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Advocacy: the voice of small business in government

Report on the Regulatory Flexibility Act FY 2011

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

February 2012

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

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To the President and the Congress of the United States

We are pleased to present to the President and Congress the fiscal year (FY) 2011 *Report on the Regulatory Flexibility Act*. In this report, the U.S. Small Business Administration's Office of Advocacy discusses federal agencies' FY 2011 compliance with the Regulatory Flexibility Act of 1980 (RFA), Executive Order (E.O.) 13272, and other applicable executive orders. In 1980, Congress enacted the RFA, which required federal agencies to review proposed regulations that would have a significant impact on small entities—small businesses, small governmental jurisdictions, and small nonprofits. Federal agencies were also required to consider significant alternatives that would minimize the impacts on small entities.

In the past three decades, the RFA has been increasingly effective in reducing the regulatory burden on small businesses. President Obama has given us additional tools to improve the regulatory development process, including E.O. 13563 and E.O. 13579, which require federal agencies to create a systematic process for reviewing rules with an eye toward reducing the regulatory burden. Using all of the tools at our disposal, Advocacy continues to make steady progress in its efforts to improve federal agencies' compliance with the RFA.

To assist federal agencies in complying with the RFA, Advocacy trains agency personnel in RFA compliance, issues comment letters on proposed regulations, and participates in small business advocacy review (SBAR) panels. The office furthers the goal of reducing the regulatory burden on small entities through congressional testimony, advocacy for legislative reform, and vital research on small business issues. To ensure that information about our initiatives on behalf of small businesses is accessible to both government and nongovernmental entities, Advocacy uses web-based tools such as RSS feeds, email alerts, regulatory alerts, the newsletter, *The Small Business Advocate*, and social media including a blog, Twitter, and Facebook.

In FY 2011, Advocacy's RFA efforts helped save nearly $11.7 billion in first-year regulatory costs for small entities, while ensuring that agencies were able meet their regulatory goals. In the current economic climate, minimizing unnecessary regulatory burdens on the small business sector so that small businesses are free to create much-needed jobs is among the highest priorities of the Office of Advocacy.

Our office works to ensure that federal agencies recognize that regulations are made more effective when small businesses are part of the rulemaking process. We continue to support federal agencies seeking to reduce the impact of their regulations on small entities by providing training in RFA compliance and conducting more outreach to the small firm communities affected by federal regulations.

We welcome your support of Advocacy's efforts on behalf of the dynamic small business sector.

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Chief Counsel for Advocacy

Charles Maresca
Director of Interagency Affairs

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1 History and Overview of the Regulatory Flexibility Act

On January 18, 2011, President Obama issued Executive Order 13563, requiring every federal agency to create a process to systematically review its rules with an eye toward reducing the burden imposed by those regulations (see the text in Appendix D). At the same time, the President also issued a memorandum to all agencies, "Regulatory Flexibility, Small Business, and Job Creation," which emphasized the agencies' responsibilities toward small businesses under the Regulatory Flexibility Act (RFA). The President's memorandum further directed that the agencies "explicitly justify" any decision not to provide flexibility for small businesses (Appendix D).

By issuing the memo and executive order, as well as a subsequent executive order for independent agencies (Appendix E) President Obama reaffirmed the commitment to the twin principles of imposing the least burden necessary to attain regulatory objectives while providing regulatory flexibility. These are principles that undergird the Regulatory Flexibility Act of 1980, as amended.

In 1974, Congress established the Office of Advocacy and created the position of Chief Counsel for Advocacy to "develop proposals for changes in policies" affecting small businesses, and to "represent the views and interests of small businesses before other federal agencies whose policies and activities may affect small business."[1] Two years later, Congress determined that the Chief Counsel would be appointed directly by the President and confirmed by the Senate. In addition to authorizing a major economic research component in Advocacy's activities, Congress also gave the Chief Counsel public law hiring authority, and authorized the Chief Counsel to prepare and publish such reports as he or she deemed appropriate without prior submission to the Office of Management and Budget or any other federal agency.

In 1980, the White House Conference on Small Business made recommendations that led directly to the passage of the Regulatory Flexibility Act. The RFA established in law the principle that government agencies must consider the effects of their regulatory actions on small entities, and where possible mitigate them. Where the imposition of one-size-fits-all regulations had resulted in disproportionate effects on small entities, it was hoped that this new approach would result in less burden for these small entities while still achieving the regulatory goals.

Under the RFA, agencies provide a small business impact analysis, known as an initial regulatory flexibility analysis (IRFA), with every proposed rule published for notice and comment, and a final regulatory flexibility analysis (FRFA) with every final rule. When an agency can determine that the rule would not have a "significant economic impact on a substantial number of small entities," the head of the agency may certify to that effect and forego the IRFA and FRFA requirements.

The RFA requires an annual report to Congress on agency compliance with the RFA. The 1980 statute authorized the Chief Counsel to appear as amicus curiae in any action to review a rule. Compliance with the RFA was not reviewable, however.

In 1994 the Government Accountability Office (GAO) reported that, based on Advocacy's annual reports, it had concluded that agency compliance with the RFA varied widely across the agencies. The 1995 White House Conference on Small Business recommended strengthening the RFA, and in 1996 President Clinton signed the Small Business Regulatory Enforcement Fairness Act. SBREFA provided for judicial review of agency compliance with key sections of the RFA. It also established a requirement that the Environmental Protection Agency

1 P.L. 93-386, The Small Business Act of 1974.

(EPA) and the Occupational Safety and Health Administration (OSHA) convene panels consisting of the head of the agency, the Administrator of the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA), and the Chief Counsel for Advocacy, whenever the agencies were developing a rule for which an IRFA would be required.

Also in 2010, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress created the Consumer Financial Protection Bureau (CFPB) and included the new agency with EPA and OSHA as agencies required to convene panels under SBREFA. These panels meet with representatives of the affected small business community to review the agencies' plans, including any draft proposals and alternative approaches to those proposals, and to provide insight on the anticipated impact of the rule on small entities. The panels issue a report, including any recommendations for providing flexibility for small entities.

In 2002, President Bush signed Executive Order 13272, which required that Advocacy be advised early in the process of any upcoming rules that would have an impact on small business, and that agencies take into account and respond to any comments on the rules submitted by Advocacy. The requirement of early notification has since been codified by the Small Business Jobs Act of 2010 (SBJA). E.O. 13272 also required Advocacy to train every federal agency in how to comply with the RFA. The executive order also requires an annual report to the President on agency compliance.

2 The RFA and Executive Order 13272: Compliance and the Role of the Office of Advocacy

The Office of Advocacy has been given the responsibility to oversee compliance with both the Regulatory Flexibility Act and Executive Order 13272, signed in August 2002. The provisions of E.O. 13272 have given Advocacy and federal agencies additional tools for implementing the RFA, and as noted, parts of the executive order have recently been codified.

Executive Order 13272 Implementation

E.O. 13272 requires that federal agencies inform the public of their plans to take small businesses and the RFA into account when promulgating regulations. After nine years, most agencies have done this at the departmental level by making their RFA policies and procedures available on their websites.

Agencies are also required to send copies to Advocacy of any draft regulations that may have a significant economic impact on a substantial number of small entities. They are required to do this at the same time a draft rule is sent to the Office of Management and Budget's Office of Information and Regulatory Affairs or at a reasonable time prior to publication in the *Federal Register.*

E.O. 13272 also requires agencies to give appropriate consideration to Advocacy's public comments on a proposed rule and to address the comments in the final rule published in the *Federal Register*. This section of the E.O. was adopted into law in 2010 as an amendment to the RFA by the Small Business Jobs Act. Most agencies complied with this provision in FY 2011.

In addition to these three requirements for federal agencies, E.O. 13272 also gave the Office of Advocacy three duties. First, Advocacy must notify agencies of how to comply with the RFA. This was accomplished in 2003 through the publication of *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*. A revised version of this guide was provided to agencies in 2009 and an updated version will be made available in fiscal year 2012, incorporating the later amendments to the RFA. The guide is also available on Advocacy's website at **http://www.sba.gov/sites/default/files/rfaguide.pdf.**

Second, Advocacy must report annually to OIRA on agency compliance with the three agency provisions. In fiscal year 2011, overall agency compliance with E.O. 13272 was good; however, a few agencies continue to ignore the requirements and fail to provide Advocacy with copies of their draft regulations. A summary of agencies' FY 2011 compliance with E.O. 13272 can be found in Chapter 3, Table 3.2.

Finally, E.O. 13272 requires Advocacy to train federal regulatory agencies in how to comply with the RFA. In fiscal year 2011, Advocacy trained nearly 200 agency employees in RFA compliance, a substantial increase over the previous fiscal year. As new staff members are hired, agencies continue to request these important training sessions. Agencies that have had numerous RFA trainings are more willing to work with Advocacy during the rulemaking process and have a clearer understanding of the nuances of RFA compliance. Advocacy continues to work with the regulatory agencies to encourage them to consider the impact of their regulations on small entities from the beginning of rule development.

Interagency Communications

Advocacy reaches out to agencies on behalf of small businesses through meetings, roundtables, and its training program. Advocacy's participation in the interagency review of draft rules has increased as the effect of Advocacy's training program grows and as agencies become more open to the assistance the office can lend. In FY 2011, Advocacy communicated with agencies through a variety of means including more than 50 formal comment letters (Charts 2.1-2.3 and Table 2.1).

Interagency cooperation can result in effective regulations that avoid excessive burdens on small firms. See the cost savings examples in Tables 2.2 and 2.3.

Roundtables

Advocacy's efforts to work with the federal agencies early in the rulemaking process have included outreach efforts through roundtables. In many cases, agency officials hear directly from small business representatives on issues related to upcoming and proposed rules. This year, several significant roundtables took place.

Advocacy hosted two small business roundtables, on December 14, 2010, and January 9, 2011, to discuss the Federal Aviation Administration's (FAA) proposed rule on Safety Management Systems for Part 121 Certificate Holders. FAA's proposed rule would require each Part 121 air carrier to develop and implement a safety management system (SMS) for their aviation activities. Small business representatives were concerned that the FAA's proposed rule was too open-ended and vague, and could cause regulatory uncertainty for small businesses. Advocacy filed public comments that reflected small business concerns raised during the roundtable meetings.

Advocacy hosted a small business roundtable on February 9, 2011, to discuss the Federal Motor Carrier Safety Administration's (FMCSA) proposed Hours of Service (HOS) of Drivers rule. The proposed rule would place new restrictions on commercial truck drivers, and reduce the number of hours they could drive. Small business representatives in the trucking industry raised concerns that the FMCSA proposed rule would reduce flexibility, among other concerns. The roundtable was attended by FMCSA Administrator Ann Ferro, who provided a background briefing and discussed small business concerns with the roundtable participants. Advocacy filed public comments that reflected small business concerns raised during the roundtable meeting.

In FY 2011, OSHA proposed a new interpretation of its noise standard, Interpretation for Feasible Administrative or Engineering Controls of Occupational Noise, which was discussed at Advocacy's regular labor safety roundtable on November 19, 2010. Representatives from OSHA and the Department of Labor's (DOL) Solicitor's Office attended the roundtable and provided a background briefing on the proposal, but small business representatives explained to the agency how difficult and expensive compliance would be. Ultimately OSHA withdrew the rule and pledged to conduct additional stakeholder outreach before proceeding.

OSHA's proposed rule on Occupational Injury and Illness Recording and Reporting Requirements for recording work-related musculoskeletal disorders (MSDs) was published in the *Federal Register* on January 29, 2010, and was also the subject of a discussion at Advocacy's regular labor safety roundtable. A representative from OSHA provided a background briefing. Advocacy filed public comments on the proposed rule recommending that OSHA reassess the cost and complexity of complying with the rule. OSHA withdrew the draft rule from OMB review, and OSHA and Advocacy jointly hosted small business outreach meetings on April 11 and 12, 2011, to obtain further input on the proposal.

On August 31, 2011, Advocacy hosted a small business employee benefits roundtable to

provide an opportunity for small business owners and representatives to discuss with representatives of the Department of Labor's Employee Benefits Security Administration (EBSA) a notice of proposed rulemaking (NPRM) titled Definition of the Term "Fiduciary." At the roundtable meeting, small business stakeholders raised questions and concerns to EBSA staff related to the costs and burdens the proposed rule would impose on small businesses. On September 19, 2011, EBSA announced that it planned to withdraw the NPRM, and that the agency would draft a new proposal in FY 2012 to update the definition of fiduciary. EBSA acknowledged that small business concerns were a factor in the agency deciding to withdraw the NPRM.

In October 2010, the Department of Labor released a proposed rule that changed the wage methodology for the Temporary Nonagricultural Employment—H-2B Program (temporary and seasonal nonagricultural workers), increasing these wages by $1.23 to $9.72 per hour. Advocacy held two roundtables on October 20, 2010, and April 26, 2011, on the proposed changes to the H-2B program, with small business stakeholders attending from the landscaping, lodging, construction, restaurants, and seafood processing industries. Small business participants were very concerned that the wage increases would shut small businesses out of this program.

