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THE FISCAL YEAR BUDGET REQUEST FOR THE SMALL BUSINESS ADMINISTRATION

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

APRIL 17, 2013

Printed for the Committee on Small Business and Entrepreneurship

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THE FISCAL YEAR BUDGET REQUEST FOR THE SMALL BUSINESS ADMINISTRATION

TUESDAY, APRIL 17, 2013

UNITED STATES SENATE,
COMMITTEE ON SMALL BUSINESS
AND ENTREPRENEURSHIP,
Washington, DC.

The Committee met, pursuant to notice, at 10:07 a.m., in Room 428–A, Russell Senate Office Building, Hon. Mary L. Landrieu, Chair of the Committee, presiding.

Present: Senators Landrieu, Cardin, Shaheen, Cowan, and Risch.

OPENING STATEMENT OF HON. MARY L. LANDRIEU, CHAIR, AND A U.S. SENATOR FROM LOUISIANA

Chair LANDRIEU. Good morning, everyone. Thank you all for joining us this morning.

Administrator, please have a seat wherever you are comfortable. I thank all the members of the Small Business Administration that work so hard and are so committed to our country and to our economy.

Before we begin, I want to acknowledge that this is Administrator Mills's last budget hearing, unfortunately. She has served as a steady hand of this ship now for several years, and it has been my real honor, Administrator, and pleasure to work so closely with you as did our former ranking member of Olympia Snow, who was a dear friend and a wonderful colleague and a great partner on this Committee.

I thank you for strengthening this agency under your watch and focusing its resources on entrepreneurship and job creation. When you stepped into this job, you took over an agency that had atrophied due to lack of resources and, to some degree, leadership; but under your guidance, SBA transformed into a more effective federal champion for small businesses.

Your efforts were recognized last year when President Obama recommended that the SBA have a seat in the cabinet room. That is something that Senator Snow, Senator Kerry, and others of us that have served on this Committee for some time have advocated; and I think because of your outstanding performance and leadership, the President said yes to that long-standing request.

So now, small businesses have a seat where they belong in the cabinet room of the President of the United States when many issues of importance are being discussed about the economic future of the country. Congress is losing a talented and effective partner

and American's small businesses are losing a tireless advocate in Administrator Mills.

The next Administrator, which we hope will be equally amazing, will soon have some big shoes to fill, and I am hoping that the President will make his choice public so this Committee can get to its task of oversight on that appointment.

As I have said many times, there is nothing small about small business in America. According to the SBA, small businesses are responsible for employing roughly half of all working Americans. These entrepreneurs pump almost $1 trillion into the economy and have most interesting generated 60 to 80 percent of the new net jobs annually over the last decade as well as produce 14 times more patents than large businesses and universities.

Many of these small business owners rely on the SBA's 3 Cs. As you and I have made many speeches around the country, they need capital, counseling, and contracting programs to succeed to develop a business plan and get their businesses off the ground, meet their payrolls, buy equipment, or building to expand or compete in an increasingly competitive global marketplace.

In this year's fiscal year 2014 request for the SBA, the President has once again signaled his commitment to our Nation's nearly 28 million small businesses, submitting a strong and fiscally responsible budget of $810 million in funding for the agency plus another $192 million for disaster loans for the ongoing and multiple disasters that are still open.

While this represents a seven percent increase over the SBA's CR funding level, a significant portion, I am sorry, decrease, while this represents a seven percent decrease over the SBA's CR funding level, a significant portion of that decrease is happily because the 7(a) program no longer needs a subsidy. It is working well which is good news, and I will talk a little bit more about that in a minute.

Overall, I think this is a solid budget in a very tough budgetary times. We all wish we had more, but we have got to live within the constraints that have been set.

It makes investments in key SBA programs but there are other crucial programs that I would like to highlight that I believe deserve a bit more focus.

First of all, the sequestration. The importance of thoughtful and strategic budgeting is more apparent today as the agency continues to operate at those sequester funding levels. While we will not receive the final breakout of the SBA's spending plan under sequester until next week, if the full amount of the agency's five percent cut is applied equally across their programs, it will severely limit the ability to deliver services to small businesses at a time when we can ill afford to retreat.

The SBA has stated that the cuts in business loan subsidy programs will prevent more than 1900 loans to small businesses, and over 33,000 fewer clients will receive counseling from our Women's Business Centers, our Small Business Development Centers, and our volunteer 350 SCORE chapters that operate on a voluntary basis throughout the country.

It will also impact the resources the SBA has to combat fraud, waste, and abuse through its reviews of our important 7(a) and HUBZone programs.

The small business impacts from sequester are certainly not limited to the SBA. They can be felt across the government. Several weeks ago I sent a letter to more than 30 agencies requesting that they share with our Committee how their small business contracting goals will be affect by the budget cuts they have received. I am eager to receive those responses and work with federal agencies to mitigate the impact of these cuts.

As we know, much of government spending is not spent actually in-house. It is contracted out to many businesses that conduct the important work of the government and we want to make sure that the sequester cuts are not falling disproportionately on the small- to medium-sized businesses that are contracting with agencies of the Federal Government.

With that in mind, I am just going to walk through briefly the Committee's funding request for the three Cs—capital, contracting, and counseling; and then we will hear from our Administrator and the Chief Counsel of Advocacy.

My hope is that today's hearing will be a constructive discussion about making smart choices to fund programs that enable this agency to be successful in its core mission. This is a budget hearing. We are going to focus on the SBA budget.

The SBA has requested $107 million of credit subsidies for the business loan program for fiscal year 2014 to support $17.5 billion in lending for 7(a) and $7.5 billion for 504.

The biggest news in this budget for the capital access program is that there is no subsidy required. The program is operating on a self-sustained basis thanks to your administration and the recovery of the economy.

The subsidy request in the budget is exclusively for the 504 program. It is a program I strongly support. This request for $107 million is down slightly from $113 million but it leverages up to $7.5 billion in loans that are otherwise unavailable in the commercial market and have been a lifesaver to many businesses that are able to refinance and get their own equity out of the buildings that they are in, not government money, their own money, to advance the goals of their business. I strongly support this modest subsidy and I would urge my members to support as well.

I want to remind you of two exciting examples of this. One, something that you know very well if you shop like I do in the local market, Chobani yogurt.

The original founders of Chobani yogurt were immigrants to this country. They were in the feta cheese business. They saw a closed-down Kraft plant in a boarded-up town, not the whole town but boarded-up plant in Emerson, New York, which is in upstate New York which suffered terribly, I understand, in the recession.

They wanted to start a feta cheese factory. In the middle of it, decided to change it to yogurt and use their official, you know, old-fashioned, traditional yogurt recipe. The rest is history.

I mean Chobani yogurt is up and running. They literally took the entire supply of milk in New York, every dairy in New York could not, at a hundred percent, produce the milk necessary to produce

this yogurt. That is how successful this business is, and I am proud to say it was one of the recipients of one of those small business loans.

The business became so successful they ran through the dairy supply. The brothers were not able to obtain a loan from their conventional lender because the bank was not comfortable assuming all the risk on their own for a food production company.

Another success story is one from the now expired 504 refinancing program. It happened in Richmond, Virginia. Richmond Piano Rebuilders purchased their facility in 2006 with a loan. Their monthly payments became difficult to afford.

In 2012, despite the property retaining its value and threatening the company's ability to keep the facility, thanks to a 504 refinance loan of $863,000 which cost the taxpayers absolutely nothing, the company was able to reduce their payments by $50,000 a year.

I mean, these programs might seem small and inconsequential but $50,000 to a small business owner annually is a lot of money. These programs, when the leadership is right, as yours is, can really work to be helpful in partnership with our local lenders, banks and non-bank lenders.

Let me mention contracting real quickly, and it is appropriate that Senator Cardin has come in. He has been a champion of this effort. In 2011, the Federal Government awarded $91.5 billion or 21.65 percent of prime contracting dollars to small businesses.

To ensure infrastructures in place to reach our 23 percent goal—we were close but did not hit our goal—this budget smartly requests $4 million in additional funding to increase to increase the number of procurement centers which are called PCRs and Commercial Marketing Representative, CMRs in the field by adding 32 personnel.

I think this is a strategic, important move to help small businesses have an opportunity to contract with the Federal Government. In addition, there will be other requests associated with this and I will have the Administrator speak more specifically to that in her remarks.

Let me mention just a word about counseling which I feel very strongly about. The SBA has requested $198 million for its entrepreneurial development programs which provide critical technical assistance, counseling, training, and mentoring to entrepreneurs across the country.

Included in this request, the agency is seeking $40 million for entrepreneurship education which will support programs such as the very successful emerging leaders e200 Program, a popular and successful federal training initiative that specifically focuses on executives of businesses poised for growth. These are not startups, businesses that are poised for growth in traditionally challenged communities.

I support this initiative broadly, conceptually. I am very interested, Administrator, in hearing some more of your detail about how this would be rolled out, and I know that the Committee will be too. But I do applaud you for the partnerships that you have developed with private for-profit, not-for-profit, university-based, and community-based programs that are really pushing out, and some large companies like Google, Goldman Sachs, and others that are

really pushing out the training of entrepreneurs in America because that is, I think, a very wise investment in time, energy, and resources.

The SBA has also requested $700,000 to conduct an evaluation of the businesses in their technical assistance programs, and I want to underscore this for our members. We partner with over 1000 delivery service points to our small business programs all around the country. I want to make sure that we really are getting the most for our dollar.

Senator Shaheen, you were governor of your State. You understand that you can have a center, you can have several. We want to know if they are really working well and if there is something that we can do to enhance their performance. And, we cannot do that unless we can measure their performance initially. So, I have been really pushing you all for performance measures. So, I am happy to see that $700,000 in the budget to do just that.

While I support some of the funding for the administrative initiatives, I am concerned about some of these decreases. I just want to mention quickly. Small Business Development Centers are being reduced. Women's Business Centers are being reduced. And according to the SBA budget justification, with modest federal investment of $112 million, the SBDCs helped out 13,600 entrepreneurs start new businesses last year. So, we are going to go over these numbers very carefully.

SCORE which comprises over 13,000 volunteers, I want to underscore this, in approximately 350 chapters across the country I think represents the best possible investment for the $7 or 8 million that we get a SCORE they take that like the loaves and fishes and they distribute it around the country very modestly.

But for the bang for that buck by getting volunteers to mentor small businesses whether it is in Idaho or New Hampshire or Louisiana or Maryland, I think and I find the SCORE chapters very enthusiastic around the country and find by businesses that have been helped by them very grateful for their volunteer support. So, we are going to focus on that.

Finally, when it comes to trade and export promotion, Senator Shaheen has been a great leader on this Committee for understanding that because one percent of all American businesses export or one percent of small businesses export, what a great potential there is, Senator, for 99 percent of our other small businesses who now can tell about their products and export their products because of the Internet, because of technology, this was never possible before.

But with new technologies, you know, people in Idaho or Louisiana who just normally sold in their own little communities can now sell their products all over the world. But that expertise as to how to navigate some of those difficult rules and regulations or challenging rules and regulations is important.

So, the STEP program was not something that the Federal Government did. They were grants that we gave out to states and the feedback that we have gotten from governors and economic development departments have been, you know, just very enthusiastic.

I am sorry to see that the President in his budget zeroed out this program. So, I am going to be calling a meeting with some of the

governors, Republicans and Democrats, economic development initiatives to see or economic development leaders to see what we could do to restore a portion of this if, in fact, it is as effective as I have been told.

So, in closing, looking at this request, I am glad to see the Administration has once again made small business a top priority, not just with words but with actions reflected in his budget by adequately funding the SBA's successful programs, eliminating some that they did not think work as well, and we are going to have a little argument about that STEP program.

But we have two panels today that are going to give us a little bit more information on the budget that is before us and this is a budget hearing.

Let me close by turning to my Ranking Member for opening remarks. We will submit your statements for the record and go to the opening statement for the Administrator.

OPENING STATEMENT OF HON. JAMES E. RISCH, A U.S. SENATOR FROM IDAHO

Senator RISCH. Thank you very much, Madam Chairman. It is unfortunate that we are having a hearing on a budget that we all know will never become law; and if we are going to do things like this, it really ought to be pragmatic and dealing with something that actually is going to become law.

I want to be brief, and I am interested in hearing from the Administrator. I had a chance yesterday to review your comments on the Joe Scarborough program (MSNBC) last November where you indicated that you were not hearing from small businesses that Obamacare was devastating. I have got to tell you that I do not know who you talk to but it is entirely different than the businesses that I talk to.

So, one of the things that I am going to be focused on here, as we talk about the budget, is what the agency is going to do to help small businesses get out from underneath this healthcare burden.

This is not the bill [referencing large stack of regulations placed behind him]. These are the regulations that have resulted from Obamacare. The bill was only two feet tall. This, I understand, is over seven feet tall.

Small businesses all over the country are trying to find a way to get out from under this, just as all big businesses and medium-sized businesses are. The difference, of course, is that big- and medium-sized businesses have a gaggle of lawyers, accountants, and human resource officers who can help them to get out from under this.

The small businesspeople, of course, have less options. If they get people to work under 30 hours, they can get out from under this. If they trim their payroll to under 50 employees, they can get out from under this. I hear all the time from businesses who are doing just that.

So, you all know the SBA wants to help small businesses. Have you created something at the Agency to help the small businesses get out from underneath this, to get around it like big businesses and medium businesses are doing?

Thank you very much, Madam Chairman.

Chair LANDRIEU. Thank you. You all can submit statements for the record.

Administrator Mills, thank you so much for being here and we are ready to hear about your budget that I think is going to be before the Appropriations Committee, not this Committee for approval.

STATEMENT OF HON. KAREN MILLS, ADMINISTRATOR, U.S. SMALL BUSINESS ADMINISTRATION

Ms. MILLS. That is correct.

Thank you very much, Chair Landrieu, and Ranking Member Risch and members of the Committee. I am very pleased to be testifying before you today.

I want to first start by thanking this Committee for its ongoing support of the SBA and its support of America's 28 million small businesses and entrepreneurs.

The President's Fiscal Year 2014 budget is focused on job creation and accelerating our economic growth. We know where American jobs come from. Half of all the people who work in American either own or work for a small business. And these businesses create two out of every three net new private sector jobs in the United States.

The Fiscal Year 2014 budget makes strategic investments in America's small businesses. It fills the gaps in the market, particularly for small dollar loans, while supporting proven programs that fuel job creation, new business formation and American innovation. These are critical to a full and robust economic recovery.

It is important to note that due to the decreased subsidy costs for our 7(a) loan program, the SBA's 2014 budget reflects a savings $109 million from our 2012 budget.

Four years ago when I first appeared before this Committee, small businesses were struggling in the face of one of the worst economic environments since the Great Depression, and at the SBA, we rolled up our sleeves and we went to work. We eliminated fees, we streamlined programs, and in some cases, we took a hundred pages of paperwork out the loan products.

The results have been significant, including two record years in 2011 and 2012 of delivering over $30 billion in loans supported by our guarantees.

Our 2014 budget builds on these efforts. Three key initiatives are the elimination of fees for borrowers and lenders for all 7(a) loans under $150,000, an extension of the 504 refinance program, and a new program called SBA ONE, which creates a single platform for all 7(a) loans and allows borrowers to more easily complete lending forms.

The 2014 budget also invests the SBA's powerful counseling and mentoring network. These investments focus on the types of small businesses that are in the best position for job creation.

Expanding firms and startups. Expanding firms created 8.7 million jobs between March 2011 and March 2012. Our budget request $40 million for an intensive business leadership program that provides the skills training to help more of these established businesses to successfully scale of their operations and create more

jobs. This program is built on a public-private partnership that will allow us to maximize its reach.

The other poised for growth is startups. These businesses punch above their weight when it comes to job creation. At the SBA, we have had our third consecutive record-breaking year for the small business investment company program, and the 2014 budget allows us to further support startups through targeted tools such as the growth accelerators and clusters.

We also know that for both established firms and startups the opportunity to sell to the Federal Government can be a game changer. As a result of our efforts, in the last three years of reporting, small businesses have accessed $32 billion more in federal contracts than in the previous three years, even as overall contract spending decreased during those years.

We continue to take a zero tolerance stand on fraud, waste, and abuse in federal contracting to make sure that small businesses are the ones getting the contracts, and we have instituted programs like QuickPay to make sure they get paid more quickly.

Our 2014 budget will continue this emphasis on contracting by putting more resources, known as Procurement Center Representatives, in the field. Our research shows that the 32 new Procurement Center Representatives proposed in the budget can influence approximately $7 billion in small business contracting.

Today, thanks to Agency-wide efforts—and the support of Congress—small businesses are interacting with a different SBA. One that is more customer-focused, more data driven, and more transparent.

On a personal note, this is likely the last time I will be testifying before this Committee. It has been an honor and a privilege to work with you over the last four years. And, once again, I want to say thank you.

[The prepared statement of Ms. Mills follows:]

U.S SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

TESTIMONY OF

KAREN G. MILLS
ADMINISTRATOR
U.S. SMALL BUSINESS ADMINISTRATION

BEFORE THE

U.S. SENATE COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP

APRIL 17, 2013

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The other area poised for growth is start-ups. These businesses punch above their weight when it comes to job creation.

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Chair LANDRIEU. Thank you, Administrator.

Let me jump right into ask you to give a bit more detail, if you will, about the $40 million request for growth accelerators and the emerging leaders program which, I think, is the big new and different part of this budget that I want to get a little bit more comfortable and I know the members are going to want to as well.

I understand that we do not have a specific authorization. You have a general authorization to conduct this program and I would like to be supportive if I can, but I want to understand a little bit more about how it is going to be designed. So, could you spend a minute please or two explaining that in some detail?

Ms. MILLS. Let me start by explaining a little bit the economic underpinnings of these programs. We know that most of the job creation in this country actually comes from two segments of small businesses, startups and existing businesses expanding.

So, right now we are looking at investment in the small businesses that are expanding and creating many jobs. We call this program sometimes within the SBA a kind of mini-MBA.

Small businesses, unlike four years ago, are seeing opportunities. They can export as you described earlier. They can get a government contract. They can get in the supply chain of a larger company.

But sometimes they are being held by lack of access and opportunity to two things—access to capital and access to the skills they need to grow their business.

Entrepreneurship skills are a very important part of the skills component and what we have done in our budget proposal is built on the terrific network of resource partners that are out there—our Small Business Development Centers and our SCORE representatives are counseling small businesses all the time.

But a small segment of these businesses who create most of the job growth by expanding need an even more intense entrepreneurial education experience.

We are building this program on a number of proven programs that are out there where we collected a lot of data about how much these business owners can improve their business, and I had the great pleasure of visiting several of them.

One in West Memphis, Tennessee, called Western Tennessee Ornamental Doors. To hear a business owner described the skills that they gain in this nine-month, intensive program, delivered in large part by our resource partners—we are not creating any new bricks and mortar; we are using our resources on the ground—and to watch how they gain new sales, how they took on that business expansion, and how they successfully grew their business to the next level as a result of this program has been the impetus to make this request for a substantial expansion the program we now run and other partners run.

Chair LANDRIEU. Yes, and I just want to underscore that because I have been following closely the Goldman Sachs initiatives, the Google initiatives, with a lot of excitement; and I am hoping that we are not reinventing the wheel because there are models out there where I think Google went into 30 cities—New Orleans was one which is what got my attention but I was interested even before they came into New Orleans, working with the local commu-

nity colleges to give an opportunity for 30 or 40 businesses that already existed but wanted to expand but just did not happen either the confidence, the marketing skills, or the ability to take their business to the next step.

I am very interested in having a hearing at some point, a roundtable, to get some information back about the success or lack thereof of those programs. I have heard they are very successful but I would like to get it officially on the record.

Are you modeling this program in some ways after that or other programs that you just want to mentions as touchstones or models that you have in mind?

Ms. MILLS. Yes, Senator. We are collaborating with Goldman Sachs, 10,000 Small Businesses, with the Kauffman Foundation, FastTrac, and with community colleges. The curriculum is the same model, and it is the same nine-month intensive.

But we have the capacity to expand this beyond where Goldman Sachs and others have taken it for a very good bang for the taxpayer buck because we have such a strong existing network of Small Business Development Centers and SCORE partners out there to help us deliver the curriculum.

Chair LANDRIEU. My last question before returning it to the Ranking Member and then to others here, give us a few minutes on the 504 refinance program and why this is so important.

Our real estate markets have not yet recovered fully, there are some markets that are stronger than others. And I know this is really under the jurisdiction of the Finance Committee and us as well as a finance issue. But give us a bit about the 504 loan program, why it is important.

