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Report on the Regulatory Flexibility Act FY 2008

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

January 2009

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To the President and the Congress of the United States

I am pleased to present to the President and the Congress the U.S. Small Business Administration, Office of Advocacy's fiscal year (FY) 2008 Report on the Regulatory Flexibility Act. The report covers federal agencies' FY 2008 compliance with the Regulatory Flexibility Act of 1980 (RFA) and Executive Order 13272, as well as Advocacy's Regulatory Review and Reform (r3) initiative. The RFA requires agencies to review the prospective impact of proposed regulations on small entities—small businesses as well as small governmental jurisdictions and small nonprofits—and to consider significant alternatives that minimize small entity impacts. Advocacy continues to make steady progress in its efforts to improve agency compliance with the RFA.

In numerous cases, Advocacy has provided federal agencies with assistance in meeting their regulatory goals and reducing the disproportionate burden of those regulations on small entities. Advocacy directs its efforts through comments regarding key agency rules, testimony to Congress, RFA compliance training for federal agencies, participation in Small Business Regulatory Enforcement Fairness Act (SBREFA) panels, advocacy for legislative reform, and vital research on small business issues. Advocacy's efforts are enhanced by numerous Web-based tools that place information sharing at the forefront: RSS feeds, e-mail alerts, an Advocacy blog—*The Small Business Watchdog*, Regulatory Alerts, and an electronic notification system for agencies to use when alterting Advocacy about rules that will have a signficiant economic impact on small entities.

Through Advocacy's work in bringing small business concerns to the rulemaking table in FY 2008, the office was able to save small entities nearly $11 billion in forgone regulatory costs, without undermining federal agencies' regulatory goals. Successful implementation of the RFA at the federal level has led to success at the state level in convincing states to adopt similar legislation to ease the burden of state regulations. In the current economic climate, it is more important than ever to minimize unnecessary regulatory burden on the sector of the economy that will likely be the innovators and job creators—small businesses.

In the next year, Advocacy looks forward to working with the new Administration and hopes to continue providing support to federal agencies seeking to reduce the impacts of their regulations on small entities by providing further training and conducting more outreach to the small business communities affected by federal regulations.

Shawne Carter McGibbon
Acting Chief Counsel for Advocacy

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1 An Overview of the Regulatory Flexibility Act and Related Policy in Fiscal Year 2008

In 1980 Congress found that regulations issued by the federal agencies imposed disproportionate burdens on small entities. With the passage of the Regulatory Flexibility Act[1] that year, Congress required that agencies determine the extent of the impact of their regulations on small businesses and consult with small businesses during the rulemaking process to determine ways to minimize the disproportionate burdens.[2] The RFA has been strengthened over the years by the passage of the Small Business Regulatory Enforcement Fairness Act in 1996,[3] and by the signing of Executive Order 13272 in 2002.[4]

Agency Compliance

Overall agency compliance with the RFA continues to develop. Agencies continue to be receptive to the RFA training the Office of Advocacy provides in accordance with E.O. 13272. (See Table A.1 for a listing of agencies trained.) Advocacy has established itself as a partner in the rulemaking process with the various agencies, and has been able to open important lines of communication between the rulemaking agencies and the small business community.

The Regulatory Review and Reform (r3) Initiative

It is also important to provide information on the cumulative effect on small businesses of federal rules. Advocacy has determined that the cumulative annual cost of federal regulations is more than $1 trillion, and that the burden falls disproportionately upon the nation's small businesses. According to Office of Advocacy-sponsored research, the per-employee burden of regulations on the smallest American businesses was 45 percent higher than the burden on the largest businesses.[5]

To address the problem of the cumulative burden of regulations, Congress included in section 610 of the RFA a requirement that agencies review the existing rules that have a significant economic impact on small entities within 10 years of promulgation.[6] Section 610 has not proven to be as effective as it could be.[7] As a result, Advocacy established the Regulatory Review and Reform Initiative, or r3. Through the r3 initiative in FY 2008, Advocacy received nominations of 83 regulations small businesses believe are ripe for review and reform. From the list of 83, Advocacy developed a "top ten" list and posted the results on its website.[8] The Office of Advocacy hopes that federal agencies will further incorporate small business concerns in their rulemaking as a result of the attention brought by the r3 process. A chart of the current status of the top ten rules for review and reform appears in Appendix A, Table A.2.

1 Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. § 601 et seq.).

2 5 U.S.C. § 601, note.

3 Small Business Regulatory Enforcement Fairness Act, Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

4 Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking, 67 *Fed. Reg*. 53461 (Aug. 16, 2002).

5 Crain, W. Mark. *The Impact of Regulatory Costs on Small Firms*. Office of Advocacy, U.S. Small Business Administration (September 2005), available at **http://www.sba.gov/advo/research/rs264tot.pdf**.

6 5 U.S.C. § 610.

7 See Government Accountability Office, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews* (GAO-07-791), 35, 43-44 (July 2007).

8 For more information about r3, see **http://www.sba.gov/advo/r3/**.

Roundtables

Over the years, Advocacy has seen increased interest in Advocacy-run roundtables, with growing participation from small business representatives as well as representatives of the federal agencies.

Some roundtables have been scheduled as regularly recurring events, such as Advocacy's monthly roundtable on environmental rules and Advocacy's occupational safety roundtable, which is generally bimonthly. Other roundtables, such as those concerning transportation and homeland security, have been held quarterly, while still others have been held on an ad hoc basis.

In FY 2008, Advocacy's roundtables addressed such issues as veteran-owned small businesses, new requirements for commercial driver training, regulations issued under the Family and Medical Leave Act, tax issues, and rules proposed by the Department of Housing and Urban Development under the Real Estate Settlement Procedures Act, among others.

Almost all of these roundtables have featured presentations by small business representatives as well as key agency personnel; every roundtable has been devoted to discussions of the impact of federal agency rules on small businesses. In holding these roundtables, Advocacy fosters the kind of information sharing between government and small businesses that the drafters of the RFA and SBREFA envisioned. The roundtables give agency personnel an opportunity to hear firsthand from small businesses how a rule is affecting or will affect them, and to hear how the rule might be adjusted to reduce the small business burden.

Judicial Review

The 1996 SBREFA amendments reformed RFA by providing for judicial review of certain agency actions under the RFA.[9] The judicial review provisions of SBREFA gave small entities a way to ensure that federal agencies meaningfully comply with the requirements of the RFA. Since the adoption of SBREFA, numerous cases have clarified the RFA and provided federal agencies with clearer guidance on its requirements. A synopsis of FY 2008 federal cases raising RFA issues is included as Table A.3 in Appendix A. The most significant case involving the RFA in FY 2008 was a ruling by a federal district court in California to enjoin enforcement of a rule issued by the Department of Homeland Security until the department conducted the appropriate analysis under the RFA.[10] The future of the challenged rule has yet to be determined as of this writing; however, the Department of Homeland Security published a supplemental regulatory flexibility analysis for the rule in April 2008. Advocacy's comments on the supplemental analysis can be found at **www.sba.gov/advo**.[11]

9 5 U.S.C. Sec. 611.

10 *AFL-CIO, et al., v. Michael Chertoff, et al*., 552 F. Supp 2d 999; October 10, 2007.

11 Comments from the Office of Advocacy, *Re: Supplemental Proposed Rule on Safe-Harbor Procedures for Employers Who Receive a No-Match Letter; Clarification; Initial Regulatory Flexibility Analysis*, April 25, 2008.

2 Federal RFA and E.O. 13272 Compliance and the Role of the Office of Advocacy

The Office of Advocacy, which oversees agency compliance with the Regulatory Flexibility Act, also was tasked with monitoring federal agency compliance with Executive Order 13272. This executive order sets forth additional compliance requirements to assist federal agencies in promulgating rules that are clear and that minimize undue economic burdens on small entities.

Federal agencies must meet three requirements set forth under section 3 of E.O. 13272. First, they must publicly document their policies for ensuring that small entities are properly considered during the rulemaking process. Second, agencies must notify Advocacy of prepublication (draft) rules that may impose a significant economic impact on small entities, either when the rule is sent to the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) or at a reasonable time prior to its publication. To best facilitate prompt agency compliance with the electronic notice requirements of E.O. 13272, Advocacy created an email address: notify.advocacy@sba.gov. Many regulatory agencies have begun to utilize this tool. Third, E.O. 13272 requires the agencies to consider Advocacy's comments and recommendations on a proposed rule and to respond to Advocacy's written comments in the final rule published in the *Federal Register*.

In addition to the three directives given to agencies, E.O. 13272 mandated three requirements for the Office of Advocacy. First, Advocacy was required to notify agencies of their compliance requirements under the RFA and the executive order. This was accomplished by the publication of *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act.* The guide was published in 2003, and Advocacy continues to receive requests for updated versions from numerous regulatory agencies. Second, the executive order provided for additional reporting by the Office of Advocacy. Previously, Advocacy had reported annually to particular congressional committees and the president on agency compliance with the RFA. E.O. 13272 added a requirement that Advocacy also report annually to the OMB's Office of Information and Regulatory Affairs about agency compliance with the three executive order requirements. Advocacy's FY 2008 report on agency compliance with E.O. 13272 is included here and in chapter 3. Finally, E.O. 13272 requires that Advocacy train federal agencies in how to comply with the RFA.

RFA Training under E.O. 13272

Advocacy has trained numerous economists, attorneys, and regulatory and policy staff at federal agencies to consider the impact of their regulations on small entities before, during, and after the drafting of their rules. In FY 2008, Advocacy continued with this task by holding training sessions for new employees of previously trained agencies, staff requesting additional training sessions, and employees of agencies not yet trained. These training sessions demonstrate to agencies that it is possible for them to accomplish their regulatory objectives while finding ways to reduce the burden on small businesses. Participants have gained tools to assist them in their economic analysis of proposed rules so that they may also identify regulatory alternatives that will reduce the potential economic impact of the regulation on small entities.

Advocacy's success in RFA compliance training throughout the federal agencies over the past five years has improved agency analysis of the federal regulatory burden on small businesses and has enhanced the factual basis for agency certifications of rules. The program has also led to a greater willingness by the agencies to share draft documents

with Advocacy. Not all agencies are quick to consider small business impacts from the beginning of rule development, but these training sessions have indeed made a difference to many agencies in their rule development process, and ultimately the training has made a difference to small businesses.

In the next phase of RFA training, Advocacy will be able to focus on agencies needing more training in the economic analysis of small business impacts, while offering the training to employees who were unable to attend previous sessions. This continued focus on the basics of the RFA—the importance of detailed economic analysis as an integral part of the public comment period, the foundation of a factual basis as a requirement for a threshold analysis of a rule's impact, and contemplating a rule's impact prior to a first draft—will continue to be important issues for Advocacy's training team in the next fiscal year.

Overview of RFA Implementation

Advocacy continues to advance agency compliance with the RFA and E.O. 13272 by coordinating with agency attorneys and economists throughout the rulemaking process. In FY 2008, Advocacy provided comments to multiple agencies, offering counsel on compliance with the RFA, identifying areas of particular concern to small businesses, and recommending burden-reducing alternatives for agency consideration. The following tables illustrate the areas in which Advocacy continues to work with agencies to comply with the RFA and summarizes the small business cost savings realized through Advocacy's efforts.

Chart 2.1 Advocacy Comments by Key RFA Compliance Issue, FY 2008

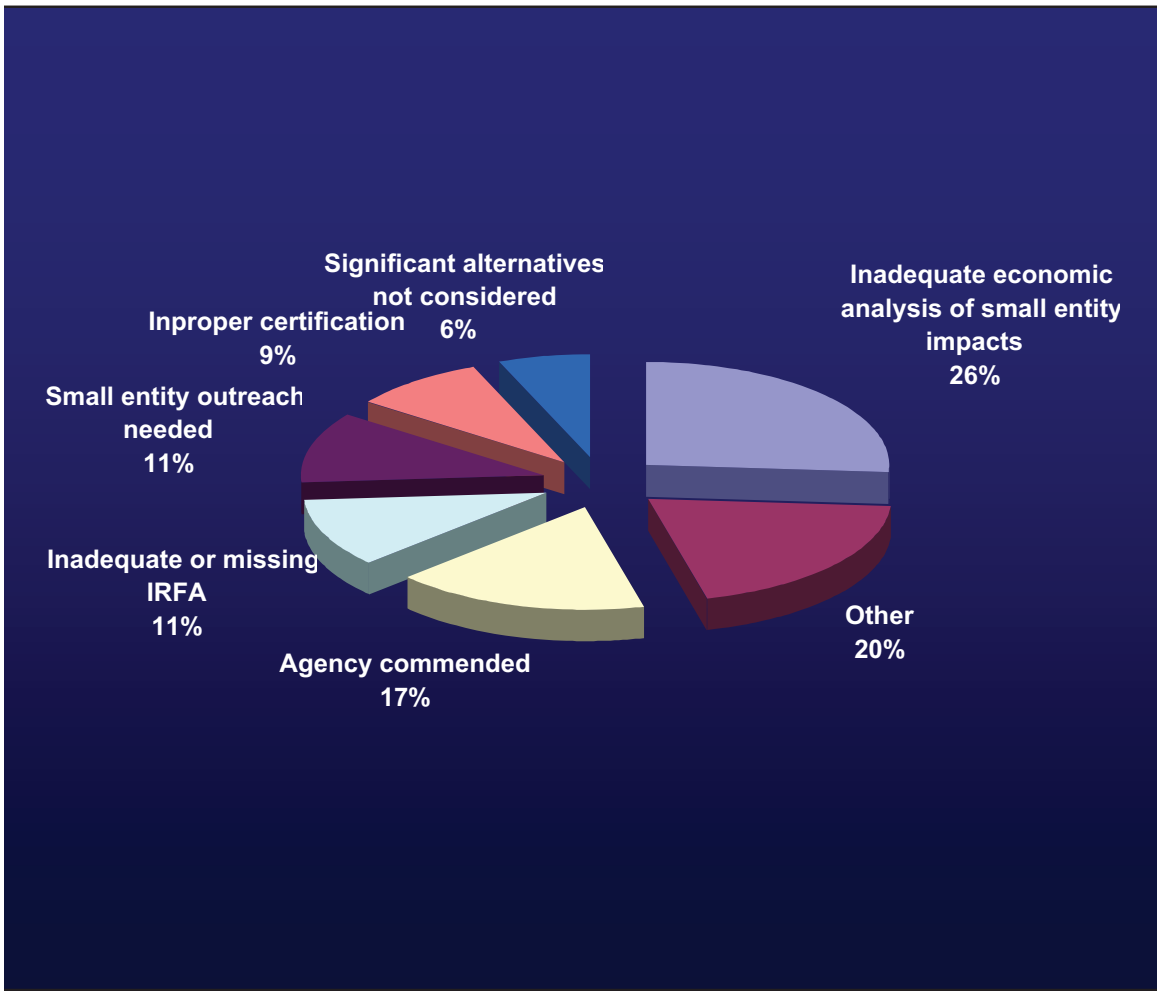


Chart 3.1 illustrates the most common concerns raised in Advocacy's comment letters. The chart highlights areas in need of continued improvement based on Advocacy's analysis of its FY 2008 comment letters.

Table 2.1 Regulatory Comment Letters Filed by the Office of Advocacy, FY 2008

Date	Agency	Comment Subject
10/02/07	SEC	Comments regarding two alternative releases on shareholder proxy access (72 *Fed. Reg.* 43488; 72 *Fed. Reg.* 43465).
10/12/07	EPA	Letter recommending inclusion of specific small entity representatives in a Small Business Advocacy Review (SBAR) Panel for EPA's revised National Primary Drinking Water Regulations.
10/25/07	EPA	Comments regarding EPA's National Emissions Standards for Hazardous Air Pollutants (72 *Fed. Reg.* 52958).
11/02/07	TSA	Comments regarding TSA's proposed Secure Flight Program regulations (72 *Fed. Reg.* 48356).
11/07/07	FCC	Comments regarding petitions by Verizon Telephone Companies for forbearance (WC Docket No. 06-172).
11/15/07	OSMRE	Comments regarding the proposed regulation, Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States (72 *Fed. Reg.* 48889).
11/29/07	DOJ	Letter forwarding Advocacy's report titled *Evaluation of Barrier Removal Costs Associated with the 2004 Americans with Disabilities Act (ADA) Accessibility Guidelines*.
12/12/07	Treasury	Comments regarding a proposed prohibition on funding of unlawful Internet gambling (72 *Fed. Reg.* 56680).
01/15/08	OSHA	Transmittal of the *Report of the Small Business Advocacy Review Panel on the Occupational Safety and Health Administration's Draft Standard for Occupational Exposure to Beryllium.*
02/20/08	SBA	Comments on the SBA's women-owned small business federal contracting procedures (72 *Fed. Reg.* 73285).
02/25/08	SEC	Comments regarding the SEC's proposal to extend the implementation date for Sarbanes-Oxley (73 *Fed. Reg.* 7449).
02/28/08	FDA	Comments regarding the FDA's guidance on the labeling of dietary supplements (73 *Fed. Reg.* 196).