In March 2011, the United States Citizenship and Immigration Service (USCIS) proposed a Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Aliens Subject to Numerical Limitations, for temporary high-skilled workers. Under this proposal, applicants would have been required to electronically register for an H-1B visa a month early and only applicants selected by a lottery could apply for a visa. USCIS proposed these changes to make the process of obtaining the H-1B visa more efficient and cost-effective for businesses. However, small business stakeholders at an Advocacy roundtable on April 15, 2011, expressed concerns that the proposal would actually create more burden and uncertainty for small employers trying to obtain H-1B workers. USCIS decided to postpone issuing a final rule.

In fiscal year 2011, Advocacy held a series of nine roundtables addressing key environmental issues. Small business representatives pointed out the difficulties posed by chemical risk characterizations at the Department of Health and Human Services (HHS) and at the Environmental Protection Agency. The small business participants noted that EPA and HHS were not following appropriate science-based procedures, including a failure to consider and address peer review comments, in assessing chemical risks. Roundtable participants also provided Advocacy with important information concerning the small business impacts of EPA's proposed boiler and related air toxics rules.

Roundtables are a useful way for agencies to engage with small businesses, even on contentious regulations. Agencies benefit by hearing firsthand how their regulations are perceived by the small business community, and small businesses benefit by having an opportunity to directly inform the federal agency about how a rule would affect their operations. At Advocacy roundtables, agencies routinely receive information or perspectives on regulatory alternatives that have the potential to reduce the impact of their rules.

The SBAR Panel Process

Section 609 of the RFA requires a "covered agency" to convene a small business advocacy review (SBAR) panel whenever a draft regulation is anticipated to have a significant economic impact on a substantial number of small entities. With the passage of the Dodd-Frank Act in 2010, the newly created Consumer Financial Protection Bureau joins the Occupational Safety and Health Administration and the Environmental Protection Agency as the only covered agencies in the federal government. Since 1996, Advocacy has

participated in 52 SBAR panels, which are composed of representatives of the covered agency, Advocacy, and OMB's Office of Information and Regulatory Affairs. The CFPB has yet to begin to issue regulations, so there has been no issue with respect to compliance with section 609. OSHA conducted no SBAR panels in FY 2011. In FY 2011, EPA convened or notified Advocacy of its intent to convene 13 panels; an assessment of the issues in EPA's FY 2011 compliance with section 609 appears in Chapter 3.

Retrospective Review of Existing Regulations

Section 610 of the RFA requires federal agencies to examine existing rules for regulatory burden on small entities. The purpose of the review, which must be performed within 10 years for final rules that have a significant economic impact on a substantial number of small entities, is "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."[2] Agencies report planned and completed section 610 reviews in the biannual Unified Agenda of Regulatory and Deregulatory Actions.[3]

This year, President Obama endorsed a broader review of existing regulations to make regulations more effective and less burdensome. Executive Order 13563, signed January 18, 2011, instructed agencies to develop a plan for periodic retrospective review of all existing regulations. OMB issued a series of memoranda implementing this requirement.[4] In response, agencies developed plans, some with the benefit of significant public input, and published these plans online.[5] The White House has posted the plans at **http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system.**

The Office of Advocacy provided comments through OMB on agency plans and will monitor agency compliance with their plans, including the continuation of periodic reviews beyond this initial implementation period. Advocacy also welcomes input from small entities to help identify future candidates for retrospective review.

Judicial Review

The 1996 SBREFA amendments reformed the RFA by providing for judicial review of certain agency actions under the RFA.[6] The judicial review provisions of SBREFA give 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 significant FY 2011 case involving the RFA was a ruling by a federal district court for the District of Columbia not to enjoin the Board of Governors of the Federal Reserve System from implementing a final rule for alleged failures to comply with the RFA.[7] The court reiterated that

2 5 U.S.C. 610(a).

3 The Unified Agenda is available online at **www.reginfo.gov.** Section 610 reviews can be found using the 'Advanced Search' feature.

4 M-11-10, Executive Order 13563, "Improving Regulation and Regulatory Review" (February 2, 2011), M-11-19, "Retrospective Analysis of Existing Significant Regulations" (April 25, 2011), and M-11-25, Final Plans for Retrospective Analysis of Existing Rules (June 14, 2011).

5 For example, EPA posted its plan at **http://www.epa.gov/improvingregulations/documents/eparetroreviewplan-aug2011.pdf**. DOT posted information on its regulatory portal, **http://regs.dot.gov/retrospectivereview.htm**.

6 5 U.S.C. Sec. 611.

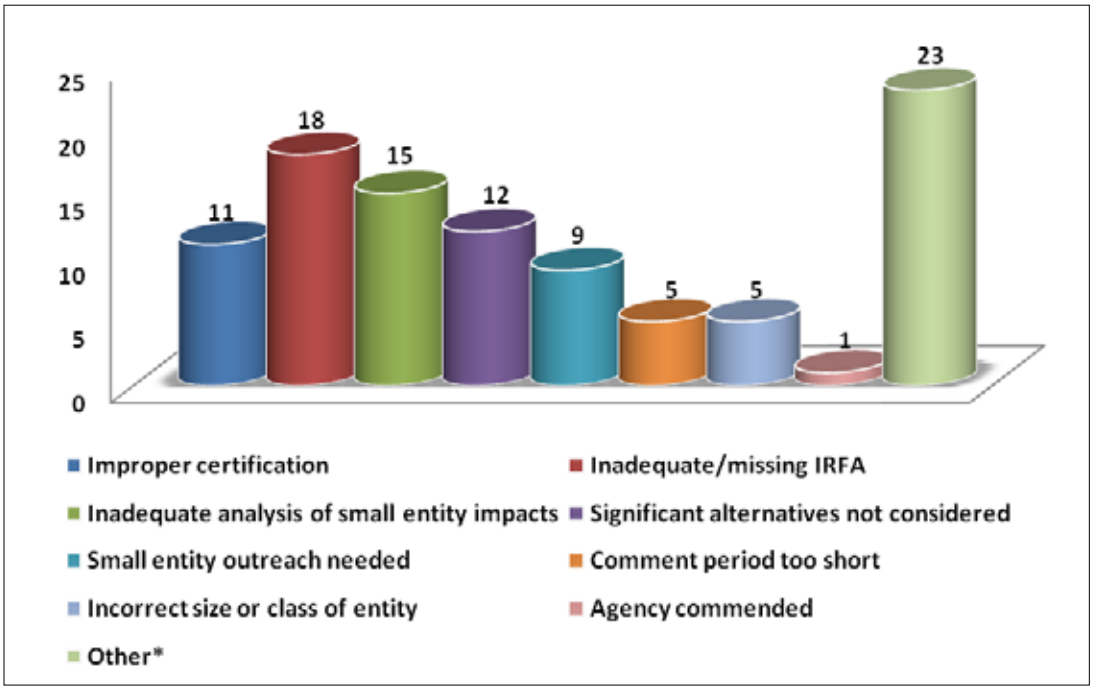
7 National Association of Mortgage Brokers v. Board of Governors of the Federal Reserve System, 773 F. Supp. 2d 151; 2011.

the RFA's "requirements are 'purely procedural'" and that the failure to comply with the RFA "may be, but does not have to be, grounds for overturning a rule." A synopsis of this case is included as Table A.2 in Appendix A.

Advocacy and the RFA in FY 2011

As a result of improvements to the RFA, Advocacy's work on behalf of small businesses has required greater and greater involvement in the federal rulemaking process. As agencies have become more familiar with the role of Advocacy and have adopted the cooperative approach Advocacy encourages, the office has had more success in urging burden-reducing alternatives. In FY 2011, this more cooperative approach yielded $11.7 billion in foregone regulatory costs (Tables 2.2 and 2.3).

Chart 2.1 Number of Specific Comments in Advocacy Comment Letters, FY 2011



*"Other" comments include a variety of concerns, for example, that the rule will have a negative impact or a significant economic impact on a substantial number of small entities, that further research or discussion is needed, that industry representatives provided specific comments, that small entity burdens should be re-evaluated, etc.

Chart 2.2 Advocacy Comments: Major Reasons Certifications Were Improper, FY 2011 (percent)

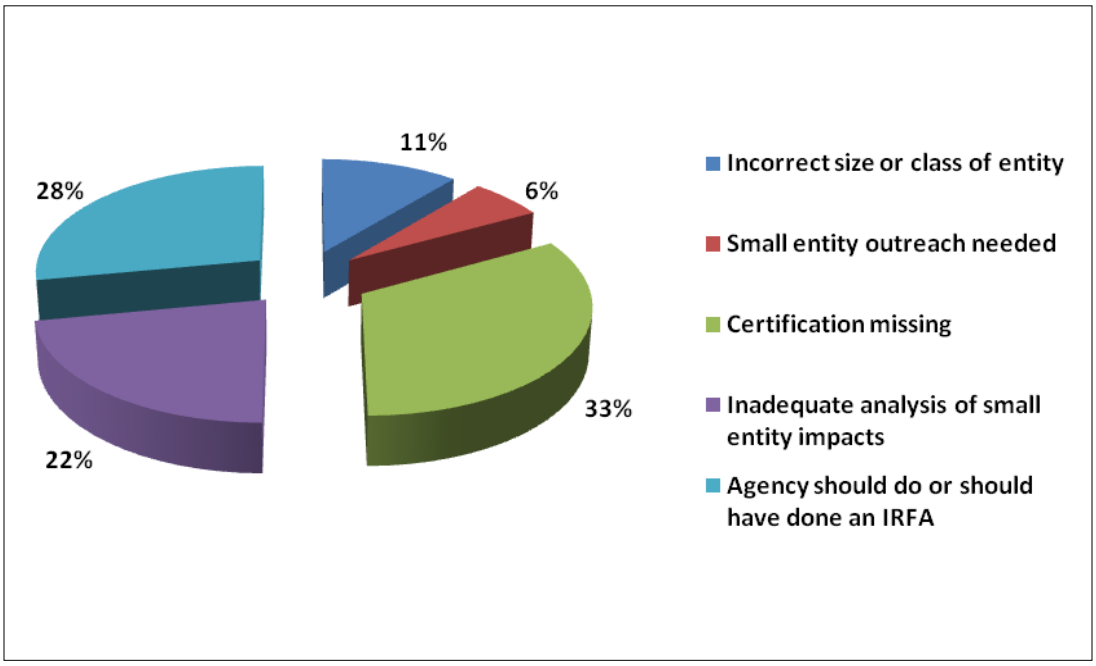


Chart 2.3 Advocacy Comments: Major Reasons IRFAs Were Inadequate, FY 2011 (percent)

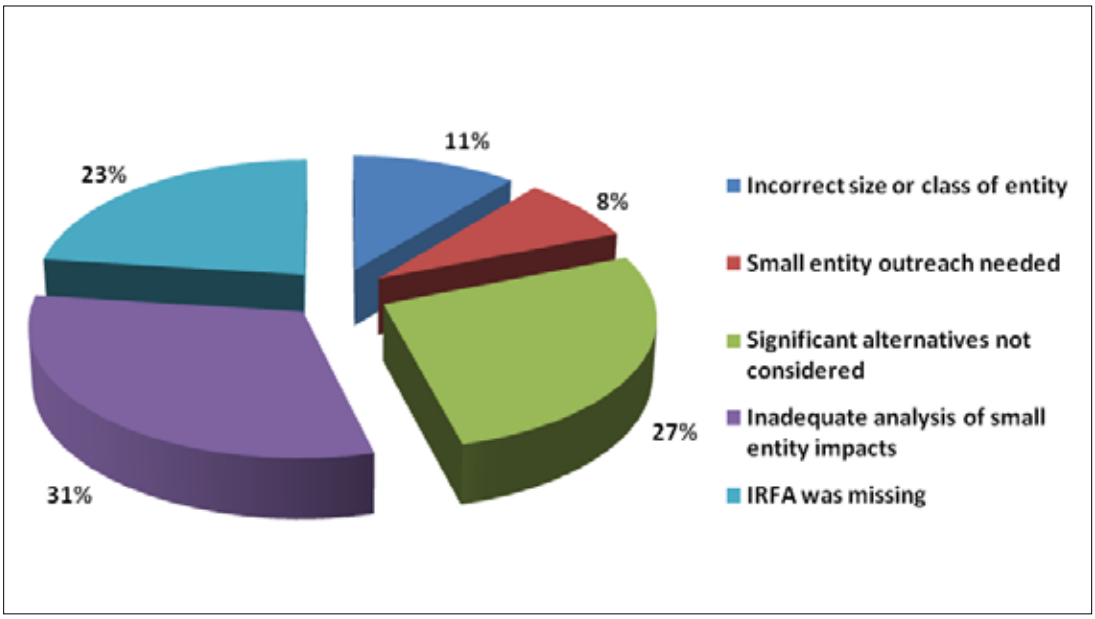


Table 2.1 Regulatory Comment Letters Filed by the Office of Advocacy, FY 2011

Date	Agency*	Title	Where Published
10/4/2010	HHS	Comments regarding Changes in Certification Requirements for Home Health Agencies and Hospices.	75 *Fed. Reg.* 43235
10/12/2010	DOE	Comments regarding Test Procedures for Walk-in Coolers and Walk-in Freezers.	75 *Fed. Reg.* 5506.
10/15/2010	FCC	Comments regarding Business Broadband Marketplace.	WC Docket No. 10-188
10/27/2010	DOL	Comments regarding Wage Methodology for the Temporary Nonagricultural Employment H-2B Program.	75 *Fed. Reg.* 61578
10/29/2010	FASB	Comments regarding Revenue Recognition from Contracts with Customers.	
11/2/2010	OSHA	Comments regarding OSHA's Proposed Changes to Consultation Procedures Rules.	75 *Fed. Reg.* 54064
11/16/2010	NOAA	Comments regarding the 90-day finding on a Petition to List Atlantic Bluefin Tuna as Threatened or Endangered under the Endangered Species Act.	75 *Fed. Reg.* 57431
11/17/2010	DOL	Comments regarding the Regulations Implementing the Longshore and Harbor Workers' Compensation Act for Recreational Vessels.	75 *Fed. Reg.* 50718
11/19/2010	EPA	Comments regarding EPA's proposed rule, Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities.	75 *Fed. Reg.* 35128
11/22/2010	DOI	Comments regarding Increased Safety Measures for Oil and Gas and Sulphur Operations on the Outer Continental Shelf.	75 *Fed. Reg.* 63609
12/1/2010	FASB	Comments regarding the Proposed Accounting Standards Update for Leases.	

