Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act, Fiscal Year 1999

THE EVE OF THE ACT'S 20TH ANNIVERSARY

Office of Advocacy
U.S. Small Business Administration
Washington, D.C.: 2000

To the President and Congress of the United States:

The Regulatory Flexibility Act (RFA) will be 20 years old on September 19, 2000. This is the nineteenth annual report submitted by a Chief Counsel for Advocacy since enactment of that law, and the fourth report since enactment of the 1996 Small Business Regulatory Enforcement Fairness Act (SBREFA) amendments to the RFA.

I am pleased to report that the RFA, as amended by the 1996 SBREFA amendments, is making a difference. There is a noticeable cultural change underway in agencies and here is the tangible proof:

- As a result of RFA intervention by Advocacy, small businesses, and SBREFA panels, agencies—to their credit—made changes to final regulations in Fiscal Year 1999 that reduced potential regulatory costs by almost **$5.3 billion.**

- And, this was accomplished *without compromising public policy objectives.*

In 1980, Congress enacted the RFA with the expectation that agencies would alter their approach to regulatory development and consider regulatory alternatives that were less burdensome on small business but equally effective in achieving public policy objectives.

In 1996, Congress strengthened the RFA with SBREFA amendments that: authorize the courts to review agency compliance with the RFA, providing for the first time an enforcement remedy; require the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to convene Small Business Advocacy Review Panels to ensure real world input from affected small entities on burdensome impacts; and reaffirm the authority of the Chief Counsel to file *amicus curiae* (friend of the court) briefs in regulatory appeals.

Small Business Advocacy Review Panels—The Importance of Data
Since enactment of SBREFA, 18 Small Business Advocacy Review Panels completed work on a diverse range of EPA and OSHA regulatory proposals. Approximately 300 small entities throughout the country were consulted in the course of the panels' deliberations. Arguably the most rewarding aspect of the panel process is the fact that small entities brought real world experiences to the panels' discussions. Small entities seldom challenged the need for regulatory solutions, but the information they provided did in fact challenge agency estimates as to cost and regulatory effectiveness. This input was important in identifying equally effective alternatives—all of which resulted in major changes to regulatory proposals. In one instance, a proposal was withdrawn in its entirety when the data showed there was no need for a national regulation.

Significantly, lessons learned through the panel process and court decisions as to the importance of data is not lost on other agencies. Agencies are beginning to appreciate how important economic impact analyses and industry input are to their public policy and regulatory efforts.

The Impact of RFA and SBREFA on Other Agencies

The fact that agency compliance with RFA may now be reviewed by the courts, coupled with the fact that small entities are taking advantage of this remedy to challenge agency compliance, provides a strong incentive for agencies to examine more carefully the small business impact of their regulatory proposals. For example, we have seen changes at agencies such as the Health Care Finance Administration and the Agricultural Marketing Service, the impact of which is not yet clear. But what we do know is that they are now seeking Advocacy's assistance early in their deliberations on how best to comply with the RFA. Industries regulated by these agencies are dominated by small entities whose survival—or extinction—in the marketplace hinges on the level of regulatory burden they must bear. The RFA in such instances is a safety net for small entities.

Some agencies, still struggling with economic impact analyses, argue that the RFA imposes additional burdens on limited resources. Advocacy is of the view that if, in fact, the analytical process mandated by RFA is imposing additional burdens, it is only because agencies have not internalized the process. Some agencies have yet to accept the concept that less burdensome alternatives may be equally effective in achieving statutory mandates. Once this concept is accepted, the analytical process mandated by the RFA will be second nature and the regulatory process itself will be more efficient.

When Good News Is Also Bad News

As stated above, increased compliance with the RFA resulted in changes to regulations that saved small business almost **$5.3 billion** in potential costs. That is the *good news*. The *bad news*, however, is that agencies *proposed* regulations that—but for the RFA and the intervention of Advocacy and others—would have imposed unnecessary costs of $5.3 billion on small business.

Data and agency resistance to the consideration of meaningful and less burdensome alternatives is the heart of the problem. Moreover, agencies do not yet clearly understand that compliance with the RFA does not mean special treatment for small business at the expense of sound public policy. Correcting these misconceptions will remain the focus of Advocacy's activities in the coming years.

In a departure from previous reports, and to be consistent with the information that must be reported each year under the Government Performance and Results Act of 1993, this year's RFA report is on a fiscal year basis rather than on a calendar year basis. If you have any questions or comments, please feel free to call me at (202) 205-6533, or contact me via e-mail at jere.glover@sba.gov.

Respectfully submitted,

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Chief Counsel for Advocacy
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CONTENTS

ABBREVIATIONS

AMS	Agricultural Marketing Service
APHIS	Animal and Plant Health Inspection Service
APA	Administrative Procedure Act
BLM	Bureau of Land Management
C.F.R.	Code of Federal Regulations
DOC	U.S. Department of Commerce
DOD	U.S. Department of Defense
DOI	U.S. Department of the Interior
DOJ	U.S. Department of Justice
DOL	U.S. Department of Labor
DOT	U.S. Department of Transportation
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FAR	Federal Acquisition Regulation
FCC	Federal Communications Commission
FDA	Food and Drug Administration
FMC	Fishery Management Council
FNS	Food and Nutrition Service
FPI	Federal Prison Industries
FRFA	final regulatory flexibility analysis
FSIS	Food Safety and Inspection Service
FTC	Federal Trade Commission
FWS	Fish and Wildlife Service
GAO	General Accounting Office
GSA	General Services Administration
HCFA	Health Care Financing Administration
HHS	U.S. Department of Health and Human Services
HUD	U.S. Department of Housing and Urban Development

ICANN	Internet Corporation for Assigned Names and Numbers
IRFA	initial regulatory flexibility analysis
IRS	Internal Revenue Service
MMS	Minerals Management Service
MSHA	Mine Safety and Health Administration
NARA	National Archives and Records Administration
NASA	National Aeronautics and Space Administration
NIST	National Institute of Standards and Technology
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
NPRM	notice of proposed rulemaking
NPS	National Park Service
OFPP	Office of Federal Procurement Policy
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
P.L.	Public Law
PRA	Paperwork Reduction Act
PWBA	Pension and Welfare Benefits Administration
RFA	Regulatory Flexibility Act
RSPA	Research and Special Programs Administration
SBA	Small Business Administration
SBREFA	Small Business Regulatory Enforcement Fairness Act
SEC	Securities and Exchange Commission
USDA	U.S. Department of Agriculture
U.S.C.	United States Code
USPS	United States Postal Service
VA	U.S. Department of Veterans Affairs
WIPO	World Intellectual Property Organization

EXECUTIVE OVERVIEW

Introduction

In 1980, Congress enacted the Regulatory Flexibility Act (RFA) with a mandate to federal regulatory agencies to analyze the impact of their regulations on small entities and to consider alternatives that would be equally effective in achieving public policy goals without unduly burdening small entities.

In 1996, Congress enacted the Small Business Regulatory Enforcement Fairness Act (SBREFA) which amended the RFA in several significant ways. First, it gave the courts jurisdiction to review agency compliance with the RFA, thus providing for the first time an enforcement venue to ensure agency compliance with the law. 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 the impact of regulations before the regulations are published for public comment. This amendment formalized for these two agencies a process for involving small entities in the agencies' deliberations on the effectiveness of regulations that would impose mandates on them. Third, it reaffirmed the authority of the Chief Counsel of Advocacy to file *amicus curiae* (friend of the court) briefs in appeals brought by small entities from agency final actions. (See Appendix A for the complete text of the law.)

By the end of Fiscal Year 1999, SBREFA had been in effect for a little over three years. It is clear that the 1996 amendments are having a major impact on the work of federal agencies. Small entities are increasingly seeking judicial review of agency compliance with the RFA and having some success. (Appendix B provides a summary of all significant RFA court decisions that have been published since 1996.) Agencies are watching court decisions closely and are increasingly seeking assistance from the Office of Advocacy in the earliest stages of regulatory development, thus expanding the work of Advocacy in pre-proposal activities to minimize harmful small business impacts.

The Role of the Office of Advocacy

Congress created the Office of Advocacy within the U.S. Small Business Administration in 1976 to be an *independent* voice for small business in the formulation of public policy. The office was given, among others, very specific statutory mandates to:

- examine and report on the constantly changing role of small business in the economy;
- measure the direct costs and other effects of government regulation on small business;
- determine the impact of the tax structure on small businesses;

- study the ability of financial markets and institutions to meet small business credit needs; and

- recommend specific measures for creating an environment in which all businesses will have the opportunity to compete on a level playing field.

The RFA requires the Chief Counsel for Advocacy to report annually to the President and the Congress on agency compliance with the law, and the SBREFA made the Chief Counsel a statutory member of the EPA and OSHA Small Business Advocacy Review Panels.

Essential to these mandates:

- research on small business trends in the economy;

- independent analyses of the impact of regulations on small business;

- two-way communications with small business trade associations and leaders throughout the country on regulatory impacts and emerging issues;

- *ad hoc*, industry-specific roundtables to discuss small business concerns; and

- meaningful small business participation in the development of public policy.

A detailed description of the Office of Advocacy is in Appendix C of this report.

Regulatory Issues—More Diverse and More Complex

In recent years, the economy has been extremely dynamic—constantly churning—with technology changing industry structure at an extremely rapid pace, creating new challenges for analyses of regulatory impacts on small business. Small business is a major force in the changing economic landscape, contributing major technological innovations that are spurring growth in the economy and creating most of the new jobs. As such, the continued viability of small business must be ensured.

As the economy becomes more technology based, not surprisingly, regulations are dealing with more and more complex societal issues. If regulations are unduly burdensome, however, they could dampen the economic growth experienced in recent years. Therefore, regulatory impact analyses are taking on an ever increasingly important role in public policy deliberations.

Data Sources—Statistical As Well As Anecdotal

Policy makers are increasingly aware that the key to rational decision making is data. To provide answers to inquiries about small business issues, the Office of Advocacy contracts with independent entities for research on a wide range of emerging public policy issues, such as the cost of regulation, contract bundling, etc., as well as research on industry specific economic impacts. It also maintains a database, unique in the federal government, on small business

characteristics. It has recently designed a new database, the Business Information Tracking Series (BITS), in cooperation with the Bureau of the Census, that allows researchers to track specific companies through various stages of growth. This database will provide some important insights on public policy needs. For information on Advocacy's most recent research reports and papers, visit Advocacy's home page at www.sba.gov/advo.

In addition to this unique *statistical* data which provides an historical perspective on small business trends, current or *anecdotal* data are compiled by Advocacy through discussions with small businesses, their representatives, and economic experts. *Ad hoc* industry specific roundtables and conference calls are held periodically to identify emerging issues and small business impacts. Advocacy has also hosted focus group discussions on emerging trends with leading futurists, prominent small business leaders, banking experts and researchers, and industrial organization economists.

Impact of SBREFA—The Role of Data and Savings Achieved

SBREFA is having a major impact on the regulatory culture. Of this, Advocacy has no doubt. There is a marked increase in requests for Advocacy's assistance prior to publication of a rule for public comment. And Advocacy is playing a more important role in the 90-day review of major rules conducted by the Office of Information and Regulatory Affairs of the Office of Management and Budget, a review that is mandated by Executive Order 12866. This is a change from Advocacy's pre-SBREFA experience. There is also increased willingness on the part of regulatory agencies to participate in Advocacy's industry roundtables where discussions focus on current problems. These roundtables play an important role in opening up dialogue between small entities and government regulators. There is little doubt that this changing culture is the result of the SBREFA amendment that authorizes the courts to review agency compliance with the RFA. This change in the law provides a significant incentive for agencies to do what they can to avoid legal challenges to their rules.

A few agencies, such as the National Marine Fisheries Service, the Health Care Finance Administration, and the Agricultural Marketing Service, have instituted some changes in response to RFA mandates, but the impact of the changes is not yet clear. However, any change could be significant since industries regulated by these agencies are part of the basic structure of the economy and are industries dominated by small entities. While regulations affecting these industries are not front-page news, regulatory impacts can often mean the difference between survival and extinction of small entities in the industries.

Having said this, it is important to note that this cultural change is by no means uniform among regulatory agencies. The largest hurdle to overcome remains agency resistance to the concept that regulatory alternatives that are less burdensome on small business may, in fact, be equally effective in achieving public policy objectives. Economic data thus become the *force majeure* in overcoming this resistance. And the value of economic data has been demonstrated time and again in the work of the Small Business Advocacy Review Panels where data has resulted in creative solutions to public policy mandates.

Small Business Advocacy Review Panels—Lessons Learned

Since enactment of SBREFA, work has been completed on 18 Small Business Advocacy Review Panels: 15 EPA panels and 3 OSHA panels. Approximately 300 small entities have been consulted on a very diverse range of rules. Independent data on the impact of regulatory proposals have played an important role in the deliberations of the panels. The additional input from small entity representatives spotlighted real life consequences of proposals under consideration. Regulations that emerged from this process have been changed in response to the information provided, and are, for the most part, less burdensome than the regulations originally considered. In one instance, a regulation was withdrawn entirely because the data clearly demonstrated that there was no need for national regulation.

It is important to emphasize that, although the regulations that emerged from the panels' deliberations were less burdensome on small entities, *public policy objectives were not compromised*. The lessons learned are the importance of data to rational decision making in solving societal problems *and* how valuable information on real world small business impacts can be in identifying equally effective regulatory alternatives.

Although work on the panels has been productive, it has also been labor intensive. It is estimated that Advocacy alone has spent an average of 500 to 600 hours on each panel for a total of between 3,500 and 4,000 hours on the panels completed in Fiscal Year 1999. Work on two OSHA panels completed this year—given the scope of the regulations considered—probably consumed more than the average.

Regulatory Savings

The impact of SBREFA goes beyond just modifications to the rules considered by the EPA and OSHA panels. As stated earlier, agencies logically wish to avoid judicial challenges to their rules and are taking greater care to comply with the RFA. The potential for judicial review provides a great incentive for agencies to integrate the comments of Advocacy and others into their deliberations. Agencies, to their credit, have changed rules to minimize burdens on small entities and the changes made in Fiscal Year 1999 alone reduced the potential cost of regulations by almost **$5.3 billion.** The specific cost savings are detailed in the table on page 6.

Advocacy Activities in Fiscal Year 1999

Advocacy's activities primarily take the form of public record communications with agencies on the impact of their regulations on small business, and whether their regulatory justifications and analyses of alternatives comply with the RFA. (Appendix D provides a complete list of all written communications and other Advocacy RFA activities during Fiscal Year 1999.) This is in addition to Advocacy's work on EPA and OSHA panels and to its increasing workload involving pre-proposal consultations with regulatory agencies. This year's report highlights some of those public record communications to illustrate the range of issues Advocacy must address. Advocacy targets its resources to those regulations where it can make a difference or where the small business interest is significant, but underrepresented, in the regulatory process. To

accomplish this, Advocacy reviewed over 1,300 proposed and final rules and submitted 76 formal comments for the public record.

Advocacy also testifies before Congress and agencies on public policy issues such as agency compliance with the RFA. (Appendix E contains the complete text of Advocacy testimony during Fiscal Year 1999.) Finally, this year's report contains a description of Advocacy's activities involving two entities not subject to the RFA—the Internet Corporation of Assigned Domain Names and Numbers and the U.S. Postal Service. Advocacy became involved with these two entities because the entities' activities are having a major impact on small businesses that dominate the affected market. Advocacy is of the view that small businesses need a spokesperson to represent them in the proceedings of these two entities.

Conclusion

This is the nineteenth report submitted by a Chief Counsel for Advocacy since enactment of the RFA in 1980. It is the fourth report since enactment of the 1996 SBREFA amendments. It should be noted that this year's report is on a fiscal year basis rather than on a calendar year basis. This change was made in order to be consistent with the information that must be reported each year under the Government Performance and Results Act of 1993 (GPRA).

Even a cursory review of all these reports will reveal differences. The main differences are the role of data in regulatory development and the impact of judicial review. Cost savings can now be documented using the data generated by the regulatory agencies themselves and/or by other third party sources. These savings are the true measure of the RFA's impact.

While the savings are, on the one hand, *good* news, they are at the same time, *bad* news—meaning agencies are still proposing regulations that are burdensome on small business. It is for this reason that Advocacy continues to maintain that the biggest hurdle to overcome is agency resistance to the notion that less burdensome alternatives can be equally effective in accomplishing public policy objectives. It is this concept that needs to be inculcated into regulatory agency deliberations. And it is the concept that will remain the focus of Advocacy's work in the coming years.

REGULATORY COST SAVINGS FOR FISCAL YEAR 1999

AGENCY	SUBJECT	ANNUAL SAVINGS	ONE-TIME SAVINGS
EPA	Air Pollution Control from Recreational Marine Engines	$3 million[1]	
EPA	Effluent Limitations Guidelines for Industrial Laundries	$103 million[2]	
EPA	Inventory Update Rule	$13 million[3]	
EPA	Radon Health Risk Reduction	$275 million[4]	
FCC	Customer Proprietary Network Information		$476 million[5]
FCC	Truth-In-Billing and Billing Format		$431.46 million[6]
FTC	Children's Online Privacy Protection		$75 million[7]
HCFA	Competitive Bidding for Medical Equipment Suppliers	not available	
HCFA	Interim Payment System for Home Health Agencies	$260 million[8]	$1,000 million[9]
HCFA	Prospective Payment System for Hospital Outpatient Services	$1,440 million[10]	
ICANN	Internet Domain Name Dispute Resolution Policy	not available	
MMS	Determination of Need for the Royalty-In-Kind Program	not available	
NARA	Agency Records Center		$1,076 million[11]
NMFS	Amendment 7 to the Atlantic Sea Scallop Fishery Management Plan	$40 million[12]	
NPS	Commercial Fishing in Glacier Bay	not available	
Treasury	Small Business Pension Plans	$83.4 million[13]	
SUBTOTALS:		**$2,239,400,000**	**$3,058,460,000**
GRAND TOTAL COST SAVINGS IN FY99:		**$5,297,860,000**	

NOTES

1. Source: The Office of Advocacy, based on EPA's economic analysis in the rulemaking record.

2. Source: The Office of Advocacy, based on EPA's economic analysis in the rulemaking record. The industry estimate, according to the Uniform and Textiles Service Association, is $200 to $450 million per year.

3. Source: The Office of Advocacy, based on EPA's economic analysis in the rulemaking record, July 29, 1999.

4. Source: The Office of Advocacy, based on EPA's economic analysis in the rulemaking record.

5. Source: FCC, Independent Alliance, and National Telephone Cooperative Association. Estimate reflects the average of the cost savings estimates provided by trade associations.

6. Source: FCC and National Telephone Cooperative Association.

7. Source: The Office of Advocacy. The FTC estimates that as a result of the changes to the rule, 300 small businesses are excluded from having to comply with the requirements that would have cost each company $250,000.

8. Source: Bureau of National Affairs (Nov. 19, 1999). The legislation saves $1.3 billion over 5 years, which averages out per year to $260 million in annual savings.

9. Source: Bureau of National Affairs (Nov. 19, 1999). The legislation saves $1 billion during the first year alone in addition to the $1.3 billion saved over 5 years.

10. Source: Bureau of National Affairs (Nov. 19, 1999). The legislation saves $7.2 billion over 5 years, which averages out per year to $1.44 billion in annual savings.

11. Source: National Archives and Records Administration.

12. Source: David Frulla, Esq., counsel to the scallop industry. The estimate reflects the expected revenue that the industry will gain from scallop fishing in the George's Bank area.

13. Source: Joint Committee on Taxation, United States Congress, H. Report 104-737 at 364. The rule saves $834 million over 10 years, which averages out per year to $83.4 million in annual savings.

THE REGULATORY FLEXIBILITY ACT AND AGENCY COMPLIANCE WITH THE LAW

The Regulatory Flexibility Act (RFA)[1] is an important statute that at long last, due largely to the 1996 SBREFA amendments, is having an impact in the way the government views the role of small business in the economy. In brief, the RFA mandates an analytical process that agencies must follow in order to level the regulatory playing field for small businesses and to preserve competition in the marketplace without compromising public policy objectives. Agencies must undertake a thorough analysis of the economic impact of their proposed regulations, and consider alternatives that will achieve the same public policy goals, but with more equitable impact on small entities.

History of the RFA

Before the RFA was enacted in 1980, federal agencies did not evaluate, nor did they see the need to evaluate, the impact that their rules would have on small businesses. It was not readily understood that small businesses would suffer disproportionately—compared to large businesses—from one-size-fits-all regulations, and that this could harm competition. More often than not, agencies failed to recognize or understand the dynamic role that small businesses play and how important they are to the nation's economic growth.

In 1980, when the first White House Conference on Small Business was held in Washington, delegates to that conference sent a message to the President and the Congress that was loud and clear. They took serious issue with burdensome federal government regulations and sought relief. Small businesses argued that when a federal agency issues a regulation, the burden of that law often falls hardest on them, not through any intentional desire by the agency to harm them, but rather, because one-size-fits-all regulations were easier to design and easier to enforce. No thought was given to any disproportionate impact, nor to the possibility that alternatives might be equally effective in achieving public policy objectives. Direct costs involved in complying with a regulation are often approximately the same for a large company as for a small company. But, since a large company is able to spread the compliance cost over larger output, it has the ability to maintain a competitive advantage over a small company subject to the same regulation.

Additionally, because large businesses can afford to hire more people to monitor proposed agency regulations and have easier and more direct input into the regulatory process, small businesses are inherently at a disadvantage in influencing final decisions on regulations.

