SBA Office of Advocacy

the voice for small business in the federal government

Report on the Regulatory Flexibility Act, FY 2004

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

February 2005

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.

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SMALL BUSINESS
RESEARCH SUMMARY

SBA Office of Advocacy

No. 250
February 2005

Report on the Regulatory Flexibility Act, FY 2004

Office of Advocacy, February 2005 [70] pages

Background

The Regulatory Flexibility Act of 1980 (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), requires federal regulatory agencies to analyze the anticipated effects of their proposed regulations on small entities and to consider equally effective alternatives that do not unduly burden small businesses. The Office of Advocacy monitors agency compliance with the law. In 2002, President Bush signed Executive Order 13272, which strengthens the RFA by directing agencies to notify Advocacy of draft rules that may have a significant economic impact on small entities to the Office of Advocacy for review. E.O. 13272 also requires the Office of Advocacy to train regulatory agencies in how to comply with the law.

Advocacy has a number of ways of becoming involved, in addition to training agencies and reviewing their proposed rules. The office participates in "SBREFA panels," which give small businesses an opportunity to be heard on specific regulations. As regulatory proposals are developed, Advocacy may prepare formal comment letters to the agencies, congressional testimony, or where warranted, "friend of the court" briefs.

Highlights

FY 2004 efforts by the Office of Advocacy to implement the RFA and E.O. 13272 helped save small businesses more than $17 billion in first-year regulatory compliance costs and $2.8 billion in ongoing annual costs (see table). In FY 2004, Advocacy focused on inadequate analysis of small entity impacts, failure to consider significant alternatives to regulatory proposals, and a lack of outreach to small businesses and other small entities. The Environmental Protection Agency and the Federal Communications Commission topped the list of agencies whose regulations received the most Advocacy attention in their importance to small firms. The report details FY 2004 comment letters and SBREFA panels.

In response to E.O. 13272, the Office of Advocacy made significant strides in training federal agencies to comply with the RFA in FY 2004. Thirty of the 66 federal agencies that affect small businesses have now been trained, and plans are under way to develop an online training module.

Agencies increasingly recognize that Advocacy's RFA expertise can help them regulate more effectively. The report notes that early intervention by the Office of Advocacy has helped agencies understand the role small businesses play in the economy and the reasons for ensuring that regulations carry out their intended purposes without unduly stifling entrepreneurial activity. Advocacy provides agencies with economic data and helps federal agencies gain input from small businesses.

The report also documents a growing movement among states to adopt statutes similar to the RFA to govern the state regulatory development process. In FY 2004, 17 states introduced small business regulatory flexibility legislation; seven signed the bills into law.

Summary of Estimated Cost Savings, FY 2004 (Dollars)

Regulatory Proposal*	First-Year Cost Savings ($)	Annual Cost Savings ($)
HUD Real Estate Settlement Procedures Act (RESPA)	10,300,000,000	
DOT Computer Reservation System	438,000,000	438,000,000
EPA Water Pollution Regulations for Centralized Waste Treatment Facilities	75,000,000	75,000,000
EPA Industrial, Commercial, and Institutional Boiler and Process Heater Air Toxics Rule	3,750,000,000	144,230,769
EPA Plywood Manufacturing Air Toxics Rule	500,000,000	150,000,000
EPA Water Quality Requirements for Construction and Development Activities	585,000,000	585,000,000
EPA Aquaculture Effluent Limitations Guidelines	5,000,000	2,000,000
EPA Meat Processing Effluent Limitations Guideline	25,000,000	25,000,000
EPA Nonroad Diesel Engines and Fuels Rule	1,386,300,000	1,386,300,000
TOTAL	**17,064,300,000**	**2,805,530,769**

*The full report details each regulatory proposal and Advocacy's intervention to achieve cost savings in foregone regulatory costs.

Scope and Methodology

The Office of Advocacy generally bases its cost savings estimates on agency estimates. Cost savings for a given rule are captured in the fiscal year in which the agency agrees to changes in the rule as a result of Advocacy's intervention. Where possible, savings are limited to those attributable to small businesses. 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.

This report was peer-reviewed consistent with Advocacy's data quality guidelines. More information on this process can be obtained by contacting the Director of Economic Research at **advocacy@sba.gov** or (202) 205-6533.

Ordering Information

The full text of this report and summaries of other studies performed under contract with the U.S Small Business Administration's Office of Advocacy are on the Internet at **www.sba.gov/advo/research**

To receive email notices of new Advocacy research, press releases, regulatory communications, and publications, including the latest issue of The Advocate newsletter, visit **http://web.sba.gov/list**.

To the President and the Congress of the United States

September 2005 marks the 25th anniversary of the Regulatory Flexibility Act of 1980 (RFA). As we approach the RFA's silver anniversary, I am pleased to present to Congress and the President this *Report on the Regulatory Flexibility Act, FY 2004*. Included in this report is the status of agency compliance with Executive Order 13272. The RFA requires agencies to consider the impact of their rules on small entities and examine significant alternatives that minimize small entity impacts. Similarly, Executive Order 13272 (E.O. 13272) directs agencies to submit draft rules that may have a significant economic impact on small entities to the Office of Advocacy for review and to address Advocacy's comments on proposed rules in the analysis accompanying the final rule. It also requires the Office of Advocacy to train regulatory agencies in how to comply with the RFA and E.O. 13272.

In Fiscal Year 2004, the Office of Advocacy trained 26 agencies on the RFA in accordance with the requirements of E.O. 13272. Our office also submitted written comments on a variety of agency rules, testified before Congress on small business issues and potential legislative changes to the RFA as well as agency compliance with the RFA, and worked successfully with several states to pass state regulatory flexibility legislation. In fact, during 2004, seven states enacted regulatory flexibility legislation. Additionally, Advocacy participated on four Small Business Regulatory Enforcement Fairness Act (SBREFA) panels and filed a notice of intent to submit an *amicus curiae* or "friend of the court" brief in a Federal Communications Commission (FCC) regulatory matter.

Throughout Fiscal Year 2004, the Office of Advocacy continued to rely on small entities to help identify and prioritize regulations that would significantly affect their operations. As part of this process, Advocacy hosted numerous roundtables to gather small entity input on the regulatory process and key rules. Advocacy also conducted RFA training for trade associations and other members of the private sector affected by agency regulations, as well as for congressional staff. These activities helped the Office of Advocacy focus our efforts on the rules and actions most important to regulated small entities. Training small business stakeholders on the valuable tools provided by the RFA and E.O. 13272 helped engage a broader advocacy community and leverage limited resources.

There were notable improvements in agency compliance with the RFA and E.O. 13272 in Fiscal Year 2004. For example, after receiving RFA training, some federal agencies began consistently submitting draft rules to Advocacy for review; others sought assistance with RFA compliance early in the rulemaking process. Further, some agencies were more willing to make regulatory changes and consider significant alternatives following discussions with Advocacy and affected small entities. Agencies willing to work with Advocacy showed significant progress in their RFA and E.O. 13272 compliance. In 2004, Advocacy's involvement in agency rulemakings helped secure more than $17 billion in first-year cost savings and more than $2 billion in recurring annual savings for small entities.

In Fiscal Year 2005, Advocacy will continue to be a bridge between regulatory agencies and small entities. Advocacy recognizes that facilitating communications between agencies and small entities will help agencies achieve compliance with the RFA and E.O. 13272 and, ultimately, reduce regulatory burdens on small entities. Our long-term objective is for agencies to have in-house RFA expertise and to internalize thoughtful consideration of small entity impacts pursuant to the RFA and E.O. 13272.

Thomas M. Sullivan
Chief Counsel for Advocacy

Contents

Abbreviations

AEM	Association of Equipment Manufacturers
AFPA	American Forest Products Association
AMS	Agricultural Marketing Service
ANPRM	advance notice of proposed rulemaking
APA	Administrative Procedure Act
APPA	American Public Power Association
APHIS	Animal and Plant Health Inspection Service
BIS	Bureau of Industry and Security
CAN-SPAM	Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003
Check 21	The Check Clearing for the 21st Century Act
CIBO	Council of Industrial Boiler Owners
CMS	Centers for Medicare and Medicaid Services
COOL	Country-of-Origin Labeling
CPG	compliance policy guide
CRA	Community Reinvestment Act
CRS	Computer Reservations System
CVM	Center for Veterinary Medicine
DAS	days at sea
DHS	Department of Homeland Security
DOC	Department of Commerce
DOD	Department of Defense
DOE	Department of Energy
DOI	Department of the Interior
DOJ	Department of Justice
DOL	Department of Labor
DOT	Department of Transportation
EBSA	Employee Benefits Security Administration
E.O.	Executive Order
EMA	Engine Manufacturers Association
EPA	Environmental Protection Agency
ESA	Endangered Species Act
ESA	Employment Standards Administration
FAA	Federal Aviation Administration
FAR	Federal Acquisition Regulation
FCC	Federal Communications Commission
FDA	Food and Drug Administration
FDIC	Federal Deposit Insurance Corporation
FLSA	Fair Labor Standards Act
FMCSA	Federal Motor Carrier Safety Administration
FMP	fishery management plan
FRA	Federal Railroad Administration
FRFA	final regulatory flexibility analysis

FRS	Federal Reserve System
FTC	Federal Trade Commission
FWS	Fish and Wildlife Service
FY	fiscal year
GSA	General Services Administration
GIPSA	Grain Inspection, Packers and Stockyard Administration
HHS	Department of Health and Human Services
HSAR	Homeland Security Acquisitions Regulations
HUD	Department of Housing and Urban Development
IP	Internet Protocol
IRF	inpatient rehabilitation facility
IRFA	initial regulatory flexibility analysis
IRS	Internal Revenue Service
MACT	maximum achievable control technology
MSHA	Mine Safety and Health Administration
MMA	Medicare Prescription Drug Improvement and Modernization Act
MO&O	memorandum opinion and order
NAICS	North American Industry Classification System
NANC	North American Numbering Council
NATM	National Association of Trailer Manufacturers
NEFMC	New England Fishery Management Council
NHTSA	National Highway Traffic Safety Administration
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
NOx	nitrogen oxide
NPRM	notice of proposed rulemaking
NTCA	National Telecommunications Cooperative Association
OCC	Office of the Comptroller of the Currency
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OPASTCO	Organization for the Promotion and Advancement of Small Telecommunications Companies
OSHA	Occupational Safety and Health Administration
OTS	Office of Thrift Supervision
PACA	Perishable Agricultural Commodities Act
PEL	permissible exposure limit
P.L	Public Law
RESPA	Real Estate Settlement Procedures Act
RFA	Regulatory Flexibility Act
RSPA	Research and Special Programs Administration
RVIA	Recreational Vehicle Industry Association
SBA	Small Business Administration
SBREFA	Small Business Regulatory Enforcement Fairness Act
SEC	Securities and Exchange Commission
TSA	Transportation Security Administration

USDA	United States Department of Agriculture
U.S.C.	United States Code
VA	Department of Veterans Affairs
VoIP	Voice over Internet Protocol

Introduction

This *Report on the Regulatory Flexibility Act, FY 2004* informs the President, the Office of Management and Budget, and Congress whether agencies are properly considering the impact of their rules on small entities and thus improving their compliance with the Regulatory Flexibility Act (RFA) and Executive Order (E.O.) 13272.

The RFA, enacted 25 years ago, requires federal agencies to determine the impact of their rules on small entities, consider alternatives that minimize small entity impacts, and make their analyses available for public comment. Signed by President George W. Bush in August 2002, E.O. 13272 provides a renewed incentive for agencies to improve their compliance with the RFA and give proper consideration to small entities in the agency rulemaking process.

Throughout the past year, the Office of Advocacy continued its efforts to represent small entities before regulatory agencies, lawmakers, and policymakers. The Office of Advocacy worked closely with small entities and their representatives to identify and comment on agency rules that would affect their interests. Advocacy's Regulatory Alerts web page located at http://www.sba.gov/advo/laws/law_regalerts.html, was a useful tool, highlighting notices of proposed rulemaking that may significantly affect small entities.

The Office of Advocacy focused on the issues that were the most important to small entities, significantly reducing regulatory burden and producing substantial cost savings. In fiscal year 2004, the Office of Advocacy achieved more than $17 billion in regulatory cost savings and more than $2 billion in recurring annual savings on behalf of small entities.

This report contains three main sections.

Section 1 is a brief overview of the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). This initial section outlines the history of the RFA, and discusses the requirements of the original law and the SBREFA amendments.

Section 2 details the role of the Office of Advocacy. This section discusses how the Office of Advocacy works with regulatory agencies to encourage them to consider the impacts of their rules on small entities, and minimize those burdens where possible. The section uses charts and tables to illustrate Advocacy's involvement in rulemakings by agency and type of comment. Also included is a listing of Advocacy's formal comment letters, SBREFA panels held by EPA and OSHA, and cost savings realized by small entities in fiscal year (FY) 2004. Section 2 also contains a map outlining state regulatory flexibility legislation and a list of the RFA training sessions Advocacy conducted in the last fiscal year.

Section 3 briefly describes many of the rules in which Advocacy intervened on behalf of small businesses in 2004. Each narrative describes the agency's action, Advocacy's intervention in the rulemaking, and the final regulatory action and cost savings where available.

1 Overview of the Regulatory Flexibility Act and Related Policy

History of the RFA

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

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

In 1993, President Clinton 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 September 2003, OMB issued Circular A-4, which provides guidance to federal agencies for preparing regulatory analyses of economically significant regulatory actions under Executive Order 12866.[3]

In 1996, Congress and the President helped the Office of Advocacy to more effectively implement the RFA by enacting the Small Business Regulatory Enforcement Fairness Act (SBREFA).[4] SBREFA

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

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

3 See the Advocacy website at www.sba.gov/advo/laws/sum_eo.html for a summary of Executive Order 12866; for more detail, visit, http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf. The circular replaces the January 1996 "best practices" and the 2000 guidance documents on Executive Order 12866.

4 Pub. L. No.. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. 104-121, 110 Stat. 857 (1996), 5 U.S.C. § 612(a).

amended the RFA to allow a small business, appealing from an agency final action, to seek judicial review of an agency's compliance with the RFA. Not surprisingly, this change has encouraged some agencies to increase their compliance with the requirements of the RFA.

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

Analysis Required by the RFA

The RFA requires each federal agency to review its proposed and final rules to determine if the rules will have a "significant economic impact on a substantial number of small entities." Section 601 of the RFA defines small entities to include small businesses, small organizations, and small governmental jurisdictions. Unless the head of the agency can certify that a proposed rule is not expected to have a significant economic impact on a substantial number of small entities,[5] 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. It must also contain a comparative analysis of alternatives to the proposed rule that would minimize the impact on small entities and document their comparative effectiveness in achieving the regulatory purpose.

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 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 it and the type of professional skills needed for compliance;
- describe the steps followed by the agency to minimize the economic impact on small entities consistent with the stated objectives of the applicable statutes; and
- give the factual, policy, and legal reasons for selecting the alternative(s) adopted in the final rule, and explain why other alternatives were rejected.[7]

The FRFA may be summarized for publication with the final rule. However, the full text of the analysis must be available for review by the public. The RFA is built on the premise that when an agency undertakes a careful analysis of its proposed regulations, with sufficient small business input, the agency can and will identify the economic impact on small businesses. Once an agency identifies the impact a rule will have on small businesses, the agency is expected to seek alternative measures to reduce or eliminate the disproportionate

5 5 U.S.C. § 605 (b). If a regulation is found not to have a significant economic impact on a substantial number of small entities, the head of an agency may certify to that effect, but must provide a factual basis for this determination. This certification must be published with the proposed rule or at the time of publication of the final rule in the *Federal Register* and is subject to public comment in order to ensure that the certification is warranted.

6 5 U.S.C. § 603.

7 5 U.S.C. § 604.

small business burden without compromising public policy objectives. The RFA does not require special treatment or regulatory exemptions 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 Small Business Regulatory Enforcement Fairness Act amended the RFA in several critical respects. First, the SBREFA amendments to the RFA were specifically designed to ensure meaningful small business input during the earliest stages of the regulatory development process.

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

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

Additionally, SBREFA amended the RFA to bring certain interpretative rulemakings of the Internal Revenue Service (IRS) within the scope of the RFA. The law now applies to those IRS rules (that would normally be exempt from the RFA as interpretative) published in the *Federal Register* that impose a "collection of information" requirement on small entities.[8] 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.[9]

Executive Order 13272

On August 13, 2002, the President signed Executive Order 13272, titled "Proper Consideration of Small Entities in Agency Rulemaking."[10] The E.O. strengthened the Office of Advocacy by enhancing its relationship with OIRA and directing agencies to work closely with the Office of Advocacy to properly consider the impact of their regulations on small entities.

The E.O. first required federal regulatory agencies to establish written procedures and policies on how they intend to measure the impact of their regulatory proposals on small entities, and vet those policies with the Office of Advocacy before publishing them.[11] By February 13, 2003, agencies were to have considered Advocacy's comments and made their final procedures available to the public through the Internet or other easily accessible means.[12] Second, the agencies must notify the Office of Advocacy of draft rules expected to have

8 5 U.S.C. § 601(b)(1)(a).
9 *Id.* at § 601.
10 Exec. Order No. 13272 67 Fed. Reg. 53461 (Aug. 16, 2002), available on the Office of Advocacy website at http://www.sba.gov/advo/laws/eo13272.pdf. The full executive order is reprinted in this report as Appendix B.
11 *Id.* at § 3(a).
12 *Id.* at § 3(a).

a significant economic impact on a substantial number of small entities under the RFA.[13] Third, agencies must consider the Office of Advocacy's written comments on proposed rules and publish a response to those comments with the final rule.[14] The Office of Advocacy, in turn, must provide periodic notification, as well as training, to all federal regulatory agencies on how to comply with the RFA.[15] These preliminary steps set the stage for agencies to work closely with the Office of Advocacy and properly consider the impact of their regulations on small entities.

13 *Id.* at § 3(b). Under the Regulatory Flexibility Act (RFA), an agency must determine if a rule, if promulgated, will have a "significant economic impact on a substantial number of small entities." If the head of the agency certifies the rule will not have such an impact, further analysis under the RFA is not needed. If, however, the agency cannot certify the rule, the agency must perform regulatory flexibility analysis under the RFA. (5 U.S.C. § 603-605).

14 *Id.* at § 3(c).

15 *Id.* at § 2 (a)-(b).

