REGULATING THE REGULATORS—REDUCING BURDENS ON SMALL BUSINESS

HEARING

BEFORE THE

SUBCOMMITTEE ON INVESTIGATIONS, OVERSIGHT AND REGULATIONS

OF THE

COMMITTEE ON SMALL BUSINESS
UNITED STATES
HOUSE OF REPRESENTATIVES

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REGULATING THE REGULATORS—REDUCING BURDENS ON SMALL BUSINESS

Thursday, March 14, 2013

HOUSE OF REPRESENTATIVES
COMMITTEE ON SMALL BUSINESS,
SUBCOMMITTEE ON INVESTIGATIONS, OVERSIGHT AND REGULATIONS
Washington, DC.

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 2360, Rayburn House Office Building. Hon. David Schweikert [chairman of the subcommittee] presiding.

Present: Representatives Schweikert, Bentivolio, Chabot, Clarke, and McLane Kuster.

Chairman SCHWEIKERT. Good morning. I want to welcome everyone to our Subcommittee. And Ranking Member Clarke, I look forward to this. I am learning lots of things. I had the opportunity to read everyone's testimony last night, and at today's hearing we are going to focus on the Regulatory Flexibility Act (RFA), analyze the impacts of these regulations and the mechanics and the advocacy you do for small business.

Once again, in much of the reading last night, there was the constant theme of the danger of a regulation that is maybe "one size fits all" and yet how radically different the sizes of our business organizations are across our country. There is one thing I am going to personally sort of keep as a theme and look for, is I found in much of this binder a lack of sort of data. Here is the flow. Here is how we actually make the decision.

Dr. Sargeant, as you give us your testimony and then we engage in some of the conversation, my understanding is you may have a few thousand rule sets that are ultimately floating across your desk. How do you triage that? How do you make a decision that these are the 40 or 50 that are most impactful? And in reality, you are not going to catch everything, but I am sort of curious of your methodology. And also suggestions from you and the rest of the witnesses on how we can make the process work even better. Remember, this is a law that has been around since the late Carter Administration. In that time set, the world has changed a lot. What do we do to continue to make this work for our small businesses out there?

Ranking Member?

Ms. CLARKE. Thank you, Mr. Chairman. And thank you for your indulgence this morning. When you are in the minority you wear multiple caps. I happen to also be a ranking member on Homeland Security, and we had a briefing this morning.

It is wonderful to be here and to have you here, Dr. Sargeant, to give us your perspective. (To the Chairman) I would like to

thank you for holding today's important hearing. Our nation's regulatory structure is absolutely vital in protecting the public. The fact is, without regulations our air would be less pure, our water unsafe to drink, and employee would potentially be subject to unsafe and hazardous working conditions. That said, most evidence points to a disproportional impact on small businesses with regards to regulatory compliance. Our small businesses and entrepreneurs simply do not have the economies of scale to mitigate the costs that large corporations do in this regard.

With that in mind, Congress passed the Regulatory Flexibility Act to ensure that the concerns of small firms were taken into account during the regulatory process. Past concerns regarding agency failure to initiate a regulatory flexibility analysis of a pending rule makes monitoring performance in this area critical. Agencies have certified that a proposed rule would not have a significant impact on small businesses when the exact opposite becomes evident after the fact. In some cases, analysis by the agencies have been lacking altogether; thus, limiting the effectiveness of the law and shortchanging America's entrepreneurs. For this act to maintain its legitimacy, it is vital that its processes and requirements be used appropriately to make regulations more targeted, efficient, and effective.

For small businesses, regulation can be a two-sided coin. While no entrepreneur wants to pay more or comply with unnecessary rules, effective regulation can prevent unfair practices that will benefit large companies at the expense of our small business community causing harm to the public interest. In that regard, our goal should not be the short-sighted removal of all regulations but rather make the process smarter, fairer, and one that protects the public good while minimizing the impact on our nation's small businesses.

Again, I thank you, Mr. Chairman. And I yield back.

Chairman SCHWEIKERT. Thank you. Doctor, I know you have testified before, but also for our future witnesses, mechanics are fairly simple. You know, five minutes, green light start, yellow light go faster, red light, an idiosyncrasy, and this will be for everyone, I am going to let you finish at least your thought. And with that, Dr. Sargeant, let me do a quick introduction for you.

Dr. Winslow Sargeant was appointed by President Obama and confirmed by the United States Senate as the sixth chief counsel advocate for the United States Small Business Administration. The Chief Counsel for Advocacy is charged with monitoring agency compliance with the Regulatory Flexibility Act and is required to annually report to Congress on his findings. Welcome. Your five minutes begins.

STATEMENT OF WINSLOW SARGEANT, PH.D., CHIEF COUNSEL FOR ADVOCACY, UNITED STATES SMALL BUSINESS ADMINISTRATION, WASHINGTON, D.C.

Mr. SARGEANT. Chairman Schweikert, Ranking Member Clarke, and Members of the Subcommittee, I am Dr. Winslow Sargeant, chief counsel for advocacy. Thank you for the invitation to appear before you today to discuss the important issue of agency compliance with the Regulatory Flexibility Act or RFA.

Congress created the Office of Advocacy in 1976 to be a voice for small business within the federal government. Advocacy's mission is to advance the views, concerns, and interests of small business before Congress, the White House, federal agencies, federal courts, and policymakers. We work with federal agencies in the rule-making process to implement the requirements of the RFA. Under the RFA, agencies must consider the effects of their proposed rules on small businesses. When an agency finds that a proposed rule may have a significant economic impact on a substantial number of small entities, the agency must consider significant alternatives that would minimize the burden on small entities while still achieving the original goal of the regulation.

Advocacy works with federal agencies in a number of ways to improve their RFA compliance and to ensure the concerns of small businesses are considered during the rulemaking process. Much of Advocacy's work with agencies is at the confidential preproposal stage when agencies are working through the regulatory development process. Advocacy continues to expand its stakeholder outreach by hearing directly from small firms and their representatives. This also gives agency rule writers a chance to hear particular small business concerns. In total, we have convened 84 roundtables since I became chief counsel.

Advocacy sends public comment letters that explain small business concerns about certain regulations and other proposals to agencies when warranted. As chief counsel, I have signed more than 90 public comment letters on a variety of topics. Three agencies are required to conduct a panel to gather comments from small entity representatives on a proposed regulation when it may have a significant economic impact on small businesses. They are EPA, OSHA, and now the CFPB. These panels include representatives from the rulemaking agency, OIRA and Advocacy. In the last two years, we have participated in a dozen Small Business Regulatory Enforcement Fairness Act (SBREFA) panels, including the first three panels ever by the CFPB.

Having generally explained how the Office of Advocacy works with agencies, I am pleased to report that agencies continued to improve their compliance with the RFA in fiscal year 2012. A detailed analysis of this compliance can be found in Advocacy's report on the Regulatory Flexibility Act fiscal year 2012 which I delivered to Congress last month. I ask that a copy of this report be submitted in its entirety into the record. Agency compliance with the RFA pays real dividends to America's small businesses. In fiscal year 2012, Advocacy's RFA work saved small businesses $2.4 billion in first year regulatory costs and another $1.2 billion in annually recurring costs.

The RFA and bipartisan efforts to enhance it have made this critical small business law more effective in reducing the regulatory burdens on small entities when regulations are still in the development stage. The willingness of agencies to attend the roundtables at Advocacy and hear directly from small businesses has been a welcome development resulting in improved agency compliance with the RFA. We have learned through our more than 30 years of experience with the RFA that regulations are more effective when small firms are part of the rulemaking process. The

result of enhanced agency cooperation with Advocacy and improved agency compliance with the RFA benefits small business, their regulatory environment, and the overall economy.

Finally, I was invited here to testify on agency compliance with the RFA. I understand testimony in the second panel contains numerous misrepresentations of my office. I would like to reserve the right to respond in detail in the record to these inaccurate allegations.

Thank you again for the opportunity to testify on the important work the Office of Advocacy does on behalf of small businesses. I would be happy to take any questions you might have.

Chairman SCHWEIKERT. Thank you, Doctor.

And do understand, when we finish up the hearing I believe these Committees have, what, five days for any additional written testimony. So if you hear something that you think needs more detailed explanation, please give it to us.

Doctor, you and I started a conversation as we were passing in, and first was the methodology of how you do your job. It is 2013. There is literally a few thousand rule sets out there in some type of promulgation. How do you decide what you are going to focus on?

Mr. SARGEANT. Well, Chairman Schweikert, there are a number of ways that the Office of Advocacy is engaged in making sure that the rules that are at the preproposal stage and also those that are being proposed that we are in touch to make sure that we are on top of all the right issues. We have a number of regional advocates who are out in the field who are in touch with small businesses. We hear their concerns. Under the RFA, when a rule will have a significant economic impact on a substantial number of small entities—now that is the determination by an agency themselves, not the Office of Advocacy—the agency must contact us to let us know that this rule is coming and they believe it is going to have a significant economic impact. So that is one way. They have to notify us that this rule is coming.

We also have a number of attorneys in the office that work directly with their counterparts at the agency, so they tell us what rules are coming. There is a regulatory agenda that is published, so we kind of see that is one input that we have as a roadmap of what is coming down the pike. So there are many ways that we are in touch.

Chairman SCHWEIKERT. In our time of doing this, and so you have a methodology where the agencies are telling you this is going to cost a certain amount and you are trying to track, have you had the experience where the feedback you are getting from outside advocacy groups are telling you dramatically different dollars, burden compared to what you are actually being told from the agency? And how do you split that sort of arbitrage? How do you make that decision? How do you triage that?

Mr. SARGEANT. Well, what we do, it is important for us to have firsthand contact with those who are going to be impacted by these rules. When a rule is proposed we will reach out. There are many ways that we will reach out to trade associations, to actual small businesses themselves to gauge from them how this rule will impact their business. And from that we may have a roundtable

where we will invite the agencies themselves to come and to share with us and with small business owners why this rule is necessary and how it will impact them.

Chairman SCHWEIKERT. Do you often run into the experience where the vision between sort of the small businesses or small business advocacy groups and what the agency is a chasm?

Mr. SARGEANT. Well, that is why I have signed more than 90 comment letters in terms of that there are times where what we are hearing from small business owners in terms of what the impact of those rules will be, and what we are hearing from those who are actually writing the rules, there is a disconnect. In our report, one of the main reasons we may write a comment letter is that we believe that there may be a certification that this rule will not have a significant economic impact, but what we are hearing is that it will. And so that is where the disconnect will be. So that is the feedback that we will give to the rule writers.

Chairman SCHWEIKERT. Doctor, do you believe your feedback is being respected by many of those regulatory agencies?

Mr. SARGEANT. Well, we generally have a good working relationship with agencies. They tend to do a good job. Under Executive Order 13272, that was signed by George W. Bush, agencies are required to respond to what we write. And so when we say in writing that we believe this rule will have this effect, they have to come back and just give some feedback.

Chairman SCHWEIKERT. Only two others. One may not be as quick as the other.

You have been working with the CFPB?

Mr. SARGEANT. Yes.

Chairman SCHWEIKERT. Wide swath regulatory authority from the community lender to the community bank. First, how has that relationship been for you, your organization? Do you feel you are getting input? But also seeing how they are a new regulatory organization, do you see the discipline being built for them to actually take your feedback and understand and listen?

Mr. SARGEANT. We have a good relationship with CFPB. And I guess one of the benefits of a new agency is that we can help to train them. And so what we did when the agency was formed under Dodd-Frank, and as you know under Dodd-Frank they are now one of the three covered agencies that must conduct panels. And so what we did, even before they started to write rules, we would invite folks from CFPB to come over to the Office of Advocacy so we can walk them through what the RFA is, how to conduct a panel, what are some of the best practices. And so far there have been three panels. And we work with them on who they should invite. Of course, it is up to the agencies themselves in terms of who will be invited to the panel, but we do have a say as one of three heads that will be part of the panel. And so out of the three panels, the feedback that I have gotten from small businesses, they are pleased that their input has been taken seriously.

Chairman SCHWEIKERT. Okay, Doctor. And the last one, and this is sort of, and for the panel as we go through this year, it sort of becomes a universal question I would like to ask, and it may be from the statute you operate under or the rule sets you have built for yourselves, what works? What does not work? If you could walk

in right now and say "I wish this was changed in my statute that would make us more effective," what would you change?

Mr. SARGEANT. Well, the RFA has been around for more than 30 years, and we feel that it has worked well. But of course, there are always ways that one could tweak it to actually make it more effective. And so under my legislative priorities I have submitted three recommendations to strengthen the RFA. One is dealing with the SBREFA panel process. What we see under 609(b) is that when I am notified that a panel will take place there is a 15-day gap that a panel can actually start. What we are saying is that for the SERs or for those who are going to be part of the panel, they need to have the data so they can contribute. It does not make sense to have a panel and then those who are at the table are not able to see the data and see why this rule is being crafted. So we believe that by having a gap of say, maybe, 60 days, then the agency will have more time to make sure that the data gets out to those that will be on the panel. So that is one.

Two, under the RFA Section 610, every year agencies are required to look at rules that are 10 years old to see whether or not those rules are needed. There is not a systematic process in terms of how each agency goes through that. One agency can say, well, we looked at the rule. It looks good. And then, and so believe——

Chairman SCHWEIKERT. And you wrote about this in the past?

Mr. SARGEANT. Yes.

Chairman SCHWEIKERT. Were you not sort of writing also that you were concerned how many agencies may or may not really be doing it?

Mr. SARGEANT. Yes. And so there should be a systematic process. So under 610, we believe that one should have a systematic process to look at the rules that are more than 10 years old and to see whether or not those rules are needed. But also look at the cost benefit is because a rule goes into effect because we are trying to achieve some regulatory action. Let us see what has taken place and see whether or not that rule is needed. So that is two.

Third, the RFA deals with direct impacts on small business, but we also know that there is what we call the near, foreseeable indirect effects. There are those that might be affected by new products and services, and so one may say, well, it is not a direct effect but we can see that what we call the circle, that one circle out, that there is an effect. And so we want agencies, and so when we train agencies in terms of how to comply with the RFA, we also tell them, yes, the language says you have to consider the direct effect on small entities. But also, we also want you to look at what is the near foreseeable indirect effect as well.

Chairman SCHWEIKERT. All right. Thank you, Doctor. Ranking Member.

Ms. CLARKE. Thank you, Mr. Chairman. And let me welcome Dr. Sargeant to the Subcommittee today once again. I would like to take a moment just to express my appreciation to you and your staff and your New York regional advocate, Terry Coaxum to inquiries from my office in the past, and I look forward to continuing that work in relationship over the course of the 113th Congress.

Just as a follow-up to your last response to our chairman, some say the biggest loophole in the RFA is the fact that it does not re-

quire agencies to analyze indirect impacts. Legislation has been approved by this Committee in the last two congresses that would have required agencies to consider foreseeable indirect impact of regulations or small firms. Would you be supportive of such a change to the RFA? And why?

Mr. SARGEANT. Yes, I would be supportive. And we actually train agencies under Executive 13272, we are charged to train agencies on how to comply with the RFA. And in our training we tell them, yes, the RFA states you have to consider the direct effects, but we also have asked them to consider also what you call the foreseeable. Because we recognize that there is an impact. And when we talk with small business owners themselves, they see that their products, their services have been impacted by a particular regulation. And so I would be supportive of making sure that agencies take into account what we call the foreseeable.

I also know that agencies, when you say—because we can measure what the direct impact is—once you say indirect effects, that is what I call this broad loop. So that is why we focus on what is called the near foreseeable. It is close. At some point everything could be tied in. And so I would be supportive and I would welcome the opportunity to work with you on how we can define what are the near foreseeable indirect effects.

Ms. CLARKE. Wonderful. And I think our chairman is interested in looking at how we can get that done.

My second question is twofold. Could you first give us a broader picture of your progress in ensuring the agencies are fully complying with the RFA? And then secondly, in requesting further compliance can you explain to us the effect of sequester that the sequester will have on the Office of Advocacy's ability to carry out its mission with regards to the regulatory burden on small businesses?

Mr. SARGEANT. Each year we put out a report on agency compliance with the RFA, and I have submitted for the record which agencies. Most agencies do a good job but some, we continue to work with them and we are pleased that the president, under Executive Order 13563, has mandated that agencies work with Advocacy to make sure that rules that are coming down the pike that they, yes, they can promote health and safety, but also take into account the impact of those rules on small business. And so we have support from the administration, and so we work with agencies to make sure that they understand the RFA and we train them. And so we also have roundtables. Roundtables that are open to the public. We invite officials from the agencies so they can hear directly from small businesses. And so that is one way that we work with agencies on how they can comply.

With regard to the sequester, yes, we have been significantly impacted by the sequester. We have been hit roughly about 5.2 percent in terms of our budget, and so we are going to lose about $460,000. And although we are not going to lose people or I do not have to furlough people, we are going to take a big hit to our research budget.

This office is founded on two goals. It is our research and the regulatory mandate. We believe that good research leads to sound regulation, but you have to have the research. So by not having

that funding, we are going to lose roughly six to seven research reports that we would normally put out and so that is the concern I have because we believe that good data leads to sound regulation.

Ms. CLARKE. Then finally, one of the ongoing concerns with the RFA has been the ability of agencies to continually forgo the requirement in section 610 that requires periodic review of the rules. How is President Obama's Executive Order 13563, which requires retrospective agency review of regulations meshing with the requirement of this section?

Mr. SARGEANT. Well, we were pleased that Executive Order 13563 came out because what it did is that it reminded agencies that this is a requirement and it dovetailed very nicely with 610. And so we have been working with OIRA. We have been working with agencies. We have shared with agencies rules that are on the books right now that we have heard from small businesses that are problematic or they have concerns with. And so we continue to work with agencies. We were pleased that Executive Order 13579 not only dealt with those that are part of the Executive branch, but also the independent agencies because the independent agencies sometimes feel that they do not have to comply with the RFA. And so that was a recommendation. We were pleased that E.O. 13563 and E.O. 135610 reminded agencies you must comply with retrospective review. And also, there has been great outreach by us to work with agencies on how to comply. And so we are seeing more progress. We are seeing more agencies asking us to help them, to train them, and so we have been very busy these past couple of years. We have trained more than 100 staffers per year now on how to comply with the RFA. So I do believe that there is a desire to look at rules that are on the books. So that has been working well.

Ms. CLARKE. Very well. Thank you so much, Dr. Sargeant. And I yield back, Mr. Chairman.

Chairman SCHWEIKERT. Thank you, Ranking Member. And my friend from Michigan. Five minutes.

Mr. BENTIVOLIO. Thank you, Mr. Chairman.

As I traveled throughout my district in Michigan, business leaders tell me the same thing over and over again—it is too hard to start or expand my small business because I can barely understand how to comply with the latest regulations that have come out of Washington. And they are right.

Over the last four years the number of business regulations has skyrocketed and the result has been the worst economic recovery in nearly a century. We have had such a weak economic growth that I am not even sure we can call it a recovery. The millions of people still out of work sure have not recovered. I once believed that this was a nation of laws; instead, I find this is not a nation of laws, rather a nation of regulations. A "regunation" if you will.

My question, Dr. Sargeant, is, well, I had a few businessmen tell me that once they are complying or working with a regulatory agency after they have worked six months or a year the executive changes—there are changes and that kind of thing—and then the new person that comes in to replace the old executive has a whole set or new set of regulations they want these businesses to adhere

to. Do you see this as a problem? And if so, how would we correct that?

Mr. SARGEANT. Well, what we try to do is to work with agencies to make sure that they understand how a particular rule will impact small businesses. But we also work with agencies because we do not block rules or make rules less effective, but we work with agencies so that they achieve their regulatory goal. But also work with agencies in terms of compliance. Because what we hear many times is that small businesses, they want to comply but sometimes they do not know how. And so there is a provision within the RFA that when you put forth a rule, that you should also put forth a document on how to comply with the rule. And so with our regional advocates who are out in the field, we work directly with small businesses. We also recognize that rules, yes, we focus at the federal level, but there are also rules at the local and state level. And as a small business owner, as someone who has run a small business, I did not look at a rule, okay, this is a federal rule, this is state, this is a local rule, I looked at it as a rule and how am I going to comply? And so that is why we work with states on how to enact a state version of the RFA.

My predecessor worked hard on how to make sure that there is a process that when rules are put forth, even at the state level, that there is feedback from small entities, but also there is a way to comply. And once that is a process, we hope that as people change that that process is clear, transparent, and predictable.

Mr. BENTIVOLIO. So what does a business do if, for instance, and I do not really think you answered my question. A business is working with a branch of regulatory agency and the executive comes in and says I want to focus on these regulations and then six months or a year later another person replaces that person at the regulatory agency and comes up with a whole new agenda. And so sometimes, according to my small businesses that I have talked to at my small business roundtables in my community and my district, say that, well, they have a whole set of different rules and it is kind of like they have to drop what they are doing trying to comply with one set to go in with a different set. Do you understand?

Mr. SARGEANT. Yes. Well, that is part of the regulatory agenda because each year, twice a year, agencies are required under the RFA to put forth what rules they are going to work on. And if the rule will have a significant economic impact on a substantial number of small entities, that is the language, they have to contact us. They are required to put what is called an IRFA. That is part of the RFA. They need to do the analysis to say how this rule will impact small entities. And so there is a process that must be followed and it is through the RFA. And that is where we get to comment. We work with agencies to make sure that small entities will have a say within the process. So the RFA works when agencies work with us and we reach out to agencies to bring in small entities so they can have a say.

Mr. BENTIVOLIO. Thank you very much, Doctor. I yield back my time.

Chairman SCHWEIKERT. Thank you. And to my good friend from New Hampshire, Ms. Kuster.

Ms. MCLANE KUSTER. Thank you very much. Thank you, Mr. Chairman and Ranking Member Clarke. And Chairman Schweikert, I did enjoy participating with you in the panel on small business leaders operating online. I am proud of the folks from New Hampshire that were doing that good work.

I am new to this Subcommittee, and I am excited to join with my colleagues from both parties to conduct oversight over the Executive branch and work with you to provide relief to overregulated small businesses. I think we all recognize that the government alone does not create jobs but that it is the responsibility of government to foster the conditions for small businesses to grow to higher and to succeed. In my state of New Hampshire, 90 percent of new jobs come from small businesses. But unfortunately, as we all know, poorly thought out regulations can all too often have the opposite impact, creating uncertainty and stifling economic growth. So in today's hyperpartisan political climate I am hopeful, and it sounds as though the Committee does have measures that we can all agree on to alleviate the burden and protect the public with important regulations.

So I am just going to ask some very basic questions. In your experience, Dr. Sargeant, what are examples of some of the successes and accomplishments in your office that you are most proud of that might give us an example of how your office provides assistance in the process in a successful example?

Mr. SARGEANT. Well, thank you for your support of the office. There are a number of ways that we engage small business, and if I was to look back at some of the successes we have had, with regard to regulation, it may take a little while for the process to be complete. But we can say that through the RFA and the work we have done, we have had a fair amount of success.

One that I can point to is something called the 3 percent withholding that was actually passed in 2005. This was a rule that said that on all federal contracts, 3 percent would be withheld until the IRS checked to make sure that taxes were paid by small businesses. Now, we believe that you have to pay your taxes, but when you work with the federal government, when you think of 3 percent, because these contracts, there is not a huge amount of margin. And so the 3 percent was taken off the top and there was no process of how long this would take for the IRS to do their job. This would put a lot of small businesses actually in debt or they would have to turn down the contract. And so we were pleased by working with small entities that this was repealed by Congress in 2012.

We also can cite what we call the IRS Home Office deduction. We were pleased, not to pick on the IRS, but we were pleased that the home office deduction, 52 percent of all small businesses are home-based businesses. And it was not a clear process of how you took into account that home office deduction. We are pleased that the IRS just recently made it clear, made it transparent such that you can, up to $1,500, you can deduct. And we have heard from home-based businesses, we have heard from small businesses this is a huge win because we know that more and more people are starting companies from home and they are not just staying at home but they will grow. And so those are just two of many examples that we have had so far, and we are pleased that our process, that the

way that we work with federal agencies, that there has been a successful outcome.

Ms. MCLANE KUSTER. Right. Good. Well, thank you.

Now, part of my district is very rural. So rural, in fact, that we are still on dial-up in this day and age. So you can imagine the burden on small businesses. I say, you know, you have a customer on the line and then you have to say, "Let me put you on hold while I go look on the Internet on another phone line." So I am just curious if you have experience with your committee, I mean, with your agency about the unique burdens on small businesses in rural communities, and particularly with regard to compliance over the Internet or paperwork production where compliance involves Internet access.

Mr. SARGEANT. Yes, we have heard of concerns. And we know firsthand, and I know firsthand because I have lived in rural communities that it is important to have access to the web. And so we put out a study. We were charged by Congress to do what is called a broadband study a couple years ago. And in the study it showed that those in rural areas paid more money for less service for broadband. And this really complicates it because we all do not choose to live in cities but this also adds to what we call brain drain where people who would like to live in rural communities, if you want to live next to a lake or live where you want to live and also run a business, you must be able to tap into broadband. And so we are concerned. And so we have shared this report with the FTC and those who oversee broadband to let them know that our nation, those who want to live in rural communities, must be able to get access to affordable and accessible broadband because it helps our economic environment, but it also will cut down on all this congestion. There are a number of benefits and so, yes, we are concerned that those who live in rural communities have to pay more for less.

Ms. MCLANE KUSTER. Great. Thank you very much.

Chairman SCHWEIKERT. Thank you, Ms. Kuster.

I just have a couple others. We were sort of sharing before. I have sort of a personal fixation in my couple years around here of how much sort of decision-making we do in this body on sort of folklore and not data and facts. And so first, walk me through a little bit of your process just so I am sort of understanding the disciplines and the mechanics within the office.

A few thousand rule sets in promulgation of some sort and somehow, as you shared with me earlier the agency said they believe this costs this, this costs this, you have trade associations that may have a very different view, but you choose 50 of them. Now those are within your process. Do you mechanically start to do a cost benefit? I mean, what is the next step you do internally to analyze those and decide is this something you need to be fairly bold about and write about? What do you do?

Mr. SARGEANT. Yes. What we do, Mr. Chairman, we will reach out to small businesses to ask them. This is a rule that is being proposed. How will this impact you? So we are pleased that we have regional advocates around the country because the majority of businesses are outside of Washington, D.C., so we must hear what is going on, and we also know that it is not a one-size-fits-

all but it is not a "one region fits all." What may happen in the Northeast may be different than what happens in the Southwest.

And so once we hear from small entities how this rule will impact them, we will actually have a roundtable. We will bring officials from the agencies. We will bring those who have different points of view to share in terms of how this rule will impact. And also, we ask the agencies to share the data, if they have it, on why they came up with this number, and then we will ask those who are at the table to share what they have. Share with the agency officials your number.

Chairman SCHWEIKERT. Dr. Sargeant, that is almost to the point.

So you are getting sort of a presentation of how they did their cost benefit?

Mr. SARGEANT. Yes. Yes.

Chairman SCHWEIKERT. Do you have an internal mechanism to vet that? Do you have a statistician sitting in the back who has built a brilliant spreadsheet and is dicing things up? I am just sort of curious how you get there.

Mr. SARGEANT. What we do is we work with small entities themselves to try to get some numbers from them. We do have our own research and sometimes there is a nice fit but sometimes it is just more of a global fit how this will impact small business. So we ask the agencies themselves. It is up to the agency to share what they have in terms of data, but also we will reach out to trade associations for them to share what they have. So that is how we hope to come together.

Chairman SCHWEIKERT. So in some ways you become sort of an aggregator of information from the agency, trade associations, individuals who believe they are going to be affected?

Mr. SARGEANT. Yes, because we have a research budget, but for us to do that research in such a short manner with the rules, it would be very, very difficult for us to do it within a timely manner. So it is important for us. We take our direction from the small business. So we want to hear from them.

Chairman SCHWEIKERT. You said something before about your 15-day window and wishing you had 60.

Mr. SARGEANT. Well, that is for the SBREFA panel process.

Chairman SCHWEIKERT. Okay, so that is the next tier.

Mr. SARGEANT. Yeah. Once I have been notified then they can start a panel within 15 days. And we believe, and I believe that you should give more time to the agencies but also to the representative who will serve on those panels so they can digest the data so they can come prepared to talk.

Chairman SCHWEIKERT. So in your internal flow, okay, so the next step after you have done your aggregation of sort of cost benefit, you have a couple of economists on staff?

Mr. SARGEANT. Yes.

Chairman SCHWEIKERT. That are doing some dicing, what they believe the economic impact is, not necessarily the cost benefit?

Mr. SARGEANT. Yes. Well, that is part of it. Yes.

Chairman SCHWEIKERT. And do they use a particular mechanics or methodology or approach?

Mr. SARGEANT. Well, you typically use cost benefit analysis. You work with the agency themselves to say, well, who did you talk to? How were you able to quantify this number? We can understand costs; sometimes benefits are hard to quantify. And so we are charged under the RFA to only look at costs. So that is what we focus on and how this rule will impact cost-wise. And so that is where we share with the agency and say, well, we believe that you have certified this rule or you have underestimated the cost because we have spoken to these businesses around the country.

Chairman SCHWEIKERT. Okay. So you do that as part of your sort of economic model?

Mr. SARGEANT. Yes.

Chairman SCHWEIKERT. Last, Dr. Sargeant, before you actually sort of spoke of the concentric rings, you know, the one step out where it may not only affect the small business but may actually affect the small business's supplier I guess is how you were ultimately trying to understand that sort of outward effect? Share with me where would you find that? How do you grab that and pull that into your analysis?

Mr. SARGEANT. Well, what we try to do when we train agency officials under the RFA, we talk about what we call the foreseeable economic impact or the indirect impact. And so if this rule is going to impact say, like you said, the suppliers, a product, or a service, what we want them to do is to try to capture that because that is not, as you mentioned with regard to the ring, that is a tightly coupled ring. That is close. That is not a huge loop. And so what we do is we give them some recommendations on products or services or work environment, how this rule will impact. And so that is the type of feedback, that is the type of training that we give to agency officials.

Chairman SCHWEIKERT. Doctor, I appreciate your time with us. If you ever find yourself on the Hill and (a) you want actually good coffee, come to my office. And this for everyone, we have a froufrou cappuccino machine. Pay for it personally. And second of all, if you ever happen to be on the Hill I would love to sort of flowchart your mechanics. Part of this is trying to understand. In my vision of the world there is a difference between doing a cost benefit analysis and an economic analysis because over here you sometimes find the law of unintended consequences. This is sort of the cost implementation compared to alternatives. Because I know you do not get to override a rule but sometimes you and I have seen occasions where if the agency was writing the rule in this direction it would have been more impactful in society than the approach they are taking. And I do not know if you get listened to in that fashion.

Mr. SARGEANT. Well, I would welcome the opportunity to have my team come over and go through the process because we train more than 100 officials each year. Many staff members from the Hill will come to our training sessions, so we could walk you through and would welcome such a dialogue.

Chairman SCHWEIKERT. I genuinely would like to learn more about what you do and how we can, you know, the impact on small business, that is where we need to find much of our job creation. So thank you, sir.

Mr. SARGEANT. Okay, thank you.

Chairman SCHWEIKERT. Doctor, I want to thank you for your testimony. You are excused. And now we are going to move on to our second panel.

Chairman SCHWEIKERT. We are about to begin the second panel. I am sure you all heard the discussion. I think actually almost everyone here has testified before. Green, start; yellow, go faster; red, we will let you sort of finish your thought.

The first witness in our second panel will be Marc Freedman, the executive director of Labor Law Policy at the U.S. Chamber of Commerce. He primarily focuses on workplace and employment regulatory issues. Before coming to the Chamber more than eight years ago, Mr. Freedman was the regulatory counsel for the Senate Small Business Committee and examined agency compliance with the Regulatory Flexibility Act. Welcome.

Is it tradition to just do one at a time? All right, your five minutes begins.

STATEMENTS OF MARC FREEDMAN, EXECUTIVE DIRECTOR, LABOR LAW POLICY, UNITED STATES CHAMBER OF COMMERCE; CARL HARRIS, VICE PRESIDENT AND GENERAL MANAGER, CARL HARRIS COMPANY, TESTIFYING ON BEHALF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS; RENA STEINZOR, PROFESSOR, UNIVERSITY OF MARYLAND CARE LAW SCHOOL

STATEMENT OF MARC FREEDMAN

Mr. FREEDMAN. Thank you, Mr. Chairman. Good morning, Chairman Schweikert and Ranking Member Clarke.

Thank you for inviting me to testify this morning on the value of the Regulatory Flexibility Act and the regulatory process.

This morning I would like to focus my remarks on examples where OSHA and other Department of Labor agencies under the current administration did not take advantage of the RFA and SBREFA in their rulemaking. Note that I said "did not take advantage."

Compliance with the Regulatory Flexibility Act enhances the rulemaking process, assuming that the goal is to produce regulations that will have the maximum beneficial impact with a minimal burdensome impact. The key is that the RFA and SBREA create channels for input from small entities that will be affected by the proposed regulations. When agencies seek this input and respect those small entities that will be subject to the regulation, all parties come out ahead.

As we have heard from Dr. Sargeant, the RFA requires agencies to assess impacts on regulations on small entities and investigate less burdensome alternatives, and in the case of OSHA, EPA, and now the CFPB, conduct small business review panels unless the agency can certify that the regulation will not have a significant economic impact on a substantial number of small entities.

For those agencies not required to conduct small business panels, the RFA's affirmative outreach requirement applies. Specifically Section 609(a) directs agencies to "assure that small entities have been given an opportunity to participate in the rulemaking."

Te timing of the small business input is an important feature of this process. Proposed regulations are not like proposed legislation which can be very fluid and undergo many changes before being enacted. When an agency proposes a regulation, they are not saying let us have a conversation about this issue; they are saying this is what we intend to put in effect unless there is some very good reason we have overlooked why we cannot. By getting direct feedback about how a regulation will affect those covered by it, the agency can make changes before the proposal is issued.

There is one more important point I want to make about the impact of the RFA. It does not force an agency to change their rulemaking, nor does it authorize the SBA Office of Advocacy to change or block an agency's rulemaking, even if the agency is ignoring Advocacy's advice. The RFA merely sets out a process; it does not specify the outcome.

Unfortunately, OSHA under this Administration has displayed a certain resistance to taking advantage of the SBREFA process. In several rulemakings, OSHA could have clearly benefitted if they had been willing to use the Small Business Panel Review Process that the Act lays out. One of OSHA's first rulemakings under this administration sought to reinforce their intention to pursue enforcement, even for those employers who are truly doing the right thing by asking for help from OSHA in identifying hazards in the workplace. As this rulemaking explicitly and exclusively deals with small businesses, OSHA would have benefitted from hearing directly about their views on it. Had they done so, they would have heard that small businesses would be less comfortable entering into the consultation program if this rulemaking is completed. Getting that message with that clarity at that time might have steered OSHA away from proposing this regulation.

Another rulemaking where OSHA suffered for not conducting a small business panel is the high profile rulemaking to add a column to the OSHA 300 recordkeeping log to track musculoskeletal disorders (MSDs)—the injuries associated with ergonomics. In January 2011, OSHA withdrew the final regulation from the Office of Information and Regulatory Affairs to get input directly from small businesses. The agency conducted three teleconferences with small businesses to hear directly from them about their concerns with this rulemaking, exactly what would have happened if the agency had conducted the Small Business Panel at the outset. If OSHA had taken advantage of the SBREFA procedures, this regulation might very well be in place by now.

Similarly, other DOL agencies besides OSHA have avoided the RFA by tremendously underestimating costs. Most notably, the Office of Labor and Management standards in their persuaded rulemaking and the Employment Training Administration in its H2B program rulemaking. Time does not permit me to discuss these in detail but they are covered in full in my statement.

Thank you very much for the opportunity to participate in this hearing this morning. I will be glad to answer any questions.

Chairman SCHWEIKERT. Thank you, Mr. Freedman.

Our next witness is Carl Harris. Mr. Harris is the co-founder of Carl Harris Company, a small specialty contracting firm in Wichita, Kansas, I have family in Derby, that erects structural steel and

precast concrete for residential and commercial buildings. He is testifying on behalf of the National Association of Home Builders.

Welcome. You have five minutes.

STATEMENT OF CARL HARRIS

Mr. HARRIS. Good morning. Chairman Schweikert, Ranking Member Clarke, and Distinguished Members of the Committee, my name is Carl Harris. I am co-founder of the Carl Harris Company. We are based out of Wichita. We have about 20 employees. I am also a member of the National Association of Home Builders (NAHB) and president of the Kansas Building Industry Association. Thank you for the opportunity to be here today to talk about the impact of regulations on small homebuilders.

As a small businessman operating in a heavily-regulated industry, I understand how difficult it can be for a small builder to operate a successful, thriving business that provides the highest level of health, safety, and welfare for its employees. The sheer volume of regulations is not the only problem. Often, regulations are crafted without respect to the size of the regulated entities. Congress appropriately acknowledged this unique burden when in 1980 it passed the Regulatory Flexibility Act, the RFA, and subsequently amended it to include the Small Business Regulatory Enforcement Fairness Act. With the RFA, Congress intended for regulations to be crafted to the scale of the businesses while achieving the goals of the rule. This was an admirable aim. However, in practice it does not appear to be working as intended.

I have had the fortune of representing the residential construction industry in a number of small business review panels over the years. I have seen firsthand how agencies great the RFA process as nothing more than a procedural, check-the-box exercise, and worse still, artfully avoid complying with certain parts altogether.

For example, in 2008, OSHA proposed the Cranes and Derricks Rule, which was intended to protect workers from the hazards associated with hoisting equipment in construction. For the development of this rule, OSHA relied on the negotiated rulemaking program. I participated as a small entity representative (SER) on the review panel that followed. Several SERs, myself included, raised concerns about the feasibility of various aspects of the rule, which was clearly designed for large, commercial construction applications. I personally put forward an effective, common sense alternative that would save lives and keep low the cost of compliance for small entities.

Unfortunately, it seems my feedback fell on deaf ears. The problem was that it was not until after the negotiated rulemaking process was complete that OSHA convened the Small Business Advocacy Review Panel. So by the time we were brought in, the rule had already been determined, and not surprisingly, OSHA was not inclined to modify it based on the panel. Had small business been consulted earlier in the process, perhaps OSHA could have developed a more workable rule for small entities, thereby reducing the cost and the burdens associated with compliance. And as it was, the process seemed little more than a procedural hurdle with little interest from OSHA to make changes based on the feedback received.

Other times small business representatives are left in the dark, brought in with insufficient information to allow us to evaluate regulatory options and provide alternatives. This was the case in 2010 when I participated in a Small Entity Review Panel that looked at a proposed federal regulation covering stormwater discharges from developed sites. EPA, in preparation for the panel, failed to provide sufficient detailed information about the upcoming rule. As a result, we had no way to estimate the compliance costs or provide meaningful feedback to reduce the regulatory burden on small businesses. Several SERs provided written comment to the effect and suggested that the agency's failure to provide sufficient information was a violation of SBREFA.

When agencies are unprepared to provide small entity review panelists with the information and data necessary to evaluate the cost and compliance obligations, the process breaks down. Not only do participants like myself question the value of their participation, but the entire regulatory program loses its legitimacy and clearly undermines Congress's intent.

These are just a couple of examples that illustrate the need for improving the way agencies conduct the required reviews of proposed regulations under RFA. Doing so would result in far more efficient regulation and reduce compliance costs for our small businesses. As Congress looks for ways to improve agency compliance with RFA, we look forward to working with legislators on the most effective ways to help America's small businesses.

Thank you for the opportunity to testify today.

Chairman SCHWEIKERT. Thank you, Mr. Harris.

Ms. Clarke.

Ms. CLARKE. Thank you, Mr. Chairman. I have the honor and privilege of introducing Ms. Steinzor. She is a professor of law at the University of Maryland's Francis Key Carey School of Law. She has taught courses in administrative law and written extensively in the area of federal regulatory policy, particularly in regard to health, safety, and the environmental regulation. She is also the president of the Center for Progressive Reform, which is a nationwide network of scholars that focuses on federal regulatory matters. Prior to her academic career she was a partner in the Washington, D.C. law firm of Spiegel & McDiarmid which counseled federal, state, and municipal clients on regulatory compliance. We would like to welcome you this morning and hear from you at this time. Thank you.

STATEMENT OF RENA STEINZOR

Ms. STEINZOR. Thank you very much for giving me an opportunity to testify today.

I could not agree more with the Subcommittee's overhang mission: strengthening the role of small business in repairing an economy ruined by deregulated, too-big-to-fail financial institutions. Big business uses small business as a kind of human shield, conflating the two sectors distinctly different needs and pushing for deregulation that could further endanger the economy and public health.

A case in point is the SBA Office of Advocacy, which has consciously diverted its limited, taxpayer-funded resources from helping small business toward pursuing the complaint du jour of the

very large companies that call the shots at the American Chemistry Council, the National Association of Manufacturers, and the U.S. Chamber of Commerce. These activities raise the disturbing prospect that the Office of Advocacy has broken the law. In fact, I hope that the evidence I put before you today will motivate you to ask the GAO to investigate whether the Office of Advocacy has complied with laws that bar federally funded agencies from lobbying and require it to conduct its affairs in the sunshine. From what we can tell, the office routinely intervenes in rulemakings with only tangential effects on its constituency, allowing Fortune 500 companies to set its agenda, do its research, and provide the substance of its comments.

Consider for example a series of e-mails exchanged between Kevin Bromberg of the Office of Advocacy and David Fisher of the American Chemistry Council. The two were discussing an aggressive lobbying campaign that large chemical manufacturers had mounted against the National Toxicology Program's proposal to declare formaldehyde as a known carcinogen. This is a scientific finding, not a regulation, but formaldehyde's manufacturers were adamant. Fisher wrote, "I suspect the delay in the assessment will not get to the press because it has been delayed already for months, so any further delay would be a nonissue." Bromberg responded, "It is probably better for now that I keep the National Toxicology Program contact in the dark."

Such skullduggery not only provides assistance to Fisher's multibillion dollar clients at the taxpayers' expense; it violates the fundamental principle that the Office of Advocacy should work within the government to find better ways for small businesses, its only legitimate constituency, to comply with the regulations the same government is writing. Between 2005 and 2012, the American Chemistry Council and its members spent over $333 million lobbying Congress and federal agencies. The last thing these giants need is a taxpayer subsidy.

As for violations of Sunshine Laws, the Office of Advocacy hosts regular environmental roundtables that feature presentations by lobbyists and lawyers for Fortune 500 companies. They occur behind closed doors and their agendas, attendance lists, and minutes are not published. Nevertheless, the roundtables result in positions that are adopted as policy by the office. Two weeks ago a senior scientist from the Environmental Defense Fund attempted to participate in a roundtable but he was told that he could listen to the discussion but not speak. The roundtable consisted of presentations by Nancy Beck, a former White House Office of Information and Regulatory Affairs staffer who now works for the American Chemistry Council, and Robert Fensterheim, a former American Petroleum Institute staffer who now works at the RegNet/IRIS Forum, an industry group dedicated to undermining EPA's integrated risk information system.

Self-righteous crusaders against regulation have become accustomed to telling only half the story to the American people. They pretend that exaggerated regulatory costs are the only result of the system and ignore its considerable benefits. Conversely, they suggest that if we dismantle the regulatory system we would suffer no negative consequences and instead reap a windfall and save money.

My testimony furnishes additional detailed information about the benefits of regulation. Thank you.

Chairman SCHWEIKERT. Thank you.

Now, a handful of questions. Mr. Freedman, you were with the Senate Small Business for how many years?

Mr. FREEDMAN. Just over five years.

Chairman SCHWEIKERT. In that time, because you probably sat through a number of these hearings, if you right now were looking for bottlenecks in the law that would actually help both advocacy for small business but also a mechanism for dealing with rule sets that are coming and trying to find what is rational both from a cost and benefits standpoint but also from an economic modeling standpoint, where do you see the bottleneck?

Mr. FREEDMAN. Thank you, Mr. Chairman.

I think I look at it this way. The critical part of the Regulatory Flexibility Act process is the go/no-go decision that focuses on the significant economic impact on a substantial number of small entities. And agencies have the flexibility to define those key terms as they wish—significant impact and substantial number of small entities. And agencies will go all over the map, even within their own agencies between rulemakings they will define things differently. And I think what might be helpful here is some type of consistency or at least some type of guidance to the agencies to say this is how we think you should define things or these are the factors you should take into effect.

And if I could just finish that point, Dr. Sargeant raised some of the things I think could be helpful. For instance, the inclusion of indirect impacts. There has been some legislation offered previously on this point. My thought is it would be helpful to be specific about what kind of indirect impacts should be included.

So, for instance, in the EPA world, states implement a lot of the requirements that the EPA lays out. The fact that the states implement those requirements is lost in the context of an indirect impact. So if that is the case, that should be brought into the discussion and those impacts should be captured going towards the question of a significant economic impact.

Chairman SCHWEIKERT. Mr. Freedman, would you go as far as trying to create a better box and how you define cost benefit, how you define, I mean, economic impact? Because in our office over the last couple months, we have tried to collect some mechanisms from different agencies. And I find sometimes they have, some it is almost anecdotal. Tell me a story. And others it is, we want to do math.

Mr. FREEDMAN. And cost benefit is a term that many people use. It frequently comes up in the context of the regulatory process and regulations. It is a very hard concept to nail down. I am not going to try and sit here and tell you that Congress in its wisdom can tell you exactly what a cost benefit analysis——

Chairman SCHWEIKERT. I never used the words wisdom and Congress in the same sentence.

Mr. FREEDMAN. Fair enough. It is a tough subject. And I think what might be helpful is to try and steer the agencies either through legislation or as Dr. Sargeant was describing, the training process embedded in the Executive Order 13272 to help agencies

get to this point of appreciating the impact and recognizing the goal of trying to capture it and be honest about it.

I think part of the discussion here is attitudinal. Agencies take a position. They want to do a reg. We have seen it time and again, and they do not want somebody else telling them how to do it. And somehow, and I do not know if it is the silver bullet here, that attitude needs to change. And I think the 13272 process is very helpful with that and a good start, but it really has to keep reinforcing it. Particularly now that we are coming into the second term of administration, people change, new people are in place. You have to keep reinforcing that type of approach.

Chairman SCHWEIKERT. But in some ways, for some of us it is just sort of the standard of practice. So we sort of, whether I agree with you or disagree with you, at least I understand how you got there and I know what I am objecting to. Or agreeing to.

Mr. FREEDMAN. Let me make one more quick point. And this is in my full statement. The problems with the agency compliance with the Regulatory Flexibility Act and SBREFA stretch back over several administrations. And this really is not a specifically Republican or Democrat example. We have seen it——

Chairman SCHWEIKERT. Well, the framework comes from the late Carter Administration?

Mr. FREEDMAN. That is correct.

Chairman SCHWEIKERT. So.

Mr. FREEDMAN. Right. But I mean, we have seen examples of agencies that did not take these issues seriously in several different administrations and different parties.

Chairman SCHWEIKERT. Okay. Mr. Harris, welcome from beautiful Wichita. Do you have a lot of snow?

Mr. HARRIS. Not anymore. We had 60 degrees there yesterday.

Chairman SCHWEIKERT. Okay, good.

Mr. HARRIS. And I came to this.

Chairman SCHWEIKERT. Because my wife is going to make me visit the relatives and when you are from Scottsdale—

Mr. HARRIS. There you go.

Chairman SCHWEIKERT. We do not go when there is snow.

This is sort of a one-off but I have been trying to get my head around a briefing I had yesterday. Do you do much concrete cutting?

Mr. HARRIS. Yes, I do.

Chairman SCHWEIKERT. Are you familiar there may be an EPA rule set out there where even the dust you create from the concrete cutting?

Mr. FREEDMAN. Silica.

Chairman SCHWEIKERT. Maybe.

Mr. FREEDMAN. Both OSHA and EPA in regard to silica.

Chairman SCHWEIKERT. Okay. I am walking through a group in a construction family. So sanding down drywall, cutting concrete, sanding, I mean, how many different elements? I mean, even down to the sandpaper you use. Would——

Mr. FREEDMAN. Those are, as I understand, the drywall in regard to silica, there is not silica in drywall cement, but in the areas that we do precast concrete, when footings and foundations are not done correctly and remediation has to be done, we understand. We

train for that at our local builders association how we would protect our workers in regard to that. We have tried to work closely with OSHA and the silica standard and how would be the best practices to deal with that and what might trigger those things. But we just got to get in—we have got to get small business involved in the regulatory process as early as possible because we truly are the experts in the field. I mean, you see a cloud of dust. You may see danger. We see that all the time. We just need to tell you what we do and how we can do it better and safer as opposed to have that come from outside.

Chairman SCHWEIKERT. Okay. All right. With that, Ms. Clarke.

Ms. CLARKE. Thank you very much, Mr. Chairman.

My first question is to Professor Steinzor. Mr. Harris, in his testimony, stated that his organization believes that "the RFA should be amended to include judicial review of the panel requirements to ensure agencies here to the law." What are your thoughts on that proposal?

Ms. STEINZOR. There is a longstanding doctrine in administrative law that does not bring you to court until an agency has issued a final agency action. And as I understand, the way this would work you would be allowed to take the agency into court mid-rulemaking. And this would cause a lot of extra delay, which also has costs. I mean, we forget that so often that the longer it takes to promulgate a rule, the more people are exposed to whatever the harm the rule is trying to address. So there are costs on both sides, and I would urge you to be cautious about that kind of approach.

Ms. CLARKE. So we are trying to weigh costs and costs essentially. For the small business, the idea that a particular rule could mean them being able to really be effective in whatever work it is that the rule is going to be applying to is a challenge for that company. On the other hand, the rule is being promulgated because there is a particular harm that an agency may be trying to address that can cost as well. And so the time factor there becomes the challenge on both sides.

Ms. STEINZOR. I could not agree more. You have put it beautifully. I would only say that I completely favor finding ways to make regulations more tolerable for small businesses. But if workers get sick they cannot come to work and that is also a very costly problem. And some of the regulations, especially ones that the Office of Advocacy has been focusing on, are so large that they are really not aimed at small business at all. Some of EPA's air pollution rules, as I say in my testimony, would save millions of lost days at work which can only help small businesses because people will not have cardiac problems, they will not have asthma attacks, et cetera.

Ms. CLARKE. Very well.

Ms. STEINZOR. Help the economy.

Ms. CLARKE. Very well. Very well.

The second question is to you again, Professor Steinzor. The Crane and Crane study has been widely cited for its estimates of the regulatory burden facing small businesses. What is your opinion of the study, and do you believe that it is credible enough to be relied on by this Committee?

