

Agency Compliance with Executive Order 13272

A Report to the Office of Management and Budget

**Implementing the President's Small Business Agenda
September 2003**



September 3, 2003

The Honorable Joshua B. Bolten
Director
Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503

Re: The Office of Advocacy's First Report to OMB on Agency Compliance with E.O. 13272

Dear Director Bolton:

On August 13, 2002, President Bush signed Executive Order 13272, titled "Proper Consideration of Small Entities in Agency Rulemaking." By signing the Executive Order (E.O.), the President delivered on an important component of his Small Business Agenda. The E.O. requires agencies to place emphasis on the consideration of potential impacts on small entities when promulgating regulations in compliance with the Regulatory Flexibility Act (RFA).

The Office of Advocacy of the U.S. Small Business Administration (SBA) was created in 1976 to represent the views and interests of small business in federal policy making activities. The Office of Advocacy (Advocacy) monitors and reports on agencies' compliance with the Regulatory Flexibility Act of 1980 (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). These laws require federal agencies to assess the impact of their policies and rulemakings on small entities. Because the Office of Advocacy is an independent office within SBA, the views of the Chief Counsel do not necessarily represent the views of the SBA or the Administration.

As part of this Executive Order, the Office of Advocacy is required to submit a report to the Director of the Office of Management and Budget annually. I am pleased to present this report to you one year after the signing of E.O. 13272. In this report, we provide information on agency compliance with three basic requirements of the E.O. We also highlight agencies that have lived up to the spirit and requirements of the E.O., engaging Advocacy early in the rulemaking process to ensure the proper consideration of small entity impacts.

The report confirms that more compliance is needed before we claim complete success in getting agencies to consider small entity impacts more fully. However, Advocacy is encouraged by the actions taken to date. We have seen improvements and expect to see more widespread compliance with both the E.O. and the RFA as Advocacy completes its RFA training of federal agencies pursuant to E.O. 13272.

The President provided my office and small entities a valuable tool when he signed E.O. 13272. I am honored to have a leadership role in implementing such an important component of the President's Small Business Agenda. I look forward to working with my federal agency counterparts to implement E.O. 13272 fully and fulfill the President's promise of tearing down regulatory barriers to job creation for small businesses.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Sullivan". The signature is fluid and cursive, with a prominent initial "T" and "S".

Thomas M. Sullivan
Chief Counsel for Advocacy

Cc: Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs

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INTRODUCTION

On March 19, 2002, the President announced his Small Business Agenda, which included the goal of “tearing down the regulatory barriers to job creation for small businesses and giv[ing] small business owners a voice in the complex and confusing federal regulatory process.”¹ To accomplish this goal, the President sought to strengthen the Office of Advocacy (referred to as Advocacy throughout this report) by enhancing its relationship with the Office of Management and Budget’s (OMB) Office of Information and Regulatory Affairs (OIRA) and creating an executive order that would direct agencies to work closely with the Office of Advocacy and properly consider the impact of their regulations on small entities. On August 13, 2002, the President delivered on his promise when he signed Executive Order 13272, titled “Proper Consideration of Small Entities in Agency Rulemaking.”²

The Office of Advocacy of the U.S. Small Business Administration (SBA) was created in 1976 to represent the views and interests of small business in Federal policy making activities.³ Advocacy monitors and reports on agencies’ compliance with the Regulatory Flexibility Act of 1980 (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).⁴ These laws require Federal agencies to assess the impact of their policies and rulemakings on small entities. Because the Office of Advocacy is an independent office within SBA, the views of the Chief Counsel do not necessarily represent the views of the SBA or the Administration.

The Executive Order (E.O.) first requires 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.⁵ Second, the agencies are to notify the Office of Advocacy prior to publication of draft rules if the rules are expected to have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (RFA).⁶ 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.⁷ The Office of Advocacy, in turn, must provide periodic notification, as well as training, to all of the agencies on how to comply with the RFA.⁸ 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.

¹ President Bush’s Small Business Agenda, announced March 19, 2002, can be viewed at <http://www.whitehouse.gov/infocus/smallbusiness/regulatory.html>.

² Exec. Order No. 13272 67 Fed. Reg. 53461 (Aug. 16, 2002), <http://www.sba.gov/advo/laws/eo13272.pdf>.

³ Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§634a-g, 637).

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

⁵ Exec. Order No. 13272, § 3(a) (Aug. 13, 2002).

⁶ Exec. Order No. 13272, § 3(b) (Aug. 13, 2002). 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 then 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 for both the proposed and final rules (5 U.S.C. § 603-605).

⁷ Exec. Order No. 13272, § 3(c) (Aug. 13, 2002).

⁸ Exec. Order No. 13272, § 2 (a)-(b) (Aug. 13, 2002).

E.O. 13272 required agencies to submit to Advocacy by November 13, 2002, their draft written procedures and policies on how they will consider the economic impacts on small entities. Advocacy then had 60 days to provide comments to each agency on its draft procedures. By February 13, 2003, agencies were to have considered Advocacy's comments and made their final procedures available to the public through the Internet or other easily accessible means.⁹ Advocacy's comments on the agencies' draft procedures were submitted as confidential interagency communications to encourage agencies to further refine their documents in response to the comments prior to their publication. As a result, this report does not detail the substance of Advocacy's comments on agency submittals under section 3(a) of E.O. 13272.

E.O. 13272 directed the Office of Advocacy to report to OMB at least annually on agency compliance with the order.¹⁰ This first report summarizes the first year of activities pursuant to E.O. 13272. It focuses on agency compliance with the E.O.'s three key requirements and spotlights the high achievement and early involvement of some agencies. Since the RFA became law in 1980, Advocacy has annually reported to Congress on agency compliance with the Act.¹¹ Beginning with our report for Fiscal Year 2003, to be released in January 2004, Advocacy will combine the E.O. and RFA reporting requirements to Congress and the OMB.

Working Closely with OIRA

On March 19, 2002, as part of his Small Business Agenda, President Bush announced a Memorandum of Understanding (MOU) between the Office of Advocacy and the Office of Information and Regulatory Affairs at the Office of Management and Budget.¹² The MOU was drafted to ensure that Advocacy and OIRA work closely together as early as possible in the regulation development process to address small business issues, particularly as they relate to disproportionate regulatory burden.¹³ This enhanced relationship fosters the consideration of small business concerns by federal regulatory agencies and enables Advocacy to assist the agencies in meeting their responsibilities under the RFA.

Increasingly, OIRA consults with Advocacy on agencies' regulatory flexibility analyses or certification decisions in particular rulemakings. Together, the offices are able to work with federal agencies to make improvements in the analyses and ensure that small business issues are addressed and regulatory burdens eased. With a focus on information sharing between Advocacy

⁹ Exec. Order No. 13272, § 3(a) (Aug. 13, 2002).

¹⁰ Exec. Order No. 13272, § 6 (Aug. 13, 2002).

¹¹ Advocacy's annual reports on implementation of the Regulatory Flexibility Act are available on the Office of Advocacy website at <http://www.sba.gov/advo/laws/flex/>.

¹² http://www.sba.gov/advo/laws/law_mou02.pdf.

