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Report on the Regulatory Flexibility Act FY 2005

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

April 2006

To the President and the Congress of the United States

I am pleased to present to Congress and the President this Report on the *Regulatory Flexibility Act, FY 2005*. Included in this report is the status of agency compliance with Executive Order 13272. The Regulatory Flexibility Act of 1980 (RFA) requires agencies to consider the impact of their rules on small entities and examine significant alternatives that minimize small entity impacts. Similarly, Executive Order 13272 (E.O. 13272) directs agencies to submit draft rules that may have a significant economic impact on small entities to the Office of Advocacy for review and to address Advocacy's comments in the analysis accompanying the final rule. It also requires the Office of Advocacy to train regulatory agencies in how to comply with the RFA and E.O. 13272.

September 2005 marked the 25th anniversary of the RFA. The anniversary marked a significant milestone and gave us the opportunity to look back at how the law has been working and to look ahead toward making it work even better. On September 19-20, 2005, exactly 25 years after the RFA was signed, the Office of Advocacy convened a symposium with our key partners in the implementation of the law. Our invitation list included federal agency contacts, key members of Congress, regulatory economists, e-regulation developers, attorneys involved in RFA litigation, oversight officials from the Office of Management and Budget, officials involved in regulatory flexibility at the state level, trade association representatives, and, most important, small business people. We spent September 20 in panel discussions on various aspects of how the law is implemented, including e-rulemaking, regulatory research, small business outreach, judicial review, and the process for reducing existing regulatory burdens. Conference participants had the opportunity to participate in the training Advocacy has been offering to federal agencies on proper RFA implementation. The *RFA Symposium Conference Proceedings* are available on Advocacy's website at *http://www.sba.gov/advo/rfa_sym0905.pdf*.

In conjunction with the symposium, we released a new Advocacy-sponsored study by Mark Crain on *The Impact of Regulatory Costs on Small Firms*. The study shows that the smallest firms bear the largest per-employee burden of federal regulatory compliance costs. Firms with fewer than 20 employees annually spend $7,647 per employee to comply with federal regulations, or 45 percent more than the $5,282 per employee spent by firms with 500 or more employees. The report analyzes compliance costs for economic, workplace, environmental, and tax regulations, and details regulatory costs for five sectors: manufacturing, trade (wholesale and retail), services, health care, and other (a residual category). The study finds that the compliance cost per employee for small manufacturers is at least double that for medium-sized and large firms. The annual cost of U.S. federal regulations totaled $1.1 trillion in 2004. The report can be found on the Office of Advocacy website at *www.sba.gov/advo/research/regulation.html*.

The Office of Advocacy trained more than 20 agencies on the RFA in accordance with the requirements of E.O. 13272 in fiscal year (FY) 2005. Our office also submitted written comments on a variety of agency rules, testified before Congress on small business issues and potential legislative changes to the RFA as well as agency compliance with the RFA, and participated in Small Business Regulatory Enforcement Fairness Act (SBREFA) panels focusing on three EPA rules. The office worked successfully with seven states to pass state regulatory flexibility legislation in 2005.

In FY 2005, two cases were decided by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) related to the RFA. The first case was *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29 (D.C. Cir., March 11, 2005). In February 2004, Advocacy filed a notice of intent to

file a "friend of the court" brief with the D.C. Circuit. In June 2004, Advocacy withdrew its notice of intent from the court and reached a settlement with the Federal Communications Commission (FCC). The FCC agreed to more fully consider impacts on small business and to urge state regulators to consider the concerns of small rural telecom providers that seek waivers to the new portability rules. The other case decided by the D.C. Circuit was *National Association of Home Builders v. United States Army Corps of Engineers*, Case No. 04-5009 (D.C. Cir., July 29, 2005). Plaintiffs challenged nationwide permits issued under the Clean Water Act because the Corps did not conduct a flexibility analysis as required by the RFA. The Corps argued that permits were not rules subject to the Administrative Procedure Act (APA) or RFA. The D.C. Circuit disagreed and ruled that permits of general applicability are rules subject to the APA.

Small entities continued to help us identify and prioritize regulations that would significantly affect their operations. Advocacy hosted numerous roundtables to gather small entity input on the regulatory process and key rules. Training small business stakeholders on the valuable tools provided by the RFA and E.O. 13272 continued to help us engage a broader advocacy community and leverage limited resources.

RFA training continues to improve agency compliance in three important ways: 1) Improvements can be seen in agency submission of draft rules to Advocacy for review through the increased number of draft rules sent to Advocacy's email notification system: *notify.advocacy@sba.gov*. 2) Improvements in seeking assistance early in the rulemaking process are evident in the increasing number of conversations with agency rule writers willing to discuss predecisional regulatory information with Advocacy lawyers and economists in an effort to improve RFA compliance. 3) Improvements in considering significant alternatives following discussions with Advocacy and affected small entities have occurred this year as some agency rules have contained realistic alternatives to their regulations that would benefit small entities.

In 2005, Advocacy's involvement in agency rulemakings helped secure $6.62 billion in first-year foregone regulatory cost savings and $965 million in recurring annual savings for small entities.

In fiscal year 2006, Advocacy will continue to weave small entities into the fabric of regulatory decisionmaking at agencies. Facilitating communications between agencies and small entities helps agencies achieve compliance with the RFA and E.O. 13272 and, ultimately, reduce regulatory burdens on small entities. Efforts to train agencies and increased attention to small business impact analysis can change how government treats small entities. We are seeing results from a greater working knowledge of the RFA and the Administration's commitment, voiced through E.O. 13272.

Chief Counsel for Advocacy

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Introduction

"The state of small business regulation has come a long way since the enactment of the Regulatory Flexibility Act in 1980," said Chief Counsel for Advocacy Thomas M. Sullivan at the Office of Advocacy's symposium on the 25th anniversary of the Regulatory Flexibility Act, September 19, 2005. At the symposium, much was said about the advances in small business regulatory policy since 1980. For example:

- In a panel on e-rulemaking, Jeffrey Lubbers of American University talked about the benefits of electronic rulemaking as an opportunity for information dissemination, government transparency, and public participation.
- Susan Dudley of George Mason University noted in a regulatory research panel that the volume of regulations continues to increase and stressed that the RFA is significant as one of the first legislative requirements to analyze the impacts of new regulations.
- Todd McCracken of the National Small Business Association in a small business outreach panel said of the increased small business involvement in the RFA process, "There's a key qualitative significance to having real input from real businesses."
- Karen Harned of the National Federation of Independent Business Legal Foundation, speaking about the judicial review provision introduced in 1995, said she believes that the possibility of litigation means that agencies have progressed in their compliance.
- In a panel on reducing existing burdens, Howard Radzely of the U.S. Department of Labor urged small business owners to get involved in the process and voice their regulatory concerns about the 200 laws enforced by the department.

In Chapter 1, Advocacy's *Report on the Regulatory Flexibility Act, FY 2005*, takes a look at the developments in the 25-year history of the RFA. Then the report focuses on the substance of RFA and E.O. 13272 enforcement in Fiscal Year 2005, examining Advocacy's role and overall trends in Chapter 2, individual agency achievements and ongoing challenges in Chapter 3, and developments in state regulatory flexibility law in Chapter 4.

1 An Overview of the Regulatory Flexibility Act and Related Policy

The RFA: A 25-Year History

As soon as President Gerald Ford signed Public Law 94-305 creating the Office of Advocacy in June 1976, the important work of paying attention to regulations' effects on small firms came under the wing of the newly created independent office. Part of Advocacy's mandate was explicitly to "measure the direct costs and other effects of government regulation on small businesses; and make legislative and nonlegislative proposals for eliminating excessive or unnecessary regulations of small businesses."

In the fall of 1979, President Jimmy Carter added the Small Business Administration to his Regulatory Council and issued a memorandum to the heads of executive departments and agencies. He said, "I want you to make sure that federal regulations will not place unnecessary burdens on small businesses and organizations," and directed agencies to apply regulations "in a flexible manner, taking into account the size and nature of the regulated businesses." Agencies were to report on their efforts to the Office of Advocacy.

Meanwhile, the House and Senate Small Business and Judiciary Committees had been holding hearings on the effects of regulation. Small business people cited evidence that uniform application of regulatory requirements made it difficult for smaller businesses to compete.

By 1980, when delegates assembled for the first of three White House Conferences on Small Business, the conference report noted that "during the past decade, the growth of government regulation has been explosive, particularly in such areas as affirmative-action hiring, energy conservation, and protection for consumers, workers, and the environment. Small business people recognize that some government regulation is essential for maintaining an orderly society. But there are now 90 agencies issuing thousands of new rules each year."

Moreover, the report said, the new Office of Advocacy had estimated that small firms spent $12.7 billion annually on government paperwork. Among the conference recommendations, the fifth highest vote-getter was a recommendation calling for "sunset review" and economic impact analysis of regulations, as well as a regulatory review board with small business representation. The conference delegates recommended putting the onus of measuring regulatory costs on the regulatory agencies—to "require all federal agencies to analyze the cost and relevance of regulations to small businesses."

1980: The Regulatory Flexibility Act

The White House Conference recommendations helped form the impetus for the passage, in 1980, of the Regulatory Flexibility Act (RFA). The intent of the act was clearly stated:

"It is the purpose of this act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives…of applicable statutes, to fit regulatory and informational requirements to the scale of businesses…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."

The law directed agencies to analyze the impact of their regulatory actions and to review existing rules, planned regulatory actions, and actual proposed rules for their impacts on small entities. Depending on the proposed rule's expected impact, agencies were required by the RFA to prepare an initial regulatory flexibility analysis (IRFA), a certification, and/or a final regulatory flexibility analysis (FRFA). Rules to be included in the agencies'

"regulatory agendas" were those likely to have a "significant economic impact on a substantial number of small entities."

Implementing the RFA

The Office of Advocacy was charged with monitoring agency compliance with the new law. Over the next decade and a half, the office carried out its mandate, reporting annually on agency compliance to the president and the Congress. But it was soon clear that the law wasn't strong enough. A briefing paper prepared for the 1986 White House Conference on Small Business noted: "The effectiveness of the Regulatory Flexibility Act largely depends on small business' awareness of proposed regulations and [their] ability to effectively voice [their] concerns to regulatory agencies. In addition, the courts' ability to review agency compliance with the law is limited."

The delegates recommended that the RFA be strengthened by requiring agencies to comply and by providing that agency action or inaction be subject to judicial review. President Ronald Reagan's 1987 report on small business noted: "Regulations and excessive paperwork place small businesses at a disadvantage in an increasingly competitive world marketplace…This Administration supports continued deregulation and other reforms to eliminate regulatory obstacles to open competition." But it would take an act of Congress to make judicial review law—and reaching that consensus needed more time.

Regulations' effects on the economic environment for competition also concerned President George H.W. Bush, whose 1992 message in the annual small business report noted: "My Administration this year instituted a moratorium on new federal regulations to give federal agencies a chance to review and revise their rules. And we are looking at ways to improve our regulatory process over the long term so that regulations will accomplish their original purpose without hindering economic growth."

In September 1993, President Bill Clinton issued Executive Order 12866, "Regulatory Planning and Review," designed, among other things, to ease the regulatory burden on small firms. The order required federal agencies to analyze their major regulatory undertakings and to take action to ensure that these regulations achieved the desired results with minimal burden on the U.S. economy.

An April 1994 report by the General Accounting Office reviewed the Office of Advocacy's annual reports on agency compliance with the RFA and concluded: "The SBA annual reports indicated agencies' compliance with the RFA has varied widely from one agency to another. …the RFA does not authorize SBA or any other agency to compel rulemaking agencies to comply with the act's provisions."

The 1995 White House Conference and SBREFA

In June 1995, a third White House Conference on Small Business examined the RFA's weaknesses. The Administration's National Performance Review had recommended that agency compliance with the RFA be subject to judicial review. Still it had not happened.

Once again, the White House Conference forcefully addressed the problem. One of its recommendations fine-tuned the regulatory policy recommendations of earlier conferences, asking for specific provisions that would include small firms in the rulemaking process.

In October, the Office of Advocacy issued a report, based on research by Thomas Hopkins, that estimated the total costs of process, environmental, and other social and economic regulations to be between $420 billion and $670 billion in 1995. The report estimated that the average cost of regulation was $2,979 per employee for large firms with 500 or more employees and $5,532 per employee for small firms with fewer than 20 employees.

In March 1996, President Clinton acted on the 1995 White House Conference recommendation that was taken up by Congress, by signing Public Law 104-121, the Small Business Regulatory Enforcement Fairness Act (SBREFA). The new law gave the courts jurisdiction to review agency compliance with the RFA. Second, it mandated that

the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) convene small business advocacy review panels to consult with small entities on regulations expected to have a significant impact on them, before the regulations were published for public comment. Third, it reaffirmed the authority of the chief counsel for advocacy to file *amicus curiae* (friend of the court) briefs in appeals brought by small entities from agency final actions.

Executive Order 13272

In March 2002, President George W. Bush announced his Small Business Agenda. The president gave a high priority to regulatory concerns, including as a key feature of his agenda the goal to "tear down the regulatory barriers to job creation for small businesses and give small business owners a voice in the complex and confusing federal regulatory process."

One key goal was to strengthen the Office of Advocacy by creating an executive order that would direct agencies to work closely with Advocacy in properly considering the impact of their regulations on small business.

In August 2002, President Bush issued Executive Order 13272. It requires federal agencies to establish written procedures and policies on how they would measure the impact of their regulatory proposals on small entities and to vet those policies with Advocacy; to notify Advocacy before publishing draft rules expected to have a significant small business impact; and to consider Advocacy's written comments on proposed rules and publish a response with the final rule. E.O. 13272 requires Advocacy to provide notification as well as training to all agencies on how to comply with the RFA. These steps set the stage for agencies to work closely with Advocacy in considering their rules' impacts on small entities.

Implementing the Executive Order

As part of its compliance with E.O. 13272, the Office of Advocacy first reported to the Office of Management and Budget in September 2003. The report noted that Advocacy had engaged agencies on E.O. 13272 and instituted an email address (*notify.advocacy@sba.gov*) to make it easier for agencies to comply with notification requirements. Advocacy developed an RFA compliance guide, posted it on its website, prepared training materials, and began training agencies throughout the government.

Nearly all of the cabinet agencies submitted written plans for compliance to Advocacy and made their RFA procedures publicly available. Advocacy has also developed a Regulatory Alerts webpage at *http://www.sba.gov/advo/laws/law_regalerts.html* to call attention to important pending regulations that may affect small entities. The final chapter on how much small businesses and other small entities are benefiting from the RFA as amended by SBREFA and supplemented by E.O. 13272 has yet to be written. Legislation has been introduced to further enhance the RFA. Advocacy believes that as agencies adjust their regulatory development processes to accommodate the RFA and E.O. 13272's requirements, the benefits will accrue to small firms. Agencies are making strides in that direction.

Regulatory Flexibility Timeline

June 1976 President Gerald Ford signs Public Law 94-305, creating an Office of Advocacy within the U.S. Small Business Administration charged, among other things, to "measure the direct costs and other effects of federal regulation small businesses and make legislative and nonlegislative proposals for eliminating excessive or unnecessary regulations of small businesses."

January 1980 The first White House Conference on Small Business calls for "sunset review" and economic impact analysis of regulations, and a regulatory review board that includes small business representation.

September 1980 President Jimmy Carter signs the Regulatory Flexibility Act, requiring agencies to review the impact of proposed rules and include in published regulatory agendas those likely to have a "significant economic impact on a substantial number of small entities."

October 1981 The Office of Advocacy reports on the first year of RFA experience in testimony before the Subcommittee on Export Opportunities and Special Small Business Problems of the U.S. House Of Representatives Committee on Small Business.

February 1983 Advocacy publishes the first annual report on agency RFA compliance.

August 1986 Delegates to the second White House Conference on Small Business recommend strengthening the RFA by, among other things, subjecting agency compliance to judicial review.

September 1993 President Bill Clinton issues Executive Order 12866, "Regulatory Planning and Review," requiring each federal agency to "tailor its regulations to impose the least burden on society, including businesses of different sizes."

June 1995 The third White House Conference on Small Business asks for specific provisions to strengthen the RFA—including the IRS under the law, granting judicial review of agency compliance, and including small businesses in the rulemaking process.

Regulatory Flexibility Timeline (cont'd)

March 1996 President Clinton signs the Small Business Regulatory Enforcement Fairness Act, giving courts jurisdiction to review agency compliance with the RFA, requiring the Environmental Protection Agency and the Occupational Safety and Health Administration to convene small business advocacy review panels, and affirming the chief counsel's authority to file *amicus curiae* briefs in appeals brought by small entities from final agency actions.

March 2002 President George Bush announces his Small Business Agenda, which promises to "tear down regulatory barriers to job creation for small businesses and give small business owners a voice in the complex and confusing federal regulatory process."

August 2002 President Bush issues Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," which requires federal agencies to establish written procedures to measure the impact of their regulatory proposals on small businesses, and to consider Advocacy comments on proposed rules, and requiring Advocacy to train agencies in the requirements of the law.

December 2002 Advocacy presents model state regulatory flexibility legislation to the American Legislative Exchange Council (ALEC) for consideration by state legislators. ALEC endorses the model legislation, and states begin adopting legislation modeled on the federal law.

May 2003 Advocacy issues *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act.*

September 2003 Advocacy presents its first report on agency compliance with E.O. 13272, noting the start of Advocacy's agency training.

September 2005 In the 25th anniversary year of the RFA, Advocacy cosponsors a symposium that looks back at the RFA's achievements and challenges and looks ahead at possible improvements. Legislation is considered in Congress to strengthen the RFA.

Historical Success Stories

SBREFA Review Panels Improve Rulemaking

In 1996, Congress fortified the Regulatory Flexibility Act with the Small Business Regulatory Enforcement Fairness Act (SBREFA). Among other things, SBREFA directed the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to convene small business review panels for regulations expected to have a significant small business impact. These panels occur before the rule is published for public comment. Significant rulemaking improvements have resulted from the SBREFA panel process.

SBREFA review panels consist of representatives from the agency, Advocacy, and the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB). The panel reaches out to small entities likely to be affected by the proposal, seeks their input, and prepares a report with recommendations for reducing the potential small business impact. The agency may modify its proposal in response to the panel report. (See Appendix A, Table A.3 for a list of SBREFA panels through FY 2005.)

