Report on the Regulatory Flexibility Act, FY 2003

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

Office of Advocacy
U.S. Small Business Administration
Washington, D.C.
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To the President and the Congress of the United States

As the Chief Counsel for Advocacy for the U.S. Small Business Administration (SBA), I am pleased to present to Congress and the President this *Report on the Regulatory Flexibility Act, FY 2003*. Pursuant to Executive Order 13272 (E.O. 13272), signed by the President August 13, 2002, Advocacy will also include in this report the status of agency compliance with the Executive Order. The Regulatory Flexibility Act of 1980 (RFA) requires agencies to consider the impact of their rules on small entities and examine effective alternatives that minimize small entity impacts. Similarly, E.O.13272 provides federal agencies new direction in their efforts to assess the impact of their rules on small entities in accordance with the RFA. It also directs the Office of Advocacy to provide agencies with information on how to comply with the Executive Order.

Fiscal Year 2003 was an eventful year for the Office of Advocacy as we continued our efforts to encourage federal agencies to comply with the RFA and E.O.13272. Over the past year, the Office of Advocacy created and implemented its RFA training program, developed model state regulatory flexibility legislation, formally commented on a variety of federal agency rules and actions, and testified before Congress on agency compliance with the RFA. Advocacy also relied extensively on small entities to identify rules that warranted our involvement. To facilitate this, the Office of Advocacy launched its new Regulatory Alerts webpage, located at *http://www.sba.gov/advo/laws/law_regalerts.html*. The webpage highlights notices of proposed rulemaking that may significantly affect small entities and contains links to allow users to comment directly on proposals.

The Office of Advocacy made significant strides on behalf of small entities in Fiscal Year 2003. In fact, two states enacted regulatory flexibility legislation and three governors signed executive orders. Additionally, the American Legislative Exchange Council (ALEC), the nation's largest bipartisan membership association of state legislators, endorsed the Office of Advocacy's model legislation promoting small-business-friendly policies. On the federal level, more agencies submitted draft rules to Advocacy for review and additional agencies approached Advocacy seeking assistance in complying with the RFA and E.O. 13272. Further, Advocacy's involvement secured more than $6.3 billion in regulatory cost savings and more than $5.7 billion in recurring annual savings on behalf of small entities.

Throughout Fiscal Year 2003, the Office of Advocacy continued to build strong working relationships with small entities, federal agencies and the Office of Information and Regulatory Affairs at the Office of Management and Budget. As a result, federal agencies are approaching Advocacy for input earlier in the rulemaking process. Likewise, on a regular basis, small entities are requesting assistance from the Office of Advocacy on rules they believe will significantly affect them.

The Office of Advocacy commends agencies that are complying with the letter and spirit of the RFA and E.O. 13272 by seeking ways to minimize the regulatory burden on small entities. In Fiscal Year 2004, as Advocacy moves forward with its government-wide RFA training, we expect more agencies to follow suit and actively seek to improve their compliance with the RFA and E.O. 13272.

Thomas M. Sullivan
Chief Counsel for Advocacy

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Abbreviations

ACMA – American Composites Manufacturers Association
AICPA – American Institute of Certified Public Accountants
ALTS – Association for Local Telecommunications Services
ANPRM – advance notice of proposed rulemaking
APA – Administrative Procedure Act
ATF – Bureau of Alcohol, Tobacco, Firearms and Explosives
CBI – confidential business information reassertion
CLECS – competitive telecommunications carriers
CRS – Computer Reservations System
Customs – United States Customs Service
DAS – days at sea
DHS – Department of Homeland Security
DOC – Department of Commerce
DOD – Department of Defense
DOI – Department of the Interior
DOJ – Department of Justice
DOL – Department of Labor
DOT – Department of Transportation
E.O. – Executive Order
EOBR – electronic on-board recorder
EPA – Environmental Protection Agency
ESA – Endangered Species Act
ETA – Employment and Training Administration
FAR – Federal Acquisition Regulation
FCC – Federal Communications Commission
FDA – Food and Drug Administration
FinCen – Financial Crimes Enforcement Network
FMCA – Florida Marine Contractors Association
FMCSA – Federal Motor Carrier Safety Administration
FRFA – final regulatory flexibility analysis
FSIS – Food Safety and Inspection Service
FTC – Federal Trade Commission
FWS – Fish and Wildlife Service
FY – fiscal year
GPO – Government Printing Office
GSA – General Services Administration
HCFC – hydrochloroflourocarbons
HCl – hydrogen chloride
HIPAA – Health Insurance Portability and Accountability Act of 1996
HHS – Department of Health and Human Services
HUD – Department of Housing and Urban Development
INS – Immigration and Naturalization Service

IRFA – initial regulatory flexibility analysis
IRS – Internal Revenue Service
LDAR – leak detection and repair
MMPA – Marine Mammal Protection Act
NEFMC – New England Fishery Management Council
NHTSA – National Highway Traffic Safety Administration
NLA – National Lime Association
NMFS – National Marine Fisheries Service
NOAA – National Oceanic and Atmospheric Administration
NOx – nitrogen oxide
NPCA – National Paint and Coatings Association
NPRM – notice of proposed rulemaking
NPS – National Park Service
OBR – Office of Burden Reduction
OCR – Office of Civil Rights
OIRA – Office of Information and Regulatory Affairs
OMB – Office of Management and Budget
OSHA – Occupational Safety and Health Administration
P.L. – Public Law
PM – particulate matter
RESPA – Real Estate Settlement Procedures Act
RFA – Regulatory Flexibility Act
RSPA – Research and Special Programs Administration
RTE – ready to eat
SBA – Small Business Administration
SBREFA – Small Business Regulatory Enforcement Fairness Act
SB/SE – Small Business / Self-Employed Division (Internal Revenue Service)
SEC – Securities and Exchange Commission
SWPP – stormwater pollution prevention plan
TCPA – Telephone Consumer Protection Act
TSCA – Toxic Substances Control Act
UNE – unbundled network elements
U.S.C. – United States Code

Executive Summary

This Fiscal Year 2003 report for the first time combines the *Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act* with Advocacy's report on *Agency Compliance with Executive Order 13272* (E.O. 13272). This report informs the President, the Office of Management and Budget (OMB), and Congress whether agencies are considering the impact of their rules on small entities and thus improving their compliance with the Regulatory Flexibility Act (RFA) and E.O. 13272.

The RFA, enacted in 1980, requires federal regulatory agencies to determine the impact of their rules on small entities, consider effective alternatives that minimize small entity impacts, and make their analysis available for public comment. Signed by President Bush in August 2002, E.O. 13272 requires agencies to establish written procedures and policies on how they measure the impact of their regulatory proposals on small entities, notify the Office of Advocacy of draft rules that are expected to have a significant economic impact on a substantial number of small entities under the RFA, consider the Office of Advocacy's comments on proposed rules, and publish a response to those comments with the final rule. E.O. 13272 also requires the Office of Advocacy to provide periodic notification, as well as training, to all of the agencies on how to comply with the RFA.

Throughout the past year, the Office of Advocacy continued its efforts to represent small entities before regulatory agencies, lawmakers, and policymakers. The Office of Advocacy worked closely with small entities to identify and comment on agency rules that would affect their interests. Taking its direction from small entities, the Office of Advocacy focused on the issues that were most important to them. As a result, Advocacy was able to reduce the regulatory burden on small entities and achieve significant cost savings.

This report contains four main sections. Section one provides a brief overview of the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). This initial section outlines the history of the RFA, discusses the requirements of the law and the SBREFA amendments to the RFA.

Section two details the role of the Office of Advocacy. This section discusses how the Office of Advocacy works with regulatory agencies at various stages of the rulemaking process to encourage them to minimize the burden of their rules on small entities. Through a series of charts and tables, this section also shows breakdowns of Advocacy regulatory actions

by agency and type of comment, a listing of the Office of Advocacy's formal regulatory comment letters, SBREFA panels held by the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA), and cost savings for Fiscal Year 2003. In Fiscal Year 2003, the Office of Advocacy achieved more than $6.3 billion in regulatory cost savings and more than $5.7 billion in recurring annual savings on behalf of small entities.

Section three provides a snapshot of several of the rulemakings in which the Office of Advocacy has intervened on behalf of small entities. Many of the rules demonstrate the Office of Advocacy's achievements with respect to improving agency compliance with the RFA. Other rules underscore Advocacy's concerns relating to specific agency compliance with the RFA. The summaries describe key agency rules or activities, Advocacy's actions with respect to the rulemakings, final regulatory actions in response to Advocacy's efforts, and cost savings associated with the agency actions.

On September 3, 2003, Advocacy submitted its first report on agency compliance with E.O. 13272 to the Office of Management and Budget (OMB). Section four of this annual report provides a brief overview and update on agency compliance with E.O. 13272 for Fiscal Year 2003.

In Fiscal Year 2003, the Office of Advocacy made significant progress working with small entities and federal agencies to improve compliance with the RFA and E.O. 13272. Advocacy expects this progress will continue in the next fiscal year. Please visit Advocacy's website at *http://www.sba.gov/advo* to learn more about the Office of Advocacy, review regulatory comment letters, and obtain useful research relevant to small entities.

Section 1: Overview of the Regulatory Flexibility Act and Federal Agency Compliance

History of the RFA

Before Congress enacted the Regulatory Flexibility Act[1] (RFA) in 1980, federal agencies did not recognize the pivotal role of small business in an efficient marketplace, nor did they consider the possibility that agency regulations could put small businesses at a competitive disadvantage with large businesses or even constitute a complete barrier to small business market entry. Similarly, agencies did not appreciate that small businesses were restricted in their ability to spread costs over output because of their lower production levels. As a result, when agencies implemented "one-size-fits-all" regulations, small businesses were placed at a competitive disadvantage with respect to their larger competitors. This problem was exacerbated by the fact that small businesses were also disadvantaged by larger businesses' ability to influence final decisions on regulations. Large businesses have more resources and can afford to hire staff to monitor proposed regulations to ensure effective input in the regulatory process. As a result, consumers and competition were penalized, while larger companies were rewarded.

The White House has taken a leadership position in standing up for small business since 1980, when the first White House Conference on Small Business was held. There, small business delegates told the President and Congress that they needed relief from the unfair burdens of federal regulation. The President listened when small businesses explained that the burden of federal agency regulations often fell hardest on them. They asserted that "one-size-fits-all" regulations, although easier to design and enforce, disproportionately affected small businesses. This led the federal government to recognize the different impacts of regulations on firms of different sizes and the disparity between large and small firms in the level of input in the regulatory process. In 1980, Congress and the President enacted the RFA to alter how agencies craft regulatory solutions to societal problems and to change the "one-size-fits-all" regulatory approach.[2]

In 1993, the President issued Executive Order 12866, which required federal agencies to determine whether a regulatory action was "significant" and therefore subject to review by the Office of Management and Budget (OMB) and the analytical requirements of the executive order. In

1. The Regulatory Flexibility Act, Pub. L. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. § 601 *et seq*.), became law on September 19, 1980. The full law as amended appears as Appendix A of this report.

2. Congress agreed with small businesses when it specifically found in the preamble to the RFA that "laws and regulations designed for application to large-scale entities have been applied uniformly to small [entities, . . .] even though the problems that gave rise to the government action may not have been caused by those small entities." As a result, Congress found that these regulations have "imposed unnecessary and disproportionately burdensome demands" upon small businesses with limited resources, which, in turn, has "adversely affected competition." FINDINGS AND PURPOSES, Pub. L. No. 96-354.

September 2003, OMB issued Circular A-4, which provides guidance to federal agencies for preparing regulatory analyses of economically significant regulatory actions under Executive Order 12866.[3]

In 1996, Congress and the President helped the Office of Advocacy to more effectively implement the RFA by enacting the Small Business Regulatory Enforcement Fairness Act (SBREFA).[4] SBREFA amended the RFA to allow a small business, appealing from an agency final action, to seek judicial review of an agency's compliance with the RFA. Not surprisingly, this change has encouraged agencies to increase their compliance with the requirements of the RFA.

In 2002, President Bush signed Executive Order 13272, titled Proper Consideration of Small Entities in Agency Rulemaking. The executive order (E.O.) requires agencies to place emphasis on the consideration of potential impacts on small entities when promulgating regulations in compliance with the Regulatory Flexibility Act (RFA). Advocacy is required to provide the agencies with information and training on how to comply with the RFA and must report to OMB annually on agency compliance with the E.O. By signing the executive order, the President provided another important tool in the small business arsenal to ensure that federal regulatory agencies comply with the RFA and include Advocacy in the process.

Analysis Required by the RFA

The RFA requires each federal agency to review its proposed and final rules to determine if the rules will have a "significant economic impact on a substantial number of small entities." Section 601 of the RFA defines small entities to include small businesses, small organizations; and small governmental jurisdictions. Unless the head of the agency can certify that a proposed rule is not 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.[5] 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. It 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.

3. See the Advocacy website at *www.sba.gov/advo/laws/sum_eo.html* for a summary of Executive Order 12866; for more detail, visit, *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf.* The circular replaces the January 1996 "best practices" and the 2000 guidance documents on Executive Order 12866.
4. Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, 110 Stat. 857 (codified at 5 U.S.C. § 601 *et. seq*.).
5. 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 or at the time of publication of the final rule in the *Federal Register* and is subject to public comment in order to ensure that the certification is warranted. See 5 U.S.C. 605(b).

When an agency issues a final rule, it must prepare a final regulatory flexibility analysis (FRFA), unless the agency head certifies that the rule will not have a significant economic impact on a substantial number of small entities and provides a statement containing the factual basis for the 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 entities subject to them and the type of professional skills essential for 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, and explain 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. The RFA is built on the premise that when an agency undertakes a careful analysis of its proposed regulations, with sufficient small business input, the agency can and will identify the economic impact on small businesses. Once an agency identifies the impact a rule will have on small businesses, the agency is expected to seek alternative measures to reduce or eliminate the disproportionate small business burden without compromising public policy objectives. The RFA does not require special treatment or regulatory exceptions for small business, but mandates an analytical process for determining how best to achieve public policy objectives without unduly burdening small businesses.

The Small Business Regulatory Enforcement Fairness Act of 1996

SBREFA amended the RFA in several critical respects. The SBREFA amendments to the RFA were specifically designed to ensure meaningful small business input during the earliest stages of the regulatory development process.

Most significantly, SBREFA authorized judicial review of agency compliance with the RFA, and strengthened the authority of the Chief Counsel for Advocacy to file *amicus curiae* briefs in regulatory appeals brought by small entities.

SBREFA also added a new provision to the RFA requiring the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to convene small business advocacy review panels (SBREFA panels) to review regulatory proposals that may have a significant economic impact on a substantial number of small entities. The purpose of a panel is to ensure small business participation in the rulemaking process, to solicit comments, and to discuss less burdensome alternatives to the regulatory proposal. Included on the panel are representatives from the rulemaking agency, the Office of Management and Budget's Office of Information and Regulatory Affairs, and the Chief Counsel for Advocacy. The Office of Advocacy assists the rulemaking agency in identifying small entity representatives from affected industries, who provide advice and comments to the SBREFA panel on the potential impacts of the proposal. Finally, the panel must develop a report on its findings and submit the report to the head of the agency within 60 days.

Additionally, SBREFA amended the RFA to bring certain interpretative rulemakings of the Internal Revenue Service (IRS) within the scope of the RFA. The law now applies to those IRS rules (that would normally be exempt from the RFA as interpretative) published in the *Federal Register* that impose a "collection of information" requirement on small entities.[6] Congress took care to define the term "collection of information" to be identical to the term used in the Paperwork Reduction Act, which means that a collection of information includes any reporting or recordkeeping requirement for more than nine people.[7]

Executive Order 13272

On March 19, 2002, the President announced his Small Business Agenda, which included the goal of "tearing down the regulatory barriers to job creation for small businesses and giv[ing] small business owners a voice in the complex and confusing federal regulatory process."[8] To accomplish this goal, the President sought to strengthen the Office of Advocacy by enhancing its relationship with the OMB's Office of Information and Regulatory Affairs (OIRA) and creating an executive order that would direct agencies to work closely with the Office of Advocacy and properly consider the impact of their regulations on small entities. On August 13, 2002, the President delivered on his promise when he signed Executive Order 13272, titled Proper Consideration of Small Entities in Agency Rulemaking.[9]

6. 5 U.S.C. § 601(b)(1)(a).
7. *Id.* § 601.
8. President Bush's Small Business Agenda, announced March 19, 2002, can be viewed at *http://www.whitehouse.gov/infocus/smallbusiness/regulatory.html*.
9. Exec. Order No. 13272, 67 Fed. Reg. 53461 (Aug. 16, 2002), available on the Office of Advocacy website at *http://www.sba.gov/advo/laws/eo13272.pdf*.

