SBA
Office of Advocacy

A Voice for Small Business

Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act, Fiscal Year 2002

January 2003

Created by Congress in 1976, the Office of Advocacy of the U.S. Small Business Administration (SBA) is an independent voice for small business within the federal government. Appointed by the President and confirmed by the U.S. Senate, the Chief Counsel for Advocacy directs the office. The Chief Counsel advances the views, concerns, and interests of small business before Congress, the White House, federal agencies, federal courts, and state policy makers. Economic research, policy analyses, and small business outreach help identify issues of concern. Regional Advocates and an office in Washington, DC, support the Chief Counsel's efforts.

For more information on the Office of Advocacy, visit *http://www.sba.gov/advo*, or call (202) 205-6533. Receive email notices of new Office of Advocacy information by signing up on Advocacy's Listservs at *http://web.sba.gov/list*

- ☑ Small Business Advocate (newsletter)
- ☑ Advocacy Press
- ☑ Advocacy Research
- ☑ Advocacy Regulatory Communications

Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act, Fiscal Year 2002

Office of Advocacy
U.S. Small Business Administration
Washington, D.C.
January 2003

The full text of this report is available on the Office of Advocacy's Internet site at *http://www.sba.gov/advo/*. Reprints in paper or microfiche are available for purchase from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

Federal Recycling Program
Printed on recycled paper.

TO THE PRESIDENT AND CONGRESS OF THE UNITED STATES:

As the Chief Counsel for Advocacy for the U.S. Small Business Administration (SBA), I am pleased to present to Congress and the President this report on federal agency compliance with the Regulatory Flexibility Act of 1980 (RFA). The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), requires federal agencies to consider the impact of their regulations on small entities, defined as small businesses, small organizations, and small governmental jurisdictions. The RFA requires federal agencies, as a part of their rulemaking, to consider regulatory alternatives to minimize the impact on small entities while achieving the stated objective of the regulation. The Chief Counsel for Advocacy is responsible for monitoring agency compliance with the RFA and reporting the findings to Congress and the President.

FY 2002 was an exciting year for the Office of Advocacy. Under President George W. Bush's leadership, the Office of Advocacy received additional tools to help reduce regulatory burdens through enhanced agency compliance with the RFA. In March, President Bush announced his Small Business Agenda. The President directed federal agencies to tear down regulatory barriers to job creation and to give small business owners a voice in the complex and confusing federal regulatory process. The President stressed the importance of a strong Office of Advocacy and called for improved coordination between my office and the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget. Under a new memorandum of understanding, Advocacy and OIRA work in close coordination to implement the President's objectives without sacrificing environmental quality, travel safety, worker protection, and other important regulatory goals.

On August 13, the President signed Executive Order 13272, strengthening the Office of Advocacy's ability to bolster agency compliance with the RFA. Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," underscores agencies' obligations to consider the impact on small entities when writing new rules and regulations. Additionally, E.O. 13272 requires that Advocacy teach agencies how to solicit and consider the views of small entities throughout the rulemaking process. We are already seeing results as agencies consult with Advocacy and ask for training earlier in the rule development process.

In FY 2002, the Office of Advocacy's efforts to improve agency compliance with the RFA on behalf of small entities secured more than $21 billion in first-year cost savings, with an additional $10 billion in annually recurring savings. Revisions made by the Environmental Protection Agency (EPA) to its Cross Media Electronic Reporting and Record-Keeping Rule (CROMERRR) produced an estimated savings of $18 billion. Although a valid cost savings, by its sheer magnitude, CROMERRR is an aberration. We commend EPA for acknowledging the need to revisit and substantially revise the recordkeeping portion of CROMERRR. Excluding CROMERRR, Advocacy's interventions in FY 2002 resulted in more than $3 billion in first-year cost savings. The Office of Advocacy lauds the achievements of its federal agency partners that used scientific and economic data and adopted the recommendations of the small business community to reduce the impact of the agencies' rules on small entities while achieving their regulatory objectives. These actions demonstrate a commitment to abide by the letter and spirit of the RFA by finding effective regulatory alternatives that accomplish public policy objectives without imposing undue hardship on small entities.

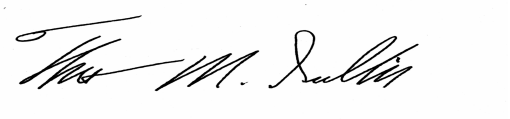
Advocacy's involvement increasingly occurs at the pre-proposal and regulatory development stages. Advocacy's experience shows that the earlier an agency considers small entity concerns, the more effective the agency can be in fulfilling the RFA's intent.

Rather than capture all the daily interactions between Advocacy and the federal agencies, our report for Fiscal Year 2002 highlights key RFA achievements as well as ongoing concerns related to agency compliance with the law. (A complete picture of RFA activities is found on the Office of Advocacy website.) Consistent with the Office of Advocacy's statutory duty to independently represent the views of small business before federal agencies and Congress, the views expressed in this report do not necessarily reflect the views of the SBA or the Administration.

Looking ahead to Fiscal Year 2003, Advocacy anticipates that cost savings will increase because of Executive Order 13272. However, in the future, when agencies request the Office of Advocacy's input earlier in the rulemaking process and improve their RFA compliance in the first instance, we anticipate that explicit cost savings achieved by Advocacy, after publication of a proposed rule, will decrease. We expect to document lower cost savings in the future because rules developed by agencies should reflect the concerns of small entities earlier in the regulatory process. If agencies follow the President's direction, my office will be applauding more agencies on their small-entity-friendly proposals. This contrasts with the traditional role of my office—criticizing overly burdensome regulatory mandates and documenting cost savings once an agency reconsiders its position.

The Office of Advocacy is available as a resource to assist federal agencies with their small entity outreach and to provide training to federal agencies and small entities on the RFA. Under Executive Order 13272, we have published new guidance on how to comply with the RFA, and Advocacy will provide government-wide training on RFA compliance. For additional information about our efforts to implement Executive Order 13272, and to view Advocacy's RFA guide, comment letters, and testimony, please visit Advocacy's website at *http://www.sba.gov/advo.*

I hope you will find this report and our website useful in your efforts to monitor federal agency compliance with the RFA. We look forward to working with the President and Congress to ensure that the RFA remains an effective tool to tear down regulatory barriers to job creation and give a voice to small entities in the federal regulatory process.



Thomas M. Sullivan
Chief Counsel for Advocacy

CONTENTS

Executive Summary 1
Overview of the Regulatory Flexibility Act and Federal Agency Compliance 3
History of the RFA 3
Analysis Required by the RFA 4
The Small Business Regulatory Enforcement Fairness Act of 1996 5
Executive Order 13272 5
Federal Agencies' Response to the RFA 6
The Role of the Office of Advocacy 7
Table 1: SBREFA Panels through Fiscal Year 2002 9
Table 2: Regulatory Comment Letters Filed by the Office of Advocacy, Fiscal Year 2002 10
Table 3: Regulatory Cost Savings, Fiscal Year 2002 13
RFA Achievements in Fiscal Year 2002 15
Department of Health and Human Services
Centers for Medicare and Medicaid Services 15
Department of Labor
Occupational Safety and Health Administration 16
Department of the Treasury
Internal Revenue Service 17
Environmental Protection Agency 18
Federal Trade Commission 21
Food and Drug Administration
Center for Food Safety and Applied Nutrition 21
Summary of Cost Savings for FY 2002 22
Ongoing RFA Compliance Concerns 23
Architectural and Transportation Barriers Compliance Board 23
Department of Defense
Defense Acquisition Regulation Council 23
Department of Health and Human Services
Centers for Medicare and Medicaid Services 24
Department of Housing and Urban Development 24
Department of the Interior
National Park Service 25
Department of Justice
Immigration and Naturalization Service 25
Department of Transportation
U.S. Coast Guard 26
Department of the Treasury
Internal Revenue Service 26
Farm Credit Administration 29
Federal Communications Commission 29
National Credit Union Administration 31

Patent and Trademark Office 31
Securities and Exchange Commission 32
Small Business Administration 32
Conclusion 33
Appendix A: The Regulatory Flexibility Act 35
Appendix B: Executive Order 13272 43
Appendix C: Abbreviations 45

EXECUTIVE SUMMARY

Over the past year, the nation's economy struggled to grow out of a recessionary period. The country met the challenge. As always, small businesses continued to be instrumental in economic growth and job creation. Where highly visible corporations have faltered, efficient small businesses have succeeded in creating wealth and jobs. Our goal is to ensure that federal agency actions do not inhibit economic innovation and expansion. As President Bush stated in his Small Business Agenda, "The role of government is not to create wealth, but to create an environment where entrepreneurs can flourish."

The Regulatory Flexibility Act (RFA)[1] is an important tool in efforts to ensure that federal regulations do not disproportionately affect small entities. Congress enacted the RFA in 1980 to require federal agencies to consider both the impacts of their rules on small entities *and* regulatory alternatives to alleviate those burdens while achieving the agency's policy objectives. Under Section 612 of the RFA, Congress instructed the Chief Counsel for Advocacy to report at least annually to Congress and the President on agency efforts pursuant to the RFA.

This annual report provides Congress and the President an opportunity to review the actions of agencies with respect to small entities. The report provides the Office of Advocacy's assessment of whether federal agencies are meeting both the intent and the letter of the law. The report contains four main sections. The first is an overview of the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). It covers the history of the RFA, the analysis it requires, federal agency implementation, and the SBREFA amendments.

The second section explains the role of the Office of Advocacy and describes the Office of Advocacy's interactions with federal agencies on behalf of small entities during the rulemaking process. It also includes lists of the Office of Advocacy's FY 2002 cost savings, formal regulatory comment letters, and SBREFA panel reviews of rules at the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA). These lists provide a general overview of the Office of Advocacy's activities.[2]

The third section covers Advocacy's achievements on behalf of small entities to improve agency compliance with the RFA. Included are descriptions of key agency actions in which the Office of Advocacy intervened, as well as the outcomes of federal agency decisions in response to Advocacy actions. In FY 2002, Advocacy's efforts on behalf of small entities secured first-year savings of more than $21 billion and additional recurring savings of $10 billion annually.[3]

The fourth and final section describes ongoing concerns related to individual agencies' compliance with the RFA.

The report's narratives cover significant achievements or ongoing concerns; not all of Advocacy's day-to-day interactions with agencies are described. To review the complete text of all regulatory comment letters, visit Advocacy's website at *http://www.sba.gov/ADVO*.