Recognizing this disparity in the level of input in the regulatory process, as well as the disparate regulatory impact on small businesses, Congress enacted the RFA in 1980 to alter how agencies

[1] The Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. § 601 *et seq.*), became law on September 19, 1980.

craft regulatory solutions to societal problems and to change the one-size-fits-all regulatory mindset of the regulators.[2]

The Analysis Required by the RFA

The RFA requires a federal agency to review its regulatory proposals and determine if any new rule is likely to have a "significant economic impact on a substantial number of small entities." If such impact is likely to occur, the agency must then prepare and make available for public comment an "initial regulatory flexibility analysis," describing in detail the potential economic impact of the proposed rule on small entities.

An essential part of this analysis is the identification of alternatives to the proposed rule which could accomplish the same regulatory objectives but with reduced economic impact on small entities. By mandating this analytical process, the RFA seeks to ensure that agencies understand not only the industries they are regulating, but the potential impact of their regulations on small entities before it becomes too late to pursue alternative measures. Therefore, during this process, it is crucial for the agencies to solicit meaningful input from the small business community as early as possible.

The RFA is premised on the concept that when an agency undertakes a careful analysis of its proposed regulations—with sufficient small business input—the agency can, and will, identify any disproportionate economic impact on small businesses. Thus, once an agency realizes the impact that a rule will have on small businesses, the RFA expects that the agency will seek alternative measures in order to reduce or eliminate the disproportionate burden on small businesses without compromising public policy objectives. The RFA does not require special treatment for small business, nor regulatory exceptions for small business. Rather, it mandates an analytical process for determining how best to achieve public policy objectives without unduly burdening small business.

Federal Agencies' Response to the RFA

The requirements of the RFA are clear. However, in monitoring agencies' compliance with RFA, the Office of Advocacy has found over the years, and so reported to the President and the Congress, that federal agencies often failed to conduct the proper analyses as mandated by the law. Some agencies ignored the RFA altogether, while others asserted that the RFA did not apply to them. Other agencies recognized the RFA's applicability to their regulations, yet failed to comply with its requirements.

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

Equally troubling was the finding that agencies often did not understand or accept the possibility that less burdensome regulatory alternatives may, in fact, be equally effective in achieving the agency's public policy objectives. Thus, many agencies failed—or even refused—to consider valid alternatives to their proposals even when such options were brought to their attention by small businesses during the rulemaking process.

Agency failures to weigh alternatives properly not only defeat the core purpose of the RFA, they effectively preclude the opportunity for small business to influence the regulatory development process as Congress intended. Until 1996, there was no way to force agencies to comply. Nor did the small business community have any remedy to seek redress. And, although the RFA authorized the Chief Counsel for Advocacy to file *amicus curiae* briefs in court cases involving agency regulation, Advocacy could not raise the issue of agency noncompliance because the courts did not have jurisdiction over the question.

The 1996 SBREFA Amendments to the RFA

The 1995 White House Conference on Small Business provided small business owners another opportunity to seek an amendment to the RFA authorizing judicial review of agency compliance with the RFA. They urged Congress to pass amendments that would add teeth to the law.

In 1996, Congress enacted the Small Business Regulatory Enforcement Fairness Act (SBREFA),[3] which amended the RFA in several critical respects. The SBREFA amendments to the RFA were specifically designed to ensure meaningful small business input during the earliest stages of the regulatory development process.

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

The SBREFA amendments also added a new provision to the RFA: a requirement that Small Business Advocacy Review Panels be convened to review EPA and OSHA rules that might affect small entities. The purpose of the panels is to elicit comments from small entities on a rule's impact and on alternatives that should be considered, and to develop a report on the panel's findings for the head of the agency within 60 days.

Impact of the SBREFA Amendments

Three full years after SBREFA amended the RFA, there are now visible signs that the regulatory environment for small businesses has changed for the better. The fact that courts may now review agency compliance with the RFA is a significant inducement for agencies to improve

[3] The Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (codified at 5 U.S.C. § 601 *et seq*.), was signed by President Clinton on March 29, 1996.

compliance in order to avoid court challenges. Consequently, some agencies have implemented significant changes to their rulemaking deliberations in order to do a better job with RFA compliance. More and more agencies are reaching out to Advocacy early in the process to seek guidance on compliance with the RFA. In addition, Advocacy has conducted several training sessions for agency personnel and continues to do so at an agency's request. Some agencies have hired personnel specifically to monitor internally the agency's compliance with the analytical process mandated by the law.

Judicial Review

Other agencies are learning to comply with the RFA as the result of litigation, which is producing a body of case law interpreting the RFA. Agencies are carefully monitoring these developments to avoid similar challenges to their rules, since it has become clear that small entities are not hesitant to initiate court challenges in appropriate cases. (See Appendix B for a list of known cases filed since passage of SBREFA.)

Small Business Advocacy Review Panels

SBREFA mandated that, whenever EPA or OSHA finds that a regulatory proposal may have significant economic impact on a substantial number of small entities, the agency is required to convene a panel and prepare a regulatory flexibility analysis. The review panel consists of representatives from the rulemaking agency, Advocacy, and the Office of Information and Regulatory Affairs within the Office of Management and Budget. The panel conducts its own outreach to small entities likely to be affected by the proposal, seeks their input on the proposed regulation, and prepares a report to either the EPA or OSHA with recommendations for reducing the potential impact of the rule on small businesses. The panel has 60 days in which to submit a report on its findings which becomes part of the public rulemaking record. After the report is received, the agency may reconsider its proposal or modify it in response to the information received.

It has been Advocacy's experience working on the panels that the agencies' economic impact analyses have greatly improved, and the RFA-mandated process has been productive for both the agencies and small businesses. Since the time the SBREFA amendments were enacted through the end of Fiscal Year 1999, 18 panel reports had been completed (15 EPA and 3 OSHA) and approximately 300 small entities had been consulted by the panels on the rather diverse issues as described in the following chart.

EPA SBREFA PANELS THROUGH FISCAL YEAR 1999

Rule Subject	Date Convened	Report Completed	NPRM
Non-Road Diesel Engines	03/25/97	05/23/97	09/24/97
Industrial Laundries Effluent Guideline	06/06/97	08/08/97	12/12/97
Stormwater Phase 2	06/19/97	08/07/97	01/09/98
Transport Equipment Cleaning Effluent Guideline	07/16/97	09/23/97	06/25/98
Centralized Waste Treatment Effluent Guideline	11/06/97	01/23/98	01/13/99
Underground Injection Control Class 5 Wells	02/17/98	04/17/98	07/29/98
Ground Water	04/10/98	06/09/98	in process
Federal Implementation Plan for Regional Nitrogen Oxides Reductions	06/23/98	08/21/98	09/30/98
Section 126 Petitions	06/23/98	08/21/98	09/30/98
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	in process
Filter Backwash Recycling	08/21/98	10/19/98	in process
Light Duty Vehicles/ Light Duty Trucks Emissions and Sulfur in Gas	08/27/99	10/26/98	05/13/99
Arsenic in Drinking Water	03/30/99	06/04/99	in process
Recreational Marine Engines	06/07/99	08/27/99	in process

OSHA SBREFA PANELS THROUGH FISCAL YEAR 1999

Rule Subject	Date Convened	Report Completed	NPRM
Tuberculosis	09/10/96	11/12/96	10/17/97
Safety and Health Program Rule	10/20/98	12/19/98	in process
Ergonomics Program Standard	03/02/99	04/30/99	11/23/99

HIGHLIGHTS OF ADVOCACY'S RFA ACTIVITIES DURING FISCAL YEAR 1999

Introduction

Since the Small Business Regulatory Enforcement Fairness Act (SBREFA) went into effect in June 1996, Advocacy has completed work on 15 EPA Small Business Advocacy Review Panels and 3 OSHA panels. Work on the panels is labor intensive, consuming approximately 500 to 600 professional hours. However, the work has been very productive.

In addition to the panels, the Office of Advocacy also evaluated over 1,300 proposed, interim, and final rules issued by federal agencies, and submitted 76 formal written communications to the agencies. As in previous years, Advocacy targeted its resources to those rules where its involvement would likely make a difference, commenting on the deficiencies in agency compliance with the RFA and the potential impact on small business of agency proposals. Generally, these involve proposals where small business interests are significant, but underrepresented in the regulatory process. In other instances, Advocacy takes action on regulations proposed by agencies which have a poor record of RFA compliance, or where an agency specifically requests Advocacy's assistance in developing a systematic approach to RFA compliance.

Each year since the passage of the 1996 SBREFA amendments to the RFA, Advocacy is finding that its staff expends more and more resources working with agencies on rules *before* they are published for public comment. Advocacy is of the view that this increase in pre-proposal work is largely attributable to the statutory change that allows courts to review agency RFA compliance in appeals from agency final actions. Agencies logically wish to avoid such reviews.

Summary of the Regulatory Flexibility Act

Before proceeding to the discussion of Advocacy's RFA activities during Fiscal Year 1999, it might be helpful to summarize the key provisions of the law. This should help provide a context for the section that follows. (The full text of the law is in Appendix A of this report.)

In brief, the RFA requires federal agencies either to certify that the rule will not have a significant economic impact on a substantial number of small entities and provide a factual basis for the determination, or prepare a regulatory flexibility analysis.

- **Certification**: If a regulation is found to not have a significant economic impact on a substantial number of small entities, the head of an agency may certify to that effect, but must provide a *factual* basis for this determination. This certification must be published with the proposed rule in the *Federal Register* for public comment to ensure that the certification is warranted.

- **Initial Regulatory Flexibility Analysis**: If a proposed rule is expected to have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis (IRFA) must be prepared and published in the *Federal Register* for public comment. This initial analysis must describe the impact of the proposed rule on small entities, contain a comparative analysis of alternatives to the proposed rule that would minimize the impact on small entities, and document their comparative effectiveness in achieving the regulatory purpose. If the analysis is lengthy, the agency may publish a summary and make the analysis available upon request.

- **Final Regulatory Flexibility Analysis**: When an agency issues a final rule, it must prepare a final regulatory flexibility analysis (FRFA) or certify that the rule will not have a significant impact on a substantial number of small entities and provide a statement of the factual basis for such certification. The final regulatory flexibility analysis must provide a succinct statement of the need for, and objectives of, the rule; summarize the issues raised by public comments on the IRFA (or certification) and the agency's assessment of those issues; describe and estimate the number of small entities to which the rule will apply or explain why no such estimate is available; describe the compliance requirements of the rule; estimate the classes of entities subject to them and the type of professional skills essential to compliance; describe the steps followed by the agency to minimize the economic impact on small entities consistent with the stated objectives of the applicable statutes; and give the factual, policy, and legal reasons for selecting the alternative(s) adopted in the final rule, explaining why other alternatives were rejected. If the analysis is lengthy, the agency may publish a summary and make the analysis available upon request.

What follows is a discussion of some of the more significant regulatory and policy work performed by the Office of Advocacy between October 1998 and September 1999. Many of these Fiscal Year 1999 activities involve work on issues initially discussed in previous years' reports. The regulatory process is, after all, a continuum of activities with important work continuing from one year to the next and, in some instances, with additional interventions by the Congress and the courts. (A complete list of written communications and other Advocacy is in Appendix D of this report.)

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

Issue: Organic Food Production, Handling, and Labeling

In 1997, Agricultural Marketing Service (AMS) proposed a regulation that was intended to set national standards for organic farmers, handlers and certifying agents. It marked the first time that AMS consulted with Advocacy on a proposed regulation. After receiving nearly 300,000 comments (mostly negative) on the proposal, AMS decided to rethink the highly controversial elements of the regulation and to re-propose it at a later time. Currently, with a new staff and administrator, AMS, along with OMB, are working with Advocacy on the new regulations, which will be published in the near future. Advocacy has had two opportunities to provide comments on the draft regulation in the hope of minimizing the burden on small entities.

Food Safety and Inspection Service

Issue: Label Review Appointments

In 1998, Food Safety and Inspection Service (FSIS) decided to eliminate face-to-face appointments with courier/expediter firms that seek label approvals for meat, poultry, and egg products on behalf of their food processor clients. FSIS implemented this sweeping policy change in a "notice of procedural change" rather than by notice and comment rulemaking. As referenced in the 1998 report on the RFA, Advocacy submitted comments criticizing the agency for ignoring proper notice and comment procedures, which are required under the Administrative Procedure Act (APA).[4] New events have subsequently transpired on this issue.

A coalition of label expediters filed suit[5] against FSIS claiming, among other things, that the agency was attempting to implement a "rule" rather than a mere "procedural change" and should have adhered to proper APA procedures. The court filed an opinion on August 30, 1999, denying the plaintiffs' motion for summary judgment. In its analysis, the court drew a fine distinction between procedural and substantive rules by stating that FSIS's proposal alters the manner in which label approval requests are received and processed by the agency, but does not alter the substantive criteria upon which the agency bases its label approval decisions or the outcome of those decisions. The court also stated that the fact that label expediters would be forced out of business was a mere "collateral" effect that was insufficient to transform a procedural rule into a substantive rule.

The plaintiffs filed an appeal, and requested that Advocacy file an *amicus curiae* brief in support of their position. Hoping that the issue could instead be resolved through direct discussions with

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[4] U.S. Small Business Administration, Office of Advocacy, *Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act, Calendar Year 1998* (Washington, D.C. U.S. Small Business Administration, 1999), p.17.

[5] *James V. Hurson Associates, Inc. v. Glickman*, No. 98-2120 (D.D.C. 1998).

the agency, the Chief Counsel for Advocacy met with USDA officials to discuss ways to minimize the burden on small businesses—the label expediters and the food processors who rely on speedy label reviews to get their products to market. Advocacy presented evidence that the face-to-face process was more efficient than the mail-in process, that small processors relied upon label expediters to remain competitive in the market, and that the sudden change in policy eroded trust in the government (especially since FSIS attempted to change its policy twice by rulemaking, but failed). The agency pledged to revisit the issue and take small business into consideration.

DEPARTMENT OF COMMERCE

The Department of Commerce (DOC) is responsible for encouraging the nation's economic growth, international trade, and technological advancements. A number of agencies within the department are responsible for achieving this mandate. The agencies manage programs affecting diverse areas of commerce, such as exports, telecommunications, economic development, electronic commerce, and patents.

National Marine Fisheries Service

The office within the DOC that promulgates the majority of the regulations affecting small entities is the National Marine Fisheries Service (NMFS), which is a division of the department's National Oceanic and Atmospheric Administration. NMFS regulates the activities of small businesses under several natural resource protection statutes such as Marine Mammal Protection Act and the Mabnuson-Stevens Fishery Conservation and Management Act.

The fishing industry is dominated by small entities, and the economies of many small communities across the country are highly dependent on the fishing industry. Regulations that adversely affect the fishing industry also affect the fishing communities. NMFS promulgates rules through fishery councils located in different geographical parts of the country. Some councils have better information collection systems than others. This affects the quality and consistency of the economic analyses performed by NMFS. The lack of consistent economic information has hindered NMFS's ability to perform thorough and credible economic analyses in compliance with the RFA. Having said this, NMFS can nevertheless be criticized for not taking aggressive steps earlier to address this deficiency.

But constructive changes are now afoot at NMFS. The agency has made changes in its institutional framework in an attempt to advance its compliance with the RFA. NMFS hired an economist and an attorney specifically to handle RFA issues. NMFS is also in the process of instituting new guidelines for determining "significant economic impact" and is holding workshops for its regulators to discuss the new guidelines. In addition, NMFS is attempting to collect additional financial information from the fishing industry that will enable NMFS to assess accurately the potential impact of its actions on the fishing industry. Hopefully, the institutional changes will also encourage consistency in the quality of the information provided in their economic analyses, as well as improve overall compliance with the RFA.

Issue: Reduced Shark Quotas

On December 20, 1996, NMFS published a proposal to reduce the existing shark fishing quota by 50 percent and certified that the reduction would not have a significant impact on a substantial number of small entities. Thus began a lengthy saga of communications between Advocacy and NMFS, in which Advocacy maintained that NMFS had not complied with the RFA and that its economic analyses were significantly flawed.[6] The shark fishing industry sued NMFS, and the case (*Southern Offshore Fishing v. Daley*[7]) was eventually referred to a special master by the U.S. District Court for the Middle District of Florida.

On October 1, 1999, the special master submitted his findings and recommendations to the court. In brief, the special master found that:

- NMFS did not have all the necessary information to evaluate and implement alternatives to the quota. However, NMFS had failed to collect meaningful economic data and this failure was arbitrary and capricious.

- NMFS's failure to give any consideration to alternatives to the quota was a wanton repudiation of the court's instruction on remand.

- NMFS acted with a lack of good faith and contrary to the court's express instructions in the preparation of the remand submission.

The special master concluded that NMFS's conduct constituted bad faith and a lack of candor to the court. The DOC filed objections to the special master's findings. A hearing on whether the special master's findings should be adopted by the court was scheduled for March 2, 2000.

Issue: Atlantic Sea Scallops

On December 18, 1998, NMFS proposed Amendment 7 to the Atlantic Sea Scallop Fishery Management Plan. The purpose of the proposal was to reduce the fishing mortality rate of the Atlantic sea scallop by eliminating overfishing in order to rebuild the stocks. NMFS suggested several changes to meet that goal, such as a reduction in the number of days at sea, and limiting the areas where fishing could occur.

Advocacy commented on the NMFS's proposal, and cited *Southern Offshore Fisheries v. Daley*[8] in questioning the agency's failure to consider an alternative submitted by members of the fishing industry. The fishing industry had earlier suggested that an area in George's Bank that was rich with scallops be opened up for fishing. The industry's proposal was supported by a scientific study concluding that there were so many scallops in the George's Bank area that

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[6] See *Annual Report of the Chief Counsel, 1998*, p.19.

[7] 995 F. Supp. 1411 (M.D. Fla 1998).

[8] *Id.*

scallops were dying from overcrowding. In its comments to NMFS, Advocacy asserted that this alternative regulatory option presented a "win-win" solution for everyone, and that the proposal should be considered seriously by NMFS.

In June 1999, the Secretary of Commerce ordered NMFS to reopen the area of George's Bank suggested by the fishing industry. According to the industry's estimation, this regulatory alternative that Advocacy supported would result in $40 million dollars of revenue for the Atlantic sea scallop fisheries.

Internet Corporation for Assigned Names and Numbers

The Internet Corporation for Assigned Names and Numbers (ICANN) is a non-profit corporation, independent of the federal government, that was formed in 1998 to take over responsibility for the Internet protocol (IP) address space allocation, protocol parameter assignment, domain name system management, and root server system management functions. Originally, the federal government had delegated these functions to the Internet Assigned Numbers Authority and other entities. In accordance with a presidential directive, the Department of Commerce transferred these management functions to this non-profit, private sector entity with international representation.

In preparation for the meeting of its board of directors in Berlin, Germany, in May 1999, ICANN requested comments on a proposed system to resolve disputes of Internet domain names. Advocacy submitted comments stating its belief that ICANN did not provide reasonable notice in violation of ICANN's own bylaws, and asked ICANN to revise the comment period and postpone a final decision until there was ample opportunity to consider all the comments filed. Advocacy also recommended that ICANN adopt the World Intellectual Property Organization (WIPO)'s definition of abusive registration. Finally, Advocacy recommended that ICANN postpone making any decision to give special protections to "famous and well-known marks" until the Domain Name Supporting Organization (DNSO) had a chance to review the issue.

In August 1999, ICANN proposed adopting a uniform dispute resolution policy to determine cases of "cybersquatting." Advocacy wrote ICANN on August 25, 1999, supporting a mandatory uniform dispute resolution process that is narrowly tailored to rectify situations of blatant abusive registrations.

Furthermore, while Advocacy agreed with ICANN's Working Group A (which was formed to discuss the dispute resolution process) that several issues in the report merit further discussion, it questioned whether WIPO was the appropriate forum for these clarifications. Advocacy instead recommended that DNSO consider the clarifications. Regardless of which body handles the clarification, Advocacy proposed that it should consider the role of small businesses and the impact these rules will have upon them.

ICANN adopted the basic premise of a dispute resolution policy at its August 1999 meeting in Santiago, Chile. Advocacy played a role in drafting the specific details of the policy to ensure that they were not unfairly burdensome on small businesses. The implementation documents were approved at ICANN's November 1999 meeting in Los Angeles, and the policy went into

effect for all the new competitive registrars in December 1999 and for Network Solutions in January 2000.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Issue: Dietary Supplements Containing Ephedra

As described in the 1998 report, Food and Drug Administration (FDA) proposed to limit the dosage of dietary supplements and to require label warnings in such a way that this product could no longer be used for weight loss. The regulations, as written, would put thousands of distributors out of business. Advocacy criticized the agency in a letter that stated, among other things, that the agency did not consider alternatives to minimize the burden on small businesses, and that the agency relied on faulty scientific evidence to support the need for the regulation.

Subsequent to publication of the 1998 report, the General Accounting Office (GAO) published its findings on FDA's regulatory procedures in this instance. The GAO concluded that FDA's analysis relied heavily on poorly documented reports of adverse events, and that FDA's analysis of impacts was not transparent and did not fully reflect uncertainties in the underlying data and assumptions. The GAO recommended that FDA go back and obtain additional information to support the agency's conclusions before proceeding to a final rule, and improve the transparency of the cost-benefit analysis in the final rule. In spite of these findings, however, GAO mysteriously concluded that the FDA complied with the requirements of the RFA.

On April 29, 1999, Advocacy submitted a letter to GAO supportive of GAO's work in analyzing FDA's proposal, but also expressing concern about GAO's conclusion that FDA complied with the RFA when FDA's analysis of impacts was clearly inadequate. The premise of the RFA, as Advocacy explained in its letter, is to require agencies to consider fully the effects of their rulemaking on small entities. The key requirement of the RFA is the preparation of initial and final regulatory flexibility analyses when a rule is likely to have a significant economic impact on a substantial number of small entities. If, as GAO would have it, the analysis and the facts, data, or science underlying the analysis do not need to be valid, then Advocacy believes the RFA-mandated analysis would merely become a procedural hoop with no value to the regulatory process. Advocacy pointed out that, while the RFA does not state how much analysis is required or what type of analysis is adequate, it believes that bad or invalid analysis certainly cannot qualify as meeting the requirements of the RFA. Unfortunately, GAO did not adopt Advocacy's position.