Date	Agency	Comment Subject
03/14/08	NHTSA	Comments regarding NHTSA's proposed tire registration and recordkeeping rule (73 *Fed. Reg.* 4157).
03/21/08	Treasury	Comments regarding an advance notice of proposed rulemaking (ANPRM) providing guidance on refund anticipation loans (RALs) (73 *Fed. Reg.* 1131).
03/31/08	EPA	Report of the Small Business Advocacy Review Panel, including the executive summary, on Revisions to the Total Coliform Monitoring and Analytical Requirements and Consideration of Distribution System.
04/07/08	DOL	Comments regarding the proposed revisions to regulations implementing the Family and Medical Leave Act (73 *Fed. Reg.* 7875).
04/08/08	FRB	Comments regarding the proposed Truth in Lending regulation (73 *Fed. Reg.* 1671).
04/23/08	DOT	Comments regarding a notice of proposed rulemaking (NPRM) on passenger vessel transportation for individuals with disabilities (73 *Fed. Reg.* 14427).
04/24/08	Treasury, IRS	Comments regarding required government withholding of 3 percent on payments for services and property (IRS Notice 2008-38).
04/25/08	DHS	Comments regarding DHS Supplemental Proposed Rule on Safe-Harbor Procedures for Employers who Receive a No-match Letter (73 *Fed. Reg.* 4157).
04/25/08	FCC	Comments commending FCC for considering a proposal to grant regulatory relief to small cable providers.
05/13/08	CPSC	Comments about the NPRM regarding setting standards for the flammability of residential upholstered furniture (73 *Fed. Reg.* 11701).
05/19/08	FCC	Comments regarding the High-cost Universal Service Support, Federal-state Joint Board on Universal Service (72 *Fed. Reg.* 73225).
06/11/08	FHA	Comments regarding the Real Estate Settlement Procedures Act: Proposed Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs (73 *Fed. Reg.* 14029).
06/25/08	SEC	Comments commending the SEC for approving a one-year extension for small businesses from the auditor attestation requirement in the Sarbanes-Oxley Act.

Date	Agency	Comment Subject
06/30/08	SEC	Comments regarding the SEC's plans to unify America's current Generally Accepted Accounting Principles with the International Financial Reporting Standards.
07/14/08	FS	Comments regarding the Forest Service's Locatable Minerals Operations NPRM (73 *Fed. Reg.* 16185).
07/23/08	DHS	Comments regarding the Commercial Fishing Industry Vessels ANPRM (73 *Fed. Reg.* 16815).
07/25/08	FCC	Comments regarding Qwest Petitions for Forbearance Pursuant to 47 U.S.C section 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas (WC Docket No. 07-97).
08/06/08	DOJ	Comments regarding the NPRM titled Nondiscrimination on the Basis of Disability by Public Accommodations and Commercial Facilities (73 *Fed. Reg.* 34508).
08/07/08	FAR Council	Comments regarding the proposed Employment Eligibility Verification rule, FAR Case 2007-013 (72 *Fed. Reg.* 33374).
08/21/08	FCC	Comments regarding the OrbitCom Petition for Forbearance of sections 61.26(b) and 61.26(c) of the FCC's rules (WC Docket 08-162).
09/15/08	DHS	Comments to DHS's U.S. Citizenship and Immigration Services regarding the NPRM titled Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers (73 *Fed. Reg.* 49109 August 20, 2008).

Table 2.2 Regulatory Cost Savings, FY 2008

Agency	Subject Description	Cost Savings/ Impact Measures
FCC	***Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172.*** On December 4, 2007, the FCC denied the six petitions filed by Verizon to request forbearance from unbundled network element (UNE) obligations. Because of information received from small business stakeholders, the Office of Advocacy was able to present data to the FCC that did not support a finding that competition in these six metropolitan areas was sufficient to justify a grant of forbearance. Because of the petition's denial, small competitive local exchange carriers (CLECS) can continue to enter and do business in the markets.	**The total one-time cost savings from this proposal are $393.9 million.**
EPA	***Automotive Spray Painting and Stripping Facilities Rule.*** EPA followed Advocacy's recommendation to clarify the applicability requirements of the final rule for facilities that use paint spray guns. The clarification included limiting the scope of the rule to automotive paint shops that spray coatings containing the hazardous air pollutants (HAPs) being regulated. Limiting the scope of the rule resulted in a reduction in the number of affected small entities from 95,000 facilities to 9,000 facilities. The cost for the specified spray booth equipment would have been at least $2,000 per facility.	**Total one-time cost savings are $172 million.**
EPA	***Air Pollution Control Standards for Iron and Steel Foundries Rule.*** On January 2, 2008, EPA published a final rule establishing new air pollution control standards for small-scale iron and steel foundries under the Clean Air Act. The rule requires foundries above a specific melting capacity to install pollution control equipment. On the basis of information received from small business stakeholders and the Office of Advocacy, EPA raised the applicability threshold for these new controls to a higher melting capacity. As a result, smaller foundries can continue to operate without having to install new controls. Advocacy had already claimed savings based on the proposal published in September 2007. Based on the language of the final rule, EPA exempted foundries with an even higher melting capacity.	**EPA's additional exemptions yielded an additional $4.94 million in one-time savings and an additional $1.003 million in recurring operating and maintenance costs saved.**

Agency	Subject Description	Cost Savings/ Impact Measures
EPA	***SPCC—Spill Prevention, Control, and Countermeasure Rule, Phase II.*** On October 15, 2007, the EPA proposed phase II requirements for facilities that store more than 1,320 gallons of oil. These facilities are required to have a prevention and response plan to minimize and eliminate releases of oil to navigable waters. In this case, Advocacy helped persuade EPA to add various changes to allow flexibility for smaller facilities—flexibility for integrity testing of tanks, flexibility of security requirements, and defining the scope of a regulated facility.	**The savings for these three provisions total $291 million annualized at the 7 percent discount rate.**
SEC	***Shareholder Proposals.*** On August 3, 2007, the SEC released two alternative proposals on shareholder proxy access, which would allow shareholders access to company proxy statements in order to nominate their own candidates to their board of directors. The SEC received more than 25,000 comment letters supporting the "long proposal," which would have enabled certain shareholders to amend future election procedures, such as allowing proxy access. Advocacy filed a public comment letter supporting the "short proposal," which affirmed the status quo position that shareholder proposals on items such as proxy access may be excluded from a company's proxy materials. Responding to input from the small business community, Advocacy commented that it did not support the long proposal because it was likely to have a disproportionate impact on smaller public companies. Advocacy was one of a few groups that actively supported the short proposal. On December 6, 2007, the SEC released the final rule on the short proposal, Shareholder Proposals Relating to the Election of Directors (SEC File No. S7-17-07).	**The adoption of the short proposal will result in one-time cost savings of $414,252,000.**

Agency	Subject Description	Cost Savings/ Impact Measures
DOD	***Contractor Code of Ethics.*** On February 16, 2007, the FAR Council published a proposed regulation titled Contractor Code of Business Ethics and Conduct. If implemented, the regulation would have required all federal prime contractors and subcontractors that were awarded a contract of $5 million or more to implement a formal code of ethics and provide an employee ethics and business training program. The proposed regulation also stated that "for contracts valued at $5 million or less such programs may not be necessarily required, but when required, they shall be suitable to the size of the company and the extent of the company's business within the federal government." Advocacy was approached by a construction trade group representing a large number of small business members about the impact of the proposal. After consultation with an industry expert on corporate ethics programs, Advocacy was informed that the type of ethics program being proposed in the FAR regulation would, conservatively, cost a company $10,000 to establish, plus another immeasurable amount annually to run and maintain the program. On May 21, 2007, the Office of Advocacy submitted an official comment letter to the FAR Council requesting reconsideration of the impacts of the proposed regulation on small businesses. On November 23, 2007, DOD, GSA, and NASA published the final contractor ethics rule with an exemption for small businesses.	**The exemptions result in one-time cost savings to small businesses of more than $5.3 billion. This total does not include the number of contracts awarded to small business subcontractors.**

Agency	Subject Description	Cost Savings/ Impact Measures
SEC	***Sarbanes-Oxley Act—Section 404(b) Extensions.*** The Sarbanes-Oxley Act of 2002 requires public companies to submit a section 404(a) management assessment report and a section 404(b) auditor's report on the company's internal controls to the SEC. Since the SEC adopted the rule implementing section 404 of the Sarbanes-Oxley Act in 2003, Advocacy and other small business stakeholders have recommended extension because these requirements would impose disproportionate costs on small entities. The SEC has delayed the section 404 implementation date for smaller public companies with less than $75 million in public float a number of times. In December 2006, the SEC released management guidance, and the Public Companies Accounting Oversight Board released a new auditing standard to address concerns with the act. In 2007, Advocacy submitted numerous comment letters to the SEC recommending that the agency further extend the deadline for section 404(b) compliance for smaller public companies to examine whether this new auditing standard would make the process more efficient. On July 2, 2008, the SEC published a final rule granting smaller public companies one more year to comply with section 404(b), requiring that they submit this report for fiscal years ending on or after December 15, 2009. The SEC granted this extension to allow the SEC to complete a study of the costs and benefits of section 404, with a particular emphasis on small business impacts.	**The one-year extension will result in one-time cost savings of $1,957,225,008.**

Agency	Subject Description	Cost Savings/ Impact Measures
FAA	***Final Revisions to Cockpit Voice Recorder and Digital Flight Data Recorder Regulation.*** The Federal Aviation Administration's proposed CVR/DFDR rule was published on February 28, 2005, and the Office of Advocacy filed formal public comments on June 25, 2005, after discussing the proposed rule with small business representatives at its regular Aviation Safety Roundtable. On March 7, 2008, the FAA issued its Final Revisions to Cockpit Voice Recorder and Digital Flight Data Recorder Regulations (CVR/DFDR rule). The final rule amends cockpit voice recorder (CVR) and digital flight data recorder (DFDR) regulations affecting certain air carriers, operators, and aircraft manufacturers. Advocacy's comments noted, among other things, that while FAA's proposed rule would apply to all aircraft with 10 or more seats, FAA's economic analysis appeared to focus mostly on large scheduled airlines (Part 121 carriers) while omitting other segments of the aviation industry, such as Part 91 (general aviation) and Part 135 operators (on-demand air charters, fractional aircraft programs, and scheduled regional carriers). In response to Advocacy's comments, FAA excluded all Part 91 operators from having to retrofit their aircraft.	**First-year cost savings are $289 million for retrofitting some 15,000 aircraft; an additional annual $13.65 million is saved in operational and maintenance costs of $910 per aircraft.**
EPA	***Area Source Standard for Metal Fabrication and Finishing.*** On June 13, 2008, the EPA signed a final Clean Air Act rule for smaller facilities that fabricate and/or finish metal products. The rule set emission standards in the form of management practices and equipment standards for small metalworking operations that use dry blasting, machining, dry grinding, and dry polishing, as well as spray painting and welding. EPA estimates that 5,800 facilities will be affected by the new rule, and that 5,300 of those facilities are small businesses. The rule imposes new monitoring and recordkeeping obligations on these sources, which EPA estimates to cost about $339 per facility per year. This obligation represents a significant reduction from the original monitoring and reporting requirements the rule would have imposed. Responding to comments from Advocacy and others, EPA proposed less burdensome reporting requirements.	**The new reporting requirements will save metalworking operations of all sizes $1,015,000 per year on a recurring basis.**

Agency	Subject Description	Cost Savings/ Impact Measures
FAR Council	***FAR Case 2006-011, Representations and Certifications—Tax Delinquencies.*** On March 30, 2007, the Federal Acquisition Council published a proposed rule that if finalized would require almost all federal contractors, prime and subcontractors, to certify whether or not they have, within a three-year period preceding the contract offer, been convicted of or had a civil judgment rendered against them for violating any tax law or failing to pay any tax, or been notified of any delinquent taxes for which the liability remains unsatisfied. On May 25, 2007, the Office of Advocacy sent a comment letter to the FAR Council. On April 22, 2008, the FAR Council published the final rule. The rule acknowledged the concerns raised by the Office of Advocacy and established a minimum federal tax delinquency threshold of $3,000. The final rule also limited the tax violations to federal criminal tax laws and it provided a detailed definition of delinquent federal taxes.	**The FAR Council's actions resulted in annual cost savings to small contractors of at least $18.8 million.**
FCC	***Qwest Petitions for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis- St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, WC Docket No. 07-97, FCC Docket No. 08-174.*** On April 27, 2007, Qwest filed a petition for forbearance pursuant to 47 U.S.C. § 160 (c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas (MSAs). Competitive local exchange providers explained to Advocacy that the requisite level of competition had not been met in these areas, and provided a recent market-based study examining the economic impact of the incumbent being granted forbearance. Advocacy asked the FCC to utilize these data when conducting its section 10 forbearance analysis to weigh the impact of this grant on small providers. On July 25, 2008, the FCC denied Qwest's forbearance request in response to Advocacy's concerns.	**Savings are more than $1.14 billion annually for small providers in the MSAs.**

Agency	Subject Description	Cost Savings/ Impact Measures
FCC	***In the Matter of Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules (CS Docket No. 98-120; FCC Docket No. 08-193).*** On September 24, 2007, Advocacy met with representatives of the American Cable Association (ACA) to discuss the regulatory burden that certain aspects of the proposed DTV transition rule would impose on their members' systems. They explained that the proposed "dual carriage" language would have required that cable systems provide customers with both broadcast and digital signals, and this mandate would have a negative economic impact on small cable systems. Advocacy continued to meet with both the ACA membership and representatives from the FCC to assist them in negotiating a compromise that would reduce this burden on the smallest systems while still achieving the commission's goal of ensuring that cable viewers are minimally affected by the digital television (DTV) transition. On September 4, 2008, the commission released its Fourth Report and Order, which carves out exemptions for small cable systems with certain characteristics. For these small entities, compliance with this rule would have cost approximately $50,000 per system.	**The costs to affected small entities have been reduced to $10,000 per system, a cost savings of approximately $160 million annually**.
EPA	***Amendments to Clean Air Act Compliance Assurance Monitoring Rule.*** On January 22, 2004, the U.S. Environmental Protection Agency published a final rule that, among other things, notified the public that EPA intended to expand the scope and stringency of the Compliance Assurance Monitoring (CAM) Rule, 69 *Fed. Reg.* 3202 (Jan. 22, 2004). EPA subsequently developed a revised monitoring regime that would require additional emissions points at facilities with federal Clean Air Act operating permits to monitor and report their emissions. After receiving comments from Advocacy and other interested parties about EPA's analysis of the costs of the proposal versus its likely benefits, EPA suspended work on the proposal indefinitely in March 2008. EPA had estimated that the amended rule would have imposed new costs of $114 million per year on regulated sources.	**Cost savings from the suspended rule are $114 million per year.**

Agency	Subject Description	Cost Savings/ Impact Measures
EPA	***Control of Emissions from Nonroad Spark Ignition Engines and Equipment.*** On September 4, 2008, EPA finalized a rule to control air pollution from gasoline-powered engines and equipment below 50 horsepower, 73 *Fed. Reg.* 59034 (October 8, 2008). As part of the final rule, EPA responded to concerns raised by Advocacy and small business stakeholders about a provision that EPA had originally proposed requiring small engine makers to certify the compliance of incomplete and replacement engines used in non-road equipment. These new certification, tracking, and monitoring requirements would have substantially added to the cost and difficulty of obtaining replacement and partially built engines. In the final rule, EPA provided per-engine family exemption allocations that will significantly lower the burden on small manufacturers and small repair facilities.	**The cost savings from this final rule are $500 million per year.**

Table 2.3 Summary of Cost Savings, FY 2008 (Dollars)[1]

Rule/ Intervention	First-year costs	Annual costs
Verizon Petition for Forbearance (FCC)[2]	393,900,000	
Automotive Spray Painting and Stripping Facilities (EPA)[3]	172,000,000	
Air Pollution Control Standards for Iron and Steel Foundries—Final (EPA)[4]	4,940,000	1,003,000
SPCC Spill Prevention, Controls, and Countermeasures Phase II (EPA)[5]	291,000,000	291,000,000
Shareholder Proposals[6]	414,252,000	
Contractor Code of Ethics (DOD, GSA, NASA)[7]	5,301,630,000	
Sarbanes-Oxley Act, Section 404(b) Extensions (SEC)[8]	1,957,225,008	
Final Revisions to Cockpit Voice Recorder and Digital Flight Data Recorder Regulations Rule (FAA)[9]	289,000,000	13,650,000
Area Source Standards for Metal Fabrication and Finishing (EPA)[10]	1,015,000	1,015,000
FAR Case 2006-011, Representations and Certifications—Tax Delinquencies (FAR Council)[11]	18,800,910	18,800,910
Qwest Petition for Forbearance (FCC)[12]	1,140,317,713	1,140,317,713
Carriage of Digital Television Broadcast Signals (FCC)[13]	160,000,000	160,000,000
Amendments to Clean Air Act Compliance Assurance Monitoring Rule (EPA)[14]	114,000,000	114,000,000
Control of Emissions from Nonroad Spark Ignition Engines and Equipment (EPA)[15]	500,000,000	500,000,000
Total	**10,758,080,631**	**2,239,786,623**

[1] The U.S. Small Business Administration, 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, the Office of Advocacy limits the savings to those attributable to small businesses. These are best estimates. First-year cost savings consist of either capital or annual costs that would be incurred in the rule's first year of implementation. Recurring annual cost savings are listed where applicable.