---

[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. The full law as amended appears as Appendix A of this report

[2] This report does not necessarily include results achieved by the Office of Advocacy during interagency review under Executive Order 12866.

[3] $18 billion resulted from the EPA's revisions to its Cross Media Electronic Reporting and Record-Keeping Rule (CROMERRR). Although a valid cost saving, by its sheer magnitude, CROMERRR is an aberration. EPA is to be commended for acknowledging the need to revisit and substantially revise the recordkeeping in CROMERRR. Excluding CROMERRR, Advocacy's FY 2002 interventions saved more than $3 billion in first-year costs.

OVERVIEW OF THE REGULATORY FLEXIBILITY ACT AND FEDERAL AGENCY COMPLIANCE

History of the RFA

Before Congress enacted the RFA in 1980, federal agencies did not necessarily recognize the pivotal role of small business in an efficient marketplace, nor did they consider the possibility that agency regulation could put small businesses at a competitive disadvantage with large businesses or even constitute a complete barrier to small business market entry. Agencies did not readily understand that small businesses, with their lower production output, had less ability to spread ostensibly proportional and equal costs over output than did their larger counterparts. Since agencies did not consider this when implementing "one-size-fits-all" regulations, small businesses suffered a competitive disadvantage; this disadvantage often served to reward less efficient larger companies at significant costs to consumers and competition.

Further, this failure to consider the effects of agency actions was exacerbated by the fact that small businesses are inherently at a disadvantage in influencing final decisions on regulations. Large businesses could afford to hire more people to monitor proposed agency regulations and had more resources to ensure effective input in the regulatory process.

The White House has taken a leadership position in standing up for small business since 1980, when the first White House Conference on Small Business was held. There, small business delegates told the President and Congress that they needed relief from the unfair burdens of federal regulation. The President listened when small businesses explained that when a federal agency issued a regulation, the burden of the law often fell hardest on them, not through any intentional desire by the agency to harm them, but because "one-size-fits-all" regulations were easier to design and enforce. This led to the federal government's recognition of the different impacts of regulations on firms of different sizes and the disparity between large and small firms in the level of input in the regulatory process. In 1980, Congress and the President enacted the RFA to alter how agencies craft regulatory solutions to societal problems and to change the "one-size-fits-all" regulatory approach.[4]

In 1993, the President issued Executive Order 12866, which required federal agencies to determine whether a regulatory action was "significant" and therefore subject to review by the Office of Management and Budget (OMB) and the analytical requirements of the executive order. In January 1996, OMB issued guidelines to federal agencies outlining the "best practices" for preparing economic analyses of significant regulatory actions under the executive order.[5]

---

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

[5] See the Advocacy website at *www.sba.gov/advo/laws/sum_eo.html* for a summary of Executive Order 12866; for more detail, visit http://www.whitehouse.gov/omb/inforeg/riaguide.html

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

Analysis Required by the RFA

The RFA requires each federal agency to review its proposed and final rules in order to determine if the rules will have a "significant economic impact on a substantial number of small entities." If a proposed rule is expected to have such an effect, an initial regulatory flexibility analysis (IRFA) must be prepared and published in the *Federal Register* for public comment.[6] If the analysis is lengthy, the agency may publish a summary and make the analysis available upon request. This initial analysis must describe the impact of the proposed rule on small entities. The initial analysis must also contain a comparative analysis of alternatives to the proposed rule that would minimize the impact on small entities and document their comparative effectiveness in achieving the regulatory purpose.

When an agency issues a final rule, it must prepare a final regulatory flexibility analysis (FRFA), unless the agency head certifies that the rule will not have a significant economic impact on a substantial number of small entities and provides a statement containing the factual basis for the certification. The final regulatory flexibility analysis must:

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

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

The RFA is built on the premise that when an agency undertakes a careful analysis of its proposed regulations—with sufficient small business input—the agency can and will identify their economic impact on small businesses. Once an agency identifies the impact a rule will have on small businesses, the agency is expected to seek alternative measures to reduce or eliminate the disproportionate small business burden without compromising public policy objectives. The

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

RFA does not require special treatment or regulatory exceptions for small business, but mandates an analytical process for determining how best to achieve public policy objectives without unduly burdening small businesses.

The Small Business Regulatory Enforcement Fairness Act of 1996

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, the Congress enacted the Small Business Regulatory Enforcement Fairness Act (SBREFA), 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.

SBREFA also added a new provision to the RFA, namely, a requirement that small business advocacy review panels be convened to review Environmental Protection Agency (EPA) and Occupational Safety and Health Administration (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 alternatives that should be considered, and to develop a report on the panel's findings for the head of the agency within 60 days.

In addition, SBREFA amended the RFA to bring certain interpretative rulemakings of the Internal Revenue Service within the scope of the RFA. The law now applies to those IRS rules (that would normally be exempt from the RFA as interpretative) published in the *Federal Register* that impose a "collection of information" requirement on small entities.[7] Congress took care to define the term "collection of information" to be identical to the term used in the Paperwork Reduction Act, which means that a collection of information includes any reporting or recordkeeping requirement for more than nine people.[8]

Executive Order 13272

On August 13, 2002, President George W. Bush signed Executive Order 13272, requiring agencies to work with the Office of Advocacy to ensure the effectiveness of the RFA.[9] By signing the executive order, the President delivered on a major component of his Small Business Plan: to tear down regulatory barriers to job creation by small businesses and give small business owners a voice in the complex and confusing federal regulatory process.

The executive order requires all federal agencies, including independent agencies, to submit to the Office of Advocacy of the U.S. Small Business Administration (SBA) their plans

[7] 5 U.S.C. § 601(b)(1)(a).
[8] *Id*. at § 601 (7) and (8).
[9] Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 Fed. Reg. 53461 (August 16, 2002), is reproduced in full in Appendix B.

on how they account for small business in their rulemaking process. Agencies have 180 days to execute these plans and must consider Advocacy's comments on their effectiveness before their implementation. In addition, the executive order directs the Office of Advocacy to provide guidance to federal agencies on the requirements of the RFA and train agencies on how to properly account for small business impact when agencies draft regulations. Agencies will submit proposed rules to the Office of Advocacy prior to publication (same as current practice and law) and are required to consider the Office of Advocacy's comments (that will reflect small business views) when the rule is finalized. The Office of Advocacy will report annually to the Director of the Office of Management and Budget on whether agencies are complying with this executive order.

The executive order is an important new tool designed to guarantee small businesses a seat at the table where regulatory decisions are made. With federal agencies contacting Advocacy earlier in the rulemaking process, agency compliance with the RFA should improve.

Federal Agencies' Response to the RFA

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

While wholesale noncompliance is no longer a problem, many agencies fail to appreciate the RFA's requirement to consider less burdensome regulatory alternatives, and the fact that less burdensome alternatives can be equally effective in achieving the agency's public policy objectives. At a minimum, if an agency cannot identify viable alternatives to their proposal, Advocacy encourages the agency to solicit comments on regulatory alternatives and to carefully consider alternatives brought to their attention by small entities during the rulemaking process.

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

THE ROLE OF THE OFFICE OF ADVOCACY

The statutory responsibilities of the Office of Advocacy include representing the interests of small business before policymaking bodies within the federal government, conducting research on small businesses' contributions to the economy, and monitoring federal agency compliance with the Regulatory Flexibility Act.

The office promotes agency compliance with the RFA through several avenues. Advocacy staff members review thousands of pages of proposed regulations and work closely with small businesses, trade associations, and federal regulatory contacts to identify areas of concern, then work to ensure that the RFA's requirements are fulfilled.

In FY 2002, the Office of Advocacy continued to see an increase in the number of agency inquiries requesting information on how to comply with the RFA and how to address RFA issues in the context of specific rules. There was a significant increase in the number of agency calls following the signing of Executive Order 13272. Such inquiries provide valuable opportunities for one-on-one guidance, as well as opportunities to address the concerns of small entities before a rule is proposed. For instance, in August 2002, the Food and Drug Administration's Center for Food Safety and Applied Nutrition (CFSAN) sought input from the Office of Advocacy on its efforts to address small business concerns related to forthcoming regulations mandated by the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. Advocacy was very encouraged by CFSAN's preliminary analysis and outreach efforts and anticipates that many small business suggestions will be incorporated in FDA's proposed rules.

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

Another avenue used by the Office of Advocacy to promote agency compliance is the network of small business representatives who can inform their members about changes in the law and how small businesses can more effectively participate in the rulemaking process. The Office of Advocacy regularly meets with small businesses and their trade associations on federal regulatory agency responsibilities under the law, factors to be addressed in agency economic analyses, and the new judicial review provision enacted in the SBREFA amendments. Roundtable meetings with small businesses and trade associations focus on specific regulations and issues, such as procurement reform, environmental regulations, and industrial safety. Advocacy also plays a key role as a participant in the small business advocacy review panels convened to review Environmental Protection Agency (EPA) and Occupational Safety and Health Administration (OSHA) rules (Table 1).

As regulatory proposals and final rules are developed, the Office of Advocacy may become involved through pre-proposal consultation, interagency review under E.O. 12866,

formal comment letters and informal comments to the agency, congressional testimony and "friend of the court" briefs. Table 2 is a listing of Advocacy's formal comment letters to the federal agencies in FY 2002.

Table 3 provides a list of the rules in which Advocacy intervened and assisted small businesses in obtaining cost savings. The Office of Advocacy calculates savings based on the agencies' own analyses of economic and scientific data. In FY 2002, revisions to federal agency actions and rulemakings in response to Advocacy's interventions produced first-year cost savings of more than $21 billion. These cost savings are unusually high because of one rule that produced savings of approximately $18 billion. Excluding that rule from the calculation, Advocacy's interventions on behalf of small businesses in FY 2002 produced savings in excess of $3 billion.