OSHA Panels

OSHA has convened seven panels since 1996. Two of the most significant were on the Safety and Health Program rule and the Ergonomics Program Standard. They demonstrate how small business input early in the regulatory process can help agencies see new ways to solve a problem through regulation—by looking at equally effective alternatives that minimize the harm to small business.

- **Safety and Health Program Rule**. In August 1998, OSHA notified Advocacy of its intent to propose a safety and health program rule. The proposal would have required employers to establish a workplace safety and health program to ensure compliance with OSHA standards and the "general duty" clause of the Occupational Safety and Health Act. Because the proposal covered nearly all employers (except those in construction and agriculture), a SBREFA panel was convened that included 19 small entity representative advisors. The panel report sent the message loud and clear to OSHA, OMB, and other federal agencies that realistic costs and accurate data must be used when promulgating regulations. As a result, this overly burdensome regulation never moved forward, and it was eventually removed from OSHA's regulatory agenda, saving small businesses billions in regulatory compliance costs.
- **Ergonomics Standard.** In March 1999, OSHA released a draft ergonomics standard and announced its intention to convene a SBREFA panel to discuss the potential impact on small businesses. The draft proposal covered every industry and business in the United States, except those in construction, maritime trades, and agriculture. Twenty small entity representatives (including 13 recommended by Advocacy) advised the panel. During the deliberations, the small entities expressed a number of concerns, especially about OSHA's estimates of the time and money required to comply. They provided OSHA with types of costs they felt were omitted and suggested that OSHA provide the assumptions it used when it proposed the standard in the *Federal Register*. The panel completed its report in April 1999. Congress repealed the ergonomics rule in March 2001. OSHA's subsequent decision to issue guidelines instead of creating a new ergonomics rule showed that the SBREFA panel process works. Advocacy estimated in 2001 that rescinding the ergonomics standard saved small businesses $3 billion. Other observers have estimated that the actual cost would have been up to 15 times higher.

EPA Panels

EPA has convened 29 SBREFA panels since 1996. These panels have improved the cost-effectiveness

of planned environmental rules and limited the adverse impact on small entities, including two small communities. Two recent successes are the panels on nonroad diesel engines and construction and development runoff.

- **Nonroad Diesel Engines and Fuel Rule.** In summer 2002, EPA notified Advocacy that it would propose further limits on emissions of nitrogen oxides and particulate matter from diesel-powered nonroad engines. These engines are used extensively in construction, agriculture, and other off-road applications. EPA also planned to dramatically reduce the allowable level of sulfur in diesel fuel used by nonroad engines. The rule was anticipated to have significant economic impacts on small equipment manufacturers who use diesel engines, and on small oil refiners and oil distributors. EPA convened a SBREFA panel with 20 small entity representative advisors who raised concerns about the technical and cost feasibility of EPA's proposed rule. The panel concluded that equipment manufacturers should be allowed to purchase current engines for several additional years, while redesigning their products to accommodate the newer engines. The panel also advised that expensive aftertreatment devices should not be required on engines with less than 25 horsepower. The SBREFA panel report recommendations, which were adopted by EPA in the final rule, allowed many small equipment manufacturers to stay in business and gave them valuable time to redesign their products to comply with the new requirements.
- **Construction and Development Site Runoff.** In June 2002, EPA proposed a rule to reduce stormwater runoff from construction and development sites of one acre or more. The original proposal carried a price tag of almost $4 billion per year, and its requirements overlapped with existing state and local stormwater programs. Small businesses provided information about the rule's potential impact and offered other options. The panel concluded that the rule's requirements would add substantial complexity and cost to current stormwater requirements without a corresponding benefit to water quality. The panel recommended that EPA not impose the requirements, and focus instead on improving public outreach and education about existing stormwater rules. In March 2004, EPA announced it would not impose new requirements for construction sites. EPA found that a flexible scheme would permit state and local governments to improve water quality without an additional layer of federal requirements and without unduly harming small construction firms. In addition to the cost savings for small businesses, rescinding the original proposal saved new home buyers about $3,500 in additional costs.

EPA Conducted Two SBREFA Panels in 2005:

- **Controlling the Interstate Transport of Air Pollution**. In early 2005, EPA notified Advocacy that it planned to propose two related regulations to address situations where EPA acts to control emissions of air pollutants from power plants that are carried across state lines to a downwind state. On April 27, 2005, EPA convened a SBREFA panel with 16 small entity representative advisors, who raised concerns about the disproportionate cost burden the rule could impose on the 58 small entities (primarily small community municipal utilities and cooperatives) that EPA estimated would be subject to the two rules. The panel considered several regulatory alternatives, and ultimately concluded that economic burdens on small entities would be minimized by a "cap and trade" program that allows companies to purchase and sell emission credits.
- **Mobile Source Air Toxics Rule.** In April 2005, EPA notified Advocacy that it was planning to propose a rule that would reduce emissions of benzene, a toxic air pollutant, from gasoline, portable gasoline containers, and certain highway vehicles. On September 7, 2005, EPA convened a SBREFA panel with 11 small entity

representatives chosen from portable gasoline container manufacturers, small oil refiners, and vehicle manufacturers. The panel considered several regulatory alternatives, and ultimately recommended a number of regulatory flexibilities, including giving small entities additional time to comply and allowing limited hardship exemptions for small firms that demonstrate an inability to meet the full program requirements.

SBREFA Panels Work

These panels illustrate that the SBREFA panel process indeed works to reduce the burdens on small entities. Because agencies are required to convene these panels, small businesses are able to shed light on agencies' underlying assumptions, rationale, and data behind their draft rulemaking. In the absence of SBREFA panels, these rules would have been promulgated as originally drafted, costing small businesses millions in unnecessary regulatory costs. The panel reports allowed EPA and OSHA to examine alternatives that accomplished their regulatory objectives while protecting small businesses.

Legal History

SBREFA amended the RFA to allow small businesses for the first time to seek judicial review of agency compliance with the RFA. In addition to legal challenges brought by small entities, the chief counsel for advocacy has the right under the RFA to file *amicus curiae* (friend of the court) briefs in RFA cases. These provisions were important in giving the Office of Advocacy and the small business community recourse when agencies were unresponsive to the law.

Hardrock Mining

On January 7, 1998, the Office of Advocacy filed an *amicus curiae* brief. The case, *Northwest Mining v. Babbitt*, F. Supp. 2d 9 (D.D.C. 1998) raised issues about a trade association's standing to bring a claim under the RFA and the Bureau of Land Management's (BLM) failure to use the proper size standard for determining the number of small businesses that may be harmed by the regulation.

In May 1998, the District Court for the District of Columbia agreed with Advocacy's arguments and ruled in favor of the plaintiff. First, the court found that the RFA extends the standing to trade associations to sue as small entities. Small entity as defined in the RFA includes the term "small organization," which means any not-for-profit enterprise that is independently owned and operated and is not dominant in its field. Since the plaintiff was a small not-for-profit organization, it was a small entity and therefore met the requirements for standing under the RFA.

In terms of the agency use of an alternate size standard, the court stated that the BLM's reasons for using another size standard were "unconvincing in light of the clearly mandated procedure of the RFA. The definitions section of the RFA uses phrases such as "'small entity' shall have the same meaning… Words such as these do not leave room for alternate interpretations by the agency." It found that since the BLM's certification did not observe the procedure required by law, the plaintiff was entitled to relief. Although the agency argued that maintenance of the rule was necessary to save the environment, the court disregarded that argument stating:

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

Sharks!

In December 1996, the National Marine Fisheries Service (NMFS) of the Department of Commerce published a proposal to reduce the existing shark fishing quota by 50 percent, certifying that the reduction would not have a significant impact on a substantial number of small entities. In January 1997, Advocacy questioned NMFS's decision to certify rather than perform an initial regulatory flexibility analysis. In its March 1997 final rule, NMFS upheld its original decision, but prepared a final regulatory flexibility analysis rather than certifying the rule.

In May 1997, the Southern Offshore Fishing Association brought suit against the Secretary of Commerce, challenging the quotas through judicial review provisions of laws including the RFA. Advocacy filed to intervene as *amicus curiae*, but withdrew after the Department of Justice stipulated that the standard of review for RFA cases should be "arbitrary and capricious," a higher standard than originally requested.

In February 1998, the United States District Court for the Middle District of Florida ruled that NMFS's certification of "no significant economic impact" and the FRFA failed to meet APA and RFA requirements. Noting Advocacy's role as "watchdog of the RFA," the Court remanded the rule and instructed the agency to analyze the economic effects and potential alternatives. Further steps culminated in the court issuing an injunction to NMFS from enforcing new regulations until the agency could establish bona fide compliance with the court's earlier orders.

A later settlement involved a delay in any decisions on new shark fishing quotas pending a review of current and future shark stocks by a group of independent scientists. In November 2001 that study was released, indicating that NMFS had significantly underestimated the number of Atlantic sharks.

Number Portability

In March 2005, the U.S. Court of Appeals for the D.C. Circuit issued a ruling that strengthened the RFA and provided needed relief to small businesses. In *U.S. Telecom Assoc. and CenturyTel, Inc. v. FCC*, No. 03-1414 (D.C. Cir., decided March 11, 2005), the Court found that the Federal Communications Commission had not complied with the RFA and sent the rule, which concerned telephone number portability, back to the agency with instructions to conduct a regulatory flexibility analysis. The Court stayed enforcement of the rule on small businesses until the agency finishes a regulatory flexibility analysis. Advocacy decided against filing an *amicus* brief after the FCC agreed to advise state regulators to give small telecom providers more flexibility.

The case is significant for three reasons. First, it reaffirms the importance of the RFA in agency rulemaking. Other claims in this case were dismissed as harmless error. Only the claim that the FCC had failed to comply with the RFA was upheld and sent back to the FCC. Second, this decision was made by the D.C. Circuit, which is the appellate court most likely to hear appeals from federal agency rulemakings. The decision from this court that upholds the RFA can be used in other appeals from other agencies. Third, by staying the rules until the RFA analysis is done, the D.C. Circuit provided immediate relief to the small entities.

The Economics of the RFA

Office of Advocacy Indicators over the Years

When the Regulatory Flexibility Act was passed in 1980, the cost of regulation was very much on the minds of economists and policymakers. Cost studies from that time period show a general consensus that small firms were being saddled with a disproportionate share of the federal regulatory burden. Then as now, one important tool for redressing the disproportionate impact on small firms was through implementation of the RFA.

As the Office of Advocacy works with federal agencies during the rulemaking process, it seeks to measure the savings of its actions in terms of the compliance costs that small firms would have had to bear if changes to regulations not been made. The first year in which cost savings were documented was 1998. Changes to rules in that year were estimated to have saved small businesses $3.2 billion. In 2004, Advocacy actions saved small businesses more than $17 billion. Advocacy continues to measure its accomplishments through cost savings.

Ultimately, if federal agencies institutionalize consideration of small entities in the rulemaking process, the goals of the regulatory flexibility process and Executive Order 13272 will be realized to a large degree, and the amount of foregone regulatory costs will actually diminish.

Economics has provided a framework for regulatory actions and for other public policy initiatives. What has been Advocacy's impact in influencing public policy and furthering research? Research by the Office of Advocacy and others over the past two decades has advanced the recognition that small firms are crucial to the U.S. economy.

The economy of 1980 and today differ greatly (Table 1.1). Real gross domestic product (GDP) and the number of nonfarm business tax returns have more than doubled since 1980. The unemployment rate and interest rates are much improved, and prices are higher, although inflation is significantly lower. One constant, though, is the lack of timely, relevant data on small businesses. The Office of Advocacy struggled throughout much of its early existence to measure the number of small firms accurately. The good news is that since 1988 the Census Bureau now has credible firm size data, in part because of funding from the Office of Advocacy. Despite the data obstacles, Advocacy research shows that more women and minorities have become business owners since 1980. Small businesses are now recognized to be job generators and the source of growth and innovation. Not only are more than 99 percent of all employers small businesses, but small firms are responsible for 60 to 80 percent of all new jobs, and they are more innovative than larger firms, producing 13.5 times as many patents per employee (see the Office of Advocacy's "Frequently Asked Questions" at *http://app1.sba.gov/faqs/faqindex.cfm?areaID=24*).

Research on small entities has gained more prominence, and entrepreneurs are widely acknowledged as engines of change in their regions and industries. The Office of Advocacy will continue to document the contributions and challenges of small business owners. Armed with these data, policymakers will be able to better consider how government decisions affect small businesses and the economy.

The Impact of Regulatory Costs on Small Firms

Regulatory policy involves difficult choices. Accurate data on costs are essential to a complete understanding of the tradeoffs involved. Even though the RFA first required agencies to consider small business impacts separately 25 years ago, dependable cost estimates have often been hard to come by.

While measuring the costs of new regulations is a prerequisite for improving regulatory policy, compliance with the sum of all current regulations also places a heavy burden on small businesses. Over the past 25 years, significant gains have been made in measuring the impact of regulatory compliance on small firms. During that time, the Office of Advocacy has produced a series of research reports on this topic, and the findings have been consistent: compliance costs small firms more per employee than large firms. The most significant series of analyses began in the 1990s when Thomas Hopkins first estimated the costs of regulatory compliance for small firms. This research was refined by Mark Crain and Hopkins in 2001, and most recently by Crain in the 2005 study, *The Impact of Regulatory Costs on Small Firms*. Crain's latest estimate shows that federal regulations cost small firms nearly 45 percent more per employee than large firms.

The 2005 report distinguishes itself from previous research by adopting a more rigorous methodology for its estimate on economic regulation, and it brings the information in the 2001 study up to date.

The research finds that the total costs of federal regulations have further increased from the level established in the 2001 study, as have the costs per employee. Specifically, the cost of federal regulations totals $1.1 trillion, while the updated cost per employee is now $7,647 for firms with fewer than 20 employees. The 2001 study showed small businesses with 60 percent greater regulatory burden than their larger business counterparts. The 2005 report shows that disproportionate burden shrinking to 45 percent.

Despite much progress since passage of the RFA 25 years ago, significant work remains. The hurdles include determining the total burden of rules on firms in specific industries or imposed by specific federal agencies. Estimates of these costs would help show policymakers the marginal cost of adding new rules or modifying existing ones; they would also help

Table 1.1 Then and Now: Small Business Economic Indicators Over 25 Years

	1980	1985	1990	1995	2000	2005
Real gross domestic product (trillions of dollars)	5.2	6.1	7.1	8.0	9.8	11.1
Unemployment rate (percent)	7.2	7.2	5.6	5.6	4.0	5.2
Consumer price index (1982=100)	82.4	107.6	130.7	152.4	172.2	193.4
Prime bank loan rate (percent)	15.3	9.9	10.0	8.8	9.2	5.8
Employer firms (millions)	--	--	5.1	5.4	5.7	5.7 (e)
Nonemployer firms (millions)	--	--	--	--	16.5	18.3 (e)
Self-employment, unincorporated (millions)	8.6	9.3	10.1	10.5	10.2	10.6
Nonfarm business tax returns (millions)	13.0	17.0	20.2	22.6	25.1	29.3

Note: All figures are seasonally adjusted unless otherwise noted. Figures for "today" represent the latest data available; 2005 data are year-to-date.
e = Estimate
Source: Federal Reserve Board; U.S. Department of the Treasury, Internal Revenue Service; U.S. Department of Commerce, Bureau of the Census and Bureau of Economic Analysis; U.S. Department of Labor, Bureau of Labor Statistics

show the effects of repealing rules that are no longer relevant, yet still cost small businesses every year. Such analyses will become crucial as the mountain of federal regulations continues to rise. The future of small businesses will be affected by rulemaking that uses the best data available to balance the costs and benefits of regulation, while considering how additional rules will affect small firms.

Training: Learning to Analyze Small Firm Impacts

One key aspect of Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," is to educate federal rulemakers on how to comply with the Regulatory Flexibility Act. Since President Bush signed E.O. 13272 in August 2002, staff at over 40 agencies have been trained.

Agency staff—attorneys, economists, policymakers and other employees involved in the regulation writing process—come to RFA training with varying levels of familiarity with the RFA, even though it has been in existence for 25 years. Some are well versed in the law's requirements, while others are completely unaware of what it requires an agency to do when promulgating a regulation.

The three-and-a-half hour session consists of discussion, group assignments (in which participants review fictitious regulations for small business impact), and a question-and-answer session. Agency employees receive a hands-on approach to the RFA and are able to see how the law's many requirements work in a real-life regulatory setting. By the end of the course there are always many revelations and excited faces as agency staff realize what they have to do to comply with the RFA and that Advocacy is there to help them along the way.

One of the most important themes throughout the course is that the agency should bring Advocacy into the rule development process early in the creation of a regulation. Advocacy works closely with agencies to help them determine whether a potential rule will have a significant economic impact on a substantial number of small entities. Making this determination is frequently where agencies make their initial mistakes under the RFA. The training session helps explain the steps rule writers need to take to make this decision accurately. By considering the impact of their regulations on small business from the beginning, agencies are more likely to promulgate a rule that is less burdensome with more effective compliance, while avoiding legal hassles and delays for noncompliance with the RFA.

Changing the culture of agency rule writers is a tall order, but Advocacy's RFA training is already having an impact on the way agencies approach rule development. Many agencies that have been through training are now consulting with Advocacy earlier in the process, exchanging draft documents, and recognizing that if they lack the information they need, Advocacy can help point them in the right direction for small business data.

2 Summary of FY 2005 Federal Agency Compliance with E.O. 13272 and the RFA

Executive Order 13272 Compliance

In August 2002, President Bush signed E.O. 13272, recognizing the importance of small businesses and creating additional RFA compliance requirements on federal regulatory agencies. Section 3 of E.O. 13272 requires agencies to do three things when promulgating regulations that affect small entities.

First, agencies are required to issue written policies and procedures to ensure that they consider the potential impact of their regulations on small businesses. These must have been made publicly available in February 2003 (see Appendix A, Table A.1 for citations to the agencies' RFA policy websites).

Second, 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.

The third requirement is that agencies address Advocacy's written comments on a proposed rule in the agency's final rule published in the *Federal Register*.

