the Chief Counsel for Advocacy to file *amicus curiae* briefs in appeals brought by small entities from agency final actions. The Chief Counsel is authorized to present views on an agency's compliance with the RFA, the adequacy of the rulemaking record with respect to small entities, and the effects of the rule on small entities.

The Role of the Office of Advocacy

The statutory responsibility of the Office of Advocacy is to represent the interests of small business before policy making bodies within the federal government, to conduct research on small businesses' contribution to the economy, and to monitor federal agency compliance with the Regulatory Flexibility Act. During 1997, the Office of Advocacy reviewed over 1,300 rulemakings and actively worked with small businesses and federal agencies on nearly 60 regulations. In addition, the office responded to congressional inquiries on issues such as procurement reform, universal telephone service, bonding for mine operations, and recordkeeping for occupational injury and illnesses.

The Office of Advocacy promotes compliance with the RFA through several avenues. In 1997, as in the past, the Office of Advocacy submitted official comments on many proposed rules critiquing agency non-compliance with the RFA and provided suggestions as to regulatory alternatives that should be considered by the agency. There was, however, a noticeable increase in the number of agency inquiries requesting information on how to comply with the RFA, as well as increased inquiries on how to address the RFA issues in the context of specific rules. These inquiries provided unique opportunities for one-on-one guidance, as well as the opportunity to address the concerns of small entities before a rule was proposed. The Office of Advocacy attributes this increase in pre-proposal consultation in part to the SBREFA amendments.

Another avenue used by the Office of Advocacy to promote agency compliance is the network of small business representatives who can inform their members about changes in the law and how small businesses can more effectively participate in the rulemaking process. The Office of Advocacy organized several briefings on the SBREFA amendments in 1997. In May, the Office of Advocacy conducted three workshops for more than 100 small business representatives to discuss the responsibilities of federal regulatory agencies under the law; factors to be addressed in economic analyses performed by agencies to assess the impact of regulatory proposals; and the new judicial review provision enacted by the SBREFA amendments. Roundtable meetings are routinely held with small businesses and trade associations on specific issues such as procurement reform, environmental regulations, and industrial safety.

The Office of Advocacy's regional advocates have also been effective in small business outreach. They identified small businesses throughout the United States that could review and comment on draft proposals on occupational safety and health programs. Rural small businesses were given information on a proposed change in universal telephone service by the Office of Advocacy's regional advocates and other small business networks. And the crabbing industry in the Northwest worked with the Office of Advocacy to get the EPA to delay a rule until its impact on that industry could be better analyzed.

Early intervention by the Office of Advocacy has helped federal agencies develop a greater appreciation of the role small businesses play in the economy and the rationale for ensuring that regulations do not erect barriers to competition. In particular, the Office of Advocacy has provided economic statistics demonstrating which industries, or industrial sectors, are dominated by small firms. These data show regulators why rules should be written to fit the economics of small businesses if public policy objectives will not otherwise be compromised. The Office of Advocacy makes these statistics available on CD-ROM and through its home page on the Internet, thereby providing federal agencies with ready access to the data for use in future rulemakings. The Office of Advocacy is also a repository of information on trade associations that can be helpful to federal agencies seeking input from small businesses.

Despite these efforts, many agencies still fail to comply with the RFA. (The efforts by the Office of Advocacy to address this problem are discussed in a later section of this report. See "Agency Experiences with the RFA," beginning on page 17.) Some agencies still use "boilerplate" language to certify that rules will not have a significant impact on a substantial number of small businesses, without providing the factual justification required by the RFA. Many agencies continue to define "small business" and "small entity" incorrectly. Other agencies fail to provide meaningful evaluations of regulatory alternatives or perform adequate economic impact analyses.

The culture change that finds some agencies welcoming the participation of small business and the Office of Advocacy in regulatory development is sometimes the result of litigation brought by small businesses against federal agencies. In 1997, an increasing number of lawsuits raised Regulatory Flexibility Act issues. Small businesses challenged agencies' compliance with the RFA for regulations published by the Bureau of Land Management, the Federal Aviation Administration, the Occupational Safety and Health Administration,

the National Marine Fisheries Service, the Environmental Protection Agency, the Federal Communications Commission, and the National Oceanic and Atmospheric Administration.

The first court decisions since the enactment of the SBREFA on RFA issues raised in regulatory appeals are now receiving appropriate attention within federal agencies (see discussion below, pages 12–16). The Office of Advocacy expects that these decisions and those in the coming year will have an impact on the future efforts of federal agencies to comply more fully with the RFA. In addition, the Chief Counsel for Advocacy filed a motion to intervene as *amicus curiae* in a case challenging a rule that requires costly bonding for small businesses that have mining claims filed with the Bureau of Land Management. (This case, *Northwest Mining v Babbitt*, is discussed below, on page 15.) The Office of Advocacy intends to use its *amicus curiae* authority judiciously, and only after all other efforts to promote compliance have failed.

In 1997, the Office of Advocacy continued its vigilant efforts to ensure that small businesses are a key player in the development of federal regulations. Educating federal agencies and holding them accountable is a critical element of the success achieved this year. However, small businesses are also exercising their rights under the Regulatory Flexibility Act, and their involvement has had an impact.

RFA Litigation in 1997

The Small Business Regulatory Enforcement Fairness Act of 1996 amended the RFA to allow small businesses to seek judicial review of agency compliance with the RFA. Shortly after the judicial review provisions became effective, small entities availed themselves of those provisions and began challenging agency actions with regard to the RFA. Small businesses challenged agencies' compliance with the RFA for regulations published by the Bureau of Land Management, the Federal Aviation Administration, the Occupational Safety and Health Administration, the National Marine Fisheries Service, the Environmental Protection Agency, the Federal Communications Commission, and the National Oceanic and Atmospheric Administration. In addition, the Chief Counsel for Advocacy filed a motion to intervene as *amicus curiae* in a case brought by a small entity group in 1997.

In 1997, the courts began to establish valuable precedent by addressing legal issues raised by small entities under the judicial review provisions of the RFA. The courts reviewed issues ranging from the adequacy of the RFA analysis to whether the SBREFA amendments to the RFA that provided for judicial review were applicable to legislative rules promulgated before the effective date of SBREFA amendments. The following is a synopsis of the cases decided by courts in 1997.[7]

Appellate Court Cases

Associated Fisheries of Maine v. Daley

In 1996, the National Marine Fisheries Service (NMFS) adopted a rule to eliminate overfishing of cod, haddock, and yellowtail flounder.[8] Although the NMFS prepared an IRFA and a FRFA for the action, the FRFA consisted of the IRFA with answers to the submitted comments. In *Associated Fisheries of Maine v. Daley*, the Associated Fisheries of Maine brought suit challenging the action

7. From a small-entity viewpoint, two of the most notable cases on RFA compliance filed in 1997 were *Northwest Mining Assn. v. Babbitt*, 5 F. Supp. 2d 9 (D.D.C. 1998) and *Southern Offshore Fishing Association v. Daley*, 995 F. Supp. 1411 (M.D. Fl. 1998). Although these two cases were not decided until 1998, the rules were promulgated and challenged in 1997.

8. 61 FR 27710 (May 31, 1996).

and NMFS's compliance with the RFA.[9]

The court held that the FRFA prepared by the NMFS pursuant the RFA was not inadequate on its face, notwithstanding the plaintiff's claim that the FRFA could not consist simply of an IRFA with responses to submitted comments attached. The court opined that an agency can satisfy provisions of the RFA by setting forth the requirements for the FRFA, as long as it compiles meaningful, easily understood analysis that covers each requisite component dictated by the statute. The end product of this analysis must be made readily available to the public. The court further stated that the secretary of commerce complied with the FRFA requirements because the secretary explicitly considered numerous alternatives; exhibited a fair degree of sensitivity concerning the need to alleviate the regulatory burden on small entities within the fishing industry; adopted some salutary measures designed to ease that burden; and satisfactorily explained reasons for rejecting others.

Southwestern Pennsylvania Growth Alliance v. Browner

In *Southwestern Pennsylvania Growth Alliance v. Browner*,[10] Advanced Manufacturing Network intervened and argued that the EPA's final rule denying Pennsylvania's request for redesignation of regulatory status was invalid because the EPA did not comply with the RFA. The court concluded that the intervenor may not raise its RFA argument because it was not adequately presented to the EPA during the rulemaking process.

Although the court ultimately ruled against the intervenor, the court addressed other issues relevant to RFA litigation. In the case, the EPA argued that the SBREFA amendments did not apply because the EPA published the final rule before the effective date of the SBREFA amendments. The court stated that the provisions of SBREFA that amended the RFA to provide for judicial review of agency action under RFA apply to legislative rules that were promulgated before the effective date of SBREFA amendments.

The EPA also argued that the intervenor could not raise the issue because it was not raised in the plaintiff's brief. The court acknowledged that, generally, arguments cannot be raised that were not raised in the parties' brief. However, the court held that when a principal party adopts by reference an argument that an intervenor fully

9. 127 F.3d 104 (1st Cir. 1997).

10. 121 F.3d 106 (3rd Cir. 1997).

briefs, the intervenor may argue the question just as if the principal party had fully briefed the issue.

District Court Cases

Associated Builders and Contractors, Inc. v. Herman

In *Associated Builders and Contractors, Inc. v. Herman*,[11] the U.S. Department of Labor suspended a revised class of employees called "helpers" on federal construction sites in 1993 and reinstated former helper regulations pursuant to a congressional mandate. The regulations expired in April 1996. When the Department of Labor did not implement the revised helper regulations after the expiration, the plaintiffs sought to have the Department of Labor re-implement and enforce the revised helper regulations. The plaintiffs alleged that the failure to implement the revised regulations violated the Administrative Procedure Act, the Davis-Bacon Act, the Unfunded Mandates Act, and the Regulatory Flexibility Act.

Regarding the RFA, the Department of Labor certified that the rule would not have a significant economic impact on a substantial number of small entities. Although the agency did not prepare a FRFA, the court held that the Department of Labor had met the requirements of the RFA. It had published a certification in the *Federal Register* along with an adequate factual basis.[12]

North Carolina Fisheries v. Daley

At issue in *North Carolina Fisheries v. Daley*,[13] was the setting of the 1997 quota for flounder fishing by the National Marine Fisheries Service (NMFS). In setting its 1997 quota, the NMFS continued the quota from the previous year. But in doing so, the NMFS did not perform a regulatory flexibility analysis. Instead, the agency certified that the rule would not have a significant impact on a substantial number of small businesses because the quota remained the same from 1996 to 1997. There was no indication in the record that the NMFS conducted any comparison of the conditions in 1996 and 1997.

The United States District Court for the Eastern District of Virginia remanded the quota issue to the Department of Commerce, the parent agency of NMFS, after finding that the department had violated the RFA and failed to provide an economic analysis sufficient to comply with National Standard 8 of the Magnuson-Stevens

11. 976 F.Supp. 1(D.D.C. 1997).