Ms. STEINZOR. No, I do not believe that it has any credibility. It has been dismantled by our organization, the Economic Policy Institute, the Congressional Research Service, the White House Office of Information and Regulatory Affairs, anybody who has looked at it cannot replicate the results. And the Economic Policy Institute, in particular, got the data and tried to reverse engineer the calculations and was unable to even come close.

One of the aspects in that study is a poll that was taken, a survey of business leaders around the world, and the World Bank which conducted the survey said it should not be used in that way. So I would urge you not to—there are better analyses.

Ms. CLARKE. Very well. And let me just, Mr. Chairman, if you will indulge me, I have one final question for Mr. Freedman.

In your discussion of OSHA's GHS rule, you state that "the agency loaded it up"—that is your quote—"with other provisions that did not make sense for small businesses but that do increase safeguards for the workers which is actually OSHA's mission." Would you care to clarify or is it your view that OSHA should give small businesses' views priorities over workers when it develops its regulations?

Mr. FREEDMAN. Thank you, Congressman Clarke.

It is my view that OSHA should follow the regulatory process and make sure that anything that is in a final rule was proposed first and that terms in the regulations are clear and understandable by small businesses and are not open traps for small businesses so that OSHA has an opportunity to just come in and enforce without the small businesses knowing what they have to comply with. It is also my view that if OSHA is going to insert a hazard into a regulation, that everyone understands the definition of that hazard and that it is not an open-ended, as I said, trap for small businesses. These things can be done in the name of protecting employees and in the name of giving small businesses a fair chance to understand the regulation.

Ms. CLARKE. So just as a follow-up, and I am going to close here, I am just trying—if I am a regulatory agency and my main function is to make sure that workers are protected, you are saying that there needs to be an overlay or a view that looks at small business in the context of protecting workers? I am trying to figure out if I were an agency person and I am concerned about the health and welfare of the employees, how you balance out those concerns in terms of how you view it because their goal is not to necessarily be concerned about the business as much as it is the employees of the business. So how would you sort of reconcile that?

Mr. FREEDMAN. Well, if I may, Congresswoman, I would ask you think about this in terms of the businessperson trying to figure this out. If OSHA puts in a requirement that is an open-ended requirement that they will not know whether they satisfied and it is just a trap for enforcement, how does that serve anybody's good? Or how does that serve anybody's goals?

What we are looking here for in the context of OSHA regulations is clarity and well-supported regulations. The more OSHA focuses on those models, the better the outcome will be, the more employers and small businesses will know what they are required to do, the more they can protect their employees. If you just throw out

a hazard that is not defined, and the one in the discussion here is combustible dust, then what is an employer to do? They do not know what that means. There is no definition of that. You cannot expect an employer to protect against something they do not know how to understand. This is just not fair. It does not get to the end goal. So I understand your concern from the agency's perspective, but the agency needs to operate within certain parameters. And that is the focal point of the regulatory process.

Ms. CLARKE. Okay. We want to just drill in a little bit more on this. How do you define "open traps"? Do you believe that OSHA is a rogue agency just looking to entrap and punish small business?

Mr. FREEDMAN. No. I would never describe OSHA as a rogue agency.

Ms. CLARKE. Okay.

Mr. FREEDMAN. I think in the current administration they have placed a very explicit emphasis on enforcement. I think some of their regulatory approaches have gone towards the idea of increasing their opportunity for enforcement. As I mentioned in the discussion about the cooperative agreements rulemaking, that was about telling small businesses that they were going to be subject to enforcement even though they are bringing OSHA in, asking for help in identifying hazards.

In the context of the GHS regulation that we are discussing here, they included a provision called Hazards Not Otherwise Classified. That is an open-ended concept. It means that an employer will not be able to tell when they have satisfied all the hazards that OSHA may have in mind. That is what I mean when I talk about traps. That is what I mean when I talk about OSHA putting in provisions that are geared towards enforcement more than they are towards safety.

Ms. CLARKE. So the whole idea of clarity and definition is what ultimately makes it a hospitable business environment?

Mr. FREEDMAN. It will certainly aid in increasing compliance and therefore adding to workplace safety.

Ms. CLARKE. Very well. Thank you, Mr. Freedman.

Thank you, Mr. Chairman.

Chairman SCHWEIKERT. Thank you, Ms. Clarke.

Mr. BENTIVOLIO. Am I getting close in pronouncing it right?

Mr. BENTIVOLIO. You did it perfect.

Chairman SCHWEIKERT. Wow.

Mr. BENTIVOLIO. Bentivolio. You have got to sing it when you say it. Thank you very much, Mr. Chairman.

Mr. Harris, I am sitting here formulating what it is like to be a contractor. Single family homes, multi, like apartments?

Mr. HARRIS. Single family, multi-family, small commercial shopping, small shopping centers, school additions, whatever I can do to make a living.

Mr. BENTIVOLIO. I understand. Nothing like the smell of fresh excavated dirt.

Mr. HARRIS. Agreed.

Mr. BENTIVOLIO. The sound of concrete coming down a chute. Right? And then you have the carpenters' fresh cut lumber, circular saws, a symphony in construction. It smells like an economy growing. And each one of those different facets of construction is a con-

tractor, a subcontractor working for you. Now, are you responsible for that subcontractor following regulations? And what is the procedure you go through, if so, to ensure that they comply with these regulations so you will not be shut down?

Mr. HARRIS. First of all, I must let you know that I am an OSHA outreach trainer for a satellite training facility which is located in our local homebuilders association. As we reach out to other small businesses to make sure that they have the information and training. Each subcontractor is responsible for their own health and safety. I am responsible for the culture of safety and health on that project. OSHA kind of recognizes that in what they call their multi-employer worksite rules. We have not seen a lot of enforcement that go up the chain but we tried to put forth the culture of safety, health, and welfare on every jobsite and filter down to our subcontractors. We realize, through the help of the National Association of Homebuilders and our local builders association that training is what the needs are.

And if I could kind of answer Congressman Clarke's question. If we have reasonable regulations, we have higher participation and compliance. So actually, we could save more lives with more reasonable regulation than if we have a hard and fast regulation that everybody is going to ignore because it does not make any sense. So that is where we think with enough early information, a chance to work in the process, which is what this does, we have a better chance of getting wound regulation that works on the jobsite.

Mr. BENTIVOLIO. That is terrific.

As a small business owner trying to do your best to comply with EPA and OSHA rules, what is your greatest fear in dealing with those agencies?

Mr. HARRIS. Surprises. A businessman cannot have surprises. I do not have the time to constantly monitor the Federal Register to see what is going down. We rely on our trade associations to help us find out what information is out there. No business likes surprises. We are planning for the future. We are estimating projects out there. We really want to work to that betterment and work within all the regulations that are out there. Surprises are what we cannot handle. If we have an opportunity to work with clarity on the development of these regulations then we can let our members know, I can let my friends know, and we can all work within the rules.

Mr. BENTIVOLIO. Thank you very much, Mr. Harris. I yield back my time.

Chairman SCHWEIKERT. Thank you. With that, thank you.

I did have just a couple odds and ends. And Mr. Freedman, one more time. If I have the good Doctor come and sit down in my office and we start to flowchart sort of how his process works, and some of this is as much making sure that the law is up-to-date for how we are passing information today. What would you inject into that conversation?

Mr. FREEDMAN. Do you mean with respect to how Advocacy functions and the process?

Chairman SCHWEIKERT. And how we are doing today, because I am still trying to get my head around this thing. I have a few thousand rule sets that affect small business. Are they capturing

and are they focusing on what is rational to focus on for small business?

Mr. HARRIS. Thank you, Mr. Chairman. And I am going to take the opportunity of your question to respond to something that Professor Steinzor mentioned. And that is her criticism of the idea of bringing in a provision that would allow small businesses to challenge an agency certification mid-rule. And she is certainly correct that agency actions have to be final before they can go to court. The value of, first of all, what you could do is describe that agency certification as a final action; therefore, making it subject to judicial review. And the point here is to preserve the timing of the small business input in the process so that you do not have to wait several years until the rule goes final and everything is baked in the cake at that point, to then say, well, way back then the agency did a bad certification and therefore, they should be challenged. The point is to be able to challenge the agency action at the time when it is still relevant to the process. And so the idea of creating an opportunity, and it could be written in a way that would be very narrow, very time sensitive, and would not disrupt the process in any tremendous way, but it is important that that decision gets attention at the time that it is made so that the input from small businesses can be brought into the process at the time it is most important.

Chairman SCHWEIKERT. Okay. Thank you, Mr. Freedman. But that is partially where I was trying to go is a true understanding of sort of the flow chart, the mechanics, and when triggers are hit because we had the good Doctor before saying there are certain things he wished he had 60 days within the SBREFA process concept.

Mr. FREEDMAN. And I think his point was well taken. Part of the discussion in the SBREFA panel process is that you are talking with people who are out there making a living, like Mr. Harris, who are not regulatory specialists. And you are asking them to look at a proposed regulation with supporting analyses and understand it in the context of this discussion, and that is just not what they do for a living. That is not even easy for me. And so giving them some more time to come up to speed on that discussion I think would help their participation in the process. And Mr. Harris has been in those panels himself, so he can probably tell you more about what would be helpful in that regard.

Chairman SCHWEIKERT. Ms. Steinzor, is my little fixation on just understanding the linearity, if that is a word, of the process appropriate?

Ms. STEINZOR. I think it is very appropriate and I would suggest to you that what you may want to pursue with Dr. Sargeant is exactly the question that you keep asking—how are these rulemakings selected? We only know what we could get from a Freedom of Information Act request to the Office of Advocacy, and what the information that we got back from that shows is that the office is in touch with a lot of large company lobbyists and that is how it makes it choices. And that when it takes a position it does not ask anybody in small business.

Chairman SCHWEIKERT. Because I actually even read the advocacy piece.

Ms. STEINZOR. Right.

Chairman SCHWEIKERT. To say that that is how they make their decisions, I do not think there is any actuarial data that says that, but they get the information. We will give you that. But to actually say one is one, I think there is not data that says that.

Ms. STEINZOR. I would love to know if they do any surveys of small businesses to identify what rules are the most problem, if they make those a priority, if they are even in touch with small businesses that have problems.

Chairman SCHWEIKERT. Okay. And the question part is fine. It is rational to say one is the cause of the effect. I would always be very careful of sort of anecdotal leaps.

So Mr. Harris, you get the last word and then we are all running off to our next panels that we are all supposed to be on.

Mr. HARRIS. What would be wrong, and again, just a country boy asking, what would be wrong with assuming that small business is affected with every regulation and then go from there and make them prove that they are not as opposed to you have to prove that they are affected significantly and with enough numbers. So I mean, almost it works out being like the Miranda regulation. You cannot do anything until you do this.

Chairman SCHWEIKERT. Why is it always the country boy gets the best line at the end of the get-together? It often works that way.

I want to thank the witnesses today. For much of this, this is also the education of a new member like myself on the committee. And I have been trying to read everything I can get my hands on. And this is actually for my brothers and sisters on the panel and anyone else in the room. I will read anything. I am fairly voracious. Send it our way. And when agencies fail to actually comply with the Regulatory Flexibility Act, let us face it. Our economy suffers, our economic growth suffers, and our job creation suffers.

The Committee will continue to exercise our oversight responsibilities to ensure that federal agencies comply with the RFA, and we will consider ways to strengthen this important statute and make sure it is also relative to today and not basically 30-plus years ago when it was originally drafted.

And I ask unanimous consent that members have five legislative days to submit written statements and supporting materials for the record. Hearing no objection. One day someone is going to object and I am going to have no idea what to do. And with that so ordered, the panel is adjourned.

[Whereupon, at 11:44 a.m., the Subcommittee was adjourned.]

APPENDIX

Advocacy: the voice of small business in government

Office of the Chief Counsel for Advocacy
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Testimony of

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy
U.S. Small Business Administration

United States House of Representatives
Committee on Small Business
Subcommittee on Investigations, Oversight and Regulations

Date: March 14, 2013
Time: 10:00 AM
Location: 2360 Rayburn House Office Building

Topic: **Regulating the Regulators—Reducing Burdens on Small Business**

Chairman Schweikert, Ranking Member Clark, and Members of the Subcommittee, I am Dr. Winslow Sargeant, Chief Counsel for the Office of Advocacy at the U.S. Small Business Administration.

Thank you for the invitation to appear before you today to discuss the critical issue of agency compliance with the Regulatory Flexibility Act (RFA).

The Office of Advocacy was created in 1976 to be a voice for small business within the federal government. Advocacy advances the views, concerns, and interests of small business before Congress, the White House, federal agencies, federal courts, and policymakers. We work with federal agencies in the rulemaking process to implement the requirements of the RFA.

The RFA requires federal agencies to consider the effects of their proposed rules on small businesses and other small entities, including small governments and small nonprofits. When an agency finds that a proposed rule may have a significant economic impact on a substantial number of small entities, it must undertake an analytical process to consider significant alternatives that would minimize the burden on small entities while still achieving the original goal of the regulation.

How Advocacy Helps Agencies Comply

The Office of Advocacy works with federal agencies in a number of ways to improve their RFA compliance and to ensure that the particular concerns of small businesses are considered during the federal rulemaking process.

RFA Training

As required in Executive Order 13272, Advocacy must train agencies on how to comply with the RFA. In addition to the officials previously trained at more than 60 agencies and subagencies, we have trained nearly 350 additional key agency officials in RFA compliance during my tenure. In FY 2012, we published an expanded and updated edition of *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act.* Increased and improved RFA training leads to better agency rulemakings, which results in increased regulatory compliance.

Interagency Communications

Much of Advocacy's work with agencies is at the confidential, pre-proposal stage, when agencies are working through the regulatory development process. When warranted, Advocacy sends agencies public comment letters that take into account small business concerns about specific regulations and other proposals. I have signed more than 90 such letters on topics including proposed revisions to the definition of solid waste, small business perspectives on the Paperwork Reduction Act, Small Business Innovation Research size regulations, and comments on regulations related to the Real Estate Settlement Procedures and Truth in Lending Acts (RESPA–TILA).

SBREFA Panels

The RFA as amended by SBREFA and the Dodd-Frank Wall Street Reform and Consumer Protection Act also specifies that three agencies must conduct a SBREFA panel for gathering comments on a proposed regulation when it may have a significant economic impact on small businesses. The three agencies are the Environmental Protection Agency, the Occupational Safety and Health Administration (OSHA), and the Consumer Financial Protection Bureau (CFPB). The panels are required to include representation from the rulemaking agency, the Office of Management and Budget's Office of Information and Regulatory Affairs, and the Office of Advocacy. The panels solicit information from small entity representatives (SERs), who represent the small businesses likely to be affected by the proposed rule. The law requires a SBREFA panel to be convened and complete its report with recommendations within a 60-day period.

Since SBREFA was passed in 1995, the three agencies have conducted SBREFA panels on 55 regulations. In the last two years, we have participated in a dozen panels, including the first three panels ever by the CFPB. We provided support to the CFPB for the panels on RESPA-TILA, mortgage servicing, and mortgage loan origination rules and were able to work with the agency to provide small business flexibilities.

Roundtables

In an effort both to hear directly from small businesses and their representatives and to give federal agency rule writers a change to hear specific small business concerns, *2012,* which I delivered to Congress last month. I ask that a copy of this report be submitted, in its entirety, into the record.

Executive Order 13272

I also am pleased to report that in FY 2012 agencies continued to improve their compliance with E.O. 13272, which was signed in August 2002 by President George W. Bush. Some of the provisions of the executive order became law under the Small Business Jobs Act of 2010.

E.O. 13272 requires Advocacy to notify agencies of the requirements of the act, provide compliance training, and submit comments to agencies and the Office of Information and Regulatory Affairs (OIRA) on agency regulations. Agencies in turn must establish written policies and procedures for RFA compliance and notify Advocacy of any draft rules with a significant economic impact on a substantial number of small entities. Where Advocacy has provided written comments, agencies must give appropriate consideration to these comments and publish their response in the *Federal Register* with the final rule.

Executive Order 13563 and RFA Section 610

In 2011, President Obama provided Advocacy with additional tools to improve the regulatory development process. Executive Order (E.O.) 13563 and E.O. 13579 instructed agencies to develop a plan for periodic retrospective review of all existing regulations

with the intention of reducing the cumulative regulatory burden. In response, Advocacy continues to expand its stakeholder outreach. We have convened 84 roundtables on a variety of topics since I became chief counsel, including 32 in FY 2012. Many of the roundtables featured significant involvement from agency officials.

For example, we held several roundtables with OSHA, where senior OSHA officials were present, on small business perspectives related to labor safety issues.

We also held a series of roundtables in several regions around the country to solicit input from small business research and technology stakeholders about the SBA's proposed regulations implementing the revised Small Business Innovation Research program.

These small business roundtables help ensure that the voices of small businesses and other small entities are heard by officials whose actions will make a difference in the regulatory environment in which they operate.

Compliance

Having generally explained how the Office of Advocacy works with agencies, I would like to address agency compliance with their RFA responsibilities. I am pleased to report that agencies continued to improve their compliance with the RFA in FY 2012, bolstered by President Obama's focus on the need for regulatory review and emphasis on the special concerns of small businesses in the rulemaking process. A detailed analysis of this compliance can be found in Advocacy's *Report on the Regulatory Flexibility Act FY* agencies developed plans, some with significant public input, and published these plans online. The White House also posted the plans and agency updates online.[1]

Cost Savings

Agency compliance with Advocacy's RFA efforts pays real dividends to America's small businesses. In FY 2012, Advocacy's RFA activities resulted in small businesses saving $2.4 billion in first-year regulatory costs and another $1.2 billion in annually recurring costs.

It is important to note that these estimated annual cost savings are derived primarily from regulatory cost estimates from the agencies themselves. Cost savings are captured in the year in which the agency's rulemaking is affected by Advocacy's intervention; and the total varies from year to year. Over the two and half years of my tenure, Advocacy's work with federal agencies has saved small businesses $17 billion in new first-year regulatory costs.

Concluding Remarks

The passage of laws amending the RFA and the Executive Orders reinforcing it have made this critical small business law more effective in reducing the regulatory burdens of small entities early—when the regulations are still in the development stage. Agencies' willingness to attend Advocacy roundtables and hear the

[1] See http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system.

concerns of small businesses has been a welcome development that has resulted in improved agency compliance with the RFA.

We have learned through our experience with the RFA that regulations are more effective when small firms are part of the rulemaking process. The result of enhanced agency cooperation with the Office of Advocacy and improved agency compliance with the RFA benefits small businesses, the regulatory environment, and the overall economy.

Thank you again for the opportunity to testify on the important work the Office of Advocacy does on behalf of small businesses. I would be happy to take any questions.

SBA
Office of Advocacy
www.sba.gov/advocacy

Advocacy: the voice of small business in government

Report on the Regulatory Flexibility Act FY 2012

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

February 2013

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

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

To the President and the Congress of the United States

The Office of Advocacy is pleased to present to the President and Congress the fiscal year (FY) 2012 *Report on the Regulatory Flexibility Act*. In this report, we discuss federal agencies' FY 2012 compliance with the Regulatory Flexibility Act of 1980 (RFA), and Executive Order (E.O.) 13272. The RFA requires federal agencies to review proposed regulations that would have a significant impact on small entities—small businesses, small governmental jurisdictions, and small nonprofits—and to consider significant alternatives that would minimize the regulatory burden on them while achieving the rules' purposes.

In FY 2012, Advocacy's RFA efforts helped save $2.4 billion in first-year regulatory costs for small entities, while ensuring that agencies were able to 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.

Thanks to the Small Business Regulatory Enforcement Fairness Act (SBREFA) and later laws and executive orders, the RFA has become more effective in reducing small firms' regulatory burden. President Obama has given us additional tools to improve the regulatory development process. In particular, E.O. 13563 requires federal agencies to create a systematic process for reviewing rules with an eye toward reducing the regulatory burden.

Regulations are more effective when small firms are part of the rulemaking process. 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 Regulatory Enforcement Fairness Act (SBREFA) panels. In fiscal year 2012, we updated our RFA training manual to reflect recent changes. The new edition of *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* is available online for use by federal rule writers and small business stakeholders.

The office furthers the goal of reducing the regulatory burden on small entities through congressional testimony, advocacy for legislative reform, and vital economic 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 email alerts, regulatory alerts, the newsletter, *The Small Business Advocate*, and social media including a blog, Twitter, and Facebook.

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

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

Charles Maresca
Director of Interagency Affairs

Contents

1 History and Overview of the Regulatory Flexibility Act

In 1964, a guide for small business owners described how government affects the economic environment for businesses, noting that the actions of the federal government, whether through legislation or "an administrative ruling of an Executive Department or regulatory agency, can mean literally life or death to a business enterprise."[1]

As part of the effort to promote better policies for small businesses, Congress in 1974 established the position of Chief Counsel for Advocacy within the Small Business Administration.[2] In 1976, this provision was expanded to create the independent Office of Advocacy headed by a presidential appointee, thus strengthening the Chief Counsel's ability to be an effective small business advocate.[3]

In 1980, the White House Conference on Small Business made recommendations that led directly to the passage of the Regulatory Flexibility Act.[4] 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 agencies' 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 the Chief Counsel to report on an annual basis 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). This new law provided for judicial review of agency compliance with key sections of the RFA. It also established a requirement that the Environmental Protection Agency (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 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. 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 in-

1 William Ruder and Raymond Nathan, *The Businessman's Guide to Washington*, Englewood Cliffs, NJ: Prentice-Hall, Inc., 1964, 1.

2 PL 93-386, the Small Business Act of 1974, directed the SBA Administrator to "designate an individual within the Administration to be known as the Chief Counsel for Advocacy to... represent the views and interests of small businesses before other Federal agencies whose policies and activities may affect small businesses."

3 P.L. 94-305.

4 See Appendix B.

sight 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 August 2002, President Bush signed Executive Order 13272, which required Advocacy to notify the leaders of the federal agencies from time to time of their responsibilities under the RFA.[5] The executive order also requires Advocacy to provide training to the agencies on how to comply with the law, and to report annually on agency compliance with the E.O. Agency compliance is detailed in the remainder of this report.

Finally, the executive order requires that the agencies provide "in any explanation or discussion accompanying publication in the *Federal Register*," a response to any written comment it has received on the rule from Advocacy. The requirement of early notification has since been codified by the Small Business Jobs Act of 2010. Also in 2010, as part of the Dodd-Frank Act, Congress created the Consumer Financial Protection Bureau (CFPB) and included the new agency with EPA and OSHA as an agency required to convene panels under SBREFA.

When President Obama issued Executive Order 13563, Improving Regulation and Regulatory Review, he imposed new requirements of heightened public participation, consideration of overlapping regulatory requirements and flexible approaches, and ongoing regulatory review.[6] E.O. 13563 was accompanied by a presidential memorandum, Regulatory Flexibility, Small Business and Job Creation. This memo reminded the agencies of their responsibilities under the RFA, and directed them "to give serious consideration" to reducing the regulatory impact on small business through regulatory flexibility, and to explain in writing any decision not to adopt flexible approaches.

On May 11, 2012, President Obama issued Executive Order 13610, Identifying and Reducing Regulatory Burdens, which established regulatory review as a rulemaking policy, and also established public participation as a key element in the retrospective review of regulations.[7] E.O. 13610 also established as a priority "initiatives that would reduce unjustified regulatory burdens or simplify or harmonize regulatory requirements imposed on small business," and ordered the agencies to "give consideration to the cumulative effects" of their own regulations.

With this emphasis on the principles of regulatory review and sensitivity to the special concerns of small businesses in the rulemaking process, federal agencies have increased their efforts to comply with the Regulatory Flexibility Act.

5 See Appendix C.

6 See Appendix D.

7 See Appendix F.

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

Oversight of compliance with both the Regulatory Flexibility Act and Executive Order 13272 is the responsibility of the Office of Advocacy. Legislative improvements to the RFA and executive orders have required greater Advocacy 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 2012, this more cooperative approach yielded $2.4 billion in foregone regulatory costs (Tables 2.2 and 2.3).

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 was signed in 2002, making this executive order now ten years old. In many ways, its few requirements have changed how many agencies draft their proposed regulations and how they consider the potential impacts of their regulatory actions on small business.

Under E.O. 13272, federal agencies are required to make publicly available information on how they take small businesses and the RFA into account when creating regulations. By the end of 2003, most agencies had made their RFA policies and procedures available on their websites.

Agencies must also send to Advocacy copies 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 such rules are sent to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) or at a reasonable time prior to publication in the *Federal Register.*

E.O. 13272 says that agencies must give appropriate consideration to Advocacy's written comments on a proposed rule and must address these comments in the final rule published in the *Federal Register*. This section of the E.O. was codified in 2010 as an amendment to the RFA by the Small Business Jobs Act. Most agencies complied with this provision in FY 2012.

The Office of Advocacy has three duties under E.O. 13272. First, Advocacy must notify agencies of how to comply with the RFA. This was first 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 the 2012 revision incorporated the later amendments to the RFA. The guide is available on Advocacy's website at **http://www.sba.gov/content/guide-government-agencies-how-comply-with-regulatory-flexibility-act-0.**

Second, Advocacy must report annually to OIRA on agency compliance with the three agency provisions. In fiscal year 2012, overall agency compliance with E.O. 13272 was good and, in some agencies, improved. 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 2012 compliance with E.O. 13272 can be found in Chapter 3, Table 3.1.

Finally, Advocacy is required to train federal regulatory agencies in how to comply with the RFA. In fiscal year 2012, Advocacy trained nearly 200 agency employees in RFA compliance. After ten years of E.O. 13272, RFA training continues to be a crucial tool in instilling small business consideration into the drafting of regulations that will affect them. Agencies that have had RFA training 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

Meetings and training sessions are some of the means by which Advocacy stays in contact with federal agencies on behalf of the small business community. Advocacy's work with federal agencies has increased in scope and effectiveness as its training program has grown and as agencies have become more open to the assistance the office can lend. In FY 2012, Advocacy's communications with agencies included 28 formal comment letters (Charts 2.1-2.3 and Table 2.1).

More effective regulations that avoid excessive burdens on small firms are the result of these efforts. See the cost savings examples in Tables 2.2 and 2.3.

Roundtables

Advocacy has continued to develop its use of stakeholder roundtables, both to hear the concerns of small businesses and to provide federal agencies a means to hear those concerns. In FY 2012 Advocacy built on its practice of inviting agency heads, rule writers, and policy directors to these roundtables. Agency officials have reported to Advocacy that these roundtables have been helpful to them in addressing the requirements of the RFA, increasing agency access to small businesses, and improving agency understanding of economic impacts on small businesses. In FY 2012, Advocacy hosted 32 roundtables on a variety of topics; the following roundtables featured significant involvement from agency officials.

Environment: Chemical Disclosure Rule. At this roundtable on October 21, 2011, Ellie Clark of the EPA Office of Pollution Prevention and Toxics described the final rule requirements of the Chemical Disclosure Rule, which requires manufacturers and reporters of chemicals to report chemical inventories in 2012. There was considerable discussion about whether firms would be able to complete the electronic reporting by the regulatory deadline, and about the difficulty of reporting on waste chemicals that are recycled into valuable products. Eventually, EPA did extend the deadline by several months, based on the concerns raised at this meeting.

Environment: Underground Storage Tanks. On January 27, 2012, Carolyn Hoskinson, Director of the Underground Storage Tank Office at EPA, presented information about the EPA's pending proposal to update the existing underground storage tank (UST) regulations that have been basically unchanged since 1988. At the discussion, industry participants raised concerns about EPA's planned action to subject a new class of wastewater treatment (WWT) tanks to UST requirements. This led to a more informed collaboration between EPA and stakeholders about the types of WWT tanks that were subject to the requirements. EPA subsequently produced a lengthy paper to address this issue in the rulemaking. The final rule is still pending.

Federal Procurement. On July 19, 2012, Advocacy held a roundtable in Albuquerque, New Mexico, to discuss regulatory issues affecting small business participation in federal procurement programs. Representatives from SBA and

other federal agencies participated in this event, as well as staff from several congressional offices.

Finance: Integrated Mortgage Disclosures and Mortgage Loan Originator Compensation. The Office of Advocacy hosted financial roundtables on July 31, 2012, and September 26, 2012, where Consumer Financial Protection Bureau (CFPB) officials listened to small entity concerns and answered questions about the CFPB's proposed rulemakings on Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (RESPA or Regulation X) and the Truth in Lending Act (TILA or Regulation Z), as well as the Mortgage Loan Originator Compensation proposed rulemaking. The Dodd-Frank Act requires the CFPB, in the former rulemaking, to establish new disclosure requirements and forms to combine the requirements of RESPA and TILA for most closed-end consumer credit transactions secured by real property. The latter rulemaking would implement statutory changes to Regulation Z's current loan originator compensation provisions. Roundtable participants discussed concerns about the way the CFPB was combining the statutory requirements and the economic burden and workability of the potential changes.

Finance: Mortgage Servicing. On September 21, 2012, CFPB listened to small entity concerns and answered questions on a conference call about its proposed rulemaking on mortgage servicing. Small entities are concerned that they may have to implement changes to correct problems that were not caused by them. The changes may be burdensome and are not within the small entity business model.

Homeland Security: Proposed Ammonium Nitrate Security Program Rule. On Tuesday, November 22, 2011, Advocacy hosted a small business roundtable on the Department of Homeland Security's (DHS) Proposed Ammonium Nitrate Security Program Rule. DHS staff from Infrastructure Protection and the Ammonium Nitrate Security Program attended the roundtable and provided a background briefing on the proposed rule and answered questions from small businesses in attendance. DHS's proposed rule would regulate the sale and transfer of ammonium nitrate pursuant to section 563 of the fiscal year 2008 Department of Homeland Security Appropriations Act, which seeks to prevent the use of ammonium nitrate in acts of terrorism. Advocacy followed up by submitting formal public comments to DHS outlining small business perspectives on the proposed rule.

Incorporation by Reference. Advocacy hosted small business roundtables on January 20 and May 9, 2012, to discuss the Incorporation by Reference (IBR) issue. At the roundtable on January 20, Emily Schleicher Bremer, an attorney advisor from the Administrative Conference of the United States (ACUS), provided the briefing on the ACUS recommendation on IBR, and small entity stakeholders discussed the issue.

At the roundtable on May 9, representatives from the Department of Transportation, the National Archives and Records Administration, and multiple interested industries presented and discussed several ongoing issues, including the ACUS recommendation to encourage IBR, the Office of the Federal Register's receipt of a rulemaking petition to define key terms associated with the practice, and OMB's request for comment on possible changes in its current IBR guidance. Advocacy organized a follow-up meeting with small business stakeholders and OMB to discuss small business perspectives on IBR. Advocacy also filed public comments with both the Office of the Federal Register and OMB, outlining small business perspectives on the IBR issue.

Minimum Wages and Overtime for Companion Care Workers. In February 2012, Advocacy hosted a small business roundtable on the Department of Labor's proposed rule that would

require some companion care workers to be paid minimum wages and overtime under the Fair Labor Standards Act (FLSA). DOL representatives Michael Hancock, Assistant Administrator for Policy at the Wage and Hour Division, and William Lesser, Deputy Associate Solicitor for the Division of Fair Labor Standards, provided an overview of the proposed revisions and answered questions. Participants expressed concern that DOL underestimated the costs of the overtime requirements, particularly costs for overnight shifts and live-in workers, and presented regulatory alternatives. Advocacy followed up by submitting public comments to DOL outlining small business feedback on the proposed rule. DOL has not finalized this rulemaking.

Motor Carrier Safety: Comprehensive Safety Assessment Program. On February 14, 2012, Advocacy hosted a small business roundtable on the Federal Motor Carrier Safety Administration's (FMCSA) Comprehensive Safety Assessment (CSA) Program. FMCSA Administrator Anne Ferro and key CSA program staff attended the roundtable and provided a background briefing about the program, including information about CSA's new Safety Measurement System (SMS) and its new Behavior Analysis and Safety Improvement Categories (BASICs). CSA is a FMCSA initiative to improve large truck and bus safety and ultimately reduce crashes, injuries, and fatalities related to commercial motor vehicles. Industry stakeholders asked questions and expressed concerns about the CSA program, including its usefulness and reliability.

Occupational Safety and Health (OSHA): Proximity Detection Systems Rule and Mine Safety and Health Management. On November 18, 2011, Roslyn Fontaine, Acting Director of the Office of Standards, Regulations and Variances, presented a regulatory update from the Mine Safety and Health Administration (MSHA) covering MSHA's proposed Proximity Detection Systems rule and its proposal for safety and health management programs for mines. OSHA staff attended the roundtable to observe and participate with small businesses in the discussion.

OSHA: Globally Harmonized System. On March 30, 2012, Dorothy Dougherty, Director, Directorate of Standards and Guidance, and Maureen Ruskin, Director of Chemical Hazards – Metals, from OSHA provided a briefing and answered questions about the final GHS rule. Other topics on the agenda included discussions of OSHA's new Memorandum on Employer Safety Incentive and Disincentive Policies, and an update on key pending MSHA rulemakings, including Examinations of Work Areas, Patterns of Violations, and Respirable Coal Mine Dust Practices.

OSHA: Illness and Injury Prevention Programs. At the May 9, 2012, roundtable (see Incorporation by Reference discussion), William Perry, Deputy Director of the Directorate of Standards and Guidance in OSHA, led a discussion of OSHA's plan for convening a SBREFA panel on its contemplated Illness and Injury Prevention Programs (I2P2).

OSHA: Labor Safety Issues. Advocacy's roundtables on May 18, August 10, and September 21, 2012, focused on small business perspectives related to labor safety issues. Cass R. Sunstein, Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, spoke at the first roundtable. Chief Counsel for Advocacy Winslow Sargeant introduced Administrator Sunstein. OSHA Directorate of Construction Director Jim Maddox and key program staff attended the roundtable on September 21 and listened to stakeholder concerns.

OSHA: Cranes and Derricks in Construction Final Rule. On September 12, 2012, Advocacy hosted a small business roundtable on OSHA's Cranes and Derricks in Construction final rule.

Jim Maddox, Director of OSHA's Directorate of Construction, and key program staff attended the roundtable, provided a background briefing, and listened to stakeholder concerns about the issue. Small businesses were concerned with new OSHA guidance suggesting that no operator may operate a crane of a capacity greater than that upon which they have been properly tested and certified. The concern was that such an interpretation could mean that currently trained and certified operators may no longer be authorized to operate cranes they are currently operating. Advocacy has conducted several follow-up activities.

Small Business Innovation Research Program. In FY 2012, Advocacy hosted several roundtables in Washington, D.C. and in the Small Business Administration's 10 regions to discuss the Small Business Innovation Research (SBIR) program. On May 28, 2012, Advocacy held a roundtable in Washington, DC, to discuss proposed regulations to implement the revised SBIR program. Representatives from the House and Senate Small Business Committees, the Small Business Office of Technology, and the National Academy of Sciences served as panelists for this roundtable. On June 18 and June 28, 2012, SBA Office of Technology Associate Administrator Sean Greene spoke at roundtables Advocacy hosted in Austin, Texas, and Boston, Massachusetts. The purpose of these roundtables was to inform and to solicit input from small business research and development stakeholders regarding the SBA proposed SBIR program regulations. Advocacy hosted a third roundtable on this topic on July 9, 2012, in New Orleans, Louisiana.

Taxation on Internet Commerce. Congressional staff attended both small business tax roundtables on the issue of taxation on internet commerce on February 23, 2012, and May 3, 2012. Some small business stakeholders contended that it is unfair for businesses which have a physical location to be responsible for collecting and remitting sales taxes while many online retailers do not. Other small businesses expressed concern with the disproportionate burden that small online retailers would face in comparison with large online retailers if required to collect and remit sales taxes. Small business representatives recommended that policymakers and legislators consider exempting small online retailers from collecting and remitting taxes from internet sales.

Small Business Pension-Related Issues. Advocacy hosted a roundtable on March 21, 2012, where staff from the IRS and Treasury met with small business stakeholders to discuss pension-related issues affecting small businesses. Small business representatives discussed the burdens associated with the "use it or lose it rule," which prohibits any contribution or benefit under a health flexible spending account (FSA) from being used in a subsequent plan year or period of coverage. After the roundtable, on May 30, 2012, the IRS issued Notice 2012-40, providing guidance on health FSAs. The IRS notice requested comments on the potential modification or elimination of the use it or lose it rule for health FSAs.

Voluntary Fiduciary Correction Program. On July 20, 2012, Advocacy hosted a roundtable where staff from the Employee Benefits Security Administration (EBSA) met with small businesses to discuss the voluntary fiduciary correction program, fee, filing, and electronic disclosure, and multiple employer plans and state-based employer plans. Small business stakeholders voiced concerns about EBSA's apparent new position on brokerage windows, which allow retirement plan participants to control certain investments made with their contributions. After the roundtable, on July 30, 2012, EBSA issued a revised guidance that addressed the small business concerns on brokerage windows.

Judicial Review of the RFA

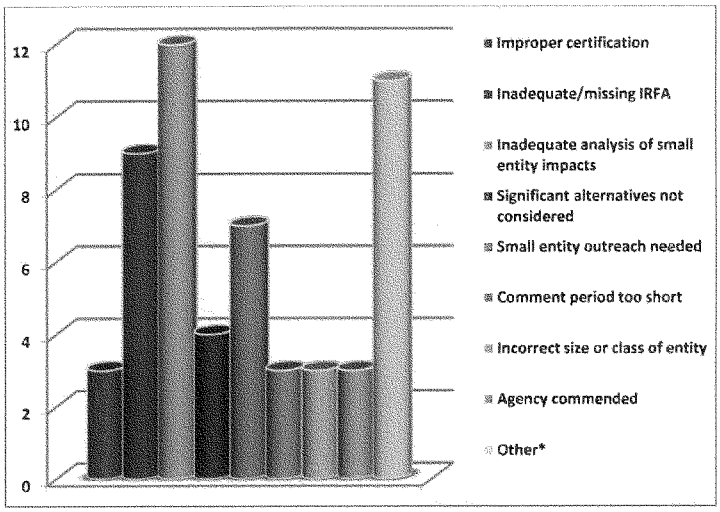
In 2012, the courts reiterated the findings of previous RFA cases and Congress.[7] In *National Association of Home Builders v. EPA*, 682 F. 3d 1032 (D.C. Cir. 2012), the court reviewed the issue of whether an agency's failure to convene a small business advocacy review panel before issuing a new rule was judicially reviewable. The court reiterated its findings in *Allied Local & Regional Manufacturers Caucus v. EPA*, 215 F.3d 61 (D.C.Cir. 2000) and said that the court "has no jurisdiction to review challenges" to an agency's compliance with section 609(b). In *Florida Wildlife Federation, Inc. v. Jackson*, 853 F. Supp. 1138 (N.D. Florida 2012), the court addressed the issue of indirect impacts and restated that when a rule's only effect on small entities will be indirect, an agency may properly make a certification. In *National Restaurant Association v. Solis*, 2012 WL 1921115 (D.D.C. 2012), the court reiterated that the requirements of the RFA are "purely procedural."

In addition, in *Louisiana Forestry Association v. Solis*, 2012 WL 3562451 (E.D. Pa. 2012), the court relied on the Senate committee report to address the RFA's requirement that an agency consider alternatives when promulgating rules. The court stated that Congress emphasized that the RFA does not require an agency to adopt a rule establishing differing compliance standards, exemptions, or any other alternative to the proposed rule. It requires that an agency, having identified and analyzed significant alternative proposals, describe those it considered and explain its rejection of any which, if adopted, would have been substantially less burdensome on the specified entities. Evidence that such an alternative would not have accomplished the stated objectives of the applicable statutes would sufficiently justify the rejection of the alternative.

Moreover, in *International Internship Programs v. Napolitano*, 853 F. Supp. 2d 86 (D.D.C. 2012), the court addressed the issue of agency decisions that were not "rules" under the RFA and found that in such an instance there is no claim for relief under the RFA. In addition, the court determined that an agency is not required to conduct a periodic small entity impact analysis pursuant to 5 USC §610 if the agency certified under §605(b) that the regulation would not have a significant economic impact on a substantial number of small entities.

7 For more detail, see Table A.2 in Appendix A.

Chart 2.1 Number of Specific Comments in Advocacy Comment Letters, FY 2012



*"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 was needed, that industry representatives provided specific comments, that small entity burdens should be re-evaluated, etc.

Chart 2.2 Advocacy Comments: Major Reasons IRFAs Were Inadequate, FY 2012 (percent)

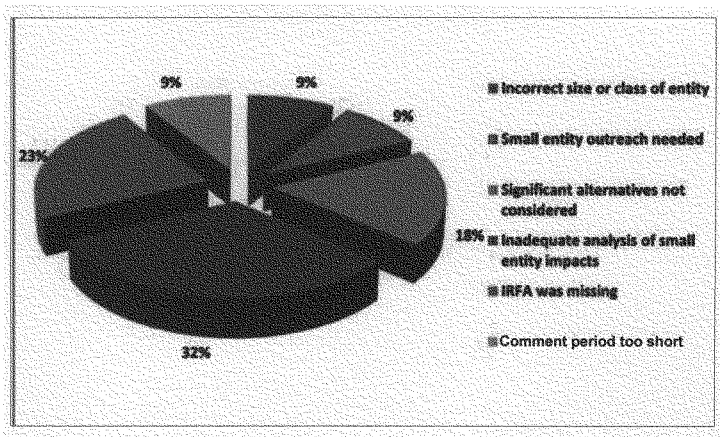


Chart 2.3 Advocacy Comments: Major Reasons Certifications Were Improper, FY 2012 (percent)

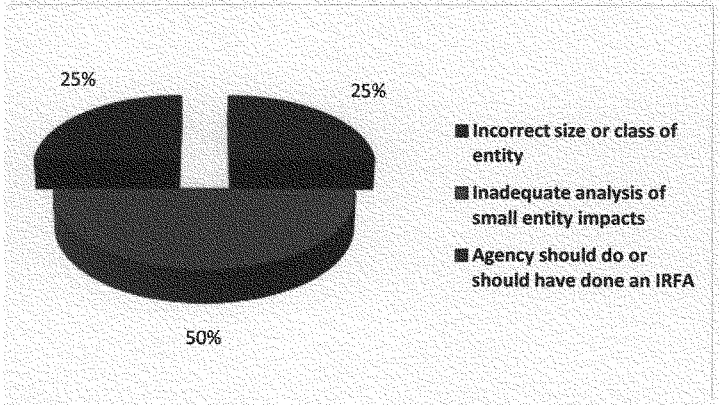


Table 2.1 Regulatory Comment Letters Filed by the Office of Advocacy, FY 2012

Date	Agency	Title	Where Published
10/3/2011	DOT	Comments on FAA's Draft Standard Operating Procedures (SOP) of the Aircraft Certification Service (AIR) Process for the Sequencing of Certification and Validations Projects.	76 Fed. Reg. 54528
10/5/2011	EPA	Comments on EPA's Integrated Risk Information System Program and the Toxicological Review of Hexavalent Chromium.	n/a
10/7/2011	DOE	Energy Conservation Program: Energy Conservation Standards for Direct Heating Equipment.	76 Fed. Reg. 43941
10/11/2011	FWS	Designation of Revised Critical Habitat for Southwestern Willow Flycatcher.	76 Fed. Reg. 50542
10/20/2011	EPA	Proposed Revisions to the Definition of Solid Waste.	76 Fed. Reg. 44094
10/25/2011	SEC	Conflict Minerals, File Number S7-40-10.	75 Fed. Reg. 80948
11/22/2011	HHS	Comments on the Department of Health and Human Services, National Toxicology Program's Report on Carcinogens.	76 Fed. Reg. 210
12/1/2011	DHS	Comments on the Department of Homeland Security's Proposed Ammonium Nitrate Security Program Rule.	76 Fed. Reg. 46908
12/6/2011	USDA	Traceability for Livestock Moving Interstate.	76 Fed. Reg. 50082
1/21/2012	EOP	Impact of Reverse Auctions on Small Businesses.	n/a
2/21/2012	EPA	Non-hazardous Secondary Materials that are Solid Waste.	76 Fed. Reg. 80452
3/12/2012	DOL	Application of the Fair Labor Standards Act to Domestic Service, Notice of Proposed Rulemaking.	76 Fed. Reg. 81190

Date	Agency	Title	Where Published
3/12/2012	EPA	Comments on EPA's Proposed Rule, National Emission Standards for Hazardous Air Pollutant Emissions: Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks; and Steel Pickling-HCl Process Facilities and Hydrochloric Acid Regeneration Plans.	77 Fed. Reg. 6628
3/14/2012	EPA	EPA's Integrated Risk Information System's Toxicological Review of Hexavalent Chromium.	n/a
3/27/2012	ACUS	Comments on Small Business Perspective on the Paperwork Reduction Act.	n/a
4/2/2012	DOJ	Delaying the Compliance Date for Certain Requirements of the Regulations Implementing Titles II and III of the Americans with Disabilities Act.	77 Fed. Reg. 16196
5/1/2012	ACUS	Comments on the Review of Regulatory Analysis Requirements and the April 24 Draft Recommendations.	n/a
5/22/2012	FCC	Comments on Proposed Mobile Device Interoperability in the Lower 700 MHz bands.	75 Fed. Reg. 9210
6/1/2012	OMB	Comments on Request for Information on Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities.	77 Fed. Reg. 19357
6/1/2012	NARA	Comments on Petition for Rulemaking on "Incorporation by Reference" and "Reasonably Available."	77 Fed. Reg. 11414
6/28/2012	NOAA	Comments on Proposed Sea Turtle Conservation Rule Imposing New Shrimp Trawling Requirements.	77 Fed. Reg. 27411
7/5/2012	FWS	Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Northern Spotted Owl; Proposed Rule and Availability of Supplementary Documents.	77 Fed. Reg. 32483

Date	Agency	Title	Where Published
7/9/2012	CFPB	Reopening of Comment Period and Request for Comment on Truth in Lending (Regulation Z).	77 Fed. Reg. 33120
7/16/2012	SBA	Comments on Proposed Small Business Innovation Size Regulations.	77 Fed. Reg. 28510
7/24/2012	IRS	Notice 2012-40, Potential Modification of Use It or Lose It Rule.	n/a
8/30/2012	CFPB	Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z).	77 Fed Reg. 51116
9/10/2012	BLM	Oil and Gas: Well Stimulation, Including Hydraulic Fracturing on Federal Indian Lands.	77 Fed Reg. 27691
9/17/2012	State	Small Business Innovation Research.	n/a

n/a = not applicable.
See Appendix G for definitions of agency abbreviations.

Table 2.2 Regulatory Cost Savings, FY 2012

Agency	Subject Description	Cost Savings/ Impact Measures
DOL	***H-2B Wage Methodology Rule, 75 Fed. Reg. 61578.*** In October 2010, the Department of Labor published a proposed rule increasing wage rates for employees working under H-2B visas. The wage rates were to take effect in March 2011. DOL extended the effective date to November 30, 2011, citing small business concerns and Advocacy's comment letters. This resulted in savings for small businesses. In FY 2012, congressional action delayed the implementation of this rule twice, resulting in total cost savings of more than $1.1 billion. First, President Obama signed appropriations bills in November and December 2011 that included language prohibiting any FY 2012 federal funding to enforce the H-2B wage rule until October 1, 2012. In addition, on September 28, 2012, the President signed into law H.J. Res. 117, which provides fiscal year 2013 appropriations for continuing projects and activities of the federal government through Wednesday, March 27, 2013. Under Sec. 101(a) of H.J. Res. 117, the DOL lacks the appropriated funds to implement the H-2B rule increasing the wage rates.	The first delayed implementation resulted in $703 million in one-time cost savings for small businesses. The second delayed implementation from H.J. Res. 117 resulted in a one-time cost savings to small businesses of $406.75 million. In total, small business saved one-time costs of $1.10975 billion as a result of the delays.

Agency	Subject Description	Cost Savings/ Impact Measures
DOT	***2010-2011 Hours of Service Rule RIN 2126-AB26.*** On Tuesday, December 27, 2011, the Federal Motor Carrier Safety Administration (FMCSA) finalized its Hours of Service (HOS) for Drivers rule. The proposed rule, which was published on December 29, 2010, would have reduced the daily maximum driving limit, reduced the maximum on-duty time limit, instituted mandatory breaks, and altered the current 34-hour restart provision. Following publication of the proposed rule, Advocacy hosted a small business roundtable (attended by the FMCSA Administrator and staff) on February 9, 2011, to discuss the proposed rule and obtain small business input. Advocacy also attended FMCSA's public listening session on the proposed rule on February 17, 2011, and filed public comments on February 25, 2011. Advocacy's comments reflected the concerns of small business representatives in the trucking industry. Advocacy's comments recommended that FMCSA consider retaining its current regulations, assess potential unintended effects, and consider other costs and operational impacts before proceeding. The final rule made several changes from the proposed rule; most notably, it left the existing 11-hour daily driving hours limit in place, left the existing 14-hour daily duty hours in place, and reduced the limitations on the 34-hour restart period.	The changes to the final rule resulted in annual cost savings for small businesses of $815 million.
EPA	***2012 Construction General Permit (Final Rule) 77 FR 12866 (Feb. 29, 2012).*** In February 2012, the Environmental Protection Agency published the Construction General Permit (Final Rule), which requires all construction activities disturbing more than one acre to install special controls and measures to limit the amount of erosion that goes into U.S. waters as a result of storm water runoff. Advocacy worked closely with EPA and industry on revising the required controls to be less costly and more cost-effective during interagency review of the draft final rule.	The revisions made to the requirements created cost savings to small entities amounting to $150 million in the first year and annually.

Agency	Subject Description	Cost Savings/ Impact Measures
EPA	***National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines (June 2012).*** In June 2012, the Environmental Protection Agency published a proposal to revise the current air pollution requirements for existing stationary reciprocating internal combustion engines (RICE), which include diesel-fuel/compression ignition (CI) engines and gas-fired/spark ignition (SI) engines. Advocacy had earlier proposed that existing SI and CI engines in areas remote from human activity not be subject to emissions standards, catalyst retrofits, and testing requirements. Instead, Advocacy suggested that EPA adopt management practices that would include periodic inspection and replacement of maintenance items, such as engine oil and filter, spark plugs, hoses, and belts. The June proposal adopted Advocacy's suggestion for SI engines in remote areas. An engine would generally be considered to be in a sparsely populated area if there are five or fewer buildings intended for human occupancy within 0.25 mile distance of the engine. Under the current rule, the capital and annual costs for four-stroke SI engines above 500 HP are estimated by EPA at $310 million and $150 million, respectively. Under the new proposal, the capital and annual costs are estimated at $30 million and $12 million respectively.	The cost savings from the new proposal for modifying the rule for SI engines are estimated at $138 million annually.