While agency compliance with both the RFA and E.O. 13272 have improved, agencies still do not reach out to Advocacy early enough in the rule development process to make a real difference in the impact of the rule on small entities. As agencies continue to make changes to their regulatory development processes to accommodate E.O. 13272's requirements, benefits to small entities will be seen. Some agencies are making strides in that direction. These can be seen in the cost savings this fiscal year. Advocacy continues to stress the importance of agency compliance with EO 13272 as another crucial step in consideration of the impact of their rules on small entities and is hopeful that real change as a result of the executive order will continue to be seen.

RFA Training under E.O. 13272

In addition to the three agency requirements, E.O. 13272 requires Advocacy to conduct federal agency training in how to comply with the RFA and the executive order. Advocacy has trained more than half of the 66 federal agencies and independent commissions identified as promulgating regulations that affect small businesses (Table 2.1. See Appendix A, Table A.2 for a complete list.)

RFA training under E.O. 13272 is having a real impact on agencies in a number of ways. One of the most important effects of the training is a closer relationship between the agency and the Office of Advocacy. As a result of the training, agency rule writers, economists, attorneys, and policymakers recognize that there is an office that can assist them with their RFA and E.O. 13272 compliance. This closer relationship has led to several agencies contacting Advocacy earlier in the rule development process regarding rules that may have a significant impact on a substantial number of small entities. Early intervention leads to better rules for small businesses.

Another improvement as a result of the training in a few agencies is a more detailed economic analysis. Where Advocacy once saw one-paragraph certifications and economic analyses without any alternatives, there are now more substantiated certifications and IRFAs that at least acknowledge an attempt to identify alternatives for small businesses.

Finally, the RFA training has increased agency use of Advocacy's email notification system of draft rules that may have a significant impact on a substantial number of small entities. Most agencies are still not using the system; however, the number is increasing as the ease of the system and the monetary savings is more widely known. Some agencies still insist on sending Advocacy paper copies of

Table 2.1 RFA Compliance Training under E.O. 13272 in FY 2005

Date	Agency/Organization	Type
10/06/04	Federal Communications Commission (second session)	Independent agency
10/20/04	Telecommunications trade associations	Trade associations
10/27/04	Department of Housing and Urban Development	Cabinet department
11/10/04	Department of Energy	Cabinet department
11/15/04	Department of Health and Human Services, Centers for Medicare and Medicaid Services	Unit within Cabinet department
12/01/04	Department of Homeland Security Transportation Security Administration U.S. Coast Guard	Units within Cabinet department
12/15/04	Department of Commerce Patent and Trademark Office	Unit within Cabinet department
01/12/05	Department of Transportation National Highway Traffic Safety Administration Federal Highway Administration	Units within Cabinet department
01/26/05	Department of Agriculture Animal and Plant Health Inspection Service	Unit within Cabinet department
02/02/05	Department of Education	Cabinet department
02/09/05	Department of Housing and Urban Development (second session)	Cabinet department
02/16/05	Department of Homeland Security Bureau of Customs and Border Protection Bureau of Citizenship and Immigration Services	Units within Cabinet department
03/02/05	Federal Election Commission	Independent agency
03/23/05	Access Board	Independent agency
04/06/05	Department of Defense Federal Acquisition Regulation Commission	Cabinet department Independent agency
04/27/05	Federal Communications Commission (third session)	Independent agency
05/11/05	Department of Commerce Office of Manufacturing Services	Unit within Cabinet department
05/18/05	Securities and Exchange Commission	Independent agency
06/29/05	Federal Deposit Insurance Corporation	Independent agency
07/26/05	Small Business Administration Office of Advocacy regional advocates (second session)	Advocacy regional staff
09/19/05	Training held at RFA Symposium	Trade associations, state officials, congressional staff, nonprofits, small businesses, federal agencies

draft rules that arrive weeks after they are published in the *Federal Register*; however, those that utilize the system find it to be a convenient method of compliance with E.O. 13272. While these RFA training successes can be noted in some agencies, most have yet to jump on the E.O. 13272 compliance bandwagon. Advocacy has continued in FY 2005 to encourage agencies to comply with E.O. 13272 through its RFA training activities, including repeat training at some agencies for new employees and those who missed the initial training. This fiscal year, in addition to training regulatory agencies, Advocacy held special sessions for trade associations, congressional staff, state government officials, and Advocacy's regional advocates.

A web-based training module planned for FY 2006 will enable Advocacy to reach agencies that have not yet been available for training, as well as to receive electronic course feedback on what agency employees have learned. With continued training on the importance of complying with the RFA and E.O. 13272, the number of regulations written with an eye toward reducing the burden on small entities will continue to grow.

RFA and SBREFA Implementation

The Office of Advocacy oversees the implementation of the RFA and E.O. 13272. Following is a summary of Advocacy's FY 2005 efforts:

Advocacy staff continued to review proposed regulations and to send comment letters to agencies where appropriate. Two dozen comment letters went to federal agencies in FY 2005 (Table 2.2).

Comment letters went to 11 agencies in FY 2005, the largest number to the Federal Communications Commission (FCC) (Chart 2.2).

As a result of Advocacy interventions, cost savings were achieved for small businesses in 10 regulations that went to the final stages in FY 2005 (Table 2.3).

Of these regulations, four had been identified in OMB *Reports to Congress on the Costs and Benefits of Federal Regulations* as candidates for regulatory reform because of their impact on small businesses.

Efforts to reduce the regulatory burden resulted in FY 2005 foregone regulatory cost savings of $6.62 billion in the first year and $965.6 million in annually recurring savings (Table 2.4).

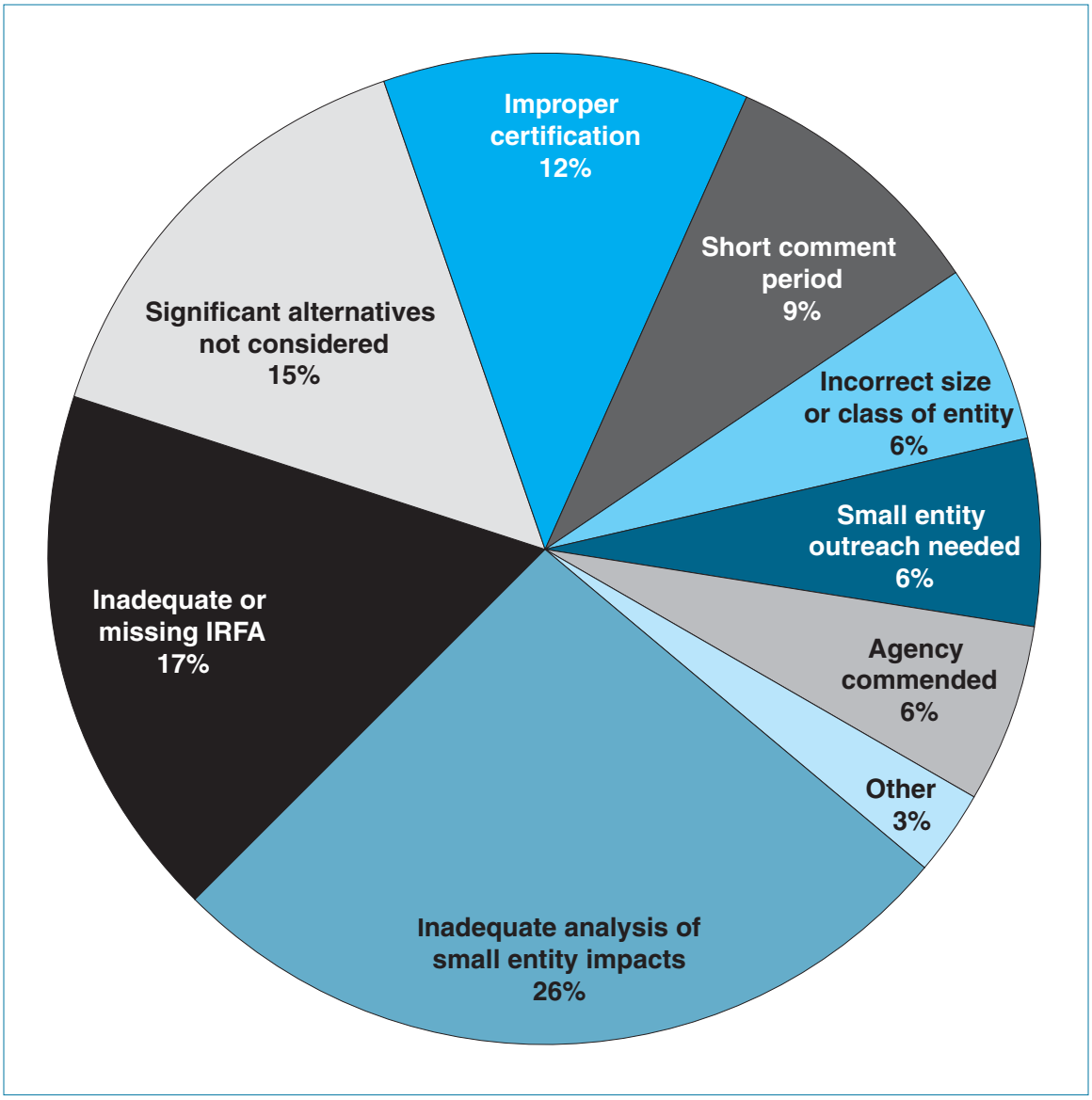
Table 2.2 Regulatory Comment Letters Filed by the Office of Advocacy, Fiscal Year 2005*

Date	Agency	Comment Subject
10/04/04	FCC	Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Dkt. No. 04-313, FCC 04-179
10/12/04	FWS	Notice of Availability of the Draft Economic Analysis on the Proposed Critical Habitat for the Santa Ana Sucker; 69 Fed. Reg. 58876 (October 1, 2004)
11/17/04	FCC	Initial Regulatory Flexibility Analysis for the Notice of Proposed Rulemaking in Telephone Number Portability; CC Dkt. No. 95-116, FCC 04-217
11/18/04	FWS	Notice of Availability of the Draft Economic Analysis on the Proposed Critical Habitat for the Riverside Fairy Shrimp; 69 Fed. Reg. 61461 (October 19, 2004)
12/15/04	FCC	Initial Regulatory Flexibility Analysis for the Notice of Proposed Rulemaking in Communications Assistance for Law Enforcement Act and Broadband Access and Services; ET Dkt. No. 04-295, FCC 04-187
12/15/04	Commerce/BIS	Notice of Proposed Rulemaking on Revised Knowledge Definition, Revision of Red Flags Guidance and Safe Harbor; 69 Fed. Reg. 60829 (October 13, 2004)
12/17/05	OSHA	Notice of Proposed Rulemaking on Occupational Exposure to Hexavalent Chromium; 69 Fed. Reg. 59306, (October 4, 2004)
12/21/04	FCC	Ex Parte Letter regarding the regulatory flexibility analysis for Developing a Unified Intercarrier Compensation Regime; CC Dkt. No. 01-92
01/13/05	SBA	Advance Notice of Proposed Rulemaking: Small Business Selected Size Standards Issues; 69 Fed. Reg. 70197 (December 3, 2004)
01/18/05	CMS	Agency Information Collection Activities; Proposed Collection; Comment Request; 69 Fed. Reg. 67745 (November 19, 2004)
02/04/05	DOJ/CRD	Advance Notice of Proposed Rulemaking; Nondiscrimination on the Basis of Disability in State and Local Government Services; Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities; 69 Fed. Reg. 58768 (September 30, 2004)
02/07/05	EPA	Standard of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Other Solid Waste Incineration Units; 69 Fed. Reg. 71472 (December 9, 2004)

Date	Agency	Comment Subject
02/25/05	GSA	Access to the Federal Procurement Data System- Next Generation (FPDS-NG); 69 Fed. Reg. 77662 (December 28, 2004)
03/08/05	FCC	Verizon's Petition for Forbearance from Title II and the FCC's Computer Inquiry Rules; WC Dkt. No. 04-440
03/11/05	SEC	Extension of Compliance Dates for the Final Rule, Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports of Non-Accelerated Filers and Foreign Private Issuers; 70 Fed. Reg. 11528 (March 8, 2005)
03/29/05	FWS	Proposed Designation of Critical Habitat for the Southwestern Willow Flycatcher; 69 Fed. Reg. 60706 (October 12, 2004)
05/17/05	FCC	Ex Parte Letter Supporting the Extension of the Stay of the Order Regarding 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
05/23/05	DOJ/CRD	Regulatory Alternatives Discussion on the Advance Notice of Proposed Rulemaking; Nondiscrimination on the Basis of Disability in State and Local Government Services; Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities; 69 Fed. Reg. 58768 (September 30, 2004)
05/23/05	FCC	Regulatory Flexibility Analysis for Developing a Unified Intercarrier Compensation Regime; CC Dkt. No. 01-92
06/28/05	FAA	Revisions to Cockpit Voice Recorder and Digital Flight Data Recorder Regulations; 70 Fed. Reg. 9751 (February 28, 2005)
07/14/05	FWS	Reopening the Comment Period on Proposed Designation of Critical Habitat for the Southwestern Willow Flycatcher; 70 Fed. Reg. 39227 (July 7, 2005)
07/27/05	FCC	Regulatory Flexibility Analysis for Special Access Rates for Price Cap Local Exchange Carriers; WC Dkt. No. 05-25
08/01/05	NMFS	Notice of Proposed Rulemaking, Fisheries of the Exclusive Economic Zone off Alaska; Groundfish Retention Standard; 70 Fed. Reg. 35054 (June 16, 2005)
08/16/05	FCC	Initial Regulatory Flexibility Analysis for Telephone Number Portability; CC Dkt. No. 95-116

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

Chart 2.1 Advocacy Comments by Key RFA Compliance Issue, FY 2005 (percent)



Throughout Fiscal Year 2005, the Office of Advocacy advised many agencies on how to comply with the RFA. Chart 2.1 illustrates the key concerns raised by Advocacy's comment letters and prepublication review of draft rules. The chart highlights areas for improved compliance based on Advocacy's analysis of its FY 2005 comment letters and other regulatory interventions summarized in this report.

Table 2.3 Regulatory Cost Savings, Fiscal Year 2005

Agency	Subject Description	Cost Savings
USDA/ APHIS	Mexican Avocado Import Program. The final rule expands existing regulations to allow distribution of Mexican Hass avocados to 47 states during all months of the year. The agency delayed distribution of the avocados to California, Florida, and Hawaii (the 3 states that have all avocado producers in the United States for the first two years of the rule). 69 Fed. Reg. 69748 (November 30, 2004).	$34.55 million each year, for the first two years of the rule. Source: APHIS.
EPA	Cooling Water Intake. The rule requires facilities that have cooling water intake structures to install devices to protect fish and other aquatic species from being killed by the intake structures. As a result of a SBREFA review panel, EPA proposed an exemption for facilities that have a cooling water intake flow of 50 million gallons per day or less. This removes all small businesses from the cooling water intake rule. Research available to the panel indicated that cooling water intake flow volumes below the 50 million gallon per day threshold are unlikely to affect fish or other aquatic species. 69 Fed. Reg. 68444 (November 24, 2004). Note: This rule was identified in the OMB 2004 *Report to Congress on the Costs and Benefits of Federal Regulations* as a candidate for regulatory reform because of its impact on small business.	$74 million over a ten-year period, and an annualized cost savings of $10.5 million. Source: EPA.
EPA	Other Solid Waste Incinerators. The rule requires new and existing incinerators at institutions such as schools, prisons, and churches to install state-of-the-art control equipment and meet costly permitting and operating requirements, or alternatively, to shut down their incinerators and send their sold waste to a landfill. EPA agreed to exempt several types of incinerators for which alternative disposal options are not feasible, including rural incinerators at institutions located more than 50 miles from an urban area where the operator can show that no other waste disposal alternative exists. 69 Fed. Reg. 71472 (December 9, 2004).	$7.5 million per year. Source: EPA.
DOD	Radio Frequency Identification Tags. DOD decided not to publish the rule as an interim final regulation. Instead the rule will go through the notice and comment process, guaranteeing small business input prior to the final rule stage. Based on DOD's analysis, it was estimated that approximately 14,000 small businesses would be affected in the first year. The rule's delay for more than a year allows small businesses greater flexibility. 70 Fed. Reg. 53955 (September 13, 2005).	$62 million. Source: DOD.

Agency	Subject Description	Cost Savings
FCC	Restriction on Fax Advertising. Advocacy and small businesses supported legislation that would recognize a previous business relationship exemption. The Junk Fax Prevention Act of 2005 was signed into law by President Bush on July 9, 2005. Pub. L. No. 109-21, 119 Stat. 359 (2005). Note: This rule was identified in the 2004 OMB *Report to Congress on the Costs and Benefits of Federal Regulations* as a candidate for regulatory reform because of its impact on small business.	$3.5 billion initially and $711 million annually. Source: FCC.
NARA	Records Center Facility Standard. The rule required extreme fire prevention and control measures at all records facilities. The 2005 final rule provides flexibility from some of the more stringent standards while still maintaining safety standards. 70 Fed. Reg. 50982 (August 29, 2005). Note: This rule was identified in the 2002 OMB *Report to Congress on the Costs and Benefits of Federal Regulations* as a candidate for reform because of its impact on small businesses.	$63 million for the first year of the rule. Source: PRISM International.
FWS	Designation of Critical Habitat for the Bull Trout. FWS submitted a draft final rule to Advocacy. The general scope of the rule was to designate certain areas as critical habitat to protect the bull trout. The final rule published by FWS included an exemption for impounded waters from the final designation of critical habitat. The exemption provided flexibility for small businesses with no impact on the species. 70 Fed. Reg. 56212 (September 26, 2005).	Not available.
MSHA	Diesel Particulate Matter Exposure in Underground Metal and Nonmetal Mines. MSHA has proposed to revise its final rule on diesel particulate matter by staggering the effective date over a five-year period to provide greater flexibility. The final rule mandated a reduced permissible exposure limit for diesel particulates in these mines from 400 micrograms per cubic meter of air to 160 micrograms per cubic meter of air. 70 Fed. Reg. 53280 (September 7, 2005).	$1.6 million per year. Source: MSHA.