*See Appendix F for definitions of agency abbreviations.

Date	Agency*	Title	Where Published
12/1/2010	HHS	Comments regarding forthcoming listing of styrene as a "reasonably anticipated" carcinogen in the National Toxicology Program report on carcinogens.	
12/13/2010	HHS and FDA	Comments regarding the Parallel Review of Medical Products.	75 *Fed. Reg.* 57045
12/20/2010	IRS	Comments regarding Specified Tax Return Preparers Required to File Individual Income Tax Returns using Magnetic Media.	75 *Fed. Reg.* 75439
12/23/2010	FRB	Comments regarding Truth in Lending.	75 *Fed. Reg.* 58539
12/23/2010	FRB	Comments regarding Truth in Lending and the Credit Card Act.	75 *Fed. Reg.* 58539
1/4/2011	FDA	Comments regarding Recordkeeping and Mandatory Third Party Disclosure for Restaurant Menu and Vending Machine Labeling under Section 4205 of the Patient Protection and Affordable Care Act of 2010.	75 *Fed. Reg.* 68361
1/4/2011	EPA	Reply to notification letter regarding the Small Business Advocacy Review Panel for Lead: Renovation and Painting Program for Public and Commercial Buildings.	
1/13/2011	FRB	Comments regarding the final rule on Regulation Z, Truth in Lending.	
1/14/2011	IRS	Comments regarding the Implementation of Rules Governing Tax Return Preparers.	IRS Notice 2011-6
1/19/2011	EPA	Comments regarding EPA's Proposed Settlement Agreements for Petroleum Refineries and Electric Utility Generating Units.	75 *Fed. Reg.* 82390; 75 *Fed. Reg.* 82392
1/24/2011	DOJ	Comments regarding Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations.	75 *Fed. Reg.* 43460

*See Appendix F for definitions of agency abbreviations.

Date	Agency*	Title	Where Published
1/31/11	All Agencies	Memorandum advising heads of all federal agencies of recent changes to the RFA and providing guidance on E.O. 13563 and accompanying memoranda.	
2/1/2011	FRB	Comments regarding Regulation Z, Truth in Lending (Mortgage Disclosures).	
2/14/2011	FWS	Comments on the Designation of Critical Habitat for the Sonoma County Distinct Population Segment of California Tiger Salamander.	75 *Fed. Reg.* 2863
2/25/2011	FMCSA	Comments regarding FMCSA's Proposed Hours of Service of Drivers Rule.	75 *Fed. Reg.* 82170
3/4/2011	FAA	Comments regarding FAA's Proposal Safety Management Systems for Part 121 Certificate Holders.	75 *Fed. Reg.* 68224
3/16/2011	EPA	Reply to the notification letter regarding the Small Business Advocacy Review Panel for the Greenhouse Gas New Source Performance Standard for Electric Utility Steam Generating Units.	
3/17/2011	DOL	Comments regarding the Amendment of the Effective Date for Wage Methodology for the Temporary Nonagricultural Employment H-2B Program.	76 *Fed. Reg.* 3452
4/4/2011	FWS	Comments regarding the Designation of Critical Habitat for Nine Bexar County, Texas, Invertebrates.	76 *Fed. Reg.* 9872
4/7/2011	USACE	Comments on the Proposal to Reissue and Modify Nationwide Permits.	76 *Fed. Reg.* 9173
4/14/2011	EPA	Reply to the notification letter regarding the Small Business Advocacy Review Panel for the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Mineral Wool Production Risk and Technology Review (RTR) Amendments.	

*See Appendix F for definitions of agency abbreviations.

Date	Agency*	Title	Where Published
4/28/2011	USCIS	Comments regarding the Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Aliens Subject to Numerical Limitations.	76 *Fed. Reg.* 11686
5/2/2011	FRB	Comments regarding the Proposed Rule for Truth in Lending/Escrow Accounts.	76 *Fed. Reg.* 11597
5/9/2011	FAA	Comments regarding the Supplementary Regulatory Flexibility Determination of the Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities.	76 *Fed. Reg.* 12559
5/12/2011	FWS	Comments regarding the Listing and Designation of Critical Habitat for the Chiricahua Leopard Frog.	76 *Fed. Reg.* 14126
5/17/2011	DOL	Comments on the Temporary Nonagricultural Employment of H-2B Aliens in the United States.	76 *Fed. Reg.* 15130
5/19/2011	FWS	Comments regarding the Revised Critical Habitat for the Pacific Coast Population of the Western Snowy Plover.	76 *Fed. Reg.* 16046
6/13/2011	EPA and OMB	Comments regarding the convening of the Small Business Advocacy Review Panel on Greenhouse Gas New Source Performance Standard for Electric Utility Steam Generating Units.	
6/14/2011	SBA	Comments regarding the Revision of SBA Size Standards for Professional, Scientific, and Technical Services.	76 *Fed. Reg.* 14323
6/22/2011	EPA and USACE	Comments regarding Identification of Waters Protected by the Clean Water Act.	76 *Fed. Reg.* 24479
6/28/2011	FDA	Comments regarding Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments and Calorie Labeling of Articles of Food in Vending Machines.	76 *Fed. Reg.* 19191; 76 *Fed. Reg.* 19237

*See Appendix F for definitions of agency abbreviations.

Date	Agency*	Title	Where Published
7/6/2011	DOL	Comments regarding the Amendment of the Effective Date for Wage Methodology for the Temporary Nonagricultural Employment H-2B Program.	76 *Fed. Reg.* 37686
7/22/2011	FRB	Comments regarding the Proposed Rule for Electronic Fund Transfers.	76 *Fed. Reg.* 29902
7/25/2011	Treasury	Comments regarding the Notice of Availability for the Preliminary Plan for Retrospective Analysis of Existing Rules.	76 *Fed. Reg.* 39315
7/25/2011	FWS	Comments regarding the Proposed Rule for Revised Critical Habitat for the Riverside Fairy Shrimp.	76 *Fed. Reg.* 31686
7/26/2011	FDA	Comments regarding the length of time it takes FDA to approve new and innovative medical devices for introduction into the marketplace.	
8/4/2011	EPA	Comments regarding the National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-fuel-fired Electric Utility, Industrial-commercial-institutional, and Small Industrial-commercial-institutional Steam Generating Units.	76 *Fed. Reg.* 24976
8/4/2011	EPA and OMB	Comments regarding the convening of the Small Business Advocacy Review Panel on Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards.	
9/26/2011	FWS	Comments regarding the Proposed Endangered Status for the Chupadera Springsnail and Proposed Designation of Critical Habitat.	76 *Fed. Reg.* 46218
9/28/2011	OSHA	Comments regarding OSHA's Proposed Occupational Injury and Illness Recording and Reporting Requirements—NAICS Update and Reporting Revision Rule.	76 *Fed. Reg.* 36414

*See Appendix F for definitions of agency abbreviations.

Table 2.2 Regulatory Cost Savings, FY 2011

Agency*	Subject Description	Cost Savings/ Impact Measures
DOJ	***Americans with Disabilities Act Regulations on Public Accommodations***. On September 15, 2010, the Department of Justice (DOJ) published a final rule that amends the agency's 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." Advocacy recommended that DOJ adopt a general safe harbor for existing elements that complied with the 1991 ADA Standards. DOJ's NPRM proposed two safe harbors to address the concerns of small businesses regarding the cost of adopting the 2010 standards. 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 gives credit to small businesses that spend 1 percent of revenue on ADA modifications. While small business representatives were supportive of the general safe harbor, they were concerned that the small business safe harbor could be interpreted as a minimum spending requirement.	In DOJ's final rule on the 2010 ADA standards, DOJ adopted the general safe harbor and declined to adopt the small business safe harbor, resulting in annual cost savings to small businesses totaling $8.3 billion.

*See Appendix F for definitions of agency abbreviations.

Agency*	Subject Description	Cost Savings/ Impact Measures
CMS	***Home Health Prospective Payment System Rate Update for Calendar Year 2011.*** On July 23, 2010, the Centers for Medicare and Medicaid Services (CMS) published in the *Federal Register* a proposed rule on the Medicare program Home Health Prospective Payment System rate update for 2011. This proposed rule would update the Home Health Prospective Payment System (HHPPS) rates effective January 1, 2011, update the wage index and outlier used under the HHPPS, and institute changes to the home health agency (HHA) capitalization requirements, among other changes. Most affected HHAs are small businesses. As a result of the comments filed by Advocacy and the affected industry, CMS made a number of changes. CMS withdrew its planned 2012 coding weight adjustment of 3.79 percent, increased the time within which a patient's face-to-face encounter with a physician had to occur from 15 days to 30 days, extended the compliance date for this provision from January 1, 2011, to April 1, 2011, and made wholesale changes to the 36-month provisions of the rule that will allow HHAs to participate in financial and ownership transactions while permitting lenders and investors to stay involved with the HHA.	As a result of the comments filed by Advocacy and the affected industry, CMS made changes to the final rule. The National Association for Home Care and Hospice estimated that the burden reduction amounted to $16 billion over 10 years, or $1.6 billion on an annual basis.

*See Appendix F for definitions of agency abbreviations.

Agency*	Subject Description	Cost Savings/ Impact Measures
DOEd	***Gainful Employment Rule.*** The Department of Education (DOEd) issued a proposed rule in July 2010 which would have required post-secondary institutions to calculate debt-to-income and repayment rate measures to obtain Title IV funds. Advocacy filed comments and met with Education officials to convey concerns that the rule would have a significant detrimental economic impact on small post-secondary programs and that these programs would not have the resources necessary to comply with the rule or identify the methods necessary to remedy noncompliance. After considering comments, DOEd included a small numbers provision in the final rule which exempts programs with fewer than 30 students from compliance with the rule.	Based upon DOEd's calculations of the costs of compliance for programs that are subject to the final rules, programs that are exempt from the rule as a result of the small program exemption will save $218.7 million.
EPA	***Removal of Milk and Milk Products from the Oil Spill Rulemaking.*** In 2008 Advocacy began advocating for the removal of milk and milk product manufacturing plants from the oil spill (SPCC) rulemaking. In 2011, EPA moved to propose and finalize this approach.	EPA estimates $146 million in annual savings from the removal of the milk and milk product manufacturing plants from the SPCC rulemaking.

*See Appendix F for definitions of agency abbreviations.

Agency*	Subject Description	Cost Savings/ Impact Measures
DOL	***EBSA Definition of the Term "Fiduciary."*** On October 22, 2010, the Department of Labor's Employee Benefits Security Administration published a notice of proposed rulemaking that would amend a 1975 regulation that defines when a person providing investment advice becomes a fiduciary under the Employee Retirement Income Security Act. The proposed rule would expand the scope of that definition to take into account changes in the expectations of plan officials and participants who receive advice, as well as the practices of investment advice providers. On August 31, 2011, Advocacy hosted a small business employee benefits roundtable to provide an opportunity for small business owners and representatives to discuss the proposed rule with EBSA staff. On September 19, 2011, EBSA announced that it planned to withdraw the proposed rule, and that the agency would draft a new proposal in FY 2012 to update the definition of "fiduciary." EBSA acknowledged that small business concerns were a factor in the agency deciding to withdraw the NPRM.	Advocacy anticipates that the withdrawal of the proposed rule will save small businesses $10.1 million in the first year, with annual cost savings of $845,000 per year.
DOL	***H-2B Wage Rule.*** The Department of Labor released a proposed rule in October 2010 increasing wage rates for employees working under H-2B visas. The wage rates were to take effect 60 days after the publication of the rule in the *Federal Register*. The final rule was published January 19, 2011. However, the final rule extended the effective date to January 1, 2012, citing small business concerns and Advocacy's comment letter. DOL subsequently moved the date up to October 1, 2011. Advocacy wrote another comment letter requesting further delays, after which DOL moved the effective date to November 30, 2011.	Advocacy estimates that the delay in the effective date will provide cost savings of $593 million to small businesses.