Health Care Financing Administration

Issue: Various Issues Resulting from the Balanced Budget Act of 1997

A number of Medicare payment reforms affecting home health agencies, nursing homes, hospital outpatient centers, teaching hospitals, etc., were enacted in the Balanced Budget Act of 1997. As

indicated in the 1998 report, Advocacy submitted comments to Health Care Financing Administration (HCFA) on the hospital outpatient prospective payment system, the home health interim payment system (and its successor, the home health prospective payment system), home health surety bonds, and the Outcomes and Assessment Information Set (OASIS). In addition, the Chief Counsel for Advocacy testified before the Senate Small Business Committee on the surety bond issue. Advocacy had been fairly critical of HCFA's implementation of the Medicare payment reforms because of their severe impact on small businesses and possible beneficiary access problems.

Subsequent to these Advocacy activities, there was a groundswell of grassroots lobbying by stakeholders to get Congress to restore some of the severe cuts triggered by the Balanced Budget Act of 1997. Advocacy's comments on the surety bond issue spurred Senator Christopher Bond to introduce a resolution of disapproval that would have "vetoed" the regulation. Instead, HCFA withdrew the regulation, and the GAO did a study that indicated that the impact would fall squarely on the shoulders of small business. HCFA is redesigning the surety bond program accordingly.

Most recently, Congress enacted Medicare "giveback" legislation—reportedly totaling $27 billion over 10 years—to provide relief to health care providers who were unfairly hurt by the earlier cuts. For instance, nursing homes will get $1.3 billion in extra aid for medically complex patients, hospitals (cancer and teaching hospitals) will get about $7.2 billion over five years, outpatient programs will get about $9.6 billion over 10 years, health maintenance organizations (HMOs) will get $2.9 billion over five years as a result of increased physician fee-for-service payments, and the scheduled 15 percent reduction in home health payments will be delayed for one year.

Throughout this process, an important change has taken place at HCFA. The agency is now consulting with Advocacy in the early stages of the regulatory process. In this past year alone, HCFA consulted with Advocacy on at least two occasions involving major regulations prior to formal proposal. Part of the impetus for these remarkable changes—including the "giveback" legislation—stemmed from the comment letter and other early action that Advocacy undertook on surety bonds for home health agencies.

Issue: Competitive Bidding for Durable Medical Equipment

As described in the 1998 report, this project seeks to limit the number of providers in a designated region for selected types of durable medical equipment and home medical equipment supplies. Under the demonstration, only successful bidders will be able to participate in the Medicare reimbursement program. Subsequent to publication of the 1998 report, HCFA selected other demonstration sites for competitive bidding. Unlike the first demonstration in Polk County Florida, however, HCFA invited stakeholders to participate in the process before finalizing the parameters of the upcoming demonstration. Moreover, HCFA has kept Advocacy apprised of the progress and outcome of the first demonstration.

DEPARTMENT OF INTERIOR

There are several regulatory agencies within the Department of Interior (DOI) responsible for managing the country's natural resources. The regulatory issues at DOI affect matters that are extremely important to small entities, such as oil rights, minerals, hardrock mining, reclamation, fish, wildlife, and parks.

As noted in the 1998 report, DOI's compliance with the RFA historically has been problematic. In the past, DOI's regulatory flexibility analyses consisted of either a single sentence stating "no significant impact on a substantial number of small entities" or a recitation of the RFA compliance requirements. In 1998, there has been some, but not marked, improvement in DOI's compliance. Cooperation has been improving between Advocacy and some agencies within DOI on RFA matters. The Minerals Management Services and the National Park Services are particularly noteworthy, while the Bureau of Land Management has not made as much progress.

Minerals Management Service

Issue: Royalty in Kind

The Royalty in Kind (RIK) program is an example of the improved cooperation between a DOI agency and Advocacy. In 1999, Minerals Management Service (MMS) contacted Advocacy about its RIK program, which was developed pursuant to the Minerals Leasing Act of 1920 (MLA). The MLA allows DOI to take federal oil in kind, in lieu of royalty cash payments, which it then sells to "eligible refiners" for use in their refineries. The RIK program was implemented by MMS to maintain a robust oil refinery industry consisting of large and small facilities.

When MMS contacted Advocacy, MMS was considering discontinuation of the program because it felt that the program was no longer necessary. MMS also asserted that participation by small refiners in the RIK program had declined significantly over the last few years. MMS believed that the decline was due to a lack of interest by small refiners. MMS asked Advocacy to review the program and to provide an opinion as to its continued value, if any.

Advocacy then convened an industry roundtable to discuss the program. Advocacy also held conference calls with members of the industry to ascertain the value of the program to small operations. After reviewing information from the agency and the industry, Advocacy concluded that the program had merit from a small business perspective and that declining participation by small businesses was due to inefficiencies in the program. MMS subsequently decided to continue the program and eliminated the inefficiencies, but did not allow the small refiners who had dropped out of the program to reenter.

Advocacy urged the agency to allow small refiners to reenter the program. MMS eventually decided to reopen a new bidding process for the RIK program. The new contracts will allow all small refiners to participate in the program—even those who had left it. Under the new program, approximately 100,000 barrels of royalty oil per day will be offered for sale to small businesses.

National Park Service

Issue: Commercial Fishing in Glacier Bay, Alaska

The National Park Service (NPS) is another example of an agency within DOI that is making an effort to comply with the requirements of the RFA. In April 1997, NPS proposed a regulation that would prohibit commercial fishing in non-wilderness waters of Glacier Bay proper. NPS contended that the prohibition was necessary to "conserve the scenery and the natural and historic objects and wildlife therein."

The proposal provided a seasonal exemption from that prohibition for a period of 15 years for commercial fishers who could demonstrate a reasonable history of participation in a specific Glacier Bay fishery. The proposal was devoid, however, of any economic information about the potential impact on the industry, even though it was known that the proposal would effectively put several operations out of business and would likely have a substantial economic impact on small fishing villages. Despite this knowledge, the NPS certified that the rule would not have a significant economic impact on a substantial number of small entities.

In February 1999, Advocacy questioned the certification and urged NPS to perform an IRFA. NPS then sought Advocacy's assistance and prepared an IRFA as required by the RFA. The rule was finalized in October 1999. The final rule contains less stringent eligibility criteria for determining which businesses were able to continue to fish under the exemption provisions of the rule.

Bureau of Land Management

Issue: Hardrock Mining

The Bureau of Land Management (BLM) has improved its efforts somewhat on complying with the RFA, Advocacy continues to be concerned about its failure to consider fully the impact of its actions on small businesses and its inability to develop and analyze alternative regulatory solutions.

BLM's hardrock mining regulation which requires miners to obtain a reclamation bond, was the subject of the *Northwest Mining v. Babbitt*[9] case. In that case, the U.S. District Court for the District of Columbia remanded the rule to the agency for failure to comply with the RFA. The basis of the court's finding was that BLM had not used the proper size standard.

In February 1999, in preparing the proposed rule, BLM consulted with Advocacy about the size standards requirements and used the proper size standard in its revised proposal. However, the information provided in the economic analysis was inconsistent with, and did not support, the agency's finding of "no significant economic impact." Also, the agency did not consider meaningful alternatives to the proposal. The only alternatives considered by BLM were shifting mining operations to non-federal lands, adopting different techniques, shortening the life of the mine, or temporarily halting mining until commodity prices increase. Each of these would have

[9] 5 F. Supp. 2d 9 (D.D.C. 1998).

had significant adverse impacts on the industry and could not be considered reasonable options. In fact, BLM did not perform an economic analysis of these alternatives, nor, more significantly, did the agency consider alternatives that would mitigate BLM's proposed action.

Finally, the agency published the proposal for comment prior to the completion of a National Academy of Sciences study that was intended to determine the necessity of the regulation and identify possible alternatives. Although Advocacy suggested that BLM extend the comment period to allow the public a chance to review the study prior to submitting comments, BLM would not. BLM only reopened the comment period after Congress directed it to do so through the 1999 Emergency Supplemental Appropriations Act.

DEPARTMENT OF LABOR

Department of Labor (DOL) has broad regulatory authority over wages, labor standards, and occupational safety concerns, including mine safety. The Pension and Welfare Benefits Administration, Mine Safety and Health Administration, and the Employment Standards Administration are just some of the agencies within DOL that have drafted or promulgated rules in Fiscal Year 1999 that have significant impacts on small businesses.

However, one agency in particular, the Occupational Health and Safety Administration (OSHA), has a tremendous impact on small entities due to the kind and scope of regulations it promulgates. In the 1996 SBREFA amendments to the RFA, Congress mandated that OSHA follow special processes when it considers regulations that will have a significant impact on small entities.

The 1996 SBREFA amendments established a new regulatory analysis process for OSHA (which also applies to the Environmental Protection Agency). The new process requires OSHA to convene a Small Business Advocacy Review Panel whenever the agency cannot certify under the RFA that a regulatory proposal will not have significant economic impact on a substantial number of small entities.

Occupational Safety and Health Administration

During Fiscal Year 1999, Advocacy worked closely with OSHA on two very important panels: the Safety and Health Program Rule panel, which concluded in December 1998; and the Ergonomics Program Standard panel, which concluded in April 1999. Advocacy's experience in working on these and other panels has demonstrated that small business input early in the regulatory process vastly alters the agency's views on how best to solve a problem through regulation. The process forces the agency to look at equally effective alternatives that do not harm competition.

Although neither of these OSHA rules have been finalized, the SBREFA panel process itself, and the panel reports which were developed as a result of the process, have only added to the knowledge of the agency and its understanding of the realistic impact these rules would likely have on small entities. The time spent on these panels and the follow up work which continues

with OSHA as well as with the Office of Information and Regulatory Affairs at the Office of Management and Budget has been, and continues to be, productive for both agencies and small businesses.

Issue: Ergonomics Standard

On March 4, 1999, OSHA released a draft of an ergonomics standard and announced its intention to convene a SBREFA panel to discuss the potential impacts of the draft rule on small businesses. The purpose of the ergonomics standard is to reduce the number of repetitive stress disorders and other musculoskeletal injuries which employees receive as a result of their regular work activity. The draft proposal covered every industry and business in the United States, except those in construction, maritime trades, and agriculture. Twenty small entity representatives were chosen to advise the panel and provide input into the draft standard. The group included 13 owners or operators recommended by Advocacy to represent the interest of the many small businesses concerned about the potential impact of this rule.

During the SBREFA panel's deliberations, the small entities expressed a number of concerns about the proposal, especially with the cost estimates. Most indicated a disbelief in OSHA's estimation of time and money that the draft proposal would require. The small entities provided the agency with types of costs which they felt were omitted from the calculations and suggested that OSHA provide the public with its assumptions when it proposes the standard in the *Federal Register*. The panel recommended that OSHA review its cost estimates and input from the small entities in order to reflect more accurately the economic impact of the ergonomics standard on small entities

Throughout the process Advocacy worked with both OSHA and OMB to ensure that the many concerns of the small business representatives on the panel were heard and taken under consideration in the panel report completed on April 30, 1999. OSHA then reviewed and revised somewhat its draft ergonomics standard and submitted it to OMB in July for mandatory 90-day review. OSHA published the proposed ergonomics rule in the Federal Register for public comment on November 23, 1999. It is anticipated that OSHA will have additional public hearings on this proposal prior to the rule becoming final.

Issue: Safety and Health Program Rule

As reported in the 1998 report, OSHA notified Advocacy on August 28, 1998, of its intent to propose a safety and health program rule. The proposal seeks to reduce the number of job-related fatalities, illnesses, and injuries by requiring 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. Elements of the rule include requirements for management leadership and employee participation, hazard identification and assessment, hazard prevention and control, information and training, and evaluation of program effectiveness. In addition, existing safety and health programs would have to demonstrate that they satisfy these core elements.

Because the scope of the proposal covers nearly all employers, except those engaged in construction and agriculture, a SBREFA panel was convened on October 20, 1998. The panel consulted with 19 small entity representatives, who voiced numerous concerns from the small business perspective. On December 10, 1998, the panel's report was submitted to OSHA, with numerous recommendations and findings of the panel with respect to the draft rule. The panel found that:

- OSHA had underestimated the costs of the proposed rule and should review its cost estimates. OSHA should clearly present, in the preamble to any proposed rule, information on the key assumptions and estimates underlying the estimated program-related costs, hazard control costs, and benefits associated with the rule. Also, OSHA should add to its cost analysis the cost of evaluating compliance by entities with existing health and safety programs and seek comment on the need for legal assistance and the cost of such assistance when conducting such an evaluation.

- OSHA should analyze and give special attention and consideration to an alternative regulation which would regulate those industries with high risks based on reports of injuries, illnesses and deaths, leaving other industries to be regulated under existing OSHA standards and state requirements.

- The issue of increased litigation risk, including employers' perception of such risk, deserves further review and OSHA should describe the issue in the preamble and solicit comment on it.

- OSHA should more clearly identify the basis for its preliminary conclusion that state health and safety programs are effective in reducing job-related injuries and illnesses.

- OSHA should clearly explain its draft enforcement policy in its regulatory document, and solicit comment on the content of the enforcement policy and its possible inclusion in the regulatory document.

Since this rule is a major rule, it must be submitted to OMB for review as required by Executive Order 12866. OMB will then have 90 days to review the proposal, after which it will be determined whether or not to publish the rule in the *Federal Register* for public comment. By the end of Fiscal Year 1999, the rule had not been submitted to OMB for review. OSHA officials have stated that the rule will be submitted to OMB some time in 2000.

Pension Welfare Benefits Administration

Issue: Benefit Claims Regulation

The Pension Welfare Benefits Administration (PWBA) proposed regulations to set new standards for the processing of group health, disability, pension, and other employee benefit plan claims filed by participants and beneficiaries of employment benefit plans. Notwithstanding the fact that the proposal, in its preamble, admitted that there would be millions of dollars in aggregate compliance costs which would be "mostly to small pension plans," PWBA made a

determination that the rule would not have "a significant economic impact on a substantial number of small entities."

In January 1999, Advocacy filed comments insisting that PWBA comply with the RFA by undertaking a regulatory flexibility analysis, since small plans will bear the brunt of the cost. Advocacy also questioned the need for such procedures for small pension plans when there was no apparent evidence that any problem existed warranting such regulations. PWBA withdrew the proposed regulations and is redrafting them to respond to the comments that were filed.

Issue: No Independent Trustee for Small Pension "Plans"

In response to discussions in the pension administration industry, Advocacy and industry representatives asked PWBA whether it had any plans to require all pension plans to use an independent financial institution as trustee or custodian. If so, this would be a significant burden for small firms since most small businesses use the owner as the trustee.

In January 1999, DOL announced that small businesses that sponsored pension plans would not be required to have independent financial institutions act as trustees.

DEPARTMENT OF THE TREASURY

The Department of Treasury performs four basic functions: (1) formulating and recommending economic, financial, tax, and fiscal policies; (2) serving as financial agency for the United States Government; (3) enforcing law related to these areas; and (4) manufacturing coins and currency. Of these responsibilities, formulating and recommending tax policy and enforcing tax law have the most dramatic impact on every business, large or small. Besides the Internal Revenue Service, other divisions, such as the Office of Thrift Supervision, and the Bureau of Alcohol, Tobacco and Firearms, also have an impact on the operation of some small businesses. Only IRS activities are highlighted here.

Internal Revenue Service

The RFA requires analysis of a proposed regulation only where notice and comment rulemaking is required.[10] Under the Administrative Procedure Act (APA), "interpretative rules" are exempt from notice and comment rulemaking. For years the Internal Revenue Service (IRS) has escaped the requirements of the RFA because the agency categorized most of its rules as "interpretative," meaning the rules simply carry out the intent of Congress and do not impose any additional requirements. In 1996, SBREFA amended the RFA to require that interpretative rules issued by the IRS that imposed a collection of information requirement would be subject to the RFA.

Since passage of SBREFA, the IRS has worked with Advocacy to enhance its compliance with the RFA. As a result, the IRS is not just relying on the APA exception, but, rather, is performing

[10] *See* 5 U.S.C. § 601(2).

some analyses of the impact of its interpretative rules on small business and is certifying most of them as having no significant impact on a substantial number of small entities. In Fiscal Year 1999, there were visible signs that the IRS's regulatory approach toward small business was getting better. For example, the IRS was more responsive to Advocacy's inquiries on small business issues. The IRS agreed to hold meetings when requested with concerned small business groups to discuss high visibility or controversial rules. The IRS has increasingly requested suggestions from small businesses—before the publication of regulations, technical advice memoranda, or guidance advisories—about which problems were the most onerous and whether there were better approaches to solve such problems.

Advocacy is encouraged by the increasing awareness of Treasury and the IRS, in particular, to the requirements of the RFA. In some cases, when the IRS consults small entities, its efforts lead to better rulemaking. While the IRS's motive may be to avoid any proposed new legislative requirement that it convene Small Business Advocacy Review Panels, the IRS has done a lot to improve its outreach to the small business community.

These issues aside, the majority of the regulations published by the IRS in FY 1999 were not subject to the RFA. The IRS's reasons for why the RFA did not apply to its regulatory actions in those circumstances included:

- The RFA applies to legislative regulations. The IRS has always maintained that virtually all its regulations are interpretative, and thus exempt from the RFA.

- Many IRS regulations clarify definitions or provide examples of application. Without more, they do not require analysis under SBREFA.

- Any interpretative regulation that was proposed prior to March 2, 1996, is not subject to the RFA as amended by SBREFA.

- Most IRS regulations have an impact on individuals, large entities, or activities that do not involve small business.

- Unless there is a form required (that is, a piece of paper that is to be filled out by the taxpayer), there is no recordkeeping requirement imposed by the rule. Also, if there is simply an addition or amendment to an existing form, the change is insignificant, and there is no new collection of information requirement. The IRS refuses to look at the document as a whole, though Advocacy has urged the agency to do so.

Issue: Restructuring of the IRS

Since the passage of the IRS Restructuring and Reform Act of 1998, the IRS has undertaken a major project to reshape the agency. The administrative changes that will result from the restructuring will have major impact on small businesses. Thus, although this issue is not a regulatory activity per se, Advocacy and small businesses have been involved in a continuing process of consultations with the IRS in the hopes that the changes will encourage the agency to become more sensitive to small businesses in future regulatory proposals.

In response to the Restructuring Act the IRS has sought Advocacy's opinions, and those of small business groups that Advocacy introduced to the IRS, in order to develop a more small-business-friendly environment. For example, the Restructuring Act created a small business division within the IRS, and the agency consulted with Advocacy to establish a size standard for the businesses that fall within the jurisdiction of the division that was suitable for serving the small business community.

However, Advocacy is disappointed that at the close of Fiscal Year 1999, the IRS had failed to appoint members to the IRS oversight board that was to be created to oversee the operation of the IRS as part of the restructuring effort. Advocacy has urged the IRS to appoint at least one small business owner to serve on the board.

Issue: ISO 9000

ISO 9000 is an international quality standard with which U.S. manufactures must comply in order to bid for contracts and to distribute products overseas. Because expensive training and certifications are required in order to meet the ISO 9000 standards, small businesses have sought permission to write off these costs from taxes in the year that costs are paid. While agreeing that the costs can be deducted from taxes, the IRS adopted the position that the costs should be deducted over a period of years, to coincide with the income attributable to them.

At the invitation of the IRS, Advocacy and a number of small business groups formed a working group to discuss and resolve the issue of the deductibility of ISO 9000 costs. The working group proposed a clarifying revenue ruling, which the IRS is currently considering. This is an example where the IRS is actively addressing regulatory problems directly and discussing pre-proposals with the regulated sector.

Issue: Electronic Federal Taxpaying System

The IRS published a requirement that businesses with employment tax obligations greater than $50,000 must pay these taxes using the electronic federal taxpaying system (EFTPS). This requirement posed a hardship for many small businesses that were not given adequate notice of the requirement or of ways to reduce the cost of setting up transactions. The requirement, which was part of the North American Free Trade Agreement (NAFTA), was to have gone into effect in 1997. However, at the insistence of Advocacy, Congress, trade associations, and concerned small businesses, the enforcement date was postponed, and emphasis was placed instead on obtaining voluntary compliance to meet revenue goals. Finally, in 1999, the IRS amended the requirement to minimize the hardship by raising the threshold for mandatory electronic submissions to $200,000—effectively excluding many small businesses from the need to comply with mandatory electronic reporting.

Issue: Unrelated Business Income Tax

In 1997, Advocacy asked the IRS to consider a rule to clarify the application of the unrelated business income tax to travel and tour activities of nonprofit entities. Regulations were issued in April 1998. The regulations were a collection of existing court rulings that established the

boundaries of which commercial touring activities are "substantially related" to the statutory mission of a tax-exempt organization. Current law requires that a commercial activity of a non-profit entity be substantially related to the purpose for which it was chartered in order for the activity to be tax exempt (e.g., charitable, educational, scientific, etc.).

When it became clear that a large number of groups on both sides of the issue wished to file comments on the regulation, Advocacy, in September 1998, requested the IRS to schedule the regulation for a public hearing. The IRS then held a hearing in February 1999, at which Advocacy testified on behalf of small businesses. First, Advocacy argued that the RFA should apply to the regulation since it imposed a *de facto* collection of information standard. Advocacy also urged a stronger standard be established to prevent tax-favored, nonprofit organizations from competing unfairly against taxpaying small businesses. Finally, Advocacy pointed out that pursuing business ventures to provide financial support for other exempt activities was not a sufficient reason under the law to circumvent the unrelated business income tax.