And Johnny Isakson and I have introduced a bill to reinstate it as you know for one year. I would actually like to see a five-year extension because by the time you do it and people know about it, half the year is over and then they cannot get their applications through. I would like a three- or a five-year extension.

If we decide it works, then we should make it work, not decide it works and give them one year. So, give us, you know, your best thoughts about the 504 program? And is it has effective as I believe that it is?

Ms. MILLS. Yes. 504 refi program has been very effective. The program ended September 30 when the Small Business Jobs Act expired, and it was extremely successful. We had 2700 loans that were made for over $2 and a half billion and we had 200 lending partners making those loans with us.

Demand still exists in the marketplace because commercial real estate prices are still depressed. In the last day of the program in 2012, we had over 400 projects pending work and about 500 million that did not get funded. So, we have requested an extension of the program.

I want to make the point that this program has zero cost to taxpayers. It operates at zero cost because we have as adjusted fee flexibility to cover the projected costs.

What it does, as you described in your opening remarks, is it allows a small business owner to unlock the equity value in their real estate and use it for working capital financing and to take ad-

vantage of low mortgage rates that exist today and move their business to the next level.

So, we think this is an very important and effective program and once again zero budget impact.

Chair LANDRIEU. Senator.

Senator RISCH. Thank you very much, Madam Chairman.

You heard my opening statements, Ms. Mills, that the thing I get all the time from small businesses is "you have got to help me on this Obamacare." What happens if a small business owner walks into an SBA office and says: "Look, Obamacare is killing me; help me get out from underneath this. I do not have a gaggle of lawyers or accountants to help me. What can I do? Help me get around this?" What do you tell them?

Ms. MILLS. Well, let me assure you——

Senator RISCH. Toughen up?

Ms. MILLS. Senator, no—that we are very, very active with small businesses and the Affordable Care Act because access to affordable health care is the number one concern, as you know, of small businesses all over the country. Their major concern is that they pay 18 percent more than big companies just because they are small.

With the Affordable Care Act, over 96 percent of small businesses will be exempt from any of the employer responsibility requirements. But there is an opportunity with the marketplaces that are opening this summer for many small businesses to get access to more affordable health care because there are going to be insurance companies bidding on their business in an open and competitive environment.

Right now if you are a small businessman and you want to provide health care, you can barely get a quote. Now, if you have an Affordable Care Act marketplace which will exist in every state, by next fall there will be enrollment; and by next January, small businesses will have the opportunity, not the requirement, but the opportunity to participate and buy their health care on those exchanges.

Senator RISCH. We are not communicating.

Your statement that you said, "Senator, you know that the access to quality health care is the number one concern of small businesses in America," did I hear you right on that?

Ms. MILLS. That is correct, according to NFIB since 1987.

Senator RISCH. Thank you.

Well, let me tell you what they tell me is their number one concern—staying in business because they cannot compete when the government tells them they have to spend money on something they do not want to spend money on, or they want to spend the money they want to spend it; not the way Washington, D.C., and the people who work here, tell them they have to do business.

I guess that is what I am looking for. You know that businesses all over America are trying to get out from under this. They are trying to get away from it. They are trying to get around it. They are not embracing this. You do not see anybody coming up and hugging this stack of documents and say "Look, this is what I want to do." They want to get away from this.

So, how do you counsel them? How do you tell them, "Look, do not give me this stuff about standing in line to get another health care policy or I am going to apply for this." They say, "Look, I do not want to do it. I do not want anything to do with the Federal Government telling me what I have got to do." Help me out here, because I get this all the time.

You know, of course, my defense is real easy. I say I did not vote for this. No Republican in this institution voted for this. But, you know, it is not as easy for you since you are part of the Administration.

What do you tell them?

Ms. MILLS. Well, let us be clear. For over 95 percent of small businesses, there will be no change. They will not have to provide any different health care or provide health care at all under the Affordable Care Act.

One of the issues that we have is that many small businesses do not have good information. At the SBA, we are aggressively providing information to small businesses both in person and on our website. So, at SBA.gov and at healthcare.gov, we have very clear and detailed explanations that a small business can walk through to see what the effect might be and the opportunity might be for them.

One of the things that we have seen is that many small businesses do not know that they are eligible for a health care tax credit. One of our jobs is to walk them through their eligibility and see if they are.

Any small business that you come to who has these concerns, please send them to our office. We are educated and equipped to walk them through, to provide any kind of service that they need to understand what access and opportunity they might as a result of this Affordable Care Act.

Senator RISCH. Well, I appreciate that, and you tell me that you will provide them with any kind of services that they want to help them in this area?

Ms. MILLS. Yes, we have an outreach on information. We are prepared throughout our network, we are educating our entire network because, as you have described, small businesses do not have a lot of capacity to work through and understand things. We will be there for them

Senator RISCH. So, to be clear, you will help them and counsel them as to how to get around this so they do not have to comply with the requirements from the Federal Government? You will help them do that?

Ms. MILLS. Let me be clear, that is not what I said.

Senator RISCH. Okay. I am done here.

Thank you, Madam Chair.

Chair LANDRIEU. Thank you.

Senator Shaheen.

Senator SHAHEEN. Thank you very much, Chair Landrieu.

I want to begin by recognizing Administrator Mills for all of the great work that you have done at SBA since you have taken on that task. As you said, this is probably the last time that you will come before this Committee, and I have very much enjoyed working with you and the willingness you have had to get out to come

to New Hampshire, to hear from our small businesses about what their concerns are. So, we will miss you.

New Hampshire is very much a small business state, as you know. 96 percent of our employers are small businesses, and so, we are very concerned about what is in SBA's budget for the upcoming year.

Like Senator Landrieu, I was pleased to see that the budget calls for reauthorizing the 504 refinancing program. I am a cosponsor with Senators Landrieu and Isakson of that legislation. I think it is very important.

There were some things in the budget proposal, however, that I was very concerned about. Like Senator Landrieu, I was concerned that the STEP program to help small businesses with exporting was not funded again. As she said so well, one percent of small and medium-sized businesses do business outside of the United States but 95 percent of the markets are outside of the United States. So, the more we can do to help our small businesses with getting into those international markets the better they are going to do.

I was also, frankly, very concerned to see that there was a new program being funded around entrepreneurship. I think that is very important. But I think it comes at a cost to the programs within SBA that are already working very well.

The Small Business Development Centers, I was disappointed to see the cut there that SCORE and the Women's Business Centers were cut because in New Hampshire we are seeing that our SBDC is going to have to lay off people.

I just think it does not make sense for us to start a new program when we have got these programs that are working very well and we are short funding them to start a new program. I think we ought to be looking at doing everything we can to ensure that our SBDCs and our SCORE program, our Women's Business Centers are funded at the level that allows them to support as many businesses as we can.

So, I wonder if you could give me some insights into the thinking behind the Administration in reducing funding for what is working to start a new program.

Ms. MILLS. I think it is important that we clarify exactly what we are doing here. Number one, this is not a new bricks and mortar program. This is a new initiative that is actually executed by the resource partners that you describe.

So, I do not think it would be correct to characterize it as taking away from our terrific resource partners that are out there. In fact, what we did when we came into the SBA is remove silos and encourage collaboration because we need to make sure every dollar gets used many different ways and we have fabulous resource partners but they were not working together. Now, they are.

The next step after that collaboration was really solidified on the ground is to use what I call our bone structure to build new capacity collaboratively, not just one silo by itself, in a way that will really drive the needs of small business in job creation. That is what you see here with our educational initiative program.

It will be done by a collaborative group of SCORE, Small Business Development Centers, and our community colleges that are in

the area, and we will be able to measure it and share best practices in a much more efficient way in the way that we proposed here.

And I want to say, we have the same levels of proposal for our resources partners in this budget that we have had in past budgets. So, we are not trying to in any way diminish the importance or the strength of their role.

Senator SHAHEEN. That is actually not my understanding. As we looked at the budget, we saw that the Small Business Development Centers would be funded with a $9.8 million decrease from fiscal year 2012 and that the Women's Business Centers and SCORE would receive similar cuts which is about eight percent.

I certainly applaud the effort to reduce the silos. I think we all agree that that is very important and that is a better way to help the folks who come to the SBA.

But the fact is, if the SBDCs have to lay off people or if SCORE cannot function, then they are not going to be able to help with this new program even though I appreciate it is not bricks and mortar but the people are not there to do the current work under the layoffs required by sequestration.

And so, I would urge the Administration to take another look at whether funding something new while we are decreasing funding for our programs that we know work makes sense.

Thank you very much.

Chair LANDRIEU. Senator Cardin.

Senator CARDIN. Thank you, Chair Landrieu.

Administrator Mills, I also want to add my congratulations for your extraordinary leadership at SBA and your public service.

You point out in your testimony that you are proud that small businesses are interacting with a different SBA, one that is customer focused, more data driven and more transparent.

I want to add that the SBA has become an effective advocate for small business and that advocacy is not only in the public. It is also within the Administration.

The $32 billion of additional procurement is a testimony to your leadership in the transformation of the SBA. So, I congratulate you for that. I am proud also the way you have worked with this Committee. Senator Landrieu and your leadership, together we have made a huge difference in helping small business and we are proud of that record.

We strengthened the tools that you have. The borrowing tools absolutely have been more effective. The numbers show that the direct participation by SBA has made a huge difference in those programs.

I am proud of the surety bond increase. We have gone now up to 6.5 million from 2 million and the role that that has played in providing more opportunities for small businesses, and, yes, the passage of the Affordable Care Act, which has provided an opportunity for small businesses today who have been shut out of the competitive market to be able to get into a competitive market to provide health benefits for their employees and to do it in an affordable way with a credit and a more accurate premiums.

Senator Risch is right. Small businesses principal objective is to stay in business, to expand, and do what they do; and you are cor-

rect that historically the number one challenge has been affordable health care.

I think, though, in recent years that has taken second place to access to capital, and I just want to talk about that for a moment because as much progress as SBA has made in its direct programs, assisted by Congress changing the laws, giving you stronger tools and the more resources, it is still the number one issue I hear prompts all businesses.

I had two or three small business forums over the last week in Maryland in all parts of our state, and the number one issue I hear is that it is so difficult in the private sector to get access to capital as a small business even though the money is there.

The community banks are still not loaning the way that they should be loaning. I know that the Obama Administration has had an initiative to try to change that. I do not think it has been effective.

What I would like to learn from you is what can we do to make it easier for small businesses to get access to capital. I know some of this is not within the jurisdiction of the Small Business Administration. A lot of this has to do with the banking issues.

I had suggested in the last Congress to give you the authority for direct loans. Now, you were not exactly excited about this or let me say the Administration was not exactly excited about it.

I think the money would have been better focused and would have done a better job quite frankly if you had any control over it rather than the way the Administration went forward with it.

But it is still a problem and we have got to do a better job if we are going to be able to unleash those startup companies to create the jobs and, and the innovation that keeps America competitive. And if we want to see the expansion of small businesses and job growth in this country, they have to get access, more access to the private sector markets that are still being denied.

Any advice on how we can try to do a better job in that area.

Ms. MILLS. Thank you, Senator. We have actually two pieces of the budget that speak directly to access to capital and to opening up more loans for more banks.

The first is that we are eliminating fees on the loans under $150,000. When, as you know, four years ago the credit markets froze, we came in with a program and reduced or eliminated fees on almost all our loans, and that was very, very successful in the Recovery Act.

We are now coming off two record years of SBA lending, but one segment has not responded. There is a gap in loans under $250,000. In fact, they were reduced by about two-thirds in 2009 and they have remained at that level.

So, we are going to take a proven method which is to eliminate fees, and we know that that will drive more activity of small business to the banks, and we are going to be able to, we hope, fill the gap for loans under $250,000—under 150,000.

In addition, the second program is called SBA ONE, and that is to make a more seamless front end of the loan process, one single application for all the different kinds of SBA loans. What will that do?

That will allow more banks to do more SBA loans, particularly the smaller loans, in more areas of the country because it will be simpler and cheaper to process without taking on additional risk.

Senator CARDIN. Would you make sure that we are kept informed as to how well this is working so that we can be your partner. We want you to succeed in these programs, believe me we do.

I saw the letter that you wrote to Chairman Mikulski on the effects of sequestration.

I am deeply concerned, Madam Chair, as to how sequestration is going to affect the availability of credit to small businesses because it is going to contract your capacity. I still believe this is an area that this Committee needs to weigh in.

You have been extremely effective, when other Committees have moved legislation, to sensitize it to small business. I would hope we will find some opportunities in this Congress to do exactly that, and I believe access to capital is still one area we need to focus on.

Chair LANDRIEU. Thank you, Senator Cardin.

Senator Cowan.

Senator COWAN. Thank you, Madam Chair.

Administrator Mills. Madam Chair, with your indulgence, before I begin my questioning of the Administrator, I just want to take this opportunity, my first, to thank everyone on this Committee and in the Senate and the Congress, frankly in the Nation for their outpouring of concern and support for the people of Boston and Massachusetts in the wake of the bombing incidents on Monday.

I know you all follow the news. You see the latest updates. It was a tragedy in the sense that we lost lives. People lost limbs, and we still have people in critical condition.

But it is worth saying here because it needs to be said and will be said many times over, the people of Boston and Massachusetts are resilient. We will bounce back.

This appears to be an act of terror, but we will not be terrorized. We will move forward. I thank you all for your support.

Chair LANDRIEU. Thank you. And, Senator, let me just say, I was remiss in not mentioning or noting that in my opening remarks. You know, our thoughts and prayers are with those who have been injured. It was such a tragic day on such a happy and celebratory day in Boston.

I was literally, as you know, just there last week with the Administrator celebrating, I think it was the 50th anniversary of women being allowed into Harvard Law School and the celebration of some extraordinary entrepreneurship that your State and your city and your area are leading.

So, it was particularly heart-felt to have literally just left the community last week. But our support will be there and if there is anything we can do to assist you and your delegation, please let us know

Senator COWAN. Thank you, Madam Chair.

Administrator, sort of brings up an issue around disaster relief, small business, SBA disaster relief funding. It remains to be seen what people scope of the damages will be in greater Boston as a result of this incident on Monday, and I am wondering if you might be able to comment on your thoughts about whether the budget proposal as it relates to disaster relief funding is sufficient gen-

erally speaking for the anticipated needs but frankly may be sufficient for these unexpected circumstances.

And if you also comment, as you know, you and I have spoken before about availability of disaster relief funding for an important industry in Massachusetts, the fishing industry, and I would love your thoughts on both of those issues please.

Ms. MILLS. Well, thank you, Senator, and thank you for mentioning the difficult days in Boston. I grew up in Boston and my son, all my children are in Boston, and my son was at the marathon and had left, and my sister lives a block and a half away.

So, it has been a difficult time, and the outpouring of support and the spirit of Boston I think shown through in a positive way.

In terms of disaster operations, as you know, we have just come into the last stages of the support for a very dramatic disaster in Hurricane Sandy. I am very pleased to say that we were able to perform very, very strongly in this disaster particularly by comparison to the way we were able to perform five years ago.

We have transformed our disaster operations since Hurricane Katrina. We now have 2000 ready reserve staff versus about 880 during Katrina. We have a facility that we filled up during this disaster of 2100 seats when we only five years ago had 366 seats available.

Back in Katrina it took us 72 days on average to process a loan. Now, in general, it takes us on average eight days; and going Sandy it was 29 days. So, we are working continuously to be ready particularly for a very difficult and encompassing disaster like Sandy.

There is a chart in the materials I gave that shows that this is the third largest disaster in the history of our disaster operations and we have already put forward over $2.2 billion in loans and loan guarantees.

We have asked in our budget request for the ability to continue in the post-Sandy environment. It is now flood season. It is tornado season. It will soon be hurricane season, and we will stand ready to perform again.

With respect to the fisheries, I believe our staff and your staff and the staff from NOAA met yesterday and I am happy to get back to you with the results of those meetings and what we can do about the fisheries.

Senator COWAN. Thank you. If I could pick up on the exchange that you had with Senator Shaheen about Small Business Development Centers. Looking at the budget as I understand it, there is a proposed reduction, and as it would impact Massachusetts, that reduction would be enough to close one of our centers.

I am wondering. As you look ahead and doing your planning, your thinking about your budget, how might we who are going to be impacted in this way working with SBA mitigate the costs of those reductions as they impact those centers?

Ms. MILLS. Thank you for the opportunity to again clarify what is requested in this budget.

Number one, what I said was that we continue to ask each year in our requests for a similar level for our resource partners; and one of the reasons why we have done the budget this way is that

that will not be all the money that are going to our resource partners.

We fully expect our resource partners and their collaborators to come forward and be the recipients of the $40 million and other funding, perhaps even the accelerator funding, depending on the proposal, as they stay the leaders in their community on entrepreneurship, education delivery.

The reason that we can be so effective in delivering a program like this is that we will do it through our existing bone structure. This is not a new bricks and mortar program.

So, we will work with all of the Small Business Development Centers to make sure that they understand how to access resources to deliver the best bang for the buck in terms of entrepreneurial education that will help particularly this segment of existing businesses that have expansion opportunities grow, and succeed, and create jobs.

Senator COWAN. Thank you for the further clarification.

Chair LANDRIEU. Let me just follow up with you, and thank you, Senator, for raising disasters. I will get to that in a minute but one more question on accelerators.

Is it the concept of this program to direct your bone structure to develop specific partners in each community to deliver high-quality entrepreneurship education? Is that how you are going to structure this program?

In other words, they are partners, community colleges. They are offices of the mayors. They are economic development offices funded by the state. They are other large corporations that would have some interest whether through their foundations or otherwise to be engaged in such an activity.

Could you try to drill down a little bit more about how exactly this $40 million is going to be spent, taking one segment or one area of the country?

Ms. MILLS. Senator, first let me clarify. I will talk about accelerators separately in a second. But on the $40 million entrepreneurship education, we are planning to leverage our resource partner network, and the way this program would operate is, based on the fundamental proven models that we have from Goldman Sachs, 10,000 Small Businesses, from the e200 curriculum that has been proven successful with metrics and from the Kauffman FastTrac program and others like Google, we will ask our resource partners to align together to develop locally the best delivery mechanism.

That may well vary by region, but most often we anticipate that our resources will be those best equipped to deliver this mini-MBA, this intensive entrepreneurship education.

And where we are doing it now, I was just in Ithaca and I asked a gentleman who had just completed the program who was there, you know, and I turned to the Small Business Development Center person, were you involved, the answer was yes.

So, they are already involved and engaged in this, in the program where it exists as e200. We know that, I want to emphasize, this is not an either/or. It is a both/and.

Chair LANDRIEU. Okay. The Economic Development Administration in the Department of Commerce also does some granting and program development for entrepreneurs.

The President has been commented, in fact, in several of speeches before the Congress about streamlining and not duplicating.

So, can you just comment for a minute about what your knowledge is of what the Department of Commerce does for entrepreneurs, how the SBA programs are little different, if they are, so that we can respond to these claims or these challenges? [chart]

Ms. MILLS. Just like we have worked on no silos within the SBA, we have actually worked on no silos across the administration. We are partnered very, very closely with the Department of Commerce on manufacturing, on our clusters, on a whole series of activities on the ground, particularly with the Economic Development Authority, EDA.

For example, we actually do joint solicitations for proposals with many other agencies, sometimes including Labor or EPA or others or the Defense Department for our cluster program. That is a model that we plan to continue and to move forward.

We also are very, very closely tied to the Department of Commerce in our integrated export activity. We are on the ground. Our USEACs in the Department of Commerce export people and Import-Export Bank have joint products, joint activities, joint objectives to deliver more.

Chair LANDRIEU. Thank you. Let me get another question in and we are going to move to our second panel in just a moment. If the Senator from Massachusetts has additional questions, I will acknowledge him in just a moment.

But, let me go back to disasters because after I believe Isaac it might have been, yes, it was before Sandy, several of the members, leaders from the House and the Senate, passed some additional authorizations giving you authority to set up quick loans, small loans.

And, I understand that that program has not yet been established. It has been over five years and I do not believe, I do not believe that those programs have been put in place.

In fact, it was the 2008 Farm Bill provided a provision for a $150,000 bridge loan to recovery-related businesses. Could you please comment about why it is taking your administration so long to get these quick disaster loans in place, or is our information incorrect?

Ms. MILLS. I am happy to arrange a detailed update for you. We have, in fact, made progress on this; and I think the objective has been to implement it in a way that does not duplicate or add cost to existing programs and to figure out the right public-private partnerships. These would be public-private partnerships with banks that would implement this.

I do know, and we will give you further updates, that this is further along in progress and was part of the discussions, if not the actions, during the recent Sandy activity.

Chair LANDRIEU. Because I think the Senator from Massachusetts will agree with me that, you know, after a disaster, businesses are really struggling to make a decision whether to come back or not.