12. Id. at 15.

13. C.A. No. 2:97cv339.

Fishery Conservation and Management Act. The basis of the court's decision was that the department failed to provide a proper factual statement to support its certification that maintaining the quota in the flounder fishery would not have a significant economic effect on a substantial number of small entities.

To address the department's non-compliance, the court ordered the Department of Commerce to "undertake enough analysis to determine whether the quota had a significant economic impact on the North Carolina Fishery."[14] The court further ordered the department to "include in . . . [the] analysis whether the adjusted quota will have a significant economic impact on a small entities in North Carolina."[15]

Cases of Note Awaiting Decision at the Close of 1997

At the end of the year, two cases of note concerning rules promulgated and challenged in 1997 were awaiting decisions from federal courts. The Office of Advocacy's 1997 involvement in these two cases justifies an explanation of their outcome in this report. (The other court decisions will be discussed in the 1998 report.)

Northwest Mining v. Babbitt

On October 19, 1997, the Chief Counsel for Advocacy filed a motion in U.S. district court to intervene as *amicus curiae* (friend of the court) in *Northwest Mining Assn. v. Babbitt, et al.*[16] The motion was filed after a coalition of small businesses challenged the Bureau of Land Management (BLM) with failing to comply with the Regulatory Flexibility Act, the Small Business Act, and the Administrative Procedure Act in promulgating a rule that would require bonding for businesses and individuals with mining rights.

The rule was finalized nearly six years after it was proposed. While the original proposal would have set a limit on bonding requirements, the final rule contained provisions not included in the original proposals — provisions that the public therefore had no opportunity to comment on. The BLM certified that the rule would not have a significant economic impact on a substantial number of small entities. However, the agency failed to substantiate its conclusions and used a series of contradictory terms to define small businesses.

14. *North Carolina Fisheries Association v. Daley*, No. 2:97cv339, slip op. at 13 (E.D. Va. Oct. 10, 1997).

15. Id.

16. *Northwest Mining v. Babbitt et al.*, 5 F.Supp. 2d 9 (D.D.C. 1998).

In its January 7, 1998, brief in *Northwest Mining*, the Office of Advocacy challenged the BLM's decision not to abide by the SBA's size standards when performing the analysis required by the RFA. In a decision handed down on May 13, 1998, the district court for the District of Columbia agreed with the Office of Advocacy's position and found that the BLM had not complied with the RFA. In remanding the rule to the agency, the court reaffirmed the importance of agency compliance with the RFA by stating:

> While recognizing the public interest in preserving the environment, the Court also recognizes the public interest in preserving the right of parties which are affected by government regulation to be adequately informed when their interests are at stake and participate in the regulatory process as directed by Congress.[17]

Southern Offshore Fishing v. Daley

In 1997, the Office of Advocacy also filed to intervene in *Southern Offshore Fishing Association v. Daley*.[18] Although the Office of Advocacy ultimately withdrew from the matter after the Department of Justice stipulated that the standard of review for RFA cases should be "arbitrary and capricious," the Office of Advocacy's involvement during the period of comment on the regulatory proposal was influential in the court's decision. After noting that the Chief Counsel for Advocacy is the "watchdog of the RFA," and quoting excerpts from the comments on the proposed rule submitted by the Chief Counsel, the court chastised the National Marine Fisheries Service for not complying with the RFA.[19]

17. Id. at 14–15.

18. *Southern Offshore Fishing Association v. Daley*, 995 F.Supp. 1411 (M.D. Fl. 1998).

19. Id. at 1434–37. In addition to *Northwest Mining v. Babbitt* and *Southern Offshore Fishing Association v. Daley*, the courts also issued rulings in 1998 in the cases of *Motor & Equipment Manufacturers Association v. Nichols*, 142 F. 3d 449 (D.C. Cir., 1998); *Greater Dallas Home Care Alliance, Metro Home Health, Inc. v. U.S* , 1998 WL 355465 (N.D. Tex.); and *Valuvision International, Inc. v. Federal Communications Commission*, 1998 WL 412483 (D.D.C.). Since this report is on RFA activity for 1997, the 1998 cases are not included in detail in this report. The 1998 report will include the new cases.

Agency Experiences with the RFA in 1997

During 1997, nearly 60 rulemakings were evaluated by the Office of Advocacy for their impact on small firms. The Office of Advocacy had 61 formal regulatory written communications with federal agencies. The Chief Counsel for Advocacy and his staff also worked extensively with agencies and the Office of Management and Budget on rules before they were published to ensure compliance with the Regulatory Flexibility Act.

Not every new regulation receives the Office of Advocacy's full attention: the office targets rules where its involvement could make a difference or where small business interests are significant, but underrepresented. In some cases, the Office of Advocacy takes action because of longstanding RFA compliance problems at an agency. In 1997, more resources were devoted to changing the systematic way a particular agency analyzes new rules, so that future compliance would be more consistent within an agency.

What follows are highlights of the Office of Advocacy's comments or work on specific regulatory proposals. A complete list of comment letters submitted in 1997 is contained in Appendix A, beginning on page 49.

Architectural and Transportation Barriers Compliance Board

The Architectural and Transportation Barriers Compliance Board, or Access Board, in conjunction with the Federal Communications Commission (FCC), has authority for implementation of section 255 of the Telecommunications Act of 1996, which assures that all telecommunications equipment and customer premises equipment for telecommunications services are designed, developed, and fabricated to be accessible to and usable for individuals with disabilities — if readily achievable. In its proposed guidelines for accessibility, usability, and compatibility of telecommunications and customer premises equipment, the board initially certified that the proposed rule would have no significant economic impact on a substantial number of small entities. However, with guidance from the Office of Advocacy and the OMB, a final regulatory flexibility analysis was developed and provisions were identified to minimize the impact on small manufacturers of such equipment, consistent with the statuto-

ry objectives. Although the Office of Advocacy did not file formal comments, it worked extensively with the Access Board in its first-time effort at drafting a regulatory flexibility analysis. The final rule and revised regulatory flexibility analysis were published on February 3, 1998.

Department of Agriculture

Food Safety and Inspection Service

Food Transportation and Storage Requirements. An advanced notice of proposed rulemaking was published by the Food Safety and Inspection Service (FSIS), along with the Food and Drug Administration (FDA), to improve the safety of potentially hazardous foods in transport and storage. The Office of Advocacy commended both agencies for seeking early input from the regulated industries. However, the Chief Counsel raised concerns in a February 21, 1997, letter about a proposal that could mandate one-size-fits-all management. This would be a departure from the regulatory approach embraced by the agency in its the recent implementation of the performance-based Hazardous Analysis and Critical Control Point procedures. In its communications with the FSIS, the Office of Advocacy outlined the advantages and disadvantages of various regulatory options, including voluntary guidelines.

Agricultural Marketing Service

Use of Spearmint Oil from the Far West. This proposed rule was a landmark for the Agricultural Marketing Service (AMS) because it was the first proposal in years from this agency that included an initial regulatory flexibility analysis. The Office of Advocacy worked diligently with the AMS to train staff, and new policies were instituted to comply with the RFA. The analysis was reviewed by the Office of Advocacy and minor suggestions were provided.

Department of Commerce

International Trade Administration

Duty-Free Insular Watches. On November 5, 1997, the International Trade Administration (ITA), in conjunction with the Department of the Interior's Office of Insular Affairs, published a joint proposed rule that would establish the total quantity and respective territorial shares of watches and watch movements that would be allowed to enter the United States free of duty in 1998 from Guam, Samoa, the U.S. Virgin Islands, and the North Mariana Islands. Under the proposed rule, the quota for imports from the U.S. Virgin Islands would be reduced by 500,000 units, a reduction of 16 percent. The quotas for Guam, American Samoa, and the North Mariana Islands

would remain the same.

The agencies published a certification that the rulemaking would not have a significant economic impact on small businesses. In a comment letter to the agencies on December 5, 1997, the Chief Counsel for Advocacy pointed out that the certification was inadequate under the RFA: the agencies provided no explanation of the nature of the industry, the number of small entities, the effects of the rule, or other data to support the certification. The Office of Advocacy urged the agencies to address these questions and comply with the RFA before finalizing the rule.

National Institute of Standards and Technology

Fastener Quality Act. On November 25, 1997, the Office of Advocacy submitted comments to the National Institute of Standards and Technology (NIST) regarding its regulations for registering a manufacturer's fastener quality assurance system in implementing the Fastener Quality Act. The regulations were intended to implement safety certifications of fasteners (for example, bolts used in critical applications such as bridges) in the manufacturing process. Although NIST had re-opened the rule to develop more options for certifying the fasteners, the Office of Advocacy remained concerned that the rules would have a disproportionate impact on small businesses. The Office of Advocacy submitted data on the industry's revenue and size, but emphasized that the regulations, while less burdensome than earlier options, would still be costly. The regulations had tremendous implications for firms, by requiring certification of laboratories that would be hired by manufacturers to end-test the product or certify the manufacturing process. With only six months to comply, small manufacturers and labs had little time to prepare for compliance with the rules. Meetings with officials from NIST and the Department of Commerce were planned to discuss methods to minimize the impact on small firms.

National Marine Fisheries Service

See the section above on the National Oceanic and Atmospheric Administration for discussion of two rules that were published in conjunction with the National Marine Fisheries Service.

National Oceanic and Atmospheric Administration

Florida Keys National Marine Sanctuary. Pursuant to the Florida Keys National Marine Sanctuary and Protection Act and the National Marine Sanctuary Act, the National Oceanic and Atmospheric Administration (NOAA) developed a comprehensive plan to govern activities in the Florida Marine Keys National Marine Sanctuary, affecting industries such as fishing, boating, and treasure hunting. Initially, NOAA certified that the rule would not have a significant economic impact. After the Office of Advocacy became

involved in the rulemaking, NOAA not only acknowledged the impact, but prepared an extensive regulatory flexibility analysis that set forth the true nature of the impact on the industry. It also addressed the impact of the regulation on treasure salvagers, an industry that NOAA had previously contended did not exist. After the Office of Advocacy worked with the agency and the OMB, a final regulatory flexibility analysis was completed that included an analysis of the affected small businesses. Although there was a significant economic impact, NOAA could not make major adjustments to the rule because the majority of the sanctuary rules are governed by state law.

Spotter Planes. NOAA and the National Marine Fisheries Service (NMFS) published a proposed rule that would impose quotas on Atlantic bluefin tuna and prohibit the use of spotter aircraft except in purse seine fisheries. In a March 31, 1997, letter, the Office of Advocacy objected to the agencies' conclusion that the rule would not have a significant economic impact on small businesses. In fact, the agency failed to use its own criteria for assessing the regulatory impact on small business. According to the Office of Advocacy's assessment, the proposed rule would force 83 percent of Atlantic fish spotter pilots out of business. The Office of Advocacy urged the agencies to conduct an initial regulatory flexibility analysis and consider possible regulatory alternatives to avoid economic ruin to this industry. When the rule was finalized on July 30, the agencies had completed a final regulatory flexibility analysis and agreed to exempt harpoon spotting. This exemption reduced the effects on the industry. The final rule affected less than 20 percent of the industry.