Agency	Subject Description	Cost Savings/ Impact Measures
SBA	***Small Business Size Standards: Professional, Scientific and Technical Services.*** On February 10, 2012, the Small Business Administration (SBA) published the final regulation concerning its periodic review of size standards. For NAICS code 54 (Professional, Scientific, and Technical Services), the SBA size standard threshold pre-proposal was at $4.5 million. SBA proposed increasing it to $19 million. Based on SBA's own assessment, it received about 1,200 comments addressing the proposed changes. Advocacy, in meetings with industry and trade groups, proposed an alternative size standard threshold between $5 million and $14 million. In the final regulation, SBA decided to set the size standard threshold for NAICS code 54 at $7 million.	For codes 541310 (Architectural Services), 541330 (Engineering Services), and 541370 (Surveying and Mapping), annual small business cost savings totaled $134.5 million.
DOJ	***Amendment of Americans with Disabilities Act Title III Regulations.*** On September 15, 2010, the Department of Justice published a final rule that amends the agency's regulations implementing Title III of the Americans with Disabilities Act (ADA). Requirements for swimming pools, wading pools, and spas were to be implemented on March 15, 2012. On January 31, 2012, DOJ released guidance on these pool requirements, in particular, pool lift rules. Small businesses contacted Advocacy and DOJ regarding this guidance document, seeking an extension of the compliance date due to this new guidance document. On March 15, 2012, DOJ extended the compliance date by 60 days and sought public comment. Advocacy submitted a comment letter recommending a further extension of the compliance date. DOJ extended the compliance date to March 15, 2013.	The extension of the compliance date leads to $99.6 million in one-time cost savings for small businesses.

See Appendix G for definitions of agency abbreviations.

Table 2.3 Summary of Cost Savings, FY 2012 (dollars)[1]

Rule / Intervention	First-year Costs	Annual Costs
H-2B Wage Rule (DOL)[2]	705,779,726	
2010-2011 Hours of Service Rule (DOT)[3]	815,000,000	815,000,000
2012 Construction General Permit (EPA)[4]	150,000,000	150,000,000
National Emissions Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines (EPA)[5]	138,000,000	138,000,000
Small Business Size Standards,: Professional, Scientific, and Technical Services (SBA)[6]	134,457,859	134,457,859
H-2B Wage Rule (DOL)[7]	406,750,000	
Amendment of Americans with Disabilities Act Title II and Title III Regulations (DOJ)[8]	99,658,231	
TOTAL	**2,449,645,816**	**1,237,457,859**

1. The Office of Advocacy generally bases its cost savings estimates on agency estimates. Cost savings for a given rule are captured in the fiscal year in which the agency agrees to changes in the rule as a result of Advocacy's intervention. Where possible, cost savings are limited to those attributable to small business. 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: Advocacy calculations based on DOL Regulatory Impact Analysis (RIA).
3. Source: Exhibit 8-2 Final DOT RIA.
4. Source: 77 FR 12866 (February 29, 2012).
5. Source: EPA RIA, pp. 4-10, **www.epa.gov/ttn/atw/rice/ricepg.html**.
6. Source: Industry analysis and FPDS data pull on 10/03/2012.
7. Source: DOL analysis.
8. Source: DOJ Small Business Impact Analysis.

3 Advocacy Review of Agency RFA Compliance in Fiscal Year 2012

The following section provides an overview of RFA and Executive Order 13272 compliance by the agencies, as well as reports on individual agencies' compliance for fiscal year 2012.

Regulatory Agendas

Section 602 of the RFA requires that in April and October each agency publish a regulatory flexibility agenda in the *Federal Register*. This agenda must provide specific information about the subject of any rule which the agency anticipates proposing, if that regulation is likely to have a significant economic impact on a substantial number of small entities. Section 602 requires the agencies to provide these agendas to the Chief Counsel for Advocacy for comment. It also requires the agencies to provide the agendas directly to small businesses or their representatives through publications "likely to be obtained" by small businesses, and to solicit comment on the agendas from small entities who will be subject to the listed regulations. These regulatory agendas are useful for putting small entities on notice of forthcoming regulations, and they are often the subject of discussion at Advocacy roundtables.

In FY 2012, regulatory flexibility agendas were published in the *Federal Register* on February 13, 2012. Agendas were provided to Advocacy on that date.

The SBREFA Panel Process

Section 609 of the RFA requires a "covered agency" to convene a small business advocacy review (SBAR or SBREFA) 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 Consumer Financial Protection Bureau joined 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 55 SBREFA panels, which are composed of representatives of the covered agency, Advocacy, and OMB's Office of Information and Regulatory Affairs. In FY 2012, the CFPB conducted three panels, EPA initiated one new panel, and OSHA conducted no SBREFA panels. Panels to date are listed in Appendix Table A.3.

Retrospective Review of Existing Regulations

RFA Section 610 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."[8] Agencies report planned section 610 reviews in the fall semiannual Unified Agenda of Regulatory and Deregulatory Actions.[9] As noted earlier, President Obama has 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

8 5 U.S.C. 610(a).

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

periodic retrospective review of all existing regulations and E.O. 13579, signed July 11, 2011, said that independent agencies should also promote the goals outlined in E.O. 13563.[10] OMB issued a series of memoranda implementing this requirement.[11] In response, agencies developed plans, some with the benefit of significant public input, and published these plans online.[12] The White House has posted the plans and agency updates online.[13]

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 regulatory candidates for retrospective review.

RFA Compliance by Agency and Issue

Department of Agriculture, Animal and Plant Health Inspection Service

Issue: Identification and Documentation of the Traceability of Livestock Moving Interstate. On August 11, 2011, the Animal and Plant Health Inspection Service (APHIS) proposed to establish national official identification and documentation requirements for the traceability of livestock moving interstate. Under the proposed rule, livestock, such as cattle and poultry, that are moved in interstate transit are required to be officially identified with a tag and accompanied by an interstate certificate of veterinary inspection or other documentation. Small businesses were concerned that APHIS had concluded that the rule would not have a significant economic effect on a substantial number of small businesses. Small businesses were particularly concerned that the agency did not consider the costs associated with the time, labor, and equipment needed to comply. Advocacy wrote a public comment letter encouraging APHIS to conduct more outreach to the cattle community and publish an initial regulatory flexibility analysis for this rule that includes estimates of the time, labor, and equipment costs that small cattle operations will incur from having to tag all cattle. A final rule has not yet been proposed.

Department of the Interior, Bureau of Land Management

Issue: Managing Flowback Water from Hydraulic Fracturing Operations. On May 11, 2012, the Bureau of Land Management (BLM) proposed a rule requiring detailed plans for managing flowback water from hydraulic fracturing operations, public disclosure of chemicals used in hydraulic fracturing operations, and confirmation that wells used in fracturing meet certain construction standards including requiring cement bond logs on surface casings. Several small businesses indicated that BLM's assumptions regarding the processes of well stimulation and hydraulic fracturing underestimate the costs that will be incurred by businesses under this rule. Advocacy published a comment letter encouraging BLM to consider less costly and less prescriptive alternatives to the proposed rule and to publish a revised economic analysis and IRFA. A final rule has not yet been proposed.

10 See Appendices D and E.

11 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).

12 For example, EPA posted its plan at **http://www.epa.gov/improvingregulations/**. DOT posted information on its regulatory portal, **http://regs.dot.gov/retrospectivereview.htm**.

13 **http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system**.

Department of the Interior, Fish and Wildlife Service

Issue: Designation of Critical Habitat for the Northern Spotted Owl (NSO). In February 2012, the Fish and Wildlife Service (FWS) proposed a revised critical habitat designation for the NSO on more than 13 million acres in California, Oregon, and Washington, including more than 1 million acres of private land. On June 1, 2012, FWS released an economic analysis on the NSO critical habitat designation. FWS has certified that the proposed critical habitat designation will not have a significant economic impact on a substantial number of small entities. Small businesses contacted Advocacy, citing concern that FWS's certification undercounts the number of small businesses affected by the rule and underestimates the economic impact of this rule on small business. In a public comment letter, Advocacy encouraged FWS to reevaluate the economic impacts of its critical habitat designation on small businesses, so that the agency can better analyze regulatory alternatives that minimize the impact of this rulemaking. FWS has not finalized the rulemaking.

Department of Justice

Issue: Americans with Disabilities Act Regulations on Public Pools and Spas. In September 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." The provisions regarding accessible entry and exit to existing swimming pools, wading pools, and spas were to be implemented on March 15, 2012.

On January 31, 2012, DOJ released guidance on these pool requirements. Small businesses contacted Advocacy and DOJ regarding this guidance document, seeking an extension of the compliance date. On March 15, 2012, DOJ extended the compliance date by 60 days and sought public comment on further extensions. Advocacy submitted a public comment letter recommending an extension of the compliance date. DOJ extended the compliance date to March 15, 2013. The extension of the compliance date led to $99.6 million in one-time cost savings for small businesses.

Department of Labor

Issue: H-2B Visa Wage Rule. In October 2010, the Department of Labor (DOL) 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 has consistently worked with small businesses on the H-2B wage rule, holding two roundtables and writing five public 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 has provided multiple extensions of the effective date of this rule, postponing its implementation date until November 30, 2011. In FY 2012, congressional action delayed the implementation of this rule twice. In November and December 2011, President Obama signed two appropriations bills that included language prohibiting any FY 2012 federal funding to enforce the H-2B wage rule until October 1, 2012. In September 2012, President Obama signed another appropriations bill that included language prohibiting funding of the H-2B rule until March 27, 2013. These delays in implementation resulted in one-time cost savings to small businesses of over $1.1 billion.

Issue: Fair Labor Standards Act (FLSA) Application to Domestic Service. In December 2011, the Department of Labor released a proposed rule that would require some companion care workers, such as those hired by staffing agencies, to be paid minimum wages and overtime under the FLSA. Companion care workers are nonmedical aides who provide in-home assistance to the elderly and infirm; these workers are currently exempt from FLSA requirements. The proposed rule would limit the companion care exemption to those employed by the family or household using those services. Advocacy held a small business roundtable in which small staffing agencies expressed concern that the overtime pay requirements will add significant burdens and costs, particularly for overnight shifts and live-in workers. In a public comment letter, Advocacy recommended that DOL publish a supplemental initial regulatory flexibility analysis (IRFA) to reevaluate the impact of this rule on small business, and consider regulatory alternatives to this rulemaking that would accomplish the agency's goals without harming small businesses. DOL has not finalized this rulemaking.

Issue: Application of the Longshore and Harbor Workers Compensation Act. The American Recovery and Reinvestment Act of 2009 (ARRA) contained amendments to the Longshore and Harbor Workers Compensation Act (LHWCA), a federal program that requires employment injury protection for workers injured on the navigable waters of the United States or adjoining areas. The ARRA exempted *all* entities conducting repair and dismantling of recreational vessels from LHWCA insurance, provided that their workers are subject to coverage under a state workers' compensation law (which is significantly less expensive). Before this change, the statute exempted only vessels under 65 feet in length. Small businesses and members of Congress contacted Advocacy citing concerns that DOL's 2011 regulations implementing the ARRA actually increased the number of manufacturers, builders, and repair shops required to buy federal insurance because it created a more restrictive definition of "recreational vessel." Small businesses were also concerned with another provision that set confusing parameters for when an employee doing both recreational and commercial repair work would be required to obtain LHWCA coverage. In December 2011, DOL released a final rule that adopted regulatory alternatives suggested by Advocacy and small business groups, which minimize the economic impact of this rulemaking. This rule resulted in small business cost savings that were unquantifiable.

Issue: Nondisplacement of Qualified Workers under Service Contracts. In March 2010, DOL released a proposed rule that implements Executive Order 13495, which states that the federal government's procurement interests in economy and efficiency are served when a winning contractor and subcontractor (successor contractors) to a federal service contract hire the losing contractor's (predecessor contractor) employees. This rule requires that any federal service contract and contract solicitations over $100,000 include a clause that requires successors and their subcontractors to offer qualified employees of the predecessor contractor a right of first refusal of employment.

Small business stakeholders expressed concern that there may be problems with implementing this executive order that may add to the compliance costs and regulatory burdens for small contractors. In particular, small contractors were concerned that the deadlines outlined in the proposal may have a negative impact on a successor contractor's ability to perform a follow-on contract.

Based on an Advocacy public comment letter, DOL adopted flexibilities in these deadlines. DOL also clarified the interaction of this rule with current federal requirements, such as those under SBA's HUBZone program and the Department of Homeland Security's Employment Eligibility Verification (E-Verify) Program. This rule resulted in small business cost savings that were unquantifiable.

Department of the Treasury, Internal Revenue Service

Issue: Potential Modification of Use It or Lose It Rule. On May 30, 2012, the Internal Revenue Service (IRS) issued Notice 2012-40 to provide guidance for health flexible spending accounts (health FSAs). Among other things, the IRS notice requests comments on the potential modification or elimination of the "use it or lose it rule" for health FSAs. The use it or lose it rule prohibits any contribution or benefit under an FSA from being used in a subsequent plan year or period of coverage. Thus, under this rule, unused amounts in the health FSA are forfeited at the end of the plan year. The IRS notice observed that, under changes in tax law pursuant to the Patient Protection and Affordable Care Act of 2010, the use it or lose it rule may no longer be necessary.

On July 24, 2012, Advocacy submitted a public comment letter commending the IRS for issuing Notice 2012-40 and considering eliminating a rule that burdens small business. Advocacy's comment letter recommended that the IRS revoke the use it or lose it rule. Instead of requiring the forfeit of unused amounts in a health FSA at the end of a plan year, Advocacy suggested that the IRS should permit an employer to give plan participants the choice of receiving the unused taxable cash or making a tax-deferred contribution to the employer's Internal Revenue Code section 401(k), section 403(b), or section 457(b) plan.

Consumer Financial Protection Bureau

Issue: Qualified Residential Mortgages. On July 9, 2012, the Office of Advocacy submitted a public comment letter to the Consumer Financial Protection Bureau (CFPB) on the reopening of the comment period on Regulation Z; Docket No.CFPB-2012-0022 Truth in Lending as it pertains to qualified residential mortgages (QRM). This matter was originally proposed by the Board of Governors of the Federal Reserve on May 11, 2011. The proposed rule addressed the new ability-to-repay requirements that will apply to consumer credit transactions secured by a dwelling. It also addressed the definition of a qualified mortgage (QM). In the QM proposal, the Federal Reserve set forth two alternatives: Alternative 1 would provide for a legal safe harbor from the ability to repay requirements; Alternative 2 would provide a rebuttable presumption of compliance. Small banks expressed concerns about the definition of QM. Advocacy asserted that community banks would no longer originate mortgage loans if the rules provided only a rebuttable presumption of compliance. A safe harbor, on the other hand, would allow small lenders to operate within known boundaries and allow consumers to obtain affordable loans. Advocacy encouraged the CFPB to give full consideration to the comments from small banks.

In addition, the CFPB requested comment on new data that the CFPB received from the Federal Housing Finance Agency. The CFPB proposed to use the data to analyze whether a lender complied with the ability-to-repay requirements. The CFPB asserted that loan performance, as measured by the delinquency rate, was an appropriate metric to evaluate whether a consumer had the ability to repay those loans at the time the loan was made. Advocacy questioned that assertion because a consumer's circumstances may have changed after a loan was made.

Issue: Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (RESPA/TILA). On August 30, 2012, the Office of Advocacy submitted a public comment letter to the CFPB on the proposed rule on Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (RESPA/TILA). The comment focused on the proposed amendment to 12 CFR § 1026.4, which revises the test for determining the finance

charge for residential mortgage loans. The proposed amendments to section 1026.4 replace the current "some fees in, some fees out" approach to the finance charge with a simpler, more inclusive test based on the general definition of finance charge in TILA section 106(a). Under proposed section 1026.4, the current exclusions from the finance charge would be largely eliminated for closed-end transactions secured by real property or a dwelling. Advocacy expressed concern that the proposed revisions could result in small community banks exiting the marketplace, leading to less competition and higher prices for consumers. This rule was the subject of a Small Business Regulatory Enforcement Fairness Act panel that convened on February 21, 2012. In light of the information that the CFPB gleaned from the small banking industry representatives, Advocacy suggested that the CFPB consider alternatives to these proposed changes.

Advocacy also expressed concerns about the lack of adequate notice because small entities that relied solely on the *Federal Register* for their information had less than 10 business days to submit comments. As a result, the comment deadline was extended to November 6, 2012, to coincide with the remainder of the proposal.

Environmental Protection Agency

Issue: Proposed Revisions to the Definition of Solid Waste (Recycling) Final Rule. On October 20, 2011, Advocacy submitted a public comment letter on the proposed revisions to the 2008 final rule regarding the Environmental Protection Agency's (EPA) Revisions to the Definition of Solid Waste (DSW). The 2008 final rule excludes certain secondary materials from regulation as hazardous under three very specific circumstances, including when materials are transferred to another company for recycling under specific conditions. These regulatory alternatives significantly reduced small business costs. EPA essentially proposed to eliminate the exclusion for the so-called transfer-based exclusion, and to make significant modifications to the legitimate recycling requirements.

Advocacy submitted a public comment letter stating that EPA should allow implementation of the 2008 final rule with some small revisions. The 2008 DSW final rule was crafted from 16 years of compromise and litigation between industry stakeholders, environmental organizations, and EPA. Advocacy urged EPA to retain the 2008 final rule provisions, particularly those related to the transfer-based exclusion and the requirements for legitimate recycling.

EPA conducted an extensive risk analysis of the 2008 rule prior to the final rule being promulgated, and concluded that there would be no net risks to future environmental and human health and safety from the rule. Advocacy believes that the 2008 rule will yield substantial economic savings to tens of thousands of small business generators, well in excess of EPA's current estimate, while still meeting the statutory goals of protecting human health and the environment and promoting recycling. EPA has not yet issued a new revised rule.

Issue: Proposed Revisions to Nonhazardous Secondary Materials that are Solid Waste (NHSM). On February 21, 2012, Advocacy submitted a public comment letter on the proposed revisions to the final rule regarding nonhazardous materials that are solid waste when used as fuels. The rule was promulgated on March 21, 2011. Nonhazardous secondary materials are materials that are left over after an industrial or other process. In many cases, these materials are burned in boilers as fuel. This use of secondary materials in boilers is a form of recycling that avoids the expense of sending these secondary materials to a landfill, paying for substitute fuel, and contributing to the release of additional greenhouse gases. If the material is determined to be a "nonwaste," then the burning of the material

is regulated under the industrial boilers rule. If the material is determined to be a "solid waste," then the boiler is regulated as a commercial industrial solid waste incinerator (CISWI), which is regulated under a separate, more stringent air pollution standard, generally making it impracticable for combustion.

EPA's failure to designate certain fuels as nonwastes would require disruption of manufacturing processes at many sites, including cement kilns, steel mills, paper mills, and other manufacturing plants. Advocacy asked EPA to make the nonwaste designation for (1) off-specification used oil, (2) pulp and paper processing residuals, (3) scrap tires in stockpiles, (4) animal manure, (5) treated wood, and (6) pulp and paper sludges. Advocacy did not see a clear difference between these wastes and the nonwaste secondary materials proposed by EPA. EPA has not yet issued a new final rule.

Issue: National Emissions Standards for Hazardous Air Pollutant Emissions: Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks. On March 12, 2012, Advocacy submitted a public comment letter to the EPA on the supplemental notice of proposed rulemaking, National Emissions Standards for Hazardous Air Pollutant Emissions: Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks. EPA's notice presented a new technology and a new residual risk analysis that would result in stricter emissions limits for hexavalent chromium. Although EPA had certified that the proposed action would not have a significant economic impact on a substantial number of small entities, Advocacy was concerned that the certification lacked a sufficient factual basis. Also, EPA had not demonstrated that the proposed requirements were technically feasible because of a lack of data on the use of alternatives to perfluorooctyl sulfonates (PFOS) fume suppressants. At Advocacy's request, EPA collected further data from small businesses and included studies on the effectiveness, availability and cost of non-PFOS fume suppressants. EPA signed the final rule on September 19, 2012.

Issue: SBREFA Panels. In 2011, EPA convened two panels that were not completed. EPA has subsequently published proposed and/or final rules within the scope of these panels, after making the required certifications under section 605(b).

Greenhouse Gas Emissions from Electric Utilities. In January 2011, EPA signed a settlement agreement requiring EPA to propose greenhouse gas (GHG) emission standards for new and existing coal-fired electric utilities.[14] The Office of Advocacy filed public comments on the settlement agreement, raising concerns about the amount of time allowed for regulatory development, including SBREFA panels.[15] EPA convened a SBREFA panel in June 2011.[16] Advocacy objected in writing to the convening because EPA was, at that time, unprepared to discuss its regulatory approach or alternatives.[17] EPA met with small entity representatives in the context of the panel, but ceased work on the panel soon afterwards. No panel report has been prepared. EPA published a proposed rule for GHG emission standards for *new* coal-fired electric utilities in April 2012, certifying that the rule would have no significant economic impact on a substantial number of small entities.[18] EPA has not an-

14 See **http://www.epa.gov/airquality/cps/settlement.html**.

15 See **http://www.sba.gov/content/letter-dated-011911-environmental-protection-agency.**

16 Although EPA lists its SBREFA panels on its public website (**http://epa.gov/sbrefa/sbar-panels.html**), the listing for "Greenhouse Gas Emissions from Electric Utility Steam Generating Units" no longer appears on the site.

17 See **http://www.sba.gov/content/letter-dated-06132011-environmental-protection-agency**.

18 See **http://yosemite.epa.gov/opei/RuleGate.nsf/(LookupRIN)/2060-AQ91** for more information on the status of GHG emission standards for new coal-fired electric utilities.

nounced plans to propose GHG emission standards for existing coal-fired electric utilities.[19]

Emissions from Petroleum Refineries. In January 2011, EPA signed a settlement agreement requiring EPA to propose GHG emission standards for new and existing petroleum refineries.[20] In August 2011, EPA convened a SBREFA panel encompassing this and other emission standards under consideration, including a reconsideration of New Source Performance Standards (NSPS) issued in 2008 and the NESHAP Risk and Technology Review required under Clean Air Act section 112.[21] Advocacy again objected in writing.[22] EPA met with small entity representatives, but soon after ceased work on the panel. No panel report has been prepared. In September 2012, EPA published a final rule resolving the reconsideration of the 2008 NSPS, certifying that the rule would have no significant economic impact on a substantial number of small entities.[23] Also in September 2012, EPA submitted to OMB for review under Executive Order 12866 a draft proposed rule, which, by EPA's description, would cover the remaining issues except GHG emission standards.[24]

Federal Communications Commission

Issue: Broadband Competition. On May 22, 2012, the Office of Advocacy submitted a comment to the Federal Communications Commission (FCC) regarding several proceedings involving attempts to support competition in the broadband marketplace. The comments focused on (1) the FCC's notice of proposed rulemaking promoting interoperability in the 700 MHz commercial spectrum, (2) the FCC's ongoing special access proceeding, and (3) an industry petition for examination of the FCC's rules regarding copper retirement.

700 MHz Interoperability. Currently, there are two distinct sets of technical specifications for devices operating in the Lower 700 MHz spectrum band, resulting in a lack of interoperability between devices operated by different service providers within the band. In 2009, an alliance consisting of four Lower 700 MHz A Block licensees filed a petition for rulemaking requesting the FCC to require that all mobile devices for the 700 MHz band be capable of operating over all frequencies in the band. In April 2012, the FCC issued a notice of proposed rulemaking seeking to resolve whether a single, unified band class for devices in the Lower 700 MHz band would result in harmful interference with the operations of Lower 700 MHz B and C Block licensees, and whether such interference can be mitigated. In public comments to the FCC, Advocacy echoed concerns that the lack of 700 MHz interoperability is preventing full and productive use of valuable spectrum to deploy mobile broadband, particularly in rural areas. Advocacy urged the FCC to move forward with a final rule, if technologically feasible, that would provide for interoperability in the lower 700 MHz spectrum by requiring all lower 700 MHz licensees to provide only devices that are capable of operating in Band Class 12. No final rule has been issued.

Special Access. Special access services are the broadband "last mile" facilities through which applications travel to reach businesses and the cell towers that transmit these applications to wireless devices. These facilities are largely

19 See **http://yosemite.epa.gov/opei/RuleGate.nsf/(LookupRIN)/2060-AR33** for more information on the status of GHG emission standards for existing coal-fired electric utilities.

20 See **http://www.epa.gov/airquality/cps/settlement.html**.

21 See **http://epa.gov/sbrefa/refinery.html**.

22 See **http://www.sba.gov/content/letter-dated-08042011-environmental-protection-agency**.

23 77 F.R. 56422 (September 12, 2012).

24 See **http://yosemite.epa.gov/opei/RuleGate.nsf/byRIN/2060-AQ75**.

owned by incumbent local exchange carriers (ILECs such as AT&T, Verizon, and CenturyLink/Qwest). Competitive carriers must lease access to these facilities in order to provide services to their customers. In recent years, competitive carriers have petitioned the FCC to reexamine its special access rules to ensure that the rates, terms, and conditions available to competitive carriers for special access are fair and reasonable. Advocacy provided public comments to the FCC about the importance of special access for ensuring a competitive broadband marketplace that offers small business consumers affordable, high-quality business broadband services, and encouraged the FCC to move forward in addressing the concerns raised by competitive carriers. The FCC recently suspended its pricing flexibility rules and will not be granting further instances of pricing flexibility until it has thoroughly reviewed its special access rules. It has also initiated a long-awaited mandatory data request from carriers regarding special access rates that will inform the review of its rules.

Legacy Copper Retirement. In many cases, legacy copper wire infrastructure provides the only last mile facility connecting many business customer locations. FCC regulations grant competitive carriers the right to lease wholesale access to copper loops from ILECs so that they can offer Ethernet and DSL broadband services to business customers. When ILECs install new fiber connections, they often retire their legacy copper loops. In so doing, they eliminate the only alternative to the ILEC fiber connection, which is not subject to the same FCC open access requirements as copper. In its public comment letter to the FCC, Advocacy repeated its concerns shared by small businesses that allowing ILECs to retire copper loops without regard to effects on competition may be impeding the ability of small business consumers to get access to affordable, high speed broadband. Advocacy encouraged the FCC to engage with competitive and incumbent carriers to determine what can be done to fix some of these issues in a way that allows incumbent carriers to retire unused copper without harming consumers, many of which are small businesses. The FCC has not yet indicated that it intends to move forward on this issue.

Securities and Exchange Commission

Issue: Conflict Minerals. On December 23, 2010, the Securities and Exchange Commission (SEC) issued a proposed rule that would require businesses that file with the SEC and manufacture products that require tin, tantalum, tungsten, and gold to report whether the minerals originated in the Democratic Republic of Congo (DRC) or a neighboring country. Under the proposed rule, if a business discovers that its minerals do originate in the DRC or one of its neighbors, more reporting would be required. The businesses would be required to report on the measures they took to exercise "due diligence" on the source and chain of custody of the minerals. The proposed rule would also require businesses to provide independent verification of these steps through an independent private sector audit of the reporting.

In the proposed rule's initial regulatory flexibility analysis, the SEC estimated that approximately 793 small entities would be subject to the proposal. The proposed rule stated that the costs of compliance are "difficult to assess but are likely insignificant." On October 6, 2011, the SEC issued a notice to extend the period to submit comments for the proposed rule until November 1, 2011.

Small business stakeholders had been in contact with Advocacy to express concern about the proposed rule. Small businesses contended that the SEC underestimated both the costs the proposed rule will impose and the number of small businesses that would be affected. Most small businesses that would be subject to the proposed rule participate in a complex supply chain composed of numerous other businesses.

The proposed rule would affect most manufacturers of electronics, aerospace, automotive, jewelry, health care devices, and industrial machinery. Even firms that do not necessarily file with the SEC might be affected if they were part of the supply chain to SEC-filing companies for these metals. Because the SEC did not take into account the complexity of supply chains and the number of small firms that are part of those supply chains, it appeared that the SEC had underestimated the number of small firms that would be affected by the proposed rule. On October 25, 2011, Advocacy filed a public comment letter recommending that the SEC publish an amended IRFA that would more accurately describe the costs and burdens of the proposed rule, and more accurately detail the number of small entities that would be affected.

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

Table 3.1 displays agency compliance with E.O. 13272's three agency requirements:[25]

- "issue written procedures and policies..." (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)).

25 The 2010 SBJA strengthened E.O. 13272 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; . . . ."

Table 3.1 Agency Compliance with the Small Business Jobs Act of 2010 and E.O. 13272, FY 2012

Department	Written Procedures	Notify Advocacy	Response to Comments	Comments
Agriculture	√	√	√	
Commerce	√	√	√	
Defense	√	√	√	
Education	√	√	√	
Energy	√	√	-	
General Services Administration	√	√	√	
Health and Human Services	√	X	X	Does not notify Advocacy of draft rules and infrequently gives Advocacy appropriate consideration in comments.
Homeland Security	√	√	-	
Housing and Urban Development	√	√	-	
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 does not respond adequately to Advocacy's comments (3(c)).
Justice	√	√	√	
Labor OSHA/MSHA	√	√	√	
State	X	√	-	
Transportation	√	√	√	
Treasury	√	√	-	
Veterans Affairs	√	√	-	

Department	Written Procedures	Notify Advocacy	Response to Comments	Comments
Other Agencies				
Consumer Financial Protection Bureau	-	√	√	
Consumer Product Safety Commission	√	√	√	
Environmental Protection Agency	√	√	√	
Equal Employment Opportunity Commission	√	√	-	
Federal Acquisition Regulation Council	√	√	√	
Federal Communications Commission	√	√	-	
Federal Reserve Board	X	√	-	
National Labor Relations Board	X	√	-	
Securities and Exchange Commission	X	√	√	
Small Business Administration	√	√	√	

1 Advocacy cannot evaluate compliance since the agency did not publish any final rules upon which Advocacy commented.
√ The agency complied with the requirement.
X The agency did not comply with the requirement.
- Not applicable in FY 2012.

Conclusion

In FY 2012, most agencies continued to comply with the requirements of the RFA and E.O 13272. Advocacy's training has helped additional agencies understand and comply with the analytical process mandated by the RFA to produce better and more informed regulatory decisions. The agencies' willingness to attend Advocacy roundtables and hear the concerns of small businesses has been a welcome development; the inexplicable circumstances that led to the late publication of the agencies' regulatory flexibility agendas will need to be addressed. 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.

Appendix A Supplementary Tables

Table A.1 Federal Agencies Trained in RFA Compliance, 2003-2012

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 Defense
- Defense Logistics Agency
- Department of the Air Force
- Department of the Army, Training and Doctrine Command
- United States Strategic Command

Department of Education

Department of Energy
- Federal Energy Regulatory Commission

Department of Health and Human Services
- Center for Disease Control and Prevention
- Center for Medicare and Medicaid Services
- Food and Drug Administration
- Indian Health Service

Department of Homeland Security
- Federal Emergency Management Agency
- Transportation Security Administration
- United States Citizenship and Immigration Service
- United States Coast Guard
- United States Customs and Border Protection

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

Table A.2 RFA Related Case Law, FY 2012

National Association of Home Builders v. EPA, 682 F. 3d 1032 (D.C. Cir. 2012).

In 2008, the Environmental Protection Agency (EPA) issued a rule regulating renovation and remodeling activities that create health hazards arising from lead paint. The rule had an opt-out provision that exempted owner-occupied housing from a rule regulating renovation and remodeling activities that created health hazards arising from lead paint if the homeowner certified that no pregnant women or young children lived there. In 2010, EPA amended the rule to eliminate the opt-out provision. The National Association of Home Builders (NAHB) petitioned for review of the amended rule on the grounds that it violated the Administrative Procedure Act (APA) and that EPA failed to convene a small business advocacy review panel before issuing the new rule, in violation of the RFA. It should be noted that EPA convened such a review panel prior to promulgating the original Renovation Rule. It did not do so again before issuing the amended rule. The plaintiffs asserted that this failure violated the RFA.

The court found that the RFA rendered the plaintiff's claim unreviewable. Section 611(c) of the RFA provides that "[c]ompliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section." 5 USC § 611(c) (emphasis added). Section 611(a) (2) grants this court "jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b) and 610. The section further provides that "[a]gency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604." Absent from these lists of reviewable claims is a claim alleging noncompliance with section 609(b)—the provision that requires the convening of small business advocacy review panels. The court reiterated its findings in *Allied Local & Regional Manufacturers Caucus v. EPA* 215 F.3d 61 (D.C.Cir. 2000) that the court "has no jurisdiction to review challenges" to an agency's compliance with that section.

The plaintiffs argued that even if they could not directly obtain review of agency compliance with section 609(b), the statute authorizes review of compliance with the final regulatory flexibility analysis requirement. They asserted that the court could regard the failure to convene a panel as a failure that renders the final regulatory flexibility analysis defective. The court disagreed because section 611(a)(2) expressly authorizes judicial review of agency compliance with sections 607 and 609(a) in connection with judicial review of section 604, but does not authorize review of compliance with section 609(b)—even in connection with a section 604 claim.

The plaintiffs also asserted that the failure to convene a review panel was arbitrary and capricious. The court stated that the RFA grants jurisdiction to review claims of noncompliance with section 604, the final regulatory impact analysis provision, "in accordance with" the APA in determining whether the agency complied with the overall requirement that an agency's decision making be neither arbitrary nor capricious. However, this applies in matters that may best be described as quasi-procedural rather than procedural. Such issues focus not on the kind of procedure that an agency must use to generate a record, but rather on the kind of decision making record the agency must produce to survive judicial review. These requirements flow not from the APA's procedural dictates, but from its substantive command that agency decision making not be arbitrary or capricious. Since a small business advocacy review panel is a purely procedural device, courts may not, under the guise of the APA's arbitrary-and-capricious review standard,

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 Agency
- Federal Maritime Commission
- 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 2012

National Association of Home Builders v. EPA, 682 F. 3d 1032 (D.C. Cir. 2012).

In 2008, the Environmental Protection Agency (EPA) issued a rule regulating renovation and remodeling activities that create health hazards arising from lead paint. The rule had an opt-out provision that exempted owner-occupied housing from a rule regulating renovation and remodeling activities that created health hazards arising from lead paint if the homeowner certified that no pregnant women or young children lived there. In 2010, EPA amended the rule to eliminate the opt-out provision. The National Association of Home Builders (NAHB) petitioned for review of the amended rule on the grounds that it violated the Administrative Procedure Act (APA) and that EPA failed to convene a small business advocacy review panel before issuing the new rule, in violation of the RFA. It should be noted that EPA convened such a review panel prior to promulgating the original Renovation Rule. It did not do so again before issuing the amended rule. The plaintiffs asserted that this failure violated the RFA.

The court found that the RFA rendered the plaintiff's claim unreviewable. Section 611(c) of the RFA provides that "[c]ompliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section." 5 USC § 611(c) (emphasis added). Section 611(a) (2) grants this court "jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b) and 610. The section further provides that "[a]gency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604." Absent from these lists of reviewable claims is a claim alleging noncompliance with section 609(b)—the provision that requires the convening of small business advocacy review panels. The court reiterated its findings in *Allied Local & Regional Manufacturers Caucus v. EPA* 215 F.3d 61 (D.C.Cir. 2000) that the court "has no jurisdiction to review challenges" to an agency's compliance with that section.

The plaintiffs argued that even if they could not directly obtain review of agency compliance with section 609(b), the statute authorizes review of compliance with the final regulatory flexibility analysis requirement. They asserted that the court could regard the failure to convene a panel as a failure that renders the final regulatory flexibility analysis defective. The court disagreed because section 611(a)(2) expressly authorizes judicial review of agency compliance with sections 607 and 609(a) in connection with judicial review of section 604, but does not authorize review of compliance with section 609(b)—even in connection with a section 604 claim.

The plaintiffs also asserted that the failure to convene a review panel was arbitrary and capricious. The court stated that the RFA grants jurisdiction to review claims of noncompliance with section 604, the final regulatory impact analysis provision, "in accordance with" the APA in determining whether the agency complied with the overall requirement that an agency's decision making be neither arbitrary nor capricious. However, this applies in matters that may best be described as quasi-procedural rather than procedural. Such issues focus not on the kind of procedure that an agency must use to generate a record, but rather on the kind of decision making record the agency must produce to survive judicial review. These requirements flow not from the APA's procedural dictates, but from its substantive command that agency decision making not be arbitrary or capricious. Since a small business advocacy review panel is a purely procedural device, courts may not, under the guise of the APA's arbitrary-and-capricious review standard,

impose procedural requirements that the APA's procedural provisions do not themselves impose. Thus, courts may not, under the guise of APA review, enforce compliance with a procedural requirement that the RFA clearly excludes from judicial review.

Florida Wildlife Federation, Inc. v. Jackson, 853 F. Supp. 1138, (N.D. Florida 2012).

Environmental groups brought actions against the Environmental Protection Agency (EPA) and numerous state environmental agencies challenging both the EPA administrator's determination that a numeric nutrient standard for Florida's lakes and flowing waters was needed to replace the state's narrative standard, as well as a rule adopting a numeric nutrient standard. The plaintiffs asserted that EPA violated the RFA by preparing a certification rather than issuing an initial or final regulatory flexibility analysis. The court found that EPA's certification was unassailable because the rule and its numeric nutrient criteria only indirectly have an impact on small entities. The direct effect is on the state of Florida. It will fall to the state to implement the criteria. When a rule's only effect on small entities will be indirect, an agency may properly make a certification.

International Internship Programs v. Napolitano, 853 F. Supp. 2d 86 (D.D.C. 2012).

The sponsor of a cultural exchange program brought action against the Department of Homeland Security (DHS), the United States Citizenship and Immigration Services (USCIS) and others, alleging defendants violated the APA and the RFA in denying its petitions for cultural visas for participants in an international internship program.

Q-1 visas were introduced to create an international cultural exchange program in order to enhance the knowledge of diversity in other cultures. In 1992, USCIS published a final rule to implement Q-1 visas. As part of the final publication, USCIS certified that the rule would not have a significant economic impact on a substantial number of small entities. The plaintiff conceded that USCIS complied with the RFA when it first promulgated Q-1 visas. However, the plaintiff asserted that USCIS amended the Q-1 visa regulations when it denied the petitions for cultural visas. The court denial of the sponsor's petitions for cultural visas did not effectively amend regulations governing cultural visas or promulgate a rule, so as to require an RFA analysis. At most, the denials represent interpretive rules (USCIS interpreted each statutory component as part of its review of the visa petitions). USCIS's decisions were not "rules" under the RFA; therefore, the plaintiff failed to state a claim for relief under the RFA.

In addition, the court rejected the plaintiff's assertion that USCIS was required to conduct a periodic small entity impact analysis pursuant to 5 USC §610. By certifying under §605(b) that the regulations will not have a significant economic impact on a substantial number of small entities, USCIS exempted itself from the periodic reviews.

Louisiana Forestry Association v. Solis, 2012 WL 3562451 (E.D. Pa. 2012).

Employer associations brought action to challenge a Department of Labor (DOL) regulation governing the calculation of the minimum wage that U.S. employers had to offer in order to recruit unskilled, nonagricultural foreign workers as part of the H-2B visa program. The employer associations argued that DOL failed to perform a reasonable, good faith RFA analysis. They asserted that DOL: (1) failed adequately to consider the impact the wage rule would have on small entities; and (2) failed to consider reasonable alternatives to the proposed rule.

The court found that both contentions lacked merit. The court stated that the scope of the RFA analysis is determined by the substantive law under which the rule was issued. Section 604(a)(6) of the RFA requires that the agency provide "a description of the steps the agency has taken to minimize the significant economic impact on small entities *consistent with the stated objectives of the applicable statutes.*" (Emphasis added). Citing Senate Report 96-878, the court further explained that the RFA's legislative history makes clear that its requirements "are not intended as a basis for a substantive challenge to the exercise of discretion by the agency in determining what rule ultimately to promulgate," and that it should not be construed in a way that weakens "legislatively mandated goals in the name of cost reduction."

In the present case, the statute's stated goal was to provide for the admission of H–2B workers if unemployed persons capable of performing such service or labor could not be found in the United States. The court was of the opinion that DOL reasonably concluded that adopting a standard that would permit small businesses to pay their H–2B workers wages below the prevailing wage as calculated by the rule's methodology would likely have an adverse effect on the wages of U.S. workers, which would contradict the objectives of the statute.

In terms of alternatives, the plaintiffs pointed to several alternatives raised in comments on the notice of proposed rulemaking that the DOL did not specifically address in its final regulatory flexibility analysis and argued that DOL erred in failing to consider those alternatives. The court stated that section 604 of the RFA requires that an agency explain "why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected." However, in enacting 604, Congress emphasized that it does not require that an agency adopt a rule establishing differing compliance standards, exemptions, or any other alternative to the proposed rule. It requires that an agency, having identified and analyzed significant alternative proposals, describe those it considered and explain its rejection of any which, if adopted, would have been substantially less burdensome on the specified entities. Evidence that such an alternative would not have accomplished the stated objectives of the applicable statutes would sufficiently justify the rejection of the alternative.

In the present case, DOL considered nine proposed alternatives and addressed the remaining comments in a general paragraph. In that paragraph, DOL explained that it rejected those alternatives because they would "at worst reduce and at best not improve the efficiency and consistency of the prevailing wage determination process, or would directly or indirectly adversely affect the wages of U.S. workers who might take H–2B jobs." The court further stated that the plaintiffs offered no arguments as to why, in their opinion, the DOL did not reasonably reject each of the proposed alternatives that they list on efficiency grounds or because they would have an adverse effect on the wages of U.S. workers, in contravention of the stated objectives of the statute. Thus, the court found that DOL's explanation of its rejection of those alternatives satisfied the RFA's requirements.

National Restaurant Association v. Solis, 2012 WL 1921115 (D.D.C. 2012).

National trade and industry associations whose members employed tipped employees brought action against the Department of Labor alleging that the APA and the RFA were violated in promulgating a regulation concerning an employer's obligation to inform tipped employees of the "tip credit" requirements of the Federal Labor Standards Act. The plaintiffs asserted that the defendants violated the APA by failing to conduct a regulatory flexibility analysis in connection with the final rule. In the final rule, the agency stated:

> [B]ecause the final rule will not impose any measurable costs on employers, both large and small entities, the Department has determined that it would not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.... The Department certified to the Chief Counsel for Advocacy to this effect at the time the NPRM was published. The Department received no contrary comments that questioned the Department's analysis or conclusions in this regard. Consequently, the Department certifies once again pursuant to 5 USC §604 that the revisions being implemented in connection with promulgating this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, the Department need not prepare a regulatory flexibility analysis.

The plaintiffs asserted that the certification was arbitrary and capricious because it was made without the benefit of comments about the compliance costs associated with the new rule. The plaintiffs also noted that there was nothing in the administrative record indicating that DOL considered the costs to small businesses of providing the required notice or the costs of additional recordkeeping or that DOL contemplated the potential economic exposure to many small businesses to regulatory violations and enforcement actions. Plaintiffs submitted that if they had had proper notice of the rule prior to its promulgation, they would have "overwhelmed the agency with information about the cost behind this proposal."

The court disagreed. It stated that the original rule would have required employers to inform employees of their intention to take the tip credit, so it is difficult to understand why the final rule's requirement that employers inform employees of the additional requirements of section 3(m) would impose a significant financial burden. In response to the court's questions at the hearing, the plaintiffs explained that the final rule was particularly burdensome because it requires employers to inform employees whenever the tip credit changes, so a poster or one-time written information sheet would not do. They asserted that all restaurant employers have been deprived of the opportunity to explain to the Department and show the Department the cost associated with the proposed rule. The court disagreed with the plaintiffs because the regulations in existence prior to the promulgation of the final rule already required successive communications with employees when the tip credit changed and the employers did not call for this requirement to be changed in their comments.

The court held that DOL complied with the requirements of the RFA when it concluded that no regulatory flexibility analysis was necessary because the rule would not have an impact on a substantial number of small entities. In doing so, it reiterated that the requirements of the RFA are "purely procedural." Although the RFA "directs agencies to state, summarize, and describe, the Act in and of itself imposes no substantive constraint on agency decision-making."

Table A.3 SBREFA Panels through Fiscal Year 2012

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	01/13/99 09/10/03	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

* 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.

5 Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (RESPA or Regulation X) and the Truth in Lending Act (TILA or Regulation Z).

Rule*	Date Convened	Date Completed	NPRM	Final Rule Published
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	
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

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Rule*	Date Convened	Date Completed	NPRM	Final Rule Published
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
Nonroad 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
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		

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5 Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (RESPA or Regulation X) and the Truth in Lending Act (TILA or Regulation Z).

Rule*	Date Convened	Date Completed	NPRM	Final Rule Published
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			
Long Term Revisions to the Lead and Copper Rule	08/14/12			
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	
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		

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5 Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (RESPA or Regulation X) and the Truth in Lending Act (TILA or Regulation Z).

Rule*	Date Convened	Date Completed	NPRM	Final Rule Published
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		
Consumer Financial Protection Bureau				
Integrated Mortgage Disclosures under RESPA/TILA[5]	02/21/12	04/23/12	08/23/12	
Mortgage Servicing	04/09/12	06/11/12	09/17/12	
Residential Mortgage Loan Origination	05/09/12	07/12/12	09/07/12	

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3 EPA has ceased action on this panel.
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5 Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (RESPA or Regulation X) and the Truth in Lending Act (TILA or Regulation Z).

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

Federal Register / Vol. 76, No. 14 / Friday, January 21, 2011 / Presidential Documents 3827

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
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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]
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Appendix F
Executive Order 13610

Federal Register
Vol. 77, No. 93
Monday, May 14, 2012

Presidential Documents

Title 3—

The President

Executive Order 13610 of May 10, 2012

Identifying and Reducing Regulatory Burdens

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to modernize our regulatory system and to reduce unjustified regulatory burdens and costs, it is hereby ordered as follows:

Section 1. *Policy.* Regulations play an indispensable role in protecting public health, welfare, safety, and our environment, but they can also impose significant burdens and costs. During challenging economic times, we should be especially careful not to impose unjustified regulatory requirements. For this reason, it is particularly important for agencies to conduct retrospective analyses of existing rules to examine whether they remain justified and whether they should be modified or streamlined in light of changed circumstances, including the rise of new technologies.

Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review), states that our regulatory system "must measure, and seek to improve, the actual results of regulatory requirements." To promote this goal, that Executive Order requires agencies not merely to conduct a single exercise, but to engage in "periodic review of existing significant regulations." Pnrsuant to section 6(b) of that Executive Order, agencies are required to develop retrospective review plans to review existing significant regulations in order to "determine whether any such regulations should be modified, streamlined, expanded, or repealed." The purpose of this requirement is to "make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

In response to Executive Order 13563, agencies have developed and made available for public comment retrospective review plans that identify over five hundred ioitiatives. A small fraction of those initiatives, already finalized or formally proposed to the public, are anticipated to eliminate billions of dollars in regulatory costs and tens of millions of hours in annual paperwork burdens. Significantly larger savings are anticipated as the plans are implemented and as action is taken on additional initiatives.

As a matter of longstanding practice and to satisfy statutory obligations, many agencies engaged in periodic review of existing regulations prior to the issuance of Executive Order 13563. But further steps should be taken, consistent with law, agency resources, and regulatory priorities, to promote public participation in retrospective review, to modernize our regulatory system, and to institutionalize regular assessment of significant regulations.

Sec. 2. *Public Participation in Retrospective Review.* Members of the public, including those directly and indirectly affected by regulations, as well as State, local, and tribal governments, have important information about the actual effects of existing regulations. For this reason, and consistent with Executive Order 13563, agencies shall invite, on a regular basis (to be determined by the agency head in consultation with the Office of Information and Regulatory Affairs (OIRA)), public suggestions about regulations in need of retrospective review and about appropriate modifications to such regulations. To promote an open exchange of information, retrospective analyses of regulations, including supporting data, shall be released to the public online wherever practicable.

Sec. 3. *Setting Priorities.* In implementing and improving their retrospective review plans, and in considering retrospective review suggestions from the

public, agencies shall give priority, consistent with law, to those initiatives that will produce significant quantifiable monetary savings or significant quantifiable reductions in paperwork burdens while protecting public health, welfare, safety, and our environment. To the extent practicable and permitted by law, agencies shall also give special consideration to initiatives that would reduce unjustified regulatory burdens or simplify or harmonize regulatory requirements imposed on small businesses. Consistent with Executive Order 13563 and Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), agencies shall give consideration to the cumulative effects of their own regulations, including cumulative burdens, and shall to the extent practicable and consistent with law give priority to reforms that would make significant progress in reducing those burdens while protecting public health, welfare, safety, and our environment.

Sec. 4. *Accountability.* Agencies shall regularly report on the status of their retrospective review efforts to OIRA. Agency reports should describe progress, anticipated accomplishments, and proposed timelines for relevant actions, with an emphasis on the priorities described in section 3 of this order. Agencies shall submit draft reports to OIRA on September 10, 2012, and on the second Monday of January and July for each year thereafter, unless directed otherwise through subsequent guidance from OIRA. Agencies shall make final reports available to the public within a reasonable period (not to exceed three weeks from the date of submission of draft reports to OIRA).

Sec. 5. *General Provisions.* (a) For purposes of this order, "agency" means any authority of the United Stetes that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

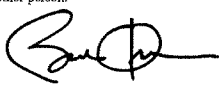
(b) Nothing in this order shall be construed to impair or otherwise affect:

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

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administretive, 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,
May 10, 2012.