And until the businesses come back, home owners do not feel comfortable coming back because there is no signal that their community will rebound.

So, why would you invest which is what—most families, their entire net worth or a large part of it is wrapped up in the equity in their home. So, why would you risk your entire net worth or a large part of it to come back to a community that is no longer going to exist? And the signs of a community existing again are when the barber shop opens and the restaurant opens and the gas station opens and, you know, the beauty salon opens again.

And if they do not open, it gives a very negative signal to homeowners that are trying to say should I take my $500,000 insurance or $250,000 insurance and rebuild here or on behalf of my children and grandchildren this is their money as well as mine, most parents feel that way, should I take it somewhere else?

So, I have become a passionate advocate, Senator Cowan, as you can imagine having gone through what we went through to get low interest loans or grants, a combination of loans and grants into the hands of businesses that, in my mind, are part of the recovery. It is part of the investment to recover in the community, of course, that we want to recover which is 99.9 percent.

Maybe you are out on an island somewhere out in the middle of the ocean where you should not have built anyway and that is a whole different matter. But when you are in downtown, you know, Brooklyn or you are in downtown Boston or you are in downtown New Orleans, most certainly you want to come back.

So, I am going to ask you the staff to really press this issue for quick, smart, outlays to pioneering businesses, and I hope that you will work with us on that.

Thank you.

Ms. MILLS. Senator, I did just want, on a personal note, thank you for your leadership in all of our disaster recovery thinking and operations. You and I traveled very early on in my tenure down to some severely affected areas and you talked about recovery, really took note of many of the things that we discussed on that trip; and even in recent times as we put forward the recovery task force on Sandy, those words were resonating with me.

So, thank you for your leadership.

Chair LANDRIEU. Well, thank you. I am going to continue to push this because of the horrors that I witnessed personally.

And again following up on the Senator from Massachusetts, if your staff could provide us with some of your best thinking about fisheries, I think it is an industry that gets lost between agriculture of which it is a part of what but it is not really their core and it is such a unique business but a business that is very important to the economies of many of our coastal communities, Senator, but more than the economy, the culture of our communities.

So, I am going to ask your staff to submit some additional information to this Committee about your best thinking about what could be done after a storm. And, Senator, do you want to add anything to this, based on your experience with some of your, you know, fisheries, the importance of getting loans to them when their boats are wrecked, their nets are destroyed, their customers are gone.

How in the heck do they walk into a bank and say I would like a $200,000 loan. They say, well, who are you going to sell your fish

to, where is your boat, and what happened to your nets? And it is a sad story from there.

Senator COWAN. Thank you for that, Madam Chair, and I thank you for those comments and your concern, heartfelt and genuine, for the fishing industry. And I know that Administrator Mills knows that industry well from her time in Massachusetts and we spent a lot of time talking about it.

And you are right. It can get lost sometimes between Committees. But I manage to find a way no matter where I am and no matter what the Committee to raise it, and I will continue to as long as I am here as I am sure my colleagues from Massachusetts will.

The only thing I would add in addition to your powerful comments, Madam Chair, is that, you know, the fishing industry are not just the men and women, the families who own the boat and the nets, and they are very important.

But there is a corollary industry, the seaside industry, the shoreside industry. Those small businesses who are impacted as much as the boats and others, and I know that Administrator Mills is very mindful of that and I look forward to continuing dialogue and the additional information you might be able to offer us there.

Ms. MILLS. Thank you. Being now a resident of the great State of Maine, I share your concern about the fisheries.

Chair LANDRIEU. Okay. Thank you very much, Administrator. You have been very generous with your time.

I think we have a second panel.

[Pause.]

Let us just stand at ease for just a minute. My staff is going to go check this message. We may take a recess but let us just sit calmly for a one second. Would the staff go check this please?

Thank you all for coming is morning.

Let us go ahead and take a seat. As announced, there is a package that is being investigated on the third floor of Russell, but we have been advised to continue on. If that changes, I will let you all know and we will take a brief break.

Before we start with our second panel, let me just put into the record some interesting information about the small business lending fund. This program has been highly criticized and it was the first time we attempted to do it.

It is a program that no longer exists. But I want to put into the record the details that we have recently received about the increase in lending that was generated by this program.

Although it did not meet the $30 billion lending target, I think we ended up through this program lending only for $4 to 5 billion, and some of the banks used this money to pay their TARP loans back.

It is interesting to see, as the data comes in, that the increase in funding for small business went up significantly relative to peer banks that did not receive or participate in the SBA program, significantly in every part of the country.

So, it is not the subject of this hearing but I wanted to get into the record. [charts]

Our second panel is Peggy Gustafson, our Inspector General. Ms. Gustafson previously served as General Counsel in the Missouri

State Auditor's Office and was Chair of the Insurance Fraud Task Force.

I think, Ms. Gustafson, you have done an outstanding job in the current position that you are in. You have given us a lot of good information and data about how to eliminate programs that do not work, identifying fraud and abuse where it exists and streamlining our operations.

That is the role of the Inspector General, and I thank you very much for your professional help.

Next we are joined by Dr. Winslow Sargeant from the Small Business Administrator Office of Advocacy. Of course, your office was created to be an advocate for small business when they have trouble with the Federal Government and rules and regulations that you can help them to navigate because we want to be a more, I do at least, want to be a more friendly government to small businesses and be a help and not a hindrance.

There have been some issues raised that I know you are going to want to comment on but let us start with you, Ms. Gustafson, for your response to our Committee based on the budget that has been submitted by the agency.

What do you think its strengths are? What do you think its weaknesses are? And are there any areas that this Committee should be focused on in terms of rooting out any fraud or corruption or waste?

STATEMENT OF HON. PEGGY E. GUSTAFSON, INSPECTOR GENERAL, U.S. SMALL BUSINESS ADMINISTRATION

Ms. GUSTAFSON. Thank you, Chair Landrieu, Ranking Member Risch and distinguished members of the Committee. Thank you for the opportunity to be here today and for your continued support of the work of the Office of the Inspector General.

I am very proud to represent the dedicated men and women of the SBA OIG. As you know, our office is an independent office within the Small Business Administration. We conduct and supervise audits, inspections, and investigations relating to SBA programs and supporting operations.

We seek to detect and to prevent waste, fraud, and abuse, and promote economy, efficiency, and effectiveness in the administration and management of the SBA's programs.

I believe that our investigations and reports, recommendations are having a very positive impact on the integrity of SBA programs and that the results from our work are measurable.

During fiscal year 2012, the Office of Inspector General issued 22 reports containing 126 recommendations for improving SBA operations, reducing fraud and unnecessary losses, and recovering funds. In addition, OIG investigations have led to 59 indictments and 59 convictions of subjects who defrauded the Federal Government.

In all, the Office of the Inspector General efforts resulted in more than $90 million in office-wide dollar accomplishments during fiscal year 2012.

Our fiscal year 2012 operating budget was $17.3 million which included a $1 million transfer from the agency's disaster loan program account which means that the total office-wide dollar accom-

plishments represent a more than fivefold return on investment in the Office of the Inspector General to the taxpayers.

Though these figures are reassuring that our work is focused on the areas of high risk within the agency, I remain concerned about the continued financial and operational risks facing the agency.

For example, in the 7(a) and 504 lending programs, the maximum allowable guarantee per loan has grown from $2 million to $5 million and for manufacturers in the 504 loan program up to $5 and a half million, which, of course, means that there has been a dramatic expansion of the potential exposure to the taxpayer should these loans default.

This exposure, combined with a swollen portfolio and limited agency oversight, increased the possibility of future losses.

SBA's payments of guarantees on defaulted loans are significantly higher than a baseline of fiscal year 2007 when there was $1 billion in guarantees paid, up to a high of $5 billion in 2010, $3.4 billion in fiscal year 2011, and $2.6 billion in fiscal year 2012.

It is noted that these figures are moving in the right direction though.

In addition, SBA contracting programs continue to be subject to fraud and weak federal oversight. And finally, shortcomings in the agencies IT systems might hinder SBA's ability to effectively manage their programs.

I appreciate the opportunity to discuss how the OIG proposes to address the noted and persisting risks. As with last year's fiscal year 2013 budget request, the President has requested a $3.1 million increase in the OIG's fiscal year 2014 budget.

We are poised to use additional resources to effectively target early defaulted loans, fraud, and lender negligence and to increase the capacity of our existing investigative personnel. In particular, additional resources would allow the OIG to establish a dedicated early defaulted loan review group to identify problem loans, would enhance our investigative capacity and enhance the OIG Hotline operations.

When lender negligence is found, the early defaulted loan review group would recommend nonpayment of the guarantee, target the most offending lenders to obtain corrective actions and perhaps most importantly identify trends for operational improvement by SBA. It would also allow these loans to be referred to criminal investigators for possible prosecution.

My office handles an average of 250 criminal and civil fraud investigations per year. Annually, we attain multiple indictments and convictions and recoveries of tens of millions of dollars.

However, additional investigative support would enhance our existing investigative capacity and allow more effective utilization of the existing investigative resources in a cost-effective manner.

Finally, regarding our hotline operation which is very often the one way that citizens contact our office with allegations of waste, fraud, or abuse, in fiscal year 2012, 535 hotline complaints were received by OIG and they were processed by just one professional staff member.

Additional staff resources are required to adequately analyze incoming complaints for possible referral, for investigation and other resolution.

In short, much work has been done but much more work remains to be done. The providing of additional resources at OIG undoubtedly would be met with a significant return on investment to the taxpayer and also a better SBA.

So, I thank you again for the opportunity to speak to you and I look forward to your questions.

[The prepared statement of Ms. Gustafson follows:]

STATEMENT OF

PEGGY E. GUSTAFSON
INSPECTOR GENERAL
U.S. SMALL BUSINESS ADMINISTRATION

BEFORE THE

COMMITTEE ON SMALL BUSINESS
AND ENTREPRENEURSHIP
U.S. SENATE

APRIL 17, 2013

INTRODUCTION

Chair Landrieu, Ranking Member Risch, and distinguished members of the Committee, thank you for giving the Small Business Administration (SBA or Agency) Office of Inspector General (OIG) an opportunity to discuss our oversight activities of SBA programs and operations.

The OIG was established within SBA by statute to promote economy, efficiency, and effectiveness and to deter and detect waste, fraud, and abuse in the Agency's programs and operations. Every year, our staff of approximately 104 employees—which includes criminal investigators, auditors and program analysts, attorneys, and support staff—conduct criminal investigations, audits, and other reviews, resulting in numerous indictments, convictions, and monetary payments of fraud perpetrators and many recommendations to the Agency for improvement and elimination of wasteful or inefficient practices.

During Fiscal Year (FY) 2012, the SBA OIG operated at an enacted budget level of $17.3 million, which included a $1.0 million transfer from the SBA Disaster Loan Program Account. Approximately 84 percent of our expenditures are attributed to payroll expenses for our 104[1] employees. The OIG issued 22 reports containing 126 recommendations for improving SBA operations, reducing fraud and unnecessary losses, and recovering funds in FY 2012. In addition, OIG investigators obtained 59 indictments and 59 convictions of subjects who defrauded the government. In all, OIG efforts resulted in more than $90 million in office-wide dollar accomplishments during FY 2012.

BUDGET REQUEST

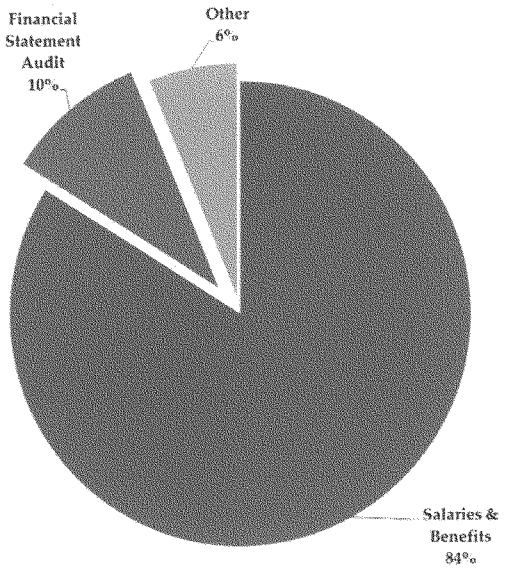
As with FY 2013, the President's FY 2014 Budget requests $19.4 million for the OIG, plus an additional $1 million to be transferred from the Disaster Loan Program, for a total of $20.4 million.

Dollars in Millions	**FY 2012 Actual**	**FY 2013 Annualized CR Level**	**FY 2014 Request**	**FY 2014 Incr/Decr**
New Budget Authority	$16.3	$16.2	$19.4	$3.2
Transfer from Disaster Loan Program Account	1.0	1.0	1.0	--
Total	**$17.3**	**$17.2**	**$20.4**	**$3.2**

[1] Includes positions funded from supplemental appropriations—the American Recovery and Reinvestment Act of 2009 and the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009.

The majority of the funds requested for FY 2014 will be used for salary and benefits for approximately 112 OIG employees and the annual audit of the Agency's financial statements by an Independent Public Accountant.

FY 2014 Estimated Obligations



These resources are needed by the OIG to continue to provide effective independent oversight of SBA's programs and operations, including the following initiatives to (1) effectively target early defaulted loans for fraud and lender negligence, and (2) meet increased demands placed on OIG investigative personnel.

- Establish a dedicated Early Defaulted Loan Review Group to identify problem loans. When lender negligence is found, this group will recommend non-payment of the guaranty (or recovery if the guaranty is already paid), target the most offending lenders to attain corrective actions, and identify trends for operational improvement by SBA. When suspected fraud is identified, those loans will be investigated. The additional resources will be used to hire auditors, investigators, and analysts and pay for related travel and other expenses.

- Enhance investigative capacity. As discussed below, the OIG handles an average of 250 criminal and civil fraud investigations per year and annually obtains multiple indictments and convictions and recoveries of

tens of millions of dollars. However, investigative capacity has been limited by staffing constraints, which have prevented the OIG from initiating or continuing a number of investigations. For instance, over the last three years, the OIG has administratively closed 171 allegations—with potential losses estimated at over $136 million—which may have met prosecutorial thresholds but could not be further investigated due to staffing constraints. Also, over the last three years the OIG proactively identified over 574 suspect loans—with potential losses estimated at over $503 million—that contained characteristics typical of problem loans. Due to staffing constraints, most of these loans could not be further reviewed to identify lender deficiencies or indications of fraud. In comparison, as of September 30, 2012, the OIG had 114 open cases related to SBA financing of small businesses (other than disaster loans) with potential dollar losses of almost $400 million. The President's FY 2014 Budget supports additional investigative support personnel (i.e., non-criminal investigators or financial analysts), which will increase investigative capacity and allow more effective utilization of existing investigative resources in a cost effective manner.

- Enhance the OIG's Hotline operations. During FY 2012, the OIG received 535 complaints through its Hotline. Also during this period:

    - 234 complaints were referred to SBA program offices or other entities;
    - 115 complaints were referred to the OIG's Investigations Division;
    - 106 complaints were reviewed by the Hotline staff;
    - 29 complaints were referred to the OIG Counsel or Auditing Divisions; and
    - 81 complaints needed no action.

The FY 2014 Budget supports additional staff resources that are needed to expeditiously and effectively analyze incoming complaints for possible referral for investigation or other resolution.

OVERSIGHT PRIORITIES

The SBA was established to maintain and strengthen the nation's economy by protecting the interests of and assisting small businesses, and by helping families and businesses recover from disasters. While SBA's programs are essential to strengthening America's economy, the Agency faces a number of challenges in carrying out its mission, including fraudulent schemes affecting all SBA programs, significant losses from defaulted loans, procurement flaws that allow large firms to obtain small business awards, excessive improper payments, and outdated legacy information systems. The Agency also faces significant management challenges.

In accordance with the Reports Consolidation Act of 2000, the OIG released its *Report on the Most Serious Management and Performance Challenges Facing the Small Business Administration in FY 2013* in October 2012. This report represents our current assessment of Agency programs and/or activities that pose significant risks, including those that are particularly vulnerable to fraud, waste, error, mismanagement, or inefficiencies. Our report is based on specific OIG, Government Accountability Office (GAO), and other official reports, as well as our general knowledge of SBA's programs and operations.

Summary of the Most Serious Management and Performance Challenges Facing the SBA in FY 2013

		Color Scores					
		Status at End of FY 2012				Change from Prior Year	
	Challenge	Green	Yellow	Orange	Red	Up ↑	Down ↓
1	Small Business Contracting	1		2		1	
2	IT Security		3	2			
3	Human Capital		1	3		1	
4	Loan Guaranty Purchase		1				
5	Lender Oversight	1	1	1		1	
6	8(a) Business Development Program		1	1	1		
7	Loan Agent Fraud	1	1			1	
8	Loan Management and Accounting System		1		3	1	3
9	Improper Payments – 7(a) program		2	2		1	
10	Improper Payments – Disaster Loan program		1				
11	Acquisition Management (NEW)						
	TOTAL	**3**	**12**	**11**	**4**	**6**	**3**

Overall, in FY 2012, the Agency made improvements across all the challenges, with the exception of one of the recommended actions under Management Challenge #6 and three of the recommended actions under Management Challenge #8. Specifically, Management Challenge #6—The Section 8(a) Business Development program needs to be modified so more firms receive business development assistance, standards for determine economic disadvantage are justifiable, and the SBA ensures that firms follow 8(a) regulations when completing contracts—remains at a rating of Red or no progress. Management Challenge #8—SBA needs to modernize its Loan Accounting System and migrate

it off the mainframe—was downgraded from a rating of Orange, or limited progress, to a rating of Red, or no progress.

Despite these two Management challenges, the progress on all other Management Challenges was notable. The effort made by Agency staff and leadership throughout FY 2012 on the recommended actions demonstrated commitment to improving the Agency's programs and operations. The Agency's efforts are reflected in the overall elevation of Management Challenge ratings.

Pursuant to P.L. 113-2, the OIG was appropriated $5 million to provide effective oversight of the SBA's disaster response to Hurricane Sandy. This funding level is based on experience with major disasters in the past, such as the Gulf Coast Hurricanes in 2005. The supplemental funding will be used to support approximately 5 auditors and 5 criminal investigators and associated operating costs for a period of at least 4 to 6 years. Availability of funds for this timeframe is particularly important because many times fraudulent loans are not immediately identified, have a deferment period for repayment, and take years to default. There is a five-year statute of limitations (from the date of the last false statement) to prove a false statement to the SBA.

PLANNED ACTIVITIES

In addition to conducting audits and reviews that are required by statutes and other directives, the OIG plans to focus on the most critical risks facing the SBA. Several areas of emphasis are discussed below.

Financial Assistance

Over the last several years, losses in the SBA's loan programs have increased substantially. Some of the increase in SBA losses correlates to similar root causes seen in the mortgage industry, such as limited oversight of lenders and loan agents, poor lender loan processing, unscrupulous borrowers, and complicit brokers and lenders. The SBA also faces a heightened risk of losses and improper payments due to expedited loan processing initiatives and its considerable reliance on outside financial institutions over which the Agency does not always exercise adequate oversight.

The Agency's business loan programs include: (1) the Section 7(a) program, in which the SBA guarantees lender-originated loans to small businesses made by lenders; and (2) the Section 504 program, in which the SBA guarantees repayment of debentures that are sold by Certified Development Companies (CDCs) to investors to create funds for loans to small businesses. The majority of loans made under the 7(a) program are made with little or no review by the SBA prior to loan approval because the Agency has delegated most of the credit decisions to the lenders originating these loans.

Two recent developments in SBA's 7(a) loan guaranty program highlight the need for continued vigilance in the OIG's oversight of the Agency. First, SBA's payments of guaranties on defaulted loans are significantly higher than a baseline of FY 2007—from $1 billion in FY 2007 to $5 billion in FY 2010, $3.4 billion in FY 2011, and $2.6 billion in FY 2012—however, it is noted these figures are moving in the right direction. Although some defaults are likely due, in part, to economic conditions, many OIG audits and investigations of loans that have defaulted early have identified problems with the loan origination, including lender negligence and fraud. Second, as a result of statutory changes in 2010, the size of loans that SBA guarantees more than doubled from $2 million to $5 million, thus dramatically expanding the potential exposure to the taxpayer. This exposure, combined with a swollen portfolio and limited Agency oversight, increase the possibility of future losses.

The OIG is using its resources to more effectively address the growing financial losses in SBA lending due to lender errors and various fraud schemes. The OIG is utilizing an Early Defaulted Loan Working Group to perform in-depth analyses of loans that default within 18 months of final disbursement. From this, the OIG either makes recommendations for loan guaranty recoveries, or if fraud is apparent, conducts criminal investigations to refer suspected fraud for prosecution. The OIG also assesses trends of lending problems. Despite past successes, such activities have been limited due to resource constraints.