Atlantic Sharks. Referencing comments submitted to NOAA by the Chief Counsel for Advocacy, the Southern Offshore Fishery Association filed suit in the U.S. district court in Tampa, Florida, challenging the Department of Commerce's final rule on Atlantic shark quotas. This case, *Southern Offshore Fishing Association v. Daley*, was filed after the Office of Advocacy submitted comments on the proposed rule on February 6. Among other issues, the agency certified that the proposed quotas that would reduce the annual catch by greater than 50 percent would not have a significant impact on small businesses. Dominated by small businesses, the shark fishing industry decided to sue NOAA and force the agency to confront violations of the RFA. The Office of Advocacy worked with the industry and the Department of Justice to obtain an agreement that the standard of review for the Regulatory Flexibility Act should be the "arbitrary and capricious" test applied by the courts in reviewing agency rules under

section 706(2)(A) of the Administrative Procedure Act.

Whale Take Reduction Plan. In May and June of 1997, the Office of Advocacy worked with the NMFS on a proposed rule it had published on April 7, 1997, to reduce serious injury and mortality of four species of large North Atlantic whales that occur incidental to commercial fishing operations. The proposed rule was in partial implementation of the Marine Mammal Protection Act. After the Office of Advocacy expressed its concerns about the proposed rule, the NMFS agreed that the regulation was far more extensive than necessary for protecting the whales. The NMFS made adjustments to the rule to lessen its impact on commercial fishing operations by allowing for flexible compliance and minimizing the areas affected by the rule. The overall effect of the changes was to reduce the impact of the rule on small businesses by 50 percent.

Department of Health and Human Services

Food and Drug Administration

Inhalation Solution Products. On September 23, 1997, the Food and Drug Administration (FDA) proposed regulations that would require new sterilization processes for preparing inhalation solutions. Small manufacturers of inhalation solutions for nebulization may be a small industry sector, but the Office of Advocacy challenged this rulemaking by the FDA that would have imposed costs of up to $1.7 million per firm for compliance. In a December 18, 1997, letter, the Chief Counsel for Advocacy asserted that the agency's proposal to require all inhalation solutions to be sterile could cause the demise of the five small businesses in the industry. With only one year to come into compliance, these small businesses would be faced with daunting costs.The FDA gave no consideration to a firm's ability to obtain financing, construct or retrofit facilities, complete paperwork, and train employees. Furthermore, the FDA failed to comply with the RFA by considering all the significant alternatives to the rulemaking that could minimize its impact on small firms.

Latex Rubber Medical Devices. In comments submitted to the FDA on October 7, 1997, the Chief Counsel for Advocacy contended that the FDA had not provided sufficient data and analysis concerning the impact of a rule requiring labeling for rubber-containing medical devices. While the goal of the rule may have been a valid effort to alert users who might be allergic to natural rubber latex, he noted, the FDA did not comply with the RFA. The agency certified that the rule would not have a significant economic impact on a substantial number of small entities, but there was no mention in

the proposed rule of the likely cost. When the FDA published the final rule, it provided a response to an industry estimate of $15,000 per device by countering that the cost would only be $1,000 to $2,000. No supporting evidence was provided for the estimate. Moreover, the FDA never estimated the number of small firms that would be affected by the rule. According to data published by the Office of Advocacy, 989 firms were in the business of fabricating rubber products. Some 90 percent of these firms had fewer than 500 employees, and were therefore small businesses.

Prohibition of Animal Proteins in Ruminant Feed. An FDA proposal to prevent "mad cow" disease from entering the U.S. cattle market, while important to the nation's food supply, nevertheless drew criticism from the Office of Advocacy because the agency failed to fully consider the impact of the rule on small companies that use ruminant tissue in animal feeds. More important, the FDA failed to consider the benefits of regulatory alternatives.

On January 3, 1997, the FDA published a proposed rule that would no longer recognize animal protein derived from ruminant tissue as safe for use in ruminant feed. The FDA acknowledged that the rulemaking would have a significant economic impact on an estimated 1.4 million businesses engaged in ruminant production. The Office of Advocacy provided estimates from its data base on the number of small businesses in each industry group that would be affected — including dog and cat food manufacturers, producers of feeds for other animals, meat packing plants, and animal and marine oil renderers. The Office of Advocacy also analyzed the agency's cost estimates and found that the FDA grossly underestimated the impact on small businesses and failed to consider the benefits of regulatory alternatives. Costs associated with the rule included disposal of 1.7 billion pounds of dead stock that could no longer be recycled into cattle and other ruminant feeds. The Office of Advocacy, along with industry representatives, urged the FDA to extend the 45-day comment period to allow for further analysis. The agency refused this request. On April 17, 1997, however, the FDA published a notice of a draft final rule for further comment. The final rule was published on June 5, 1997. In the end, the FDA agreed to remove the labeling requirements for pet food manufacturers, a change that resulted in a tremendous savings for this industry without jeopardizing the nation's food supply.

Food Transportation and Storage. See the section covering the Department of Agriculture's Food Safety and Inspection Service on page 18.

Health Care Financing Administration

Medicare Coverage of Ambulance Services. On November 4, 1997, the Office of Advocacy submitted comments to the Health Care Financing Administration (HCFA) on a proposal that would base Medicare reimbursement to ambulance services on the beneficiary's medical condition, rather than the type of vehicle used to transport the patient (advanced life support versus basic life support). The agency failed to analyze the impact on small firms when it published the proposed rulemaking: No description of the projected compliance costs were included, nor was there a description of the small firms that would be affected by the change in reimbursement regulations. The proposed rule would require ambulance providers to document and submit to HCFA a record of which level of care was needed by a beneficiary patient based on certain diagnostic codes. The Office of Advocacy questioned how this rule could be implemented realistically and equitably, because it would require an ambulance service to determine how to serve a patient based upon symptoms, but to be paid later based upon a diagnosis. An added complication is that many state and local laws require a minimum level of ambulance service, regardless of federal law. In some rural areas, communities may have only one type of highly equipped advanced life support ambulance to service all calls. The Office of Advocacy provided HCFA with guidelines for completing a regulatory flexibility analysis for this rulemaking.

Department of the Interior

Bureau of Land Management

Bonding Requirements. On October 10, 1997, the Chief Counsel for Advocacy filed a motion to intervene as *amicus curiae* (friend of the court) in *Northwest Mining Assn. v. Babbitt, et al.* in U.S. district court.[20] The motion was filed after a coalition of small businesses challenged the Bureau of Land Management's (BLM) rulemaking and its failure to comply with the Regulatory Flexibility Act, the Small Business Act, and the Administrative Procedure Act. The rule, requiring bonding for businesses and individuals with mining rights, was finalized nearly six years after it was first proposed. While the original proposal would have set a limit on bonding requirements, the final rule set a minimum and included new provisions for engineering assessments and paperwork that were not contained in the original proposal. The BLM certified that the rule would not have a significant economic impact on a substantial number of small enti-

20. See page 15 for a full discussion of this case and other litigation with RFA issues.

ties. However, the agency failed to support its conclusions and used a series of contradictory terms to define small businesses.

Minerals Management Service

Oil and Gas Production. The Office of Advocacy submitted comments on May 28, 1997, to the Minerals Management Service (MMS) on its failure to comply with the RFA. The proposed rule would regulate oil and gas production's measuring methods, commingling, and security. The MMS provided no supporting data when it certified that the rule would not have a significant economic impact on a substantial number of small entities. The Office of Advocacy reminded the MMS that the certification was subject to judicial review and would probably fail under court scrutiny. Upon receipt of the comments, the MMS invited staff from the Office of Advocacy to brief its officials on the RFA and to make recommendations for improving the agency's compliance. As a result, the MMS is now working to bring the rule into compliance before publication in final form.

Duty-Free Insular Watches. See the section on the Department of Commerce's International Trade Administration for a joint proposed rulemaking (page 18).

Department of Justice

Drug Enforcement Administration

Methamphetamine Shipments. While the Drug Enforcement Administration (DEA) does not commonly regulate small businesses, it does regulate some over-the-counter drugs handled by small retailers and wholesalers. The agency proposed a rule to prevent large bulk quantity sales to relatively anonymous buyers and the potential abuse by clandestine methamphetamine manufacturers. While a regulatory analysis was completed for retailers and wholesalers, the Office of Advocacy identified a subset within the wholesale industry that sold small quantities of methamphetamine-containing drugs to convenience stores. In addition to the exemptions provided to retailers, Advocacy recommended that the DEA study alternatives — such as less frequent reporting — that would lessen the burden on small wholesalers.

Department of Labor

Employment Standards Administration

Black Lung Benefits. On August 21, 1997, the Office of Advocacy submitted comments to the Employment Standards Administration (ESA) regarding the agency's decision to certify a rule that would

increase the costs of black lung insurance for mining operations by as much as 84 percent. The agency concluded that the increases would not have a significant economic impact on a substantial number of small entities. This certification was not supported by any statements in the record. The Office of Advocacy's statistics show that the coal mining industry was dominated by small firms (1,811 small firms constituted 95 percent of the industry). Because the increase in costs was linked with payroll, the Office of Advocacy's analysis showed that small firms were disproportionately affected. Small firms' payroll represented a much larger portion of their annual revenues than larger firms. Officials from the ESA contacted the Office of Advocacy to review the small business statistics and cost estimates before proceeding with the rule.

Longshore and Harbor Workers' Compensation. The ESA proposed to increase civil penalties for violations for the Longshore and Harbor Workers' Compensation Act. The agency certified that the change would not have a significant economic impact on small firms but provided ambiguous reasoning. The Office of Advocacy asked the agency to clarify its rule and analysis before certifying the final rule. The agency responded to the Office of Advocacy's request and clarified that the cost would be only $2,500 in the aggregate, and much less per case.

Mine Safety and Health Administration

Noise Exposure. On August 1, 1997, the Office of Advocacy submitted comments to the Mine Safety and Health Administration (MSHA) regarding its proposed rule for occupational noise exposure. The Office of Advocacy had met with officials of the MSHA earlier in 1997 to discuss the RFA and the process required for using a size standard different from that required by the Small Business Administration. The agency decided to forego using an alternative standard and completed an analysis for the entire universe of affected small businesses.

However, the agency decided to certify that the rule would not have a significant economic impact on small businesses. While the agency estimated costs for small businesses to be $4,359 to as much as $14,492, the MSHA did not provide a record that demonstrated these costs were not significant. The Office of Advocacy emphasized that the analysis did not show how small mines would accommodate the need for immediate capital outlays for engineering controls and account for increased operating costs for new practices, such as administering audiograms. In addition, the regulation's requirement to use "all feasible engineering and administrative controls" was

vague, and the Office of Advocacy recommended clarification for small business implementation.