This matter is still pending before the IRS, but the agency has since held a series of meetings with interested small business organizations to develop more information.

Issue: Simplified Tax and Wage Reporting System

During Fiscal Year 1999, Advocacy continued to work with the IRS to establish a simple filing form that would satisfy the wage and tax reporting obligations of the very smallest businesses under both federal and state tax law. The single form would have the effect of tiering reporting requirements, and would make tax reporting dramatically easier for the smallest businesses.

Advocacy's research has revealed that tax reporting is a major burden to small businesses, and the development of a simple, single, multi-purpose form that eliminates duplicative filings of tax and wage information requested by federal, state, and local agencies would reduce significantly such burdens. Thus, in Fiscal Year 1999, the IRS developed a pilot "single point filing" program that was initiated in Montana. Thus far, the pilot program has proved to be successful, and the IRS is currently duplicating the pilot in Iowa but with electronic single point filing. Advocacy supported special legislation to enable the pilot program, and will continue to work with the IRS to ensure that the program is replicated throughout the nation.

Issue: Cash vs. Accrual Accounting

The IRS rules require large businesses to use accrual accounting (the recognition of income and expenses when the obligation for them occurs), rather than cash accounting (the reporting of income or expense when the cash is actually received or distributed). However, the rules also require that accrual accounting be used where a business (small or large) has an inventory.

During Fiscal Year 1999, Advocacy became aware that the IRS field officers were imposing accrual accounting requirements on far more small businesses than is required by law. It was found that the IRS was strictly enforcing this requirement against small businesses even in circumstances where the inventory found was only a very small part of their business. For example, in once case, the IRS enforced this requirement against a dentist who ordered and fitted

a bridge for some patients. Similarly, the IRS would have enforced this requirement against heating and air-conditioning contractors who had ductwork on hand to lay out systems in a home or building.

In response to this enforcement problem, Advocacy and some concerned trade associations formed a working group with key officers of the IRS and reviewed the existing IRS policy and its impact on small business. As a result, the IRS agreed to review the policy and issue guidance that would make it clear that raw materials that were not a substantial part of the business of the taxpayer would not qualify as inventory, and therefore not impose accrual accounting in those instances.

Issue: Small Business Pension Plans

Over the years, Advocacy has formed informal roundtable groups around issues of concern to small businesses. During Fiscal Year 1999, Advocacy's roundtables covering tax and pension issues met with the pension policy decision makers at the IRS and Treasury to review regulatory burdens that prevented small businesses from participating in 401(k) plans.

These plans provide tax benefits to businesses and employees who contribute to investments that are set aside for the employees' retirement. The Small Business Jobs Protection Act of 1996 had created a "safe harbor" that would allow small businesses to participate in 401(k) programs without having to fulfill various burdensome tests and other requirements. However, one drawback is that a business has to declare early in the tax year if it intends to make the contributions necessary to participate in the safe-harbor program. Small businesses do not know from one year to the next what their profits will be, and thus, small business owners are afraid to make such a financial commitment in order to participate in the 401(k) safe harbor program.

As a result of the meeting with the Advocacy roundtables, the IRS and Treasury have agreed to review and clarify the law to help small businesses participate in the plan. Finally, the IRS has implemented the regulations Advocacy sought for two years since the passage of the Small Business Job Protection Act of 1996.[11] The Act, the regulations, and the simplified rules they create set up a small business plan that is expected to save small businesses over $80 million a year.

ENVIRONMENTAL PROTECTION AGENCY

As detailed above, the 1996 SBREFA amendments to the RFA established a new regulatory analytical process specifically for the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA). The Small Business Advocacy Review Panel process requires these two agencies to convene a special panel whenever the agencies cannot certify under the RFA that a regulatory proposal will not have significant economic impact on a substantial number of small entities.

[11] Pub. L. No. 104-188.

The panel, consisting of representatives from the agency, Advocacy, and Office of Information and Regulatory Affairs within the Office of Management and Budget, reaches out to small entities likely to be affected, seeks their input on the proposed regulation, and prepares a report to the administrator of either the EPA or OSHA with recommendations for reducing the potential impact of the rule on small businesses.

Advocacy's experience in working with panels since 1996 has demonstrated that through the use of these structured procedures, the agencies' analytical process is greatly improved. Thus, it is fair to conclude that the panel process has had a constructive effect on the work of the EPA and OSHA, and that the time spent on the panels has been, and continues to be, productive for both agencies, with the benefits redounding to small businesses without compromising public policy objectives.

For EPA's rulemakings, over 250 small entity representatives have already participated on fifteen completed EPA panels since SBREFA was enacted in 1996. Each of these 15 panels produced positive outcomes for the EPA and small businesses. In response to small business input, the panels made over 140 concrete recommendations to the EPA that address small business concerns to be considered in the development of a proposed rule. When EPA publishes a rule for comment, the EPA explicitly addresses each panel recommendation, and makes the panel report part of the public record.

The following are some EPA regulatory activities during Fiscal Year 1999—some involving the SBREFA panels and others not—that demonstrate how that agency's approach to rulemaking now routinely takes into consideration small business interests.

Issue: Tier 2/Gasoline Sulfur Rule

The EPA convened a panel in June 1998 on an action to regulate the sulfur content of gasoline in order to enable light-duty vehicles to lower sulfur emissions (Tier 2 light-duty vehicle and light-duty truck emission standards, heavy-duty gasoline engine standards and gasoline sulfur standards, or the "Tier 2/Gasoline Sulfur" rule). The panel completed its report in October 1998.

During the panel process, its members made a site visit to Frontier Oil Company's refinery in Cheyenne, Wyoming, at the company's invitation. The panel noted that this was a unique opportunity to gain a first-hand perspective on what a small refinery would have to do in order to comply with the proposed rule. What the panel learned on this trip was that the cost of compliance would effectively put small refiners out of business, with a resultant increase in gasoline prices. More importantly, the panel also learned that the small refiners' product did not contribute significantly to the overall sulfur emission problem that EPA was trying to address.

The panel then considered a wide range of options and regulatory alternatives for providing small businesses with flexibility in complying with potential Tier 2 vehicle emission and gasoline sulfur standards. In response to the comments received, as well as additional business and technical information gathered concerning the affected small entities, the panel ultimately recommended several alternatives. In light of the potentially severe impacts of the regulation on small refiners, the panel agreed on a recommendation to delay application of its rule to small

refiners for several years. This regulatory option would still accomplish the environmental goals that EPA wanted to meet.

In May 1999, the EPA issued its proposed rule based on the panel's recommendation. The EPA's action met with approval from the regulated industries as well as from Advocacy. The proposed rule that resulted from the panel process was clearly an appropriate regulatory solution to achieving the desired environmental results, without unnecessarily jeopardizing small refiners, which are the major source of competition in the industry. The final rule, which was issued in December 1999, adhered very closely to the approach of the proposal for small refiners.

Issue: Effluent Limitations Guidelines for Industrial Laundries

In 1992, the EPA initiated regulatory action that identified 1,700 industrial laundries as a potential source of hazardous waste solvents discharged to publicly-owned treatment works. Since this rulemaking involved potentially significant economic impact on a substantial number of small businesses, a SBREFA-mandated review panel was convened in June 1997. A report was issued by the panel in August 1997, making a number of substantive recommendations to the agency. Among others, the panel suggested specific exclusion options for small businesses, and recommended that the agency solicit public comment on a "no-regulation" option in the proposed rule. The panel's recommendations were considered and subsequently addressed in the proposed rule, published in December 1997.

Following publication of the proposal, EPA continued to work with the industry—which is dominated by small business—and supported the industry's proposal for a strong voluntary pollution prevention program that includes working with the industry's customers to encourage further pollution prevention efforts.

Comments raised by the small entity representatives during the panel process and by subsequent commenters on the proposal convinced the agency that the industry discharges were not significant enough to warrant national regulation of the entire industry. Thus, in July 1999, the EPA withdrew its proposed rule and announced that it would not impose national clean water standards on industrial laundries.

Issue: Gas Stations Gain Relief from Duplicative Paperwork

Small gasoline station owners used to be burdened by duplicative government reporting requirements. Under the various federal and state laws, these small businesses were responsible for submitting basically the same information to three separate regulatory entities: state and local emergency planning commission offices (as well as local fire departments), state underground storage tanks (UST) offices, and the EPA. As required by the Resource Conservation and Recovery Act, the information provided on the EPA forms was similar and comparable to information submitted to state UST offices.

To further aggravate the duplicative filing burdens on small gas station owners, sections 311 and 312 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) required all businesses to report to the EPA if gasoline was present on their premises. While it is clear to

all that retail gas stations have gasoline present on their premises, about 200,000 small gasoline outlets nationwide were required, under EPA's interpretation of the law, to report this fact year after year, expending about 558,000 hours in paperwork and over $16 million in costs per year.

After more than ten years of pursuing relief from this requirement, in February 1999, Advocacy and the small businesses were finally successful in eliminating this duplicative reporting requirement when the EPA's Administrator signed a rule into effect.

Issue: Chemical Inventory Update Rule

In August 1999, the EPA issued a proposed rule involving modifications to the Chemical Inventory Update rule. Under this rule, importers and manufacturers of chemicals in quantities above a certain reporting threshold were required to report information about the quantity and use of those chemicals to the EPA for use in characterizing chemical hazards. Working closely with OMB and EPA during the interagency review process under Executive Order 12866, Advocacy was able to achieve savings of approximately $13 million dollars per reporting cycle, or approximately 25 percent of the cost. In particular, Advocacy strongly sought and was successful in obtaining exemption for importers and producers of natural gas from reporting requirements, since this burden substantially duplicated the required reporting made by the same firms to the Department of Energy.

Issue: Persistent Bioaccumulative Toxics—Toxic Release Inventory Reporting

Since the rule was initiated in 1988, Advocacy has worked with EPA on the Toxic Release Inventory reporting rule, and Advocacy was instrumental in getting the EPA to implement simplified estimation techniques in the original 1988 rule, and a simplified Form A in 1994.

During 1999, Advocacy became involved in interagency review of two rules affecting the reporting of chemicals that are known as "persistent bioaccumulative toxics." These are chemicals that are potentially more harmful because they accumulate in the environment. In both rulemakings, Advocacy was critical of the need to increase the reporting burden on industry, with questionable benefits to the right-to-know objectives of the statute. As a result, EPA eliminated about 30 percent of the reporting burden in the January 1999 proposal, which included establishing a lower reporting threshold for about 25 chemicals and chemical categories. The final rule on this proposal was promulgated in October 1999 with few revisions.

The second rule, which would lower the reporting threshold for lead, was proposed in August 1999. Advocacy expects that this rulemaking will be completed in 2000.

FEDERAL COMMUNICATIONS COMMISSION

Issue: Small Local Telephone Carriers as Small Businesses

Throughout Fiscal Year 1999, the Federal Communications Commission (FCC) issued regulatory flexibility analyses that stated small incumbent local exchange carriers (ILECs) were not small businesses because they were dominant in their field of business. On May 27, 1999, in a letter sent to the FCC, Advocacy disagreed with the FCC's determination that small ILECs were dominant in their fields of operation and, therefore, not small businesses under the RFA. Advocacy stated that the SBA has the statutory authority to define small businesses, and that the SBA defines dominance on a national basis. Advocacy thus requested that the FCC consider small ILECs as small businesses when conducting an RFA analysis. After several telephone conversations and a meeting between Advocacy and FCC staff, the agency agreed to reword its regulatory flexibility analysis and consider small ILECs as small businesses.

Issue: Customer Proprietary Network Information

In April 1998, the FCC released an order designed to protect private and personal information about a customer's name, address, calling patterns, and calling plans (records referred to as "customer proprietary network information," or CPNI). The FCC adopted very stringent and burdensome rules that required local telephone companies to maintain records and create safeguards that were far in excess of the statutory mandate.

On July 3, 1998, Advocacy filed an *ex parte* letter with the FCC, asserting that the FCC's rule violated several statutory duties set forth in the Paperwork Reduction Act (PRA). Advocacy argued that the FCC did not develop a specific, objectively supported estimate of burden, failed to seek public comments on the accuracy of the agency's estimate of the burden of the proposed collection of information, and did not evaluate whether the proposed collection is necessary and useful. Moreover, since the FCC changed the rule materially from the original proposal, Advocacy maintained that the agency then had a duty to submit new data to the OMB in support of its PRA request for approval.

In December 1998, Advocacy joined a coalition of industry representatives that was formed in response to a request from the FCC that the industry itself propose alternatives to the agency's actions. The coalition submitted a proposal to the FCC in January 1999 which would protect the personal information of telecommunications carriers while imposing substantially less costs on the industry than the FCC's original proposal. In August 1999, the FCC issued an order which revised its earlier decision and adopted the industry coalition's proposal almost entirely.

Issue: Broadband Deployment

In August 1998, the FCC released an order and a notice of proposed rulemaking to encourage broadband deployment in the nation. Broadband is form of high-capacity, high speed data communication that is commonly used for connection to the Internet.

On October 16, 1998, Advocacy filed comments with the FCC, asserting that the FCC's regulatory flexibility analysis was insufficient. First, Advocacy argued that the FCC failed to include all classes of small entities in its analysis when it neglected to recognize small incumbent local exchange carriers (ILEC) as small entities. Second, the FCC failed to describe adequately the proposed reporting, recordkeeping, and other compliance requirements, by disclosing only three of the six compliance requirements proposed, and not completely disclosing the other three that were discussed. Third, Advocacy's comments pointed out that the FCC failed to consider significant alternatives to the proposed reporting, recordkeeping, and other compliance requirements that can minimize the significant economic impact of the proposed rules.

The FCC released a Third Report and Order in which it dismissed Advocacy's concerns regarding the IRFA in its FRFA. The FCC stated that it had properly identified all classes of entities, and that it had adequately described the compliance requirements and alternatives in the text of the proposed rule.

Issue: Spectrum License Transfer to Leap Wireless

In November 1998, the FCC issued a notice soliciting comment on the transfer of several Personal Communications Service (PCS) spectrum licenses from a small business to Leap Wireless, which is a spin-off company from Qualcomm, Inc. Leap Wireless had earlier asked the FCC to be considered a "very small business" for purposes of qualifying for various benefits in the auction process.

On December 14, 1998, Advocacy filed with the FCC a petition to deny, arguing that the FCC should deny Leap Wireless the status of very small business. Advocacy did not object, however, to the transfer of the spectrum licenses to Leap Wireless. Advocacy argued that Leap Wireless did not qualify as a very small business, because the company should be considered an affiliate of Qualcomm, its former parent company. Doing so would be consistent with the FCC's affiliation and attribution rules, judging the situation by a totality of circumstances. For example, Qualcomm had considerable, and thus impermissible, influence over Leap Wireless, based on the inherent nature of Leap Wireless as Qualcomm's spin-off. Additionally, in analyzing the common stock and management interests between Leap Wireless's and Qualcomm's directors and officers, the source of Leap Wireless's assets, operating capital, investment capital, and multiple contractual arrangements, Advocacy argued that Leap Wireless cannot be considered a very small business that should be allowed to take advantage of auction benefits.

In April 1999, the FCC issued an order which approved the transfer upon certain conditions. The FCC agreed with Advocacy that Leap Wireless was a subsidiary of Qualcomm and required numerous separation efforts before the FCC would approve the transfer. These conditions include restructuring the financing so that it no longer was financed in the majority by Qualcomm, as well as restructuring the board so that former Qualcomm officials were no longer in control.

Issue: Commercial Mobile Radio Service Spectrum Cap

In December 1998, the FCC released a notice of proposed rulemaking asking for comment as to whether the agency should raise or suspend altogether the spectrum cap on commercial mobile radio service (CMRS). Currently, a single spectrum licensee is limited to 45 megahertz (MHz) of spectrum in the cellular, PCS, and specialized mobile radio services.

On February 10, 1999, Advocacy filed reply comments with the FCC that stated that the 45 MHz spectrum cap has served a valuable and useful purpose in promoting competition, lowering entry barriers, and encouraging technological innovation. Advocacy recommended that, if the FCC decides to eliminate the spectrum cap, then all licenses must be assigned before the spectrum cap is relaxed; the spectrum cap should only be raised—not eliminated; CMRS build-out requirements should be maintained; and new spectrum cap rules should be applied evenly to all markets.

In September 1999, the FCC released an order that adopted all of Advocacy's recommendations. The FCC kept the spectrum cap in urban areas at 45 MHz and raised the spectrum cap to 55 MHz in rural areas in order to spur deployment of services. The agency also relaxed ownership attribution benchmarks to help increase the availability of capital to all wireless carriers.

Issue: Inter-Carrier Compensation for Internet Service Providers

In February 1999, the FCC released a notice of proposed rulemaking that solicited comment on whether Internet service providers (ISP) should receive compensation for the termination of telephone calls onto their network. On July 14, 1999, Advocacy sent a letter to the FCC stating that two aspects of the FCC's IRFA were insufficient to satisfy the statutory requirements of the RFA. First, Advocacy commented that the FCC did not accurately identify all small entities affected by the rulemaking by not including small ISPs. Second, Advocacy argued that the FCC did not consider alternatives to minimize the impact upon small entities.

The FCC has not taken further action on this issue since the proposed rulemaking.

Issue: Local Telephone Service Line-Sharing

In March 1999, the FCC proposed rules to require incumbent local exchange carriers (ILEC) to allow ISPs to use local telephone lines to provide broadband service without providing local telephone service that would run on the same line. This division is called "line-sharing."

In a letter sent to the FCC on July 26, 1999, Advocacy agreed that the FCC had statutory authority to require line-sharing and that it was in the public interest to do so. However, Advocacy argued that the notice was vague and it did not provide sufficient notice to provide a basis for a rulemaking. In addition, Advocacy pointed out that the FCC's regulatory flexibility analyses did not satisfy the requirements of RFA. Thus, Advocacy recommended that the FCC consider comments received in response to the notice, but also issue a second further notice of proposed rulemaking along with revised regulatory flexibility analyses before adopting rules regarding line sharing.

Issue: Truth in Billing

In June 1999, the FCC issued the truth-in-billing rule as well as a further notice of proposed rulemaking, seeking public comment on the manner in which certain charges are organized and described on telephone bills. The FCC intended these rules to provide customers with helpful information regarding their telephone service.

In comments filed with the FCC on July 27, 1999, Advocacy stated that, while it supports the FCC's goal to reduce unauthorized charges to customers by clarifying information on telephone bills, the agency's regulatory flexibility analysis suffers from the same vagueness and lack of basic information as the telephone bills the rulemaking was designed to cure. Advocacy pointed out that both the initial and final regulatory flexibility analyses were fundamentally flawed, as they did not analyze any of the compliance requirements contained in the order, and the notice failed to estimate the cost of these far-reaching and expensive regulations on small businesses.

On August 30, 1999, Advocacy also sent a letter to OMB stating that the FCC did not properly balance the compliance burdens upon small wireline carriers, especially in light of Year 2000 (Y2K) compliance requirements. The FCC also relied improperly on the waiver process to ease compliance burdens on small carriers when an exception in the rulemaking would have been more appropriate. Therefore, Advocacy asked OMB to disapprove the information collection contained in the truth-in-billing order. In a letter to the FCC on September 3, 1999, Advocacy supported requests for a limited waiver to the rules. Advocacy stated that the regulations adopted by the FCC are unduly burdensome on small businesses and would interfere with other important public policy goals, such as Year 2000 computer conversion preparations.

In response to concerns raised by Advocacy, as well as by the OMB and affected sectors of the industry, the FCC agreed to postpone enforcement of two of the most expensive requirements until April 2000.

FEDERAL TRADE COMMISSION

Issue: Children's Online Privacy Protection

Historically, the Federal Trade Commission (FTC) is an agency that consistently works to comply with the RFA. The agency's work on this issue serves as another concrete example of its efforts to do so.

On April 27, 1999, the FTC published the Children's Online Privacy Protection Rule to implement the Children's Online Privacy Protection Act of 1998 (COPPA), which prohibits unfair and deceptive acts and practices in connection with the collection and use of personal information from and about children on the Internet.

The goals of COPPA are to enhance parental involvement in a child's online activities, help protect the safety of children in online forums (such as chat rooms, home pages, pen-pal services) where children may make public postings of identifying information, maintain the

security of children's personal information collected online, and limit the collection of children's personal information without parental consent. To achieve these goals, the FTC proposed several requirements for the collection of information by Internet advertisers, retailers, etc., including parental notification, prominent display of information on collection of information policies, and security procedures to protect a child's personal information. The FTC certified that the proposed rule would not have a significant economic impact on a substantial number of small businesses.

Advocacy questioned the FTC's certification, discussing several provisions of the proposed rule that could be quite costly to small businesses. Advocacy suggested that the FTC prepare an IRFA to analyze fully the potential impact of the proposal on small businesses, define which small businesses needed to comply with the proposal, and analyze possible alternatives to the proposal.

Conversations and meetings held between the FTC and Advocacy staff focused on how much regulatory discretion COPPA gave to the FTC. Subsequently, the FTC published an IRFA. As a result, the FTC implemented an alternative that specifically defined which small businesses needed to comply with the rulemaking. This change resulted in cost savings of approximately $75 million.

FEDERAL PROCUREMENT AGENCIES

Federal acquisition reform has been a major issue for Congress and regulatory agencies since 1994. The Federal Acquisition Streamlining Act of 1994[12] and the Federal Acquisition Reform Act of 1996[13] represent significant reform initiatives that are intended to reduce paperwork burdens on federal contractors, facilitate the acquisition of commercial products, enhance the use of simplified procedures for small purchases, and improve the efficiency of the laws governing the procurement of goods and services.