Agency	Subject Description	Cost Savings
DOT/FMCSA	Hours of Service of Truckers. FMCSA amended an earlier 2003 rule that had been remanded to the agency by the U.S. Court of Appeals for the D.C. Circuit, but left in effect by Congress pending final agency action. Advocacy urged FMCSA to reduce the regulatory burdens on short-haul drivers by allowing some of them to drive two extra hours once per week (offset by rest time) as well as reducing recordkeeping requirements. FMCSA agreed to these changes. 70 Fed. Reg. 49978 (August 25, 2005). Note: This rule was identified in the 2004 OMB *Report to Congress on the Costs and Benefits of Federal Regulations* as a candidate for regulatory reform because of its impact on small business.	$200 million in first year and $200 million annually. Source: FMCSA.
SEC	Extension of Compliance for Periodic Reports. As required by the Sarbanes-Oxley Act of 2002, SEC published final rules June 18, 2003, requiring businesses that raise funds from public investors to report on internal controls and audit procedures. Advocacy urged SEC to delay the first compliance deadline, and the SEC extended the deadline for one year. 70 Fed. Reg. 56825 (September 29, 2005).	$2.68 billion in first year. Source: FEI.

Table 2.4 Summary of Estimated Cost Savings, FY 2005 (Dollars)

Rule / Intervention	First-Year Costs	Annual Costs
APHIS Mexican Avocado Import Program[1]	34,550,000	34,550,000
EPA Cooling Water Phase III[2]	10,500,000	10,500,000
EPA Other Solid Waste Incinerators[2]	7,600,000	7,600,000
DOD RFID[3]	62,000,000	--
FCC Do not FAX[4]	3,556,430,226	711,286,045
NARA Records Center Facility Standards[5]	63,000,000	--
FWS Bull Trout Critical Habitat Designation[6]	--	--
MSHA Diesel Particulate Matter[7]	9,274,325	1,620,869
DOT/FMCSA Hours of Service[8]	200,000,000	200,000,000
SEC Extension of Compliance[9]	2,680,000,000	--
TOTAL	6,623,354,551	965,556,914

1 Source: Animal and Plant Health Inspection Service (APHIS).

2 Source: Environmental Protection Agency (EPA).

3 Source: Department of Defense (DOD).

4 Source: U.S. Chamber of Commerce survey.

5 Source: PRISM International and National Archive and Records Administration (NARA).

6 Note: Cost savings for this rule are not publicly available because savings were accrued during the draft stage of the rule.

7 Source: Mine Safety and Health Administration (MSHA).

8 Source: Federal Motor Carrier Safety Administration (FMSCA).

9 Source: Calculations were based on data from a Financial Executives International (FEI) survey.

Note: The Office of Advocacy generally bases its cost savings estimates on agency 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.

3 Advocacy Review of Agency RFA Compliance in Fiscal Year 2005

As agencies grow in their familiarity with the RFA and E.O. 13272, and with the Office of Advocacy, compliance will come more easily to the agencies. In monitoring agency compliance, Advocacy has found that there is an increase in the number of agencies that make a good-faith effort to comply with the RFA. However, even agencies with generally good RFA compliance from time to time fail to comply with the RFA on particular rulemakings.

Department of Agriculture

E.O. 13272 Compliance

The Department of Agriculture (USDA) has made its policies for considering small entity impacts when promulgating regulations publicly available as required by section 3(a) of E.O. 13272. As in previous years, two agencies within USDA consistently notify Advocacy of rules that may have a significant economic impact on small entities: the Animal and Plant Health Inspection Service (APHIS) and the Grain Inspection, Packers and Stockyard Administration (GIPSA).

Animal and Plant Health Inspection Service

- **Issue: Mexican Hass Avocado Import Program.** On November 30, 2004, APHIS published a final rule regulating the importation of Hass avocados into the United States. The rule contained a final regulatory flexibility analysis. The final rule expands existing regulations to allow distribution of Mexican Hass avocados to 47 states during all months of the year. APHIS shared the draft regulation with Advocacy prior to publication. The following description summarizes small business regulatory flexibility without compromising the confidentiality of interagency deliberations

  Concerned that small avocado producers in California, Florida, and Hawaii would be significantly affected by the proposal, Advocacy submitted confidential interagency comments to the agency. In the final rule, based on comments from regulated entities and Advocacy, APHIS decided to delay distribution of the avocados to California, Florida, and Hawaii for the first two years of the rule. The delay will allow small avocado producers in the affected states to better prepare for the change in market conditions and pricing. Cost savings amounting to $34.55 million each year for the first two years resulted from the flexibilities in this final rule.

- **Issue: National Animal Identification System; Draft Strategic Plan and Draft Program Standards.** On May 6, 2005, APHIS published in the *Federal Register* a notice of availability of the Draft Strategic Plan and Draft Program Standards documents for the National Animal Identification System (NAIS). The NAIS will be a mechanism for tracking animals from birth to slaughter and is designed to enhance the U.S. response to disease outbreaks across different animal species. The program will trace animals during a disease outbreak and allow APHIS and the federal and state governments and private industry to minimize the impact of an outbreak on domestic and foreign markets. The documents outline the process of developing the NAIS and the agency's current understanding of how the system would work when implemented. In the notice, the agency solicited public feedback on various elements of the system. The following description summarizes coverage of small business flexibility under consideration without compromising the confidentiality of interagency deliberations.

Advocacy is concerned that the standards, as written, could have a significant economic impact on a substantial number of small producers and slaughtering plants. Affected entities have informed Advocacy that the proposed NAIS standards do not adequately consider existing animal identification technology already in use by some in the affected industry and that implementing the system, especially the technology infrastructure, would be costly for small businesses. Additionally, industry personnel are concerned that the publication of the proposed system did not include an initial regulatory flexibility analysis; thus, the potential costs to the industry were not clearly outlined in the proposal.

Because of extensive public interest, APHIS extended the comment period for the proposed system for an additional 30 days. In confidential interagency comments submitted to the agency, Advocacy shared industry concerns with APHIS. Advocacy also urged the agency to consider the potential economic impacts on small entities as well as alternatives to minimize the impact. APHIS has not completed work on the NAIS documents. Advocacy will continue to monitor this issue and to work with the agency to address small entity impacts.

Department of Commerce

E.O. 13272 Compliance

The Department of Commerce (DOC) complies with the requirements of E.O. 13272. Its RFA policies are publicly available in compliance with section 3(a), and DOC's agencies notify Advocacy of draft rules as required by section 3(b). For example, the National Marine Fisheries Service (NMFS) routinely submits draft proposed and final rules to the Office of Advocacy. NMFS did not publish any final rules in FY 2005 that were the subject of any Advocacy comments; therefore, NMFS' compliance with section 3(c) cannot be assessed. As one of the agencies involved in Advocacy's RFA training pilot program, NMFS was one of the first agencies to receive RFA training.

Advocacy also works with the Patent and Trademark Office (PTO) at the Department of Commerce. The PTO regularly submits to Advocacy draft proposed and final rules that may have a significant economic impact on a substantial number of small entities. In FY 2005, PTO staff participated in Advocacy's RFA training program and began submitting draft regulations to Advocacy's email notification system more regularly. The agency expressed a willingness to work with Advocacy earlier in the rulemaking process to ensure proper completion of agency initial regulatory flexibility analyses (IRFAs) and certifications. PTO did not publish any final rules in FY 2005 that were the subject of any Advocacy comment; therefore, compliance with section 3(c) of E.O. 13272 cannot be assessed. Advocacy plans to train the remaining agencies at DOC in the next fiscal year.

During the past year, Advocacy worked closely with the Office of Manufacturing and Services at the Department of Commerce. Although this office is not focused strictly on small business issues, there is a similarity between the Office of Advocacy's mission and the purpose of the Manufacturing and Services office. To capitalize on this, Commerce loaned an economist to the Office of Advocacy to learn more about the regulatory process and, conversely, so that Advocacy could benefit from greater use of Commerce data in preparing regulatory flexibility analyses. There is potential for future collaboration between the offices in the area of impact analysis.

Bureau of Industry Standards (BIS)

- **Issue: Revised Definition of "Knowledge" for "Red Flags" Guidance and Safe Harbor.** On October 13, 2004, BIS published a proposed rule: Revised "Knowledge" Definition, Revision of "Red Flags" Guidance and Safe Harbor, designed to determine whether an exporter understood that it was violating exporting control rules. Current regulations apply a "high probability" standard that the exporters know that they are violating exporting controls. The proposed rule would:

– revise the definition of knowledge for determining whether or not exporters know they are violating export controls;
– revise the Export Administration regulations to incorporate a "reasonable person" standard;
– replace the phrase "high probability" with "more likely than not;"
– update the "red flags" guidance to increase the number of circumstances identified as expressly creating a red flag of potential violations of the Export Administration regulations; and
– create a safe harbor from certain knowledge-based violations if the exporter takes certain steps.

BIS certified that the rule would not have a significant economic impact on a substantial number of small entities. The basis of the certification was that the proposal was a "mere clarification."

Advocacy discussed the proposal with small entity representatives and submitted comments questioning whether the proposed change was a mere clarification. Advocacy noted that BIS was proposing to change the definition in a way that lowers the standard for establishing whether the exporter has knowledge of a potential export control violation. Small businesses that might not have been liable in the past could potentially be held liable for an export control violation under the proposed new standard and could incur more legal expenses, fines, and penalties.

In addition, under the proposed "safe harbor" provision, businesses could learn whether BIS agrees with them that the transaction qualifies for a safe harbor. The provision was intended to help businesses avoid fines and penalties, which BIS believes would mitigate the impact of the rule. However, small business representatives are concerned that small businesses would have to wait for an extended period of time for an opinion. To prevent this, Advocacy asked BIS to give full consideration to alternatives from the industry, such as imposing a 30-day timeframe for BIS to provide an opinion on whether the transaction qualifies for a safe harbor. Advocacy also asked BIS to give full consideration to the suggestion that BIS allow for concurrent consideration of license applications while an exporter's request is pending a determination through the safe harbor process. This rule has not been finalized.

National Marine Fisheries Service

- **Issue: Designation of Critical Habitat for 12 Evolutionarily Significant Units of West Coast Salmon and Steelhead in Washington, Oregon, and Idaho.** In 2000, the National Marine Fisheries Service designated critical habitat for salmon and steelhead across approximately 150,000 miles of rivers, streams, and shores in the Pacific Northwest. The agency failed to consider the economic impacts of the designation of critical habitat on small entities as required by the RFA, instead attributing all costs from designating critical habitat to the earlier decision to list the species. In light of decisions by federal courts that rejected such attribution of costs to listing decisions, NMFS revisited the rulemaking. In addition, after the first designation of critical habitat, the U.S. Geological Survey made available to NMFS more detailed watershed maps, which allowed the agency to identify more accurately areas that should be designated as critical habitat.

  The agency withdrew the 2000 rulemaking and re-proposed the designation on June 14, 2004. The agency kept the comment period for the notice of proposed rulemaking open through October 30, 2004. In response to the designation of critical habitat for the salmon, small farmers, developers, ranchers and others raised concerns about the costs the rule would impose. On January 5, 2005, NMFS published a final rule that included less than 30,000 miles of the 2000 rule's original 150,000 miles of rivers, streams, and shores. In 2000, NMFS did not provide an estimate of the costs its original rule would impose on the public, but the agency did estimate the impacts of its 2005 rule. Though there is insufficient data to provide an estimate of the cost savings the final 2005 rule represented over the original 2000 rule, it is likely that

the reduction of critical habitat by 80 percent represented major cost savings for small entities.

- **Issue: Fisheries of the Exclusive Economic Zone Off Alaska; Groundfish Retention Standard.** On June 16, 2005, NMFS published a proposed rule on Fisheries of the Exclusive Economic Zone Off Alaska; Groundfish Retention Standard. The proposed rule implements Amendment 79 to the Fisheries Management Plan for groundfish of the Bering Sea and Aleutian Islands. The purpose of the action is to reduce bycatch and improve utilization of groundfish harvested by catcher/processor trawl vessels. It implements an annual groundfish retention standard (GRS) as well as monitoring and enforcement measures for trawl catcher/processors greater than 125 feet.

  The catcher/processors for the groundfish industry contacted Advocacy regarding the size standard used for determining a small catcher processor. Instead of using the 500 employee size standard for floating factory ships in its initial regulatory flexibility analysis, NMFS used the $3.5 million annual volume standard for fish harvesting operations. Advocacy argued that without the appropriate size standard there was no way of knowing whether NMFS was correct in determining that none of the industry participants were small. The industry was also concerned about aspects of the proposal that were not recommended, like new monitoring and enforcement measures, a new observer schedule, and the installation of a new NMFS-approved scale. Advocacy asked NMFS to perform an economic analysis on the new aspects of the rule and publish the analysis for public comment. This rule has not been finalized.

Department of Defense

E.O. 13272 Compliance

The defense-related regulations of greatest interest to small businesses are procurement regulations issued by the Federal Acquisition Regulation (FAR) Council. The Department of Defense (DOD) has procedures in place that comply with section 3(a) of E.O. 13272. Consideration of small business impacts in these rulemakings is covered by the policies and procedures of the FAR Council, submitted to Advocacy by the General Services Administration. The Department of Defense has not published procedures that would apply to rulemakings other than those considered by the FAR Council. In compliance with section 3(b) of E.O. 13272, DOD submits prepublication rulemakings for Advocacy consideration. DOD did not publish any final rules in FY 2005 that were the subject of any Advocacy written comments; therefore, DOD compliance with section 3(c) cannot be assessed. DOD staff received RFA training in FY 2005.

- **Issue: Radio Frequency Identification Tags.** The Department of Defense issued a proposed regulation on April 21, 2005, to amend the Defense Federal Acquisition Regulation Supplement by adding a requirement that packages be marked with passive radio frequency identification (RFID) tags. The change would require contractors to affix passive RFID tags at the case and palletized unit load levels when shipping packaged operational rations, clothing, individual equipment, and tools.

  Advocacy was involved in the confidential interagency deliberations of this rule. Advocacy's early involvement resulted in a detailed economic analysis of the impact of the rule on small entities. DOD also conducted outreach to the small business community. The outreach includes an ongoing training program for small businesses to develop the necessary tools and knowledge to comply with the new DOD acquisition requirements.

  The final rule was implemented on September 13, 2005. The flexibilities achieved in this final rule resulted in $62 million in first-year cost savings.

Department of Education

E.O. 13272 Compliance

The Department of Education (Education) has made its policies and procedures publicly available as required by section 3(a) of E.O. 13272. Education notifies Advocacy through Advocacy's email notification system of draft rules that may have a significant impact on a substantial number of small entities, as required by section 3(b) of E.O. 13272. Education has not published any final rules in FY 2005 that were the subject of any Advocacy comments; therefore, Education's compliance with section 3(c) cannot be assessed. Education staff received RFA training in FY 2005.

Department of Energy

E.O. 13272 Compliance

The Department of Energy (DOE) has complied with section 3(a) of E.O. 13272 by making its policies and procedures publicly available on its website. In FY 2005, DOE provided Advocacy with all of its draft rules when they were sent to OMB for review, in compliance with section 3(b) of the Executive Order. Advocacy has not filed comments on any DOE rules since the establishment of the section 3(c) requirement. DOE staff received RFA training in FY 2005.

Department of Health and Human Services

E.O. 13272 Compliance

The Department of Health and Human Services (HHS) made its policies and procedures publicly available as required by section 3(a) of E.O. 13272. The Centers for Medicare and Medicaid Services (CMS) and the Food and Drug Administration (FDA), two agencies that often promulgate rules that affect small businesses, did not consistently submit drafts of rules pursuant to section 3(b) of E.O. 13272 in FY 2005. Neither CMS nor FDA published final rules in FY 2005 that were the subject of any Advocacy comments; therefore, compliance with section 3(c) of E.O. 13272 cannot be assessed. HHS staff received RFA training in FY 2005.

Centers for Medicare and Medicaid Services

- **Issue: Agency Information Collection Activities; Proposed Collection; Comment Request.** On November 19, 2004, the Centers for Medicare and Medicaid Services published in the *Federal Register* a summary of proposed collections for public comment pursuant to section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995. In the summary, CMS sought comment on the national implementation and utilization of the Hospital Consumer Assessment of Health Plans Survey (HCAHPS). According to CMS the goal of the HCAHPS was to "offer consumers choice and create incentives for hospitals to improve performance in areas that are important to patients." Ultimately, CMS plans to publish the data obtained through HCAHPS to assist consumers in selecting hospitals that deliver high-quality care. Advocacy commented on the rule on January 18, 2005, citing its concern that the HCAHPS would place a significant economic and paperwork burden on hospitals, many of which are small entities. Advocacy suggested that CMS revisit its analysis of the paperwork burden associated with the survey and consider reducing the number of survey questions.

Food and Drug Administration

- **Issue: Current Good Tissue Practice for Manufacturers of Human Cellular and Tissue-Base Products; Inspection and Enforcement—Final Rule.** Advocacy reviewed this final rule prepublication via confidential interagency review. Advocacy commented publicly on the proposed rule on November 5, 2001,

believing that the rule had the potential to affect small businesses negatively. The FDA took into account public comments filed in response to the proposed rule and reflected those comments in the economic analysis in the final rule. The final rule allowed affected entities significant flexibility in determining how to comply with the rule. The final rule also granted affected entities the ability to seek an exemption from, or propose an alternative to, a particular provision of the rule where appropriate. Cost savings are not available for this rule.

- **Issue: Beverages: Bottled Water.** On October 28, 2004, Advocacy reviewed and commented through confidential interagency review on the FDA's proposed rule seeking to revise the allowable levels of arsenic in drinking water. As a result of Advocacy's early intervention, FDA sought comments in the published proposed rule on the profitability of small water manufacturers, on compliance costs, and on whether there were viable alternatives that would reduce the cost of the rule on small entities.

Department of Homeland Security

E.O. 13272 Compliance

The Department of Homeland Security (DHS) has made progress in complying with E.O. 13272. DHS received its RFA training in FY 2005, and it has posted its RFA policy on its website, as required by section 3(a) of E.O. 13272. DHS did not submit any draft rules to Advocacy in 2005. DHS has not published final rules in FY 2005 that were the subject of Advocacy comments; therefore section 3(c) of E.O. 13272 cannot be assessed.