[2] Source: Office of Advocacy estimate based on Federal Communications Commission (FCC) data.

[3] Source: Advocacy estimate.

[4] Source: Environmental Protection Agency (EPA).

[5] Source: EPA, EPA environmental impact analysis, August 2007 draft, Exhibit 1-2.

[6] Source: Securities and Exchange Commission (SEC).

[7] Source: Department of Defense, General Services Administration, National Aeronautics and Space Administration, and Advocacy analysis. GSA data for FY 2007 through the third quarter show 530,163 small business contracts at a value of $5 million or less. The total cost is estimated at 530,163 (total contracts ≤$5,000,000) x $10,000 (program set-up cost).

[8] Source: SEC and Financial Executives International.

[9] Source: Federal Aviation Administration (FAA).

[10] Source: Advocacy estimate based on EPA data.

[11] Source: Advocacy estimate based on data in rulemaking.

[12] Source: QSI, *An Analysis of Qwest's Petition for Forbearance.*

[13] Source: American Cable Association.

[14] Source: EPA.

[15] Source: EPA.

3 Advocacy Review of Agency RFA Compliance in Fiscal Year 2008

The Office of Advocacy has worked consistently with federal agencies to examine the effects of their proposed regulations on small entities since the enactment of the Regulatory Flexibility Act in 1980. Advocacy demonstrates its commitment to working with agencies to reduce the burden of federal regulations on small entities by providing written interagency communications, public comments, RFA training, and congressional testimony, as well as hosting RFA panels and roundtables. Communication and coordination between other federal agencies and the Office of Advocacy has increased in the effort to address small business concerns in policy deliberations. The following section provides an overview of RFA and E.O. 13272 compliance by agency in fiscal year 2008.

Department of Agriculture

E.O. 13272 Compliance

The U.S. Department of Agriculture (USDA) has complied with section 3(a) of E.O. 13272 by making its policies for considering small business impacts when promulgating regulations publicly available on its website. The following agencies within USDA generally comply with section 3(b) of E.O. 13272 by notifying Advocacy of rules that may have a significant economic impact on a substantial number of small entities: the Animal and Plant Health Inspection Service (APHIS), the Agricultural Marketing Service (AMS), and the Grain Inspection, Packers, and Stockyards Administration (GIPSA). Advocacy has provided RFA training to all of these agencies. USDA published two final rules that were the subject of Advocacy comment in FY 2008 and regularly complies with section 3(c) of the E.O. 13272 by responding to Advocacy's written comments.

Animal and Plant Health Inspection Service

Issue: Viral Hemorrhagic Septicemia: Interstate Movement and Import Restrictions on Certain Live Fish. In September 2008, the Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) published an interim final rule in the *Federal Register* establishing regulations to restrict the interstate movement and importation into the United States of live fish that are susceptible to viral hemorrhagic septicemia (VHS), a highly contagious disease of certain fish. Advocacy filed comments with APHIS seeking to bring to the agency's attention many concerns about the rule sounded by small aquaculture businesses. Advocacy commented that small businesses were concerned that the interim final rule would have a significant economic effect on the industry and that alternatives were available that would serve to minimize the cost of the regulation to those businesses, while accomplishing the agency's objective. As a result of Advocacy's comments and those made by industry, APHIS chose to delay implementation of the rule so that it could evaluate the comments and make adjustments to the rule as needed.

Agricultural Marketing Service

Issue: **Mandatory Country-of-Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts.** In August 2008, the Department of Agriculture's Agricultural Marketing Service (AMS) published an interim final rule in the *Federal Register* implementing mandatory country of origin food labeling. The Food, Conservation, and Energy Act of 2008 amended the Agricultural Marketing Act of 1946 to require

retailers to notify their customers of the country of origin of covered commodities. Covered commodities included muscle cuts of beef (including veal), lamb, chicken, goat, and pork; ground beef, ground lamb, ground chicken, ground goat, and ground pork; wild and farm-raised fish and shellfish; perishable agricultural commodities; macadamia nuts, pecans, ginseng, and peanuts.

Advocacy has been involved in the country-of-origin labeling rulemaking since 2001. Advocacy provided AMS with suggestions on how to reduce the rule's burden on the regulated small businesses and encouraged the agency to entertain additional alternatives. As a result of Advocacy's intervention, AMS changed the period in which the retail product must be relabeled when it has been in inventory and reduced the time that records must be maintained by the retailer.

Department of Commerce

E.O. 13272 Compliance

The Department of Commerce (DOC) continues to comply with the requirements of E.O. 13272. Its RFA policies are publicly available in compliance with section 3(a) of E.O. 13272, and DOC's agencies notify Advocacy of draft rules as required by section 3(b) of E.O. 13272. For example, the National Marine Fisheries Service (NMFS) not only notifies Advocacy of its draft rules, but also routinely submits them to the Office of Advocacy for interagency review. Similarly, in the last year, the United States Patent and Trademark Office (PTO) complied with section 3(b) of E.O. 13272 by notifying Advocacy of its draft rules and submitting them to Advocacy.. DOC did not publish any final rules in FY 2008 that were the subject of any Advocacy comment; therefore, DOC's compliance with section 3(c) of E.O. 12372 cannot be assessed.

Department of Defense

E.O. 13272 Compliance

The Federal Acquisition Regulation Council (FAR Council) promulgates procurement regulations that are governmentwide and affect small businesses. The FAR Council statutorily includes representation from the Department of Defense (DOD), the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA). The DOD regulations, called the Defense Federal Acquisition Regulation Supplement (DFARS), are specific to DOD and can only supplement the FAR Council regulations. The FAR Council and DOD regulatory processes are interrelated and DOD's procedures comply with section 3(a) of E.O. 13272. DOD notifies Advocacy of its draft rules in compliance with section 3(b) of E.O. 13272, and routinely submits prepublication rulemakings for Advocacy consideration. DOD did not publish any final rules in FY 2008 that were the subject of any written Advocacy comments; therefore, DOD compliance with section 3(c) cannot be assessed. DOD's staff received RFA training in FY 2005. Advocacy worked closely with OIRA's Defense regulatory team, providing significant interagency input on several regulations in fiscal year 2008.

Federal Acquisition Regulation Council

Issue: Contractor Code of Ethics. On February 16, 2007, the FAR Council published a proposed regulation titled Code of Business Ethics and Conduct. If implemented, the regulation would have required all federal prime contractors and subcontractors awarded a contract of $5 million or more to implement a formal code of ethics and provide an employee ethics and business training program. The proposed regulation also stated that "for contracts valued at $5 million or less such programs may not be necessarily required, but when required, they shall be suitable to the size of the company and the extent of the company's business within the federal government."

Advocacy was approached by a construction trade group representing a large number of small business members about the impact of the proposal. After consultation with an industry expert on corporate ethics programs, Advocacy was informed that the type of ethics program being proposed in the FAR regulation would, conservatively, cost a company $10,000 to establish, plus another immeasurable amount annually to run and maintain the program. On May 21, 2007, the Office of Advocacy submitted an official comment letter to the FAR Council requesting reconsideration of the impacts of the proposed regulations on small businesses. On November 23, 2007, DOD, GSA, and NASA published the final contractor ethics rule with an exemption for small businesses. The exemptions resulted in one-time cost savings for small businesses of $5.3 billion. (The savings total does not include the savings for small businesses participating in procurement as subcontractors to larger businesses.)

Issue: FAR Case 2006-011, Representations and Certifications—Tax Delinquencies. On March 30, 2007, the FAR Council published a proposed rule that if finalized would require almost all federal contractors, prime contractors and subcontractors, to certify whether or not they have, within a three-year period preceding the contract offer, been convicted of or had a civil judgment rendered against them for violating any tax law or failing to pay any tax, or been notified of any delinquent taxes for which the liability remains unsatisfied.

On May 25, 2007, The Office of Advocacy sent a comment letter to the FAR Council. On April 22, 2008, the FAR Council published the final rule. The rule acknowledged the concerns raised by the Office of Advocacy and established a minimum federal tax delinquency threshold of $3,000 for compliance. The final rule also limited the tax violations to federal criminal tax laws and provided a detailed definition of delinquent federal taxes. These actions resulted in an annual cost savings to small contractors of at least $18.8 million.

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 economic impact on a substantial number of small entities, as required by section 3(b) of E.O. 13272. Education has not published any final rules in FY 2008 that were the subject of any Advocacy comment; therefore, Education's compliance with section 3(c) cannot be assessed.

Department of Energy

E.O. 13272 Compliance

The Department of Energy (DOE) has complied with section 3(a) of E.O. 13272 by maintaining its RFA policies and procedures on its website. DOE complies with section 3(b) of E.O. 13272 by notifying Advocacy of draft rules that may have a significant economic impact on a substantial number of small entities, and also routinely submits draft rules to Advocacy for review prior to their publication in the *Federal Register.* DOE did not publish any final rules in FY 2008 that were the subject of Advocacy comment. Therefore, DOE's compliance with section 3(c) of E.O. 13272 cannot be assessed.

Department of Health and Human Services

E.O. 13272 Compliance

The Department of Health and Human Services (HHS) has complied with section 3(a) of E.O. 13272 by making its policies and procedures publicly available online. Agencies within HHS do not consistently notify Advocacy of draft proposed rules pursuant to section 3(b) of E.O. 13272. The Food Safety and Inspection Service (FSIS) and the

Centers for Medicare and Medicaid Services (CMS) published final rules that were the subject of Advocacy comments, and both agencies complied with section 3(c) of E.O. 13272 by publicly responding to Advocacy's comments when publishing their final rules in the *Federal Register.*

Food Safety and Inspection Service

Issue: Availability of Lists of Retail Consignees during Meat or Poultry Recalls. On July 17, 2008, the FSIS published a final rule in the *Federal Register* amending the federal meat and poultry products inspection regulations to provide that the agency would make available to the public the names and locations of the retail consignees of meat and poultry products that had been recalled if the recalled product had been distributed at the retail level. Pursuant to the RFA, the agency certified that the rule would not have a significant economic impact on a substantial number of small entities.

Advocacy filed public comments on the proposed rule on May 4, 2006, informing FSIS that its certification of no impact had an insufficient factual basis pursuant to the RFA. Advocacy also provided the FSIS with information about industry concerns with respect to the rule, including loss of proprietary information and unanticipated adverse effects on recall efficiency. As a result of Advocacy's comments, FSIS agreed to remove the certification of no impact, perform a final regulatory flexibility analysis (FRFA), and restrict the rule's requirements to Class I recalls only. Because of Advocacy's intervention, regulatory costs to the industry were reduced.

Centers for Medicare and Medicaid Services

Issue: HIPAA Administrative Simplification: Modification to Medical Data Code Set Standards to Adopt ICD-10-CM and ICD-10-PCS. On August 22, 2008, as part of implementing the Health Insurance Portability and Accountability Act (HIPAA), the Centers for Medicare and Medicaid Services published a proposed rule in the *Federal Register* titled HIPAA Administrative Simplification: Modification to Medical Data Code Set Standards to Adopt ICD-10-CM and ICD-10-PCS. The rule modified two of the medical data code set standards adopted in the Transactions and Code Sets final rule published in 2000. More specifically, the rule was set to modify the standard code sets for coding diagnoses and inpatient hospital procedures by concurrently adopting the International Classification of Diseases, Tenth Revision, Clinical Modification (ICD-10-CM) and Procedure Coding System (ICD-10-PCS).

Although CMS acknowledged that significant costs would be incurred by regulated health care providers, the agency chose to certify that the rule would not have a significant economic impact on a substantial number of small entities. Advocacy suggested that because of CMS's expectation that most health care providers in the United States would use the ICD-10 code, CMS should prepare an initial regulatory flexibility analysis (IRFA) that would assess the rule's economic impact on covered health care providers. CMS agreed to withdraw its certification and perform the IRFA.

Issue: Health Insurance Reform; Modifications to the HIPAA Electronic Transaction Standards. On August 22, 2008, CMS published a proposed rule in the *Federal Register* titled Health Insurance Reform; Modifications to the HIPAA Electronic Transaction Standards. The rule proposed to adopt updated versions of the standards for electronic transactions originally adopted in the regulations titled Health Insurance Reform: Standards for Electronic Transactions, published in 2000. More specifically, the rule would enhance the electronic filing of certain health and billing information by transitioning from Version 4010 to Version 5010.

Although CMS acknowledged that regulated health care providers would incur large costs, the agency chose to certify that the rule would not have a significant economic impact on a substantial number of small entities. Advocacy suggested that because of CMS's expectation that most health care

providers in the United States would use Version 5010, the agency should prepare an IRFA that would assess the rule's economic impact. CMS agreed to withdraw its certification and perform the IRFA.

Department of Homeland Security

E.O. 13272 Compliance

The Department of Homeland Security (DHS) has made some progress in complying with E.O. 13272. DHS has posted its RFA policy on its website, as required by section 3(a) of E.O. 13272. The Transportation Security Administration (TSA) was trained in RFA compliance in FY 2005, and the U.S. Coast Guard (USCG) was trained in FY 2005 and FY 2008. However, Advocacy has been unable to schedule RFA training with other DHS components despite repeated requests. DHS did not notify Advocacy of all of its draft rules that may have had a significant economic impact on a substantial number of small entities in FY 2008, as required by section 3(b) of E.O. 13272. DHS did not publish any final rules in FY 2008 that were the subject of Advocacy comments; therefore, compliance with section 3(c) of E.O. 13272 cannot be assessed. Advocacy submitted comments to DHS on its Supplemental Safe Harbor Procedures for Employers Who Receive a No-match Letter Rule; however, that rule was not finalized in FY 2008.

Department of Housing and Urban Development

E.O. 13272 Compliance

The Department of Housing and Urban Development (HUD) has made its policies and procedures available to the public in compliance with section 3(a) of E.O. 13272. HUD consistently 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 E.O. 13272. HUD received RFA training in FY 2005. HUD did not publish any final rules in FY 2008 that were the subject of any Advocacy public comments; therefore, the agency's compliance with section 3(c) of E.O. 13272 cannot be assessed.

Issue: ***Real Estate Settlement Procedures Act of 1974 (RESPA).*** In 2002, HUD issued a proposed rule to revise the regulations implementing RESPA. The purpose of the proposal was to simplify and improve the process of obtaining home mortgages and to reduce settlement costs to consumers. Small businesses throughout the real estate and settlement services industry strongly opposed the rule. Advocacy filed comments on behalf of small businesses in October 2002. Advocacy's comments suggested that HUD prepare a revised IRFA to provide information to the public about the industries affected by the proposal and alternatives to minimize the impact on small entities. Advocacy also emphasized its desire to continue working with HUD to ensure that improvements to the mortgage financing and settlement process are sensitive to the impact on small business.

In March 2004, HUD withdrew the draft final RESPA rule from OMB review. Subsequently, Advocacy worked with HUD to perform outreach to the small business community, to discuss the impact of RESPA reform on small entities, and to develop less burdensome alternatives. In addition to attending roundtables that HUD held in Washington, DC. Advocacy and HUD cosponsored three roundtables around the country. Members of every aspect of the real estate community were invited to participate in the roundtables held in Chicago, Fort Worth, and Los Angeles.