¹³ Advocacy funded research to address the proportion of the federal regulatory burden falling on small business. The research was conducted by Drs. Mark Crain and Thomas Hopkins in 2001. The researchers concluded that considering all federal regulations and all business sectors, federal regulations cost firms with fewer than 20 employees nearly \$7,000 per employee per year. Regulations cost medium-sized firms about \$4,300 and large firms \$4,500 per year per employee. Costs per employee thus appear to be 55 to 60 percent higher in small firms than in medium-sized and large firms. *The Impact of Regulatory Costs on Small Firms*, Crain, Mark W. and Thomas D. Hopkins, Office of Advocacy, U.S. Small Business Administration, October 2001. <http://www.sba.gov/advo/research/rs207tot.pdf>.

and OIRA during interagency review of draft rules under E.O. 12866,¹⁴ the two offices work collaboratively to address small business concerns early in the rulemaking process.

Has E.O. 13272 Made a Difference?

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

Since August 13, 2002, Advocacy has worked to spread the word regarding the requirements of the new Executive Order through memoranda to agency heads¹⁵ and roundtables with agency general counsels. As part of this outreach, Advocacy instituted an e-mail address, notify.advocacy@sba.gov, to make it easier for agencies to comply electronically with the notice requirements of the E.O. and the RFA.

The government-wide RFA training required under section 2(b) of E.O. 13272 will help agencies overcome the inertia caused by past practices and will lead regulatory agencies toward exemplary RFA compliance. Advocacy's RFA training will address the basics and complexities of how to comply with the RFA and when to seek input from Advocacy. The training will help to solidify what a few agencies already know about the RFA and will sharpen agency knowledge of how to perform an RFA analysis.

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

As previously mentioned, E.O. 13272 required Advocacy to issue notices to agencies on the basic requirements of the RFA by November 13, 2002, and to provide training to agencies on compliance with the RFA.¹⁶ On November 13, 2002, Advocacy posted on its website an RFA compliance guide for federal agencies and solicited input on its contents. With the benefit of input from agencies and others, Advocacy made further revisions to the guide, which was issued in final form in May 2003.¹⁷

¹⁴ Executive Order 12866 applies to individuals and requires that regulations impose the least burden on society.

¹⁵ Memorandum dated August 22, 2002, http://www.sba.gov/advo/laws/memoeo02_0822.pdf; memorandum dated November 13, 2002, http://www.sba.gov/advo/laws/memorfa02_1013.pdf.

¹⁶ Exec. Order No. 13272, § 2 (a), 2(b), (Aug. 13, 2002).

¹⁷ *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* is available on Advocacy's website at <http://www.sba.gov/advo/laws/rfaguide.pdf>.

In June 2003, Advocacy awarded a contract to Gillespie Associates to develop an RFA training curriculum based on Advocacy's RFA guide. The training was pilot tested with the assistance of three federal agencies to obtain feedback before implementing the training government-wide.¹⁸ On July 23, 2003, Advocacy held its first training pilot at the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA). The second pilot involved the Environmental Protection Agency (EPA) on July 24, 2003, and the third pilot was held on August 7, 2003, at the Department of Transportation's Research and Special Programs Administration (RSPA).

Each training pilot provided a valuable forum for input and discussion on the content and presentation of the curriculum, including the use of team exercises as a training tool. Based on an assessment of the pilots and the input received from participants from each agency, the Office of Advocacy revised the RFA training plan. Specifically, revisions will ensure participants have sufficient time for the exercises and will improve the coordination between the pre-training reading materials and the participants' guide used for the classroom training. Advocacy also revised the scenarios used in the training exercises to provide examples of good analysis under the RFA, as well as to identify frequent missteps by agencies in fulfilling their RFA requirements. The government-wide rollout of the training is being scheduled and will continue into 2004.

Training the entire federal government is a challenge for Advocacy, given limited resources. This top priority will result in increased demands on the office as agencies begin to use Advocacy as a resource in their efforts to improve RFA compliance. Through training, Advocacy seeks to have agencies take ownership of their responsibilities under the E.O. and the RFA and to be consistent in properly considering the impacts of their rules on small entities and seeking regulatory alternatives to minimize those impacts. Advocacy is a resource in the agencies' efforts toward that end. Face-to-face training will help educate agency personnel while reiterating Advocacy's role as an advocate for small entities and a resource for improving agency RFA compliance.

The ultimate test of agency compliance with E.O. 13272 is whether an agency gives proper consideration to impacts on small entities and makes changes to reduce those impacts. Advocacy will seek to fulfill that objective through early involvement in rulemakings and submission of public comments on proposed rules. Under the E.O., agencies must give every appropriate consideration to comments provided by Advocacy on a draft rule, and must include a discussion or explanation of the agency's response to Advocacy's comments on the proposed rule in publishing the final rule in the *Federal Register*. In the past year, a handful of agencies issued final rules that were the subject of Advocacy public comments. Each of these agencies addressed the comments; however, they did not all adopt Advocacy's recommendations on behalf of small entities. More time is needed to assess overall agency compliance with this important provision of the E.O. The E.O. provisions requiring consideration of Advocacy's concerns on behalf of

¹⁸ The July/August 2003 edition of Advocacy's monthly newsletter, *The Small Business Advocate*, contains an article describing the pilot training sessions at <http://www.sba.gov/advo/news/julaug03.pdf>.

small entities will assist agencies in promulgating regulations with an eye toward reducing their burden on small entities.

Advocacy is optimistic that small businesses will begin to feel the benefits of E.O. 13272 when agencies adjust their regulatory development processes to accommodate the requirements of the RFA and the E.O. As more agencies work with the Office of Advocacy earlier in the rule development process, consistently use Advocacy's e-mail notification system for draft rules that may have a significant impact on a substantial number of small entities, and give Advocacy's comments appropriate consideration, we will see progress. This report provides a listing of the agencies making strides toward E.O. 13272 compliance. 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.

Presidential Documents

Title 3—

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.

SUMMARY OF COMPLIANCE

Cabinet-Level Departments

All Cabinet-level departments, except for the Department of State and the newly formed Department of Homeland Security,¹⁹ submitted a written plan to Advocacy for review in compliance with section 3(a) of E.O. 13272. Section 3(a) also required agencies to consider Advocacy's comments on their draft RFA procedures and subsequently to make their revised procedures publicly available through the Internet or other easily accessible means by February 2003. Nearly all Cabinet-level departments made their RFA procedures publicly available.²⁰

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

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

Section 3(c) of E.O. 13272 requires agencies to give every appropriate consideration to any comments provided to Advocacy regarding a draft rule. The agency is required to include in the *Federal Register* the agency's response to any written comments submitted by Advocacy on a proposed rule. Most agencies' rules on which Advocacy has commented have not been finalized during the past year. Therefore, many agencies have not yet had an opportunity to comply with this section of the E.O. More time is needed to assess overall agency compliance with this important provision of the E.O., although agency compliance will be listed in the report.