2 Federal Agency Compliance and the Role of the Office of Advocacy

By independently representing the views of small business, the Office of Advocacy is an effective voice for small business before Congress and federal regulatory agencies. Since its creation in 1976, the Office of Advocacy has pursued its mission of creating research products that help lawmakers understand the contribution of small businesses to the U.S. economy. Since enactment of the RFA in 1980, Advocacy's regulatory experts have monitored federal agency compliance with the law and worked to convince federal agencies to consider the impact of their rules on small businesses before the rules go into effect. In 2003, the Office of Advocacy added a new component: reducing regulatory burdens for small businesses at the state level. The Office of Advocacy's regional advocates promoted state model legislation based on Advocacy's experience with the federal RFA and E.O. 13272.[16]

Is Executive Order 13272 Making a Difference?

With the new E.O., some agencies are increasingly recognizing the importance of small business to the nation's economy and the benefit of considering the impacts of their rulemakings on small entities. Those agencies trying to comply with the requirements of the E.O. are coming to Advocacy earlier in the rule development process, resulting in earlier consideration of small business impacts of draft regulations. However, many agencies still do not solicit Advocacy's input early enough in the rule development process.

Section 3(a) of the E.O requires agencies to issue written procedures and policies to ensure that their regulations consider the potential impact on small entities and make them publicly available. All Cabinet-level departments except the Department of State have submitted written plans to Advocacy. The departments have also made the procedures publicly available in compliance with the E.O. (Table 1).

Section 3(b) of E.O. 13272 requires agencies to notify Advocacy of any draft rules that may have a significant economic impact on a substantial number of small entities under the RFA. Such notifications are to be made (i) when the agency submits a draft rule to OIRA under Executive Order 12866, or (ii) if no submission to OIRA is required, at a reasonable time prior to publication of the rule by the agency. To make it easier for agencies to comply electronically with the notice requirements of the E.O. and the RFA, Advocacy established an email address, notify.advocacy@sba.gov. A few agencies have adopted an email system to advise Advocacy of such rules. The agencies that use the email exclusively[17] have found it to be a simple process for meeting the notification requirements.

Section 3(c) of E.O. 13272 requires agencies to give every appropriate consideration to Advocacy's comments on a proposed rule. In the final rule, published in the *Federal Register*, an agency must respond to any written comments submitted by Advocacy on the proposed rule. Many agencies have not yet had an opportunity to comply with this section of the E.O. because the rules on which Advocacy has commented have not been finalized. More time is needed to assess overall agency compliance with this provision of the E.O.

Advocacy continues to be less satisfied with the response to E.O. 13272 by independent regulatory agencies. Of the 75 independent regulatory agencies, 16 responded to the requirements of the E.O. Of these, eight provided written procedures to

16 See p. 23 for a report on the state model RFA legislation, Appendix A for the complete text of the RFA, and Appendix B for the complete text of E.O. 13272.

17 The Environmental Protection Agency, the Department of Veterans Affairs, the Securities and Exchange Commission, and the Department of Justice utilize the system effectively.

Advocacy, six claimed not to regulate small entities, and two claimed to be exempt from the E.O. Independent agencies with plans are generally complying with sections 3(b) and 3(c) of the E.O., or have not had an opportunity to comply.

Advocacy remains most concerned with the noncompliance of eight particular independent agencies that regulate small entities and did not submit written procedures to Advocacy. The eight independent agencies are the Export-Import Bank of the United States, the Farm Credit Administration, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Housing Finance Board, the Federal Maritime Commission, the Federal Reserve System, and the Securities and Exchange Commission. Both the Federal Communications Commission and the Federal Deposit Insurance Corporation submitted letters in response to E.O. 13272.[18] As government-wide RFA training moves forward, the training of independent agencies will be an important step in helping these agencies to comply with the executive order.

RFA Training under E.O. 13272

Executive Order 13272 requires Advocacy to train regulatory agencies on how to comply with the RFA and the E.O. Advocacy identified 66 departments, agencies, and independent commissions that promulgate regulations affecting small business. By training approximately 25 agencies each year, Advocacy hopes to complete training of all 66 agencies before FY 2008. A list of the RFA training sessions conducted in FY 2004 is in Table 2 of this report.

The government-wide rollout of the RFA training began in October 2003. Advocacy has trained more than 30 federal agencies in how to comply with the RFA and the E.O. Agencies that have participated in the rigorous half-day training are more aware of their compliance responsibilities under the RFA and the E.O. Increasingly, agency staff are willing to share draft rules and other important information with Advocacy. This enables Advocacy to better assist them in assessing the small business impacts of their draft rules. Moreover, a large part of the training is laying the foundation for productive relationships between Advocacy and the regulatory agencies. For those agencies willing to take advantage of Advocacy's expertise, knowing where to go for assistance on RFA issues is vital.

Advocacy is in the process of developing the next phase of its RFA training program. The office is working with an outside contractor to create an online computer-based RFA training module. The online training will be useful for both new agency employees and as a review for existing employees.

Advocacy remains optimistic that small businesses will begin to realize the benefits of E.O. 13272 when agencies adjust their regulatory development processes to accommodate the requirements of the RFA and the E.O. As more agencies work with the Office of Advocacy earlier in the rule development process and give small entity impacts appropriate consideration, regulations should show more sensitivity to small business considerations. The E.O. is an important tool designed to guarantee small businesses a seat at the table where regulatory decisions are made. Advocacy will continue working closely with all federal regulatory agencies to train them on the RFA and increase compliance with both the RFA and E.O. 13272.

18 In lieu of submitting policies and procedures in compliance with E.O. 13272, the Federal Communications Commission (FCC) and the Federal Deposit Insurance Commission (FDIC) submitted letters to Advocacy. The FCC's letter indicated the agency's intent to consider the impacts of its regulations on small entities and highlighted its small entity programs designed to encourage participation by small businesses. Advocacy responded by urging the FCC to comply with the E.O. by submitting the required policies and procedures and submitting to Advocacy draft rules that may have a significant impact on small entities. The letter from the FDIC supported the goals of the RFA and indicated the FDIC's commitment to complying with the obligations of the RFA. However, FDIC asserted that E.O. 13272 does not apply to the FDIC because it is an independent agency. Advocacy will continue to work with these independent agencies to bring them into compliance with the executive order. As government-wide RFA training moves forward, the training of independent agencies will be an important step in helping them comply.

"We are grateful to [Advocacy] for bringing to the FCC their interactive training on addressing small business concerns in regulatory proceedings. We have worked closely with SBA's Office of Advocacy in the past, and appreciate their efforts on behalf of small telecommunications businesses. We congratulate them on creating a fine program." —Carolyn Fleming Williams, Director, Office of Communications Business Opportunities, Federal Communications Commission

"During the training…[Advocacy staff] did a wonderful job of articulating the purpose and requirements of the RFA. Because most of the ATF employees attending the training had no background in the RFA, your staff had a particularly hard job, but they were extremely effective…We are certain we will take advantage of [Advocacy's offer to assist ATF in the future] as we begin to apply our training to regulatory projects." — Stephen Rubenstein, Chief Counsel, Bureau of Alcohol, Tobacco, and Firearms

"EBSA employees have said your training was excellent. It's a credit to all of you for keeping up the quality after so many sessions." —Fred Siskind, Office of the Assistant Secretary for Policy, U.S. Department of Labor

Table 1 Summary of Cabinet Department Compliance with Section 3(a) of E.O. 13272: Establishing procedures to Promote RFA compliance

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

Note: The following independent agencies that regulate small entities did not submit written procedures under Section 3(a) of E.O. 13272: the Export-Import Bank of the United States, the Farm Credit Administration, the Federal Communications Commission (submitted letter saying not covered by executive orders), the Federal Deposit Insurance Corporation (submitted letter saying not covered by executive orders), the Federal Emergency Management Agency, the Federal Housing Finance Board, the Federal Maritime Commission, the Federal Reserve System, and the Securities and Exchange Commission.

Table 2 RFA Training in Federal Agencies, FY 2003-2004

In fulfillment of E.O. 13272 requirements, Advocacy has trained the following federal departments and agencies in how to comply with the Regulatory Flexibility Act.

Cabinet Departments

Department of Commerce
- National Oceanic and Atmospheric Administration*

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

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

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

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

Department of Transportation
- Federal Aviation Administration
- Federal Motor Carrier Safety Administration
- Federal Railroad Administration
- Research and Special Programs Administration*

Department of the Treasury
- Alcohol, Tobacco, Tax, and Trade Bureau
- Financial Crimes Enforcement Network
- Financial Management Service
- Internal Revenue Service
- Office of the Comptroller of the Currency

Department of Veterans Affairs

Independent Federal Agencies

Environmental Protection Agency*
Federal Communications Commission
General Services Administration/FAR Council
Small Business Administration

*Trained in FY 2003

RFA and SBREFA Implementation

Advocacy promotes agency compliance with the RFA in several ways.[19] Advocacy staff members regularly review proposed regulations and work closely with small entities, trade associations, and federal regulatory contacts to identify areas of concern, then work to ensure that the RFA's requirements are fulfilled (Charts 1 and 2).

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 unduly stifle entrepreneurial growth. The Office of Advocacy continues to provide economic data, whenever possible, to help agencies identify industrial sectors dominated by small firms. Statistics show regulators why rules should be written to fit the unique characteristics of small businesses if public policy objectives will not otherwise be compromised. Advocacy makes statistics available on its Internet website and maintains a database of information on trade associations that can be helpful to federal agencies seeking input from small businesses.

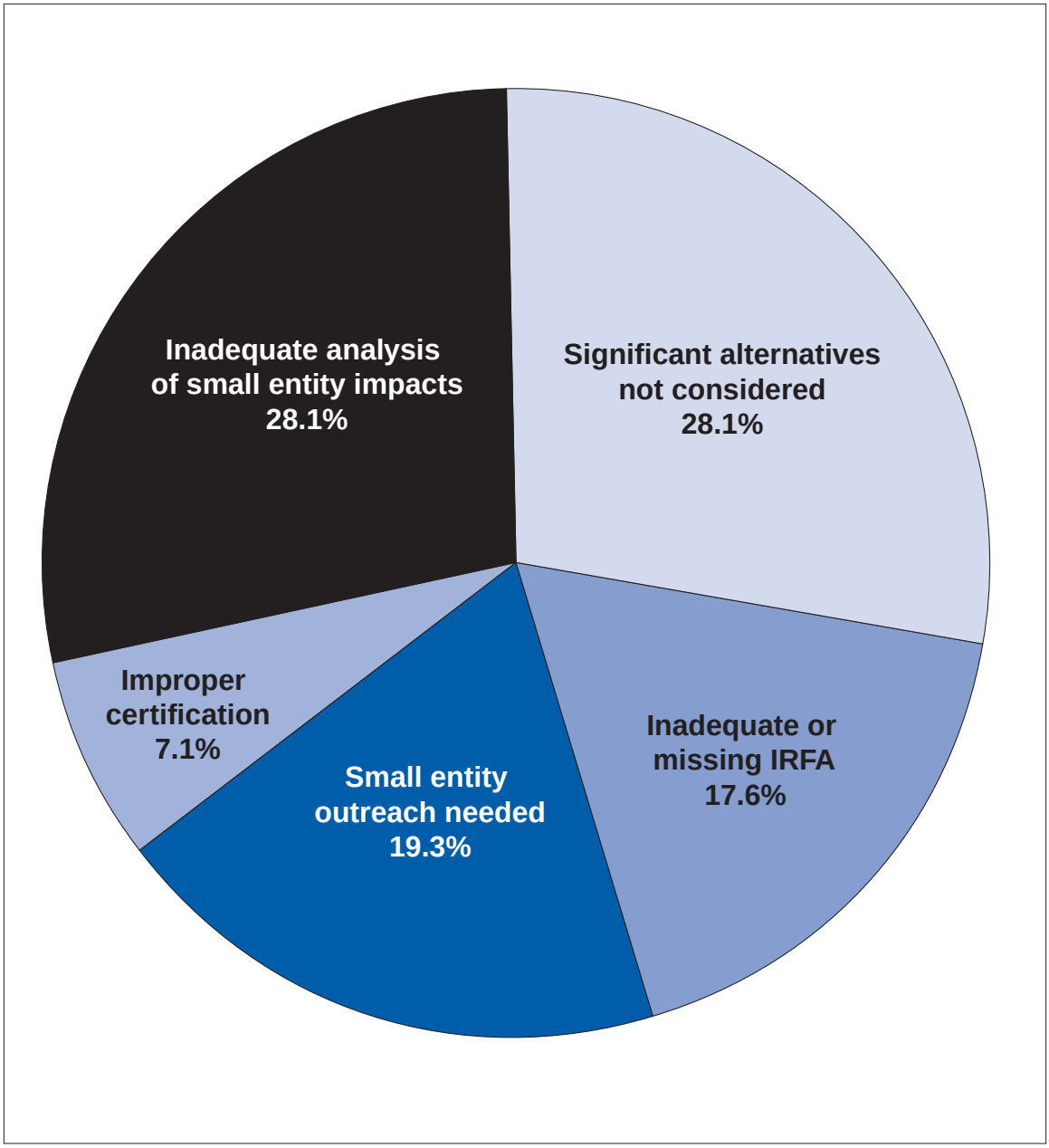
The Office of Advocacy also promotes agency compliance with the RFA through its collaboration with a network of small business representatives. Advocacy staff regularly meet with small businesses and their trade associations regarding federal agency responsibilities under the RFA, factors to be addressed in agency economic analyses, and the judicial review provision enacted in the SBREFA amendments. Roundtable meetings with small businesses and trade associations focus on specific regulations and issues, such as procurement reform, environmental regulations, and industrial safety. Advocacy also plays a key role as a participant in the SBREFA panels convened to review EPA and OSHA rules (Table 3).

As regulatory proposals and final rules are developed, the Office of Advocacy is 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. In 2004, Advocacy submitted a notice of intent to file an *amicus curiae* brief in a litigation proceeding involving the FCC's memorandum opinion and order on local number portability. Ultimately, the notice of intent was withdrawn, as Advocacy and the FCC were able to reach a settlement agreement. Table 4 lists Advocacy's formal comment letters to federal agencies in FY 2004.

Table 5 outlines the rules in which Advocacy intervened and assisted small businesses in obtaining cost savings. Advocacy calculates cost savings based on agency data or industry estimates in the absence of agency data. In FY 2004, revisions to federal agency actions and rulemakings in response to Advocacy's interventions produced first-year cost savings of more than $17 billion (Table 6).

19 The full text of the Regulatory Flexibility Act is in Appendix A.

Chart 1 Advocacy Comments, by Key RFA Compliance Issue, FY 2004 (percent)



Throughout Fiscal Year 2004, the Office of Advocacy advised many agencies on how to comply with the RFA. Chart 1 illustrates the key concerns raised by Advocacy's comment letters and pre-publication review of draft rules. The chart highlights areas for improved compliance based on Advocacy's analysis of its FY 2004 comment letters and other regulatory interventions summarized in this report.

Chart 2 Advocacy Comments and Regulatory Interventions by Agency, FY 2004 (percent)

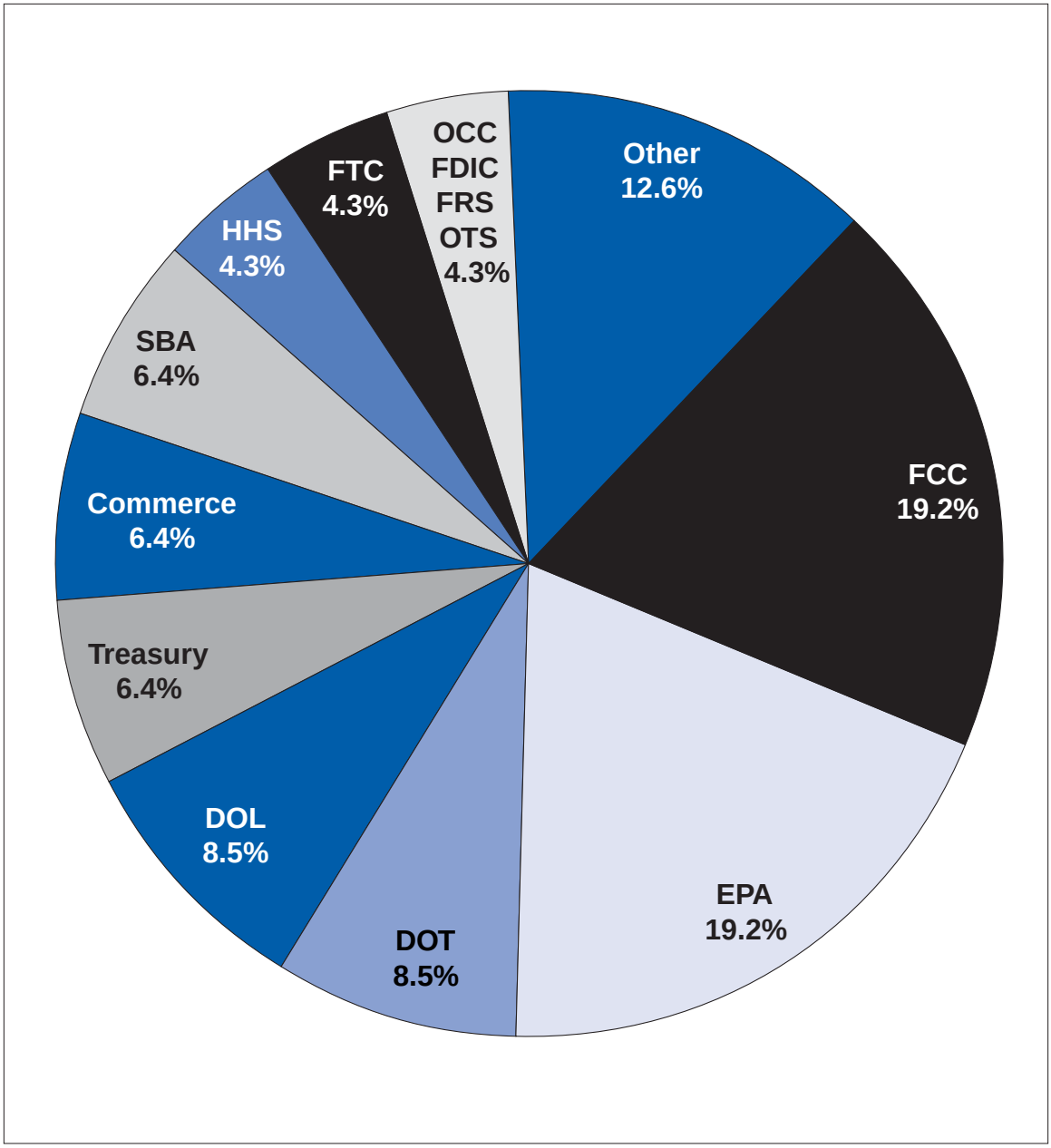


Chart 2 identifies agencies that were the focus of Advocacy's letters and regulatory interventions during Fiscal Year 2004. With the volume of rulemakings in progress each year, Advocacy cannot review every rule for RFA compliance. Instead, Advocacy takes its direction from small businesses, focusing its regulatory interventions on rulemakings identified by small businesses as a priority. This chart simply illustrates the distribution of Advocacy's comment letters and other regulatory interventions across agencies and may not reflect on the agencies' overall RFA compliance records.