*See Appendix F for definitions of agency abbreviations.

Agency*	Subject Description	Cost Savings/ Impact Measures
EPA	***Lead Clearance Final Rule.*** In response to comments by the Office of Advocacy and small businesses, in August 2011 EPA declined to finalize costly amendments to its current standards for renovation of residences and buildings containing lead-based paint. EPA requires that contractors use particular practices to maintain a lead-safe environment during renovations to protect children and pregnant women. EPA had proposed to add an additional lead laboratory testing requirement to its current rule requiring extensive cleaning procedures and a cleaning verification procedure. The agency decided against applying it to residences and buildings. EPA also agreed with Advocacy's suggestion to clarify the "vertical containment" provision that requires renovators to take special precautions to contain lead paint dust from contaminating nearby properties. EPA showed great flexibility in permitting the use of procedures equivalent to potentially costly or unsafe vertical containment requirements.	EPA estimates that these proposed testing requirements would have cost between $282 million and $304 million per year, with an average of $293 million per year. Advocacy expects that this decision alone will account for approximately $100 million in annual cost savings. Total cost savings will reach an estimated $393 million per year.
DOE	***Showerhead Water Efficiency Standard Guidance.*** In May 2010, the Department of Energy (DOE) proposed a rule that would have clarified the definition of a "showerhead" for the purpose of enforcing existing water efficiency regulations for showerheads. Advocacy arranged for a meeting between DOE and several small business stakeholders who expressed their concerns that the definition of showerhead put forth in DOE's proposed rule ran contrary to long-standing industry interpretation of the term. As a result of this meeting and other outreach with industry, DOE withdrew the proposal and instead issued enforcement guidance and provided a grace period of two years to allow manufacturers to sell any remaining noncompliant products, and to adjust their product designs to ensure compliance with the Energy Policy and Conservation Act and DOE's regulations.	As stated in the final guidance document, DOE changed course in order to enforce the existing standards in a manner that avoids needless economic dislocation that some industry representatives estimated would cost $400 million.

*See Appendix F for definitions of agency abbreviations.

Table 2.3 Summary of Cost Savings, FY 2011 (dollars)[1]

Rule/Intervention	First-Year Costs	Annual Costs
American with Disabilities Act Regulations on Public Accommodations[2]	8,333,997,831	8,333,997,831
Home Health Prospective Payment System Rate Update for Calendar Year 2011[3]	1,600,000,000	1,600,000,000
Gainful Employment Rule[4]	218,700,000	218,700,000
Removal of Milk from the Oil Spill Rulemaking[5]	146,000,000	146,000,000
DOL: EBSA Definition of the Term "Fiduciary"[6]	10,138,000	845,000
DOL: H-2B Wage Rule[7]	593,180,000	
Lead Clearance Final Rule[8]	393,000,000	393,000,000
DOE: Clarification of the Definition of Showerheads[9]	400,000,000	
TOTAL	**11,695,015,831**	**10,692,542,831**

1. The Office of Advocacy bases its cost savings estimates primarily on agency estimates, when available. In the alternative, cost estimates are obtained from the entities affected, their organizations, and/or the public record. Cost savings for a given rule as a result of Advocacy's intervention are captured in the fiscal year in which the agency takes final action on the rule. 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: DOJ Regulatory Impact Analysis (RIA), E.H. Pechan, 2007
3. Source: National Association for Home Care and Hospice
4. Source: DOE Analysis
5. Source: EPA RIA, pp 24-25
6. Source: DOL RIA, Table 2, *Federal Register* at 75 *Fed. Reg.* 65274 (October 22, 2010)
7. Source: DOL RIA
8. Source: *Federal Register* at 76 *Fed. Reg.* 47918 (August 5, 2011)
9. Source: DOE Regulatory Review Plan

3 Advocacy Review of Agency RFA Compliance in Fiscal Year 2011

Since the enactment of the Regulatory Flexibility Act in 1980, the Office of Advocacy has worked consistently with federal agencies to examine the effects of their proposed regulations on small entities. 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, and by hosting RFA panels and roundtables. Over the years, 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 Executive Order 13272 compliance by agency for fiscal year 2011.

Department of Education

Issue: Gainful Employment Rulemaking. On July 26, 2010, the Department of Education (DOEd) published a notice of proposed rulemaking titled Program Integrity: Gainful Employment. The rule proposed to establish measures for determining whether certain postsecondary educational programs lead to "gainful employment" in recognized occupations, and the conditions under which these educational programs remain eligible for the student financial assistance programs authorized under title IV of the Higher Education Act of 1965.

On September 8, 2010, Advocacy submitted comments on this rule. In the comments, Advocacy forwarded small businesses' concerns that the economic analysis did not adequately capture the potential impact on small institutions and that the metrics proposed to be used to define gainful employment disadvantaged small institutions. Advocacy also relayed small institutions' concerns that they would not have the resources necessary to assess their compliance with the rule and to identify the methods necessary to remedy noncompliance.

The final regulations implemented several changes that address the issues raised by small institutions and others during the comment period. The final rule gives all programs three years to improve and provides that DOEd will release data to help institutions identify and improve their failing programs. The final rule also improves the repayment rate and debt-to-earnings measures by (1) allowing institutions to demonstrate that their programs meet the debt-to-earnings ratio with alternative reliable earnings information and increasing the number of school years that will be used in measuring performance, (2) measuring debt burdens based on an assumption that loans are repaid over 10 to 20 years depending on the level of degree, rather than 10 years for all programs, (3) limiting debt in the debt-to-earnings calculation to tuition and fee charges, (4) allowing borrowers meeting their obligations under income-sensitive repayment plans to be considered successfully repaying their loans, and (5) excluding programs with 30 students or fewer. Many of the changes were suggested by small institutions.

Department of Energy

Issue: Walk-in Coolers and Freezers. On January 4, 2010, the Department of Energy published proposed energy efficiency test procedures for commercial walk-in coolers and freezers. Following publication of the proposal, DOE received significant feedback from the walk-in

manufacturing industry. In response, DOE published a supplemental notice of proposed rulemaking incorporating several proposed changes to the test procedures on September 9, 2010. In public comments, Advocacy noted that small manufacturers represent a large proportion of manufacturers supplying custom walk-in coolers and freezers, and produce a larger variety of "basic models," as defined by the proposal. Because the test procedures would require testing for every "basic model" produced by a manufacturer, small manufacturers would face significantly disproportional burdens under the proposed procedures. Advocacy recommended that DOE consider adopting an alternative test procedure that would allow manufacturers to rely on the certifications of walk-in component suppliers for test results, and manufacturers could then use these values in the calculations of energy consumption for each basic model they produce. Advocacy also recommended that DOE consider allowing manufacturers to group basic models into a "family" of models and requiring only the lowest-efficiency basic model in the family to be certified. In April 2011, DOE published a final rule adopting both of Advocacy's recommendations, providing significant cost savings for small walk-in manufacturers.

Issue: Showerhead Water Efficiency Standard Guidance. In 2010, DOE asked for comment on a rule interpreting the statutory term "showerhead" for purposes of enforcing water efficiency standards. Advocacy initiated a meeting with DOE and several small business stakeholders to discuss how the rule would have a significant negative impact on small manufacturers of showerheads, as well as small plumbing contractors. As a result of this meeting and other outreach with industry, DOE decided instead to issue enforcement guidance. DOE provided an enforcement grace period of two years to allow such manufacturers to sell any remaining noncompliant products, and to give manufacturers the opportunity to adjust their product designs to ensure compliance with the Energy Policy and Conservation Act (EPCA) and DOE's regulations. As stated in the final guidance document, DOE changed course to enforce the existing standards in a manner that avoids needless economic dislocation that some industry representatives estimated at $400 million.

Department of Health and Human Services

Centers for Medicare and Medicaid Services and Food and Drug Administration

Issue: Parallel Review of Medical Products. On September 17, 2010, the Centers for Medicare and Medicaid Services and the Food and Drug Administration (FDA) published a notice requesting public comment on their plans for parallel review of medical products, which would establish a practice of overlapping evaluations of premarket medical products as long as the manufacturer agreed to parallel review. The hope was that the parallel review would shorten the time necessary for device approval by the FDA and the acquisition of a national coverage determination by CMS. Numerous medical devices manufacturers, venture capitalists, and biotechnology companies approached Advocacy with their concerns that the plan would have a significant impact on their businesses, the majority of which are small.

The notice sought public input on 17 questions posed by CMS and the FDA regarding the parallel review process. Advocacy provided the agencies with industries' positions on the questions and their concerns about the development of the program. Advocacy also asked the agencies to analyze the potential impacts of the parallel review program and entertain reasonable alternatives as required by the RFA.

Food and Drug Administration

Issue: Agency Information Collection Activities; Proposed Collection; Comment Request; Restaurant Menu and Vending Machine Labeling: Recordkeeping and Mandatory Third Party Disclosure under Section 4205 of the Patient Protection and Affordable Care Act of 2010. The Affordable Care Act (ACA) amended sections of the Food, Drug, and Cosmetic Act and required chain restaurants and similar retail food establishments with 20 or more locations doing business under the same name and offering for sale substantially the same menu items, as well as operators of 20 or more vending machines, to disclose certain nutrition information for certain food items offered for sale so that consumers can make more informed choices about the food they purchase. On August 25, 2010, the FDA published a guidance document designed to provide industry with information on the effect of the ACA on state and local menu and vending labeling laws. On November 5, 2010, the FDA published a notice requesting public comment on the recordkeeping and mandatory third party disclosure provisions of the ACA as they related to the menu labeling requirements of the law.

Advocacy was approached by interested restaurant and vending stakeholders, the majority of whom were small business owners and operators. They wanted Advocacy to provide the FDA with their positions on the notice, and to voice the industry's concerns that the FDA had underestimated the recordkeeping burden and the number of business entities that will be affected by the law. Advocacy provided the FDA with the industries' concerns, and suggested that the agency not pursue implementing the law through guidance, but through rulemaking. Advocacy also asked the agency to analyze the potential impacts of the labeling requirements under the RFA as it develops the menu labeling rules. As a result of Advocacy's involvement and the comments submitted by affected businesses, on January 25, 2011, the FDA announced the withdrawal of the guidance, noting that the agency intended to complete notice and comment rulemaking.

Issue: Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, and Food Labeling; Calorie Labeling of Articles of Food in Vending Machines. On April 6, 2011, after withdrawing its guidance on the menu labeling requirements of the ACA, the FDA published two proposed food and calorie labeling rules, one for chain restaurants and the other for vending machines. In the RFA analysis of the rules, the FDA appropriately concluded that the rules would have a significant impact on a substantial number of small entities, and the agency prepared an IRFA. Upon reviewing the IRFA, Advocacy noted that the FDA likely underestimated the number of small entities expected to be affected by the rule and underestimated the cost of compliance for those entities; the agency also did not discuss the industry's suggested alternatives designed to lessen the impact of the rules. Advocacy is waiting for the final rules to be published before ascertaining whether the FDA made any changes to the proposed rule.

Department of Homeland Security

U.S. Citizenship and Immigration Services

Issue: H -1B Visa Advanced Registration Rule. In March 2011, the United States Citizenship and Immigration Service (USCIS) proposed an advance registration phase for the H-1B visa program to make the process of obtaining this visa more efficient and cost-effective for businesses. H-1B visas are temporary visas for highly skilled foreign nationals. Under this rulemaking, applicants would have been required to electronically

register for an H-1B visa a month early; applicants selected from this lottery could then apply for a visa.

Advocacy submitted a public comment letter to USCIS based on concerns raised at a small business roundtable attended by small employers utilizing the H-1B visa program. One concern expressed was that, as proposed, the registration requirement may actually create more burden and uncertainty for small employers trying to obtain H-1B workers. Advocacy recommended that USCIS evaluate these small business concerns and possibly reconsider whether the agency should proceed with this program at this time. USCIS has decided to postpone issuing a final rule. This postponement represents substantial small business cost savings over what would have been required.

Department of the Interior

Issue: Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Increased Safety Measures for Energy Development on the Outer Continental Shelf. As a result of the Deepwater Horizon explosion and subsequent oil spill, the Department of the Interior (DOI) developed certain recommendations regarding safety measures for deepwater drilling, which were released in a report titled *Increased Safety Measures for Energy Development on the Outer Continental Shelf*. The report recommended that certain measures be implemented to ensure sufficient redundancy in blowout preventers, promote well integrity, and enhance well control. On June 8, 2010, the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE) issued a Notice to Lessees and Operators (NTL) that immediately implemented certain recommendations in the report. On October 14, 2010, DOI published an interim final rule codifying the requirements listed in the NTL as well as other recommendations identified in the report as suitable for implementation through emergency rulemaking. The interim final rule includes a limited discussion of the impact of the rule on small businesses. On November 22, 2010, Advocacy filed comments with BOEMRE requesting that the agency publish a supplemental IRFA with information regarding the distribution of costs among small businesses affected by the rule. On December 23, 2010, BOEMRE published the supplemental IRFA.

