



**Testimony of**

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**U.S. Small Business Administration**

***United States House of Representatives***  
***Committee on Small Business***  
***Subcommittee on Underserved, Agricultural, and Rural Business***  
***Development***

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Created by Congress in 1976, the Office of Advocacy of the U.S. Small Business Administration 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 <https://advocacy.sba.gov/>, or call (202) 205-6533.

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**U.S. Small Business Administration**

Chairman Golden, Ranking Member Tenney, and Members of the Committee on Small Business, Subcommittee on Underserved, Agricultural, and Rural Business Development. I am honored to be here today on behalf of the Office of Advocacy (Advocacy) to present testimony to you about our office, the federal rulemaking process, and our activity during the COVID-19 pandemic. Advocacy is an independent office that speaks on behalf of the small business community before federal agencies, Congress, and the White House. The views in my testimony do not necessarily reflect the views of the Administration or the Small Business Administration (SBA), and this statement has not been circulated to the Office of Management and Budget for clearance.

**I. The Independent Office of Advocacy**

First, as the Deputy Chief Counsel, and on behalf of the entire Advocacy team, we would like to thank the committee for the tremendous support you have shown the office over the years.

Congress recognized early the importance of small businesses to our nation's economy. The Office of Advocacy was created by Congress in 1976 to be an independent voice for small business within the federal government. Title II of Public Law 94-305 and the Regulatory Flexibility Act confer responsibilities and authorities on Advocacy. Both laws are standing, non-expiring legislation and have been amended since passage.

An important theme leading to Public Law 94-305 was the need for an independent voice within the federal government to represent the interests of small business. The law provides that the Chief Counsel is to be appointed from civilian life by the President with the advice and consent of the Senate,<sup>1</sup> and Advocacy employees serve at the pleasure of the Chief Counsel. Further, the law authorized the Chief Counsel to prepare and publish reports as deemed appropriate. The reports "shall not be submitted to the Office of Management and Budget (OMB) or to any other Federal agency or executive department for any purpose prior to transmittal to the Congress and the President."<sup>2</sup> For this reason, Advocacy does not circulate its work for clearance with the SBA Administrator, OMB, or any other federal agency prior to publication. Since 2010, Advocacy has also had independent budget authority.<sup>3</sup>

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<sup>1</sup> As of this hearing, President Biden has not named a nominee for the Chief Counsel for Advocacy.

<sup>2</sup> § 206, Public L. No. 94-305, 15 U.S.C. § 634f.

<sup>3</sup> The Small Business Jobs Act of 2010 established a separate appropriations account for Advocacy, in addition to a requirement that SBA provide operating support for Advocacy. Advocacy's funds are to remain available until expended. Pub. L. No. 111-240, title I, § 1601(b) (Sept. 27, 2010), 124 Stat. 2551, 15 U.S.C. § 634g. These provisions became operational with Advocacy's budget request for Fiscal Year 2012. Since then, Advocacy's annual Congressional Budget Justification and

However, Advocacy still encounters challenges with maintaining its independence from SBA. The fact that “Small Business Administration” remains a part of Advocacy’s name continues to confuse the public and even some federal agencies. To avoid this confusion, the committee might consider changing Advocacy’s name to clarify that Advocacy is not a program within the Small Business Administration, but rather a separate, independent office representing small businesses.

That said, Advocacy is a relatively small office and continues to rely on SBA for a variety of administrative support services, ranging from office space, equipment, IT, communications support, human resources support, and acquisitions, which are outlined in a Memorandum of Understanding between SBA and Advocacy. Advocacy’s administrative support staff utilize SBA’s systems to keep Advocacy functioning at a high level of productivity.

It is also important to note the other ways in which Advocacy and SBA interact. Advocacy’s economic research team’s work is widely used by SBA offices. For example, the number of small businesses in the United States is a common statistic used by SBA and other agencies but is calculated by Advocacy’s research team.<sup>4</sup> Advocacy also works closely with the SBA Ombudsman and prides itself on the level of cooperation and assistance that its professionals provide to all SBA program and policy staff.

## **II. Small Business Research**

Public Law 94-305 made economic research a core mission of the Office of Advocacy. This mission includes documenting the role of small businesses and entrepreneurship in the economy and examining various issues of relevance to small business owners. These elements of Advocacy’s mission are the primary responsibility of the Office of Economic Research (OER). OER specializes in the following areas: the small business economy, small firm dynamics, small business finance, regulatory policy, international small business issues, barriers to entrepreneurship, and ownership of businesses by demographic groups such as veterans, women, and minorities.

OER economists work with federal statistical agencies to acquire and analyze data on small businesses, conduct in-house research, and manage contract research projects. OER economists also work closely with the legal team in Advocacy’s Office of Interagency Affairs to assess the economic impacts of proposed federal rules on small businesses and alternative regulatory approaches that would reduce economic burdens. Advocacy economists and attorneys collaborate to train federal agency staff on analyzing regulatory impacts on small businesses in accordance with the Regulatory Flexibility Act and Executive Order 13272.

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its accompanying Annual Performance Report have appeared in a separate budget appendix following the main SBA budget request.