The purpose of the acquisition reform efforts is to make the government operate more like a commercial buyer and make it easier and more appealing for businesses to participate in government markets. In turn, the federal government would also be assured that its nearly $200 billion procurement budget would achieve greater spending power. Some of the changes required a total revamping of the federal acquisition process in order to streamline the process for the procuring of goods and services.

As a result of major procurement reform adopted between 1994 and 1997, 1998 was a year of implementation, adjustment, and evaluation. While the overall acquisition reform process has been positive, the past year or two saw the emerging of several post-reform actions that have the potential to be negative to small businesses. The most visible sign in this regard is the apparent decline in the prime contract dollars awarded to small business. Accordingly, 1999 saw the

[12] Pub. L. No. 103-355.

[13] Pub. L. No. 104-106.

beginning of implementing regulatory measures to correct certain portions of the federal procurement system.

Federal Acquisition Regulations Council

Issue: Additional Authority to Contracting Officers

The Federal Acquisition Regulations (FAR) system was established to codify and publish uniform policies and procedures for acquisition by all executive agencies. The FAR is issued and maintained jointly under the statutory authorities granted to the FAR Council, consisting of the Secretary of Department of Defense, Administrator of the General Services Administration (GSA), and the Administrator of the National Aeronautics and Space Administration. GSA's "FAR Secretariat" publishes the FAR on behalf of the FAR Council.

On July 9, 1999, FAR Case 99-010, "Contractor Responsibility, Labor Relations Cost, and Costs Relating to Legal and Other Proceedings," was published in the *Federal Register*. This proposed rule issued by the FAR Council would provide a federal contracting officer with unilateral authority to reject an apparently successful bid. The proposed rule would give this power to the contracting officer even if a final adjudication had not been reached by an established review board or body.

On November 8, 1999, Advocacy filed comments, expressing concerns with the FAR Council's lack of a factual basis for its certification under the RFA that the proposal would have no significant impact on a substantial number of small businesses. Subsequent to the submission of this letter, the FAR Council, through its representative, the Office of Federal Procurement Policy, initiated correspondence with Advocacy regarding the FAR Council's compliance with RFA. The issue is still pending.

Department of Justice, Bureau of Prisons, Federal Prison Industries

Issue: Engine Electrical Component

The Federal Prison Industries (FPI) is a wholly owned government corporation that was created by statute in 1934. FPI was given several statutory mandates, one of which is to serve as a "mandatory source" in selling its products to federal agencies. Under this requirement, agencies are generally required to buy from FPI before they can buy from the private sector.

On March 31, 1999, Advocacy commented on FPI's proposed "Competitive Impact Study, Federal Supply Code 2920, Engine Electrical Component." The study provides justification for the expansion of FPI's market share of current engine electrical components. Ironically, in the study, FPI identified at least four small businesses that would be adversely harmed by the proposed expansion. To illustrate, if the expansion were to occur, FPI estimated that one small business would lose more than thirty percent of its business base. As a result of Advocacy's letter, FPI agreed to restrict its expansion into the engine electrical component market.

National Archives and Records Administration

Issue: Agency Records Centers

The National Archives and Records Administration (NARA) provides federal agencies with standards, procedures, and guidelines for the use of commercial records storage facilities. On April 30, 1999, NARA published a notice of proposed rulemaking on agency record centers, and subsequently extended the public comment period to July 7, 1999. In that notice NARA certified that the requirements it proposed would not have a significant impact on a substantial number of small entities, but provided no factual basis for the certification as required by the RFA.

Advocacy expressed concern with NARA's lack of a factual basis for its certification, which prompted NARA to publish an IRFA on September 15, 1999. During the public comment process, NARA received many suggestions from small businesses, which the agency ultimately accepted when it issued its final rule. NARA estimates that the costs to small businesses to comply with the final rule were substantially mitigated by several changes that were made as a result of the RFA analysis on the rule.

UNITED STATES POSTAL SERVICE

Issue: Regulation on Commercial Mail Receiving Agencies

The U.S. Postal Service (USPS) is not an agency whose rules are subject to the notice and comment provisions of the Administrative Procedures Act. As such, it is not subject to the RFA.[14] Nevertheless, Advocacy used the principles of the RFA to address concerns raised by small entities when USPS promulgated a rule concerning commercial mail receiving agencies (CMRA).

On March 25, 1999, USPS published a final rule in the *Federal Register* on delivery of mail to CMRAs. At the time that the rule was finalized, USPS asserted that "the sole postal purpose of the rule is to increase the safety and security of the mail." Among other things, the rule required CMRA users to use the term PMB (standing for "private mail box"), in their addresses, provide two forms of identification when renting a mailbox, and file a PS Form 1583 with USPS disclosing the actual location of the user, which form would be publicly available. If a CMRA user did not comply with the rule, USPS stated that the mail would not be delivered.

Although USPS received over 8,000 comments in opposition to the proposal and only 10 comments in favor, USPS finalized the rule. In promulgating the rule, USPS asserted that the rule was necessary to combat mail fraud. USPS, however, did not have any statistics or studies to prove that fraud occurred at any greater rate at CMRAs than at USPS's own post office boxes.

[14] The RFA defines "agency" as an agency as defined in section 551(1) of Title 5, 5 U.S.C. § 601(1). Pursuant to 39 U.S.C. § 410, USPS is exempt from complying with the section 551 of Title 5. USPS, therefore, is not an agency as defined by the RFA.

Since USPS is not an agency subject to the RFA, Advocacy did not initially become involved in this issue but did so when small businesses began notifying Advocacy about the impact of the final rule. Advocacy then held roundtables and conference calls with small entities. Advocacy also sent letters to the Postmaster and attended meetings to present the views of small businesses. In its correspondence, Advocacy pointed out that the rulemaking was not only discriminatory and arbitrary,[15] it was extremely costly to small businesses. While the USPS had allowed users one year to add PMB to the address before stopping mail delivery, it did not take into account either the loss that small businesses would suffer from customers relying on address information contained in old materials to contact the business, or the stigma of having to use PMB in an address. Also there were safety concerns regarding the release of the actual location of a CMRA user.

USPS has since announced that it will only release information as to the actual address of the CMRA user upon receipt of a subpoena or a court order, thus addressing one of the security concerns raised by many users.

Further, at the end of October, USPS stated that it would be publishing a revised rulemaking to address the PMB issue. To date that has not occurred. Advocacy will continue to work closely with small entities and attend meetings at USPS in an attempt to minimize the impact of the rule on small entities.

[15] Advocacy asserted that the rule was arbitrary and discriminatory because it only applied to CMRA facilities and not other bulk mail types of receiving facilities such as hotels, large businesses, colleges, corporate suites, etc. Moreover, there was no information to indicate that fraud was occurring at any greater rate at CMRAs then through the regular mail, USPS postal boxes, or other means of delivery.

CONCLUSION

The 1998 RFA report concluded that the Office of Advocacy witnessed renewed interest by federal agencies on compliance with the RFA, and that a cultural change is underway in the agencies' approach to RFA activities.

During Fiscal Year 1999, Advocacy saw this trend continue, and federal agencies appear to be more eager than ever before to comply with the law. Agencies are working with Advocacy much earlier in the rulemaking process to identify problems when they are easier to correct. Early consultation also means that Advocacy is spending more of its resources on pre-proposal, non-public work with the agencies.

In the end, the true measure of the RFA's effectiveness is how well agencies are analyzing the impact of its rules on small business. This past fiscal year, rules were changed in response to information demonstrating there were less burdensome alternatives that were equally effective in achieving public policy goals. These alternatives reduced the cost of proposals to small business by almost $5.3 billion. While agencies deserve credit for integrating information on less costly regulations into their decision process and changing their regulatory proposals, the RFA's ultimate goal is to have this process integrated into each agency's decision process so that rules proposed will not be unduly burdensome on small business. Some agencies are striving toward this objective; others still have much work to do.

APPENDIX A:

THE REGULATORY FLEXIBILITY ACT

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

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 B:

RFA COURT DECISIONS PUBLISHED SINCE THE 1996 SBREFA AMENDMENTS TO THE RFA

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) was signed into law on March 29, 1996. In amending the Regulatory Flexibility Act of 1980 (RFA), SBREFA allowed small businesses, for the first time, to seek judicial review of agency compliance with the RFA. Shortly after this provision of the law became effective, small entities began challenging a wide variety of federal agencies' RFA actions.

In addition to legal challenges brought by small entities since SBREFA was enacted, the Chief Counsel for Advocacy also exercised his right under the RFA to file as *amicus curiae* (friend of the court) in RFA cases.

The following chart lists, in chronological order, every known significant court decision dealing with RFA issues that has been published since 1996. A short synopsis of each case follows the chart. While Advocacy attempts to maintain a complete record of cases and decisions that raise RFA issues, there is no provision in the RFA that requires notification of case filings be sent to Advocacy. Therefore, the following is compiled from all the information available to the Office of Advocacy, and may not necessarily be a complete listing.

RFA COURT DECISIONS PUBLISHED SINCE 1996

CASE	CITATION	DATE ISSUED	COURT
Associated Builders & Contractors, Inc. v. Herman	976 F. Supp. 1 (D.D.C. 1997)	07/23/97	District
Southwestern Pennsylvania Growth Alliance v. Browner	121 F.3d 106 (3d Cir. 1997)	07/28/97	Appeals
Associated Fisheries of Maine, Inc. v. Daley	127 F.3d 104 (1st Cir. 1997)	09/16/97	Appeals
Motor & Equipment Manufacturers Association v. Nichols	142 F.3d 449 (D.C. Cir. 1998)	04/24/98	Appeals
Northwest Mining Association v. Babbitt	5 F. Supp. 2d 9 (D.D.C. 1998)	05/13/98	District
ValueVision International, Inc. v. FCC	149 F.3d 1204 (D.C. Cir. 1998)	07/24/98	Appeals
Grand Canyon Air Tour Coalition v. FAA	154 F.3d 455 (D.C. Cir. 1998)	09/04/98	Appeals
North Carolina Fisheries Association, Inc. v. Daley	27 F. Supp. 2d 650 (E.D. Va. 1998)	09/28/98	District
Greater Dallas Home Care Alliance v. United States	36 F. Supp. 2d 765 (N.D. Tex. 1999)	02/08/99	District
Tutein v. Daley	43 F. Supp. 2d 113 (D. Mass. 1999)	03/17/99	District
National Propane Gas Association v. Department of Transportation	43 F. Supp. 2d 665 (N.D. Tex. 1999)	03/17/99	District
State of Washington v. Daley	173 F.3d 1158 (9th Cir. 1999)	04/02/99	Appeals
American Trucking Association v. EPA	175 F.3d 1027 (D.C. Cir. 1999)	05/14/99	Appeals
Southern Offshore Fishing Association v. Daley	55 F. Supp. 2d 1336 (M.D. Fla. 1999)	06/30/99	District

FEDERAL APPEALS COURT CASES

Southwestern Pennsylvania Growth Alliance v. Browner, 121 F.3d 106 (3d Cir. 1997)

In 1996, Southwestern Pennsylvania Growth Alliance petitioned the court for review of an EPA final rule which denied the Commonwealth of Pennsylvania's request that the EPA redesignate the Pittsburgh-Beaver Valley nonattainment area to attainment status for ozone, pursuant to the Clean Air Act. In the litigation, Advanced Manufacturing Network intervened and argued that the EPA's final rule denying Pennsylvania's request was invalid because the EPA did not comply with the RFA when it issued a short certification that the rule would not affect a substantial number of small entities.

The court concluded that the intervenor may not raise its RFA argument because it was not adequately presented to the EPA during the rulemaking process. The court also ruled, in the alternative, that the intervenor's RFA argument lacks merit, because the EPA's final rule was sufficient to satisfy the requirements of the RFA.

Although the court ruled against the intervenor on its RFA arguments, it nevertheless made significant findings relating to SBREFA's retroactive applicability. In light of the recently enacted SBREFA amendments to the RFA, the court was confronted here with the question of whether it had jurisdiction to hear the intervenor's RFA argument in this case. The intervenor argued that since SBREFA provided for judicial review of agency action under the RFA, the court had the jurisdiction to hear its argument that the EPA failed to comply with the RFA. The EPA argued to the contrary, that the SBREFA does not provide jurisdiction over the intervenor's RFA claim, because the EPA published its final rule before the effective date of the SBREFA amendments (90 days after the Act was enacted).

Relying on the Supreme Court's precedent on the question of the temporal reach of new statutes (*Landgraf v. USI Film Prods*., 511 U.S. 244 (1994), *Lindh v. Murphy*, 521 U.S. 320 (1997)), the court held that the SBREFA amendment entitling small entities to judicial review does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions always completed." This is because the SBREFA amendment "did not change the substantive RFA requirements that applied to the EPA's promulgation of the final rule." Accordingly, the court held that the intervenor properly filed this matter for judicial review under the new SBREFA provision.

In this regard, the court carefully analyzed the language of the SBREFA amendments and found that the only mention about the applicability to past agency action is the section that states: "This subtitle shall become effective on the expiration of 90 days after the date of enactment of this subtitle, except that such amendments shall not apply to interpretative rules for which a notice of proposed rulemaking was published prior to the date of enactment." Since this provision expressly states that SBREFA does not apply to interpretive rules that were promulgated before the effective date, the court found that SBREFA does apply to legislative rules that were promulgated before the effective date, such as the EPA's legislative rule, which is the subject of this litigation.

Associated Fisheries of Maine, Inc. v. Daley, 127 F.3d 104 (1st Cir. 1997)

In 1996, the National Marine Fisheries Service (NMFS) adopted a rule to eliminate overfishing of cod, haddock, and yellowtail flounder. Although the NMFS prepared an IRFA and a FRFA for the rule, the FRFA contained the IRFA with no changes except for answers to the submitted comments. In this litigation, the Associated Fisheries of Maine brought suit challenging the action and NMFS' compliance with the RFA.

The court held that the FRFA prepared by NMFS pursuant the RFA was not inadequate on its face, notwithstanding the plaintiff's claim that the FRFA could not consist simply of an IRFA with responses to submitted comments attached. The court opined that an agency can satisfy provisions of the RFA by setting forth the requirements for the FRFA, as long as it compiles meaningful, easily understood analysis that covers each requisite component dictated by the statute. The end product of this analysis must be made readily available to the public.

The court further stated that the Secretary of Commerce complied with the FRFA requirements because the secretary explicitly considered numerous alternatives, exhibited a fair degree of sensitivity concerning the need to alleviate the regulatory burden on small entities within the fishing industry, adopted some salutary measures designed to ease that burden, and satisfactorily explained reasons for rejecting others.

Motor & Equipment Mfrs. Ass'n v. Nichols, 142 F.3d 449 (D.C. Cir. 1998)

The plaintiffs represented businesses that manufacture, rebuild, and sell car parts in the automobile "aftermarket." Defendant Nichols was the assistant administrator for EPA. The plaintiffs challenged the EPA's decision to permit California to enforce its own regulations of the "on board emissions devices" pursuant to the Clean Air Act, as well as the EPA's rule deeming compliance with the California diagnostic device regulations to constitute compliance with the federal diagnostic device regulations. Plaintiffs also argued that the EPA failed to comply with the RFA.

In ruling that California's own regulations were sufficient to constitute federal compliance, the EPA had concluded that the rule would not have a significant economic effect on a substantial number of small businesses. Thus, the EPA did not conduct a regulatory flexibility analysis on the rule. In making its determination, however, the EPA only considered the impact of its decision on large and small volume automobile manufacturers, which did not include the businesses that the plaintiffs represented. Thus, the plaintiffs asserted that the impact on automobile aftermarkets should have been considered as well.

In its decision, the court disagreed and found that the RFA does not require an analysis in such situations:

> While EPA only considered whether its deemed-to-comply rule would have 'a substantial impact' on 'large and small volume automobile manufacturers,' . . . it was not obliged to conduct a regulatory flexibility analysis for any other business, including the

> businesses represented by petitioners. An agency is under 'no obligation to conduct a small entity impact analysis of effects on entities which it does not regulate.' *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996); *see also Mid-Tex Elec. Co-op, Inc. v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985). Because the deemed-to-comply rule did not subject any aftermarket businesses to regulation, EPA was not required to conduct a flexibility analysis as to small aftermarket businesses. It was only obliged to consider the impact of the rule on small automobile manufacturers subject to the rule, and it met that obligation.

ValueVision Int'l, Inc. v. FCC, 149 F.3d 1204 (D.C. Cir. 1998)

In 1997, the plaintiff challenged portions of a Federal Communications Commission (FCC) rule setting rates, terms and conditions for the carriage of "leased access" programming on cable systems. Among the issues raised, plaintiff contended that the FCC violated the RFA in that while the agency performed an IRFA, it only focused on the effect of the rule on small cable operators. The plaintiff argued that the FCC should have considered the interests of leased access programmers—most of whom were small businesses.

The FCC argued that the plaintiff was barred from raising the RFA issue because it failed to argue the point below. The FCC argued that it did issue an IRFA with the proposed rule but the plaintiff did not comment on the fact that the FCC's finding granted too much attention to small cable operators and too little to small leased access programmers.

The court ruled that the fact that the FCC addressed the issue of small leased access programmers in its FRFA preserved the question on appeal of whether this discussion was sufficient. The court also held that the FCC fulfilled its obligations under the RFA. The court reasoned that the FCC's primary focus on small cable operators was understandable since that was the group that was directly affected by the new rule.

It also found that the FCC's conclusion that the revised rules would have only a "positive" effect on programmers (because of various reasons) was sufficient to satisfy the obligations of the RFA. Although the language of Section 604 of the RFA is neutral as to the need to perform an analysis on positive or negative effects, the court interpreted the RFA as only applying to the negative impact of rules on small businesses. Specifically, the court stated that the RFA "provides that an agency shall accompany the promulgation of new rules with a 'final regulatory flexibility analysis' assessing the negative impact of the rules on small businesses."

Grand Canyon Air Tour Coalition v. FAA, 154 F.3d 455 (D.C. Cir. 1998)

In 1996, the Federal Aviation Administration (FAA) issued a final rule restricting access to the Grand Canyon National Park by small aircraft tour operators. The rule limited tour operators' access to certain areas, the time for flying, and the frequency of flights, but the FAA certified

that under the RFA, the rule would not have a significant economic impact on a substantial number of small entities.

The Office of Advocacy had earlier filed comments on the FAA's notice of proposed rulemaking. Thus, when the matter went to court, the Office of Advocacy filed a "Notice of Intent to File an *Amicus Curiae* Brief," pursuant to its authority under Section 612(b) of the RFA, to address FAA's noncompliance with the RFA. Advocacy ultimately withdrew this Notice in exchange for an agreement with the U. S. Department of Transportation that the FAA would "submit to the court a statement detailing the new data regarding the number of aircraft subject to the regulation . . . [and] include in their communication to the court a statement that the agency erroneously certified under the Regulatory Flexibility Act that the final rule would not have a significant economic impact on a substantial number of small entities."

The court ultimately found that the FAA performed a lengthy analysis. It also found that the FAA satisfied the requirements necessary to demonstrate a rational decision-making process that it responded to relevant comments, and considered reasonable alternatives.

Washington v. Daley, 173 F.3d 1158 (9th Cir. 1999)

The State of Washington, the Midwater Trawlers Cooperative, West Coat Seafood Processors Association and Fisherman's Marketing Association appealed the district court's dismissal of their petitions seeking to overturn regulations allocating groundfish catches of whiting off the Washington coast to four Northwest Indian tribes. They also sought review of the court's decision to grant summary judgment in favor of the Secretary of Commerce on the allegations that challenged the Secretary's compliance with the Magnuson Fishery Conservation and Management Act, the Endangered Species Act, and the RFA.

The court upheld the lower court's decision. In granting summary judgment on the RFA issue, the district court found that the Department of Commerce's decision that the agency action would not have a significant economic impact on a substantial number of small entities was valid. The district court specifically noted that the agency concluded that the seven percent tribal allocation of whiting would result in a one to three percent reduction in annual gross revenue for Midwater. Midwater had argued that the court erred in considering the overall effect on its revenues, rather than the effect only on revenue earned from the sale of whiting. The appeals court found that the RFA only requires an agency to consider the economic effect on the entity, not the effect on revenue earned for a particular harvest.

Am. Trucking Ass'n v. EPA, 175 F.3d 1027 (D.C. Cir. 1999)

The Clean Air Act requires EPA to promulgate and periodically revise national ambient air quality standards (NAAQS) for each air pollutant identified by the agency as meeting certain statutory criteria. In 1997, EPA issued final rules revising the primary and secondary NAAQS for particulate matter and ozone. At the time of the rulemaking, EPA certified the rule pursuant to the RFA as not having any impact on small entities. The basis of the certification was that EPA concluded that small entities were not directly subject to the rule because NAAQS regulate small entities only indirectly through state implementation plans.

Plaintiffs argued that the EPA improperly certified under the RFA, asserting that if the EPA had complied with the RFA, it would likely have promulgated less stringent NAAQS than those actually chosen, which would have reduced the burden upon small entities.

The court agreed with the agency and ruled that the EPA adequately complied with the RFA when it certified small entities are not subject to the proposed regulation. The court also rejected other arguments raised by the plaintiffs. For example, relying on a letter from the Office of Advocacy to the EPA stating that NAAQS do impose requirements upon small entities, the plaintiffs had argued that the court must defer to the SBA's interpretation of the RFA. The court ruled, however, that the SBA "neither administers nor has any policymaking role under the RFA; at most its role is advisory. Therefore, we do not defer to the SBA's interpretation of the RFA."