Department of Justice

Issue: Americans with Disabilities Act Regulations on Public Accommodations. In September 2010, the Department of Justice published a final rule that amends the agency's regulations implementing Title III of the Americans with Disabilities Act. 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." DOJ's 2010 ADA Standards for Accessible Design adopt the United States Access Board's 2004 Americans with Disabilities Act Accessibility Guidelines (2004 ADAAG). The agency had not changed its Title III ADA regulations since 1991.

Advocacy has submitted multiple comment letters and a report on this issue. When DOJ released its Advance Notice of Proposed Rulemaking (ANPRM) on this issue in 2004, Advocacy submitted a public comment letter stating that the new regulations would unfairly punish the small businesses that had complied with the 1991 regulations. Advocacy recommended that DOJ adopt a general safe harbor for existing elements that complied with the 1991 ADA Standards. In November 2007, 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*. The report found that both small and large firms face substantial costs from the adoption of the barrier removal requirements in the 2004 ADAAG.

In June 2008, DOJ released a notice of proposed rulemaking adopting the 2004 ADAAG standards (now called the 2010 ADA standards). DOJ's NPRM proposed two safe harbors to address the concerns of small businesses regarding the cost of adopting the 2010 standards. Under the proposed "general" safe harbor, existing facilities' compliance with the current 1991 ADA standards would be sufficient to meet the new requirements. The small business safe harbor would have given credit to small businesses that spend 1 percent of revenue on ADA modifications.

Advocacy held a small business roundtable on this rule and wrote a comment letter based on this input. While the small business representatives were supportive of the general safe harbor, these entities were concerned that the small business safe harbor could be interpreted as a minimum spending requirement. In DOJ's final rule on the 2010 ADA standards, DOJ adopted the general safe harbor and declined to adopt the small business safe harbor, resulting in annual cost savings to small businesses totaling $8.3 billion.

Department of Labor

Issue: H-2B Visa Wage Rule. In October 2010, the Department of Labor released a proposed rule that changed the methodology for calculating the wages of H-2B visa workers, increasing these wages by $1.23 to $9.72 per hour. The H-2B visa program provides employers facing a shortage of seasonal workers a legal method to temporarily hire nonagricultural foreign workers. Some of the top industries that utilize the H-2B program are landscaping, lodging, construction, restaurants, and seafood processing.

Advocacy worked with small businesses on the H-2B wage rule, holding two roundtables and writing four public regulatory comment letters to DOL citing the negative impact the wage increase will have on small businesses. Based on Advocacy's involvement in this issue, DOL provided extensions in the effective date of this rule. At the final rule stage, DOL extended the effective date by one year, to January 1, 2012. DOL later changed the effective date to October 1, 2011. Based on small business input, including another Advocacy comment letter, DOL postponed the effective date by 60 days, to November 30, 2011. Advocacy estimates that the delay in the effective date will provide cost savings of $593 million to small businesses.

Department of the Treasury

Internal Revenue Service

Issue: Implementation of Rules Governing Tax Return Preparers. On January 4, 2011, the Internal Revenue Service (IRS) issued Notice 2011-6 to provide relief requested by small business return preparers from some of the new IRS registration, testing, and education requirements related to preparer tax identification numbers (PTINs). On January 14, 2011, Advocacy submitted a public comment letter commending the IRS for listening to the concerns of small businesses by creating an exception to the new requirements so that staff who assist in preparing all or substantially all of a return, but do not sign the return, and are supervised by an attorney, certified public accountant, or enrolled agent, can obtain a PTIN. Notice 2011-6 excluded such supervised staff from the competency exam and continuing education requirements set out in proposed regulations on Circular 230 standards of practice. Notice 2011-6 also exempted from the exam requirements those preparers who do not prepare any Form 1040 series returns or accompanying schedules. Therefore, Notice 2011-6 exempted the employee plan administrators who prepare only Forms 5500 from the new requirements, relieving small businesses of the burdens that owners were anticipating.

Environmental Protection Agency

Issue: SBAR Panels. Under section 609(b) of the RFA, EPA must convene small business advocacy review panels (also known as SBAR or SBREFA panels) when it is required to prepare an IRFA for a proposed rule. This year, EPA convened or notified Advocacy of its intent to convene 13 panels, in addition to concluding one panel that had convened in 2010. These panels are shown in Table 3.1.

Advocacy had concerns with a number of panels on this list, and, for the first time, expressed some of these concerns in public letters. Advocacy criticized EPA's conduct of the Utility Maximum Achievable Control Technology (Utility MACT) panel in its August 4 public comment letter. Advocacy also sent letters to EPA objecting to the convening of the panels on greenhouse gas (GHG) regulation of electric utilities and petroleum refineries. In all three of these cases, Advocacy's major concern with the panels was the lack of information provided to the small entity representatives (SERs) about the potential effects of the proposed rule and the lack of significant regulatory alternatives to be discussed with the SERs. The information EPA was prepared to share upon convening the panels was lacking in regulatory specifics and instead only generally described EPA's statutory obligations and a range of technological emissions control options available to industry.

EPA also informed Advocacy of its intent to convene a number of panels on rules that it subsequently decided to certify, including panels on NESHAPs (National Emission Standards for Hazardous Air Pollutants) for secondary aluminum smelting and the greenhouse gas standards for electric utilities. Although Advocacy does welcome subsequent policy decisions that reduce the economic impacts sufficiently to justify certification, in both of these cases EPA's timeline would have required convening panels well before policy options could be outlined sufficiently to understand potential impacts.

A common theme among many of these difficulties is the prevalence of judicial deadlines in EPA rulemakings, most through negotiated settlements or consent decrees. This year, Advocacy filed a public comment on a settlement agreement which established the regulatory timeline for the GHG regulation of electric utilities and petroleum refineries, arguing that the proposed timeline could not be met if the agency did not know in advance that it could certify both rules. As of September 30, EPA has missed the deadline for proposing GHG rules for electric utilities, despite informing Advocacy of its intent to certify after convening the panel.

Issue: Milk and Milk Products; Oil Spill Prevention, Control and Countermeasures Rule. As part of the Obama Administration's efforts to make regulations more effective and eliminate unnecessary burdens, EPA exempted milk and milk product containers from the Oil Spill Prevention, Control and Countermeasure rule, potentially saving the milk and dairy industries more than $140 million per year. This regulation has been in place since the 1970s, and with this action, EPA for the first time will ensure that all milk and milk products will be formally exempted. EPA determined that this unintended result of the current regulations—which were designed to prevent oil spill damage to inland waters and shorelines—placed unjustifiable burdens on the dairy industry. The final rule was promulgated on April 18, 2011.

Issue: Lead Renovation, Repair and Painting (LRRP) Final Lead Clearance Rule. EPA, in July 2011, in response to comments by the Office of Advocacy and small businesses, declined to finalize costly amendments to its current standards for renovation of residences and buildings containing lead-based paint, the Lead Renovation, Repair and Painting (LRRP) Rule. EPA requires that during renovations, contractors use particular

Table 3.1 Environmental Protection Agency Rulemakings Involving Small Entities, FY 2011

Rules for which EPA SBAR panels were convened	Convening Date	Completion Date	Judicial or Statutory Deadline
Revision of New Source Performance Standards for New Residential Wood Heaters	08/04/2010	10/26/2011	N
National Emission Standards for Hazardous Air Pollutants for Coal- and Oil-fired Electric Utility Steam Generating Units	10/27/2010	03/02/2011	Y
Stormwater Regulations Revision to Address Discharges from Developed Sites	12/06/2010	10/04/2011	N
Formaldehyde Emissions from Pressed Wood Products	02/03/2011	04/04/2011	Y
National Emission Standards for Hazardous Air Pollutants Risk and Technology Review for the Mineral Wool and Wool Fiberglass Industries	06/02/2011	10/26/2011	Y
Greenhouse Gas Emissions from Electric Utility Steam Generating Units	06/09/2011	*	Y
Control of Air Pollution From Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards	08/04/2011	10/14/2011	N
Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards	08/04/2011		Y
Rules for which EPA announced its intention to convene a panel	**Status**		
Lead; Renovation, Repair, and Painting Program for the Exterior of Public and Commercial Buildings	609(b)(1) notice: 12/16/2010		Y
Financial Responsibility Requirements for Hard Rock Mining	609(b)(1) notice: 05/31/2011		N
Secondary Aluminum Production Risk and Technology Review	609(b)(1) notice: 07/29/2011 *		Y
Long-Term Revisions for the Lead and Copper Rule (LCR)	Informal notice: 06/13/2011		N
Development of a National Rulemaking for Revising the Waste-water Discharge Standards for Steam Electric Power Plants	Informal notice: 06/13/2011		N
Drinking Water Regulatory Actions for Perchlorate	Informal notice: 7/26/ 2011		N
National Emission Standards for Hazardous Air Pollutants for Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks Risk and Technology Review Amendments	Informal notice: 08/31/2011		Y

* EPA has ceased action on this panel.

practices for maintaining a lead-safe environment to protect children and pregnant women. EPA had proposed to add an additional lead laboratory testing requirement to its current rule requiring extensive cleaning procedures and a cleaning verification procedure. The agency wisely concluded that the additional lab testing step was unnecessary and would lead to homeowners choosing to use uncertified contractors or doing it themselves, thereby adding to the risk of contaminating their own residences. EPA estimates that these proposed testing requirements would have cost between $282 million and $304 million per year. The existing rule, EPA further reasoned, will effectively reduce lead dust hazards.

EPA also agreed with Advocacy's suggestion to clarify the "vertical containment" requirement that requires renovators to take special precautions to contain lead paint dust to prevent it from contaminating nearby properties. EPA showed great flexibility in permitting the use of procedures equivalent to potentially costly or unsafe vertical containment requirements that would require scaffolding surrounded by plastic sheathing to keep the lead dust contained. Advocacy expects that this decision alone would account for more than $100 million in annual cost savings. The final clearance rule was published in the *Federal Register* on August 5, 2011.

Reform of the expensive requirements of the current LRRP rule continues to be one of the highest priorities of the small business community.

Issue: Waters of the United States. On May 2, 2011, the Environmental Protection Agency and the Army Corps of Engineers (collectively, the agencies) published the proposed guidance for determining whether a waterway, water body, or wetland is protected by the Clean Water Act. The guidance would replace previous guidance concerning the scope of protection for critical waters. On June 22, Advocacy submitted comments regarding whether the agencies had included the costs of compliance with the Endangered Species Act in their cost-benefit analysis for the guidance. Advocacy also suggested that the issue of the scope of protected waters was better dealt with using the formal rulemaking process rather than issuing guidance. The agencies have yet to finalize the guidance.

Issue: Construction and Development Water Pollution Guidelines. On December 1, 2009, EPA promulgated the Construction and Development (C&D) Water Pollution Guidelines, which impose requirements for stormwater discharges from construction and development sites. In April 2010, Advocacy petitioned EPA to reconsider the rule because it was based on a costly advanced treatments system and because it included a numeric standard for turbidity. Advocacy asserted that the rule imposed "a numeric standard that is costly, difficult to implement, and based on numerous factual errors." As a result of this and a petition by industry, EPA vacated this standard in the fall of 2010. The absence of this requirement could save affected small businesses up to $10 billion per year. EPA did further work this year to correct its errors, and released another version for review by the Office of Management and Budget. Based on additional comments raised by the Office of Advocacy, EPA withdrew the draft proposal from review in August 2011 and agreed to seek additional data upon which a valid standard could be written.

Issue: Boiler MACT. EPA has been engaged in a multi-year effort to issue a series of rules collectively referred to as the boiler rules: National Emission Standards for Hazardous Air Pollutants for Major Source Industrial, Commercial and Institutional (ICI) Boilers and Process Heaters; NESHAP for Area Source ICI Boilers and Process Heaters; Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration (CISWI) Units; and Identification of Nonhazardous Secondary Materials (NHSM) that are Solid Waste. All four

rulemakings have been conducted under judicial timelines and continuing litigation.

In March 2011, EPA issued all four rules as final, under a consent decree deadline. Advocacy raised significant concerns about these rules in public comments in 2010, and many of those concerns remained with the final rules. With respect to the RFA, the EPA had not prepared an analysis sufficient to support its certification that the NHSM rule would not have a significant economic impact on a substantial number of small entities. The CISWI rule should not have been certified because EPA has not properly evaluated whether a "substantial" number of small entities would experience significant economic effects. However, upon publication, EPA announced it would reconsider many of the provisions of these rules and requested additional data and comments. Advocacy has discussed these rules at a number of environmental roundtables this year.

Issue: Coal Ash. On June 21, 2010, EPA published a proposed rule, Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals (CCR) from Electric Utilities (also known as the coal ash rule). This rule would establish standards for the handling, storage, and disposal of CCR, and, depending on the approach chosen by EPA, would have a significant effect on electric utilities using coal, as well as small entities that transport CCR or recycle it into useful and economically valuable products. EPA certified the rule and did not prepare an IRFA. On November 19, 2010, Advocacy submitted a public comment describing significant concerns about EPA's estimates of the potential costs to small entities and questioning whether EPA has a factual basis for its certification. EPA has since published a notice of data availability and request for comments.