Table 3 SBREFA Panels Through Fiscal Year 2004

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

1 Notice of proposed rulemaking (NPRM).
2 Proposed rule was withdrawn August 18, 1999. EPA does not plan to issue a final rule.

Rule Subject	Date Convened	Report Completed	NPRM1	Final Rule Published
Environmental Protection Agency (contd.)				
Construction and Development Effluent Guideline	07/16/01	10/12/01	06/24/02	Withdrawn[3]
Aquatic Animal Production Industry	01/22/02	06/19/02	09/12/02	08/23/04
Lime Industry—Air Pollution	01/22/02	03/25/02	12/20/02	01/05/04
Non-Road Diesel Emissions—Tier 4 Rules	10/24/02	12/23/02	05/23/03	06/29/04
Cooling Water Intake Structures—Phase III Facilities	02/27/04	04/27/04	11/24/04	
Occupational Safety and Health Administration				
Tuberculosis	09/10/96	11/12/96	10/17/97	Withdrawn[4]
Safety and Health Program Rule	10/20/98	12/19/98	Withdrawn	
Ergonomics Program Standard	03/02/99	04/30/99	11/23/99	11/14/00[5]
Electric Power Generation, Transmission, and Distribution	04/01/03	06/30/03		
Confined Spaces in Construction	09/26/03	11/24/03		
Occupational Exposure to Respirable Crystalline Silica Dust	10/21/03	12/19/03		
Occupational Exposure to Hexavalent Chromium	01/30/04	04/20/04	10/04/04	

3 Proposed rule was withdrawn on April 26, 2004. EPA does not plan to issue a final rule.
4 Proposed rule was withdrawn on December 31, 2003. OSHA does not plan to issue a final rule.
5 President Bush signed Senate J. Res. 6 on 03/20/01, which eliminated this final rule under the Congressional Review

Table 4 Regulatory Comment Letters Filed by the Office of Advocacy, Fiscal Year 2004*

Date	Agency	Comment Subject
10/06/03	Treasury/IRS	Notice of Proposed Rulemaking; Depreciation of Vans and Light Trucks; 68 Fed. Reg. 40224 (July 07, 2003).
10/10/03	FCC	*Ex Parte* Presentation Regarding the Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; CG Dkt. No. 02-278; FCC 03-153; 68 Fed. Reg. 44143 (July 25, 2003).
10/30/03	FCC	Reply to the Petition for Reconsideration; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; CG Dkt. No. 02-278; FCC 03-153; 68 Fed. Reg. 44143 (July 25, 2003).
11/03/03	Commerce/ NOAA/NMFS	Amendment 13 to the New England Groundfish Fishery Management Plan.
11/03/03	HHS/CMS	Proposed Rule; Medicare Program; Changes to the Criteria for Being Classified as an Inpatient Rehabilitation Facility; 68 Fed. Reg. 53266 (September 9, 2003).
12/05/03	USDA/AMS	Proposed Rule; Mandatory Country-of-Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts; 68 Fed. Reg. 61944 (October 30, 2003).
12/18/03	SEC	Proposed Rule; Security Holder Director Nominations; 68 Fed. Reg. 60784 (October 23, 2003).
12/18/03	SBA	Proposed Rule; Small Business Government Contracting Programs; 68 Fed. Reg. 60015 (October 20, 2003).
01/05/04	DHS	Interim Rule; Homeland Security Acquisition Regulation; 68 Fed. Reg. 67867 (December 4, 2003).
02/04/04	FCC	Reply Comment; Telephone Number Portability; CC Dkt. No. 95-116; FCC 03-284; 68 Fed. Reg. 68831 (December 10, 2003).
02/04/04	EPA	Toxic Chemical Release Reporting; Online Dialogue Phase II; 68 Fed. Reg. 62759 (November 5, 2003).
02/13/04	FCC	Notice of Intent to File *Amicus*; U.S. Court of Appeals for the District of Columbia Circuit; Telephone Number Portability; CC Dkt. No. 95-116; FCC 03-284 68; Fed. Reg. 68831 (December 10, 2003).

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

Date	Agency	Comment Subject
02/27/04	Commerce/ NMFS	Proposed Rule; Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery; Amendment 13; Fed. Reg. 4362 (January 29, 2004).
03/12/04	Treasury/FRS	Proposed Rule; Availability of Funds and Collection of Checks; 69 Fed. Reg. 1470 (January 8, 2004).
03/29/04	Commerce/ NMFS	Proposed Rule; Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Amendment 10; 69 Fed. Reg. 8915 (February 26, 2004).
03/30/04	EPA	Final Determination on Effluent Limitation Guidelines and New Source Performance Standards for the Construction and Development Category; 67 Fed. Reg. 42644 (June 24, 2002).
03/31/04	FTC	Proposed Rule; Addressing the Feasibility of a National Do-Not-Email Registry under the CAN-SPAM Act; Project No. R411008, RIN 3084-AA96; 69 Fed. Reg. 11776 (March 11, 2004).
04/02/04	DOT/FAA	Proposed Rule; National Air Tour Safety Standards; 68 Fed. Reg. 60572 (October 22, 2003).
04/06/04	OCC/FRS/ FDIC/OTS	Proposed Rule; Joint Proposal to Amend the Community Reinvestment Act Regulations; 69 Fed. Reg. 5729 (February 6, 2004).
04/09/04	HUD	Withdrawal of Real Estate Settlement Procedures Act Draft Final Rule.
04/15/04	OCC/FRS/ FDIC/OTS	Request for Burden Reduction Recommendations; Consumer Protection; Lending Related Rules; Economic Growth and Regulatory Paperwork Reduction Act of 1996 Review; 69 Fed. Reg. 2852 (January 21, 2004).
04/20/04	FTC	Proposed Rule; Addressing the Small Business Impacts of the Implementation of the CAN-SPAM Act; Project No. R411008, RIN 3084-AA96; 69 Fed. Reg. 11776 (March 11, 2004).
05/14/04	OMB	OMB Draft 2004 Report to Congress on the Costs and Benefits of Federal Regulations; 69 Fed. Reg. 7987 (February 20, 2004).
05/28/04	FCC	Review of Regulatory Requirements for IP-Enabled Services; WC Dkt. No. 04-36, FCC 04-28; 68 Fed. Reg. 16193 (March 29, 2004).
06/10/04	FCC	Notice of Withdrawal; U.S. Court of Appeals for the District of Columbia Circuit; Telephone Number Portability; CC Dkt. No. 95-116; FCC 03-284; 68 Fed. Reg. 68831 (December 10, 2003).
06/10/04	EPA	Recommendations for Regulatory Revisions; Spill Prevention, Control and Countermeasure Regulation; 67 Fed. Reg. 47041 (July 17, 2002).
06/29/04	SBA	Proposed Rule; Small Business Size Standards; Restructuring of Size Standards; 69 Fed. Reg. 1310 (March 19, 2004).

Date	Agency	Comment Subject
07/01/04	SBA	Withdrawal of the Proposed Rule on Small Business Size Standards; 69 Fed. Reg. 39874 (July 1, 2004).
08/16/04	DOT/FAA	Supplemental Notice of Proposed Rule; Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities; FAA-2002-11301; 69 Fed. Reg. 27980 (May 17, 2004).
08/24/04	FCC	*Ex Parte* Presentation; Regarding the Initial Regulatory Flexibility Analysis for Local Telephone Competition and Broadband Reporting; WC Dkt. No. 04-141; FCC 04-81; 69 Fed. Reg. 30252 (May 27, 2004).
09/07/04	FCC	*Ex Parte* Letter Supporting the Extension of the Stay of the Order Regarding Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; CG Dkt. No. 02-278, FCC 03-153; 68 Fed. Reg. 44143 (July 25, 2003).
09/21/04	FCC	Proposed Rule; Reply Comment Regarding the Initial Regulatory Flexibility Analysis for NPRM in Federal-State Joint Board or Universal Service; CC Dkt. No. 96-45, FCC 04-127; 69 Fed. Reg. 40839 (July 7, 2004).

Table 5 Regulatory Cost Savings, Fiscal Year 2004

Agency	Subject Description	Cost Savings
HUD	Real Estate Settlement Procedures Act (RESPA). HUD withdrew its proposed RESPA rule from OMB review pending further discussion with affected consumer and industry groups.	**$10.3 billion in the first year.** Source: HUD.
DOT	Changes to the Computer Reservation System (CRS). The final rule deregulated much of the CRS system, allowing travel agencies to negotiate their own contracts as well as permitting them to receive bonuses and other incentives from CRSs.	**$438 million in the first year and annually.** Source: DOT.
EPA	Water Pollution Regulations for Centralized Waste Treatment Facilities. EPA's final rule eliminated pollution limits for the chemical molybdenum in centralized waste water treatment facilities.	**$75 million in the first year and annually.** Source: EPA.
EPA	Industrial, Commercial, and Institutional Boiler and Process Heater Air Toxics. EPA's final rule exempted small facilities from new pollution control equipment installation requirements if they show no adverse impacts on neighboring facilities. .	**$3.75 billion in the first year and $144 million annually.** Source: CIBO, AFPA, APPA.
EPA	Plywood Manufacturing Air Toxics Rule. EPA's final rule exempted small manufacturing facilities from the plant emission requirements, provided the facilities show no adverse impacts on neighboring communities.	**$500 million in the first year and $150 million annually.** Source: AFPA.
EPA	Water Quality Requirements for Construction and Development Activities. EPA withdrew a proposed rule that would have imposed new storm water management requirements on construction and development activities. .	**$585 million in the first year and annually.** Source: EPA.
EPA	Aquaculture Effluent Limitations Guidelines. EPA's final rule substituted management requirements for numerical pollutant limits. EPA also focused the rule on the 50 largest small businesses.	**$5 million in the first year and $2 million annually.** Source: EPA.

Agency	Subject Description	Cost Savings
EPA	Meat Processing Effluent Limitations Guidelines. EPA exempted from its final rule plants that process less than 100 million pounds of poultry, increased the limits on permissible nitrogen and ammonia discharges for plants directly connected to water bodies, and exempted indirect dischargers.	**$25 million in the first year and annually**. Source: EPA.
EPA	Nonroad Diesel Engines and Fuels Rule. EPA modified its final rule to allow small manufacturers additional time to meet new emissions standards for certain engines. The agency delayed the requirement for NOx adsorbers on smaller engines pending a technology review, and exempted the smallest diesel engines from the requirement to carry particulate matter filters.	**$1.38 billion in the first year and annually.** Sources: EPA, AEM, EMA.

Table 6 Summary of Cost Savings, FY 2004[1] (Dollars)

Rule / Intervention	First-Year Cost Savings ($)	Annual Cost Savings ($)
HUD Real Estate Settlement Procedures Act (RESPA)[2]	10,300,000,000	
DOT Computer Reservation System[3]	438,000,000	438,000,000
EPA Water Pollution Regulations for Centralized Waste Treatment Facilities[4]	75,000,000	75,000,000
EPA Industrial, Commercial, and Institutional Boiler and Process Heater Air Toxics Rule[5]	3,750,000,000	144,230,769
EPA Plywood Manufacturing Air Toxics Rule[6]	500,000,000	150,000,000
EPA Water Quality Requirements for Construction and Development Activities[7]	585,000,000	585,000,000
EPA Aquaculture Effluent Limitations Guidelines[8]	5,000,000	2,000,000
EPA Meat Processing Effluent Limitations Guideline[9]	25,000,000	25,000,000
EPA Nonroad Diesel Engines and Fuels Rule[10]	1,386,300,000	1,386,300,000
TOTAL	**17,064,300,000**	**2,805,530,769**

1 The Office of Advocacy generally bases its cost savings estimates on agency estimates. Cost savings for a given rule are captured in the fiscal year in which the agency agrees to changes in the rule as a result of Advocacy's intervention. Where possible, we limit 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 Source: HUD.
3 Source: DOT.
4 Source: EPA.
5 Source: The Council of Industrial Boiler Operators, American Forest and Paper Association, American Public Power Association.
6 Source: American Forest and Paper Association.
7 Source: EPA.
8 Source: EPA.
9 Source: EPA.
10 Source: EPA, The Association of Equipment Manufacturers, and the Engine Manufacturers Association.

Small Business Friendly Regulation: Model Legislation for the States

Advocacy's regional advocates, located in the Small Business Administration's 10 regions, help identify regulatory concerns of small business by monitoring the impact of federal and state policies at the grassroots level. The regional advocates educate governors, state officials, state legislators, and small business representatives about the benefits of reducing state regulatory burdens on small business. As a result, in FY 2004, 17 states introduced regulatory flexibility legislation, and seven states signed the legislation into law. The map provides an overview of state regulatory flexibility legislation. Table 7 lists the states that are considering or that have enacted state regulatory flexibility legislation.

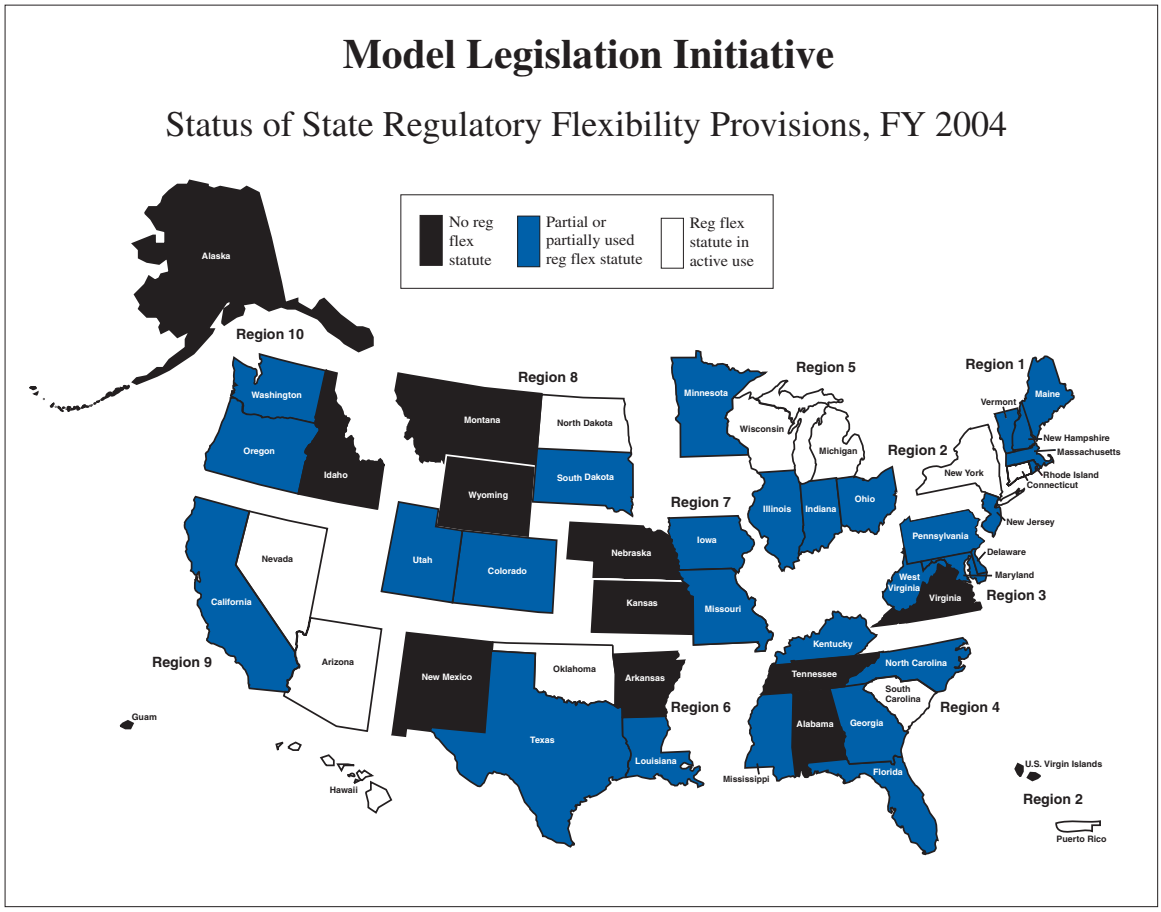


Table 7 Small Business Friendly Legislation by the Numbers

7 states enacted regulatory flexibility legislation in FY 2004

Connecticut (SB 293)	Missouri (HB 978)	South Carolina (H 4130)	Wisconsin (SB 100)
Kentucky (HB 609)	Rhode Island (S3233)	South Dakota (SB 112)	

17 states introduced regulatory flexibility legislation in FY 2004

California	Kansas	Pennsylvania	Washington
Connecticut*	Kentucky*	Rhode Island*	Wisconsin*
Georgia	Missouri*	South Carolina*	
Idaho	Nebraska	South Dakota*	
Illinois	New Jersey	Tennessee	

Current Status As of September 30, 2004

10 states and 1 territory have comprehensive regulatory flexibility statutes

Arizona	Michigan	North Dakota	South Carolina*
Connecticut*	Nevada	Oklahoma	Wisconsin*
Hawaii	New York	Puerto Rico	

29 states have partial or partially used regulatory flexibility statutes

California	Kentucky*	New Hampshire	Texas
Colorado	Louisiana	New Jersey	Utah
Delaware	Maine	North Carolina	Vermont
Florida	Maryland	Ohio	Washington
Georgia	Massachusetts	Oregon	West Virginia
Illinois	Minnesota	Pennsylvania	
Indiana	Mississippi	Rhode Island*	
Iowa	Missouri*	South Dakota*	

11 states, 2 territories, and the District of Columbia have no regulatory flexibility statute

Alabama	Guam	Nebraska	Virginia
Alaska	Idaho	New Mexico	Wyoming
Arkansas	Kansas	Tennessee	
District of Columbia	Montana	Virgin Islands	

* Enacted in FY 2004

Note: For more information on state regulatory flexibility legislation, visit Advocacy's website at http://www.sba.gov/advo/laws/law_modeleg.html.he general purpose of the RFA is clear. In monitoring agency

3 Advocacy Review of Agency RFA Compliance in Fiscal Year 2004

The general purpose of the RFA is clear. In monitoring agency compliance, the Office of Advocacy has found over the years, and reported to the President and Congress, that a number of federal agencies failed to conduct the proper analyses 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; nevertheless, some agencies continue to fall short and others, with generally good RFA compliance, from time to time fail to comply with the RFA on particular rulemakings.