Occupational Safety and Health Administration

In 1997, the Office of Advocacy analyzed and made recommendations for rules of the Occupational Safety and Health Administration (OSHA) that were at various stages of development. As OSHA's methylene chloride and respirator exposure final rules made their final round through the OMB, the Office of Advocacy ensured that the effects on small business, as supported by the rulemaking record, were considered. Following proposals, the Office of Advocacy worked with small business groups to consider the economic impact of a tuberculosis exposure regulation and a steel erection rule drafted by a negotiated rulemaking committee. The Office of Advocacy also brought small businesses into the regulatory process for many rules still under development, such as the proposed implementation of comprehensive safety and health programs, exposure limits on metal working fluid, and the revision of permissible exposure limits for air contaminants. Finally, two existing rules were reviewed under section 610 of the Regulatory Flexibility Act.

Methylene Chloride. On January 7, 1997, OSHA finalized a rulemaking for occupational exposure to methylene chloride that would place a tremendous burden on small businesses, including furniture refinishing companies, foam manufacturers, and methylene chloride manufacturers. The Office of Advocacy objected to many provisions of the rulemaking during a final OMB review in 1996. As a result of the Office of Advocacy's efforts, OSHA made some provision in the proposed rule for manufacturers with fewer than 100 employees. On March 11, 1997, the Office of Advocacy submitted comments on the information collection requirements of the rule that had been published by OSHA for comment after the rule was made final. The Office of Advocacy emphasized in its comments that OSHA continued to use an improper definition for small businesses when assessing the effects of paperwork and other compliance burdens.

Small business organizations filed petitions with the U.S. Court of Appeals and the secretary of labor seeking to stay the rulemaking, alleging that OSHA violated the Regulatory Flexibility Act. The petitioners referenced a letter from the Chief Counsel for Advocacy to OSHA that urged the agency to "develop flexible alternatives for small firms affected by this rulemaking, beyond micro-businesses with less than 20 employees." In support of reaching a compromise that would minimize the burden on small businesses, the Chief Counsel for Advocacy wrote a letter urging the agency to stay the

rule. While awaiting a decision by the secretary of labor to reopen the rule, OSHA agreed to delay implementation.

Respirator Requirement. Working with OSHA and the OMB during the OMB review process, the Office of Advocacy recommended numerous changes to a draft final rule issued by OSHA governing respirator use in the workplace. OSHA agreed to analyze the impact of the rule on industries that have intensive use of negative pressure respirators, to define the term "ensure" (which is used throughout the regulation), and to eliminate the requirement for providing five to six respirators for fit testing. OSHA modified the rule by accepting many of the recommendations for minimizing the burden on small businesses made by the Office of Advocacy (comments submitted on April 13, 1995) and other small business representatives (such as phasing in the requirement and eliminating the use of unapproved standards).

Tuberculosis Exposure. In 1996, the first Small Business Advocacy Review Panel convened to address a draft proposed rule on occupational exposure to tuberculosis. The panel report was finalized on November 12, 1996, and the proposed rule was published on October 17, 1997. The rule included some changes from those recommended by the panel report, including a clearer definition of a "suspected infection." OSHA also agreed to undertake an extensive study of the effects of the rule on non-profit organizations that provide services to the homeless. In anticipation of commenting on the rule, the Office of Advocacy convened a meeting with representatives of organizations that submitted comments to the panel. Representatives of homeless shelters, nursing facilities, home health care, and clinics continued to express strong objections to the proposed rule because it duplicates local infectious disease control efforts and mandates procedures that may not be appropriate for medical care. As a result of this meeting, a large coalition was formed that included small and large commercial entities, non-profit service providers, epidemiologists, infectious disease experts, and health care officials to draft comments for OSHA.

Steel Erection Standard. In 1997, OSHA circulated a draft proposal of safety standards for the steel erection industry. The draft standards were developed by the Steel Erection Negotiated Rulemaking Committee, a panel convened by OSHA under negotiated rulemaking procedures set forth in the Negotiated Rulemaking Act of 1990 (5 USC 581–90). In a letter to the Chief Counsel for Advocacy on August 27, 1997, OSHA requested a waiver of the requirement under the SBREFA amendments to the RFA that a Small Business

Advocacy Review Panel be convened to consider any proposals with significant small-business impacts before they are published by OSHA. In its request for a waiver, OSHA asserted that the review panel would not contribute to advancing the effective participation of small business in the rulemaking process because, in this instance, small businesses had actively contributed to developing the proposed standards through the negotiated rulemaking process.

The Office of Advocacy consulted with the construction industry and the steel fabricating and manufacturing sector in considering the request for a waiver. In response to the request, the Office of Advocacy asked that OSHA remove provisions from the draft rule that were not part of the negotiated rulemaking process. (These additional provisions would have required certification of steel beams and columns that had been coated with primer paint.) OSHA agreed to do this. The Office of Advocacy also insisted that OSHA develop an economic analysis of the effects of the proposals on steel fabricators. The rule had been developed in the negotiated rulemaking by steel users. However, OSHA (and the committee) had failed to develop data on the feasibility and cost of refitting the steel to meet the standard, and the argument of "pass through" costs did not address possible capital expenses and profit losses that could be incurred by the manufacturers. In response, OSHA completed a preliminary economic analysis in December 1997. By the end of the year, the Office of Advocacy was continuing its consultations with small businesses about OSHA's request for a waiver and the analysis it had submitted.[21]

Safety and Health Programs. At the Office of Advocacy's initiative, OSHA agreed to work with the office and the OMB to set up a series of regional small business meetings as part of the Small Business Advocacy Review Panel process for evaluating a draft proposed rule for comprehensive safety and health programs. The rule is expected to have broad application to all firms with employees. Four meetings were held with small businesses during the summer in Atlanta, Georgia; Philadelphia, Pennsylvania; Columbus, Ohio; and Portland, Oregon. As a result of these meetings, the Office of Advocacy was able to document the initial concerns of small firms about OSHA's rulemaking record before the expected convening of a panel in 1998.

21. The Office of Advocacy ultimately provided a waiver on January 23, 1998, without objections by the affected small businesses.

Metal Working Fluids. Throughout 1996, the Office of Advocacy met with associations that represent small firms engaged in metal working to discuss OSHA's plan to develop a proposed rule that would reduce the permissible exposure limit for metal working fluids. As a result of these concerted efforts of small firms and the Office of Advocacy, OSHA agreed to contract with the National Institute for Occupational Safety and Health to conduct research on exposure in small firms. This research began in January 1997. In addition, the Office of Advocacy urged OSHA to convene a standards advisory committee (SAC) with significant small business representation. In May 1997, the agency announced that three of the five employer representatives selected were from small businesses. The first meeting of the SAC was convened on September 2, 1997, and no proposed rulemaking will be developed until the SAC completes its work in 18 to 24 months.

Permissible Exposure Limits. During an Office of Advocacy roundtable on OSHA issues in February 1997, small business representatives expressed tremendous concern over OSHA's decision to promulgate new permissible exposure limit (PEL) regulations for air contaminants under a new fast-track process of rulemaking. Moreover, the industry raised concerns about the selection of PELs, the scientific data, and the economic models being developed. In September 1997, Dr. Adam Finkel, director of OSHA Health Standards Programs, met with small business representatives during an Office of Advocacy roundtable to discuss this issue. Dr. Finkel agreed to provide the small businesses with a list of PELs under consideration and a preliminary estimate of the industries affected.

Review of Existing Regulations. OSHA decided to review two existing regulations in 1997 under section 610 of the Regulatory Flexibility Act. This section of the law requires federal agencies to periodically review rules that have a significant economic impact on a substantial number of small businesses. The Office of Advocacy commented on the lockout/tagout standard that requires employers to protect employees from hazardous energy exposure, and the ethylene oxide exposure standard. Because the input from small business was limited, the Office of Advocacy provided extensive recommendations for improving participation through trade associations and journals.

Department of Transportation

The Department of Transportation's (DOT) compliance with the RFA has been the focus of the meetings between the Office of Advocacy and the DOT's general counsel's office throughout 1997. During 1996, the Federal Railroad Administration made tremendous strides toward improving its economic analyses, and this relationship was solidified in 1997 when the agency consulted with the Office of Advocacy before most proposed rules were published. The relationship with the FAA improved during 1997 after a court case was filed challenging a rule that the Office of Advocacy had criticized.[22] The DOT general counsel's office made a concerted effort to educate all of the DOT's agencies by distributing RFA materials developed by the Office of Advocacy and by holding meetings with staff.

Federal Railroad Administration

In 1996, the Office of Advocacy and the Federal Railroad Administration (FRA) initiated a working relationship that matured in 1997 when the FRA began forwarding draft regulatory analyses to the Office of Advocacy before proposed rules were published. The analyses have improved, and the agency has given special attention to the tour railroad industry. During 1997, the Office of Advocacy consulted on a personal communications equipment rule, a track safety standard, and a whistle-blowing ban. Official comments on proposed rules became unnecessary this year because of this working relationship. The most common difficulty is that many rules are drafted by federal advisory committees, in which small businesses are underrepresented, and the FRA is concerned about upsetting the delicate balance of an agreement made by the committees. The solution for this problem is more representation of small businesses on the committees and a greater appreciation by the committees for the agency's obligations under the Regulatory Flexibility Act.

Federal Aviation Administration

Grand Canyon Fly-Over. Following comments submitted in 1996, the Office of Advocacy met with the Federal Aviation Administration (FAA) regarding the impact of regulations that would restrict air tour operations over the Grand Canyon National Park. A rule reducing flight space by approximately 50 percent was finalized in January 1997. Shortly thereafter, the FAA was sued by a coalition

22. *Grand Canyon Air Tour Coalition v. FAA*, 1998 WL 558805 (D.C. Cir.).

of small tour operators in federal court. In the case, *Grand Canyon Tour Coalition v. FAA,* the plaintiffs raised the issue of the FAA's failure to comply with the RFA.[23] The Office of Advocacy entered into discussions with the FAA and the Department of Justice. The FAA agreed to work with the Office of Advocacy to rewrite its outdated RFA policy guidelines, to place new small business data on the record for comment, and to admit to the court that the FAA had erroneously certified that the proposed rule would not have had a significant economic impact on small businesses. Oral arguments in the court case were heard in November 1997. In addition, the FAA delayed implementing some portions of the rule in order to further explore regulatory alternatives.

Certification of Changes. When changes are made to aircraft, the aircraft must be recertified to standards determined by the FAA. The FAA has allowed exemptions from new safety requirements in the past, but in 1997 proposed that new airworthiness standards be applied even to refurbished planes. The FAA invited the Office of Advocacy to discuss the implications of the rulemaking on small businesses. The Office of Advocacy made a series of suggestions. First, quantifying the cost of the regulation seemed difficult because any business seeking certification would encounter costs unique to the type of aircraft, the number of changes, and the particular standards. While the agency should not certify the final rule, the Office of Advocacy recommended that the FAA describe a series of scenarios to explain how the new certification would change the process and costs for small businesses. Second, the Office of Advocacy recommended that the FAA offer guidance to small businesses on how to conduct a cost/benefit analysis to determine whether retrofitting older aircraft would be more cost-effective than buying new ones.