Independent Regulatory Agencies

Advocacy was less satisfied with the response to E.O. 13272 by independent regulatory agencies. Of the 75 independent regulatory agencies, 16 responded to the requirements of the E.O. Eight provided written procedures to Advocacy, six claimed not to regulate small entities, and two

¹⁹ The Department of Homeland Security (DHS) was not in existence at the time E.O. 13272 was signed. After its organization in January 2003, DHS contacted Advocacy to request assistance with the development of procedures and policies in order to comply with E.O. 13272.

²⁰ The Department of State, the Department of Homeland Security, the FAR Council, and the Department of the Interior have not yet made procedures for the consideration of small entities in agency rulemaking publicly available.

claimed to be exempt from the Executive Order. Independent agencies with plans are generally complying with sections 3(b) and 3(c) of the E.O., or have not had an opportunity to comply. While 59 non-responses is a large number, Advocacy is most concerned with the noncompliance of nine particular independent agencies that regulate small entities and did not submit written procedures to Advocacy.²¹ As Advocacy moves forward with government-wide RFA training, we will continue to urge these agencies to comply with the Executive Order.

²¹ The nine 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 Emergency Management Agency, 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.

AGENCY COMPLIANCE WITH E.O. 13272

Cabinet-Level Departments

Department of Agriculture

The U.S. Department of Agriculture (USDA) submitted its RFA procedures and policies to Advocacy on December 9, 2002, in compliance with section 3(a) of E.O. 13272. USDA submitted an existing 1997 Departmental Regulation (DR) that outlined compliance with all executive orders, laws, and regulations that govern the rulemaking process.

USDA's initial submission to Advocacy indicated an intention to update the document. USDA has yet to make revised procedures publicly available as required by section 3(a). The 1997 DR is available on USDA's website (www.usda.gov/directives/files/dr/DR1512-001.pdf).

USDA submitted four draft rules to Advocacy under section 3(b) of E.O. 13272. USDA has not finalized any rule in the past year on which Advocacy has filed comments and therefore has not yet had an opportunity to comply with section 3(c) of the E.O.

Department of Commerce

The Department of Commerce (DOC) submitted its RFA procedures and policies to Advocacy on November 13, 2002, in compliance with section 3(a). DOC's final procedures and policies incorporated the suggested changes from Advocacy and were made available by February 13, 2003 on DOC's website, <http://www.ogc.doc.gov/ogc/legreg/testimon/108f/guidelines.htm>. On February 20, 2003, a notice of availability of the procedures was published in the *Federal Register* (68 Fed.Reg. 8201).

The Department of Commerce has provided notice to Advocacy of draft proposed rules that may have a significant impact on a substantial number of small entities, as required by section 3(b) of E.O. 13272. This past year, DOC did not publish any final rules on which Advocacy filed public comments.²² Therefore, DOC has not yet had to comply with Section 3(c).

Frequently, DOC contacts Advocacy and provides draft rules early in the rule development process. The National Oceanic and Atmospheric Administration (NOAA) was the first agency to participate in Advocacy's RFA pilot training program. NOAA's experience with RFA compliance and its input on Advocacy's training proved to be extremely valuable in the development of the overall training program.

Since August 13, 2002, Advocacy has commented on the following rules promulgated by the Department of Commerce:

²² The Office of Advocacy submitted a letter to the New England Fishery Council regarding the data for Amendment 13 to the New England Fishery Management Groundfish Management Plan on October 28, 2002. In response to Advocacy's letter, NOAA asked the court to delay the implementation of the New England groundfish management regulations.

- **Letter dated 06/10/03 to the National Marine Fisheries Service** regarding the proposed emergency rule on the Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies; 68 Fed. Reg. 20096 (April 24, 2003) available at: http://www.sba.gov/advo/laws/comments/nmfs03_0610.html.
- **Letter dated 11/08/02 to the National Oceanic and Atmospheric Administration** regarding the New England Groundfish Management Plan available at: http://www.sba.gov/advo/laws/comments/noaa02_1108.html.
- **Letter dated 10/28/02 to the New England Fishery Management Council** regarding the New England Groundfish Management Plan available at: http://www.sba.gov/advo/laws/comments/noaa02_1028.html.

Department of Defense

Federal Acquisition Regulation (FAR) Council

The Federal Acquisition Regulation (FAR) Council²³ submitted its 1987 Operating Procedures for Complying with the Regulatory Flexibility Act to Advocacy on November 19, 2002, in compliance with section 3(a) of E.O. 13272. The FAR Council has yet to finalize its RFA procedures and make them available to the public.

In the past year, the FAR Council has issued two proposed rules it identified as likely to have a significant economic impact on a substantial number of small entities. The FAR Council did not notify Advocacy as required by section 3(b) of the E.O. The proposed regulations contained adequate initial regulatory flexibility analysis (IRFA) discussions, so Advocacy did not comment on either of the rules.

Because the FAR Council has not issued any final rules this year on which Advocacy has filed comments, it has not yet had an opportunity to comply with section 3(c) of the E.O.

Since August 13, 2002, Advocacy has submitted the following comment on a rule promulgated by the FAR Council:

- **Letter dated 12/13/02 to the General Services Administration** regarding the notice of proposed rulemaking, Federal Acquisition Regulation; Procurement of Printing and

²³ The Federal Acquisition Regulation (FAR) Council is made up of the Department of Defense (DOD), the General Services Administration (GSA), and the National Aeronautical and Space Administration (NASA). Advocacy considered the FAR Council's response to E.O. 13272 to represent that of DOD, GSA and NASA since most rules affecting small business that are promulgated from these agencies arise from the FAR Council. GSA submitted supplemental procedures for their non FAR Council rules in compliance with E.O. 13272.

Duplicating through the Government Printing Office, 67 Fed. Reg. 68,914 (November 13, 2002) available at: http://www.sba.gov/advo/laws/comments/gsa02_1213.html.

Department of Education

The Department of Education submitted its RFA procedures and policies on November 13, 2002, in compliance with section 3(a) of E.O. 13272.

The Department of Education included Advocacy's suggestions in final procedures and policies published in the *Federal Register* on May 12, 2003 (68 Fed. Reg. 25357) and posted them at: <http://www.ed.gov/legislation/FedRegister/finrule/2003-2/051203d.html>.

This past year, the Department of Education did not issue any draft rules identified by the agency as potentially having a significant economic impact on a substantial number of small entities. Therefore, they have not yet had an opportunity to comply with section 3(b) of E.O. 13272. Because Education has not issued any final rules this year on which Advocacy has filed comments, the department has not yet had an opportunity to comply with section 3(c) of the E.O.

Department of Energy

On November 13, 2002, the Department of Energy (DOE) submitted a draft Notice of Procedures and Policies in compliance with section 3(a) of E.O. 13272. Based on Advocacy's comments, DOE revised its draft notice and published final procedures and policies for complying with the RFA in the *Federal Register*, 68 Fed. Reg. 7990 (February 19, 2003) and posted it on the DOE website, www.gc.doe.gov/rulemaking/eo13272.pdf.

This past year, DOE did not issue any draft rules identified by the department as potentially having a significant impact on a substantial number of small entities. Therefore, they have not yet had an opportunity to comply with section 3(b) of E.O. 13272. Because the department has not issued any final rules this year on which Advocacy has filed comments, DOE has not had an opportunity to comply with section 3(c) of the E.O.