Department of Agriculture

E.O. 13272 Compliance

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

APHIS has proposed some rules that could significantly affect a substantial number of small entities and has properly notified Advocacy as required by section 3(b) of the E.O. While the agency often certifies that its rules will not have a significant impact on a substantial number of small entities, it performs a fair number of IRFAs. Advocacy is working with the agency on improving technical aspects of its IRFAs. The agency should have a better understanding after completing RFA training slated for early 2005. Advocacy is developing contacts with key industry groups concerned with APHIS regulations. This will allow Advocacy to focus on rules that are a priority for small entities affected by APHIS's rules.

It is too early to determine if the USDA, as a whole, is in compliance with section 3(c), the requirement to address Advocacy's comments in their final rules, because no rules have gone final in the past two years in which Advocacy has filed comments. The USDA has not yet received RFA training. APHIS is scheduled for its first training session in 2005. Following this session and others at the department, Advocacy expects to see an improvement in E.O. compliance from the agencies within the USDA.

Agricultural Marketing Service

Issue: Mandatory Country-of-Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities and Peanuts

The Farm Security and Rural Investment Act of 2002 (2002 Farm Bill) required the U.S. Department of Agriculture (USDA) to issue regulations requiring country-of-origin labeling (COOL) for certain commodities including beef, lamb, pork, fish, peanuts, and fresh and frozen fruits and vegetables.

Advocacy began working with USDA's Agricultural Marketing Service (AMS) on COOL prior to its publication of a proposed rule. On October 30, 2003, AMS issued a proposed rule requiring food retailers to notify customers of the country of origin of covered commodities beginning September 30, 2004. It also proposed considerable recordkeeping and record retention requirements for food producers and retailers. AMS prepared an initial regulatory flexibility analysis (IRFA) as required by the RFA to analyze the proposed rule's economic impacts on small entities.

On December 5, 2003, Advocacy filed comments on the proposed rule, requesting that AMS expand its analysis to address the potential economic impacts on small retailers, suppliers and producers/growers licensed under the Perishable Agricultural Commodities Act of 1930 (PACA) and PACA-exempt small food entities. Advocacy urged AMS to lessen the compliance burdens on small businesses by

reducing the record retention requirements. In its letter, Advocacy also provided specific data on the rule's economic impact on small entities obtained from outreach to affected small businesses, including a roundtable held on November 17, 2003.

Because of concerns regarding the potential cost of mandatory COOL, Congress included language in the 2004 Consolidated Appropriations Act that delayed implementation of the rule for all covered commodities, except wild and farm-raised fish and shellfish, until September 2006. Advocacy welcomed this reprieve to allow additional time for AMS to study COOL and develop less burdensome ways to implement it.

On September 30, 2004, AMS published an interim final COOL rule for fish and shellfish. Consistent with Advocacy's prior recommendations, the interim final rule permits food labels to display the country of origin. AMS reduced the record retention requirement for producers and retailers to one year in cases where the food label sufficiently establishes country of origin. In addition, the agency announced it will delay active enforcement until September 2005, which allows time for retailers and producers to exhaust existing inventories of labels and packing materials.

"The SBA Office of Advocacy held important roundtables to help identify the disproportionate impact of mandatory country-of-origin labeling on smaller producers, suppliers, and retailers. Advocacy's findings and the comments submitted to Members of Congress and the Administration were instrumental in educating the different branches of government about the problems that the law would pose for small businesses." — Deborah White, Associate General Counsel for Regulatory Affairs, Food Marketing Institute

Department of Commerce

E.O. 13272 Compliance

The RFA compliance policies of the Department of Commerce (DOC) are publicly available as required by section 3(a), and the department notified Advocacy of draft rules as required by section 3(b). The agency within DOC that had the greatest involvement with Advocacy in FY 2004 was the National Marine Fisheries Service (NMFS). NMFS routinely submits to Advocacy draft proposed and final rules that it believes will have a significant economic impact on a substantial number of small entities as required by the E.O.. The Bureau of Industry and Security (BIS) also submitted a draft proposed rule to Advocacy for review. In its final rules, NMFS has addressed Advocacy's comments as required by section 3(c) of the E.O. As one of the agencies involved in Advocacy's RFA training pilot program, NMFS was one of the first agencies to receive RFA training. Advocacy plans to train the remaining agencies at the DOC in the next fiscal year.

National Marine Fisheries Service

Issue: Amendment 13 to the New England Groundfish Management Plan

Amendment 13 is a comprehensive fishery management plan (FMP) designed to rebuild the fishing stock in New England, eliminate overfishing, and reduce bycatch, which occurs when other fish are unintentionally caught. It includes several recreational and commercial fishery management measures such as possession limits, fishing area closures, trip limits, days-at-sea limitations, and gear restrictions. Advocacy began working with the fishing industry and the National Marine Fisheries Service (NMFS) on Amendment 13 in the summer of 2002 because of concerns that Amendment 13 would be overly burdensome to small fishers.

On January 29, 2004, NMFS published a notice of proposed rulemaking to implement Amendment 13. Although the proposed rule reflected a significant recommendation from the small fishers, they still had numerous concerns about provisions governing default measures for establishing fishing mortality rates, conditional fishing area closures, and the extension of cod trip limits and gear requirements to the eastern U.S. and Canadian coastline.

On February 27, 2004, Advocacy submitted comments to NMFS encouraging full consideration of the fishing industry's concerns. Advocacy also

suggested that NMFS improve its RFA analysis by publishing a summary of the small entity impacts, presenting a more thorough analysis of the reporting and recordkeeping costs, supplying more detail on the classification of vessels, and providing the public with access via the Internet to the tables that supplemented the analysis. Advocacy also asked NMFS to conduct a more thorough analysis of the impact on recreational vessels.

NMFS issued a final rule on April 27, 2004, to implement Amendment 13. In the final rule, the agency responded to the issues raised by Advocacy as required by E.O. 13272. In addition, NMFS provided some of the information that Advocacy requested to clarify the IRFA, such as providing a table to summarize impacts, and providing information about vessel size and party vessels. NMFS also modified the rule as it applied to U.S./Canada management areas.

On September 14, 2004, NMFS issued a proposed rule to adjust Amendment 13 to allow for additional fishing of groundfish. Advocacy will continue to work with the industry as NMFS implements adjustments for Amendment 13.

Issue: Amendment 10 to the Atlantic Sea Scallop Fishery

Amendment 10 is a comprehensive long-term program to manage the sea scallop fishery in the northeastern United States. The amendment seeks to maximize scallop yield through an area rotation management program and includes measures to minimize the adverse effects of fishing on essential fishing habitat, establishes days-at-sea allocations, and introduces measures to eliminate bycatch.

On February 26, 2004, NMFS issued a proposed rule to implement Amendment 10. NMFS proposed to allow areas to be closed and reopened to fishing on a rotational basis, depending on the condition and size of the scallop resource in the areas. The scallop industry advised Advocacy that it was most concerned about provisions that required scallop fishers to increase the diameter of the gear rings and the size of the fishing mesh. Additionally, the scallop fishers raised concerns that the days at sea (DAS) set aside for observer coverage and the compensation for early trip termination were potentially inconsistent with the intent of the New England Fishery Management Council (NEFMC), which assisted NMFS in the development of Amendment 10.

Advocacy submitted comments on March 29, 2004, questioning the lack of data to support NMFS's conclusion that the long-term benefits of the gear modifications outweighed the short-term costs and revenues lost. Further, Advocacy took issue with the agency's method for determining the offset for observer costs and the compensation for trips that are terminated early.

In its letter, Advocacy encouraged NMFS to carefully consider the comments filed by affected small entities, clarify aspects of the rule that impose unnecessary burdens on small entities, and address RFA compliance issues raised by Advocacy in the final regulatory flexibility analysis. Advocacy also recommended that the NMFS review the NEFMC's management plan to determine if the changes in the proposal were consistent with it. Advocacy also suggested that NMFS make the gear modifications optional until it has enough data to analyze the impact of the gear modification on small entities.

On June 23, 2004, NMFS issued a final rule to implement Amendment 10. In the final rule, NMFS addressed some of the issues raised by Advocacy by adjusting the multiplier for the DAS observer coverage and by allowing the vessel operator to determine whether a trip must be terminated early.

On August 26, 2004, NMFS published a proposed rule to adjust Amendment 10 to allow scallop fishing within the areas closed to multispecies fishing. If adopted, this change could give scallop fishers additional opportunities to fish, thereby reducing the economic impact of Amendment 10. Advocacy will continue to work with the scallop fishery and NMFS as the agency makes framework adjustments to implement Amendment 10.

"The Office of Advocacy has been an important element in the government's development of increasingly complicated scallop rulemaking processes. They have helped re-open some of the nation's historically most productive scallop grounds on Georges Bank, off New England; asked probing and effective questions about disproportionate costs; and helped address and fix practical economic and safety concerns that fishermen have had about a new management regime. We really appreciate Advocacy's responsiveness and assistance over the years." —Marjorie Orman, Board Member, Fisheries Survival Fund and Owner, Solveig's Settlement House, Fairhaven, Massachusetts

Department of Defense

E.O. 13272 Compliance

The defense-related regulations of greatest interest to small businesses are procurement regulations issued by the Federal Acquisition Regulation (FAR) Council. Consideration of small business impacts in these rulemakings is covered by the policies and procedures of the FAR Council submitted to Advocacy by the General Services Administration. The Department of Defense (DOD) has not published procedures that would apply to rulemakings supplemental to the FAR Council. Advocacy will continue to work with DOD to encourage it to publish procedures pursuant to this section. In FY 2004, DOD did not provide Advocacy with any draft rules under section 3(b) of the E.O., and Advocacy is not aware of any proposed rules being released that would have triggered the notice requirement. In addition, DOD did not issue any final rules in FY 2004 that were previously the subject of comments from Advocacy, so it is too early to report on DOD's compliance with section 3(c) of the E.O.

Department of Education

E.O. 13272 Compliance

The Department of Education (Education) has made its policies and procedures publicly available as required by section 3(a) of E.O. 13272. Education notifies Advocacy through Advocacy's email notification system of draft rules that may have a significant impact on a substantial number of small entities, as required by section 3(b) of the E.O. Education has not finalized any rules in the past fiscal year on which Advocacy has filed comments. Therefore, it is too early to report on Education's compliance with section 3(c) of the E.O.

Department of Energy

E.O. 13272 Compliance

The Department of Energy (DOE) has complied with section 3(a) of the E.O. by making its policies and procedures publicly available on its website. DOE is scheduled for RFA training in FY 2005. In FY 2004, DOE did not provide any draft rules to Advocacy under section 3(b) and the Office of Advocacy is not aware of any proposed rules being issued that would have triggered the notice requirement prior to publication. Advocacy has not filed comments on any DOE rules that have gone final in the last fiscal year, so it is too early to report on DOE's compliance with section 3(c) of the E.O.

Department of Health and Human Services

E.O. 13272 Compliance

The Department of Health and Human Services (HHS) made its policies and procedures publicly available as required by section 3(a) of the E.O. The Centers for Medicare and Medicaid Services (CMS) and the Food and Drug Administration (FDA), two agencies that often promulgate rules that affect small businesses, did not consistently submit drafts of rules pursuant to section 3(b) of the E.O. in 2004. CMS participated in two RFA training sessions in FY 2004 and additional trainings are planned for next year. FDA has also received training on how to comply with the RFA and the E.O. With regard to section 3(c), it is still too early to report on HHS's compliance with this provision, as no rules have been finalized this fiscal year on which Advocacy has filed comments. Advocacy will continue to work with HHS to improve its compliance with the E.O.

Centers for Medicare and Medicaid Services

Issue: Medicare Program; Changes to the Criteria for Being Classified as an Inpatient Rehabilitation Facility

On September 9, 2003, CMS published a proposed rule seeking to change the criteria Medicare uses for classifying a hospital as an inpatient rehabilitation facility (IRF). For an IRF to be eligible for Medicare payment during its most recent cost reporting period, CMS proposed that 75 percent of the IRF's total patient population must require intensive rehabilitation services for treatment of one or more of 10 qualifying medical conditions. CMS acknowledged that the proposed rule would likely have a significant economic impact on a substantial number of small entities and prepared an IRFA as required by the RFA.

Small entities informed Advocacy that the proposed rule could cause affected IRFs to close because they could not meet its eligibility requirements. On November 3, 2003, Advocacy filed comments on the proposed rule citing concerns that it would negatively impact patient care and reduce the economic viability of IRFs. Advocacy questioned the adequacy of the data used by CMS to justify the proposed rule. Advocacy encouraged CMS to reduce the IRF patient threshold to 50 percent or less for a three-year period while CMS acquired more data.

On May 7, 2004, CMS published a final rule that adopted several of Advocacy's suggestions. In particular, CMS adopted lower patient thresholds for a three-year period while the agency continued to study the issues. CMS also made changes to the qualifying medical conditions consistent with concerns raised by Advocacy and small IRFs. CMS also addressed Advocacy's comments as required by E.O. 13272. The changes made by CMS should enable IRFs to retain their eligibility for Medicare reimbursement, and save significant revenues while providing appropriate patient care.

Issue: Medicare Program; Medicare Prescription Drug Benefit

In December 2003, Congress passed and President Bush signed into law the Medicare Prescription Drug Improvement and Modernization Act of 2003 (MMA). The MMA created a Medicare prescription drug benefit that will become available by January 1, 2006. On August 3, 2004, CMS published a proposed rule implementing the Medicare prescription drug benefit. The proposed rule was consistent with recommendations made by Advocacy in a May 2002 comment letter on CMS's proposed rule to establish a Medicare-endorsed prescription drug card. Advocacy has encouraged CMS to issue a final rule that retains these recommendations to help reduce the economic impact on small pharmacies.

Advocacy's 2002 comments sought to ensure that small pharmacies could join card programs that offered a drug discount card and that card sponsors would be prohibited from offering a "mail order only" benefit. These recommendations had been reflected in CMS's final Medicare-Endorsed Prescription Drug Card rule from September 2002. However, the 2002 prescription drug card initiative was invalidated by the United States District Court for the District of Columbia—resulting in Congress passing and the President signing into law the MMA authorizing CMS to undertake the prescription drug discount benefit program. On August 3, 2004, CMS published a proposed rule seeking to implement the Medicare prescription drug benefit. The proposed rule included provisions that were consistent with the suggestions Advocacy made to CMS on the earlier iterations of the rule. As a result of Advocacy's participation in this CMS rulemaking, many small independent pharmacies will be able to participate and compete in the Medicare discount drug card program.

Food and Drug Administration

Issue: Compliance Policy Guide 7125.40; Sec. 608.400 - Compounding of Drugs for Use in Animals

The Animal Medicinal Drug Use Clarification Act of 1994 granted the FDA the authority to enforce

the compounding of drugs intended for use in animals. The FDA's Center for Veterinary Medicine (CVM) issued a Compliance Policy Guide (CPG) in 1996. The guide informed FDA staff, industry and the public of the agency's position on the types of compounding that might be subject to enforcement action. In July 2003, without the benefit of notice and comment rulemaking, the FDA updated the CPG to promote consistency in its veterinary drug compounding policies.

In November 2003, Advocacy met with representatives from several pharmaceutical compounding organizations regarding the economic impact of the revised CPG. Advocacy subsequently met with the FDA to discuss the CPG and encouraged the agency to meet with the compounding organizations. In May 2004, Advocacy facilitated a meeting between the FDA and the compounding organizations to discuss the implications of the updated CPG for the industry. The FDA later announced its intention to draft and publish for public comment a revised CPG on veterinary pharmaceutical compounding in the near future. Advocacy will continue to monitor development of the rule and work with the affected small entities and the FDA to ensure proper consideration of small entity impacts as required by the RFA and E.O. 13272.

"The SBA's Office of Advocacy provided critical assistance to thousands of independent pharmacists across the nation after the United States Food and Drug Administration's Center for Veterinary Medicine released a Compliance Policy Guide which would have had a devastating economic impact on the industry. Advocacy's intervention and facilitation of direct meetings between pharmacists and FDA officials was crucial in having this CPG reviewed and rewritten. Without Advocacy's ability to intercede, thousands of pharmacies would have been left without a voice, and would have been unduly impacted." —Mark Deion, President, Deion Associates & Strategies, Inc.

Department of Homeland Security

E.O. 13272 Compliance

The Department of Homeland Security (DHS) policies and procedures statement is publicly available on its website, as required by section 3(a) of the E.O. DHS has not complied with the notice requirements of section 3(b) of the E.O. Several DHS staff received an RFA briefing in anticipation of more detailed training sessions. Agencies within DHS will be trained in the next fiscal year, beginning with the Transportation Security Administration (TSA). In addition, the Office of Advocacy recently met with new DHS personnel retained to work on regulatory compliance issues. In the past year, DHS primarily published interim rules requesting public comments. Advocacy has not filed written comments on any DHS rules that have been issued as final rules this fiscal year. Therefore, it is still too early to report on DHS compliance with section 3(c) of the E.O.

Issue: Homeland Security Acquisitions

On December 4, 2003, DHS published for comment an interim rule titled Homeland Security Acquisitions Regulations (HSAR). The rule consolidated the department's acquisition regulations into a single location within the *Code of Federal Regulations*. DHS had issued the interim rule under the "good cause" exemption to the notice and comments requirements of the Administrative Procedure Act (APA), citing urgent and compelling reasons requiring publication of the rule. Advocacy commended DHS for soliciting public comments on the interim rule.

After speaking with affected small businesses, Advocacy submitted a comment letter to DHS on January 5, 2004. Advocacy urged DHS to further examine the economic impacts of the rule on small entities, clarify sections of the rule that create unnecessary confusion, and re-examine the incentives allowing large business prime contractors to participate in the mentor-protégé program. DHS has not yet taken final action on the rule and Advocacy will continue to work with the department to address the concerns raised by the affected small entities.

Department of Housing and Urban Development

E.O. 13272 Compliance

The Department of Housing and Urban Development (HUD) made its policies and procedures available to the public in the timeframe required by section 3(a) of the E.O. HUD also began notifying Advocacy of rules that may have a significant impact on a substantial number of small entities as required by section 3(b) of the E.O. HUD is scheduled to be trained on RFA and E.O. compliance in FY 2005. It is still too early to report on HUD's compliance with section 3(c) since no rules were finalized on which Advocacy filed comments.

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

In 2002, HUD issued a proposed rule to revise the regulations implementing the Real Estate Settlement Procedures Act (RESPA). Despite HUD's good intentions to simplify and improve the process of obtaining home mortgages and to reduce settlement costs to consumers, the proposed rule was strongly opposed by small businesses throughout the real estate and settlement services industry.

Advocacy filed comments on behalf of small business on October 28, 2002. Advocacy's comments suggested that HUD prepare a revised IRFA to provide information to the public about the industries affected by the proposal and alternatives to minimize the impact on small entities. Advocacy also emphasized its desire to continue working with HUD to ensure that the improvements to the mortgage financing and settlement process stimulate small business growth.