Cargo Standards for Fire Safety. After a fire in the cargo area and the subsequent crash of a passenger airliner over Florida in 1996, the FAA reevaluated its standards for fire safety. Staff of the FAA and the Office of Advocacy met in November 1997 to discuss a proposed rule that would set new standards for aircraft cargo fire detection and suppression systems. The Office of Advocacy requested that the FAA correct its regulatory flexibility analysis by using the SBA's definition of small business, describe the range of costs as they apply to

23. Id.

various sizes and types of businesses, and describe costs as a percentage of revenue or profit to determine the impact on small firms. In addition, the Office of Advocacy urged the FAA to better explain why it rejected regulatory alternatives.

Department of the Treasury

Internal Revenue Service

Definition of Limited Partnerships. The Office of Advocacy submitted comments to, and testified before, the Internal Revenue Service (IRS) regarding the hardship that small businesses would incur as a result of proposed changes to the definition of a "limited partnership." The IRS had proposed redefining "limited partnership" without conducting a regulatory flexibility analysis. The IRS argued that its rule was "interpretative," did not impose any information collection requirements, and therefore was not subject to the RFA. In an April 14 comment letter, the Chief Counsel for Advocacy argued that the new rule would create a potential tax obligation for millions of partners that was not contemplated in the Internal Revenue Code. Moreover, the proposed change would require taxpayers to keep more detailed records in order to meet the burden of proof regarding their partnership and the amount of time they spend working with it. In testimony on May 21, 1997, before an IRS panel regarding the proposal, the Office of Advocacy recommended that the IRS withdraw its proposal until a full analysis of its impact on small businesses could be completed. The proposal was subsequently withdrawn and the Treasury Department started discussions with affected industries to resolve the matter.

Uniform Capitalization of Expenses for Property Produced in Farming Operations. On August 22, 1997, the IRS published a regulation with the intent of clarifying the deductibility of certain expenses incurred in connection with property produced in a farming business. Under the new regulation, small businesses, particularly in the nursery industry, faced new and complicated rules for determining whether plants held for growth and further cultivation were deductible or capitalized expenses. On November 21, 1997, the Office of Advocacy submitted comments urging the IRS to complete a regulatory analysis. This was required, according to the comment letter, because the "interpretative" rule would place a burden on nurseries to demonstrate that they are a "farming business" (thus allowing them to deduct the operating costs of holding plants for growth and further cultivation).

While the Office of Advocacy commended the IRS for trying to

clarify its rule, the agency was told that the regulatory process would be helped "if the RFA were not routinely circumscribed with boilerplate language but, instead, was embraced by IRS." The rule could have been interpreted as requiring any grower who has plants in a portable condition (in sod balls or plastic containers) to keep records that provide a proportional allocation of all costs to each plant. However, the vast majority of plants are grown in moveable conditions. The IRS agreed to further clarification in consultation with the appropriate industries.

Electronic Filing of Tax and Payroll Payments. The Office of Advocacy worked with the IRS on the implementation of the North Atlantic Free Trade Agreement provision that requires electronic filing of payroll taxes. In order to minimize the impact on small firms, the IRS agreed to allow all businesses with under $50,000 in payroll withholding obligations to participate in electronic filing voluntarily, instead of mandating electronic payment as planned. In addition, the agency agreed not to impose penalties until January 1, 1998, on businesses not using, or inaccurately using, the system.

Substantiation of Travel and Entertainment Expenses. On March 25, 1997, the IRS issued a rule that would minimize the burden of recording travel and entertainment expenses for business deductions. As part of its follow-up to the 1995 White House Conference on Small Business, the Office of Advocacy had urged the IRS to reduce this paperwork burden. While the IRS could not change the law on the deductibility requirements, it dramatically reduced the record-keeping required on small expenditures by raising the threshold for producing records from $25 to $75.

Efforts to Consult on RFA Compliance. On December 2, 1997, the IRS sought consultation with the Office of Advocacy for the development of upcoming analyses to determine the impact of its rules on small firms. While officials of the IRS had previously attended RFA briefings sponsored by the Office of Advocacy, this marked the first occasion that the agency approached the Office of Advocacy for RFA compliance assistance on specific regulatory analysis. In its meeting with the IRS, the Office of Advocacy provided a review of the IRS's initial regulatory flexibility analyses under development and provided examples of acceptable methods. One of the Office of Advocacy's principal suggestions was that the IRS stop relying on boilerplate RFA language and replace it with thoughtful analysis. Advocacy and IRS officials agreed to meet regularly to work on pending proposals and analyses.

Environmental Protection Agency

The Office of Advocacy worked extensively with the Environmental Protection Agency (EPA) and small businesses during 1997 on pre-proposed regulations before publication. Five Small Business Advocacy Review Panels were initiated on draft proposed rulemakings. The Small Business Regulatory Enforcement Fairness Act requires the EPA to convene panels with the Chief Counsel for Advocacy and officials from the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) for proposed rules that are expected to have a significant economic impact on a substantial number of small entities. This process is valuable to small businesses because the EPA and OIRA staff learn firsthand about the impact of rule from small business representatives. The Office of Advocacy supplements this process by providing small business statistics on revenue, employment, and the number of facilities affected and by conducting independent research on the specific effects of the proposal on regulated industries.

In addition to its panel work, the Office of Advocacy continued to weigh in on EPA issues affecting small firms, including the regulations implementing the National Ambient Air Quality Standards (NAAQS), paperwork burdens arising from toxic release inventory, reporting requirements for ozone and particulate matter, chemical inventory reporting, and pesticide hazard reporting.

Emission Standards for Non-Road Diesel Engines. On September 24, 1997, the EPA published a proposed rule governing emissions from non-road diesel engines. Earlier in the year, the EPA had convened a Small Business Advocacy Review Panel. The panel sought input about the rule that would limit emissions standards from small manufacturers that use, modify, or manufacture non-road diesel engines. After the EPA followed the recommendations of small business representatives, most of the estimated 283 small businesses affected by the non-road diesel engine rule were not expected to suffer significant adverse financial impacts. The panel presented five recommended changes, and all were adopted in the September 24 proposal. Four of the recommendations left only 9 percent of small firms significantly affected, and the fifth provides relief for small companies hard hit by the rule. On October 2, 1997, the Chief Counsel for Advocacy wrote, "The publication of this rulemaking is a landmark achievement. As the first proposal [after a panel], it is a shining example of proof that the goals of mitigating adverse small business regulatory impacts and the protection of human health and

the environment are not mutually exclusive." Because of the changes, the EPA was able to certify under the RFA that the proposed rule would not have a significant impact on small firms.

Effluent Guidelines for Industrial Laundries. The EPA published a proposed rule for industrial laundries on December 17, 1997, that was revised as a result of input from small businesses to a Small Business Advocacy Review Panel. The proposal would require pretreatment standards for industrial laundries' discharge of water pollutants that pass through publicly owned treatment works (POTWs). At the request of the Office of Advocacy, and to facilitate analysis, the EPA used a method of presenting data regarding the proposed rule that provided small businesses with more information than is generally made available. A "model plant" analysis was developed that combined data from groups of similar-sized plants and allowed review of underlying economic impacts on businesses of different sizes.

In a December 17, 1997, letter, the Chief Counsel for Advocacy noted that the EPA was able to propose a small-business exemption that covered 8 percent of the affected businesses without an adverse impact on the environment. (Ninety-three percent of the industrial laundry industry is made up of small businesses, and most of these would be subject to the new regulations.) The Office of Advocacy maintained throughout the panel process that the rule unnecessarily covered many small operations because local POTWs already regulate small businesses' discharges adequately. Based on comments received, the EPA may increase the number of small businesses eligible for exemption under the final rule.

Storm Water Regulations. On June 16, 1997, a Small Business Advocacy Review Panel was convened for regulations under development for implementing phase II of the National Pollutant Discharge Elimination System that would affect small governmental jurisdictions, construction firms, and industrial facilities. The proposed rule would address currently unregulated discharges of storm water and provide regulatory relief to industrial facilities where materials and activities were not exposed to storm water. Among regulatory alternatives that the panel raised in its August 7, 1997, report were that the EPA:

- exempt municipalities within urban areas with populations of less than 1,000;
- draft less burdensome regulations for construction sites that disturbed no more than five acres; and

• minimize paperwork.

Independent research sponsored by the Office of Advocacy provided critical regulatory analysis for the panel. In particular, the analysis outlined the case for providing regulatory relief for construction sites.

Other Panels on EPA Rules. Two additional Small Business Advocacy Review Panels convened in 1997 to address small business concerns about draft regulatory proposals of the EPA. The final reports of these panels will be released upon publication of the proposed rules. The Chief Counsel for Advocacy co-authored the reports of both of these panels. They are:

• "Effluent Limitations Guidelines and Standards for the Transportation Equipment Cleaning Industry Category" (panel completed on September 23, 1997) and

• "Effluent Limitations Guidelines and Standards for the Centralized Waste Treatment Point Source Category" (panel completed on January 23, 1998).

Ozone and Particulate Matter Standards. In 1997, the EPA withdrew plans to convene a Small Business Advocacy Review Panel for the implementation of the National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter. The EPA reasoned that the agency was setting standards for states' and regions' air quality, and it was not regulating small entities as a result. The Office of Advocacy maintains that the proposed rule, published on July 18, would have a significant economic impact because it requires state governments to implement regulations that will impose burdens on small firms. The Office of Advocacy documented its objections to the EPA's position in a November 18, 1996, letter to the agency.

As a result of the Office of Advocacy's concerns, the EPA committed to take steps to reduce these burdens. On November 7, 1997, the EPA proposed a rule regarding interstate transport of ozone. The rule would greatly reduce the need for states in the East to regulate small firms for ozone pollution. The EPA is expected to take further measures to reduce the impact on small firms of the ozone–particulate matter standards.

Community Right-to-Know Reporting for Gasoline Stations. Since 1987, the Office of Advocacy has been calling for the elimination of the reporting requirements for gasoline stations under the Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986. In 1995, the Office of Advocacy renewed its request to eliminate such reporting, contending that gasoline stations are already

regulated by the federal underground storage program. Moreover, the public already knows that gas stations do, in fact, have gasoline on the premises. Filing federal EPCRA reports results in an estimated $25.3 million of unnecessary costs for small businesses. In a letter to the EPA on February 13, 1997, the Chief Counsel for Advocacy reminded the agency that this issue continues to be a priority for small gas stations and sought regulatory relief in this area.

Toxic Release Inventory. The Office of Advocacy has been seeking relief for small business since the inception of the EPA's Toxic Release Inventory (TRI) program in 1988. Under the program, businesses are required to report to the EPA data on toxic chemicals they have released or transferred. The Office of Advocacy has argued that firms face tremendous paperwork burdens, particularly for reporting small amounts of chemical releases. In 1997, the Office of Advocacy continued to urge the EPA to take serious steps to reduce these burdens.