[FR Doc. 2012–11798
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Appendix G Abbreviations

A&E	architecture and engineering
ACUS	Administrative Conference of the United States
ADA	Americans with Disabilities Act
AIR	Aircraft Certification Service
ANPRM	advance notice of proposed rulemaking
APA	Administrative Procedure Act
APHIS	Animal and Plant Health Inspection Service
ARRA	American Recovery and Reinvestment Act
BASICs	Behavior Analysis and Safety Improvement Categories
BLM	Bureau of Land Management
CAIR	clean air interstate rule
CFPB	Consumer Financial Protection Bureau
CI	compression ignition
CISWI	Commercial and Industrial Solid Waste Incineration (rule)
CMS	Centers for Medicare and Medicaid Services
CSA	Comprehensive Safety Assessment Program
DHS	Department of Homeland Security
DOE	Department of Energy
DOI	Department of the Interior
DOJ	Department of Justice
DOL	Department of Labor
DOT	Department of Transportation
DRC	Democratic Republic of Congo
DSW	definition of solid waste
EBSA	Employee Benefits Security Administration
E.O.	Executive Order
EOP	Executive Office of the President
EPA	Environmental Protection Agency
EPCA	Energy Policy and Conservation Act
FCC	Federal Communications Commission
FIP	federal implementation plan
FLSA	Fair Labor Standards Act
FMCSA	Federal Motor Carrier Safety Administration
FRFA	final regulatory flexibility analysis
FSA	flexible spending account
FWS	Fish and Wildlife Service
FY	fiscal year
GAO	Government Accountability Office
GHG	greenhouse gas
GHS	Globally Harmonized System (of classification and labeling of chemicals)
HHS	Department of Health and Human Services
HOS	hours of service

I2P2	injury and illness prevention programs
IBR	Incorporation by Reference
ILEC	incumbent local exchange carrier
IRFA	initial regulatory flexibility analysis
IRS	Internal Revenue Service
LDV/LDT	light-duty vehicles / light-duty trucks
LHWCA	Longshore and Harbor Workers Compensation Act
MHz	megahertz
MSHA	Mine Safety and Health Administration
MSO	Musculoskeletal Reporting rule
NAHB	National Association of Home Builders
NARA	National Archives and Records Administration
NESHAP	National Environmental Standards for Hazardous Air Pollutants
NHSM	nonhazardous secondary materials
NOAA	National Oceanic and Atmospheric Administration
NPRM	notice of proposed rulemaking
NSO	northern spotted owl
NSPS	New Source Performance Standards
NTTAA	National Technical Transfer Advancement Act
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
PFOS	perfluoroocytl sulfonates
P.L.	Public Law
QM	qualified mortgage
QRM	qualified residential mortgage
RESPA	Real Estate Settlement Procedures Act
RFA	Regulatory Flexibility Act
RIA	regulatory impact analysis
RICE	reciprocating internal combustion engines
SBA	Small Business Administration
SBIR	Small Business Innovation Research
SBJA	Small Business Jobs Act
SBREFA	Small Business Regulatory Enforcement Fairness Act
SEC	Securities and Exchange Commission
SI	spark ignition
SMS	Safety Measurement System
SOP	standard operating procedure
State	Department of State
TILA	Truth in Lending Act
Treasury	Department of the Treasury
USCIS	United States Citizenship and Immigration Service
USDA	United States Department of Agriculture
UST	underground storage tanks
WWT	wastewater treatment tank

SBA
Office of Advocacy
www.sba.gov/advocacy

Advocacy: the voice of small business in government

March 20, 2013

The Honorable David Schweikert, Chairman
U.S. House of Representatives Small Business Committee,
Subcommittee on Investigations, Oversight and Regulations
2361 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Yvette Clarke, Ranking Member
U.S. House of Representatives Small Business Committee
Subcommittee on Investigations, Oversight and Regulations
B-343C Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Schweikert and Ranking Member Clarke:

Let me begin by thanking you and the House Small Business Subcommittee on Investigations, Oversight and Regulations for the March 14, 2013, hearing to examine the compliance of federal agencies with the Regulatory Flexibility Act (RFA) and the efforts of the Office of Advocacy to hold agencies accountable. As a former small business owner and entrepreneur myself, I also want to thank you for your strong, continued support for the nation's many small businesses and the work Advocacy does on their behalf.

As you know, Congress created the Office of Advocacy in 1976 as an independent office tasked with advancing the views, concerns and interests of small businesses before Congress, the White House, federal agencies, federal courts and state policy makers. Then, in 1980, Congress passed the Regulatory Flexibility Act (RFA) and directed the Office of Advocacy to monitor compliance with the new law. The RFA asks federal agencies to try and minimize the impact of proposed federal regulations on small businesses. Specifically, when a federal agency designates that a proposed rule or regulation will have a "significant economic impact on a substantial number of small entities," the RFA directs them to consider alternatives to reduce this impact.

Advocacy's role, as set by the RFA, is not to block rules and regulations or make them less effective. Instead, we work with federal agencies to find alternatives that accomplish the agency's mission, while easing the regulation's burden on small businesses – an approach I have worked hard to ensure our office always pursues.

The RFA is an important law that helps federal agencies adopt sound regulations, while also minimizing those regulations' impact on small businesses. Spanning across Republican and Democratic Administrations, the Office of Advocacy has saved small businesses more than $85 billion in first-year regulatory costs over the last decade through its work with federal agencies and the RFA. These savings help agencies achieve their regulatory goal, while also allowing small businesses to spend more time and money growing their business.

As I mentioned in my opening remarks at the March 14 hearing, I wanted to respond to the later testimony of Rena Steinzor, president of the Center for Progressive Reform (CPR), who used the RFA hearing as an opportunity to launch inaccurate allegations against the Office of Advocacy and the work we do on behalf of small businesses. While I admire Ms. Steinzor's passion, I believe her testimony and the Center for Progressive Reform's report are inaccurate and represent a fundamental misunderstanding of our office.

Ms. Steinzor accuses the Office of Advocacy of "consciously diverting its limited, taxpayer-funding resources away from helping truly small businesses understand and comply with regulatory requirement toward pursuing the complaint du jour of the very large companies..."

Our congressional mandate is to focus on easing a regulation's burden on small businesses as the regulation is going through the regulatory process and not to provide compliance assistance. The rule-making agencies themselves are tasked with helping small businesses comply with the rules and regulations after they are issued. CPR makes this complaint throughout its report, and, while we support any additional help for small businesses, Advocacy must focus its limited, taxpayer-funding resources to remain within the bounds of our congressional mandate.

Ms. Steinzor also complains that we ignore the needs of small businesses – a frequent criticism throughout her testimony and CPR's report. Again, these allegations are completely inaccurate. Small businesses make up about 99 percent of all businesses in this country, and so Advocacy listens to and works with a wide array of entrepreneurs and small business groups. Advocacy's staff and regional advocates stationed across the country regularly visit small businesses to speak with owners; attend issue conferences and seminars; host or attend roundtable discussions; speak frequently with regulatory and economic experts; and often see firsthand how regulations affect small businesses. Similar to how Members of Congress depend on their district staff, field representatives and caseworkers to be their eyes and ears on the ground, our regional advocates fill this same important role.

Additionally, throughout my tenure as Chief Counsel, I have visited more than 30 states to speak with small business owners and the Office of Advocacy has held more than 3,000 meetings or roundtable discussions with small businesses, entrepreneurs and key stakeholders. In fact, one small business owner who spoke at the March 14 hearing alongside Ms. Steinzor – Carl Harris of the Carl Harris Company in Wichita, Kansas – later said in an interview with the Washington Business Journal that the Office of Advocacy has done "a great job" in representing the interests of small companies in the regulatory process.

As part of Advocacy's overall outreach efforts, our office regularly convenes roundtable discussions, all of which are open to the public, to learn about upcoming or pending regulations and other issues of concern to small entities (e.g. small businesses, small organizations and small governmental jurisdictions). Ms. Steinzor and CPR continue to label these important discussions as "secret and closed-door" meetings and suggest they violate the Federal Advisory Committee Act (FACA). Again, Ms. Steinzor is incorrect and, I believe, misunderstands the role these roundtables play as part of our overall outreach efforts.

Advocacy's roundtables do not violate FACA, because these roundtables are not designed to formulate consensus recommendations for the office, nor are any such recommendations the "preferred" source of advice for office policies – two important criteria established in FACA. The Office of Advocacy sought and received an opinion several years ago from the SBA Office of General Counsel to ensure the roundtable discussions were in full compliance with the law – and we remain in full compliance today.

Advocacy invites and welcomes all perspectives at these roundtables – including input from small business owners, trade associations, regulatory experts and staff and leadership from federal agencies and Congress – that can help Advocacy better understand potential impacts on small businesses and to propose solutions. On many occasions, representatives and heads of the regulatory agencies themselves and staff from many congressional offices are present at these meetings and we welcome their participation.

To preserve frank and open discussion, Advocacy has a long-standing policy to ask that press not attend and the informal discussions similarly not be disclosed to the press. However, members of the press are on roundtable distribution lists, receive copies of presentations and other materials distributed at the roundtables and regularly report on the public presentations.

Ms. Steinzor also suggests that Advocacy is breaking the law when we advocate the views of small businesses throughout the regulatory process, which she claims is in violation of the Anti-Lobbying Act – a law that prohibits some forms of lobbying by federal employees. Again, this accusation represents a fundamental misunderstanding of our office. In fact, Congress created the Office of Advocacy to advance and advocate the views, concerns and interests of small businesses before Congress, the White House, federal agencies, federal courts and state policy makers. So, we are required by law to advise federal agencies and Congress about small business issues. To do so, Advocacy uses broad outreach to small businesses, sound economic research and expert policy analyses, all of which help identify small business concerns so entrepreneurs can focus on running their business, creating jobs and strengthening their communities.

In the discussions about the size of small businesses, Ms. Steinzor claims that Advocacy's small business size standards are too broad. The Office of Advocacy does not set the definition of a small business. Under the Small Business Act, small businesses are defined by the U.S. Small Business Administration Office of Size Standards; Advocacy and the agencies are required by law to use those standards.

Finally, Ms. Steinzor and CPR claim Advocacy takes "consistently hostile" stances on regulatory proposals and tries to undercut the work of rule-making agencies. Again, these accusations represent a complete misunderstanding of our office. I strongly believe regulations serve an important role in our economy and our society, from helping to ensure we have clean air and water, to making toys safer for children and to protecting the health and safety of employees while at work. Advocacy's role, as mandated by Congress, is not to block rules and regulations or make them less effective; rather, our role is to work with regulators and Congress to get the same result they want from the regulation, while easing that regulation's burden on small businesses. We believe rules and regulations are stronger and more effective when small businesses are part of the rule-making process. Our principal goal is and always has been to improve the regulation and not to block it.

Thank you again for the March 14th hearing on the Regulatory Flexibility Act and for letting me respond to the recent accusations made against the Office of Advocacy. While we disagree with Ms. Steinzor's testimony and the CPR report, I always welcome constructive criticism on how the Office of Advocacy can be improved. As this office's Chief Counsel, I ensure you that we will continue our work advocating the views and concerns of small businesses throughout the federal government and will, to the best of our ability, meet the duties and responsibilities given to us by your committee and the U.S. Congress.

Sincerely,

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

Statement of the U.S. Chamber of Commerce

ON: Regulating the Regulators- Reducing Burdens on Small Business

TO: House Committee on Small Business, Subcommittee on Investigations, Oversight and Regulations

BY: Marc Freedman, the United States Chamber Of Commerce

DATE: March 14, 2013

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing small businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

Mr. Chairman, Madam Ranking Member, thank you for inviting to testify this morning on the value of the Regulatory Flexibility Act in the regulatory process. I am Marc Freedman, and I serve as the Executive Director for Labor Law Policy at the U.S. Chamber. In that role I work on several important workplace and employment regulatory areas, most notably OSHA, the FMLA, and the FLSA. Before coming to the Chamber more than eight years ago, I was the Regulatory Counsel for the Senate Small Business Committee with the primary responsibility of overseeing agency compliance with the Regulatory Flexibility Act as modified by the Small Business Regulatory Enforcement Fairness Act (SBREFA).

This morning I would like to focus my remarks on examples where OSHA and other Department of Labor agencies under the current administration did not take advantage of the RFA and SBREFA in their rulemakings. Note that I said "did not take advantage." The Reg Flex Act and SBREFA can be potent tools for agencies to help them develop better, more tailored regulations. Instead of seeing these laws as opportunities to get insightful input, too often agencies see these laws as obstacles in the rulemaking process to be overcome.

The Regulatory Flexibility Act and SBREFA Enhance Rulemakings

The RFA and SBREFA are common sense additions to the rulemaking process which, at their core, just ask agencies to respect the small businesses that will be subject to their regulations. The RFA requires that agencies conduct analyses on the impact regulations will have on small entities, or in the case of OSHA, EPA, and now the CFPB, small business review panels, unless the agency can "certify" that the regulation will not have a "significant economic impact on a substantial number of small entities." Compliance with the Regulatory Flexibility Act enhances the rulemaking process—assuming that the goal is to produce regulations that will have the maximum beneficial impact with a minimal burdensome impact.

As I have reviewed agency rulemakings over the years, I have seen many agencies go to some lengths to avoid conducting these analyses. The dispute often arises in the context of the "factual basis" agencies are required to provide to support their certification. In some rulemakings I have reviewed, this factual basis is either absent, or the agency uses a declarative tautological statement that the proposed regulation will not have a significant economic impact on a substantial number of small entities to support the certification that the regulation will not have a significant economic impact on a substantial number of small entities. Often agencies seriously underestimate the cost impacts of a regulation. In some cases this can also mean ignoring industries affected. I should point out that these problems of agency adherence to the requirements of the RFA are not unique to any specific administration or party—they span several administrations of both political parties.

The key is that the RFA and SBREFA create channels for input from small entities that will be affected by the proposed regula-

tions. When agencies seek this input, and respect those small entities that will be subject to the regulation, all parties come out ahead. Beyond the requirements for small business review panels that apply to OSHA, EPA, and the CFPB, the RFA's affirmative outreach requirement applies to all other agencies subject to the Administrative Procedure Act's requirement for notice and comment rulemaking. Section 609(a) directs agencies to "assure that small entities have been given an opportunity to participate in the rulemaking...through the reasonable use of techniques such as—(3) the direct notification of interested small entities." As the Regulatory Flexibility Act and even SBREFA were enacted before the advent of the internet, this requirement is considerably easier now than when these laws were passed, and accordingly there is even less reason why agencies should avoid doing this. Too many times agencies think that publishing a proposed regulation in the Federal Register constitutes some form of affirmative outreach.

In addition to requiring certain steps if an agency cannot certify a regulation, the RFA always allows an agency to voluntarily engage in the outreach and analysis steps specified by the RFA and SBREFA even if an agency is able to certify that the trigger threshold has not been met.

There is one more important point I would like to make about the impact of the RFA: it does not force an agency to change their rulemaking, nor does it authorize the SBA Office of Advocacy to change or block an agency's rulemaking, even if that agency is ignoring Advocacy's advice. The RFA merely sets out a process but it does not specify the outcome.

Examples of OSHA Rulemakings Where A SBREFA Panel Would Have Made A Difference

Unfortunately, OSHA under this administration has displayed a certain resistance to taking advantage of the SBREFA process. In various examples, OSHA could have clearly benefited if they had been willing to use the small business panel review process that the act lays out. And in each of these cases, there would have been no delay in moving the rulemakings forward.

Early in this administration, OSHA initiated several rulemakings without availing themselves of the benefits from the small business panel reviews. In each case they certified that these rulemakings did not trigger SBREFA but in each case the agency would have benefited from using the small business panel review even if the certification was valid.

One of the first rulemakings from this OSHA was one to "clarify" when small businesses who voluntarily enter into the on-site consultation program—that is they ask for help from OSHA in identifying hazards in their workplace—would be subject to enforcement. Traditionally, there is a fire wall between the consultation and enforcement programs. This cooperative agreements rulemaking sought to reinforce that OSHA was going to look for opportunities to pursue enforcement even for those employers who are truly doing the right thing.

OSHA certified that this proposed regulation would not trigger SBREFA, but as it explicitly and exclusively deals with small busi-

nesses, OSHA would have benefited from hearing directly from small businesses about their views on this rulemaking. Indeed, not conducting a small business review panel for this rulemaking reveals the lack of concern this OSHA has for the impact of their actions on small businesses. Had they done so, they would have heard that small businesses would be less comfortable entering into the consultation program if this rulemaking is completed. Getting that message with that clarity at that time, might have steered OSHA from proposing this regulation. The Chamber filed comments making this point, as did the SBA Office of Advocacy.

Reducing participation in this program may be one of OSHA's goals as Secretary Solis and then Acting Assistant Secretary Jordan Barab made explicitly clear in speeches during that period that they wanted to emphasize enforcement and deemphasize cooperative agreements and other approaches that did not rely on enforcement.

The only regulatory agenda for 2012, issued in late December, indicates that this rulemaking is scheduled to be finalized in April.

Another rulemaking where OSHA suffered for not conducting a small business panel review is the high profile rulemaking to add a column to the OSHA 300 recordkeeping log to track musculoskeletal disorders (MSDs)—the injuries associated with ergonomics. OSHA certified this regulation as not having a significant economic impact on a substantial number of small entities, based on their claim that compliance with this would only take five minutes. OSHA severely underestimated the impact of this rulemaking by ignoring the fact that small businesses would now be held accountable for determining whether an MSD is work related—a potentially complicated and uncertain analysis. The Chamber urged OSHA to conduct the small business review plan, but OSHA declined to do so.

In July 2010, OSHA submitted a final regulatory package to OIRA for review but in January 2011, OSHA was forced to withdraw the regulation from OIRA and instructed to get more input from small businesses. This resulted in the agency conducting three teleconferences with small businesses to hear directly from them about their concerns with this rulemaking—exactly what would have happened if the agency had conducted the small business panel review at the early stages of the rulemaking. If OSHA had taken advantage of the SBREFA procedures, this regulation might very well be in place by now. Instead, it is languishing on the long term action list and is blocked from moving forward because of an appropriations rider.

The last OSHA rulemaking I want to bring up is the Globally Harmonized System for Classification and Labeling—GHS for short. This is a sweeping regulation that modifies how producers of hazardous chemicals and downstream users of those products must label them for hazards and train employees on those hazards. The rulemaking was actually started in the Bush administration. Again, OSHA declined to conduct a SBREFA panel claiming that any costs related specifically to complying with the new regulation would be onetime adjustments from compliance with the precursor Hazard Communication Standard and therefore, the impact was

minimal and did not warrant the small business panel review. OSHA did claim to voluntarily comply with the other requirements of SBREFA by responding to the issues covered under an Initial Regulatory Flexibility Analysis or IRFA, but they stopped short of conducting the small business review panel.

In fact, OSHA claimed this regulation would result in substantial net savings to employers because it would eliminate the need to produce two sets of labels and safety data sheets when selling products into international markets. OSHA claims that this regulation will save just over $550 million net of costs annually.[1] Even if this calculation is accurate, and we think there are several reasons why it is not, this amount when spread over OSHA's estimate of the number of affected establishments of 5.4 million produces an annual net benefit of about $100.

The sad point is that this was a regulation that everyone agreed should happen. The Bush administration initiated it, Republicans in Congress had called for it, and this was supposed to be the low hanging fruit. Unfortunately, when this administration decided to take on this rulemaking, they loaded up the regulation with various provisions that do not make sense or were not even in the proposal:

- OSHA created a new hazard category for Hazards Not Otherwise Classified—a catch all that means employers will never know if they have labeled and trained for all the hazards that OSHA expects.
- OSHA inserted coverage for combustible dust into the final regulatory text without putting it in the proposed test despite the fact that OSHA does not have a regulatory definition for this hazard and is actually conducting a separate rulemaking to develop a standard on combustible dust.
- OSHA specified that the deadline for employers to have their training program in place would be a year before the deadline for producers to update their labels and safety data sheets—the very material that will be the focus of the training programs.

These and other problems would have been made known to OSHA during a small business panel review if OSHA had not certified this regulation as not triggering SBREFA, or had decided to voluntarily conduct the panel. As several of these issues are now being litigated, learning about these problems before the regulation was proposed might have saved OSHA and the Department considerable resources and insured a smoother implementation.

The timing of the input that comes from a small business panel is an important feature of this process. Once a regulation is proposed, an agency is restricted in how much they can change it before it becomes final. Proposed regulations are not like proposed legislation which can be very fluid and go through several iterations and changes before being enacted. When an agency pro-

[1] This rulemaking has also been cited by the Obama administration as part of the regulatory "look back" effort intended to review old regulations and modify or eliminate them. OSHA' claim that this regulation will save $2.5 billion over five years is a significant part of the overall savings claimed by this effort.

poses a regulation, they are not saying "let's have a conversation about this issue," they are saying, "this is what we intend to put into effect unless there is some very good reason we have overlooked why we cannot." By giving an agency direct feedback about how a regulation will affect those covered by it, the agency can learn about problems before they get locked into the regulation.

Examples Where OSHA SBREFA Panels Are Helpful

As an example of the positive benefits from OSHA conducting a small business review panel, consider the rulemaking to revise the crystalline silica standard. In 2003, OSHA conducted a panel to take input on how this revision would affect small businesses. Silica is present in a very wide array of workplaces, in particular in construction which is dominated by small businesses. One point made by the small businesses in that review was that reducing the exposure limit would create tremendous burdens and is likely not even technologically feasible. Significantly, they told OSHA that the problem was not an exposure limit that was too high, but that the current exposure limit is too frequently ignored. Because of the review, interested parties were able to see what OSHA was considering and what is likely at OIRA under review as a proposed regulation which has triggered widespread alarm and concern. This administration claims to want to be the most transparent ever; conducting these panels is one of the best ways to achieve that goal.

Another example of where an OSHA SBREFA panel will be beneficial is the anticipated panel for OSHA's Injury and Illness Prevention Program, or I2P2, rulemaking. This will be OSHA's most sweeping rulemaking ever; it will require all employers to implement safety and health programs according to criteria OSHA will establish. To OSHA's credit, the agency has committed to conducting the SBREFA small business panel review. Several times last year OSHA indicated this process would be getting under way, but it has not yet. When it does, interested parties beyond just those participating in the panel review will be able to learn what OSHA has in mind and see their draft economic analysis. Former SBA Advocacy Chief Counsel Jere Glover has told me that this process of OSHA showing their cards is perhaps the most significant benefit of this process.

Examples Where OSHA Should Have Done Rulemakings Complete with SBREFA Panels

Not only has this OSHA given short shrift to the RFA/SBREFA process when it has conducted rulemakings, but there are also examples where the agency should have gone through rulemaking but did not. Had they done rulemakings in these examples, they would have been well served to conduct small business review panels.

In October 2010, OSHA proposed to change the interpretation for the term "feasible" as it applies under the Noise Reduction Standard. Before this proposal, employers had broad leeway to use personal protective equipment such as noise canceling headphones or ear plugs, as long as they provided adequate protection. Under the

interpretation, "feasibility" would be reinterpreted to mean anything that did not cause a business to go out of business. The result would be to force many employers to redesign their workplaces to install costly engineering controls or implement costly and inefficient administrative controls so that employees would only work short periods and be rotated in and out of the hazard.

As this was merely an interpretation, and not a rulemaking, it was not subject to the requirements of SBREFA. OSHA published the new interpretation for comment, but did not conduct any of the analyses associated with a rulemaking such as costs or impact on small businesses. Thankfully, in January 2011, OSHA was forced to withdraw this interpretation due to an uproar as more and more businesses learned about it and determined what the impact would be. An independent economic analysis, because OSHA had not done one, suggested the impact on the economy would be more than $1 billion.

The most recent example of a policy change where OSHA should have done a rulemaking but did not was the memo to regional administrators from Deputy Assistant Secretary Richard Fairfax on March 12, 2012. This memo laid out various scenarios that could constitute violations of the whistleblower protections. Included in these scenarios was the use of safety incentive program that focus on rates of injuries reported. This memo thus created a consequence to employers using these types of plans where neither the statute nor any regulation establish a prohibition on these plans or discuss when they are appropriate. Because this creates a new legal consequence for employers, this would have been better handled through a rulemaking where OSHA would reveal the data and evidence that supports this measure, rather than just stating blithely that "OSHA has observed that the potential for unlawful discrimination under all of these policies may increase when management or supervisory bonuses are linked to lower reported injury rates."

Examples of Other Agencies that Erroneously Avoided RFA Compliance

In addition to OSHA not taking advantage of the RFA/SBREFA procedures to enhance their rulemakings, other DOL agencies have similarly avoided the RFA. Most notable have been the Office of Labor Management Standards in its "Persuader" rulemaking and the Employment and Training Administration in its rulemaking changing how the H–2B visa program would work.

In the "Persuader" rulemaking, that would severely restrict the availability of the "advice" exemption for reporting under the Labor Management Reporting and Disclosure Act, OLMS certified that the proposed regulation would not have "a significant economic impact on a substantial number of small entities" based solely on the number of NLRB representation and decertification elections held. The proposed regulations would, however, greatly expand the requirement for employers and their consultants to file and thus the Department grossly under estimated the cost to employers. The Department estimated that the total cost before filing would be merely $825,866. The Chamber's more detailed economic analysis how-

ever showed that the proposed rule will impose a first year cost burden on the economy of between $910.1 million to $2.2 billion and subsequent annual costs of between $285.9 million to $793.1 million.

Similarly, the Employment and Training Administration dramatically under estimated the cost of the major changes they proposed to the H–2B visa program which is heavily used by small businesses. The Chamber's economic analysis shows that the Department's estimated first year cost of the proposed rule increases from the published amount of $2.1 million to a revised total of $53.1 million, and the subsequent years' annual costs increase from the published amount of $810,000 per year to a revised total cost of $50.81 million per year. The undiscounted total cost over ten years increases from the published total of $9.35 million to a revised ten-year total of $509.39 million. The ETA claimed that it did not have adequate data to provide a more accurate estimate of the costs. The only reason the ETA did not have this data is that it did not try to develop it. This was a case where the agency should have followed the instructions from Section 609(a) to assure participation from small entities.

Conclusion

The Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act exist to help agencies improve their rulemakings, not to impede them. If agencies welcomes the input of small businesses as a source of real world understanding these regulations would likely be more narrowly tailored without sacrificing the agency mission or regulatory objective. In the interest of transparency, OSHA should conduct more small business panel review and other agencies should look for more direct ways to develop the input of small businesses consistent with Section 609(a).

Testimony of

Carl Harris

On Behalf Of the
National Association of Home Builders

Before the
United States House of Representatives
Committee on Small Business
Subcommittee on Investigations, Oversight, and Regulations

Hearing on
"Regulating the Regulators – Reducing Burdens on Small Business"

March 14, 2013

On behalf of the more than 140,000 members of the National Association of Home Builders (HAHB), I appreciate the opportunity to submit this testimony. My name is Carl Harris. I am a builder from Wichita, Kansas, and co-founder of Carl Harris Co., Inc. As a specialty contracting firm founded in 1985 we employ approximately twenty individuals and are engaged in a variety of residential and light-commercial construction applications. I also serve as a national area chairman for the National Association of Home Builders and am the 2013 President of the Kansas Building Industry Association.

As a small businessman operating in a heavily regulated industry, I understand how difficult (and often costly) it can be to comply with the myriad of government regulations that apply to my day-to-day work. As a frequent industry representative in the statutorily-mandated small business feedback portion of the regulatory rulemaking process, I am well aware of the role small businesses play in informing regulators of the potential burdens borne by small business with new regulations. I am also aware of the strengths and weaknesses inherent to the process.

While the original Congressional intent and subsequent additions/enhancements to the Regulatory Flexibility Act are to be lauded, the reality is that far too often agencies either view compliance with the Act as little more than a procedural "check-the-box" exercise or they artfully avoid compliance by other means. Agencies should seek to partner with small entities to help create more efficient, more effective regulations and, in so doing, reduce the compliance costs for small businesses. I am pleased that the Subcommittee is focusing today on the impacts of regulation on small businesses.

The Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[1] requires federal agencies to consider the effect of their actions on small entities, including small businesses, small non-profit enterprises, and small local governments. When an agency issues a rulemaking proposal, the RFA requires the agency to "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."[2]

The RFA states that an initial regulatory flexibility analysis (IRFA) shall address the reasons that an agency is considering the action; the objectives and legal basis of the rule; the type and number of small entities to which the rule will apply; the projected reporting, record keeping, and other compliance requirements of the proposed rule; and all federal rules that may duplicate, overlap, or conflict with the proposed rule. The agency must also provide a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes which minimize any significant economic impact of the proposed rule on small entities.[3]

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[1] 5 U.S.C. 601–612
[2] 5 U.S.C. 603(a).
[3] 5 U.S.C. 603(c).

Section 605 of the RFA allows an agency, in lieu of preparing an IRFA, to certify that a rule is not expected to have a significant economic impact on a substantial number of small entities. If the head of the agency makes such a certification, the agency must publish the certification in the Federal Register along with a statement providing the factual basis for the certification.[4] The agency must then prepare a final regulatory flexibility analysis (FRFA) for publication with the final rule.[5] The FRFA must include a succinct statement of the need for, and the objectives of, the rule, a description of and the estimate of the number of small entities to which the rule will apply, a description of the projected reporting, recordkeeping, and other compliance requirements of the rule, and a description the steps the agency has taken to minimize the significant economic impacts on small entities consistent with the stated objectives and the factual, policy, and legal reasons why the selected option was chosen and the alternatives rejected.[6]

In addition, under the 1996 amendments to the RFA, known as the Small Businesses Regulatory Enforcement Fairness Act (SBREFA)[7], when the Occupational Safety and Health Administration (OSHA) or Environmental Protection Agency (EPA) is required to prepare an IRFA[8], they must first notify the Chief Counsel for Advocacy of the Small Business Administration ("Advocacy") and provide Advocacy with information on the potential impacts of the proposed regulation on small entities and the type of small entities that may be affected. Advocacy must then identify individual representatives of affected small entities for the purpose of obtaining advice and recommendations about the potential impacts of the proposed rule, and the agency must convene a review panel made up of the agency, Advocacy, and the Office of Management and Budget to review the materials the agency has prepared (including any draft proposed rule), collect advice and recommendations of the small entity representatives and issue a report on the comments of the small entity representatives and the findings of the panel. Following this process, the agency shall modify the proposed rule, the IRFA, or the decision on whether an IRFA is required.[9] While there are exceptions to the requirement to conduct a SBREFA panel, these are limited to situations where the agency certifies that the rule will have a minimal impact.[10]

Small Entity Input Considered After the Negotiated Rule

In 2008, OSHA proposed the Cranes and Derricks Rule, which was intended to protect workers from the hazards associated with hoisting equipment in construction. For the development of this rule, OSHA relied on the negotiated rulemaking process, wherein the rule is developed by a committee comprised of individuals who represent the interests of those who will be significantly affected by the rule.

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[4] 5 U.S.C. 605.
[5] 5 U.S.C. 604.
[6] 5 U.S.C. 604(a).
[7] 5 U.S.C. 609.
[8] Section 1100G of Dodd-Frank amendment § 609(b) to add CFPB to the list of agencies.
[9] 5 U.S.C. 609(b)(1) through (6).
[10] 5 U.S.C. 609(c).

Unfortunately it wasn't until after the negotiated rulemaking process was complete that OSHA convened a Small Business Advocacy Review Panel to evaluate the potential impact of the rule on small entities. I was fortunate to have participated as a small entity representative in the review of the proposed Safety Standard for Cranes and Derricks in Construction. Several Small Entity Representatives (SERs), myself included, raised concerns at the time that the Cranes and Derricks proposal did not differentiate between crane applications on residential construction sites and large commercial construction sites. As a result, any rule issued with this fundamental oversight would disproportionately impact small entities.

I use cranes almost every day for our residential and light commercial work. We use cranes to set large trusses, steel framing for greater clear heights and greater open spaces, and precast concrete pieces including floors over basements and safe rooms.

I personally put forward an effective, feasible alternative that would save lives and reduce injuries in a more cost-effective way by developing regulations for crane operator certification which are appropriate to the equipment that is being used and the risks presented by that equipment. This included principles of what should be required for crane operators: employer training for the specific equipment in use, employer assessment of the conditions of the job site, and the equipment and certification by the employer that the training has been completed.

Again, it is unfortunate that small businesses were not brought in until after the rule had already been developed through the negotiated rulemaking process. As it was, the process seemed little more than a procedural hurdle with little interest from OSHA to make changes based on the feedback received.

Poor Economic Analysis and the True Costs to Small Entities

In 2010, OSHA proposed revising its Occupational Injury and Illness Recordkeeping regulation to include additional reporting requirements on work-related musculoskeletal disorders (MSDs).

While OSHA certified, in accordance with the Regulatory Flexibility Act (RFA), that the proposed recordkeeping rule would "not have a significant impact on a substantial number of small entities," industry groups urged OSHA to solicit further input on the impact of the proposed rule on small businesses by convening Small Business Advocacy Review Panel, as mandated by the RFA. However, in lieu of a proper small business panel, OSHA convened a series of teleconferences in 2011, which I participated in, to reach out to the small business community for input on the proposal.

During the teleconferences, I raised the concern that the proposed rule would result in additional costs to small employers which OSHA had not yet considered. Recording MSDs entails far more than simply placing a check mark in the MSD column. It requires a thorough investigation to correctly classify MSDs. Most employers in the home building industry are generally not qualified to assess such work-related illnesses. Only qualified medical per-

sonnel can analyze MSD injuries—I certainly do not have this medical expertise and very few home builders have medical degrees. Therefore, evaluating each MSD case would be very time consuming for employers, particularly small ones. This evaluation would likely take several hours to several days—not minutes as OSHA suggests—to consult with qualified medical personnel, review medical records and reports, and determine whether the MSD is new, work-related, or otherwise recordable. This would result in significantly increased costs to small businesses.

As a result of not engaging small businesses earlier and in a more comprehensive manner, OSHA failed to account for the true impact this proposed rule would have on small entities and their employees. OSHA has since temporarily withdrawn the proposed Recordkeeping rule citing the need for "greater input from small businesses on the impact of the proposal."[11] I, along with NAHB, welcome the prospect of partnering with OSHA on the proposed rule in the hopes of developing a better, more workable rule for small entities that takes into account the true costs associated with compliance.

Failure to Engage Small Entities in a Meaningful Way

Improving the way the agencies conduct the required reviews of proposed regulations under RFA would result in far more efficient regulations and reduced compliance costs for small businesses.

Unfortunately, agencies often either fall to comply with the RFA by ignoring the statutory obligation to convene a small entity review panel or convene a panel but fail to provide SERs sufficient information concerning the proposed rule to allow them to evaluate regulatory options or provide alternatives.

This was the case for a small entity review panel on which I recently served that reviewed a proposed federal regulation covering stormwater discharges from developed sites. EPA, in preparation for the panel, failed to provide sufficient detailed information about the upcoming rule.[12] As a result, NAHB members serving as SERs were unable to estimate compliance costs or identify ways to reduce the regulatory burden upon small businesses. Several SERs provided written comment that the lack of information made providing meaningful input difficult and noted that the agency's failure to provide sufficient information was a violation of SBREFA. Despite these concerns, EPA concluded the small entity review panel in December 2010.

This experience highlights a reoccurring limitation of the current RFA/SBREFA process—namely that the federal agencies often view compliance as largely a procedural function during the federal rulemaking process and not—as Congress intended—an opportunity to reduce the burden of regulations on small businesses. When agencies are unprepared to provide small entity review panelists with the information and data necessary to evaluate the costs and com-

[11] http://www.osha.gov/pls/oshaweb/owadisp.show—document?p—table=NEWS—RELEASE&p—id=19158

[12] EPA's stormwater rule was identified in the December 2010 Unified Agenda notice as "Stormwater Regulations Revisions To Address Discharges From Developed Sites." See 75 Fed. Reg. 79851, December 20, 2010.

pliance obligations, the process breaks down. Not only do the participants question the value of their participation, but the entire regulatory program loses its legitimacy and clearly undermines Congress's intent.

Failure to Comply with the SBREFA Panel Requirements

While going through the procedural motions and failing to provide the small business community with the necessary tools to provide meaningful, constructive feedback is a significant problem, far more problematic are the occasions when agencies obviate their responsibility to convene review panels, thus removing a small business entirely from the equation. This was the case when EPA failed to convene a review panel as the agency sought to amend its Lead Renovation, Repair, and Painting (RRP) rule.

The RRP Rule requires for-hire contractors that conduct renovation activities in residences built before 1978 to obtain certification from EPA; use "lead-safe work practices" designed to contain and minimize dust created during the renovation activity; and maintain records on these activities. Shortly after finalizing the RRP Rule in 2008, as a result of a settlement agreement EPA reached with public interest advocates, EPA proposed amending the regulation to remove the "Opt-Out Provision." The opt-out provision allowed homeowners to authorize their contractor to use traditional work practices under certain circumstances, resulting in significant cost savings.

Removing the opt-out provision more than doubled the number of homes subject to the RRP Rule to 78 million and EPA estimated the cost of this action to be $500 Million annually.[13] However, the costs are far greater because of EPA's flawed economic analysis, which significantly underestimated the true compliance costs. The agency initially estimated that compliance costs would add $35 to a typical remodeling job; yet for a typical window replacement project the cost ranges from $90 to $160 per window opening, easily adding more than $1,000 to each project. Moreover, an EPA Inspector General's (IG) report, published on July 25, 2012, found that the EPA failed to use accurate or even reliable information on the likely costs of changes to the RRP rule on small entities. More specifically, the report called on EPA to review both the original RRP rule and the removal of the Opt-Out provisions using RFA Section 610 authorities:

> *"We have identified only a few aspects of EPA's complex benefits-costs analysis that are limited. However, we believe these aspects limit the reliability of EPA's estimates of the rule's costs and benefits to society. The Administration's 2011 Executive Order [E.O. 13563] and Section 610 of the Regulatory Flexibility Act provide EPA an opportunity to review the Lead Rule to determine whether it should be*

[13] 75 Fed. Reg. 24802, 24812 (May 6, 2010). The agency estimated that the removal of the Opt-Out provision would result in $500 million in costs in the first year, but projected this amount would decrease to $200 million each year once the agency certified a test kit that satisfied the RRP Rule's criteria for accurately measuring the presence of lead in paint at regulated levels. However, no such test kit has been identified and therefore these cost savings have not been realized.

modified, streamlined, expanded, or repealed in light of the known limitations in the rule's underlying cost and benefit estimates."

EPA acknowledged during the initial rulemaking that the Opt-Out Rule substantially impacted a significant number of small entities and complied with the RFA's regulatory flexibility analysis reporting requirements. However, EPA refused to convene a new panel. Instead, EPA relied on a panel convened more than a decade earlier for the original RRP Rule. EPA stated "that reconvening the Panel would procedurally duplicative and is unnecessary given that the issues here were within the scope of those considered by the Panel." [14]

In the 17 years since the RFA was amended by SBREFA to include the panel requirement, EPA has convened approximately 43 panels. According to a recent report issued by the Congressional Research Service (CRS), EPA issued **nearly the same number** of significant regulations during the first Obama Administration.[15] It defies belief that so few EPA regulations have met the threshold under SBREFA and these numbers illustrate how reluctant agencies are to comply with the law.

Contributing to the lack of EPA's compliance with the RFA is the absence of an enforcement mechanism. While section 611 of the RFA provides for judicial review of some of the act's provisions, it does not permit judicial review of section 609(b), which contains the panel requirement.[16] NAHB believes that the RFA should be amended to include judicial review of the panel requirement to ensure agencies adhere to the law.

Many of the deficiencies found in EPA's RRP rule could have been addressed if EPA complied with both the letter and spirit of the RFA. Ultimately, because they didn't convene a panel, EPA was unable to produce a workable rule and has unnecessarily burdened small entities.

Underestimating Impacts to Avoid Statutory Requirements

Under the Endangered Species Act (ESA), the U.S. Fish and Wildlife Service and National Oceanic and Atmospheric Administration (collectively referred to as "the Service") can prohibit the issuance of any federal permit if the Service determines the proposed activity may result in the "adverse modification" of critical habitat.[17] Congress, recognizing the potential economic impact of critical habitat designations, requires the Service to perform an economic analysis whenever the Service proposes to designate crit-

[14] *Id.* at 24815.

[15] The Congressional Research examined 45 regulations it characterized as satisfying OMB's "significance" threshold of $100 million annual effect on the U.S. economy in a report addressing the rate of issuing regulations during the first Obama Administration. *Regulations: Too Much, Too Little, or On Track?*, http://www.fas.org/sgp/crs/misc/R41561.pdf (last visited Mar. 5, 2013).

[16] Section 611(a)(1) states: "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."

[17] 16 U.S.C. § 1636(2)

ical habitat. Congress also gave the Service the authority to exclude any area from a "final" critical habitat designation, provided the Service determines the economic costs resulting from critical habitat designation outweighs the biological benefits to the species.[18]

While the Service is required to comply with the RFA, they frequently will adopt the stance that small entities are not significantly impacted by a proposed critical habitat designation, and certify as such. The designation of critical habitat directly impacts land developers, builders, states, and local governments by restricting their ability to undertake otherwise lawful land use activities. The designation of critical habitat by the Service is unlike other ESA regulatory restrictions in that the Service can designate private property as critical habitat regardless of whether a federally protected species will ever occupy the property in question. For NAHB members, the designation of critical habitat by the Service has a significant economic impact on their land development projects and their businesses. As explained further below, the designation of critical habitat triggers a complex federal permitting process known as the ESA Section 7 consultation process that can result in the Service prohibiting otherwise lawful land use activities if the Service determines proposed activities may result in adverse modification of critical habitat.

The ESA's Section 7 consultation process often significantly impacts small businesses and is fraught with permitting delays, increased costs and land use extractions. While the Service's regulations say the ESA Section 7 formal consultation process should take no longer than four and half months (135 days) to complete, the Service routinely fails to complete the consultation process within its own prescribed permitting deadlines.[19] For example, the U.S. General Accounting Office (GAO) conducted an audit of ESA Section 7 consultations permits performed in the Pacific Northwest in 2003 following the Service's decision in the late 1990's to list as "endangered" over 20 subpopulations of salmon species. GAO's audit found the Service routinely exceeded the Section 7 permitting timeframes for formal consultation by many months and in some cases years.[20] Homeowners living near Seattle, Washington waited over two years for the Service and the Army Corps of Engineers (Corps) to complete ESA Section 7 formal consultations for a CWA Section 404 wetland permits (needed to install private boat docks on Lake Washington.[21] In the case of the homeowners, GAO estimated the economic impact from the Section 7 permitting delay for the federal wetlands permits to be approximately $10,000 per homeowner.[22] While understandably outrageous, these types of permitting delays are common for NAHB members whose projects

[18] 16 U.S.C. § 1633(b)(2)
[19] 50 CFR § 402.14 (2012)
[20] GAO Report (2003) *Endangered Species: Despite Consultation Improvement Efforts in the Pacific Northwest, Concerns Persist about the Process*, GAO–03–949T, Executive Summary.
[21] GAO Report (2003) *Endangered Species: Despite Consultation Improvement Efforts in the Pacific Northwest, Concerns Persist about the Process,* GAO–03–949T, page 12
[22] GAO Report (2003) *Endangered Species: Despite Consultation Improvement Efforts in the Pacific Northwest, Concerns Persist about the Process,* GAO–03–949T, page 12

occur in areas designated by critical habitat and require a Section 404 permit.

Despite these examples of significant economic impacts on small entities, the Service routinely claims that the RFA does not apply when designating critical habitat. Three examples of past critical habitat designations where the Service has certified the RFA does not apply are:

• *Vernal Pools* (crustaceans and plants)—FWS finalized the designation of over 800,000 acres of land across San Diego and Riverside counties in California.[23] According to FWS's ESA § 4(b)(2) economic analysis the potential economic impact on residential construction activities could be upward of $800 million dollars. However, the FWS "certified" the RFA does not apply because "not a substantial number of small entities" will be impacted by the proposed rule.[24]

• *California Coastal Gnatcatcher* (bird)—FWS proposed to designate as critical habitat about 200,000 acres located across Los Angeles, Orange, San Bernardino, Riverside, and Ventura counties.[25] Again under economic analysis required under the ESA § 4(b)(2) FWS found an economic impact of greater than $880 million dollars—a majority of the economic impact occurring due to future residential development. However again FWS "certified" the RFA does not apply since "not a substantial number of small entities will be impacted."[26]

• *Cactus Ferruginous Pygmy-Owl* (bird)—FWS proposed to designate as critical habitat over 1.2 million acres encompassing the entire Tucson, Arizona metropolitan area.[27] The Service's sweeping critical habitat designation for the pygmy-owl was outrageous considering only 18 known owls existed in the entire area. That mean each of the 18 known owls would have greater than 66,000 acres of critical habitat much of it located on private lands. Biologists have since shown that these owls typically require anywhere between 50–290 acres each.[28] Once again the Service's own ESA economic analysis found staggering economic impacts upon NAHB members and local governments including $545 million dollars decline in housing production, a loss of $68 million dollars in local taxes and fees from reduced residential construction, and most importantly the loss of 2,748 of construction jobs all over a ten year period. Shockingly the Service again certified the RFA did not apply since not a substantial number of small entities would be impacted.

Conclusion

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[23] 70 Fed. Reg. § 46934 (August 11, 2005)
[24] 70 Fed. Reg. § 46954 (August 11, 2005)
[25] 72 Fed. Reg. § 72010 (December 19, 2007)
[26] 72 Fed. Reg. § 72067 (December 19, 2007)
[27] 67 Fed. Reg. § 71032 (November 27, 2002)
[28] FWS. 2000. Chapter 1: The Cactus Ferruginous Pygmy-Owl: Taxonomy, Distribution, and Natural History. Retrieved on March 11, 2013. Available at *http://www.fs.fed.us/rm/pubs/rmrs—gtr043/rmrs—gtr043—005—015*.

Congress, in crafting the RFA, clearly intended for all covered federal agencies to carefully consider the proportional impacts of federal regulations on small businesses.

> *"It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulations. To achieve this principal, 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."*[29]

Unfortunately, all too often federal agencies view RFA compliance as either a technicality of the federal rulemaking process or, worse yet, as unnecessary. In an effort to ensure that regulations are crafted in accordance with the Congressional intent of the RFA, I urge Congress to seek out ways to improve agency compliance with the Regulatory Flexibility Act.

[29] Regulatory Flexibility Act of 1980 (P.L. 96–354)

CPR CENTER FOR PROGRESSIVE REFORM

TESTIMONY OF

Rena Steinzor
Professor, University of Maryland Carey School of Law
and
President, Center for Progressive Reform (www.progressivereform.org)

before the

Committee on Small Business
Subcommittee on Investigations, Oversight and Regulations
U.S. House of Representatives

Hearing on
Regulating the Regulators—Reducing Burdens on Small Business

March 14, 2013

Mr. Chairman, ranking member Clarke, and members of the subcommittee, I appreciate the opportunity to testify today on the benefits for small business of regulations that protect public health, worker and consumer safety, and the environment.

I could not agree more with the Subcommittee's overarching mission: strengthening the role of small business in repairing an economy ruined by rampant speculation and the excessive greed of financial institutions that Attorney General Eric Holder has embarrassingly implied are too big to prosecute. Rather than take an honest look at how weak regulation allowed Wall Street to engineer the 2008 crash, big business uses small business as a kind of human shield, conflating the distinctly different needs in the two sectors and pushing for deregulation that could further endanger the economy and public health.

A case in point is the Small Business Administration's (SBA) Office of Advocacy, which has consciously diverted its limited, taxpayer-funded resources away from helping truly small business understand and comply with regulatory requirement toward pursuing the complaint *du jour* of the very large companies that call the shots at the American Chemistry Council, the National Association of Manufacturers, and the U.S. Chamber of Commerce. ***These activities raise the disturbing prospect that the Office of Advocacy has broken the law.*** In fact, I hope that the evidence I put before you today will motivate you to ask the Government Accountability

Office (GAO) to investigate the SBA Office of Advocacy regarding its compliance with laws that (1) bar federally funded agencies from lobbying Congress and (2) require it to conduct its affairs in the sunshine. We hope you will also ask GAO to investigate how the Office of Advocacy ensures that its intervention in individual rulemakings genuinely advance the interests of truly small businesses. From what we can tell, it routinely intervenes in rulemakings with only tangential effects on its constituency.

I am a law professor at the University of Maryland Carey School of Law and the President of the Center for Progressive Reform (CPR) (http://www.progressivereform.org/). Founded in 2002, CPR is a network of sixty scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. We have a small professional staff funded by foundations. I joined academia mid-career, after working for the Federal Trade Commission for seven years and the House Energy and Commerce Committee for five years. For seven years, I served as the lawyer for small, publicly-owned electric systems that have much in common with the businesses under your jurisdiction. My work on environmental regulation includes four books, and over thirty articles (as author or co-author). My most recent book, published by the University of Chicago Press, is *The People's Agents and the Battle to Protect the American Public: Special Interests, Government, and Threats to Health, Safety, and the Environment*, co-authored with Professor Sidney Shapiro of Wake Forest University's School of Law, which comprehensively analyzes the state of the regulatory system that protects public health, worker and consumer safety, and natural resources, and concludes that these agencies are under-funded, lack adequate legal authority, and consistently are undermined by political pressure motivated by special interests in the private sector. I have served as consultant to the Environmental Protection Agency (EPA) and testified before Congress many times.

My testimony today makes four points:

Small business deserves assistance regarding compliance with regulatory requirements and the SBA Office of Advocacy ought to provide this assistance rather than operating as an institutionalized opponent of regulations targeted by its big business cronies.

Two recent reports by CPR and the Center for Effective Government reveal that the Office of Advocacy systematically ignores the needs of small business and instead operates, largely in secret, as a loyal foot soldier in the big business campaign against regulation.

Regulation is vital to the quality of life we take for granted in America, saving lives, preserving health, and safeguarding the natural environment for our children.

If anything, our regulatory system is dangerously weak, and Congress should focus on reviving it rather than eroding public protections.

The Disgraceful Track Record of the SBA Office of Advocacy

As you are no doubt aware, Congress established the SBA in 1953 to safeguard the interests of small business in an economy buffeted by World War II and the Korean War. Legitimate concerns about the competitive disadvantages that small business faced during

wartime motivated the establishment of broadly based effort to ensure small business access to federal procurement contracts and to conduct specialized outreach to women, people of color, and veterans.

The SBA Office of Advocacy was created in 1976 to represent small business before federal agencies. To the extent that the Office of Advocacy's role in the rulemaking process is to ensure that the concerns of truly small businesses are raised before agencies, this limited mission makes sense. After all, truly small businesses don't have the resources to represent their interests in Washington. And those interests are often quite distinct from the big business with which they compete.

Unfortunately, the Office of Advocacy has strayed far from this mission, as explained in two particularly shocking investigative reports I have attached to my testimony. The reports reveal that the SBA Office of Advocacy has systematically consorted with big business to pursue an agenda of undercutting health, safety and environmental agencies without considering at any point whether the way its staff spend their time confers any benefit on small business. The Office of Advocacy succeeds only in echoing the complaints voiced by well-heeled lobbyists representing the wealthiest companies and most powerful trade groups in the country. Meanwhile, the legitimate concerns of truly small businesses continue to be drowned out.

The first report, authored by the Center for Effective Government (CEG), describes how the Office of Advocacy hosts regular "Environmental Roundtables" that are attended by trade association representatives and lobbyists. The meetings are held at law firms that represent organizations like the American Chemistry Council, and feature presentations by lobbyists and lawyers who represent Fortune 100 companies. They occur behind closed doors and their agendas, attendance lists, and minutes are not published. Nevertheless, the roundtables result in positions that become the Office of Advocacy's policy positions.