Department of Housing and Urban Development

E.O. 13272 Compliance

The Department of Housing and Urban Development (HUD) made its policies and procedures available to the public in the timeframe required by section 3(a) of E.O. 13272. HUD notified Advocacy of rules that may have a significant impact on a substantial number of small entities as required by section 3(b) of E.O. 13272. HUD received RFA training in FY 2005. Advocacy and HUD developed a good working relationship in FY 2005 through the Real Estate Settlement Procedures Act (RESPA) roundtables Advocacy cosponsored with HUD (see below) and the RFA training session.

- **Issue: Real Estate Settlement Procedures Act: Simplifying and Improving the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers**. In 2002, HUD issued a proposed rule to revise the regulations implementing RESPA. The purpose of the proposal was to simplify and improve the process of obtaining home mortgages and to reduce settlement costs to consumers. The proposed rule was strongly opposed by small businesses throughout the real estate and settlement services industry.

  Advocacy filed comments on behalf of small business on October 28, 2002. Advocacy's comments 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 also emphasized its desire to continue working with HUD to ensure that improvements to the mortgage financing and settlement process are sensitive to the impact on small business.

  In March 2004, HUD withdrew the draft final RESPA rule from OMB review. In the withdrawal letter to OMB, HUD Secretary

Alphonso Jackson stated that based on concerns from members of Congress and key members of consumer and industry groups he believed that it would be prudent for HUD to reexamine the RESPA rule before it is made final.

In FY 2005, Advocacy worked with HUD to perform outreach to the small business community to discuss the impact of RESPA reform on small entities and to flush out less burdensome alternatives. In addition to attending roundtables that HUD held in Washington, D.C., on RESPA reform, Advocacy and HUD cosponsored three roundtables around the country. Members of every aspect of the real estate community were invited to participate in the roundtables held in Chicago, Fort Worth, and Los Angeles. Advocacy will continue working with HUD as it evaluates the information gained from the roundtables.

Department of the Interior

E.O. 13272 Compliance

The Department of the Interior (DOI) has made its policies and procedures publicly available in compliance with section 3(a) of E.O. 13272. As required by section 3(b), DOI notifies Advocacy of rules that it has determined could have a significant economic impact on a substantial number of small entities. Prior to publication of a rule, agencies within DOI typically submitted notifications and a "record of compliance" to Advocacy. DOI also utilized Advocacy's email notification system to inform Advocacy of draft rules that may affect small business.

The Fish and Wildlife Service (FWS) continues to certify its final designations of critical habitat for endangered species as not having a significant economic impact on a substantial number of small entities despite small business views to the contrary voiced during the process. FWS has not completed an IRFA or FRFA for its critical habitat designations. This exception to DOI's attention to the RFA and E.O. 13272 is of concern and Advocacy will continue to work with FWS to improve its RFA and E.O. 13272 compliance. Advocacy has commented on three final rules that were published by FWS during fiscal year 2005—the final designations of critical habitat for the Southwestern willow flycatcher, the Santa Ana sucker, and the Riverside fairy shrimp (see Table 2.2). FWS did respond to Advocacy's comments, in compliance with section 3(c).

Fish and Wildlife Service

- **Issue: Endangered and Threatened Wildlife Plants; Designation of Critical Habitat for the Bull Trout.** FWS submitted a draft final rule to Advocacy that would designate areas as critical habitat to protect the bull trout. The final rule published by FWS included an exemption for impounded waters from the final designation of critical habitat, providing significant relief for small farmers and businesses in the affected area while preserving the protections intended in the critical habitat designation. Cost savings achieved in this rule cannot be determined because they are based on confidential FOIA-exempt material.

Department of Justice

E.O. 13272 Compliance

The Department of Justice (DOJ) has made its policies and procedures publicly available as required by section 3(a) of E.O. 13272. DOJ notifies Advocacy through Advocacy's email notification system of draft rules that may have a significant impact on a substantial number of small entities, as required by section 3(b) of E.O. 13272. DOJ did not publish any final rules in FY 2005 that were the subject of any Advocacy comment; therefore, DOJ's compliance with section 3(c) cannot be assessed. Staff at DOJ have not yet received RFA training.

Department of Labor

E.O. 13272 Compliance

The Department of Labor (DOL) has made its policies and procedures publicly available as required by section 3(a) of E.O. 13272. Agencies within DOL notify Advocacy by mail and by Advocacy's email notification system of rules that may have a significant impact on a substantial number of small entities, as required by section 3(b) of E.O. 13272. There were no electronic notifications by OSHA or the Mine Safety and Health Administration (MSHA). Neither OSHA nor MSHA published any final rules during FY 2005 that were the subject of any Advocacy comment; therefore, compliance with Section 3(c) of E.O. 13272 cannot be assessed. Advocacy submitted comments to OSHA on its proposed occupational exposure to hexavalent chromium standard, but that rule has yet to be finalized. OSHA and MSHA frequently participate in Advocacy small business regulatory roundtables on occupational safety and health and mine safety and health issues. OSHA's Office of Small Business Assistance has been proactive in discussing small business issues with Advocacy. As part of the SBREFA process, OSHA has contacted Advocacy to discuss rules that may have a significant economic impact on a substantial number of small entities and where a SBREFA panel is expected. The Department of Labor was previously trained in RFA compliance.

Mine Safety and Health Administration

- **Issue: Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Mines Rule.** MSHA proposed to revise its final rule on Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Mines. The final rule mandated a reduced permissible exposure limit (PEL) for diesel particulates in underground metal and nonmetal mines from 400 to 160 micrograms per cubic meter of air (total carbon) effective on January 20, 2006. MSHA proposes staggering the effective date of the final regulation over a five-year period to provide greater flexibility to mine operators. Advocacy reviewed this rule prepublication via confidential interagency review. The rule would ease the regulatory burden on small mine operators, who argued that meeting the final exposure limit was not technologically feasible (using existing filter technology) and was unduly expensive.

  Advocacy raised this issue at several of its small business labor safety roundtables. The roundtables included presentations by both small business representatives and MSHA personnel. Advocacy also communicated directly with OMB and MSHA on a confidential interagency basis regarding this rule. The agency was convinced that technological feasibility issues justify the staggered implementation schedule. As a result of the flexibilities contained in this rule, first-year cost savings of $9.3 million and annual cost savings of $1.6 million will be realized by small businesses.

Occupational Safety and Health Administration

- **Issue: Occupational Exposure to Hexavalent Chromium Rule.** OSHA has proposed to revise its existing standard for employee exposure to hexavalent chromium (Cr(VI)) from the current level of 52 micrograms per cubic meter of air (for an 8-hour time-weighted average) to one microgram per cubic meter of air. Advocacy reviewed this rule prepublication via confidential interagency review. The rulemaking was mandated by the U.S. Court of Appeals for the Third Circuit. OSHA initiated a SBREFA panel process in 2003 that included conferring with representatives from affected small entities in several industries, including chemical, alloy, and pigment manufacturing, electroplating, welding, and aerospace.

  Advocacy participated in the SBREFA panel process and submitted detailed comments to the agency recommending a permissible exposure

limit of 23 micrograms per cubic meter of air based on technological and economic feasibility. This issue has been the subject of presentations by small business representatives likely to be affected by the standard at several small business labor safety roundtables hosted by Advocacy. Advocacy has worked directly with OMB and OSHA in confidential interagency deliberations. The final permissible exposure limit is expected to be published in 2006.

- **Issue: Electric Power Generation, Transmission, and Distribution Rule.** OSHA has proposed to update the existing standard for the construction of electric power transmission and generation installations to make them more consistent with the more recently promulgated general industry standard. Advocacy reviewed this rule prepublication via confidential interagency review. The proposal would also make miscellaneous changes to both standards, including adding provisions related to the relationship between host employers and contractors, the requirements for flame-resistant clothing, training, and electrical protective equipment. OSHA initiated a SBREFA panel process in 2003 and obtained comments on its draft proposal from representatives of small entities that would be affected by the rule.

  Advocacy participated in the SBREFA panel process and has discussed the proposed rule at several of its small business labor safety roundtables. In addition, Advocacy recently hosted a conference call of the small entity representatives to obtain their input on the proposed rule and has also communicated directly with OMB and OSHA in confidential interagency deliberations. The final rule is expected to be published in 2006.

- **Issue: Notice of Section 610 Review of Lead In Construction Standard**. OSHA is undertaking a review of its lead in construction standard under Section 610 of the Regulatory Flexibility Act. Section 610 requires federal agencies to review their existing rules periodically to determine whether they should be continued without change, amended, or rescinded consistent with the underlying statute. OSHA's lead standard is designed to prevent occupational exposures to lead on construction sites. It applies to many small businesses in the construction industry that must comply with its worker protection requirements.

  Small business representatives from the residential remodeling industry presented issues at several small business labor safety roundtables hosted by Advocacy. Advocacy also hosted a specific small business roundtable on this issue, where small business representatives from affected industries and representatives from OSHA, HUD, and EPA (each has regulations concerning lead hazards) attended. Advocacy continues to monitor the rulemaking process.

Department of State

E.O. 13272 Compliance

The Department of State did not provide any draft rules to Advocacy in 2005. Although the State Department has solicited input from Advocacy on rulemakings in the past, the State Department did not publish any final rules in FY 2005 that were the subject of Advocacy comment; therefore, the State Department's compliance with section 3(c) cannot be assessed.

Department of Transportation

E.O. 13272 Compliance

The Department of Transportation (DOT) has made its policies and procedures publicly available as required by Section 3(a) of E.O. 13272. The Federal Highway Administration (FHWA) and the National Highway Traffic Safety Administration (NHTSA) were trained in RFA compliance in FY 2005. Agen-

cies within DOT notify Advocacy in a timely manner, through Advocacy's email notification system, of draft rules that may have a significant economic impact on a substantial number of small entities, as required by Section 3(b) of E.O. 13272. DOT submitted 10 electronic notifications to Advocacy in FY 2005; however, it did not notify Advocacy of the Federal Aviation Administration's (FAA) proposed Washington, D.C., Special Flight Rules Area rule as required by Section 3(b) of E.O. 13272. DOT agencies did not finalize any rules during FY 2005 upon which Advocacy filed comments; therefore, compliance with Section 3(c) of E.O. 13272 cannot be assessed. Advocacy submitted comments to the Federal Aviation Administration on its proposed revisions to cockpit voice recorder and digital flight data recorder regulations, but that rule has yet to be finalized. In addition, the Federal Motor Carrier Safety Administration (FMCSA) finalized its Hours of Service of Drivers rule. While the agency certified under the RFA that the final rule would not have a significant economic impact on a substantial number of small entities, the agency did make several revisions to the rule that reduced regulatory burdens on small short-haul drivers.

Federal Aviation Administration

- **Issue: Revisions to Cockpit Voice Recorder and Digital Flight Recorder Regulations.** FAA has proposed to require upgraded cockpit voice recorder (CVR) and digital flight data recorder (DFDR) equipment on all aircraft with 10 or more seats, including increased recording time for CVRs, an independent backup power source, separate CVR and DFDR containers, and increased data recording rates. The proposed rule would also require onboard recording of data-link communications if they are installed. FAA's proposed rule is based largely on recommendations from the National Transportation Safety Board (NTSB) and is intended to help improve the speed of aircraft accident investigations. FAA's proposed rule would apply to both large scheduled airlines and other small business segments of the aviation industry, such as on-demand air charters, fractional aircraft programs, and small regional carriers.

  Small business representatives affected by the rule raised issues at the small business aviation safety roundtable hosted by Advocacy. Advocacy filed a comment letter with the agency expressing concern that the agency's IRFA did not capture many small businesses that will be affected by the proposed rule, failed to use the correct SBA size standard, and did not consider less burdensome alternatives for small business.

  FAA is currently reviewing the comments on its proposed rule and is expected to issue a final rule in 2006.

Federal Motor Carrier Safety Administration

- **Issue: Hours of Service of Drivers Rule. FMCSA issued a final rule on Hours of Service of Truckers**. The final rule amended an earlier 2003 rule that was remanded to the agency by the U.S. Court of Appeals for the D.C. Circuit, but left in effect by Congress pending final agency action. Advocacy reviewed this rule prepublication via confidential interagency review. The final rule establishes requirements for commercial truck drivers, including maximum driving time, mandatory duty and off-duty time, recovery periods, and sleeper berth provisions, as well as new requirements for short-haul drivers. Approximately 70 percent of both the long-haul and short-haul sectors are small businesses.

  Small business representatives affected by the rule raised issues at several small business transportation safety roundtables hosted by Advocacy. Advocacy has worked directly with OMB and FMCSA in confidential interagency deliberations to resolve issues raised by the affected small entities.

  The agency decided to reduce the regulatory burdens on short-haul drivers by allowing some of them to drive two extra hours once per week (offset by rest time) as well

as reduced recordkeeping requirements. These reduced burdens were justified because short-haul drivers return to their work-reporting location each night and operate within a 150-mile radius from that location. The agency found that short-haul drivers experience significantly fewer fatigue-related crashes than long-haul drivers. Cost savings of $200 million the first year and $200 million annually resulted from the flexibilities contained in this rule.

Pipeline and Hazardous Materials Safety Administration

E.O. 13272 Compliance

In 2005, the Pipeline and Hazardous Materials Safety Administration (PHMSA, formerly the Research and Special Programs Administration or RSPA) submitted draft regulations to Advocacy in compliance with section 3(b) of E.O. 13272. Although not always consistent with its submissions, the agency has expressed a desire to consult more frequently with Advocacy on initial regulatory flexibility analyses and certifications.

- **Issue: Hazardous Materials: Safety Requirements for External Product Piping on Cargo Tanks Transporting Flammable Liquids.** On December 30, 2004, PHMSA published a proposed rule that would limit the amount of flammable liquid that could be left in external product piping on cargo tank motor vehicles. External product piping, commonly known as wetlines, is the series of pipes located underneath cargo tank motor vehicles that are the conduit through which the tanks are loaded or unloaded with petroleum or other flammable products. After a tank truck is either filled or emptied, approximately 30-50 gallons of product can remain in the wetlines. PHMSA's proposal established a new standard that limits to one liter or less the amount of flammable product that could remain in each wetline after drainage. After reviewing the proposed rule and conferring with affected entities, Advocacy determined that the rule essentially established a *de facto* requirement for cargo tank operators involved in the transport of flammable liquids to install either a manual or automatic purging device to meet the new standard.

  Recognizing that the proposed rule could have a significant economic impact on a substantial number of small entities, PHMSA completed an initial regulatory flexibility analysis (IRFA) for the proposed rule. Advocacy and affected small entities expressed concern that the IRFA did not adequately estimate the number of businesses that would be adversely affected by the regulation. On March 24, 2005, Advocacy hosted a roundtable to discuss the proposed rule and obtain data from industry personnel that would be affected. The industry informed Advocacy that the regulation would be extremely expensive to implement. In particular, industry representatives questioned the efficacy and ease of installation of the purging device discussed in the proposed rule.

  Although PHMSA has not finalized the rule, the agency has committed to working with Advocacy to address industry concerns and meet their obligation under the RFA to identify less burdensome alternatives in the final rule.

- **Issue: Applicability of the Hazardous Materials Regulations to Loading, Unloading, and Storage**. During fiscal year 2004, small entity representatives approached Advocacy to discuss PHMSA's final regulation on Applicability of the Hazardous Materials Regulations to Loading, Unloading, and Storage; Final Rule (HM-223). Although the rule was finalized in October 2003, it was not effective until June 1, 2005. Industries affected by the regulation filed appeals with PHMSA and notified Advocacy of their concerns.

  Industry representatives indicated that the final rule would either severely limit or terminate PHMSA's jurisdiction over the loading, unloading and storage of hazardous materials

in transportation in areas that PHMSA has historically regulated and that the industry was comfortable with the agency's historical jurisdiction. Affected entities informed Advocacy that complying with the regulation would create extensive costs, complexity, and confusion, especially for small entities. Additionally, the industry was concerned that limiting the agency's jurisdiction would have an adverse impact on safety and would contribute to conflicting regulation by other federal agencies, and state and local jurisdictions.

Advocacy used a research firm to complete a report that analyzed problems with the HM-223 regulation and recommend revisions. Advocacy shared the draft document with PHMSA, other federal agencies with jurisdiction over hazardous materials, and several industry peer reviewers. Industry commenters, PHMSA, and the other federal agencies submitted comments on the draft report to Advocacy in March 2005. On February 18, 2005, Advocacy participated as an observer at a meeting on HM-223 between the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA), PHMSA personnel, and industry groups affected by the regulation.

Despite the concerns raised by Advocacy in its report and the appeals presented by the industry, the agency published a final rule with little change on April 15, 2005. The October 2004 regulation, as amended by the new final rule, was effective as of June 1, 2005. Advocacy is continuing to work with PHMSA and other federal agencies to address unresolved concerns about the final rule.

- **Issue: Hazardous Materials: Transportation of Lithium Batteries.** On April 2, 2002, PHMSA published a proposed rule regulating lithium batteries. The rule would require producers and transporters of lithium batteries to comply with stricter packaging and testing requirements. Concerned about the potential economic impact of the regulation, small entities affected by the rule contacted Advocacy. Advocacy's analysis of the regulation and discussions with regulated entities suggested that there were problems with the costs of the rule, the estimate of the number of small businesses affected, and the impact on annual revenues of affected small businesses. Advocacy questioned whether the agency's certification was appropriate.

  On August 22, 2003, after conferring with Advocacy, OIRA issued a return letter to the agency. In its letter, OIRA recommended that the agency either complete an initial regulatory flexibility analysis or provide a statement of factual basis for the certification in accordance with section 605 of the RFA. Additionally, Advocacy submitted interagency comments to the agency on the proposed rule.

  On June 15, 2005, PHMSA issued an IRFA for the proposed rule in the *Federal Register*. The agency addressed Advocacy's comments in the IRFA. Advocacy will continue to monitor this issue, as the agency has not taken final action on the rule.

Department of the Treasury

E.O. 13272 Compliance

The Department of the Treasury (Treasury) made its policies and procedures available to the public as required by section 3(a) of E.O. 13272. The agencies within Treasury that most concern small business are the Internal Revenue Service (IRS), the Office of the Comptroller of the Currency (OCC), and the Office of Thrift Supervision (OTS).