Issue: Utility MACT. In October 2010, EPA convened an SBAR panel on National Emission Standards for Hazardous Air Pollutants for Coal- and Oil-fired Electric Utility Steam Generating Units (EGU) (also known as the Utility or EGU MACT). This rule, issued under judicial timeline, would establish emissions standards for coal- and oil-fired electric utilities and require significant retrofits in most small entities affected. The panel concluded on March 2, 2011, issuing a panel report that did not make unanimous recommendations. In many cases, Advocacy asserted that the panel lacked sufficient information upon which to make recommendations. In addition, Advocacy endorsed comments from the representatives of small utilities critical of EPA's conduct of the panel.

EPA published a proposed rule on May 3, 2011. Advocacy filed comments on August 4. Advocacy raised significant concerns about the conduct of the SBAR panel and the adequacy of EPA's compliance with the RFA and consideration of regulatory alternatives. Advocacy believes EPA did not conduct the panel in a manner that gave the small utilities an understanding of the rule to be proposed or its potential effect. EPA cited the judicial deadlines as a reason for convening the panel without providing the necessary information. While Advocacy understands the constraints under which EPA was operating, the office does not believe citing these constraints remedies the problems with the panel.

Advocacy also believes that EPA's IRFA was not adequate, both because most of the document identified as the IRFA was a recitation of the SBAR panel report, which listed factors EPA should consider in its rulemaking rather than regulatory alternatives, and because EPA underestimated the potential impacts on small entities. Advocacy also described a number of significant regulatory alternatives that EPA could have considered under the statute but that EPA discarded without considering the impact on small entities.

Federal Communications Commission

Issue: Business Broadband Marketplace. On October 15, 2010, Advocacy filed public comments with the Federal Communications Commission (FCC) in response to its request for comments on the business broadband marketplace. The comments followed an October 5, 2010, roundtable that Advocacy hosted with a group of individuals representing small and competitive broadband providers. No matter which broadband transmission technology is used, all participants expressed concerns regarding barriers to greater market participation for their firms. Advocacy urged the FCC to move forward on policy decisions that will encourage further small business participation in the broadband market and foster competition necessary for successful universal broadband deployment.

Specifically, Advocacy's comments discussed the following issues: the impact of the availability and affordability of "middle mile" infrastructure access on the ability of competitive broadband providers to enter the market; the importance of preserving legacy copper networks and concerns about how the pace of copper retirement and limited access to other "last mile" facilities affect competition and consumer choice; access to wireless spectrum and potential problems regarding the lack of mandated device interoperability across the 700 MHz zone; and the impact of proposed reforms of utility pole attachment regulations on cable broadband providers. The FCC has not acted on many of the items discussed in Advocacy's comments yet; however, the FCC did finalize its pole attachment regulations, making it easier for small telecommunications and cable companies to secure access to utility poles. The FCC is still navigating device interoperability issues, copper retirement, and special access issues.

Federal Reserve Board

Issue: Regulation Z Closed End Credit. On September 24, 2010, the Federal Reserve Board (the Board) finalized a rule amending Regulation Z, which implements the Truth in Lending Act. In the final rule, the Board adopted an alternative that permits loan originator compensation to be based on loan amount. In addition, the final rule does not apply to open-end credit or timeshare plans and does not extend the record retention requirement to persons other than the creditor who pays loan originator compensation.

After the rule was finalized, Advocacy met with small entities, including brokers in New England, and learned that the small entities did not understand the requirements of the rule. Subsequently, Advocacy learned that the Board had not published a compliance guide as required by Section 212(a)(3) of the Small Business Regulatory Enforcement Fairness Act, which states that the guide is to be published on the same date as the date of publication of the final rule or as soon as possible after that date and not later than the date on which the requirements of the rule become effective. Advocacy submitted a letter dated January 13, 2011, inquiring into the lack of a compliance guide for this rule and requested a delay in the rule's implementation since a guide was not available. The Board issued a three-page guide approximately a week later. After the guide was issued, Advocacy received comments from small entities that the guide did not provide the information needed to answer their questions. Advocacy sent a follow-up letter on February 1, stating that the guide did not meet the requirement that a guide include a description of actions needed to meet the requirements of a rule, to enable a small entity to know when such requirements are met. The Board held a webinar on compliance in March 2011.

Issue: Regulation Z: Truth in Lending Pertaining to Mortgage Disclosures. On December 23, 2010, Advocacy submitted comments on

the Board's proposed regulation on Regulation Z; Docket No R-1390 Truth in Lending. The proposed regulations would revise and enhance disclosure requirements of Regulation Z for transactions secured by a consumer's principal dwelling, and the consumer's right to rescind open- and closed-end loans. The proposal would also revise the rules for determining whether a closed-end mortgage is a higher-priced mortgage loan subject to special consumer protections, to ensure that prime loans are not incorrectly classified as higher-priced loans, mandate reverse mortgage counseling, and prohibit reverse mortgage cross-selling.

In the RFA section of the proposal, the Board acknowledged that the proposed rule would have a significant economic impact on a substantial number of small entities and prepared an IRFA. However, the Board stated that the economic impact of the proposal was unknown. Advocacy expressed concern about this proposal going forward when so little is known about its potential costs, at a time when other major changes for the industry are on the horizon. The burdensome changes may lead to small entities leaving the mortgage industry, which could in turn have negative impacts on the availability of mortgages, competition, and the consumer. Advocacy encouraged the Board to postpone the rulemaking until the upcoming changes to the Real Estate Settlement Procedures Act (RESPA)-Truth in Lending Act (TILA) rulemaking are completed. Advocacy asserted that over the past few years, the mortgage industry has been inundated with changes to TILA, RESPA, and other mortgage-related laws. Dodd-Frank requires the new Consumer Financial Protection Bureau to review RESPA-TILA. Postponing this rulemaking until after the upcoming RESPA-TILA proposals would allow an opportunity to fully analyze the impact of this proposal in light of the changes to the industry.

On February 1, 2011, the Federal Reserve issued a press release stating that it was not planning to finalize three pending rulemakings under Regulation Z, which implements TILA, prior to the transfer of authority for such rulemakings to the Consumer Financial Protection Bureau.

Issue: Regulation Z: Truth in Lending to Implement the Credit Card Accountability and Responsibility Act. On December 23, 2010, Advocacy submitted comments on the Board's proposed regulation on Regulation Z; Docket No R-1393 Truth in Lending. The purpose of the proposed rule was to amend the provisions that apply to open-end credit plans so as to implement provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009. The proposal clarified specific portions of the rule and staff commentary that the Board finalized on February 22, 2010, and June 15, 2010, which dealt with issues such as TILA disclosures for credit cards, the reasonableness of penalties and fees, rate increases, over–the-limit increases, and student credit cards.

In the RFA section of the proposal, the Board simply stated that it had performed an RFA analysis in the previous rulemakings. Advocacy stated that by relying on the previous rulemakings, the Board was not considering changes to the industry over the last two years. The RFA requires agencies to show that they at least did some comparison between the conditions of the previous rulemakings and the conditions of the proposal, in order to show that a good faith effort was made to comply with the law. Advocacy encouraged the Board to comply with the requirements of the RFA by performing the necessary analysis, including a discussion of alternatives to this action which will minimize the impact on small entities.

Issue: Regulation Z Escrow Accounts. On May 2, 2011, Advocacy submitted comments on the Board's proposed rulemaking on Regulation Z; Docket No. R-1406 Truth in Lending. The proposal implements amendments to TILA made by the Dodd-Frank Wall Street Reform and Consumer Protection Act. Regulation Z currently

requires creditors to establish escrow accounts for higher-priced mortgage loans secured by a first lien on a dwelling. The proposed rule will lengthen the time for which these mandatory escrow accounts must be maintained. In addition, the rule proposes disclosure requirements regarding escrow accounts and exempts certain loans from the escrow requirements.

The Board prepared an IRFA for the proposed rule. In the IRFA, the Board acknowledged that escrow accounts are burdensome but asked commenters to provide further detail. Advocacy expressed concern that the Board may be shifting its burden to provide information about the potential economic impact of the rulemaking onto the small entities that may need to comply.

Advocacy was also concerned about the narrow scope of the exemption that applies only to creditors who make most of their first-lien higher-priced mortgage loans in counties designated by the Board as rural or underserved. In addition, these creditors, together with their affiliates, may originate and service only 100 or fewer first-lien mortgage loans, and together with affiliates may not escrow for any mortgage loan they service. Advocacy asserted that the requirements would be difficult for small entities to meet.

The proposal also requires two new disclosures relating to escrow accounts. The first disclosure would be required three business days before consummation of a mortgage transaction for which an escrow account will be established. The second disclosure would be given when a mortgage transaction is entered into without an escrow account or when an escrow account on an existing mortgage loan will be cancelled. Advocacy recommended that any changes to disclosures be postponed until the issue is transferred to the Consumer Financial Protection Bureau.

Issue: Electronic Funds Transfer Proposal. On July 22, 2011, Advocacy submitted a comment letter on the Board's proposed rulemaking on Regulation E; Docket No. R-1419 Electronic Fund Transfers. The proposal implements the Dodd-Frank Wall Street Reform and Consumer Protection Act remittance transfer provisions. It contains new protections for consumers who send remittance transfers to designated recipients in a foreign country by providing consumers with disclosures and error resolution rights. The disclosures must be in English and in each of the foreign languages principally used by the remittance provider to solicit, advertise, or market transfer services at a particular office. Providers must also investigate errors and correct them within 90 days of notice of the error. The proposed rule will affect money transmitters and financial institutions.

The Board prepared an IRFA for the proposed rule as it applies to money transmitters. Although the Board took some steps to reduce the regulatory burden on providers in general, Advocacy expressed concern about the lack of information about compliance costs and the Board's failure to discuss alternatives. The Board certified that the proposed rule would not have a significant economic impact on a substantial number of small financial institutions.

Advocacy expressed concern about the confusing nature of the certification and questioned whether the certification was appropriate. Since the proposal would be transferred to the Consumer Financial Protection Board for finalization, Advocacy recommended that the CFPB withdraw the proposal so that a small business advocacy review panel could be convened to allow the CFPB to present alternatives to small entity representatives and obtain valuable insight from the industry and ways to reduce the economic burden of this rulemaking. Alternatively, Advocacy encouraged the CFPB to perform small entity outreach to obtain information so that it can publish a meaningful supplemental IRFA on the economic impact on all entities that would be affected by the proposal and on viable alternatives before going forward with the final rule.

Financial Accounting Standards Board

Issue: Revenue from Contracts with Customers. On June 24, 2010, the Financial Accounting Standards Board (FASB) issued an exposure draft of a proposed Accounting Standards Update of Topic 605. On October 20, 2010, Advocacy staff participated in a conference call with FASB staff responsible for drafting the exposure draft. During the call, Advocacy conveyed to FASB staff the various concerns of small businesses that the exposure draft, if finalized, would have a negative impact on small businesses. FASB assured Advocacy that the process to finalize the exposure draft would be open and transparent to the public, and that FASB would take into account the concerns of small businesses during this process. On October 28, 2010, Advocacy submitted a comment letter commending FASB for participating in the conference call. Advocacy looks forward to working with FASB during this process to minimize the burdens of the exposure draft on small businesses.

Small Business Administration

Issue: Increase in the Size Standards in the North American Industry Classification System for Sectors 54 and 81. On May 12, 2011, Advocacy sent a formal comment letter to the Small Business Administration (SBA) requesting that the SBA give consideration to an extension of time for the public to respond to proposed changes in business size standards. The proposed changes would have affected 35 industries and one subindustry in the North American Industry Classification System (NAICS) Sectors 54, professional, scientific and technical services, and 81, other services. In response to Advocacy's letter, the SBA formally extended the comment period for 30 days.

On June 14, 2011, Advocacy submitted a second comment letter to SBA with three recommendations. In the area of architecture and engineering (A&E) services, Advocacy recommended that SBA consider a size standard for A&E small businesses that would be smaller than the proposed $19 million but would allow for some growth for these firms in the federal marketplace. In the area of mapping services it was recommended that SBA consider more contemporary data sources that reflect the current characteristics of the industry. In the area of accounting, Advocacy recommended that SBA reconsider the methodology used to determine the size standard and that it give consideration to a methodology proposed by the American Institute of Certified Public Accountants.

Compliance with E.O. 13272 and the Small Business Jobs Act

E.O. 13272 requires agencies to take three specific actions to further compliance with the Regulatory Flexibility Act (see Table 3.2 for details about agency compliance). Each agency shall:

- "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" (Section 3(a)).
- "[n]otify Advocacy of any draft rules that may have a significant economic impact on a substantial number of small entities under the Act" (Section 3(b)).
- "[g]ive every appropriate consideration to any comments provided by Advocacy regarding a draft rule" (Section 3(c)).

The Small Business Jobs Act of 2010 strengthened the requirement of section 3(c) by requiring agencies to include in their final

regulatory flexibility analysis "the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;..."

Conclusion

In FY 2011, Advocacy observed continued improvement in federal agencies with respect to their RFA and E.O. 13272 compliance. The challenges of working with stakeholders and federal agencies to ensure that federal regulations do not unfairly burden small businesses continue. Nevertheless, Advocacy's training has helped many agencies see that the analytical process mandated by the RFA produces better and more informed regulatory decisions. The Office of Advocacy will continue working with federal agencies to ensure that they fulfill their obligations under the RFA, while meeting their regulatory goals.