FEDERAL DISTRICT COURT CASES

Associated Builders & Contractors, Inc. v. Herman, 976 F. Supp. 1 (D.D.C. 1997)

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

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

Northwest Min. Ass'n v. Babbitt, 5 F. Supp. 2d 9 (D.D.C. 1998)

In 1997, a coalition of small businesses challenged the Bureau of Land Management (BLM) with failing to comply with the RFA, the Small Business Act, and the APA, in promulgating a rule that would require bonding for businesses and individuals with mining rights. The rule was finalized nearly six years after it was proposed. While the original proposal would have set a limit on bonding requirements, the final rule contained provisions not included in the original proposals—provisions that the public therefore had no opportunity to comment on. The BLM certified under the RFA that the rule would not have a significant economic impact on a substantial number of small entities. However, the agency failed to substantiate its conclusions and used a series of contradictory terms to define small businesses.

In January 1998, the Office of Advocacy filed its first ever *amicus curiae* brief in court, challenging BLM's use of a small business size standard that was not in compliance with the SBA's size standards published in compliance with the Small Business Act. The brief also

raised concerns about BLM's failure to comply with the APA and the substance of the economic analysis put on the record by the BLM.

In its decision, the court agreed with the Office of Advocacy's position and found that BLM had not complied with the RFA. The court held that the final rule's certification violated the RFA by failing to incorporate correct definition of "small entity. In remanding the rule to the agency, the court reaffirmed the importance of agency compliance with the RFA by stating: "While recognizing the public interest in preserving the environment, the Court also recognizes the public interest in preserving the right of parties which are affected by government regulation to be adequately informed when their interests are at stake and participate in the regulatory process as directed by Congress."

North Carolina Fisheries Ass'n, Inc. v. Daley, 27 F. Supp. 2d 650 (E.D. Va. 1998)

In setting its 1997 quota for flounder fishing, the NMFS continued the quota from the previous year. But in doing so, the NMFS did not perform a regulatory flexibility analysis. Instead, the agency certified that the rule would not have a significant impact on a substantial number of small businesses because the quota remained the same from 1996 to 1997. However, there was no indication in the record that the NMFS conducted any comparison of the conditions in 1996 and 1997.

The court remanded the quota to the Department of Commerce, NMFS' parent agency, after finding that the Department violated the RFA and failed to provide an economic analysis sufficient to comply with National Standard 8 of the Magnuson-Stevens Act. The court ruled that the Department failed to provide a proper factual statement to support its certification under the RFA. The court ordered the Department to undertake enough analysis to determine whether the quota had a significant economic impact on the North Carolina Fishery.

On remand, the issue before the court was whether the Secretary of Commerce had discharged his responsibilities under the RFA and under National Standard 8 of the Magnuson Act to perform an economic analysis. The court granted the plaintiffs' renewed motion for summary judgment, stating:

> After review of the Secretary's so-called Economic Analysis and the independent expert's comments, the Court finds that the Secretary of Commerce acted arbitrarily and capriciously in failing to give any meaningful consideration to the economic impact of the 1997 quota regulations on North Carolina fishing communities. Instead, the Secretary has produced a so-called economic report that obviously is designed to justify a prior determination.

Because the court found that the Secretary and the agency did not uphold their responsibilities under the law, it set aside the 1997 summer flounder quota and imposed a penalty against the NMFS.

Greater Dallas Home Care Alliance v. United States, 36 F. Supp. 2d 765 (N.D. Tex. 1999)

In 1998, the plaintiffs sought a preliminary injunction alleging that Congress had acted irrationally and unconstitutionally in passing those portions of the Balanced Budget Act of 1997 which changed the method of payment and reimbursement to home health care providers. The plaintiffs further alleged that the Health Care Financing Administration (HCFA) failed to comply with the RFA in implementing the legislation because it did not assess the costs and benefits of available regulatory alternatives and select approaches to maximize these net benefits, including more cost effective options for regulatory relief for small businesses.

In June 1998, the court denied the plaintiffs' request for preliminary injunction and ruled that HCFA acted properly. On the RFA issue, the court stated that because the underlying statute set forth in detail the formula for the new cost limit, it found that HCFA was merely implementing Congress' directives and was, therefore, not required to conduct a regulatory flexibility analysis.

In a subsequent motion to reopen the case, the plaintiff sought to include a letter written by the Office of Advocacy, dated June 15, 1998, as new evidence. Advocacy's letter had criticized HCFA's procedure in promulgating the regulations. The court denied the motion, stating that the letter is a legal opinion on issues fully presented and argued during the hearing already held. The court also found that, even if the letter contained factual information, it was cumulative and duplicative of evidence presented by witnesses, and that admitting it into evidence would be prejudicial and disruptive because the defendants would be allowed to cross examine the authors of the letter and call witnesses in opposition.

Finally, in February 1999, the court dismissed the entire proceeding through a motion for summary judgment granted to the defendant government agencies.

Tutein v. Daley, 43 F. Supp. 2d 113 (D. Mass. 1999)

In 1998, New England commercial fishermen of Atlantic Bluefin Tuna filed suit against the Secretary of Commerce, asserting that the Secretary acted in an arbitrary and capricious manner in issuing an advisory guideline for defining "overfished," and by declaring the Atlantic Bluefin Tuna as overfished based on stock size rather that fish mortality rates. In addition to the plaintiffs' arguments under the Magnuson Fishery Conservation and Management Act, they also claimed that the Secretary violated the RFA by failing to prepare regulatory flexibility analysis for the guideline. The Department had certified under the RFA that the guideline would not have a significant impact upon a substantial number of small entities.

The court dismissed one of the plaintiffs' counts by ruling that Congress did not intend to allow for judicial review of an advisory guideline under the APA and the Magnuson Act. As for the RFA argument, the court deferred its ruling by accepting the agency's argument that the issue is not ripe for decision by the court at this time. The court did find that the issue could be reviewed within the Fisheries Management Program and the implementation of final regulations for consistency with national standards and other laws such as the RFA.

Nat'l Propane Gas Ass'n v. Dep't Transp., 43 F. Supp. 2d 665 (N.D. Tex. 1999)

In 1997, the Department of Transportation's Research and Special Programs Administration (RSPA) instituted an emergency interim final rule to address concerns about the transportation of compressed gas on highways. RSPA later modified and adopted the interim final rule as the emergency discharge control regulation for loading or unloading of cargo tank motor vehicles. The regulation required vehicle operators to shut down immediately if they learned of a gas leakage.

Gas companies brought suit alleging various violations of the APA and RFA. Plaintiffs challenged the rule on the ground that defendants failed to prepare a FRFA as required by the RFA. RSPA argued that the rule was not subject to the RFA because the RFA applies only to the rules for which an agency is required to publish a notice of proposed rulemaking pursuant to Section 553 of the APA. RSPA asserted that the APA did not require a notice of proposed rulemaking here due to the emergency nature of the rule. Nevertheless, RSPA claimed that in preparing preliminary and final regulatory evaluations under Executive Order 12866, the agency did analyze the impact of the interim final rule and the final rule on all affected parties, including small businesses.

The court agreed, and found that although the agency did not prepare a FRFA, all of the elements of a FRFA were available throughout their summary of such analysis published in the *Federal Register*. As such, the court found that RSPA complied with each of the requirements found in the RFA, including responding to comments and consideration of alternatives. The court asserted that a preliminary regulatory evaluation was available in the docket for the public to provide comment, and it also found that to require an additional analysis by the agency would be duplicative.

Southern Offshore Fishing Ass'n v. Daley, 55 F. Supp. 2d 1336 (M.D. Fla. 1999)

In May 1997, the plaintiff fishing association initiated suit against the secretary of the Department of Commerce, challenging commercial harvest quotas for Atlantic sharks pursuant to judicial review provisions of Magnuson-Stevens Act and RFA. For the year 1997, NMFS promulgated a 50 percent quota reduction for sharks, which the plaintiffs argued would have a significant economic impact on the fisheries. After almost three years of litigation, this matter is still pending, and the United States District Court for the Middle District of Florida maintains jurisdiction of NMFS' actions in this regard.

In 1997, the Office of Advocacy filed to intervene as amicus curiae in this litigation. Although the Office ultimately withdrew from the matter after the Department of Justice stipulated that the standard of review for RFA cases should be "arbitrary and capricious," the Office of Advocacy's involvement during the period of comment on the regulatory proposal was influential in the court's decision. For example, the court noted that the Chief Counsel for Advocacy is the "watchdog of the RFA," and quoted excerpts from Advocacy's comments on the proposed rule as the court chastised NMFS for not complying with the RFA.

In February 1998, the court ruled that the Secretary was not arbitrary and capricious in his decision to reduce the quota. However, in determining whether NMFS complied with the RFA, the court found that the secretary's certification of "no significant economic impact" and the FRFA failed to satisfy the APA standards and RFA requirements. The court criticized the agency's economic analyses and failure to comply with the law. The court stated:

> NMFS prepared a FRFA lacking procedural or rational compliance with the requirements of the RFA. Section 604 requires that any FRFA contain 'a summary of the significant issues raised by 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.' . . . NMFS could not possibly have complied with § 604 by summarizing and considering comments on an IRFA that NMFS never prepared. NMFS's refusal to recognize the economic impacts of its regulations on small business also raises serious questions about its efforts to minimize those impacts through less drastic alternatives. . . . NMFS may not have rationally considered whether and how to minimize the 1997 quotas' economic impacts because the agency fundamentally misapprehended the unraveling economic effect of its regulations on small business.

The court remanded the agency's RFA determinations to the Secretary with instructions to undertake a rational analysis of the economic effects and potential alternatives. The court retained jurisdiction over the case to review the economic analysis. Because of the delicate status of the Atlantic sharks, the court ruled that the public interest requires maintenance of the 1997 Atlantic shark quotas pending remand and further review of the court.

On remand, the NMFS prepared a draft analysis and published it for public comment. After reviewing the draft analysis, the Office of Advocacy concluded that the analysis did not comply with the RFA. Specifically, Advocacy commented that the analysis lacked important substantive information about the economic impact of this rulemaking on small businesses. A major flaw in the analysis was that the agency did not use a consistent definition of the industry. Another major flaw was the fact that the analysis was based on gross revenues without considering the impact on profits. The agency also assumed a certain level of diversification that was not supported by information on the industry's structure. The Office of Advocacy's comment also addressed the agency's failure to present the economic information in a manner that could be understood by the public, perform an economic analysis of the alternatives, and address all of the concerns raised by the court.

The court issued another order in October 1998, critiquing the insufficiency of the court ordered economic analysis of the effects of the reduction in the shark quota submitted by NMFS. The court found, "the 1997 quota visited on shark fishermen a tangible and significant economic hardship." It stated that relying on the 2,000 plus permit holders as the operative universe of shark fishermen, when a smaller pool was more representative of the industry, enabled NMFS to

disperse arithmetically the statistical impact of the quotas on shark fishermen. The court also found that "NMFS inadequately considered, and perhaps overlooked altogether, feasible alternatives or adjustments to the 1997 quotas that may mitigate the quotas' pecuniary injury to the directed shark fisherman." In doing so, the court stated that "the defendant affords minimal treatment to more realistic and constructive alternatives." Therefore, the court appointed a "special master" pursuant to Rule 53 of the Federal Rules of Civil Procedure to assist the court in reviewing the NMFS' consideration of alternatives. The defendant objected to the special master referral, and requested the court to instead remand the matter again to NMFS for yet further economic analysis. The court denied this request, but, following subsequent requests from the parties, the court extended the stay of the special master proceedings through June 1999.

In June 1999, the plaintiffs filed a "Notice of Quota Reduction Contrary to Court Order," alerting the court that NMFS had promulgated new regulations, to become effective July 1, 1999, which substantially reduces the Atlantic shark quotas from operative 1997 levels and implements new, more restrictive fish management and counting methods.

The court then issued an order requiring the parties to show cause why "preventative relief and contempt sanctions (including injunctive relief and fines, if appropriate)" should not issue against the defendant agency for its "imminent violation" of the court's earlier orders requiring that the 1997 Atlantic shark quotas be maintained "pending remand and until further order of the Court." Following written responses, the court held a hearing on this new issue. The next day, on June 25, 1999, the plaintiffs filed a new lawsuit, challenging the newly issued regulations. This new lawsuit was consolidated with the instant matter.

On this new issue, NMFS took the position that the newly issued regulations are consistent with the court's previous orders because they representing merely a required step in the agency's ongoing obligation to manage and preserve fish stocks. The plaintiffs argued that the agency cannot effectuate these new regulations until the court relinquished jurisdiction over the ongoing remand proceedings and entered a final order. In its ruling on June 30, 1999, the court agreed with the plaintiffs that the defendant has violated both the spirit and letter of the court's earlier rulings in this case by implementing the new regulations. The court harshly criticized the agency's behavior and stated:

> Having observed NMFS's conduct in this litigation, as well as in North Carolina Fisheries Ass'n v. Daley, 27 F. Supp. 2d 650 (E.D. Va. 1998, Doumar, J.) and Atlantic Fish Spotters Ass'n v. Daley, 8 F. Supp. 2d 113 (D. Mass. 1998, Tauro, C.J.), I reluctantly conclude that in this instance NMFS is an agency willing to pursue its institutional objectives without acknowledging applicable Congressional and judicial limitations. The Court has found in this case that the agency illegally instituted the 1997 quotas by failing to minimize and account for the socio-economic impact of the quotas on small business, precisely in defiance of the Congressional mandate that NMFS wisely balance shark interests against human interests. Although the preservation of Atlantic shark species is a benevolent, laudatory goal, conservation does

> not justify government lawlessness. According to Congress, NMFS cannot act to preserve sharks heedless of the human costs. The Magnuson Act and the RFA place on the agency an affirmative and significant statutory obligation to protect the interests of fishers by pursuing feasible and less restrictive alternatives to monolithic regulatory measures that adversely and materially affect small business. See 16 U.S.C. § 1855(f) and 5 U.S.C. § 611(a)(1). From the time that the plaintiffs instituted this action on May 2, 1997, over two years ago, the Court has yet to find that NMFS complied with the law. Although empowered to regulate, NMFS is not empowered to regulate in any manner it chooses, regardless of cost, lawfully or unlawfully.

The court then issued an injunction to NMFS from enforcing the new regulations until the agency can establish bona fide compliance with the court's earlier orders. The court emphasized that the injunction is not "punishment for governmental misconduct." Rather, the court's "intention is merely to enforce the will of Congress as expressed in the RFA in which consideration of the economic damage to fishers became a condition precedent to lawful regulation of the fishery by NMFS."

On October 1, 1999, the special master submitted his findings and recommendations to the court, finding that NMFS' failure to collect meaningful economic data was arbitrary and capricious. Additionally, the special master found that NMFS' failure to give any consideration to alternatives to the quota was a wanton repudiation of the court's instruction on remand, and that the agency's conduct constituted bad faith and a lack of candor to the court. The agency filed objections to these findings. The court has scheduled a hearing for March 2, 2000, to determine whether the special master's findings should be adopted by the court.

APPENDIX C:

THE OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION

The Office of Advocacy of the U.S. Small Business Administration, established by Congress in 1976 under Public Law 94-305, serves a unique role in government. The Office is headed by a Chief Counsel for Advocacy, who is appointed from the private sector by the President and confirmed by the Senate. The Office's mission is to represent the views of small business before federal agencies and Congress. The Chief Counsel also is charged with monitoring federal agencies' compliance with the Regulatory Flexibility Act (RFA) and reporting annually to Congress on its implementation. In brief, the office's statutory responsibilities are to:

- examine the role of small business in the economy and its contributions to competition;
- evaluate the financial markets and the credit needs of small business;
- measure the cost of regulations on small businesses using economic research; and
- monitor federal agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

Under the Office of Advocacy's legislative mandate to represent small business views before the Congress and federal policymakers, the Chief Counsel may take (and at times has taken) positions contrary to those of the administration and Congress on matters affecting small businesses.

Three units within the Office of Advocacy carry out its functions: the Office of Interagency Affairs, the Office of Economic Research, and the Office of Information.

The Office of Interagency Affairs, staffed primarily by attorneys, is active in policy development. Its major responsibility is the review of regulatory proposals from all federal agencies. It also provides staff support to the Chief Counsel for work on SBREFA-mandated Small Business Advocacy Review Panels convened for EPA and OSHA regulations. The staff also reviews regulations for their impact on small business and submits formal comments to agencies about their proposed regulations, their economic analyses regarding the economic impacts of these proposed regulations on small business, and the agencies' compliance with the RFA.

In a court of appeals, the Chief Counsel has the statutory authority under the RFA to file an *amicus curiae* brief. Also pursuant to its statutory authority, the Office of Interagency Affairs prepares an annual report to Congress and the President on federal agencies' compliance with the RFA. In addition to reviewing regulatory proposals, the staff of the Office of Interagency Affairs develop policy proposals and comment on proposed legislation pending before the Congress.

The Office of Economic Research co-sponsors data collection by agencies such as the Bureau of the Census, the Federal Reserve Board, and the Internal Revenue Service on important small business topics including small-firm characteristics, minority- and women-owned businesses, and small business economic trends. Through the Office of Advocacy, government entities and the general public can access Census data for some 1,200 industries organized by four-digit standard industrial classification (SIC) codes and data for 900 industries on a state-by-state basis by two-digit SIC codes. Another resource made available by the Office of Economic Research is banking data that makes available, for the first time, comprehensive data on banks' lending to small businesses.

The Office of Economic Research also sponsors small business research on subjects such as acquisitions and mergers, competition, employment and training, franchising, regulations, energy, productivity, taxes, and women- and minority-owned businesses. Each year, the Office of Economic Research compiles economic data on small business and information on policy research that is published in *The State of Small Business: A Report of the President*.

As the outreach branch of the Office of Advocacy, the Office of Information publishes a monthly newsletter, *The Small Business Advocate*, disseminating it to approximately 10,000 individuals, academicians, trade associations, and others interested in small business issues. The Office of Information also edits and manages the publication of numerous Office of Advocacy documents such as: *The State of Small Business: A Report of the President*; *Catalog of Small Business Research*; annual implementation reports on the 1995 White House Conference on Small Business; *Small Business Economic Indicators*; and the *Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act*.

The Office of Advocacy engages in a wide range of other projects designed to encourage the growth of small businesses. The Office continues to oversee projects such as:

- the implementation of the recommendations of the 1995 White House Conference on Small Business;
- the initiation of an Internet-based investment service, called ACE-*Net*, that is designed to improve small business access to venture capital;
- the development of a model stock purchase agreement that will reduce the costs of negotiated agreements for equity investments in small businesses across state lines; and
- the establishment of a procurement system, called PRO-*Net*, an Internet-based resource that, among other things, makes available to government procurement offices and contractors information about women-owned firms and minority-owned firms that are part of the SBA's 8(a) program.

Additional information about the Office of Advocacy is available from: Office of Advocacy, U.S. Small Business Administration, 409 Third Street, S.W., Washington, D.C. 20416. Telephone (202) 205-6532; fax (202) 205-6928; Internet website: *www.sba.gov/ADVO/*.

APPENDIX D:

REGULATORY COMMENTS FILED BY THE OFFICE OF ADVOCACY DURING FISCAL YEAR 1999

The following 76 formal comments were submitted to various agencies and entities by the Office of Advocacy during Fiscal Year 1999. These documents in their entirety are available from Advocacy's Internet website at: **www.sba.gov/advo/laws/comments/**.

DATE	AGENCY	COMMENT SUBJECT
10/07/98	FCC	*Ex Parte* presentation in non-restricted proceedings, *In re* Access Charge Reform, CC Docket No. 96-262; and Truth-in-Billing and Billing Format, CC Docket No. 98-170.
10/14/98	FDA	Structure or function claims/statements made for dietary supplements, 63 Fed. Reg. 23,624 (April 29, 1998).
10/16/98	FCC	Reply comments on deployment of wireline services offering advanced telecommunications services, CC Docket No. 98-147.
10/26/98	FCC	Access charge reform, CC Docket No. 96-262; price cap performance review for local exchange carriers, CC Docket No. 94-1; Consumer Federation of America *et al*., petition for rulemaking, RM-9210; MCI Telecommunications Corp., emergency petition for prescription, CC Docket No. 97-250.
11/02/98	HCFA	Implementation of Balanced Budget Act of 1997 requirements relating to home medical equipment suppliers, inherent reasonableness and competitive bidding demonstration projects.
11/03/98	HUD	RFA Certification on the requirements for notification, evaluation and reduction of lead-based paint hazards in federally-owned residential property and housing receiving federal assistance, 63 Fed. Reg. 54,422 (October 9, 1998).
11/06/98	FCC	GTE Telephone Operating Companies (GTOC) Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79.

11/18/98	HCFA	Failure to comply with the RFA in promulgating the final rule on revisions to payment policies and adjustments to the relative units under the physician fee schedule for calendar year 1999, 63 Fed. Reg. 58,814 (November 2, 1998).
11/20/98	FCC	*Ex Parte* in non-restricted proceedings, *In re* federal-state joint board on universal service, CC Docket No. 96-45.
12/02/98	APHIS	Proposed rule for importation of orchids in growing media, Docket No. 98-035-163, Fed. Reg. 46,403 (September 1, 1998).
12/03/98	EPA	Reply to EPA's notice regarding a SBREFA panel for the national primary drinking water regulation for arsenic.
12/08/98	EPA	Comments on draft rule on persistent bioaccumalative toxics under the toxics release inventory reporting program.
12/14/98	FCC	Application for assignment of broadband PCS C and F block licenses to Cricket Holdings, Inc., a wholly-owned subsidiary of Leap Wireless International, Inc., FCC public notice DA 98-2319; AirGate Wireless, L.L.C., (FCC File No. 0000002035); Jacksonville Wireless, L.P. (FCC File No. 0000002167).
12/18/98	OMB	Comments on the paperwork impact on small businesses resulting from the bidding forms associated with HCFA's competitive bidding demonstration project.
12/23/98	OMB	Comments on the paperwork impact of HCFA's OASIS regulations, 62 Fed. Reg. 11,035 (March 10, 1997).
01/18/99	VA	Acquisition regulations on simplified acquisition procedures for health case resources, 63 Fed. Reg. 60,256 (November 9, 1998).
01/26/99	PWBA	Comments on the cost to small pension plans of changing appeals procedures for claims, proposed rules for administration and enforcement of claims procedure under ERISA, 63 Fed. Reg. 48,390 (September 9, 1998).
01/27/99	HCFA	Correction of errors in letter dated November 2, 1998, regarding Inherent Reasonableness and Competitive Bidding for Medical Equipment Suppliers.
01/27/99	OSHA	Response to OSHA's request for guidance on data submissions and lessons learned from the Safety and Heath Panel in preparation for convening a SBREFA panel on the Ergonomics standard.