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

TABLE 1: SBREFA PANELS THROUGH FISCAL YEAR 2002

Rule Subject	Date Convened	Report Completed	NPRM[1]	Final Rule Published
Environmental Protection Agency				
Non-Road Diesel Engines	03/25/97	05/23/97	09/24/97	10/23/98
Industrial Laundries Effluent Guideline	06/06/97	08/08/97	12/12/97	Withdrawn[2]
Stormwater Phase 2	06/19/97	08/07/97	01/09/98	12/08/99
Transport Equipment Cleaning Effluent Guideline	07/16/97	09/23/97	06/25/98	08/14/00
Centralized Waste Treatment Effluent Guideline	11/06/97	01/23/98	01/13/99	12/22/00
Underground Injection Control Class V Wells	02/17/98	04/17/98	07/29/98	12/07/99
Ground Water	04/10/98	06/09/98	05/10/00	
Federal Implementation Plan for Regional Nitrogen Oxides Reductions	06/23/98	08/21/98	10/21/98	
Section 126 Petitions	06/23/98	08/21/98	09/30/98	05/25/99
Radon in Drinking Water	07/09/98	09/18/98	11/02/99	
Long Term 1 Enhanced Surface Water Treatment	08/21/98	10/19/98	04/10/00	01/14/02
Filter Backwash Recycling	08/21/98	10/19/98	04/10/00	06/08/01
Light Duty Vehicles/Light Duty Trucks Emissions and Sulfur in Gasoline	08/27/98	10/26/98	05/13/99	02/10/00
Arsenic in Drinking Water	03/30/99	06/04/99	06/22/00	01/22/01
Recreational Marine Engines	06/07/99	08/25/99	10/05/01 08/14/02	11/08/02
Diesel Fuel Sulfur Control Requirements	11/12/99	03/24/00	06/02/00	01/18/01
Lead Renovation and Remodeling Rule	11/23/99	03/03/00		
Metals Products and Machinery	12/09/99	03/03/00	01/03/01	
Concentrated Animal Feedlots	12/16/99	04/07/00	01/12/01	
Reinforced Plastics Composites	04/06/00	06/02/00	08/02/01	
Stage 2 Disinfection Byproducts	04/25/00	06/23/00		
Emissions from Non-Road and Recreational Engines and Highway Motorcycles	05/03/01	07/17/01	10/05/01 08/14/02	11/08/02
Construction and Development Effluent Guideline	07/16/01	10/12/01	06/24/02	
Aquatic Animal Production Industry	01/22/02	06/19/02	09/12/02	
Lime Industry- Air Pollution	01/22/02	03/25/02	12/20/02	
Non-Road Diesel Emissions—Tier 4 Rules	10/24/02	12/23/02		
Occupational Safety and Health Administration				
Tuberculosis	09/10/96	11/12/96	10/17/97	
Safety and Health Program Rule	10/20/98	12/19/98	Withdrawn	
Ergonomics Program Standard	03/02/99	04/30/99	11/23/99	11/14/00[3]

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

TABLE 2: REGULATORY COMMENT LETTERS FILED BY THE OFFICE OF ADVOCACY, FISCAL YEAR 2002[10]

Date	Agency	Comment Subject
10/12/01	EPA	Transmittal of the Report of the Small Business Advocacy Review Panel on the Environmental Protection Agency's Planned Proposed Rule for Effluent Limitation Guidelines and Standards for the Construction and Development Industry
11/05/01	HHS/FDA	Current Good Tissue Practice for Manufacturers of Human Cellular and Tissue-Based Products; Inspection and Enforcement; 66 Fed. Reg. 1508 (January 8, 2001)
11/06/01	FCC	Developing a Unified Intercarrier Compensation Regime; CC Dkt. No. 01-92
11/21/01	FCA	Electronic Commerce Proposed Rule; 66 Fed. Reg. 53348 (October 21, 2001)
11/27/01	EPA	Reply to the Notification Letter Regarding a Small Business Advocacy Review Panel on Effluent Limitations Guidelines and Standards for the Aquatic Animal Production Point Source Category
12/07/02	USDA/FSIS	Notice and Request for Comment on Intentions to Harmonize Procedures with those of the Food and Drug Administration with Respect to the Target Tissue/Marker Residue Policy in Testing Animal Tissues for Residues of New Animal Drugs; 66 Fed. Reg. 40964 (August 6, 2001)
12/21/01	DOI/BLM	Mining Claims under the General Mining Laws; 66 Fed. Reg. 54834 (October 30, 2001)
12/28/01	HHS/CMS	Medicare Program: Revisions to Payment Policies and Five-Year Review of and Adjustment to the Relative Value Units Under the Physician Fee Schedule for Calendar Year 2002; 66 Fed. Reg. 55245 (November 1, 2001)
02/05/02	EPA	Impending Maximum Achievable Control Technology (MACT) "Hammer" Under Clean Air Act §112(j)
02/05/02	NTIA	Privatization of the Management of the U.S. Internet Top Level Domain

[10] The complete text of Advocacy's regulatory comment letters is available on Advocacy's website, *http://www.sba.gov/ADVO.*

Date	Agency	Comment Subject
02/20/02	EPA	Recommendations for Metals Hazard Assessment Framework and Related Comments on the Science Underlying the January 2001 Lead Toxic Release Inventory Reporting Rule
02/27/02	EPA	Establishment of Electronic Reporting; Electronic Records; 66 Fed. Reg. 46162 (August 31, 2001)
03/08/02	MDA	Fiscal Year 2002 Research and Development Spending for the Small Business Innovation Research Program (SBIR)
03/08/02	RUS	Telecommunications System Construction and Specifications, 66 Fed. Reg. 43309; and RUS Standard for Service Installations at Customer Access Locations; 66 Fed. Reg. 43314
03/11/02	DOT	Federal Requirements for Propeller Injury Avoidance Measures; 66 Fed. Reg. 63645 (December 10, 2001)
03/13/02	FCC	Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; MM Dkt. No. 01-317, MM Dkt. No. 00-244, FCC 01-329
03/19/02	FCC	Concerning Nationwide Licensing Areas in Government Transfer Bands; WT Dkt. No. 02-08, FCC 02-15
03/29/02	SBA	Small Business Size Regulations; Government Contracting Programs; HubZone Program Proposed Rule; 67 Fed. Reg. 3826 (January 28, 2002)
05/03/02	DOI	The National Park Service's Supplemental Environmental Impact Statement over the Snowmobile Phaseout in Yellowstone Park; 67 Fed. Reg. 15223 (March 29, 2002)
05/03/02	HHS/CMS	Medicare Program: Medicare-Endorsed Prescription Drug Card Initiative; 67 Fed. Reg. 10262 (March 6, 2002)
05/06/02	DARC	Defense Acquisition Regulation Supplement; Competition Requirements for Purchase of Service under Multiple Award Contracts; 67 Fed. Reg. 15351 (April 1, 2002)
05/07/02	FCC	Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets and Definition of Radio Markets; MM Docket No. 01-317, MM Docket No. 00-244, FCC 01-329
05/23/02	EPA	Control of Emissions from Land-based Recreational Engines; 67 Fed. Reg. 15223 (March 29, 2002)

Date	Agency	Comment Subject
05/28/02	OMB	Comments on the OMB Draft Report to Congress on the Costs and Benefits of Federal Regulation; 67 Fed. Reg. 15014 (March 28, 2002)
06/12/02	EPA	Transmittal of the Report of the Small Business Advocacy Review Panel on the Environmental Protection Agency's Planned Proposed Rule for Effluent Limitation Guidelines and Standards for the Aquatic Animal Production Industry
06/14/02	EPA	Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information; 67 Fed. Reg. 21234 (April 30, 2002)
06/17/02	PTO	Processing Fee for Use of Paper Forms for Submission of Applications for Registration and Other Documents; 67 Fed. Reg. 35081 (May 17, 2002)
06/28/02	FTC	Telemarketing Sales Rule User Fees; 67 Fed. Reg. 37362 (May 29, 2002)
08/06/02	Customs	Notice of Proposed Rulemaking on the Conditional Release Period and Customs Bond Obligations for Food, Drugs, Devices and Cosmetics Regulated by the Food and Drug Administration; 67 Fed. Reg. 39322 (June 7, 2002)
08/09/02	EPA	Hydrochlorofluorocarbon (HCFC) Foam Allocation Proposed Rule - Noncompliance with the Regulatory Flexibility Act; 66 Fed. Reg. 38063 (July 29, 2001)
08/13/02	IRS	Request for a 90-day Extension to File Comments on the Notice of Proposed Rulemaking: Excise Taxes; Definition of Highway Vehicle; 67 Fed. Reg. 38913 (June 6, 2002)
08/19/26	SEC	Certification of Disclosure in Companies' Quarterly and Annual Reports Rule; 67 Fed. Reg. 41877 (June 20, 2002)
08/26/02	NCUA	Size Standard for Small Credit Unions; 67 Fed. Reg. 38431 (June 4, 2002)
08/27/02	FCC	Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; CC Dkt. No. 02-33, FCC 02-42
09/06/02	ATBCB	Recommending that the Compliance Board Postpone the Vote on the Draft Final Rule to the Americans with Disabilities Act Accessibility Guidelines
09/25/02	EPA	Comments on Proposed Settlement with the Sierra Club; 67 Fed. Reg. 54804 (August 26, 2002)

TABLE 3: REGULATORY COST SAVINGS, FISCAL YEAR 2002

The Office of Advocacy's involvement in the following rulemaking activities during Fiscal Year 2002 resulted in first-year cost savings of more than $21 billion, with over $10 billion in additional ongoing annual savings.

Agency	Subject Description	Cost Savings
CMS	*Revisions to Payment Policies and Five-Year Review of, and Adjustment to, the Relative Value Units Under the Physician Fee Schedule for Calendar Year 2002.* CMS increased the reimbursement rate for procedures performed by portable x-ray providers.	**$1.37 million in one-time savings** Source: Mobile X-Ray Providers Association using CMS estimates.
EPA	*Concentrated Animal Feeding Operation Effluent Guideline and Permit Revisions.* EPA limited coverage to environmentally significant sources and cut the cost of the rule by some two-thirds annually.	**$645 million in first-year savings; additional $645 million in annual savings** Source: Office of Advocacy, based on EPA cost analysis.
EPA	*Aquaculture Effluent Guidelines.* EPA exempted fish production pond systems that do not contribute significantly to water pollution.	**$350 million in first-year savings; additional $350 million in annual savings** Source: Office of Advocacy, based on EPA cost analysis.
DOE	*Energy Efficiency Standards for Air Conditioners and Air Conditioning Heat Pumps*. Energy efficiency standard for air conditioners raised from 10 percent to 20 percent, rather than the more costly 30 percent that DOE originally proposed.	**$130 million in one-time savings** Source: Office of Advocacy, based on DOE cost analysis.
IRS	*Cash Accounting.* IRS Revenue Procedure allowed certain small businesses to use cash vs. the more difficult accrual method of accounting.	**$250 million in one-time savings** Source: Office of Advocacy, based on IRS analysis of businesses covered.
EPA	*Meat Processing Effluent Guidelines*. EPA regulation eliminated indirect dischargers from compliance with the rule.	**$50 million in first-year savings; additional $50 million in annual savings** Source: Office of Advocacy, based on EPA cost analysis.
DOD	*Army Fort Campbell Office Supply Schedule Contract.* Federal contract award went to small business rather than large business.	**$100 million in one-time savings** Source: Department of the Army.