In FY 2004, the House Committee on Small Business and the Senate Committee on Banking, Housing, and Urban Affairs held hearings to discuss the RESPA rule. The hearings focused on the potential impact of the proposed RESPA rule on the real estate and settlement services industry, with particular attention paid to the impacts on small entities.

In December 2003, HUD submitted its draft final RESPA rule to the Office of Management and Budget for review. During the review period, numerous small entity representatives met with OMB to discuss the implications of the proposed rule and urge its reconsideration. Advocacy participated in several of these meetings and continued to work with HUD and OMB to address the concerns raised by small businesses in the real estate and settlement services industry.

In March 2004, after extending the 90-day review period, HUD withdrew the draft final RESPA rule from OMB review. In the withdrawal letter to OMB, HUD Secretary Alphonso Jackson stated that based on concerns from members of Congress and key members of consumer and industry groups he believed that "it would be prudent for HUD to reexamine the RESPA rule before it is made final." He indicated his intent to re-propose the rule after having met with affected consumer and industry groups, as well as briefing members of Congress.

Secretary Jackson's decision to withdraw the rule was widely praised by the small businesses that raised concerns about the rule. On April 9, 2004, Advocacy sent a letter to Secretary Jackson commending him for his decision to withdraw the draft final RESPA rule from OMB review. By withdrawing the rule, HUD will have an opportunity to assess the full impact of the RESPA regulations on small businesses and consider less burdensome alternatives. In its letter, Advocacy supported HUD's decision to reexamine the RESPA rule, meet with industry groups, and seek public comment on a new proposed rule. Advocacy estimates one-time cost savings from the withdrawal of the RESPA rule to be $10.3 billion. Advocacy will continue working with HUD as it reevaluates the rule and its analysis of the potential impacts on small entities.

"The Office of Advocacy provided an invaluable role in the federal rulemaking process on the Real Estate Settlement Procedures Act (RESPA) revisions proposed in 2002. The roundtable Advocacy held in 2002 initiated the office's involvement in the process and proved an effective forum for a public dialogue on this rule. The potential effect of the proposed rule on small business was identified by Advocacy and eventually became a key concern on Capitol Hill and within HUD. As a representative of an industry association that has 2,400 small business owners, I believe Advocacy's involvement in the RESPA issue really made a difference in our members' belief that the federal government was accessible to them and listened to their concerns. The opportunity to meet with Advocacy during the rulemaking process and discuss the effects of the proposed rule was invaluable. —Ann von Eigen, Legislative/Regulatory Counsel, American Land Title Association

Department of the Interior

E.O. 13272 Compliance

The Department of the Interior (DOI) has made its policies and procedures publicly available in compliance with section 3(a) of the E.O. As required by section 3(b), DOI notifies Advocacy of rules that could have a significant economic impact on a substantial number of small entities. Prior to publication of a rule, agencies within DOI typically submitted notifications and a "record of compliance" to Advocacy. DOI also utilized Advocacy's email notification system to inform Advocacy of draft rules that may affect small business. Advocacy held one RFA training for DOI employees in FY 2004 and anticipates future training sessions. As a result, agencies within DOI contacted Advocacy prior to finalizing rules. The agencies requested Advocacy's guidance and then incorporated that advice into regulatory actions. This is a significant improvement in the Department's RFA and E.O. compliance. Because DOI has not issued any final rules this fiscal year on which Advocacy filed comments, it is too early to report on DOI's compliance with section 3(c) of the E.O.

The Fish and Wildlife Service (FWS) continues to certify its final designations of critical habitat for endangered species as not having a significant economic impact on a substantial number of small entities despite small business views voiced during the process. FWS has not completed an IRFA or FRFA for a critical habitat designation. This exception to DOI's attention to the RFA and E.O. is of concern and Advocacy will continue to work with FWS to improve its RFA and E.O. compliance.

Fish and Wildlife Service

Issue: Designation of Critical Habitat for the Bull Trout

On November 29, 2002, FWS proposed to designate more than 18,000 miles of rivers and streams and almost 500,000 acres of lakes and reservoirs as critical habitat for the bull trout across the states of Washington, Oregon, Idaho, and Montana. Under section 605 of the RFA, FWS certified that the proposed rule would not have a significant economic impact on a substantial number of small entities. The Office of Advocacy conducted outreach to small entities potentially affected by the proposed rule. As a result of these conversations, Advocacy recognized that the proposed rule should not have been certified because it would likely have a significant economic impact on a substantial number of small entities in a number of the affected counties.

In its discussions with FWS, Advocacy recommended that the agency revisit the economic impacts of the proposed designations and consider less burdensome alternatives. In particular, Advocacy recommended that FWS not designate areas it had identified as most likely to affect small businesses due to their high commercial value or importance as water sources for agricultural use. FWS took Advocacy's comments under advisement as it reviewed the comments and prepared its final rule. On September 21, 2004, FWS issued a final rule that excluded high cost areas, reduced the des-

ignated river and stream miles from 18,175 to 1,745, and reduced the acres of lakes and reservoirs designated from 498,782 to 61,235. Based on FWS's economic analyses, Advocacy believes that the changes made by FWS eliminated a majority of the rule's 10-year estimated cost of $200 million to $260 million.

"The Idaho Farm Bureau Federation greatly appreciates the hard work SBA did on behalf of our members to turn the over-reaching bull trout critical habitat designation in Idaho into a more sensible approach. Our members own small businesses on the main streets throughout Idaho, ranches, farms, and dairies which rely on irrigation water, timberland and small mills in the central and northern areas, recreation and tourism businesses, the entire range of small businesses negatively affected by the original designation. We still question the four subunits remaining as critical habitat but are grateful that SBA brought common sense to the table." —Frank Priestley, President, Idaho Farm Bureau Federation

Ongoing Concerns

Section 4 of the Endangered Species Act (ESA) outlines two distinct regulatory actions that FWS may take to protect species. First, FWS may "list" a species, which protects the species from any action that may "jeopardize the continuing existence of the species." Second, once a species is listed, FWS must complete a notice and comment rulemaking designating "critical habitat" for that species and the activities that FWS has determined would "adversely modify" that critical habitat. These regulatory actions can impose significant costs on small entities that need to obtain federal permits, such as Clean Water Act permits, Forest Service grazing permits, or Bureau of Land Management permits. These costs are imposed by FWS in the form of project delays, mitigation costs, and required scientific study as part of the "consultation" process, during which FWS must determine whether a project will result in jeopardy to a listed species or adverse modification to a listed species' designated critical habitat.

Until recently, the FWS did not establish critical habitat for most species. Instead, the agency relied on an interpretation of the jeopardy test that imposed project consultation requirements, similar to those for adverse modification, without submitting a critical habitat designation to notice and comment rulemaking, as required by the ESA. Small entities informed Advocacy that they regularly incur significant costs in FWS's jeopardy consultations.

Pursuant to settlement agreements reached by FWS with public interest groups, FWS agreed to perform some critical habitat rulemakings subject to restrictive mandatory schedules. However, small entities have informed Advocacy that the agency repeatedly fails to consider regulatory impacts, citing the strict rulemaking schedules agreed to by FWS. The majority of the critical habitat designation rules issued by the FWS are certified under section 605 of the RFA as not having a significant economic impact on a substantial number of small entities. Small businesses have advised Advocacy that the economic analyses performed by FWS for rules designating critical habitat do not accurately capture the rules' impacts.

Advocacy continues to work with affected small entities and FWS in an effort to bring FWS rulemakings into compliance with the RFA. Although FWS has demonstrated some willingness to consider small entity impacts during its considerations for critical habitat designations, the agency continues to certify all critical habitat rules under the RFA.

Department of Justice

E.O. 13272 Compliance

The Department of Justice (DOJ) has made its policies and procedures publicly available as required by section 3(a) of E.O. 13272. DOJ notifies Advocacy through Advocacy's email notification system of draft rules that may have a significant impact on a substantial number of small entities, as required by section 3(b) of the E.O. It is too early to report on DOJ's compliance with section 3(c) of the E.O. because the agency has not finalized any rules in the past fiscal year on which Advocacy has filed comments.

Department of Labor

E.O. 13272 Compliance

The Department of Labor (DOL) has made its policies and procedures publicly available as required by section 3(a) of E.O. 13272. Agencies within DOL notify Advocacy by mail and by Advocacy's email notification system of rules that may have a significant impact on a substantial number of small entities, as required by section 3(b) of the E.O. Advocacy submitted comments on DOL's rule to update its overtime pay regulations, which was finalized in FY 2004. In its rulemaking, DOL addressed Advocacy's comments, as required by section 3(c) of the E.O. The final rule included a small business safe harbor consistent with Advocacy's comments.

Advocacy held four RFA training sessions for DOL employees in fiscal year 2004. One session was for Occupational Safety and Health Administration (OSHA) employees and another was for Mine Safety and Health Administration (MSHA) employees. The remaining sessions were for DOL employees from various agencies. Since the training sessions, DOL regulatory staff has contacted Advocacy with follow-up questions. OSHA and MSHA employees were more aware of their requirements under the RFA and the E.O. following the training sessions. As part of the SBREFA panel process, OSHA typically contacted Advocacy to discuss rules that may have a significant impact on a substantial number of small entities.

Employment Standards Administration, Wage and Hour Division

Issue: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees

On April 23, 2004, DOL issued a final rule revising its overtime pay regulations that incorporated small business concerns and addressed outstanding issues for millions of small employers. Advocacy worked closely with DOL and representatives of affected small entities to ensure that small business concerns were addressed in the final rule and that the costs to small business were reflected in the economic analysis. Advocacy began working with DOL prior to publication of the proposed rule in March 2003. Advocacy submitted comments on June 24, 2003, informing DOL that small businesses generally supported the changes to the overtime regulations, but could not absorb a minimum salary level test significantly above the increase contained in the proposed rule.

DOL's final rule changed its existing regulations on overtime pay for white collar workers to eliminate confusion and to reduce a recent increase in lawsuits on this issue. While the Fair Labor Standards Act of 1938 (FLSA) requires all employers to pay employees overtime, it exempts white collar workers who are "executive, administrative, or professional employees" from the overtime pay requirement. Because the FLSA does not define the terms "executive," "administrative or "professional," the DOL's regulations must define which employees fall within these classes and are thus exempt from overtime pay. DOL achieved this by setting a minimum salary and outlining certain duties required of an employee to be considered an exempt white collar employee. In its final rule, DOL raised the minimum salary level slightly above the level proposed, simplified the descriptions of employees' duties, and included a safe harbor provision for inadvertent violations consistent with Advocacy's comments. These and other changes in DOL's enforcement practices were welcomed by Advocacy and affected small businesses.

"The Office of Advocacy correctly identified that updating the white-collar regulations was an issue of particular importance to small businesses who struggled to understand and comply —often without the benefit of HR staffs and attorneys—with the outdated regulations. They were involved with the issue from the beginning, including filing comments on the proposed regulations and educating key players on the impact of the regulation on small business. The Office of Advocacy is a strong and reliable voice for small business and their advocacy is critical in helping to educate policymakers about the needs and challenges small businesses face."— Sandra Boyd, Vice President for Human Resource Policy, National Association of Manufacturers

Occupational Safety and Health Administration

Issue: Occupational Exposure to Crystalline Silica

On October 20, 2003, OSHA held a SBREFA panel to review a draft proposed rule regulating occupational exposure to respirable silica dust. Exposure to high levels of silica dust can lead to silicosis, lung fibrosis, lung cancer, and other respiratory diseases.

The SBREFA panel included representatives from OSHA, the Office of Management and Budget, and Advocacy. Small entity representatives from various industries, including the stone and gravel industry, construction, the paint and coatings industry, and others, provided information, comments, and recommendations on the draft proposed rule and draft analyses of its economic impacts, as well as the technical feasibility and risk assessments supporting the draft proposal.

The small entity representatives were concerned that OSHA had underestimated the cost of the new silica rule. They noted that several compliance methods listed in the rule were either not feasible or were too costly for the affected small entities. The representatives also felt that the agency had overestimated the benefits that would be gained from the new rule.

The SBREFA panel issued its final report on December 19, 2003. In its report, the panel urged OSHA not to move forward with the new rule. Instead, the panel recommended that the agency expand its outreach and enforcement program under the existing silica rule. The panel also encouraged OSHA to recalculate the costs of the rule using better economic data.

OSHA is reviewing the panel report as it considers next steps. OSHA did not issue a proposed rule in FY 2004. OSHA Assistant Secretary John Henshaw has indicated that the agency is moving forward with an economic analysis in response to the panel report. Advocacy will continue working with the agency to address the concerns raised by the SBREFA panel.

"The SBREFA process was helpful to the Brick Industry Association as our members conveyed their initial impressions about OSHA's preliminary thoughts concerning a possible silica rulemaking. At the outset, SBA and Labor Department officials said they welcomed our opinions…we were gratified to see in the SBREFA panel's final report a number of areas in which brick industry comments had, in fact, been relayed to the OSHA Administrator. Given that the vast majority of brick industry companies are small businesses, it is critical that our concerns about what could possibly be an exorbitantly expensive rule receive the requisite attention." —Joseph S. Casper, Vice President of Environmental Health and Safety, The Brick Industry Association

Issue: Confined Spaces in Construction

OSHA convened a SBREFA panel on September 26, 2003, to consider a draft proposed rule on confined spaces in the construction industry. Confined spaces in construction refer to workspaces that a construction employee can enter, but have restricted or limited means for entry and exit. Such spaces are not designed for continuous employee occupancy and are often subject to additional hazards, including the potential for engulfment or toxic atmospheres. The draft proposed rule required employers to identify and evaluate the hazards present in such spaces before entry. It also required employers to prevent untrained employees from going into confined spaces. The draft rule imposed requirements for recordkeeping, atmospheric testing and monitoring, and rescue plans for instances where employees are trapped or engulfed in a confined space. The SBREFA panel of representatives from Advocacy, OSHA, and OMB received comments and suggestions from small entity representatives including home builders, general contractors, and subcontractors involved in commercial construction.

The final report of the SBREFA panel was issued on November 23, 2003. The report informed OSHA that the costs imposed by the draft proposed

rule would be too high. Instead, the panel recommended that OSHA investigate how to adapt existing confined spaces standards used in general industry to the construction industry. Such steps would reduce the cost burden on affected entities while helping to achieve the agency's objectives. OSHA did not issue a notice of proposed rulemaking in FY 2004. Advocacy will continue monitoring the issue.

Issue: Occupational Exposure to Hexavalent Chromium

On February 19, 2004, OSHA convened a SBREFA panel on a draft proposed rule to regulate occupational exposure to hexavalent chromium. Scientific studies indicate that exposure to high levels of hexavalent chromium can cause cancer and a variety of other maladies. The draft proposed rule would reduce occupational exposure by lowering the permissible exposure limit (PEL) to hexavalent chromium from 52 micrograms per cubic meter of air to 1 microgram per cubic meter. As written, the rule would require new engineering and administrative controls and impose new recordkeeping and medical management requirements.

The SBREFA panel received comments and data from small entity representatives from several industries including electroplating, chrome pigment producers, chrome pigment users, shipbuilders and construction. The small entity representatives informed the panel that worksites in the construction and maritime industries present difficulties for the regulatory scheme contemplated by the draft proposal. In short, the small entity representatives suggested that the regulation was more suitable for the fixed worksites found in general industry. The panel reviewed the draft proposal, listened to the industry comments, and evaluated several alternatives.

In the panel report issued on April 20, 2004, the SBREFA panel recommended that OSHA consider several alternatives, including removal of the construction and maritime industries from the scope of the rule. On October 4, 2004, OSHA published a proposed rule on occupational exposure to hexavalent chromium. In the proposal, OSHA excluded the construction and maritime industries from most of the requirements for monitoring and engineering controls. However, OSHA included a PEL significantly lower than the threshold recommended in the SBREFA panel report as technically feasible. Advocacy will continue to work with OSHA and affected small entities to help craft a technically feasible and less burdensome regulation. Comments on the proposed rule are due by January 3, 2005.

"I was very impressed by the efforts made during the SBREFA panel process to understand and consider all the participants' viewpoints. The initiative shown by the Office of Advocacy to develop a thorough understanding of the scientific and practical issues was especially noteworthy." — Joel Barnhart, Vice President and Technical Advisor, Elementis Chromium

Department of State

E.O. 13272 Compliance

The Department of State has not posted its policies and procedures to promote compliance with the RFA, as required by section 3(a) of the E.O. Advocacy will continue to reach out to the State Department to encourage it to develop and publish policies and procedures on consideration of small entity impacts during rulemaking. In FY 2004, the State Department did not provide any draft rules to Advocacy under section 3(b), and the Office of Advocacy is not aware of any proposed rules being issued that would have triggered the notice requirement prior to publication. Advocacy is pleased that its input was solicited for a rule that is currently in the early stages of development. The State Department did not issue any final rules in FY 2004 that were the subject of prior comments by Advocacy, so compliance with section 3(c) was not triggered.

Department of Transportation

E.O. 13272 Compliance

The Department of Transportation (DOT) has made its RFA compliance policies and procedures pub-

licly available as required by section 3(a) of the E.O. DOT agencies utilized Advocacy's email notification system to submit draft rules that may have a significant impact on a substantial number of small entities, as required by section 3(b) of the E.O. Four agencies within DOT have received Advocacy's RFA training: the Research and Special Programs Administration (RSPA), the Federal Aviation Administration (FAA), the Federal Railroad Administration (FRA), and the Federal Motor Carrier Safety Administration (FMCSA). The remaining DOT agencies will be trained in FY 2005. As a result of the trainings, the agencies have consulted with Advocacy on initial regulatory flexibility analyses and certifications. They have all provided draft rules to Advocacy, as required by section 3(b) of the E.O. As a result, Advocacy was able to provide feedback at an earlier stage, allowing time for DOT agencies to make changes before the rules were published in the *Federal Register*. Advocacy has not filed written comments on any proposed rule that was finalized in fiscal year 2004, so it is too early to report on DOT's compliance with section 3(c) of the E.O.

Issue: Computer Reservations System Regulations

On November 15, 2002, DOT published a proposed rule to revise its Computer Reservations System (CRS) regulations. DOT issued its proposed rule to examine whether the existing rules governing these systems were necessary and, if so, whether they should be modified. Through its small business outreach, Advocacy determined that the proposed rule had several provisions that could harm small businesses, including travel agencies. In its March 2003 comment letter, Advocacy encouraged DOT to publish for comment a revised IRFA that identified the affected small entities, analyzed the proposal's economic impact on the small entities, and addressed regulatory alternatives that would minimize the impact on small businesses.