01/28/99	FWS	Endangered and threatened wildlife and plants, proposed determination of critical habitat for the Huachuca Water Umbel, 63 Fed. Reg. 71,838; and endangered and threatened wildlife and plants, proposed determination of critical habitat for the Cactus Ferruginous Pygmy-Owl, 63 Fed. Reg. 71,820.
01/28/99	NMFS	Fisheries of the northeastern U.S., Amendment 7 to the Atlantic Sea Scallop Fishery Management Plan, 63 Fed. Reg. 70,093 (December 18, 1998).
02/01/99	NPS	Proposed rule to prohibit commercial fishing in nonwilderness waters of Glacier Bay National Park, Alaska, 62 Fed. Reg. 18,547.
02/01/99	OSHA	Ergonomics program rule, letter acknowledging receipt of OSHA's SBREFA panel notification letter.
02/10/99	IRS	Testimony of Russell Orban, Assistant Chief Counsel for Tax Policy, Office of Advocacy, before an IRS panel regarding the unrelated business income tax and the travel and tour industry, Section 513 CC:DOM:CORP:R (Reg-121268-96).
02/10/99	FCC	1998 biennial regulatory review for spectrum aggregation limits for wireless telecommunications carriers, WT Docket No. 98-205.
02/18/99	FCC	*Ex Parte* filing for subscriber list information, Section 222(e) of the Telecommunications Act of 1996, CC Docket No. 96-115.
02/19/99	FSIS	New policy statement on beef and E. coli 0157:H7 and impact on small entities, 64 Fed. Reg. 2803.
02/19/99	FDA	Small business impact relating to the international drug scheduling of Ephedrine, Dihyroetorphine, Remifentanil, and certain isomers, Docket No. 98N-0148, 64 Fed. Reg. 1629 (January 11, 1999).
03/05/99	HHS	Comments on the prospective payment system and inducement of Medicare Part B services by skilled nursing facilities.
03/10/99	WIPO	Testimony of Eric Menge, Assistant Chief Counsel for Telecommunications, Office of Advocacy, before WIPO regarding internet domain name projects.
03/11/99	MMS	Determination of need for the Royalties-in-Kind program.

03/17/99	FCC	Response to Leap Wireless International, Inc.'s March 5, 1999 modification of assignment application; assignment of F Block License from AirGates Wireless, L.L.C., to Cricket Holding, Inc., DA 98-2319 (FCC File No. 000002035); Leap Wireless International, Inc., Application for Auction number 22 (FCC File No. 0221346036).
03/19/99	WIPO	Comments regarding WIPO's internet domain name process.
03/22/99	FCC	*Ex Parte* comments on additional information regarding broadcast PCS spectrum included in the auction scheduled for March 23, 1999; petition for extraordinary relief regarding Gloria Borland Hawaii PCS, Inc.
03/24/99	BLM	Proposed rule on mining claims under general mining laws, surface management, 64 Fed. Reg. 6422 (February 9, 1999).
03/31/99	FPI	Competitive Impact Study, Federal Supply Code 2920, requesting the FPI to reconsider its proposal to increase its share of the federal market for engine electrical components.
04/23/99	EPA	Comments on the radon health risk reduction and cost analysis, 64 Fed. Reg. 9560 (February 26, 1999).
04/29/99	GAO	Comments on the draft of the GAO's report on uncertainties in analyses underlying the FDA's proposed regulation of ephedrine alkaloids in dietary supplements.
05/04/99	EPA	Response to the EPA's SBREFA panel notification letter on a rule regarding control of air pollution from new compression-ignition and spark-ignition recreational marine engines.
05/10/99	BLM	Further comments on proposed rules on mining claims under the general mining laws; surface management, 64 Fed. Reg. 6422 (February 9, 1999).
05/13/99	HCFA	Comment on civil money penalties for nursing homes and change in notice requirements, 64 Fed. Reg. 13,354 (March 18, 1999).
05/20/99	ICANN	Final report on the internet domain name dispute resolution process.
05/21/99	Senate	Response to Senator Michael B. Enzi's request for Advocacy's views on whether the RFA should be amended to include the Mine Safety and Health Administration in the list of agencies subject to the SBREFA panel process.

05/25/99	OMB	New draft proposal for the reporting of lead under the Toxic Release Inventory Program as a PBT chemical.
05/27/99	FCC	Initial and final regulatory flexibility analyses for *In re* Deployment of Wireline Services Offering Advanced Telecommunications Capability CC Docket No. 98-147; and *In re* Inter-Carrier Compensation for ISP.
05/27/99	HHS	Revising HHS' Freedom of Information Act regulations and implementation of the Electronic Freedom of Information Act amendments, 64 Fed. Reg. 14,668 (March 26, 1999).
05/27/99	EPA OMB	First comment to EPA and OMB on the Inventory Update Rule under the Toxic Substances Control Act draft proposal.
05/28/99	EPA OMB	Second comment to EPA and OMB on the Inventory Update Rule under the Toxic Substances Control Act draft proposal.
06/02/99	EPA	Environmental significance of new draft proposal for the reporting of lead under the Toxic Release Inventory Program as a PBT chemical.
06/04/99	BLM	Onshore oil and gas leasing and operations, 63 Fed. Reg. 66,840 (December 3, 1998).
06/08/99	FCC	*Ex Parte* presentation in restricted proceeding, *In re* Access Charge Reform, CC Docket No. 96-262.
06/14/99	FCC	*Ex Parte* presentation in a non-restricted proceeding, initial regulatory flexibility analysis of *In re* Inter-Carrier Compensation for ISP, CC Docket No. 99-68, 64 Fed. Reg. 14,203 (March 24, 1999).
06/16/99	FTC	Proposed rule on Children's Online Privacy Protection Act, 64 Fed. Reg., 22,750 (April 27, 1999).
06/18/99	RSPA	DOT, RSPA's Hazardous Materials Transportation Registration and Fee Assessment Program, Docket No. 99-5137 (Hazard Material 208C), 64 Fed. Reg. 18,786 (April 15, 1999).
06/25/99	USPS	Final rule on delivery of mail to commercial mail receiving agencies, 64 Fed. Reg. 14,385 (March 25, 1999).
07/01/99	FAA	Inadequate RFA certification of its proposed Parachute Operations rulemaking, Docket No. FAA-99-5483, 64 Fed. Reg. 18,302 (April 13, 1999).

07/22/99	FCC	Proposed rule on deployment of wireline services offering advanced telecommunications capability, CC Docket No. 98-174, 64 Fed. Reg. 23,229 (April 30, 1999).
07/26/99	FCC	Proposed rule on Truth-in-Billing and Billing Format, CC Docket No. 98-170, 64 Fed. Reg. 34,499 (June 25, 1999) and 64 Fed. Reg. 34,488 (June 25, 1999).
07/29/99	HCFA	Prospective payment system for hospital outpatient services and its impact on small and rural hospitals, 63 Fed. Reg. 47,552 (September 8, 1998).
08/02/99	FCC	Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as amended, promotion of spectrum efficient technologies on certain Part 90 frequencies and establishment of public service radio pool in the private mobile frequencies below 800 MHz, CC Docket No. 99-87, 64 Fed. Reg. 23,571 (May 3, 1999).
08/18/99	FCC	Proposed rule on Calling Party Pays Service Offering in the commercial mobile radio services, WT Docket No. 97-207, 64 Fed. Reg. 38,396 (July 16, 1999).
08/25/99	ICANN	Response to the ICANN's at-large membership proposal.
08/25/99	ICANN	Response to ICANN's proposal for a board of independent review.
08/25/99	ICANN	DNSO Working Group A, Final Report to the ICANN Board.
08/27/99	FNS	Proposed rule on food stamp program, revisions to the retail food store definition and program authorization guidance, 64 Fed. Reg. 35,082 (June 30, 1999).
08/27/99	FNS	Proposed rule on special supplemental nutrition program for women, infants and children; food delivery systems, 64 Fed. Reg. 32,308 (June 16, 1999).
08/27/99	FMC	Reply to New England Fishery Management Council’s request for proposals for the annual framework adjustment for the Atlantic Sea Scallop.
08/30/99	OMB	Notice of public information collection submitted to OMB for review and approval of the Truth-in-Billing and Billing Format report and order, OMB Control Number 3060-0854.

09/02/99	FCC	Proposed rule on promotion of competitive networks in local telecommunications markets, WT Docket No. 99-217, 64 Fed. Reg. 41,883 (August 2, 1999).
09/03/99	FCC	Proposed rule on Truth-in-Billing and Billing Format, CC Docket No. 98-170.
09/09/99	FDA	Final rule on effective date of requirement for pre-market approval of the silicone inflatable breast prosthesis, 64 Fed. Reg. 45,155 (August 19, 1999).
09/17/99	NMFS	Proposed rule to reduce the catch of spiny dogfish and make other changes that would significantly impact spiny dogfish harvesters and processors, 64 Fed. Reg. 42,071 (August 3, 1999).
09/20/99	EPA	Reply to EPA's notice regarding a SBREFA panel for the proposed heavy-duty engine standards and diesel fuel sulfur control requirements to control air pollution from new motor vehicle engines.
09/21/99	EPA	Reply to EPA's notice regarding a SBREFA panel for proposed concentrated animal feeding operation regulations; national pollutant discharge elimination system and effluent limitation guidelines regulations.
09/23/99	EPA	Reply to EPA's notice regarding a SBREFA panel for the regulation of lead based-paint renovation and repair activities.
09/23/99	EPA	Reply to EPA's notice regarding a SBREFA panel for effluent limitations guidelines for metals products and machinery industry.

APPENDIX E:

RFA-RELATED TESTIMONY PRESENTED BY THE OFFICE OF ADVOCACY DURING FISCAL YEAR 1999

Testimony of

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

before the
Subcommittee on Fisheries, Conservation, Wildlife and Oceans
Committee on Resources
United States House Of Representatives

April 29, 1999

Good morning, Mr. Chairman and Members of the Subcommittee on Fisheries Conservation, Wildlife and Oceans. My name is Jere W. Glover and I am Chief Counsel for the Office of Advocacy at the U.S. Small Business Administration. Thank you for inviting me to testify today on the impact of the Regulatory Flexibility Act of 1980 on fisheries conservation and management and how the RFA has been implemented the National Marine Fisheries Service (NMFS). At the outset, let me state that the views expressed here are my own and do not necessarily reflect the views of the SBA Administrator or the Administration.

Before I address the issues raised in your letter of invitation, it might be helpful to review the mission of the Office of Advocacy. The Office is a creature of Congress. It was established by Congress in 1976 and given the statutory mission to represent the views of small business before federal agencies and Congress.[1] Some of the explicit mandates of the Office include conducting research and reporting on the contribution made by small business to the economy. Some of our most recent studies include Small Farm Lending in the United States; Small Farm Lending by Bank Holding Companies; Minorities in Business; Women in Business; and Federal Procurement from Small Firms. We are very excited about a new database we have created at the Bureau of the Census that will allow us to trace firms through time so that we can accurately measure job generation by firm size for all sectors of the economy. For the first time, we are adding Community Reinvestment Act (CRA) data to our banking studies so that we can more

[1] Public Law 94-305 established the Office of Advocacy as an independent office charged with representing the views and interests of small businesses before the federal government. The Chief Counsel is appointed by the President and confirmed by the Senate.

accurately measure small business lending in each state. Data and research are the forces through which we can identify the need for policy changes, barriers to small business growth and related problems which policy makers can address, either through legislation or regulatory development.

As Chief Counsel of Advocacy, I am also charged with monitoring and reporting annually to Congress on federal agency compliance with the Regulatory Flexibility Act (RFA),[2] as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).[3] This will be the focus of my remarks since I do not have the expertise to discuss the impact of the RFA on fisheries conservation and management. NMFS's mission, to preserve the fish stock in order to ensure an adequate fish supply for food and other purposes, and, in the long run, the business of fishing, is extremely important – but admittedly complex. How effective NMFS is in carrying out its fish conservation mission is for others to address, those who have more technical knowledge about the science of the fisheries. What I can discuss is how well NMFS is complying with the RFA, whether it is generating the kind of economic data needed by policymakers deliberating conservation options, and whether the fishing industry is playing a meaningful role in the regulatory process.

Before discussing the implementation of the RFA by NMFS, I would like to review briefly the policy underpinnings of the Regulatory Flexibility Act. In adopting the RFA in 1980, Congress made several findings: (1) uniform federal regulations produced a disproportionate adverse economic hardship on small entities; (2) regulations that were designed for large entities were being applied to small entities, even though the problems were not created by small entities; (3) the failure of government agencies to recognize differences in the scale and resources of regulated entities adversely affected competition in the marketplace, discouraged innovation, restricted improvements in productivity, and discouraged entrepreneurship.[4] Congress also found that treating all entities equally led to an inefficient use of regulatory agency resources, enforcement problems, and actions that were inconsistent with legislative intent. Congress determined that, in the rulemaking process, agencies should be required to solicit comments from small entities; examine the impact of the proposed and existing rules on small entities; examine regulatory alternatives that achieve the same purposes while minimizing small business impacts; and review the continued need for existing rules.

The RFA addresses these congressional concerns by mandating that regulatory agencies consider the potential impact of their regulations on small entities. More than mere consideration of potential impacts, the RFA mandates that agencies open their deliberations to public scrutiny, requiring them to justify their choice of regulation against the backdrop of economic information about the industry being regulated and the estimated effectiveness of the rule in accomplishing its stated public policy objective. Let it be clear that the RFA does not require special treatment

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[2] 5 U.S.C. § 601 *et seq.*

[3] Pub. L. No. 104-121, 110 Stat. 857 (codified at 5 U.S.C. § 601 *et seq.*).

[4] *See* Pub. L. No. 96-354, Sec. 2(a), 94 Stat. 1164 (FINDINGS AND PURPOSES) (1980).

for small business. It merely requires agencies to ensure a level playing field for small business, consistent with their statutory mission.

Many agencies, initially, simply ignored the RFA by relying on a provision of the law that allows agencies to certify that a regulatory proposal will not have a significant economic impact on a substantial number of small entities. A requirement that the certification be substantiated was ignored. Others performed inadequate regulatory flexibility analyses of the small entity impacts, thus depriving the public of the opportunity to react to meaningful analyses of alternatives.

Since agency compliance with the RFA was not judicially reviewable, agencies could not be held accountable for their noncompliance with the statute. Judicial review was a statutory modification long sought by small business, as recently as the 1995 White House Conference on Small Business.

Congress remedied this deficiency and other ambiguities in the law by amending the RFA in 1996 with enactment of the Small Business Regulatory Enforcement Fairness Act (SBREFA). The 1996 amendments strengthened the requirements of the RFA as to what should be included in a Final Regulatory Flexibility Analysis (FRFA) and what was needed to justify a certification. Most significantly, SBREFA amended the law to allow the courts to review agency compliance with the RFA in appeals brought by small entities from agency final actions.

Specific provisions of the RFA, as amended, are relevant to our discussions today. Agencies are required to prepare and publish an initial regulatory flexibility analysis and a final regulatory flexibility analysis for each rule that will have a significant economic impact on a substantial number of small entities. The RFA exempts an agency from these requirements if the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."

When an agency publishes a regulatory proposal, the RFA requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis" which will "describe the impact of the proposed rule on small entities." If the proposed rule is expected to have a significant economic impact on a substantial number of small businesses, an initial regulatory flexibility analysis (IRFA) must be prepared and published with the proposed rule. The IRFA is required in order to ensure that the agency has considered all reasonable regulatory alternatives that would minimize the rule's economic impact on affected small entities. In accordance with Section 603(b) of the RFA, each IRFA must address the reasons that an agency is considering the action; the objectives and legal basis of the rule; the type and number of small entities to which the rule will apply; the projected reporting, record keeping, and other compliance requirements of the proposed rule; and all federal rules that may duplicate, overlap or conflict with the proposed rule. If the proposed rule is not expected to have a significant economic impact on a substantial number of small entities, an agency may issue a certification to that effect but must provide the factual basis that justifies the certification.

With that legal detail as background, I now come to the issue before us, namely, how well does NMFS comply with the law.

Throughout the years, the Office of Advocacy has monitored the activities of NMFS since the various sectors of the fishing industry are dominated by small businesses. Our statistics show that 95 per cent of commercial fishing businesses are small.[5] Of equal interest to policy makers is the fact that NMFS regulations affect not only the business of fishing, but also the communities that rely heavily on the fishing industry. Entire communities are known to be dependent economically on the industry.

NMFS regularly provides the Office of Advocacy with copies of its proposed regulations, as well as environmental and economic impact information for the proposals. In the last three years, Advocacy has sent several letters to NMFS regarding the need to improve compliance with the RFA. The letters addressed various issues such as the inadequacy of justification for a certification, NMFS's failure to include sufficient information in a summary of an IRFA to facilitate public comment, or the failure to provide details discussion on alternative regulatory options it considered. The major problems we have encountered with NMFS are the data on which NMFS relies; whether NMFS has made an objective analysis of the anticipated impact; whether the information provided is the best information available; whether the information is analyzed properly; whether the agency has properly identified the segment of the industry that will be affected; and whether the agency has truly considered workable alternatives to the proposed action.

It is important to keep in mind that it is not Advocacy's mission to stop regulation – only unwarranted regulation that adversely affects small business and to which there are viable public policy alternatives. The Office of Advocacy has discussed its concerns with NMFS and NMFS has expressed a willingness to work with the Office of Advocacy to assist in furthering NMFS's efforts to comply with the RFA. The Office of Advocacy has also provided NMFS with specific examples of what we can euphemistically call "red flag" issues that need to be addressed in any notice of proposed rulemaking.[6] The Office has also provided significant guidance in the kind of regulatory analysis that, in our view, is necessary for compliance with the RFA. In response, NMFS recently hired an economist specifically to address the agency's RFA compliance.

Whenever the Office of Advocacy contacts NMFS about problems in the RFA portion of a particular rulemaking or an NMFS policy, NMFS makes an effort to address Advocacy's concerns. For example, Advocacy has contended that regulatory impact statement on profit data is a better guideline for determining economic impact than merely impacts on gross revenues. This is particularly important in an industry where profit margins are narrow. Advocacy has discussed this particular issue specifically with NMFS. It is our understanding that NMFS is considering whether this is doable, considering data constraints, and whether those constraints can be overcome.

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[5] *The Number and Percent of Firms, Establishments, Employment, Annual Payroll, and Estimate Receipts by Industry and Employment Size*, U.S. Census Bureau, Dep't Comm. (1995) (prepared under contract by the Office of Advocacy, Small Business Administration).

[6] The Office of Advocacy has informed NMFS that the three areas that are definite "red flags" are the agency's failure to recognize the existence of a particular segment of the industry, the failure to acknowledge a "significant economic impact" when the agency is proposing a drastic action, and the failure to consider alternatives.

Although the Office of Advocacy is pleased with the cooperative efforts that NMFS is making towards regulatory flexibility compliance, Advocacy remains concerned about the validity of issues brought to its attention in February of this year when the Office of Advocacy held a roundtable discussion with members of the fishing industry. The Office of Advocacy asked the participants to state their primary concerns about NMFS and the RFA. During the "round robin" discussion, the participants alleged the following:

1. NMFS does not consider viable alternatives to regulations suggested by the industry and other industry experts;
2. NMFS does not abide by the Regulatory Flexibility Act or consider the true economics of the industry in formulating regulations;
3. NMFS does not consider the cumulative impacts of regulations;
4. NMFS has politicized the process (*e.g.* preference to recreational fishing);
5. The fishery councils are imposing regulations without considering the comments of the industry;
6. NMFS does not follow economically sound practices with regards to bycatch; and
7. NMFS does not use the best available science when formulating its regulations.

The discussion was not designed to elicit factually substantiated information. It also should be emphasized that Advocacy is not in a position to judge the validity or objectivity of the concerns articulated at the meeting. We recognize that in fiercely competitive industries a strong aversion to any regulation is likely to dominate a large segment of the regulated population. Segments of the fishing industry may very likely fall into that category. Nevertheless, it would be valuable to research the decisions of NMFS to see if in fact it does not alter its regulations in response to reasonable suggestions from the industry and other experts and I so advised the group. Without documentation, their allegations might continue to be disregarded or not given any credence. The industry spokespersons attending the meeting indicated that they have hired attorneys, scientists, and economists to prepare reports to rebut the data and analyses made by NMFS regarding the fishing stock, industry practices, economic impact of proposed regulations, and viable alternatives, which, when provided to NMFS, they claimed were ignored. Whether or not this is true, we have no way of knowing without some independent research.