On March 14, 2008, HUD published a new proposed rule on RESPA. The purpose of the proposed rule is to simplify and improve the disclosure requirements for mortgage settlement costs under RESPA and to protect consumers from unnecessarily high settlement costs. The revisions aimed to protect consumers by taking steps to: 1) improve the good faith estimate (GFE) form to make it easier to shop for settlement service providers; 2) ensure

that page one of the GFE provides a clear summary of the loan terms and total settlement charges; 3) provide accurate estimates of costs of settlement services; 4) improve disclosure of yield spread premiums; 5) facilitate comparison of the GFE and the HUD-1/HUD-1A settlement statements; 6) ensure that at settlement borrowers are aware of final loan terms and settlement costs by allowing them to read and receive a copy of the "closing script;" 7) clarify HUD-1 instructions; 8) clarify HUD's current regulations concerning discounts; and 9) expressly state under what circumstances RESPA permits certain pricing mechanisms that benefit consumers, such as average cost pricing and discounts, including volume-based discounts.

After holding a roundtable attended by several members of the industry (including representative realtors, settlement service providers, mortgage brokers, and mortgage bankers), Advocacy submitted comments on the proposal. Advocacy was concerned that HUD may have underestimated the proposal's costs, thereby creating a potential uneven playing field for some small entities. Advocacy suggested that HUD create a GFE that mirrors the HUD-1 to prevent consumer confusion and clarify the language on tolerances. Advocacy also suggested that HUD eliminate the closing script from the proposal and reconsider volume discounts and the yield spread premium disclosure. Advocacy further requested a delayed implementation period for small entities, if HUD decides to go forward with the proposal. HUD did not publish a final rule in FY 2008.

Department of the Interior

E.O. 13272 Compliance

The Department of the Interior (DOI) has a departmental manual publicly available online listing the requirements and guidance to promote RFA compliance, in accordance with section 3(a) of E.O. 13272.

As required by section 3(b) of E.O. 13272, the National Park Service (NPS) notifies Advocacy of rules that it has determined could have a significant economic impact on a substantial number of small entities. NPS did not submit any final rules in FY 2008 that were the subject of any of Advocacy's comments; therefore, NPS's compliance with section 3(c) of E.O. 13272 cannot be assessed.

The U.S. Fish and Wildlife Service (FWS) does not notify Advocacy of any draft rules that may have a significant economic impact on a substantial number of small entities, as required by section 3(b) of E.O. 13272. FWS fails to prepare an IRFA or a certification that its rules may have a significant economic impact on a substantial number of small entities when the rule is proposed. FWS also does not provide an economic analysis at the proposed rule stage. Advocacy believes that these delays in completing the necessary RFA analysis hinder the ability of affected small entities to provide meaningful comment on a proposal's impact. FWS submitted no final rules in FY 2008 that were the subject of Advocacy comments. Advocacy is working with the FWS to improve its E.O. 13272 and RFA compliance.

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 economic impact on a substantial number of small entities, as required by section 3(b) of E.O. 13272. DOJ did not publish any final rules in FY 2008 that were the subject of any Advocacy comment; therefore, DOJ's compliance with section 3(c) of E.O. 13272 cannot be assessed. DOJ received RFA training in FY 2008.

Issue: Americans with Disabilities Act Regulations on Public Accommodations. In June 2008, DOJ published a notice of proposed rulemaking outlining revisions to the Department's 1991 regulations implementing Title III of the Americans with Disabilities Act (ADA). Title III sets standards for

making buildings accessible for people with disabilities and requires existing facilities to remove barriers that conflict with these standards when such modifications are "readily achievable." The NPRM proposed to adopt the 2004 ADA accessibility guidelines (ADAAG) recommended by the Architectural and Transportation Barriers Compliance Board (the Access Board). DOJ has not yet finalized this rule, but Advocacy has been actively involved in this rulemaking.

When DOJ released the advance notice of proposed rulemaking for this rule, Advocacy submitted a public comment letter stating that applying the 2004 ADAAG retroactively would unfairly punish small businesses that were trying to comply with the 1991 regulations. In November 2007, the Office of Advocacy submitted a report to the U.S. Department of Justice titled *Evaluation of Barrier Removal Costs Associated with the 2004 Americans with Disabilities Act Accessibility Guidelines.* This report found that both small and large firms face substantial costs from the adoption of the barrier removal requirements in the 2004 ADAAG. These higher costs are associated with typical small firm buildings rather than large firm buildings, whether measured per square foot or per employee.

DOJ's NPRM proposed two safe harbors to address these concerns. Under the "general" safe harbor, existing facilities' compliance with the current 1991 ADA standards may be sufficient to meet the new requirements. The "small business" safe harbor would give credit to small businesses that spend 1 percent of revenue on ADA modifications. In April 2008, Advocacy held a small business roundtable on the rule attended by small business stakeholders and the Department of Justice, and wrote a comment letter based on this input. Advocacy recommended that the DOJ clarify safe harbor provisions and publish a small business compliance guide in conjunction with the final rule. Advocacy also recommended that DOJ include further cost estimates in its IRFA.

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. The Mine Safety and Health Administration (MSHA), Occupational Safety and Health Administration (OSHA), Employment and Training Administration (ETA), Employment Standards Administration (ESA), and Employee Benefits Security Administration (EBSA) were trained in RFA compliance in FY 2004. Agencies within DOL notify Advocacy in a timely manner, through Advocacy's email notification system (OSHA) or by mail (MSHA), of draft rules that may have a significant economic impact on a substantial number of small entities, as required by section 3(b) of E.O. 13272. DOL agencies did not finalize any rules in FY 2008 upon which Advocacy filed comments; therefore, compliance with section 3(c) of E.O. 13272 cannot be assessed. Advocacy submitted comments to OSHA on its proposed confined spaces in construction rule; however, that rule was not finalized in FY 2008. In addition, Advocacy participated in a small business advocacy review panel on OSHA's draft standard for occupational exposure to beryllium; however, that rule was not proposed in FY 2008.

Department of State

E.O. 13272 Compliance

The Department of State (State) has made some progress in complying with E.O. 13272. While State has not posted its RFA policy on its website as required by section 3(a) of E.O. 13272, it was trained in RFA compliance in FY 2006. State did not notify Advocacy of any draft rules in FY 2008 as required by section 3(b) of E.O. 13272; however, it published one final rule in FY 2008 that concerned comments filed by Advocacy. After addressing Advocacy's comments in the final rule, in compliance

with section 3(c) of E.O. 13272, the department reimposed the small business impacts in a subsequent rule and policy change.

Issue: Final Exchange Visitor Program; Trainees and Interns Rule. The Department of State issued a final rule on June 19, 2007, for designating U.S. government, academic, and private sector entities to conduct educational and cultural exchange programs pursuant to the Mutual Educational and Cultural Exchange Act of 1961, as amended (the Fulbright-Hays Act). The final rule imposed a variety of new requirements on designated program sponsors operating under the J-1 visa program before they could accept a participant into their exchange program. During the proposed rule period, several small aviation flight schools contacted Advocacy and said that several of the provisions related to aviation flight training schools would be economically detrimental to them.

Advocacy filed comments on the proposed rule and, based on Advocacy's comments, the State Department exempted aviation flight schools from the final rule. However, on December 20, 2007, the State Department issued a new rule that said it may, in its sole discretion, revoke the J-1 designation of a class of designated programs if State determines that they no longer further the security or diplomatic interests of the United States. Following that action, the State Department issued a statement of policy on July 11, 2008, announcing that aviation flight schools will no longer be eligible to participate in the J-1 visa program, thereby eliminating the exemption it had earlier provided. State did not prepare a regulatory flexibility analysis for its final rule or provide a factual basis for its certification that the rule would not have a significant economic impact on a substantial number of small entities.

Advocacy hosted a roundtable for affected aviation flight schools participating in the J-1 visa program to discuss this issue and attended follow-up meetings at the State Department and the Office of Management and Budget. The Department of Homeland Security has stated publicly that it is committed to taking over the J-1 visa program for aviation flight schools in some manner prior to the State Department's termination date. No further action with respect to this rule took place in FY 2008.

Department of Transportation

E.O. 13272 Compliance

The Department of Transportation (DOT) has made its policies and procedures publicly available as required by section 3(a) of E.O. 13272. The Federal Aviation Administration (FAA) was trained in RFA compliance in FY 2003 and FY 2008. The Federal Motor Carrier Administration (FMCSA) and the Federal Railroad Administration (FRA) were trained in RFA compliance in FY 2004 and FY 2008. The National Highway Traffic Safety Administration (NHTSA) and the Federal Highway Administration (FHWA) were trained in RFA compliance in FY 2005. Agencies within the Department of Transportation notify Advocacy in a timely manner, through Advocacy's email notification system, of draft rules that may have a significant economic impact on a substantial number of small entities, as required by Section 3(b) of E.O. 13272.

DOT agencies finalized one rule (FAA's Digital Flight Recorder rule) in FY 2008. However, while FAA did respond to certain concerns raised by Advocacy in a general manner, it did not respond directly to Advocacy's comments as required by section 3(c) or indicate a particular response to Advocacy's comments in any way.

Issue: Final Revisions to Cockpit Voice Recorder and Digital Flight Recorder Regulations. DOT's Federal Aviation Administration (FAA) issued its final Revisions to Cockpit Voice Recorder and Digital Flight Recorder Regulations rule on March 7, 2008. The final rule amends cockpit voice recorder (CVR) and digital flight data recorder (DFDR) regulations for certain air carriers, operators, and aircraft manufacturers. Specifically, the final rule increases the duration of certain CVR recordings, increases

the data recording rate for certain DFDR parameters, requires physical separation of the DFDR and CVR, increases the requirements for the reliability of the power supplies to both the CVR and DFDR, and requires that certain datalink communications received on an aircraft be recorded if datalink communication equipment is installed. The rule as originally proposed would have applied to numerous small businesses required to retrofit their aircraft.

FAA's proposed rule was discussed during one of Advocacy's aviation safety roundtables, which included presentations by small business representatives who would have been affected by the rule. Advocacy filed formal comments with FAA expressing concern that the agency's regulatory impact analysis did not capture many small businesses likely to be affected by the proposed rule, failed to use the correct SBA size standard, and did not consider less burdensome alternatives for small businesses.

While the FAA generally responded to several of the issues raised by Advocacy, it did not provide a specific response to Advocacy's comments as required by section 3(c) of E.O. 13272. FAA did, however, modify the rule by exempting general aviation operators from the requirement to retrofit their airplanes, which saved the operators several hundred million dollars.

Department of the Treasury

E.O. 13272 Compliance

The Department of the Treasury (Treasury) has made its policies and procedures available to the public in compliance with section 3(a) of E.O. 13272. Three agencies within Treasury create regulations of most concern to small businesses: the Internal Revenue Service (IRS), the Office of the Comptroller of Currency (OCC), and the Office of Thrift Supervision (OTS). Treasury and the Internal Revenue Service have not notified Advocacy of any draft proposed rules under section 3(b) of E.O. 13272. Both OCC and OTS notify Advocacy in accordance with the requirements of section 3(b) of E.O. 13272.

In FY 2008, Advocacy held two RFA training sessions for IRS staff. Treasury and the IRS did not publish any final rules in FY 2008 that were the subject of Advocacy comments; therefore the compliance of Treasury and the IRS with section 3(c) of E.O. 13272 cannot be assessed. Advocacy did not file any comments with OCC or OTS in FY 2008.

Issue: Three Percent Withholding Requirement for Government on Payments for Services and Property. On March 11, 2008, Treasury and the IRS published Notice 2008-38, which invited public comments regarding guidance to be provided to government entities required to withhold 3 percent on payments made by the government entities or their paying agents for services and property.

On April 24, 2008, Advocacy submitted a public comment to Treasury and the IRS in which Advocacy suggested that Treasury and the IRS consider the following recommendations to reduce the overall burden of the 3 percent withholding requirement on small businesses: (1) small businesses could be permitted to offset payroll tax submissions by the 3 percent amount withheld and could be reimbursed quarterly for any amounts withheld in excess of their payroll tax liabilities; (2) subcontractors could be excluded from the definition of "contract amount;" and (3) federal construction contracts already subject to the Miller Act could be exempt from the requirements of the 3 percent withholding requirement. To the extent that Treasury and the IRS use the language of Notice 2008-38 as the basis for a future notice of proposed rulemaking, Advocacy reminded the agencies of their obligation to comply with the RFA. The guidance was still under consideration as of the end of FY 2008.

Issue: Guidance Regarding Marketing of Refund Anticipation Loans (RALs) and Certain Other Products in Connection With the Preparation of a Tax Return. On January 7, 2008, Treasury and the IRS published an advance notice of proposed rulemaking that detailed rules that Treasury and the

IRS are considering for a proposed regulation that would separate the act of return preparation from the act of marketing or purchasing certain financial products. The proposal would prohibit the use of information obtained by a tax return preparer during the tax-preparation process, for the purpose of marketing a RAL or similar product or service.

The ANPRM, if finalized, would affect small businesses that market RALs and other similar products. On March 21, 2008, Advocacy submitted a public comment to Treasury and the IRS in which Advocacy noted that it stands ready to assist the agencies to comply with the RFA in the development of the proposed rules related to RALs. The ANPRM was still under consideration as of the end of FY 2008.

Issue: Escrow Accounts, Trusts, and Other Funds Used During Deferred Exchanges of Like-Kind Property. On February 7, 2006, Treasury and the IRS published a proposed rule that would affect qualified intermediaries that facilitate exchanges of like-kind property. On May 8, 2006, Advocacy submitted a public comment to Treasury and the IRS in which Advocacy advised that the full extent of the economic impact on small businesses could not be precisely determined from the IRFA included in the proposed rule. Advocacy also recommended that Treasury and the IRS consider a de minimus exemption for smaller "facilitator" loans.

Advocacy's ongoing support encouraged Treasury and the IRS to publish a revised IRFA with a period for comment in the *Federal Register* on March 20, 2007. On May 10, 2007, Advocacy submitted a public comment to Treasury and the IRS commending them for the revised IRFA. The additional analysis in the revised IRFA afforded affected taxpayers a clearer understanding of the impact of the proposed regulations.

On August 25, 2008, Treasury and the IRS published a final rule in the *Federal Register* that adopted Advocacy's recommendations. The final rule provides an exemption for facilitator loans of less than $2 million. Advocacy commends Treasury and the IRS for their willingness to work collaboratively with the affected small businesses to reduce the burden of this rule.

Issue: Unlawful Internet Gambling. On October 4, 2007, the Board of Governors of the Federal Reserve System (FRB) and the Department of the Treasury published a proposed rule titled Prohibition on Funding of Unlawful Internet Gambling to implement applicable provisions of the Unlawful Internet Gambling Enforcement Act of 2006. The proposed rule required participants in designated payment systems to establish policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit transactions in connection with unlawful Internet gambling. The proposed rule did not specify which gambling activities or transactions were legal or illegal because the act itself defers to underlying state and federal gambling laws in that regard; determinations under those laws may depend on the facts of specific activities or transactions.

Advocacy commented that the agencies may not have fully considered the economic impact on small businesses as required by the RFA. Although the IRFA submitted by the agencies identified types of small businesses affected by the proposal, it failed to provide information about the nature of the impact; to analyze viable alternatives; or to identify duplicative, overlapping, or conflicting federal rules as required by the RFA. Instead of identifying duplicative rules, the agencies sought public comment on whether there are statutes or regulations that would duplicate, overlap, or conflict with the proposed law. Advocacy commented that the RFA places the duty to identify existing regulations on agencies, not small entities. Advocacy encouraged the agencies to prepare and publish for public comment a revised IRFA to determine the full economic impact on small entities and consider significant alternatives to meet its objective while minimizing the impact on small entities. The agencies did not publish a final rule in FY 2008.

Issue: Truth in Lending. On January 9, 2008, the Board of Governors of the Federal Reserve System

published a proposed rule in the *Federal Register* titled Regulation Z: Truth in Lending. The proposed rule implements the Truth in Lending Act and the Home Ownership and Equity Protection Act. The goals of the proposal were to protect consumers in the mortgage market from unfair, abusive, or deceptive lending and servicing practices while preserving responsible lending and sustainable homeownership; to ensure that advertisements for mortgage loans provide accurate and balanced information and do not contain misleading or deceptive representations; and to provide consumers transaction-specific disclosures early enough to use while shopping for a mortgage. After meeting with members of the mortgage brokerage industry, Advocacy commented that the agency may not have fully considered the economic impact on small businesses as required by the RFA. Advocacy was also concerned about potential conflicts with HUD's proposed rule on RESPA reform.

The FRB published the final rule in July 2008. The board made changes to the rule that minimized the impact on small entities; for example, providing a different standard for defining higher-priced mortgage loans to more accurately correspond to mortgage market conditions and excluding from the definition some prime loans that might have been classified as higher-priced under the proposed rule. These changes decreased the economic impact of the final rule on small entities by limiting their compliance costs for prime loans the FRB did not intend to cover under the higher-priced mortgage loan rules. The board also provided a longer implementation period for complying with the rule and later effective dates for the escrow requirement than for the other parts of the final rule to give small entities time to come into compliance with the final rule's requirements. Finally, the board withdrew proposals 1) to prohibit creditors from paying a mortgage broker more than the consumer had agreed in advance the broker would receive, and 2) to require a servicer to provide to a consumer upon request a schedule of all specific fees and charges that may be imposed in connection with the servicing of the consumer's account.