While the IRS has not notified Advocacy of any draft proposed rules under section 3(b), Advocacy has been invited to, and has participated in, several prepublication and some predrafting meetings on IRS regulatory proposals regarding potential effects on small business. Under section 3(c) of E.O. 13272, the IRS has made reference to Advocacy comments in general, but the comments were not

attributed to Advocacy. During FY 2005 Advocacy consulted with the IRS about the RFA. Early in the year the IRS sent some rules to Advocacy early in the process; however, as the year progressed, fewer rules were submitted prepublication. IRS did not publish any final rules in FY 2005 that were the subject of any Advocacy comment; therefore, IRS' compliance with section 3(c) cannot be assessed.

Both OCC and OTS notify Advocacy in accordance with the requirements of section 3(b). Advocacy did not file any comments with OCC and OTS in FY 2005.

Department of Veterans Affairs

E.O. 13272 Compliance

The Department of Veterans Affairs (VA) continues to take a position that most of its regulations do not affect small entities. A review of E.O. 13272 notifications to Advocacy will support this position. Notwithstanding, VA has fully complied with E.O. 13272 by notifying Advocacy of proposed regulatory actions that may have a significant impact on a substantial number of small entities, as required by section 3(b) of E.O. 13272. The VA did not publish any final rules in FY 2005 that were the subject of Advocacy comment; therefore VA's compliance with section 3(c) cannot be assessed.

Environmental Protection Agency

E.O. 13272 Compliance

The Environmental Protection Agency (EPA) has made its comprehensive policies and procedures document available on its website, in compliance with section 3(a) of E.O. 13272. In FY 2005, EPA provided Advocacy with all of its draft rules when they were sent to OMB for review in compliance with section 3(b) of E.O. 13272. EPA addressed Advocacy's comments in its final rules as required by section 3(c) of E.O. 13272. EPA already has a high level of compliance with the RFA and E.O. 13272, so they were able to assist Advocacy in the development of the RFA training program. Two training sessions for EPA staff were held in FY 2005.

- **Issue: Clean Water Act Requirements for Industrial Cooling Water Intake Structures**. On November 24, 2004, the EPA published a proposed Clean Water Act rule that would require facilities that have cooling water intake structures to install devices to protect fish and other aquatic species from being killed when they are pulled into intake structures. As originally conceived by EPA, the rule would have applied to more than 700 facilities, including more than 80 owned by small entities. As a result of the recommendations of a SBREFA review panel conducted in early 2004, EPA proposed an exemption for facilities that have a cooling water intake flow of 50 million gallons per day or less. Research available to the panel indicated that cooling water intake flow volumes below the 50 million gallon per day threshold are unlikely to affect fish or other aquatic species. EPA's proposed exemption would remove almost all small entities from coverage by the cooling water intake rule. This exemption means annual cost savings to small businesses of $10.5 million.

- **Issue: Clean Air Act Requirements for Institutional Incinerators**. On December 9, 2004, the EPA published a proposed rule that would establish new air pollution control requirements for very small municipal waste combusters and for institutional waste incinerators that burn nonhazardous waste such as paper, cardboard, and food waste. The rule would require new and existing incinerators at institutions such as schools, prisons, and churches to install state-of-the-art control equipment and meet costly new permitting and operating requirements. Alternatively, EPA would require these institutions to shut down their incinerators and send their solid

waste to landfills. Advocacy was concerned that EPA had not adequately considered the additional costs imposed on small communities and rural institutions to transport their solid wastes over long distances. As a result of Advocacy's intervention on behalf of these small entities, EPA agreed to propose an exemption for rural incinerators located more than 50 miles from an urban area. The exemption means cost savings to small firms of $7.6 million annually.

Federal Acquisition Regulation Council

E.O. 13272 Compliance

The policies and procedures required by section 3(a) that were provided by DOD apply also to the FAR Council. While the FAR Council has not provided Advocacy with notification as required by E.O. 13272, Advocacy now has an open invitation to attend the regulatory council's deliberations, which provides Advocacy with access to the predecisional deliberative rulemaking process. Advocacy has provided confidential input on several predecisional regulations this past fiscal year. One case is DFARS 2003-D101, Quality Control of Aviation Critical Safety. The Office of Advocacy worked very closely with OIRA and the DOD regulatory team to improve the regulatory analysis. The FAR Council has had several RFA training sessions, including a session in FY 2005 to increase its awareness and understanding of the RFA requirements. The FAR Council did not publish final rules in FY 2005 that were the subject of Advocacy comment; therefore FAR Council compliance with section 3(c) cannot be assessed.

- **Issue: Access to Federal Procurement Data System-NG**. The Federal Procurement Data System (FPDS) is the primary database of the federal government for information relating to federal procurement. Reliable, timely, and quality information is a keystone in the decisionmaking process. Small entities especially rely on public data.

  On December 28, 2004, the Federal Acquisition Regulation (FAR) Council and the General Services Administration (GSA) published an interim final rule with request for comments establishing the rate to charge nongovernmental entities for a direct computer connection with the Federal Procurement Data System.

  The FAR Council and GSA issued this interim regulation under the good cause exception of the Administrative Procedure Act, citing the existence of urgent and compelling reasons to publish an interim rule prior to the opportunity for public comment.

  On February 7, 2005, Advocacy held a procurement roundtable to discuss, among other things, the accuracy of federal procurement data from the Federal Procurement Data System. This roundtable also discussed problems small users had in gaining access to the electronic system. Based on comments from small businesses, Advocacy filed written comments on February 25, 2005.

  Advocacy urged the FAR Council and GSA to make the summary procurement data free of charge and to improve upon the timeliness, quality, and reliability of the data.

Federal Communications Commission

E.O. 13272 Compliance

In response to E.O. 13272, the Federal Communications Commission (FCC) sent Advocacy a letter about its commitment to uphold the spirit of E.O. 13272 and to review its rules for impacts on small entities. The FCC said it would not make its policies and procedures publicly available, contrary to the requirements of section 3(a) of E.O. 13272, maintaining that as an independent agency, it is not covered by E.O. 13272. The agency has reiterated its intent to abide by the spirit of E.O. 13272 and

to work with Advocacy in training its rule writers on the RFA. The FCC consistently mails Advocacy proposed and final rules that have a significant impact on a substantial number of small entities. The FCC does so after the rule has been adopted and released to the general public, but before it is sent to the *Federal Register*. This provides Advocacy with additional time to review proposed rules before the comment deadline, but does not entirely meet the requirements of E.O. 13272, section 3(b). In FY 2005, the agency addressed Advocacy's comments in final rules as required by section 3(c) of E.O. 13272. FCC staff received RFA training in FY 2005.

- **Issue: Broadband Reporting.** On November 9, 2004, the FCC issued a notice of proposed rulemaking (NPRM) for Local Competition and Broadband Reporting. The rule became effective in March 2005. In the NPRM, the FCC asked for comment on: (1) extending the local competition and broadband reporting program for five years beyond its current sunset in March 2005; and (2) revising the program to improve data collection on broadband deployment.

  The initial regulatory flexibility analysis accompanying the NRPM did not identify or analyze the impacts of the proposed reporting requirements on currently exempt small entities, nor did it identify or analyze significant alternatives that would meet the FCC's objective. Advocacy filed a comment recommending that the FCC consider simplifying the revised reporting form or establishing a short form for small carriers previously exempt from reporting. Advocacy urged the FCC to consider comments from small carriers on ways to meet its improved data gathering objectives while minimizing the impact on small entities.

  On November 12, 2004, the FCC issued a Report and Order that altered the FCC's local competition and broadband data reporting program and extended the program for five years. The new report eliminated existing reporting thresholds, required small businesses that were previously exempt to report their broadband deployment, and required service providers to report more detailed information on the speed of the broadband service deployed. In addition, the FCC simplified the reporting form proposed in the rule, which would lessen the burden on all entities required to submit reports. The FCC stated that these modifications would satisfy Advocacy's request while allowing the FCC to determine whether broadband is being deployed to all Americans.

- **Issue: Communications Assistance for Law Enforcement Act.** On August 9, 2004, the FCC issued a proposed rule to apply the Communications Assistance for Law Enforcement Act (CALEA) to packet-mode services, which are broadband Internet access service and Voice over Internet Protocol (VoIP). CALEA is designed to (1) preserve the ability of law enforcement agencies to carry out wiretaps and other properly authorized intercepts, (2) protect privacy, and (3) avoid impeding the development of new technologies. The FCC also proposed to limit the availability of compliance extensions and require carriers to deploy equipment that is CALEA-compliant.

  The FCC issued an IRFA as part of its proposed rule, but did not, in Advocacy's opinion, adequately analyze the impacts of the proposed rule on small businesses. On December 15, 2004, Advocacy filed a reply comment with the FCC on the applicability of the CALEA to packet-mode services, recommending that the FCC publish a revised IRFA for comment that would include the estimates of the costs small carriers will incur to be CALEA-compliant under the proposed rule. Small entities would then be able to comment on the accuracy of the estimates and ways to minimize the impact. Advocacy also recommended that the FCC develop alternative schemes to allow for the purchase and operation of equipment that will enable small telecommunications carriers to become compliant.

  On September 23, 2005, the FCC issued a Report and Order that required all facilities-

based broadband Internet access providers and providers of interconnected VoIP service to be CALEA-compliant. The FCC rejected Advocacy's recommendation to complete an economic analysis by stating that it had described what the potential economic impact on small businesses would be. The FCC also rejected Advocacy's comments that the FCC had failed to provide significant alternatives, stating that the proposed rule combined with the IRFA appropriately identified all ways in which the FCC could lessen regulatory burdens on small entities. Accordingly, the FCC declined Advocacy's recommendation to publish a revised IRFA.

- **Issue: Computer Inquiry Rules**. On December 23, 2004, the FCC issued a public notice asking for comment on a petition filed by Verizon under Section 10 of the Telecommunications Act of 1996 asking the FCC to forbear from applying Title II regulations and the Computer Inquiry rules to broadband services offered by Verizon. Section 10 allows the FCC to forbear from applying any regulation to a telecommunications carrier if the FCC determines that:
(1) enforcement of the regulation is not necessary to ensure that the charges and practices are just and reasonable and are not unreasonably discriminatory; (2) enforcement is not necessary for the protection of consumers; and (3) forbearance is consistent with the public interest.

  On March 8, 2005, Advocacy filed a reply comment with the FCC urging the FCC to conduct an economic analysis consistent with the RFA when considering Verizon's petition for forbearance. A thorough economic impact analysis would assist the FCC in answering whether or not a Section 10 petition is in the public interest. Advocacy encouraged the FCC to reach out to small entities, especially small Internet service providers (ISPs), to determine the economic impact Verizon's petition would have on them. The FCC can draw a significant amount of information from the initial comments from small ISPs, including the number of small ISPs affected and some general information on how they are affected.

  As of September 30, 2005, the FCC had not issued a final rule or a supplemental rulemaking.

- **Issue: Intercarrier Compensation.** On December 21, 2004, Advocacy filed a letter with the FCC discussing its views on the analysis required of the FCC by the RFA on an expected regulatory proposal on Developing a Unified Intercarrier Compensation Regime. Intercarrier compensation is how telecom carriers reimburse each other for terminating telephone calls on each others' networks. The FCC is considering intercarrier compensation plans submitted by various coalitions and companies within the telecommunications industry. The FCC has been attempting to reform and unify the current system of compensation schemes for several years.

  As a guide to what issues the FCC should consider in the IRFA, Advocacy reviewed four of the industry compensation plans and spoke with representatives of several small telecom carriers and their organizations. Advocacy notified the FCC that a unified intercarrier compensation regime could have a significant impact on the cost recovery of small rural carriers. Advocacy also informed the FCC that small carriers, both rural and competitive, are less able to recover their costs through increased subscriber line charges. Small carriers recommend a cost-based compensation system rather than a system in which carriers terminate on other carriers' networks for no charge and recover the costs from their own customers.

  On March 3, 2005, the FCC issued a proposed rule on intercarrier compensation, officially asking for comment on the compensation schemes. The FCC took into account Advocacy's comments and grouped the plans into general categories in the IRFA and conducted an impact analysis on each category.

  On May 23, 2005, Advocacy filed an additional comment with the FCC in response to the FCC's proposed rule. Advocacy spoke with

small telecommunications carriers and their representatives to identify issues that will have a significant impact on small businesses. These issues include: regulatory complexity, cost recovery, interconnection, and universal service. Advocacy presented these issues to the FCC and asked the agency to consider the impact each of the proposed plans would have upon small businesses. Advocacy presented significant alternatives based on its outreach. These alternatives included: making "bill and keep" optional, providing a minimum interconnection agreement rather than removing the requirement altogether, making universal service portable, and moving to a capacity-based interconnection regime.

As of September 30, 2005, the FCC had not issued a final rule or a supplemental rulemaking.

- **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, which 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 and did not grant an exception to trade associations or nonprofit organizations when communicating through a facsimile device to their members.

  Advocacy requested that the FCC revisit this decision in light of the economic impact on small businesses, small trade associations, and small nonprofit organizations (all within the small entity definition of 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. The FCC stayed the fax portion of their rule on August 18, 2003, and the established business relationship portion on October 3, 2003, resulting in a significant costs savings to small businesses.

  Small business trade associations worked with Congress to draft a bill that would make the established business relationship exemption permanent. Advocacy sent letters to the House of Representatives and the Senate encouraging Congress to pass legislation that would grant additional flexibility to small businesses. The House of Representatives passed a bill on July 20, 2004, while the Senate Commerce, Science, and Transportation Committee reported out an identical bill on July 22, 2004. After the full Senate failed to take action, the legislation was reintroduced in the 109th Congress.

  On August 10, 2004, business groups filed petitions with the FCC to extend the stay for an additional six months. Advocacy wrote a letter in support of the extension, saying that it would give Congress the opportunity to adequately consider the pending legislation and give the FCC an opportunity to clarify their rule. On October 1, 2004, the Federal Communications Commission granted a six-month extension (until June 30, 2005) of the stay of enforcement of the "do not fax" rules. As the deadline approached, business groups asked the FCC to extend the stay for another six months. On May 17, 2005, Advocacy filed a letter supporting the extension of the stay. The FCC granted the extension until January 7, 2006. Shortly after the extension, Congress passed the Junk Fax Prevention Act of 2005 (P.L. 109-21) which President Bush signed into law on July 9, 2005. This bill codified the established business relationship exemption, allowing small businesses to fax their customers if they include an opt-out provision on the cover page. As a result of the legislation, small businesses saved more than $3.5 billion initially and will save $711 million annually.

- **Issue: Special Access Rates**. On January 31, 2005, the FCC issued a proposed rule on Special access rates. Special access services are dedicated wires and other facilities that run directly between two customers or between a customer and a telecommunications carrier other than the incumbent carrier. The FCC considered modifying its rules in response to the expiration of the current regulatory scheme for price cap carriers, which was intended to run until June 30, 2005, but now will continue until the FCC adopts a subsequent plan.

  On July 27, 2005, Advocacy filed a reply comment with the FCC to discuss regulatory impacts and available alternatives in response to the FCC's proposed rule on special access rates. Advocacy agreed with the FCC's determination that this proposed rule will have a significant economic impact on a substantial number of small telecommunications carriers and urged the FCC to give careful consideration to alternatives that would minimize that impact.

  Advocacy presented alternatives based on its outreach to small businesses, including: use of a forward-looking model for setting price caps, use of downward pricing flexibility, revisiting FCC's cost studies, reliance on a surrogate rate, restriction on bundling, restriction on previous purchase level, restriction on length of term commitments, and restriction on terminating calls with competitors.

  As of September 30, 2005, the FCC had not issued a final rule or a supplemental rulemaking.

- **Issue: Telephone Number Portability: Wireline-to-Wireless Porting**. On April 22, 2005, the FCC issued a public notice containing an IRFA for an order which requires small rural telecommunications carriers to provide wireline-to-wireless telephone number portability. Porting is the transfer of a telephone number from one carrier to another at a customer's request. Wireline-to-wireless porting is the transfer of a number from a wireline carrier to a wireless carrier, and wireless-to-wireline porting is a transfer in the opposite direction. The FCC published the IRFA in response to a court order which held that the FCC had not complied with the RFA and directed the agency to conduct the analysis.[1]

  On August 16, 2005, Advocacy filed a comment in response to the IRFA. In its comment Advocacy said that the IRFA did not satisfy the requirements of the RFA, as the FCC did not provide any estimates on the costs, projected recordkeeping, or professional skills necessary to implement wireline-to-wireless number portability. Advocacy advised the FCC that its treatment of alternatives to minimize significant economic impact on small entities was deficient.

  To determine what alternatives the FCC should consider in the IRFA, Advocacy spoke with representatives of small telecommunications carriers and their trade associations and reviewed the comments by small businesses submitted during the course of the rulemaking. In its comment, Advocacy discussed the regulatory impacts on small rural wireline carriers and presented alternatives based on its outreach. These alternatives included: require physical interconnection for wireline-to-wireless number portability, waive the enforcement of wireline-to-wireless number portability, and exempt small rural wireline carriers from the portability requirement.

  Advocacy urged the FCC to consider the regulatory impact on small rural carriers and recommended that the FCC issue a supplemental IRFA with a more thorough analysis of the impacts and significant alternatives. As of September 30, 2005, the FCC had not issued a final regulatory flexibility analysis.

[1] *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29 (D.C. Cir. 2005) stated that the FCC failed to comply with the RFA's requirement to prepare a final regulatory flexibility analysis regarding the order's impact on small entities and remanded the order to the FCC to prepare a final regulatory flexibility analysis.

- **Issue: Local Number Portability – Porting Interval**. On September 16, 2004, the FCC issued a proposed rule that sought comment on a recommendation of the North American Numbering Council (NANC) that would reduce the intermodal porting interval. Intermodal porting is the transfer of a number from a wireline carrier to a wireless carrier at a customer's request. The NANC recommended a combination of two proposals, which it determined would result in a shorter porting interval. The NANC predicted that this would reduce the porting interval from 96 hours to 53 hours.

  The FCC issued an IRFA as part of its proposed rule. The FCC recognized that reducing the porting interval may require system upgrades and impose new obligations and costs on carriers. The agency sought comment on the impacts of the proposed rule on small telephone companies and ways to reduce the burden, pursuant to the RFA.