The EPA expanded TRI requirements to seven industries in a final rule on May 1, 1997. To offset these new burdens, the EPA delayed implementation of the new rule until July 1, 1999, saving $100 million in industry costs. Furthermore, the EPA committed to working with affected parties to review TRI paperwork burdens. The Office of Advocacy provided some specific recommendations to increase the reporting threshold to lessen the burden for more small firms. The EPA continues to work with the Office of Advocacy and stakeholders to resolve this issue.

Pesticide Reporting. Before the EPA finalized a rule for reporting by pesticide companies, the Office of Advocacy had an opportunity to recommend clarifications and revisions to minimize the burden on small firms. Under the Federal Insecticide, Fungicide, and Rodenticide Act, the EPA's final regulation, published on September 19, 1997, requires reports on the adverse effects of pesticide use. The Office of Advocacy was concerned with various issues that were raised during the final OMB review process. The EPA agreed to define narrowly the agents and employees covered by the rule (the number of affected persons was reduced to an average of seven per firm). In response to concerns that reporting "minor adverse effects" would exponentially increase reporting requirements, the EPA agreed to review the value of the required information after three years.

Ocean Disposal and Crabbing. Plans to expand two ocean sites located near the mouth of the Columbia River in Washington for disposal of dredged material created major anguish for the

Northwest crabbing industry. Waste disposal in the two expanded sites could kill a large crab population. The Office of Advocacy challenged the EPA's certification that its decision would not have a significant impact on small firms. In response, the EPA agreed to stay the rule — scheduled to go into effect in June 1997 — for several months, until officials could review the harm to small firms in the crabbing industry.

Federal Bureau of Investigation

Communications Assistance to Law Enforcement Act

The Office of Advocacy worked with the Federal Bureau of Investigation (FBI) and its independent contractors in the fall of 1997 on the implementation of its rules and completion of its first regulatory flexibility analysis for "notice of capacity" requirements called for under the Communications Assistance to Law Enforcement Act (CALEA). In two previous notices, the FBI concluded that its implementation of CALEA was not subject to the RFA. The FBI reconsidered this conclusion in the light of public comment and encouragement from the OMB and the Office of Advocacy. The Office of Advocacy also recommended several edits in the FBI's final notice and FRFA that would provide adequate notice and minimize the economic burdens to small telecommunications providers subject to the rule. These recommendations included: (1) structure and headings for the FRFA; (2) clarification of exactly what small entities would be subject to this stage of the rules; (3) clarification that the government's reimbursement for a carrier bringing its system to maximum capacity included all expenses necessary to meet the five-day turnaround; (4) and a proposed waiver process that would address the Office of Advocacy's concern that some small carriers (especially new entrant personal communications services [PCS] "C" and "F" Blocks) may not be able to meet the maximum capacity requirements set forth in the final rule. The final notice was released in early 1998.

Federal Communications Commission

Universal Service. In 1997, the Office of Advocacy was involved extensively in the Federal Communications Commission's proceeding to implement universal service support systems, one of the cornerstones of the Telecommunications Act of 1996. Final rules were released on May 8, 1997, that established new programs to give schools, libraries, and rural health care centers access to telecommunications, information, and Internet service at discounts. In addi-

tion, the final rules provided for the preservation of historical support for rural and high-cost areas and low-income subscribers.

The FCC's acknowledgment that small businesses have more than one telephone line, and its rejection of the Federal-State Joint Board on Universal Service's recommendation that universal service support for high-cost and rural areas be eliminated or reduced for businesses with more than one phone line, was a major victory for the Office of Advocacy in 1997. The Joint Board's recommendation, if adopted, would have had severe economic effects on small businesses in rural and high-cost areas, increasing considerably the cost of basic telephone service and the cost of living for their customers.

After submitting comments to the FCC in April and December 1996, the Office of Advocacy filed additional comments in January 1997, criticizing the Joint Board's misperception that small businesses were only those businesses with one phone line and that all businesses with multiple lines were large businesses. Its proposal to reduce and/or eliminate universal support to multiple-line businesses would have had an adverse impact on small businesses and rural areas' economies generally.

The Office of Advocacy asserted that the regulatory flexibility analysis accompanying the Joint Board's recommended decision was untimely, improperly published, and inadequate. The IRFA did not reflect that cuts in rural communities' universal service support — estimated between $1 and $3 billion — would stifle the use of advanced telecommunications and technologies (such as fax machines, the Internet, credit card and check approval machines, etc.) in these areas and would hinder the ability of small businesses to compete with similar companies in urban and suburban areas.

In its April 4, 1997, comments, the Office of Advocacy recommended that small entities be classified not by the number of telephone lines, but by annual gross receipts. The Office of Advocacy further recommended that the FCC:

• exempt institutional and small governmental entities to ensure that the needs of public health, safety, and welfare would be met; and
• provide an exemption for small firms with $5 million or less in annual gross receipts from any reduction in universal service support.

Throughout the FCC's deliberations from January through April 1997, the Office of Advocacy discussed various issues with the FCC and many stakeholders on this issue. The Office of Advocacy also submitted comments on April 29, 1997, that illustrated the cumulative impact of the potential loss of universal service support with increased telephone rates on an average small business with eight

telephone lines.[24] It estimated that if support were decreased by only 25 percent, the average small business would incur, at the highest level, an annual increase in telephone costs of $259 in Kentucky, $973 in Missouri, and $8,489 in Texas (assuming that the local telephone companies passed through their increased costs to their customers).

On May 8, 1997, the FCC released its final rules. It rejected the Joint Board's recommended decision to eliminate universal support for rural and high-cost areas, and published an extensive FRFA with input from the Office of Advocacy. Moreover, the FCC elected to continue the level of support for rural and high-cost areas until it could analyze fully the development of new support mechanisms, and implemented an 18-month transition period for larger "price-cap" carriers and a three-year extension for smaller carriers serving rural areas. To better assess the changing telecommunications landscape in rural America (and in recognition of the Office of Advocacy's concerns regarding the economic impact on rural areas), the FCC also recommended that the Joint Board create a rural task force to assist it in its work of reforming universal service subsidies.

In response to the FCC's request for nominations to the rural task force, the Office of Advocacy supported representation by small business consumer interests as well as the small business telecommunications providers already represented, to better address the interests of all classes of small entities.

Access Charges. The FCC's reform of access charges was a separate but related and concurrent proceeding to its universal service rulemaking. The Office of Advocacy speculated that small businesses would encounter increased charges under anticipated access charge reform, and encouraged the FCC to look at the cumulative economic impact of its proposals on small business subscribers with multiple lines. To highlight these issues, the Chief Counsel for Advocacy submitted a letter to the FCC on April 29, 1997, that illustrated what a potential $3 increase in the subscriber line charge (SLC) would mean for an average small business with eight telephone lines, particularly if universal support for high-cost areas were reduced. The Chief Counsel also expressed reservations in his letter about the rate savings for long-distance customers to be received from interexchange carriers (IXCs or long-distance companies) that the FCC

24. The results of an independent telephone user poll prepared for the Office of Advocacy under the direction of the California Small Business Association specifically for this proceeding reported that the average small business has eight telephone lines.

projected. (The commission's projection was based on the supposition that these companies would pass through their FCC-imposed reduction of $1.5 billion in access charges paid to local telephone companies.) The Office of Advocacy did not believe that small business subscribers would be the beneficiaries of such a reduction in rates, at least not enough to offset the FCC's proposed increases in certain flat-rate charges.

The FCC's "first report and order" was adopted on May 7, 1997 (at the same time as the universal service reforms), and it addressed several of the Office of Advocacy's concerns. First, acknowledging for the first time that small businesses have multiple phone lines, the FCC reported a four-line average. (In all previous analyses, the FCC had assumed that small businesses had one telephone line.) Second, an anticipated increase of $3.50 in the SLC for all business lines was reduced to $1.90 in the first year and capped at $3.00 for subsequent years. Third, the presubscriber interexchange carrier charge (PICC), a new, flat-rate charge created by the FCC, was reduced by almost 40 percent — from a reported proposed amount of $4.50 to $2.75 — for multiple-line businesses. It is estimated that the economic savings to small businesses will be $255.4 million from 1997 through 1998.

The Office of Advocacy continued to have major concerns that small businesses with multiple lines and low-volume long-distance usage would not be the beneficiaries of access charge reform. Therefore, on November 21, 1997, the Chief Counsel for Advocacy submitted a letter to the FCC chairman that criticized the commission's first report and order, and subsequent orders on reconsideration. The Chief Counsel asserted that the FCC violated the RFA by its failure to (1) implement the RFA properly so that the economic impact on all affected small entities would be sufficiently addressed in the public record; (2) identify properly, describe, and reasonably estimate the number of all small entities to which these rules would apply; and (3) analyze the impact of its rules on small interexchange carriers and small business end users, including examining less burdensome alternatives.

The Chief Counsel argued that a proper regulatory flexibility analysis would have uncovered the tremendous increase in telephone bills due to FCC-imposed flat rate charges for certain small business end users as well as the disproportionate impact of the elimination of the unitary rate structure option for tandem-switched transport on small IXCs. For example, pointing to record evidence that tandem switch charges could increase by 400 percent for the estimated 600 small IXCs, the Chief Counsel questioned the FCC's conclusion

that the rule change "should promote competition" when small IXCs could be forced out of business and the top four long-distance carriers — AT&T, MCI, Sprint and WorldCom — already serving 88 percent of the nation's presubscribed lines, would further dominate the industry. In his letter, the Chief Counsel was particularly critical of the FCC's omission of regulatory alternatives. The FCC did not provide any analysis of options presented by commenters that would have reduced the impact on small business end users or small telecommunications providers.

Toll-Free Service. The FCC's "second report and order" prohibits, for the first time, the "hoarding and brokering" of toll-free numbers, and presumes that a subscriber in the possession of more than one number is involved in illegal activity. Furthermore, the FCC mandated that toll-free carriers terminate the service of a subscriber that the carrier believes to be hoarding or brokering toll-free numbers. On December 12, 1997, the Office of Advocacy submitted *ex parte* comments on the FCC's second report and order and its notice of proposed rulemaking and argued the following:

• The FCC did not comply with the statutory requirements of the Administrative Procedure Act and the RFA when it released a new rule on toll-free service access codes.

• The proposed rules would impose egregious harm on the economic welfare of millions of small businesses that have value in, and prudently use, their toll-free numbers. Legitimate businesses, such advertising and marketing firms, telemarketers, retail and mail-order firms, and commercial publishers, could be subject to forfeitures and criminal sanctions for "hoarding and brokering" toll-free numbers if the FCC vaguely defines this activity.

• The rule was unconstitutional and extremely burdensome because the FCC's carrier enforcement mandate did not provide adequate due process. The toll-free service of a small business subscriber could be terminated by its carrier (also impermissibly without an official FCC finding) before the small business had the opportunity to defend itself.