Department of Health and Human Services

On November 19, 2002, the Department of Health and Human Services (HHS) provided Advocacy with its procedures and policies in compliance with section 3(a) of E.O. 13272.

In its final procedures and policies, HHS included many of Advocacy's suggestions. The document was posted on the HHS website in May 2003 at www.hhs.gov/execsec/smallbus.html.

Over the past year, HHS has not submitted any draft proposed rules to Advocacy that were identified by HHS as having a significant economic impact on a substantial number of small entities pursuant to section 3(b) of E.O. 13272. Because HHS has not issued any final rules this year on which Advocacy has filed comments, HHS has not had an opportunity to comply with section 3(c) of the E.O.

Centers for Medicare and Medicaid Services

In the past year, Advocacy and the Centers for Medicare and Medicaid Services (CMS) improved communication and increased their early interaction on rules affecting small businesses. CMS has approached Advocacy on a number of regulatory issues early in the rule deliberation process. For example, after CMS requested Advocacy's input on its 2004 Physicians Fee Schedule, Advocacy held a roundtable to help CMS determine potential impacts on small entities in the preparation of its upcoming rules. On July 14, 2003, Linwood L. Rayford, III, Assistant Chief Counsel for Food, Drug and Health Policy, testified before the U.S. House of Representatives, Committee on Small Business, on the Role of Medical Professionals as Small Business Owners. The testimony is available at: http://www.sba.gov/advo/laws/test03_0714.html.

CMS did not notify Advocacy of each draft proposed rule for which the agency performed an initial regulatory flexibility analysis pursuant to section 3(b) of E.O. 13272. CMS has not had an opportunity to comply with section 3(c) of the E.O, since the agency has not issued any final rules this year on which Advocacy has commented.

Food and Drug Administration

The Food and Drug Administration (FDA) came to the Office of Advocacy for early assistance with regulations prepared under the Public Health Security and Bio-Terrorism Preparedness and Response Act of 2002.²⁴ Aside from these rules, the FDA has not provided Advocacy with notice of draft rules which they have determined may have a significant economic impact on a substantial number of small entities pursuant to section 3(b) of E.O. 13272. Since August 13, 2002, FDA has not issued any final rules on which Advocacy has commented. Therefore, FDA has not yet had an opportunity to comply with section 3(c) of E.O. 13272.

At the request of FDA, Advocacy provided training on the Regulatory Flexibility Act to regulatory staff of the Center for Devices and Radiological Health. This training was held in advance of the pilot program developed in July 2003.

Since August 13, 2002, Advocacy has made the following comments on rules promulgated by the Department of Health and Human Services:

- **Letter dated 05/15/03 to the Department of Health and Human Services** regarding the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Standards for Privacy of Individually Identifiable Health Information, available at http://www.sba.gov/advo/laws/comments/hhs03_0515.html.
- **Letter dated 04/07/03 to the Department of Health and Human Services, Food and Drug Administration** regarding the proposed rule, Dietary Supplements Containing Ephedrine Alkaloids, Reopening of the Comment Period; 68 Fed. Reg. 10417 (March 5, 2003), available at http://www.sba.gov/advo/laws/comments/fda03_0407.html.

²⁴ For more information on FDA's efforts, please see www.fda.gov/oc/bioterrorism/bioact.html.

- **Letter dated 11/27/02 to the Department of Health and Human Services, Food and Drug Administration** regarding Support for the Petition for Continuation of Stay of Action; FDA Final Rule on Policies, Requirements and Procedures; Prescription Drug Marketing Act of 1987; Prescription Drug Amendments of 1992; 64 Fed. Reg. 67720 (December 3, 1999) at http://www.sba.gov/advo/laws/comments/fda02_1127.html.

Department of Homeland Security

The newly formed Department of Homeland Security (DHS) was created after the President signed Executive Order 13272. DHS contacted Advocacy in January 2003 to request assistance with the development of procedures and policies for complying with the Regulatory Flexibility Act. At this time, DHS is developing its procedures for taking small entities into consideration in the rulemaking process under E.O. 13272 and the RFA. The department has yet to submit a draft to Advocacy or make its final policies available to the public as required by section 3(a) of E.O. 13272.

DHS has not provided Advocacy with notification of all draft rules on which DHS issued an initial regulatory flexibility analysis as required by section 3(b) of the E.O.. Because of pressure to move quickly to address the terrorism threat, most of the agency's rules are published as interim final rules. This practice concerns Advocacy because most of the procedural safeguards provided to small entities by the RFA and E.O. 13272 are lost when agencies issue interim final rules. Since August 13, 2002, DHS has not issued any final rules on which Advocacy has commented. Therefore, DHS has not yet had an opportunity to comply with section 3(c) of E.O. 13272.

Advocacy commented on the following rule promulgated by the Bureau of Customs and Border Protection (formerly the Customs Service) within the Department of Homeland Security:

- **Letter dated 05/12/03 to the U.S. Customs Service** (now the Bureau of Customs and Border Protection) regarding its notice of proposed rulemaking on the Tariff Treatment Related to Disassembly Operations under the North American Free Trade Agreement; 68 Fed. Reg. p. 12011 (March 13, 2003), available at: http://www.sba.gov/advo/laws/comments/customs03_0512.html.

Department of Housing and Urban Development

The Department of Housing and Urban Development (HUD) submitted its draft RFA policy document to Advocacy on November 13, 2002, in compliance with section 3(a) of E.O. 13272.

HUD incorporated some of Advocacy's suggested changes in its final RFA policies and procedures document and has made the Department's final document publicly available at www.hud.gov/offices/osdbu/policy/impact.cfm

Since August 13, 2002, HUD has not proposed any rules that it expects to have a significant economic impact on a substantial number of small entities and has therefore not yet had an opportunity to comply with section 3(b) of the E.O. In October 2002, Advocacy submitted

written comments on HUD's proposed rule to amend the Real Estate Settlement Procedures Act (RESPA). The rule has not been finalized. Therefore, HUD has not yet had the opportunity to comply with section 3(c) of the E.O. Advocacy has urged HUD to respond to Advocacy's comments in accordance with E.O. 13272.

Advocacy submitted the following comment letter on the rule promulgated by the Department of Housing and Urban Development:

- **Letter dated 10/28/02 to the Department of Housing and Urban Development** regarding its notice of proposed rulemaking on the Real Estate Settlement Procedures Act (RESPA); Simplifying and Improving the Process for Obtaining Mortgages to Reduce Settlement Costs to Consumers; 67 Fed. Reg. 49134 (July 29, 2002), available at: http://www.sba.gov/advo/laws/comments/hud02_1028.html.

Department of the Interior

The Department of the Interior (DOI) submitted Chapter 3 of its 1998 Departmental Manual in compliance with section 3(a) of E.O. 13272 on November 13, 2002. These policies were posted on DOI's website in 1998. DOI has not finished revising its policies, under review as part of a larger revision to the manual currently under way. DOI anticipates the final document will be available by the end of September 2003. The existing document can be found at <http://elips.doi.gov/elips/release/3207.htm>.