The executive order (E.O.) first required federal regulatory agencies to establish written procedures and policies on how they intend to measure the impact of their regulatory proposals on small entities, and vet those policies with the Office of Advocacy before publishing them.[10] Second, the agencies must notify the Office of Advocacy of draft rules expected to have a significant economic impact on a substantial number of small entities under the RFA.[11] Third, agencies must consider the Office of Advocacy's written comments on proposed rules and publish a response to those comments with the final rule.[12] The Office of Advocacy, in turn, must provide periodic notification, as well as training, to all federal regulatory agencies on how to comply with the RFA.[13] These preliminary steps set the stage for agencies to work closely with the Office of Advocacy and properly consider the impact of their regulations on small entities.

E.O. 13272 required agencies to submit to Advocacy by November 13, 2002, draft written procedures and policies on how the agency will consider the economic impacts on small entities. Advocacy had 60 days to provide comments on each agency's draft procedures. By February 13, 2003, agencies were to have considered Advocacy's comments and made their final procedures available to the public through the Internet or other easily accessible means.[14]

E.O. 13272 also directs the Office of Advocacy to report to OMB at least annually on agency compliance with the executive order.[15] Advocacy's first report to OMB was published in September 2003.[16] Advocacy's comments on the agencies' draft procedures were submitted as confidential interagency communications to encourage agencies to further refine their documents in response to the comments prior to their publication. As a result, Advocacy's first report did not detail the substance of Advocacy's comments on agency submittals under section 3(a) of E.O. 13272. Instead, the first report summarized the first year of activities pursuant to E.O. 13272, focused on agency compliance with the E.O.'s three key requirements, and spotlighted the high achievement and early involvement of some agencies.

Has E.O. 13272 Made a Difference?

Although the RFA has been in existence for more than 20 years, agency compliance has been inconsistent, and many of the original concerns regarding the disproportionate impact of federal regulations on small entities persist today. E.O. 13272 provides a renewed incentive for agencies to

10. *Id*. § 3(a).
11. *Id*. § 3(b). Under the Regulatory Flexibility Act (RFA), an agency must determine if a rule, if promulgated, will have a "significant economic impact on a substantial number of small entities." If the head of the agency certifies the rule will not have such an impact, further analysis under the RFA is not needed. If, however, the agency cannot certify the rule, the agency must perform regulatory flexibility analysis under the RFA (5 U.S.C. § 603-605).
12. *Id*. § 3(c).
13. *Id.* § 2(a)-(b).
14. *Id*. § 3(a).
15 *Id*. § 6. Advocacy's annual reports on implementation of the Regulatory Flexibility Act are available on the Office of Advocacy website at *http://www.sba.gov/advo/laws/flex/*.
16. *Agency Compliance with Executive Order 13272; A Report to the Office of Management and Budget* is available on Advocacy's website at *http://www.sba.gov/advo/laws/eo13272_03.pdf*.

upgrade their compliance with the RFA and give proper consideration to small entities in the agency rulemaking process.

Since August 13, 2002, Advocacy has worked to spread the word regarding the requirements of the new executive order through memoranda to agency heads[17] and roundtables with agency general counsels. As part of this outreach, Advocacy instituted an e-mail address, *notify.advocacy@sba.gov*, to make it easier for agencies to comply electronically with the notice requirements of the E.O. and the RFA.

"Executive Order 13272 inspired FDA to explore other ways of enhancing small business participation in its rulemaking process...FDA now posts a listing of all upcoming proposed and final rules that the agency believes may have an impact on small entities. This list...can be seen at *www.fda.gov/oc/industry/small business/outreach.html*... FDA remains committed to the Administration's small business enhancement initiative and we will continue to work with the SBA to forge better communications."

Jeffrey Shuren
Assistant Commissioner
for Policy
Food and Drug Adminstration

Since August 13, 2002, some agencies have responded to the E.O. by soliciting Advocacy's input on rules during the development stage. This crucial early involvement enables Advocacy to identify potential RFA compliance problems and to address them with the agency more thoroughly. Since the signing of E.O. 13272, agencies are increasingly coming to Advocacy before a rule is published in the *Federal Register* and before regulatory approaches are selected. Many agencies have yet to recognize the value of soliciting Advocacy's input early in the rule development process. With the new E.O. and leadership from the White House, agencies are increasingly recognizing the importance of small business to this nation's economy and the benefit of considering the impacts of their rulemakings on small entities.

As previously mentioned, E.O. 13272 required Advocacy to issue notices to agencies on the basic requirements of the RFA by November 13, 2002, and to provide training to agencies on compliance with the RFA.[18] On November 13, 2002, Advocacy posted on its website an RFA compliance guide for federal agencies and solicited input on its contents. With the benefit of input from agencies and others, Advocacy made further revisions to the guide, which was issued in final form in May 2003.[19]

In June 2003, Advocacy awarded a contract to Gillespie Associates to develop an RFA training curriculum based on Advocacy's RFA guide pursuant to section 2(b) of E.O. 13272. The training was pilot-tested with the assistance of three federal agencies to obtain feedback before implementing the training government-wide.[20] On July 23, 2003, Advocacy held its first training pilot at the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA). The second involved the EPA on July 24, 2003, and the third, the Department of Transportation's Research and Special Programs Administration (RSPA) on August 7, 2003.

17. Memorandum dated August 22, 2002, available on Advocacy's website at http://www.sba.gov/advo/laws/memoeo02_0822.pdf; memorandum dated November 13, 2002, available at *http://www.sba.gov/advo/laws/memorfa02_1013.pdf*.
18. Exec. Order No. 13272, § 2(a), 2(b), (Aug. 13, 2002).
19. *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* is available on Advocacy's website at *http://www.sba.gov/advo/laws/rfaguide.pdf*.
20. The July/August 2003 edition of Advocacy's monthly newsletter, *The Small Business Advocate*, contains an article describing the pilot training sessions at *http://www.sba.gov/advo/news/julaug03.pdf*.

Each training pilot provided a valuable forum for input and discussion on the presentation and content of the curriculum, including the use of team exercises as a training tool. Based on an assessment of the pilots and the input received from participants from each agency, the Office of Advocacy revised the RFA training plan. Specifically, revisions ensured participants now have sufficient time for the exercises and improved the coordination between the pre-training reading materials and the participants' guide used for the classroom training. Advocacy also revised the group exercises used in the training to provide examples of good analysis under the RFA, as well as to identify frequent missteps by agencies in fulfilling their RFA requirements.

"As a new rulesmaker, I found the training to be a very thorough introduction to the RFA."

Regulatory Specialist
Department of Transportation,
Research and Special Programs
Administration

Advocacy is working with Gillespie Associates to create an online computer-based RFA training program. The online training will be valuable for both new employees and as a review session for existing employees. The online training module will be developed through Advocacy's FY 2004 budget.

In an effort to determine the number of agencies that need training, Advocacy has identified 66 departments, agencies, and independent commissions that promulgate regulations affecting small business. These 66 are the key agencies of concern to Advocacy and the small business community. Because some are large or include a number of sub-agencies, it will take more than 66 training sessions to accomplish the task. Advocacy plans to complete training for all 66 before FY 2008, with approximately 25 agencies trained per year. The government-wide rollout of the training began in October 2003.

The comprehensive RFA training will help agencies overcome the inertia caused by past practices and will lead regulatory agencies toward exemplary RFA compliance. The RFA training will address the basics and complexities of how to comply with the RFA and when to seek input from Advocacy. It will help to solidify what a few agencies already know about the RFA and will sharpen agency knowledge of how to perform an RFA analysis.

Training the entire federal government is a challenge for Advocacy, given limited resources. This top priority will result in increased demands on the office as agencies begin to use Advocacy as a resource in their efforts to improve RFA compliance. Through training, Advocacy seeks to have agencies take ownership of their responsibilities under the E.O. and the RFA and to be consistent in properly considering the impacts of their rules on small entities and seeking regulatory alternatives to minimize those impacts.

The ultimate test of agency compliance with E.O. 13272 is whether an agency gives proper consideration to impacts on small entities and makes changes to reduce those impacts. Advocacy will seek to fulfill that objective through early involvement in rulemakings and/or submission of public

comments on proposed rules. Under the E.O., agencies must give every appropriate consideration to comments provided by Advocacy on a draft rule, and must include a discussion or explanation of the agency's response to Advocacy's comments published with the final rule in the *Federal Register*. In the past year, a handful of agencies issued final rules that were the subject of Advocacy public comments. Each of these agencies addressed the comments; however, they did not all adopt Advocacy's recommendations on behalf of small entities. More time is needed to assess overall agency compliance with this important provision of the E.O. The E.O. provisions requiring consideration of Advocacy's concerns will assist agencies in promulgating regulations with an eye toward reducing their burden on small entities.

Advocacy is optimistic that small businesses will begin to feel the benefits of E.O. 13272 when agencies adjust their regulatory development processes to accommodate the requirements of the RFA and the E.O. As more agencies work with the Office of Advocacy earlier in the rule development process and give small entity impacts appropriate consideration, small businesses will see progress. The E.O. is an important tool designed to guarantee small businesses a seat at the table where regulatory decisions are made. Advocacy will continue working closely with all federal regulatory agencies to train them on the RFA and increase compliance with both the RFA and E.O. 13272. A summary of agency compliance with E.O. 13272 is in section four of this report.

Federal Agencies' Response to the RFA

The general purpose of the RFA is clear. However, in monitoring agency compliance, the Office of Advocacy has found over the years, and reported to the President and Congress, that many federal agencies failed to conduct the proper analyses as required by the law. In recent years, Advocacy has noticed an increase in the number of agencies that make a good faith effort to comply with the RFA. Some agencies continue to fall short and others with generally good RFA compliance from time to time fail to comply on particular rulemakings.

However, agencies still fail to appreciate the RFA's requirement to consider less burdensome regulatory alternatives. Often, agencies are not aware of less burdensome alternatives that can be equally effective in achieving the agency's public policy objectives. At a minimum, if an agency cannot identify viable alternatives to their proposal, Advocacy encourages the agency to solicit comments on regulatory alternatives and to carefully consider those brought to their attention by small entities during the rulemaking process.

An agency's failure to weigh alternatives properly not only defeats the core purpose of the RFA, but effectively excludes small entities from meaningful opportunities to influence the regulatory development process as Congress intended. Until 1996, there was no legal consequence for an agency's failure to comply with the RFA, nor did small entities have a civil remedy to seek redress. Although the RFA authorized the Chief Counsel for Advocacy to file *amicus curiae* briefs in court cases involving agency regulation, prior to SBREFA, Advocacy could not successfully raise the issue of agency noncompliance because the provisions of the RFA were not directly reviewable by courts.

Section 2: The Role of the Office of Advocacy

By independently representing the views of small business, the Office of Advocacy is an effective voice for small business before Congress and federal regulatory agencies. Since its founding in 1976, the Office of Advocacy has pursued its mission in two ways: by creating research products that help lawmakers understand the contribution of small businesses to the U.S. economy and through regulatory experts who monitor federal agency compliance with the RFA and work to convince federal agencies to consider the impact of their rules on small businesses before the rules go into effect. In 2003, Advocacy added a new component: reducing regulatory burdens for small businesses at the state level by involving its regional advocates in promoting state model legislation based on Advocacy's experience with the federal Regulatory Flexibility Act and E.O.13272. The regional advocates, located in SBA's 10 regions, help identify regulatory concerns of small business by monitoring the impact of federal and state policies at the grassroots level.

Advocacy promotes agency compliance with the RFA in several ways. Advocacy staff members regularly review proposed regulations and work closely with small entities, trade associations, and federal regulatory contacts to identify areas of concern, and then work to ensure that the RFA's requirements are fulfilled. Chart 1 identifies the distribution of the compliance issues identified in Advocacy comment letters and regulatory interventions in 2003. Chart 2 reflects the agencies that were recipients of Advocacy comment letters and initiatives, but does not reflect on these agencies' overall RFA compliance. In addition, Advocacy's RFA training sessions, as required by E.O. 13272, provide agencies with the tools and information they need to consider the impact of their regulations on small entities.

Early intervention by the Office of Advocacy has helped federal agencies develop a greater appreciation of the role small business plays in the economy and the rationale for ensuring that regulations do not erect barriers to competition. The Office of Advocacy continues to provide economic data, whenever possible, to help agencies identify industries or industrial sectors dominated by small firms. Statistics show regulators why rules should be written to fit the economics of small businesses if public policy objectives will not otherwise be compromised. Advocacy makes the statistics available on its Internet website and maintains a database of information on trade associations that can be helpful to federal agencies seeking input from small businesses.

The Office of Advocacy also promotes agency compliance with the RFA through its collaboration with a network of small business representatives. Advocacy staff regularly meet with small businesses and their trade associations regarding federal agency responsibilities under the RFA, factors to be addressed in agency economic analyses, and the judicial review provision enacted in the SBREFA amendments. Roundtable meetings with small businesses and trade associations focus on specific regulations and issues, such as procurement reform, environmental regulations, and industrial safety. Advocacy also plays a key role as a participant in the SBREFA panels convened to review EPA and OSHA rules (Table 1).

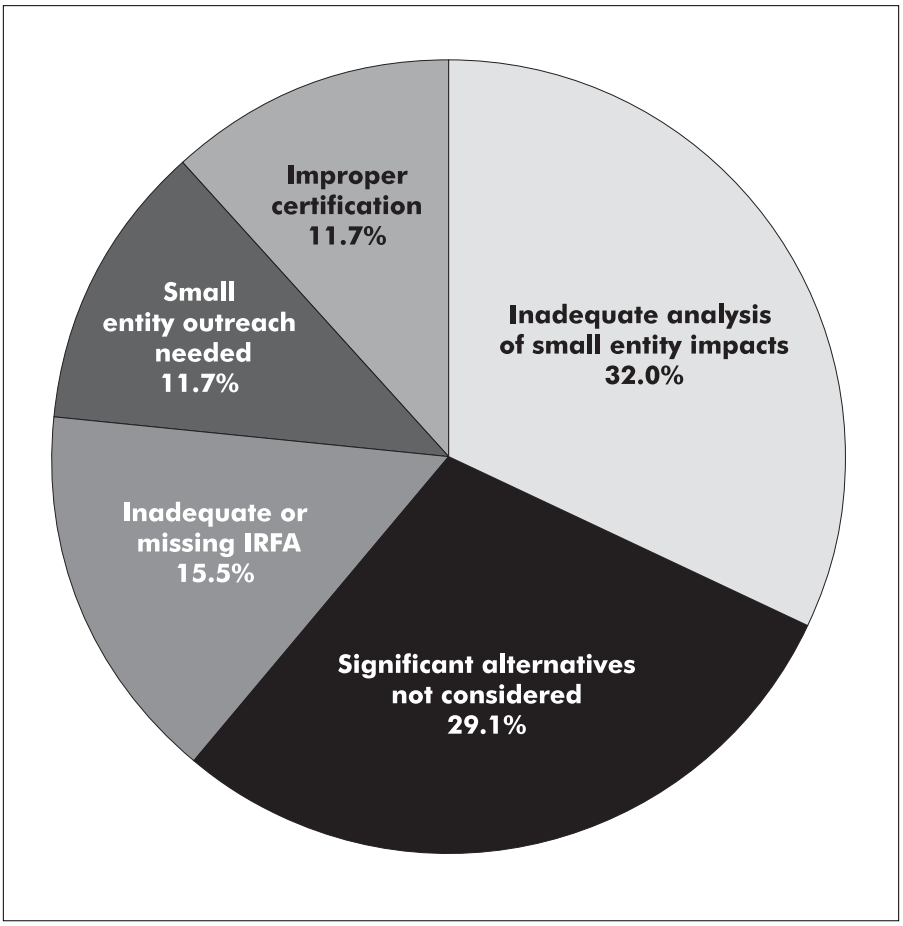
As regulatory proposals and final rules are developed, the Office of Advocacy may become involved through pre-proposal consultation, interagency review under E.O. 12866, formal comment letters and informal comments to the agency, congressional testimony and "friend of the court" briefs. Table 2 is a listing of Advocacy's formal comment letters to the federal agencies in FY 2003.