The loss of a toll-free number and the interruption of business can be extremely costly. The Office of Advocacy was also concerned that larger carriers would have the unfettered ability to abuse their small business subscribers for the benefit of the carrier's larger subscribers that have higher volumes of toll-free calls. The Office of Advocacy contended that: (1) the final rule was not a logical outgrowth of the commission's original proposed rule; (2) the final regulatory flexibility analysis failed to identify properly, describe, and rea-

sonably estimate the number of all small entities subject to the rule; (3) the analysis also failed to detail the compliance requirements for small businesses; and (4) the analysis failed to analyze the impact of its rule on small business end users and small business toll-free providers.

Personal Communications Services. In June 1997, the Office of Advocacy convened a joint FCC-SBA focus group to address the issue of financial restructuring for personal communications services (PCS) "C" Block. The C Block auction was reserved exclusively for small businesses, and several of the largest winners had experienced some financial difficulty in meeting installment payment schedules. The focus group included representatives from the FCC's Wireless Telecommunications Bureau and the Office of Communications Business Opportunities, and the SBA's Office of Business Initiatives, Office of Financial Assistance, Office of Size Standards, and Office of Technology. As a result of this meeting, and further consultations with other stakeholders, the Office of Advocacy submitted comments September 8, 1997, regarding the FCC's restructuring proceeding.

The FCC's second report and order and "further notice of proposed rulemaking," adopted on September 15, 1997, included several of the Office of Advocacy's recommendations: (1) C Block licensees to receive a menu of options for financial relief; (2) an option for licensees to receive amnesty (if they turn in their license(s), their debt will be forgiven); (3) a deferment of installment payments until March 1998 (however, not as long as the Office of Advocacy had requested); and (4) the preservation of exclusive small-business participation for a re-auction of returned licenses.

Broadcast Ownership. On June 30, 1997, the Office of Advocacy objected to the adoption of a series of rules proposed by the FCC that would relax several existing broadcast ownership rules. The Office of Advocacy asserted that the commission should complete an analysis of the state of the broadcast industry since the passage of the Telecommunications Act of 1996 before it finalized rules for television national ownership, cross-ownership rules for broadcasting and newspapers, attribution rules, and duopoly/local marketing agreements. Given the tremendous rate of mergers and acquisitions in the broadcast industry, as well as the impact of increased media concentration on collateral industries such as programming, syndication, and advertising, the FCC has a threefold statutory duty to: (1) serve the public interest in the promotion of a diversity of voices/owners under the Communications Act of 1934; (2) eliminate the market

entry barriers for small entities under the Telecommunications Act of 1996; and (3) identify the significant economic impact that relaxation or repeal of its broadcast ownership rules would have on small entities under the RFA.

Since the Office of Advocacy's request, the commission has funded five studies by independent contractors that examine small, minority, and women-owned broadcasters. Some of the topics under study include: (1) the impact of radio duopolies on small and minority-owned stations; (2) obstacles faced by small businesses, minorities and women in broadcast licensing; and (3) the nexus between broadcast minority ownership and programming. The studies are nearing completion. The proceedings on broadcast ownership, attribution, and national ownership are pending.

Emergency Alert Systems. The FCC's Order for Emergency Alert Systems (EAS) for cable television systems was released on September 29, 1997. The Office of Advocacy had filed comments in this proceeding in February 1995 and successfully argued for the FCC to minimize the economic burden on small systems upgrading their cable systems to include emergency alert capabilities. It is estimated that a full EAS would cost approximately $10,000 to $20,000 per cable headend.[25]

EASs are required by the Communications Act of 1934. In its final rules, the FCC took several steps to eliminate the economic burden of bringing all cable systems in compliance with the EAS requirements. First, the FCC extended the deadline for small cable systems (as defined by the number of subscribers) to implement the new EAS, providing for a five-year phase-in period for the finance and installation of the expensive upgrades. Small systems with less than 10,000 subscribers have a deadline of October 1, 2002, for installation. Systems with more than 10,000 subscribers must install EAS by December 31, 1998. Furthermore, the FCC designated different technical standards for different classes of small systems. For example, small systems with 5,000 or fewer subscribers may either provide the national level EAS message on all programmed channels or provide an audio EAS message and video interrupt on all channels by the installation date. Larger systems have increased requirements. It is estimated that the savings to small cable systems will be $83.3 million.

25. A headend is the electronic control center of a cable system that receives and imports off-the-air and locally generated cablecasting signals.

Federal Trade Commission

Franchise Rule

On April 30, 1997, the Office of Advocacy submitted comments to the Federal Trade Commission (FTC) on its advance notice of proposed rulemaking to amend its disclosure requirements for franchising and business opportunity ventures. The Office of Advocacy commended the FTC for complying with the RFA by reviewing the rule under section 610 that requires federal agencies to conduct periodic reviews of existing regulations. An extensive list of recommendations was presented to the FTC that included:

- Retaining federal franchisor disclosure regulations, to ensure all small business franchises have complete information;
- Requiring franchisors to disclose lawsuits filed against or by franchisees; and
- Requiring the disclosure of statistics on intra-franchise competition, earnings, and franchise renewal rates.

General Services Administration

Full and Open Competition in Government Contracting

On July 11, 1997, the Office of Advocacy once again challenged proposed regulations that would create barriers to small businesses seeking to sell goods and services to the federal government. Amendments to the Federal Acquisition Regulation (FAR) were proposed to implement the Federal Acquisition Reform Act of 1996 (P.L. 104-106). The new law allows contracting officers to restrict the competitive range (that is, the number of offerors) if the official determines that it would result in "efficient competition." The Office of Advocacy challenged the General Service Administration's (GSA) interpretation of the legislation when the agency proposed to allow competition to be limited when the contracting officer identified those proposals "most highly rated." This limitation could, in effect, allow the officer to select as few as two offers that were subjectively "highly rated" by the contracting officer. If allowed, the process could bypass full and open competition by permitting personal choices for the purpose of simplifying the job of the government buyer.

The Office of Advocacy urged the GSA to consider a number of recommendations, such as requiring at least one small business in the range of competitors, defining "efficient competition," and correcting significant errors in the agency's initial regulatory flexibility analysis. The GSA suggested that only 7,000 small businesses would be significantly affected by the rule. In fact, a large number of current and potential small contractors could be shut out of federal procurement.

When the rule was finalized, the GSA took some steps to address the Office of Advocacy's concerns. The agency completed a more thorough analysis of the rulemaking, but it failed to provide sufficient measures to minimize the impact on small firms. The Office of Advocacy commended the agency for its improved efforts, but still found it far short of assuring full and open competition.

Office of Federal Procurement Policy

See the above section on the General Services Administration for a discussion of full and open competition in government contracting.

Securities and Exchange Commission

The Office of Advocacy and the Securities and Exchange Commission (SEC) worked closely together in 1997 to improve regulatory compliance assistance for small businesses and small entities in several ways. In April 1997, the two agencies collaborated to publish *Q&A: Small Business & the SEC*. This compliance booklet was written under the SEC's new policy of "plain English." It is intended to help small businesses understand how to raise capital and comply with federal securities law.

The Office of Advocacy helped arrange small business town hall meetings in 1997. Headed by SEC Chairman Arthur Levitt and the SEC commissioners throughout the country, the town hall meetings were held in Richmond, Virginia; Austin, Texas; Los Angeles, California; Tampa and Fort Lauderdale, Florida; Cambridge, Massachusetts; Evanston, Illinois; St. Louis, Missouri; and Minneapolis, Minnesota. These town hall meetings were designed to inform small businesses of recent SEC initiatives for small businesses and to gather feedback on SEC rules and regulations.

Also in 1997, the SEC consulted with the Office of Advocacy on the appointment of a small business ombudsman, a position located within the SEC's Office of Small Business Policy, to help small businesses on compliance and enforcement issues.

The SEC is mandated by statute to hold on an annual basis a government-business forum on small business capital formation. This forum brings together small business owners, policy experts, attorneys, accountants, and government officials to make recommendations to federal regulatory agencies and Congress on how to improve access to capital for small businesses in the tax, credit and securities areas. It is an excellent venue for small businesses to share their ideas

and recommendations about SEC regulatory actions and outreach. The Office of Advocacy is a member of the forum's executive committee and works very closely with the SEC in putting together the forum and reaching out to the small business community.

Finally, in 1997 the SEC consulted with the Office of Advocacy on a variety of regulatory activities. The commission consulted the Office of Advocacy on the designation of small business regulatory compliance guides[26] and on the SEC's policy statement on its "Informal Guidance Program."[27] In addition, the Office of Advocacy was consulted about proposed regulations implementing and updating the SEC's "Small Business and Small Organization: Definitions for Purposes of the Regulatory Flexibility Act."[28] The SEC also sought the Office of Advocacy's input on the alternative size standard definition request to the SBA Administrator encompassed in the proposed and final rule implementing, "Expansion of Short-Form Registration to Include Companies with Non-Voting Common Equity."[29]

In 1997, the SEC has continued to maintain high standards in implementing the Regulatory Flexibility Act and reaching out to small entities to participate in the regulatory process.

26. 63 FR 4104 (Jan. 28, 1997).

27. 62 FR 15604 (April 12, 1997).

28. 63 FR 4106, 13356 (Jan. 28, 1997).

29. 63 FR 26386 (May 14, 1997).

Conclusion

Noticeable progress has been made by federal agencies in complying with the Regulatory Flexibility Act, in large part due to the SBREFA amendments. However, significant work remains to be done to bring all agencies into compliance on a consistent basis. Several agencies still have much to learn about the importance of small business to the economy and the underlying rationale of the RFA. Some have yet to comprehend that the RFA does not require special treatment for small business. Rather, it establishes a process for analyzing how to achieve public policy objectives while still preserving a level playing field for small business.

The Office of Advocacy has devoted significant resources to educating federal agencies about the law and its overriding objectives. Staff of the Office of Advocacy have been available for consultation on specific regulatory proposals, economic impact analyses, and overall RFA compliance. When such consultation is not completely successful, the Chief Counsel for Advocacy submits extensive comments on regulatory proposals and economic analyses, and monitors challenges to final rules by small entities — all with the objective of ensuring that small business interests are appropriately considered.

The potential for review of RFA issues in appellate litigation unquestionably has provided a major incentive for federal agencies to take greater care to ensure compliance with the act. The Office of Advocacy's increasingly direct involvement in regulatory development, and its potential role as *amicus curiae* in regulatory appeals, provides more opportunities to resolve RFA disputes and to bring agencies into compliance.