Alerted by the CEG's report, environmental organization representatives attempted to participate in a roundtable, but were told that they could listen to the discussion but were not allowed to speak. (See Richard Denison, Environmental Defense Fund, "A mission corrupted: Your tax dollars pay for ACC to coach big industry on how to undercut EPA's IRIS program," http://blogs.edf.org/nanotechnology/2013/03/05/a-mission-corrupted-your-tax-dollars-pay-for-acc-to-coach-big-industry-on-how-to-undercut-epas-iris-program/) The roundtable consisted of presentations by Nancy Beck, a former White House Office of Information and Regulatory Affairs (OIRA) staffer who now works for the American Chemistry Council, and Robert Fensterheim, a former American Petroleum Industry staffer who now works at the RegNet/IRIS Forum, an industry group dedicated to undermining EPA's Integrated Risk Information System (IRIS).

The IRIS program compiles toxicological profiles of chemicals sold in large quantities in commerce, or otherwise threatening public health and the environment. Its profiles do not have regulatory effect, although large chemical manufacturers are very sensitive to their potential to reveal a chemical's toxicity. Given all the decisions that affect small business today, it is mystifying why the chemical industry's campaign against IRIS implicates the interests of more than a tiny handful of small businesses and, in fact, the CEG report finds no evidence that the Office of Advocacy received any request or comment from its ostensible constituency before

pursuing these issues. As the CEG report explains, these activities, especially the sponsorship of the secretive roundtables, appear to violate the Federal Advisory Committee Act (FACA).

Correspondence received in response to a CEG Freedom of Information Act (FOIA) request reveals that the SBA Office of Advocacy played a leading role in the American Chemistry Council's crusade to halt the Department of Health and Human Service's National Toxicology Program's efforts to list chemicals as "known" or "probable" carcinogens, in probable violation of the Anti-Lobbying Act and other lobbying restrictions. Once again, there is no evidence that the Office of Advocacy consulted with any small businesses in emphasizing these issues.

The Center for Progressive Reform (CPR) report, released in tandem with the CEG's investigative findings, found that the Office of Advocacy defines "small" businesses as any oil refinery that has up to 1,500 employees and any chemical plant that has up to 1,000 employees. This strange approach allows it to push for preferential regulatory treatment for relatively large firms that do not conform to any common sense understanding of what a "small business" is. This approach further obscures its efforts to win approval from big business in regulatory battles that have at best a marginal impact on small business interests. As just one example, CPR reports on the Office of Advocacy's enthusiastic participation in a rulemaking designed to reduce emissions of hazardous air pollutants such as arsenic, lead, and formaldehyde from coal-fired power plants. The Office of Advocacy argued to the EPA that the rule should be cut back to cover only mercury emissions. Its arguments closely tracked those made in a 200-page submission from the Southern Company, the fourth largest utility in the country.

CPR's report makes a crucial observation with regard to the Office of Advocacy's aggressive deregulatory efforts: by taking consistently hostile stances to health and safety rulemaking proposals, it sacrifices any opportunity to work with the agencies in an effort to mitigate the impact of the proposals on truly small businesses. We understand the reasons for this approach, and they aren't pretty. Rewriting the comments prepared by big law firms for even bigger companies is far easier than rolling up your sleeves and working with agency officials to design innovative compliance alternatives.

The report recommends that the Office of Advocacy restore its focus on helping truly small businesses—that is, those firms with 20 or fewer employees. Second, it recommends a new mission for the Office of Advocacy: promoting win-win regulatory solutions that help small businesses achieve protective regulatory standards without undermining their ability to compete with larger firms.

The Benefits of Regulation

Self-righteous crusaders against regulation have become accustomed to telling only half the story to the American people: they pretend that exaggerated regulatory costs are the only result of the system, and ignore its considerable benefits. Conversely, they suggest that if we dismantled the regulatory system, we would suffer no negative consequences and instead reap a windfall in saved money. This devious approach is like setting out to balance a family budget,

stockpiling all the available money (pay checks, investments, or social security), and ignoring whatever you are able to buy (a place to live, leisure pursuits, or a college education).

What does it mean to leave the benefits side of the ledger blank? Because the benefits of regulation are spread throughout the population, to every man, woman, and child in America—regardless of class, race, background, or ethnicity—this myopic focus on the costs to regulatory industries raises the question of which group of citizens is more important—stockholders and brokers or everyday people who need clean air and water, safe workplaces and products, and financial and health care systems free of price gouging and other forms of fraud. Should the second group risk grave harm so that the first group can maximize profits, or is there a better way?

Just ask anyone whose life was saved by a seat belt, whose children escaped brain damage because the EPA took lead out of gas, who turns on the faucet knowing the water will be clean, who takes drugs for a chronic illness confident the medicine will make them better, who avoided having their hand mangled in machinery on the job because an emergency switch was there to cut off the motor, who has taken their kids on a trip to a heritage national park to see a bald eagle that was saved from the brink of extinction—the list goes on and on.

The simple fact is that people need to be healthy enough to go to work and school. To use the example of the benefits achieved by the EPA, the agency that has served as the poster child for supposed regulatory excess: in 2010, clean air rules saved 164,300 adult lives. By 2020, they will save 237,000 lives annually. These rules save 13 million days of work loss due to pollution-related illnesses like asthma, and 3.2 million days of school loss. By 2020, they will save 17 million work loss days and 5.4 million school loss days. The economic value of Clean Air Act regulatory controls are estimated to be $2 trillion annually by 2020, dwarfing $65 billion in compliance costs.[1]

Previous Congresses did not pass the Clean Air and Water Acts, drug and food safety laws, and the Occupational Health and Safety Act simply to annoy industry. You took action so that this country does not regress to a time when our rivers caught fire, our cars exploded on rear impact, ours workers contracted liver cancer from breathing in benzene, and the industrial zones of our cities and towns were smothered under a blanket of chemical haze. The legacy of regulation is not economic ruin, but the possibility that our grandchildren will be better off than their parents' generation.

Revitalizing Regulation

A series of catastrophic regulatory failures have focused attention on the troubled condition of regulatory agencies assigned to protect public health, worker and consumer safety, and the environment. The destructive convergence of funding shortfalls (many agency budgets have stagnated or declined while the size of their has grown), political attacks from Congress and even the White House, and outmoded legal authority (decades-old statutes that only allow for miniscule penalties for egregious worker safety violations, for instance) have set the stage for ineffective enforcement and unsupervised industry self-regulation. From the Deepwater Horizon

[1] *See* ENVTL. PROTECTION AGENCY, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020 (Mar. 2011), *available at* http://www.epa.gov/oar/sect812/feb11/fullreport.pdf.

spill in the Gulf of Mexico that killed eleven and caused grave environmental and economic damage, to the worst mining disaster in 40 years at the Big Branch mine in West Virginia with a death toll of 29, the signs of regulatory dysfunction abound. Peanut paste tainted by salmonella, glasses imprinted with the Shrek logo contaminated by cadmium and sold at McDonald's, Code Red smog days when parents are warned to keep their children indoors, the Vioxx recall—at the bottom of each well-publicized event is an agency unable to do its job and a company that could not be relied upon to put the public interest first.

Consider the example of compounding pharmacies left virtually unregulated by state pharmacy boards and the Food and Drug Administration (FDA). A compounding pharmacy in Massachusetts sold drugs contaminated with meningitis to clinics and hospitals nationwide. The bad medicine has killed 48 and sickened 666, shaking public confidence to its core. In a rare display of honesty, FDA Commissioner Margaret Hamburg told the Reuters news service: "Over the years, there has been substantial debate within Congress about the appropriate amount of FDA oversight and regulation of compounding pharmacies. But unfortunately, there has been a lack of consensus and many challenges from industry." And David Kessler, who served as FDA Commissioner during the Clinton Administration, speculated that the deeply discordant tensions of the presidential election affected the FDA's performance: "Everyone is closed down right now," he said. "People are being very careful. No one wants to make a mistake." Compounding pharmacies make 40 percent of the injectable drugs administered in medical facilities across the country. Yet other than excoriating Commissioner Hamburg, Congress has done nothing to improve the oversight of the industry.

As this incident illustrates, the agencies do their best to appear as if they are operating normally, when any close observer reaches the unavoidable conclusion that they are being prevented from achieving their statutory mission of protecting the public in an effective and timely manner. When industrial activities go wrong, the responsible agency's harshest critics vilify the regulators first, overlooking or making excuses for the corporate executives whose negligence caused the disaster. The result is an excruciating Catch-22: regulators are de-funded and de-fanged, but held to impossible standards when corporate negligence inevitably emerges. The real question for Congress is how to revive the agencies assigned to protect the American people, not how to demoralize their staffs, cut their budget, and squelch their rules.

Distorting the Interests of Small Business:

How the Small Business Administration Office of Advocacy's Politicization of Small Business Concerns Undermines Public Health and Safety

by CPR Member Scholar Sidney Shapiro
and CPR Policy Analyst James Goodwin

CPR CENTER FOR PROGRESSIVE REFORM

CENTER FOR PROGRESSIVE REFORM WHITE PAPER #1302
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About the Center for Progressive Reform

Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both privare and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation, and improved public access ro information. CPR is grateful to the Public Welfare Foundation for funding this white paper.

This white paper is a collaborative effort of the following individuals: **Sidney Shapiro** holds the University Distinguished Chair in Law at the Wake Forest University School of Law and is a member of the Board of Directors of the Center for Progressive Reform. **James Goodwin** is a Policy Analyst with the Center for Progressive Reform.

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Executive Summary

It's likely that few outside of Washington have heard of the Small Business Administration's (SBA) Office of Advocacy, but this tiny and largely unaccountable office has quietly become a highly influential player in the federal regulatory system, wielding extraordinary authority over the workplace safety standards employers must follow, the quantity of air pollution factories can emit, and the steps that food manufacturers must take to prevent contamination of the products that end up on the nation's dinner tables.

The Office exercises this authority by superintending agency compliance with an expanding universe of analytical and procedural requirements—imposed by a steady stream of statutes and executive orders issued during the past three decades—that purportedly seek to ensure that agencies account for small business interests in their regulatory decision-making. Controversial rules can quickly become mired in this procedural muck, and an agency's failure to carry out every last required analysis with sufficient detail and documentation can spell doom for even the most important safeguards. This system provides the Office of Advocacy with a powerful lever for slowing down rules or dictating their subsrance.

The Office of Advocacy's role in the regulatory system bears a striking resemblance to that played by the White House Office of Information and Regulatory Affairs (OIRA). Both operate to similar effect, functioning as an anti-regulatory force from within the regularory structure, blocking, delaying, and diluting agency efforts to protect public health and safety. Moreover, both offices have entry into the regulatory process on the strength of seemingly neutral principles and policy goals—promotion of economic efficiency and protection of small business, respectively. But in actual practice, both offices serve to politicize the process, funneling special interest pressure into agency rulemakings, even though such interests have already had ample opportunity to comment on proposed regulations. Despite these similarities, however, OIRA receives the bulk of attention from policymakers, the media, and the public.

This report shines light on the Office of Advocacy's anti-regulatory work, examining how its participation in the rulemaking process further degrades an already weakened regulatory system. As a preliminary matter, the nominal objective of the Office of Advocacy—subsidizing small businesses through preferential regulatory treatment[1]—is based on a needless and destructive tradeoff; the government has several policy options for promoting small businesses without sacrificing public health and safety. The Office of Advocacy nevertheless devotes much of its time and resources to blocking, delaying, or diluting regulatory safeguards or to supporting general anti-regulatory attacks from industry and its allies in Congress. In short, blocking regulations has become the Office of Advocacy's *de facto* top priority, and its commitment to this goal has led the Office to engage in matters that have little or nothing to do with advancing small business interests or with ensuring that federal policy reflects the unique needs of these firms.

Blocking regulations has become the Office of Advocacy's *de facto* top priority, and its commitment to this goal has led the Office to engage in matters that have little or nothing to do with advancing small business interests or with ensuring that federal policy reflects the unique needs of these firms.

More specifically, the report finds that the Office of Advocacy:

- Pursues an inherently flawed mission that needlessly sacrifices public health and safety;
- Adds several unnecessary roadblocks to the rulemaking process, preventing agencies from achieving their respective missions of helping people and the environment in an effective and timely manner;
- Sponsors anti-regulatory research designed to bolster politicized attacks against the U.S. regulatory system;
- Testifies at congressional hearings aimed at advancing politicized attacks against regulations that are inconvenient to well-connected corporate interests;
- Takes advantage of overly broad small business size standards to weaken regulations for large firms;
- Enables trade association lobbyists to subvert its small business outreach efforts;
- Interferes with agency scientific determinations despite lacking both the legal authority and relevant expertise to do so; and
- Pushes for rule changes that would benefit large firms instead of narrowly tailoring its recommendations so that they help only truly small businesses.

The report concludes by identifying several reforms that would enable the Office of Advocacy to work constructively with regulatory agencies during the rulemaking process to advance small business interests without undermining those agencies' mission of protecting public health and safety. These recommendations are summarized in Table 1.

Table 1: Recommendations for Reforming the Office of Advocacy

A New Mission: Promote "Win-Win" Regulatory Solutions that Ensure Both Small Business Competitiveness and Strong Protections for People and the Environment	• Congress should amend the Office of Advocacy's authorizing statutes to focus on promoting small business "competitiveness" instead of on reducing regulatory impacts or burdens. • Congress should provide the SBA with additional legal authorities to establish new subsidy programs that affirmatively assist small businesses meet effective regulatory standards without undermining their competitiveness. • Congress should establish and fully fund a network of small business regulatory compliance assistance offices. • Congress should significantly increase agency budgets so that they can effectively account for small business concerns in rulemakings without hindering their ability to move forward with needed safeguards. • The Office of Advocacy should identify and implement regulatory solutions that will enable small businesses to meet strong public health and safety standards while remaining competitive with larger firms. At a minimum, these solutions should include regulatory compliance assistance, finding opportunities to partner small businesses in mutually beneficial ways, and securing subsidized loans to cover compliance costs. • The Office of Advocacy should develop new guidance that helps agencies better address small business concerns in rulemakings by working toward win-win regulatory solutions. • The President should revoke Executive Order 13272, which empowers the Office of Advocacy to work with OIRA to interfere in agency rules.
Restored Focus: Helping Truly Small Businesses Only	• Congress should revise the Office of Advocacy's small business size standards so that they (1) focus on truly small businesses (*i.e.*, those with 20 or fewer employees) and (2) prevent the Office from working on behalf of all firms, regardless of size, that work in industrial sectors that pose a high risk to public health and safety. • Congress should prohibit the Office of Advocacy from working with non-small businesses and should establish legal mechanisms for ensuring that this prohibition is observed. • Congress should conduct more frequent and thorough oversight of the Office of Advocacy.

In recent years, corporate interests and their anti-regulatory allies in Congress have championed several bills that would enhance the Office of Advocacy's power to prevent agencies from carrying out their statutory missions of protecting public health and safety. Two hills—the Regulatory Flexibility Improvements Act and the Freedom from Restrictive Excessive Executive Demands and Onerous Mandates Act—would require agencies to complete several new analytical and procedural requirements purportedly aimed at reducing regulatory burdens on small businesses. The bills would empower the Office of Advocacy to monitor agency compliance with these requirements, bolstering its ability to interfere in individual rulemakings. A third bill, the Clearing Unnecessary Regulatory Burdens Act, would authorize the Office of Advocacy to second-guess agency civil enforcement actions against small businesses for certain first-time violations of regulatory reporting requirements.

These bills are part of the broader wave of anti-regulatory attacks that has dominated the political landscape ever since the Republican Party's success in the 2010 congressional elections. When launching these attacks, anti-regulatory advocates frequently invoke small-business concerns. Small business has become a highly romanticized, almost mythological concept among the public and policymakers alike, evoking images of small "mom and pop" stores lining the idyllic Main Street of some quaint village. Because no politician wants to run the risk of being painted as "anti-small business," anti-regulatory advocates have worked tirelessly to promote their cause as essential to helping small businesses. Moreover, recent high profile catastrophes involving inadequately regulared large businesses—including the BP oil spill and the Wall Street financial collapse—have provided anti-regulatory advocates with additional impetus to adopt the frame of small business to advance their agenda. In this atmosphere, proposals to expand the powers of the reliably anti-regulatory Office of Advocacy have become especially attractive to policymakers intent on weakening the nation's already fragile regularory system.

Background: The Pervasive Problem of Under-Regulation

The United States faces a problem of under-regulation. The regulatory system is supposed to protect public health and safety against unacceptable risks, but the destructive convergence of inadequate resources, political interference, and outmoded legal authority often prevents regulatory agencies from fulfilling this task in a timely and effective manner. Unsupervised industry "self-regulation" has filled the resulting vacuum, yielding predictably catastrophic results.

Evidence of inadequate regulation and enforcement abounds—from the BP oil spill in the Gulf of Mexico to the Upper Big Branch Mine disaster that claimed the lives of 29 men; from the decaying natural gas pipeline networks running beneath our homes to the growing risk of imported food tainted with salmonella, botulism, or other contaminants showing up on grocery store shelves. And, of course, inadequate regulation of the financial services industry triggered the current economic recession and left millions unemployed, financially ruined, or both.

The proliferation of analytical and procedural requirements in the rulemaking process is a significant cause of this dysfunction.[2] Regulatory agencies must negotiate these analytical hurdles, even as their statutory responsibilities expand and their budgets remain constant or shrink. As agencies grow more "hollowed-out"—stretched thin by the demands of doing more with less—their pursuit of new safeguards becomes subject to increasing delays, while many critical tasks are never addressed at all.[3] Careful analysis is important, but the regulatory process has already become so ossified by needless procedures and analyses that rulemakings commonly require between four and eight years to complete.[4] Many of these analyses and procedures also provide powerful avenues for political interference in individual rulemakings, as the Office of Information and Regulatory Affairs' (OIRA) centralized regulatory review process clearly illustrates.[5] A recent CPR study found that OIRA frequently uses this review process to delay or weaken rules following closed-door meetings with corporate lobbyists.[6]

The Office of Advocacy Pushes the Regulatory Process Toward Less Effective Regulation

Since its creation, the Office of Advocacy's role in the rulemaking process has continually expanded, providing it with numerous opportunities to intervene in and potentially undermine individual rulemakings. Congress created the Office to represent small business in the regulatory system and to advocate for reduced regulation of small business. From this limited mandate to advocate on behalf of small businesses, the Office has morphed into an institutionalized opponent of regulation, slowing the regulatory process and diluting the protection of people and the environment against unreasonable risks. Yet, there is insufficient public recognition of how the Office participates in the rulemaking process and why its participation ends up making it more difficult for agencies to reduce safety, health and environmental risks. In addition, the Office engages in activities that bolster political attacks on regulation, such as publishing estimates of regulatory costs that are wildly inaccurate, and that fly in the face of estimates from other agencies of government with considerably greater expertise in the area. Such activities are frequently undertaken in conjunction with interest groups and trade associations that represent large business, not small ones. At times it is difficult to find any difference between the positions taken by the Office and those taken by such prominent regulatory opponents as the U.S. Chamber of Commerce.

The Office of Advocacy has morphed into an institutionalized opponent of regulation, slowing the regulatory process and diluting the protection of people and the environment against unreasonable risks.

Significantly, when the Office interferes in agency efforts to do the people's business—that is, implement and enforce duly enacted legislation—it does so free of virtually any public accountability mechanisms. The Office is housed within, but institutionally insulated from the Small Businesses Administration (SBA), a federal agency that supports America's small business sector through subsidized loans, preferential government contracting, and other assistance programs. As such, no chain of command connects the Office to either the head of the SBA or the President.[7] At the same time, Congress has shirked its responsibility to provide meaningful oversight of the Office's activities. While Office of Advocacy officials have testified at dozens of hearings in the last 16 years, only four of those hearings could be described as oversight hearings for the Office.[8] (In reality, two of those four hearings focused on supposed weaknesses in the Office's legal authorities and proposals for strengthening those authorities, rather than critically evaluating its performance.) By comparison, Congress has held dozens of oversight hearings for the EPA in the last year alone. Because of the lack of active oversight, Congress has no way to keep track of the Office's participation in the regulatory process or to ensure that it is not abusing its authority to intervene in rules to benefit politically powerful corporate interests at the expensive of public health and safety.

A Flawed Mission: Needlessly Sacrificing Public Health and Safety

Preferential regulatory treatment for small business can include regulatory exemptions; less stringent or delayed regulatory requirements; and relaxed enforcement for regulatory violations, such as waived or reduced penalties. As with other subsidies that small businesses receive—such as subsidized loans, tax breaks, and preferential government procurement and contracting policies[9]—preferential regulatory treatment makes it easier for people to start and sustain small businesses. But it also enables these businesses to avoid taking responsibility for pollution, workplace risks, or any other socially harmful byproducts of their activities. In other words, preferential regulatory treatment involves an explicit policy choice to shift the costs of these social harms from small businesses to the general public.

Governments typically subsidize an activity because they want more of the benefits that the activity produces. Accordingly, policymakers typically justify small business subsidies on the grounds that these businesses generate greater job growth and innovation as compared to non-small businesses. As numerous studies have demonstrated, however, small businesses actually create very few jobs on net, and the evidence is at best mixed as to whether these firms create more innovation (however that concept is defined and measured).[10]

Whatever jobs or other economic benefits small businesses do create come at a certain societal price. As Professor Richard Pierce of The George Washington University Law School has pointed out, preferential regulatory treatment for small businesses can be "socially destructive," because such firms produce greater amounts of many social harms as compared to their larger counterparts—including dangerous workplaces, instances of racial discrimination, and air and water pollution.[11] For example, one study found that the risk of a fatal work-related accident is 500 times greater for employees of small businesses than for employees of large businesses. In addition, small businesses are less likely than their larger counterparts to reduce their social harms in the absence of enforcement-backed regulation.[12] Since the cost of reducing social harms is often disproportionately greater for small businesses, they have a stronger economic incentive to avoid pursuing reductions as much as possible. Further, both reputational concerns and fear of lawsuits are less likely to motivate small businesses to reduce their social harms. Because many small businesses work in relatively anonymity, they tend not to suffer significant reputational costs when they are caught polluting or operating a dangerous workplace. Typically lacking "deep pockets," small businesses also tend not to be attractive defendants, even when their socially harmful activities have clearly injured others.

Preferential regulatory treatment doesn't just let small businesses off the hook for the social harms they create; it can also enable larger businesses to avoid taking responsibility for their social harms as well.[13] When small firms are exempted from regulation, larger businesses have a strong incentive to try to game the system by outsourcing their more socially harmful activities to them.

There is a fundamental flaw in the Office of Advocacy's core mission: its work to weaken regulatory requirements for small businesses comes at too high a cost in terms of increased risks to public health, safety, and the environment.

These concerns expose the fundamental flaw in the Office's core mission: Its work to weaken regulatory requirements for small businesses comes at too high a cost in terms of increased risks to public health, safety, and the environment. Preferential regulatory treatment is the worst kind of subsidy to provide for small businesses, since, as compared to larger firms, they often produce disproportionately greater amounts of the kind of social harms that regulations are meant to alleviate. To the extent that the Office succeeds at securing preferential regulatory treatment for small businesses, it is affirmatively promoting the uniquely disproportionate amount of social harms they create.

The Office of Advocacy Creates Roadblocks to Effective Regulation

Passed by Congress in 1976, Pub. L. 94-305[14] created the Office of Advocacy and charged it with representing small businesses before federal agencies. With the passage of the Regulatory Flexibility Act[15] (Reg-Flex) in 1980, Congress made preferential regulatory treatment of small businesses an explicit goal of the rulemaking process and empowered the Office to push agencies to pursue this goal. The enactment of the Small Business Regulatory Enforcement Fairness Act (SBREFA) in 1996 and the issuance of Executive Order 13272 by George W. Bush in 2002 has further strengthened the Office's role as an opponent of effective regulation.

Using its authority under Pub. L. 94-305, Reg-Flex, and Executive Order 13272, the Office has employed compliance guidance, regulatory comments, and congressional communications to push agencies to delay, weaken, or abandon crucial rulemakings.

The Regulatory Flexibility Act's Analytical Requirements

Reg-Flex requires agencies to perform several resource-intensive and time-consuming analyses of their rules to assess their potential impacts on small businesses. These analyses, layered as they are on top of the existing morass of regulatory-impact analyses, create an additional battery of procedural obstacles, further contributing to the ossification problem that already prevents agencies from developing effective new safeguards in a timely fashion.

Reg-Flex's analytical requirements apply only if, prior to proposing the rule, the agency finds that it would have a "significant economic impact" on a large number of small businesses, a concept that the Act fails to define. Otherwise, the agency can "certify" that the rule will not have such an impact, exempting it from the statute's remaining requirements. For rules found to have a significant impact, the agency must prepare two different "regulatory flexibility" analyses, an "initial" analysis for the proposed version of the rule and a "final" one for the final version.

The two regulatory flexibility analyses provide an inherently distorted picture of the regulations being assessed—one that is heavily biased against protective safeguards. Agencies must focus exclusively on the rule's potential costs on small businesses; the rule's benefits—the reason the agency is developing the rule at all—are ignored. In addition, the agency must evaluate possible alternatives that would "minimize" the rule's costs for small businesses. Among the alternatives that agencies must consider are rules that exempt small businesses, impose weaker standards, or phase in regulatory requirements over a longer timeline. Again, benefits are ignored: Such analysis automatically disregards any alternatives that would provide greater protections at equal or only slighter greater cost to small busineses.

Within 10 years of their completion, significant impact rules must go through still a third analysis—the Reg-Flex periodic look-back requirement. Reg-Flex requires that agencies review these rules to determine whether they should be eliminated or amended to "minimize" costs on small business. Again, this one-sided, anti-regulatory analytical framework ignores regulatory benefits and does not allow agencies to consider expanding rules that have proved to be successful.

Reg-Flex's Look-Back Requirement: The Real Record

A recent CPR study reviewed the Reg-Flex look-backs for nearly 40 Environmental Protection Agency and Occupational Safety and Health Administration regulations and found that nearly every one had concluded that the regulations were still necessary and did not adversely impact small businesses.

Source: Sidney Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation* 10 (Ctr. for Progressive Reform, White Paper 1109, 2011), *available at* http://www.progressivereform.org/articles/RegBenefits_1109.pdf.

In 1996, Congress amended Reg-Flex to make agency compliance with several of its provisions—including certification that a rule will not have a significant impact on small businesses—judicially reviewable. This amendment makes all agency analyses part of the record for judicial review, and it authorizes reviewing courts to reject a rule on the sole basis that the agency had failed to adequately comply with one of the Act's procedural requirements.

Guidance on Complying with the Regulatory Flexibility Act

Responding to Executive Order 13272's requirement that the Office of Advocacy "train" agencies on how to comply with Reg-Flex, the Office has issued a guidance document in which it spells out in great detail its excessively strict interpretation of Reg-Flex's requirements. (The Office most recently updated and expanded the document in May of 2012.) For example, in the guidance, the Office seeks to strongly discourage agencies from certifying their rules (*i.e.,* formally concluding that the rules will not have a significant impact on small businesses, thereby exempting them from Reg-Flex's procedural requirements) by demanding that they build a virtually bulletproof record to support the certification, including providing specific data on how many businesses the rule would affect and what economic effect the rule would have on those businesses.[16] In so doing, the Office sought to expand the range of rules subject to its influence (*i.e.,* by increasing the number of rules subject to Reg-Flex procedural requirements that the Office oversees). Moreover, generating such data about a rule's potential impacts so early in a rulemaking is nearly impossible even under the best circumstances. Nevertheless, whenever agencies are unable to satisfy the Office's strict certification record requirement, the guide advises agencies to conduct an initial regulatory flexibility analysis or even conduct a full-blown advanced notice of proposed rulemaking, procedures that add months to the process and waste scarce agency resources.

Remarkably, in the guidance, the Office also directs agencies to consider in their initial regulatory flexibility analysis regulatory alternatives that are not even within an agency's legal authority to adopt. So, for example, the Office would encourage an agency to develop a rule that requires small businesses to test a piece of safety equipment only once a year, even though the underlying statute mandates that such equipment be tested at least twice a year. The guidance imposes this requirement even though Reg-Flex does not authorize it. Instead, the Act stipulates that any alternatives that agencies consider to minimize costs for small businesses must still meet applicable "statutory objectives."[17] In clear contradiction of Reg-Flex's plain language, the Office asserts in the guidance "that the IRFA [initial regulatory flexibility analysis] is designed to explore less burdensome alternatives and not simply those alternatives it is legally permitted to implement."[18]

Regulatory Comments

Pursuant to its authority under Pub. L. 94-305 to represent small businesses before federal agencies, the Office of Advocacy frequently comments on agencies' proposed rules in order to criticize agencies for not following its excessively strict interpretation of Reg-Flex's procedural requirements.[19] In its recent comments, the Office typically invokes the strict interpretation of these provisions that it has outlined in its Reg-Flex compliance guidance document.

Invariably, the faults that the Office of Advocacy asserts are aimed either at increasing the procedural burdens of Reg-Flex's requirements—and thus adding more delay to a rulemaking—or at weakening agency rules outright. The Office might claim that an agency has improperly certified that its rule will not have a large impact on small business (and thus is not subject to Reg-Flex's requirements). Or it might claim that the agency has not properly carried out required Reg-Flex analyses, perhaps alleging that an agency hasn't included enough detail or factual evidence, or that the agency has underestimated a rule's costs or has failed to considered adequate weaker alternatives. For example, in its recent comments on the U.S. Fish and Wildlife Services' (FWS) proposed rule that revises the agency's critical habitat designation for the Northern Spotted Owl, the Office argued that the FWS's evidentiary record in support of certification lacked the necessary specific data and detail called for in its compliance guidance document.[20] With such comments, the Office seeks to use procedural hurdles of its own creation as a way to hamstring federal regulators working to fulfill their statutory obligations to regulate within their areas of expertise.

With its regulatory comments, the Office of Advocacy seeks to use procedural hurdles of its own creation as a way to hamstring federal regulators working to fulfill their statutory obligations to regulate within their areas of expertise.

Through Executive Order 13272, the President has given the Office's comments special weight, making it difficult for an agency to dismiss the comments, even when they lack merit. The Order directs agencies to "[g]ive every appropriate consideration" to these comments. The Order further requires that agencies specifically respond to any of the Office's written comments in the preamble to the final rule.

Many reviewing courts take the Office's comments as powerful evidence that an agency has failed to comply with Reg-Flex, though these courts are otherwise not obliged to defer to the Office's interpretations of Reg-Flex's provisions.[21] For example, a federal district court rejected a National Marine Fisheries Service (NMFS) rule setting commercial fishing quotas for Atlantic shark species after finding that the agency had failed to comply with various Reg-Flex procedures.[22] (As noted above, agency compliance with Reg-Flex's provisions is judicially reviewable, and courts have the authority to reject rules if they determine that an agency has failed to adequately comply with one or more of these provisions.) The court's analysis in support of this finding relied heavily on the comments that the Office submitted during the rulemaking process.[23]

Reports to Congress and Congressional Testimony

Reg-Flex and Executive Order 13272 direct the Office of Advocacy to monitor and report to Congress annually on agency compliance with Reg-Flex's requirements. In these reports, the Office provides detailed critiques of each agency's purported failures to implement Reg-Flex in accordance with the Office's strict interpretation of the Act's provisions. For example, in its most recent report, the Office of Advocacy faulted the initial regulatory flexibility analysis that the Food and Drug Administration (FDA) performed for its proposed rules requiring dietary information laheling for chain restaurant menus and vending machines, arguing that the agency's analysis underestimated both the numher of small businesses the rules would impact and the regulatory costs the rules would impose on those businesses.[24] The FDA developed these rules to implement two provisions in the Patient Protection and Affordable Care Act (PPACA)—the 2010 health care system reform law. One objective of the PPACA was to reduce overall health care costs in the United Stares, and these provisions were aimed at helping Americans to adopr healthier diets, which in turn would enable them to avoid potentially expensive medical problems in the future.

For agencies eager to avoid attracting unwanted attention from congressional members ideologically opposed to their statutory mission, the threat of negative reports from the Office can have a strong coercive on their activities. Many agencies take self-defeating preemptive actions, such as preparing overly elaborate or unrequired analyses or drafting inappropriately weak rules—actions that waste scarce agency resources and dilure public health and safety protections. The Office's negative report regarding the FDA's implementation of these two controversial provisions in the PPACA undoubtedly has supplied welcome ammunition to congressional Republicans who continue to wage a full-scale assault on the law.[25] The fear of attracting this kind of bad publicity likely pushes the FDA and others agencies engaged in implemenring the health care reform law to be overly cautious with their Reg-Flex compliance, even when detrimental to the public interest.

In addition to the annual reports, Office of Advocacy officials also testify at congressional hearings to complain about what they claim are failures by agencies to properly fulfill Reg-Flex requirements. For example, in April of 2011, the Deputy Chief Counsel for the Office of Advocacy testified at a House Oversight Committee hearing dedicated to attacking the Environmental Protection Agency's (EPA) greenhouse gas regulations. In her testimony, the Deputy Chief Counsel argued that the EPA had failed to comply witb several requirements, including criticizing the factual basis the agency supplied to justify certifying its first vehicle efficiency standard as not having a significant impact on small businesses.[26] As with the annual reports, tbe threat of negative publicity from Office of Advocacy testimony can pusb agencies to overcompensate in their Reg-Flex compliance efforts.

Small Business Regulatory Enforcement Fairness Act Panels

The 1996 Small Business Regulatory Enforcement Fairness Act (SBREFA) amended Reg-Flex to require the EPA and the Occupational Safety and Health Administration (OSHA) to give specially assembled small business panels a chance to oppose proposed rules before the rest of the public even has a chance to see them. Following the passage of the Dodd-Frank Wall Street reform bill, congressional Republicans quickly enacted a bill that subjected the Consumer Financial Protection Bureau (CFPB), an agency created by the Dodd-Frank statute to help implement many of its reform provisions, to the SBREFA panel requirement as well.

The three agencies must undertake the SBREFA panel process for all planned rules that are predicted to have a significant impact on small businesses—the same trigger for the various other Reg-Flex analytical requirements. However, as with the Reg-Flex requirements, an agency need not undertake the SBREFA panel process if it formally certifies that its planned rule will not have a significant impact on small businesses. As noted above, an agency's decision to certify is subject to judicial review. Given that the Office has set such a high bar for justifying certification, the threat of judicial review can strongly discourage agencies from certifying a rule, even when this step would he appropriate.

In some cases, the Office has pressured agencies into undertaking the functional equivalent of a SBREFA panel, even though their planned rule plainly would not have a significant impact on small businesses. For instance, OSHA huckled under Office of Advocacy pressure and conducted a pseudo-SBREFA panel process for its then-planned "300 log MSD column" rule, which would have added a column to the required injury and illness recording form so that employers can keep track of their workers' employment-related musculoskeletal injuries.[27] OSHA went through this process even though the rule's projected costs would amount to a mere $4.00 per employer in its first year and $0.67 every year thereafter.[28]

Much like the Office of Information and Regulatory Affairs' (OIRA) centralized review process, the SBREFA panel process focuses on weakening rules because the panels are dominated hy interests opposed to strong regulatory requirements. Beside the rulemaking agency representatives, each SBREFA panel must include the Chief Counsel of the Office of Advocacy (*i.e.*, the individual who heads the Office), OIRA officials, and small business "representatives." The Office works with these other outside participants to criticize an agency's rule with the goal of weakening it. At the end of the process, the panel prepares a report compiling all of the criticisms of the draft rule, which is then included in tbe official rulemaking record.

Reg-Flex requires that a rulemaking agency respond to the criticisms included in the panel's report, and a failure to do so can provide a reviewing court with a basis to reject the underlying rule. This process contributes to the ossification of the rulemaking process, mentioned earlier, and it can create a potent incentive for an agency to weaken the rule rather than mount a time-consuming defense of a stronger rule, which would require producing an elaborate analysis to respond to all the criticisms raised in the SBREFA panel report.

SBREFA panel-related delays can add up to a year to the rulemaking process if not longer. These delays come on top of the several months of delay that the other Reg-Flex requirements introduce into the rulemaking process. By law, the formal panel period is supposed to last around two months. But, eager to avoid extensive criticism during the SBREFA panel process, agencies frequently spend months revising their planned rules and any underlying economic analyses prior to convening the formal panel. For example, preparations for the SBREFA panel process appear to have delayed OSHA's work on the Injury and Illness Prevention Program (I2P2) rule by more than a year. In June of 2011, the agency had planned to convene a SBREFA panel for its rule by the end of the month. Eventually, OSHA pushed this date back to January of 2012 and then March of 2012.[29] According to Office of Advocacy records, OSHA still has not convened this panel,[30] bringing the total delay to 16 months and counting.

Centralized Regulatory Review at the Office of Information and Regulatory Affairs

Executive Order 13272 directs the Office of Advocacy to work closely with OIRA—another institution that serves to weaken regulation, as previous CPR reports have discussed—when intervening in agency rules. The Office frequently takes advantage of the Order's authorization to meet with OIRA to raise concerns about proposed agency rules. In fact, a 2012 report from CPR on OIRA meetings with outside advocates found that the Office participated in 122 of the 1,080 reported meetings (or more than 11 percent) that OIRA held over the 10-year period covered in the CPR study.[31] The Office was by far the most frequent non-White House participant in OIRA meetings and attended more than three times the number of meetings attended by the most active industry participant, the American Chemistry Council (39 meetings).[32]

This Executive Order builds off of a March 2002 Memorandum of Understanding, which establishes a formal partnership between the Office and OIRA to strictly enforce Reg-Flex's procedural requirements to "achieve a reduction" in regulatory burdens for small businesses.[33] The Memorandum directs the Office to seek OIRA's assistance in pushing agencies to take corrective action—including more detailed analyses, evaluating additional less costly alternatives, or even adopting a less costly alternative—when the Office determines that they have failed to satisfy its strict interpretation of Reg-Flex's requirements. Given that OIRA has the power to reject the rules it reviews, agencies are unlikely to ignore its demands for Reg-Flex-related corrective actions. As such, OIRA provides powerful reinforcement in the

unlikely event that the Office is unable to extract these corrective actions on its own. The Memorandum also deputizes OIRA to aid in monitoring agency compliance with Reg-Flex requirements as part of its normal regulatory review activities. Whenever OIRA determines that an agency has likely failed to satisfy the Office of Advocacy's strict interpretation of any Reg-Flex requirements, it must then work with the Office to push the offending agency to take corrective action.

Participation In Lawsuits Challenging Rules

Reg-Flex authorizes the Office of Advocacy to join in lawsuits brought by industry to challenge agency rules, enabling it to push the reviewing court to reject rules for failing to satisfy applicable Reg-Flex procedural requirements.[34] These lawsuits create the highly unusual scenario in which one office within the Executive Branch is actively engaged in a legally binding effort to undermine an action taken by another office within the Executive Branch.

The Office of Advocacy has already participated in several lawsuits in which the reviewing court returned the rule to the agency to bring the underlying analyses into compliance with one or more of Reg-Flex's provisions.[35] In response to these adverse rulings, agencies must undertake new and more detailed analyses, delaying the implementation of their rules and using up scarce agency resources.

The Office of Advocacy Bolsters Political Attacks on Regulations

In addition to the previous rulemaking-related activities, the Office of Advocacy has taken actions to buttress the attacks that industry and its allies in Congress have waged against the U.S. regulatory system as a whole.

Sponsoring Anti-Regulatory Research

Over the years, the Office of Advocacy has doled out taxpayer money to sponsor several research projects brazenly designed to advance the cause of further weakening the U.S. regulatory system. Non-governmental researchers carry out these projects under contracts awarded by the Office with little in the way of oversight or peer review.

The most egregious Office of Advocacy-sponsored research project was the 2010 study by economists Nicole Crain and Mark Crain, which purported to find that the annual cost of federal regulations in 2008 was about $1.75 trillion.[36] As a CPR white paper first found,[37] and a separate evaluation by the non-partisan Congressional Research Service later confirmed,[38] Crain and Crain were only able to achieve this outlandish cost figure by employing faulty models, biased assumptions, and erroneous data. The report's myriad methodological defects all have a distinctly anti-regulatory bias, each leading inevitably to overstated cost calculations. Beyond these methodological defects, the Crain and Crain

report is noteworthy for what it omits: any attempt to account for regulatory benefits. The report's exclusive focus on regulatory costs—absurdly high cost estimates, in fact—while ignoring benefits provides an inherently distorted picture of the regulatory system that is skewed against all safeguards, no matter how critical they are for protecting public health and safety

The Crain and Crain report's biased frame and visibly overstated findings are tailor made to support the false conservative narrative that eliminating regulatory safeguards will translate into economic growth and job creation.

The Office's flawed management of the Crain and Crain report contract was equally disturbing. The contract failed to require the report's authors to disclose all of the report's underlying data, models, assumptions, and calculations, making it impossible to independently verify the integrity of the report's findings. In addition, the Office of Advocacy's peer review process for the report was woefully inadequate: One reviewer raised significant concerns with the report's underlying methodology which were never addressed while the other's review consisted of only the following 11-word comment: "I looked it over and it's terrific, nothing to add. Congrats[.]"[39]

Despite the Crain and Crain report's dubious provenance, regulatory opponents routinely cite its findings when attacking the U.S. regulatory system or pushing for legislation that would undermine agencies' ability to carry out their mission of protecting public health and safety. The report's biased frame and visibly overstated findings are tailor-made to support the false conservative narrative that eliminating regulatory safeguards will translate into economic growth and job creation. For example, the House Committee on Oversight and Government Reform, which has held dozens of anti-regulatory hearings since the committee returned to Republican control, cited the Crain and Crain report and its findings extensively in a February 2011 study, which attempts to make the specious argument that pending regulations are stifling job creation.[40] Similarly, Sen. Rand Paul (R-KY) invoked the Crain and Crain report when arguing for the Regulations from the Executive in Need of Scrutiny Act, a bill he sponsored that would effectively shut the regulatory system down by blocking all major regulations unless a majority in both Houses of Congress voted within 90 days to approve them.[41]

Participating in Anti-Regulatory Congressional Hearings

Office of Advocacy officials have long served as loyal allies in Congress's anti-regulatory hearings, consistently delivering testimony that reinforces the political case for weakening regulations and further hobbling the regulatory system. As noted, these officials frequently testify to criticize agency compliance with Reg-Flex procedural requirements, but the same testimony is also broadly critical of the regulatory system as a whole, echoing the talking points typically found in the testimony of industry representatives or in the opening statements of anti-regulatory Members of Congress. For example, the head of the Office of Advocacy during the George W. Bush Administration testified at a 2005 House Committee on Government Reform hearing focused on attacking various EPA regulations. His testimony helped advance the transparently political agenda of the hearing by strongly

criticizing EPA regulations as unduly burdensome—while conspicuously ignoring their benefits—and by advocating for rolling them back.[42]

Office of Advocacy officials have also testified at hearings to support passage of several pending anti-regulatory bills. In his testimony at a 2006 hearing, for example, the then head of the Office of Advocacy asserted that the Office "supports the goals of" a proposed bill that would amend Reg-Flex's procedural and analytical requirements to make them more burdensome for agencies to complete.[43]

The Office of Advocacy Engages in Anti-Regulatory Activities Unrelated to Helping Small Businesses

The focal point of the Office of Advocacy's institutional mission has evolved from seeking preferential regulatory treatment for small businesses to opposing all regulations. Aided and abetted by industry groups and their political allies, the Office pursues this mission by working to block regulations opposed by large corporate interests and attempting to interfere in the scientific underpinning of agency regulations.

The Office of Advocacy's Small Business Size Standards Are Overly Broad

For the purposes of implementing Reg-Flex, the Office of Advocacy employs a definition of "small business" that is a far cry from the common understanding of that term's meaning. Instead of being based on a single number (for example, any firm with 20 or fewer employees), the definition is actually a complex scheme that sets varying size standards for each industrial sector within the economy.[44] Critically, these standards are based on the relative size of different firms within each given industry, and, as a result, the "small businesses" in industries that comprise mostly large-sized firms can be huge. In some sectors, the definition of small business includes firms that employ more than 1,000 workers. For example, the Office considers a petroleum refinery to be a "small business" as long as it employs fewer than 1,500 workers. Similarly, chemical plants that employ fewer than 1,000 workers are a "small business" in the Office's eyes.

Because of these overly broad small business size standards, the Office is able to push for preferential regulatory treatment for relatively large firms, firms far bigger than the term "small business" suggests. For example, in August of 2011, the Office submitted comments on the EPA's proposed rule to reduce hazardous air pollution for fossil fuel-based power plants criticizing the agency's efforts to comply with several Reg-Flex procedural requirements, including the SBREFA panel process. Among other things, the Office argued that the EPA had not adequately considered potentially less burdensome regulatory alternatives for "small business" power plants in its initial regulatory flexibility analysis.[45]

Trade Association Lobbyists Subvert the Office of Advocacy's Small Business Outreach Efforts

In addition, large corporate interests have supplied representatives for SBREFA panels. For example, a lobbyist from the American Farm Bureau—a politically powerful trade group that typically works to advance the interests of industrial-scale farms—recently served as a "small business" representative on the SBREFA panel for the EPA's 2010 update to its renewable fuel standard program.[46] By permitting organizations such as the American Farm Bureau to participate in SBREFA panels, the Office of Advocacy has stretched the concept of small business representative beyond all recognition. The American Farm Bureau's membership includes several industrial-scale agriculture operations that would not meet even the Office's generous definition of small business. And, the interests of these industrial-scale operations often dictate the organization's political agenda, even when those interests are antithetical to those of genuinely small farms.[47] For example, the catastrophic droughts that affected much of the United States this past summer provided a glimpse of the harsh impacts that climate change will have on America's small farmers. Nevertheless, the American Farm Bureau worked tirelessly to help defeat the 2009 climate change bill that would have curbed greenhouse gas emissions through a comprehensive cap-and-trade system.[48]

In some cases, the small business representatives who participate in SBREFA panels come at the suggestion of lobbyists for large trade associations, such as the National Association of Home Builders, whose members include large corporations that do not meet the Office's small business size standards.[49] This practice raises the concern that lobbyists operating to advance the interests of large corporations improperly use small businesses representatives as surrogates to attack rules they oppose, enabling these corporate interests to avoid incurring any potential political costs for opposing safeguards that are otherwise popular with the general public.

The participation of large corporate interests defeats the objective of SBREFA panels—namely, to gather the perspective of small business on pending regulations that would otherwise not be available in the absence of these panels. These panels offer small businesses a critical opportunity to offer their unique concerns regarding a planned rule—an opportunity that is all the more important because large corporate interests have come to dominate every other step in the rulemaking process, including notice-and-comment and OIRA's centralized review.[50] By permitting lobbyists for trade associations and other large corporate groups take part in SBREFA panels, the Office risks allowing the voice of truly small businesses to be drowned out at this stage of the rulemaking process as well.

The Office of Advocacy Interferes with Agency Scientific Determinations

The Office of Advocacy frequently operates outside its legal authority and scientific expertise by weighing in on agencies' purely scientific determinations. For example, in October of 2011, the Office submitted regulatory comments criticizing the EPA's Integrated Risk Information System (IRIS) program.[51] A frequent target of industry attacks, IRIS is a centralized database that gathers human health risk assessments for various environmental contaminants, which the EPA can use to set regulatory standards.[52] Specifically, the Office criticized the data and models that the EPA had used in its IRIS risk assessment for the harmful chemical hexavalent chromium, and it urged the agency to revise its assessment, a process that would waste scarce resources and delay the final assessment by several months. The Office also recommended that the EPA reform the entire IRIS program, arguing that it lacked "objectivity" and adequate "scientific rigor."[53] Such recommendations are far beyond the expertise of the Office and have unique interests of small business. They do, however, bear a striking resemblance to the arguments that industry lobbyists make about IRIS assessments.

The Office intervenes in these kinds of scientific determinations despite the fact that they do not independently impose any regulatory requirements, and thus have no real impact on small businesses. In June of 2009, the Office intervened in the EPA's proposed greenhouse gas endangerment finding, which did nothing more than certify the federal government's official finding that greenhouse gases "endanger public health and welfare" by contributing to global climate change. Nevertheless, the Office argued in its comments that the EPA should abandon the effort completely.[54] The comments added nothing constructive to the EPA's endangerment finding efforts, failing to address any of the scientific questions at issue. Instead, the Office devoted its comments to arguing that the Clean Air Act's regulatory programs were not well suited to regulating greenhouse gases and might disproportionately harm small businesses—all hypothetical and unrelated matters that would be better addressed in comments on any actual Clean Air Act rules aimed at regulating greenhouse gases. Again, such arguments were not grounded in any expertise the Office might have, or in any unique small business interest, but they did comport with big-business criticisms of the EPA's finding.

The Office's decision to move into regulatory science is far removed from its statutory mission to argue for preferential regulatory treatment for small business. This interest in attacking regulatory science can only be understood as the Office assuming the role of arguing against more stringent regulation in all forums that may relate to regulatory protections, even ones where the agency has no expertise.

The Office of Advocacy Pushes for Weaker Regulatory Requirements for Large Businesses

The Office of Advocacy commonly seeks to weaken the requirements of proposed rules for all affected entities, rather than seeking rule changes that are tailored to reducing adverse impacts on small firms only. For example, in its comments on the EPA's proposed rule to limit hazardous air pollutants from oil- and coal-fueled power plants, the Office criticized the agency for not considering as a regulatory alternative a rule that would merely limit plants' mercury emissions. Remarkably, the Office recommended that this drastically scaled-back rule apply to all power plants, regardless of their size.[55] Such an alternative would provide no unique preferential regulatory treatment for "small" power plants. It would also leave unregulated all of the other toxic air pollutants that power plants release—including arsenic, lead, and formaldehyde—in clear violation of the Clean Air Act.[56] While this alternative would certainly reduce regulatory costs for small power plants, its primary effect would be to provide a huge regulatory subsidy to the large power plants that dominate the electricity generating industry. Here again, the Office offered commentary that could just have easily been written by big-business or special interest lobbyists, rather than focusing on an small-business interest in the proposed regulations.

The Office also frequently joins representatives of the largest corporations and trade groups in meetings with OIRA officials to push for rule changes that would benefit large businesses. For example, in July of 2010 an Office of Advocacy official attended a meeting with the U.S. Chamber of Commerce, the National Association of Manufacturers, and the National Association of Home Builders to try to push OIRA to block OSHA's 300 log MSD column rule.[57] In October of 2006 an Office of Advocacy official attended a meeting with ExxonMobil, the American Chemistry Council, and Bayer Corporation to push for changes to the EPA's pending rule to revise its definition of solid waste under the Resource Conservation and Recovery Act.[58]

In many cases, weaker regulatory requirements for large firms can actually have the perverse effect of harming small businesses—rather than helping them—and thus directly conflicts with the Office's mission. Regulatory subsidies for large firms can make it even more difficult for small businesses to remain competitive, inhibiting people's ability to start these firms and sustain them over the long run.