Table 3 provides a list of the rules in which Advocacy intervened and assisted small businesses in obtaining cost savings. The Office of Advocacy calculates savings based on agency data or industry estimates in the absence of agency data. In FY 2003, revisions to federal agency actions and rulemakings in response to Advocacy's interventions produced first-year cost savings of more than $6.3 billion.

The Office of Advocacy continues to work through the RFA and SBREFA processes to bring about better rulemaking at federal agencies. Executive Order 13272 also encourages federal agencies to revisit the importance of the RFA and improve their compliance.

Overall, in FY 2003, the Office of Advocacy continued to see an increase in the number of agency inquiries requesting information on how to comply with the RFA and how to address RFA issues in the context of specific rules. Such inquiries provide Advocacy with opportunities to provide agencies one-on-one guidance, as well as opportunities to address the concerns of small entities before a rule is proposed or finalized.

Chart 1. Advocacy Comments, by Key RFA Compliance Issue, FY 2003 (Percent)



Throughout Fiscal Year 2003, the Office of Advocacy advised many agencies on how to comply with the RFA. Chart 1 illustrates the key concerns raised by Advocacy's comment letters and pre-publication review of draft rules. The chart highlights areas for improved compliance based on Advocacy's analysis of its FY 2003 comment letters and other regulatory interventions summarized in this report.

Chart 2. Advocacy RFA Comments by Agency, FY 2003 (Percent)

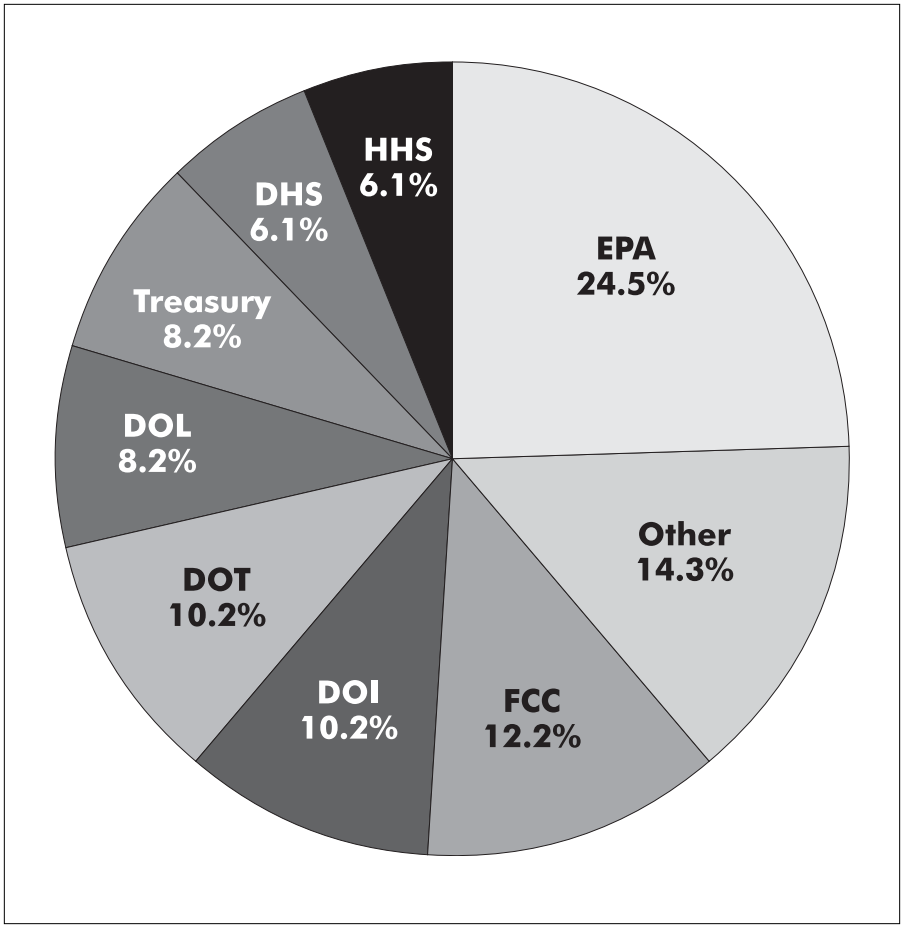


Chart 2 identifies agencies that were the focus of Advocacy's letters and regulatory interventions during Fiscal Year 2003. With the volume of rulemakings in progress each year, Advocacy cannot review every rule for RFA compliance. Instead, Advocacy takes its direction from small businesses, focusing its regulatory interventions on rulemakings identified by small businesses as a priority. This chart simply illustrates the distribution of Advocacy's comment letters and other regulatory interventions across agencies and may not reflect on the agencies' overall RFA compliance records.

Table 1: SBREFA Panels Through Fiscal Year 2003

Rule Subject	Date Convened	Report Completed	NPRM[1]	Final Rule Published
Environmental Protection Agency				
Non-Road Diesel Engines	03/25/97	05/23/97	09/24/97	10/23/98
Industrial Laundries Effluent Guideline	06/06/97	08/08/97	12/12/97	Withdrawn[2]
Stormwater Phase 2	06/19/97	08/07/97	01/09/98	12/08/99
Transport Equipment Cleaning Effluent Guideline	07/16/97	09/23/97	06/25/98	08/14/00
Centralized Waste Treatment Effluent Guideline	11/06/97	01/23/98	01/13/99	12/22/00
Underground Injection Control Class V Wells	02/17/98	04/17/98	07/29/98	12/07/99
Ground Water	04/10/98	06/09/98	05/10/00	
Fed. Implementation Plan for Regional Nitrogen Oxides Reductions	06/23/98	08/21/98	10/21/98	
Section 126 Petitions	06/23/98	08/21/98	09/30/98	05/25/99
Radon in Drinking Water	07/09/98	09/18/98	11/02/99	
Long Term 1 Enhanced Surface Water Treatment	08/21/98	10/19/98	04/10/00	01/14/02
Filter Backwash Recycling	08/21/98	10/19/98	04/10/00	06/08/01
Light Duty Vehicles/Light Duty Trucks Emissions and Sulfur in Gasoline	08/27/98	10/26/98	05/13/99	02/10/00
Arsenic in Drinking Water	03/30/99	06/04/99	06/22/00	01/22/01
Recreational Marine Engines	06/07/99	08/25/99	10/05/01 08/14/02	11/08/02
Diesel Fuel Sulfur Control Requirements	11/12/99	03/24/00	06/02/00	01/18/01
Lead Renovation and Remodeling Rule	11/23/99	03/03/00		
Metals Products and Machinery Effluent Guideline	12/09/99	03/03/00	01/03/01	05/13/03

Table 1: SBREFA Panels Through Fiscal Year 2003 (continued)

Rule Subject	Date Convened	Report Completed	NPRM[1]	Final Rule Published
Environmental Protection Agency (continued)				
Concentrated Animal Feedlots Effluent Guideline	12/16/99	04/07/00	01/12/01	02/12/03
Reinforced Plastics Composites	04/06/00	06/02/00	08/02/01	04/21/03
Stage 2 Disinfection Byproducts	04/25/00	06/23/00		
Long Term 2 Enhanced Surface Water Treatment	04/25/00	06/23/00	08/11/03 08/18/03	
Emissions from Non-Road and Recreational Engines and Highway Motorcycles	05/03/01	07/17/01	10/05/01 08/14/02	11/08/02
Construction and Development Effluent Guideline	07/16/01	10/12/01	06/24/02	
Aquatic Animal Production Industry	01/22/02	06/19/02	09/12/02	
Lime Industry—Air Pollution	01/22/02	03/25/02	12/20/02	
Non-Road Diesel Emissions—Tier 4 Rules	10/24/02	12/23/02	05/23/03	
Occupational Safety and Health Administration				
Tuberculosis	09/10/96	11/12/96	10/17/97	
Safety and Health Program Rule	10/20/98	12/19/98	Withdrawn	
Ergonomics Program Standard	03/02/99	04/30/99	11/23/99	11/14/00[3]
Electric Power Generation, Transmission, and Distribution	5/01/03	06/30/03		
Confined Spaces in Construction	09/25/03	11/25/03		
Occupational Exposure to Crystalline Silica	10/21/03	12/19/03		

1. Notice of proposed rulemaking (NPRM).
2. Proposed rule was withdrawn August 18, 1999. EPA does not plan to issue a final rule.
3. President Bush signed Senate J. Res. 6 on 03/20/01, which eliminates this final rule under the Congressional Review Act.

Table 2: Regulatory Comment Letters Filed by the Office of Advocacy, Fiscal Year 2003*

Date	Agency	Comment Subject
10/28/02	HUD	Notice of Proposed Rulemaking on the Real Estate Settlement Procedures Act (RESPA); Simplifying and Improving the Process for Obtaining Mortgages to Reduce Settlement Costs to Consumers; 67 Fed.Reg. 49134 (July 29, 2002).
10/28/02	DOC/NOAA	The New England Groundfish Management Plan.
10/30/02	DOL/OSHA	Ergonomics for the Prevention of Musculoskeletal Disorders: Guidelines for Nursing Homes; 67 Fed. Reg. 55884 (August 30, 2002).
11/08/02	DOC/NOAA	The New England Groundfish Management Plan.
11/14/02	Treasury/IRS	Guidance on Reporting of Deposit Interest Paid to Nonresident Aliens; 67 Fed. Reg. 50386 (August 2, 2002).
11/27/02	HHS/FDA	Support for the Petition for Continuation of Stay of Action; FDA Final Rule on Policies, Requirements and Procedures; Prescription Drug Marketing Act of 1987; Prescription Drug Amendments of 1992; 64 Fed. Reg. 67720 (December 3, 1999).
12/04/02	Treasury/IRS	Notice of Proposed Rulemaking: Excise Taxes; Definition of Highway Vehicle; 67 Fed. Reg. 38913 (June 6, 2002).
12/13/02	GSA	Notice of Proposed Rulemaking; Federal Acquisition Regulation; Procurement of Printing and Duplicating through the Government Printing Office; 67 Fed. Reg. 68914 (November 13, 2002).
12/23/02	EPA	Transmittal letter to Christine Todd Whitman, Administrator, EPA, regarding the Report of the Small Business Advocacy Review Panel on Control of Emission of Air Pollution from Land-Based Nonroad Compression Ignition Engines.
01/13/03	SEC	Notice of Proposed Rulemaking; Strengthening the Commission's Requirements Regarding Auditor Independence; 67 Fed. Reg. 76780 (December 13, 2002).
01/24/03	DOL/ETA	Notice of Proposed Rulemaking; Unemployment Compensation—Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations; 67 Fed. Reg. 72122 (December 4, 2002).

*Note: The complete text of Advocacy's regulatory comments is available on Advocacy's website, *http: www. sba.gov/advo/laws/comments/*.

Table 2: Regulatory Comment Letters Filed by the Office of Advocacy, Fiscal Year 2003 (continued)

Date	Agency	Comment Subject
01/27/03	DOI/FWS	Notice of Proposed Rulemaking; Florida Manatees; Incidental Take During Specified Activities; 67 Fed. Reg. 69078 (November 14, 2002).
01/28/03	DOT	Notice of Proposed Rulemaking; Participation by Disadvantaged Business Enterprises in Airport Concessions; 67 Fed. Reg. 76327 (December 12, 2002).
02/05/03	FCC	Initial Regulatory Flexibility Analysis for Triennial Review of Unbundling Obligations of Incumbent Local Exchange Carriers; CC Dkt. No. 01-338; FCC 01-361.
02/06/03	OMB	In response to the Office of Information and Regulatory Affair's (OIRA) report to Congress titled *Stimulating Smarter Regulation*, which listed 267 rules recommended for reform, the Office of Advocacy highlighted 30 regulations and guidance documents that are high priorities for reform to benefit small businesses.
02/28/03	FCC	Federal-State Joint Board on Universal Service, *et alia*; CC Docket No. 96-45; FCC 02-329.
03/14/03	DOT	Notice of Proposed Rulemaking; Computer Reservations System (CRS) Regulations; Statements of General Policy; 67 Fed. Reg. 69366 (November 15, 2002).
03/24/03	EPA	Notice of Proposed Rulemaking; Acquisition Regulation: Background Checks for Environmental Protection Agency (EPA) Contractors Performing Services On-Site; 68 Fed. Reg. 2988 (January 22, 2003).
04/07/03	HHS/FDA	Proposed Rule; Dietary Supplements Containing Ephedrine Alkaloids; Reopening of the Comment Period; 68 Fed. Reg. 10417 (March 5, 2003).
04/09/03	FCC	Broadcast Ownership Rules MB Dkt. No. 02-277; FCC 02-249.
05/12/03	DHS/Customs	Notice of Proposed Rulemaking on the Tariff Treatment Related to Disassembly Operations Under the North American Free Trade Agreement; 68 Fed. Reg. 12011 (March 13, 2003).
05/14/03	FCC	Basic and Enhanced 911 Provision by Currently Exempt Wireless and Wireline Services; CC Dkt. No. 94-102; FCC 02-326.

Table 2: Regulatory Comment Letters Filed by the Office of Advocacy, Fiscal Year 2003 (continued)

Date	Agency	Comment Subject
05/15/03	HHS/OCR	Health Insurance Portability and Accountability Act of 1996 (HIPAA)-Standards for Privacy of Individually Identifiable Health Information.
06/03/03	DOI/FWS	Notice of Proposed Rulemaking; Establishment of Three Additional Manatee Protection Areas in Florida; 68 Fed. Reg. 16602 (April 4, 2003).
06/04/03	OMB	Comments Regarding the Draft Report of the Small Business Paperwork Relief Task Force; 68 Fed. Reg. 25165 (May 9, 2003).
06/10/03	Commerce/NMFS	Proposed Emergency Rule on the Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies; 68 Fed. Reg. 20096 (April 24, 2003).
06/24/03	DOL	Proposed Rulemaking; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees; 68 Fed. Reg. 15559 (March 31, 2003).
06/27/03	DOL/OSHA	Reply to the notification letter regarding a small business review panel on Electric Power Generation, Transmission, and Distribution.
06/27/03	DOI/FWS	Arizona Pygmy-owl Critical Habitat Designation; 67 Fed. Reg. 71032 (November 27, 2002).
07/07/03	Treasury/FinCen	Notice of Proposed Rulemaking on the Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Investment Advisers; 68 Fed. Reg. 23646 (May 5, 2003).
07/07/03	DOJ/ATF	Notice of Proposed Rulemaking on Commerce in Explosives; 68 Fed. Reg. 4406 (January 29, 2003).
08/14/03	FCC	Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991 (also known as the "Do-Not-Call" and the "Do-Not-Fax" rule); CG Dkt No. 02-278; FCC 03-153.
08/20/03	EPA	Notice of Proposed Rulemaking on the Control of Emissions of Air Pollution From Nonroad Diesel Engines and Fuel; 68 Fed. Reg. 28328 (May 23, 2003).

Table 2: Regulatory Comment Letters Filed by the Office of Advocacy, Fiscal Year 2003 (continued)

Date	Agency	Comment Subject
8/25/03	FCC	Petition for Reconsideration; Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991 (also known as the "Do-Not-Call" and the "Do-Not-Fax" rule); CG Dkt No. 02-278; FCC 03-153.
09/02/03	EPA	Toxic Chemical Release Reporting; Alternate Threshold for Low Annual Reportable Amounts; Request for Comment on Renewal Information Collection; 68 Fed. Reg. 39071 (July 1, 2003).
09/09/03	Treasury/IRS	To Assistant Deputy Commissioner David A. Mador supplementing previous comments submitted by the Office of Advocacy in regard to Excise Taxes: Communications Services, Distance Sensitivity; 58 Fed. Reg. 15690 (April 1, 2003).
09/26/03	DOT/NHTSA	In Support of Petition for Reconsideration—Denman Tire Corporation; Federal Motor Vehicle Safety Standards; Tires; 68 Fed. Reg. 38116 (June 26, 2002).