On January 7, 2004, the DOT announced that it would deregulate the CRS industry by discontinuing most of its regulations on January 31, 2004. To ensure a smooth transition, rules governing display bias and prohibiting CRSs from imposing certain unreasonably restrictive contract clauses remained in effect until July 31, 2004. The final rule allowed travel agencies to negotiate their own contracts, and receive bonuses and other incentives from CRSs. The travel agent industry was very pleased with DOT's decision and estimated that removal of the CRS rules prevented travel agents from losing $438 million annually in revenue.

"The Office of Advocacy stood by us every step of the way - in writing letters, in official testimony. If there are any other small business industries out there that aren't taking advantage of the services of this office, they are missing out on the miracle worker of this Administration."
—Barbara O'Hara, Vice President for Government Affairs, American Society of Travel Agents

Federal Aviation Administration

Issue: Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities

On May 17, 2004, the FAA issued a supplemental notice of proposed rulemaking on antidrug and alcohol misuse prevention programs. The supplemental notice reopened the record of a February 28, 2002, notice of proposed rulemaking of the same name. The supplemental rule made clear that employees who perform safety-sensitive functions are subject to mandatory drug and alcohol testing. The FAA certified, under section 605(b) of the RFA, that the clarification would not have a significant economic impact on a substantial number of small entities. The earlier proposed rule also contained a certification. Despite this assertion, the agency received several comments on the supplemental notice. Affected entities argued that the supplemental notice was more than a clarification and would have a significant economic impact on their operations.

The Office of Advocacy submitted formal comments on the supplemental notice to the FAA on August 16, 2004. In its comments, Advocacy informed the FAA that it lacked a factual basis for its certification as required by section 605 of the RFA. Advocacy's analysis indicated that, for the first time, the FAA drug and alcohol testing requirement would reach lower tier subcontractors such as parts suppliers, refurbishers, brokers, fabricators, metal finishers, interior restorers, machinists, metallurgical consultants, and rebuilders at any tier of subcontract. The FAA's economic analysis did not include any information on these entities. Advocacy suggested that the agency include specific information on these entities and if the data are not available, the FAA should specifically request it from the industry. Advocacy also expressed concern about the FAA's analytical approach. The agency used aggregate data and an assumed average size of 19 employees per small entity across all the affected industries. Advocacy informed the agency that such assumptions were likely to be inaccurate.

To date, the FAA has not responded to the comments it received from the affected entities and Advocacy. Advocacy will continue to monitor this issue.

Issue: National Air Tour Safety Standards

On October 22, 2003, the FAA published a proposed rule that would establish new safety standards for commercial air tour operators. The rule would eliminate existing exemptions for commercial air tours now conducted under Title 14, Part 91 (small sightseeing operators) of the *Code of Federal Regulations* and require all air tour operators to obtain Title 14, Part 119 certification. Currently, Part 91 exempts certain nonstop sightseeing flight operators who use the same airport for takeoff and landing and fly within a 25-mile radius, from certification required under Part 119.

The FAA acknowledged that the proposed rule would have a significant economic impact on small air tour operators because many would choose to exit the sightseeing industry rather than obtain the more costly Part 119 certification. In April 2004, Advocacy submitted comments to the FAA on the proposed rule. In its comments, Advocacy expressed concern that many small operators could not afford the cost of obtaining Part 119 certification and thus would be forced to exit the industry. Further, Advocacy asserted that the rule imposed new cost burdens on existing Part 119 operators who could not absorb the additional costs and remain in business. Advocacy also questioned the economic data used by the FAA to support the rule. Advocacy pointed out some flaws in the data and suggested that the agency withdraw the rule until it could obtain more complete data on the potential economic impact of the rule on affected small entities. In response to the thousands of comments it received, the FAA extended the comment deadline, hosted an online discussion, and held two public meetings to discuss the proposal with affected entities. The FAA has not finalized the rule. Advocacy will continue working closely with the air tour industry and the FAA to resolve ongoing concerns.

"The Small Business Administration Office of Advocacy…helped preserve the future for nearly 1,500 small aviation businesses. That's the number of aviation sightseeing companies that would have been driven under if an FAA regulatory change had been put into effect. That change would have choked off some $7 million a year in business along with charity fundraisers—with no demonstrable improvement in aviation safety. The Office of Advocacy's strong comments and call for withdrawal were a significant victory for sightseeing operators and pilots who volunteer their skills and aircraft for charity." —Luis Gutierrez, Director, Regulatory and Certification Policy, Aircraft Owners and Pilots Association

National Highway Traffic Safety Administration

Issue: Reporting of Information and Documents about Potential Defects

On July 10, 2002, the National Highway Traffic Safety Administration (NHTSA) published a final rule titled Reporting of Information and Documents

about Potential Defects. The rule required vehicle manufacturers to report claims and complaints attributable to possible vehicle manufacturing defects. Following publication of the final rule, several trade associations including the National Association of Trailer Manufacturers (NATM) and the Recreational Vehicle Industry Association (RVIA) submitted petitions of reconsideration to the agency. RVIA challenged the reporting threshold of 500 vehicles annually and suggested that 5,000 vehicles annually would be more appropriate. NATM encouraged the agency to exempt trailers of less than 26,000 pounds gross vehicle weight from the rule.

Several of the industry groups requested that Advocacy submit a letter in support of the petitions for reconsideration to the agency. While Advocacy did not submit a letter, the office helped the agency obtain information on small businesses affected by the rule. NHTSA denied the petitions on January 23, 2004. However, the agency included an updated regulatory evaluation in its published response. The new regulatory evaluation provided greater detail about the impact of the rule. NHTSA also agreed to review the adequacy of the reporting threshold in 2006. Advocacy was provided an opportunity to review the updated analysis in accordance with the requirements of E.O. 13272.

Department of the Treasury

E.O. 13272 Compliance

The Department of the Treasury (Treasury) made its policies and procedures available to the public as required by section 3(a) of the E.O. The agencies within Treasury that most concern small business are the Internal Revenue Service (IRS), the Office of the Comptroller of the Currency (OCC) and the Office of Thrift Supervision (OTS). While the IRS has not notified Advocacy of any draft proposed rules under section 3(b), Advocacy has been invited to, and has participated in, several pre-publication and some pre-drafting meetings on IRS regulatory proposals regarding potential effects on small business. Both OCC and OTS notified Advocacy in accordance with the requirements of section 3(b). Advocacy filed comments on one IRS rule that was finalized in fiscal year 2004. Under section 3(c) of the E.O., the IRS did make reference to the comments in general, but the comments were not attributed to Advocacy. In addition, Advocacy's assertion that the regulation was a legislative rule, and not merely interpretative, was dismissed by the IRS. In the future, Advocacy advises IRS to specifically address its concerns in final rules in order to comply. In its final rule on the Community Reinvestment Act, OTS addressed Advocacy's comments as required under section 3(c) of the E.O. The IRS and OCC received RFA training in FY 2004. Since the training, the IRS has contacted Advocacy more frequently regarding RFA and E.O. 13272 questions on various regulatory issues and proposals.

Internal Revenue Service

During FY 2004, Advocacy increasingly consulted with the IRS about the RFA. Advocacy is seeing some regulations earlier, allowing time to consult with the agency before the rules are published. Advocacy attributes this trend to the participation of IRS regulation writers and their supervisors in RFA training pursuant to E.O. 13272.

Issue: Legislation to Increase RFA Compliance by the IRS

On May 5, 2004, the Chief Counsel for Advocacy testified before the Committee on Small Business, U.S. House of Representatives, on improving the Regulatory Flexibility Act, H.R. 2345. In his testimony, the Chief Counsel recommended extending the SBREFA panel process to include rules promulgated by the IRS. The Chief Counsel also addressed whether the RFA should be expanded to make it clear that IRS interpretative rules should comply with the RFA, regardless of whether a collection of information requirement is imposed by statute or regulation. Advocacy believes the narrow IRS interpretation of the SBREFA amendments is a result of the IRS contention that its regulations never "impose on small entities a collection of information requirement." Rather, the IRS believes that, in all instances, the requirements to collect information are imposed by statute.

The IRS's inclination to classify all of its regulations as interpretative and as not imposing collections of information has allowed the agency to avoid complying fully with the RFA.

In August 2004, Advocacy completed a review of the Internal Revenue Service's history with respect to the RFA since the passage of SBREFA. From SBREFA's enactment in 1996 to early August 2004 the IRS published 875 regulatory proposals in the *Federal Register*.[20] Of the 875 (none of which the IRS classified as "legislative" and therefore subject to the RFA without regard for the imposition of a collection-of-information requirement), the Internal Revenue Service conducted an IRFA or a FRFA in 29 instances (3 percent). In another 278 instances (32 percent), the IRS certified that the regulation would not have a significant economic impact on a substantial number of small entities. Generally, the certifications did not include a detailed factual basis for the public to evaluate the IRS position. Therefore, in only 35 percent of the regulatory proposals did the IRS acknowledge the applicability of the RFA, and in most of these instances the certifications were not supported by analyses. On 498 occasions (57 percent), the IRS insisted that the regulation imposed no collection-of-information requirement and was not subject to the RFA. In a small number of regulations, the IRS stated both that there was no collection-of-information requirement (and therefore no RFA analysis or certification would be required) and simultaneously certified that the information collection would have no significant impact on small businesses.

Advocacy supports efforts by Congress to instill a system of regulatory flexibility analysis in the IRS and will continue working with the IRS to increase small business involvement in rulemaking.

Issue: Depreciation of Vans and Light Trucks

On July 7, 2003, the Internal Revenue Service issued a proposed rule modifying existing regulations under Internal Revenue Code section 280F, limiting the depreciation allowance for passenger automobiles. Certain vans and light-duty trucks were excluded from the depreciation limits. The proposed regulations would have allowed certain vehicles to escape the depreciation limits if they were specially modified, minimizing the likelihood that the vehicles would be used for personal purposes.

The Office of Advocacy filed comments on the proposed rule on October 6, 2003, commending the IRS for its initial outreach to small businesses and suggesting that physical modification of the vehicles was too strict a standard. Advocacy pointed out that the regulations were "legislative" regulations requiring compliance with the RFA. Advocacy requested that the IRS analyze the small entity impacts as required by the RFA. As an alternative, Advocacy suggested a "need plus use" test be inserted in the section 280F regulations. Thus, if a business owner could substantiate the need for a light truck or van and its actual use in the trade or business, Advocacy suggested that the IRS exempt the vehicle from the passenger automobile depreciation limits.

On June 25, 2004, the IRS published its final and temporary regulations. The final regulations rejected Advocacy's suggested need/use test as "inherently subjective [causing] administrative difficulty of the type that the proposed regulations were designed to avoid."[21] Further, the agency rejected Advocacy's characterization of the regulation as "legislative," and stated that no regulatory flexibility analysis was needed.

Issue: Questionable W-4s

The IRS currently requires employers receiving "questionable W-4s" (W-4s claiming complete exemption from withholding and W-4s claiming more than 10 withholding allowances) to submit these forms to the IRS. Very few employers comply with this requirement, and the IRS follows up with few because its system is entirely manual. This matter

20 Sorted by RIN number. Advocacy has eliminated from this review advanced notices of proposed rulemaking and regulations projects for which the notice of proposed rulemaking was issued before March 29, 1996.

21 69 Fed. Reg. 35513.

is important to the IRS because persons with no taxes withheld are the least likely to comply with their tax reporting and payment duties.

On September 29, 2004, the IRS outlined to Advocacy and several industry groups a new system for dealing with questionable W-4s. Among the features of the proposed system was a new duty on employers to report to the IRS any employee who increased his/her withholding allowances by more than 3 in any one-year period. Advocacy pointed out to the IRS that this would entail an entirely new system of recordkeeping for employers (including small businesses) to monitor their employees' one-year W-4 history on a rolling forward basis, and impose additional burden on employers who would be required regularly to consult these records to determine which employees, if any, to report to the IRS. Advocacy suggested that the IRS abandon this feature of its proposed program. As a result, the IRS withdrew this aspect of its W-4 proposal.

Advocacy commended IRS on its willingness to listen to the constructive views of small business and change course as a result. Advocacy is hopeful that the IRS will seek consultation on more rules affecting small entities in the coming year.

"Regulators often overlook the required preparations for compliance. In a recent meeting with the Internal Revenue Service, the Office of Advocacy tuned in to the time and expense involved in a proposal for additional payroll recordkeeping of the W-4 forms. The cost of compliance could have included hundreds of millions of dollars and thousands of manhours. The Office of Advocacy was quick to analyze the repercussions and calculate the potential cost to employers. Businesses appreciate the Office of Advocacy saving employers the turmoil and the furor that would have been stirred up if the proposal had been made a requirement. This is a good example of government agencies interacting and listening to one another for the good." —Barbara Majors CPP, Payroll Administrator, American Payroll Association, Atlanta Chapter

Office of Comptroller of the Currency, Office of Thrift Supervision, Federal Deposit Insurance Corporation, and Federal Reserve System

Issue: Community Reinvestment Act

On February 6, 2004, the Office of the Comptroller of the Currency (OCC), the Federal Reserve System, the Federal Deposit Insurance Corporation (FDIC), and the Office of Thrift Supervision (OTS) ("the agencies") proposed a rule to revise the Community Reinvestment Act (CRA) regulations. Under the CRA, regulated financial institutions must demonstrate that they serve the credit needs, consistent with safe and sound lending practices, of the communities in which the insured bank or thrift is chartered to do business, including low- and moderate-income communities. The CRA also helps improve access to credit among underserved rural and urban communities.

The purpose of the proposal was to reduce unwarranted regulatory burdens and to better address abusive lending practices. The agencies proposed to change the definition of "small institution" by increasing the asset threshold from less than $250 million to less than $500 million, without regard to the amount of assets held by an affiliated holding company. This change would increase the number of banks and thrifts whose CRA performance is evaluated under the streamlined performance standards for small institutions.

After consulting with representatives of small banks, Advocacy submitted comments to the agencies. In its comments submitted on April 16, 2004, Advocacy commended the agencies for proposing a rule that would reduce regulatory burdens on small banks and thrifts. Advocacy encouraged the agencies to consider changes to the CRA examination process, and suggested they provide a factual basis to support their certification under section 605 of the RFA.

In July 2004, the Federal Reserve and OCC announced they were withdrawing their proposals and keeping the $250 million size standard. OTS and FDIC however, announced that they would change the definition of a "small institution" to one that has less than $1 billion in assets.

On August 20, 2004, the FDIC published a proposed rule seeking additional comments on changes to its CRA regulations that would increase the threshold of a small bank from $250 million to $1 billion. FDIC also proposed to add community development criteria to performance standards for institutions between $250 million and $1 billion in size. The criteria would evaluate whether the institutions provided a choice or combination of community development lending, investment, and service activities (depending on community needs). They would also provide greater choices of lending activities for banks in rural areas. Advocacy will continue monitoring the various rulemakings and will work with the agencies to ensure that the concerns of small financial institutions are considered.

Department of Veterans Affairs

E.O. 13272 Compliance

The Department of Veterans Affairs (VA) has made its policies and procedures for RFA compliance available to the public as required by section 3(a) of the E.O. VA asserts that most of its regulations do not affect small entities. A review of the agency's E.O. notifications supports this assertion. Notwithstanding, VA has complied with the E.O. by notifying Advocacy of proposed regulatory actions it believes may have a significant economic impact on a substantial number of small entities, as required by section 3(b) of the E.O. The VA has also received RFA training. Advocacy has not filed written comments on any VA proposed rules that were finalized during this fiscal year, so it is too early to report on VA's compliance with section 3(c) of the E.O.

Architectural and Transportation Barriers Compliance Board

E.O. 13272 Compliance

The Architectural and Transportation Barriers Compliance Board (Access Board) has not published written policies and procedures that ensure that the potential impacts of agencies' draft rules on small businesses are properly considered during the rulemaking process, as required by section 3(a) of the E.O. The Access Board did not issue any rules in fiscal year 2004 that it characterized as having a significant economic impact on a substantial number of small entities. In FY 2004, the Access Board issued a final rule and addressed Advocacy's prior written comments as required by section 3(c). Regrettably, the agency rejected Advocacy's concerns regarding the sufficiency of its economic analysis. A description of the issue appears below. Advocacy will continue to help the Access Board improve their RFA and E.O. compliance.

Issue: Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act Accessibility Guidelines

On July 23, 2004, the Access Board issued a final regulation under the Americans with Disabilities Act (ADA) that imposed new handicapped accessibility requirements affecting millions of small businesses. The rule dictated specific design requirements for elements of all newly constructed and altered facilities that either hold themselves open to the public or have employees. The final rule contained design element changes such as door widths, dressing room designs, wheelchair clearance in all employee work areas, visible fire alarms, and many others. The Access Board certified that the final rule would not have a significant economic impact on a substantial number of small entities.

In its comments on the proposed rule, Advocacy advised the Access Board of its concerns that the rule should not be certified under section 605 of the RFA. Advocacy conducted extensive outreach to regulated small entities, who stated that the rule imposed significant regulatory costs. Additionally, small entities indicated that the Access Board had not addressed their concerns in its RFA analysis. Advocacy is continuing to work with affected small entities, in preparation for a subsequent rulemaking by DOJ to determine how the final rule adopted by the Access Board should apply to existing facilities, especially those owned by small businesses. On September 30, 2004, DOJ

issued an advance notice of proposed rulemaking soliciting comments on whether or how it should adopt the Access Board's rule with respect to existing facilities.

"The American Hotel & Lodging Association sought the assistance of the U.S. Small Business Administration during the rewriting of the ADA Accessibility Guidelines before the U.S. Access Board. With the active cooperation of the SBA, we were able to achieve reasonable final regulations on scoping requirements and fire alarm installation, saving the lodging industry billions in unnecessary expenses." —Kevin Maher, Vice President for Governmental Affairs, American Hotel & Lodging Association

Board of Governors of the Federal Reserve System

E.O. 13272 Compliance

The Board of Governors of the Federal Reserve System (FRS) has not published policies and procedures as required by section 3(a) of the E.O. In FY 2004, the FRS did not notify Advocacy of rules that may have a significant economic impact on small entities, as required by section 3(b) of the E.O. However, during the fiscal year, the FRS issued two joint rules with the Federal Deposit Insurance Corporation, the Office of Thrift Supervision and the Office of the Comptroller of the Currency on which Advocacy filed comments. The FRS did not address Advocacy's comments in the final rules as required by section 3(c) of the E.O. Advocacy will continue to work with the FRS to bring them into compliance with the RFA and E.O. and to provide RFA training.