DOI notifies Advocacy of draft rules that may have a significant economic impact on a substantial number of small entities in compliance with section 3(b) of E.O. 13272. In compliance with section 3(c) of the E.O., DOI has considered Advocacy's comments on proposed rules and included an agency response to the comments in published final rules.

Fish and Wildlife Service

Since January 2003, the Fish and Wildlife Service (FWS) has issued five draft rules believed by Advocacy to have a potential significant economic impact on a substantial number of small entities. FWS has certified each rule under 605(b) of the RFA as not having a significant economic impact on a substantial number of small entities. Therefore, FWS has not submitted any rules in draft to Advocacy pursuant to section 3(b) of E.O. 13272. Two of the rules are for the protection of manatees in Florida. Three others regulate critical habitats in various areas of the United States.

Advocacy provided comments to FWS on both of the manatee rules. One rule was ultimately withdrawn by FWS. In the final version of the second manatee rule, published in the *Federal Register*, FWS considered Advocacy's comments, as required by section 3(c), although the rule was left unchanged.

Since August 13, 2002, Advocacy has submitted the following comments on rules promulgated by the Fish and Wildlife Service:

- **Letter dated 01/27/03 to the Department of Interior** on notice of proposed rulemaking, Florida Manatees; Incidental Take During Specified Activities; 67 Fed. Reg. 69078 (November 14 , 2002), at http://www.sba.gov/advo/laws/comments/doi03_0127.html.
- **Letter dated 06/27/03 to the U.S. Fish and Wildlife Service** regarding Arizona Pygmy-Owl Critical Habitat Designation; 67 Fed. Reg. 71,032 (November 27, 2002), available at http://www.sba.gov/advo/laws/comments/fws03_0627.html.
- **Letter dated 06/03/03 to the U.S. Fish and Wildlife Service** regarding notice of proposed rulemaking, Establishment of Three Additional Manatee Protection Areas in Florida; 68 Fed. Reg. 16,602, (April 4, 2003); available at Fact Sheet Summarizing Advocacy's Letter, http://www.sba.gov/advo/laws/comments/fws03_0603.html.
- **Testimony of July 17, 2003, by the Chief Counsel for Advocacy before the Subcommittee on Rural Enterprise, Agriculture, and Technology, Committee on Small Business, U.S. House of Representatives** regarding "Endangered Farmers and Ranchers: Unintended Consequences of the Endangered Species Act," available at: http://www.sba.gov/advo/laws/test03_0717.html.

Department of Justice

In compliance with section 3(a) of E.O. 13272, the Department of Justice (DOJ) provided Advocacy with a draft statement on December 6, 2002, outlining procedures DOJ follows to ensure that potential impacts on small entities are properly considered during the rulemaking process. DOJ's final procedures and policies reflected Advocacy's comments and can be found at www.usdoj.gov/olp/execorder13272.pdf.

DOJ sends Advocacy all draft proposed and final rules at the time they are sent to the Office of Management and Budget or before, in compliance with section 3(b) of E.O. 13272. DOJ has not finalized any rule in the past year on which Advocacy has filed comments. Therefore, DOJ has not yet had an opportunity to comply with section 3(c) of E.O. 13272.

Bureau of Alcohol, Tobacco, Firearms, and Explosives

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) did not issue any draft rules determined by the agency to have a potential significant economic impact on a substantial number of small entities. Therefore, ATF has not submitted any draft rules to Advocacy under section 3(b) of E.O. 13272. Advocacy comment on one ATF rule that Advocacy believed might have a significant economic impact on a substantial number of small businesses.

During the period covered by this report, Advocacy submitted the following comment letter on rules and guidelines promulgated by the Bureau of Alcohol, Tobacco, Firearms and Explosives of the Department of Justice:

- **Letter dated 07/07/03 to the Bureau of Alcohol, Tobacco and Firearms** regarding the notice of proposed rulemaking on Commerce in Explosives; 68 Fed. Reg. 4406 (January 29, 2003), available at: http://www.sba.gov/advo/laws/comments/atf03_0707.html.

Department of Labor

The Department of Labor (DOL) submitted its RFA policy document to Advocacy on November 7, 2003, in compliance with section 3(a) of E.O. 13272. DOL accepted most of Advocacy's suggestions and incorporated them into its final document. The DOL procedures can be found on its website, www.dol.gov/dol/regs/guidelines.htm.

In compliance with section 3(b) of E.O. 13272, DOL has notified Advocacy of draft rules that the department has determined may have a significant economic impact on a substantial number of small entities. DOL has not finalized any rule in the past year on which Advocacy has filed comments and therefore has not yet had an opportunity to comply with section 3(c).

Since August 13, 2002, Advocacy has commented on the following rules promulgated by the Department of Labor:

- **Letter dated 06/24/03 to the U.S. Department of Labor** regarding the proposed rulemaking, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; 68 Fed. Reg. 15559 (March 31, 2003), available at http://www.sba.gov/advo/laws/comments/dol03_0624.html.
- **Letter dated 01/24/03 to the Department of Labor, Employment and Training Administration** regarding the notice of proposed rulemaking, Unemployment Compensation—Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations; 67 Fed. Reg. 72122 (December 4, 2002), available at http://www.sba.gov/advo/laws/comments/dol03_0124.html.

Occupational Safety and Health Administration

In the past year, the Occupational Safety and Health Administration (OSHA) has notified the Office of Advocacy prior to convening two Small Business Regulatory Enforcement Fairness Act (SBREFA) panels, as required by the RFA and in compliance with section 3(b) of E.O. 13272.²⁵ OSHA has not finalized any rule in the past year on which Advocacy has filed comments and therefore has not yet had an opportunity to comply with section 3(c) of the E.O. Advocacy commented on OSHA's proposed ergonomics guidelines (see below). Several of Advocacy's suggestions and comments were included in the final guidelines.²⁶

²⁵ Under §609 of the RFA, the Occupational Safety and Health Administration and the Environmental Protection Agency must conduct a review panel on any rule that may have a significant economic impact on a substantial number of small entities. The panel must seek the advice and recommendations of small entity representatives regarding the draft rule and then must compile a final report of those findings. Advocacy and the Office of Management and Budget also participate in the panel process. 5 U.S.C. § 609(b).

²⁶ See <http://www.osha.gov/SLTC/ergonomics/index.html>.

- **Letter dated 10/30/02 to the Department of Labor, Occupational Safety and Health Administration** regarding Ergonomics for the Prevention of Musculoskeletal Disorders: Guidelines for Nursing Homes; 67 Fed. Reg. 55884 (August 30, 2002), available at http://www.sba.gov/advo/laws/comments/osha02_1030.html.

Mine Safety and Health Administration

The Mine Safety and Health Administration (MSHA) sends Advocacy all proposed rules.²⁷ MSHA did not send any draft rules to Advocacy that the agency concluded may have a significant economic impact on a substantial number of small entities in the past year and therefore has not yet had an opportunity to comply with section 3(b) of E.O. 13272.

Employee Benefits Security Administration

The Employee Benefits Security Administration (EBSA) determined that one proposed rule may have a significant economic impact on a substantial number of small entities. In accordance with section 3(b) of E.O. 13272 and the RFA, EBSA submitted the rule to Advocacy for review. In the past year, EBSA has not issued any final rules on which Advocacy commented and therefore EBSA has not had an opportunity to comply with section 3(c) of E.O. 13272.