  Advocacy filed a comment with the FCC stating that the cost of requiring small telephone companies to comply with a shorter porting interval would outweigh the benefits of shortening the time their customers have to wait for their numbers to be ported from wireline to wireless phones in rural areas. Advocacy recommended that the FCC grant an exemption to small businesses because of the small number of porting requests received in rural areas and the expense to small telephone companies that must either rely on third parties or perform the ports manually.

  As of September 30, 2005, the FCC had not issued a final rule or a supplemental rulemaking.

- **Issue: Unbundled Network Elements (UNEs)**. On August 20, 2004, the FCC issued a proposed rule to determine which network elements under the Telecommunications Act of 1996 must be unbundled and made available by incumbent telecom carriers to competitive carriers to ensure that competitive carriers have access to essential network elements necessary for providing competitive telephone service.

  On October 4, 2004, Advocacy filed a comment with the FCC addressing two significant deficiencies in the IRFA. First, the FCC did not analyze the economic impact on small businesses of eliminating UNEs. Instead, the FCC listed small entities that would be affected, but posed the question of actual impact to the general public. The RFA encourages the FCC to conduct its own analysis and rely on public comment to improve the quality of analysis prior to making a final decision. To correct this deficiency, Advocacy recommended that the FCC issue a revised IRFA to analyze the impacts of this rule on small businesses.

  Second, the FCC did not identify or analyze alternatives to minimize the burden on small businesses in the IRFA. Advocacy spoke with several small competitive carriers about possible alternatives that would minimize the impact on small businesses. Advocacy identified alternatives that could help the FCC minimize the rule's small business impact.

  On Feb. 23, 2005, the FCC issued an order on remand modifying the FCC's unbundling rules and made unbundled access to transport and loops conditional upon the competitive deployment at a wire center or along routes. The FCC set forth specific transition plans to govern competitive carriers' migration from UNEs to alternative arrangements, where necessary. The FCC rejected Advocacy's recommendation that small entities were disadvantaged by any lack of specificity regarding specific results potentially resulting from this proposed rule. Instead, the FCC claimed that the proposed rule posed specific questions to commenters and solicited comment from all parties sufficient to comply with the RFA even though the FCC did not propose specific rules. With this justification, the FCC declined to issue a revised IRFA.

- **Issue: Voice over Internet Protocol**. On March 10, 2004, the FCC issued a proposed rule on whether Internet Protocol (IP)-enabled

services should be considered a telecommunications service or an information service and which regulatory scheme should be applied to this technology. On May 28, 2004, Advocacy filed comments with the FCC, noting that the proposed rule did not contain concrete proposals and was more akin to an advance notice of proposed rulemaking or a notice of inquiry. Because of the vagueness of the NPRM, the IRFA did not provide an analysis of proposed compliance burdens, consideration of alternatives, or discussion of overlapping regulations.

Should the FCC decide to adopt regulations for IP-enabled services after consideration of the comments to the NPRM, Advocacy recommended that the FCC publish for public comment a further notice of proposed rulemaking with a revised IRFA to consider the impact of the proposed requirements on small entities, to provide analysis of significant alternatives that minimize the economic impact on them, and to review overlapping regulations.

On June 3, 2005, the FCC released a report and order requiring providers of interconnected Voice over Internet Protocol (VoIP) service to supply enhanced 911 capabilities to their customers. The FCC rejected Advocacy's recommendation that it issue a revised IRFA, stating that small entities had already received sufficient notice of the issues because the FCC considered the economic impact on small entities and what ways are feasible to minimize the burdens imposed on those entities, and, to the extent feasible, implemented those less burdensome alternatives.

National Archives and Records Administration

- **Issue: Standards for Federal Record Centers**. In August 2005, the National Archives and Records Administration (NARA) published a final regulation on Federal Record Centers. This final rule modifies NARA facility standards established by a final rulemaking in 1999 for records storage facilities that house federal records. In the 1999 rulemaking process, Advocacy commented on the proposed rule and worked with NARA to improve its RFA compliance. Specifically, the 1999 rule required special roof construction, certification of multi-story structures, and fire protection system certification. The final rule abolished these requirements and simply requires that small entities comply with state and local building codes instead.

  The final August 2005 rule addresses records center industry concerns identified in the 2003 OMB *Report to Congress on Costs and Benefits of Federal Regulations*. Advocacy continued to work with NARA and the small business record center trade organizations in the finalization of the August 2005 rule. Cost savings in the amount of $63 million in the first year of the rule were achieved for small businesses.

Securities and Exchange Commission

E.O. 13272 Compliance

The Securities and Exchange Commission (SEC) has not made public its written policies and procedures for the consideration of small entities in its rulemaking as required by section 3(a) of E.O. 13272. The SEC does consistently notify Advocacy of rules which may have a significant economic impact on a substantial number of small entities, as required by section 3(b). The SEC did not publish any final rules in FY 2005 that were the subject of any Advocacy comment; therefore, SEC's compliance with section 3(c) cannot be assessed.

- **Issue: Advisory Committee on Smaller Public Companies**. Small business representatives and Advocacy recommended to the SEC that the agency could benefit from the advice of a balanced committee of representatives of smaller public companies. This recommendation

stemmed from a combination of recent changes to securities law and changed circumstances required by the Sarbanes-Oxley Act of 2002 (SOA). In January 2005, the SEC officially convened the SEC Advisory Committee on Smaller Public Companies, and assigned an office to support the committee's activities. Since its convening, the SEC's advisory committee has met several times, collected expert and small business testimony on securities law reform, and made preliminary recommendations to the SEC. The SEC has demonstrated a commitment to working with the public to balance the impacts of its regulatory actions on small businesses, and Advocacy looks forward to working with the SEC on the advisory committee's final recommendations.

- **Issue: Extension of Small Public Company Compliance Deadline for New Internal Control Reporting Requirement**. In response to one recommendation under consideration at the SEC's advisory committee, the SEC provided small businesses with an extension of time for implementation of Section 404 of the SOA to ensure that the advisory committee's final recommendations on Section 404 have time to be implemented. SEC's action is estimated to save nonaccelerated filers (smaller public companies) approximately $2.68 billion in first-year compliance costs.

Small Business Administration

E.O. 13272 Compliance

The Small Business Administration (SBA) provides Advocacy with notification of draft rules that may have a significant impact on a substantial number of small entities, as required by section 3(b) of E.O. 13272. As a result of RFA training and continued RFA discussions on draft rules, SBA personnel have sought Advocacy input earlier in the regulatory development process. SBA did not publish any final rule in FY 2005 that was the subject of any Advocacy comment; therefore, SBA's compliance with section 3(c) cannot be assessed.

- **Issue: Selected Size Standard Issues**. On December 3, 2004, SBA issued an advance notice of proposed rulemaking (ANPRM) in the *Federal Register* on Small Business Selected Size Standards Issues. This regulation attempted to seek comments on size standard issues not discussed in the March 2004 proposed restructuring of SBA's system of size standards. The ANPRM was seeking comments on whether there should be an exclusion from the affiliation rule with venture capital companies and how to best simplify size standards.

  Based on conversations with affected small businesses and a procurement roundtable held on April 4, 2004, Advocacy filed a written comment letter on January 13, 2005. Advocacy urged SBA to seek public input on the need to streamline the duplicative regulatory impact analysis requirements that agencies must follow under the Regulatory Flexibility Act and SBA size standard regulations. SBA has not taken further action on this ANPRM.

Conclusion

Advocacy has seen the beginnings of a transformation in regulatory flexibility analysis from a process that in 1980 relied primarily on paperwork and formal written comments to a broader technology-enhanced process that allows for earlier, more real-time, and more direct information exchange among agency rule writers, the Office of Advocacy, and affected small entities.

A careful look at the last three years of RFA experience since President Bush's announcement of E.O. 13272 indicates signs of progress:

- As of the end of FY 2005, more than 40 agencies had been trained in how to comply

with the RFA, and more agencies were taking the initiative to examine their rules for small entity impacts.

- Almost all Cabinet-level departments that issue regulations have adopted a written policy on how they will comply. Many have offices to help small businesses understand and comply with their regulations.
- As evidenced in a number of the 2005 cases reported here, the Office of Advocacy's involvement was much more likely to start at a proposal's prepublication stage, so that small entity concerns could be addressed earlier, resulting in more carefully targeted improvements to proposed rules.
- Agencies are responding to Advocacy's comments on proposed rules when they publish the final rules in the *Federal Register*.
- Technology played a key role in small entities' ability to comment earlier and more meaningfully on new regulatory proposals. Advocacy posted key regulatory proposals of interest to small businesses on its Regulatory Alerts page and provided for small entities to comment on regulations through regulations.gov at *http://www.sba.gov/advo/laws/law_regalerts.html*.
- SBREFA panels continued to give federal regulators new insights during the rule drafting stage into how their rules would affect small businesses and other small entities on the ground. Some agencies that are not required to use these panels are nevertheless meeting informally with small businesses in roundtables in an effort to determine the likely effects of their rules.

Overall, regulatory development and sensitivity to impacts on small entities have improved considerably since the RFA was enacted in 1980. More improvements are needed: new 2005 research indicates that the disproportionate regulatory burden on small entities continues. Advocacy's top legislative priority articulated in FY 2005 for the 109th Congress was to amend the RFA and SBREFA to improve the regulatory climate for small businesses and "to give small businesses a legitimate voice in the regulatory process" (see Appendix D).

At the September 2005 symposium, Chief Counsel for Advocacy Thomas M. Sullivan noted "The past 25 years have taught us that monitoring federal agency compliance is an ongoing task, and it is something that advocates will be doing 25 years from now as well." If the result is regulations that are better designed to achieve their mission with relatively less burden on small entities, the effort will be well worthwhile.

4 State Flexibility: Small Business Regulatory Flexibility Model Legislation Initiative

While federal measures are in place to reduce regulatory burdens on small businesses, the need for flexibility does not stop at the federal level. At least 92 percent of businesses in every state are small businesses, and they bear a disproportionate share of regulatory costs and burdens. However, sometimes because of their size, the aggregate importance of small businesses to the economy is overlooked. Because of this, it is very easy to fail to notice the negative impact of regulatory activities on them. Recognizing that state and local governments can be a source of burdensome regulations on small business, Advocacy drafted model regulatory flexibility legislation for the states based on the federal Regulatory Flexibility Act.

"This bill is all about making life easier for our state's small businesses, which is a big step forward in stimulating job creation and economic growth in South Carolina. Ultimately, though, letting those businesses keep more of what they earn so they can reinvest in new people, new equipment and new technologies is going to have the biggest impact on our state's economy."

South Carolina Governor Mark Sanford

The intent of Advocacy's model legislation is to foster a climate for entrepreneurial success in the states so that small businesses will continue to create jobs, produce innovative new products and services, and bring more Americans into the economic mainstream. Excessive regulation can be reduced and the economy improved without sacrificing important regulatory goals such as higher environmental quality, greater travel safety, better workplace conditions, and increased family financial security.

According to Advocacy's state model legislation, successful state-level regulatory flexibility laws should address the following: 1) a small business definition that is consistent with state practices and permitting authorities; 2) a requirement that state agencies perform an economic impact analysis on the effect of a rule on small businesses before they regulate; 3) a requirement that state agencies consider alternatives that are less burdensome for small businesses while still meeting the agency's regulatory goals; 4) a provision that requires state governments to review existing regulations periodically; and 5) judicial review to give the law "teeth."

"Small business is the dynamo that powers our economy, and every dollar a small business puts towards complying with cumbersome government regulations is a dollar that cannot be spent expanding the business, providing benefits or hiring new employees. I sponsored HB 33 because I see smarter regulations as an economic development tool and strongly feel that we can add an awareness of the needs of small businesses to the regulatory process without compromising the health, safety, or welfare of the public."

Alaska State Representative Kevin Meyer

Many states have some form of regulatory flexibility laws on the books. However, many of these laws do not contain all of the five critical elements addressed in Advocacy's model legislation. Recognizing that some laws are missing key components that give regulatory flexibility its effectiveness, legislators continue to introduce legislation to strengthen their current systems.

Since 2002, 14 states have enacted regulatory flexibility laws,[2] 33 state legislatures have considered

[2] The states are Alaska, Colorado, Connecticut, Indiana, Kentucky, Missouri, New Mexico, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Virginia, and Wisconsin. Missouri enacted two laws.

regulatory flexibility legislation[3] and four executive orders have been signed by governors implementing regulatory flexibility.[4]

In 2005, 18 states introduced regulatory flexibility legislation.[5] Alaska Governor Frank Murkowski, Indiana Governor Mitch Daniels, Missouri Governor Matt Blunt, New Mexico Governor Bill Richardson, and Virginia Governor Mark Warner signed regulatory flexibility legislation into law and Arkansas Governor Mike Huckabee implemented regulatory flexibility through an executive order in 2005.

"Adding judicial review is an important step forward for our state's small businesses. Now the law has some teeth, and that will help small business and state agencies work together to produce good regulations that get the job done without causing serious harm. It means a better business and job creating climate for Missouri."

Scott George, President and CEO of Mid American Dental & Hearing Center in Mt. Vernon, MO

Advocacy welcomes the opportunity to work with state leaders on regulatory flexibility. The office's 10 regional advocates located across the country help educate governors, state officials, state legislators, and small business representatives about the benefits of reducing state regulatory burdens on small businesses.

The text of Advocacy's model legislation, updated versions of the state regulatory flexibility legislative activity map and contact information for the regional advocates can be found on the website *http://www.sba.gov/advo/* under "State Activities."

Success Stories

Colorado's Cork and Go Rule: Regulation 47-918

Under Colorado law, hotels and restaurants are permitted to reseal, and allow a customer to remove from the premises, an open bottle of partially consumed wine purchased at the hotel or restaurant with some limitations.

To implement this law, the Colorado Department of Public Health and Environment (DPHE) proposed a rule amendment that would require hotels and restaurants offering resealing of opened bottles to purchase commercially manufactured stoppers and sealable containers such as bags or boxes. The overall cost of compliance for this regulatory proposal was estimated at approximately $1,771,500 to $3,275,000.[6]

A small business is defined under the Colorado Administrative Procedure Act as having 500 or fewer employees. More than 4,000 firms in the state operate with an active liquor license and would have been affected by the rule. Under Colorado's regulatory flexibility structure, the Department of Regulatory Agencies (DORA) reviews proposed rules affecting small businesses and can request that an agency prepare an analysis of a proposed rule's economic impact on small entities. In this circumstance, DORA asked DPHE to determine the cost that would be incurred by small businesses to comply with the proposed rule.

DORA's review of the proposal found that the law under which the rule was promulgated did not specify how bottles were required to be re-corked,

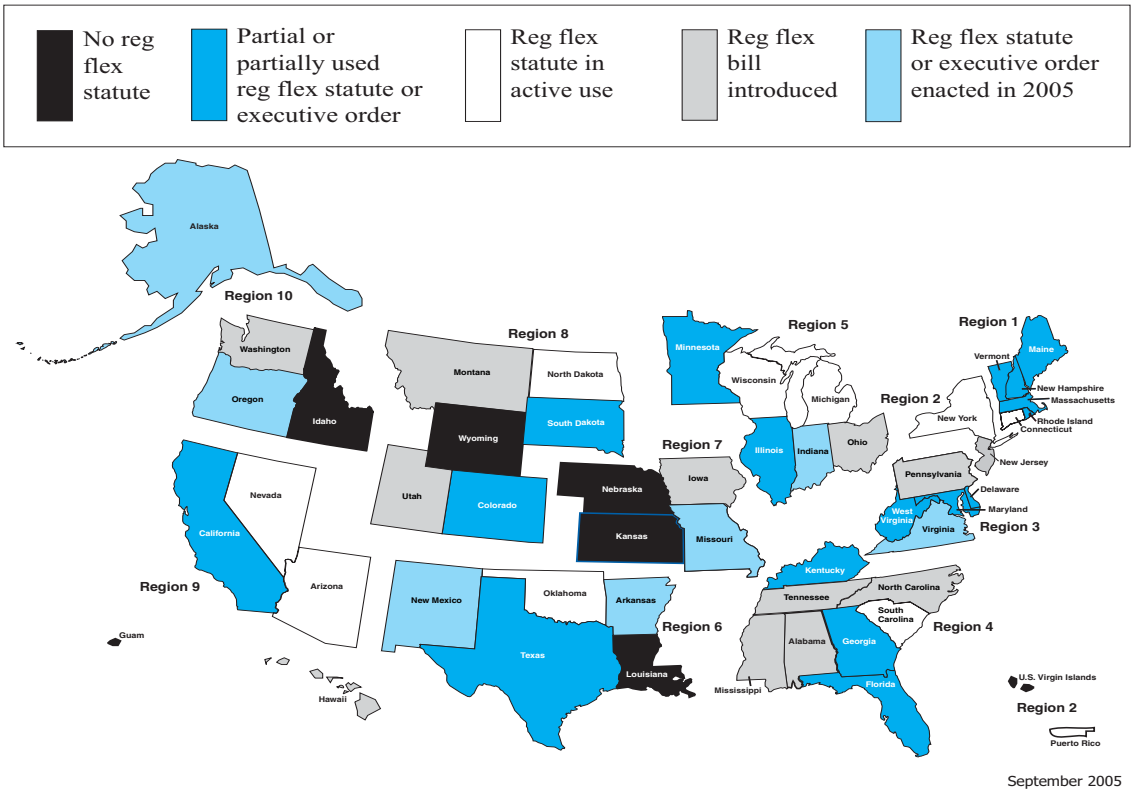
[3] The states are Alabama, Alaska, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.

[4] These states include Arkansas, Massachusetts, Missouri (whose executive order was later superseded by legislation), and West Virginia.

[5] The states are Alabama, Alaska, Hawaii, Indiana, Iowa, Mississippi, Missouri, Montana, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington.

[6] This number is approximate and based on the cost of a commercially manufactured stopper, corks and overstocking charges multiplied by the number of small businesses in Colorado subject to the rule.