Helping Small Businesses While Promoting Public Health and Safety: It's Time to Reform the Office of Advocacy

A New Mission: Promoting Win-Win Regulatory Solutions

The role of the Office of Advocacy should be to develop "win-win" regulatory solutions that help small businesses meet the high regulatory standards needed to protect public health and safety, instead of lowering those standards for them. In other words, the Office should seek to protect small businesses "competitiveness" without undermining public health and safety. In many cases, the costs of complying with regulations can put small businesses at a competitive disadvantage with larger businesses, which are better equipped to pass many of these costs along to their consumers. Larger businesses are also able to afford attorneys, engineers, accountants, and other compliance consultants, who can help them devise cheaper ways to fulfill regulatory requirements.

Providing small businesses with preferential regulatory treatment helps them remain competitive with larger firms, but it comes at the expense of public health and safety. In effect, preferential regulatory treatment subsidizes small businesses by passing on to the public the socially harmful impacts of their activities, such as air and water pollution, hazardous working conditions, and unreasonably dangerous consumer products. In contrast, the Office's current approach of working to reduce regulatory burdens across the board for all firms reduces regulatory impacts on small businesses, but does nothing to promote small business competitiveness. This approach also likely undermines regulatory safeguards more severely than would an approach that merely focuses on providing preferential regulatory treatment to small businesses alone.

The role of the Office of Advocacy should be to develop "win-win" regulatory solutions that help small businesses meet the high regulatory standards needed to protect public health and safety, instead of lowering those standards for them.

Fortunately, if the public agrees that small businesses need to be subsidized, policymakers have an alternative strategy: They can promote small business competitiveness by affirmatively helping them to meet effective public health and safety standards. The Office should use its role in the regulatory process to explore and promote creative solutions for achieving this goal. Such creative solutions could include:

- **Providing monetary assistance to truly small businesses so that they can meet higher regulatory standards.** Monetary assistance could include direct subsidies to cover part or all of the costs of equipment upgrades required for regulatory compliance. Alternatively, the Office could work to obtain subsidized loans to help small businesses defray regulatory compliance costs.

- **Expanding regulatory compliance assistance programs.** SBREFA established several compliance assistance programs, including requiring agencies to produce "compliance guides" for each of their rules that have a significant impact on small businesses.[59] These compliance guides describe the rule and explain what actions small businesses need to take to comply. Congress can help improve the effectiveness of compliance guides by providing agencies with full funding to produce and distribute them. In addition, Congress can establish local offices throughout the country staffed with compliance consultants that can help small businesses understand their obligations under different regulations. To be effective, Congress must ensure that the network of compliance consultant offices is fully funded.

- **Partnering small businesses to promote beneficial synergies on regulatory compliance.** The Office could explore different ways of partnering small businesses that will help them meet regulatory obligations in mutually beneficial ways. For example, the Office could help establish a cooperative of small businesses within a given location, which could share the cost of compliance assistance services, such as those provided by accountants or engineering consultants. Alternatively, the Office could establish partnerships that build off the Small Business Administration's (SBA) preferential government procurement and contracting policies for helping small businesses. For example, if a small business requires special services, such as accounting, to comply with a regulation, then the Office could explore ways to partner that business with another small firm that provides those special services. In this way, the Office can assure that one small business's compliance with regulations help to create a profitable market for another small business.

To achieve these reforms, Congress will need to:

- Amend the primary statutory authorities under which the Office operates (P. Law. 94-305 and Reg-Flex) to replace their focus on reducing small businesses' regulatory costs with a new focus on promoting win-win regulatory solutions that ensure small business competitiveness without undermining public health and safety;
- Expand the Office's legal authority as necessary to enable it to explore and promote win-win regulatory alternatives that help small businesses meet high regulatory standards while maintaining competitiveness;
- Provide the SBA with additional legal authorities to establish and implement new win-win regulatory subsidy programs that affirmatively assist small businesses remain competitive while meeting high regulatory standards;
- Establish and fully fund a network of small business regulatory compliance assistance offices; and
- Increase agency budgets so that they are able to carry out Reg-Flex analyses and compliance assistance guides without displacing critical resources needed to advance their statutory mission of protecting public health, safety, and the environment.

In addition, the Office will need to:

- Significantly overhaul its Reg-Flex compliance guide for agencies, so that it helps them to work toward creative win-win regulatory solutions that enable small businesses to remain competitive while meeting high regulatory standards and
- Work with small businesses to develop and promote win-win regulatory solutions in comments on proposed regulations, SBREFA panels, lawsuits, and sponsored research. SBREFA panels in particular will be critical for gathering the unique views of small businesses for identifying how pending regulations might inhibit their ability to compete and for developing innovative solutions for helping these firms to meet high regulatory standards while remaining competitive.

Finally, the President should revoke Executive Order 13272. Given its strong anti-regulatory culture, OIRA is unlikely to provide the Office with much assistance in identifying ways to help small businesses meet regulatory standards needed to protect public health, safety, and the environment. Instead, OIRA will likely continue to push the Office to weaken agency rules, even where potential win-win regulatory solutions are appropriate and available.

Restored Focus: Helping Truly Small Businesses Only

The Office of Advocacy has become a potent anti-regulatory force, working to block, delay, and dilute all regulations, even those that do not have a clear impact on small businesses. Whatever the policy goals are that might justify shielding small businesses from fulfilling their regulatory obligations, they certainly do not extend to larger businesses. Accordingly, the Office should restrict its actions to helping truly small businesses only.

The Office of Advocacy should employ new small business size standards, applicable to all industrial sectors, that define a "small business" as only those firms with 20 or fewer employees.

To accomplish this goal, Congress will need to do the following:

- **Enact legislation that revises the SBA's small business size standards.** The new size standards should define a small business as any firm with 20 or fewer employees—regardless of which industry the firm is in—rather than basing the definition on the relative size of different firms within each given industry, as the current size standards do. This revision would not only better align the regulatory definition for small business with the popular understanding of that term, it would better effectuate the policy goals that the government seeks to achieve by providing truly small businesses with preferential regulatory treatment. In addition, the small size standards should exclude certain industrial categories that pose an inherently high risk to public health and safety, such as the dry cleaning industry. Businesses in these exempted industrial categories should not qualify for win-win regulatory subsidy programs, even if they have 20 or fewer employers, because their activities are too harmful to public health and safety.
- **Enact legislation that prohibits large corporate interests from participating in or using small business surrogates to participate in SBREFA panels.** To participate in SBREFA panels, a business must first qualify as a small business under the revised small business size standard. To make this mandate enforceable, the law should further require all businesses that participate in SBREFA panels to certify that they both meet the revised small business standard and are not acting as agents for any business or trade group that does not meet the revised small business standard. Congress should declare that making a false statement in this certification is a crime under 18 U.S.C. §1001. Furthermore, Congress should bar for at least three years any business that makes a false statement in the certification from participating in any future SBREFA panels and from qualifying for any win-win regulatory subsidy programs established and implemented either by the Office or by the SBA.
- **Conduct more frequent and thorough oversight.** The House and Senate committees with primary jurisdiction over the Office—presently, the House Small Business Committee and the Senate Small Business and Entrepreneurship Committee—should endeavor to conduct at least one oversight hearing for the Office every year. One of the goals of these oversight committee hearings should be to ensure that the Office is limiting its activities to helping only businesses that meet the revised small business size standard.

Again, the President can reinforce these reforms by revoking Executive Order 13272. Because OIRA has such a strong anti-regulatory culture, any continued collaboration with OIRA will likely encourage the Office to continue working to block, delay, and dilute regulations for businesses not meeting the revised small business size standard.

Endnotes

1 We borrow term the "preferential regulatory treatment" with slight modification from a 1998 law review article by administrative law professor Richard Pierce. *See* Richard J. Pierce Jr., *Small is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 Admin. L. Rev. 537 (1998). The term includes regulatory exemptions; less stringent or delayed regulatory requirements; and relaxed enforcement for regulatory violations, such as waived or reduced penalties. *See id.* at 542-43.

2 Public Citizen, The Federal Rulemaking Process, *available at* http://www.citizen.org/documents/Regulations-Flowchart.pdf.

3 Sidney Shapiro et al., *Regulatory Dysfunction: How Insufficient Resources, Outdated Laws, and Political Interference Cripple the "Protector Agencies"* 6-8 (Ctr. for Progressive Reform, White Paper 906, 2009), *available at* http://www.progressivereform.org/articles/RegDysfunction_906.pdf [hereinafter Shapiro et al, *Regulatory Dysfunction*].

4 *The "Regulatory Accountability Act of 2011": Hearing on H.R. 3010 Before the H. Comm. on the Judiciary*, 112th Cong. 6 (2011) (statement of Sidney A. Shapiro, University Distinguished Chair in Law, Wake Forest University School of Law, and Member Scholar and Vice President, Center for Progressive Reform), *available at* http://www.progressivereform.org/articles/Shapiro_RAA_Testimony_102511.pdf.

5 Shapiro et al, *Regulatory Dysfunction*, *supra* note 3, at 12-14.

6 Rena Steinzor et al., *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment* (Ctr. for Progressive Reform, White Paper 1111, 2011), *available at* http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf [hereinafter Steinzor et al, *Behind Closed Doors*]. Specifically, the study found that OIRA routinely meets corporate interests behind closed doors during the review process and then delays or changes rules that are subject of such meetings at a disproportionately higher rate.

7 To illustrate the Office's independence, the SBA's organizational chart presents the Office as a "floating box" without any lines denoting a chain of command to the rest of the agency. *See* U.S. Small Bus. Admin., Organization Chart, *available at* http://www.sba.gov/sites/default/files/SBA%20Organization%20Chart%2003-16-2012.pdf.

8 *See Office of Advocacy Fiscal Year 2012 Budget: Hearing Before the S. Comm. on Small Bus. & Entrepreneurship*, 112th Cong. (statement of Winslow Sargeant, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin.), *available at* http://www.sba.gov/sites/default/files/test11_0331.pdf; *The Small Business Office of Advocacy Improvements: Hearing Before the Subcomm. on Workforce, Empowerment, & Gov't Programs and the Subcomm. on Regulatory Reform & Oversight of the H. Comm. on Small Bus.*, 108th Cong. (statement of Thomas M. Sullivan, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin.), *available at* http://www.sba.gov/sites/default/files/files/test03_0401.pdf; *Strengthening the Office of Advocacy. Hearing Before the H. Comm. on Small Bus.*, 107th Cong. (statement of Thomas M. Sullivan, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin.), *available at* http://www.sba.gov/sites/default/files/files/test02_0320.pdf; *Improving the Office of Advocacy. Hearing Before the H. Comm. on Small Bus.*, 106th Cong. (statement of Jere W. Glover, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin.), *available at* http://www.sba.gov/sites/default/files/files/test00_0621.pdf.

9 *See* Pierce, *supra* note 1, at 540-42.

10 *Id.* at 549-57. *See also* Ruth Marcus, Op-Ed., *The Little Engine That Can't: The Myth About Small Businesses and Jobs*, Wash. Post, Sept. 15, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/09/14/AR2010091405459.html; Veronique de Rugy, *America's Small-Business Fetish: When It Comes to Job Creation, Size Doesn't Matter*, Reason, June 2012, *available at* http://reason.com/archives/2012/05/21/americas-small-business-fetish.

11 Pierce, *supra* note 1, at 557-60.

12 *Id.* at 562-68.

13 *Id.* at 570-74.

14 15 U.S.C. §§634a-634g .

15 Regulatory Flexibility Act, 5 U.S.C. §§601-612.

16 Off. of Advoc., U.S. Small Bus. Admin., A Guide for Agencies: How to Comply with the Regulatory Flexibility Act: Implementing the President's Small Business Agenda and Executive Order 13272, 11-14 (2012) *available at* http://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf [hereinafter Off. of Advoc., RFA Guide].

17 *See* 5 U.S.C. §603(c).

18 Off. of Advoc., RFA Guide, *supra* note 16, at 38.

19 In Fiscal Year 2011, the Office of Advocacy submitted over 50 comment letters. *See* Off. of Advoc., U.S. Small Bus. Admin., 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, 4 (2012), *available at* http://www.sba.gov/sites/default/files/11regflx_0.pdf [hereinafter Off. of Advoc. FY 2011 RFA Report].

[20] Comments on Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Northern Spotted Owl from Winslow Sargeant, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin., and Janis C. Reyes, Assistant Chief Counsel, Off. of Advoc., U.S. Small Bus. Admin., to Daniel Ashe, Director, U.S. Fish & Wildlife Serv., Dept. of Interior (July 5, 2012), *available at* http://www.sba.gov/sites/default/files/files/Advocacy_Spotted_Owl_Comment_Letter.pdf.

[21] Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1044 (D.C. Cir. 1997), *modified in other respect*, 195 F.3d 4 (D.C. Cir. 1999), *reversed in other respect*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

[22] Southern Offshore Fishing Ass'n v. Daley, 995 F. Supp. 1411, 1436 (M.D. Fla. 1998).

[23] *See id.* at 1435.

[24] Off. of Advoc. FY 2011 RFA Report, *supra* note19, at 23.

[25] For example, the nutrition information labeling rules were attacked at a recent hearing before the House Oversight and Government Reform Committee's Subcommittee on Health Care. *See, e.g.*, *Impact of Obamacare on Job Creators and Their Decision to Offer Health Insurance: Hearing Before the Subcomm. on Health Care, District of Columbia, Census, & the Nat'l Archives of the H. Comm. on Oversight & Gov't Reform*, 112th Cong. 6 (statement of Andrew Puzder, Chief Exec. Officer, CKE Restaurants, Inc.), *available at* http://oversight.house.gov/wp-content/uploads/2012/04/7-28-11-Subcommittee-on-Health-Care-District-of-Columbia-Census-and-the-National-Archives-Hearing-Transcript.pdf.

[26] *Assessing the Impact of EPA Greenhouse Gas Regulations on Small Business: Hearing Before the Subcomm. on Reg. Aff., Stimulus Oversight, & Gov't Spending of the H. Comm. on Oversight & Gov't Reform*, 112th Cong. 75-127 (statement of Claudia Rodgers, Deputy Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin.), *available at* http://oversight.house.gov/wp-content/uploads/2012/04/4-6-11-Subcommittee-on-Regulatory-Affairs-Stimulus-Oversight-and-Government-Spending-Hearing-Transcript.pdf.

[27] *See* Press Release, Occupational Safety & Health Admin. U.S. Dept. of Labor, U.S. Labor Department's OSHA Reopens Public Record on Proposed Record-Keeping Rule to Add Work-Related Musculoskeletal Disorders Column, *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=19824.

[28] Occupational Injury and Illness Recording and Reporting Requirements, 75 Fed. Reg. 4728, 4737-38 (proposed Jan. 29, 2010) (to be codified at 29 C.F.R. pt. 1904).

[29] Rena Steinzor & James Goodwin, *Opportunity Wasted: The Obama Administration's Failure to Adopt Needed Regulatory Safeguards in a Timely Way is Costing Lives and Money* (Ctr. for Progressive Reform, Issue Alert 1204, 2012), http://www.progressivereform.org/12RulesIssueBrief.cfm (last visited Dec. 10, 2012).

[30] *See* Off. of Advoc., U.S. Small Bus. Admin., *OSHA SBREFA Panels*, http://www.sba.gov/advocacy/825/5717 (last visited Dec. 10, 2012).

[31] Steinzor et al, *Behind Closed Doors*, *supra* note 6, at 26.

[32] *Id.* at 18.

[33] Memorandum of Understanding Between the Off. of Advoc., U.S. Small Bus. Admin., and the Off. of Info. & Reg. Aff., U.S. Off. of Mgmt. & Budget (Mar. 19, 2002), *available at* http://www.sba.gov/sites/default/files/MOU_OIRA.pdf.

[34] As noted above, agency compliance with many of these requirements is judicially reviewable, and violations of these requirements can result in the rejection of an otherwise lawful rule.

[35] *See, e.g.*, Southern Offshore Fishing Ass'n v. Daley, 995 F. Supp. 1411 (M.D. Fla. 1998); Northwest Mining Ass'n v. Babbit, 5 F. Supp. 2d 9 (D.D.C. 1998).

[36] Nicole V. Crain & W. Mark Crain, The Impact of Regulatory Costs on Small Firms (2010), *available at* http://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20(Full).pdf.

[37] Sidney Shapiro et al, *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs* (Ctr. for Progressive Reform, White Paper 1103, 2011) *available at* http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf [hereinafter Shapiro et al, *Crain and Crain Report*].

[38] Curtis W. Copeland, *Analysis of an Estimate of the Total Costs of Federal Regulations* 2 (Cong. Research Serv., R41763, Apr. 6, 2011), *available at* http://www.progressivereform.org/articles/CRS_Crain_and_Crain.pdf.

[39] Shapiro et al, *Crain and Crain Report*, *supra* note 37, at 3, 4.

[40] Comm. on Oversight & Gov't Reform, U.S. House of Representatives, Assessing Regulatory Impacts to Job Creation 14, 15 (Preliminary Staff Report, 2011), *available at* http://oversight.house.gov/wp-content/uploads/2012/01/Preliminary_Staff_Report_-_Regulatory_Impediments_to_Job_Creation.pdf#_.pdf.

[41] *Federal Regulation: A Review of Legislative Proposals, Part I: Hearing Before the S. Comm. on Homeland Security & Governmental Aff.*, 112th Cong. 1 (statement of Sen. Rand Paul), *available at* http://www.hsgac.senate.gov/hearings/federal-regulation-a-review-of-legislative-proposals-part-i (follow "Download Statement (84k)" hyperlink under "Senator Rand Paul R (KY)").

[42] *The Impact of Regulation on U.S. Manufacturing: Spotlight on the Environmental Protection Agency: Hearing Before the Subcomm. on Regulatory Aff. of the H. Comm. on Gov't Reform*, 109th Cong. 2-3 (statement of Thomas M. Sullivan, Chief Counsel for Advoc., Off. of Advoc., U.S. Small Bus. Admin.), *available at* http://www.sba.gov/sites/default/files/files/test05_0928.pdf.

[43] *Hearing on the Regulatory Flexibility Improvements Act - H.R. 682 Before the Subcomm. on Com, & Admin L. of H. Comm. on the Judiciary*, 109th Cong. 4 (statement of Thomas M. Sullivan, Chief Counsel for Advocacy., Off. of Advoc., U.S. Small Bus. Admin.), *available at* http://www.sba.gov/sites/default/files/files/rest06_0720.pdf.

[44] Section 601(3) of Reg-Flex defines a "small business" as having "the same meaning as the term 'small business concern' under section 3 of the Small Business Act.'" 5 U.S.C. §601(3). Pursuant to Section 3 of the Small Business Act, the Small Business Administration has developed size standards for defining small businesses according to different industrial sectors of the economy, which are catalogued at 13 C.F.R. §121.201.

[45] Comments on National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units from Winslow Sargeant, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin., and David Rostker, Assistant Chief Counsel for Environment and Regulatory Reform, Off. of Advoc., U.S. Small Bus. Admin., to Lisa Jackson, Administrator, U.S. Envtl. Protection Agency (Aug. 4, 2011), *available at* http://www.sba.gov/sites/default/files/files/epa11_0804.pdf.

[46] Final Report of the Small Business Advocacy Review Panel on EPA's Planned Proposed Rule Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program 8-9 (2008).

[47] *See, e.g.*, Ian T. Shearn, *Whose Side Is the American Farm Bureau On?*, The Nation, July 16, 2012, *available at* http://www.thenation.com/article/168913/whose-side-american-farm-bureau#.

[48] Allison Winter, *Farm Bureau Fires Back Against Climate Bill's "Power Grab,"* N.Y. Times, Jan. 11, 2010, *available at* http://www.nytimes.com/cwire/2010/01/11/11climatewire-farm-bureau-fires-back-against-climate-bills-93758.html?pagewanted=all; Donald Carr, *Drought-Stricken Farmers Pay the Price for Failed Climate Bill*, Huffington Post, Aug. 12, 2012, *available at* http://www.huffingtonpost.com/donald-carr/droughtstricken-farmers-p_b_1729235.html.

[49] *See* Final Report of the Small Business Advocacy Review Panel on EPA's Planned Proposed Rule: Lead-Based Paint; Certification and Training; Renovation and Remodeling Requirements 30 (2000).

[50] *See, e.g.*, Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 Admin. L. Rev. 99, 128-29 (2011) (reviewing public comments for EPA rules on hazardous air pollutants, and finding that industry groups submitted 81 percent of comments compared to just 4 percent submitted by public interest groups); Steinzor et al, *Behind Closed Doors*, *supra* note 6, at 20 (reviewing participation rates in OIRA lobbying meetings and finding that over 65 percent of meeting participants represented corporate interests compared to just 12 percent representing public interest groups).

[51] Comments on EPA's Integrated Risk Information System Program and the Toxicological Review of Hexavalent Chromium from Winslow Sargeant, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin., and Sarah Bresolin Silver, Assistant Chief Counsel, Off. of Advoc., U.S. Small Bus. Admin., to Paul Anastas, Assistant Administrator, Off. of Res. & Dev., U.S. Envtl. Protection Agency (Oct. 5, 2011), *available at* http://www.sba.gov/sites/default/files/files/epa11_1005.pdf.

[52] Rena Steinzor, *More Anti-EPA Shenanigans? Is IRIS Next on the Hit List? We'll Be Watching*, CPRBlog, Sept. 8, 2011, http://www.progressivereform.org/CPRBlog.cfm?idBlog=4A015085-B5C2-4FC8-05F55BABAECB52D0 (last visited Dec. 10, 2012).

[53] *Id.* at 3-4.

[54] Comments on EPA's Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases from Shawne C. McGibbon, Acting Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin., and Keith W. Holman, Assistant Chief Counsel for Environmental Policy, Off. of Advoc., U.S. Small Bus. Admin., to U.S. Envtl. Protection Agency 3-4 (June 23, 2009), *available at* http://www.sba.gov/sites/default/files/reg%20623.pdf.

[55] Comments on National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units from Winslow Sargeant, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin., and David Rostker, Assistant Chief Counsel for Environment and Regulatory Reform, Off. of Advoc., U.S. Small Bus. Admin., to Lisa Jackson, Administrator, U.S. Envtl. Protection Agency 13-14 (Aug. 4, 2011), *available at* http://www.sba.gov/sites/default/files/files/epa11_0804.pdf.

[56] John Walke, *Industry Urges Killing Mercury & Air Toxics Standards With False Arguments to Resurrect Mercury-Only Standards*, Switchboard, June 11, 2012, http://switchboard.nrdc.org/blogs/jwalke/as_we_approachsenator_inhofes.html (last visited Dec. 10, 2012).

[57] Off. of Info. & Reg. Aff., U.S. Off. of Mgmt & Budget, *Meeting Record Regarding: 300 Column (July 21, 2010)*, http://www.whitehouse.gov/omb/1218_meeting_07212010 (last visited Dec. 10, 2012).

[58] Off. of Info. & Reg. Aff., U.S. Off. of Mgmt & Budget, *Meeting Record Regarding: Definition of Solid Waste (Oct. 13, 2006)*, http://www.whitehouse.gov/omb/oira_2050_meetings_543/ (last visited Dec. 10, 2012).

[59] Small Business Regulatory Enforcement Fairness Act of 1996 §223, 5 U.S.C. §601 note.

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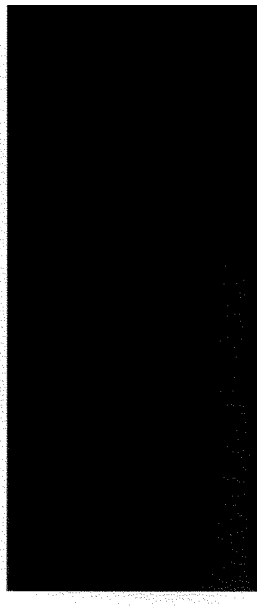

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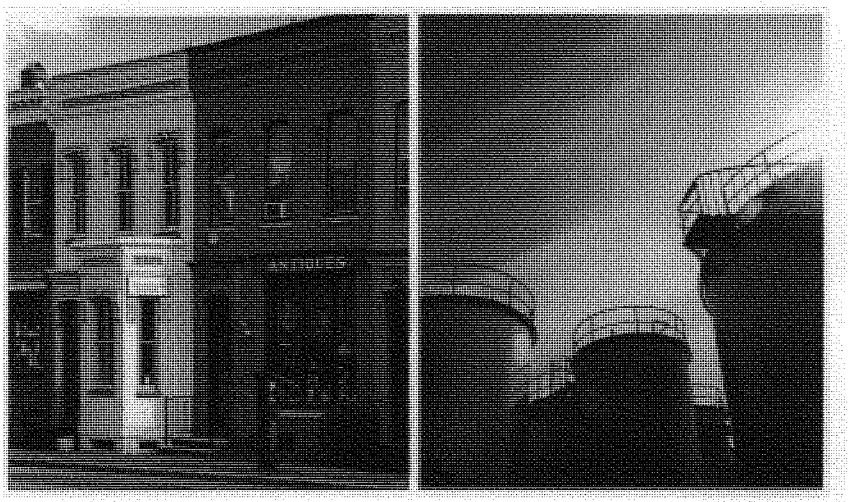
Whose Interests Does the Office of Advocacy at the Small Business Administration Serve?



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Center for
EFFECTIVE
GOVERNMENT
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Small Businesses, Public Health, and Scientific Integrity:

Whose Interests Does the Office of Advocacy at the Small Business Administration Serve?

Executive Summary

This report examines the activities of an independent office within the Small Business Administration: the Office of Advocacy. The Office of Advocacy has responsibility for ensuring that federal agencies evaluate the small business impacts of the rules they adopt. Scientific assessments are not "rules" and do not regulate small business, yet the Office of Advocacy decided to comment on technical, scientific assessments of the cancer risks of formaldehyde, styrene, and chromium. By its own admission, Advocacy lacks the scientific expertise to evaluate the merits of such assessments.

The report analyzes correspondence and materials received through a Freedom of Information Act request made by staff at the Center for Effective Government. Our inquiry was driven by two questions: Why did the Office of Advocacy get involved in the debate over scientific assessments that do not regulate small business? Whose interests does the Office of Advocacy of the Small Business Administration actually serve?

We found that the Office of Advocacy's comments on these assessments raised no issues of specific concern to small business and relied almost exclusively on talking points provided by trade associations dominated by big chemical companies. Between 2005 and 2012, the American Chemistry Council (ACC) and its members spent over $333 million lobbying Congress and federal agencies on, among other things, a protracted campaign to prevent government agencies from designating formaldehyde, styrene, and chromium as carcinogens. The Formaldehyde Council, Styrene Industry Research Council, and Chrome Coalition spent millions more. These groups asked the Office of Advocacy for assistance, and the Office became their willing partner.

We conclude that the Office of Advocacy's decision to comment on scientific assessments of the cancer risks of certain chemicals constitutes a significant and unwarranted expansion of its role and reach beyond its statutory responsibilities. We recommend that Congress ask the Government Accountability Office (GAO) to investigate the Office of Advocacy and exert more rigorous oversight of its activities to ensure its work does not undermine the efforts of other federal agencies to fulfill the goals Congress has assigned them.

Key Findings:

- The Office of Advocacy hosts regular Environmental Roundtables attended by trade association representatives and lobbyists. The discussions and minutes are kept secret, although the consensus positions that emerge appear to inform the Office of Advocacy's policy positions. These meetings violate the spirit, and perhaps the letter, of the Federal Advisory Committee Act.

- The Office of Advocacy staff made no effort to educate themselves on the science underlying the debates about the cancer risks of formaldehyde, styrene, and chromium or to verify the accuracy of the talking points provided to them by industry lobbyists before filing comments critical of the scientific conclusions in each assessment. Instead, the Office of Advocacy simply repackaged and submitted talking points provided by trade association lobbyists as formal comments.

- Correspondence between the Office of Advocacy and trade associations dominated by large chemical companies and their lobbyists suggests the Office became entangled in a major lobbying campaign to prevent the federal government from listing certain chemicals as known or probable carcinogens. E-mails suggest the Office of Advocacy may have violated the Anti-Lobbying Act and other lobbying restrictions.

- No small businesses objected to the scientific assessments or asked the Office of Advocacy to intervene in the cancer assessments. The Office of Advocacy made no effort to determine whether the positions it took represented small business views and interests. Moreover, since small businesses may produce substitutes for toxic chemicals, a cancer finding for existing chemicals could open up new markets for substitute chemicals produced by small businesses.

- No process or procedures seem to be in place to ensure that the activities of the Office of Advocacy are consistent with, and do not work to undermine, the statutory responsibilities of other agencies.

Recommendations:

- The Office of Advocacy should limit its work to regulatory activities affecting small business, as authorized by the Regulatory Flexibility Act and subsequent laws.

- Congress should ask GAO to investigate whether the Office of Advocacy's Environmental Roundtables violate Federal Advisory Committee Act provisions.

- The Office of Advocacy should independently verify the factual claims it makes in comments to other federal agencies and should not comment on technical or scientific matters on which its staff have no expertise.

- Congress should ask GAO to investigate whether the activities of the Office of Advocacy represent impermissible lobbying by federal employees.

- The Office of Advocacy should develop procedures to verify that its policies represent the interests of small business. Its comments should be limited to offering a small business perspective that the regulating agency would not otherwise hear.

- Congress should exert more rigorous oversight over the Office of Advocacy to ensure its work does not delay or prevent other federal agencies from fulfilling their statutory goals, especially those scientific and regulatory agencies tasked with protecting the health of the American people.

Introduction

Americans have long championed small businesses. According to the U.S. Census Bureau, about 5,821,277 businesses with fewer than 100 employees are operating in the U.S. today, employing about 35 percent of the workforce.[1] The federal government has been actively supporting small businesses since 1953, when the Small Business Administration was established to provide them with subsidized loans and assistance. Over the years, survey after survey has shown that a majority of Americans – across the political spectrum – believes that government should continue to provide assistance and support to small businesses.[2]

Surveys also show broad support for federal efforts to protect public health.[3] The public expects the government to keep tainted food and medicines off store shelves. They want cancer-causing chemicals regulated, air pollution controlled, and the safety of our water supplies ensured. In fact, most Americans believe that existing regulations need to be better enforced.[4] There is no reason that these two popular functions of government should conflict.

Yet our investigation, based on correspondence and materials provided through Freedom of Information Act requests, has unearthed activities by a little-known independent office within the Small Business Administration – the Office of Advocacy – that is working to undermine efforts by federal scientists to identify public health hazards and ensure that American families are protected from cancer-causing substances. These assessments do not regulate the activities of small business and seem far outside the Office's mission – to represent the views and interests of small businesses to other federal agencies.

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1 *See Statistics about Business Size (including Small Business)*, U.S. Census Bureau, http://www.census.gov/econ/smallbus.html (last visited Jan. 14, 2013).

2 *See, e.g.*, SMALL BUSINESS MAJORITY, OPINION POLL: SMALL BUSINESS VIEWS ON TAXES AND THE ROLE OF GOVERNMENT (OCT. 25, 2012), http://www.smallbusinessmajority.org/small-business-research/taxes/taxes-and-role-of-government.php (finding that "the majority of small businesses believe government can play an effective role in helping small businesses thrive").

3 *See* COALITION FOR SENSIBLE SAFEGUARDS, SUMMARY OF LAKE RESEARCH PARTNERS 2011 REGULATORY RESEARCH (2011), http://www.sensiblesafeguards.org/assets/documents/css-lrp-summary.pdf (summarizing the findings of a national poll conducted May 2011).

4 *Id.*

Specifically, the Office of Advocacy sought to block the publication of scientific assessments of the risks of cancer developed by the National Toxicology Program and the Environmental Protection Agency's Integrated Risk Information System. When cancer assessments are delayed or stopped, it means more Americans will be exposed to substances that can kill. Delay costs lives.

Moreover, a recent survey of a representative sample of small business owners (businesses with under 100 employees) suggests that the positions taken by the Office of Advocacy do not represent the views of the constituency on whose behalf it is supposed to advocate.[5] About 60 percent of small business owners reported that they believe "exposure to toxic chemicals in day-to-day life" is a very serious or somewhat serious threat today; 75 percent supported "stricter regulation of chemicals produced and used in everyday products"; 94 percent said "companies using chemicals of concern to human health should disclose their presence to customers and the public"; and 92 percent said there should be "a public, easily accessible database identifying chemicals of high concern to human and environmental health." The survey mirrored the demographics of small business owners: three quarters of the respondents were male; 82 percent were white; half identified as Republican and 23 percent as Independents.[6]

The activities of the Office of Advocacy described in this report represent an unwarranted expansion of its jurisdiction, extending its reach well beyond the statutory responsibilities assigned to the Office under the Regulatory Flexibility Act and subsequent legislation. The Office of Advocacy operates with little oversight by the Small Business Administration, the White House, or Congress. Its effort to expand its jurisdiction to weigh in on toxic hazards threatens important health programs designed to inform the public and federal regulatory agencies about health risks.

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5 The survey of 511 small business owners found that small business owners (SBOs) generally believe toxic chemicals pose a threat to people's health, and support stricter regulation and greater disclosure of toxic chemicals. The sample was weighted by gender, region, ethnicity, industry type, and business size to match the characteristics of small business owners nationally. The margin of error for the survey is + or – 4.4%. *Poll of Small Business Owners on Toxic Chemicals*, American Sustainable Business Council (ASBC) (Sept. 2012), http://asbcouncil.org/node/846.

6 *Id.*

1. Federal Government Support for Small Businesses and the Office of Advocacy

Congress established the Small Business Administration (SBA) as a separate, executive branch agency in 1953 to provide businesses "which are independently owned and operated and which are not dominant in their field of operation" with financial assistance, such as government-backed loans.[7] For the next two decades, this cabinet-level agency responded to requests for assistance by business.

In 1974, when Congress amended the Small Business Act, it created the office of Chief Counsel for Advocacy within the Small Business Administration "*to represent the views and interests of small businesses before other Federal agencies whose policies and activities may affect*" small businesses.[8] Two years later, in 1976, the Office of Advocacy became an independent office within SBA, headed by the Chief Counsel for Advocacy. The Chief Counsel is appointed by the president and confirmed by the Senate.[9] As head of an independent office, the Chief Counsel is not required to submit his reports and comments to the SBA Administrator or to the White House Office of Management and Budget (OMB) for review or approval.[10]

Since the Office was established, its statutory authority has grown. In 1980, Congress passed the Regulatory Flexibility Act (RFA), which requires every federal agency to assess and mitigate the impact of proposed and final rules on small business consistent with its statutory mission and gave the Office of Advocacy the responsibility for overseeing agency compliance with this new mandate.[11]

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7 Stephen L. Keleti & Joseph A. Maranto, *Planning a Full-Scale Audit of the Small Business Administration*, 10 GAO REVIEW 51 (1975), *available at* http://archive.gao.gov/otherpdf1/091092.pdf.

8 Small Business Amendments Act of 1974, Pub. L. No. 93-386, sec. 10, § 5(e)(4), 88 Stat. 742, 749 (1974), *amended by* Small Business Act and Small Business Investment Act of 1958, amendments, Pub. L. No. 94-305, tit. 2, § 201, 90 Stat. 663, 668 (1976) (current version at 15 U.S.C. § 634c(4) (2006)).

9 Small Business Act and Small Business Investment Act of 1958, amendments, Pub. L. No. 94-305, 90 Stat. 663 (1976) (current version at 15 U.S.C. § 634a-f (2006)).

10 15 U.S.C. § 634(f).

11 OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION, 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, at 1 (2012) [hereinafter OFFICE OF ADVOCACY REPORT ON THE REGULATORY FLEXIBILITY ACT FY 2011], *available at* http://www.sba.gov/sites/default/files/11regflx_0.pdf.

Congress again expanded its statutory responsibilities in 1996 when it enacted the Small Business Regulatory Enforcement Fairness Act (SBREFA).[12] Among other provisions, this law required the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA) to convene small business review panels for every proposed rule that will have a "significant economic impact on a substantial number of small entities."[13] The head of the agency, the head of the Office of Information and Regulatory Affairs (OIRA) (an office within OMB), and Chief Counsel for Advocacy are required to attend each panel and meet with representatives of "small entities" to review new rules the agency may propose and the agency's analysis of the impact the rule may have on small businesses. The panel then suggests ways the agency can mitigate the impact on small business. The SBREFA process delays development of workplace safety and environmental rules considerably.

In 2002, President George W. Bush further expanded the Office of Advocacy's responsibilities through Executive Order 13272.[14] Under this executive order, all federal agencies were required to notify the Office of Advocacy earlier in the rulemaking process of rules that could potentially have a significant effect on small businesses. This was intended to give agencies more time to adequately consider and respond to comments submitted by the Office of Advocacy.[15] The Small Business Jobs Act of 2010 codified these new requirements.

The Office of Advocacy's budget for FY 2012 was $9.12 million. It has a staff of 46. By comparison, OIRA, a key office in OMB responsible for reviewing the rules proposed by all executive agencies, had a staff of 45 in FY 2012.[16]

As its budget and staff have grown, the Office of Advocacy has moved beyond commenting on how regulations impact small business to questioning the merits of scientific assessments of toxic hazards. This substantial expansion of Advocacy's role is well beyond its statutory responsibility or substantive expertise.

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12 Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C., 15 U.S.C., and 28 U.S.C.).

13 OFFICE OF ADVOCACY REPORT ON THE REGULATORY FLEXIBILITY ACT FY 2011, *supra* note 11, at 1–3. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 also provided that the Consumer Financial Protection Bureau must conduct Small Business Advocacy Review (SBAR) panels when proposing economically significant rules. *Id.* at 2.

14 Exec. Order No. 13272, 3 C.F.R. 247 (2003), *available at* http://www.forcffectivegov.org/files/regs/library/co13272.pdf.

15 OFFICE OF ADVOCACY REPORT ON THE REGULATORY FLEXIBILITY ACT FY 2011, *supra* note 11, at 2–3.

16 OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION, CONGRESSIONAL BUDGET JUSTIFICATION FY 2013, at 6, *available at* http://www.sba.gov/sites/default/files/files/3-508%20Compliant%20FY%202013%20Office%20of%20Advocacy%20CBJ%281%29.pdf.

2. Protecting the Public from Cancer-causing Chemicals: Scientific Assessments of Health Risks

A number of laws have been passed directing federal agencies to protect the public from health hazards and to reduce the cancer risks posed by toxic substances. For example, the Clean Air Act requires EPA to reduce particulates in the air based on science showing their presence increases the risk of respiratory diseases. Congress directed the Consumer Product Safety Commission (CPSC) to ban lead in toys after it was shown that ingesting lead could cause brain and organ damage in infants. Congress required the Food and Drug Administration (FDA) to ban the use of certain preservatives if they are shown to cause cancer.

However, scientific evidence about the effects of chemicals on human health is cumulative. It is rare for a single study or two to provide definitive proof of increased cancer risks. Scientists rely on controlled experiments with animals to predict a chemical's effect in humans. Epidemiological studies may indicate, but rarely prove, an association between exposure and harm for several reasons. Epidemiological studies with adequate statistical power to detect small increases in common cancers require the collection of data and analysis of effects among large groups of exposed people. They cannot be completed until enough time has passed for latent effects to be detected. And, accurate data on past exposures is rarely available; reconstructed data may not accurately reflect past exposures. Because of this, determining what amount of exposure to what chemicals causes cancer inevitably requires scientists to make informed judgments.

Rather than asking each federal agency tasked with protecting the public's health to conduct its own evaluations of the scientific evidence on carcinogens, several agencies are tasked with evaluating scientific information and disseminating their conclusions to other federal agencies and the public. Two of these programs are the National Toxicology Program in the Department of Health and Human Services (HHS) and the Integrated Risk Information System in EPA. Neither program sets emission standards for chemical discharges or enforces health or safety standards later set by other agencies. Their role is to be an "honest broker" of scientific studies. However, because labeling a substance a cancer-causing agent can have adverse consequences in the market and lead to stricter regulation down the road, chemical manufacturers watch this process carefully, challenge research findings, and develop their own research to promote alternative hypotheses about cancer causation.

The National Toxicology Program Report on Carcinogens

The Public Health Service Act of 1978 directs the Secretary of Health and Human Services to prepare a Report on Carcinogens every other year that identifies substances with the potential to cause cancer.[17] The National Toxicology Program (NTP) prepares the report to be issued on behalf of the Secretary of HHS, who then communicates this information to the American people to ensure they can make informed decisions about where they live and work.

The report has two classifications: 54 substances are classified as *known to be a human carcinogen;* 186 substances are classified as *reasonably anticipated to be a human carcinogen.*[18] A substance is *known to be a human carcinogen* if there is "sufficient evidence of carcinogenicity from studies in humans, which indicates a causal relationship between exposure to the agent, substance, or mixture, and human cancer."[19] A substance is *reasonably anticipated to be a human carcinogen* if there is some evidence of carcinogenicity from studies in humans, evidence of carcinogenicity from animal studies, or other evidence to suggest a substance causes cancer. The Report on Carcinogens only puts substances into these broad categories; it does not quantitatively estimate the risk of cancer.

Because manufacturers fear that classifying a substance as a "known carcinogen" can reduce its use, public officials have developed a thorough and scrupulous process for determining what substances should be placed on the list. The NTP permits anyone to suggest a chemical should be put on the list, removed, or reclassified. Once NTP decides to evaluate a nominated substance, it conducts a comprehensive review of the evidence of its carcinogenicity. This draft background document is submitted to an expert panel for peer review and is put online to allow the public to comment. After peer review comments are incorporated into a revised report on the substance, it is published again, and the public can again comment. The final background document is then further reviewed by two interagency scientific review groups. Taking all this feedback into account, NTP prepares a draft "substance profile" and classification listing recommendation, which is then reviewed by its own Board of Scientific Counselors (BSC). The BSC solicits comments and holds a public hearing; it then reports on whether the scientific information in the draft substance profile is technically correct, clearly stated, and supports the classification recommendation. Only after this process has been completed is the new Report on Carcinogens published.[20]

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17 Community Mental Health Centers Act, Amendments, Pub. L. No. 95-622, Sec. 262(b)(4), 92 Stat. 3412, 3434-35 (1978) (codified as amended at 42 U.S.C. § 241(b)(4) (2006)).

18 NAT'L TOXICOLOGY PROGRAM, U.S. DEP'T OF HEALTH & HUMAN SERVICES, THE REPORT ON CARCINOGENS: KEY POINTS; 12TH EDITION (2011), *available at* http://www.niehs.nih.gov/health/materials/report_on_carcinogens_12th_edition_the_508.pdf.

19 *Report on Carcinogens: Listing Criteria*, Nat'l Toxicology Program, http://ntp.niehs.nih.gov/?objectid=47B37760-F1F6-975F-7C15022B9C93B5A6 (last updated June 15, 2011).

20 In fact, the National Toxicology Program revised the procedures for completing the Report on Carcinogens several times since 1980 and each time, it has added opportunity for public comment and additional peer review.

These procedures mean that a great deal of time is required to complete a new edition of the Report on Carcinogens. Large chemical companies who make the chemicals being evaluated and the trade associations of which they are members commented repeatedly on the 12th Report, which was published in 2011. In fact, their comments dominated the debate at NTP over which chemicals should be listed as carcinogens.

The Environmental Protection Agency's Integrated Risk Information System Assessments

Another major database of information about chemical toxicity is the Integrated Risk Information System (IRIS) at EPA, which contains information on the health effects of environmental contaminants.[21] IRIS assessments evaluate the scientific data on chemical hazards and calculate acceptable exposure levels – the level below which no health effects are expected (known as the reference dose or reference concentration in air). The IRIS reference dose may be used by other EPA programs in determining the dose of a chemical to which the public may be exposed.

The IRIS database contains profiles for over 550 chemicals. Like the NTP Report on Carcinogens, the assessments are the result of an extensive, multi-step review process. A new IRIS assessment involves a comprehensive literature review, multiple opportunities for public comment, rigorous peer review of draft background documents, and final review by independent experts and other agency staff. The entire process takes at least two years (and often longer). The final IRIS assessment is posted online along with the summary, toxicological review, and EPA responses to comments received.

NTP and IRIS provide citizens with important information about the cancer hazards Americans face. Neither NTP nor IRIS assessments produce rules or regulations that govern business activity. Yet the Office of Advocacy at the SBA intervened in both the NTP and the IRIS assessment processes. We investigated how and why interventions related to three specific chemicals – formaldehyde, styrene, and chromium – occurred.

21 *Integrated Risk Information System (IRIS): Basic Information*, U.S. Environmental Protection Agency, http://www.epa.gov/iris/intro.htm (last updated Sept. 26, 2012).

The Center for Effective Government's Investigation

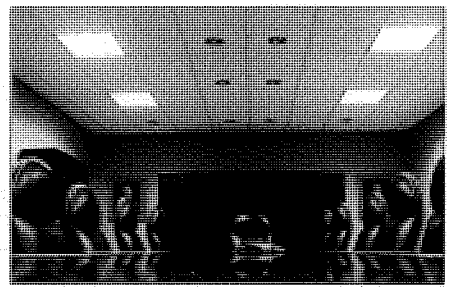
The Center for Effective Government (formerly OMB Watch) filed several Freedom of Information Act requests with the Office of Advocacy in the spring of 2012. One request asked for documents relating to Advocacy's comments on NTP's 12th Report on Carcinogens and the risks posed by formaldehyde and styrene. Another FOIA request asked for documents relating to the Office of Advocacy's comments on EPA's IRIS risk assessment for chromium. Advocacy staff forwarded some documents responsive to our request. After we discovered a number of missing documents, staff searched their files again and provided more relevant documents. Advocacy claims the only documents not disclosed were intra- or interagency deliberative documents withheld under FOIA exemption 5.[22] The Office did not provide the Center for Effective Government with a list of withheld documents.

For each of the three chemical assessments investigated, the debate over the carcinogenicity of each substance has been going on for decades and involves complex, technical evaluations of toxicological and epidemiological data. The large manufacturing companies that produce these chemicals have spent tens of millions of dollars disputing the scientific evidence showing increased cancer risks. The Office of Advocacy admits it has no scientific expertise in this area, yet it chose to intervene in these proceedings. In each of the cases we examined, we asked:

- Who asked the Office of Advocacy to intervene in these chemical assessments?
- What efforts did Office of Advocacy staff make to educate themselves on the science underlying the debates about the health risks of these chemicals?
- What efforts did the Office of Advocacy make to determine the interests of small businesses in these issues (i.e., whether small businesses felt this was a priority for them and/or the impact that a cancer designation for these chemicals would have on small businesses)?

22 FOIA exemption 5 allows the government to withhold information that concerns communications within or between agencies that are protected by legal privileges including the attorney-work product privilege and deliberative process privilege. *See Frequently Asked Questions*, FOIA.gov, http://www.foia.gov/faq.html (last visited Jan. 9, 2013).

3. The Office of Advocacy's Interventions in Scientific Debates About Public Health and Toxic Chemicals



In each of the cases discussed below, a growing body of scientific evidence documented the cancer risks of the chemical agents. But as the research evidence grew, so too did the lobbying efforts of large producers. It appears that the Office of Advocacy became inappropriately and impermissibly entangled in these lobbying campaigns. Before moving into three case studies of these activities, a word is needed about the Office of Advocacy's Roundtables because they seem to play a critical role in shaping the priorities of the Office.

The Roundtables

Our research suggests that the Office of Advocacy began holding regular roundtables on different subjects with industry groups around 1990. According to its reports, "Some roundtables have been scheduled as regularly recurring events, such as Advocacy's monthly roundtable on environmental rules and Advocacy's occupational safety roundtable, which is generally bimonthly. Other roundtables, such as those concerning transportation and homeland security, have been held quarterly, while still others have been held on an ad hoc basis."[23]

The Office of Advocacy issues the invitations to its roundtables, which are usually held at the law offices of a firm representing a participating trade association. From correspondence and reports we have obtained,[24] it seems that trade association representatives and lobbyists sometimes directly ask to give presentations at the roundtables.[25] In other cases, Advocacy staff have worked with trade association staff to plan presentations, asking for input on the agenda, the presenters, and the title.[26]

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23 OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION, REPORT ON THE REGULATORY FLEXIBILITY ACT FY 2008: ANNUAL REPORT OF THE CHIEF COUNSEL FOR ADVOCACY ON IMPLEMENTATION OF THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 13272, at 2 (2009), *available at* http://www.sba.gov/sites/default/files/files/08regflx.pdf.

24 The Office of Advocacy provided the environmental roundtable e-mail list, although it is not the most current version and some e-mails may have changed in the past six months. We were given presentations for the environmental roundtable on July 29, 2011 at which representatives from the American Composite Manufacturers Association and Kitchen Cabinet Manufacturers Association made presentations. Other miscellaneous roundtable documents were provided as well.

25 E-mail from Randy Schumacher, registered lobbyist for ACC, to Kevin L. Bromberg, Office of Advocacy (Mar. 16, 2011) ("I spoke to Ann earlier this week about presenting the Cr6 research at your upcoming roundtable. Did she indicate she would like to be part of the program?").

26 E-mail from Kevin L. Bromherg, Office of Advocacy, to Charlie Grizzle, lobbyiest for the Formaldehyde Council, and Jim

Most attendees at the roundtables represent trade associations that have large corporate members, as well as small business members. Advocacy does not require that attendees represent small businesses. In one e-mail, a staff member at the Office of Advocacy told a lobbyist for General Electric that he was invited to attend a Labor Safety roundtable as long as he "maintain[ed] a small business perspective! ;-)"[27] Several small business groups perceived to be liberal or aligned with Democrats were not on the e-mail invitation lists for roundtables held in 2010 and 2011.[28]

The discussions at the roundtables are closed to the press, and participants are told they cannot publicly comment on the discussions.[29] Any party may report to its membership what it said, but participants are asked not to report what other participants say or to repeat what representatives of the Office of Advocacy say. Our investigation suggests that Advocacy's positions on policy issues grow out of the discussion at these roundtables.

The documents from the roundtables obtained through our Freedom of Information Act requests and interviews conducted with participants suggest that presentations on the three chemical assessments were dominated by the interests of large chemical manufacturers. The presentations strongly criticized the science showing cancer risks; no competing views were presented. Nor was there an effort to determine how cancer assessments may impact small businesses within a certain industry or whether such an assessment might open markets for substitute chemicals. The assumption seems to be that a cancer assessment that adversely affects a big chemical company will adversely affect small businesses. From the materials we were provided and from interviews, we found no evidence that "[s]mall business representatives" initiated conversation at the roundtables on "the difficulties posed by chemical risk characterizations at the Department of Health and Human Services (HHS) and at the Environmental Protection Agency"[30] as the Office of Advocacy later claimed.