The OIG's national initiative to detect fraud committed by loan agents, such as packagers and brokers, continues to be a priority for the office. A loan agent is sometimes hired by an applicant or lender to assist the applicant in obtaining an SBA loan. Although honest loan agents help small businesses gain access to capital, some dishonest ones have perpetrated fraudulent schemes involving tens of millions of dollars in loans. These fraudulent loans often default for non-payment, and the SBA is forced to use taxpayer funds to purchase the guaranteed portions of the loans. In a recent case, an OIG investigation led to the indictment of three loan brokers and their company for conspiring to provide false information to SBA in order to obtain SBA loans. This is a complex loan fraud scheme involving loans valued at approximately $100 million. Over the past decade, the OIG has obtained convictions and guilty pleas on numerous cases involving loan agent fraud on SBA-guaranteed loans, totaling in excess of $358 million.

The OIG recently has initiated a review of the examination process for the Small Business Investment Company (SBIC) program. In addition, the OIG will continue to conduct audits of business loans that default quickly because past work has shown such loans were not always properly originated and that effective controls and procedures were not in place to prevent improper payments. Future OIG efforts will focus on: (1) SBA's loan origination process to determine its compliance and effectiveness; (2) SBA quality control programs to determine the extent to which programs are mitigating the risk of loss; (3) SBA's management

of certain loan programs; and (4) the reliability of data in the Agency's Loan Accounting System.

OIG audits related to disaster loans will continue to focus on loan origination, disbursement, repayment, servicing, and liquidation activities. Such audits may assess whether the SBA processed homeowner and business loan applications in accordance with the Agency's procedures, verified uses of loan proceeds before loans were fully disbursed, and appropriately identified duplicate benefits. Future efforts will focus on the loss verification process and analyzing, through cross cutting projects, whether there are redundancies among agencies providing various forms of assistance to disaster victims. Such efforts would focus on determining whether there is potential to reduce costs across agencies while streamlining and consolidating processes for disaster victims. The OIG also will continue to investigate allegations of unauthorized use of loan proceeds; overstatement of financial losses; material false statements in the application process; false/counterfeit supporting documentation; and false assertions regarding primary residency in affected areas at the times of the disasters. As of September 30, 2012, the OIG had 26 open cases involving disaster loans with potential dollar losses of over $12.8 million.

In response to the increase in fraud following Hurricanes Katrina, Wilma, and Rita, the OIG and other law enforcement organizations established the National Center for Disaster Fraud. From FY 2006 through FY 2012, the OIG, in conjunction with other law enforcement agencies, has produced 86 arrests, 95 indictments, and 91 convictions related to wrongdoing in SBA's Disaster Loan program for these three hurricanes. Investigations for these disasters— to date— have resulted in over $6.6 million in court-ordered restitution and related recoveries, as well as the denial of nearly $4.5 million in loans to potentially fraudulent borrowers. In addition, the OIG has investigated fraud related to 2008 Hurricanes Ike and Gustav.

Government Contracting and Business Development

The SBA directs significant efforts toward helping small businesses obtain Federal contracts and providing other business development assistance. The SBA's Office of Government Contracting and Business Development is tasked with helping small businesses obtain a fair proportion of Federal contracting opportunities and helping small, disadvantaged, and women-owned businesses build their potential to compete more successfully in a global economy. Oversight of the Government Contracting and Business Development programs, including investigating allegations that ineligible companies are fraudulently benefitting from these programs, remains a key priority for the OIG. As of September 30, 2012, the OIG had 62 open government contracting cases, with potential dollar losses of over $1.5 billion based on the total dollar value of the contracts.

The OIG has in the past year received a significant increase in the number of qui tam False Claims Act suits that have been filed by private sector parties alleging fraud in SBA government contracting programs. In light of increases in qui tam claims that the government has experienced over the past several years, the OIG expects the volume of this work to increase. This will require expenditure of additional resources to investigate these allegations.

Aside from these issues, there are other reasons to be concerned about government contracting programs.

- There has been a high level of congressional interest in small businesses receiving a fair share of Federal contracts. The OIG will continue to assess whether the SBA is taking adequate steps to ensure the integrity of small business contracting, with an emphasis on issues such as the accuracy of reporting small business contract activity, large businesses being classified as small businesses, adherence to regulations to protect small businesses, training of government contracting personnel, deterring fraudulent acquisition of government contracts, and bundling of contracts.

- The Section 8(a) Business Development program continues to be susceptible to major vulnerabilities. These include limited program oversight; inequitable distribution of contracting opportunities among participants; a lack of reasonable, measurable, consistent, and mandatory criteria pertaining to economic disadvantage; a lack of implemented criteria defining business success for purposes of program graduation; and misrepresentation by companies as small, minority-owned, or disadvantaged businesses to gain an unfair advantage in the Federal marketplace. The OIG will continue to review these issues and the SBA's management of the Section 8(a) program.

- The Historically Underutilized Business Zone (HUBZone) program provides Federal contracting assistance to small businesses located in economically distressed areas with the intent of stimulating economic development. The Service-Disabled Veteran-Owned Small Business (SDVOSB) program provides more opportunities in Federal contracting for disabled veterans who own small businesses. The GAO has identified significant control weaknesses in these programs that have allowed ineligible firms to receive millions of dollars in contracts. The OIG will examine the SBA's claim that it has implemented a more rigorous HUBZone certification process in the hopes of preventing ineligible firms from achieving certification. In addition, the OIG plans to review the HUBZone decertification process once the SBA completes its reengineering of this process. The OIG also will continue to pursue prosecution, civil fraud recovery, and debarment of contractors who improperly obtain HUBZone, SDVOSB, and other preferential contracts.

Financial Management and Information Technology

The OIG will continue to oversee the audits of the SBA's financial statements, as well as Federal Information Security Management Act (FISMA) and Federal Information Systems Controls Audit Manual (FISCAM) reviews, which are conducted by an Independent Public Accountant under a contract with the OIG. The OIG also will continue its review of the SBA's compliance with the Improper Payments Elimination and Recovery Act (IPERA). The OIG anticipates that the scope of financial statement audits will continue to expand as a result of growing direct and guaranteed loan portfolios. The OIG plans to review SBA's actions to implement the requirements of the GPRA Modernization Act of 2010. The review will survey the sources and use of performance information in program decision-making and evaluate the effectiveness of corrective actions deployed to address long standing challenges, needs, and problems.

The OIG also will continue to monitor systems development activities related to improvements to the SBA's Loan Management and Accounting System, a system that is critical to SBA's ability to administer its loan portfolio, which in FY 2012 totaled over $102 billion. OIG efforts will include determining whether adequate System Development Lifecycle Controls are in place as the SBA endeavors to move its batch COBOL systems from the mainframe to a new hosting environment. As threats to disrupt cyber-based systems continue to escalate, the Agency must take steps to improve controls to prevent outages and loss of sensitive data and to ensure the continuity of mission critical operating systems. The OIG will conduct audits to assess the security of the SBA's computer operating system, network, and hosted applications by performing assurance reviews. The OIG also will review the sufficiency of SBA resources used to manage computer security, maintain systems, provide technical support, and administer security training.

Security Operations

The OIG's Office of Security Operations (OSO) is responsible for processing name checks and, where appropriate, fingerprint checks to ensure that applicants meet certain character standards before participating in programs involving business loans, disaster assistance loans, Section 8(a) certifications, surety bond guarantees, SBICs, and CDCs. As a result of OIG referrals during FY 2012, SBA business loan program managers declined 54 applications totaling over $37.2 million, and disaster loan program officials declined 26 applications totaling over $2.1 million, due to character issues of loan applicants. In addition, the Section 8(a) program declined 31 applications for admission. Over $300 million in loans have been declined during the last 10 years due to character problems identified by the OIG, thereby making credit and SBA assistance available to otherwise eligible applicants. The OSO also is responsible for performing required background investigations for covered SBA employees and adjudicate SBA employees/contractors for issuance of PIV cards pursuant to HSPD-12

background investigation requirements. During FY 2012, the OIG initiated 333 background investigations and issued 49 security clearances for SBA employees and contractors.

Review of Proposed Regulations and Initiatives

As part of the OIG's proactive efforts to promote accountability and integrity and reduce inefficiencies in SBA programs and operations, the OIG reviews changes that SBA is proposing to make to its program directives such as regulations, internal operating procedures, policy notices, and SBA forms that are completed by the public. Frequently, the OIG identifies material weaknesses in these proposals and works with the Agency to implement recommended revisions to promote controls that are more effective and deter waste, fraud, or abuse. During FY 2012, the OIG reviewed 136 proposed revisions of program management or SBA reorganization documents and submitted comments on 79 of these initiatives.

Debarment and Administrative Enforcement Actions

As a complement to the OIG's criminal and civil fraud investigations, the OIG continually promotes the use of suspensions, debarments, and other administrative enforcement actions as a means to protect taxpayer funds from those who have engaged in fraud or otherwise exhibited a lack of business integrity. The OIG regularly identifies individuals and organizations for debarment and other enforcement actions and submits detailed recommendations with supporting evidence to the responsible SBA officials. During FY 2012, the OIG sent 45 suspension and debarment referrals to SBA. Most OIG administrative referrals involve the abuse of SBA's loan and preferential contracting programs. When appropriate, the OIG recommends that the SBA suspend the subject of an ongoing OIG investigation given program risk presented by the continued participation of those individuals and entities.

Fraud Awareness Briefings

The OIG continues to conduct briefings on topics related to fraud in government lending and contracting programs. During FY 2012, the OIG provided 24 fraud awareness presentations for more than 1,100 attendees, including SBA and other Government employees, lending officials, and law enforcement representatives. Topics included types of fraud; fraud indicators and trends; and how to report suspicious activity that may be fraudulent.

CONCLUSION

The SBA OIG continues to focus on the most critical risks facing the SBA. Our resources are directed at key SBA programs and operations, to include financial assistance, government contracting and business development, financial

management and information technology, disaster assistance, Agency management challenges, and security operations. We also will continue to partner with the Agency to ensure that taxpayer and small business interests are protected and served well by reviewing proposed regulations and initiatives, pursuing debarment and administrative enforcement actions, and providing fraud awareness briefings. We value our relationship with this Committee, and with the Congress at large, and look forward to working together to address identified risks and the most pressing issues facing the SBA.

Chair LANDRIEU. Thank you.
Mr. Sargeant.

STATEMENT OF HON. WINSLOW SARGEANT, CHIEF COUNSEL FOR ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION

Mr. SARGEANT. Chair Landrieu, Ranking Member Risch and members of the Committee, good morning. Thank you for the opportunity to appear today to discuss the Office of Advocacy's budget request for fiscal year 2014. In the interest of time, I will summarize my prepared remarks and ask that my full statement be included in the record.

On behalf of the entire Advocacy team, I would like to again thank the Committee for its continued support for the Office of Advocacy. Underscoring this support was the establishment of a separate account for Advocacy in addition to a requirement that SBA provide the operating support for our office.

These provisions have enhanced our independence and have increased transparency for our many stakeholders on our costs and operations. The Office of Advocacy's budget submission is part of the president's request for SBA and the government as a whole.

Since my testimony is not circulated for comment through OMB or other federal offices, my views on matters other than the official budget requests do not necessarily reflect the position of the Administration or SBA.

For fiscal year 2014, the Office of Advocacy requests $8.45 million for our direct expenses. In recognition of the need for federal agencies to reduce their budget requests during the current economic condition, this represents a reduction $191,000 or 2.2 percent from our fiscal year 2013 enacted level.

This amount includes $7.3 million for personnel costs. $700,000 will be allocated for economic research. The balance of our requests, $395,000, covers all other direct expenses including travel, training, office supplies, subscriptions for legal and economic research resources and other miscellaneous expenses.

With 95 percent of Advocacy's total budget request concentrated on staffing and research, any significant reduction from the amount requested must come from one or both of these areas.

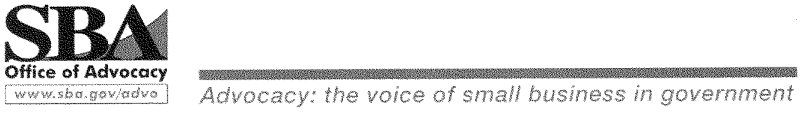
Advocacy's professional staff is our most important resource. We cannot accomplish our important mission without them. Therefore, the majority of Advocacy's funding reduction is coming from our budget for economic research.

As a result, we are expecting a modest reduction in the number of research reports or data products in fiscal year 2014 from 25 to 20.

I would like to conclude by citing a benchmark that demonstrates what a good investment Advocacy is for America's taxpayers. On average during the most recent five years from which we have final data from fiscal year 2008 to fiscal year 2012, each $981 Congress has spent on Advocacy has yielded $1 million in regulatory cost savings for America's small businesses.

Thank you again for your support of the Office of Advocacy. I look forward to continuing to work with you on issues of importance to small business and would be happy to answer any questions.

[The prepared statement of Mr. Sargeant follows:]



Testimony of

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

United States Senate
Committee on Small Business and Entrepreneurship

Date:	April 17, 2013
Time:	10:00 a.m.
Location:	Room 428 Russell Senate Office Building Washington, D.C.
Topic:	Office of Advocacy Fiscal Year 2014 Budget

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. The Chief Counsel for Advocacy, who is appointed by the President and confirmed by the U.S. Senate, 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. Issues are identified through economic research, policy analyses, and small business outreach. The Chief Counsel's efforts are supported by offices in Washington, D.C., and by Regional Advocates. For more information about the Office of Advocacy, visit ***http://www.sba.gov/advocacy****, or call (202) 205-6533.*

Chair Landrieu, Ranking Member Risch, and Members of the Committee, good morning. As Chief Counsel for Advocacy, I thank you for the opportunity to appear before the Committee today to discuss the Office of Advocacy's budget request for Fiscal Year 2014.

Advocacy's independence and new separate account legislation

First, on behalf of the entire Advocacy team, we would like to again thank the Committee for the tremendous support you have shown for our office over the years. Underscoring this support was a provision in Public Law 111-240 that established in the Treasury a separate account for Advocacy, in addition to a requirement that SBA provide operating support for our office. These provisions have enhanced our independence and have increased transparency for our many stakeholders on our costs and operations.

There is a long legislative history supporting the Congressional intent that Advocacy is an independent office housed within SBA, and that its mission and activities, and the discretion exercised by the Chief Counsel in their implementation, are independent of the SBA and its management and normal chain of command. As you know, Advocacy has its own statutory charter, Public Law 94-305, which is not part of the Small Business Act. The Regulatory Flexibility Act (RFA) also conveyed additional duties and powers on the Chief Counsel, as did Executive Order 13272.

Advocacy's independence allows us to take strong positions in our comment letters, publications, testimony and other work, without going through clearance within the executive branch. While such review and coordination is certainly appropriate for most agencies, in our case it is not. That is because it is the job of each Chief Counsel to transmit directly to policymakers the unfiltered views of our small entity stakeholders.

Advocacy now has statutory line-item funding, segregated in a separate Treasury account similar to that of the SBA Inspector General. This means that Congress sets the amount available for direct Advocacy costs, and these funds are not commingled with other SBA funding. The enactment of these Advocacy budgetary provisions underscores our independence and indicates

that Congress intended to identify clearly the resources available to Advocacy, provide a basis for performance measurement, and promote certainty in Advocacy budgets. The statutory line-item for Advocacy became fully operational in FY 2012, and the President's budget request for FY 2014 is the third that reflects the establishment of the new Treasury account for our office.

Advocacy's FY 2014 budget request

In recognition of the need for federal agencies to reduce their budget requests during the current economic conditions, the Office of Advocacy requests $8.455 million for its direct expenses in FY 2014, a reduction of $191,000 (or 2.2 percent) from its FY 2013 enacted level.

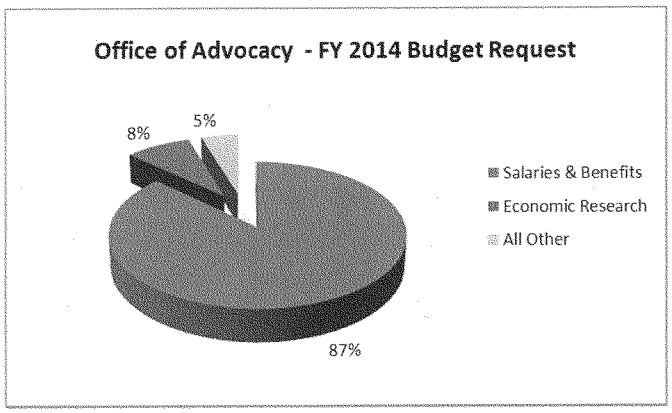
Dollars in Millions	FY 2012 Enacted Level	FY 2013 Enacted Level	FY 2014 Request
New Budget Authority	9.120	8.646	8.455

This amount includes $7.36 million to support 46 positions, the same number that Advocacy currently has when fully staffed. Advocacy's professional staff is our most important asset, and it is appropriate that the largest share of our budget goes to human resources.

The FY 2014 budget request will also support an economic research program of $700,000. This includes funding for data acquisition, specialized contract research, support of custom data tabulations at other agencies, and related costs. In recent years, Advocacy has produced an average of 25 new reports or data products each year. Because much of the reduction in Advocacy's budget request has come from this area, we expect a modest reduction in the numbei of such reports in the future, with our revised annual goal being 20 reports or data products.

The balance of our request, $395,000, covers all other direct expenses, including travel, training, office supplies, subscriptions to legal and economic research resources, and other miscellaneous expenses directly attributable to Advocacy.

Together, staffing and research account for 95 percent of Advocacy's total request, and any significant reduction from the amounts requested necessarily come from one or both of these areas.



Additional support for Advocacy in the FY 2014 budget request

In addition to a separate account for Advocacy, Public Law 111-240 also included a provision that SBA was to supply Advocacy with operational support such as office space, rent and utilities, telecommunications, equipment and maintenance, etc. Advocacy negotiated a Memorandum of Understanding (MOU) with SBA's Office of the Chief Financial Officer and other SBA support offices in which the agency has agreed to provide all of the items contemplated in the new law without charge to Advocacy's appropriation account, including centralized indirect expenses shared with other SBA offices (such as procurement & payroll services). Although the support package for Advocacy that SBA is now providing will not be charged to our appropriation account, the costs for these services and other indirect overhead appear elsewhere in SBA's budget. Because these overhead costs do not affect our direct costs, and because they for the most part reflect SBA accounting conventions, Advocacy will not be directly involved in their calculation or reporting.

Revisions to strategic goals and performance metrics

The Government Performance and Results Act of 1993 (GPRA), as amended by the GPRA Modernization Act of 2010 (Public Law 111-352), requires federal agencies to establish strategic goals and more detailed performance objectives to meet these goals. Programs and offices within agencies have performance indicators to measure progress in meeting these goals and objectives, and final performance measurements are reported publicly each year. In the past, Advocacy's performance indicators have supported an SBA objective to "foster a small business-friendly environment by reducing burdens on small business and improving collection of relevant small business data." However, with the establishment of our own separate appropriations account and budget appendix, Advocacy now has its own strategic goals and metrics.

Advocacy's two strategic goals closely align with the office's primary statutory missions, regulatory advocacy and economic research. These revisions will not change in any way our commitment to providing small businesses with an effective voice in the regulatory process and providing our stakeholders with high-quality research and data products. The current fiscal year, FY 2013, is the first in which the performance objectives and metrics for Advocacy's revised strategic goals have been fully in place. A detailed discussion of the revisions to Advocacy's goals and performance metrics is included in the Advocacy appendix to SBA's congressional budget justification document, along with our annual performance report for FY 2012 and goals for FY 2013 and FY 2014. There are the two strategic goals that we have adopted going forward:

- *Advocacy Strategic Goal 1:* To be an independent voice for small businesses inside the government and to assist federal agencies in the development of regulations and policies that minimize burdens on small entities in order to support their start-up, development and growth.

- *Advocacy Strategic Goal 2:* To develop and disseminate research and data on small businesses and the role that they play in the economy, including the availability of credit, the effects of regulations and taxation, the role of firms owned by women, minority and veteran entrepreneurs, innovation, and factors that encourage or inhibit small business start-up, development and growth.

New Innovation Initiative

Last year, Advocacy launched a new effort which we call the Innovation Initiative. This effort focuses on the specific needs and concerns faced by high-growth companies and entrepreneurs. These innovative businesses face different challenges in starting, maintaining and growing their operations than do other types of small businesses. They often pioneer technologies, business models, and practices that are not yet addressed by the federal government's existing regulations and processes.