Table 3: Regulatory Cost Savings, Fiscal Year 2003

The Office of Advocacy's involvement in the following rulemaking activities during Fiscal Year 2003 resulted in first-year regulatory cost savings of more than $6.3 billion,[1] and more than $5.7 billion in ongoing annual savings.[2]

Agency	Subject Description	Cost Savings
EPA	*Metal Products and Machinery Effluent Guidelines.* The Environmental Protection Agency (EPA) excluded three significant industrial sectors from a final rule imposing additional water pollution regulations.	**$1 billion in one-time small business savings.** Source: EPA.
EPA	*Toxic Substance Control Act Inventory Update Rule.* EPA's final rule: (1) increased the threshold triggering processing and use reporting responsibilities; and (2) eliminated the proposed confidential business information reassertion requirements.	**$4.9 million in annual small business cost savings** Source: EPA.
EPA	*Spray and Pour Polyurethane Foam Allocation Rule.* EPA's final rule created a petition process to allow small businesses that use or manufacture polyurethane foam access to a chemical EPA had originally proposed to ban.	**$75 million in sales would have been lost in 2003, and $50 million in 2004.** Source: Advocacy estimate based on EPA data.
EPA	*Industrial Boilers and Process Heaters Air Toxics Rule*. EPA's proposed rule exempts small boilers commonly used by smaller businesses from further, potentially costly emission control requirements.	**$354 million in first-year savings; additional $18 million in annual savings.** Source: EPA and the furniture manufacturing industry.
DOI/NPS	*Special Regulation for Areas of the National Park System.* The National Park Service (NPS) postponed for one year the implementation of a rule to restrict snowmobile use in Yellowstone National Park, the John D. Rockefeller, Jr., Memorial Parkway, and portions of the Grand Teton National Park.	**$15 million savings in potential economic loss to small businesses.** Source: NPS.
NEFMC and DOC/ NMFS	*New England Ground Fish Management Plan*. The New England Fishery Management Council (NEFMC) postponed further action on Amendment 13 pending the results of a confirmation study and two independent research studies.	**The average estimated reduction in total fishing income that was avoided for the given period was $51.2 million.** Source: NEFMC.

1. These cost savings consist of foregone capital or annual compliance costs that otherwise would be required in the first year of a rule's implementation.
2. The Office of Advocacy captures cost savings in the fiscal year and quarter in which the regulating agency agrees to changes resulting from the Office of Advocacy's intervention. The results reported for any quarter, therefore, do not reflect the total of Advocacy's interventions to date that may produce quantifiable cost savings in the future. In addition, because agencies may make further revisions to a rule, cost savings may adjust over time based on new information and/or further negotiations.

Table 3: Regulatory Cost Savings, Fiscal Year 2003 (continued)

Agency	Subject Description	Cost Savings
DHS/INS	*Rule Limiting the Period of Admission for B Nonimmigrant Aliens.* The INS withdrew a draft final rule from OMB review that would have eliminated the 6-month minimum admission period for B-2 visitors for pleasure. A default admission period of 30 days would have been imposed which could have severely affected small businesses	**Small businesses in the travel industry saved approximately $2.1 billion annually.** Source: DOC.
Treasury/IRS	*Rule on the Definition of Highway Vehicle and the repeal of the exemption from excise taxes of "mobile machines."* The IRS delayed further action on a proposed rule that would eliminate a 30-year definition that exempted certain vehicles from highway use excise taxes.	**Delaying the rule saved small businesses approximately $460 million in increased taxes and compliance costs.** Source: FHWA.
DOI/FWS	*Rule Limiting the Construction of Docks in Florida.* The Fish and Wildlife Service (FWS) withdrew a proposed rule that would have significantly limited dock construction in 12 Florida counties and required dock construction firms in the state to obtain letters of authorization from the agency before building.	**Cost savings amount to $102 million annually for affected small businesses in Florida.** Source: FMCA.
DOI/FWS	*Rule Designating Critical Habitat.* Due to potential economic impacts on small developers and builders, FWS excluded Solano County and four other counties from the final rule designating critical habitat in California and Oregon.	**Excluding Solano County produced cost savings of $141 million in the first year and annually.** Source: FWS.
EPA	*Miscellaneous Coating Manufacturing Air Toxics Rule.* EPA adopted recommended alternatives to minimize the cost burden on affected small business manufacturers of a proposed air toxics standard for companies that produce paints, inks, and adhesives.	**Produced first-year cost savings of $22.5 million and annual compliance savings of $12 million.** Source: NPCA.
EPA	*Construction General Permits Rule.* The EPA adopted a final general permit for construction sites affecting one or more acres to: (1) eliminate certain pollutant budget requirements in the permit; and (2) have EPA determine whether a construction project causes or contributes to water quality violations.	**Cost savings in monitoring and consultant fees amount to $200 million in the first year and annually.** Source: Advocacy estimate based on EPA data.
EPA	*Lime Manufacturing Air Toxics Rule.* EPA's rule created a separate subcategory for facilities with wet scrubbers.	**Produced cost savings of $800,000 annually.** Source: NLA

Table 3: Regulatory Cost Savings, Fiscal Year 2003 (continued)

Agency	Subject Description	Cost Savings
EPA	*Reinforced Plastics Air Toxics Rule.* In the final rule that requires the manufacturers of reinforced plastic parts to reduce emissions of certain specific toxic air pollutants from their plants, EPA adopted a recommendation that the 95 percent capture and control requirements be applied only to new plants and not existing plants.	**Produced cost savings for small businesses of about $4 million in the first year and annually.** Source: EPA and ACMA.
EPA	*Miscellaneous Plastic Parts and Products Air Toxics Rule.* In the final rule that requires certain plastic parts manufacturers to reduce the emissions of volatile organics from products used to coat parts in the manufacturing process, EPA incorporated suggested alternatives for complying with multiple overlapping rules.	**Produced implementation cost savings of $20 million in the first year and annually.** Source: Advocacy estimate based on EPA data.
FCC	*Triennial Review of Unbundled Network Elements (UNE) Obligations.* The FCC adopted a recommendation that the FCC retain the UNE obligations to preserve the viability of competitive telecommunications carriers' access to unbundled network elements.	**Produced cost savings of $1.6 billion in the first year and annually.** Source: ALTS.
FCC	*Rule Limiting Fax Communications.* The FCC stayed enforcement of a rule that required any person to obtain prior express permission in writing, with a signature from the recipient, before sending an unsolicited fax advertisement.	**Cost savings estimates not yet available.**
DOT/FMCSA	*Hours of Service of Drivers, Driver Rest and Sleep for Safe Operations.* The Federal Motor Carrier Safety Administration's (FMCSA) final rule limiting the number of hours that drivers of commercial motor vehicles can work incorporated small business suggestions to exempt the intercity motor coach industry and drop the proposed requirement for electric on-board recorders.	**Produced a savings of $180 million in first-year capital costs and $18 million in annually recurring maintenance costs.** Source: FMCSA.
SEC	*Securities and Exchange Commission Procurement Action*. The SEC revised a sole source solicitation that would have prevented small business competition.	**Resulted in a small business contractor winning the contract for a one-time value of $59,970.** Source: SEC.
DOD/Army	*Department of the Army Procurement Action*. The Department of the Army agreed to exercise the next option year of a contract serviced by small business.	**The contract is valued at $372,000 annually.** Source: Army.
FTC	*Telemarketing Sales Rule*. In its final rule, the FTC adopted recommendations to let small businesses update their company-specific Do Not Call lists quarterly instead of monthly. The rule also allows small businesses to receive access to five area codes of the national Do Not Call Registry without charge.	**Produced cost savings of $31 million in the first year and annually.** Source: FTC.

Table 4: Summary of Regulatory Cost Savings, FY 2003 (In Dollars)

Rule / Intervention[1]	First-Year Cost	Annual Cost
EPA Metal Products and Machinery Effluent Guidelines	1,000,000,000	1,000,000,000
EPA TSCA Inventory Update Rule Amendments[2]	4,912,500	4,912,500
EPA Spray and Pour Polyurethane Foam Allocation Rule	75,000,000	50,000,000
EPA Industrial Boilers and Process Heaters Air Toxics Rule[3]	354,198,684	18,198,684
NPS Special Regulation for Areas of the National Park System	15,000,000	-
NMFS New England Groundfish Management Plan (Amendment 13)	51,200,000	-
INS Limiting the Period of Admission for B Nonimmigrant Aliens	2,100,000,000	2,100,000,000
IRS Mobile Machinery[4]	460,000,000	460,000,000
FWS Limiting the Construction of Docks in FL[5]	102,000,000	102,000,000
FWS Critical Habitat in CA and OR	141,000,000	141,000,000
EPA Miscellaneous Coating Manufacturing Air Toxics Rule	22,500,000	12,000,000
EPA Construction General Permits	200,000,000	200,000,000
EPA Lime Manufacturing Air Toxics Rule	800,000	800,000
EPA Reinforced Plastics Air Toxics Rule[6]	4,000,000	4,000,000
EPA Miscellaneous Plastic Parts Air Toxics Rule	20,000,000	20,000,000
FCC Triennial Review - Unbundled Network Elements[7]	1,600,000,000	1,600,000,000
FMCSA Hours of Service Rule	180,000,000	18,000,000
SEC Procurement Action	59,970	-
DOD Army Procurement Action	372,000	372,000
FTC Telemarketing Sales Rule	31,000,000	31,000,000
TOTAL	**6,362,043,154**	**5,762,283,184**

1. The Office of Advocacy bases its cost savings estimates on agency data and industry estimates. Cost savings for a given rule are captured in the fiscal year in which the agency agrees to changes in the rule as a result of Advocacy's intervention. Where possible, savings are limited to those attributable to small businesses. These are best estimates. First-year cost savings consist of either capital or annual costs that would be incurred in the rule's first year of implementation. Recurring annual cost savings are listed where applicable.
2. All figures were provided on a per-reporting-cycle basis. Advocacy took the difference between the costs put forth in the proposed rule and those provided in EPA's amended proposal and divided by the length of the reporting cycle. To that figure were added the cost savings from EPA agreeing to drop the confidential business information (CBI) reassertion requirements.
3. A study commissioned by the furniture manufacturing industry revealed first-year and annual costs of $18 million. EPA data suggest that 1,386 boilers were exempted (1,344 after accounting for the 42 boilers already taken into account by the furniture manufacturing study) with average costs of retrofitting of $250 million. Annual costs are those derived by the furniture manufacturing study: $18 million.
4. The final annual revenue impact is $462 million (based on Frank Swain's congressional testimony May 1, 2003, citing Federal Highway Administration estimates).
5. Based on estimates from the Florida Marine Construction Association (FMCA), the rule would have cost their members approximately $102 million per year in lost business, and 996 jobs would also be lost. Most of the loss is borne by Southwest Florida. FMCA estimates that its members account for 10 percent of all revenues for the total marine contracting industry.
6. The October 2001 analysis by Environomics, prepared for the Composites Fabricators Association, estimated that imposing the 95 percent capture and control on existing plants would have cost about $40 million annually, or about 2.4 times the EPA estimate. EPA staff estimates that about 10 percent of the affected firms are small, making the small business savings roughly $4 million per year.
7. According to the Association for Local Telecommunications Services (ALTS), had the unbundling obligations been lifted, most competitive local exchange carriers (CLECs) would have gone out of business. Those remaining would have worked out leasing agreements with the regional Bell operating companies (RBOCs). We are using the $1.6 billion increase in market capitalization for CLECs as proxy for the cost savings achieved by the FCC rule allowing the CLECs to continue their reliance on unbundled network elements (UNE) obligations. The CLECs in the ALTS study employ 70,000 employees.

Section 3: RFA Achievements in Fiscal Year 2003 and Ongoing Concerns

Department of Agriculture
Food Safety and Inspection Service

Issue: Performance Standards for the Production of Ready-to-Eat Meat and Poultry Products

On June 4, 2003, the Department of Agriculture's Food Safety and Inspection Service (FSIS) published an interim final rule, with request for comment, requiring food establishments that produce certain ready-to-eat (RTE) meat and poultry products to take steps to further reduce the incidence of Listeria monocytogenes (Listeria). The interim final rule requires establishments that produce RTE products to develop written procedures to control Listeria, to test and verify the effectiveness of the procedures, and to share testing data with FSIS. To enforce the rule, FSIS will continue to conduct random testing to verify that establishments have control programs in place that are effective at reducing Listeria.

Advocacy was involved at the pre-proposal stage in 2001, and then again prior to the publication of the interim final rule. As FSIS acknowledged in its rulemaking, small and very small businesses constitute about 97 percent of the establishments in the RTE meat and poultry industry, and would incur 80 percent of the cost of complying with the rule. Advocacy was pleased that FSIS published an interim final rule with the opportunity for public comment, rather than a direct final rule. This allowed small businesses additional time to analyze the rule and file public comments. Additionally, Advocacy was pleased that FSIS published a small business compliance guide and agreed to reduce the frequency of verification tests at small establishments with good compliance histories.

Department of Commerce
National Marine Fisheries Service

Issue: Amendment 13 to the New England Groundfish Management Plan

The New England Fishery Management Council (NEFMC) is developing a major revision to the fishery management plan governing the federal fishery for groundfish off the Northeastern United States. Commonly referred to as Amendment 13, the comprehensive fishing plan revisions will be designed to rebuild the groundfish stock, eliminate overfishing, and reduce by-catch, which occurs when other fish are accidentally caught. The revisions may include quotas, area restrictions, days at sea limitations and gear restrictions. Small entities in the fishing community have advised Advocacy that the plan revisions could determine whether small fisherman will be able to continue to make a viable income. Following action by the NEFMC in November 2003, the National Marine Fisheries Service (NMFS) will develop a proposed rule to implement Amendment 13.

Advocacy will work closely with the affected small entities and NMFS to ensure the rulemaking complies with the RFA. By court order, a final regulation must be implemented by May 2004.

Advocacy is working closely with the fishing industry and has an excellent working relationship with NMFS. Through Advocacy's efforts to ensure that the concerns of small entities are addressed and that the best available science is used in developing Amendment 13, small businesses had an interim victory in late 2002. In October, Advocacy wrote NEFMC recommending that an independent stock assessment be performed to ensure that their decisions would be based on the best available science, and that less burdensome regulatory alternatives were considered. Advocacy asked that further action on the management plan be delayed pending the results of a confirmation study and two independent research studies to determine what, if any, impact a previous error had on the overall groundfish stock assessment. The NEFMC obtained an extension of a court-imposed deadline and postponed its consideration pending those results. Based on data from the New England Fishery Management Council, the average estimated reduction in total fishing income that was avoided for the given period was $51.2 million.

"Many things have helped in making the Amendment 13 industry version acceptable. However, we feel strongly that the Regulatory Flexibility Act process helped very much with this situation, as well as the assistance and support of the Office of Advocacy of the Small Business Administration. Amendment 13 will make a difference in many people's lives. Fishermen will be able to stay in the fishing industry and still support their families."

Angela Sanfilippo, President
Gloucester Fishermen's Wives Association

In April 2003, NMFS proposed an emergency rule to continue measures specified in a court-approved settlement agreement pending implementation of Amendment 13 and to implement a days at sea (DAS) leasing program to mitigate potential harm from the continuation of the terms of the settlement agreement. Under the proposal, NMFS would implement a program to allow permit holders to lease DAS from one multispecies vessel to another for no more than one fishing year. NMFS sought to implement the proposal on an emergency basis to provide the fishing industry with an opportunity to mitigate the potential economic harm caused by continuation of the restrictive measures while maintaining conservation neutrality. On June 10, 2003, Advocacy submitted comments encouraging NMFS to give full consideration to the comments of small entities in the fishing community prior to making a final determination on whether to implement the proposed emergency DAS leasing program. Advocacy also encouraged NMFS to perform extensive outreach to ensure that affected small businesses had an opportunity to participate in the process. In July, NMFS withdrew the DAS portion of the emergency rulemaking because of the uncertainty of the economic impact on the industry. The terms of the settlement agreement remain in effect.

Department of Health and Human Services
Office of Civil Rights

Issue: Health Insurance Portability and Accountability Act of 1996 – Standards for Privacy of Individually Identifiable Health Information; Standards for the Security of Electronic Health Information

Congress enacted the Health Insurance Portability and Accountability Act (HIPAA) in 1996. Among other things, HIPAA required the Department of Health and Human Services (HHS) to establish certain privacy and electronic transaction standards. Pursuant to the Administrative Simplification subtitle of HIPAA, HHS promulgated rules providing security standards for protecting individually identifiable health information (privacy rule) when it is maintained by a covered health care provider or when it is transmitted electronically (electronic transaction rule). The rules apply to health plans, health care clearinghouses, and most health care providers. The privacy rule was effective on April 14, 2003, and the electronic transaction rule was effective on October 16, 2003.

The vast majority of health care providers and entities covered by the rules are small. Therefore, Advocacy was concerned that small health care entities and providers would be significantly affected. Similarly, providers were concerned that HHS would enforce penalties while they were still learning how to comply with the rule. Advocacy was intimately involved prior to the rule's publication and during the public comment periods for the proposed and final rules. Advocacy filed public comments on the rule on February 25, 2000.