Department of Veterans Affairs

E.O. 13272 Compliance

The Department of Veterans Affairs (VA) has made its RFA policies publicly available on its website, as required by section 3(a) of E.O. 13272, while maintaining that most of its regulations do not affect small entities. The VA notifies Advocacy of any proposed rules that may have a significant economic impact on a substantial number of small entities in accordance with section 3(b) of E.O. 13272. The VA did not publish any final rules in FY 2008 that were the subject of Advocacy's comments; therefore, the department's compliance with section 3(c) of E.O. 13272 cannot be assessed.

Consumer Product Safety Commission

E.O. 13272 Compliance

The Consumer Product Safety Commission (CPSC) has made its RFA policies and procedures publicly available on its website as required by section 3(a) of E.O. 13272. The CPSC does not regularly give Advocacy draft proposed rules before publication as required by section 3(b) of E.O. 13272. The CPSC did not publish any final rules in FY 2008 that were the subject of Advocacy's comments; therefore, compliance with section 3(c) of E.O. 13272 cannot be assessed.

Environmental Protection Agency

E.O. 13272 Compliance

The Environmental Protection Agency (EPA) has made its RFA policies and procedures publicly available through its website in accordance with section 3(a) of E.O. 13272. EPA has also consis-

tently notified Advocacy of draft proposed rules that are expected to have a significant economic impact on a substantial number of small entities before publishing them in the *Federal Register*, as required by section 3 (b) of E.O. 13272. EPA also consistently provides prepublication draft rules for Advocacy review. EPA continues to respond to Advocacy's comments in accordance with section 3(c) of E.O. 13272.

Issue: Control of Emissions from Nonroad Spark Ignition Engines and Equipment. On September 4, 2008, EPA finalized a rule to control air pollution from gasoline-powered engines and equipment below 50 horsepower. (See 73 *Fed. Reg.* 59034, October 8, 2008). As part of the final rule, EPA responded to concerns raised by Advocacy and small business stakeholders about a provision that EPA had originally proposed, requiring small engine makers to certify the compliance of incomplete and replacement engines used in nonroad equipment. These new certification, tracking, and monitoring requirements would have added substantially to the cost and difficulty of obtaining replacement and partially built engines. In the final rule, EPA provided per-engine family exemption allocations that will lower significantly the burden on small manufacturers and small repair facilities. .

Issue: Amendments to Clean Air Act Compliance Assurance Monitoring Rule. In January 2004, EPA published a final rule that, among other things, notified the public that the agency intended to expand the scope and stringency of the Compliance Assurance Monitoring (CAM) Rule. 69 *Fed. Reg.* 3,202 (Jan. 22, 2004). EPA subsequently developed a revised monitoring regime that would require additional emissions points at facilities with federal Clean Air Act operating permits to monitor and report their emissions. After receiving comments from Advocacy and other interested parties about EPA's analysis of the costs of the proposal versus its likely benefits, EPA suspended work on the proposal indefinitely in March 2008. EPA had estimated that the amended rule would have imposed new costs of $114 million per year on regulated sources.

Issue: Area Source Standard for Metal Fabrication and Finishing. On June 13, 2008, EPA signed a final Clean Air Act rule for smaller facilities that fabricate and/or finish metal products. The rule set emission standards in the form of management practices and equipment standards for small metalworking operations that use dry blasting, machining, dry grinding, and dry polishing, as well as spray painting and welding. EPA estimates that 5,800 facilities will be affected by the new rule, and that 5,300 of those facilities are small businesses. The rule imposes new monitoring and recordkeeping obligations on these sources, which EPA estimates will cost about $339 per facility per year. This obligation represents a significant reduction from the original monitoring and reporting requirements the rule would have imposed. Responding to comments from Advocacy and others, EPA proposed less burdensome reporting requirements that Advocacy estimates will save metalworking operations of all sizes $1.015 million per year on a recurring basis..

Issue: Automotive Spray Painting and Stripping Facilities Rule. On January 9, 2008, EPA published a final Clean Air Act rule for small facilities that engage in paint stripping, surface coating of motor vehicles (e.g., auto body shops), and other surface coating operations. The final rule establishes new emission standards for these facilities. Advocacy submitted a public comment letter on October 25, 2007, raising concerns about the expansive scope of EPA's proposed rule. EPA followed Advocacy's recommendation to clarify the applicability requirements of the final rule for facilities that use paint spray guns. The clarification included limiting the scope of the rule to automotive paint shops that spray coatings containing the hazardous air pollutants (HAPs) being regulated. Limiting the scope of the rule resulted in a reduction in the number of affected small entities from 95,000 facilities to 9,000 facilities. The cost for the

specified spray booth equipment would have been at least $2,000 per facility.

Issue: Air Pollution Control Standards for Iron and Steel Foundries Rule. On January 2, 2008, EPA published a final rule establishing new air pollution control standards for small-scale iron and steel foundries under the Clean Air Act. The rule requires foundries above a specific melting capacity to install pollution control equipment. On the basis of information received from small business stakeholders and the Office of Advocacy, EPA raised the applicability threshold for these new controls to a higher melting capacity. As a result, smaller foundries can continue to operate without having to install new controls. Advocacy had already claimed savings based on the proposal published in September 2007. Based on the language of the final rule, EPA exempted foundries with an even higher melting capacity, yielding an additional $4.94 million in one-time savings and an additional $1.003 million in recurring operating and maintenance costs saved.

Issue: Multi-Sector General Permit. On September 29, 2008, EPA promulgated the Multi-sector General Permit (MSGP), which affects thousands of industrial facilities that discharge stormwater and are regulated by the EPA. All facilities must prepare and implement a stormwater pollution prevention plan (SWPPP). These plans are designed to minimize the discharge of pollutants in stormwater, and include good housekeeping and containment measures. There are requirements for annual inspection and quarterly visual monitoring of each stormwater outfall during the entire five-year term. In addition, there are analytical (chemical) monitoring requirements, generally on a quarterly basis for one or two years.

Advocacy submitted comments in November 2006 to address the impact on the 3,656 federally regulated facilities. More important, the MSGP may serve as a model for the nearly 50 state programs that issue their own permits for approximately 100,000 industrial facilities. Advocacy expressed concern about the high cost and questionable utility of the stormwater analytical monitoring requirements. The permit affects facilities in 29 industrial sectors, including mining, logging, manufacturing, transportation, and landfills, which Advocacy estimates are 60 percent small businesses. In particular, Advocacy criticized the inclusion of the sampling of total suspended solids (TSS) for 12 new industrial sectors dominated by small businesses. Advocacy's comments established that there was little correlation between higher TSS measurements and chemical contamination of stormwater, and therefore these costly new requirements yielded little benefit. As a result of Advocacy's comments and others, EPA deleted the requirements for the 12 new sectors, resulting in millions of dollars in savings annually.[12]

Issue: Spill Prevention, Control, and Countermeasure (SPCC). On December 26, 2006, EPA published a final rule governing the Spill Prevention Control and Countermeasure rule for facilities that manage or use oil (SPCC I). The SPCC rule requires affected facilities to take steps to prevent or minimize releases of oil to navigable waters. In December 2006, EPA adopted streamlined requirements for small facilities that handle less than a certain threshold quantity of oil, and for those facilities with oil-filled equipment. In response to the outcry from regulated facilities regarding the 2002 SPCC rule, EPA, in collaboration with the Office of Advocacy, initiated rulemaking to revise the SPCC requirements. Advocacy issued a first set of recommendations in June 2004 to address smaller oil facilities. The 2006 rule is largely an outgrowth of Advocacy's 2004 plan.

In October 2007, EPA proposed additional flexibility for small facilities. With respect to the oil-filled equipment requirements, facilities are permitted to use an oil spill contingency plan, in lieu of the more expensive requirement for secondary containment around the equipment. EPA also added some simplified requirements for the smaller facilities going beyond SPCC I, including a visual inspection option for small-volume tanks. The agency also tailored the requirements for hundreds of thousands of oil production facilities, which are mostly

12 A precise amount of savings could not be calculated; therefore, this rule does not appear in the cost savings tables (Tables 2.2 and 2.3).

owned by small businesses. Overall, these revisions will reduce the regulatory and paperwork burdens on small facilities, while increasing overall compliance with the SPCC program and focusing facilities on measures that will prevent oil spills from reaching waterways. EPA estimates the savings for these revisions at $188 million per year, most of which should accrue to small businesses. EPA was scheduled to promulgate these revisions shortly after the end of FY 2008 (SPCC II).

Federal Acquisition Regulation Council

E.O. 13272 Compliance

The policies and procedures required by section 3(a) that were provided by DOD apply also to the Federal Acquisition Regulation Council (FAR Council). The FAR Council has complied with section 3(b) by making its deliberations and predecisional deliberative rulemaking processes open to the Office of Advocacy. Advocacy commented on several of the preproposed FAR rules that may have a significant economic impact on a substantial number of small entities in FY 2008. (See Department of Defense for more detail.) Advocacy coordinated closely with OIRA and the FAR Council to improve the regulatory analysis process and hosted several RFA training sessions to increase the FAR Council's understanding of RFA requirements. The FAR Council published two final rules in FY 2008 that were the subject of Advocacy comments and was in compliance with section 3(c) of E.O. 13272.

Federal Communications Commission

E.O. 13272 Compliance

Historically, the Federal Communications Commission's (FCC) compliance with E.O. 13272 remains problematic. In past years the FCC has attempted to use its status as an independent agency to bypass compliance with E.O. 13272. In FY 2005, the FCC sent Advocacy a letter suggesting that as an independent agency it is not required to comply with E.O. 13272, but that it is committed to upholding the spirit of the law by examining its rules for small entity impacts. Most recently, the FCC defended criticism of its RFA compliance in its brief before the United States Court of Appeals for the District of Columbia Circuit in *National Telecommunications Cooperative Association v. Federal Communications Commission and the United States of America* (No. 08-1071).

At issue in the case, the FCC's local number portability order required small wireline carriers to transport or "port" telephone numbers to mobile service providers located outside the areas served by small wireline carriers. This matter was previously before the D.C. Circuit in 2005, when the court remanded the case and instructed the FCC to conduct a FRFA as required by the RFA, 5 U.S.C. Section 604. While the commission did publish a FRFA, the petitioners appealed, urging the court to find that the FCC's final decision was inconsistent with the intent of Congress as expressed in the RFA. Petitioners argued that the FRFA did not consider significant issues and alternatives as expressed through public comments. Oral arguments were scheduled to take place at the end of January 2009.

The FCC has not made its policies and procedures to promote RFA compliance publicly available as required by section 3(a) of E.O. 13272. In part, the Commission complies with section 3(b) by notifying Advocacy of proposed rules that may have a significant economic impact on a substantial number of small entities. The FCC sends its notices by mail following the adoption and release of the rule and prior to the rule's publication in the *Federal Register* as required by section 3(b).

In FY 2008, the Commission increased its focus on small business issues, but still published deficient IRFAs. The FCC's IRFAs are inadequate because they consistently lack a proper economic analysis of how the rule will affect small entities. The FCC often does not provide meaningful alternatives as required by the RFA, but has improved its use of alternatives offered by small businesses in their comments.

Advocacy continues to offer the FCC assistance in complying with the RFA; FCC staff received RFA training in 2005. The Office of Advocacy often reaches out to engage the FCC early in the rulemaking process and to provide their bureaus with additional RFA training.

Issue: Carriage of Digital Television Broadcast Signals. The FCC released its Fourth Report and Order regarding the dual carriage of digital television broadcast signals. The final rule requires cable operating systems to provide customers with both broadcast and digital signals. However, the technical requirements of this rule would have imposed an economic burden on some of the smallest cable systems. Advocacy communicated the concerns of these small entities to the FCC, and encouraged the commission to shape the rule in a way that would fulfill the policy goals while reducing the disproportionate regulatory burden on small systems. Advocacy recommended that the FCC carve out an exemption for some small entities. In its order, the FCC included an exemption for small carriers that exhibited certain characteristics. For these small entities, compliance with the rule would have cost approximately $50,000 per system. The exemption has reduced these costs, saving small systems approximately $160 million annually.

Issue: Forbearance. Issues related to the FCC's forbearance procedures were prevalent in FY 2008. Section 10 of the Communications Act of 1934, as amended, sets forth the analysis that the FCC must conduct when determining whether it should grant specific companies relief from certain regulations. Typically, a finding of adequate competition will assist in supporting a grant of forbearance. However, in recent years, small carriers have grown concerned that the FCC's section 10 forbearance analyses did not incorporate the best available data, and that the process itself lacked an adequate level of transparency. To best address these concerns, Advocacy requested that the FCC open a rulemaking to examine ways in which the agency could strengthen the forbearance process. In addition, Advocacy filed letters urging the commission to consider newly released data in considering specific forbearance petitions from Verizon and Qwest in various metropolitan statistical areas (MSAs). The FCC considered these data and denied petitions for forbearance from both Verizon and Qwest in various MSAs. This decision saved small competitive local exchange carriers (CLECs) approximately $393.9 million in total one-time cost savings for the Verizon forbearance petition and $1.14 billion annually for the Qwest petition.

Securities and Exchange Commission

E.O. 13272 Compliance

The Securities and Exchange Commission (SEC) has not made public its written policies and procedures for the consideration of small entities in its rulemaking as required by section 3(a) of E.O. 13272. The SEC consistently notifies Advocacy through Advocacy's email notification system of draft rules that may have a significant economic impact on a substantial number of small entities, as required by section 3(b) of E.O. 13272. The SEC published four final rules in FY 2007 that were subject to Advocacy comment, and complied with section 3(c) of E.O. 13272, as all of these final rules addressed Advocacy comments.

Issue: The Sarbanes-Oxley Act Section 404 Requirements. In 2003, the SEC adopted rules implementing section 404 of the Sarbanes-Oxley Act, which required public companies to submit a management report and an external auditor report on their internal controls, or company safeguards against fraudulent and mistaken transactions and annual financial reports. Based on concerns raised by Advocacy and other small business stakeholders, the SEC reexamined the costs inherent in complying with section 404 and delayed the implementation date for small businesses with a public float of less than $75 million. However, accelerated filers, or larger companies with a public float of more than

$75 million, had to comply with section 404 and reported problems because of the lack of management guidance. These larger companies also faced difficulties with the rule's onerous one-size-fits-all auditing standard that resulted in excess costs and redundancies.

In 2006, the SEC's Advisory Committee on Smaller Public Companies recommended that the SEC defer the implementation of the new section 404 internal control reporting requirements until an adequate framework is in place to account for the differences in size between smaller and larger companies. On December 15, 2006, the SEC published a final rule granting smaller public companies a five-month extension for the management assessment report and a 17-month extension for the auditor's report.

On February 1, 2008, the SEC proposed an additional one-year extension of section 404(b) of the Sarbanes-Oxley Act of 2002 for smaller public companies, and on February 25, 2008, Advocacy submitted a comment letter in support of the SEC's proposed extension. On June 20, 2008, the SEC announced its approval of a one-year extension of section 404(b) of the Sarbanes-Oxley Act of 2002 for smaller public companies. The extension of the auditor attestation requirement will allow the SEC to complete a cost-benefit study of section 404 for small companies. On October 3, 2008, Advocacy submitted a public comment commending the SEC commissioners for their ongoing dedication to easing the difficult process of implementing section 404 for smaller companies.

Issue: Unification of Accounting Standards. On June 30, 2008, Advocacy submitted a public comment letter to the SEC concerning the commission's publicly announced plan to align America's current Generally Accepted Accounting Principles (GAAP) with the International Financial Reporting Standards (IFRS). Small businesses had contacted Advocacy and expressed concern that they would no longer be permitted to utilize the last-in, first-out (LIFO) inventory accounting method, and that eliminating their ability to use LIFO would result in a tax increase that could ultimately force many small businesses to close.

In its comment letter, Advocacy noted that prohibiting businesses from using LIFO would raise business taxes in two ways. First, a business would see higher future taxes because it would be unable to use LIFO to protect itself from rising inventory costs. Second, a business would be required to pay taxes on its existing "LIFO reserves." On August 27, 2008, the SEC issued a press release announcing that it will be seeking public comment on a release (published in the *Federal Register*) that will include both (1) a proposed roadmap for the potential mandatory adoption of IFRS by issuers in the United States and (2) a proposed rule that would allow the optional use of IFRS by certain qualifying domestic issuers. The SEC had not issued its proposed roadmap in the *Federal Register* as of the end of FY 2008.