Agency	Subject Description	Cost Savings
MDA	*SBIR Program.* Agency did not eliminate its SBIR funding /program.	**$73.8 million in one-time savings** Source: SBA SBIR—Office of Technology.
EPA	*Cross Media Electronic Reporting and Record-Keeping Rule (CROMERRR*). EPA is no longer considering the portion of the rule that would have required any facility using a computer to keep records for EPA to retrofit their computers.	**$18 billion in first-year savings; additional $7.65 billion in annual savings** Source: Office of Advocacy, based on EPA's analysis of the per-system costs for retrofit.
EPA	*Construction and Development Effluent Guidelines.* EPA revised its proposal removing additional requirements for water pollution abatement at construction sites, which would have cost $3 billion annually. Fifty percent of the affected entities are small entities.	**$1.5 billion in first-year savings; additional $1.5 billion in annual savings** Source: Office of Advocacy, based on EPA analysis.
EPA	*National Emissions Standards for Hazardous Air Pollution (NESHAP) for Lime Manufacturing Plants.* Savings achieved by a 50 percent reduction in compliance costs under EPA's regulation.	**$5 million in first-year savings; $5 million in annual savings** Source: Office of Advocacy, based on EPA analysis.
DLA	*Federal Prison Award*. Federal contract award went to small business rather than a large operation.	**$60,000 in one-time savings** Source: Office of Advocacy, based on amount of contract award.
USAID	*Agency Intervention.* USAID agreed to make payment to a small business contractor after having initially refused to do so.	**$300,000 in one-time savings** Source: USAID.

RFA ACHIEVEMENTS IN FISCAL YEAR 2002

Department of Health and Human Services

Centers for Medicare and Medicaid Services

Issue: Medicare Program: Medicare–Endorsed Prescription Drug Card Initiative Program

On March 6, 2002, the Centers for Medicare and Medicaid Services (CMS) published a notice of proposed rulemaking (NPRM) in the *Federal Register* concerning the "Medicare-Endorsed Prescription Drug Card Initiative." CMS would endorse drug card sponsors that met the requirements of the rule. The endorsed sponsors would negotiate discounted prescription drug prices with pharmaceutical manufacturers and pass along any reductions in cost to Medicare beneficiaries. While lauding the policy underlying the rule, Advocacy argued that the rule could have a detrimental effect on small pharmacies and other small businesses. Advocacy's positions were as follows:

- Advocacy was concerned about CMS's economic projections and the assumption that small pharmacies will suffer an economic impact of only 1 percent of revenue when there was information from industry and other sources that the impact on revenue would be greater.
- The rule may result in excluding small pharmacies from participation in the plan. The average small pharmacy will not be able to meet the criteria necessary for participation in the program based on economies of scale.
- CMS should ensure small pharmacy participation by granting them the right to choose whichever sponsorship program they wish to join, especially in rural or underserved areas.
- A fixed negotiation fee for pharmacy benefit management organizations (PBMs) may help level the playing field for small pharmacies.
- CMS's creation of a "consortium of sponsors" may not adequately protect small businesses' right to participate in the program. Advocacy suggested that the appropriate federal agencies should have jurisdiction and access to the necessary information to prevent abuse of the program or anticompetitive practices.

In response to Advocacy's comments, CMS made certain changes in the final rule, which should benefit small businesses. These changes include:

- PBMs must ensure that beneficiaries have convenient access to a sufficient number of pharmacies. CMS reduced the access ratio standards from 90/10 to 90/5 (90 percent of Medicare beneficiaries must live within 5 miles of a contracted pharmacy). This should help small pharmacies, especially in rural and underserved areas.
- Card sponsors must report to CMS the participation of independent pharmacies in their networks.
- Sponsors may not rely solely on rebates obtained from pharmacies. Endorsement is contingent on sponsors securing rebates from manufacturers.

- Sponsors may not offer a mail-order-only option for participation in the plan.
- CMS agrees that it must perform some level of oversight. It will develop and operate a system to track and manage complaints by beneficiaries and others (including pharmacies and sponsors).

Issue: Medicare Program: Revisions to Payment Policies and Five-Year Review of, and Adjustment to, the Relative Value Units under the Physician Fee Schedule for Calendar Year 2002

On November 1, 2002, CMS published a proposed rule concerning Medicare revisions to payment policies and a five-year review of the relative value units under the physician fee schedule for calendar year 2002. Advocacy's December 28, 2001, comment letter addressed the reimbursement rate for portable x-ray and EKG providers under the physician fee schedule. Advocacy advised CMS that it violated the RFA by failing to prepare an initial regulatory flexibility analysis or to certify that the rule would not have a significant economic impact on a substantial number of small entities. Many of the affected portable x-ray and EKG providers were likely to be small entities, and a substantial number would be affected by CMS's decision to reduce payments under the physician fee schedule. CMS had not investigated the impact of the proposed reduction in the transportation reimbursement fees, which account for most of the costs incurred by portable x-ray providers. In response to Advocacy's comments, CMS revised the final rule to increase payments to portable x-ray and EKG providers by approximately 8 percent for services in 2003. This is a net 3 percent increase after factoring in the reduction in transportation costs. CMS also agreed to provide guidance to its regional contractors in an effort to apply transportation rate reimbursement more evenhandedly.

Department of Labor

Occupational Safety and Health Administration

Because of the potential regulatory burden, Congress mandated that the Occupational Safety and Health Administration (OSHA) follow special requirements under SBREFA when it considers regulations that will have a significant impact on small entities. The small business advocacy review panel process requires OSHA and the Environmental Protection Agency to convene special panels whenever the agencies cannot certify under the RFA that a regulatory proposal will not have a significant economic impact on a substantial number of small entities. To date, OSHA has convened three such panels.[11] Advocacy's experience in working with OSHA small business advocacy review panels has demonstrated that small business input early in the regulatory process improves the rule. The SBREFA panel process itself and the reports issued by the panel have added to OSHA's knowledge and its understanding of the serious impact these rules have on small entities.

[11] OSHA's ergonomics standard is the only proposed OSHA rule subject to a SBREFA panel that has been made final; however, Congress passed a Resolution of Disapproval under the Congressional Review Act to strike the rule.

Issue: Ergonomics Guidelines

In April 2002, Advocacy commended OSHA for listening to the concerns of small businesses when it announced its new approach to ergonomics. The purpose of ergonomics guidelines is to reduce work-related ergonomic injuries by providing practical suggestions for problem tasks. Rather than pursuing a new rule, OSHA said it would address ergonomics through the development of industry-specific guidelines. The guidelines are part of a four-pronged effort by OSHA to address ergonomics following the congressional veto of a final rule in early 2001. The new approach also includes education and research and the establishment of a National Advisory Committee on Ergonomics. OSHA's nonregulatory approach is consistent with Advocacy's prior recommendation that the agency review and discuss various alternatives to the ergonomics standard; a 1999 SBREFA panel had recommended nonregulatory guidelines and outreach. As OSHA develops industry guidelines, Advocacy will continue to work with small businesses, trade associations, and OSHA to ensure that the agency considers the impacts on millions of small businesses while accomplishing its public policy objective of a safe workplace.

Department of the Treasury

Internal Revenue Service

Since passage of SBREFA, the Internal Revenue Service (IRS) has interpreted the applicability of the RFA as narrowly as possible and limited the scope of RFA analyses. For example, the IRS has applied the RFA only to interpretative rules that require an actual document to be filed with the IRS, and then only analyzes the amount of time required to record that one new piece of information. Often, instead of issuing a proposed rule that could be subject to the RFA, the IRS issues "revenue procedures" and "technical advice memoranda" that escape analysis altogether.

IRS compliance with the RFA has improved in part because of the IRS Restructuring and Reform Act of 1998, which created an infrastructure within the IRS to concentrate attention on small entities, particularly small businesses. The new Small Business / Self-Employed Division (SB/SE) provides a feedback system that helps the IRS resolve issues with considerable outreach to the small business community. This new structure better enables the Office of Advocacy and affected small entities to participate in the process. Through its SB/SE Division, the IRS is responsive to the Office of Advocacy's questions and often agrees to meet to discuss controversial rules with concerned small business groups.

Other signs of progress include the research unit within the SB/SE Division, which should help provide IRS regulation writers with solid data to assess regulatory choices. In addition, the IRS Taxpayer Advocate has done an excellent job of gathering information on trouble spots and issuing an annual report that is a very useful tool for the small business community to document areas where the IRS procedures create problems. Finally, in 2002, the IRS created the Office of Burden Reduction within the SB/SE, headed by a senior level IRS executive who is actively searching out ways to streamline regulatory and paperwork burdens. Although there is plenty of room for improvement, the IRS has established some important mechanisms that have helped improve its rulemaking process and small business relations.

Issue: Cash v. Accrual Accounting

Beginning in 1999, the Office of Advocacy actively encouraged the IRS to liberalize its rules to allow small firms to use the cash method of accounting. The Internal Revenue Code primarily requires only large firms 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 expenses when the cash is actually received or distributed). However, all firms, including very small businesses, were required to use accrual accounting if they derived any portion of their income from the sale of an inventory. In testimony before Congress in July 2001, Advocacy recommended an expansion of cash accounting. Advocacy met extensively with the IRS to encourage an increase in the threshold at which small businesses are exempted from accrual accounting. In December 2001, the IRS issued a notice requesting comments on a proposed revenue procedure (that would become Rev. Proc. 2002-28) to exempt most small service providers from the requirement to use accrual accounting. Accrual accounting would still apply to small manufacturers, wholesalers, and retailers because of their extensive use of inventories. The IRS made Rev. Proc. 2002-28 applicable to tax years ending on or after December 31, 2001, which enabled affected small businesses to use cash accounting for the 2001 tax year. The comments on the IRS proposal were overwhelmingly favorable. While lauding the policy underlying Rev. Proc. 2002-28, Advocacy had encouraged the IRS to make this change by notice and comment rulemaking, which requires compliance with APA and RFA, as well as providing a procedural framework for the consideration of comments. The use of revenue procedures rather than formal notice and comment rulemaking enables the IRS to reverse its policy at some future date; where notice and comment rulemaking is used, the same procedures must be used for any subsequent change or reversal.