Department of State

The Department of State (State) did not submit written procedures and policies to Advocacy as required by section 3(a) of E.O. 13272. State notifies Advocacy of rules that may have a significant economic impact on a substantial number of small entities, as required by section 3(b) of the E.O.²⁸ Since State has not issued any final rules this past year on which Advocacy has filed comments, the department has not had an opportunity to comply with section 3(c).

Department of Transportation

The Department of Transportation (DOT) submitted its draft RFA procedures and policies to Advocacy on November 13, 2002, in compliance with section 3(a) of E.O. 13272. Most of Advocacy's suggestions were incorporated into DOT's final written procedures for complying with the RFA. DOT made the final document available to the public on its website at <http://regs.dot.gov/eo-13272.doc>.

Since the E.O. was issued, DOT agencies have not notified Advocacy of any draft rules that could have a significant impact on a substantial number of small entities prior to publication. Therefore, the DOT has not yet had an opportunity to comply with section 3(b) of E.O. 13272. In

²⁷ However the proposals often arrive after publication in the *Federal Register*. Advocacy has initiated an e-mail notification system to cure this problem: notify.advocacy@sba.gov.

²⁸ The Department of State has begun utilizing Advocacy's e-mail notification system, notify.advocacy@sba.gov.

compliance with section 3(c), DOT responded to Advocacy's comments²⁹ on the Hours of Service final rule upon its publication in the *Federal Register*.³⁰

DOT's Research and Special Programs Administration was chosen to participate in Advocacy's RFA pilot training program to provide feedback on the training program before its rollout for the entire government. RSPA's experience with RFA compliance and its input on Advocacy's training proved to be extremely valuable in the development of the overall training program.

Since August 13, 2002, Advocacy has made the following comments on rules promulgated by the Department of Transportation:

- **Letter dated 01/28/03 to the Department of Transportation** regarding the notice of proposed rulemaking, Participation by Disadvantaged Business Enterprises in Airport Concessions, 67 Fed. Reg. 76327 (December 12, 2002), available at http://www.sba.gov/advo/laws/comments/dot03_0128.html.
- **Letter dated 03/14/03 to the Department of Transportation** regarding the notice of proposed rulemaking, Computer Reservations System ("CRS") Regulations; Statements of General Policy; 67 Fed. Reg. 69366 (November 15, 2002), at http://www.sba.gov/advo/laws/comments/dot03_0314.html.

Department of the Treasury

The Department of the Treasury (Treasury) submitted its draft procedures to Advocacy on November 13, 2002, in compliance with section 3(a) of E.O. 13272.

Treasury adjusted the final procedures to reflect Advocacy's comments and suggestions. The final document was made publicly available by the February 13, 2003, deadline at <http://www.treas.gov/regs/2002-rfa-compliance.pdf?IMAGE.X=24&IMAGE.Y=8>.

Since August 13, 2002, Advocacy has commented on the following rule promulgated by the Department of the Treasury:

- **Letter dated 07/07/03 to the U.S. Department of the Treasury** regarding the notice of proposed rulemaking on the Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Investment Advisers; 68 Fed. Reg. 23646 (May 5, 2003), available at http://www.sba.gov/advo/laws/comments/treasury03_0707.html.

Internal Revenue Service

Under section 7805(f) of the Internal Revenue Code, the Internal Revenue Service (IRS) provides Advocacy with all draft proposed and final rules. The IRS did not identify any of these rules as potentially having a significant economic impact on a substantial number of small

²⁹ Advocacy's comments are available at: http://www.sba.gov/advo/laws/comments/slater00_1215.html.

³⁰ 68 Fed. Reg. 22455 (April 28, 2003).

entities and therefore did not notify Advocacy of any draft rules pursuant to section 3(b) of the E.O. The IRS has not finalized any rule in the past year on which Advocacy has filed comments. Therefore, the IRS has not yet had an opportunity to comply with section 3(c) of the E.O.

Since August 13, 2002, Advocacy has commented or testified as follows concerning RFA compliance by the Internal Revenue Service of the Department of the Treasury:

- **Letter dated 08/13/02 to the Internal Revenue Service** regarding a request for a 90-day extension to file comments on the notice of proposed rulemaking, Excise Taxes; Definition of Highway Vehicle; 67 Fed. Reg. 38,913 (June 6, 2002), available at http://www.sba.gov/advo/laws/comments/irs02_0813.html.
- **Letter dated 11/14/02 to the Internal Revenue Service** regarding Guidance on Reporting of Deposit Interest paid to Nonresident Aliens; 67 Fed. Reg. 50386 (August 2, 2002), available at http://www.sba.gov/advo/laws/comments/irs02_1114.html.
- **Letter dated 12/04/02 to the Internal Revenue Service** regarding the notice of proposed rulemaking, Excise Taxes; Definition of Highway Vehicle; 67 Fed. Reg. 38,913 (June 6, 2002), available at http://www.sba.gov/advo/laws/comments/irs02_1204.html.
- **Testimony dated 12/05/02 to the Internal Revenue Service by Russell Orban, Assistant Chief Counsel for Tax Policy of the Office of Advocacy** regarding the proposed rule, Guidance on Reporting of Deposit Interest Paid to Nonresident Aliens. 67 Fed. Reg. 50386 (August 2, 2002), available at http://www.sba.gov/advo/laws/comments/test02_1205.pdf.
- **Testimony dated 02/27/03 to the Internal Revenue Service by Russell Orban, Assistant Chief Counsel for Tax Policy of the Office of Advocacy** regarding the proposed rule, Excise Taxes; Definition of Highway Vehicle; available at http://www.sba.gov/advo/laws/comments/test03_0227.html.
- **Letter dated 03/07/03 to the U.S. Department of the Treasury's Assistant Secretary Pamela Olson** in appreciation of Treasury's action in postponing final action on Excise Taxes: Definition of Highway Vehicle, available at http://www.sba.gov/advo/laws/comments/irs03_0307.html.
- **Testimony dated 05/01/03, by the Chief Counsel for Advocacy before the U.S. House of Representatives, Small Business Committee**, concerning Internal Revenue Service Compliance with the Regulatory Flexibility Act, available at http://www.sba.gov/advo/laws/test03_0501.html.

Department of Veterans Affairs

The Department of Veterans Affairs (VA) issued written procedures and policies to promote compliance with the RFA on December 12, 2002, pursuant to section 3(a) of E.O. 13272. The

agency included some of Advocacy's comments in the final document, available at www.va.gov/OSDBU/library/eo13272.htm.

In the past year, the VA has not promulgated any draft rules judged by the department to have a potential significant economic impact on a substantial number of small entities. Therefore, the VA has not yet had an opportunity to comply with section 3(b) of E.O. 13272. The VA has not finalized any rule in the past year on which Advocacy has filed comments and therefore has not yet had an opportunity to comply with section 3(c).