Table 3.2 Agency Compliance with the Small Business Jobs Act of 2010 and E.O. 13272, FY 2011

Department*	Written Procedures	Notify Advocacy	Response to Comments	Remarks
Agriculture	√	√	#	
Commerce	√	√	-	
Defense	√	√	√	
DOEd	√	√	√	
Energy	√	√	-	
GSA	√	√	√	
HHS	√	X	X	In general, with the exception of FDA, divisions within HHS do not notify Advocacy of draft rules and infrequently give Advocacy appropriate consideration in comments.
DHS	√	√	-	
HUD	√	√	-	
Interior	√	X	X	The Fish and Wildlife Service does not notify Advocacy of rules that will have a significant impact on small entities (3)(b)) and consistently fails to respond adequately to Advocacy's comments (3(c)).
Justice	√	√	√	
Labor OSHA/ MSHA	√	√	√	

* See Appendix F for definitions of agency abbreviations.
√ The agency is in compliance with the requirement.
X The agency is not in compliance with the requirement.
- Not applicable in FY 2011.
Advocacy cannot evaluate compliance since the agency did not publish any final rules upon which Advocacy commented.
† The agency did not comply, but as an independent regulatory agency, it is not subject to the E.O. requiring written procedures.

Department*	Written Procedures	Notify Advocacy	Response to Comments	Remarks
State	X	-	-	State is required to publish its written procedures on its website but does not do so.
Transportation	√	√	√	
Treasury	√	√	-	
Veterans Affairs	√	√	-	
Other Agencies				
CPSC	√	√	√	
EPA	√	√	√	
EEOC	√	-	-	
FAR Council	√	√	√	
FCC	†	√	-	
Federal Reserve	†	√	√	
NLRB	†	-	-	
SEC	†	√	-	
SBA	√	√	√	

* See Appendix F for definitions of agency abbreviations.
√ The agency is in compliance with the requirement.
X The agency is not in compliance with the requirement.
- Not applicable in FY 2011.
Advocacy cannot evaluate compliance since the agency did not publish any final rules upon which Advocacy commented.
† The agency did not comply, but as an independent regulatory agency, it is not subject to the E.O. requiring written procedures.

Appendix A Supplementary Tables

Table A.1 Federal Agencies Trained in RFA Compliance, 2003-2011

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
- Centers for Disease Control and Prevention
- Centers 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
- Bureau of Ocean Energy Management, Regulation and Enforcement (formerly Minerals Management Service) Fish and Wildlife 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 State

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
- Pipeline and Hazardous Materials 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

Office of Management and Budget
- Office of Federal Procurement Policy

Independent Federal Agencies
- Access Board
- Consumer Financial Protection Bureau
- 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 RFA Related Case Law, FY 2011

National Association of Mortgage Brokers v. Board of Governors of the Federal Reserve System

773 F.Supp.2d 151 (D.D.C. 2011)

The National Association of Independent Housing Professionals, Inc. (NAIHP) and the National Association of Mortgage Brokers (NAMB) "requested the Court to issue a temporary restraining order and preliminary injunction to enjoin the Board of Governors of the Federal Reserve System [the Board] from implementing a final rule that restricts certain compensation practices of loan originators relating to mortgage loans [the rule]." Among other claims, the plaintiffs argued that the Board failed to comply with the RFA because they "[1] failed to provide a statement of need for or objectives of the rule; [2] failed to meaningfully analyze the rule's impact on small businesses; [3] failed to respond to public comments; and [4] failed to analyze alternatives to the proposed regulation."

The court disagreed, finding that the final regulatory flexibility analysis (FRFA) [1] stated that the rule "'address[es] problems that have been observed in the mortgage market' in order 'to prohibit unfair and deceptive acts and practices in connection with mortgage loans;'" [2] recognized the rule would have a "'significant economic impact on a substantial number of small entities' but the 'precise compliance costs would be difficult to ascertain;'" [3] discussed and rejected proposals from public comments "to further increase disclosure for mortgage brokers and another regarding exemptions;" and [4] did not need to address each portion of the rule challenged in the comments because it "addressed the effects of all of the Rule's prohibitions regarding loan originator compensation collectively, and this satisfies the Board's obligations under 5 U.S.C. § 604(a)."

In making its ruling the court reiterated that the RFA's "requirements are 'purely procedural' [and] though it directs agencies to state, summarize, and describe, the Act in and of itself imposes no substantive constraints on agency decisionmaking."[1] Moreover, the agency "needn't present its FRFA in any 'particular mode of presentation,' as long as the FRFA 'compiles a meaningful, easily understood analysis that covers each requisite component dictated by the statute and makes the end product—whatever form it reasonably may take—readily available to the public.'"[2]

Finally, the court noted that failure to comply with the RFA "may be, but does not have to be, grounds for overturning a rule."[3] Additionally, while making a Section 604 challenge, parties may raise the "related but distinct claim" that an agency did not reasonably address the rule's impact on small businesses and such challenges are evaluated under the arbitrary and capricious standard of review.[4]

[1] Citing Nat'l Tel. Co-op. Ass'n v. FCC, 563 F.3d 536, 540 (D.C. Cir. 2009).
[2] Citing Nat'l Ass'n of Psychiatric Health Systems v. Shalala, 120 F. Supp. 2d 33, 42 (D.D.C. 2000).
[3] Citing Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 538 (D.C. Cir. 1983).
[4] Citing Nat'l Tel. Co-op. Ass'n, 563 F.3d at 40; see also Nat'l Coal. For Marine Conservation v. Evans, 231 F. Supp. 2d 119, 142 (D.D.C. 2002).

Table A.3 SBAR Panels through Fiscal Year 2011

Rule*	Date Convened	Date Completed	NPRM	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[1]	06/06/97	08/08/97	12/17/97	
Stormwater Phase II	06/19/97	08/07/97	01/09/98	12/08/99
Transportation Equipment Cleaning Effluent Guidelines	07/16/97	09/23/97	06/25/98	08/14/00
Centralized Waste Treatment Effluent Guideline	11/06/97	01/23/98	09/10/03 01/13/99	12/22/00
UIC 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
FIP for Regional NOx 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
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
LDV/LDT Emissions and Sulfur in Gas	08/27/98	10/26/98	05/13/99	02/10/00
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	

*See Appendix F for abbreviations.
NPRM= notice of proposed rulemaking
[1] Proposed rule withdrawn August 18, 1999; EPA does not plan to issue a final rule.
[2] Proposed rule withdrawn April 26, 2004, EPA does not plan to issue a final rule.
[3]EPA has ceased action on this panel.
[4] Proposed rule withdrawn December 31, 2003, OSHA does not plan to issue a final rule.

Rule*	Date Convened	Date Completed	NPRM	Final rule Published
Metals Products and Machinery	12/09/99	03/03/00	01/03/01	05/13/03
Concentrated Animal Feedlots	12/16/99	04/07/00	01/12/01	02/12/03
Reinforced Plastics Composites	04/06/00	06/02/00	08/02/01	04/21/03
Stage 2 Disinfectant Byproducts Long Term 2 Enhanced Surface Water Treatment	04/25/00	06/23/00	08/11/03 08/18/03	01/04/06 01/05/06
Construction and Development Effluent Limitations Guidelines[2]	07/16/01	10/12/01	06/24/02	
Nonroad Large SI Engines, Recreation Land Engines, Recreation Marine Gas Tanks and Highway Motorcycles	05/03/01	07/17/01	10/05/01 08/14/02	11/08/02
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 Engines - Tier IV	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 CAIR Rule)	04/27/05	06/27/05	08/24/05	04/28/06
FIP for Regional Nox/So2 (2005 CAIR Rule)	04/27/05	06/27/05	08/24/05	04/28/06
Mobile Source Air Toxics	09/07/05	11/08/05	03/29/06	02/26/07
Non-Road Spark-Ignition Engines/ Equipment	08/17/06	10/17/06	05/18/07	10/08/08
Total Coliform Monitoring (TCR Rule)	01/31/08	01/31/08	07/14/10	
Renewable Fuel Standards 2 (RFS2)	07/09/08	09/05/08	05/26/09	03/26/10

*See Appendix F for abbreviations.
NPRM= notice of proposed rulemaking
[1] Proposed rule withdrawn August 18, 1999; EPA does not plan to issue a final rule.
[2] Proposed rule withdrawn April 26, 2004, EPA does not plan to issue a final rule.
[3]EPA has ceased action on this panel.
[4] Proposed rule withdrawn December 31, 2003, OSHA does not plan to issue a final rule.

Rule*	Date Convened	Date Completed	NPRM	Final rule Published
Revision of New Source Performance Standards for New Residential Wood Heaters	08/04/10	10/26/11		
National Emission Standards for Hazardous Air Pollutants for Coal- and Oil-fired Electric Utility Steam Generating Units	10/27/10	03/02/11		
Stormwater Regulations Revision to Address Discharges from Developed Sites	12/06/10	10/04/11		
Formaldehyde Emissions from Pressed Wood Products	02/03/11	04/04/11		
National Emission Standards for Hazardous Air Pollutants (NESHAP) Risk and Technology Review (RTR) for the Mineral Wool and Wool Fiberglass Industries	06/02/11	10/26/11		
Greenhouse Gas Emissions from Electric Utility Steam Generating Units[3]	06/09/11			
Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards	08/04/11	10/14/11		
Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards	08/04/11			
Occupational Safety and Health Administration				
Tuberculosis[4]	09/10/96	11/12/96	10/17/97	
Safety and Health Program Rule	10/20/98	12/19/98		
Ergonomics Program Standard	03/02/99	04/30/99	11/23/99	11/14/00
Confined Spaces in Construction	09/26/03	11/24/03	11/28/07	

*See Appendix F for abbreviations.
NPRM= notice of proposed rulemaking
[1] Proposed rule withdrawn August 18, 1999; EPA does not plan to issue a final rule.
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[3]EPA has ceased action on this panel.
[4] Proposed rule withdrawn December 31, 2003, OSHA does not plan to issue a final rule.

Rule*	Date Convened	Date Completed	NPRM	Final rule Published
Electric Power Generation, Transmission, and Distribution	04/01/03	06/30/03	06/15/05	
Occupational Exposure to Crystalline Silica	10/20/03	12/19/03		
Occupational Exposure to Hexavalent Chromium	01/30/04	04/20/04	10/04/04	02/28/06
Cranes and Derricks in Construction	08/18/06	10/17/06	10/09/08	08/09/10
Occupational Exposure to Beryllium	09/17/07	01/15/08		
Occupational Exposure to Diacetyl and Food Flavorings Containing Diacetyl	05/05/09	07/02/09		

*See Appendix F for abbreviations.
NPRM= notice of proposed rulemaking
[1] Proposed rule withdrawn August 18, 1999; EPA does not plan to issue a final rule.
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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), the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203), and the Small Business Jobs Act of 2010 (P.L. 111-240).

Congressional Findings and Declaration of Purpose

(a) The Congress finds and declares that —

(1) when adopting regulations to protect the health, safety and economic welfare of the Nation, Federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public;

(2) laws and regulations designed for application to large scale entities have been applied uniformly to small businesses, small organizations, and small governmental jurisdictions even though the problems that gave rise to government action may not have been caused by those smaller entities;

(3) uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources;

(4) the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;

(5) unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;

(6) the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation;

(7) alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes may be available which minimize the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions;

(8) the process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions to examine the impact of proposed and existing rules on such entities, and to review the continued need for existing rules.

(b) It is the purpose of this Act [enacting this chapter and provisions set out as notes under this section] to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve

this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

Regulatory Flexibility Act

§ 601. Definitions

For purposes of this chapter —

(1) the term "agency" means an agency as defined in section 551(1) of this title;

(2) the term "rule" means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law, including any rule of general applicability governing Federal grants to State and local governments for which the agency provides an opportunity for notice and public comment, except that the term "rule" does not include a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances;

(3) the term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the *Federal Register*;

(4) the term "small organization" means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the *Federal Register*;

(5) the term "small governmental jurisdiction" means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the *Federal Register*;

(6) the term "small entity" shall have the same meaning as the terms "small business," "small organization" and "small governmental jurisdiction" defined in paragraphs (3), (4) and (5) of this section; and

(7) the term "collection of information" —

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

(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, 10 or more

persons, other than agencies, instrumentalities, or employees of the United States; or

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

(B) shall not include a collection of information described under section 3518(c)(1) of title 44, United States Code.

(8) Recordkeeping requirement — The term "recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified records.

§ 602. Regulatory agenda

(a) During the months of October and April of each year, each agency shall publish in the *Federal Register* a regulatory flexibility agenda which shall contain —

(1) a brief description of the subject area of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities;

(2) a summary of the nature of any such rule under consideration for each subject area listed in the agenda pursuant to paragraph (1), the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking, and

(3) the name and telephone number of an agency official knowledgeable concerning the items listed in paragraph (1).

(b) Each regulatory flexibility agenda shall be transmitted to the Chief Counsel for Advocacy of the Small Business Administration for comment, if any.