Using Advocacy's ten regional advocates, supported by the office's attorneys and economists in Washington, Advocacy is conducting outreach to engage innovators, entrepreneurs, investors, research universities, and industry representatives to hear first-hand what impediments exist for innovative small businesses in high-growth sectors. We have already had two highly successful regional conferences in Seattle and Pittsburgh as part of the Innovation Initiative. Advocacy will inform policymakers in the Congress, the White House, and federal agencies of specific concerns heard in its outreach efforts, and it will work with the relevant agencies to facilitate the adoption of regulations and administrative practices that take into account the needs of high-growth small businesses.

Conclusion

I would like to conclude by citing a benchmark that demonstrates what a good investment Advocacy is for America's taxpayers. On average during the most recent five years for which we have final data (FY 2008 through FY 2012), each $981 Congress has spent on Advocacy has yielded $1 million in regulatory cost savings for America's small businesses.

Let me again thank the Committee and its staff for the tremendous support you have given the Office of Advocacy for so many years. It helps us immeasurably in our work to know that we have this support. We look forward to continuing to work with you on issues of importance to small business. I would be pleased to answer any questions that you might have.

Chair LANDRIEU. Thank you. I am going to take five minutes for questioning and then turned it over to my Ranking Member and then to the Senators that are here.

Ms. Gustafson, you said that the SBA has made no progress at all in your testimony to modernize the SBA's loan accounting system and migrate it off the mainframe which is noted as challenge number 8 in your documents. As a result, you downgraded it from an orange to a red.

Can you explain significance of this downgrade and elaborate on this challenge that the agency seems to not be able to make too much progress on?

Ms. GUSTAFSON. Absolutely. The LMAS loan management accounting system computer platform has been a source of great concern for my office for several years. It is a very large program that is behind the times. Since 2005, we have noted that it is, it is an antiquated program that is very, very difficult to upgrade.

It uses a COBOL-based language that hardly anybody knows and what we have been saying since 2005 is that it needs to be moved off the mainframe onto a more modern web-based environment.

Now, the agency has made several attempts, several fits and starts to modernize the system. The estimates to modernize the system are in the hundreds of millions of dollars. It is a very big system.

Now, the progress that has been made, to be fair, is a couple of years ago the agency decided to undertake this process in the way that we had been suggesting that they do it in and in a way that OMB is also moving all big IT projects towards which is do it in stages.

Do not try to do hundreds of millions of dollars all at once. If you make a mistake, then all of a sudden you find you spent hundreds of millions of dollars or tens of millions of dollars and you have to start over; and that, in fact, had happened.

What has been happening recently is they now are taking it in incremental steps called incremental improvement projects, and there has been some progress made in the last year to begin to move it off the mainframe which is definitely a sign of progress.

The moving to the red; there were three parts of the management challenge that moved to red that were of a concern to us, and are a concern to us, deal with the quality assurance program, the quality control program to make sure that all the checks are being done as it goes forward, independent verification and validation.

It is crucial that those be paid very close attention to and that they make sure that those steps are done. I will tell you that I have been assured that progress will be made this year and I am very hopeful that that is the case.

Chair LANDRIEU. But let me be very clear and I am going to do more reading on my own on this. But, is this the computer program that backs up the major lending programs that go through the banks in the country, the 7(a) and 504 and our lending partners?

Ms. GUSTAFSON. Right. This is their management of the loans. Again, I believe that what they have shown is that they are beginning to move it again. It is when you think of an old mainframe system, you know, servers in a room, they are beginning to migrate to a web-based environment.

Chair LANDRIEU. Because, the reason I am pressing this, and I am going to really press this as an efficiency to achieve here is because technology is moving so quickly and so fast.

And while you say that the estimates are that it will be hundreds of millions of dollars to change it, when I see businesses to changing technology, they might be spending a little bit more money but they are saving so much more money because the technology is now off the shelf.

I cannot understand how large entities in this country, private entities, manage billions and trillions of dollars under management and have to track things just like this agency and they have been on a new system for over decades and we still cannot get to a new system. I am having a hard time figuring this out.

I think the barrier of the estimate of the money is pushing them off when maybe there is a much simpler, much less expensive solution. I am going to ask my ranking member who is probably pretty good on this to give us some ideas about how to achieve this because, and any ideas that you have, please submit them. But I am going to spend a good bit of time the next couple of months on this.

Let me just ask one more question. If you could, Mr. Sargeant, Dr. Sargent, give us, you know, two or three of your, real quickly, your best examples of regulations because that is what your office was created for. It was created before I got to be Chair of this Committee. It has been supported by Democrats and Republicans for many years.

What have you been able to convince the Administration not to move forward with or several rules and regulations that you believe, and you could just mention two examples this year where you have been able to buffer some small businesses from regulations that either did not make sense or would have been too cumbersome.

Mr. SARGEANT. Chair Landrieu, thank you for your leadership. Thank you for your support of small businesses. As you know, small businesses are the backbone of our economy.

We are pleased that our research shows the contributions that small business owners make. And what we know is that small business owners seek to do what they do best which is to create jobs, create money, create wealth.

And so, what we seek to do within the Office of Advocacy, which is what we were created to do, make sure that small businesses have a voice within the regulatory process.

We believe very early on that good research, just like good research leads to sound regulation, by having more stakeholders within the process when the voices who are at the table are being regulated, we believe that——

Chair LANDRIEU. Can you give us two examples this year? And if you cannot off the top of your head, if you will submit those to us, two examples.

Mr. SARGEANT. Well, two examples. One, we are pleased that the IRS made some changes to the home office deduction; 52 percent of all businesses are home-based businesses, and it was very complicated on how one would take advantage of the IRS home office deduction. So, we are pleased that this year alone that they came out, made sure——

Chair LANDRIEU. Did you all do that administratively or did we do that legislatively?

Mr. SARGEANT. Well, what we did, under Executive Order 13563, where the President asked for regulatory review and reform, we submitted what we heard from small businesses the things that they most thought was onerous and not clear, and so this was one of the rules and so we are pleased that that was repealed.

We also were pleased, and this is near and dear to your heart with regard to the turtle exclusionary device. We met with NOAA. I went down to New Orleans, went on a shrimp boat and I saw that NOAA was going to move forward with the rule that would require this TED device to be on shrimpers and on skimmers.

We know that the fisheries have been hard hit on a number of fronts, but this would have caused fishermen to lose their catch. And so what we did is that we had a roundtable, had NOAA on the phone. They were able to talk directly to the fishermen to say, well, this may not be the best way to move forward and we were pleased that they did not move forward. They are still going to collect data. So, that is two rules that we have worked on.

Chair LANDRIEU. I am going to ask your office to submit for our review a list of about 20 very specific actions that you all took this year and I am going to review in your report how many actions that were taken that had the results of reducing regulations and I am going to turn it over to Senator Risch.

Mr. SERGEANT. Okay.

Senator RISCH. Thank you, Madam Chairman.

I thank both of you for your service. These are critical services when the government is paying as much money as they are spending on these enterprises. We all know that money has a tendency to fall through the cracks and go places that people do not want it to go.

So, thank you both for your service.

I would like to help, Madam Chairman, on the computer matters but I would need my grandchildren here actually do give me a hand.

Chair LANDRIEU. Well, maybe we should invite them because we need their help.

Senator RISCH. Anyway, but we rely on experts like you for those kinds of things because again if somebody does not build a fire under them, they do not seem to get changed.

Mr. Sargeant, how many people do you have in the Office of Advocacy? What is the total?

Mr. SARGEANT. We have 46 full-time equivalents within the Office of Advocacy.

Senator RISCH. 46 people. And I do not know how the chairman feels about this but I noted, as you pointed out, the fact that in the President's proposal that your office was being cut; and at the same time that those cuts were being proposed, there is a proposal to add nine new programs in the SBA totaling just under $75 million. It would seem to me that your office ought to be increased; this thing ought to be reversed. It ought to be your office that is going up instead of down because obviously what I hear from businesses, small, medium, and large, is that the bureaucracy is killing them, that they are being smothered by the regulatory process.

A good example of that is Obamacare. You know, that was an almost 3000-page bill. It was given to us about 30 minutes before we voted on it.

But the real atrocities have come after the bill and that is the regulatory process. I have brought in today, this is, they tell me, seven feet three inches tall, and it includes the rules and regulations for Obamacare. None of us voted on these. These were put into place by the bureaucracies as it attempts to make Obamacare work.

Your job, as I understand it, is to see when there are proposals for rules and regulations, that they have as modest an impact as possible on small businesses.

Is that one of your charges?

Mr. SARGEANT. Yes, that is one of my charges.

Senator RISCH. Have you guys looked at every one of these pages?

Mr. SARGEANT. Well, we have looked at a number of rules that have come out under the ACA; and so, we work with DOL, we work with HHS, we work with the IRS, we work with SBA to make sure that they understand what impact the rules will have on small business.

Senator RISCH. And have you had some successes in walking them backwards on any of these rules and regs, or do you just talk with them and they patronize you and pat you on the head and send you back to the offices? Have you had any successes?

Mr. SARGEANT. Well, many of the rules that we have heard about from small businesses, mostly deal with not being sure of how to comply. And so, what we do is we work with agencies, not just on the rule itself but we make sure that small businesses will know how to comply, because we believe that once they know how to comply, then the rules will be effective.

So, that is what we are trying to do, to make sure that the rules are written in plain language but also make sure that small businesses are at the table to give feedback to regulators so that they know how to make sure that these rules do not disproportionately impact small businesses.

Senator RISCH. Perfect. Do you think you get that done with 46 people? I mean, I look at this. I do not know how—and this is just one law. Obamacare. You have got to deal with the EPA. You have got to deal with the IRS. You have got to deal with all of the other regulatory agencies, and they tell me, although we pass about 2,000 pages of law a year, that the bureaucracy produces about 70,000 pages of rules and regulations. Do you get that done with 46 people?

Mr. SARGEANT. Well, we work with what we have; and right now with the budget, we are able to accomplish and work across agencies. We have a dedicated and a talented staff with many years of experience.

We work with small businesses. We work with our regional advocates. Our charge is to make sure that we follow the Federal Register, see what is being posted. Many times the agencies will notify us if a rule will have a significant economic impact, under the RFA, as they have to contact us.

And so we make do with what we have. But, of course, the more responsibilities we take on, then we have to look and see how we can make the best use of our resources.

Senator RISCH. Well, first of all, I cannot tell you how delighted I am to hear an agency say, we do the best we can with what we have. Believe me, that is what we ask out of every agency. I appreciate the no whining and the comment that you are doing the best you can.

The difficulty I have is, if there is one agency that should whine a little bit, it looks like it should be you. I just cannot understand how 46 people can look at 70,000 pages of rules and regulations every year, especially when you look at something like this. I mean, I do not know how many Philadelphia lawyers it would take to go through this and look at the law of unintended consequences and all of the other things that flow from these kind of regulations.

So, bless you for what you do but it just seems to me that it would take a lot more of an effort. Again, I want to underscore, Madam Chairman, and want to note for the record that this business of adding nine new programs and $75 million when these guys are laboring with just 46 people trying to help small businesses, I just think is really, really the wrong direction to be going.

So again, my time is up even though the clock seems to be frozen. Thank you, Madam Chairman. I do not know how that happened. I do not usually get that kind of break here, but thanks so much and I appreciate that.

Again, thank you for what you do and the same with you, Ms. Gustafson. Thank you so much.

Chair LANDRIEU. Thank you for your comments. But, Senator, I would be remiss if I did not underscore, though, that there may be nine new initiatives but it is being done with less money than last year.

And the government is dynamic and they have got to eliminate things that are not working and moved to proven models, and I think that is what we are seeing in this budget.

Now, I am not completely convinced of this accelerator model yet; but if it were nine new programs and the budget was going up 20 percent, that would be one thing but it is nine new programs within a lower dollar amount than last year.

So, that is what I think we need to keep our eyes on, and I know you will join me in that, Senator.

Senator RISCH. I will do that, Madam Chairman, and was it the growth accelerators that you have questions about?

Chair LANDRIEU. Well, yes.

Senator RISCH. That is only $5 million out of the $75 million.

Chair LANDRIEU. It is $40 million I think but I do not know.

Senator RISCH. That is the entrepreneurship education program.

Chair LANDRIEU. Correct, and there are some initiatives in the budget that move money around in the budget. But I think that is what departments should do is to figure out, when it is up to us, to give our green light or red light or yellow lights because we are not the final say. Of course, the Congress is.

But our comments about this budget and what we think is a good thing or a bad thing do influence what our colleagues will say. And what would concern me is if they were spending 20 percent more

money and not eliminating things but they seem to be cutting back on certain things, shifting their focus around, and that is what this hearing is about, to see if that allocation has been done correctly. And, I have not made any final decisions until after this hearing. So, we will get to visit about that.

Senator RISCH. You know, and I really appreciate that but, you know, when you spend $40 million on an entrepreneurship education program, look, we Americans understand entrepreneurship. We were born in entrepreneurship. We are the entrepreneurs of the world. You do not need to spend $40 million educating people on entrepreneurship.

I would much rather see this money go to Mr. Sergeant's office and have him go through this thing and get Administration by the throat and try to convince them of what they are doing, how they are strangling small businesses. That is my view. Thank you.

Chair LANDRIEU. Thank you.

Senator Cowan.

Senator COWAN. Thank you. Thank you, Madam Chair.

General Gustafson and Mr. Sargeant, it is good to see you again. Thank you for your testimony.

First of all, I have great respect for both what you do and your agency's responsibilities. I think when we are in the business of expending public dollars, and we are, for important purposes, it is always an incumbent upon us to make sure those dollars are being spent wisely and efficiently, and it seems like you are both in the business of ensuring that. So, I thank you for that.

And, I have some experience with that from my time with the state level in Massachusetts working closely with the Inspector General there who, I used to tell him all the time, did a great job of keeping all of us honest about the work that we had to do.

Mr. Sargeant, as you know from our conversation when I was the governor's chief legal counsel, I, in effect, served in the role that you did when you came to the regulatory process of ensuring that when our agencies were proposing regulations, we were clear about the impact on small businesses and others and ensured that regulations would not have a negative impact and sought feedback from those who would be regulated.

And frankly, when there was, and most recently looking at regulations that had been on the books for many, many years and deciding whether or not they still served a particular purpose in taking what some would say was the bold but seemingly reasonable action of actually removing some regulations from the books which is always interesting.

General Gustafson, back to your issue about the loan program, your concern and, as the Chair has indicated, you moved, on the dashboard you moved it, we saw the light go from yellow to red which is never a good thing.

I am curious. I would like to hear a little more about that. One of the most frustrating things I recall from my time in state service looking at some of these issues when you were dealing with agency officials and trying to get them to move forward or change some things, often the response was, well, we have always done it this way.

Can you elaborate a little bit more about why you think we are not moving forward in the way that you propose and what is the basis of that resistance, and what, if anything, can we do, we the Senate, the Congress, do to help advance the cause?

Ms. GUSTAFSON. I think as far as the LMAS platform, the loan management platform, where they went from orange to red, the key thing that the Congress needs to continue to do, which they have done, is to continue to emphasize to the administration and to the Administrator how crucial this project is and to make sure that they know that, and they do know this, that we are watching and that you are watching.

I mean, this is then again a subject of concern both within the agency and with this Committee and Congress for several years now.

So, I would not say necessarily that in the last couple of years, I would not say that the problem has been a reticence on the agency to agree with us.

As I said before, we had been pushing for several years for them to take this in stages and to try to not, you know, build an entirely new car from the get-go but, you know, start fixing the part of the car that needed to be fixed.

And so, that has been a change, a very positive change that the agency has begun to do that. So, I do not think it really is a reluctance on their part.

Part of the issues that the challenge report from last fiscal year showed had to do with things like getting the people on board that needed to be onboard timely as far as contracting and the quality assurance parts and on the independent verification and validation.

Part of it was they had not yet gotten the people on board through contracting, or otherwise, that they needed to get on board and make sure there was a segregation of duties such that a lot of what those reds have to do with, have to do with is the process of them checking themselves as they go along with quality assurance part and stuff like that.

And so, it was them following a little behind the curve on those aspects that resulted in those reds. And that is why, as I indicated to Senator Landrieu through—of course, we continue a constant dialogue with the agency on all of these management challenges.

This is not something that we visit just once a year and, boom, now you are red, or you are orange, or something like that; and through the conversations that we continue to have, it seems to me, at least anecdotally, and of course, we go back and check this, we never take anybody at their word. We are the OIG. It seems like—it would not shock me if we did not see progress in that area, that that has been improved.

Senator COWAN. Mr. Sargeant, we have a little bit of time left but I am just curious. Picking up where the Ranking Member expressed concern about the size of your staff and your willingness to do everything you can with what you have, has there any thought been given to ask the agencies themselves perhaps through some process to identify, as we did in Massachusetts at the State level, those regulations that the agency who should know the best believe are no longer useful or repetitive or outdated or do not

serve any particular purpose, to identify those for consideration either being revised or revoked or removed from the books?

Have you thought about a process like that?

Mr. SARGEANT. Senator Cowan, under Executive Order 13563, the President did call for agencies to look at the rules that were on their books and then to do an assessment in conjunction with us as to whether or not those rules were needed.

And so, what we did is that we submitted rules that we got from small businesses, because it is one thing for the agency to do the analysis and to look at rules themselves, but it is another thing to get feedback from those who, you know, from the stakeholders.

So, what we try to do is to make sure that it is not just that they are looking at the rules but there is a feedback loop where they are hearing what we are hearing in terms of how those rules will impact and to identify the rules that will get the best bang for the buck.

So, we continue to work with the administration. There were three rules. One was the IRS rule that was mentioned that was on the books for a long time. There was a three percent withholding rule that was also on the books. That was repealed.

And so, we will continue to work with the administration in terms of how to identify rules under what is called the RFA 610. Every 10 years if a rule has been on the books for 10 years, the agency is required to look at those rules to assess whether or not those rules are needed.

One of my legislative priorities is to request that the agencies have a structured process so that the agency will not just look at the rule and say, well, okay, we think it is still needed.

But to really do the analysis because now there are 10 years that they can look back to see what the impact of that rule is and whether or not it has been effective and whether it is no longer needed.

And so, those are some of the things that we hope to do, and I would welcome the opportunity to work with you on ways that we could strengthen this process.

Senator COWAN. Thank you.

Senator RISCH. Madam Chairman, Senator Cowan, that is such a great idea to review those rules and regulations. In fact, it is unfortunate they do not expire and sunset and give us a chance to actually deal with them.

The Executive Order you are referring to, is that the one that President Obama——

Mr. SARGEANT. Yes, that was Executive Order——

Senator RISCH. You know, for a long time, for a long time after that, we heard the only rule that was repealed as a result of that was EPA finally deciding that spilled milk was not a hazardous substance.

Are there some other rules that were repealed under that Executive Order?

Mr. SARGEANT. Well, there were other rules.

Senator RISCH. Two others.

Mr. SARGEANT. One was the three percent withholding and also the one on the IRS home office deduction. And, there are others. Well, the rules that I am talking about——

Senator RISCH. Was not the three percent, did not we do that? Did not Congress do that?

Mr. SARGEANT. Yes.

Senator RISCH. So, it was not the administration.

Mr. SARGEANT. It was not, yes

Senator RISCH. So, there have been two rules repealed by the Administration as a result of his Executive Order, is that what you are telling us?

Mr. SARGEANT. Well, those are rules that I look at for small business. There may be some other rules that may have impacted large businesses.

Senator RISCH. Is one of them the milk rule that I referred to?

Mr. SARGEANT. Yes, the milk rule and the rule that dealt with the IRS.

Senator RISCH. I do not know of any others but perhaps there were, perhaps there were some others. But anyway, Senator Cowan, thank you for that. That is something that really needs to be done. I appreciate it.

Chair LANDRIEU. Thank you, again thank you all very much and the meeting is adjourned.

[Whereupon, at 11:53 a.m., the Committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

<u>*QFRs*</u> - ADMINISTRATOR MILLS
From Chair Landrieu

"The FY 2014 Budget Request for the Small Business Administration"

Disaster Loans

<u>Question – Implementation of Guaranteed Disaster Loan Pilot Programs</u>
The 2008 Farm Bill included two new SBA bridge loan programs – a $25,000 Immediate Disaster Assistance Program (Rep. Velasquez) and a $150,000 Expedited Disaster Loan Program (Chair Landrieu). We created these programs to give SBA additional "tools in its toolbox" after catastrophic disasters such as Katrina/Rita. Congress subsequently provided necessary funds ($1.7 million) through appropriations bills for SBA to test these programs with local lenders. That testing is crucial so that SBA can make necessary improvements in the event that it needs to mobilize these programs.