Environmental Protection Agency

Issue: Cross Media Electronic Reporting and Recordkeeping Rule

In August 2001, the Environmental Protection Agency (EPA) issued an NPRM to establish the terms for its acceptance of electronic recordkeeping and reporting of environmental information. The Cross Media Electronic Reporting and Recordkeeping Rule (CROMERRR) required any facility using a computer to keep records for EPA to retrofit their computer systems, at a per-business, per-system cost for retrofit estimated at $40,000 up front and $17,000 annually. Although EPA characterized this rule as "voluntary," stating that it would still allow paper records to be submitted, Advocacy asserted that EPA had defined electronic records in its rule too broadly so as to apply to any record created by a computer.

Advocacy spoke on behalf of small businesses informally and through written public comments. In response to the issues Advocacy raised, EPA decoupled its proposals to separate electronic recordkeeping from electronic reporting. At Advocacy's September 6 environmental roundtable, EPA officials announced the agency's intention to issue a final rule on electronic reporting and to conduct additional research before proceeding with a rule on electronic records. EPA's decision to forego the recordkeeping provisions resulted in savings of $18 billion in up-front first-year compliance costs and $7.65 billion in recurring annual savings.

Issue: Construction and Development Effluent Guidelines Proposed Rule

In April 2002, EPA proposed additional storm water requirements to reduce sediment runoff during active construction, from construction sites encompassing one acre or more. EPA held a SBREFA panel in compliance with the RFA. The Construction and Development Effluent Guidelines (C&D) SBREFA panel completed its report with recommendations to the EPA Administrator in October 2001. During the SBREFA panel process, EPA was considering very costly additional requirements that duplicated existing permitting regulations, which require state and local governments to establish both active phase and post-construction requirements. Advocacy raised concerns that such an approach could substantially raise the cost of new homes. Such an increase could restrict access to home ownership, also an Administration priority. EPA chose to revise its proposed regulation, saving approximately $3 billion annually of the rule's original estimated annual cost of $4 billion. EPA has instead proposed three alternate approaches, which range from reliance on existing federal, state, and local requirements to adding inspection and certification requirements into the existing storm water permits for the active construction phase. The cost of the most expensive version of the three alternatives proposed is estimated at less than $1 billion per year. In this rulemaking, EPA found an effective way to protect lakes and streams without unfairly burdening small businesses and homeowners.

Issue: Toxic Release Inventory Reporting – Revision of Reporting Threshold for Lead and Lead Compounds

The EPA issued a final rule in January 2002 to reduce the reporting threshold for lead from 10,000 pounds to 10 pounds, which would increase the number of small businesses required to report the use of lead at their manufacturing facilities. This rule is part of the community right-to-know requirements to inform the public about releases into the environment. The reduction in the threshold was justified by the agency's designation of lead as a "persistent bioaccumulative toxic" (PBT) chemical. However, the Office of Advocacy and others pointed out that the scientific basis for this rule was not established. Further, the agency did not follow the required peer review procedures before the final rule was adopted. EPA is now implementing the peer review process described in the preamble to the final rule. The EPA Science Advisory Board (SAB) issued its first report in October 2002, which indicates that two of three elements of EPA's PBT metals methodology were questionable. The SAB review will continue next year. The final rule is currently in litigation. The Office of Advocacy expects that EPA will make appropriate changes to conform the rule to the eventual SAB recommendations.

Issue: Hydrochlorofluorocarbon Foam

In August 2002, the Office of Advocacy wrote the EPA regarding its July 2001 proposed rule to reduce the use of hydrochlorofluorocarbon (HCFC) to assure compliance with the international treaty obligations under the Montreal Protocol. Advocacy urged EPA to provide regulatory relief for thousands of small business users of HCFC-141b, which is used to create foam components for a wide variety of commercial and consumer products. Without this relief, hundreds of small businesses were in jeopardy of going out of business, and thousands more would have been adversely affected. Prior to proposing the rule, EPA failed to recognize the rule's significant

impact on small firms, and consequently, EPA inadvertently violated the RFA by not convening a SBREFA panel to examine the economic impact on small firms. In its letter to EPA, Advocacy suggested the agency provide relief through a petition mechanism that would allow suppliers of the HCFCs to obtain supplies for the small business users who had no available substitute to HCFC-141b. EPA could implement Advocacy's recommendation without jeopardizing compliance with the international treaty. EPA promulgated the final rule providing this regulatory relief in December 2002.

Issue: Aquaculture Industry Effluent Guidelines: Proposed Rule

In September 2002, EPA issued a proposed rule governing water pollution discharges from the aquaculture (fish farming) industry. In compliance with the RFA, EPA convened a SBREFA panel prior to issuing the proposed rule. Based on a recommendation from the SBREFA panel report, EPA exempted from the proposed rule all pond-based systems, which account for approximately 3,000 of 4,000 facilities. Pond systems are self-contained and do not produce environmentally significant water pollution discharges. This change achieves approximately $350 million in annual savings for small businesses. Additionally, EPA proposed an annual production threshold of $100,000, which focuses the regulation on 200 facilities (or about 5 percent of the potentially affected facilities). Similarly, EPA found that there were no serious environmental issues created by the smaller facilities.

Issue: Meat Processing Effluent Guidelines

On January 30, 2002, EPA proposed an effluent guideline rule for the meat processing industry. The Office of Advocacy worked with EPA to develop the proposed rule. EPA was considering proposing potentially costly regulations on a portion of the affected small businesses engaged in meat processing. However, after additional analysis and discussion with the Office of Advocacy, EPA proposed to exempt all the meat processors that discharge wastewater into publicly owned treatment works (POTWs). EPA agreed to the exemption based on the agency's determination that the POTWs appropriately treat the wastewater without the need for further regulation on the discharger. This determination is analogous to the decision that EPA made in 1998 not to regulate the laundry industry, after similar intervention by Advocacy. This is a major small business victory affecting thousands of small meat processors.

Issue: National Emissions Standards for Hazardous Air Pollution for Lime Manufacturing Plants

In compliance with the RFA, EPA convened a SBREFA panel in anticipation of the agency issuing a proposed national emission standard for hazardous air pollution (NESHAP) for lime manufacturing plants. In its March 25, 2002 report, the SBREFA panel recommended several changes to the draft proposed rule regulating air toxic emissions from the lime industry. According to industry estimates, the panel's recommended changes would reduce the total annualized compliance cost by 50 percent, from $10 million per year to $5 million per year. These savings would be realized by 11 small businesses that operate 13 plants and would be subject to the rule. Removing the requirement to control hydrochloric acid, which had no

environmental benefits, accounts for 75 percent of the cost reductions, and will benefit all of the small firms (nearly $300,000 per plant, on average). In the proposed rule, which EPA published on December 20, 2002, the agency is also allowing many small businesses to retain their existing monitoring systems, rather than requiring them to install a new monitoring system with equivalent effectiveness.

Issue: Concentrated Animal Feeding Operation Effluent Guideline and Permit Revisions

EPA issued a final rule regulating concentrated animal feeding operations (CAFOs) in December 2002 that requires approximately 15,500 of the largest operations to seek water permits for their discharges. This rule was the subject of a SBREFA panel report in April 2000. Advocacy is pleased that the final rule, in many respects, reflected the unanimous recommendations of the panel members. More specifically, in that report, the panel recommended that EPA limit the expansion of the universe to the facilities that were eventually included in the final rule. In this manner, EPA included the most environmentally significant sources and reduced the total costs of the rule from nearly $1 billion annually to only about $335 million annually. The facilities excluded from the final rule did not contribute significantly to excess nutrient runoff because smaller facilities generally apply the excess waste as fertilizer on cropland.

Federal Trade Commission

Issue: Telemarketing Sales Rule User Fees

In May 2002, the Federal Trade Commission (FTC) issued a proposed rule examining the costs and implications of user fees to access a proposed national do-not-call registry. In comments to the FTC, Advocacy supported permitting small telemarketers to access up to five area codes per year without a user charge. However, overlapping federal and state do-not-call registries may create undue burdens for small telemarketers, and Advocacy encouraged the FTC to seek solutions minimizing the small business impact while accomplishing the agency's regulatory goals. In December 2002, the FTC issued a final rule that showed it had agreed with Advocacy's suggestion that duplication be avoided. The FTC indicated it was engaged in a process of active consultation to develop procedures that would result in one harmonized do-not-call registry.

Food and Drug Administration

Center for Food Safety and Applied Nutrition

Issue: Rulemaking Pursuant to the Public Health Security and Bioterrorism Preparedness and Response Act of 2002

In August 2002, the Food and Drug Administration's Center for Food Safety and Applied Nutrition (CFSAN) contacted the Office of Advocacy to discuss the expected small business impact of forthcoming regulations mandated by the Public Health Security and Bioterrorism

Preparedness and Response Act of 2002 (Pub. L. 107-188). CFSAN sought Advocacy's input on how to proceed with its analysis pursuant to the RFA. Advocacy was very encouraged by the level of cooperation and preliminary analysis done by CFSAN in compliance with the requirements of the RFA. Based on CFSAN's pre-proposal outreach and analysis, the agency should have access to valuable information on regulatory approaches and alternatives to reduce the potential impact of its proposed regulations on small entities. Advocacy attended an interagency briefing on the draft regulations in November. CFSAN's presentation reflected its consideration of small business impacts and the inclusion of provisions to reduce the adverse impacts on small entities. At year's end, Advocacy anticipated that CFSAN's consideration of the small business impacts would be included in the proposed rules that were due to be published in late 2002 and early 2003.

Summary of Cost Savings for FY 2002 (Dollars)[1]

Rule / Intervention	First-Year Costs	Annual Costs
CMS FY 2003 Revisions to Physicians Fee Schedule	1,370,000	NA
Concentrated Animal Feeding Operation Effluent Guideline and Permit Revisions	645,000,000	645,000,000
Aquaculture Effluent Guidelines	350,000,000	350,000,000
DOE Energy Efficiency Standards for Air Conditioners and Air Conditioning Heat Pumps	130,000,000	NA
IRS Cash Accounting	250,000,000	NA
Meat Processing Effluent Guidelines	50,000,000	50,000,000
Army Ft. Campbell Office Supply Schedule Contract	100,000,000	NA
Missile Defense Agency, SBIR Program	73,800,000	NA
Cross Media Electronic Reporting and Record-Keeping Rule (CROMERRR)[2]	18,000,000,000	7,650,000,000
EPA Construction and Development Effluent Guideline	1,500,000,000	1,500,000,000
National Emissions Standards for Hazardous Air Pollution (NESHAP) for Lime Manufacturing Plants	5,000,000	5,000,000
Defense Logistics Agency Federal Prison Award	60,000	NA
Agency Intervention (USAID)	300,000	NA
Total[3]	**21,105,530,000**	**10,200,000,000**

NA = Not applicable.