Chart 4.1 Mapping State Regulatory Flexibility Provisions, FY 2005



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nor did it specify that sealable containers, in addition to the stoppers, are required. The Colorado Restaurant Association, on behalf of its small members, objected to the rule on the basis that the cost of compliance would be overly burdensome to the regulated small entities.

After discussions with DORA and the Colorado Restaurant Association, and before going further with the rulemaking process, DPHE agreed to revise its initial proposal. The revised rule is a success for small business because it provides an economical way for businesses to comply with the rule. The final rule allows the use of the original cork to re-cork the bottle. Businesses are still required to use sealable bags, but are not required to incur the expense of commercially manufactured stoppers and corks.

DPHE, DORA, and small businesses worked together under Colorado's regulatory flexibility law. DORA's small business outreach was an important tool. Small businesses proved to be an invaluable resource to the agency in determining which alternatives might be less burdensome. The end result was a cost savings to small business without compromising the agency's objective. This example demonstrates how agencies, as well as small businesses, can benefit by implementing a comprehensive regulatory flexibility system.

Lizzy's Ice Cream: A Case for Common Sense Regulation

Under the Food Protection Program in the Massachusetts Department of Public Health (MDPH), businesses transporting frozen or refrigerated products are required to purchase or lease a mechanically refrigerated vehicle (105 CMR 561.000). This provision costs businesses approximately $50,000 per truck and several thousand dollars annually in operating costs.

Nick Pappas decided to leave the corporate world and open Lizzy's Ice Cream Parlor in Waltham, Massachusetts. Lizzy's homemade "super premium" ice cream was a hit, and Nick eventually decided to sell his product through supermarkets around Greater Boston. As he was unable to afford a mechanically refrigerated vehicle and would be making only a small number of deliveries, he developed a system to operate a refrigerator unit on his own truck using the truck's existing power system. After conducting diligent research, he determined that his approach was equally effective and would save him thousands of dollars.

Nick was unable to gain approval for his method from MDPH. Not only was his evidence ignored, but there appeared to be no rational or scientific basis for the standards required by the agency. He found no studies justifying the regulation and no supporting evidence of any citizens sickened by ingesting improperly refrigerated ice cream.

MDPH conducted hearings on updating their frozen dessert regulations and Nick, along with other small business owners, used the opportunity to voice concerns about the adverse impact of the rule on their businesses. As a result of the hearing, MDPH revised the regulations to allow anyone proposing to use an alternative method for transporting frozen or refrigerated products to apply for a variance, accompanied by an explanation of how safe temperatures would be maintained. Allowing small businesses affected by the rule to present alternatives saved the small firms the $50,000 for a new vehicle, plus the annual insurance and operating costs.

Although Massachusetts does not require any agency to conduct a review or analysis of the impact of regulations on small businesses, MDPH decided to employ this good government practice. Other agencies, as well as small businesses, would benefit greatly by implementing a similar process. This can be accomplished by enacting a strong regulatory flexibility law.

Nick's story validates a key element of regulatory flexibility, which is the requirement that agencies review existing regulations periodically to determine whether they should be continued without change, or be amended or rescinded to minimize the economic impact of the rule on small businesses. In the case resolved by the Massachusetts Department of Public Health, a less burdensome alternative was achieved for Lizzy's Ice Cream and other small firms without compromising the health, safety, and welfare of citizens.

Table 4.1 State Regulatory Flexibility 2005 Legislative Activity

Seven states enacted regulatory flexibility legislation or an executive order in 2005:

Alaska (HB33)

Arkansas (EO)

Indiana (HB1822)

Missouri (HB576)

New Mexico (HB869)

Oregon (HB3238)

Virginia (HB1948/SB1122)

Eighteen states introduced regulatory flexibility legislation in 2005:

Alabama (HB 745)

Alaska (HB33)

Hawaii (HB602/SB422)

Indiana (HB1822)

Iowa (SB65)

Mississippi (HB1472/SB2795)

Missouri (HB576)

Montana (HB630)

New Jersey (A3973/S2754)

New Mexico (HB869/SB842)

North Carolina (SB664)

Ohio (SB15)

Oregon (HB3238)

Pennsylvania (HB236/SB842)

Tennessee (HB279/SB1276)

Utah (HB209)

Virginia (HB1948/SB1122)

Washington (HB1445)

Table 4.2 State Regulatory Flexibility Legislation, Status as of October 2005

14 states and one territory have active regulatory flexibility statutes:

Arizona	Michigan	North Dakota[2]	South Carolina[1]
Connecticut[1]	Missouri	Oklahoma	Virginia
Hawaii	Nevada	Oregon	Wisconsin[1]
Indiana	New York	Puerto Rico	

28 states have partial or partially used regulatory flexibility statutes:

Alaska	Illinois	Mississippi	Rhode Island[1]
Arkansas	Iowa	New Hampshire	South Dakota[1]
California	Kentucky[1]	New Jersey	Texas
Colorado[2]	Maine	New Mexico	Utah
Delaware	Maryland	North Carolina	Vermont
Florida	Massachusetts[2]	Ohio	Washington
Georgia	Minnesota	Pennsylvania	West Virginia[2]

Eight states, two territories, and the District of Columbia have no regulatory flexibility statutes:

Alabama	Idaho	Montana	Virgin Islands
District of Columbia	Kansas	Nebraska	Wyoming
Guam	Louisiana	Tennessee	

[1]In 2004, the state enacted legislation or an executive order that offered regulatory relief for state small businesses.
[2]In 2003, the state enacted legislation or an executive order that offered regulatory relief for state small businesses.

Appendix A Supplementary Tables

Table A.1 Cabinet Department RFA Procedures in Compliance with Section 3(a) of E.O. 13272

Department	Document made available at:
Agriculture	*www.ocio.usda.gov/directives/files/dr/DR1512-001.pdf*
Commerce	*www.ogc.doc.gov/ogc/legreg/testimon/108f/guidelines.htm*
Defense	DOD has not submitted procedures separate from the FAR Council/ GSA's submission.
Education	*www.ed.gov/legislation/FedRegister/finrule/2003-2/051203d.html*
Energy	*www.gc.doe.gov/rulemaking/eo13272.pdf*
Health and Human Services	*www.hhs.gov/execsec/smallbus.html*
Homeland Security	*www.tsa.gov/public/display?theme=5*
Housing and Urban Development	*www.hud.gov/offices/osdbu/policy/impact.cfm*
Interior	*http://elips.doi.gov/elips/release/3207.htm*
Justice	*www.usdoj.gov/olp/execorder13272.pdf*
Labor	*www.dol.gov/dol/regs/guidelines.htm*
State	The Department of State has not submitted written procedures.
Transportation	*www.regs.dot.gov/docs/eo-13272.pdf*
Treasury	*www.treas.gov/regs/2002-rfa-compliance.pdf?IMAGE.X=24\&IMAGE.Y=8*
Veterans Affairs	*www.va.gov/OSDBU/library/eo13272.htm*

Table A.2 Federal Agencies Trained in RFA Compliance, FY 2003-2005

In fulfillment of E.O. 13272, Advocacy trained regulatory staff from the following federal departments and agencies on how to comply with the Regulatory Flexibility Act from July 2003 through September 2005.

Department of Agriculture
- Animal and Plant Health Inspection Service

Department of Commerce
- National Oceanic and Atmospheric Administration
- Manufacturing and Services
- Patent and Trademark Office

Department of Education

Department of Energy

Department of Health and Human Services
- Centers for Medicare and Medicaid Services
- Food and Drug Administration

Department of Homeland Security
- Bureau of Citizenship and Immigration Services
- Bureau of Customs and Border Protection
- Transportation Security Administration
- United States Coast Guard

Department of Housing and Urban Development
- Community Planning and Development
- Fair Housing and Equal Opportunity
- Manufactured Housing
- Public and Indian Housing

Department of the Interior
- Bureau of Indian Affairs
- Bureau of Land Management
- Fish and Wildlife Service
- Minerals Management Service
- National Park Service
- Office of Surface Mining, Reclamation, and Enforcement

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

Department of Labor
- Employee Benefits Security Administration
- Employment and Training Administration
- Employment Standards Administration
- Mine Safety and Health Administration
- Occupational Safety and Health Administration

Department of Transportation
- Federal Aviation Administration

- Federal Highway Administration
- Federal Motor Carrier Safety Administration
- Federal Railroad Administration
- National Highway Traffic Safety Administration
- Research and Special Programs Administration

Department of the Treasury

- Financial Crimes Enforcement Network
- Financial Management Service
- Internal Revenue Service
- Office of the Comptroller of the Currency
- Tax and Trade Bureau

Department of Veterans Affairs

Independent Federal Agencies

- Access Board
- Environmental Protection Agency
- Federal Communications Commission
- Federal Deposit Insurance Commission
- Federal Election Commission
- General Services Administration / FAR Council
- Securities and Exchange Commission
- Small Business Administration

Table A.3 SBREFA Panels through Fiscal Year 2005

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	
Federal 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
Concentrated Animals Feedlots Effluent Guideline	12/16/99	04/07/00	01/12/01	02/12/03
Reinforced Plastic Composites	04/06/00	06/02/00	08/02/01	04/21/03

Rule Subject	Date Convened	Report Completed	NPRM[1]	Final Rule Published
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	Withdrawn[3]
Aquatic Animal Production Industry	01/22/02	06/19/02	09/12/02	08/23/04
Lime Industry—Air Pollution	01/22/02	03/25/02	12/20/02	01/05/04
Non-Road Diesel Emissions—Tier 4 Rules	10/24/02	12/23/02	05/23/03	06/29/04
Cooling Water Intake Structures—Phase III Facilities	02/27/04	04/27/04	11/24/04	
Section 126 Petition (2005 Clean Air Implementation Rule)	04/27/05	06/27/05	08/24/05	
Federal Implementation Plan for Regional Nitrogen Oxides (2005 Clean Air Implementation Rule)	04/27/05	06/27/05	08/24/05	
Mobile Source Air Toxics – Control of Hazardous Air Pollutants From Mobile Sources	09/07/05			
Occupational Safety and Health Administration				
Tuberculosis	09/10/96	11/12/96	10/17/97	Withdrawn[4]
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[5]
Electric Power Generation, Transmission, and Distribution	04/01/03	06/30/03	06/15/05	
Confined Spaces in Construction	09/26/03	11/24/03		
Occupational Exposure to Respirable Crystalline Silica Dust	10/21/03	12/19/03		
Occupational Exposure to Hexavalent Chromium	01/30/04	04/20/04	10/04/04	

[1] Notice of proposed rulemaking (NPRM).
[2] Proposed rule was withdrawn August 18, 1999. EPA does not plan to issue a final rule.
[3] Proposed rule was withdrawn on April 26, 2004. EPA does not plan to issue a final rule.
[4] Proposed rule was withdrawn on December 31, 2003. OSHA does not plan to issue a final rule.
[5] President Bush signed Senate J. Res. 6 on 03/20/01, which eliminated this final rule under the Congressional Review Act.

Appendix B The Regulatory Flexibility Act

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

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

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

Appendix C
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.

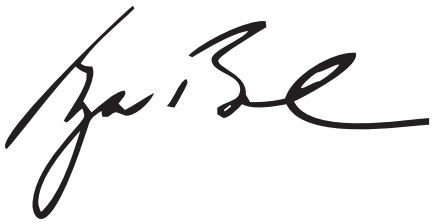
Sec. 4. *Definitions.* Terms defined in section 601 of title 5, United States Code, including the term ''agency,'' shall have the same meaning in this order.

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.

Appendix D Advocacy Legislative Priorities for the 109th Congress

The Office of Advocacy was established pursuant to P.L. 94-305 to represent the views of small business before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The Office of Advocacy's top legislative priority is to give small businesses a legitimate voice in the regulatory process.

Advocacy's research shows that small businesses pay an average of $7,647 per employee annually to comply with federal regulations—45 percent more than large businesses. Yet, small businesses generate 60-80 percent of all net new jobs, represent 99.7 percent of employers, employ half of all private sector employees, and innovate at a rate 13 times greater than large firms.

For twenty-five years, the Regulatory Flexibility Act (RFA) has required that agencies consider less burdensome approaches to regulation in order to level the playing field for small business. The RFA was amended in 1996 by the Small Business Regulatory Enforcement Fairness Act (SBREFA). Among other things, the 1996 amendments made agency small business impact analysis subject to judicial review and required two agencies, the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA), to seek direct input from small entities prior to issuing regulatory proposals.

Government has saved small entities billions of dollars by following the RFA's direction and minimizing the impact of regulatory mandates on small business. History has shown that regulatory sensitivity towards small entities can be achieved without sacrificing the underlying purpose of environmental protection, workplace safety, border security, and other governmental priorities.

The 109th Congress has the opportunity to amend the RFA and SBREFA to improve the regulatory climate for small business. The following four amendments fill in loopholes that currently reduce the effectiveness of both statutes.

I. Review of Existing Rules

The W. Mark Crain study on regulatory costs showed a cost to Americans of $1.1 trillion. Much of that regulatory burden falls on the business community. Since new regulations are promulgated each year, the cumulative impact can be staggering. It is necessary to evaluate existing regulations periodically to minimize this impact.

Amendment:

Modify section 610 of the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (RFA), that requires federal agencies to review 10-year-old regulations to assess their present-day impact. Section 610 should be broadened so that agencies review all rules periodically and not just those viewed as significant when initially promulgated. This change would encourage agencies to update their rules every 10 years to ensure that regulatory protections reflect current conditions.

II. Proper Consideration of Small Entities in Agency Rulemaking

The President prioritized the need for government agencies to consider their impact on small entities under the RFA when he signed Executive Order 13272. Section 3 of the Executive Order requires agencies to notify the Office of Advocacy of draft rules that will have a significant economic impact on a substantial number of small entities. It also requires agencies to give appropriate consideration to Advocacy's comments and address the comments in final rules.

Amendment:

Codify section 3 of the Executive Order to ensure that the President's attention to the impact of regulation on small entities becomes a permanent part of how government operates. This amendment will also ensure that independent agencies comply with the RFA.

III. Help States Consider Alternatives to Costly Regulation

The federal government sometimes issues regulations that must be implemented by the states. When this happens, federal agencies are not required to do the detailed analysis of impacts and alternatives required under the RFA. Instead, states with RFA-type laws on the books, and with fewer resources than federal agencies, must do the analysis themselves, resulting in what amounts to an unfunded mandate. Under current law, agencies are only required to analyze direct impacts, even though there may be foreseeable and costly indirect impacts when states enforce federal regulations.

Amendment:

Amend the RFA to ensure that agencies analyze the impact of their rules on small entities and provide states with regulatory alternatives that will enable states to meet federal requirements while minimizing the impact on small entities.

IV. Help Small Business Comply with Regulations

Sometimes small business noncompliance with federal regulations is simply due to the fact that they do not understand the regulations. The intent behind section 212 of SBREFA was to ensure that small businesses had a way to understand often complex and technical federal regulations. Section 212 of SBREFA requires federal agencies to publish a small business compliance guide for each final rule that has a significant economic impact on a substantial number of small entities. However, small businesses continue to be frustrated with rules that are not published with adequate compliance information.

Amendment:

Amend SBREFA to require that agencies publish plain language small business compliance guides whenever a final rule requires a final regulatory flexibility analysis (FRFA). Agencies would also be required to report annually on their efforts to comply with this section.

Appendix E
Abbreviations

AED	automated external defibrillator
ALEC	American Legislative Exchange Council
AMS	Agricultural Marketing Service
ANPRM	advance notice of proposed rulemaking
APA	Administrative Procedure Act
APHIS	Animal and Plant Health Inspection Service
BIS	Bureau of Industry and Security
BLM	Bureau of Land Management
CALEA	Communications Assistance for Law Enforcement Act
CMS	Centers for Medicare and Medicaid Services
CRD	Civil Rights Division (U.S. Department of Justice)
Cr(VI)	hexavalent chromium
CVR	cockpit voice recorder
DFDR	digital flight data recorder
DHS	Department of Homeland Security
DOC	Department of Commerce
DOD	Department of Defense
DOE	Department of Energy
DOI	Department of the Interior
DOJ	Department of Justice
DOL	Department of Labor
DORA	Department of Regulatory Agencies (Colorado)
DOT	Department of Transportation
DPHE	Department of Public Health and Environment (Colorado)
E.O.	Executive Order
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FAR	Federal Acquisition Regulation
FCC	Federal Communications Commission
FDA	Food and Drug Administration
FEI	Financial Executives International
FHWA	Federal Highway Administration
FMCSA	Federal Motor Carrier Safety Administration
FPDS	Federal Procurement Data System
FRFA	final regulatory flexibility analysis
FWS	Fish and Wildlife Service
FY	fiscal year
GDP	gross domestic product
GIPSA	Grain Inspection, Packers and Stockyard Administration

GRS	groundfish retention standard
GSA	General Services Administration
HCAHPS	Hospital Consumer Assessment of Health Plans Survey
HHS	Department of Health and Human Services
HUD	Department of Housing and Urban Development
IP	Internet Protocol
IRFA	initial regulatory flexibility analysis
IRS	Internal Revenue Service
ISP	Internet service provider
MDPH	Massachusetts Department of Public Health
MSHA	Mine Safety and Health Administration
NAIS	National Animal Identification System
NANC	North American Numbering Council
NARA	National Archives and Records Administratoin
NHTSA	National Highway Traffic Safety Administration
NMFS	National Marine Fisheries Service
NPRM	notice of proposed rulemaking
NTSB	National Transportation Safety Board
OCC	Office of the Comptroller of the Currency
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
OTS	Office of Thrift Supervision
PEL	permissible exposure limit
PHMSA	Pipeline and Hazardous Materials Safety Administration
P.L.	Public Law
PRISM	Professional Records and Information Services Management International
PTO	Patent and Trademark Office
RESPA	Real Estate Settlement Procedures Act
RFA	Regulatory Flexibility Act
RFID	radio frequency identification
RSPA	Research and Special Programs Administration
SBA	Small Business Administration
SBREFA	Small Business Regulatory Enforcement Fairness Act
SEC	Securities and Exchange Commission
SOA	Sarbanes-Oxley Act
TCPA	Telephone Consumer Protection Act
UNEs	unbundled network elements
U.S.C.	United States Code
USDA	United States Department of Agriculture
VA	Department of Veterans Affairs
VoIP	Voice over Internet Protocol