Issue: Smaller Public Company Regulatory Reforms. In FY 2008, the SEC published two final rules subject to Advocacy comment that allowed more small public companies to take advantage of beneficial regulatory programs:

Forms S-3 and F-3. In December 2007, the SEC published a final rule that will increase the eligibility requirements for Forms S-3 and F-3 for public companies with a public float below $75 million. These "short forms," which were previously limited to use by companies with more than $75 million in public float, allow companies to incorporate past and future filings by reference and to utilize shelf registrations. Shelf registrations allow companies to register securities prior to any specific offering, and to release delayed or continuous offerings without waiting for additional SEC action. According to the SEC, almost 5,000 small public companies that filed annual reports in 2006 had a public float below $75 million. Advocacy submitted a public comment letter supporting this proposal while noting that several small business representatives were concerned that the proposal limits small entities with a public float below $75 million from selling more than 20 percent of their public float

in offerings over a period of 12 calendar months. These entities were concerned that this restriction would limit the ability of smaller entities to raise capital in the public markets. Advocacy recommended that the SEC consider raising this limit for smaller public companies using the short forms. In its final rule, the SEC followed this recommendation and limited small entities with a public float below $75 million from selling more than 33 percent of their public float in offerings over a period of 12 calendar months.

Regulation S-B. On December 19, 2007, the SEC published a final rule that expands the eligibility of the SEC's scaled disclosure and reporting requirements under Regulation S-B to smaller public companies with a public float of less than $75 million. Previously, only small business issuers with a public float and revenues of less than $25 million were eligible to use forms under Regulation S-B. According to the SEC, more than 3,000 companies had a public float under $25 million, compared with almost 5,000 small public companies with a public float below $75 million in 2006. Advocacy submitted a public comment letter supporting the SEC's proposal to update the definition of "smaller public company" to companies with less than $75 million in public float for future regulations. Following Advocacy's recommendations, the SEC also updated the small business size standard with the Small Business Administration to correspond with this regulatory change.

Based on conversations with small business representatives, Advocacy also recommended that the SEC reconsider the proposal's elimination of the Regulation S-B forms. This proposal will require these smaller public companies to utilize a modified version of the regular registration forms. Advocacy recommended that the SEC provide a two-year phase-in period to allow users the choice of the Regulation S-B forms or the modified regular registration forms. In its final rule, the SEC adopted a one-year phase-in period to utilize the modified regular registration forms.

Issue: Shareholder Proxy Access Rules. In December 2007, the SEC published a final rule, Shareholder Proposals Relating to the Election of Directors (the short proposal), which affirmed the agency's status quo position that shareholder proposals on items such as proxy access may be excluded from a company's proxy materials. Proxy materials are documents used to inform shareholders and solicit votes for corporate decisions, such as the election of directors and other corporate actions. Advocacy submitted a comment letter supporting the short proposal, which was one of two alternatives released by the SEC on shareholder proxy access. The SEC did not finalize the rule, Shareholder Proposals (the long proposal), which would have enabled certain shareholders to amend future election procedures, such as allowing proxy access. Currently, if a shareholder seeks to nominate nominees for the company's board of directors, the party must pay the costs of soliciting their own proxy statements. Advocacy commented that it did not support the long proposal because allowing shareholders access to the proxy document would shift these costs to companies, which would have to pay for and publish the shareholder's nomination materials. Based on SEC data, the adoption of the short proposal will result in cost savings of $414,252,000.

Small Business Administration

E.O. 13272 Compliance

The U.S. Small Business Administration (SBA) has made significant efforts to stay in compliance with E.O. 13272. SBA has published its RFA procedures in compliance with section 3(a) of E.O. 13272. SBA notifies Advocacy of draft rules in compliance with section 3(b) of E.O. 13272, and consistently provides Advocacy with rules for review. As a result of RFA training and continued RFA discussions on draft rules, SBA personnel have utilized Advocacy input earlier rather than later in the regulatory development process. SBA published one final rule in

FY 2008 that was the subject of an Advocacy comment letter; SBA gave Advocacy's comments appropriate consideration, in compliance with section 3(c) of E.O. 13272..

Issue: Women-Owned Small Business Federal Contracting Assistance Procedures. On June 15, 2006, SBA published proposed regulations to implement section 811 of the Small Business Reauthorization Act of 2000. In July 2006, Advocacy submitted comments on the proposed rule. In the July 2006 letter, Advocacy recommended several changes, including removal of the formal certification process and revising and incorporating new underrepresentation data on women-owned small businesses (WOSBs) in the IRFA.

On December 27, 2007, SBA determined that the June 15 proposed rule needed significant changes warranting public comment. The December 27, 2007, proposed rule incorporated Advocacy's July 2006 recommendation that the program should not have a formal certification process but that eligible firms should be allowed to self-certify. The December 27 proposed regulation, however, included a new requirement for each agency to determine whether it had discriminated against women-owned small businesses before it could create a program to set aside contracts for WOSBs. This major addition to the proposed rule might have required WOSBs to petition agencies to make a discrimination finding. The addition did not discuss the cost to WOSBs if they had to formally petition an agency to make such a finding.

On February 20, 2008, the Office of Advocacy filed a comment letter recommending that the final rule provide cost data on the effort required by WOSBs expected to play a role in compelling agencies to determine evidence of discrimination. SBA issued the final regulation on September 30, 2008, and assured Advocacy that women-owned small businesses will not be required or expected to participate in individual agency discrimination fact-finding processes. SBA concluded that this process will not generate compliance costs for WOSBs.

Conclusion

In FY 2008, Advocacy observed continued improvement by federal agencies with respect to their RFA and E.O 13272 compliance. Advocacy continues to face the challenge of working with stakeholders and federal agencies to ensure that federal regulations do not place small businesses at a competitive disadvantage because of disproportionate regulatory burdens. The significant small business cost savings realized through increased interagency dialogue and outreach to small business stakeholders is evidence of Advocacy's success in fostering agency RFA compliance.

In the future, Advocacy will continue to work cooperatively with federal agencies so that they can both meet their regulatory goals and fulfill their obligations under the RFA. To accomplish this, Advocacy will focus its efforts on training new agency staff to establish continuity with respect to agency compliance with the RFA and E.O. 13272. Advocacy will continue providing input to federal agencies about the impacts of proposed regulations on small entities early in the rulemaking process.

4 Small Business Regulatory Flexibility Model Legislation Initiative

In December 2002, Advocacy presented model regulatory flexibility legislation for the states based on the federal Regulatory Flexibility Act.[13] The intent of the model legislation is to foster a climate for entrepreneurial success in the states.

The American Legislative Exchange Council (ALEC) adopted the legislation as a model bill, and numerous state legislators, stakeholders, and small business advocacy organizations have pursued its passage in various states, including the National Federation of Independent Business (NFIB), state chambers of commerce, the U.S. Chamber of Commerce, the Small Business & Entrepreneurship Council (SBEC), and the National Association for the Self-employed (NASE).

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

Since 2002, 44 states have enacted the model bill, at least in part, through legislation or an executive order. Of the 44, 17 states—plus one territory—have active regulatory flexibility statutes in place. In 2008, 10 states introduced regulatory flexibility legislation: Arizona (HB 2235), Florida (HB 7109), Hawaii (HB 2781, HB 2686, HB 2736), Illinois (HB 302), Iowa (SF 2227), Kansas (HB 2827), Louisiana (HB 368), Massachusetts (SB 2413), New Jersey (A832), and Utah (HB 53). Florida, Hawaii, Kansas, Louisiana, and Utah signed bills into law.[14] The following is a real-world example that demonstrates the value to small businesses of regulatory flexibility at the state level.

Wisconsin's Family Child Care Centers Benefit from Regulatory Flexibility

The Wisconsin Department of Health and Family Services (DHFS) is required to establish minimum requirements and standards for the operation of day care centers in the state. In November 2007, the department proposed a series of rules to update the current standards. One chapter affected was HFS 45, dealing with family child care centers.

The initial proposed modification to the standards required family child care centers that use on-premises play space to have a permanent boundary to protect children under care from nearby hazards. The initial analysis suggested fences be used as the boundary and estimated that 80 percent of currently licensed family child care providers already had the appropriate enclosure, and another 1 to 2 percent of facilities had permission to use off-premises play space that did not require enclosure. That, however, still left 500 to 600 facilities affected.

The department estimated that the cost to purchase and install the fences would start at $300 and noted that using other materials could increase the

13 The text of Advocacy's model legislation, updated versions of the state regulatory flexibility legislative activity map, and the regional advocates' contact information can be found on the Office of Advocacy website at **www.sba.gov/advo/laws/law_modeleg.html**.

14 Illinois HB 302 and Massachusetts SB 2413 were both introduced in the 2007 legislative session and continued to be active in 2008.

costs. No other specific estimates were listed. The analysis also touched on the possibility of centers qualifying for an exception to the rule (decided on a case-by-case basis) based on other protections that could be put in place to adequately protect children; however, few details were given.

Under Wisconsin law, agencies are required to review the economic impact of their proposed rules on small businesses and consider alternatives that would be less burdensome. In addition, the Wisconsin Small Business Regulatory Review Board (SBRRB) was created in 2004 to serve as a voice for small businesses. Rules are brought to the SBRRB for review in several ways. Agencies may ask the board directly for comments about an economic analysis, or representatives of affected industries may request that the board review a rule when they feel that the analysis is lacking or inadequate. In this case, representatives of the day care center industry requested the board's involvement on rule HFS 45 because they felt that the economic analysis was deficient.

After review, the SBRRB submitted comments about HFS 45 to the department. One section of the analysis believed by the board to be inadequate was an estimate of the economic impact with respect to the permanent barrier requirement. The board recommended that DHFS reevaluate the data sources used in the analysis. The board acknowledged that the analysis may have met minimum requirements but that by neglecting to include a broad range of fencing options and costs, it misrepresented the likely economic impact of the proposed rule on small businesses. The SBRRB requested that the department include any nonfencing options that would still be acceptable and include more information about the differences in fencing options and costs.

In its final analysis, the department took the board's suggestions into consideration and included several fencing options (with costs listed), making it clear that a fence was not required if other alternatives were used (such as plants and landscaping). As a result, small businesses were provided a more thorough analysis of possible costs, and were offered alternatives to permanent fencing that might be more affordable.

This example demonstrates the importance of analyzing the economic impact of a rule on smaller entities and of considering less burdensome alternatives. In this example, when the burden on small firms was reduced, they were better able to survive in a competitive marketplace and benefit the state's economy, while at the same time meeting the agency's objective of creating appropriate requirements and standards for day care centers.[15]

The Role of Advocacy's Regional Advocates

The Office of Advocacy is strengthened by regional advocates located in the Small Business Administration's 10 regions across the country. These accomplished individuals are the chief counsel for advocacy's direct link to small business owners, state and local government bodies, and organizations that support the interests of small entities. The regional advocates help identify regulatory concerns of small businesses by monitoring the impact of federal and state policies at the grassroots level. Their work goes far to develop programs and policies that encourage fair regulatory treatment of small businesses and to help ensure their future growth and prosperity. Each promotes, counsels, and champions the causes of small business to stakeholders, legislative bodies, universities, and small business owners.

The regional advocates promote the three main components of Advocacy's state model regulatory flexibility act: introduction and passage of Advocacy's state model regulatory flexibility act, small business activism, and executive leadership.

15 Effective July 1, 2008, agency authority to administer the licensing of child care centers was transferred from the Department of Health and Family Services (DHFS) to the Department of Children and Families (DCF).

Introduction and Passage of the Legislation

Regional advocates are responsible for facilitating the introduction and implementation of the model RFA in each state in their region. To accomplish this goal, the regional advocates must determine the state's small business climate and work with state and local government officials, small businesses, and other stakeholders to encourage the introduction, passage and implementation of the legislation.

To be successful, regional advocates must find key champions in the state legislature who will support the model RFA, introduce the bill, and expend legislative resources to see the bill through the legislative process. Regional advocates must also be continually involved with the sponsor(s) of the legislation, small businesses and other support groups throughout the process. Such involvement may include providing educational information, testifying at a committee hearing, or answering questions about the model RFA.

Small Business Activism and Executive Leadership

Following the enactment of legislation, regional advocates are also responsible for facilitating the implementation of the law by encouraging small business activism and executive leadership. Not only are governors instrumental in getting the model legislation passed; their leadership in carrying out existing regulatory flexibility law is critical. Offices of the secretaries of state and other executive departments are also critically important resources.

Small business activism is essential. Stakeholders (small business owners, trade associations, and other membership groups) will benefit from a state's regulatory flexibility law if they are educated and encouraged to become actively engaged in the system.

Small business outreach is also important to determine whether an existing regulatory flexibility law is or is not working effectively. Through relationships with small business owners, agencies and other stakeholder groups, regional advocates collect concrete examples where, for example, an alternative regulatory approach was utilized by an agency to minimize the economic impact of the rule on small businesses. Also important are examples of best practices in each state—the regulatory alert systems, e-mail notification systems, and other programs that inform small businesses of agency regulatory activities and facilitate the efficient functioning of the program. Regional advocates also provide examples that show how a state's law or system can be improved to create a friendlier small business regulatory environment.

With the involvement of the small business community and state and local policymakers, and with the support of Advocacy's regional team, the model regulatory flexibility initiative continues to achieve a better regulatory and economic environment for small businesses across the nation.

Table 4.1 State Regulatory Flexibility Legislation, 2008 Legislative Activity

Five states enacted regulatory flexibility legislation in 2008

Florida (HB 7109)	Kansas (HB 2827)	Utah (HB 53)
Hawaii (HB 2781)	Louisiana (HB 368)	

Ten states introduced regulatory flexibility legislation in 2008

Arizona (HB 2235)	Iowa (SF 2227)	Massachusetts (SB 2413)*
Florida (HB 7109)	Kansas (HB 2827)	New Jersey (A 832)
Hawaii (HB 2781, HB 2686, HB 2736)	Louisiana (HB 368)	Utah (HB 53)
Illinois (HB 302)*		

* This bill, introduced in the 2007 legislative session, continued to be active in 2008.

Table 4.2 State Regulatory Flexibility Legislation, Status as of October 2008

Seventeen states and one territory have active regulatory flexibility statutes

Arizona	Maine	Oklahoma	Tennessee
Colorado	Missouri	Oregon	Virginia
Connecticut	Nevada	Puerto Rico	Wisconsin
Hawaii	New York	Rhode Island	
Indiana	North Dakota	South Carolina	

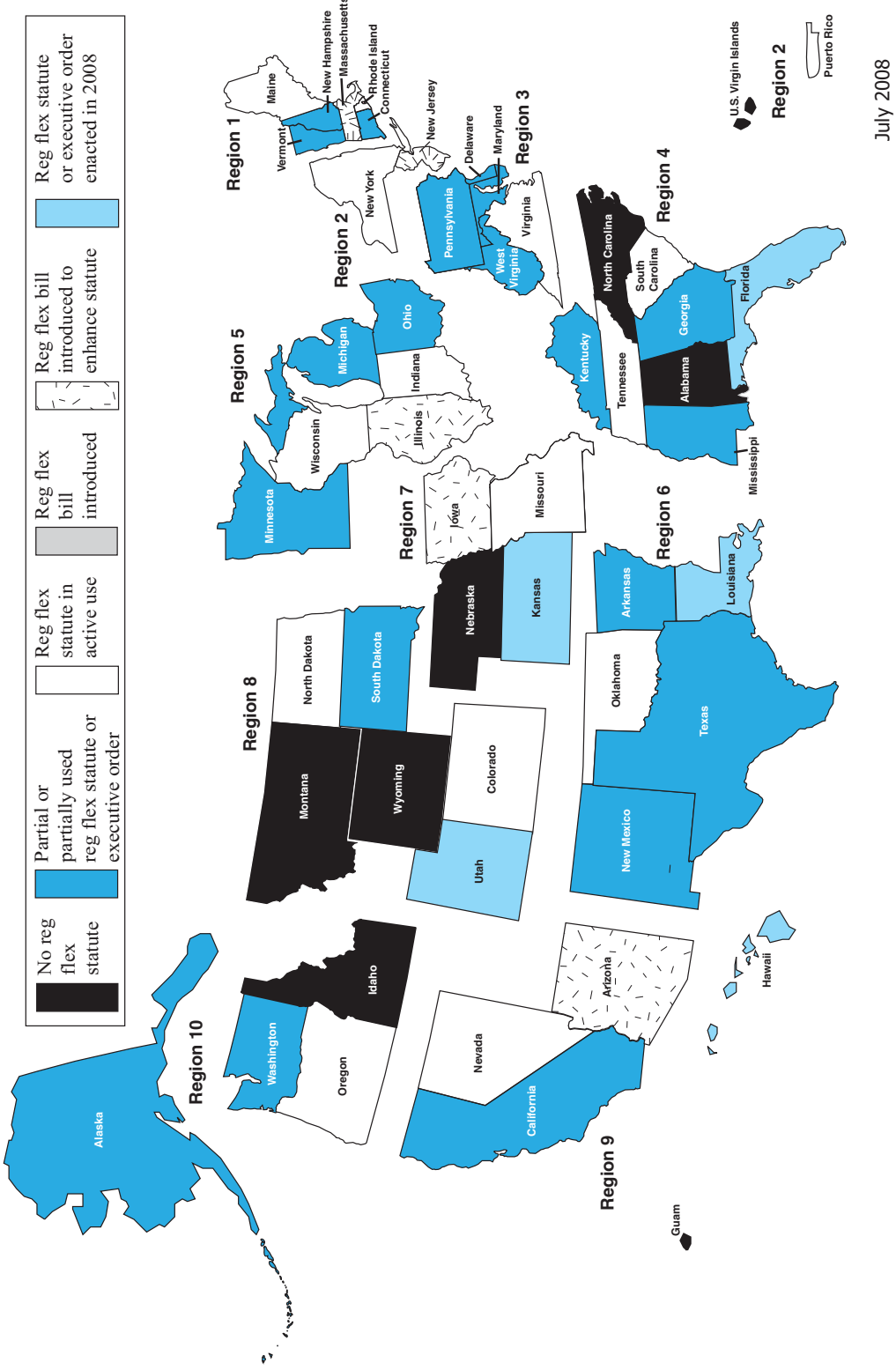
Twenty-seven states have a partial or partially used regulatory flexibility statute or executive order