Independent Agencies and Commissions

Consumer Product Safety Commission

The Consumer Product Safety Commission (CPSC) submitted draft procedures for compliance with the RFA to Advocacy on November 12, 2002, in compliance with section 3(a) of E.O. 13272. CPSC revised its procedures following Advocacy's comments and posted the document on the agency's website on January 30, 2003. The public can access the documents online at www.cpsc.gov/businfo/smbusrm.html.

In the past year, the CPSC has not issued any draft rules that it determined may have a significant economic impact on a substantial number of small entities. Similarly, the agency has not published any final rules on which Advocacy has commented. Therefore, CPSC has not yet had an opportunity to comply with either section 3(b) or section 3(c) of E.O. 13272.

Equal Employment Opportunity Commission

On November 26, 2002, the Equal Employment Opportunity Commission (EEOC) submitted its draft procedures and policies document to Advocacy as required by section 3(a) of E.O. 13272. EEOC revised its written procedures based on Advocacy's comments and published the final version at <http://www.eeoc.gov/policy/regflexibilityact.html>.

The EEOC did not issue any draft rules determined by the commission to have a potential significant economic impact on a substantial number of small entities. Therefore the EEOC has not had an opportunity to comply with section 3(b) of E.O. 13272. The agency also did not publish any final rules on which Advocacy commented, so they have not yet had to comply with Section 3(c) of the E.O.

Environmental Protection Agency

In 1999, the Environmental Protection Agency (EPA) established procedures and policies to ensure that small entities are considered during the agency's rulemaking process. On November 24, 2002, EPA submitted this document to Advocacy in compliance with section 3(a) of E.O. 13272. EPA is currently revising the 1999 guidance in order to comply with E.O. 13272 and incorporate some of Advocacy's comments. The new guidance has not been made available to the public because it is still being finalized. The 1999 guide is available at: <http://www.epa.gov/sbrefa/documents/iguid99.pdf>.

As part of the SBREFA panel process,³¹ the EPA has notified Advocacy of two draft rules that may have a significant impact on small entities.³² On August 19, 2002, Advocacy commented on

³¹ Under §609 of the RFA, the Environmental Protection Agency and the Occupational Safety and Health Administration must conduct a review panel on any rule that may have a significant economic impact on a substantial number of small entities. The panel must seek the advice and recommendations of small entity representatives regarding the draft rule and then must compile a final report of those findings. Advocacy and the

a third rule, the proposed Hydrochlorofluorocarbon Foam Allocation rule. A review of the final version of this rule indicates that EPA appropriately considered and responded to Advocacy's comments in compliance with section 3(c) of E.O. 13272.³³ The second rule is not yet final.

EPA was one of the three agencies chosen to provide feedback on Advocacy's RFA pilot training program before its rollout for the entire government. EPA's experience with RFA compliance and its input on the Advocacy training proved to be extremely valuable in the development of the overall training program.

Since August 13, 2002, Advocacy has commented on the following rules promulgated by the EPA:

- **Letter dated 08/09/02 to the Environmental Protection Agency** regarding Hydrochlorofluorocarbon (HCFC) Foam Allocation Proposed Rule, Noncompliance with the Regulatory Flexibility Act; 66 Fed. Reg. 38063 (July 29, 2001), available at http://www.sba.gov/advo/laws/comments/epa02_0809.html.
- **Letter dated 09/25/02 to the Environmental Protection Agency** commenting on Proposed Settlement with the Sierra Club; 67 Fed. Reg. 54804 (August 26, 2002), available at http://www.sba.gov/advo/laws/comments/epa02_0925.html.
- **Letter dated 10/09/02 to the Environmental Protection Agency** in reply to the notification letter regarding a Small Business Advocacy Review Panel on Cooling Water Phase III, available at http://www.sba.gov/advo/laws/comments/epa02_1009.html.
- **Letter dated 03/24/03 to the Environmental Protection Agency** regarding the notice of proposed rulemaking, Acquisition Regulation; Background Checks for EPA Contractors Performing Services On-Site; 68 Fed. Reg. 2988 (January 22, 2003), available at http://www.sba.gov/advo/laws/comments/epa03_0324.html.

Federal Communications Commission

On November 13, 2003, the Federal Communications Commission (FCC) wrote to Advocacy indicating a willingness to consider the effect of its regulations on small entities and to continue meeting with Advocacy. The FCC did not submit written procedures and policies to Advocacy as required by section 3(a) of E.O. 13272.

Since August 13, 2002, the FCC has issued numerous draft rules determined by the commission to have potentially significant economic impacts on a substantial number of small entities. In accordance with the E.O., the agency has sent all proposed rules to Advocacy for review and

Office of Management and Budget also participate in the panel process. See 5 U.S.C. § 609(b). A list of EPA's panels can be found at http://www.sba.gov/advo/laws/is_epapanels.html.

³² The two draft rules are Control of Emissions of Air Pollution from Land Based Non-Road Compression Ignition Engines and the Cooling Water Phase II Regulation under Section 316(b) of the Clean Water Act.

³³ Advocacy's comments are available at http://www.sba.gov/advo/laws/comments/epa02_0809.html

comment. To date, only the FCC's Media Ownership Rule has been finalized. In the final Media Ownership Rule, the FCC gave appropriate consideration to Advocacy's comments in compliance with section 3(c) of E.O. 13272 and a response to the comments was published in the *Federal Register* and online at <http://www.fcc.gov/ownership>.

Since August 13, 2002, Advocacy has submitted the following comments on rules promulgated by the Federal Communications Commission:

- **Letter dated 08/27/02 to the Federal Communications Commission** regarding Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; CC Dkt. No. 02-33, FCC 02-42, available at http://www.sba.gov/advo/laws/comments/fcc02_0827.html.
- **Letter dated 02/05/03 to the Federal Communications Commission** regarding the initial regulatory flexibility analysis for the Triennial Review of Unbundling Obligations of Incumbent Local Exchange Carriers, CC Dkt. No. 01-338, FCC 01-361, available at http://www.sba.gov/advo/laws/comments/fcc03_0205.html.
- **Comment dated 02/28/03 to the Federal Communications Commission** concerning the Federal-State Joint Board on Universal Service, et alia, CC Dkt. No. 96-45, FCC 02-329, available at http://www.sba.gov/advo/laws/comments/fcc03_0228.html.
- **Letter dated 04/09/03 to the Federal Communications Commission** regarding Broadcast Ownership Rules; MM Dkt. No. 02-277, FCC 02-249, available at http://www.sba.gov/advo/laws/comments/fcc03_0409.html.
- **Letter dated 05/14/03 to the Federal Communications Commission** regarding Basic and Enhanced 911 Provision by Currently Exempt Wireless and Wireline Services; CC Dkt. No. 94-102, FCC 02-326, available at http://www.sba.gov/advo/laws/comments/fcc03_0514.html.
- **Letter dated 08/14/03 to the Federal Communications Commission** regarding Ex Parte Presentation in a Non-Restricted Proceeding Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Dkt No. 02-278, available at http://www.sba.gov/advo/laws/comments/fcc03_0814.html.

Federal Deposit Insurance Corporation

On December 5, 2002, the Federal Deposit Insurance Corporation (FDIC) wrote to Advocacy stating its willingness to support the goals of the RFA and indicating the agency's commitment to comply with its obligations. However, FDIC stated that as an independent agency the E.O. does not apply. FDIC did not submit written procedures and policies to Advocacy as required by E.O. 13272.