While I acknowledge that SBA has been working to get these programs piloted, <u>the bottom line is that – after 5 years - the agency has yet to conduct actual tests with lenders</u>. I am particularly frustrated that SBA made steps but did not ultimately follow through on piloting either program in areas impacted by Hurricane Sandy last year.

- **Will the SBA pilot this program during Fiscal Year 2014? (Yes/No)**

  Answer: The challenge for SBA in trying to stand up these two programs has been making them attractive for our lending partners. Banks are historically hesitant to become involved in disaster lending because of its high risk nature. In our outreach to banks, we have encountered concern about the proposed underwriting/processing criteria for a small interim emergency disbursement designed to preserve a disaster-impacted business prior to its ability to secure regular disaster loan approval. That process is currently undergoing review and refinement. Our hope is that we will be able to attract banks to the revised IDAP program and pilot the program in Fiscal Year 2014. Once the IDAP pilot is operational, SBA expects to move forward with developing the Expedited Disaster Loan Program.

<u>Question – Effective Disaster Response</u>
The FY13 Budget includes $192 million in disaster loan administrative expenses. This request bolsters funding provided for SBA disaster loans in the Hurricane Sandy Supplemental earlier this year. As of March 31st, SBA had $242.4 million available in administrative funds and $693.7 million in loan making subsidy funds. Overall, these subsidy funds would support approximately $6.24 billion in disaster loans.

- **Do you believe that the reforms to date, as well as the disaster funding included in this Budget request, will allow SBA to <u>effectively</u> respond to disasters which may occur during Fiscal Year 2013?**

Answer: We believe that the disaster reforms to date, as well as the disaster funding included in the President's FY2014 Budget request, will allow SBA to effectively respond to disasters which may occur during Fiscal Year 2014.

- **The Budget request includes $192 million for disaster loan administrative expenses but no funding for disaster loan authority. Does SBA require additional appropriations for disaster loan authority at this time?**

  Answer: SBA does not require additional appropriations for disaster loan authority at this time. We believe that we have sufficient funding to support $6.42 billion in disaster loans as of May 31, 2013.

Question – Pioneer Business Assistance

SBA has made improvements since 2005 to get businesses timelier assistance. I am still concerned, however, that SBA could better target disaster loans to "pioneer" businesses or those which may be vital to recovery (debris removal, child care centers, hardware stores, etc.). If homeowners see their local gas station or restaurant is open, it encourages them to come home to rebuild. The businesses, in turn, see their business pick up.

- **How could the SBA improve its disaster loan process to encourage these pioneer businesses to re-open sooner?**

  Answer: In general, SBA disaster loans are processed in the order they are received. A business owner's decision to apply for disaster loan assistance and the timing of submittal can be affected by numerous factors other than the return of a business's customer base, including: availability of insurance or other compensation, restoration of utilities and infrastructure, and the decision to cease business operations rather than incur debt to finance recovery needs.

  SBA uses a myriad of resources to provide outreach to the business community so as to encourage businesses affected by a disaster to apply for assistance. For example, in response to Hurricane Sandy, SBA created a dedicated Hurricane Sandy page on its Website that allows business owners to access recovery resources 24/7, including the Electronic Loan Application (ELA). Further, in order to provide more resources to the business community, in addition to having SBA representatives in each of the Federal Disaster Recovery Centers, SBA also opened more than 25 Business Recovery Centers (BRCs) in the Hurricane Sandy affected states. Finally, in coordination with our resource partners, SBA has also launched a Technical Assistance Loan Application Initiative (TALAI). The goal of this initiative is to provide follow-up assistance to disaster business applicants whose business loan applications were either declined or withdrawn. Declined and withdrawn business applicants are referred to SBA's resource

partners to get additional counseling and guidance to help strengthen their loan applications for resubmission and possible reconsideration.

Question – Interest Rates

I understand that SBA disaster loan interest rates are generally below market. However, I note that for a business determined to have "credit elsewhere," the interest rate is about 6 percent, which is higher than what a borrower can get on a conventional loan in the New York area, which is approximately 5 percent.

- **Why does the SBA charge higher interest rates than for-profit banks?**

  Answer: SBA is not in competition with private sector lenders and sets its rates based on similar instruments in the private sector, based on statute. The interest rate and the 7 year term restriction for business loans determined to have credit available elsewhere direct the disaster impacted business to the lender that best meets its needs. If a business determined to have credit available elsewhere is unable to find better terms (including interest rate), then SBA is not charging a higher interest rate than for-profit banks.

Post-Hearing Questions for the Record
Submitted to Administrator Mills
From Senator James E. Risch
Ranking Member

1. Administrator Mills, during the debates concerning sequester the White House and the SBA issued what I would consider scare tactics stating that sequester would result in loan guarantees being reduced by $902 million. Yet in your budget, you appear to have enough of a surplus to waive fees on all loans below $150,000 which will cost $14.7 million.

   Do you stand by your statements that sequester will result in a reduction in your loan guarantees and if so, how are you justifying waiving fees and requesting zero subsidy for the 7(a) loan program?

   ***Answer**: As a result of sequester, SBA's overall loan authority is being reduced by $902 million. This cut creates a high level of uncertainty for our lenders and borrowers as we approach the final months of the fiscal year. Whether loans will not be made as a result of the sequester cuts will depend on a number of factors such as the volume of 7(a) and 504 loans for the fiscal year. I am hopeful there will not be an interruption in lending, but the level of uncertainty created by the sequester cuts is not good for small business or our lending partners.*

   The President's FY2014 Budget Proposal is separate from these sequester cuts. As you noted, SBA is requesting zero subsidy for the 7(a) loan program based on our modeling for FY2014 and will also waive fees on 7(a) loans less than $150,000. Because the largest credit gap remains for these smaller dollar loans, eliminating fees will encourage lending to small businesses that face the most constraints on credit access and will create lending opportunities important for startups and entrepreneurs in underserved communities.

   If sequester has caused such a burden to the SBA's core programs, how do you justify an additional $75 million in unauthorized spending which you propose in this budget?

   ***Answer:** I want to make it clear that all of SBA's programs and initiatives have been implemented in accordance with our authority as provided by Congress. That is to say we have no unauthorized programs. The funds requested for FY 2014 will be used to carry out activities that enable SBA to fulfill its statutory mission.*

2. An astounding portion of the SBA budget is spent on new pilot programs and initiatives that have not been approved by Congress. In the budget before us today, **the Administration could have cut the SBA's budget by 21%, excluding loan subsidy, just by freezing the FY 2013 spending level and eliminating subsidy for the 7(a) program.**

Instead, the SBA has requested almost $75 million dollars for nine new, unauthorized, duplicative programs and the hiring of 201 new Federal employees. Unfortunately, this is consistent with this Administration's philosophy that we can tax and spend our way out of the current national debt crisis.

Administrator Mills, I assume you aware of the debt crisis going on in this country, yet in the wake of sequester and the current debt crisis do you believe it is appropriate for the SBA to make cuts from core and authorized SBA programs like SCORE, Small Business Development Centers (SBDCs), and others while at the same time proposing $75 million in new unauthorized spending on pilot programs whose effectiveness have not yet been proven?

Answer:

As I stated above, all of SBA's programs and initiatives have been implemented in accordance with our authority as provided by Congress.

It is critical in today's economy that we continue to support job creation where it has the greatest opportunity – among our nation's 28 million small businesses. In FY 2014 the SBA will continue to target investment in small businesses by providing more tools to help startups and existing businesses grow and create jobs while increasing SBA's efficiency and effectiveness.

SBA will continue to invest in small businesses at historic levels, but will require less money from the federal budget to do so. SBA's FY 2014 budget request reflects a savings of $109 million from our FY 2012 enacted level primarily due to the decreased subsidy cost for our 7(a) Loan Program. Decreased subsidy amounts are attributed to improving economic conditions and lower projected loan defaults.

SBA will expand its entrepreneurial education and business skills training programs, including programs targeting mid-stage businesses that are demonstrated job creators, as well as the Boots to Business Training initiative for transitioning veterans; further streamline and simplify our loan processing using SBA ONE; increase access to capital for startups and entrepreneurs in underserved communities by eliminating fees on 7(a) loans below $150,000; invest in growth accelerators and regional innovation clusters; and guarantee more than $27 billion in loans to small businesses.

3. Administrator Mills, do you agree that it is vital that the Office of Advocacy remain independent of the SBA in order to effectively monitor that Administration's regulations and perform research on the challenges facing small businesses.

   In your time as Administrator, have you requested or suggested any specific research or studies from the Office of Advocacy?

***Answer**: SBA has a good working relationship with the Office of Advocacy and I have a standing monthly meeting with the Chief Counsel for Advocacy, Dr. Winslow Sargeant, to discuss a variety of small business issues. While potential areas of research and the importance of accurate small business data regularly are discussed in our meetings, it is always clear that the Office of Advocacy operates independently from the Office of the Administrator and that the Chief Counsel for Advocacy will decide which research projects the Office of Advocacy pursues.*

Do you agree that it would be inappropriate for your office to dictate the research being performed by the Office of Advocacy, and that doing so would jeopardize the independence of the Chief Counsel?

***Answer**: I agree that the decision on what research the Office of Advocacy pursues rests solely with the Chief Counsel for Advocacy. I respect this independence and would never attempt to dictate to that office what research they should perform. That said, I think dialogue between SBA and the Office of Advocacy on small business issues and research is appropriate and can be mutually beneficial.*

4. The President's budget reiterated interest in raising the federal minimum wage to $9 an hour, a move unsupported by America's small businesses because of the disproportionate burden it places on them. Big businesses, which rarely employ minimum wage workers, are better suited to absorb the costs of such an increase. Small businesses on the other hand, have to use their limited resources to pay for other things including, operating expenses, administrative costs, high taxes, and soon possible penalties thanks to Obamacare.

   A higher minimum wage means a reduction in entry-level positions. If small businesses are forced to pay more for labor, they will find ways to use less labor.

   The SBA represents America's most powerful job creators, but an increase in the minimum wage would effectively prevent small businesses from hiring new workers. How is the SBA working to address this? We need to focus on expanding small businesses, not obstructing them from growth by raising costs and increasing regulations. What does the SBA propose to do for small businesses should they have to decrease labor in order to afford a new minimum wage?

   Small businesses cannot afford to pay a worker more than their value and raising the minimum wage would force businesses to do just that. What is the SBA doing to address the concerns small businesses have about the current high costs of labor?

   ***Answer:** The minimum wage has worked for all Americans since its introduction 68 years ago, yet the federal government has allowed the minimum wage level to deteriorate in real value to its lowest point in 50 years. In response, 20 states and the District of*

Columbia have raised their minimum wages above the federal level, up from three in 1996.

A new study by the Center for American Progress and Policy Matters Ohio (http://www.americanprogress.org/issues/regulation/report/2006/05/10/1960/good-for-business/) illustrates that these state initiatives have proven to be good government policy. The study compares the performance of small businesses with under 500 employees in the 39 states that accepted the federal minimum wage before 2003 to the 12 states (including the District of Columbia) that had minimums above the federal level in January 2003. The study found that between 1997 (when more states began having higher minimums) and 2003:

- *Employment in small businesses grew more (9.4%) in states with higher minimum wages than federal minimum wage states (6.6%) or Ohio.*
- *Inflation-adjusted small business payroll growth was stronger in high minimum wage states (19.0%) than in federal minimum wage states (13.6%) or Ohio.*

More data became available in 1998, allowing further analysis. Between 1998 and 2003:

- *The number of small business establishments grew more in higher minimum wage states (5.5%) than in federal minimum wage states (4.2%) or Ohio.*
- *Small business retail employment grew more in higher minimum wage states (9.2%) than in low minimum wage states (3.0%) or Ohio.*
- *Retail payroll grew more in higher minimum wage states (12.3%) than in low minimum wage states (6.4%) or Ohio.*
- *States with high and low minimum wages had similar growth in number of restaurants, restaurant payrolls, and restaurant employment.*

Post-Hearing Questions for the Record
Submitted to Mr. Winslow Sargeant
From Senator James E. Risch
Ranking Member

1. **Since being confirmed by the Senate in 2011 your Office has recorded the worst record of any Chief Counsel achieving just $2.45 billion in first-year cost savings in FY 2012. This was a 79 percent drop from 2011 and an 84 percent drop from 2010.**

   To what do you attribute these huge drops in cost savings for small business by your office? How do you plan to change this performance with all the new regulations small businesses are facing?

   The Office of Advocacy's first-year cost savings primarily are derived from the regulatory cost estimates of the agencies themselves. The cost savings are captured in the year in which the rule affected by Advocacy's intervention is released, which may not coincide to the year of Advocacy's involvement in the rule. Advocacy does not dictate when rules are promulgated.

   Significant variations in cost savings can and do occur from year to year. Depressed cost savings may indicate a decrease in the number of rules promulgated or agencies not adopting Advocacy recommendations but do not reflect a reduction in Advocacy's efforts to achieve small-business regulatory cost savings.

   As the 2012 Annual Performance Report (APR) points out, however, Advocacy's average annual cost savings for the prior five years at the end of FY 2012 was $9.35 billion in savings per year, almost the same as its prior five-year average at the end of FY 2011, $9.38 billion in savings per year. We believe that these five-year averages give a better picture of our continuing efforts rather than snapshots taken in any given single year.

   In FY 2012, Advocacy saw fewer regulations on which it had worked go final, the stage at which cost savings are captured. Advocacy expects to capture cost savings on some of these rules in FY 2013. Also, cost savings were difficult to quantify for a number of regulations, and additional unmeasured savings were achieved during pre-proposal interagency consultations.

   In my tenure of more than two-and-half years, Advocacy's work with federal agencies has saved small businesses more than $17 billion in new first-year regulatory costs. Advocacy will continue to strive to achieve significant regulatory cost savings for America's small businesses.

2. **One of the driving factors prompting support for the PPACA was the availability of a "choice option" plan that would allow small businesses to provide health care coverage that would function like that of larger firms, where the employer is able to provide multiple health insurance plans for the employees to choose from. This employee choice model found within the forthcoming Small Business Health Options Program (SHOP) exchange was supposed to start in 2014, but is now delayed until 2015 in the health exchanges being run by the federal government (and not required by the state run exchanges until then also)[1], leaving small businesses with just a single plan to offer their employees.**

   Small businesses, who often have employees ranging in age from 23 years old to 63 years old, were promised affordable health care option plans that could vary depending on the employee's needs. Instead, this purportedly attractive choice model and elusive cost-saving effect have been delayed even further, while the penalties for not offering insurance remain in place. My colleague Senator Landrieu even stated that this delay will "prolong and exacerbate health care costs that are crippling 29 million small businesses."[2]

   What is Advocacy doing in regards to the penalty being imposed on small businesses while a lack of affordable coverage options remains to be seen?

   The benefit of allowing small businesses to purchase group insurance together is to spread risk and bring down costs for premiums, however with this delay, the health care law is continuing to place an undue financial burden on small businesses. Issues with this program mimic the delay and design issues found with the model Massachusetts small business program that had less than 5,000 small businesses enrolled in the exchange out of nearly 700,000 small businesses operating in the state. How is Advocacy working with small businesses who are not interested in supporting a doomed program that will continue to leave them paying more than their larger counterparts?

   Over the last decade one of the most important priorities for small businesses has been how to provide its employees with affordable and effective health care coverage. The PPACA is a complex law involving multiple federal agencies. PPACA's SHOP provisions were designed to help small businesses and their employees acquire health care coverage while serving to reduce the rising cost of obtaining health insurance.

   Advocacy, while complying with its regulatory review responsibilities under the RFA, has been active in its role of acting as a voice for small business. Advocacy has taken concerns and suggestions from small businesses about the law and provided those issues to the U.S. Department of Health and Human Services and the other federal agencies

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[1] Idaho has opted for a state-based health insurance exchange. http://gov.idaho.gov/mediacenter/press/pr2012/12Dec/pr_64.html.

[2] Pear, R. "Small Firms' Offer of Plan Choices Under Health Law Delayed," New York Times, April 1, 2013. http://www.nytimes.com/2013/04/02/us/politics/option-for-small-business-health-plan-delayed.html?_r=0.

charged with implementing the law. Advocacy also was asked to participate on the Federal Exchange Working Group in order to help inform small businesses and their representatives about federal outreach on the exchanges.

Advocacy will continue to help small businesses become better informed about PPACA allowing them to determine how to best acquire affordable and effective health coverage for their employees.

3. **Dr. Sargeant, you have voiced complaints before about how difficult it is for small businesses to understand and comply with IRS requirements. And since the PPACA's enactment, it has been even more of a red tape nightmare, with regulations registering nearly 20,000 pages. I think we both recognize that comprehension, cost, and compliance with government regulations are disproportionately burdensome to American small businesses and making the need to help these groups is vital.**

   More rules are being made every day in an attempt to clarify this law but they are only complicating matters more for our small businesses, who have limited resources for understanding these regulations. The IRS recently had a three month open comment period regarding one of the most complicated and intrusive provisions of the law, the employer mandate, during which leading national small business groups including the U.S. Chamber of Commerce and NFIB commented in detail on how this portion of law impacts small businesses and how it should be changed. The Office of Advocacy, a purported megaphone for small businesses across the country, submitted a single letter in which they simply requested an RFA analysis instead of advocating for real changes requested by employers.[3]

   How has Advocacy been acting on behalf of the small businesses in regards to the proposed regulations being developed by the IRS for the health care law? What else have you done in terms of the regulations being developed for the employer mandate besides that single letter? What in your opinion are the current obstacles that prevent or limit the voice of small business from being heard in IRS rulemaking?

   These additional rules and taxes coming up are going to have a devastating impact on the health care industry and the economy as a whole. Small business resources are already stretched thin and it is up to Advocacy to give these businesses a voice when it comes to influencing IRS rulemaking and defeating this tower of tape. What specific policy options would Advocacy propose to give small businesses a greater voice in IRS rulemaking and prevent this government intrusion in the future?

[3] http://www.regulations.gov/#!documentDetail;D=IRS-2013-0001-0057.

During my travels as Chief Counsel, I have heard from many small businesses concerned with the Affordable Care Act (ACA). The concerns primarily involve confusion and questions about the law's tax incentives and penalties. Advocacy has acted as an informational resource for inquiring small businesses, referring them to the appropriate agencies, websites and other resources designed to answer questions about the ACA.

As you know, the ACA allowed many of the first regulations issued under the law to be promulgated as interim final rules. This severely limits the applicability of the Regulatory Flexibility Act (RFA) and its analytical requirements. With respect to those regulations issued as proposed rules, we reviewed them as we are required to do under the RFA. We communicated small-business concerns with some of the rules to the appropriate agencies, to the staff of various members of Congress, and to the public through our comment letters.

4. **As outlined in the FY 2013 Budget Justification, in FY 2014, Advocacy plans to keep up its efforts to train federal regulatory agency personnel on Regulatory Flexibility Act compliance, assist regulatory agencies in complying with the requirements of Executive Order 13563 and 13610, implement retrospective review of existing regulations, as well as implementation of new initiatives focusing on the specific needs and concerns faced by high-growth companies and entrepreneurs. Advocacy also notes in the FY 2014 Budget Justification that the office expects another year of high Small Business Regulatory Enforcement Fairness Act panel activity as the new Consumer Financial Protection Bureau promulgates regulations.**

   The President's FY 2014 Budget requests $8.455 million for the Office of Advocacy. This is a $445,000 (or 5 percent) decrease from the FY 2013 budget request. With a constant stream of new regulations, the Office of Advocacy has an ever increasing workload in its role as advocate for small businesses.

   With continuing priorities, new Advocacy initiatives, and new regulations affecting small businesses being issued continuously, how does the Office of Advocacy plan to conduct adequate oversight with decreased resources?

   Advocacy's FY 2014 budget request of $8.455 million is $191,000 (or 2.2 percent) less than its FY 2013 enacted level of $8.646 million. Both amounts will support a base staffing level of 46 positions, the same level as that in FY 2012. Advocacy's FY 2014 budget anticipates a reduction in contract economic research and miscellaneous administrative expenses (such as travel and training) to achieve the planned savings. There will be no reduction in Advocacy's regulatory activities or the number of personnel working in this area.

5. **In addition to the 84% reduction in regulatory cost-savings, since your confirmation in 2011, the Office of Advocacy has seen significant decreases in the number of trained regulatory staff with in-house expertise on the Regulatory Flexibility Act –**

from 193 trained staff before your confirmation to 100 in the last Fiscal Year. This is a 48% reduction. The number of public comment letters put out by your office has similarly decreased dropping from 51 in FY 2011 to 28 in FY 2012 - a 45% drop in one fiscal year.