Issue: Check Clearing for the 21st Century

On January 8, 2004, the FRS published a notice of proposed rulemaking on the availability of funds and collection of checks. The proposal implements the Check Clearing for the 21st Century Act (Check 21), which facilitates the broader use of electronic check processing. Check 21 authorized the use of a new negotiable instrument called a substitute check. Although the act does not mandate that any bank change its current collection practices, all banks are required to educate their customers about electronic check clearing. The proposed rule: 1) set forth the requirements of the act that apply to banks; 2) provided model disclosure and model notices relating to substitute checks; and 3) set forth endorsement requirements for substitute checks.

Small banks were concerned about the costs associated with the mandatory disclosures, consumer education, and training of employees about the requirements of the rule. They were also worried that the provisions pertaining to the magnetic ink character recognition line would make processing substitute checks less efficient than processing paper checks. Further, they were concerned that the provisions pertaining to automated clearinghouse transactions and breaches of the Uniform Commercial Code warranties may be outside of the scope of the act.

On March 12, 2004, Advocacy submitted comments to the agency. In its comments, Advocacy encouraged the FRS to publish a supplemental IRFA that adequately analyzed the proposed rule's impacts on small entities. Advocacy noted that the IRFA in the proposal did not describe or estimate the number of small entities to which the proposed rule would apply. Advocacy also urged the FRS to give full consideration to alternatives to minimize the impact on small banks. On August 4, 2004, the FRS published a final rule that did not address Advocacy's concerns pursuant to E.O. 13272. Advocacy will continue working with the FRS to improve its RFA compliance.

Environmental Protection Agency

E.O. 13272 Compliance

The Environmental Protection Agency (EPA) has made its comprehensive policies and procedures document available on its website, in compliance with section 3(a) of the E.O. In 2004, EPA has provided Advocacy with all of its draft rules when they were sent to OMB for review in compliance with section 3(b) of the E.O. in FY 2004. EPA addressed

Advocacy's comments in its final rules as required by section 3(c) of the E.O. Select EPA staff participated in the first pilot training program on the RFA. EPA already has a high level of compliance with the RFA and E.O., so they were able to assist Advocacy in the development of the training program. Other EPA staff will receive the revised training program in the next fiscal year.

Issue: Aquaculture Effluent Limitations Guidelines

On June 30, 2004, EPA published a final rule promulgating national water quality requirements for the aquaculture sector (fish and other aquatic animals). Based on the input from the Office of Advocacy, and from the Departments of Agriculture and Commerce and other federal agencies, EPA determined that it would be inappropriate to implement numerical limits to reduce suspended solids for this sector. Instead, EPA decided to issue a final rule that established a set of management requirements to reduce the total suspended solids (the main pollutant of interest). The final rule also included specific requirements regarding drugs and pesticides that may enter the water in a facility.

The pre-proposal draft of the rule was the subject of a SBREFA panel in January 2002. The final rule incorporated the SBREFA panel recommendation that EPA include only the largest facilities in the rule. As a result, only the 50 largest small business facilities are covered by the rule. The changes saved small businesses $5 million in first-year capital costs, and about $2 million in annual operating expenses.

Issue: Industrial, Commercial, and Institutional Boiler and Process Heater Air Toxics Rule

On September 13, 2004, the EPA published a final Clean Air Act rule that requires facilities with boilers or process heaters to reduce emissions of certain toxic air pollutants from their boilers or process heaters. Advocacy worked with EPA prior to publication of the proposed rule to ensure that the rule would not impose costly control requirements on small businesses with small boilers and insignificant emissions. In the final rule, EPA adopted Advocacy's recommendation that facilities able to demonstrate that their boiler/process heater operations will not affect the health of neighboring individuals will not be required to install the new pollution control equipment. EPA also adopted Advocacy's recommendations regarding requirements for fuel analysis, frequency of monitoring, and the averaging of emissions from different units. The cost savings resulting from the final requirements total $3.75 billion in avoided first-year capital costs and $144 million in avoided annual operating expenses.

"Without the excellent effort of the SBA Office of Advocacy, I doubt if a reasonable and environmentally effective Boiler MACT could have been achieved with the flexibility to meet the standards for improving the environment and saving industry hundreds of millions of dollars. Thanks, Advocacy!" —Robert D. Bessette, President, Council of Industrial Boilers

Issue: Nonroad Diesel Engine and Fuels Rule

On June 29, 2004, EPA published a final Clean Air Act rule requiring new emission controls for nonroad diesel engines. Nonroad diesel engines are used extensively in construction, agriculture, and other off-road applications. The rule requires diesel engines to be redesigned and fitted with control equipment similar to catalytic converters now found on automobiles. The rule also requires dramatic reductions in the sulfur levels of diesel fuel used by nonroad engines. EPA expects the rule will reduce emissions from nonroad diesel engines by up to 90 percent. In October 2002, a SBREFA panel was held to review a draft version of the proposed rule. The final panel report recommended that EPA exclude engines below 70 horsepower from the rule.

As a result of Advocacy's involvement in the rulemaking process, EPA added flexibility provisions to the final rule to allow small manufacturers additional time to meet new engine/equipment design requirements. EPA agreed to exempt engines below 25 horsepower from the requirement to

install catalyst-based particulate filters. The agency will also conduct a technology review before requiring engines below 75 horsepower to install the most expensive technology to control oxides of nitrogen (NOx adsorbers). Cost savings resulting from Advocacy's actions total over $1.38 billion annually.

Issue: Meat Processing Effluent Limitations Guidelines

On February 26, 2004, EPA issued a final rule that requires facilities that process meat and poultry products, including processors, slaughterhouses and renderers, to reduce water pollution discharges. Prior to publication, EPA made two changes to the final rule in response to Advocacy's recommendations. First, EPA raised the cutoff for requirements in one of the poultry processing subcategories from 10 to 100 million annual pounds of product. Second, EPA raised the numerical limits for nitrogen and ammonia for the plants that are direct dischargers (plants that discharge directly to water bodies). Projected annual cost savings total $25 million. EPA also eliminated regulation of indirect dischargers—those who send their wastewater to publicly owned treatment plants—in the proposal.

Issue: Plywood Manufacturing Air Toxics Rule

On February 27, 2004, EPA issued a final rule that requires plywood and composite wood manufacturers to reduce emissions of certain toxic air pollutants from their plants. Plywood and composite wood products are manufactured by bonding wood material (fibers, particles, strands, etc.) or agricultural fiber, generally with resin under heat and pressure, to form a structural panel or engineered wood product. Plywood and composite wood products include plywood, veneer, particle board, and oriented strandboard. The primary regulated pollutants are acetaldehyde, acrolein, formaldehyde, methanol, phenol and propionaldehyde, which comprise about 95 percent by volume of the hazardous air pollutants emitted by this industry.

Prior to publication of the proposed rule, EPA adopted Advocacy's recommendation that facilities demonstrating that their operations will not affect the health of neighboring individuals (low-risk facilities) will not be required to install new pollution controls. EPA also adopted Advocacy's suggestions regarding frequency of monitoring and the averaging of emissions from different units. Projected cost savings for the forest products industry total $500 million in first-year capital costs and $150 million in recurring annual savings.

Issue: Water Pollution Regulations for Centralized Waste Treatment Facilities

On December 22, 2003, EPA issued a final rule that revised the water pollution regulations for the centralized waste treatment industry, eliminating the pollution limitation level for the metal molybdenum. Molybdenum is a commonly occurring low-toxicity metal. The centralized waste industry and Advocacy had urged EPA to eliminate the standard because it was based on an incorrect data set. EPA had initially determined that EPA-specified technology would achieve significant removal of molybdenum from the water, but later agreed that its analysis was erroneous. EPA issued the revised final rule on the effective date of its December 2000 regulation, regulating several pollutants but omitting molybdenum. According to the affected industry, EPA's revision results in annual cost savings of approximately $75 million to several hundred affected facilities.

Issue: Water Quality Requirements for Construction and Development Activities

On March 31, 2004, EPA withdrew its proposed rule that would have imposed new storm water management and other water quality requirements on construction and development activities. In choosing the "no regulation" option, EPA recognized that a new program would be costly, disruptive, and redundant. The agency determined that existing state and federal storm water program requirements for construction activities adequately protect water quality. The programs already include storm water management requirements and water quality regulations.

In the June 2002 SBREFA panel report, the SBREFA panel recommended that EPA consider the "no regulation" option. EPA's decision to withdraw

the proposed rule was consistent with the SBREFA panel's recommendation that reflected input from about 20 small entity representatives. EPA's withdrawal of the rule resulted in recurring annual cost savings to small businesses totaling $585 million.

"The administration definitely made the right choice by recognizing the unnecessary burdens of added regulation. EPA already has comprehensive storm water permitting rules in place that limit site runoff and protect our environment. Adding a new rule would have resulted in significant increases in new home building costs to the tune of $3.5 billion a year, that is, approximately $1,700 for each new single family home. When providing affordable housing for America's working families is a national crisis, a new rule would be excessive and absolutely unnecessary." — Bobby Rayburn, Former President, National Association of Home Builders

Federal Acquisition Regulation Council

E.O. 13272 Compliance

The Federal Acquisition Regulation (FAR) Council complied with section 3(a) of the E.O. by making its policies and procedures publicly available. The FAR Council did not notify Advocacy of rules that it believed would have a significant economic impact on small entities, as required by section 3(b) of the E.O. As a result of several meetings between Advocacy and senior FAR/GSA managers, Advocacy is now given notice of pre-dispositional regulatory case meetings. The case meetings occur before regulations are finalized for publication in the *Federal Register*. The FAR Council participated in one RFA training session, and another session will occur in FY 2005. Advocacy has not filed written comments on any proposed FAR Council rule that was finalized this fiscal year; therefore it is too early to report on its compliance with section 3(c) of the E.O.

Federal Communications Commission

E.O. 13272 Compliance

In response to E.O. 13272, the Federal Communications Commission (FCC) sent Advocacy a letter regarding its commitment to uphold the spirit of the E.O. and review its rules for impacts on small entities. The FCC did not make its policies and procedures publicly available, as required by section 3(a) of the E.O., maintaining that as an independent agency, it is not covered by E.O. 13272. The FCC has reiterated its intent to abide by the spirit of the E.O. and to work with Advocacy in training its rule writers on the RFA. The FCC consistently mails Advocacy proposed and final rules that have a significant impact on a substantial number of small entities. The FCC does so after the rule has been adopted and released to the general public, but before it is sent to the *Federal Register*. This provides Advocacy with additional time to review proposed rules before the comment deadline but does not necessarily meet the requirements of E.O. section 3(b). In FY 2004, the FCC issued a final rule that adopted obligations for Enhanced 911 systems for wireless services. The FCC did not address Advocacy's comments as required by section 3(c) of the E.O.

Issue: Restrictions on Fax Advertising

On July 3, 2003, the FCC released a final rule in the "do-not-call" proceeding, which the FCC initiated to curb intrusive telemarketing and promote consumer privacy pursuant to the Telephone Consumer Protection Act of 1991. As part of the "do-not-call" rules, the FCC adopted a "do-not-fax" provision, which required any person to obtain prior express permission in writing, with a signature from the recipient, before sending an unsolicited fax advertisement. Unlike the general "do-not-call" provisions of the rule, the FCC removed the "established business relationship" exemption and did not grant an exception to trade associations or nonprofit organizations when communicating through a facsimile device to their members.

Advocacy urged the FCC to reconsider its decision and encouraged the agency to conduct a more thorough analysis of the economic impact of the fax advertising restrictions. Small businesses, small trade associations, and small nonprofit organizations informed Advocacy at a roundtable on November 17, 2003, that the rule would have a severe impact on their operations. In a series of filings during October and November of 2003, Advocacy asked the FCC to reinstate the "established business relationship" and nonprofit exemptions, create a presumption that membership in a trade association acts as consent, and clarify the definition of an unsolicited commercial advertisement. The FCC stayed the fax portion of the rule on August 18, 2003, and the established business relationship portion on October 3, 2003, resulting in significant cost savings to small businesses.

A U.S. Chamber of Commerce study found that more than 26 percent of small and 56 percent of medium-sized and large businesses estimated that it would take 40 hours or more just to obtain written consent from their entire fax list, while more than half of those estimated it would take more than 100 hours.[22] Approximately 28 percent of the small companies estimated an annual cost of over $2,000 to maintain the written consents. Nearly one-third of all respondents reported that they sent faxes to at least 500 different fax numbers in 2003.

Small business trade associations worked with Congress to craft legislation to make the "established business relationship" exemption permanent. The legislation would grant additional flexibility to small businesses and minimize their costs. In June and July 2004, Advocacy sent letters to both houses of Congress encouraging passage of the legislation. The House of Representatives passed H.R. 4600 on July 20, and the Senate Commerce, Science, and Transportation Committee reported out an identical bill, S. 2603, on July 22, 2004.

On August 10, 2004, business groups filed petitions with the FCC to extend the stay for an additional six months. Advocacy submitted a letter to the agency on September 7, 2004, supporting the extension. Advocacy urged the FCC to grant the extension to give Congress the opportunity to consider the pending legislation and give the FCC an opportunity to clarify its rule. On October 1, the FCC released an order granting a six-month extension (until June 30, 2005) of the stay of enforcement of the do-not-fax rules. Advocacy will continue to work with the affected small businesses to resolve this issue.

"The National Association of Realtors commends the SBA's Office of Advocacy for its work this year on the government's 'do-not-fax' rules. The impact of the Federal Communications Commission's decision to reverse its longstanding facsimile advertisement rules on our industry is profound. For example, real estate brokers and agents would be prohibited from faxing any property listings to consumers who call asking for information on available properties without signed written permission. NAR estimates that over 67 million permission forms would have been necessary to sustain the 6 million-plus home sales transactions that occurred last year. The SBA's Office of Advocacy quickly stepped up to the plate to support our efforts to educate the Commission on the negative economic impact and problematic constraints associated with the FCC's 'do-not-fax' rules. On behalf of our one million members, whose livelihoods depend on this country's free enterprise system, we thank the Chief Counsel and his staff for their outstanding advocacy efforts." —A. Mansell, President, National Association of Realtors

22 Letter from R. Bruce Josten, Chamber of Commerce of the United States of America, to Chairman Michael Powell, CG Dkt. No. 02-278 (April 28, 2004).

Issue: Broadband Reporting

On August 24, 2004, Advocacy filed a letter with the FCC on its notice of proposed rulemaking (NPRM) for Local Competition and Broadband Reporting. In the NPRM, the FCC asked for comment on: (1) extending the local competition and broadband reporting program for five years beyond its sunset in March 2005; and (2) revising the program to improve data collection on broadband deployment.

The IRFA accompanying the NPRM listed the changes proposed in the NPRM and asked for comment, but did not identify or analyze the impacts of the proposed reporting requirements on currently exempt small entities. Similarly, the FCC did not identify or analyze significant alternatives that would meet the FCC's regulatory objective. On August 24, 2004, Advocacy filed comments recommending that the FCC consider simplifying the revised reporting form or establishing a short form for small carriers previously exempt from reporting. Advocacy urged the FCC to consider comments from small carriers on ways for the FCC to meet its improved data gathering objectives while minimizing the impact on small entities. Advocacy will continue to work with the FCC and the affected small entities to improve the data available on broadband deployment while minimizing the impact on small telecom providers.

Issue: Local Number Portability – Wireline to Wireless Porting

On November 10, 2003, the FCC issued a memorandum opinion and order (MO&O), declaring that wireline carriers have an obligation to transfer telephone numbers to wireless carriers with service areas that overlap the wireline carriers' rate center, even when there is no point of interconnection (a physical point where the systems of two carriers are connected for the purpose of routing calls from one system to another). The FCC stated that the order "clarified" an earlier final rule and did not require notice and comment under the Administrative Procedure Act (APA) or an RFA analysis of the small business impacts.

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) and the National Telecommunications Cooperative Association (NTCA) filed a brief with the District of Columbia Circuit Court on December 15, 2003, challenging the order on behalf of small rural wireline carriers. These petitioners claimed the FCC order would have a significant economic impact on their small business members, as it requires hardware and software upgrades to the network, transport to the tandem switch where the small carrier links with the larger carrier (usually a Bell operating company), and toll costs across that other carrier's network to the wireless carrier's point of interconnection. The two associations estimated that the regulatory impact would be $76,000 per carrier in initial costs and $46,000 in recurring costs. Petitioners claimed that the FCC did not comply with the RFA and the APA before imposing the order's requirements.

On February 13, 2004, Advocacy filed a notice of intent as it prepared to file an *amicus curiae* or "friend of the court" brief with the U.S. Court of Appeals for the D.C. Circuit. Advocacy's objective was to preserve the integrity of the rulemaking process by ensuring agency compliance with the RFA. While preparing the brief, Advocacy pursued discussions with the FCC for the purpose of reaching an accommodation.

On June 9, 2004, Advocacy withdrew its notice of intent to file an *amicus curiae* brief, having reached an agreement with the FCC. The FCC agreed to work with Advocacy to more fully consider impacts on small business and to urge state regulators to consider the concerns of small rural telecom providers that seek waivers to the new portability rules. On June 18, 2004, FCC Chairman Michael Powell sent a letter to the National Association of Regulatory Utility Commissioners. Since that time, at least 16 state utility commissions have granted waiver petitions that provide small telecom providers extensions or suspended enforcement of the rule. While Advocacy was pleased to reach an accommodation with the FCC, its agreement does not reflect on the merits of the challenge

filed by the small rural telecom providers under the RFA. The case was argued before the Circuit Court of the District of Columbia on November 18, 2004. A decision is expected in early 2005.

"Thanks to SBA intervention, FCC Chairman Powell sent a letter to state regulators noting the burdens that local number portability rules can have on small businesses, especially in rural areas, and urging the states to be flexible. Because states have the power to grant waivers, getting extra time for rural businesses while crucial unanswered questions are being addressed means a lot for our members—more than 560 small telephone companies across the country." —Steve Pastorkovich, Business Development Director, OPASTCO

Issue: Local Number Portability – Porting Interval

Responding to comments by small rural wireline telephone carriers, Advocacy filed a comment letter on February 4, 2004, addressing the FCC's Further Notice of Proposed Rulemaking on Wireless-to-Wireline Local Number Portability. In the proposed rule, the FCC sought comments on whether it should reduce the four-business-day interval for porting numbers between wireless and wireline carriers. The proposal suggested that the FCC was considering reducing the interval for wireline carriers to port numbers to wireless carriers.

The Office of Advocacy raised concerns that the vagueness of the proposal and its IRFA did not satisfy the requirements of the RFA. Advocacy agreed with small rural wireline carriers that the changes suggested by the FCC's notice of proposed rulemaking would impose significant economic burdens on small wireline carriers. Advocacy recommended that the FCC convert its "Further Notice of Proposed Rulemaking" to a "Notice of Inquiry" and advised the agency not to proceed to a final rule until it published for comment a proposed rule with specific regulatory requirements and a meaningful IRFA.