The FDIC has not issued any proposed rules found by the agency to have a potentially significant economic impact on a substantial number of small entities. Therefore, FDIC has not yet had an

opportunity to comply with section 3(b) of E.O. 13272. FDIC did not publish any final rules on which Advocacy commented, so they have not yet had to comply with Section 3(c) of the E.O.

Federal Trade Commission

The Federal Trade Commission (FTC) submitted its 1998 Rules of Practice and Operating Manual Procedures that Implement the Regulatory Flexibility Act to Advocacy on November 13, 2002, as required by section 3(a) of E.O. 13272. The final document reflects changes suggested by Advocacy and can be accessed online at <http://www.ftc.gov/foia/eo13272.pdf>.

Typically, the FTC sends Advocacy all of its rules at the time rules are sent to the *Federal Register* in compliance with section 3(b) of E.O. 13272.

While Advocacy has not filed any comments with the FTC since August 2002, Advocacy did file comments on the Telemarketing Sales Rule on June 28, 2002.³⁴ The FTC incorporated Advocacy's changes when it finalized the Telemarketing Sales Rule at 68 Fed. Reg. 4269, (January 29, 2003), in accordance with section 3(c) of E.O. 13272.

National Credit Union Administration

The National Credit Union Administration (NCUA) submitted its 1987 Interpretive Ruling and Policy Statement (IRPS) 87-2, Developing and Reviewing Government Regulations, to Advocacy on October 22, 2002, as required by section 3(a) of E.O. 13272.

On May 29, 2003, NCUA published a revised Interpretive Ruling and Policy Statement 03-2, amending IRPS 87-2, in the *Federal Register*.³⁵ The final procedures incorporated Advocacy's comments and can be found online at <http://www.ncua.gov/ref/IRPS/IRPS87-2.html>. The document updates the previous procedures and directs NCUA's regulators to consult the Office of Advocacy's RFA compliance guide.

NCUA notifies Advocacy of draft rules that may have a significant economic impact on a substantial number of small entities at the time the rules are sent to the *Federal Register*. Therefore, NCUA has not submitted any rules in draft to Advocacy pursuant to section 3(b) of E.O. 13272. On August 26, 2002, Advocacy commented on NCUA's chosen size standard for small credit unions, proposed before the E.O. was issued.³⁶ NCUA responded to Advocacy's comments in compliance with section 3(c) of E.O. 13272 and has since revised its size standard for future rules.

Pension Benefit Guaranty Corporation

On November 12, 2002, the Pension Benefit Guaranty Corporation (PBGC) submitted its draft RFA procedures to Advocacy in compliance with section 3(a) of E.O. 13272. PBGC made its

³⁴ See http://www.sba.gov/advo/laws/comments/ftc02_0628.html

³⁵ 68 Fed. Reg. 31949.

³⁶ Advocacy's letter is available at http://www.sba.gov/advo/laws/comments/ncua02_0826.html.

procedures for compliance with the RFA publicly available by February 13, 2003. The final PBGC procedures adopted most of Advocacy's suggestions and can be found at http://www.pbgc.gov/laws/rulemaking_small_entities.htm.

PBGC sends Advocacy all of its regulations for review. In the past year, PBGC did not submit any draft rules to Advocacy that were thought by the agency to have a potential significant economic impact on a substantial number of small entities. Therefore, PBGC has not yet had an opportunity to comply with section 3(b) of E.O. 13272. PBGC has not finalized any rule in the past year on which Advocacy has filed comments and therefore has not yet had an opportunity to comply with section 3(c) of the E.O.

Presidio Trust

On November 12, 2002, the Presidio Trust (Trust) Board of Directors submitted a draft policy document in compliance with section 3(a) of E.O. 13272. The Trust adopted its Policy for Consideration of Small Entities in Agency Rulemaking on January 21, 2003. Although available to the public, the policy is not yet posted online because the Trust is in the process of launching a new website. Advocacy anticipates that the policy will be accessible on the new Trust website by August 31, 2003.

The Trust has not issued any rules in the past year that it determined may have a significant economic impact on a substantial number of small entities and therefore has not yet had an opportunity to comply with section 3(b) of E.O. 13272. The Trust has not finalized any rule in the past year on which Advocacy has filed comments and has not yet had an opportunity to comply with section 3(c) of the E.O.

Securities and Exchange Commission

The Securities and Exchange Commission (SEC) did not submit written procedures and policies to Advocacy as required by section 3(a) of the Executive Order.

The SEC has issued several proposed rules in the past 12 months that were believed by the SEC to have a potentially significant economic impact on a substantial number of small entities. SEC notifies Advocacy of every proposed rule prior to publication of the rule in the *Federal Register* in compliance with section 3(b) of E.O. 13272. The SEC has also begun using Advocacy's e-mail notification system. Advocacy commented on two proposed SEC rules. The agency considered Advocacy's suggestions, as required by section 3(c) of E.O. 13272, and made changes in both rules that minimized the potential impact on small businesses.

Since August 13, 2002, Advocacy has commented on the following rules promulgated by the Securities and Exchange Commission:

- **Letter dated 08/19/02 to the Securities and Exchange Commission** regarding Certification of Disclosure in Companies' Quarterly and Annual Reports Rule; 67 Fed. Reg. 41877 (June 20, 2002), available at http://www.sba.gov/advo/laws/comments/sec02_0819.html.

- **Letter dated 01/13/03 to the Securities and Exchange Commission** regarding the notice of proposed rulemaking; Strengthening the Commission's Requirements Regarding Auditor Independence ; 67 Fed. Reg. 76,780 (December 13, 2002), available at http://www.sba.gov/advo/laws/comments/sec03_0113.html.

Small Business Administration

In accordance with section 3(a) of E.O. 13272, the Small Business Administration (SBA) submitted its draft RFA procedures to Advocacy on November 13, 2002. SBA made its revised procedures available to the public on August 4, 2003. The document reflects input from the Office of Advocacy and is online at <http://www.sba.gov/library/regflexactcompliance.html>.

Since August 13, 2002, the SBA has issued two draft rules that SBA determined may have a significant economic impact on a substantial number of small entities. The two draft rules were sent to Advocacy for review and comment in compliance with section 3(b) of E.O. 13272. Advocacy did not provide any comments to SBA because the RFA analysis was sufficient in both rules. SBA has not finalized any rule in the past year on which Advocacy has filed comments and therefore has not yet had an opportunity to comply with section 3(c) of the E.O.

Other Independent Regulatory Agency Responses to E.O. 13272

The independent agencies listed below responded to E.O. 13272 stating that they do not issue regulations having an impact on small entities and therefore would not be submitting RFA procedures and policies. Advocacy agreed with the agencies' assessment, thanked the agencies for responding, and reminded them to provide Advocacy with RFA procedures as required by E.O. 13272, should they regulate small entities in the future.

Corporation for Community and National Service
Federal Maritime Commission
International Trade Commission
Marine Mammal Commission
Office of Special Counsel
Peace Corps
U.S. Merit Systems Protection Board