Alaska	Iowa	Minnesota	South Dakota
Arkansas	Kansas	Mississippi	Texas
California	Kentucky	New Hampshire	Utah
Delaware	Louisiana	New Jersey	Vermont
Florida	Maryland	New Mexico	Washington
Georgia (EO)	Massachusetts (EO)	Ohio	West Virginia (EO)
Illinois	Michigan	Pennsylvania	

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

Alabama	Idaho	Nebraska	Virgin Islands
District of Columbia	Montana	North Carolina	Wyoming
Guam			

Chart 4.1 Mapping State Regulatory Flexibility Provisions, FY 2008



Appendix A Supplementary Tables

Table A.1 Federal Agencies Trained in RFA Compliance, 2003-2008

As required by E.O. 13272, the Office of Advocacy has offered training to the following federal departments and agencies in how to comply with the Regulatory Flexibility Act.

- Department of Agriculture
  - Animal and Plant Health Inspection Service
  - Agricultural Marketing Service
  - Grain Inspection, Packers, and Stockyards Administration
  - Forest Service
  - Rural Utilities Service
- Department of Commerce
  - National Oceanic and Atmospheric Administration
  - National Telecommunications and Information Administration
  - Office of Manufacturing Services
  - Patent and Trademark Office
- Department of Education
- Department of Energy
- Department of Health and Human Services
  - Center for Medicare and Medicaid Services
  - Food and Drug Administration
- Department of Homeland Security
  - Bureau of Citizenship and Immigration Services
  - Bureau of Customs and Border Protection
  - Federal Emergency Management Agency
- Transportation Security Administration
  - United States Coast Guard
- Department of Housing and Urban Development
  - Office of Community Planning and Development
  - Office of Fair Housing and Equal Opportunity
  - Office of Manufactured Housing
  - Office of Public and Indian Housing
- Department of the Interior
  - Bureau of Indian Affairs
  - Bureau of Land Management
  - Fish and Wildlife Service
  - Minerals Management Service
  - National Park Service
  - Office of Surface Mining Reclamation and Enforcement

- Department of Justice
  - Bureau of Alcohol, Tobacco and Firearms
  - Drug Enforcement Administration
  - Federal Bureau of Prisons
- Department of Labor
  - Employee Benefits Security Administration
  - Employment and Training Administration
  - Employment Standards Administration
  - Mine Safety and Health Administration
  - Occupational Safety and Health Administration
- Department of Transportation
  - Federal Aviation Administration
  - Federal Highway Administration
  - Federal Motor Carrier Safety Administration
  - Federal Railroad Administration
  - Federal Transit Administration
  - Maritime Administration
  - National Highway Traffic Safety Administration
  - Research and Special Programs Administration
  - Surface Transportation Board
- Department of the Treasury
  - Alcohol and 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
  - Access Board
  - Consumer Product Safety Commission
  - Commodity Futures Trading Commission
  - Environmental Protection Agency
  - Farm Credit Administration
  - Federal Communications Commission
  - Federal Deposit Insurance Corporation
  - Federal Election Commission
  - Federal Housing Finance Board
  - Federal Reserve System
  - Federal Trade Commission
  - General Services Administration / FAR Council
  - National Credit Union Administration
  - Nuclear Regulatory Commission
  - Pension Benefit Guaranty Corporation
  - Securities and Exchange Commission
  - Small Business Administration
  - Trade and Development Agency

Table A.2 Status Report on FY 2008 Top Ten Rules for Review and Reform

Rule for Reform	Agency	Current Status
Update Air Monitoring Rules for Dry Cleaners to Reflect Current Technology. EPA should revise outdated or inaccurate testing requirements so that modern dry cleaners can have a valid method for demonstrating compliance. Contact: Keith Holman **keith.holman@sba.gov**	EPA	Revising the New Source Performance Standard (NSPS) for petroleum dry cleaning equipment is a priority for EPA. When implemented, the NSPS revision will update emission testing requirements to work with modern dry cleaning machines.
Flexibility for Community Drinking Water Systems. EPA should consider expanding the ways for small communities to qualify to meet alternative drinking water standards, provided that the alternative standards are protective of human health and are approved by state authorities. Contact: Kevin Bromberg **kevin.bromberg@sba.gov**	EPA	On March 2, 2006, EPA announced a review of the affordability criteria for small systems (**http://edocket.access.gpo.gov/2006/pdf/06-1917.pdf**, 71 *Federal Register* 10671). EPA has not announced when its review will be completed.
Simplify the Rules for Recycling Solid Wastes. EPA should simplify the rules for recycling useful materials that, because of their current classification, must be handled, transported, and disposed of as hazardous wastes. Contact: Kevin Bromberg **kevin.bromberg@sba.gov**	EPA	On October 28, 2003, EPA issued a proposal to revise the definition of solid waste (**www.epa.gov/fedrstr/EPA-WASTE/2003/October/Day-28/f26754.pdf**). The agency issued a supplemental proposal on March 26, 2007 (**www.epa.gov/fedrgstr/EPA-WASTE/2007/March/Day-26/f5159.pdf**). On October 7, 2008, EPA issued the final rule implementing this reform, Revisions to the Definition of Solid Waste, 73 *Federal Register* 64668 (October 30, 2008) (**www.epa.gov/EPA-WASTE/2008/October/Day-30/f24399a.htm**).
EPA Should Clearly Define "Oil" in Oil Spill Rules. EPA should clarify the definition of "oil" in its oil spill program, so that small facilities that store nonpetroleum-based products are not unintentionally captured by spill prevention program requirements. Contact: Kevin Bromberg **kevin.bromberg@sba.gov**	EPA	On May 30, 2008, EPA and representatives of the U.S. Coast Guard met with small business stakeholders. EPA has not formally announced its intention to review its definition of oil in its oil spill program.
Update Flight Rules for Washington, D.C. Regional Area. FAA and other agencies should review the flight restriction rule for the region surrounding Washington, D.C, to determine whether the rules could be revised to avoid harming small airports within the region. Contact: Bruce Lundegren **bruce.lundegren@sba.gov**	DOT/ FAA	On March 19, 2008, the FAA notified Advocacy by letter (**www.sba.gov/advo/r3/faa08_0319.pdf**) that it expects to finalize the flight restriction rules by January 2009. FAA indicated in the letter that the agency would work with Advocacy to ensure a transparent review of the rules' impact on small entities.

Rule for Reform	Agency	Current Status
Eliminate Duplicative Financial Requirements for Architect-Engineering Services Firms in Government Contracting. The duplicative retainage requirement should be removed or reduced in architect-engineering services contracts, as has been done for other services. Contact: Major Clark **major.clark@sba.gov**	FAR Council	The Office of Federal Procurement Policy (OFPP) submitted Advocacy's r3 retainage proposal to the FAR Council. The FAR case number assigned to this issue is 2008-015. The FAR case is being reviewed by the FAR finance team, which anticipated completing a committee report by September 30, 2008. The report was to indicate the council's next steps regarding the proposed FAR change. (**http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=af578f0605dcf172475b4fe29b115955&rgn=div6&view=text&node=48:1.0.1.1.1.5&idno=48**)
Simplify the Home Office Business Deduction. The IRS should revise their rules to permit a standard deduction for home-based businesses, which constitute 53 percent of all small businesses. Contact: Dillon Taylor **dillon.taylor@sba.gov**	IRS	On March 14, 2008, the IRS informed Advocacy that this issue has been assigned to IRS attorneys for review (**www.sba.gov/advo/r3/irs08_0314.pdf**). On July 30, 2008, the deputy commissioner of the IRS's Small Business/Self-Employed Division testified on this issue before the House Small Business Subcommittee on Regulations, Healthcare, and Trade (**www.house.gov/smbiz/hearings/hearing-7-30-08-regulatory/IRS.pdf**). The IRS is continuing to review this issue, including exploring opportunities to simplify the rules and make Form 8829, Expenses for Business Use of Your Home (**www.irs.gov/pub/irs-pdf/f8829.pdf**), easier to use.
Update MSHA Rules on Use of Explosives in Mines to Reflect Modern Industry Standards. MSHA should update its current rules to be consistent with modern mining industry explosives standards. Contact: Bruce Lundegren **bruce.lundegren@sba.gov**	DOL/ MSHA	MSHA has not formally announced its intention to update explosives standards. The group that nominated this issue testified before the House Small Business Subcommittee on Regulations, Healthcare and Trade on July 30, 2008 (**www.house.gov/smbiz/hearings/hearing-7-30-08-regulatory/Santis.pdf**).
Update OSHA's Medical/Laboratory Worker Rule. The current rule should be reviewed to determine whether it can be made more flexible in situations where workers do not have potential exposure to bloodborne pathogens. Contact: Bruce Lundegren **bruce.lundegren@sba.gov**	DOL/ OSHA	OSHA has not formally announced its intention to review rules governing exposure to bloodborne pathogens.

Rule for Reform	Agency	Current Status
Update Reverse Auction Techniques for Online Procurement of Commercial Items. The current reverse auction techniques should be reviewed to determine whether a government-wide rule is necessary to create a more consistent and predictable online process. Contact: Major Clark **major.clark@sba.gov**	OFPP	On October 4, 2006, the Office of Federal Procurement Policy (OFPP) announced to the acquisition community that this action item is under review to determine the appropriate course of action for this acquisition tool (**www.sba.gov/advo/r3/ofpp06_1004.pdf**). OFPP has completed surveys of vendors (**http://edocket.access.gpo.gov/2007/pdf/07-1967.pdf**) and users (**http://edocket.access.gpo.gov/2007/pdf/07-4065.pdf**). The surveys were targeted for government buyers who have never done a procurement using a reverse auction (**http://www.dau.mil/performance_support/mdcsurvey/pros/pros.htm**), and government buyers with significant experience using reverse auctions (**http://www.dau.mil/performance_support/mdcsurvey/govtexp/govtexp.htm**). The outcome of this review should be a FAR reverse auction regulation establishing conditions of applicability. This regulatory framework will be supplemented by a detailed "best practice" guide for the acquisition community.

Table A.3 Updates of RFA-related Case Law, 2007-2008

Case	Description and Status
Valentine Props. Assoc. v. U.S. Dep't of Housing & Urban Dev., 2007 WL 3146698 (S.D.N.Y. Oct. 12, 2007) (Not reported in the F. Supp.)**.**	The plaintiff owned two apartment complexes with section 8 subsidy contracts with the U.S. Department of Housing and Urban Development originating in 1978. When the contracts were signed, each unit was required to meet "decent, safe and sanitary" conditions; however, these conditions were not defined in the United States Housing Act of 1937. HUD performed annual inspections to ensure that these undefined requirements were met. In 1998, HUD updated the act to include a specific definition of these conditions, and formed the Real Estate Assessment Center (REAC) to carry out these inspections. In 2003, the plaintiff's properties failed inspection, and HUD attempted to terminate the contracts. The plaintiff sought a declaratory judgment that the use of REAC for pre-existing contracts and termination of these contracts violated the terms of the contracts and the Fifth Amendment. The plaintiff asserted that the REAC regulations contradicted the requirements contained in E.O. 12866 and the RFA. The defendant filed 12(b)(1), (6) motions, which the court granted. However, the court found that HUD's effort to terminate the contracts after adoption of the new definition of the disputed terms violated the terms within the contracts. The court did not address the RFA.
Am. Fed'n of Labor v. Chertoff, 552 F. Supp. 2d 999 (N.D. Cal. 2007)**.**	The Department of Homeland Security (DHS) promulgated a final rule titled Safe-Harbor Procedures for Employers Who Receive a No-match Letter. *See* 72 Fed. Reg. 45611 (Aug. 15, 2007). Under the rule, an employer received a "no-match" letter if an employee's name and social security number did not match. The plaintiff union and business group sought a preliminary injunction to bar enforcement of the rule under several theories, asserting that it was arbitrary and capricious in violation of the APA, and that promulgation of the rule violated the RFA for failure to conduct a final regulatory flexibility analysis. This analysis requires, in pertinent part: 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] the steps the agency has taken to minimize the significant economic impact on small entities, 5 U.S.C. § 604(a). In promulgating the rule, DHS claimed an exception permitted in the RFA that allows for an agency to certify that the rule will not have a significant economic impact on a substantial number of small entities, 5 U.S.C. § 605(b). At first, DHS asserted that the rule merely provided clarification of terms. However, in briefing, DHS claimed that the FRFA was unnecessary because the RFA does not apply to interpretive rules. The court was unable to consider the second explanation, focusing instead on DHS's first argument, which was that there would not be a significant economic impact on small

Case	Description and Status
	entities. The court was persuaded by the plaintiff's declarations that the rule would have a significant impact, noting the potential significance of the costs of hiring human resources staff to track and solve mismatches within the timeframe allotted in the rule, the costs of hiring legal services help, and the costs of training current staff. The court found discrepancies in DHS's arguments, and granted the plaintiff's motion for preliminary injunction.
Tafas v. Dudas, 530 F. Supp. 2d 786 (E.D. Va. 2008).	The plaintiff, an inventor, brought an action against the Patent and Trademark Office (PTO) under the Administrative Procedure Act (APA), challenging newly adopted rules that limited the number of continuing applications, requests for continued examination (RCE), and claims that the applicant could make. The plaintiff made a claim for discovery on the ground that the PTO made an erroneous and bad-faith judgment under the RFA that the new rules would not have a significant economic impact on a substantial number of small entities. The court reiterated *U.S. Cellular Corp. v. FCC* and *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA* and stated that the RFA imposes no substantive requirements on an agency; rather, its requirements are purely procedural in nature. It further quoted *U.S. Cellular Corp. v. FCC* and stated that an agency need only put forth a reasonable, good-faith effort to fulfill the procedural requirements. The court held that notice in the *Federal Register*, as well as 1,100 pages dedicated to the RFA in the administrative record, were sufficient for the court to determine whether the PTO made a reasonable, good-faith effort to comply with the RFA's procedural requirements.
Tafas v. Dudas, 541 F. Supp. 2d 805 (E.D. Va. 2008).	The plaintiffs, a pharmaceutical company and an inventor, brought an action against the Patent and Trademark Office (PTO) challenging newly adopted rules that limited the number of continuing applications, requests for continued examination, and claims that the applicant could make. The plaintiffs argued that the new rules violated the Constitution, the Patent Act, the APA, and the RFA, and sought an injunction against the implementation of the rules. The court ruled that 35 U.S.C.A. § 2(b)(2) does not give the PTO the ability to make substantive rules, even though the PTO is required to have notice and comment. Instead, the PTO's ability is limited to procedural rules. Though the PTO argued its rule is procedural, it is not, as it "affects individual rights and obligations" (541 F. Supp. 2d at 814, quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302). For example, the new rules shift the examination burden from the PTO to the applicants and limit the number of patent applications. Accordingly, the plaintiff's motion for summary judgment was granted. The court did not address the merits of the RFA claim.