Skillen, Dir., RISE, cc: Jane C. Luxton, Attorney, Pepper Hamilton, LLP (June 25, 2010) (Subject line: Draft Roundtable Notice_ please review) ("Jane, Charlie – you can decide if I should list both of you or just Charlie. Also, Charlie, I would be interested in a formaldehyde update also – if you could handle it. I would list that separately. . . . *Jim – we can add an additional speaker with you if you like. Please review the time frames also.*"); E-mail from Kevin L. Bromberg to David Fischer, ACC, Ann Mason, ACC, and John Schweitzer, ACMA (June 28, 2011) ("I'm thinking of two presenters on the NTP process for styrene and formaldehyde – and to contrast this process with the IRIS risk assessment process, and the merits of the science controversies – for an hour slot on the 29th. Thoughts?"); E-mail from David Fischer to Kevin L. Bromberg, Ann Mason, and John Schweitzer (July 6, 2011) ("Kevin, I think discussing NTP process would be very worthwhile but not sure two talks would be necessary since the flaws in the formaldehyde process were also apparent in styrene's as well. I'm wondering if we want to discuss the larger issue of rampant redundancy and inconsistency in hazard/risk assessment within the federal govt. In particular, is the RoC still relevant? Thanks."); E-mail from John Schweitzer to Kevin L. Bromberg (July 11, 2011) ("We've got a toxicologist standing by for the July 29 SBA Roundtable. . . ."); E-mail from John Schweitzer to Kevin L. Bromberg (July 22, 2011) ("I will likely present the styrene issue next week, instead of Jim Bus. Since NTP is not participating, we don't need to employ our big 'science guns.'"); E-mail from Kevin L. Bromberg to David Fischer and John Schweitzer (July 12, 2011) (asking for suggestions for the title of Advocacy's environmental roundtable scheduled for July 29th, 2011 and offering three titles for consideration).

27 E-mail from Bruce E. Lundegren, Office of Advocacy, to Pat K. Casano, General Electric (Jan. 10, 2011).

28 After testifying at a joint hearing before the House Science Committee and Small Business Committee on April 25, 2012, American Sustainable Business Council was invited to attend the Environmental Roundtables.

29 *See* E-mail from Kevin L. Bromberg, Office of Advocacy, to John Schweitzer, ACMA (Aug. 1, 2011). In editing a press release for ACMA, Mr. Bromberg wrote "we prefer that we stick to what was presented at the Roundtable – and not a reference to the discussion at the Roundtable- which we try to keep confidential to aid in having an open discussion (see the bottom of all Roundtable notices). Participants are free, however, to make known their own comments."

30 OFFICE OF ADVOCACY REPORT ON THE REGULATORY FLEXIBILITY ACT FY 2011, *supra* note 11, at 5.

When a federal agency relies on a group of outside advisors to formulate policy, the process is supposed to be governed by the Federal Advisory Committee Act (FACA).[31] This law is designed to "limit the influence of special interests" in the public policy decision making process. The law requires that meetings of advisory groups be open to the public and that advisory committees be balanced.

The Office of Advocacy's roundtables may represent improperly constituted advisory committees. Advocacy invites a group of private citizens to regularly meet and solicits their input on policy positions. The Office of Advocacy appears to rely on the "consensus views" expressed during these meetings to formulate the positions it takes. Yet Advocacy conducts the roundtables behind closed doors and does not disclose records of what is said. Clearly, the roundtables are incompatible with the goals of FACA.

The Formaldehyde War

Formaldehyde is a colorless, flammable, strong-smelling chemical that is used as an adhesive, disinfectant, and preservative. It is found in the home in products such as particleboard, plywood, and glues. Exposure to formaldehyde can cause sensory and skin irritation and chemical sensitivity. Workers who produce or use formaldehyde are exposed to greater levels than the general public.[32] In 1981, formaldehyde was listed as *reasonably anticipated to be a human carcinogen* in the NTP Report on Carcinogens.

The early evidence of the relationship between formaldehyde and cancer actually came from the Chemical Industry Institute of Toxicology (CIIT), a research group founded by 11 large chemical companies.[33] In 1979, it reported that rats exposed to formaldehyde contracted cancer. Shortly after this finding, and a strategy memo put out by a Georgia-Pacific health and safety official,[34] the CIIT shifted its focus to conducting research showing that humans metabolize formaldehyde differently than rats, so that given the same level of exposure, people absorb less formaldehyde than rats. Risk assessments based on actual cancer incidence among formaldehyde-exposed workers show risks 50 times higher than those predicted by CIIT's models.[35] A lobbying effort to block the regulation of formaldehyde as a cancer-causing substance was funded by the Formaldehyde Institute.

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31 FACA rules apply when an assemblage of individuals that includes at least one non-federal employee (a) is working as a group and (b) is "established or utilized" by agency (c) to provide "advice or recommendations" to the agency. 5 U.S.C. App. 2 § 3(2) (2006).

32 *See generally Formaldehyde and Cancer Risk*, Nat'l Cancer Institute, http://www.cancer.gov/cancertopics/factsheet/Risk/formaldehyde (last reviewed June 10, 2011); *Formaldehyde*, Ctrs. for Disease Control and Prevention, http://www.cdc.gov/niosh/topics/formaldehyde/ (last updated Mar. 3, 2012).

33 DAN FAGIN ET AL., TOXIC DECEPTION: HOW THE CHEMICAL INDUSTRY MANIPULATES SCIENCE, BENDS THE LAW, AND ENDANGERS YOUR HEALTH 47 (1996).

34 Georgia-Pacific, a subsidiary of Koch Industries, is one of the country's top producers of formaldehyde. Other large chemical companies who have been active in the fight include Cleanese, Dupont, and other members of the now-defunct Formaldehyde Institute. *See Formaldehyde Added to "Known Carcinogens" List Despite Lobbying by Koch Brothers, Chemical Industry*, Democracy Now (June 14, 2011), *available at* http://ec.libsyn.com/p/8/5/6/8565271316161e75/dn2011-0614-1.mp3?d13a76d516d9dec20c3d276ce028ed5089ab1ce3dae902ea1d01cd8032d8ce5c4d5e&c_id=3325818; Laurie Bennett, *The Mighty Formaldehyde Lobby*, Muckety (Oct. 7, 2012, 7:09 AM), http://news.muckety.com/2012/10/07/the-mighty-formaldehyde-lobby/38441.

35 FAGIN ET AL., *supra* note 33, at 76.

Based on the NTP assessment in 1981, the Occupational Safety and Health Administration (OSHA) sought to regulate workplace exposure to formaldehyde. Industry opposition was so intense that a new exposure limit was only published in response to a court order.[36] OSHA's final standard, not issued until 1987, fully considered, and rejected, the industry theory; instead, OSHA concluded that formaldehyde posed a significant cancer risk to exposed workers.[37]

EPA also set out to evaluate formaldehyde's risks. In the 1980s, its risk assessment accepted the industry theory that formaldehyde posed little cancer risk to humans,[38] even though EPA's own Science Advisory Board warned the agency against this approach in 1992.[39]

Over the past two decades, a growing body of human epidemiology studies has consistently shown upper airway and blood cancers among workers exposed to formaldehyde. In fact, the International Agency for Research on Cancer (IARC) designated formaldehyde a "probable human carcinogen" as early as 1987 and in 2006 concluded that there is "sufficient evidence in humans" that formaldehyde causes cancer of the nasal passages and "strong but not sufficient" evidence for a causal association between leukemia and formaldehyde.[40]

By 2008, a paper by EPA concluded that the industry risk model showing minimal human risk was "unsupportable."[41] As a result, EPA revised its formaldehyde risk assessment in 2009, concluding, as had IARC, that formaldehyde is known to cause cancer of the nasal passages and leukemia.

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36 UAW v. Donovan, 756 F.2d 162 (D.C. Cir. 1985).

37 UAW v. Pendergrass, 878 F.2d 389 (D.C. Cir. 1989). Although both OSHA and the courts rejected the formaldehyde industry's self-serving interpretation of the chemical's cancer risk, economists at OMB's Office of Information and Regulatory Affairs (OIRA) accepted it. OIRA repeatedly cited OSHA's formaldehyde standard as a rule with large costs but few benefits. OIRA's analysis of the costs and benefits of formaldehyde regulation has been thoroughly discredited. *See* Lisa Heinzerling, *Regulatory Costs of Mythical Proportions*, 107 YALE L.J. 1981 (1998).

38 *See* FAGIN ET AL., *supra* note 33, at 89–91.

39 *Id.* at 73.

40 Int'l Agency for Research on Cancer (IARC), *Formaldehyde, 2-Butoxyethanol and 1-tert-Butoxypropan-2-ol*, 88 IARC MONOGRAPHS ON THE EVALUATION OF CARCINOGENIC RISKS TO HUMANS (2006), *available at* http://monographs.iarc.fr/ENG/Monographs/vol88/mono88.pdf.

41 Franklin Mirer, *Risky Business: Forming Your Opinion Regarding Cancer and Formaldehyde*, THE SYNERGIST, Apr. 2009, at 32 (quoting Kenny S. Crump et al., *Sensitivity Analysis of Biologically Motivated Model for Formaldehyde-Induced Respiratory Cancer in Humans*, 52:6 ANNALS OF OCCUPATIONAL HYGIENE 481 (2008)).

Producers immediately began a campaign to block the new IRIS risk assessment. Initially, the Formaldehyde Institute led the fight against designating formaldehyde as a carcinogen, but it disbanded in 1993 after documents showing the industry's research strategy of obfuscating formaldehyde's risks were produced during discovery in a lawsuit seeking damages for illnesses caused by formaldehyde exposure. The Formaldehyde Council assumed its role as the dominant industry trade association in 1995. It was dominated by big chemical companies that were manufacturing formaldehyde.[42] In 2010, it ceased operations at the same time that the American Chemistry Council (ACC) formed a Formaldehyde Panel funded by Georgia-Pacific (owned by Koch Industries) and Hexion Specialty Chemicals.[43] Beginning in 2010, efforts to block the IRIS and NTP assessments of formaldehyde, at federal agencies and in Congress, were led by lobbyists for the ACC.

Sen. David Vitter (R-LA) put a hold on an EPA nominee until the agency asked the National Academy of Sciences (NAS) to review the IRIS formaldehyde risk assessment shortly after a lobbyist for the Formaldehyde Council held a fundraiser on the senator's behalf.[44] Koch Industries and a Formaldehyde Council lobbyist also gave generous campaign contributions to other senators leading the effort to delay the assessment.[45] Responding to this political pressure, EPA requested the review, which NAS published in April 2011.[46] The NAS review affirmed EPA's conclusion that formaldehyde was a known human carcinogen, causing upper airway cancers, but directed EPA to restate its reasons for concluding that formaldehyde caused leukemia in humans. EPA has not released revisions to its formaldehyde IRIS assessment since the NAS review was completed.

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42 The by-laws of the Formaldehyde Council require that members of the Board of Directors represent Tier 1 members of the Council. Companies must pay $200,000 to become Tier 1 members, so it is unlikely that many small businesses sat on the Formaldehyde Council's governing body.

43 *See ACC Forms New Formaldehyde Panel*, American Chemistry Council, http://www.americanchemistry.com/11312.

44 Joaquin Sapien, *How Senator Vitter Battled the EPA over Formaldehyde's Link to Cancer*, ProPublica (Apr. 15, 2010, 2:30 AM), http://www.propublica.org/article/how-senator-david-vitter-battled-formaldehyde-link-to-cancer.

45 *Id.* (linking Koch Industries and Charles Grizzle, a lobbyist for the Formaldehyde Council, to campaign contributions to Sens. Inhofe and Vitter).

46 COMMITTEE TO REVIEW EPA'S DRAFT IRIS ASSESSMENT OF FORMALDEHYDE, NAT'L RESEARCH COUNCIL, REVIEW OF THE ENVIRONMENTAL PROTECTION AGENCY'S DRAFT IRIS ASSESSMENT OF FORMALDEHYDE (2011), *available at* http://books.nap.edu/openbook.php?record_id=13142. Industry interprets the NAS report as critical of EPA's risk assessment; environmental groups such as Natural Resources Defense Council interpret the report as questioning EPA's discussion of how formaldehyde causes blood cancers, without disagreeing with its conclusion that formaldehyde is carcinogenic.

At HHS, NTP responded to the IARC listing and new research by proposing to move formaldehyde from an "anticipated" human carcinogen to a "known human carcinogen," causing upper airway cancers and leukemia, as they prepared the 12th Report on Carcinogens. The Formaldehyde Council and the ACC strongly objected, filing multiple comments with NTP. Industry demanded that NTP incorporate the NAS analysis of the IRIS risk assessment into its evaluation, which it did. But the ACC and Dow Chemical continued to lobby Congress to delay publication of the Report on Carcinogens until another NAS review was conducted.[47] Republican House representatives unsuccessfully pushed an appropriations rider to delay the Report's release.[48]

"NTP Excerpt – What is the detailed industry argument that this is incorrect?"

-e-mail subject line from Kevin L. Bromberg, Office of Advocacy, to Randy Schumacher, registered lobbyist for ACC

Advocacy Involvement

The Office of Advocacy waded into the debate in November 2011 with formal comments claiming that "[s]mall businesses have taken issue with . . . formaldehyde's listing as 'known to be a human carcinogen'" and that they were "concerned with the quality of scientific analysis" relied upon by NTP.[49]

Our review of the materials gathered from our Freedom of Information Act request shows no documents from any small businesses asking the Office of Advocacy to intervene in the formaldehyde listing, nor did any small business file comments with NTP criticizing its analysis.[50] Instead, internal Advocacy documents show that Advocacy communicated regularly with registered lobbyists for the Formaldehyde Council and ACC.[51]

"I guess he's essentially wrong. It's probably better for now that I keep the NTP contact in the dark."

-e-mail from Kevin L. Bromberg, to David Fischer, ACC

47 *See* Jennifer Sass, *Health Scientists Sign on to Tell Congress Not to Strip Funding for the Report on Carcinogens*, Switchboard: Natural Resources Defense Council Staff Blog (Sept. 5, 2012), http://switchboard.nrdc.org/blogs/jsass/health_scientists_sign_on_to_t.html.

48 COMMITTEE ON APPROPRIATIONS, 112TH CONGRESS, WORKING BILL ON APPROPRIATIONS FOR DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, EDUCATION, AND RELATED AGENCIES FY 2013, (Comm. Print 2012), *available at* http://appropriations.house.gov/uploadedfiles/bills-112hr-sc-ap-fy13-laborhhsed.pdf.

49 Letter from Winslow Sargeant, Chief Counsel for Advocacy, and Sarah Bresolin Silver, Assistant Chief Counsel, Office of Advocacy, to Kathleen Sebelius, Sec'y of Health & Human Services, U.S. Dep't of Health & Human Services (Nov. 22, 2011), http://www.sba.gov/sites/default/files/Advocacy_Comment_Letter-Report_On_Carcinogens.pdf.

50 The only comments NTP received were from trade associations, large chemical companies, consulting firms, and academic and research institutions. *See Formaldehyde [CAS No. 50-00-0], Public Comments: Substances Newly Reviewed for the 12th RoC*, Nat'l Toxicology Program, http://ntp.niehs.nih.gov/index.cfm?objectid=20A477F2-F1E6-975E-7472FC6B0DA56D9C#formaldehyde (last updated July 19, 2012).

51 *See* E-mails between Kevin Bromberg, Office of Advocacy, and Randy Schumacher, registered lobbyist for ACC (May 2011); E-mails between Kevin Bromberg, Office of Advocacy, and Charles Grizzle, registered lobbyist for the Formaldehyde Council (June-Aug. 2010).

Moreover, documents show that the Office of Advocacy made no effort to evaluate the scientific evidence behind the NTP assessment. Instead, Advocacy asked lobbyists for ACC to provide a "detailed industry" rebuttal to NTP.[52] In May 2011, Advocacy staff followed up with ACC and its lobbyists about their meetings with agency officials regarding formaldehyde.[53] Advocacy also collaborated on press strategy with ACC[54] and discussed whether and when to share materials with agency staff.[55]

Styrene Skirmishes

Styrene is a clear, liquid, volatile organic compound used predominantly in the manufacture of plastics and rubber.[56] Synthetic styrene derived from oil and natural gas is most commonly found in carpet backing, fiberglass composites (e.g., bathtubs and kitchen countertops), and even in polystyrene food containers. Styrene may be released into the environment during manufacture, use, or disposal, contaminating air and drinking water.

As far back as 1988, studies showed styrene caused cancer in laboratory mice.[57] Human studies in the years since have suggested that occupational exposure to styrene can lead to increased risk of lymphomas, leukemia, and pancreatic or esophageal cancers.[58] The IARC has listed styrene as "possibly carcinogenic to humans" since 2002.[59] Growing evidence from animal studies and limited evidence of cancer risks among workers caused NTP to propose listing styrene as "reasonably anticipated" to cause cancer in its 12th Report on Carcinogens.

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52 E-mail from Kevin L. Bromberg, Office of Advocacy, to Randy Schumacher, registered lobbyist for ACC, and cc: David Fischer, ACC (May 25, 2011). The e-mail contained the subject line, "NTP Excerpt – What is the detailed industry argument that this is incorrect?"

53 E-mail from Kevin L. Bromberg, Office of Advocacy, to Randy Schumacher, registered lobbyist for ACC (May 24, 2011) ("News from the meeting?"); E-mail from Kevin L. Bromberg, Office of Advocacy, to David Fischer, ACC (May 24, 3011) ("Was there an ACC meeting today with HHS? Any news?").

54 E-mail from Kevin L. Bromberg, Office of Advocacy, to David Fischer, ACC, and Randy Schumacher, registered lobbyist for ACC (May 25, 2011) (Kevin Bromberg: "Will the news about an RoC delay get into the press? Do you want it there?").

55 E-mail from David Fischer, ACC, to Kevin L. Bromberg, Office of Advocacy (May 25, 2011) (David Fischer: "Who at NTP were you thinking of sharing it with? John Bucher of NTP essentially told House committee staff that the NRC's report was not relevant to the NTP RoC."); E-mail reply from Kevin L. Bromberg to David Fischer (May 25, 2011) (Kevin Bromberg: "I guess he's essentially wrong. It's probably better for now that I keep the NTP contact in the dark.").

56 Agency for Toxic Substances & Disease Registry, U.S. Dep't of Health & Human Services, Toxicological Profile for Styrene 1–8 (2010), *available at* http://www.atsdr.cdc.gov/toxprofiles/tp53.pdf; Nat'l. Toxicology Program, U.S. Dep't of Health & Human Services, Styrene: Key Points (June 2011), *available at* http://www.niehs.nih.gov/health/materials/styrene_508.pdf; *Frequently Asked Questions*, Styrene Info. & Res. Center, http://www.styrene.org/faq.html#one (last visited Jan. 7, 2013).

57 Barbara Conti et al., *Long-Term Carcinogenicity Bioassays on Styrene Administered by Inhalation, Ingestion and Injection and Styrene Oxide Administered by Ingestion in Sprague-Dawley Rats, and Para-Methylstyrene Administered by Ingestion in Sprague-Dawley Rats and Swiss Mice*, 534 Annals of the N.Y. Acad. of Sci. 203–34 (1988).

58 Nat'l Toxicology Program, *supra* note 50.

59 Int'l Agency for Research on Cancer (IARC), *Some Traditional Herbal Medicines, Some Mycotoxins, Napthalene, and Styrene*, 82 IARC Monographs on the Evaluation of Carcinogenic Risks to Humans 437–522 (2002), *available at* http://monographs.iarc.fr/ENG/Monographs/vol82/mono82.pdf.

Not surprisingly, companies producing styrene vigorously disputed its danger to humans. Like formaldehyde producers, they argued that humans metabolize the toxin differently than animals, so higher exposures are less toxic to people than to laboratory mice. The Styrene Information and Research Council (SIRC) spent over $20 million on 47 studies examining the health and environmental effects of styrene exposure; none found clear cancer risks.[60] Yet other evidence tells a different story.[61]

In fact, OSHA has regulated styrene's "narcotic" health effects on workers since 1971.[62] By 1989, with evidence of cancer risks increasing, OSHA proposed to revisit its limits on permissible exposure to styrene.[63] But industry associations strongly objected to OSHA characterizing styrene as carcinogenic, arguing there was insufficient data to support such a classification.[64] OSHA backed down; its final rule reducing styrene exposure, later overturned in court, relied only on "its narcotic effects" as justification.[65]

In 1998, SIRC convinced EPA to allow SIRC to conduct the IRIS hazard assessment of styrene.[66] The industry assessment was of such poor quality that it was unusable. However, the tactic delayed EPA's IRIS assessment update of the cancer risks of styrene for some time.[67]

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60 *Summary of SIRC-Supported Research*, Styrene Info. & Res. Center, http://www.styrene.org/science/research_summary.html (last visited Jan. 7, 2013).

61 *See supra* notes 57–59.

62 Air Contaminants, 29 C.F.R. § 1910.1000 tbl. Z-1 (1999).

63 The update was referred to by OSHA as the PEL project and OSHA sought to substitute outdated consensus standards, first adopted by the American Conference of Government Industrial Hygienists (ACGIH) in the 1960s, with consensus standards current in the late 1980s. Final Rule, Air Contaminants, 54 Fed. Reg. 2332–2983 (Jan. 19, 1989), *revoked* 58 Fed. Reg. 35338–35351 (June 30, 1993).

64 Letter from John B. Jenks, Chairman, Styrene Info. & Research Ctr. et al., to Joseph A. Dear, Assistant Sec'y of Occupational Safety & Health, U.S. Dep't of Labor (Jan. 30, 1996), *available at* http://www.acmanet.org/ga/osha_styrene_agreement_docs_1996.pdf.

65 OSHA's PEL update was invalidated by the 11th Circuit. AFL-CIO v. OSHA, 965 F.2d 962 (11th Cir. 1992); *see also* Revocation of Final Rule, 58 Fed. Reg. 35338–35351 (June 30, 1993).

66 *See* JENNIFER SASS & DANIEL ROSENBERG, NATURAL RESOURCES DEFENSE COUNCIL, THE DELAY GAME: HOW THE CHEMICAL INDUSTRY DUCKS REGULATION OF THE MOST TOXIC SUBSTANCES 15 (2011), *available at* http://www.nrdc.org/health/files/IrisDelayReport.pdf.

67 *Id.* at 16.

Since styrene was nominated for inclusion in the 12th Report on Carcinogens in 2004, SIRC filed 22 comments arguing against listing the substance.[68] As the Report neared publication, the industry group doubled its lobbying expenditures, increasing its funding from $200,000 in 2010 to over $400,000 in 2011.[69] Rep. Rick Boucher (D-VA), Rep. John Shadegg (R-AZ), and 34 other members of Congress sent a letter to HHS Secretary Kathleen Sebelius criticizing the NTP assessment of styrene's risks,[70] and the American Composite Manufacturers Association (ACMA) campaigned "aggressively to overturn the NTP listing."[71] When the Report on Carcinogens was finally released on June 10, 2011, it listed styrene as "reasonably anticipated" to cause cancer. The same day, SIRC and Dart Corporation filed suit challenging this assessment of styrene's risks.[72]

Dow Chemical is a founding member of SIRC. Two of the association's websites are registered to the Management Informations Systems Director at the American Chemistry Council. SIRC's offices, coincidentally, were in the same location in Arlington, VA, as those of the Formaldehyde Council. And one of its lobbying firms also lobbied for ACC, while another of its firms lobbied for Dow Chemical.

Advocacy Involvement

The Office of Advocacy was asked by lobbyists from SIRC and ACMA to comment on the NTP assessment of styrene and did so. A consultant from a lobbying firm hired by SIRC first contacted the Office of Advocacy on June 4, 2010, regarding the styrene listing under review for the 12th Report on Carcinogens.[73] Following that contact, the same consultant helped ACMA representatives plan a meeting with Advocacy on Sept. 15, 2010, to discuss ACMA's concerns about the styrene assessment.[74]

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68 Intervenor-Defendants' Reply in Support of Defendants' & Cross Motions for Summary Judgment at 6, Styrene Info. & Research Ctr., Inc. v. Sebelius, No. 11-1079 (D.D.C. Aug. 10, 2012).

69 SIRC's lobbying expenditures had been minimal before 2010. *Lobbying: Styrene Information and Research Center (2011)*, Center for Responsive Pol., http://www.opensecrets.org/lobby/clientsum.php?id=D000057259&year=2011 (last visited Jan. 7, 2012); *Lobbying: Styrene Information and Research Center (2010)*, Center for Responsive Pol., http://www.opensecrets.org/lobby/clientsum.php?id=D000057259&year=2010 (last visited Jan. 7, 2012).

70 Letter from Rep. Rick Boucher and Rep. John Shadegg et al., to Kathleen Sebelius, Sec'y of Health & Human Services, U.S. Dep't of Health & Human Services (Apr. 21, 2010) (requesting that the listing of styrene be deferred for review until the 13th Report on Carcinogens).

71 *ACMA Continues Fight on NTP Styrene Listing*, Am. Composites Manufacturers Ass'n (ACMA), http://www.acmanet.org/ga/styrene.cfm (last visited Jan. 7, 2013). ACMA had lobbying expenses relating to NTP of at least $56,000 in 2010 and $70,000 in 2011. *Lobbying: American Composites Manufacturers Assn (2011)*, Center for Responsive Pol., http://www.opensecrets.org/lobby/clientsum.php?id=D000023940&year=2011 (last visited Jan. 7, 2013); *Lobbying: American Composites Manufacturers Assn (2010)*, Center for Responsive Pol., http://www.opensecrets.org/lobby/clientsum.php?id=D000023940&year=2010 (last visited Jan. 7, 2013).

72 Complaint, Styrene Info. & Research Ctr., Inc. v. Sebelius, No. 11-1079 (D.D.C. June 10, 2011), *available at* http://www.styrene.org/news/pdfs/06-10-11-SIRCvSebeliusComplaint.pdf.

73 E-mail from Burleson Smith to Kevin L. Bromberg (June 4, 2010) (attaching letters sent by the Styrene Information and Research Council and members of Congress to the Secretary of Health and Human Services requesting that the styrene listing be deferred and re-reviewed in the 13th Report on Carcinogens).

74 E-mail from Burleson Smith to Charles A. Maresca (Sept. 14, 2010) (sending over the list of attendees for the meeting); E-mail from Burleson Smith to Charles A. Maresca (Sept. 15, 2010) (attaching the ACMA Issue Summary in advance of the meeting outlining ACMA's "previous efforts to ask NTP to review all of the data . . . .").

At the meeting, directors of ACMA or its lobbyists asked Advocacy to schedule an interagency meeting with the Office of Management and Budget and NTP to discuss the assessment and to submit a request to Sebelius asking her to drop the styrene listing.[75] After a second meeting on Nov. 30, 2010, ACMA directors submitted letters to the Office of Advocacy asking the Office to get involved with the styrene listing.[76] Staff at Advocacy quickly did as they were asked and forwarded ACMA's letter to HHS on the same day.[77] In its letter, ACMA claimed the NTP listing would jeopardize 500,000 jobs. That figure represents more than 75 percent of all jobs SIRC identifies as styrene-related.

When these efforts failed to block the listing, industry lobbyists asked for help in securing changes to the assessment procedures so that they could have more opportunities to influence the process, even though the industry trade associations and research groups had already commented extensively on NTP's proposed listing. The ACC launched a lobbying campaign to get Congress to change the procedures; SIRC actively lobbied in support of this effort.[78]

No individual small business contacted Advocacy about the styrene listing. The Office of Advocacy received correspondence about the styrene assessment only from SIRC and ACMA. Small businesses did not file comments on styrene with NTP independent of ACMA.[79]

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75 E-mail from Burleson Smith to Charles A. Maresca (Sept. 15, 2010). The e-mail includes an attachment describing ACMA's actions related to the styrene listing and asks the Small Business Administration to: "Elevate this issue as a priority within the Office of Advocacy and assign a member of your staff to champion this effort; Contact the Office of Management and Budget Office of Information and Regulatory Affairs (OMB-OIRA) and request an interagency meeting with NTP to evaluate these claims; Submit a request to the Secretary of Health and Human Services Sebelius to postpone making her determination regarding styrene until the 13th RoC in order to implement the improvements to the process and to review all of the data for styrene before making a determination regarding the potential for carcinogenicity in keeping with other review processes." *Cf.* Letter from Winslow Sargeant, Chief Counsel for Advocacy, Office of Advocacy, to Kathleen Sebelius, Sec'y of Health & Human Services, U.S. Dep't of Health & Human Services (Dec. 1, 2010), *available at* http://www.sba.gov/sites/default/files/hhs10_1201.pdf.

76 E-mail from Burleson Smith to David J. Rostker (Nov. 30, 2010) (sending a follow-up email from the meeting earlier that day with an attachment to an Information Quality Act Request for Corrections that SIRC submitted to HHS in October 2009); E-mail from Angie Castillo to David J. Rostker (Dec. 1, 2010) (attaching separate letters from Tom Dobbins and Monty Felix to the Chief Counsel for Advocacy).

77 E-mail from Angie Castillo to David J. Rostker (Dec. 1, 2010) (attaching separate letters from Tom Dobbins and Monty Felix to the Chief Counsel for Advocacy). Letter from Winslow Sargeant, Chief Counsel for Advocacy, Office of Advocacy, to Kathleen Sebelius, Sec'y of Health & Human Services, U.S. Dep't of Health & Human Services (Dec. 1, 2010), *available at* http://www.sba.gov/sites/default/files/hhs10_1201.pdf. Advocacy's comment letter "encourage[s] NTP to consider all relevant scientific data in making its recommendations, including studies that show negative or null results" and to "carefully consider these concerns as the 12th *Report on Carcinogens* is finalized and the preparations for the 13th report are begun." *Id.* ACMA quickly thanked Advocacy for its help. E-mail from Tom Dobbins to David J. Rostker (Dec. 2, 2010) ("Thanks to you, Dr. Sargeant and the rest of the team for the quick turnaround on this important letter.").

78 Kate Sheppard, *Republicans Attempt to Ax Program Monitoring Carcinogens*, Mother Jones (Aug. 24, 2012, 2:00 AM), http://www.motherjones.com/blue-marble/2012/08/republicans-attempt-ax-program-monitoring-carcinogens; Sarah Vogel, *Hands off the Report on Carcinogens*, Environmental Defense Fund (Sept. 5, 2012), http://blogs.edf.org/nanotechnology/2012/09/05/hands-off-the-report-on-carcinogens/; Nicholas D. Kristof, *The Cancer Lobby*, N.Y. Times (Oct. 6, 2012), http://www.nytimes.com/2012/10/07/opinion/sunday/kristof-the-cancer-lobby.html?_r=0; *see also* sources cited *supra* note 69.

79 *Scientific Reviews for Listings in the 12th Report on Carcinogens: Public Comments*, Nat'l Toxicology Program, http://ntp.niehs.nih.gov/index.cfm?objectid=20A477F2-F1F6-975E-7472FC6B0DA56D9C#styrene (last updated July 19, 2012).

Advocacy filed a second set of comments after the Report on Carcinogens was published and SIRC had filed its lawsuit challenging the styrene classification. In its comments in November 2011, Advocacy criticized the NTP listing of styrene again, in the same letter it sent criticizing the formaldehyde listing, expressing concern about "the quality of [the Report on Carcinogens'] scientific analysis, the robustness of the scientific process, including procedures for peer review and public comment procedures, and that [the Report on Carcinogens] is duplicative of other federal chemical risk assessment programs, particularly the IRIS."[80] These comments repeated the talking points provided by ACMA and SIRC.[81]

The Office of Advocacy became involved in the styrene issue in response to a request by the affected trade associations, which are dominated by big businesses or their lobbyists, and its comments repeated their arguments. At a hearing on the Report on Carcinogens, held by the House Science Committee and Small Business Committee in April 2012, Advocacy staff admitted they made no effort to verify industry's claims.[82] After hearing the testimony, Rep. Brad Miller (D-NC) commented that the Office of Advocacy "relied for their scientific judgment and process comments on the information provided by Styrene lobbyists, so their testimony was really just an echo of what we heard from the Dow Chemical industry scientist."[83]

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80 Letter from Winslow Sargeant, Chief Counsel for Advocacy, and Sarah Bresolin Silver, Assistant Chief Counsel, Office of Advocacy, to Kathleen Sebelius, Sec'y of Health & Human Services, U.S. Dep't of Health & Human Services (Nov. 22, 2011), http://www.sba.gov/sites/default/files/Advocacy_Comment_Letter-Report_On_Carcinogens.pdf; Letter from Winslow Sargeant, Chief Counsel for Advocacy, and Sarah Bresolin Silver, Assistant Chief Counsel, Office of Advocacy, to Dr. Ruth Lunn, Director, Office of the Report on Carcinogens 4 (Dec. 14, 2011), *available at* http://ntp.niehs.nih.gov/NTP/RoC/Thirteenth/Process/PublicComm/SBA20111214.pdf.

81 E-mail from Burleson Smith to Charles A. Maresca (Sept. 15, 2010). This e-mail includes an attachment of an ACMA Issue Summary to be discussed at the meeting with Advocacy on Sept. 15, 2010. The document identifies four major areas of concern: [1] The styrene listing will raise unnecessary concerns about the safety of styrene among employees and communities exposed to the chemical; [2] NTP's position on styrene is inconsistent with a European report and a Blue Ribbon Panel report on styrene because NTP failed to adequately consider negative studies; [3] NTP's review process causes concerns about the scientific quality and validity of its findings on styrene; and [4] Businesses that have participated in the NTP process have not been assured that their comments were considered during the review process. These talking points were reiterated in a presentation by ACMA at Advocacy's environmental roundtable on July 29th, 2011. Advocacy's letter on November 22, 2011 regarding styrene and formaldehyde mirror the talking points made in these two documents.

82 Webcast, *How the Report on Carcinogens Uses Science to Meet its Statutory Obligations, and its Impact on Small Business Jobs, Hearing Before the Subcomm. on Investigations and Oversight of the H. Comm. on Science, Space, and Technology and the Subcomm. on Healthcare and Technology of the H. Comm. on Small Business*, 112th Cong. (2012) [hereinafter *Hearing on Report on Carcinogens*] (statement of Charles A. Maresca, Dir., Interagency Affairs, Office of Advocacy, U.S. Small Bus. Admin.), *available at* http://science.edgeboss.net/wmedia/science/sst2012/042512.wvx.

83 Press Release, Committee on Science, Space, and Technology Minority, Subcommittee Misses Opportunity to Understand the Impact of National Toxicology Program's Report on Carcinogens (Apr. 25, 2012), http://democrats.science.house.gov/press-release/subcommittee-misses-opportunity-understand-impact-national-toxicology-program%E2%80%99s-report.

Chromium Battles

Chromium is a naturally occurring heavy metal, found in two widely used classes of compounds: trivalent chromium (chromium-3) and the more carcinogenic hexavalent chromium (chromium-6).[84] Hexavalent chromium is used for chrome plating, dyes and pigments, treating wood, and for producing steel and other alloys.[85] Hexavalent chromium exposure can come from inhaling or ingesting the substance. Inhalation of hexavalent chromium has long been recognized as a cancer risk to workers in the chromium industry. In fact, hexavalent chromium has been listed as a "known human carcinogen" in NTP's Report on Carcinogens since 1980,[86] and the EPA IRIS database has calculated maximum limits for chromium inhalation since 1998.[87]

OSHA began regulating worker exposure to chromium in 1971, after it adopted a consensus standard as a mandatory workplace limit.[88] The National Institute for Occupational Safety and Health recommended OSHA improve its chromium-6 standard in 1975 to better protect workers,[89] but no new OSHA standard was forthcoming. In 1993, Public Citizen and the Oil, Chemical and Atomic Workers sued OSHA to compel it to set new exposure standards to reduce workers' chromium cancer risk.[90]

The Chrome Coalition, a trade association of chromium manufacturers, immediately hired consultants to publicize the findings from 18 studies on the health effects of hexavalent chromium it had commissioned; all found minimal cancer risks.[91] Industry groups also urged OSHA to delay action until an EPA study on chromium's cancer risk had been completed. When the study showed cancer risks, industry interests urged further delays and more analysis.

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84 *See generally* Int'l Agency for Research on Cancer (IARC), *Chromium, Nickel and Welding*, 49 IARC MONOGRAPHS ON THE EVALUATION OF CARCINOGENIC RISKS TO HUMANS (1990), *available at* http://monographs.iarc.fr/ENG/Monographs/vol49/mono49.pdf.

85 AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, U.S. DEP'T OF HEALTH & HUMAN SERVICES, TOXICOLOGICAL PROFILE FOR CHROMIUM 1–8 (2012), *available at* http://www.atsdr.cdc.gov/toxprofiles/tp7.pdf.

86 Notice, First Annual Report on Carcinogens, 45 Fed. Reg. 61,372 (Sept. 16, 1980); *see also* IARC, *supra* note 84 (explaining that hexavalent chromium was identified in the IARC monographs as a known human carcinogen in 1973, and supplementing the monograph with new evidence in support of the original classification).

87 U.S. ENVIRONMENTAL PROTECTION AGENCY, IRIS TOXICOLOGICAL REVIEW OF HEXAVALENT CHROMIUM (1998), *available at* http://www.epa.gov/iris/toxreviews/0144tr.pdf.

88 Air Contaminants, 29 C.F.R. § 1910.1000 tbl. Z-1 (1999). Public Citizen Health Research Group v. Chao, 314 F.3d 143, 146-47, 2002 U.S. App. LEXIS 26778 (3d Cir. Dec. 24, 2002) (explaining that OSHA's 1971 standard for hexavalent chromium was based on a recommended standard by the American National Standards Institute (ANSI) in 1943. ANSI's standard followed from reports from the 1920's about hexavalent chromium's acute effects).

89 NAT'L INSTITUTE FOR OCCUPATIONAL SAFETY & HEALTH, DHHS (NIOSH) PUB. NO. 76-129, CRITERIA FOR A RECOMMENDED STANDARD: OCCUPATIONAL EXPOSURE TO CHROMIUM (VI) (1975), *available at* http://www.cdc.gov/niosh/docs/1970/76-129.html.

90 OCCUPATIONAL SAFETY AND HEALTH LAW § 13 (Randy S. Rabinowitz & Scott H. Durham eds., 2d ed. Supp. 2008). OSHA had attempted to set a new standard for chromium-6 as part of a cumulative carcinogen standard in 1977, but the Supreme Court invalidated the OSHA rulemaking, finding that the agency must perform an individual risk assessment for each chemical standard it develops. *See* DAVID MICHAELS, DOUBT IS THEIR PRODUCT: HOW INDUSTRY'S ASSAULT ON SCIENCE THREATENS YOUR HEALTH 97–100 (2008).

91 MICHAELS, *supra* note 90, at 100–01; David Michaels et al., Commentary, *Selected Science: An Industry Campaign to Undermine an OSHA Hexavalent Chromium Standard*, Envtl. Health: A Global Access Sci. Source 2 (2006), *available at* http://www.ehjournal.net/content/pdf/1476-069X-5-5.pdf.

As the debate over the cancer risks of inhaling chromium-6 progressed, another battle opened up. The movie *Erin Brockovich*, which premiered in 2000, described the struggle of residents of Hinkley, CA, to get compensation from Pacific Gas & Electric after it contaminated the town's drinking water with chromium, making many residents ill. The case settled for $333 million in 1993, making it the largest class-action in U.S. history at the time.[92]

By 2010, an NTP study showed that ingestion of drinking water contaminated with hexavalent chromium caused cancer in laboratory animals,[93] and staff at EPA believed there was enough information to calculate a reference concentration (maximum exposure level) for chromium ingestion. If EPA was able to do this, new drinking water standards for chromium levels nationwide would likely follow.

Industry objected,[94] arguing that chromium is metabolized by humans into a less toxic form of the metal, thus posing minimal cancer risk from drinking water. Their "evidence" was a 1997 re-analysis (shown to be fraudulent in 2005[95]) of a 1987 Chinese study.[96] The American Chemistry Council's Hexavalent Chromium Panel, the apparent successor to the Chrome Coalition, led the objections, urging EPA to delay its IRIS assessment until an industry-funded study had been completed.[97] Since October 2010, the American Chemistry Council has filed 25 separate comments objecting to the IRIS assessment of hexavalent chromium – almost half of the total number of comments filed.[98] EPA bowed to industry pressure and agreed to indefinitely delay its IRIS assessment.[99]

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92 Sedina Banks, *The "Erin Brockovich Effect": How Media Shapes Toxics Policy*, 26 ENVIRONS ENVTL. L. & POL'Y J. 219, 230 (2003). In 2003, Honeywell International, Inc., was ordered to pay $400 million for cleanup of chromium in New Jersey. REBECCA SUTTON, ENVIRONMENTAL WORKING GROUP, CHROMIUM-6 IN U.S. TAP WATER 17 (2010), *available at* http://static.ewg.org/reports/2010/chrome6/chrome6_report_2.pdf. A similar class action suit was filed against Honeywell & PPG Industries in 2010. Smith v. Honeywell Int'l, Inc., No. 2:10-cv-03345, 2011 U.S. Dist. LEXIS 51854 (D.N.J. May 13, 2011).

93 NAT'L TOXICOLOGY PROGRAM, NTP TR 546, TECHNICAL REPORT ON THE TOXICOLOGY AND CARCINOGENESIS STUDIES OF SODIUM DICHROMATE DIHYDRATE (CAS NO. 7789-12-0) IN F344/N RATS AND B6C3F1 MICE (DRINKING WATER STUDIES) (July 2008), http://ntp.niehs.nih.gov/ntp/htdocs/LT_rpts/tr546.pdf; Press Release, Nat'l Institute of Health, Hexavalent Chromium in Drinking Water Causes Cancer in Lab Animals (May 16, 2007), http://www.nih.gov/news/pr/may2007/niehs-16.htm.

94 *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, PUBLIC DOCKET FOLDER, DRAFT TOXICOLOGICAL REVIEW OF CHROMIUM: IN SUPPORT OF SUMMARY INFORMATION ON THE INTEGRATED RISK INFORMATION SYSTEM (IRIS), EPA-HQ-ORD-2010-0540, http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;D=EPA-HQ-ORD-2010-0540 (last visited Jan. 10, 2013).

95 *Id.* As a result of the fraudulent study, the Journal pulled it from publication and issued a letter regarding the incident. P. Brandt-Rauf, Editorial Retraction, *Cancer Mortality in a Chinese Population Exposed to Hexavalent Chromium in Water*, 48(7) J. OCCUPATIONAL & ENVTL. MEDICINE 749 (2006).

96 *See* ENVIRONMENTAL WORKING GROUP, CHROME-PLATED FRAUD: HOW PG&E'S SCIENTISTS-FOR-HIRE REVERSED FINDINGS OF CANCER STUDY (2005), http://www.ewg.org/book/export/html/8626.

97 Letter from Ann Mason, Senior Director, Am. Chemistry Council, to Rebecca Clark, Acting Director, Nat'l Ctr. for Envtl. Assessment, U.S. Environmental Protection Agency (Dec. 23, 2010), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2010-0540-0027 (select the pdf icon by "view attachment" to download the attached file). American Chemistry Council's Hexavalent Chromium Panel funded this new, $4 million study, which was conducted by Tox Strategies and a team of scientists with ties to industry. According to ACC's website, "The panel's primary activities include sponsoring research to fill the scientific database informing the risk levels for hexavalent chromium in drinking water and communicating the findings of this research." *Hexavalent Chromium*, AmericanChemistry.com, http://www.americanchemistry.com/HexavalentChromium. ACC also began a letter writing campaign from industry organizations to EPA asking the agency to delay its assessment until the new industry study is complete. *See, e.g.*, E-mail from Randy Schumacher to Kevin L. Bromberg (Sept. 15, 2011) (attaching several letters from trade associations all asking EPA Administrator Lisa Jackson to postpone the IRIS assessment of chromium until ACC completes its ongoing research project and EPA has had an opportunity to consider the data).

98 U.S. ENVIRONMENTAL PROTECTION AGENCY, PUBLIC DOCKET FOLDER, *supra* note 94.

99 *IRISTrack Detailed Report: Chromium VI Assessment Milestones and Dates*, U.S. Envtl. Protection Agency, http://cfpub.epa.gov/ncea/iristrac/index.cfm?fuseaction=viewChemical.showChemical&sw_id=1114 (last updated Jan. 8, 2013).

Advocacy Involvement

The Office of Advocacy became involved in the debate about the cancer risks of ingesting chromium after being contacted by the same ACC lobbyist who had urged Advocacy to become involved in the debate about formaldehyde risks.[100] In June 2011, the lobbyist suggested Advocacy staff write a letter to EPA asking that it delay completion of the chromium assessment until after the ACC study had been completed.[101] The request did not mention any small business concerns.

Advocacy did not attempt to research or validate the ACC's position on chromium. Staff at the Office of Advocacy did ask if there was evidence showing a link between chromium-laced drinking water and cancer and was assured that new industry-funded research would answer these questions.[102] This apparently satisfied Advocacy staff.[103]

Staff at the Office of Advocacy also asked if any small businesses were affected by the chromium risk assessment. ACC assured Advocacy that they were, and Advocacy staff asked no more questions.[104] No small business contacted the Office of Advocacy to challenge the IRIS chromium assessment. A few small businesses filed comments with EPA on the IRIS chromium assessment, echoing the comments already filed by ACC asking EPA to delay the IRIS assessment until after completion of ACC's new study.

On Oct. 5, 2011, Advocacy submitted a letter to EPA expressing the concerns of "small business representatives" over EPA's IRIS evaluation that hexavalent chromium is carcinogenic.[105] The Office of Advocacy went on to claim that EPA did not have sufficient data to estimate the risk from ingestion of chromium and argued that EPA should not rely on a linear model to estimate the cancer risks of exposure to low doses of chromium. The Office asked EPA to delay its final assessment until a new industry study was completed and its results incorporated into the assessment.

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100 E-mail from Randy Schumacher to Bruce E. Lundegrun (Feb. 3, 2011) ("May I impose on you to help arrange a meeting with your Advocacy Office colleagues who handle environmental issues? The Senate EPW Committee held a hearing on drinking water contaminants yesterday at which Administrator Jackson testified. My interest in setting up the meeting has been raised substantially as a result of her testimony. As you may recall, I represent the American Chemistry Council's Hexavalent Chromium Panel, and Cr6 was one of the topics of the hearing.").

101 E-mail from Randy Schumacher to Kevin L. Bromberg (June 28, 2011) ("I would like you to be aware EPA's Cr6 risk assessment is moving forward apparently without waiting for ACC's MOA and PK studies to be completed and accepted for publication, notwithstanding the agency's own peer reviewers strong recommendation. NFIB recently sent a letter to Administrator Jackson calling upon her to stop the Cr6 risk assessment process to do exactly as EPA's peer reviewers deemed advisable. . . .Since it appears EPA needs to hear from more constituents for it to listen to its own peer review team, would SBA be willing to send a letter to Ms. Jackson to weigh in on this matter?").

102 E-mail from Kevin L. Bromberg to Jeff Hannapel, Steve Via, and Randy Schumacher (Feb. 25, 2011) ("Birnbaum told the committee that studies, other than EWG, have found a 'statistically significant association between hexavalent chromium in drinking water and cancer.' Does anyone have these studies , or the references to these studies?"); E-mail from Randy Schumacher to Kevin L. Bromberg (Feb. 25, 2011) ("ACC's research is examining why this occurs and whether Cr6 at low doses (consistent with existing drinking water standards) has the same carcinogenic effects and mode if [*sic*] action. . . .").

103 E-mail from Kevin L. Bromberg to Randy Schumacher (Feb. 25, 2011) ("thx.") (responding to chain of e-mails on the association between hexavalent chromium in drinking water and cancer).

104 E-mail from Kevin L. Bromberg to Ann Mason and Randal Schumacher (Oct. 3, 2011) ("Since this is the oral ingestion standard, is this toxicological review even relevant to platers, like NAMF? Isn't that only inhalation risk – and a separate risk assessment, that I believe is under development? Isn't this review solely of interest to drinking water suppliers?"). Reply e-mail from Ann Mason to Kevin L. Bromberg and Randal Schumacher (Oct. 3, 2011) ("Yes the oral tox review will impact drinking water systems AND will impact all cleanup and possible effluent standards. So the industries interested in the Cr6 oral tox review include all of the Cr6 user industries, including all industries that do plating or use chromium.").

105 Letter from Winslow Sargeant, Chief Counsel for Advocacy, and Sarah Bresolin Silver, Assistant Chief Counsel, Office

The ACC lobbyist provided the Office of Advocacy with these talking points and edited its draft letter to EPA.[106] Advocacy's final letter to EPA precisely mirrors the text forwarded to it by the ACC and is remarkably similar to ACC's comments to EPA.[107]

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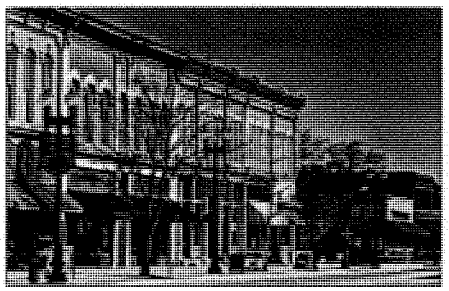
of Advocacy, to Paul Anastas, Assistant Adm'r, U.S. Environmental Protection Agency (Oct. 5, 2011), http://www.sba.gov/advocacy/816/27201.

106 *See* E-mail from Randy Schumacher to Kevin L. Bromberg (Sept. 15, 2011) (attaching several letters from trade associations all asking EPA Administrator Lisa Jackson to postpone the IRIS assessment of chromium until ACC completes its ongoing research project and EPA has had an opportunity to consider the data); E-mail from Kevin L. Bromberg to Ann Mason and Randy Schumacher (Oct. 3, 2011) ("Ann, Randy – a question on Cr 6: 'Initial results show that Cr(VI) is not mutagenic at low [ ] and that the human stomach has a substantial ability to reduce Cr(VI) to the benign chromium-3. Confirmation of a threshold would mean that there is no cancer risk at low doses, contrary to the current EPA model.' Would you edit these sentences – or is this accurate?"); E-mail from Randy Schumacher to Ann Mason (Oct. 3, 2011) (providing his suggested edits to Kevin Bromberg's text); E-mail from Ann Mason to Randal Schumacher and Kevin L. Bromberg (Oct. 3, 2011) ("This text is ok with me as edited by Randy. Note that some of the EPA peer reviewers were particularly emphatic about this point. Kevin, did you want/need to include a quote from them?"); E-mail from Kevin L. Bromberg to Randal Schumacher and Ann Mason (Oct. 3, 2011) ("Can you get some good quotes from scientists not named in the NRDC letter? Also, is there a good argument about the gastric issue that you could offer?").