(c) Each agency shall endeavor to provide notice of each regulatory flexibility agenda to small entities or their representatives through direct notification or publication of the agenda in publications likely to be obtained by such small entities and shall invite comments upon each subject area on the agenda.

(d) Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda.

§ 603. Initial regulatory flexibility analysis

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the *Federal Register* at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration. In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules published in the *Federal Register* for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement.

(b) Each initial regulatory flexibility analysis required under this section shall contain —

(1) a description of the reasons why action by the agency is being considered;

(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

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

(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as —

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) the use of performance rather than design standards; and

(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

(d) (1) For a covered agency, as defined in section 609(d)(2), each initial regulatory flexibility analysis shall include a description of—

(A) any projected increase in the cost of credit for small entities;

(B) any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any increase in the cost of credit for small entities; and

(C) advice and recommendations of representatives of small entities relating to issues described in subparagraphs (A) and (B) and subsection (b).

(2) A covered agency, as defined in section 609(d)(2), shall, for purposes of complying with paragraph (1)(C)—

(A) identify representatives of small entities in consultation with the Chief Counsel for Advocacy of the Small Business Administration; and

(B) collect advice and recommendations from the representatives identified under subparagraph (A) relating to issues described in subparagraphs (A) and (B) of paragraph (1) and subsection (b).

§ 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 statement of the need for, and objectives of, the rule;

(2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement 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) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;

(4) 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;

(5) 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;

(6)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;

(6)[1] for a covered agency, as defined in section 609(d)(2), a description of the steps the agency has taken to minimize any additional cost of credit for small entities.

(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

1 So in .original. Two paragraphs (6) were enacted.

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 advance 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

(1) the Environmental Protection Agency,

(2) the Consumer Financial Protection Bureau of the Federal Reserve System, and

(3) 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.

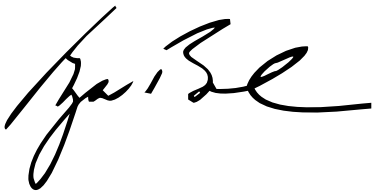
Sec. 4. *Definitions.* Terms defined in section 601 of title 5, United States Code, including the term ''agency,'' shall have the same meaning in this order.

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
Executive Order 13653 and Memorandum

Federal Register
Vol. 76, No. 14
Friday, January 21, 2011

Presidential Documents

Title 3—

The President

Executive Order 13563 of January 18, 2011

Improving Regulation and Regulatory Review

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to improve regulation and regulatory review, it is hereby ordered as follows:

Section 1. *General Principles of Regulation.* (a) Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements.

(b) This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993. As stated in that Executive Order and to the extent permitted by law, each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(c) In applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Sec. 2. *Public Participation.* (a) Regulations shall be adopted through a process that involves public participation. To that end, regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.

(b) To promote that open exchange, each agency, consistent with Executive Order 12866 and other applicable legal requirements, shall endeavor to provide the public with an opportunity to participate in the regulatory process. To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally

be at least 60 days. To the extent feasible and permitted by law, each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.

(c) Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.

Sec. 3. *Integration and Innovation.* Some sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. Greater coordination across agencies could reduce these requirements, thus reducing costs and simplifying and harmonizing rules. In developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote such coordination, simplification, and harmonization. Each agency shall also seek to identify, as appropriate, means to achieve regulatory goals that are designed to promote innovation.

Sec. 4. *Flexible Approaches.* Where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible.

Sec. 5. *Science.* Consistent with the President's Memorandum for the Heads of Executive Departments and Agencies, "Scientific Integrity" (March 9, 2009), and its implementing guidance, each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions.

Sec. 6. *Retrospective Analyses of Existing Rules.* (a) To facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible.

(b) Within 120 days of the date of this order, each agency shall develop and submit to the Office of Information and Regulatory Affairs a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.

Sec. 7. *General Provisions.* (a) For purposes of this order, "agency" shall have the meaning set forth in section 3(b) of Executive Order 12866.

(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department or agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
January 18, 2011.

[FR Doc. 2011–1385
Filed 1–20–11; 8:45 am]
Billing code 3195–W1–P

Presidential Documents

Memorandum of January 18, 2011

Regulatory Flexibility, Small Business, and Job Creation

Memorandum for the Heads of Executive Departments and Agencies

Small businesses play an essential role in the American economy; they help to fuel productivity, economic growth, and job creation. More than half of all Americans working in the private sector either are employed by a small business or own one. During a recent 15-year period, small businesses created more than 60 percent of all new jobs in the Nation.

Although small businesses and new companies provide the foundations for economic growth and job creation, they have faced severe challenges as a result of the recession. One consequence has been the loss of significant numbers of jobs.

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, establishes a deep national commitment to achieving statutory goals without imposing unnecessary burdens on the public. The RFA emphasizes the importance of recognizing "differences in the scale and resources of regulated entities" and of considering "alternative regulatory approaches . . . which minimize the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions." 5 U.S.C. 601 note.

To promote its central goals, the RFA imposes a series of requirements designed to ensure that agencies produce regulatory flexibility analyses that give careful consideration to the effects of their regulations on small businesses and explore significant alternatives in order to minimize any significant economic impact on small businesses. Among other things, the RFA requires that when an agency proposing a rule with such impact is required to provide notice of the proposed rule, it must also produce an initial regulatory flexibility analysis that includes discussion of significant alternatives. Significant alternatives include the use of performance rather than design standards; simplification of compliance and reporting requirements for small businesses; establishment of different timetables that take into account the resources of small businesses; and exemption from coverage for small businesses.

Consistent with the goal of open government, the RFA also encourages public participation in and transparency about the rulemaking process. Among other things, the statute requires agencies proposing rules with a significant economic impact on small businesses to provide an opportunity for public comment on any required initial regulatory flexibility analysis, and generally requires agencies promulgating final rules with such significant economic impact to respond, in a final regulatory flexibility analysis, to comments filed by the Chief Counsel for Advocacy of the Small Business Administration.

My Administration is firmly committed to eliminating excessive and unjustified burdens on small businesses, and to ensuring that regulations are designed with careful consideration of their effects, including their cumulative effects, on small businesses. Executive Order 12866 of September 30, 1993, as amended, states, "Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account,

among other things, and to the extent practicable, the costs of cumulative regulations."

In the current economic environment, it is especially important for agencies to design regulations in a cost-effective manner consistent with the goals of promoting economic growth, innovation, competitiveness, and job creation.

Accordingly, I hereby direct executive departments and agencies and request independent agencies, when initiating rulemaking that will have a significant economic impact on a substantial number of small entities, to give serious consideration to whether and how it is appropriate, consistent with law and regulatory objectives, to reduce regulatory burdens on small businesses, through increased flexibility. As the RFA recognizes, such flexibility may take many forms, including:

- extended compliance dates that take into account the resources available to small entities;
- performance standards rather than design standards;
- simplification of reporting and compliance requirements (as, for example, through streamlined forms and electronic filing options);
- different requirements for large and small firms; and
- partial or total exemptions.

I further direct that whenever an executive agency chooses, for reasons other than legal limitations, not to provide such flexibility in a proposed or final rule that is likely to have a significant economic impact on a substantial number of small entities, it should explicitly justify its decision not to do so in the explanation that accompanies that proposed or final rule.

Adherence to these requirements is designed to ensure that regulatory actions do not place unjustified economic burdens on small business owners and other small entities. If regulations are preceded by careful analysis, and subjected to public comment, they are less likely to be based on intuition and guesswork and more likely to be justified in light of a clear understanding of the likely consequences of alternative courses of action. With that understanding, agencies will be in a better position to protect the public while avoiding excessive costs and paperwork.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Nothing in this memorandum shall be construed to impair or otherwise affect the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the *Federal Register*.

THE WHITE HOUSE,
Washington, January 18, 2011

[FR Doc. 2011–1387
Filed 1–20–11; 8:45 am]
Billing code 3110–01–P

Appendix E
Executive Order 13579

Federal Register
Vol. 76, No. 135
Thursday, July 14, 2011

Presidential Documents

Title 3—

The President

Executive Order 13579 of July 11, 2011

Regulation and Independent Regulatory Agencies

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to improve regulation and regulatory review, it is hereby ordered as follows:

Section 1. *Policy.* (a) Wise regulatory decisions depend on public participation and on careful analysis of the likely consequences of regulation. Such decisions are informed and improved by allowing interested members of the public to have a meaningful opportunity to participate in rulemaking. To the extent permitted by law, such decisions should be made only after consideration of their costs and benefits (both quantitative and qualitative).

(b) Executive Order 13563 of January 18, 2011, ''Improving Regulation and Regulatory Review,'' directed to executive agencies, was meant to produce a regulatory system that protects ''public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.'' Independent regulatory agencies, no less than executive agencies, should promote that goal.

(c) Executive Order 13563 set out general requirements directed to executive agencies concerning public participation, integration and innovation, flexible approaches, and science. To the extent permitted by law, independent regulatory agencies should comply with these provisions as well.

Sec. 2. *Retrospective Analyses of Existing Rules.* (a) To facilitate the periodic review of existing significant regulations, independent regulatory agencies should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data and evaluations, should be released online whenever possible.

(b) Within 120 days of the date of this order, each independent regulatory agency should develop and release to the public a plan, consistent with law and reflecting its resources and regulatory priorities and processes, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.

Sec. 3. *General Provisions.* (a) For purposes of this order, ''executive agency'' shall have the meaning set forth for the term ''agency'' in section 3(b) of Executive Order 12866 of September 30, 1993, and ''independent regulatory agency'' shall have the meaning set forth in 44 U.S.C. 3502(5).

(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department or agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
July 11, 2011.

[FR Doc. 2011–17953
Filed 7–13–11; 11:15 am]
Billing code 3195–W1–P

Appendix F Abbreviations

ACA	Affordable Care Act
ADA	Americans with Disabilities Act
ADAAG	Americans with Disabilities Act Accessibility Guidelines
A&E	architecture and engineering
ANPRM	advance notice of proposed rulemaking
BOEMRE	Bureau of Energy Management, Regulation, and Enforcement (formerly MMS)
CAIR	clean air interstate rule
CCR	coal combustion residuals
C&D	construction and development
CFPB	Consumer Financial Protection Bureau
CISWI	Commercial and Industrial Solid Waste Incineration (rule)
CMS	Centers for Medicare and Medicaid Services
CPSC	Consumer Product Safety Commission
DHS	Department of Homeland Security
DOE	Department of Energy
DOEd	Department of Education
DOI	Department of the Interior
DOJ	Department of Justice
DOL	Department of Labor
EBSA	Employee Benefits Security Administration
EEOC	Equal Employment Opportunity Commission
EGU	electric utility generating units
E.O.	Executive Order
EPA	Environmental Protection Agency
EPCA	Energy Policy and Conservation Act
FAA	Federal Aviation Administration
FAR	Federal Acquisition Regulation
FASB	Financial Accounting Standards Board
FCC	Federal Communications Commission
FDA	Food and Drug Administration
FIP	federal implementation plan
FMCSA	Federal Motor Carrier Safety Administration
FRB	Federal Reserve Board
FRFA	final regulatory flexibility analysis
FWS	Fish and Wildlife Service
FY	fiscal year
GAO	Government Accountability Office
GHG	greenhouse gas
GSA	General Services Administration
HHA	home health agency

HHPPS	Home Health Prospective Payment System
HHS	Department of Health and Human Services
HOS	hours of service
HUD	Department of Housing and Urban Development
ICI	industrial, commercial, and institutional
IRFA	initial regulatory flexibility analysis
IRS	Internal Revenue Service
LCR	Lead and Copper Rule
LDV/LDT	light-duty vehicles / light-duty trucks
LRRP	Lead Renovation, Repair, and Painting Rule
MACT	maximum achievable control technology
MSD	musculo-skeletal disorders
MSHA	Mine Safety and Health Administration
NAICS	North American Industry Classification System
NAIHP	National Association of Housing Professionals
NAMB	National Association of Mortgage Brokers
NESHAP	National Environmental Standards for Hazardous Air Pollutants
NHSM	nonhazardous secondary materials
NLRB	National Labor Relations Board
NOAA	National Oceanic and Atmospheric Administration
NOx	nitrogen oxide
NPRM	notice of proposed rulemaking
NTL	notice to lessees and operators
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
P.L.	Public Law
PTIN	preparer tax identification number
RESPA	Real Estate Settlement Procedures Act
RFA	Regulatory Flexibility Act
RFS	renewable fuel standards
RIA	regulatory impact analysis
RTR	risk and technology review
SBA	Small Business Administration
SBAR	Small Business Advocacy Review Panel
SBJA	Small Business Jobs Act
SBREFA	Small Business Regulatory Enforcement Fairness Act
SEC	Securities and Exchange Commission
SER	small entity representative
SI	spark ignition
SMS	safety management system
SOx	sulphur oxide
SPCC	Spill Prevention Control and Countermeasures
State	Department of State
TCR	Total Coliform Monitoring

TILA	Truth in Lending Act
Treasury	Department of the Treasury
UIC	underground injection control
USACE	United States Army Corps of Engineers
U.S.C.	United States Code
USCIS	United States Citizenship and Immigration Service