Discussions Advocacy has had with individuals knowledgeable in the science of conserving fish stock have persuaded us that conservation predictions are difficult. Thus, the task facing NMFS is not problem-free and is clearly susceptible to significant debate. However, Advocacy remains concerned that NMFS, at least in its public documents, appears to give exclusive priority to one of its statutory goals, that of conserving the fish stock, to the exclusion of considering the short and long term impact on the industry of its cuts in quotas. There does not appear to be sufficient recognition that the industry has a major interest in remaining viable and that this interest can be used to achieve NMFS' objectives. When NMFS does not provide sufficient analyses in justification for its decisions, nor any comprehensive discussion of alternatives suggested by the industry that it feels will equally preserve the stock while minimizing the adverse impact on small businesses; it is breaking faith with an industry it is obligated to preserve. Regulating a highly competitive industry is not an easy task. It takes special effort to form a partnership with that industry to achieve consensus on what is in the best interests of achieving what appears at the moment to be – but should not be – irreconcilable conflicts in public policy objectives.

Advocacy will continue to hold roundtable meetings with the industry to which NMFS will be invited to determine where we can establish consensus on resolution of the more contentious issues.

In closing it is important to underscore the fact that Advocacy is pleased with NMFS' willingness to work with us and with the steps it has taken to work toward greater compliance with the RFA. Their efforts are in good faith and we applaud them for what they have done thus far. The steps taken by NMFS are all in the right direction.

Testimony of

Russell Orban
Assistant Chief Counsel for Tax Policy
Office of Advocacy, U.S. Small Business Administration

before the
Internal Revenue Service Panel

February 10, 1999

Thank you for this opportunity to testify before you regarding the proposed regulations that seek to clarify the current state of the law regarding the tax treatment of income that is generated by travel and tour activities of tax exempt organizations. These regulations would answer the question what activities are substantially related to the purpose for which its tax exempt status was granted to an organization pursuant to Internal Revenue Code (IRC) § 501. Section 513(a) sets out that an unrelated trade or business is any activity carried on for the production of income which is not substantially related to the performance of the organization's exempt purpose. We commend the Internal Revenue Service for starting this process and we are convinced that it can produce a positive result.

My name is Russell Orban. I am appearing on behalf of the Office of Advocacy of the Small Business Administration. My comments today are made pursuant to notice received under section 7805(f) of the Internal Revenue Code which provides the Office of Advocacy with the statutory authority to comment on proposed regulations[7] and also under general authority of the Office of Advocacy to monitor Agency compliance with the Regulatory Flexibility Act (RFA)[8] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA).[9] The Office was created in 1976 to represent the views and interests of small business in federal

[7] 26 U.S.C § 7805(f).

[8] 5 U.S.C. Chapter 6.

[9] Pub. L. No. 104-121, 110 Stat. 857 (codified at 5 U.S.C. § 601 *et seq.*).

policymaking activities. The Chief Counsel's Office participates in rulemaking when he deems it necessary to ensure proper representation of small business interests. The views expressed are solely those of the Office of Advocacy and do not necessarily reflect the views of the U.S. Small Business Administration or any other government agency.

The Problem with Unrelated Business Income

It has been our longstanding position that the engagement of tax exempt organizations or government agencies in profit-making activities should always be reviewed very carefully and with some healthy skepticism. Competition by exempt non-profits with for-profit business is essentially government subsidized competition with the private sector. To the extent that the federal government subsidizes nonprofit organization activity through the income tax-exemption, through lower postal rates or though other legal exemptions or preferences, nonprofit commercial activity can be carried on with a lower cost than the for-profit sector. This creates a competitive advantage and contributes to the overall feeling in the small business community that the system which allows such activity is unfair.

The Internal Revenue Code is the principal mechanism for balancing the need to encourage nonprofit services with the advantages of the exempt status. The Internal Revenue Service plays a pivotal role in making the system work. To work properly, the law and implementing regulations must be clear and uniformly enforced. Our office has concluded that the current law and regulations do not live up to this standard. We have been joined in this conclusion by the non-profit community, which seeks to avoid costly audits and uncertainty; by the IRS and the Treasury Department which has testified about the need to clarify the issue and the difficulty of applying the current standard, by Congress and finally, time and time again by the small business community. We are appreciative that the IRS long recognized the problems caused by the current situation and seek to address the issue directly.

Our Office became aware of the problem shortly after we created over 20 years ago. The first Task Force Study we ever commissioned addressed government sponsored competition for small businesses, including competition from exempt non-profits. In 1980 the first White House Conference on Small Business brought thousands of businesses together from around the country to recommend a small business agenda for the federal government. They recommended action be taken to protect taxpaying small businesses from government subsidized, unfair competition. A similar recommendation was made at the 1986 White House Conference on Small Business. The 1995 White House Conference on Small Business brought 2000 small business owners to Washington DC, each either appointed by their Congressman or elected by over 25,000 small business owners participating in preliminary conferences in every state in the union. One of their top recommendations was a resolution calling on the government to prohibit tax-exempt organizations from engaging in direct competition with taxpaying small businesses in profit making activities.

The Scope of the Problem

Every year, the problem gets more serious. The growth of tax-exempt competition has exploded in the service oriented nonprofit sector. The number of active 501(c)(3) non-profits, the

category of non-profit most likely to compete in the travel and tours area had ballooned to over 579,384 in 1994. Again, these are just the organizations that are required to file a report. In 1994, the latest year for which we have data, the total revenue for most 501(c)(3) organizations (excluding private foundations and most religious organizations and again, reflecting only those required to report) was $589 billion or about an 8.5 percent slice of our gross domestic product. Of this, program services activities, that is non-donative activities including related and unrelated business income, represented more than 70 per cent of the total revenue for them. These organizations are substantial, well run businesses. The record shows that there has been a steady decline in the reliance on traditional donative sources for funding. In 1946 exempt charitable organizations received 41 percent of their support from dues, assessments, private contributions and government grants. By 1975 it was down to 29 percent; 1983 was 22 percent and 12 percent in 1994.

And for the most part, running a exempt non-profit organization is BIG business. These organizations held a trillion dollars in assets in 1994 and we are confident they have grown dramatically during the recent prolonged business boom. The size of these organizations gives small businesses some idea of the size of the problem they face. For example, the top 5 percent of these organizations (those with assets of $10 million or more) hold 87 percent of the tax exempt organization's revenues assets and produce 80 percent of the revenues. The top 20 percent (organizations with over $1 million in assets) hold 97 percent of the assets and take in 94% of the revenue. These are very large operations indeed and are skilled at marketing, sales, management, quality control and have access to some of the best lawyers, accountants and consultants. They are formidable competitors in any arena. So when these groups, including some you will hear from today, such as educational institutions or museums or scientific trek conductors decide they want to provide tours to their target markets, it has serious consequences for small business.

No discussion of statistics would be complete, however, without pointing out the need for more. The Statistics on Income group does a marvelous job putting out a wealth of information as do many other sources. More information would be welcome, however. For example, in SOI's 1994 analysis of non-profits, the total revenue listing for the "education" NTEE category was $112 billion. That is the category where one is likely to find all college revenues and college backed tours; but the figure seemed low to us. The footnote explains that the figure does not include state and local run colleges and universities. I get travel brochures from my alma mater monthly and it turns out those are not even included.

Another problem is trying to find out specific information from IRS Form 990. I am specifically referring to Part VII, "Analysis of Income-Producing Activities" The form is set up in such a way that no business code is attached to "related or exempt function income." The box is there, but it is tied to another areas. A compilation of that information would have helped me to know how much money is going to exempt nonprofits for tour and travel related activities that those organization categorize as exempt because it is related. It is simply a matter of taking the "a" box out from under the label. It is a small point, but it would provide a better base on which to make policy decisions.

The Problem We Face Today

The Unrelated Business Income Tax (UBIT) was designed to require taxation for commercial activities undertaken by tax-exempts outside their recognized activities. Small businesses, unsubsidized by tax breaks, do not view the current system as a fair one. The Department of the Treasury in testimony before Congress, has expressed this same concern:

> Limits on the scope of such tax exemption are appropriate and necessary. . . . The role of the . . . not-for-profit sector should similarly be restricted to that of supplementing, and not supplanting, the activities of for-profit businesses.[10]

The crux of the problem that has generated these complaints is the inadequacy of the UBIT to spell out precisely what is and is not taxable. More specifically, the difficulty is in determining what types of activities are "substantially related" and therefore exempt. As we made clear in our letter, the lack of useful guidance to clarify the gray areas where most nonprofit travel and tour activities occur, the lack of objective standards, the shear number of nonprofits and their increasing emphasis on commercial activity, have fueled the debate. Unfortunately, small travel and tour providers are concerned that the absence of meaningful regulations laying out the parameters of the "substantially related test" allow tax-exempt organizations to compete freely against small businesses but without the same tax load.

In this regard, a hearing and further outreach and discussion with all parties offers the Service an opportunity discuss other options. The soft shoulders of the "substantially related" test make doing business uncertain for the small firms that complain about unfair competition, for the Service which must enforce the law and even for the nonprofits which must comply with the law.

We are, therefore, pleased that the Service has agreed to address this issue through a proposed regulation. However, we share the view of many commentators that any proposed rule should lay out more solid ground-rules. The proposed rule iterates current technical advise memoranda and private letter rulings without listing factors that lead to taxation or documentation that tax-exempts should provide to justify the exemption of income from their travel tour program.

Applicability of the Regulatory Flexibility Act

The "Special Analyses" section of the proposed rule states as follows:

> It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S. C. chapter 6) does not apply.

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[10] *Hearings before the Subcomm. on Oversight, House Comm. on Ways & Means*, (June 22, 1987).

Information Collection Requirement

The Office of Advocacy believes that the proposed regulations do impose a collection of information requirement on small entities. The preamble says:

> In particular, because the IRS relies heavily on review of records to determine whether an organization's trade or business activities further an exempt purpose, comments are requested on whether the IRS should specify the types of records organizations should keep to establish the activities purpose.

This statement puts organizations on notice that they are going to have to have sufficient records to satisfy the facts and circumstances test that is proposed. It also invites comments as to whether it should specify the types of records it should require. Even if the Service decides that the proposed rule is interpretative, a classification we feel is debatable, the RFA as amended by SBREFA provides that an analysis still should be done "to the extent that such interpretative rules provide a collection of information requirement."[11] "Collection of information" is defined within the title to include "recordkeeping requirements," which are defined as a "requirements imposed by an agency on persons to maintain specified records."[12] As such, SBREFA requires the burden on small entities be analyzed with an opportunity for the public to comment on the analysis.

Legislative Rule vs. Interpretative Rule.

In order to get to an examination of whether a proposed regulation *requires* a collection of information, the service must first have determined that the rule is interpretative rather than legislative and therefore Section 553(b) of the Administrative Procedures Act does not apply. We think there is at least a colorable case that the proposal is legislative.

A "rule" that is subject to the RFA is any rule "for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of the APA or any other law."[13] Section 553(b) of the APA provides, "Except when notice or hearing is required by statute, this subsection does not apply—(A) to interpretative rules . . ." The Service has steadfastly maintained over the years that the vast majority of its rules are interpretative rules and therefore not subject to the APA or the RFA.

The distinction between legislative and interpretative is important in this case because it is necessary for the Service to first make a decision that a proposed rule is interpretative and therefore not subject to "notice and comment" rulemaking before it can claim exemption from

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[11] 5 U.S.C. § 603(a).

[12] 5 U.S.C. § 601(7)(A)(I) and (8).

[13] 5 U.S.C. § 601 2(b).

complying with the RFA based on its assertion that no information collection requirement is imposed on small entities.

Generally, a determination whether a rule is "legislative" and, therefore, subject in all cases to the RFA, or "interpretative" and, therefore, not subject to the RFA unless there is an information collection requirement, has rested on whether the rule is the "product of an exercise of delegated legislative power to make law through rules (and therefore a legislative rule),[14] the degree of discretion left to the IRS to fashion a rule and the scope of the rule that was fashioned.[15] In the present case, the IRS is delineating specific facts and circumstances that it maintains will satisfy the law. We contend that it is within their discretion to delineate such facts and that this might be enough to require a regulatory flexibility analysis.

Recommendations

In a letter on June 27, 1996, the Office of Advocacy requested Assistant Secretary Lubick to place on the Department of Treasury business plan a rulemaking to clarify the issue. Although we are gratified that the IRS took action on the rule, judging by the comments that have been filed, it is clear that there are still many areas that need to be addressed.

This hearing was an excellent first step. The IRS should go further and analyze alternative proposals that provide more guidance to non-profits and small businesses alike. Most of the small business comments have asked that the rulemaking be expanded, or withdrawn and re-proposed in a form that covers the needs of the travel and tour industry adequately. Our Office supported the idea of having a hearing and giving all parties a chance to be heard. The hearing provides a full airing for alternatives which then can be analyzed and discussed by the service. This would carry out the intent of the Regulatory Flexibility Act which would help this promulgation process.

Additionally, we would like to see Form 990 improved by adding a requirement to specify the NTEE category even if an exemption is claimed for a related business; and more reporting of the revenues of all 501(c)(3) organizations.

The rule itself should go into more detail rather than simply restating clear-cut examples. Most of the examples tell us very little about the real world of travel and tour offerings. Listing a series of factors the IRS will consider would at least make sure everyone played by the same rules. Small businesses should also have a clear avenue to bring offenders to the Service's attention.

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[14] Kenneth Culp Davis, *Administrative Law Treatise*, 1979, at 36.

[15] According to the IRS, the difference between legislative and interpretative is "primarily the degree of discretion that we have in applying the rules. In other words, if the statute is not specific but says 'this is the objective we want to achieve and you [IRS] write the rules to achieve it' we regard those as legislative; but when they say 'these are the rules,' obviously then they are interpretative." Implementation of the Regulatory Flexibility Act: Hearings Before the Subcomm. on Special Small Business Problems, House Comm. on Small Business, 99th Cong., 2d Sess. 70 (1986) (testimony of Roscoe Egger, Commissioner, Internal Revenue Service).

The rule should set out plainly the types of record that need to be kept to qualify. We feel that if a clear standard is set, exempt non-profits will make every effort to comply.

Thank you for this opportunity to testify.

Testimony of

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submitted to the
World Intellectual Property Organization

March 10, 1999

Good afternoon. My name is Eric Menge, and I am Assistant Chief Counsel for Telecommunications at the Office of Advocacy, U.S. Small Business Administration. I thank you for this opportunity to speak to you regarding the Interim Report of the World Intellectual Property Organization Internet Domain Name Process.

Congress established the Office of Advocacy in 1976 to represent the views and interests of small business within the U.S. federal government. Its statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, developing proposals for changes in agencies' policies, and communicating these proposals to the agencies. Advocacy is greatly concerned that the proposals made in the Interim Report are overbroad and would have an undue detrimental effect on small businesses who are not infringing on trademark rights. In particular, Advocacy believes that the alternative dispute resolution process proposed would provide large corporations with deep pockets the ability to unjustly expand their trademark protections beyond the rights accorded by law by leveraging the expensive and extensive arbitration process proposed in the Interim Report. Furthermore, Advocacy is concerned that the notice of WIPO's proceeding was insufficient to provide small business an opportunity to comment on this far-reaching and important subject.

The Interim Report Recommendations Are Overbroad

The WIPO Internet Domain Name Process was initiated in response to the White Paper published by the U.S. Department of Commerce, which asked for WIPO to: (1) develop recommendations for a uniform approach to resolving trademark/domain name disputes involving cyberpiracy, (2) recommend a process for protecting famous trademarks in the generic top level domains, and (3) evaluate the effects of adding new general top level domains and related dispute resolution procedures on trademark and intellectual property holders.

The Office of Advocacy does not support cybersquatters who register domain names solely to extort payment from trademark holders. However, Advocacy believes that any effort made to counter cybersquatting should be narrowly tailored in such a fashion to curb this abuse without infringing on the rights of legitimate domain-name registrants. After reading the Interim Report, Advocacy believes the alternative dispute resolution process is not narrowly tailored. Instead, it is overbroad and raises the possibility of First Amendment violations, as it acts as a prior restraint. Any business must think twice about using a domain-name based off of a non-trademark corporate identity.

The Interim Report Recommendation Would Detrimentally Impact the Economy

Advocacy also believes that the alternative dispute resolution procedure would have a significant economic impact on small businesses who are not infringing on a trademark protections.
In 1998, there were 23 million small businesses in the United States, who represent more than 99 percent of all employers. Small businesses employ 52 percent of private workers and employ 38 percent of private workers in high-tech occupations. Virtually all of the net new jobs in the United States were provided by small businesses. Small business is the engine that drives the U.S. economy.

And small business uses the Internet. As of November 1998, 41 percent of small and mid-sized businesses have a Web site, 22 percent of small and mid-sized businesses are using the Internet to sell goods and services, and 18 percent are using the Internet to purchase goods and services for their firms or to share data with suppliers and customers. Therefore, a policy that would detrimentally affect them would undermine the goal of increasing Internet usage and encouraging e-commerce.

Five of the provisions in the Interim Report would have a significant economic and legal impact on small businesses.

1. The alternative dispute resolution forces the registrant to agree to jurisdiction in many places including foreign nations. As written, the registrant can not only be sued in its home country, but also in any country that has a registration authority.
2. The lack of a predictable legal scheme in arbitration will drive up costs. Arbiters are to "make reference" to the law that a national court would use. Therefore, the registrant must be familiar not only with the intellectual property laws of its own nation but those of other nations.
3. If a challenger to a domain name loses, its ability to sue in court is preserved. This would effectively add a layer of litigation, extending the proceedings and making them more costly and intimidating for small businesses.
4. The arbiter has the ability to allocate costs of the proceeding. If the arbiter decides that the registrant has violated the trademark holder's rights, the registrant is responsible for paying all the arbitration fees. Even if unlikely, the mere possibility would cause grave concern to small businesses who do not have deep pockets.
5. If the registrant loses at arbitration, the transfer or cancellation of the domain name is effective immediately. The losing-registrant must get a stay from a national court

which has jurisdiction over the winning party, and the losing-registrant now has the burden of proof.

Practical Effect on Small Business

Advocacy believes that most domain name disputes will involve large companies, who hold a trademark, challenging small companies and individuals, who do not, for the right to a domain name. Advocacy believes this will be the case for several reasons. First, most likely only the large companies have the financial and legal resources to initiate litigation or an arbitration process. Second, while many small companies do hold trademarks, most do not. They are small businesses with a limited scope and range and do not need trademark protection. Third, even when they are trademark holders, small businesses will rarely challenge a prior registrant, because of the cost and delay of doing so. Instead, these small businesses will use an alternate domain name. Fourth, large corporations do register trademarks, so attempts to challenge their domain names will fail because of the trademark protection. For these reasons, Advocacy believes that the vast majority of the time the challenger to a domain name registration will be a large company with deep pockets and the defending registrant will be a small business, organization, or individual.

The recommendations in the Interim report favor the large corporation to such a drastic extent that it would *de facto* expansion trademark rights far beyond current law. Advocacy believes that large companies, who are trademark holders, can threaten small business registrants, who are not violating anyone's trademark, with the process recommended in the Interim Report to force them to surrender their domain name. Imagine a small business whose domain name is challenged by a large company who is a trademark holder. This small business is not infringing on the trademark holder's rights because they operate in different industries and there is no likelihood of confusion.

Unfortunately, the small business must defend its domain name before an arbiter to show that there is no infringement. This arbiter is expensive and can make decisions based on references to national laws, especially problematic if the large company is a multi-national corporation. Also, the arbiter could decide that the small business must pay the fees for the proceeding. Furthermore, the rights of the large company to sue in court are preserved *de novo*. With its deep pockets, the large company will certainly sue the small business as soon as the ink is dry on an arbitration decision against them. As part of the registration process, the small business has agreed to jurisdiction not only in its own locality but also in the venue of the registration authority. Potentially, the small business would have to travel to a foreign country or to another state if the authority is located domestically. This entire process favors the deep pockets who can afford the multiple layers of litigation, the travel, and the international legal research. When faced with the daunting task of defending its domain name, small businesses will not defend it under this process. They cannot afford it in time or money. Rather they will simply give up. They will surrender the domain name, even when they are not infringing on a trademark and are legitimate registrants.

The alternate dispute resolution process proposed in the Interim report will act as a Sword of Damocles over the heads of small businesses that want to establish an Internet presence and

engage in e-commerce. Because they cannot afford to defend themselves against challenges to their domain names, they will always be vulnerable to sudden and unpredictable forced changes in their Internet addresses. This uncertainty will act as a barrier, keeping small businesses from establishing a presence on the Internet. It will inhibit their ability to use the medium and will deny useful products and services to consumers. Advocacy asks that the Panel consider the effect upon small businesses when making its final recommendation.

Small Business Did Not Have Adequate Notice To Make Meaningful Comments

Lastly, Advocacy believes that small business did not receive adequate notice of these proceedings to make meaningful comments to these proceedings. Notice and comment is a central feature of the United States' Administrative Procedure Act. When properly followed, it allows all parties a chance to participate in an agency's rulesmaking process. It also allows the U.S. federal agency the opportunity to receive comments which may identify problems or issues the agency did not consider. Although WIPO is not subject to the APA, Advocacy believes that ICANN's relationship with the U.S. Department of Commerce makes it appropriate to follow its procedure and allow opportunity for notice and comment.

The lack of adequate and equitable notice to small business has limited their ability to participate in this proceeding. With the comment deadline two days away, the Panel is still holding regional hearings, and this is the first to be held in the United States. Advocacy recommends that the Panel extend the comment deadline and make a more adequate solicitation of comments, including publication in the U.S. *Federal Register* and similar widely-distributed publications.

On behalf of the Office of Advocacy, I thank you for this opportunity to speak. On behalf of small business, I encourage the Panel to consider the overbroad nature of the Interim Report's proposals and the significant economic impact they would have on small business, as well as giving small business an equitable opportunity to contribute to this process.

Thank you.