As a result of Advocacy's involvement, the final rule gave covered small entities an additional year to comply with the privacy regulations. However, HHS has yet to publish small entity compliance guides as required under SBREFA, although the agency has been encouraged to do so by Advocacy in its public comment letter and a followup letter on May 15, 2003. Because of the complexity of the rule, Advocacy encouraged HHS officials to disseminate compliance information to small health care providers. HHS' Office of Civil Rights, charged with enforcement of the privacy rule, has supplemented its web page with information for smaller providers and other small businesses. Further, Medicare officials within HHS agreed to continue to pay claims that do not meet the new transaction standards after the October 16 deadline, ensuring that cash flow to providers is not disrupted.

Department of Homeland Security
Immigration and Naturalization Service

Issue: Limiting the Period of Admission for B Nonimmigrant Aliens

In April 2002, the Immigration and Naturalization Service (INS) published a proposed rule limiting the period of admission for B nonimmigrant aliens. The proposal eliminated the minimum admission period of B-2 visitors for pleasure; reduced the maximum admission period of B-1 and B-2

visitors from one year to six months; and established greater control over a B visitor's ability to extend status or change status to that of a nonimmigrant student. The INS certified that the rule would not have a significant economic impact on a substantial number of small entities. Advocacy submitted comments expressing its concern about the potential economic impact the proposal might have on small entities in the travel and tourism industry, such as hotels, tour operators, souvenir shop owners, transportation providers, and restaurant owners. Although the proposal required only nonimmigrant aliens to comply with the regulation, Advocacy asserted that the rule had a foreseeable impact on the travel industry. Advocacy advised the INS to perform an initial regulatory flexibility analysis, as a matter of good public policy, to explore the economic impacts of the rule fully and evaluate less costly alternatives. In February 2003, INS withdrew a draft final rule from OMB review, generating annual cost savings of approximately $2.1 billion for small businesses in the travel industry. Advocacy will continue to work with the INS on future visa rules that may significantly affect small businesses in the travel industry.

"Many in the DC area who rely on international tourists and business travelers have been hurt by the decline in travel here. Had the B-2 visa rule been implemented, even fewer international travelers would visit DC and I am certain my business would have seen fewer customers come to us for guide services."

Neil Amrine, President, Guide Service of Washington, Inc.

Issue: Port Security

Department of Homeland Security
U.S. Coast Guard

On July 1, 2003, the Coast Guard published "temporary interim" rules on maritime port security. The rules govern security for onshore and offshore facilities and vessel security. They also establish port security committees in every port and mandate an automatic identification system for vessels. Mandated by the Maritime Transportation Security Act of 2002,[21] the interim rules are exempt from the notice and comment requirements of the Administrative Procedure Act,[22] (APA) and thus from the RFA. However, the Coast Guard completed initial regulatory flexibility analyses to flesh out the impacts on small entities. Prior to publication of the interim rules, the Coast Guard held seven stakeholder meetings around the country and specifically sought the input of small businesses. Advocacy also participated in two briefings for federal agencies prior to publication of the interim rules.

After the interim rules were published, the Coast Guard addressed the concerns of small businesses that commented on the rules. For example, commenters pointed out that the definition of onshore "facilities" would affect a variety of tourist attractions, restaurants, and other areas where tourist boats occasionally docked. The Coast Guard agreed that the definition incorrectly included such entities and re-wrote the definition. As a result, the final port security rules reflect the Coast Guard's flexibility in addressing national security needs without unduly burdening small businesses.

Prompted by a discussion with the Office of Advocacy, the Coast Guard also updated its instruction on port security committees, encouraging the committees to include representatives of small businesses. The committees are charged with developing port security plans for times when there is an elevated threat level.

21. P.L. 107-295, 116 Stat. 2064.
22. 5 U.S.C. § 553(a).

Department of Housing and Urban Development

Issue: Real Estate Settlement Procedures Act: Simplifying and Improving the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers

In July 2002, the Department of Housing and Urban Development (HUD) published a proposed rule implementing the Real Estate Settlement Procedures Act (RESPA). The purpose of the proposal was to simplify and improve the process of obtaining home mortgages and reduce settlement costs to consumers. The proposal addressed the issue of lender payments to mortgage brokers by changing the way payments in brokered transactions were recorded and reported to consumers. It required a good-faith estimate settlement disclosure and allowed for packaging of settlement services and mortgages. On October 28, 2002, Advocacy submitted comments to the agency, asserting that the IRFA did not clearly set forth the impact of the proposal on small entities or consider viable alternatives. Advocacy suggested that HUD prepare a revised IRFA to provide information to the public about the industries affected by the proposal and alternatives to minimize the impact on small entities. Advocacy emphasized its willingness to continue to work with HUD to ensure that the improvements to the mortgage financing and settlement process stimulate small business growth. Advocacy has met with HUD to discuss economic information about small entities and other issues pertaining to HUD's RFA compliance.

Congress has also expressed an interest in the RESPA issue. The House Committee on Financial Services and the House Committee on Small Business held hearings; the Senate Committee on Banking, Housing, and Urban Affairs has held two hearings. The hearings focused on the impact the RESPA rule may have on small entities. The agency has not finalized the rule.

Department of the Interior
Fish and Wildlife Service

Issue: Designation of Critical Habitat for 11 Vernal Pool Species in California

On March 14, 2003, the Fish and Wildlife Service (FWS) proposed to designate more than 1.6 million acres across 36 counties of California and one county in Oregon as critical habitat for four vernal pool species of crustaceans and eleven vernal pool species of plants. Under section 605 of the RFA, FWS certified that the proposed rule would not have a significant economic impact on a substantial number of small entities. The Office of Advocacy reached out to small entities potentially affected by the proposed rule and determined that it would have a significant economic impact on a substantial number of small entities in a number of counties.

Advocacy recommended that the FWS not designate Solano County, California, and other similarly situated counties as critical habitat because

of the potential impacts on small developers and builders. In the final rule issued on August 16, 2003, the FWS excluded Solano County, as well as Butte, Madera, Merced, and Sacramento counties. The exclusion of Solano County from the final rule produced cost savings of $141 million in the first year and annually thereafter. FWS did not have separate estimates for the costs saved from excluding the counties of Butte, Madera, Merced, and Sacramento, so those savings are not quantifiable at this time.

Issue: Designation of Critical Habitat for the Pygmy Owl in Arizona

On November 27, 2002, the FWS proposed a rule designating critical habitat for the cactus ferruginous pygmy owl (pygmy owl) on 1.2 million acres of land in southern Arizona. The designation of the land as critical habitat introduces land development restrictions and consultation requirements that can greatly increase the cost of using land for commercial purposes such home development, cattle ranching, and mining—uses vital to Arizona's economy. Also in Arizona, the proposed designation included large areas of Tucson's projected high-growth corridors.

FWS certified the proposed rule under section 605 of the RFA as not having a significant economic impact on a substantial number of small entities. Given the amount of land the agency proposed to designate as critical habitat, the Office of Advocacy consulted with small entities in the affected area. Based on input from small entities and their representatives, the Office of Advocacy determined that the rule would have a significant impact on a substantial number of small entities. The rule was likely to cost small construction, cattle ranching, and mining entities millions of dollars per year. Scientific evidence provided to the Office of Advocacy indicated that the proposed FWS rule was over-inclusive in the land designation necessary for recovery of the pygmy owls known to exist.

On June 27, 2003, the Office of Advocacy submitted written comments to the FWS. Advocacy informed the agency that the proposed rule had been improperly certified. Advocacy suggested that the agency conduct outreach to small entities to determine the propriety of the certification. Advocacy also noted that Executive Order 12866 and the RFA required the FWS to set concrete goals for owl recovery and explain what biological benefit FWS expected to achieve by placing restrictions on 1.2 million acres of land. Advocacy further stated its belief that the FWS was in violation of the RFA because it was proceeding to enforce critical habitat strictures through a letter from the Service's field office to the U.S. Army Corps of Engineers without having completed notice and comment rulemaking on the proposed rule as required by the Administrative Procedure Act. Small business representatives informed Advocacy that the FWS had adopted measures during the comment period for the proposed rule which introduced

critical habitat mitigation on development projects across most of southern Arizona. Advocacy was concerned that the FWS is proceeding without the benefit of informed comments, specifically those from small business interests. Advocacy requested that the FWS stay its enforcement of critical habitat restrictions and consultation requirements in southern Arizona.

On August 19, 2003, the United States Court of Appeals for the Ninth Circuit held that the FWS had not made sufficient scientific determinations on the record to support the listing of the Arizona population of the pygmy owl as an endangered species. The Court of Appeals ordered the Arizona District Court to remand the rule listing the owl as endangered back to the agency. The order is currently pending. As a result, no critical habitat rule is in place, nor can one take effect unless FWS re-lists the pygmy owl as endangered. Advocacy believes that FWS has also stopped its efforts to impose consultation and mitigation requirements pursuant to the field supervisors' letter.

Ongoing Concerns

Under the Endangered Species Act (ESA), the FWS "lists" a species as endangered and, "to the maximum extent prudent and determinable," may designate "critical habitat" for that species. Designation of land as critical habitat can impose significant costs on small entities that need to obtain federal permits, such as Clean Water Act permits, Forest Service grazing permits, or Bureau of Land Management permits. These costs are imposed by FWS in the form of project delays, mitigation costs, and required scientific study during the "consultation" process.

Until recently, the FWS did not establish critical habitat for most species. However, FWS is interpreting recent court decisions to require the designation of critical habitat for all species the agency lists as endangered, for the purposes of recovery. This new interpretation of the ESA's "necessary and prudent" standard essentially requires the agency to designate critical habitat for hundreds of listed species that lack critical habitat. In many cases, litigation has imposed strict time limits for designating critical habitat for these species.

Historically, rules issued by the FWS have been certified under section 605 of the RFA as not having a significant economic impact on a substantial number of small entities. Advocacy's small entity outreach has shown on several occasions that the FWS improperly certified its rules. Small businesses have advised Advocacy that the economic analyses performed by FWS do not accurately capture the rules' impacts. Advocacy is working with affected small entities and FWS in an effort to bring FWS rulemakings into compliance with the RFA. FWS is presently facing litigation

challenging at least two rules on RFA grounds. Small businesses have also expressed concern that the extensive amount of litigation over critical habitat designations has discouraged the Service from conducting small business outreach. Advocacy has offered its assistance to the FWS to correct this situation.

Currently, FWS appears in need of internal guidance on the proper application of the RFA when designating critical habitat. Advocacy urges the FWS to establish concrete and binding agency guidelines for FWS field personnel on how to comply with the RFA and when to conduct outreach to determine a rule's impact on small businesses during the designation process. Advocacy recommends that the Department of the Interior include in its written policy and procedures on RFA compliance issued pursuant to section 3(a) of E.O.13272 further guidance on performing small entity outreach and on how to prepare a threshold analysis of small entity impacts to determine whether a rule should be certified under section 605 of the RFA as not having a significant economic impact on a substantial number of small entities. Interior has not yet completed such a revision to its written policies and procedures.

Issue: Incidental Take of Manatees in Florida

On November 14, 2002, the Fish and Wildlife Service proposed a rule under the Marine Mammal Protection Act (MMPA) authorizing incidental take of Florida manatees resulting from watercraft access facilities in Florida. FWS certified the rule under the RFA as not having a significant economic impact on a substantial number of small entities.

The Office of Advocacy consulted with small dock construction firms and their representatives and learned that the proposed rule represented a new interpretation of the MMPA. Under the proposed rule, builders would be required, for the first time, to obtain letters of authorization from the FWS before building single-family-home docks. In addition, the rule would severely restrict the construction of single-family-home docks across 12 Florida counties. With the benefit of small entity input, the Office of Advocacy determined that the rule would have a significant economic impact on a substantial number of small entities, and that the threshold analysis completed by FWS was deficient under the RFA. Small entities also informed FWS and the Office of Advocacy of their intent to litigate the new application of the MMPA's incidental take restrictions to single-family-home dock construction.

On January 27, 2003, the Office of Advocacy submitted written comments to FWS, urging it to conduct small entity outreach and complete an initial regulatory flexibility analysis for the proposed rule. Because of Advocacy

intervention and concerns raised by small dock construction firms and other affected small entities, FWS withdrew the proposed rule on May 8, 2003, producing cost savings amounting to $102 million annually.

Subsequently, FWS took action to limit the permitting of dock construction under the new interpretation of the MMPA advanced in the proposed rule. On August 28, 2003, the City of Cape Coral filed suit in the Middle District of Florida alleging that FWS had failed to process permits in a timely way in violation of the Endangered Species Act. The suit also alleged that FWS violated the APA and the RFA. On September 17, 2003, a second lawsuit was filed by the Florida Marine Contractors Association and a number of affected small construction firms, challenging the new application of the MMPA to single-family-home dock construction projects. Advocacy is monitoring the ongoing litigation.

Issue: Three Additional Manatee Protection Areas in Florida

On April 4, 2003, the Fish and Wildlife Service proposed three manatee protection refuges in which watercraft would be required to operate at slow or idle speeds. The agency certified the proposed rule as not having a significant economic impact on a substantial number of small entities. The Office of Advocacy consulted with affected small entities in the areas, and determined that the manatee refuges would greatly reduce boating traffic, marine construction, recreational activities and related commercial activity.

On June 3, 2003, the Office of Advocacy submitted written comments stating that the proposed rule should not have been certified under the RFA and instead FWS should have conducted an initial regulatory flexibility analysis of the impacts on small businesses. The FWS published a final rule on August 6, 2003, without publishing an IRFA for public comment. Consistent with E.O. 13272, FWS acknowledged the concerns raised by Advocacy in the preamble to the final rule, but certified the final rule as not having a significant economic impact on a substantial number of small entities.

In addition to the lawsuit referenced above, on August 28, 2003, the City of Cape Coral filed a second lawsuit in the Middle District of Florida alleging that FWS had violated the APA and the RFA by improperly certifying this final rule. The lawsuit is currently pending against the FWS.

Department of the Interior
National Park Service

Issue: Snowmobile Ban from Yellowstone and Grand Teton National Parks

In January 2001, the National Park Service (NPS) published a proposed rule banning snowmobiles from Yellowstone National Park, the John D. Rockefeller, Jr., Memorial Parkway, and portions of the Grand Teton National Park. Prior to publication of the rule, the Office of Advocacy was

involved in NPS discussions on how to reduce noise and air pollution caused by the use of snowmobiles in certain national parks.

In 2001 and 2002, Advocacy filed comment letters with the NPS arguing that a total ban of snowmobiles would have a significant impact on small businesses located in and around the parks covered by the rule. Further, Advocacy asserted that newly designed four-stroke snowmobiles were more effective in reducing noise and air pollution. Advocacy continued to monitor and meet with NPS representatives on the snowmobile rule throughout 2002-2003.

Small businesses had an interim victory on November 18, 2002, when the NPS postponed the implementation of the rule for one year. Industry calculated that had the ban happened in the 2001-2002 time period, the economic loss to small businesses in the West Yellowstone area would have amounted to $15 million.

On August 27, 2003, after it completed a supplemental environmental impact study, the NPS issued a revised proposed regulation. The regulation would allow use of snowmobiles in the affected parks under certain conditions. The rule would limit the number of snowmobiles entering the parks, and require them to be certified and to use commercial guides. Advocacy believes this result is a good compromise and will help to minimize the economic impact of the rule on small businesses in the surrounding communities. As of the end of FY 2003, the NPS has not issued a final regulation.[23]

"West Yellowstone has become the gateway of choice over the past 20+ years for about 60,000 visitors each winter using snowmobile and snowcoach transportation. The snowmobile breathed life into a stagnant economy and our town flourished as 90-95% of the visitors used the snowmobile as their transportation of choice. Our town has been built on the strength of a summer and winter economy. The snowmobile ban would have been financially devastating to my businesses and the town."

Clyde G. Seely

Issue: Commerce in Explosives

Department of Justice
Bureau of Alcohol, Tobacco, Firearms, and Explosives

On January 29, 2003, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) issued a proposed rule that changes the requirements for recordkeeping and storage facilities for explosives. The ATF certified the rule under section 605 as not having a significant economic impact on a substantial number of small entities.

Advocacy filed a comment letter with the ATF on July 7, 2003, informing the agency that the certification was improper because it lacked a discussion of the factual basis supporting the agency's decision to certify. Advocacy urged the ATF to better identify the industry it was proposing to regulate and the small entities that would be affected by the proposed rule. The explosives industry includes many small businesses. In fact, industry statistics indicate that the commercial explosives and fireworks industries that manufacture explosives are dominated by small firms. Advocacy recommended that the agency perform an economic analysis that would better measure the economic impact of the proposed rule on those small entities. To date, no further action has been taken on the rule.