Case	Description and Status
Nat'l Mining Ass'n v. Mine Safety and Health Admin., 512 F.3d 696 (D.C. Cir. 2008).	The Mine Safety and Health Administration (MSHA) proposed a rule amending the Federal Mine Health and Safety Act of 1977. The association challenged the proposed rule, arguing, among other things, that MSHA failed to comply with the RFA by not analyzing the economic impact of the hardened room option. When MSHA published the temporary standard, it certified that the primary method of compliance—placing a separate set of rescue devices in each emergency escapeway—would not have a significant economic impact on small businesses. The plaintiffs did not challenge the sufficiency of the certification. The court found that since the primary method of compliance did not create a significant economic burden on small businesses, there was no reason for MSHA to undertake an economic analysis of the alternative. The court further stated that if the hardened room option was considerably more expensive, small businesses could simply refuse to choose it.
Am. Forest Res. Council v. Hall, 533 F. Supp. 2d 84 (D.D.C. 2008).	The plaintiff, a forest products trade association, brought an action alleging that the United States Fish and Wildlife Service's (FWS) decision, after conducting a five-year status review, to maintain threatened species listing for a species of seabird violated the Endangered Species Act (ESA), the Administrative Procedure Act (APA), the Regulatory Flexibility Act (RFA), the Unfunded Mandates Reform Act, and the National Environmental Policy Act (NEPA). The parties filed cross-motions for summary judgment. Because NEPA did not create a cause of action, the defendant's action must be "a final agency action for which there is no other adequate remedy in court" (533 F.Supp. 2d at 90). The Supreme Court developed a two-part test to determine finality: "First, the action must mark the 'consummation' of the agency's decisionmaking process...it must not be of a merely tentative or interlocutory nature….second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" (*Bennett v. Spear*, 520 U.S. 154, 177, 1997.) The court found that the five-year status review qualified as a consummation of the decisionmaking process, as the defendant determined that the species would remain protected. The likelihood of revision of the rule sometime in the future was considered irrelevant. However, the court ruled that legal consequences did not flow from the five-year review, as the defendant is not required to change the species status based on it. Accordingly, the court granted the defendant's motion, holding that decisions to maintain threatened species listings are not subject to judicial review. The court did not address the RFA issue.

Case	Description and Status
Atlantic Urological Assoc. v. Leavitt, 549 F.Supp.2d 20 (D.D.C. 2008).	To counteract the practice of physician groups using offsite laboratories for lab work, and then claiming that doctors in both locations "shared a practice" for purposes of billing, HHS created the Anti-Markup Rule. This rule permitted billing Medicare only for lab work performed in a "centralized building." The plaintiff urology physicians' group challenged the rule. It asserted arbitrary and capricious violation of the APA, as well as violation of the RFA, stating that the defendant failed to prepare a final regulatory flexibility analysis. The court granted the defendant's motion to dismiss for lack of standing and jurisdiction, and did not address the alleged APA and RFA violations.

Table A.4 SBREFA Panels through Fiscal Year 2008

Rule Subject	Date Convened	Report Completed	NPRM[1]	Final Rule Published
Environmental Protection Agency				
Nonroad 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
Transportation 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 09/10/03	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	11/08/06
Federal Implementation Plan (FIP) for Regional Nitrogen Oxides Reductions	06/23/98	08/21/98	10/21/98	04/28/06
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	01/10/06	
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

Rule Subject	Date Convened	Report Completed	NPRM[1]	Final Rule Published
Long Term 2 Enhanced Surface Water Treatment	04/25/00	06/23/00	08/11/03	01/05/06
Emissions from Nonroad and Recreational Engines and Highway Motorcycles	05/03/01	07/17/01	10/05/01 08/14/02	11/08/02
Construction and Development Effluent Guideline	07/16/01	10/12/01	06/24/02	Withdrawn[3]
Aquatic Animal Production Industry	01/22/02	06/19/02	09/12/02	08/23/04
Lime Industry—Air Pollution	01/22/02	03/25/02	12/20/02	01/05/04
Nonroad 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	06/15/06
Section 126 Petition (2005 Clean Air Implementation Rule—CAIR)	04/27/05	06/27/05	08/24/05	04/28/06
Federal Implementation Plan for Regional Nitrogen Oxides (CAIR)	04/27/05	06/27/05	08/24/05	04/28/06
Mobile Source Air Toxics—Control of Hazardous Air Pollutant from Mobile Sources	09/07/05	11/08/05	03/29/06	02/26/07
Nonroad Spark-ignition Engines/ Equipment	08/17/06	10/17/06	05/18/07	10/08/08
Total Coliform Monitoring Rule (TCR)	01/31/08	03/31/08		
Construction and Development Effluent Guideline	09/10/08	[4]	11/28/08	[4]
Occupational Safety and Health Administration				
Tuberculosis	09/10/96	11/12/96	10/17/97	Withdrawn[5]
Safety and Health Program Rule	10/20/98	12/19/98	In process	
Ergonomics Program Standard	03/02/99	04/30/99	11/23/99	11/14/00[6]
Electric Power Generation, Transmission, and Distribution	04/01/03	06/30/03	06/15/05	
Confined Spaces in Construction	09/26/03	11/24/03	11/28/07	
Occupational Exposure to Respirable Crystalline Silica Dust	10/20/03	12/19/03		
Cranes and Derricks in Construction	08/18/06	10/17/06	10/09/08	

Rule Subject	Date Convened	Report Completed	NPRM[1]	Final Rule Published
Occupational Exposure to Beryllium	09/17/07	01/15/08		

[1] Notice of proposed rulemaking (NPRM).
[2] Proposed rule was withdrawn August 18, 1999. EPA does not plan to issue a final rule.
[3] Proposed rule was withdrawn on April 26, 2004. EPA does not plan to issue a final rule.
[4] This is a second panel on the topic; see the panel convened 07/16/01.EPA certified the rule; the panel did not issue a report.
[5] Proposed rule was withdrawn on December 31, 2003. OSHA does not plan to issue a final rule.
[6] President George W. Bush signed Senate J. Res. 6 on March 20, 2001, which eliminated this final rule under the Congressional Review Act.

Appendix B
The Regulatory Flexibility Act

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

Congressional Findings and Declaration of Purpose

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

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

Regulatory Flexibility Act

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

§ 611 Judicial review
§ 612 Reports and intervention rights

§ 601 Definitions

For purposes of this chapter —

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

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

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

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

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

§ 602. Regulatory agenda

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

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

§ 603. Initial regulatory flexibility analysis

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

§ 604. Final regulatory flexibility analysis

(a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice

of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a), the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain —

(1) a succinct statement of the need for, and objectives of, the rule;

(2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and

(5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

(b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the *Federal Register* such analysis or a summary thereof.

§ 605. Avoidance of duplicative or unnecessary analyses

(a) Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.

(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the *Federal Register* at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

(c) In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of sections 602, 603, 604 and 610 of this title.

§ 606. Effect on other law

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

§ 607. Preparation of analyses

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

§ 608. Procedure for waiver or delay of completion

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

(b) Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the completion of the requirements of section 604 of this title for a period of not more than one hundred and eighty days after the date of publication in the *Federal Register* of a final rule by publishing in the *Federal Register*, not later than such date of publication, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes timely compliance with the provisions of section 604 of this title impracticable. If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days from the date of publication of the final rule, such rule shall lapse and have no effect. Such rule shall not be repromulgated until a final regulatory flexibility analysis has been completed by the agency.

§ 609. Procedures for gathering comments

(a) When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques such as—

(1) the inclusion in an advanced notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;

(2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;

(3) the direct notification of interested small entities;

(4) the conduct of open conferences or public hearings concerning the rule for small entities including soliciting and receiving comments over computer networks; and

(5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.

(b) Prior to publication of an initial regulatory flexibility analysis which a covered agency is required to conduct by this chapter—

(1) a covered agency shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with information on the potential impacts of the proposed rule on small entities and the type of small entities that might be affected;

(2) not later than 15 days after the date of receipt of the materials described in paragraph (1), the Chief Counsel shall identify individuals representative of affected small entities for the purpose of obtaining advice and recommendations from those individuals about the potential impacts of the proposed rule;

(3) the agency shall convene a review panel for such rule consisting wholly of full time Federal employees of the office within the agency responsible for carrying out the proposed rule, the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel;

(4) the panel shall review any material the agency has prepared in connection with this chapter, including any draft proposed rule, collect advice and recommendations of each individual small entity representative identified by the agency after consultation with the Chief Counsel, on issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c);

(5) not later than 60 days after the date a covered agency convenes a review panel pursuant to paragraph (3), the review panel shall report on the comments of the small entity representatives and its findings as to issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c), provided that such report shall be made public as part of the rulemaking record; and

(6) where appropriate, the agency shall modify the proposed rule, the initial regulatory flexibility analysis or the decision on whether an initial regulatory flexibility analysis is required.

(c) An agency may in its discretion apply subsection (b) to rules that the agency intends to certify under

subsection 605(b), but the agency believes may have a greater than de minimis impact on a substantial number of small entities.

(d) For purposes of this section, the term "covered agency" means the Environmental Protection Agency and the Occupational Safety and Health Administration of the Department of Labor.

(e) The Chief Counsel for Advocacy, in consultation with the individuals identified in subsection (b)(2), and with the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, may waive the requirements of subsections (b)(3), (b)(4), and (b)(5) by including in the rulemaking record a written finding, with reasons therefor, that those requirements would not advance the effective participation of small entities in the rulemaking process. For purposes of this subsection, the factors to be considered in making such a finding are as follows:

(1) In developing a proposed rule, the extent to which the covered agency consulted with individuals representative of affected small entities with respect to the potential impacts of the rule and took such concerns into consideration.

(2) Special circumstances requiring prompt issuance of the rule.

(3) Whether the requirements of subsection (b) would provide the individuals identified in subsection (b)(2) with a competitive advantage relative to other small entities.

§ 610. Periodic review of rules

(a) Within one hundred and eighty days after the effective date of this chapter, each agency shall publish in the *Federal Register* a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities. Such plan may be amended by the agency at any time by publishing the revision in the *Federal Register*. The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. The plan shall provide for the review of all such agency rules existing on the effective date of this chapter within ten years of that date and for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, he shall so certify in a statement published in the *Federal Register* and may extend the completion date by one year at a time for a total of not more than five years.

(b) In reviewing rules to minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes, the agency shall consider the following factors—

(1) the continued need for the rule;

(2) the nature of complaints or comments received concerning the rule from the public;

(3) the complexity of the rule;

(4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and

(5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

(c) Each year, each agency shall publish in the *Federal Register* a list of the rules which have a significant economic impact on a substantial number of small entities, which are to be reviewed pursuant to this section during the succeeding twelve months. The list shall include a brief description of each rule and the need for and legal basis of such rule and shall invite public comment upon the rule.

§ 611. Judicial review

(a) (1) For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of

sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.
(2) Each court having jurisdiction to review such rule for compliance with section 553, or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.
(3) (A) A small entity may seek such review during the period beginning on the date of final agency action and ending one year later, except that where a provision of law requires that an action challenging a final agency action be commenced before the expiration of one year, such lesser period shall apply to an action for judicial review under this section.

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

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

(ii) where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 1-year period, the number of days specified in such provision of law that is after the date the analysis is made available to the public.
(4) In granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with this chapter and chapter 7, including, but not limited to —

(A) remanding the rule to the agency, and

(B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.
(5) Nothing in this subsection shall be construed to limit the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law or to grant any other relief in addition to the requirements of this section.
(b) In an action for the judicial review of a rule, the regulatory flexibility analysis for such rule, including an analysis prepared or corrected pursuant to paragraph (a)(4), shall constitute part of the entire record of agency action in connection with such review.
(c) Compliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section.
(d) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise permitted by law.

§ 612. Reports and intervention rights

(a) The Chief Counsel for Advocacy of the Small Business Administration shall monitor agency compliance with this chapter and shall report at least annually thereon to the President and to the Committees on the Judiciary and Small Business of the Senate and House of Representatives.
(b) The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as amicus curiae in any action brought in a court of the United States to review a rule. In any such action, the Chief Counsel is authorized to present his or her views with respect to compliance with this chapter, the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities.
(c) A court of the United States shall grant the application of the Chief Counsel for Advocacy of the Small Business Administration to appear in any such action for the purposes described in subsection (b).

Appendix C
Executive Order 13272

Presidential Documents

Executive Order 13272 of August 13, 2002

The President

Proper Consideration of Small Entities in Agency Rulemaking

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

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

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

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

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

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

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

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

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

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

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

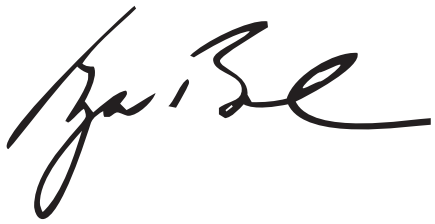
Sec. 4. *Definitions.* Terms defined in section 601 of title 5, United States Code, including the term ''agency,'' shall have the same meaning in this order.

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

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

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

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



THE WHITE HOUSE,
August 13, 2002.

Appendix D
Abbreviations

ACA	American Cable Association
Access Board	Architectural and Transportation Barriers Compliance Board
ADA	Americans with Disabilities Act
ADAAG	Americans with Disabilities Act accessibility guidelines
ALEC	American Legislative Exchange Council
AMS	Agricultural Marketing Service
ANPRM	advance notice of proposed rulemaking
APA	Administrative Procedure Act
APHIS	Animal and Plant Health Inspection Service
CAM	compliance assurance monitoring
CFR	Code of Federal Regulations
CLECS	competitive local exchange carriers
CMS	Centers for Medicare and Medicaid Services
CPNI	customer proprietary network information
CPSC	Consumer Product Safety Commission
CVR	cockpit voice recorder
DFARS	Defense Federal Acquisition Supplement
DFDR	digital flight data recorder
DHFS	Department of Health and Family Services (Wisconsin)
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
DTV	digital television
EBSA	Employee Benefits Security Administration
Education	Department of Education
E.O.	Executive Order
EPA	Environmental Protection Agency
EPCRA	Emergency Planning and Community Right to Know Act
ESA	Employment Standards Administration
ESA	Endangered Species Act
ESD	examination support document
ETA	Employment and Training Administration
FAA	Federal Aviation Administration
FAR	Federal Acquisition Regulation
FCC	Federal Communications Commission

FDA	Food and Drug Administration
Fed. Reg.	*Federal Register*
FEI	Financial Executives International
FHWA	Federal Highway Administration
FIP	federal implementation plan
FMCSA	Federal Motor Carrier Safety Administration
FRA	Federal Railroad Administration
FRB	Federal Reserve Board
FRFA	final regulatory flexibility analysis
FS	Forest Service
FWS	Fish and Wildlife Service
FY	fiscal year
GAAP	Generally Accepted Accounting Principles
GAO	Government Accountability Office
GFE	good faith estimate
GIPSA	Grain Inspection, Packers, and Stockyards Administration
GSA	General Services Administration
HAPs	hazardous air pollutants
HHS	Department of Health and Human Services
HIPAA	Health Insurance Portability and Accessibility Act
HUD	Department of Housing and Urban Development
IFRS	International Financial Reporting Standards
IRFA	initial regulatory flexibility analysis
IRS	Internal Revenue Service
LIFO	last-in first-out
MSA	metropolitan statistical area
MSGP	Multi-sector General Permit
MSHA	Mine Safety and Health Administration
NASA	National Aeronautics and Space Administration
NASE	National Association for the Self-employed
NEPA	National Environmental Policy Act
NFIB	National Federation of Independent Business
NHTSA	National Highway Traffic Safety Administration
NPRM	notice of proposed rulemaking
NPS	National Park Service
OCC	Office of the Comptroller of the Currency
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
OSMRE	Office of Surface Mining Reclamation and Enforcement
OTS	Office of Thrift Supervision
P.L.	Public Law
PTO	Patent and Trademark Office
r3	Regulatory Review and Reform Initiative
RALs	refund anticipation loans

RCE	requests for continued examination
REAC	Real Estate Assessment Center
RESPA	Real Estate Settlement Procedures Act
RFA	Regulatory Flexibility Act
SBA	Small Business Administration
SBAR	Small Business Advocacy Review Panel
SBEC	Small Business & Entrepreneurship Council
SBREFA	Small Business Regulatory Enforcement Fairness Act
SBRRB	Small Business Regulatory Review Board (Wisconsin)
SEC	Securities and Exchange Commission
SPCC	Spill Prevention Control and Countermeasures
SPPP	stormwater pollution prevention plan
State	Department of State
Treasury	Department of the Treasury
TSA	Transportation Security Administration
TSS	total suspended solids
UNE	unbundled network element
U.S.C.	United States Code
USCG	U.S. Coast Guard
USDA	United States Department of Agriculture
VA	Department of Veterans Affairs
VHS	vital hemorrhagic systicemia
WOSB	woman-owned small business