[1] Cost-savings estimates are based on agency estimates. Cost savings for a given rule are captured in the fiscal year in which the agency agrees to changes in the rule as a result of Advocacy's intervention. Where possible, Advocacy limits the savings to those attributable to small businesses. These are best estimates. First-year cost savings consist of either capital or annual costs that would be incurred in the rule's first year of implementation. Recurring annual cost savings are listed where applicable.

[2] In response to concerns raised by the Office of Advocacy, EPA publicly announced on Sept. 9, 2002, that it would withdraw the proposed requirements for electronic recordkeeping. The final rule, expected in December 2002, will address electronic reporting only. Advocacy calculated the cost savings based on EPA's own estimates of $40,000 in upfront costs and $17,000 in annual costs. EPA intends to revisit electronic recordkeeping in a separate rulemaking.

[3] FY 2002 cost savings less CROMERRR are $18 billion less, or $3,105,530,000.

Source: U.S. Small Business Administration, Office of Advocacy, based on agency analyses of economic and scientific data. See note 1.

ONGOING RFA COMPLIANCE CONCERNS

Architectural and Transportation Barriers Compliance Board

The Architectural and Transportation Barriers Compliance Board (Access Board) is charged with setting handicapped barrier removal standards for "public accommodations" under the Americans with Disabilities Act (ADA). These regulations affect tens of thousands of small entities that serve the public on a regular basis. The Office of Advocacy has been working with the Access Board to ensure that small businesses have a seat at the table.

Issue: Americans with Disabilities Act Accessibility Guidelines Revisions

In June 2002, the Access Board published a draft final version of its proposed rules revising the Americans with Disabilities Act Accessibility Guidelines (ADAAG). The ADAAG sets the minimum acceptable standards for accessibility barriers for handicapped people in public accommodations. Among other things, these regulations would impose burdens on small hotels, bars and restaurants, banks, retailers, public arenas, and movie theaters. The rule's impact on small businesses was estimated to be in the billions of dollars.

In September 2002, Advocacy sent a letter urging the Access Board to postpone final approval of the draft final rule until the Access Board more fully considered the rule's impact on new construction and the burdens on existing small business owners, which the agency had not yet analyzed. As of January 2003, the Access Board had not released the rule to OMB for publication. Advocacy will continue to voice small business concerns regarding the rule's impacts and to encourage consideration of less burdensome alternatives by the Access Board and later by the Department of Justice, when it initiates rulemaking on retrofitting of existing facilities pursuant to the ADAAG.

Department of Defense

Defense Acquisition Regulation Council

Issue: Regulation implementing Section 803 of the National Defense Authorization Act of Fiscal Year 2002

On April 1, 2002, the Defense Acquisition Council published in the *Federal Register* an interim rule titled "Defense Acquisition Regulation Supplement; Competition Requirements for Purchase of Service under Multiple Award Contracts," DFARS Case 2001-D017. The rule is designed to implement Section 803 of the National Defense Authorization Act of Fiscal Year 2002 (Public Law 107-107), which requires the Department of Defense to issue defense acquisition regulations requiring competition in the purchase of services under multiple award contracts. The Office of Advocacy provided comments on the regulation, expressing concern that the certification of "no significant impact on small businesses" did not provide an adequate factual basis to support its conclusion. The

Office of Advocacy recommended more clarity in the final rule regarding the economic impact on small businesses. The agency has not taken a final action.

Department of Health and Human Services

Centers for Medicare and Medicaid Services

Issue: Medicare and Medicaid Programs: Conditions of Participation: Patients' Rights (One-Hour Rule)

The Office of Advocacy has had ongoing concerns with a CMS rulemaking intended to reduce the incidence of potential injury associated with restraining or secluding individuals in health care facilities. The rule requires that a face-to-face assessment be made by a physician within one hour of initiating patient restraint or seclusion. Advocacy commented that the one-hour provision would be particularly burdensome on rural treatment facilities and suggested alternatives that would reduce the burden on health care facilities, such as allowing other capable health care practitioners besides physicians to perform the patient assessment and allowing the use of audio/video monitoring equipment.

The one-hour rule was challenged in the United States District Court for the District of Columbia. The court held in favor of CMS's ability to promulgate the rule, but ordered CMS to fulfill its obligations under the RFA by completing a final regulatory impact analysis. CMS published its final rule in the *Federal Register* on October 2, 2002. Advocacy was pleased that CMS decided to adopt some of its suggestions, but continued to be troubled that, among other things, CMS failed to provide adequate data in support of the rule, to adequately assess the impact on small health care entities, and to adequately support the alternatives chosen. Advocacy looks forward to working with CMS in the future to eliminate such areas of concern.

Department of Housing and Urban Development

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

The Department of Housing and Urban Development (HUD) published a proposed rule on the Real Estate Settlement Procedures Act (RESPA). The purpose of the proposal is to simplify and improve the process of obtaining home mortgages and reduce settlement costs to consumers. The proposal addresses the issue of lender payments to mortgage brokers by changing the way payments in brokered transactions are recorded and reported to consumers. It requires a good-faith estimate (GFE) settlement disclosure and allows for packaging of settlement services and mortgages. Advocacy submitted comments suggesting that HUD prepare a revised IRFA to provide information to the public about the industries affected by the proposal and alternatives to minimize the impact on small entities. Advocacy emphasized its willingness to continue to work with HUD to ensure that the improvements to the mortgage financing and settlement process stimulate small business growth. HUD is currently examining public comments on this proposed rule.

Department of the Interior

National Park Service

Issue: Snowmobile Ban from Yellowstone and Grand Teton National Parks

On two occasions the Office of Advocacy commented on the National Park Service's (NPS) rulemaking seeking to eliminate snowmobile use in Yellowstone and Grand Teton National Parks because of air and noise pollution. Advocacy was concerned that the ban on snowmobiles would have a detrimental economic impact on small businesses in the surrounding communities. Advocacy argued that the NPS failed to adequately assess the rule's impact on small businesses and that because of recent advancements made in snowmobile emission technology, the NPS could accomplish its regulatory goals by limiting the numbers of snowmobiles admitted to the parks, thereby obviating the need for a total ban.

On November 12, 2002, the NPS released an internal review document that would allow limited access for snowmobiles in the affected parks and on November 18 published in the *Federal Register* a final rule that postponed the implementation of the rule while it completed a supplemental environmental impact study. The NPS action resulted in a suit being filed by four environmental groups in the United States District Court. Advocacy will continue to monitor this situation as it unfolds.

Department of Justice

Immigration and Naturalization Service

Issue: Limiting the Period of Admission for B Nonimmigrant Aliens

The Immigration and Naturalization Service (INS) published a proposed rule on limiting the period of admission for B nonimmigrant aliens. The proposal eliminated the minimum admission period of B-2 visitors for pleasure; reduced the maximum admission period of B-1 and B-2 visitors from one year to six months; and established greater control over a B visitor's ability to extend status or change status to that of a nonimmigrant student. INS asserted that the changes are necessary to enhance its ability to support the national security needs of the United States and certified that the rule would not have a significant economic impact on a substantial number of small entities. Advocacy submitted comments expressing its concern about the potential economic impact this proposal might have on small entities in the travel and tourism industry, such as hotels, tour operators, souvenir shop owners, transportation providers, and restaurant owners. Although the proposal required only nonimmigrant aliens to comply with the regulation, Advocacy asserted that the rule had a foreseeable impact on the travel industry. INS should therefore perform an IRFA as a matter of good public policy, in order to explore fully the economic impacts of this rule and less costly alternatives. Subsequently, INS met with industry groups and listened to their concerns. Advocacy is encouraged by INS outreach and their dialogue with small business and awaits final action.

Department of Transportation

U.S. Coast Guard

Issue: United States Coast Guard Requirements for Propeller Injury Avoidance Measures

The U.S. Coast Guard's statutory mandate is to establish minimum safety standards for recreational vessels and equipment. The purpose of this rule is to reduce the number of boaters that are seriously or fatally injured when struck by a nonplaning recreational houseboat with propeller-driven propulsion. This rule would require propeller cages or emergency shutdown switches and video monitors. Citing the RFA, the Coast Guard certified that the rule would not have a significant economic impact on a substantial number of small entities. The Coast Guard acknowledged that an estimated 300 houseboat rental facilities would be required to install the required propeller injury avoidance measure, but would have three years to do so under the rule.

Small businesses were extremely concerned about the rule as proposed. The Office of Advocacy submitted a comment letter to the Coast Guard advising that the rulemaking did not comply with the RFA. Advocacy's comment letter pointed out that 98 percent of all recreational goods rental facilities are small businesses and that the average cost per facility would be three percent of annual volume, cutting into profits very seriously. In addition, the Coast Guard's cost estimates did not take into account installation, operation, and maintenance costs, further eroding any profit for these facilities. Advocacy maintained that an initial regulatory flexibility analysis rather than certification was warranted. The Coast Guard is in the process of addressing the comments it has received.

Department of the Treasury

Internal Revenue Service

The RFA requires analysis of a proposed regulation only where notice and comment rulemaking is required. Under the Administrative Procedure Act, interpretative rules are exempt from notice and comment rulemaking. For years, the IRS escaped the requirements of the RFA because it categorized most of the rules it promulgates as "interpretative," meaning the rules simply carry out the intent of Congress and do not impose any additional requirements within the discretion of the agency. In 1996, SBREFA amended the RFA to require that interpretative rules—including revenue regulations carrying out statutes—that impose a collection of information requirement be subject to the RFA. Since passage of SBREFA, the IRS has worked with the Office of Advocacy to learn more about complying with the RFA. The IRS is performing more certifications and has done IRFAs with more frequency. In FY 2002, the IRS again was responsive to the Office of Advocacy's questions, and arranged meetings when requested with concerned small business groups to discuss controversial rules.

When is an RFA Analysis of an IRS Proposal Not Warranted?