23. The Department of the Interior issued the final rules on December 9, 2003 Subsequently a group of interested parties filed in U.S. District Court for the District of Columbia seeking to overturn the final rules. The court struck the final rules on December 16. Advocacy will continue to monitor the situation and work with affected parties.

Department of Labor
Occupational Safety and Health Administration

Issue: Ergonomics Guidelines

On November 21, 2002, Chief Counsel for Advocacy Thomas M. Sullivan signed a memorandum of understanding with John Henshaw, Assistant Secretary of Labor for Occupational Safety and Health, and Michael Barrera, SBA National Ombudsman, pledging to work together to inform small businesses of OSHA's new industry-specific ergonomics guidelines. The agreement also makes clear the roles of OSHA and the SBA Ombudsman in listening and responding to the concerns of small businesses.

On March 13, 2003, OSHA released its first voluntary guidelines, Ergonomics for the Protection of Musculoskeletal Disorders: Guidelines for Nursing Homes. The purpose of the guidelines is to reduce work-related ergonomic injuries by providing practical suggestions for problem tasks. The final version of the guidelines reflected Advocacy's suggestion that the agency avoid a programmatic approach in favor of recommending specific actions for problem tasks.

Issue: Electric Power Generation, Transmission, and Distribution

On May 1, 2003, OSHA convened a small business advocacy review panel (SBREFA panel) to review a draft proposed rule regulating standards for electric power line construction. Panel members included representatives from OSHA, the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) and the Chief Counsel for Advocacy. Small entity representatives selected by Advocacy and OSHA provided information, comments and recommendations on the draft proposal to the SBREFA panel.

The small entity representatives, including construction companies, small utility companies, and tree trimming companies, agreed to the need for an updated standard. However, they were critical of OSHA's draft regulation and its economic analysis. They pointed out several instances in which OSHA had underestimated the costs of the draft rule. The agency had also failed to notice that several practices required under the draft rule would create new hazards.

The final report of the SBREFA panel was presented to John Henshaw, Assistant Secretary of Labor for Occupational Safety and Health, on June 27, 2003. The report noted that small businesses were concerned the draft proposal would be more costly than OSHA estimated and that it would interfere with the normal contractual relationships between subcontractors, general contractors and utility companies. The report included the small business recommendation that OSHA redraft the rule so that it is similar to the electric power rule for general industry. Advocacy will review OSHA's

revised draft proposal, pursuant to E.O. 13272, for substantive changes based on the comments and recommendations in the SBREFA panel report.

Issue: White Collar Overtime Pay Exemption

Department of Labor
Wage and Hour Division

On March 31, 2003, the Department of Labor's (DOL) Wage and Hour Division proposed a rule to update and simplify the regulations governing which employees are exempt from the Fair Labor Standards Act's requirement for overtime pay. The proposed rule would revise definitions of "executive," "administrative," and "professional" for the purpose of determining whether an employee falls into one of the groups exempt from overtime pay.

Pursuant to E.O. 13272, DOL sought Advocacy's involvement prior to publication of the proposed rule. Advocacy reviewed the draft rule package for its compliance with the RFA. Following publication of the proposed rule, Advocacy consulted extensively with small businesses and their representatives regarding the potential impacts of the rule and less burdensome alternatives. On June 6, 2003, the Office of Advocacy hosted a roundtable of more than a dozen trade associations and DOL representatives to receive additional input on the proposed rule. Small business representatives informed Advocacy that the proposed increases in minimum salary levels for exempt employees would impose significant burdens on small businesses. However, small businesses were willing to incur additional compliance costs and overtime obligations because the simplified duties test in the proposed rule would provide long-term benefits by removing the complexities in the current rules and minimizing litigation.

On June 24, 2003, the Office of Advocacy submitted written comments to the DOL asking the agency to consider a less burdensome alternative to the proposed minimum salary level, provide enforcement flexibility to help small businesses come into compliance, and publish a small entity compliance guide to help small businesses determine their responsibilities under the new rule. Advocacy also asked the agency to clarify additional aspects of the rule. Small businesses and their representatives have informed the Office of Advocacy that this rulemaking is one of the most important reform initiatives to reduce regulatory burden, and the Office of Advocacy will continue to monitor its developments.

Issue: Computer Reservations System

Department of Transportation

On November 15, 2002, the Department of Transportation (DOT) published a proposed rule on the Computer Reservations System (CRS) regulations. The purpose of the proposal was to examine whether the existing CRS rules were necessary and, if so, whether they should be modified.

DOT proposed eliminating some CRS rules to promote competition in the airline industry, reducing regulation of airline sales over the Internet and reducing regulations to allow airlines greater flexibility in bargaining with the systems. Advocacy determined that although the proposed rule contained provisions that could help small businesses, it also had several provisions that could harm small businesses. The initial regulatory flexibility analysis prepared by DOT did not have enough information about the potential impacts on small entities or contain viable, less burdensome alternatives. Advocacy encouraged DOT to issue a revised IRFA to provide information about the affected small entities, the projected economic impact of the proposal, and regulatory alternatives to achieve DOT's objectives while minimizing the impact on small businesses. DOT has not yet issued a final rule. In the interim, DOT contacted Advocacy to inquire about obtaining economic data on the travel industry.

Issue: Participation by Disadvantaged Business Enterprises in Airport Concessions

On December 12, 2002, DOT issued a proposed rule, Participation by Disadvantaged Business Enterprises in Airport Concessions. The proposed rule, among other things, would adjust the size standards for disadvantaged business participation in airport concessions. On January 28, 2003, the Office of Advocacy submitted written comments to DOT regarding the compliance of the proposed regulation with the RFA. The proposed regulation was certified by the Secretary of DOT, in accordance with section 605 of the RFA, as not having a significant economic impact on a substantial number of small entities. Section 605(b) requires a certification to include the factual basis to support the Secretary's determination. The proposed regulation lacked a discussion of the factual basis supporting the Secretary's decision to certify. The certification was also deficient because DOT did not discuss the impact of the proposed rule on two of the three types of small entities recognized by the RFA. Section 601 of the RFA defines small entities to include small businesses, small organizations, and small governmental jurisdictions. DOT did not discuss the impact of its changes on small organizations and small governmental jurisdictions. Advocacy recommended that DOT perform a preliminary analysis of the proposed rule's impact on small entities to determine if an IRFA should be performed. If DOT determined that the proposed rule met the section 605(b) RFA test, then the certification with its factual basis should be published in the final rule. To date, the agency has not taken further action on the rule.

Issue: Hours of Service

Department of Transportation
Federal Motor Carrier Safety Administration

On April 28, 2003, the Federal Motor Carrier Safety Administration (FMCSA) issued a final rule that limits the number of hours drivers of commercial motor vehicles may work. The final rule also establishes mandatory minimum rest and sleep periods.

Advocacy's involvement in this rulemaking began in 1996, when the Department of Transportation (DOT) issued an advance notice of proposed rulemaking (ANPRM) and held six public "listening sessions" asking for comments on various studies on driver fatigue and other related matters. The Office of Advocacy also held roundtable discussions on the ANPRM to obtain input from small entities. On May 2, 2000, FMCSA published a notice of proposed rulemaking (NPRM), and again held several public meetings for the purpose of gathering comments on the proposed rule.

"The motorcoach industry is embroiled in the worst economic storm which we have ever seen. Rising insurance premiums, a decrease in ridership, coupled with the depressed resale value of our coaches have made staying in business a challenge. If our industry would have been subjected to the new Hours of Service rule many small carriers would have been forced out of business."

Godfrey LeBron
Vice President
Paradise-Trailways

In written comments submitted to the FMCSA on December 15, 2000, Advocacy pointed out that the NPRM had omitted certain critical costs to small businesses and had not differentiated among the various regulated industries when analyzing the costs of the rule. Advocacy specifically mentioned the intercity motorcoach industry as an example of an industry for which the agency had not provided any data on costs. Advocacy also informed the FMCSA that the costs of mandatory electronic on-board recorders (EOBRs) were significantly underestimated.

In its final rule, the FMCSA exempted the intercity motorcoach industry from the rule, resulting in large but undocumented savings to that industry. The FMCSA also dropped the requirement for EOBRs, agreeing with Advocacy and others that the technology is not sufficiently developed and the costs could be too prohibitive to justify requiring them. The decision to drop the EOBR requirement resulted in a savings of $180 million in first-year capital costs and $18 million in annually recurring maintenance costs.

Issue: Hazardous Materials: Transportation of Lithium Batteries

Department of Transportation
Research and Special Programs Administration

On August 22, 2003, OMB's Office of Information and Regulatory Affairs (OIRA) issued a return letter to the Research and Special Programs Administration (RSPA) on a draft final rule regulating lithium batteries. OIRA, along with the Office of Advocacy, was concerned about the agency's certification that the rule would not have a significant economic impact on a substantial number of small entities. The rule would require producers and transporters of lithium ion batteries to comply with the strict packaging and testing requirements for batteries containing much more lithium. In consultation with Advocacy, OIRA notified the agency by letter that there were concerns about RSPA's estimate of the costs of the rule, the

number of small businesses regulated, and the annual revenues of the affected small businesses. In its letter, OIRA recommended that RSPA either develop an initial regulatory flexibility analysis to encourage further public comment or provide a statement of factual basis for the certification as required by section 605 of the RFA. The agency has not yet taken further action on the rule.

Department of the Treasury
Financial Crimes Enforcement Network

Issue: Anti-Money-Laundering Programs for Investment Advisors

On May 5, 2003, the Department of the Treasury's Financial Crimes Enforcement Network (FinCen) issued a proposed rule that would require investment advisers who manage client assets to establish programs to prevent their firms from being used as money-laundering facilities. The proposed rule requires firms to develop a written anti-money-laundering program and train employees on the new procedures. Each firm must identify its vulnerabilities to money laundering, put in place controls to address the vulnerabilities, and establish a mechanism to assess the effectiveness of the controls. The firms must also delegate to the Securities and Exchange Commission (SEC) the authority to evaluate certain investment advisers for compliance with the program. FinCen certified that the proposed rule would not have a significant economic impact on a substantial number of small entities.

Small businesses advised Advocacy that complying with the rule would be costly and time-consuming for small businesses. In comments submitted to FinCen on July 7, 2003, Advocacy questioned whether FinCen had fully considered the impact of the proposal on small entities. Although FinCen stated that the compliance burden should be *de minimis*, there was no explanation of how FinCen reached this conclusion. Advocacy informed FinCen that the certification must include an explanation of the factual basis to support the decision to certify. Advocacy also suggested that there was insufficient data to determine if the number of affected entities were substantial and that the proposal might be duplicative for small savings associations. Advocacy will continue to monitor this issue.

Department of the Treasury
Internal Revenue Service

On May 1, 2003, the Chief Counsel for Advocacy testified before the Committee on Small Business, U.S. House of Representatives, on the Internal Revenue Service's (IRS) compliance with the RFA, the IRS' current interpretation of the RFA, and actions taken by the IRS in compliance with Executive Order 13272.[24] The Chief Counsel discussed interactions between the IRS and Advocacy to address the concerns of small entities, and the ongoing differences between the IRS' and Advocacy's interpretations of how the RFA as amended by SBREFA applies to IRS interpretative rules. The IRS characterization of a rule as "legislative" or "interpretative" often determines whether or not an RFA analysis is performed. The Administrative Procedure Act requires notice and comment rulemaking for

24. The Chief Counsel's testimony is available on Advocacy's website at: *www.sba.gov/advo/laws/*.

"legislative" rules (involving questions of policy), triggering an agency's obligation to comply with the RFA. In 1996, Congress amended the RFA with SBREFA to bring IRS "interpretative" rules, which the IRS defines as "flowing directly from a statute or other legal authority," under the RFA when the interpretative rule is published for notice and comment, and when it imposes a collection of information on small entities. Advocacy and the IRS continue to view the impact of the SBREFA amendments differently.

The IRS interprets SBREFA to require an analysis of the impact on small entities of only the collection of information, and often narrows the number of rules requiring such analysis by interpreting the "collection of information" requirement as triggered when the rule would require small entities to complete a new IRS form. The Office of Advocacy, however, interprets SBREFA as requiring the IRS to perform an initial regulatory flexibility analysis of the entire rule and not just the collection of information, and finds that the "collection of information" requirement is triggered when a rule requires recordkeeping, regardless of whether a new form is required.

Under the IRS interpretation of SBREFA, those rules identified for RFA compliance are most often certified as not having a significant economic impact on a substantial number of small entities. Advocacy often disagrees with the IRS decision to certify the rule and instead recommends that it perform an initial regulatory flexibility analysis to gain a better understanding of a rule's impact and to ensure that less burdensome alternatives are considered. An IRFA provides the agency with a better understanding of the rule's impact and results in better policy because the analysis is shared with those about to be regulated. In fact, the Treasury Department testified that it had done significant studies and preparatory work on the two examples (mobile machines and non-resident aliens) mentioned at the hearing. If it had just published those findings, it would have gone a long way towards fulfilling RFA requirements.

Advocacy continues to promote its interpretation of the RFA's applicability to IRS interpretative rules, while working with the IRS to pursue alternate paths to facilitate small business involvement and input into the IRS rulemaking and policy development process. For example, the IRS Small Business/Self-Employed Division (SB/SE) has worked closely with the small business community to identify contentious issues and resolve them through consultation and negotiation. The SB/SE division's small business outreach also allows Advocacy and affected small entities to participate more actively in the rulemaking process. In addition, the Taxpayer Advocate's Office and the Office of Burden Reduction (OBR) have worked with Advocacy. In fact, since 2002, the OBR has reduced forms and paperwork requirements for small businesses by over 70 million hours. Similarly, the IRS industry issue resolution process, and its regular

meetings with tax practitioners and trade associations focused on small business tax issues, provide vehicles for small business input on upcoming regulations and issues.

Issue: Excise Taxes: Definition of Highway Vehicle (Mobile Machines)

On June 6, 2002, the IRS issued a proposed rule on Excise Taxes; Definition of Highway Vehicle that would alter a 30-year definition that exempted certain vehicles from highway use excise taxes (diesel and gasoline taxes, taxes on new chassis and tires, and heavy vehicle use taxes). The IRS characterized the rule as interpretative and said the RFA did not apply. Advocacy and the small business community viewed the proposed rule as a legislative rulemaking because it changed the benefits that had been available to many small businesses for decades. Moreover, small businesses would incur substantial costs on top of the additional taxes. Advocacy submitted comments to the agency on December 4, 2002, and then testified at the IRS hearing on the issue on February 27, 2003. Advocacy encouraged the IRS to perform an IRFA to bring the proposed rule into compliance with the RFA. If it was a legislative rule, RFA compliance would be required and in the alternative, if it was an interpretative rule, RFA compliance would be required in Advocacy's view because the rule imposed new paperwork and recordkeeping requirements that it had not considered.

"The SBA Advocate has pushed the IRS on excise tax issues important to small business. IRS did not think about small business impact of proposed mobile machinery definition changes, and SBA Advocacy called them on it."

Dave Fuhs, President, NECS, Jasper, IN

Advocacy was pleased by the response of the IRS and the Treasury Department to the concerns of the small business community. During the consideration of the "mobile machine" proposed regulations, Treasury granted extra time for small businesses to file comments, made experts available for roundtable meetings with small businesses, and scheduled a hearing where small business owners could voice their concerns. The February hearing opened with the announcement that Treasury was instructing the IRS to make no final decision on the mobile machinery rule until after Congress had the opportunity to consider the issue during reauthorization of the Highway Trust Fund. Had the regulation been promulgated, industry representatives estimate it would have cost small businesses approximately $460 million annually in increased taxes and compliance costs. This cost estimate is based on the Federal Highway Administration's estimation of the revenue that would be raised had the rule gone into effect. Advocacy considers Treasury's suspension of the rulemaking to be a good result for small businesses. Advocacy will continue to monitor this issue.

Issue: Deposit Interest on Nonresident Aliens

On November 14, 2002, the Office of Advocacy filed comments on a proposed rule titled Guidance on Reporting Deposit Interest on Non-resident Aliens ("Non-resident Alien Interest"). The rule requires financial institu-

tions to report to the IRS interest paid to nonresident aliens from 17 industrialized countries. The IRS did not analyze the impact on small businesses before issuing the proposed rule, characterizing the rule as interpretative, without a new collection of information requirement, and therefore exempt from the RFA.