Your office is charged with minimizing the burden of federal regulations on small businesses. Having already seen large decreases in training and oversight from the Office of Advocacy, I am interested to hear your office's plan to adequately advocate for small businesses in an environment that is seeing a continual release of federal regulations. How does the Office of Advocacy anticipate handling the increased regulatory workload with decreased resources?

As Advocacy's FY 2012 Annual Performance Report (APR) explains, an important limitation of the cost savings performance indicator is that cost savings from rules on which Advocacy has worked are contingent on actions over which Advocacy has no control. Cost savings rely on externalities – regulatory agencies make the actual decisions that reduce burdens on small entities, not Advocacy, and these agencies control both the timing and amount of savings when they finalize and publish their rules.

Concerning the number of regulatory officials receiving RFA compliance training, Advocacy provided such training to 148 officials in FY 2012, 189 in FY 2011, 193 in FY 2010, 28 in FY 2009, and 151 in FY 2008, an annual average of 142. The 148 trained in FY 2012 was more than the average and 48 percent more than our annual goal of 100. It is not surprising that as more and more officials have received this training, there are fewer that sign up for it, especially with reduced staffing now occurring in many agencies and offices.

As to reduction in regulatory comment letters, Advocacy uses such formal public communications when warranted, but the number of letters is not a good indicator of Advocacy's overall engagement with federal agencies. Many more informal interagency communications occur than published comment letters – and much of Advocacy's involvement in the rule development process is not reflected in the formal comment letters. This engagement can take many forms, including confidential interagency communication, SBREFA panels, technical assistance, counsel on RFA compliance issues, specialized economic research on how many entities might be affected by a proposal, and outreach assistance.

As Advocacy's annual RFA reports show, the office published 28 formal comment letters in FY 2012, 51 in FY 2011, 39 in FY 2010, 34 in FY 2009, and 33 in FY 2008. The five-year average is 37 per year. The number in any given year can vary considerably. Advocacy does not use the number of formal comment letters as a performance indicator because they are only a partial measure of the office's engagement with federal agencies.

Nominal decreases in a single year of the number of officials receiving RFA training or the number of public comment letters published are not indicative of any reduction in Advocacy's efforts to reduce the regulatory burden on small businesses. Fluctuations in

these measures are normal. No reduction in Advocacy's regulatory activities or the number of personnel working in this area is expected under the FY 2014 budget request.

6. **The Office of Advocacy is responsible for reviewing regulations that may be harmful to small businesses. Please provide a list of rules and regulations for review that your office has submitted either directly to federal agencies or the Office of Information and Regulatory Affairs. What, if any, new regulations and rules have been added to the original Regulatory Review and Reform Initiative list?**

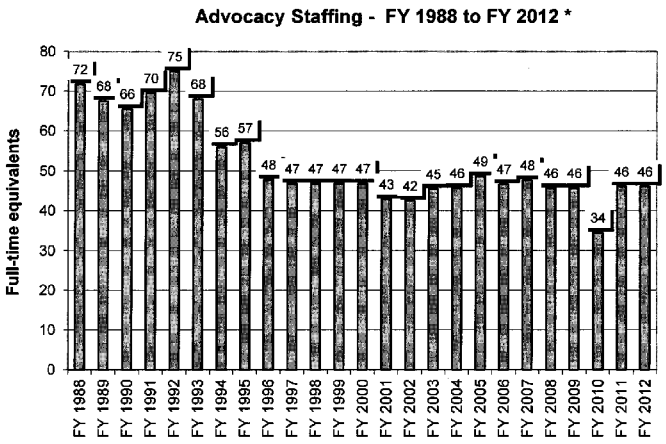
   The Office of Advocacy supports the retrospective regulatory reviews called for in Executive Orders 13563 (January 18, 2011), 13579 (July 11, 2011), and 13610 (May 10, 2012). As instructed by these Executive Orders, Federal agencies prepared retrospective review plans and released them for public comment. Copies of these plans are available on the White House website. <http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system>.

   The Office of Advocacy reviewed and commented on agency review plans during OMB's review of these plans (see OMB Memorandum M-11-10, February 2, 2011). These retrospective reviews have also encompassed the long-standing agency obligation to review existing regulations under section 610 of the RFA.

   The Office of Advocacy continues to welcome input from small entities affected by unreasonably burdensome regulations, either through its office in Washington, DC or through its Regional Advocates in the field, and will use that input to help inform agency retrospective review plans moving forward.

7. **Please provide a list of the total number of full time employees in the office for each fiscal year for the past ten years. Out of the total FTEs each year, how many were economists and attorneys dedicated to reviewing regulations?**

   Below is a chart depicting employment levels in the Office of Advocacy from FY 1988 through FY 2012. During the last 17 years, staffing levels have been fairly consistent with the exception of years immediately following a change in administrations resulting in the appointment of a new chief counsel. Advocacy's Office of Interagency Affairs, in which its regulatory attorneys work, has been Advocacy's largest operating division throughout this period, with 14 FTEs until 2009 and 13 FTEs since. Two regulatory economists, one of whom also is an attorney, work with the Office of Interagency Affairs and provide technical assistance in regulatory review.



* Data for Fiscal Years 1988 - 1990 are derived from SBA's annual congressional budget submissions. Data for Fiscal Years 1991 - 2012 are FTE actuals (rounded to whole numbers) that are derived from Advocacy personnel records and represent the highest level on board during the year. Fluctuations occur during the year due to normal attrition and staff replacement.

Post-Hearing Questions for the Record
Submitted to Inspector General Peggy Gustafson
From Senator James E. Risch
Ranking Member

1. The President's FY 2014 Budget requests $19.4 million for the Office of Inspector General with an additional allocation of $1.0 million to be taken from the Disaster Loan Program. This new budget level of $20.4 million is a $3.1 million increase over the FY 2013 request of $17.3 million. Approximately 84% of the budgeted funds will be used for salary and benefits, 10% will be allocated for the annual financial statements audit, with the remaining 6% reserved for other miscellaneous direct expenses.

   For what, specifically, does the OIG require an additional $3.1 million in budget allocation? What new personnel, initiatives, or investigations does the office propose for FY 2014?

   The President's FY 2014 Budget requests $19.4 million for the OIG, plus an additional $1 million to be transferred from the Disaster Loan program, for a total of $20.4 million. These resources are needed by the OIG to continue to provide effective independent oversight of SBA's programs and operations, including the following initiatives to (1) effectively target early defaulted loans for fraud and lender negligence, and (2) meet increased demands placed on OIG investigative personnel.

   Establish a dedicated Early Defaulted Loan Review Group to identify problem loans. When lender negligence is found, this group will recommend non-payment of the guaranty (or recovery if the guaranty is already paid), target the most offending lenders to attain corrective actions, and identify trends for operational improvement by SBA. When suspected fraud is identified, those loans will be investigated. The additional resources will be used to hire auditors, investigators, and analysts and pay for related travel and other expenses.

   Enhance investigative capacity. As discussed below, the OIG handles an average of 250 criminal and civil fraud investigations per year and annually obtains multiple indictments and convictions and recoveries of tens of millions of dollars. However, investigative capacity has been limited by staffing constraints, which have prevented the OIG from initiating or continuing a number of investigations. For instance, over the last three years, the OIG has administratively closed 171 allegations—with potential losses estimated at over $136 million—which may have met prosecutorial thresholds but could not be further investigated due to staffing constraints. Also, over the last three years the OIG proactively identified over 574 suspect loans—with potential losses estimated at over $503 million—that contained characteristics typical of problem loans. Due to staffing constraints, most of these loans could not be further reviewed to identify lender deficiencies or indications of fraud. In comparison, as of September 30, 2012, the OIG had 114 open cases related to SBA financing of small businesses (other than disaster loans) with potential dollar losses of almost $400 million. The President's FY 2014 Budget supports additional investigative support personnel (i.e., non-criminal

investigators or financial analysts), which will increase investigative capacity and allow more effective utilization of existing investigative resources in a cost effective manner.

In addition, similar to the experience of the Federal Government as a whole, in the past several years the SBA OIG has seen a marked increase in the number of qui tam False Claims Act cases that are filed by private sector whistleblowers, many relating to SBA's government contracting programs. OIG is obligated to spend investigative resources reviewing these cases to determine whether the allegations are viable and whether the government should take over the litigation.

Enhance the OIG's Hotline operations. During FY 2012, the OIG received 535 complaints through its Hotline. Also during this period:

- 234 complaints were referred to SBA program offices or other entities;
- 115 complaints were referred to the OIG's Investigations Division;
- 106 complaints were reviewed by the Hotline staff;
- 29 complaints were referred to the OIG Counsel or Auditing Divisions; and
- 81 complaints needed no action.

The FY 2014 Budget supports additional staff resources that are needed to expeditiously and effectively analyze incoming complaints for possible referral for investigation or other resolution.

2. Fraudulent loans continue to be a problem for the SBA, which must use taxpayer dollars to purchase the guaranteed portion of these bad loans. Last week in your testimony before the House Committee on Appropriations Subcommittee on Financial Services and General Government, you discussed an increase in losses in the SBA's loan programs.

What are the OIG's estimates on the amount of losses the SBA incurs as a result of fraud? What is not being prosecuted?

The OIG does not have an estimate on the amount of losses the SBA incurs as a result of fraud. As noted in our response to question #1 above, the OIG does have estimates relative to alleged fraud that is reported to the OIG or discerned from OIG reviews and fraud detection programs.

What is the OIG's plan to address the risks of financial loss faced by the SBA? What efforts are being made by the OIG to identify, combat, and prosecute fraud in the SBA's lending programs?

The funding requested for FY 2014 will be used by the OIG to more effectively address the growing financial losses in SBA lending due to lender errors and various fraud schemes. The OIG will utilize an Early Defaulted Loan Review Group to perform in-depth analyses of loans that default within 18 months of final disbursement. From this, the OIG will either make recommendations for loan guaranty recoveries, or if fraud is apparent, conduct criminal investigations to refer suspected fraud for prosecution. The

OIG also will continue with its recent initiatives to assess trends and patterns within SBA loan portfolio data to identify high-risk audit areas and potential fraud within the SBA's loan programs; and to identify loan data reliability issues warranting attention by the Agency.

The OIG also will continue its national initiative to detect fraud committed by loan agents, such as packagers and brokers. A loan agent is sometimes hired by an applicant or lender to assist the applicant in obtaining an SBA loan. Although honest loan agents help small businesses gain access to capital, some dishonest ones have perpetrated fraudulent schemes involving tens of millions of dollars in loans. These fraudulent loans often default for non-payment, and the SBA is forced to use taxpayer funds to purchase the guaranteed portions of the loans. Over the past decade, the OIG has obtained convictions and guilty pleas on numerous cases involving loan agent fraud on SBA-guaranteed loans, totaling in excess of $358 million.

The OIG recently has initiated a review of the examination process for the SBIC program. We also initiated an audit of the liquidation of SBICs in receivership. In addition, the OIG will continue to conduct audits of business loans that default quickly because past work has shown that such loans were not always properly originated and that effective controls and procedures were not in place to prevent improper payments. These audits will seek recovery of improper loan purchases from lenders and include recommendations for program or process improvements when identified. Future and ongoing OIG efforts will focus on: (1) SBA's loan origination process to determine its compliance and effectiveness; (2) SBA quality control programs to determine the extent to which programs are mitigating the risk of loss; (3) SBA's management of certain loan programs; and (4) the reliability of data in the Agency's Loan Accounting System.

Additionally, among other actions taken by the OIG, we have identified for a number of years in our management challenge report several critical steps that the Agency needs to take to reduce financial losses in SBA's business loan programs. These include: (1) establishing an effective quality assurance process to ensure that SBA decisions to pay guaranties on defaulted loans are made properly; (2) establishing an effective oversight program over lenders and other program participants to identify and prevent risky or improper lender misconduct; and (3) developing effective processes to track loan agent participation in these business lending programs and to administratively terminate loan agents that commit fraud and other wrongdoing from participating in these programs. In response to these management challenges, the Agency has improved its processes but we continue to press SBA to make additional needed improvements.

Finally, the OIG reviews all agency-proposed revisions to its regulations, standard operating procedures, notices and public use forms relevant to the business loan programs. Frequently, we identify and obtain agency agreement to remedy problems that could allow for greater financial losses or reduced accountability by lenders, borrowers and other loan program participants.

3. In the FY 2014 Budget Justification, the OIG echoes concerns outlined in their October 2012 *Report on the Most Serious Management and Performance Challenges Facing the SBA in Fiscal Year 2013*. The budget justification and report detail problem areas that the SBA needs to address and includes recommendations on how best to resolve each challenge.

What would you characterize as the most persistent and serious challenges that the SBA still faces? What steps does the OIG suggest in addressing these maters? How is the SBA's Administration being held accountable for remedying these flaws?

In FY 2013, there are 11 top management challenges were identified by the OIG, which were reported in accordance with the Reports Consolidation Act of 2000. This report represents our current assessment of SBA programs and/or activities that pose significant risks, including those that are particularly vulnerable to fraud, waste, error, mismanagement, or inefficiencies. The Challenges are not presented in order of priority, as we believe that all are critical management or performance issues.

Our report is based on specific OIG, Government Accountability Office, and other official reports, as well as our general knowledge of SBA's programs and operations. Our analysis generally considers those accomplishments that the SBA reported as of September 30, annually. Within each Management Challenge, there are a series of "recommended actions" to resolve the Challenge. Each recommended action is assigned a color "status" score. The scores are as follows: Green for "Implemented," Yellow for "Substantial Progress," Orange for "Limited Progress," and Red for "No Progress."

The policies and procedures that guide SBA officials in considering OIG-issued reports are set forth in OMB Circular A-50. This Circular appropriately indicates audit follow-up is an integral part of good management and is a shared responsibility of agency management officials and of auditors. For our part, OIG officials are responsible for making independent audits and investigations and reviewing responses to these reports. Significant disagreements in this process are addressed with the audit follow-up official—the SBA Deputy Administrator. SBA management officials are responsible for receiving and analyzing OIG reports, providing timely responses, and taking corrective action, where appropriate. OMB Circular A-50 indicates that management officials are responsible for identifying and providing the OIG dates for achieving corrective action as part of their written comments on reported findings and recommendations.

The SBA Administrator transmits semiannually to the Congress an OIG report summarizing its activities during the immediately preceding 6-month period ending either March 31 or September 30. These reports include among their contents descriptions of significant problems, abuses, and deficiencies relating to the administration of programs and operations of the SBA disclosed by OIG activities; a description of the recommendations for corrective action made during the reporting period with respect to significant problems, abuses, or deficiencies; and an identification of each significant recommendation described in previous semiannual reports on which corrective action has not been completed. These reports provide the Congress with necessary information to conduct robust oversight of the SBA.

4. According to a report issued by your office last month, the SBA has entered into over 400 unauthorized agreements for acquisition of goods and services. These unauthorized agreements impact the SBA's ability to legally acquire products and services as well as increase operational costs in the Acquisition Division. These commitments totaled more than $1.4 million in inappropriately expended SBA funds between November 2010 and May 2012. The report notes that these unauthorized commitments directly impact the SBA's ability to provide assistance to small businesses.

   Can you discuss the issues outlined in the March 2013 report and their impact on the SBA and taxpayers? What recommendations does the OIG have to address these unauthorized commitments by the SBA?

   OIG Audit Report 13-14, *The SBA's 417 Unauthorized Commitments Impacted Mission-Related Services and Increased Costs* was issued on March 28, 2013. This report presents the results of the OIG's audit of the SBA's Unauthorized Commitments. The audit objective was to determine the extent and reasons unauthorized commitments occurred. The OIG determined that the SBA received invoices associated with 417 unauthorized commitments, valuing more than $1.4 million between November 2010 and May 2012. The OIG found that the total number of unauthorized commitments at the SBA in the last two fiscal years greatly exceeded the total number of unauthorized commitments at six other federal agencies of a similar size. Further, the OIG believes that the 417 unauthorized commitments directly affected the ability of the Agency to procure goods and services for its daily operations legally and efficiently, and limited its ability to provide needed support to small businesses.

   The SBA continues to improve its acquisition process and preventing unauthorized commitments, however, transformation of the culture needs to occur. In order to implement a successful culture change, the SBA needs to hold its employees accountable for their actions, have detailed policy and guidance readily accessible to all employees, and provide meaningful training to all employees. Furthermore, as we discussed in our management challenges report our knowledge and familiarity with SBA's current acquisition activities indicate that while improvements are in process, continuing challenges exist with the acquisition system, including poorly defined requirements, internal control deficiencies, improper funding of contracts, inadequate oversight, and outdated and incomplete SOPs related to acquisition management.

   The OIG recommended seven actions to improve contract management at the SBA and significantly decrease the total number of future unauthorized commitments:

   We recommended that the SBA Administrator:

   1. Determine whether it is appropriate and feasible to take administrative and/or legal actions against SBA employee(s) making unauthorized commitments in instances where an unauthorized commitment cannot be ratified.

   We recommended that the Chief Acquisition Officer in coordination with the Senior Procurement Executive:

1. In the short-term, issue a Procedural Notice identifying what an unauthorized commitment is and that under no circumstances should an unauthorized commitment occur. This Procedural Notice should also state that administrative and/or legal action may be taken against those employees who commit the Government without the authority to do so.
2. Update and implement the Agency Standard Operating Procedures for acquisitions to include the information provided in the Procedural Notice on unauthorized commitments.
3. Develop a separate acquisition process guide for SBA staff specific to unauthorized commitments and the ratification process.
4. Update the COR Acceptance Letter to include that SBA staff assigned as a COR will not make any unauthorized commitment, and will follow guidance related to unauthorized commitments.
5. Consider options for incorporating compliance with the COR Acceptance Letter and Federal Acquisition Regulations into the annual performance assessment for those SBA employees certified as CORs.
6. Provide annual training to SBA employees involved in the acquisition process on properly planning for and managing contracts at the beginning of the fourth quarter to include addressing how unauthorized commitments occurred in the past and how to prevent them.

Senator Carl Levin
Questions for the Record
Small Business Administration FY2014 Budget
April 17, 2013

1. HUBZONES

The Historically Underutilized Business Zones (HUBZone) Empowerment Contracting program encourages economic development in historically underutilized business zones - "HUBZones" to promote economic development and employment growth in distressed areas by providing access to more federal contracting opportunities.

There is some agreement about the need to modify the HUBZone formula so it doesn't discriminate against non-metropolitan counties in high unemployment states. Because of wide swings in unemployment rates between regions and states the current unemployment-based formula for determining SBA HUBZone eligibility for non-metropolitan counties is proving to be inequitable, particularly for counties in states still suffering from high unemployment. Many HUBZone areas that still have high unemployment will, nonetheless, lose their eligibility due to the release of new economic data. For instance, this year many high unemployment counties around the country stand to lose their SBA HUBZone eligibility, including a number of counties in Michigan's upper peninsula.

Consideration should be given to the small businesses which undertake the months-long process of becoming HUBzone certified, then to lose the certification due to the county being re-designated. This is a rigorous process and businesses should be given at least a minimum expectation for remaining certified even if the county has been re-designated.
I would like to work with the House and Senate Small Business Committees and the SBA to identify a more equitable formula so that these high unemployment counties, located throughout the country, do not lose their HUBZone eligibility and undercut the benefits the program was trying to provide. One option might be to require that the unemployment rate be not less than 120% of the average unemployment rate for the United States or for the state in which such county is located, whichever is less, rather than the current 140%.

Question:
What role can the SBA play in looking for a more equitable HUBZone formula so that companies that have gone through the rigorous approval process can stay in the program for a reasonable amount of time and so that it doesn't discriminate as much against non-metropolitan counties in high unemployment states?

Answer:

SBA is happy to work with Congress in looking at improvements for the HUBZone program. In recent years, SBA has had a strong focus on the oversight of the program and making sure that only those firms currently qualified to participate are HUBZone certified. SBA agrees, however,

that there are opportunities to improve the HUBZone program through legislative changes. SBA welcomes the chance to look at the impact of potential changes, to give technical advice, and to more generally engage in policy discussions with Congress about the HUBZone program.

2. Intermediary Lending Pilot Program (ILP)

The Intermediary Lending Pilot Program (ILP), enacted as part of the Small Business Jobs Act of 2010 (P.L. 111-240) was a three year pilot program that allowed up to 40 intermediaries to apply for $1 million in loans from the SBA. These SBA loans were to be used by the intermediaries to capitalize revolving loan funds through which loans of up to $200,000 would be made to small businesses in need of flexible debt financing to sustain and create jobs. The program was authorized for three years and funded for two years.