Most IRS regulations are not subject to the RFA despite SBREFA having extended application of RFA to interpretative rules that impose a collection-of-information requirement. Advocacy recognizes it would be time-consuming and unproductive to compel an RFA analysis or SBREFA panel in cases where it would not produce results. The following are examples of the types of IRS regulations that Advocacy believes do not require analysis:

1. The RFA applies only to "legislative" regulations except where an interpretative regulation requires a collection of information. The IRS has always maintained that virtually all its regulations are interpretative and thus exempt from the RFA. Many IRS regulations simply clarify definitions or provide examples of application of requirements that were set by Congress. These do not require analysis under the RFA.

2. Most IRS regulations have an impact on groups other than small businesses, such as individuals or large entities; these are not covered by the RFA.

3. Any interpretative regulation proposed prior to March 29, 1996, is not subject to the RFA even as amended by SBREFA.

IRS Rulemakings that would Benefit from Analysis

In some instances, the IRS has made the conscious decision not to perform an IRFA. In addition to the fact that the RFA requires an IRFA, Advocacy believes that an IRFA provides the agency with a better understanding of a rule's impact and results in better policy because the analysis is shared with those about to be regulated. When an agency has done its homework, an IRFA should not pose any additional burden. Examples of the types of rules for which the IRS could benefit from small entity analysis are as follows:

1. Even where the rule imposes a "collection of information" requirement (which SBREFA defines to include "recordkeeping"), the IRS has taken the view that only the portion of the regulation that contains such a requirement needs to be analyzed for its impact on small businesses. Advocacy believes that once the agency has committed to look at the regulation, it should analyze how the entire regulation will affect small businesses.

2. The IRS has often taken the view that unless a "form" is required (literally a paper document a taxpayer must complete), no recordkeeping requirement is imposed by the rule. In cases where a proposed regulation would add a line or a section to an *existing* form, the change is generally deemed insignificant by the IRS and therefore not a new collection-of-information requirement for RFA purposes. But additions to a form add cumulatively to the burden and Advocacy believes it is fair for the entire burden to be reviewed and presented to the public for comment. The law requires the regulator to review the entire burden anyway, and to make an informed decision about the significance of the information collection.

3. The IRS occasionally maintains that a proposed regulation in an entirely new area will have a significant impact on a substantial number of small businesses, but that its requirements simply and specifically "flow from mandates set by Congress." Advocacy understands that directives from the Congress may preclude some or even any alternatives but believes that an analysis needs to be done where there is a significant impact. The analysis alerts small businesses of what is coming so they can prepare for compliance and gives them an opportunity to suggest useful alternatives. It also may serve to inform legislative and administrative policymakers of the true burden their decisions may impose in practice.

Issue: National Research Program

The Office of Advocacy has been monitoring the IRS's implementation of its National Research Program (NRP). Under the NRP, the IRS will systematically audit approximately 50,000 taxpayers, including a significant number of small business owners filing schedule C returns. The NRP will select taxpayers at random. Of those selected for face-to-face audits, 28,000 will be "limited" in scope and 2,000 will be full audits. The NRP will use private and government databases to review previous returns and look for inconsistencies. Since announcing the program in January 2002, the IRS has made an effort to treat the program as a quasi-rulemaking. The NRP team met with hundreds of small businesses and trade representatives to explain the program and solicit feedback on the potential interaction with small business owners.

The Office of Advocacy met regularly with NRP officials to express concern and urge them to consider ways to minimize the potential burden on small business owners. The IRS agreed to train their NRP auditors to minimize the possible intrusion and to alert small business owners of their rights, including the right to be represented by counsel. The Office of Advocacy is also working on an information campaign to advise small business owners of the seriousness of these audits and their rights, including the ability to stop the audit and have time to review the file or seek professional help.

Issue: Mobile Machinery

On June 6, 2002, the IRS published an NPRM, "Excise Taxes; Definition of a Highway Vehicle" (67 Fed. Reg. 38913), to limit the exemption from federal excise taxes to farm vehicles used off-road. The proposal represented a significant change of policy, affecting small businesses from coast to coast that owned nonfarm equipment that had historically been exempt from four federal excise taxes provided the vehicles were used off-road. Since 1956, highway use taxes have supported federal highway construction. There are currently four excise taxes: fuel tax on gasoline, fuel tax on diesel, truck and trailer excise tax, and annual heavy vehicle tax. Because the taxes are for highway use, equipment that is not a "highway vehicle" is exempt under prior IRS regulation. Under the proposed rule, equipment that is capable of being used on-road is taxed whether or not its primary use is off-road.

The Office of Advocacy convened a roundtable on the IRS proposal. Representatives of affected businesses and trade associations agreed that the proposed rule would have a significant economic impact on a substantial number of small entities, and that the regulation imposed a collection of information requirement. Nevertheless, the IRS viewed the rule as interpretative (not covered by APA notice and comment rulemaking), and as not imposing a "collection of

information" requirement on small entities. Because the proposed rule would change settled law, overturning decades of court findings and private letter rulings, Advocacy believes the proposal is more than an interpretative regulation. The Office of Advocacy and numerous other small business advocates wrote letters to the IRS requesting a 90-day extension to the comment period so that small businesses scattered nationwide would have time to comprehend the proposal and provide thoughtful, authoritative comments. Advocacy viewed the rule as a significant regulatory action within the meaning of Executive Order 12866 and urged the IRS to analyze the potential cost and impact. The IRS granted the extension. IRS is currently considering its options after receiving the benefit of additional comments by the public who were able to submit their concerns under the extension.

Farm Credit Administration

Issue: Electronic Commerce Disclosures to Shareholders

On October 22, 2001, the Farm Credit Administration (FCA) published a notice of proposed rulemaking (NPRM) on electronic commerce disclosure to shareholders. In the NPRM, FCA stated that the proposed rule was designed to remove regulatory barriers to e-commerce and create a flexible regulatory environment that facilitates the safe and sound use of new technologies by Farm Credit System institutions and their customers. The NPRM did not contain a certification or an initial regulatory flexibility analysis. The Office of Advocacy recommended that the FCA republish the proposed rule with a valid certification or an IRFA. FCA has not yet acted on this proposed rule.

Federal Communications Commission

The Federal Communications Commission's (FCC) compliance with the RFA has been sporadic due, at least in part, to the FCC's structure, which divides rule drafting among multiple bureaus, each dealing with a separate part of the telecommunications industry. The FCC's notices of proposed rulemaking often do not contain any specific regulatory approaches or regulatory text. Instead, the FCC issues a series of broad questions soliciting comments. Because the FCC provides the details of the regulation only in the final rulemaking, it is difficult, if not impossible, for Advocacy and affected small entities to assess the impacts at the proposed rule stage and recommend less burdensome regulatory alternatives for the FCC's consideration.

On a positive note, the FCC's Office of Communications Business Opportunities now meets frequently with the Office of Advocacy to discuss issues involving the FCC and the RFA. These meetings provide a forum for discussing Advocacy's concerns regarding the FCC's RFA compliance, its process for drafting regulatory compliance guides, and the impact of particular rulemakings on small businesses. Advocacy believes these meetings are valuable to encourage FCC compliance with the RFA and there is a mutual commitment for this dialogue to continue.

Issue: Broadband Access to the Internet over Wireline Facilities

In February 2002, the Federal Communications Commission (FCC) proposed a rule to reclassify the provision of wireline broadband Internet access service as an information service and asked for comments on the ramifications of such classification. In its letter to the FCC, Advocacy noted

that classifying broadband Internet access as an information service would affect more than 7,000 small businesses and could cost those businesses an estimated $8 billion in revenue. Advocacy recommended that the FCC revise its IRFA to include an analysis of the impact classification of wireline broadband Internet access service would have on small Internet service providers. The FCC was urged to adopt the alternative proposed by affected small entities and classify wireline broadband Internet access service as composed of two separate services—the transmission of broadband signals as a telecommunications service, and the provision of Internet access service as an information service. This alternative would accomplish the FCC's regulatory goal of encouraging broadband deployment, while minimizing the disproportionate impact on small businesses. The FCC has not yet acted on this proposed rule.

Issue: Multiple Ownership of Radio Broadcast Stations in Local Markets and Definition of Radio Markets

In November 2001, the FCC issued a rulemaking seeking to examine the effect consolidation has had on the radio broadcast industry and to consider possible changes to its local radio ownership rules and policies to reflect the current radio marketplace. Advocacy recommended that the FCC treat the numeric limits of Section 202(b) of the Telecommunications Act as a presumption of acceptable levels of local radio ownership that can be rebutted by specific reasons to conclude that diversity or competition in a market would be harmed. Further, any modifications to ownership rules should be guided by public interest values or promote viewpoint and source diversity and increasing competition. The FCC has not yet acted on this proposed rule.

Issue: Concerning Nationwide Licensing Areas in Government Transfer Band

In February 2002, the FCC proposed new service rules for licensing a total of 27 megahertz of spectrum in seven different bands that were transferred from government to nongovernment use. The FCC proposed to license several of the spectrum bands in single blocks nationwide. In response to the FCC's regulatory flexibility analysis, Advocacy recommended that the FCC not license on a nationwide basis as it could create a nearly impenetrable bar for small businesses to become licensees. Advocacy urged the FCC to use smaller geographic areas, such as metropolitan statistical areas and rural service areas, in order to encourage small business participation in the spectrum auction and to speed service to rural areas. The FCC has not yet acted on this proposed rule.

Issue: Developing a Unified Intercarrier Compensation Regime

In April 2001, the FCC issued a proposed rule to revise complex regulations on intercarrier compensation with a single unified regime that more accurately reflects the economic benefits to the parties of a call and to remove sources of regulatory arbitrage. The FCC proposed replacing the current "calling party's network pays" regime with a "bill and keep" (B&K) regime. The FCC presents two different versions of B&K: "central office bill and keep" and "bill access to subscribers—interconnection cost split." In comments in response to the FCC's regulatory flexibility analysis, Advocacy stated that while costs are shared between the calling party and the called party, the calling party receives more of the benefit and therefore should carry most of the

cost. Advocacy noted that a B&K system would have an enormous impact on small businesses. The office urged the FCC to take several steps to ensure that small business telecommunications providers are not unfairly burdened by the new regulatory regime and to adequately fund and maintain universal service. Finally, because the FCC's general questions in this rulemaking are more appropriate to a notice of inquiry (NOI) than an NPRM, Advocacy recommended that the FCC change this rulemaking to an NOI. The FCC has not yet acted on this proposed rule.