107 Letter from Winslow Sargeant, Chief Counsel for Advocacy, and Sarah Bresolin Silver, Assistant Chief Counsel, Office of Advocacy, to Paul Anastas, Assistant Adm'r, U.S. Environmental Protection Agency (Oct. 5, 2011), http://www.sba.gov/advocacy/816/27201; U.S. ENVIRONMENTAL PROTECTION AGENCY, PUBLIC DOCKET FOLDER, *supra* note 94.

4. Did the Office of Advocacy's Actions Really Serve the Interests of Small Businesses?



Like most Americans, we believe a vibrant small business sector supports a more resilient economy. The assistance the Small Business Administration provides to small business owners is an important public service, increasingly so when markets are dominated by large corporations. The mission of the Office of Advocacy is to ensure that other federal agencies consider small business concerns.

However, this investigation reveals that, rather than aligning its mission with the work of other federal agencies, the Office of Advocacy actually worked with large business interests to obstruct and delay the work of at least two agencies tasked with protecting the health and safety of the American people. One part of government should not be working to undermine the efforts of another.

The correspondence into and out of the Office of Advocacy that we have examined paints a picture of a federal agency extremely responsive to the agenda of trade associations dominated by big chemical manufacturers and their lobbyists. No small business asked the Office of Advocacy to intervene with the NTP Report on Carcinogens or the EPA IRIS assessments of cancer risks. Advocacy's comments on these assessments offered no small business perspective to NTP or IRIS. No small business filed an independent comment critical of the formaldehyde and styrene assessments; a few small businesses did comment on the chromium assessment. In each case, the Office of Advocacy made no attempt to determine whether the views of the American Chemistry Council, the American Composite Manufacturers Association, or the Formaldehyde Council actually represented the views or interests of small businesses.

The Office of Advocacy's close coordination of its efforts with lobbyists seeking legislation to obtain the same results suggests its staff engaged in impermissible lobbying. Advocacy's efforts to block the NTP and IRIS assessments were initiated by the American Chemistry Council and groups or lobbyists associated with it. ACC is made up of 140 chemical companies; it claims that 70 of its members are "small and medium sized businesses" but doesn't specify what it means by "small" or "medium." Its membership is dominated by the largest chemical companies in the country, including Dow, DuPont, Exxon Mobil, Georgia-Pacific, and more. Its federal lobbying expenditures in the fourth quarter of 2011 were the fifth highest of any group filing lobbying reports. Its Formaldehyde Panel is funded by Georgia-Pacific and Hexion, both large companies. Dow is a major player in both ACC and the Styrene Information and Research Council. ACC's Chromium Panel succeeded the Chrome Coalition. There is no evidence of any small business role in any of the ACC coalitions.

This is not surprising since small businesses do not share the anti-regulatory views of large chemical companies. A survey by the American Sustainable Business Council concluded that:

> Organizations like the American Chemistry Council have made anti-regulation legislation in Congress and state legislatures a top priority, pushing the myth that all regulations are a threat to small business growth .... But the reality is that small business owners see the value of sound regulations to help guide the market to deliver innovation for safer chemicals and products, which consumers are demanding. This data shows that no matter what your political affiliation is, there is agreement that toxic chemicals need to be regulated to prevent risk for business and the public.[108]

Even the Office of Advocacy's own research shows that challenging cancer assessments is simply not a priority of actual small business owners. According to an initiative to identify the interest of small business (referred to as the r3 initiative[109]), the top regulatory issues of concern to small business related to their ability to compete against large businesses for government contracts; EPA rules, particularly its "Once in, Always in" policy,[110] were also a concern. Advocacy received no nominations related to scientific assessments.[111]

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108 *Toxic Chemical Reform Good for Business—New Poll*, American Sustainable Business Council (ASBC) (Nov. 13, 2012), http://asbcouncil.org/node/845.

109 *Small Business Regulatory Review and Reform Initiative*, SBA Office of Advocacy, http://archive.sba.gov/advo/r3/. The r3 Initiative began under Chief Counsel for Advocacy, Tom Sullivan, but did not continue after he resigned in 2008. The initiative was designed to allow small businesses to nominate rules for review, which Advocacy would then review and publish as a top ten list in its annual RFA report. *Post Hearing Questions and Answers for the Record Submitted to Sen. Olympia Snowe by Winslow Sargeant, Jan. 25, 2011 (Next Steps for Main Street: Reducing the Regulatory and Administrative Burdens on America's Small Businesses: Hearing Before the U.S. Senate Committee on Small Business and Entrepreneurship* (Nov. 18, 2010)), *available at* http://www.sba.gov/advocacy/2675/14163; *see also New Small Business Program Will Influence Agency Regulatory Reviews*, OMB Watch (Sept. 11, 2007), http://www.foreffectivegov.org/node/3419.

110 *See* U.S. Environmental Protection Agency, Potential to Emit for MACT Standards -- Guidance on Timing Issues (May 16, 1995) for an explanation of the Once in, Always in air quality policy. http://www.epa.gov/ttn/caaa/t3/memoranda/pteguid.pdf.

111 *Regulatory Review and Reform (r3) Top 10 Rules, 2008 in* Report on the Regulatory Flexibility Act FY 2007: Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act and Executive Order 13272, at Appx. B (2008), *available at* http://www.sba.gov/sites/default/files/files/07regflx.pdf; *Regulatory Review and Reform (r3) Top 10 Rules, 2009*, SBA Office of Advocacy, http://archive.sba.gov/advo/r3/r3_nominations09.html#10. Although

Moreover, testimony at a recent joint hearing of the House Science Committee and Small Business Committee[112] suggests that small businesses may in fact *benefit* from stricter regulation of some toxic substances, because the prohibition of some chemicals may open up new markets for those who manufacture "green" substitutes. The Vice President of BioAmber, Ally Latourelle, stated in her testimony that "recognition that styrene is 'reasonably anticipated' to be carcinogenic is not detrimental to our small business. In fact, for our business, as an alternative to petrochemicals, and the developers of non-toxic styrene replacement products, reports published by government on the toxicology of chemicals and regulations of those chemicals is a driver to our business as well as our strategic partners in the area of chemical production and manufacturing."[113] Apparently, the Office of Advocacy never inquired about these issues.

Advocacy's website indicated that it was accepting nominations until December 31, 2010 for its 2011 r3 initiative, the r3 Top Ten list has not been published in the RFA since 2009.

112 *Hearing on Report on Carcinogens, supra* note 82 (statement of Ally Latourelle, Vice President, Gov't Affairs, BioAmber, Inc.).

113 *Id.*

5. Conclusions

The Regulatory Flexibility Act assigns to the Office of Advocacy responsibility for ensuring that federal agencies evaluate the impacts on small businesses of the rules they adopt. Cancer risk assessments are not covered by the Regulatory Flexibility Act. They do not regulate small business. The Office of Advocacy had no reasonable basis for becoming involved in the NTP or IRIS assessments.

The Office of Advocacy's decision to comment on technical, scientific assessments represents a significant and unwarranted expansion of its role and extends its reach well beyond the regulatory process. By its own admission, Advocacy lacks the scientific expertise to evaluate the merits of the NTP/IRIS assessments. Advocacy's comments on these assessments raised no issues of specific concern to small business but relied almost exclusively on talking points provided by trade associations engaged in major lobbying campaigns.

Between 2005 and 2012, the American Chemistry Council and its members spent more than $333 million lobbying Congress and federal agencies.[114] The Formaldehyde Institute/ Council, Styrene Industry Research Council, and Chrome Coalition spent millions of dollars in a protracted lobbying campaign to prevent government agencies from designating these substances as carcinogenic and tens of millions more on research carefully designed to support their claims that these substances do not cause cancer in humans. These groups asked the Office of Advocacy for assistance, and the Office became a willing partner in these lobbying efforts.

The Office of Advocacy's efforts to block the NTP and IRIS assessments came amid efforts by the ACC to win congressional approval of legislation overhauling the NTP and IRIS assessment processes. Both ACC and Dow Chemical lobbied Congress to delay publication of the Report on Carcinogens until the National Academy of Sciences conducted yet another review.[115] Rep. Denny Rehberg (R-MT) unsuccessfully pushed an appropriations rider to do just that.[116]

Besides the moral and ethical concerns raised by efforts to keep substances known to cause cancer on the market and in wide use, the activities of the Office of Advocacy are disturbing because they may be illegal. Civil and criminal laws bar federal employees from lobbying. While the Government Accountability Office admits that lobbying restrictions are "unclear and imprecise," the Comptroller General has said anti-lobbying laws prohibit providing "administrative support for teh [*sic*] lohbying activities of private organizations."[117]

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114 Jeremy P. Jacobs, *Industry Group Boosted Political Spending Last Year – And it Paid Off*, E&E Daily (Feb. 7, 2012), http://www.eenews.net/public/EEDaily/2012/02/07/1.

115 *See* Sass, *supra* note 47.

116 COMMITTEE ON APPROPRIATIONS, *supra* note 48.

117 U.S. GENERAL ACCOUNTING OFFICE, GAO/T-OGC-96-18, TESTIMONY BEFORE THE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT, HOUSE OF REPRESENTATIVES: H.R. 3078, THE FEDERAL AGENCY ANTI-LOBBYING ACT; STATEMENT OF ROBERT P. MURPHY, GENERAL COUNSEL, GENERAL ACCOUNTING OFFICE (1996), *available at* http://gao.justia.com/department-of-the-interior/1996/5/h-r-3078-the-federal-agency-anti-lobbying-act-t-ogc-96-18/T-OGC-96-18-full-report.pdf; *Lobbying and Publicity or Propaganda Guidelines: Appropriations Act Riders*, Nat'l Institute Of Health Ethics Program, http://ethics.od.nih.gov/

Our investigation raises serious questions about the lack of oversight of the Office of Advocacy's actions. The Office's activities are not reviewed by the administrator of the Small Business Administration or the White House. Congress has conducted no oversight hearings on the Office in more than 25 years, and GAO has not investigated the Office's activities.

Specific Findings and Recommendations

The Office of Advocacy submitted comments regarding three widely used chemicals, objecting to cancer assessments by the National Toxicology Program and the Environmental Protection Agency's Integrated Risk Information System, even though no federal regulation was at stake. These actions were not authorized by the Regulatory Flexibility Act and improperly expanded the Office of Advocacy's jurisdiction into areas in which it has no expertise.

- Recommendation: The Office of Advocacy should limit its work to regulatory activities affecting small business, as authorized by the Regulatory Flexibility Act and subsequent laws.

The Office of Advocacy hosts regular Environmental Roundtables attended by trade association representatives and lobbyists. The discussions and minutes are kept secret, although the consensus positions that emerge appear to inform the Office of Advocacy's policy positions. These meetings violate the spirit, and perhaps the letter, of the Federal Advisory Committee Act.

- Recommendation: Congress should ask GAO to investigate whether the Office of Advocacy's Environmental Roundtables violate Federal Advisory Committee Act provisions.

The Office of Advocacy staff made no effort to educate themselves on the science underlying the debates about the cancer risks of these chemicals or to verify the accuracy of the talking points provided to them by industry lobbyists before filing comments critical of the NTP/IRIS processes and the scientific conclusions in each assessment.[118] Instead, the Office of Advocacy simply repackaged and submitted talking points provided by trade association lobbyists as formal comments.

- Recommendation: The Office of Advocacy should independently verify the factual claims it makes in comments to other federal agencies and should not comment on technical or scientific matters on which its staff have no expertise.

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topics/Lobby-Publicity-Guide.htm#Footnote (last updated Feb. 18, 2011). A 2009 investigation condemned the activities of a small unit inside the Department of Interior where communication between government staff and external parties "created the potential for conflicts of interest or violations of law." Rep. Rob Bishop (R-Utah) who had called for the investigation responded: "The ongoing, explicit, far-reaching coordination between special interest lobbying groups and [government staff] . . . is troubling . . . . This inappropriate meddling of private and public lobbying efforts is precisely the sort of thing I warned against . . . ." Bruce Hosking, *Role of BLM Employees Questioned in Federal Investigation*, Examiner.com (Oct. 8, 2009), http://www.examiner.com/article/role-of-blm-employees-questioned-federal-investigation.

118 In each of these cases (formaldehyde, styrene, and chromium), other federal agencies like OSHA, NIOSH, ATSDR also extensively reviewed their cancer risks. The Office of Advocacy made no effort to even compare the NTP or IRIS assessments to the work of other federal agencies.

Correspondence between the Office of Advocacy and trade associations dominated by large chemical companies and their lobbyists suggests the Office became entangled in a major lobbying campaign to prevent the federal government from listing certain chemicals as known or probable carcinogens. E-mails suggest the Office of Advocacy may have violated the Anti-Lobbying Act and other lobbying restrictions.

- Recommendation: Congress should ask GAO to investigate whether the activities of the Office of Advocacy represent impermissible lobbying by federal employees.

No small businesses objected to the scientific assessments or asked the Office of Advocacy to intervene in the cancer assessments. The Office of Advocacy made no effort to determine whether the positions it took represented small business views and interests. Moreover, since small businesses may produce substitutes for toxic chemicals, a cancer finding for existing chemicals could open up new markets for substitute chemicals produced by small businesses.

- Recommendation: The Office of Advocacy should develop procedures to verify that its policies represent the interests of small business. Its comments should be limited to offering a small business perspective that the regulating agency would not otherwise hear.

No process or procedures seem to be in place to ensure that the activities of the Office of Advocacy are consistent with, and do not work to undermine, the statutory responsibilities of other agencies.

- Recommendation: Congress should exert more rigorous oversight over the Office of Advocacy to ensure its work does not delay or prevent other federal agencies from fulfilling their statutory goals, especially those scientific and regulatory agencies tasked with protecting the health of the American people.

Center for
EFFECTIVE
GOVERNMENT
Formerly OMB Watch

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March 13, 2013

The Honorable Dave Schweikert
Chairman, Subcommittee on Investigations,
Oversight and Regulations
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Yvette D. Clarke
Ranking Member, Subcommittee on Investigations,
Oversight and Regulations
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Schweikert and Ranking Member Clarke:

On behalf of Associated Builders and Contractors (ABC), a national association of 72 chapters representing 22,000 merit shop construction and construction-related firms, I am writing in regard to the upcoming subcommittee hearing, "Regulating the Regulators – Reducing Burdens on Small Business."

As builders of our communities and infrastructure, ABC members understand the value of standards and regulations based on solid evidence, with appropriate consideration paid to implementation costs and input from affected businesses. It is important that federal agencies appropriately evaluate risks, weigh the costs and assess the benefits of regulations.

However, federal agencies today are exercising incredible power through rulemaking and guidance. They are able to operate relatively unchecked and unsupervised, especially during the early stages of the regulatory process. In addition, they often circumvent the will of Congress and the public by issuing regulations with poor or incomplete economic cost-benefit forecasting or other data analysis, instead of using the best and most accurate data that could have created more practical and sustainable rules and regulations. At a time when construction faces an unemployment rate greater than 15 percent, there needs to be greater accountability and transparency in the federal regulatory process.

One way the small business community has continued to have a voice in the regulatory process is through the Small Business Administration's Office of Advocacy (Advocacy). Due in large part to its independence, Advocacy has been able to reduce the regulatory cost of small businesses to comply with federal regulations, without undermining rulemaking objectives. In the fiscal year 2012, Advocacy reported that it saved small businesses more than $2.4 billion in new regulatory costs. The agency provides a voice to small businesses by submitting comments in response to proposed rulemaking, hosting public roundtables, presenting congressional testimony, engaging in interagency dialogue, filing amicus curiae, periodically reviewing existing regulations, and participating in Small Business Regulatory Enforcement Fairness Act (SBREFA) panels when convened by other federal agencies.

We appreciate your attention on the issue of regulatory reform and look forward to continuing to work with you on making the regulatory process more accountable and transparent for small businesses.

Sincerely,

Kristen Swearingen
Senior Director, Legislative Affairs

4250 North Fairfax Drive, 9th Floor • Arlington, VA 22203 • 703.812.2000 • www.abc.org

March 14, 2013

The Honorable Sam Graves
Chairman
Small Business Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable Nydia Velazquez
Ranking Member
Small Business Committee
U.S. House of Representatives
Washington, DC 20515

Chairman Graves and Ranking Member Velazquez,

We are writing to thank you for holding a hearing on the Office of Advocacy ("Advocacy") at the U.S. Small Business Administration (SBA). The Regulatory Flexibility Act of 1980 was designed to give small businesses a more effective voice in the regulatory process and Advocacy's role in implementing the Regulatory Flexibility Act (RFA) is an important one that deserves Congress's attention.

As you know, small businesses are the backbone of our nation's economy and great care must be taken to ensure they are not unduly burdened by federal regulations that may unnecessarily hamper their ability to create jobs and build communities. One of the first research reports released by Dr. Winslow Sargeant as Chief Counsel for Advocacy showed that small businesses are disproportionately affected by federal regulations.[1] The study found that small businesses spend more than $8,000 per employee annually to comply with federal regulations. In fact, the study concluded that complying with federal regulations costs small businesses 36 percent more than it docs for businesses that employ 500 or more employees. Advocacy works every day to try and create a more level playing field on which small businesses can compete.

Advocacy advances the interests of small businesses in the development of federal regulations by ensuring that the requirements set forth by the Regulatory Flexibility Act of 1980,[2] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996,[3] are met. Advocacy reviews the regulatory flexibility analysis or certification prepared by federal departments and agencies, submits comments on proposed rules, hosts roundtables to solicit comments from small business entities, presents congressional testimony, engages in interagency dialogue, files *amicus curiae*, periodically reviews existing regulations, and participates as a panel member on SBREFA panels when convened by the respective federal agency. In our

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[1] Nicole V. Crain and W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, U.S. Small Business Administration, Office of Advocacy-sponsored research (September 2010), at www.sba.gov/advo/research/rs371tot.pdf .
[2] Pub.L.No.96-354, 94 Stat. 1164 (1981).
[3] Pub.L.No. 104-121, 110 Stat. 857 (1996), codified as amended at 5 U.S.C. Sec. 601-612.

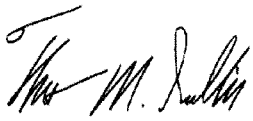
experience, Advocacy fulfilled those duties by focusing exclusively on representing small entities and by going to great lengths to solicit input from organizations that represent small businesses. We provided agencies with small business input that we were able to obtain because Advocacy has a better trust relationship with small business advocacy organizations than many federal regulatory and enforcement agencies. It is our belief that this practice continues and regulatory agencies benefit tremendously from Advocacy's engagement with the small business community.

The need for Advocacy to represent the interests of small businesses in the development of federal regulations is arguably more important now than it was when we were Chief Counsels. One report shows that at the end of 2012 there were 854 regulations under development at federal agencies that will impact small businesses.[4] The last time the number of rules under development with small-business impacts exceeded 800 was more than 10-years ago.

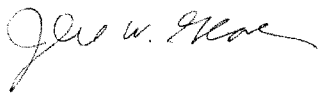
At a time when our economy is still seeking to fully recover and our nation is counting on small businesses to hire new employees in order to bring the unemployment rate down, we must be sensitive to how federal regulations impact small business. Advocacy's role is to ensure that agencies reflect that sensitivity in their rulemakings.

We greatly appreciate the Committee's attention to these important issues.

Sincerely,



Thomas Sullivan
Chief Counsel for Advocacy
2002-2008



Jere Glover
Chief Counsel for Advocacy
1994-2001

[4] Wayne Crews, *Small Business Regulations Surge Under Obama, Forbes* (February 6, 2012) at http://www.forbes.com/sites/waynecrews/2013/02/06/small-business-regulations-surge-under-obama/ .

NAMA
Serving the Vending, Coffee Service and Foodservice Management Industries

March 11, 2013

The Honorable Sam Graves
Chairman, Committee on Small Business
Unites States House of Representatives
2361 Rayburn House Office Building
Washington, DC 20515-6315

RE: Regulatory Flexibility Act (RFA)

Dear Chairman Graves,

It has recently been brought to my attention that the Committee on Small Business Subcommittee on Investigations, Oversight and Regulations will be conducting a hearing on March 14, 2013 to examine agency compliance with the Regulatory Flexibility Act (RFA) and to highlight issues to be addressed through future congressional activity. On behalf of the National Automatic Merchandising Association (NAMA), I would like to submit this letter for the hearing record.

As you may be aware, NAMA is the leading voice of the $42 billion vending and refreshment services industry. Founded in 1936, NAMA is comprised of over 1,700 industry suppliers, operators, equipment manufacturers and service providers, including many of the world's most recognized brands. The vending and refreshment services industry provides jobs for more than 700,000 hardworking Americans. NAMA members also include many small, multi-generational family-owned businesses, with three or fewer employees.

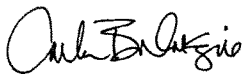
Due to the large number of these small enterprises, it is important for the federal government to apply principles of flexibility and awareness when issuing regulations that affect our industry. The RFA provides this flexibility and awareness by requiring agencies to consider the impact of their regulatory proposals, and to analyze alternatives that minimize the impact of regulations on small business. Also, by allowing public comment, small business people are given the opportunity for input regarding the effects the proposed regulations could have on their operations.

Our industry is appreciative of the RFA's recognition that small businesses have needs that may be different from larger business entities. We believe that it has led to greater sensitivity to small businesses when drafting proposed regulations. For example, in recent comments to the Food and Drug Administration (FDA) regarding proposed rules for calorie disclosure on vending machines, NAMA strongly supported the FDA's attempt to allow maximum flexibility in how disclosure can take place, and the Agency's attempt to minimize the economic impact to small businesses.

The National Automatic Merchandising Association • www.vending.org
Headquarters 20 North Wacker Drive, Suite 3500 • Chicago, IL 60606-3102 • Voice 312/346-0370 • Fax 312/704-4140
Eastern Office 1600 Wilson Blvd., Ste. 650 • Arlington, VA 22209 • Voice 571/346-1900 • Fax 703/836-8262
Southern Office 2300 Lakeview Parkway, Suite 700 • Alpharetta, GA 30009 • Voice 678/916-3852 • Fax 678/916-3853
Western Office 150 South Los Robles Avenue, Suite 830 • Pasadena CA 91101 • Voice 626/229-0900 • Fax 626/229-0777

Thank you for allowing NAMA the opportunity to provide our input on the importance of RFA, specifically with regard to our small business members. We look forward to working with the Committee and federal agencies to promote the specific needs of small businesses within the vending and refreshment services industry.

Sincerely,



Carla Balakgie, FASAE, CAE
President and CEO
NAMA

NFIB
The Voice of Small Business.

March 11, 2013

The Honorable Sam Graves
Chairman
Committee on Small Business
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Graves:

The National Federation of Independent Business (NFIB) appreciates the opportunity to submit this letter for the record to the Committee on Small Business for the hearing entitled "Regulating the Regulators – Reducing Burdens on Small Business."

NFIB is the nation's leading small business advocacy organization representing over 350,000 small business owners across the country, and we appreciate the opportunity to provide our perspective on how the Regulatory Flexibility Act (RFA) helps small businesses.

Excessive and complex regulatory burdens continue to be a hardship for many small business owners across America. In NFIB's most recent *Small Business Economic Trends*, released today, small-business owners ranked "government requirements and red tape" as the most important problem facing their business, in a tie with taxes.[1] More than one in five respondents cited regulation as the biggest issue.

Furthermore, a U.S. Small Business Administration's Office of Advocacy study found in 2010 that regulatory compliance costs small businesses 36 percent more per employee per year than their larger counterparts.[2]

Small businesses operate on thin margins. Mandating that a small business install an expensive piece of equipment or take on a burdensome process that makes their company less efficient affects a business's ability to either retain or grow jobs. Regulation is indeed necessary, but its impacts need to be studied carefully.

The RFA has been a critical tool to ensuring that rules are not simply "one-size-fits-all." Coupled with its amending law, the Small Business Regulatory Enforcement Fairness Act (SBREFA), the RFA requires agencies to analyze their rules' impact on small business and encourages regulations that meet agency goals while minimizing the compliance burden.

The law and its ideals have traditionally been supported by both parties. The RFA itself was signed by President Carter. SBREFA was signed by President Clinton. Executive Order 13272,

[1] http://www.nfib.com/research-foundation/surveys/small-business-economic-trends
[2] http://www.sba.gov/advo/research/rs371tot.pdf

which helped further ensure the proper consideration of small entities in agency rulemaking, was signed by President George W. Bush.

The analyses provided for under the RFA give agencies the opportunity to further understand how their rules affect small businesses. By attaining this understanding on the front end of the rulemaking process, agencies can actually save time by getting a rule right the first time rather than having to make corrections after a rule has been finalized.

As the government agency in charge of implementing many elements of the RFA, the U.S. Small Business Administration's Office of Advocacy (Advocacy) has likewise played a critical role in helping to reduce the regulatory burden on small firms. Advocacy is uniquely positioned within the federal government to work with agencies on commonsense fixes to complex regulatory schemes that provide small businesses the relief they need while meeting agency objectives. Advocacy works with small businesses to ensure that it truly represents the concerns of those employers that are disproportionately burdened by regulation. In FY 2012 alone, Advocacy saved small businesses $2.4 billion in initial-year regulatory compliance costs[3].

NFIB could not be more supportive of the RFA and SBREFA, and how Advocacy carries out its responsibilities under these laws. Without them, small businesses, which continue to be burdened by excessive regulation, would surely be worse off. We encourage the Small Business Committee to ensure agency compliance with the RFA, and to strengthen it by giving Advocacy greater authority over implementing it.

NFIB appreciates the opportunity to share the views of our members regarding the RFA and looks forward to working with the Committee to improve the regulatory environment for small business owners.

Sincerely,

Susan Eckerly

Susan Eckerly
Senior Vice President
Public Policy

[3] http://www.sba.gov/sites/default/files/files/FIN_12regflx.pdf, pp. 3.

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March 14, 2013

The Honorable Sam Graves,
Chairman, House Committee on Small Business
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The National Roofing Contractors Association commends you and other members of the House Small Business Committee for holding a subcommittee hearing entitled "Regulating the Regulators – Reducing Burdens on Small Business." The impact of burdensome and often counterproductive regulations on roofing industry entrepreneurs has been a major concern of NRCA for many years. We look forward to working with you and other members of the committee to address this issue through the passage of regulatory reform legislation.

Established in 1886, NRCA is one of the nation's oldest trade associations and the voice of professional roofing contractors worldwide. NRCA has approximately 4,000 members in all 50 states who are typically small, privately held companies, with the average member employing 45 people and attaining sales of about $4.5 million per year.

The outlook for economic growth in the construetion industry, despite some progress in recent months, remains uncertain. NRCA fears that any hope of resuming significant job creation in the roofing industry could be jeopardized by an avalanche of federal regulations and their impacts on small businesses. Employers in the roofing industry face an unprecedented combination of regulations issued by the Occupational Safety and Health Administration (OSHA), Dept. of Labor, National Labor Relations Board and other federal agencies. In addition, much uncertainty exists over the voluminous regulations to implement the Affordable Care Act which will impose new mandates on employers beginning next year. The cumulative burden of counter-productive regulations is highly disruptive to entrepreneurs seeking to start or grow a business.

Congress should take action to strengthen and improve current protections for small business in the regulatory process, such as the Regulatory Flexibility Act. Congress cannot create jobs but can provide employers with a less burdensome regulatory environment that facilities job creation.

NRCA is aware that this hearing will review the role of the Regulatory Flexibility Act (RFA), which requires certain federal agencies to consider the impact of proposed regulations on small businesses and consider the least burdensome alternative form of regulation. The RFA also established the Small Business Administration Office of Advocacy, which represents small businesses in the development of federal regulations. NRCA believes that the RFA and the Office of Advocacy have played crucial roles in protecting small businesses from intrusive regulations over the years. For example, the Office of Advocacy's work demonstrating how the Department of Homeland Security's 2007 Social Security Letter No-Match Rule would have been extremely burdensome for small employers was instrumental in having that regulation withdrawn in 2009.

As far back as 1996, NRCA was a major advocate for passage of the Small Business Regulatory Enforcement Fairness Act, which made important improvements to the RFA. Given the passage of time since the last major changes to the RFA, NRCA strongly believes that the law should be reviewed and strengthened in order to better ensure the concerns of small businesses are heard and considered throughout the regulatory process. Given the current explosion of regulation, it is obvious there are gaps in the law that need to be reformed so the RFA can again ensure the interests of small businesses are protected from burdensome regulations.

During the previous Congress, NRCA supported the Regulatory Flexibility Improvements Act (H.R. 527), which would strengthen protections for small businesses against intrusive government regulations by updating the RFA. This legislation would require regulators to conduct more comprehensive analysis of the impact of proposed regulations on job creation, consider the indirect impact of regulations on small businesses (in addition to direct impacts), and conduct economic analyses before issuing agency guidance documents. H.R. 527 also expands the existing small business advocacy review panel process and clarifies the standard for review of existing regulations by federal agencies. These and other reforms will greatly improve the process under which federal agencies analyze and develop new regulations.

H.R. 527 received significant bipartisan support when it was approved by the House in December, 2011, but unfortunately died in the Senate. NRCA urges Congress to move forward with this and other regulatory reform measures on a bipartisan basis to address the needs of small business in the current regulatory process.

Again, thank you for holding this hearing and considering NRCA's views on the issue of regulatory reform. NRCA looks forward to working with Congress in efforts to improve the federal regulatory process in order to minimize burdens on small businesses.

Sincerely,

Bruce M. Crory

Bruce McCrory
Kiker Corp., Mobile, AL
President, NRCA

March 12, 2013

Honorable Sam Graves
Chairman
U. S. House of Representatives
Committee on Small Business
Washington, D. C. 20515

Dear Mr. Chairman:

Thank you for convening the upcoming hearing of the Subcommittee on Investigations, Oversight and Regulations in the matter of "Regulating the Regulators – Reducing Burdens on Small Business."

NTCA–The Rural Broadband Association represents more than 800 providers of advanced communications infrastructure and services that are situated throughout rural America. Each one of these highly regulated entities are small businesses in the purest sense of the phrase, operating as locally owned and operated partners with the consumers and communities they serve.

Nevertheless, a multitude of entities with diverse abilities and resources operate in the American communications industry. To counteract the natural inclination to develop "one size fits all" approaches to policy, Congress and the President enacted the Regulatory Flexibility Act (RFA) in 1980. The RFA directs agencies to balance the societal goals tied to federal regulations with the needs of small businesses such as our members.

Though the RFA has been good for small business, we are often concerned that our industry's primary federal regulator, the Federal Communications Commission (FCC), often gives insufficient regard to the law and its mandate to thoroughly review the impact of proposed regulatory orders on America's small community-based communications providers. The RFA is supposed to force agencies to be creative with regulatory alternatives. Instead of conducting this analysis, agencies often summarily state that alternative regulation was considered and rejected.

In 2004 our organization sued the FCC over its new number portability obligations on telephone companies. The rules created costly new obligations and, in NTCA's opinion, were heavily skewed in favor of large competitive providers that can readily absorb the cost of new regulations. The court forced the agency to perform the required RFA analysis and NTCA and its members offered suggestions on lessening the burden of the rule while still accomplishing its goals. Ultimately, the FCC rejected or ignored the suggestions and NTCA sued again, arguing that the analysis was deficient. The court stated that the RFA's requirements are "purely procedural." It requires the agency to do no more than state and summarize issues and situations.

Because the FCC is an independent agency, it is largely not subjected to direct oversight by the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) as most other federal agencies are. The OIRA was created by Congress to review Federal regulations and reduce unnecessary burdens.

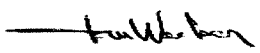
Further, the FCC is not required to comply with Executive Order 13272, which specifically deals with cooperation between the Small Business Administration's Office of Advocacy (OA) and other federal agencies regarding implementation of the RFA, or Executive Order 12866, which requires a cost benefit analysis for all significant rules. The OA is the independent voice for small business within the federal government and the watchdog of the RFA. The FCC's Office of Communications Business Opportunities is responsible for overseeing compliance with the RFA for every agency rule, but doesn't appear to work very closely with the various FCC bureaus until late in the regulatory process.

Should the committee determine legislative initiatives may be warranted to address such concerns, we offer the following suggestions:

- Codify the appropriate provisions of Executive Orders 13272 and 12866 to make them applicable to independent agencies in the same manner that they now apply to all other Executive agencies;
- Require all agencies to explain whether and how each rulemaking promotes and/or protects small businesses;
- Amend the RFA to require agencies to suggest and analyze alternatives that account for the nature and competitive position of small businesses when conducting rulemakings;
- Require regulatory entities to consult with the Small Business Administration's OA well in advance of rules being adopted and to specifically address any suggested additions or modifications;
- Provide the FCC's OCBO with specific authority and responsibility to require agency bureaus to coordinate regulatory initiatives with the office from the very conception of action on any proceeding.

Mr. Chairman, again we express our gratitude that you have seen fit to convene this hearing and we look forward to continuing to work with you and your committee colleagues to develop a regulatory environment that will give America's small businesses the confidence to invest and flourish.

Sincerely,



Tom Wacker
NTCA-The Rural Broadband Association
Vice President of Government Affairs

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Dave Osiecki
Senior Vice President
Policy and Regulatory Affairs

March 11, 2013

The Honorable Sam Graves
Chairman
Committee on Small Business
U.S. House of Representatives
1415 Longworth House Office Building
Washington, D.C. 20515

Dear Congressman Graves:

The American Trucking Associations (ATA), 950 N. Glebe Road, Arlington, VA 22203, is pleased to submit this letter in support of the Regulatory Flexibility Act (RFA). ATA, founded in 1933, serves as the nation's preeminent organization representing the interests of the U.S. trucking industry. Directly and through its affiliated organizations, ATA encompasses every type and class of motor carrier operating on our nation's highways.

Since its passage in 1980, the RFA has established a comprehensive process requiring federal agencies to balance the intent of proposed regulations with their potential impact on regulated entities, including small businesses. The RFA has not only resulted in federal regulatory agencies better understanding and weighing the potential costs and benefits of proposed and final regulations through impact analyses on small businesses, but it has also improved the transparency of the entire regulatory processes. As a result of the RFA, today federal agencies develop and publish annual Unified Regulatory Agendas, allowing private sector entities to better determine and analyze what potential rules are likely to have a "significant" impact on specific economic sectors.

Because the trucking industry is comprised primarily of small businesses, the RFA has been an important instrument in determining the potential impact and burden of proposed regulations on motor carriers. According to the U.S. Department of Transportation's, Federal Motor Carrier Safety Administration, there are approximately 500,000 motor carriers operating today. Of these motor carriers, 90.2 percent operate six or fewer trucks, and 97.2 percent operate fewer than twenty trucks[i].

Although the trucking industry generates over $600 billion in gross freight revenues and transports 67.0% of total domestic tonnage[ii], the vast majority of motor carriers generate less than $25.5 million in revenue, the SBA's threshold amount for defining an enterprise as a small business[iii]. As an essential and ubiquitous industry within the U.S. economy, trucking companies employ more than 3 million commercial truck drivers, and employ roughly 6.3 million people throughout the economy in jobs that relate to trucking (excluding self-employed).

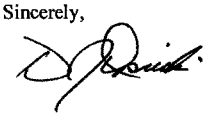
As a heavily regulated industry, ATA and motor carriers have worked incessantly, many times with the support of the SBA's Office of Regulatory Affairs, on a number of rules to reduce any potential adverse effects while seeking positive regulatory outcomes based on sound data, scientific research and risk-based approaches. For example, recent significant regulatory initiatives include the impact of:

- Hours of Service regulations impacting commercial truck drivers;
- The Compliance, Safety and Accountability (CSA) program;
- Multiple background checks and credentials required of truck drivers.

Again, the trucking industry is a strong supporter of the RFA as it has added important elements of management oversight, predictability and transparency to the federal regulatory process. Although the RFA does not compel specific regulatory outcomes, it requires agencies to assess the impacts of their proposed and final rules on small entities, and to select less burdensome alternatives – or explain why they cannot do so.

ATA and its members thank you for allowing us to express our support for the RFA and for your leadership on this important issue. We look forward to working with you and other members of the Small Business Committee in continuing to improve the federal regulatory process.

Sincerely,



David J. Osiecki
Senior Vice President

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[i] American Trucking Association's *American Trucking Trends, 2012*

[ii] Ibid.

[iii] Table of Small Business Size Standards Matched to North American Industry Classification System Codes; U. S. Small Business Administration; October 1, 2012; pg. 24

March 14, 2013

The Honorable Sam Graves
Chairman
Small Business Committee
U.S. House of Representatives
Washington DC 20515

Dear Chairman Graves:

Thank you for holding a hearing today to examine how the Office of Advocacy ("Advocacy") at the U.S. Small Business Administration (SBA) is effectively representing small businesses in federal rulemaking proceedings. As you know, Advocacy was given specific authority by the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203) to represent the views of small business in conjunction with rulemakings initiated by the Consumer Financial Protection Bureau (CFPB).[1] Advocacy is working with small business stakeholders and with the CFPB to ensure small business concerns are considered in CFPB rulemakings. On behalf of the undersigned small business organizations, we want to impress upon your Committee that more needs to be done to guarantee that the CFPB approaches rulemakings with the highest sensitivity towards the Bureau's impact on small businesses.

Advocacy has solicited the views of small business stakeholders by hosting six roundtables on CFPB regulatory proposals. At those roundtables, Advocacy encouraged CFPB officials to attend so they could hear concerns directly from small business stakeholders. Advocacy has submitted five public comment letters on four CFPB regulatory proposals to ensure the views of those small business stakeholders are part of the public comments that CFPB considers prior to deciding what form final rulemakings will take. Finally, Advocacy has participated in three Small Business Advocacy Review Panels that are required by the Small Business Regulatory Enforcement Fairness Act (SBREFA).

Advocacy's involvement has made a difference in sensitizing CFPB to its impact on the small business community. In CFPB's loan originator compensation rule, Advocacy was publicly critical of the Bureau's "zero-zero alternative" proposal that would have required lenders to offer a loan option with no discount points or origination fees.[2] Advocacy argued that the "zero-zero alternative" would not have been a viable option for small banks and the CFPB agreed. The "zero-zero alternative" was not included in the final rule.

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[1] Pub. L. No. 111-203, Section 1100 G, *Small Business Fairness and Regulatory Transparency*, (July 21, 2010).

[2] *Office of Advocacy Letter to The Honorable Richard Cordray, Director, CFPB re: 2012 Truth in Lending Act (Regulation Z) Loan Originator Compensation (Docket No. CFPB-2012-0037, RIN3170-AA13)*, pages 4-5 (October 16, 2012). Letter may be accessed at: http://www.sba.gov/advocacy/816/337341 .

In CFPB's mortgage servicing rule, Advocacy applauded the CFPB's exemption for small servicers. Advocacy helped convince the CFPB that an exemption for small servicers that service 5,000 mortgage loans or less was a better policy than CFPB's original proposal to exempt servicers that handle 1.000 mortgage loans per year.[3]

These are two examples of Advocacy's work to help CFPB minimize the regulatory burden on small entities while accomplishing the Bureau's regulatory objectives.

While Advocacy deserves credit for their work on small business issues, more needs to be done. We believe that the CFPB should do a better job disclosing how its regulations will impact the cost of credit for small businesses, a requirement under the Dodd-Frank law.[4] We also believe that the CFPB should convene a Small Business Advocacy Review Panel any time a regulatory proposal will negatively impact small entities. We believe that when there is a question of whether to convene a panel, the CFPB should err on the side of convening one. The CFPB is well advised to work closely with Advocacy to solicit and receive small business stakeholder input as early in the regulatory process as possible. That way, the CFPB can lessen the likelihood of issuing regulations that have unintended negative consequences on the small business sector.

Thank you for your Committee's attention to these important issues.

Sincerely,

Air Conditioning Contractors of America
American Bankers Association
American Composites Manufacturers Association
CHKB, LLC
Community Mortgage Lenders of America
Direct Marketing Association
Illinois Association of Mortgage Professionals
Institute for Liberty
International Franchise Association
IPC – Association Connecting Electronics Industries
Lorraine Enterprises
National Association for the Self-Employed
National Association of Independent Housing Professionals
National Association of the Remodeling Industry
National Black Chamber of Commerce

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[3] *Office of Advocacy Letter to The Honorable Richard Cordray, Director, CFPB re: 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal (Docket No. CFPB-2012-0034, RIN 3170-AA14) and 2012 Truth in Lending Act (Regulation Z) Mortgage Servicing Proposal (Docket No. CFPB-2012-0033, RIN3170-AA14),* Page 4 (October 5, 2012). Letter may be accessed at: http://www.sba.gov/advocacy/816/335841 .

[4] Pub. L. No. 111-203, Section 1100G (d)(1)(A).

National Federation of Independent Business
National Kitchen & Bath Association
National Lumber and Building Material Dealers Association
National Roofing Contractors Association
National Small Business Association
NJ-PMO
Painting & Decorating Contractors of America
Plumbing-Heating-Cooling Contractors--National Association
Rowley Company
Small Business & Entrepreneurship Council
Small Business Investor Alliance
Steeger USA
Team Builders International
The Capital Corporation
The Financial Services Roundtable
The Latino Coalition
The National Roofing Contractors
Truck Renting and Leasing Association
U.S. Chamber of Commerce
UpFront Mortgage Brokers

NARI®
NATIONAL ASSOCIATION OF
THE REMODELING INDUSTRY

March 14, 2013

The Honorable Sam Graves
Chairman
Small Business Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable Nydia Velazquez
Ranking Member
Small Business Committee
U.S. House of Representatives
Washington, DC 20515

Dear Chairwoman Graves and Ranking Member Velazquez:

On behalf of the National Association of the Remodeling Industry (NARI), I am writing to thank you for holding a hearing on reducing burdens on small business and for including the Chief Counsel for Advocacy at the U.S. Small Business Administration (SBA) as a witness. Through this letter, NARI would like to express its strong support for SBA's Office of Advocacy because of the office's work on behalf of small businesses that dominate the remodeling sector.

NARI is a non-profit trade association with national headquarters in Des Plaines, Illinois with 58 local chapters located in most major metro areas. NARI's core membership is comprised of 7,000 residential remodeling contractors, 80% of which have 20 employees or less.

Small businesses are the backbone of our Nation's economy and their ability to operate efficiently and free of unnecessary regulatory burdens are vital components of our country's economic recovery. Regulations emanating from the Affordable Care Act, the Dodd-Frank Law, changing federal tax provisions, and other statutes make the Office of Advocacy's mission more important now than ever before.

The Office of Advocacy has been particularly helpful in our dialogue with the U.S. Environmental Protection Agency (EPA). In December 2005, EPA proposed rules directed at remodeling and construction firms to protect pregnant women and young children from the hazards of lead paint during renovations in homes constructed before 1978. Although we provided constructive input to EPA, the agency's regulatory approach failed to recognize the role NARI plays in educating and training our members and educating our customers on lead-safe work practices. Additionally, EPA did not adequately demonstrate how the additional requirements levied on remodelers would reduce the risk of lead poisoning. NARI was worried that higher costs for remodeling jobs (it was estimated that EPA's rules would raise remodeling costs by 15 % and insurance costs by 28%) would lead to home owners hiring less professional contractors which would put children and pregnant women at greater risk of lead poisoning.

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Visit us on our website at www.RemodelToday.com and at http://nariremodelers.com

NARI®
NATIONAL ASSOCIATION OF THE REMODELING INDUSTRY

NARI's concerns about the costs of EPA regulations driving customers toward cheap alternatives to professional remodeling continue today. We feel as though we have a partner in SBA's Office of Advocacy when we try and communicate to EPA that there are more cost-effective ways to protect pregnant women and young children from lead paint hazards that can occur during remodeling jobs.

NARI greatly appreciates the Committee's activity to ensure small businesses are not crippled by unnecessary or unduly burdensome regulations. We are confident that your oversight will help SBA's Office of Advocacy do an even better job representing us and other organizations that are made up of small business members.

Sincerely,

Mary Busey Harris

Mary Busey Harris, CAE
Executive Vice President

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Visit us on our website at www.RemodelToday.com and at http://nariremodelers.com

NATIONAL RESTAURANT ASSOCIATION

March 12, 2013

The Honorable Sam Graves
Chairman
Committee on Small Business
U.S. House of Representatives
Washington D.C. 20515

The Honorable Nydia M. Velázquez
Ranking Member
Committee on Small Business
U.S. House of Representatives
Washington, D.C. 20515

Re: Support for Efforts to Examine Agency Compliance with the Regulatory Flexibility Act

Dear Chairman Graves and Ranking Member Velázquez:

The National Restaurant Association strongly supports the House Small Business Committee's efforts to examine agency compliance with the Regulatory Flexibility Act.

The National Restaurant Association is the leading business association for the restaurant and food service industry. The industry is comprised of 980,000 restaurant and foodservice outlets employing 13.1 million people who serve 130 million guests daily. Despite being an industry of predominately small businesses, the restaurant industry is the nation's second-largest private-sector employer, employing about 10 percent of the U.S. workforce.

Small businesses are the backbone of our nation's economy, and their ability to operate efficiently and free of unnecessary regulatory burdens is critical to our country's economic recovery. Research from a 2010 study released by the Small Business Administration Office of Advocacy illustrates that the small business community is disproportionately affected by burdensome federal regulations.

We appreciate the Committee's efforts to ensure that agencies are complying with the Regulatory Flexibility Act and thank you for your efforts to examine this critical issue. We look forward to continuing to work with you to advance this cause.

Sincerely,

Angelo I. Amador, Esq
Vice President
Labor & Workforce Policy

Ryan P. Kearney
Manager
Labor & Workforce Policy

Cc: Members of the House Committee on Small Business

March 12, 2013

The Honorable David Schweikert
Chairman
Investigations, Oversight and Regulations Subcommittee
Committee on Small Business
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Yvette Clarke
Ranking Member
Investigations, Oversight and Regulations Subcommittee
Committee on Small Business
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Schweikert and Ranking Member Clarke:

The National Retail Federation applauds your leadership in convening the Committee on Small Business Subcommittee on Investigations, Oversight and Regulations hearing titled, "Regulating the Regulators – Reducing Burdens on Small Businesses." The Regulatory Flexibility Act (RFA) is an important tool working to alleviate regulatory burdens for small retail businesses around the country.

As the world's largest retail trade association and the voice of retail worldwide, NRF's global membership includes retailers of all sizes, formats and channels of distribution as well as chain restaurants and industry partners from the United States and more than 45 countries abroad. In the U.S., NRF represents an industry that includes more than 3.6 million establishments and which directly and indirectly accounts for 42 million jobs – one in four U.S. jobs. The total U.S. GDP impact of retail is $2.5 trillion annually, and retail is a daily barometer for the health of the nation's economy.

More than 95 percent of retailers are small businesses operating one location and Main Street merchants, focused on growth and innovation. Over half of all retail establisbments employ fewer than five workers. Even the largest retailers work regularly with suppliers and vendors that are small businesses, driving job growth for all sectors of the economy. NRF enjoys a productive working relationship with the Small Business Administration's Office of Advocacy (OOA) on a variety of issues. This letter will discuss three examples of the OOA's commitment to small retailers' concerns.

NRF welcomed the OOA's February 25, 2011 letter to the Department of Transportation, Federal Motor Carrier Safety Administration (FSCMA) highlighting the significant burdens included in the Proposed Hours of Service of Drivers Rule. The OOA's letter included a robust reflection of small businesses concerns including the lack of support for the proposed rule in existing safety and health data, the reduction in flexibility and possible negative impact of the proposed rule on safety and driver health, and the operationally disruptive and costly impact of the proposed rule.

NRF appreciated the OOA's October 25, 2011 comment letter to the U.S. Securities and Exchange Commission (SEC) recommending the SEC publish an amendment initial regulatory flexibility analysis (IRFA) for the proposed conflict mineral rule. The OOA argued that the SEC's original IRFA did not accurately reflect the costs associated with compliance based on their meetings with small retailers and the SEC underestimated the number of small businesses that would be impacted by the proposed rule.

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www.nrf.com

As a final example, NRF participated in a Roundtable hosted by the Office to discuss impact of sales tax fairness legislation in May 2012. The SBA and the OOA have been involved in years of discussions about the impact of sales tax fairness legislation and the appropriate size of the bill's small business exemption, and they continue to have an important role in giving a voice to all small businesses around the country when legislation is being considered by Congress.

Thank you for your commitment to the small business community's concerns. We look forward to continuing to working with you on this issue.

Sincerely,

David French
Senior Vice President
Government Relations

cc: Members of the House Small Business Subcommittee on Investigations, Oversight and Regulations

March 13, 2013

The Honorable Sam Graves
Chairman
Committee on Small Business
United States House of Representatives
Washington, D.C. *(via electronic email)*

Dear Chairman Graves:

The Small Business & Entrepreneurship Council (SBE Council) strongly supports the Regulatory Flexibility Act (RFA). The RFA, even with its limitations, remains an effective tool in helping to mitigate the impact of burdensome regulation on our nation's small business owners and entrepreneurs. As you know, SBE Council and our 100,000 members continue to support efforts to strengthen and improve the RFA. The considerable increase in regulatory activity, along with inconsistency in how federal agencies follow the RFA, warrants greater accountability by the agencies as well as tools and procedures to strengthen the voice of small businesses in the rulemaking process.

From the beginning, the RFA and its intentions have enjoyed wide bipartisan backing. That's because common sense, along with what small business owners report, have justified action by Congress to protect entrepreneurs from the harmful consequences of overregulation. Research and data affirm this effect – that is, regulation has a disproportionate cost impact on small businesses and their ability to compete, create jobs and grow. The SBA's Office of Advocacy has captured this impact through its research, but so have the extensive findings of the small business community at large and the countless personal stories of entrepreneurs before your Committee and other House Committees.

Unfortunately, the RFA has not kept pace with the growth of the federal government and the extreme pace of rulemaking. According to the Office of Information and Regulatory Affairs (2012), there are 4,062 proposed federal regulations in the pipeline with more than 400 impacting small business. SBE Council supported the House-passed Regulatory

Flexibility Improvements Act of 2011 (H.R. 527) in the 112th Congress (which would strengthen and improve the RFA), along with other reform measures to hold federal agencies - and Congress – more accountable when it comes to regulations.

It is our hope that the hearing on March 14, "Regulating the Regulators – Reducing Burdens on Small Business," explores these issues and identifies solutions that will better protect small businesses and our economy from the high costs of too much regulation. We must strengthen the RFA. Again, it has been a useful tool that can be made even more effective through common sense changes.

Regulatory burden and threats, on top of the weak economic recovery and higher business and health coverage costs, continue to weigh heavily on America's small businesses. We look forward to our continued work with you and the Committee to identify solutions to help our small businesses grow and thrive in the competitive global economy.

Thank you for your leadership.

Sincerely,

Karen Kerrigan
President & CEO

○