Question:
With the second round of funding completed, please provide a status report on SBA's implementation of the ILP, a list of the intermediary lending organizations that received ILP loans and to the extent possible examples of the types of loans that the ILP's made in turn to small businesses using the ILP funds. In addition, what has the SBA learned from the ILP pilot in terms of meeting the demands of small businesses for slightly larger loans than are available through the Microloan program?

Answer:

As part of the Agency's implementation of the ILP Program, SBA published regulations in April 2011 and a Procedural Guide in January 2012 to communicate program requirements to participating ILP Intermediaries and other interested organizations. Additionally, SBA has held several training opportunities for selected ILP Intermediaries to learn and discuss program requirements.

SBA selected 20 organizations during FY2011 and 18 organizations during FY2012 to participate in the ILP Program. While SBA had funding and authority to select up to 20 organizations in FY2012, SBA did not receive enough qualified applications to do so. Of the 38 organizations selected, 37 currently participate in the ILP Program and are listed below. (After more thoroughly reviewing program requirements, the additional organization which had been selected declined to participate.)

ILP Intermediaries	*City*	*State*
3Core, Inc.	*Chico*	*CA*
Banco de Desarrollo Centro Oriental, Inc. (BADECO)	*Caguas*	*PR*
Barberton Community Development Corporation	*Barberton*	*OH*
Ben Franklin Tech Partners of Southeast Pennsylvania, The	*Philadelphia*	*PA*
Biddeford-Saco Area Economic Development Corporation	*Saco*	*ME*

ILP Intermediaries	*City*	*State*
Business Finance Group, Inc.	*Fairfax*	*VA*
Capital Regional Development Council	*Concord*	*NH*
Center for Economic & Empowerment Development	*Fayetteville*	*NC*
Central Minnesota Development Company	*Andover*	*MN*
Clay-Platte Development Corporation	*Kansas City*	*MO*
Colorado Lending Source, Ltd.	*Denver*	*CO*
Cooperative Fund Of New England	*Amherst*	*MA*
Craft 3 a/k/a (ShoreBank Enterprise Group Pacific)	*Ilwaco*	*WA*
Dakota Certified Development Corporation	*Fargo*	*ND*
Eastern Shore Entrepreneurship Center	*Easton*	*MD*
Fresno County Economic Opportunities Commission	*Fresno*	*CA*
Grand Central Texas DC	*Austin*	*TX*
GROW South Dakota	*Sisseton*	*SD*
Hamilton County Development Company, Inc.	*Cincinnati*	*OH*
La Fuerza Unida Community Development Corporation	*East Norwich*	*NY*
Mahoning Valley Economic Development Corporation	*Youngstown*	*OH*
Metropolitan Economic Development Association	*Minneapolis*	*MN*
Ohio Community Development Finance Fund	*Columbus*	*OH*
Oregon Business Development Corporation	*Bend*	*OR*
Pacific Community Ventures (PCV)	*San Francisco*	*CA*
Paragon Foundation of Palm Beach County, Inc., The	*West Palm Beach*	*FL*
PIDC Regional Development Corporation	*Philadelphia*	*PA*
Rural Nevada Development Corporation	*Ely*	*NV*
San Fernando Valley Small Business Development Corp.	*Van Nuys*	*CA*
Seattle Economic Development Fund	*Seattle*	*WA*
ShoreBank Enterprise Detroit d/b/a Detroit Development Fund	*Detroit*	*MI*
South Eastern Development Foundation	*Sioux Falls*	*SD*
Support Center-NC, The	*Raleigh*	*NC*
Tampa Bay Economic Development Corporation	*Tampa*	*FL*
TELACU Community Capital, Inc.	*Loa Angeles*	*CA*
UP Business Capital	*Marquette*	*MI*
Valley Development Initiative	*Salem*	*OR*

As of June 19, 2013, ILP Intermediaries had approved loans for $15.1 million to 174 small businesses under the program. More than 80 percent of these funds were loaned in the $50,000 to $200,000 range, which is outside the scope of the Microloan Program. SBA has learned that

a high demand exists for nonprofit lenders to make these slightly larger loans. In addition, the longer repayment term of the ILP program compared to the microloan program (20 years vs. 10 years, respectively) helps to facilitate larger loans as it provides the intermediaries more time to recoup losses from defaulted loans to small business borrowers than does the shorter term of Microloan Program loans.

U.S. Senator Maria Cantwell
U.S. Senate Committee on Small Business and Entrepreneurship

Hearing
"The President's FY 2014 Budget Proposal for the Small Business Administration"
April 17, 2013

For Karen Mills

Questions for the Record
Administrator Mills, your fiscal year 2014 budget proposal did not include any funding for "Year 3" of the SBA State Trade and Export Promotion (STEP) Pilot Grant initiative. You are probably aware that my home state of Washington was awarded a combined $3 million in years 1 and 2 and has used that minimal investment to provide export assistance to 395 small businesses, resulting in an aggregate increase of $38.4 million actual and $212.5 million forecasted export sales, representing actual and expected state tax revenues of more than $10 million and supporting more than 1,350 jobs.

- With this in mind, do you believe the STEP pilot grant initiative has been a success?

  ***Answer**: Although export sales often take months to bear fruit, the early results for the program are strong. Based on reports from STEP program award recipients for the first four quarters of FY 2012, under the initial $29 million round of award funds, STEP clients achieved immediate export sales of approximately $74 million, attributable to assistance under the STEP program. This represents a return on federal investment of 2.5:1.*

  Further, STEP clients estimated export sales of over $600 million by September 30, 2013, as a result of the program. This would represent a return on federal investment of approximately 20:1.

  On a state-by-state basis, results are also positive. For example, Tennessee STEP clients achieved export sales of $8.9 million, yielding just under 24:1 ROI, on a federal investment of $375,000. Further, Tennessee STEP clients estimated sales of $24.6 million by September 30, 2013, representing a return on federal investment over 65:1. Over time, levels of return on federal investment can be expected to grow.

  Other success measures:

  - *STEP-related export volume in 21 states exceeded their STEP funding in Year 1.*
  - *Over 740 small and medium sized enterprises attended trade shows in 2012 through STEP.*

- Is there a specific reason why the Administration didn't request funding for a third year of the STEP pilot grant initiative?

  ***Answer**: The Administration's decision not to request funding for the STEP program in the FY2014 budget proposal came down to the budget environment and fiscal constraints we currently face. The STEP program was one of several programs that received funding through the*

- Because the increase of small business prime contracts from the Department of Energy will come at the expense of some small business subcontracts, how will small businesses fare overall from these changes?

  ***Answer**: The conversion from a subcontract to a prime contract is a net gain for small business and the Government. The same firms that are performing as subcontractors can also compete for and win the prime contract. However, instead of a relationship with the prime the firm will have a direct relationship with the Government, which many small businesses would prefer for purposes of controlling the work, being paid on time and in full, and gaining the experience and past performance that can help them compete for and win other prime contracts. Competition is required at the prime contract level, which could result in the Government receiving better value at lower cost, while eliminating the overhead or markup paid to the large prime.*

- How much risk of further delays to Hanford cleanup is added from increasing the number of prime contractors?

  ***Answer**: This question is better suited for the Department of Energy.*

- If contracts for the delivery of materials are separated from their use, are there more timing and logistical challenges that could arise and potentially cause delays to cleanup?

  ***Answer**: This question is also better suited for the Department of Energy.*

- Are agencies prepared on a staff level to significantly increasing the percentage of small business prime contractors? To that end, are you worried that increasing the number of prime contracts, for some agencies, may require a significant – and unsustainable – increase in the federal workforce to award, manage, and audit those contracts?

  ***Answer**: SBA is not in a position to assess staffing levels at other agencies. We note that Congress has set an annual Government-wide goal of 23 percent of all prime contracting dollars to be awarded to small business concerns. We also note that contracting officers have responsibility for contract performance, which includes subcontracts in addition to prime contracts.*

Small Business Jobs Act of 2010 that we did not request additional funds for. The Administration had to make a number of tough decisions in the FY2014 budget concerning a number of successful programs, and the decisions around STEP were no exception.

- Are there specific improvements you would suggest Congress make to the SBA State Trade and Export Promotion (STEP) grant initiative if it pursues a full authorization?

  ***Answer**: If Congress chooses to pursue a full authorization of the STEP program, SBA is happy to work with Congress on specific areas for improvement. One potential example is making sure the administrative funding provided to execute the program matches the period of performance of the STEP recipients (i.e., when a STEP recipient receives a no cost extension, the agency's administrative funding is still on a fiscal year, requiring the agency to adjust the scope and support of the execution and compliance effort).*

SBDCs

Administrator Mills, Small Business Development Centers (SBDCs) have a long history of meeting deliverables and having a strong presence in both urban and rural communities. In my home state, our SBDC network of trusted advisors helped more than 3,000 small businesses in 2012.

- In light of the Administration's fiscal year 2014 budget, which proposes reductions of $7.8 million, do you believe that SBDCs will be able to maintain that level of tailored, one-on-one service to small businesses?

  ***Answer**: Yes, we believe the requested budget levels in the President's FY2014 budget request will allow our valued Resource Partners to continue to provide America's small businesses with the targeted and effective counseling and training services entrepreneurs need to start, grow and create jobs.*

  To that end, the President's FY14 budget requests over $120 million in continued support for SBA's Small Business Development Centers (SBDCs), Women's Business Centers (WBCs) and SCORE. With required matching funds, this will enable continued delivery of critical counseling, training and related support to small businesses nationwide.

  Though tough budget decisions will have to be made on an ongoing basis, we fully anticipate effectively maintaining the high quality of services provided across our network to small businesses and aspiring entrepreneurs.

Prime Contracting

Administrator Mills, I think we can all agree that increasing government contracting to small businesses is a worthy goal, and I'm pleased to have fought over the years to both increase the number of prime and subcontracts to small businesses. I have a few concerns about implementation, though. My understanding is that some agencies, such as the Department of Energy, with large prime contracts are having to de-scope existing prime contracts to transition them to *small business* prime contracts.

QUESTIONS SUBMITTED BY SENATOR MARK PRYOR
TO ADMINISTRATOR KAREN MILLS

FOR THE RECORD OF THE
APRIL 17, 2013 SMALL BUSINESS COMMITTEE HEARING
ON THE FY 2014 SMALL BUSINESS ADMINISTRATION BUDGET

Sequestration Cuts

I have been told that SBA reduced fiscal year 2013 funding for its national network of Small Business Development Centers by $9 million due to the sequester. This represents an 8 percent annualized cut in the SBDC program. If the SBA was supposed to cut each program by 5 percent, why was the SBDC program singled out for such a large funding cut?

Answer: *Under sequestration, SBA was required to cut each of its sequestrable appropriation accounts by 5 percent. Within each of these accounts, SBA had to make some very tough choices. Therefore, we took a strategic approach, with the goal of maintaining the SBA's core mission, including ensuring that our resource partner network would be able to continue to deliver essential counseling services. The reduction in funding for SBDCs was one of a number of difficult choices we made in order to comply with the law while still supporting SBA's mission. For example, we also reduced funding for Women's Business Centers, SCORE and our Clusters initiative.*

Entrepreneurial Education

SBA is proposing to invest $40 million in a re-tooled entrepreneurial education training program called Emerging Leaders. SBA already has in the Small Business Development Centers a national program that provides hands-on executive and business training. Why does SBA need another program that duplicates services provided by the SBDCs? Would it not be more cost effective to strengthen the existing SBDC network, even if it means giving them new or enhanced responsibilities, that standing up a brand new program that provides many of the same training services already available through the SBDCs?

Answer: *Without question, SBA has no interest in duplicating the services provided by our valued Resource Partner Network (Small Business Development Centers, Women's Business Centers and SCORE), or in building an unnecessary new program to provide training services already available in the Network. To the contrary, SBA's FY14 budget request to support intensive entrepreneurship training is intended to provide needed resources so that our Resource Partners (working collaboratively with each other and with local economic development partners) can do more of the training they already provide and which we know is extremely effective at creating and preserving jobs.*

We know that about two-and-a-half times as many jobs are created each year by expansion of existing businesses as from new business startups. We also know that avoiding stagnation and decline by keeping existing businesses on a growth trajectory is the best strategy for preserving thousands of paying jobs already in existence.

Currently, millions of existing small business owners plan to grow their businesses, but lack sufficient training in areas like accounting, market analysis or finance. They have the will to succeed but require access to quality, targeted education and mentorship to help them create and implement strong growth plans, access capital, increase revenue, and ultimately create new jobs. Many of these businesses reside in underserved areas, where the need and the opportunity are especially great.

SBA, through its Resource Partners, has extensive experience providing intensive entrepreneurship training. The key features of this training are multi-week courses with intensive curriculum and peer review and networking. Examples of this kind of training include the Maryland SBDC's "CEO Accelerator" program, Goldman Sachs' 10,000 Small Businesses program, Kauffman's Fastrac Growth program, and SBA's Emerging Leaders program.

We know intensive entrepreneurship training is cost-efficient and that it works: In the most recent year of SBA's Emerging Leaders, for example, at an average dollar cost per student-hour of training of $33.00, 75% of graduate businesses added new employees, 60% increased revenue, and graduates accessed over $26 million in new financing, $330 million in government contracts and created 908 new jobs.

SBA intends to provide competitively-awarded grants to Resource Partners and other community development organizations in local communities to deploy best-practice intensive training on a "team" basis in the format that works best in that community. Currently, our existing intensive entrepreneurship training programs are over-subscribed and the need for more such training is great. SBA's Resource Partner network will be a critical component in the success of the entrepreneurial training program, leveraging their vast existing network and expertise to do the intensive training which the requested additional resources will make possible. If the request is funded, SBA anticipates it will be able to provide intensive training to 10,000 existing small businesses poised for growth, will create over 25,000 new jobs, and will preserve over 100,000 existing jobs.

SBA believes the proposed format for grants to collaborative community-based teams represents the best and most efficient use of taxpayer dollars. Our Resource Partner networks are extremely effective and efficient when they combine their unique strengths locally to deliver the best overall service to small businesses in each community. By leading formation of local teams with our SBA District Offices, community colleges, local Mayors' offices, private sector partners and local economic development entities, they can best deploy their combined strengths to support intensive small business growth and job creation.

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

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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

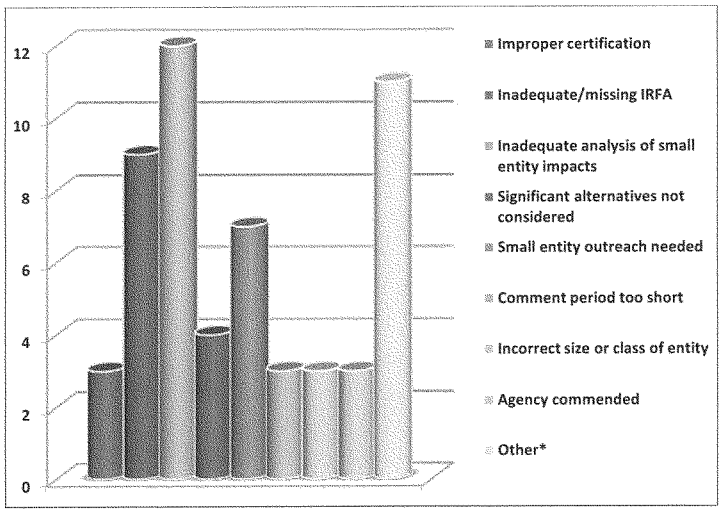
In 2012, the courts reiterated the findings of previous RFA cases and Congress.[7] In *National Association of Home Builders v. EPA*, 682 F. 3d 1032 (D.C. Cir. 2012), the court reviewed the issue of whether an agency's failure to convene a small business advocacy review panel before issuing a new rule 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)

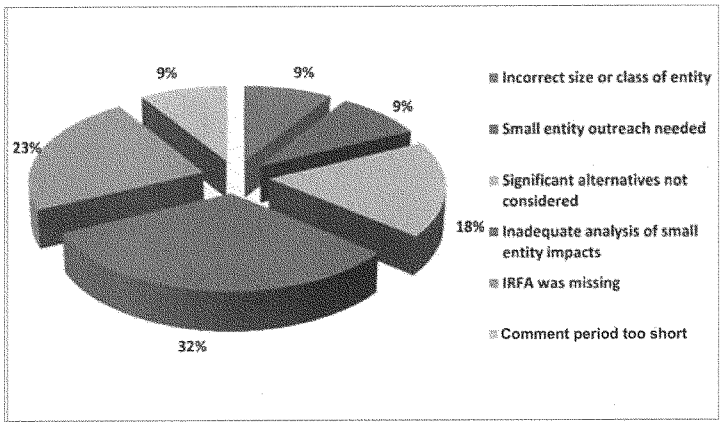


Chart 2.3 Advocacy Comments: Major Reasons Certifications Were Improper, FY 2012 (percent)

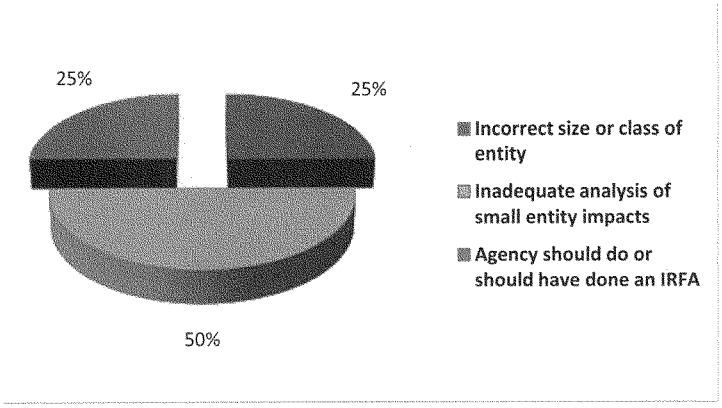


Table 2.1 Regulatory Comment Letters Filed by the Office of Advocacy, FY 2012

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	√	√	-[1]	
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

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

Department of Justice
- Bureau of Alcohol, Tobacco, and Firearms
- Drug Enforcement Administration
- Federal Bureau of Prisons

Department of Labor
- Employee Benefits Security Administration
- Employment and Training Administration
- Employment Standards Administration
- Mine Safety and Health Administration
- Occupational Safety and Health Administration
- Office of Federal Contract Compliance Programs

Department of State

Department of Transportation
- Federal Aviation Administration
- Federal Highway Administration
- Federal Motor Carrier Safety Administration
- Federal Railroad Administration
- Federal Transit Administration
- Maritime Administration
- National Highway Traffic Safety Administration
- Pipeline and Hazardous Materials Safety Administration
- Research and Special Programs Administration
- Surface Transportation Board

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

Department of Veterans Affairs
- National Cemetery Administration

Office of the Director of National Intelligence

Office of Management and Budget
- Office of Federal Procurement Policy

Independent Federal Agencies

- Access Board
- Consumer Financial Protection Bureau
- Consumer Product Safety Commission
- Commodity Futures Trading Commission
- Environmental Protection Agency
- Farm Credit Administration
- Federal Communications Commission
- Federal Deposit Insurance Corporation
- Federal Election Commission
- Federal Housing Finance 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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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
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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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
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.
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).

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

§ 601. Definitions

For purposes of this chapter —

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

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

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

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

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

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

(7) the term "collection of information" —

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

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

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

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

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

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

§ 602. Regulatory agenda

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

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

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

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

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

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

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

§ 603. Initial regulatory flexibility analysis

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

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

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

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

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

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

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

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

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

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

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

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

(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

3821

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.

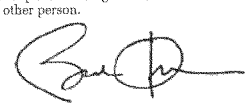
(b) Nothing in this order shall be construed to impair or otherwise affect:

(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:

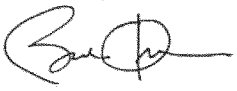
- extended compliance dates that take into account the resources available to small entities;
- performance standards rather than design standards;
- simplification of reporting and compliance requirements (as, for example, through streamlined forms and electronic filing options);
- different requirements 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
Filed 1–20–11; 8:45 am]
Billing code 3110–01–P

Appendix E
Executive Order 13579

41587

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

Presidential Documents

Title 3—

The President

Executive Order 13579 of July 11, 2011

Regulation and Independent Regulatory Agencies

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

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

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

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

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

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

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

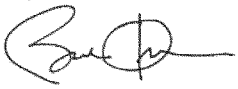
(b) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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



THE WHITE HOUSE,
July 11, 2011.

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

Appendix F
Executive Order 13610

28469

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." Pursuant 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 initiatives. 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 States 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, 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,
May 10, 2012.

[FR Doc. 2012–11798
Filed 5–11–12; 11:15 am]
Billing code 3295–F2–P

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