Appendix A: Regulatory Comments Filed by the Office of Advocacy in 1997

Date	*Agency*	*Comment Subject*
01/10/97	FCC	Brief regarding Federal-State Joint Board on Universal Service (CC Docket no. 96-45).
02/06/97	NMFS, NOAA	Proposed rulemaking on reducing the quota for the directed shark fishery (61 FR 67295, Dec. 20, 1996).
02/06/97	AMS	Proposed rule regarding quantity and allotment percentages for spearmint oil produced in the far West (Docket no. FV-96-985-4PR; 62 FR 942, Jan. 7, 1997).
02/07/97	EPA	Letter regarding the chemical wholesale industry (SIC 5169) and its potential selection for reporting under expanded Toxic Release Inventory reporting requirements.
02/13/97	EPA	Memo concerning revocation of significant new use rules (SNUR) — Regulatory Flexibility violation (62 FR 6160, Feb. 11, 1997).
02/13/97	EPA	Letter regarding emergency planning and community right-to-know reporting requirements for gasoline stations.
02/21/97	FSIS	Advanced notice of proposed rule on transportation and storage requirements for potentially hazardous foods (Docket no. 95-049A; 61 FR 59372, Nov. 22, 1996).
02/27/97	FDA	Proposed rule on prohibiting animal proteins in ruminant feed; small business impact (Docket no. 96N-0135; 62 FR 552, Jan. 3, 1997).
03/06/97	FRA	Draft initial regulatory flexibility analysis for track safety standard.
03/11/97	OSHA	Information collection requirements for final rule for occupational exposure to methylene chloride (Docket no. ICR96-15; 62 FR 1494, Jan. 10, 1997).

Date	*Agency*	*Comment Subject*
03/18/97	EPA	Regarding effluent limitations guidelines and standards for the industrial laundries point source category (40 CFR Part 441; Small Business Advocacy Review Panel).
03/18/97	EPA	Regarding implementation of ozone and particulate matter national ambient air quality standards and regional haze regulations (Small Business Advocacy Review Panel).
03/24/97	FCC	Regarding notice of *ex parte* presentation in a non-restricted proceeding, in re: Federal-State Joint Board on Universal Service recommended decision (CC Docket no. 96-45).
03/31/97	NOAA	Proposed rule on the Atlantic highly migratory species fisheries; tuna fishery regulatory adjustments (62 FR 9726, March 4, 1997).
04/04/97	FCC	Brief concerning Federal-State Joint Board on Universal Service (CC Docket no. 96-45).
04/11/97	FCC	Letter regarding notice of *ex parte* presentation in a non-restricted proceeding, in re: Federal-State Joint Board on Universal Service recommended decision (CC Docket no. 96-45).
04/14/97	FERC	Comments on pending merger application between Potomac Electric Power Company and Baltimore Gas and Electric Company.
04/14/97	IRS	Proposed amendments to the income tax regulations related to the definition of limited partners. CC:DOM:CORP:R (REG-209824-96).
04/25/97	EPA	Regarding comprehensive NPDES phase II storm water regulations (Small Business Advocacy Review Panel).
04/25/97	EPA	Regarding effluent limitations guidelines and standards for the transportation equipment cleaning point source category (40 CFR Part 442; Small Business Advocacy Review Panel).
04/29/97	FCC	Regarding Federal-State Joint Board on Universal Service's (CC Docket no. 96-45) recommendation on access charge reform (CC

Date	*Agency*	*Comment Subject*
		Docket nos. 96-262, 94-1, 91-213, 96-263).
04/29/97	EPA	Regarding plans to expand two ocean dredged material disposal sites, designated as sites "B" and "E," at the mouth of the Columbia River.
04/30/97	FCC	Advanced notice of proposed rule to amend trade regulation rule entitled "Disclosure Requirements and Prohibitions concerning Franchising and Business Opportunity Ventures" (16 CFR Part 436).
05/21/97	IRS	Testimony before an Internal Revenue Service panel regarding amendments to the definition of limited partners for tax purposes (Reg. 209824-96).
05/23/97	EPA	Report of Small Business Advocacy Review Panel concerning emission standards for certain non-road diesel engines.
05/28/97	MMS	Proposed rule on oil and gas production measurement, surface commingling and security (62 FR 8665, Feb. 26, 1997).
05/30/97	EPA	Effluent limitations guidelines and standards for the centralized waste treatment point source category (40 CFR Part 437; Small Business Advocacy Review Panel).
06/10/97	EPA	Report of Small Business Advocacy Review Panel concerning the first phase of a two-phase implementation effort for proposed air quality standards for ozone and particulate matter.
06/20/97	EPA	Comments regarding Federal Insecticide Fungicide and Rodenticide Act, sec. 6(a)(2), draft final rule.
06/30/97	FCC	Broadcast television national ownership rules (MM Docket no. 96-222); review of regulations governing television broadcasting (MM Docket no. 91-221); reexamination of cross-interest policy (MM Docket no. 87-154); newspaper/ radio cross ownership waiver policy (MM Docket no. 96-197).

Date	*Agency*	*Comment Subject*
07/11/97	GSA	Proposed revision of FAR Part 15: "contracting by negotiating; competitive range determinations" (FAR Case no. 95-029; 62 FR 26640, May 14, 1997).
07/25/97	DOL	Proposed rule for amending the regulations implementing the Longshore and Harbor Workers' Compensation Act, July 3, 1997.
08/01/97	MSHA	Proposed rule for occupational noise exposure (30 CFR Part 32; RIN 1219-AA53).
08/07/97	EPA	Report of the Small Business Advocacy Review Panel convened on July 19, 1997, for proposed rulemaking to revise the National Pollutant Discharge Elimination System regulations under the Clean Water Act, sec. 402(p)(6).
08/08/97	OSHA	Comments responding to review of the control of hazardous energy sources (lockout/tagout) standard (Docket no. S-012-B; RFA sec. 610; 62 FR 29089, May 29, 1997) and the occupational exposure to ethylene oxide standard (Docket no. H-200-C; RFA sec. 610; 62 FR 28649, May 27, 1995).
08/08/97	EPA	Report of the Small Business Advocacy Review Panel convened June 6, 1997, for proposed rulemaking for effluent limitations guidelines and pretreatment standards for the industrial laundries point source category.
08/21/97	ESA	Proposed rule implementing the Federal Coal Mine Health and Safety Act of 1969, as amended (62 FR 3338, Jan. 22, 1997; RIN 1215-AA99).
09/08/97	FCC	Comments concerning efforts to address the concerns of licensees of the broadband personal communications services "C" block restructuring (WT Docket no. 97-82 and DA 97-697).
09/16/97	EPA	Memo on federally imposed reduction of nitrogen oxide emissions by state regulations.
09/17/97	OSHA	Comments on intent to publish a proposed rule

Date	*Agency*	*Comment Subject*
		for steel erection, subpart R of 29 CFR part 1926, and on OSHA's requested waiver from the SBREFA panel provisions (Small Business Advocacy Review Panel).
09/23/97	EPA	Report of the Small Business Advocacy Review Panel convened on July 16, 1997, on effluent limitation guidelines and standards for the transportation equipment cleaning industry point source category (40 CFR Part 442).
09/24/97	DOT	Letter of agreement concerning the final rule on air tour operations in the Grand Canyon National Park (61 FR 69302).
09/25/97	EPA	Comments filed with the National Advisory Committee on Environmental Protection and Technology (NACEPT) Toxic Data Release Committee of EPA, regarding recommendations to update the Form A, which is the streamlined reporting form for the Toxic Chemical Release Inventory reporting requirements (sec. 313 of the Emergency Planning and Community Right to Know Act of 1986).
10/02/97	EPA	Proposed rulemaking regarding non-road diesel engines. (This rule was the first rule proposed by EPA subject to a Small Business Advocacy Review Panel.)
10/07/97	FDA	Final rule for labeling rubber-containing medical devices (62 FR 51021, Sept. 30, 1997).
10/14/97	EPA	Regarding revisions to new source review (NSR) regulations to implement the new National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter (Small Business Advocacy Review Panel).
10/15/97	FCC	Nominations for the Federal-State Joint Board on Universal Service Rural Task Force (CC Docket no. 96-45).
10/16/97	OSHA	Comments on request for a waiver from Small Business Advocacy Review Panel for steel erection rulemaking.

Date	*Agency*	*Comment Subject*
10/17/97	DEA	Proposed rule for implementation of the Comprehensive Methamphetamine Control Act of 1996 (62 FR 52294, Oct. 7, 1997).
10/21/97	NOAA	Letter commending NOAA for the final regulatory flexibility analysis performed for implementing the final management plan for the Florida Keys National Marine Sanctuary and the supplement to the final regulatory flexibility analysis.
10/29/97	OFPP	Final regulatory flexibility analysis for the final rule, FAR Part 15: "contracting by negotiating; competitive range determinations" (FAR Case no. 95-029; 62 FR 51224, Sept. 30, 1997).
11/04/97	HCFA	Proposed rule for Medicare coverage of ambulance services (62 FR 32715, June 17, 1997).
11/13/97	EPA	Reply to the EPA's notification of the initiation of a Small Business Advocacy Review Panel for rulemaking to revise the Form 2C, "Application Form for Facilities that Discharge Wastewater to U.S. Waters."
11/21/97	IRS	Proposed amendments to the income tax regulations related to expenses incurred in connection with property produced in a farming business (62 FR 44542, Aug. 22, 1997).
11/21/97	FCC	*Ex parte* comment and petition for reconsideration for access charge reform (CC Docket no. 96-262).
11/25/97	NIST	Proposed rule for implementation of the Fastener Quality Act (Docket no. 970724177-7177-01; 62 FR 47240, Sept. 8, 1997).
12/05/97	ITA, OIA	Proposed rule for total quantity and respective territorial shares of insular watches and watch movements that will be allowed to enter the United States free of duty in calendar year 1998 (62 FR 59829, Nov. 5, 1997).
12/12/97	FCC	*Ex parte* petition for reconsideration of the second report and order for toll-free service access

Date	*Agency*	*Comment Subject*
		codes (Docket no. 95-155).
12/17/97	EPA	Letter commending EPA for implementation of Small Business Advocacy Review Panel process for proposal regarding effluent limitations (water pollution rule) affecting the industrial laundries industry (40 CFR Part 441).
12/18/97	FDA	Proposed rule for sterility requirements for inhalation solution products (62 FR 49638, Sept. 30, 1997).
12/22/97	EPA	Reply to notification letter requesting small-entity representatives for Small Business Advocacy Review Panel for proposed rulemaking regarding Class "V" underground injection wells under 40 CFR Parts 144 and 146.

Appendix B: The Regulatory Flexibility Act

The following text of the Regulatory Flexibility Act 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) and was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (P.L. 104-121).

§ 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.

§ 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 succinct statement of the need for, and objectives of, the rule;

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

(3) 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;

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

(5) 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.

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

§ 605. Avoidance of duplicative or unnecessary analyses

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

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

rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

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

§ 606. Effect on other law

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

§ 607. Preparation of analyses

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

§ 608. Procedure for waiver or delay of completion

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

(b) Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the 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 advanced notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;

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

(3) the direct notification of interested small entities;

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

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

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

(1) a covered agency shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with information on the potential impacts of the proposed rule on small entities and the type of small entities that might be affected;

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

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

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

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

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

(c) An agency may in its discretion apply subsection (b) to rules that the

agency intends to certify under subsection 605(b), but the agency believes may have a greater than de minimis impact on a substantial number of small entities.

(d) For purposes of this section, the term "covered agency" means the Environmental Protection Agency and 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).