In its comment letter, Advocacy advised the IRS that the proposed regulation imposed a collection of information requirement. In fact, under the rule, all financial institutions, large or small, that pay interest on accounts to nonresident aliens from the named countries will be required to collect information. Advocacy encouraged the IRS to publish for public comment an IRFA or a certification, with a factual basis demonstrating that the regulation will not have a significant economic impact on a substantial number of small entities.

Advocacy testified at the IRS hearing on the rule on December 5, 2002. At the hearing, several financial associations representing small community banks and savings and loans explained the increased paperwork and reporting requirements of the rule. They stressed that the costs of establishing reporting and information transfer systems are especially significant for small businesses. Additionally, in written comments, small businesses argued that a sizable recordkeeping/reporting requirement was being imposed by the IRS on a vast new category of depositors (nonresident aliens from the 17 named countries). Advocacy advised the IRS that the new additions to the existing forms create burdens on small business that should be analyzed. Further, virtually every group commenting on the proposal argued that the rule involves serious questions of tax policy and thus is not merely an interpretative rule. In that case, the IRS must complete an IRFA to assess the rule's impact on small businesses. The agency has not taken final action on the rule.

Issue: Excise Taxes on Certain Toll Calls

On April 1, 2003, the IRS issued a proposed rule that would change the definition of toll call service established by Congress in 1965. The rule states that a 3 percent tax will be levied on toll calls that calculate their fees based on distance covered and elapsed time. Under current law, certain listed industries are exempt from the tax if they use a communications service based on a flat fee or a fee based on elapsed time. The listed industries include news services, broadcasters, common carriers like railroads and trucking companies, and telephone and telegraph companies. These companies are predominantly small and are very reliant on communications services for their business. The proposed rule directly contradicts the language in the 1965 statute by simply saying the charge "need not vary with distance to be subject to the tax." Advocacy believes that this type of regu-

lation is legislative in nature because it changes a fundamental definition and makes the applications of the provisions of the statute unclear. Therefore, the IRS must certify the rule in accordance with section 605(b) of the RFA or conduct an IRFA to determine the rule's impact on small businesses.

Based on discussions with affected small businesses, Advocacy filed written comments on September 9, 2003. In the comments, Advocacy advised the IRS that the proposal could raise taxes and operating costs for thousands of small businesses currently exempt from the tax. Advocacy also pointed out that since IRS field agents would be determining which services were taxable, without a clear standard, the rule could lead to additional audits and penalties. Advocacy urged the IRS to analyze the impact of the rule on small businesses as required by the RFA. The IRS has not yet issued a final rule.

Environmental Protection Agency

Issue: Construction General Permit

In June 2003, the Environmental Protection Agency (EPA) issued a general permit for construction sites that affect more than one acre in certain states and on Indian lands where the EPA is the permit-issuing authority. The permit requires the development of a stormwater pollution prevention plan (SWPP). A SWPP protects water quality by limiting sediment discharge into the waters.

Advocacy reviewed the draft permit and suggested revisions prior to publication of the final rule. Advocacy's suggestions for small businesses eliminated the need for a specific pollutant budget for construction discharges, where no such limit had previously been developed by the local authorities. Given the limited local resources, it would be extremely difficult to develop such budgets in a timely fashion for tens of thousands of construction sites on a case-by-case basis. Advocacy also suggested that small business facilities were not equipped to determine whether an individual project causes or contributes to a water quality violation, and recommended that EPA make this determination. EPA adopted both of these recommendations in the final general permit. The cost savings in monitoring and consultant fees amount to approximately $200 million in the first year and annually.

Issue: Hydrochlorofluorocarbon (HCFC) Foam Allocation Rule

In December 2002, the EPA promulgated the final HCFC Foam Allocation Rule to reduce the use of hydrochlorofluorocarbon (HCFC) to assure compliance with the international treaty obligations under the Montreal Protocol. The rule regulates the use of HCFC-141b, a material used to create foam that is used in a variety of commercial and consumer products. Advocacy commented on the proposed rule in August 2002, urging EPA to

provide regulatory relief for thousands of small business users of HCFC-141b. Advocacy's letter acknowledged that EPA had inadvertently violated the RFA by not recognizing the significant impact on small firms, which should have triggered a SBREFA panel prior to publication of the proposed rule. Advocacy advised EPA that without regulatory relief, hundreds of small businesses were in jeopardy of going out of business, and thousands more would be adversely affected. Advocacy suggested EPA provide relief through a petition mechanism that would allow suppliers of the HCFCs to obtain supplies for the small business users who had no available substitute to HCFC-141b. Advocacy informed the agency that it could implement the recommendation without jeopardizing compliance with the international treaty.

"The final version of the HCFC Foam Allocation Rule...was brought about in no small part through the combined efforts of small business foam formulators, the SBA, and certain manufacturers...The positive aspect was the incorporation into the rule of the potential for formulators to continue to purchase stockpiled HCFC-141b. "

Tom Sparks for Polythane Systems, Inc.

EPA's final rule included the petition mechanism suggested by Advocacy, providing regulatory relief to small businesses. If the petition process had not been available, Advocacy estimates that small businesses would have lost approximately $75 million in sales in 2003, and $50 million in 2004.

Issue: Industrial Boilers and Process Heaters Air Toxics Rule

EPA proposed a rule on January 13, 2003, to regulate hazardous air emissions from industrial boilers and process heaters. Advocacy worked with EPA during the pre-proposal stage to ensure that the rule would not require businesses with small boilers (and insignificant emissions) to install costly controls. As a result of Advocacy's early involvement, the proposed rule exempts several hundred of the smallest boilers from further emission control requirements. EPA estimated that some 800 remaining coal- and wood-fired boilers would be affected by the rule. Exempting smaller boilers resulted in first-year cost savings of $354 million and annual cost savings of $18 million for affected small entities. Advocacy is continuing to work with EPA to further reduce the cost burden of this rule on small entities.

Issue: Inventory Update Rule Amendments

In 1999, EPA proposed a rule to amend its Inventory Update Rule, which provides information to EPA for updating its Toxic Substances Control Act (TSCA) chemical inventory data base. Every four years, manufacturers and importers must report current data on the production volume, plant site, and site-limited status of certain chemicals. The proposal would keep the same reporting cycle, add a large number of chemicals to the required reporting list (between 4,000 and 5,000 different chemicals), and require reporting of information on manufacturing exposure and eventual end use of the chemicals. The EPA estimated that the rule would cost between $74 million and $90 million in the first year and between $20 million and $23 million annually over the next 20 years. Small businesses were concerned

that the new manufacturing exposure and end use data reporting would require manufacturers to engage in costly information collection.

The Office of Advocacy worked closely with small businesses and the EPA to help create a rule that reduced the estimated costs. Advocacy suggested that the final rule should contain a higher volume threshold, which companies would have to pass to trigger processing and use reporting responsibilities. In the final rule, EPA agreed to a reporting level cutoff for the new information requirements. This resulted in a cost savings of almost one-quarter of the rule's cost with the lower reporting threshold, for an annualized cost savings of $4.3 million to $4.9 million every year.

Issue: Lime Manufacturing Air Toxics Rule

In 2003, the EPA made available a final rule regulating lime manufacturing air toxics. The final rule was posted on EPA's website;[25] however, it has not yet been published in the *Federal Register*. The rule requires the lime manufacturing industry to install additional air pollution controls. Small firms operate 14 of about 80 lime plants covered by the rule.

Advocacy's involvement began in March 2002, with the SBREFA panel review of the pre-proposal lime manufacturing air toxics rule. In the pre-proposal draft rule, EPA required plants to reduce hydrogen chloride (HCl) emissions, and required replacement of wet scrubber pollution control devices with baghouses. Because of small business input, EPA and Advocacy concluded during the SBREFA panel process that further control of HCl emissions was not required. The panel adopted this recommendation in its report and EPA deleted the HCl requirement from the proposed rule issued in December 2002. The revision will save affected small businesses about $4.2 million annually.[26]

"The Panel process, and the enhanced communications it fostered, assisted EPA in making changes to its pre-Panel draft of the rule that significantly reduced the cost of compliance for industry, while maintaining regulatory effectiveness...The changes also reduced the likelihood that compliance costs would force small lime companies to cease operations."

Eric Malès
National Lime Association

After the rule was proposed, Advocacy and small businesses developed an analysis that demonstrated that replacing the wet scrubbers with baghouses would cause an increase in the release of sulfur oxides and particulate matter. Advocacy recommended that EPA create a separate subcategory for facilities with wet scrubbers in the final rule. This would permit the facilities to retain existing air pollution controls and not harm the environment. EPA adopted the panel's suggested revision in the final rule. The revision will save small firms an additional $800,000 annually and provide a benefit to the environment that EPA had not previously recognized.

25. EPA has signed the final rule, which appears on its website at: *www.epa.gov/ttn/atw/lime/limepg.html*, but has yet to be published in the *Federal Register.*
26. These cost savings were reflected as $5 million in Advocacy's 2002 RFA report, but subsequent information revised the cost estimate to $4.2 million.

Issue: Miscellaneous Coating Manufacturing Air Toxics Rule

On April 4, 2002, EPA proposed a maximum achievable control technology air toxics standard for companies that manufacture paints, inks and adhesives. The rule would require coating manufacturers to install devices to capture and destroy hazardous air pollutants in storage tanks, process vessels, equipment, transfer operations, and wastewater treatment systems. EPA proposed requiring coating manufacturers to perform extensive leak detection and repair (LDAR) activities, as well as other costly requirements designed to capture small amounts of air toxics.

After consulting with small businesses, Advocacy recommended several alternatives that could yield significant environmental benefits with a lower cost burden. In its final rule,[27] EPA agreed to give businesses the option of using a sensor-based LDAR system that the National Paint and Coatings Association estimates will save the 58 affected coating manufacturers $2.5 million in the first year and $2 million in each succeeding year. EPA also agreed to limit the transfer operation requirements to apply to bulk transfer operations only. This will allow companies to install less costly condenser units instead of thermal oxidation units. The changes will produce first-year cost savings of $22.5 million and annual compliance cost savings of $12 million.

Issue: Miscellaneous Plastic Parts Air Toxics Rule

In April 2003, EPA promulgated a new air toxics rule for the manufacture of miscellaneous plastic parts. The rule requires these plastic parts manufacturers to reduce the emissions of specific toxic air pollutants. In the rule, EPA adopted the flexible approach developed by Advocacy for facilities that are required to comply with multiple air toxics rules for coatings. To provide regulatory certainty and simplicity for affected small businesses, Advocacy suggested several alternatives for reducing the regulatory burden of complying with two or more overlapping rules. Advocacy recommended that facilities could choose to comply with a single rule if the facility was predominantly affected by a single rule, or could use an emission averaging approach across all the applicable rules, at the option of the facility.

EPA's final rule[28] incorporated many of Advocacy's recommendations, providing implementation cost savings of $20 million for facilities that use volatile organic products to coat parts in the manufacturing process (from metal furniture to automobile manufacturers) in the first year and annually.

27. EPA has signed the final rule, which appears on its website at *www.epa.gov/ttn/atw/mcm/mcmsigned_fr.pdf*, but it has yet to be published in the *Federal Register*.
28. EPA signed its final rule on August 29, 2003. The final rule has yet to be published in the *Federal Register*, but is available on its website at *www.epa.gov/ttn/atw/plastic/pppfnlpkg22aug03.pdf.*

Issue: Reinforced Plastics Air Toxics Rule

In April 2003, EPA promulgated a new air toxics rule for the manufacture of reinforced plastic parts. The rule requires that the industry reduce the emissions of certain toxic air pollutants from their plants. The pre-proposal draft of this rule was the subject of a SBREFA panel report in June 2000. EPA's final rule incorporated a recommendation by Advocacy that the 95 percent capture and control requirements be applied only to new plants and not also to existing plants as proposed. The expense to retrofit existing plants would be significant, while new plants can more cost effectively include pollution control in building specifications. This change produced cost savings of about $40 million per year. EPA estimates that 10 percent of these facilities are small businesses, producing cost savings specific to small business of about $4 million in the first year and annually.

Issue: Water Pollution Rule for Metal Products and Machinery

In January 2001, the EPA proposed a water pollution control rule that would regulate about 10,000 facilities, including iron and steel plants, metal finishing plants, electroplaters, automotive plants, and computer plants that manufacture various products and machinery that contain metals. EPA estimated that the regulation would cost $2 billion a year.

Advocacy's involvement began in March 2000 with the SBREFA panel's review of the pre-proposal draft rule. At that time, many small business representatives informed the panel that the rule was expensive and lacked environmental benefits. Further, small businesses argued that most of the facilities were already regulated by other EPA water pollution rules. Although EPA tried to minimize the small business impacts by implementing the recommendations in the SBREFA panel report, the proposed rule included technical and analytical errors.

Advocacy analyzed the environmental and economic data in the proposed rule, and worked with the affected small business trade associations. Advocacy agreed with small businesses that the proposal had limited environmental benefits. Advocacy shared with EPA concerns over technical errors in the rule and its limited benefits. In its final rule, published in May 2003, EPA excluded three significant industrial sectors from the regulation. EPA's final rule applied to one sector of several thousand facilities that had not previously been subject to federal standards. As a result, the cost of the rule was reduced to approximately $13 million annually and the small businesses, which bore approximately half of the cost of the proposed rule, will save approximately $1 billion annually.

Issue: Background Checks for EPA Contractors

On January 22, 2003, EPA published proposed regulations in the *Federal Register* titled Acquisition Regulation: Background Checks for Environmental Protection Agency Contractors Performing Services on Site. The regulation would require contractors and subcontractors to perform background checks and make suitability determinations on their employees before the employees can perform on-site contract services for the EPA.

On March 24, 2003, Advocacy submitted a formal comment letter to the EPA informing the agency that the rule did not adequately comply with the RFA. The proposed regulation contained a certification as permitted under section 605(b) of the RFA. However, the certification did not include a factual basis for the EPA's conclusion that the regulation would not have a significant economic impact on a substantial number of small entities. Advocacy also expressed concern that the cost of complying with the regulation would negatively affect small business subcontractors. The Office of Advocacy recommended that the EPA take the necessary steps to bring the rulemaking into compliance with the RFA by either publishing the factual basis for the certification or by publishing an IRFA for public comment. EPA has not yet issued a final rule.

Issue: Regulation of Emissions from Nonroad Diesel Engines

On October 24, 2002, EPA convened a SBREFA panel to review a draft rule proposal to limit emissions of oxides of nitrogen (NOx) and particulate matter (PM) from nonroad diesel-powered engines, such as construction, farming, and landscaping equipment. Small entity representatives from the affected industry provided comments to the panel on the draft proposed rule.

EPA's draft proposal contemplated eliminating about 80-90 percent of both NOx and PM emissions from nonroad diesel engines using devices placed in the exhaust line to burn off or trap the emissions. The technologies considered were NOx aftertreatment devices, which burn gases containing NOx, and PM filters, which filter out the sooty PM emissions from exhaust. The draft proposal mandated aftertreatment devices for all engines above 25 horsepower, including smaller engines for which the technology does not currently exist. During the SBREFA panel discussion, Advocacy questioned the small business representatives about the available technologies. The SBREFA panel learned that for engines below 70 horsepower, application of aftertreatment was not likely to be cost-effective. Compliance with the rule as drafted would force small equipment manufacturers to either curtail production of smaller diesel equipment lines and incur significant regulatory costs for redesign or exit the market. Scientific

"We have a division within our company that manufactures airport runway sweepers that have been sold in ten countries outside the United States. This division employs twenty people for this aviation product, including five in the engineering department and fifteen in manufacturing...These runway sweepers compete in the world market with manufacturers based primarily in Europe. We envision that we will be at a substantial price disadvantage with these foreign manufacturers if they are not required to comply with the nonroad diesel regulations at their point of manufacture, or at the delivery point of their non-US customers. Designing for tier 4 compliance will consume approximately half of our available engineering resources, at the expense of the development of new products. We are concerned that compliance with these tier 4 regulations will not be as high a priority with our customers as the new products and features that they have been requesting. As a small manufacturer, we do not have the resources to provide both."

Eric Ramsey
Director of Product Engineering
Sweepster, LLC

information provided by the EPA during the SBREFA panel indicated that excluding engines below the 70 horsepower threshold would not result in a major reduction in the rule's environmental benefits. EPA's data indicated that engines below 70 horsepower accounted for a very small portion of NOx and PM emissions.