On September 16, 2004, the agency issued a Second Further Notice of Proposed Rulemaking with an IRFA, requesting comment on regulatory options recommended by the North American Numbering Council (NANC) and solicited comment on alternatives to reduce the small entity impact, including exemptions or an extended timeframe for small telecom carriers. Advocacy, pleased at the efforts the FCC made, is currently reviewing the supplementary rulemaking and will reach out to small businesses to determine its impact and solicit alternatives.

Issue: Voice over Internet Protocol

On May 28, 2004, Advocacy filed comments with the FCC on its NPRM for Internet Protocol (IP)-enabled services. Voice over IP (VoIP) is a new technology that allows users to make telephone calls using the Internet. In the proposed rule, the FCC solicited comment on whether IP-enabled services should be considered a telecommunications service or an information service, and which regulatory scheme should be applied to the technology.

Advocacy noted that the notice of proposed rulemaking did not contain proposed regulatory requirements and was similar to an advance notice of proposed rulemaking or a notice of inquiry. Similarly, the IRFA did not provide an analysis of proposed compliance burdens, consideration of alternatives, or discussion of overlapping regulations.

Advocacy recommended that the FCC publish for public comment a further notice of proposed rulemaking proposing regulatory requirements, with a supplemental IRFA that analyzes the impact of the proposed requirements on small entities, includes significant alternatives to minimize the economic impact on them, and identifies any overlapping regulations. The FCC has not issued a final rule or a supplemental rulemaking in this matter.

Issue: Universal Service

On September 21, 2004, Advocacy filed a reply comment with the FCC on a proposed rule that would limit Universal Service support to primary telephone lines. An IRFA was included in the proposed rule, but it did not adequately analyze the

impact of restricting Universal Service support to primary lines on small telecom carriers.

Advocacy recommended that the FCC further analyze the regulatory alternatives to determine how to minimize the economic impact on small telecommunications carriers. Specifically, Advocacy suggested that the FCC review the alternatives recommended by the Federal-State Joint Board on Universal Service. In addition to the analysis required by the RFA, Advocacy recommended that the FCC consider analyzing the impact of each regulatory alternative on small business end-users of telecom services because of the potentially significant impact on those entities in rural areas. To date, the FCC has not issued a final rule or acted on this rule.

Federal Trade Commission

E.O. 13272 Compliance

The Federal Trade Commission (FTC) made public its written policies and procedures on considerations of small business impacts during the rulemaking process as required by section 3(a) of the E.O. The FTC also began sending Advocacy notice of draft rules that may have a significant impact on a substantial number of small entities, as required by section 3(b) of the E.O. Advocacy has not filed written comments on any FTC rules that were finalized this fiscal year, so it is too early to report on FTC compliance with section 3(c).

Issue: Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003

On March 31, 2004, Advocacy filed comments with the FTC on its advance notice of proposed rulemaking to implement the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act). In the ANPRM, the FTC solicited public comment on the practicality, technical feasibility, privacy, and enforceability of a National Do-Not-Email Registry in preparation for a report to Congress and for a possible rulemaking, as required by the CAN-SPAM Act.

In comments filed on April 20, 2004, Advocacy commended the FTC for considering the impact on small businesses early in its rulemaking. Advocacy encouraged the FTC to give careful consideration to the impact on small businesses and to perform a thorough economic analysis when issuing a proposed rule that builds upon the information gained from comments to the ANPRM. Advocacy expressed concerns that a National Do-Not-Email Registry might not be a practical solution to curbing unwanted, unsolicited commercial email and that a one-size-fits-all approach such as a Do-Not-Email Registry may have unintended negative consequences on small business. Advocacy recommended that the FTC consider other means of controlling unwanted, unsolicited commercial email, including promoting technology-based solutions.

In the FTC's June 15, 2004, *National Do-Not-Email Registry Report to Congress*, the agency explained that significant security, enforcement, practical, and technical challenges made a registry an ineffective solution to the spam problem. Specifically, the FTC was concerned that a registry of individual email addresses would create severe security and privacy risks that would likely result in registered addresses receiving more spam because spammers would use such a registry as a directory of valid email addresses. Furthermore, the FTC concluded that a registry of email addresses would have no practical impact on delivery of spam as most spammers mask their identities or are already operating illegally. The FTC recommended that Congress not create a National Do-Not-Email Registry, which is in keeping with Advocacy's comments.

Securities and Exchange Commission

E.O. 13272 Compliance

The Securities and Exchange Commission (SEC) has not made public its written policies and procedures for the consideration of small entities in its rulemaking as required by section 3(a) of the E.O. The SEC does consistently notify Advocacy of rules which may have a significant economic impact on a substantial number of small entities, as required by section 3(b). Advocacy has not filed written comments on any SEC rules that were finalized this fiscal year, so it is too early to report on SEC compliance with section 3(c).

Small Business Administration

E.O. 13272 Compliance

The Small Business Administration (SBA) placed its RFA policies and procedures on its website as required by section 3(a) of the E.O. SBA notifies Advocacy of draft rules that may have a significant impact on a substantial number of small entities as required by section 3(b) of the E.O. Advocacy did not file written comments on any proposed SBA rules that were finalized in FY 2004, so it is too early to report on SBA's compliance with section 3(c) of the E.O.

Issue: Small Business Government Contracting Programs

On October 20, 2003, the SBA published proposed regulations titled Small Business Government Contracting Programs. Small businesses contacted the Office of Advocacy concerning the inclusion of small business prime contractors in the new provision. The proposed section 125.3(b) would require all prime contractors, including small businesses, to demonstrate their good faith efforts to facilitate small business subcontracting. Such efforts would include breaking out contract work items into economically feasible units to facilitate small business participation, conducting marketing research to identify small business subcontractors, and assisting interested small businesses in obtaining bonding, lines of credit, and required insurance. Small businesses contacted Advocacy to convey their concern that SBA's proposal would create confusion and impose new responsibilities and paperwork burdens on small businesses receiving prime contracts.

In comments filed on December 8, 2003, Advocacy urged SBA to amend proposed section 125.3(b) to exclude small business prime contractors, making it consistent with the current regulations and the underlying authorizing statute. The SBA has not taken final action on this rule.

Issue: Restructuring Small Business Size Standards

On March 19, 2004, SBA issued a proposed regulation to make major changes to its size standards program. The Small Business Act authorizes SBA to establish definitions by which businesses are deemed small and thus eligible to receive assistance through a variety of financial, procurement, and business development programs. The proposed regulations were to amend Title 13 Part 121 of the *Code of Federal Regulations*, which implements the size standards program. The current SBA size standards program consists of 37 different size levels, which apply to 1,151 industries and 13 subindustry activities in the North American Industry Classification System (NAICS). The proposed regulations sought to simplify the application of SBA's size standards to federal programs. To accomplish this, SBA proposed to move from receipts-based size standards to a system that is mainly employee-based. Under the proposal, the employee-based size standards would range between 50 employees and 1,500 employees. Small businesses with 1 to 49 employees would automatically fall into the 50 range category. No business would count as a small business with 1,501 or more employees.

The Office of Advocacy assisted the SBA in its outreach efforts to the small business community. Discussions with many small businesses indicated that they were very concerned about the potential negative impacts of the proposed regulation on their businesses.

On June 29, 2004, Advocacy submitted written comments to SBA regarding the proposed regulation and its compliance with the RFA. Advocacy urged SBA to delay the rulemaking in order to conduct formal stakeholder meetings throughout the country. The stakeholder meetings would allow the SBA to better understand and analyze the proposed rule's impact on small businesses. The SBA included an IRFA in the proposal. However, the IRFA did not identify or evaluate the economic impact of the proposal on small entities with respect to regulatory actions and programs of other federal agencies. Advocacy's letter explained that the IRFA did not provide the public with sufficient information on all of the industries that would be affected by the size standard changes.

On July 1, 2004, SBA withdrew the proposed rule. The agency committed to publishing an

advance notice of proposed rulemaking with a series of outreach meetings to solicit input from small business stakeholders. In its withdrawal notice, SBA stated its objective to seek comment on alternatives that would permit the size standards program to be revised while minimizing the adverse economic impact on regulated small entities.

Conclusion

Since its enactment 25 years ago, the RFA has become a valuable advocacy tool for small entities. In recent years, the Congress, through passage of SBREFA, and the President, by crafting E.O. 13272, have recognized the importance of regulatory flexibility and strengthened its implementation. Using these tools, the Office of Advocacy has worked closely with federal regulatory agencies to reduce regulatory burdens on small entities, contributing to the continued growth and viability of the small business sector.

In FY 2004, more agencies approached the Office of Advocacy requesting RFA training or seeking advice early in the rulemaking process. Advocacy expects this trend will continue. The strides made during FY 2004 suggest that both small entities and agencies are beginning to fully appreciate the value and importance of the RFA. Further, small entities are becoming increasingly aware that Advocacy can play a key role in helping to improve the regulatory environment.

In FY 2005, Advocacy will continue to educate government agencies on compliance with the RFA and E.O. 13272. Advocacy will work with both agencies and small entities to help craft regulations that achieve agency objectives while minimizing regulatory burdens. The Office of Advocacy will celebrate 25 years of the RFA by utilizing all available tools to promote RFA compliance and continuing to explore new ways to more effectively advocate on behalf of small entities before Congress and in federal and state regulatory agencies.

Appendix A The Regulatory Flexibility Act

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

Congressional Findings and Declaration of Purpose

(a) The Congress finds and declares that —
(1) when adopting regulations to protect the health, safety and economic welfare of the Nation, Federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public;
(2) laws and regulations designed for application to large scale entities have been applied uniformly to small businesses, small organizations, and small governmental jurisdictions even though the problems that gave rise to government action may not have been caused by those smaller entities;
(3) uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources;
(4) the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;
(5) unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;
(6) the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation;
(7) alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes may be available which minimize the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions;
(8) the process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions to examine the impact of proposed and existing rules on such entities, and to review the continued need for existing rules.

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

Regulatory Flexibility Act

§ 601 Definitions

For purposes of this chapter —

(1) the term "agency" means an agency as defined in section 551(1) of this title;
(2) the term "rule" means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law, including any rule of general applicability governing Federal grants to State and local governments for which the agency provides an opportunity for notice and public comment, except that the term "rule" does not include a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances;
(3) the term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the *Federal Register*;
(4) the term "small organization" means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the *Federal Register*;
(5) the term "small governmental jurisdiction" means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the *Federal Register*;
(6) the term "small entity" shall have the same meaning as the terms "small business," "small organization" and "small governmental jurisdiction" defined in paragraphs (3), (4) and (5) of this section; and
(7) the term "collection of information" —

(A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either —

(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, 10 or more persons, other than agencies, instrumentalities, or employees of the United States; or

(ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes; and

(B) shall not include a collection of information described under section 3518(c)(1) of title 44, United States Code.
(8) Recordkeeping requirement — The term "recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified records.

§ 602. Regulatory agenda

(a) During the months of October and April of each year, each agency shall publish in the *Federal Register* a regulatory flexibility agenda which shall contain —
(1) a brief description of the subject area of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities;
(2) a summary of the nature of any such rule under consideration for each subject area listed in the agenda pursuant to paragraph (1), the objectives

and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking, and
(3) the name and telephone number of an agency official knowledgeable concerning the items listed in paragraph (1).
(b) Each regulatory flexibility agenda shall be transmitted to the Chief Counsel for Advocacy of the Small Business Administration for comment, if any.
(c) Each agency shall endeavor to provide notice of each regulatory flexibility agenda to small entities or their representatives through direct notification or publication of the agenda in publications likely to be obtained by such small entities and shall invite comments upon each subject area on the agenda.
(d) Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda.

§ 603. Initial regulatory flexibility analysis

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the *Federal Register* at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration. In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules published in the *Federal Register* for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement.
(b) Each initial regulatory flexibility analysis required under this section shall contain —
(1) a description of the reasons why action by the agency is being considered;
(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;
(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.
(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as —
(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
(3) the use of performance rather than design standards; and
(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

§ 604. Final regulatory flexibility analysis

(a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section

603(a), the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain —
(1) a succinct statement of the need for, and objectives of, the rule;
(2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
(3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
(4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
(5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.
(b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the *Federal Register* such analysis or a summary thereof..

§ 605. Avoidance of duplicative or unnecessary analyses

(a) Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.
(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the *Federal Register* at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.
(c) In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of sections 602, 603, 604 and 610 of this title.

§ 606. Effect on other law

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

§ 607. Preparation of analyses

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

§ **608. Procedure for waiver or delay of completion**

(a) An agency head may waive or delay the completion of some or all of the requirements of section 603 of this title by publishing in the *Federal Register*, not later than the date of publication of the final rule, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes compliance or timely compliance with the provisions of section 603 of this title impracticable.
(b) Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the completion of the requirements of section 604 of

this title for a period of not more than one hundred and eighty days after the date of publication in the *Federal Register* of a final rule by publishing in the *Federal Register*, not later than such date of publication, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes timely compliance with the provisions of section 604 of this title impracticable. If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days from the date of publication of the final rule, such rule shall lapse and have no effect. Such rule shall not be repromulgated until a final regulatory flexibility analysis has been completed by the agency.

§ 609. Procedures for gathering comments

(a) When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques such as—
(1) the inclusion in an advanced notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;
(2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;
(3) the direct notification of interested small entities;
(4) the conduct of open conferences or public hearings concerning the rule for small entities including soliciting and receiving comments over computer networks; and
(5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.
(b) Prior to publication of an initial regulatory flexibility analysis which a covered agency is required to conduct by this chapter—
(1) a covered agency shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with information on the potential impacts of the proposed rule on small entities and the type of small entities that might be affected;
(2) not later than 15 days after the date of receipt of the materials described in paragraph (1), the Chief Counsel shall identify individuals representative of affected small entities for the purpose of obtaining advice and recommendations from those individuals about the potential impacts of the proposed rule;
(3) the agency shall convene a review panel for such rule consisting wholly of full time Federal employees of the office within the agency responsible for carrying out the proposed rule, the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel;
(4) the panel shall review any material the agency has prepared in connection with this chapter, including any draft proposed rule, collect advice and recommendations of each individual small entity representative identified by the agency after consultation with the Chief Counsel, on issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c);
(5) not later than 60 days after the date a covered agency convenes a review panel pursuant to paragraph (3), the review panel shall report on the comments of the small entity representatives and its findings as to issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c), provided that such report shall be made public as part of the rulemaking record; and
(6) where appropriate, the agency shall modify the proposed rule, the initial regulatory flexibility analysis or the decision on whether an initial regulatory flexibility analysis is required.
(c) An agency may in its discretion apply subsection (b) to rules that the agency intends to certify under subsection 605(b), but the agency believes may have a greater than de minimis impact on a substantial number of small entities.
(d) For purposes of this section, the term "covered agency" means the Environmental Protection

Agency and the Occupational Safety and Health Administration of the Department of Labor.
(e) The Chief Counsel for Advocacy, in consultation with the individuals identified in subsection (b)(2), and with the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, may waive the requirements of subsections (b)(3), (b)(4), and (b)(5) by including in the rulemaking record a written finding, with reasons therefor, that those requirements would not advance the effective participation of small entities in the rulemaking process. For purposes of this subsection, the factors to be considered in making such a finding are as follows:
(1) In developing a proposed rule, the extent to which the covered agency consulted with individuals representative of affected small entities with respect to the potential impacts of the rule and took such concerns into consideration.
(2) Special circumstances requiring prompt issuance of the rule.
(3) Whether the requirements of subsection (b) would provide the individuals identified in subsection (b)(2) with a competitive advantage relative to other small entities.

§ 610. Periodic review of rules

(a) Within one hundred and eighty days after the effective date of this chapter, each agency shall publish in the *Federal Register* a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities. Such plan may be amended by the agency at any time by publishing the revision in the *Federal Register*. The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. The plan shall provide for the review of all such agency rules existing on the effective date of this chapter within ten years of that date and for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, he shall so certify in a statement published in the *Federal Register* and may extend the completion date by one year at a time for a total of not more than five years.
(b) In reviewing rules to minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes, the agency shall consider the following factors—
(1) the continued need for the rule;
(2) the nature of complaints or comments received concerning the rule from the public;
(3) the complexity of the rule;
(4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and
(5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.
(c) Each year, each agency shall publish in the *Federal Register* a list of the rules which have a significant economic impact on a substantial number of small entities, which are to be reviewed pursuant to this section during the succeeding twelve months. The list shall include a brief description of each rule and the need for and legal basis of such rule and shall invite public comment upon the rule.

§ 611. Judicial review

(a) (1) For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.
(2) Each court having jurisdiction to review such

rule for compliance with section 553, or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(3) (A) A small entity may seek such review during the period beginning on the date of final agency action and ending one year later, except that where a provision of law requires that an action challenging a final agency action be commenced before the expiration of one year, such lesser period shall apply to an action for judicial review under this section.

(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section 608(b) of this chapter, an action for judicial review under this section shall be filed not later than—

(i) one year after the date the analysis is made available to the public, or

(ii) where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 1-year period, the number of days specified in such provision of law that is after the date the analysis is made available to the public.

(4) In granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with this chapter and chapter 7, including, but not limited to —

(A) remanding the rule to the agency, and

(B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.

(5) Nothing in this subsection shall be construed to limit the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law or to grant any other relief in addition to the requirements of this section.

(b) In an action for the judicial review of a rule, the regulatory flexibility analysis for such rule, including an analysis prepared or corrected pursuant to paragraph (a)(4), shall constitute part of the entire record of agency action in connection with such review.

(c) Compliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section.

(d) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise permitted by law.

§ 612. Reports and intervention rights

(a) The Chief Counsel for Advocacy of the Small Business Administration shall monitor agency compliance with this chapter and shall report at least annually thereon to the President and to the Committees on the Judiciary and Small Business of the Senate and House of Representatives.

(b) The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as *amicus curiae* in any action brought in a court of the United States to review a rule. In any such action, the Chief Counsel is authorized to present his or her views with respect to compliance with this chapter, the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities.

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

Appendix B
Executive Order 13272

Presidential Documents

Executive Order 13272 of August 13, 2002

The President

Proper Consideration of Small Entities in Agency Rulemaking

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

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

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

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

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

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

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

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

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

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

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

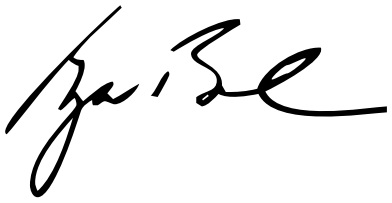
Sec. 4. *Definitions.* Terms defined in section 601 of title 5, United States Code, including the term ''agency,'' shall have the same meaning in this order.

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

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

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

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



THE WHITE HOUSE,
August 13, 2002.