National Credit Union Administration

Issue: Size Standard for Small Credit Unions

While reviewing the National Credit Union Administration's (NCUA) proposed rule on prompt corrective action, the Office of Advocacy learned that instead of using the SBA size standard of $150 million in annual receipts for small credit unions, NCUA uses its own size standard of $1 million in assets. Although NCUA established its size standard pursuant to the requirements set forth in Section 601(a) (4) of the RFA, the agency had not reviewed its definition of a small credit union since 1987. Advocacy submitted comments expressing concern that the definition may not reflect the current state of the industry. NCUA had an obligation to review the standard pursuant to Section 610 of the RFA, which requires agencies to perform periodic review of the rules issued by the agencies within 10 years of publication of the final rule. NCUA responded to the Office of Advocacy's comments by stating that it would review the size standard to determine whether it should be modified for use in future rulemakings.

Patent and Trademark Office

Issue: Processing Fee for Use of Paper Forms for Submission of Applications for Registration and Other Documents

The United States Patent and Trademark Office (USPTO) proposed a rule on the processing fee for the use of paper forms for submission of applications for registration and other documents. The proposal amends the USPTO rules to require payment of a $50 paper processing fee when a party submits a paper document instead of an electronically transmittable form if such a form is available on the Trademark Electronic Application System (TEAS). In the proposal, USPTO asserted that the fee reflected the additional average cost of processing a paper document. USPTO certified that the proposal would not have a significant economic impact on a substantial number of small entities. Advocacy commented that USPTO failed to provide a factual basis for its RFA certification and to consider the impact of the rule on small organizations and governmental jurisdictions that apply for patents. Because the rule required all paper applicants to pay the extra filing fee, it would affect a substantial number of small entities. Advocacy further asserted that since the $50 filing fee applied to each individual claim (there are 45 possible claims), paper filing could be quite costly. Moreover, because the electronic filing did not allow for copying data among fields, electronic filing could also be costly in time and resources. The USPTO has not taken final action on this rule.

Securities and Exchange Commission

Issue: CEO/CFO Certification of Annual and Quarterly Reports

In June 2002, the SEC's Division of Corporation Finance published an NPRM for chief executive officer/chief financial officer (CEO/CFO) certification of annual and quarterly reports. This rule would require all CEOs and CFOs of public companies to sign their annual and quarterly reports and include a statement that the financial information in the report is true and correct. The CEO and CFO must state that they have reviewed the company's internal audit controls and found them sufficient. This certification requirement was mandated by the Sarbanes-Oxley Act of 2002. The Office of Advocacy commented that small public companies should be given a reasonable amount of time to implement compliance procedures for such sweeping changes in filing liability. In its final rule, the SEC refused to consider a postponed effective date for small businesses, and instead stated that by not making the rule retroactive to previously ended filing periods the SEC had given sufficient small business consideration. The Office of Advocacy encouraged the SEC to issue a small entity compliance guide as required by SBREFA to aid small businesses with their compliance. To date, the SEC has not issued small entity guidance.

Small Business Administration

Issue: HUBZone Program Government Contracting Size Standards

On January 28, 2002, the SBA published proposed small business size regulations for government contracting programs and in particular the HUBZone Program. The proposed rule was designed to implement legislative changes to the HUBZone program and to amend broader SBA regulations on subcontracting limitations and size standards regarding the nonmanufacturer rule. SBA's IRFA defined small entities as small businesses. The definition did not include nonprofits and small governmental jurisdictions. The Office of Advocacy provided comments on the proposed regulation, complimenting parts of the IRFA and recommending changes to the FRFA, including the definition of the term "small entity." The SBA has yet to take final action on this rule.

CONCLUSION

While RFA compliance is improving, attention to regulatory impact on small entities continues to be uneven in a number of federal agencies. Rules of great importance to small entities often do not receive the benefit of the analysis required by the RFA. The agencies with the best RFA programs engage the Office of Advocacy early in the process and reach out effectively to potentially affected small entities. Improving compliance with the RFA involves increasing agencies' sensitivity to small entity impacts and their willingness to consider regulatory alternatives that achieve regulatory objectives while minimizing the impact on small entities.

The SBREFA panel process involves the Office of Advocacy and small entity representatives at the pre-proposal stage. This requirement requires OSHA and EPA to incorporate RFA considerations at the inception of the agency's rulemaking process. While the Office of Advocacy may disagree with EPA and OSHA on a given rule, the SBREFA panel process has improved the agencies' sensitivities to small entity impacts.

The Office of Advocacy believes that Executive Order 13272 will encourage other agencies to improve their RFA compliance. The obligation to make public each agency's plan for RFA compliance will provide the Office of Advocacy and affected small entities a window into their thinking. The fact that agencies were required to revisit their internal guidance, or create it if it did not exist, should help re-educate agency personnel about the RFA's requirements.

Executive Order 13272 also requires the Office of Advocacy to provide government-wide training. The RFA implementation guide for federal agencies has been updated and is on the Office of Advocacy's website for easy access and subsequent updates. During agency training, the Office of Advocacy will explore what constitutes a "significant economic impact on a substantial number of small entities" and the requirements for certification, IRFAs, and FRFAs. Advocacy's objective will be to encourage agencies to incorporate RFA compliance in their rulemaking processes from the beginning.

In the end, if the agencies do not improve their performance in general, or on any one specific rule, Congress left the final word with the courts. Small entities aggrieved by federal agency rules that do not comply with the RFA have the option to file suit to force agency compliance. The Office of Advocacy stands ready and willing to fulfill its potential role in filing a friend-of-the-court brief to ensure agency compliance with the law.

The policy objectives underlying the RFA remain valid today. Federal agencies should examine the impact of their rulemaking actions on small entities and consider less burdensome regulatory alternatives. This is good governance, in addition to being the law. Under President Bush's leadership, federal agencies, the Office of Advocacy, and affected small entities will tear down regulatory barriers to job creation and give small business owners a voice in the federal regulatory process.

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

§ 602 Regulatory agenda
§ 603 Initial regulatory flexibility analysis
§ 604 Final regulatory flexibility analysis
§ 605 Avoidance of duplicative or unnecessary analyses
§ 606 Effect on other law
§ 607 Preparation of analyses
§ 608 Procedure for waiver or delay of completion
§ 609 Procedures for gathering comments
§ 610 Periodic review of rules
§ 611 Judicial review
§ 612 Reports and intervention rights

§ 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: EXECUTIVE ORDER 13272

Title 3--
The President

Executive Order 13272 of August 13, 2002

Proper Consideration of Small Entities in Agency Rulemaking

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

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

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

(a) shall notify agency heads from time to time of the requirements of the Act, including by issuing notifications with respect to the basic requirements of the Act within 90 days of the date of this order;
(b) shall provide training to agencies on compliance with the Act; and
(c) may provide comment on draft rules to the agency that has proposed or intends to propose the rules and to the Office of Information and Regulatory Affairs of the Office of Management and Budget (OIRA).

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

(a) Within 180 days of the date of this order, issue written procedures and policies, consistent with the Act, to ensure that the potential impacts of agencies' draft rules on small businesses, small governmental jurisdictions, and small organizations are properly considered during the rulemaking process. Agency heads shall submit, no later than 90 days from the date of this order, their written procedures and policies to Advocacy for comment. Prior to issuing final procedures and policies, agencies shall consider any such comments received within 60 days from the date of the submission of the agencies' procedures and policies to Advocacy. Except to the extent otherwise specifically provided by statute or Executive Order, agencies shall make the final procedures and policies available to the public through the Internet or other easily accessible means;
(b) Notify Advocacy of any draft rules that may have a significant economic impact on a substantial number of small entities under the Act. Such notifications shall be made (i) when the agency submits a draft rule to OIRA under Executive Order 12866 if that order requires

such submission, or (ii) if no submission to OIRA is so required, at a reasonable time prior to publication of the rule by the agency; and

(c) Give every appropriate consideration to any comments provided by Advocacy regarding a draft rule. Consistent with applicable law and appropriate protection of executive deliberations and legal privileges, an agency shall include, in any explanation or discussion accompanying publication in the Federal Register of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule that preceded the final rule; provided, however, that inclusion is not required if the head of the agency certifies that the public interest is not served thereby.

Agencies and Advocacy may, to the extent permitted by law, engage in an exchange of data and research, as appropriate, to foster the purposes of the Act.

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

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

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

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

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

THE WHITE HOUSE,

August 13, 2002.

APPENDIX C: ABBREVIATIONS

AMS - Agricultural Marketing Service
APHIS - Animal and Plant Health Inspection Service
APA - Administrative Procedure Act
ATBCB - Architectural and Transportation Barriers Compliance Board
BLM - Bureau of Land Management
CBD - *Commerce Business Daily*
C.F.R - *Code of Federal Regulations*
CFSAN – Center for Food Safety and Applied Nutrition
CMS - Centers for Medicare and Medicaid Services
Customs - United States Customs Service
DARC- Defense Acquisition Regulation Council
DBE - disadvantaged business enterprise
DEA - Drug Enforcement Administration
DLA – Defense Logistics Agency
DOC - Department of Commerce
DOD - Department of Defense
DOI - Department of the Interior
DOJ - Department of Justice
DOL - Department of Labor
DOT - Department of Transportation
EIS - environmental impact statement
EPA - Environmental Protection Agency
ESA - Employment Standards Administration
FAA - Federal Aviation Administration
FAR - Federal Acquisition Regulation
FCA – Farm Credit Administration
FCC - Federal Communications Commission
FDA - Food and Drug Administration
FHWA - Federal Highway Administration
FLSA - Federal Labor Standards Act
FMC - Fishery Management Council
FMCSA - Federal Motor Carrier Safety Administration
FNS - Food and Nutrition Service
FPI - Federal Prison Industries
FRA - Federal Railroad Administration
FRFA - final regulatory flexibility analysis
FS - Forest Service
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
LOC - Library of Congress
MDA- Missile Defense Agency
MMS - Minerals Management Service
MSA - metropolitan statistical area
MSHA - Mine Safety and Health Administration
NAS - National Academy of Sciences
NASA - National Aeronautics and Space Administration
NCUA- National Credit Union Administration
NEPA - National Environmental Policy Act
NHTSA - National Highway Traffic Safety 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
NRC - National Research Council
NTIA- National Telecommunications and Information Administration
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
PTO- Patent and Trademark Office
PWBA - Pension and Welfare Benefits Administration
RFA - Regulatory Flexibility Act
RSPA - Research and Special Programs Administration
RUS- Rural Utilities Service
SBA - Small Business Administration
SBDC - small business development center
SBIC - small business investment company
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