The final SBREFA panel report recommended that EPA refrain from imposing more stringent NOx and PM emissions requirements on engines below 70 horsepower. EPA issued the proposed rule on May 23, 2003. Advocacy submitted written comments to EPA on August 20, 2003, urging the agency to adopt the less burdensome regulatory approaches for small entities identified through the SBREFA panel process. The EPA has not completed the rulemaking. Advocacy is continuing to work with EPA to further reduce the cost burden of this rule on small entities.

Federal Acquisition Regulation Council

Issue: Procurement of Government Printing

On November 13, 2002, the Federal Acquisition Regulation Council (FAR Council) issued a proposed regulation on the procurement of printing and duplicating through the Government Printing Office (GPO), FAR case 2002-011. The proposed regulation implements Office of Management and Budget (OMB) Memorandum Number M-02-07, Procurement of Printing and Duplicating through the Government Printing Office. The memorandum and proposed regulation encourage competition in government printing by eliminating restrictions that mandate the use of GPO as the single source for printing services.

On December 13, 2002, the Office of Advocacy submitted formal comments to the FAR Council regarding the proposed regulation and its compliance with the RFA. The FAR Council certified the proposed rule as not having a significant economic impact on a substantial number of small entities. The certification did not provide a factual basis for such a decision as required by section 605 of the RFA. Without a factual basis, it is difficult for small entities to evaluate the impact of the proposed rule and the validity of the certification. To correct this deficient certification, the Office of Advocacy recommended that the FAR Council either publish the factual basis for the certification or publish an IRFA for public comment. The FAR Council has not yet taken a final action.

Federal Communications Commission

As noted in last year's report, the Federal Communications Commission's (FCC) compliance with the RFA has been inconsistent. This is partially due to the agency's structure, which divides rule drafting among multiple bureaus. Each bureau is responsible for a separate part of the telecommunications industry. The agency also continues the practice of issuing notices of proposed rulemaking that often do not contain any specific regu-

latory approaches or proposed regulatory text. Instead, the FCC issues a series of broad questions soliciting comments. The agency provides the details of the regulation in the final rule. As Advocacy stated before, this makes it difficult, if not impossible, for Advocacy and affected small entities to assess the impacts at the proposed rule stage and recommend less burdensome regulatory alternatives for the FCC's consideration.

There are new developments that should enhance the FCC's consideration of small entity impacts. First, Advocacy is expanding the focus of its regular meetings with the FCC's Office of Communications Business Opportunities to extend beyond the general topic of RFA compliance to include discussions with the bureaus on the small entity impacts of particular rules. Second, Advocacy is providing the FCC with RFA training pursuant to E.O. 13272. Finally, Advocacy is following up its comment letters to the FCC with *ex parte* meetings focused on the agency's outreach to small entities and its analysis of the economic impact of its rules on small entities.

Issue: Restrictions on Fax Advertising

On July 3, 2003, the FCC released a rule in the "do-not-call" proceeding, which the FCC initiated to curb intrusive telemarketing and promote consumer privacy. As part of the "do-not-call" rules, the FCC adopted a "do-not-fax" provision. The provision required any person to obtain prior express permission in writing, with a signature from the recipient, before sending an unsolicited fax advertisement.

Unlike the general "do-not-call" provisions of the rule, the FCC removed the "established business relationship" exemption from the "do-not fax" provision and did not grant an exception to trade associations or nonprofit organizations when communicating through a facsimile device to their members.

In light of the economic impact on small businesses, small trade associations, and small nonprofit organizations, Advocacy requested that the FCC stay the rule and revisit its decision. The FCC did not conduct an adequate analysis of the impact on small entities as required by the RFA. Specifically, Advocacy requested that the FCC reinstate the established business relationship exemption and the nonprofit exemption, create a presumption that membership in a trade association acts as consent, and clarify the definition of an unsolicited commercial advertisement. In August 2003, Advocacy submitted a petition for reconsideration of the rule to the FCC. The FCC is currently receiving comments on the petitions for reconsideration.

On August 18, 2003, the FCC stayed the fax portion of the rule until January 1, 2005. On October 3, 2003, the established business relationship portion of the rule was also stayed until January 1, 2005. The stay preserved the status quo pending the FCC's decision on the petitions for reconsideration.

"The National Association of Wholesaler-Distributors is an industry-wide trade association which represents approximately 40,000 companies, many of them small businesses. When we notified them of the Federal Communications Commission's proposed ban on unsolicited commercial faxes, their reaction was intense and immediate. In November, more than 200 companies responded in less than one week to a survey in which we asked how they use faxes in their normal business operations and what it would cost them in dollars and cents to comply with the FCC's regulations. We hope the FCC will revisit and revise these unwieldly regulations, and we applaud the work of the Offiice of Advocacy at the Small Business Administration for its committed efforts on behalf of America's small businesses."

Jade West
Sr. Vice President - Government Relations
National Association of Wholesaler-Distributors

Issue: Triennial Review of Unbundled Network Elements

In December 2001, the FCC proposed a rule reviewing the FCC's policies on access to unbundled network elements (UNEs) by competitive local exchange carriers (CLECs). Although the FCC conducted an initial regulatory flexibility analysis, it did not consider the impact of delisting UNEs on small competitive telecommunications carriers. In February 2003, Advocacy recommended that the FCC either publish a revised IRFA for comment or address the impact in the final regulatory flexibility analysis of the final rule. The analysis should specifically discuss the impact delisting of UNEs would have on small competitive carriers. Advocacy also urged the FCC to consider suggested alternatives that would further the agency's regulatory goal of encouraging competition and investment in facilities while minimizing the impact on small businesses and their ability to compete. In February 2003, the FCC adopted a final rule that retained the UNE obligations, thus preserving the viability of CLECS for a cost savings of $1.6 billion in the first year and annually.

Issue: Exemption from Enhanced 911 Requirements

In December 2002, the FCC proposed a rule to determine whether it remains appropriate to continue to exempt a class of select wireless and wireline service providers from 911 and enhanced 911 regulations. In a May 14, 2003, letter, Advocacy applauded the FCC's initial regulatory flexibility analysis, as the FCC did a thorough job reviewing the rule for small business impacts and presenting those impacts in a comprehensive and clear manner. The FCC also discussed several viable alternatives and addressed the benefits and limitations of each. Advocacy encouraged the FCC to build upon the example set in this analysis and to continue to consider and minimize the impact on small businesses in future rulemakings. The FCC has not yet acted on this proposed rule.

Issue: Assessing Contributions to the Universal Service Fund

In December 2002, the FCC proposed a rule on alternative ways of assessing contributions to the Universal Service Fund. Currently, the FCC assesses these contributions based on a telecommunications carrier's interstate telecommunications revenues. The FCC proposed alternatives such as basing the assessment on the number of connections to the interstate telecommunications network, the capacity connected to the interstate telecommunications network, and the number of telephone numbers connected to the interstate telecommunications network. In its formal comment submitted on June 28, 2003, Advocacy pointed out that changing how universal service funds were assessed could radically alter the burden on small businesses. If the FCC retains the current methodology, then

small businesses that make many long distance calls receive the brunt of the burden. Further, if the FCC switches to a connection-based methodology, small businesses with a large number of lines will be the ones burdened. Advocacy urged the FCC to continue to conduct outreach to small businesses. The FCC has not yet acted on this proposed rule.

Issue: Broadcast Media Ownership

In September 2002, the FCC proposed a rule to review its broadcast ownership rules as required by Section 202 of the Telecommunications Act of 1996. The FCC's proposed rule sought extensive comment on issue areas rather than specific proposals or tentative conclusions. The FCC conducted an initial regulatory flexibility analysis, which concluded that there was no impact on small businesses from the proposed rulemaking. During the course of the rulemaking, the FCC indicated through speeches and other signals that it intended to lift many, if not all, of the ownership restrictions. Given this material change in the purpose of the proposed rule, Advocacy advised the FCC in an April 9, 2003, comment letter, that Advocacy disagreed with the FCC's assessment that the rule would not have an impact on small businesses. Advocacy recommended that the FCC treat this proposed rule as a notice of inquiry and issue a further proposed rulemaking. Advocacy also recommended that the FCC complete a supplemental IRFA to comply with the RFA. The FCC declined Advocacy's recommendations and released the final rule with a final regulatory flexibility analysis on July 2, 2003.

Securities and Exchange Commission
Office of the Chief Accountant

Issue: Auditor Independence Rules Pursuant to the Sarbanes-Oxley Act of 2002

On December 13, 2002, the Securities and Exchange Commission (SEC) proposed new rules for auditors to ensure the independence of the audits of public company financial statements. The rules implemented Sections 201 through 204 and Section 206 of the Sarbanes-Oxley Act of 2002. The rules require the limitation by auditors of services offered to audit clients, rotation of audit partners, auditor disclosures to audit clients, and other provisions. The rule would prohibit any audit partner from providing audit services to a public company for more than five years. Thus, to retain clients, an audit firm would be required to transfer audit clients to different lead audit partners within the firm.

After consulting with small accounting firms and their smaller public company clients, the Office of Advocacy determined that the requirement for audit partner rotation would disproportionately affect small public accounting firms. About 500 small public accounting firms that provided audit services to approximately 700 clients would be subject to the rule's

"The exemption relating to auditor rotation for small firms auditing SEC registrants has allowed talented professionals from small CPA firms to continue providing audit services to public companies. This was important not only for the CPA firms to be able to continue to practice in this arena but also to allow small business registrants to have a choice of CPA firms that is not limited to the large national firms. The outcome of this exemption allows hundreds of firms to continue to practice auditing public companies that would otherwise have been precluded due to size of firm. The Small Business Administration was very helpful in framing the issues relating to small businesses and providing feedback to the SEC that was insightful and appropriate which, I believe, influenced the final ruling."

Bill Balhoff
CPA Director, Postlethwaite & Netterville

requirement for audit partner rotation. Since they were too small to rotate audit partners, these firms were already exempt from an almost identical American Institute of Certified Public Accountants (AICPA) rule requiring audit partner rotation.

On January 13, 2003, the Office of Advocacy submitted written comments to the SEC on the proposed rule's audit partner rotation requirement, requesting that the SEC exempt small audit firms in the same way the AICPA has exempted them. Advocacy noted that requiring audit partner rotation would result in small accounting firms being immediately prohibited from providing audit services to public companies. On January 28, 2003, consistent with Advocacy's comments, the SEC published a final rule allowing accounting firms with fewer than five audit clients and fewer than 10 partners to be exempted from the rotation requirement.

Section 4: Summary of Compliance with Executive Order 13272

Cabinet-Level Departments

All Cabinet-level departments, except the Department of State and the newly formed Department of Homeland Security, submitted written plans to the Office of Advocacy for review in compliance with section 3(a) of E.O. 13272. The Department of Homeland Security (DHS) was not in existence at the time E.O. 13272 was signed. After its organization in January 2003, DHS contacted Advocacy to request assistance with the development of procedures and policies in order to comply with E.O. 13272. Section 3(a) also required agencies to consider Advocacy's comments on their draft RFA procedures and subsequently to make their revised procedures publicly available through the Internet or other easily accessible means by February 2003. Nearly all Cabinet-level departments made their RFA procedures publicly available. As of September 30, 2003, the Department of State, the Department of Homeland Security, the FAR Council, and the Department of the Interior had not yet made procedures for the consideration of small entities in agency rulemaking publicly available.

While the plans were vastly different in their comprehensiveness and potential effectiveness, Advocacy was generally pleased with the level of responsiveness to this section of the E.O. The most useful plans described the ways in which RFA compliance would occur and assigned responsibility for specific RFA tasks in the regulatory development process. The challenge now is to hold agencies to their written procedures and policies on complying with the RFA. Advocacy continues to educate agency personnel about these policies and encourages them to be aware of what their own agency has publicly agreed to do with regard to the RFA.

Section 3(b) of E.O. 13272 requires agencies to notify Advocacy of any draft rules that may have a significant economic impact on a substantial number of small entities under the RFA. Such notifications are to be made (i) when the agency submits a draft rule to OIRA under Executive Order 12866, or (ii) if no submission to OIRA is required, at a reasonable time prior to publication of the rule by the agency. Most agencies have not met this requirement under E.O. 13272, and Advocacy's first annual report to OMB reflected which agencies have not complied with this provision.[29]

Section 3(c) of E.O. 13272 requires agencies to give every appropriate consideration to any comments provided to Advocacy regarding a draft rule. The agency is required to include in the *Federal Register* the agency's response to any written comments submitted by Advocacy on a proposed rule. Most agencies' rules on which Advocacy has commented have not been finalized during the past year. Therefore, many agencies

29. See *Agency Compliance with Executive Order 13272* at *www.sba.gov/advo/laws/eo13272_03.pdf*.

have not yet had an opportunity to comply with this section of the E.O. More time is needed to assess overall agency compliance with this important provision of the E.O., although agency compliance was listed in the first annual report to OMB.

Independent Regulatory Agencies

Advocacy was less satisfied with the response to E.O. 13272 by independent regulatory agencies. Of the 75 independent regulatory agencies, 16 responded to the requirements of the E.O. Eight provided written procedures to Advocacy, six claimed not to regulate small entities, and two claimed to be exempt from the executive order. Independent agencies with plans are generally complying with sections 3(b) and 3(c) of the E.O., or have not had an opportunity to comply. While 59 nonresponses is a large number, Advocacy is most concerned with the noncompliance of eight particular independent agencies that regulate small entities and did not submit written procedures to Advocacy. The eight independent agencies are the Export-Import Bank of the United States, the Farm Credit Administration, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Housing Finance Board, the Federal Maritime Commission, the Federal Reserve System, and the Securities and Exchange Commission. Both the Federal Communications Commission and the Federal Deposit Insurance Corporation submitted letters in response to E.O. 13272. As government-wide RFA training moves forward, Advocacy will continue to urge these agencies to comply with the executive order.

Conclusion

The Office of Advocacy has worked extensively to educate federal regulatory agencies on compliance with the RFA and E.O. 13272. As a result, several agencies have actively sought ways to improve their compliance, either through involving Advocacy in the rulemaking process or reaching out to small entities. Advocacy's efforts have yielded some successes, yet there is still room for improvement.

In the coming year, Advocacy will conduct 25 agency RFA training sessions pursuant to E.O. 13272. The training sessions will be a valuable tool to help Advocacy accomplish our objective of ensuring that federal agencies analyze the impact of their rules on small entities and consider effective, less burdensome alternatives. Moreover, Advocacy will utilize tools such as the Regulatory Alerts page and state regulatory flexibility laws to encourage small entities to become more involved in the rulemaking process. By focusing our efforts on those issues most important to small entities, Advocacy will help ensure compliance with the RFA and E.O. 13272 while effectively advancing the views, interests, and concerns of small entities before key policymakers.

Appendix A: The Regulatory Flexibility Act, as Amended

The following text of the Regulatory Flexibility Act of 1980, as amended, is taken from Title 5 of the United States Code, Sections 601-612. The Regulatory Flexibility Act was originally passed in 1980 (P.L. 96-354). The Act was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (P.L. 104-121).

Congressional Findings and Declaration of Purpose

(a) The Congress finds and declares that—

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

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

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

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

(5) unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;

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

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

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

need for existing rules.

(b) It is the purpose of this Act [enacting this chapter and provisions set out as notes under this section] to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

Regulatory Flexibility Act

§ 601 Definitions

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 rule-making record with respect to small entities and the effect of the rule on small entities.

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

Appendix B: Executive Order 13272

Presidential Documents

Executive Order 13272 of August 13, 2002

The President

Proper Consideration of Small Entities in Agency Rulemaking

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

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

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

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

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

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

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

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

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

(c) Give every appropriate consideration to any comments provided by Advocacy regarding a draft rule. Consistent with applicable law and appropriate protection of executive deliberations and legal privileges, an agency shall include, in any explanation or discussion accompanying publication in the **Federal Register** of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule that preceded the

final rule; provided, however, that such inclusion is not required if the head of the agency certifies that the public interest is not served thereby. Agencies and Advocacy may, to the extent permitted by law, engage in an exchange of data and research, as appropriate, to foster the purposes of the Act.

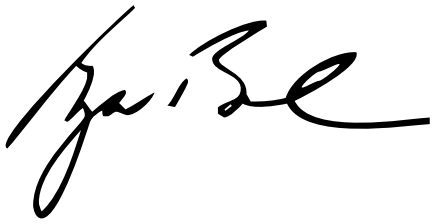
Sec. 4. *Definitions.* Terms defined in section 601 of title 5, United States Code, including the term ''agency,'' shall have the same meaning in this order.

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

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

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

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



THE WHITE HOUSE,
August 13, 2002.