<sup>4</sup> There are 32.5 million small businesses in the United States. U.S. SMALL BUS. ADMIN. OFFICE OF ADVOCACY, 2021 SMALL BUSINESS PROFILE: UNITED STATES, 1 (2021), <https://cdn.advocacy.sba.gov/wp-content/uploads/2021/08/30143723/Small-Business-Economic-Profile-US.pdf>. Advocacy calculates small business statistics using the most recent data available from government sources.

Advocacy uses its economic research funds for two purposes. First, OER sponsors the development and continuation of small business data series and special data tabulations on specific small business topics from federal statistical agencies. Second, OER funds contract research on specialized small business issues through the federal procurement process. For example, in December 2021, the U.S. Census Bureau released the 2018 Nonemployer Statistics by Demographics (NES-D), which is partially funded by Advocacy. NES-D is a new data program that is a key component in providing annual comprehensive statistics on women-, minority-, and veteran-owned businesses.<sup>5</sup>

Advocacy publications take many forms, including traditional publications such as reports, bulletins, frequently asked questions, and state economic profiles, along with newer products such as issue briefs, fact sheets, and infographics. Additionally, OER economists give presentations on small business research and statistics at various conferences, forums, events, roundtables, and meetings.

Advocacy sponsors issue-specific research on a wide variety of topics of interest to stakeholders within Advocacy's research mandate. Advocacy welcomes suggestions for small business research topics from many sources to identify and validate important topics, including input from congressional offices, other federal agencies, small business organizations, advocacy groups, and small businesses themselves. For example, after receiving requests from several congressional offices for small business data and information at the congressional district level, Advocacy began a new annual profile series, "Small Business Profiles for the Congressional Districts" in 2019. In December, Advocacy released these profiles for the third consecutive year.<sup>6</sup>

Advocacy staff and leadership also seek to identify areas where new research is needed and feasible given the state of existing data. Subject to the availability of resources, Advocacy periodically solicits research proposals on topics of interest according to the federal procurement process administered by SBA's Acquisition Division. Each awarded contract research project is monitored by an Advocacy staff member serving as the Contracting Officer's Representative for the project and goes through an updated peer review process. In 2015, Advocacy improved controls over its research process, including strengthening its peer review process. OER continuously assesses and refines its research process to best carry out the special responsibility of being the only federal office tasked with producing small business research and statistics.

OER publishes an annual report detailing its research activity for the year, including a listing of publications, small business economic research forums held, and an overview and update of the most

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<sup>5</sup> More information about this data program can be found on Advocacy's website at <https://advocacy.sba.gov/2021/12/21/u-s-census-bureau-releases-new-data-on-business-owner-demographics/> or on the Census Bureau's website at <https://www.census.gov/programs-surveys/abs/data/nesd.html>.

<sup>6</sup> Advocacy's 2021 Small Business Profiles for the Congressional Districts can be found on Advocacy's website at <https://advocacy.sba.gov/2021/12/29/2021-small-business-profiles-for-congressional-districts/>. Previous profile series for both the states and Congressional districts can be found at <https://advocacy.sba.gov/category/research/state-profiles/>.

widely used publicly available data series on small businesses. In FY 2020, OER produced 21 publications, and in FY 2021, OER produced 23 publications covering a wide range of topics.<sup>7</sup>

### **III. Advocacy's Role in the Federal Rulemaking Process**

#### **A. The Regulatory Flexibility Act**

Federal regulations can have a disproportionate impact on small businesses. To mitigate that impact, the Regulatory Flexibility Act (RFA),<sup>8</sup> enacted in September 1980, requires federal agencies to consider the impact of their regulatory proposals on small entities, analyze effective alternatives that minimize small entity impacts, and make their analyses available for public comment. The RFA applies to a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Advocacy continues to emphasize that the RFA “does not seek preferential treatment for small entities, nor does it require agencies to adopt regulations that impose the least burden on them, or mandate exemptions for them. Rather, it requires agencies to examine public policy issues using an analytical process that identifies barriers to small business competitiveness and seeks a level playing field for small entities, not an unfair advantage.”<sup>9</sup>

Under the RFA, when an agency proposes a regulation that would have a “significant economic impact on a substantial number of small entities,” the regulation must be accompanied by an impact analysis known as an initial regulatory flexibility analysis (IRFA) when the rule is published for public comment.<sup>10</sup> When the final rule is published, it must be accompanied by a final regulatory flexibility analysis (FRFA).<sup>11</sup> These analyses must describe, among other things:

- 1) The reasons why the regulatory action is being considered.
- 2) The small entities to which the proposed rule will apply and, where feasible, an estimate of their number.
- 3) The projected reporting, recordkeeping, and other compliance requirements.
- 4) Any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities.

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<sup>7</sup> OER's annual report for FY 2021 is still in development, and the FY 2020 report can be accessed on our website at <https://advocacy.sba.gov/2022/03/31/annual-report-of-the-office-of-economic-research-fy-2020/>.

<sup>8</sup> 5 U.S.C. § 601, et seq. The Regulatory Flexibility Act was originally passed in 1980 (Pub. L. No. 96-354). The Act was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. No. 104-121), the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203), and the Small Business Jobs Act of 2010 (Pub. L. No. 111-240).

<sup>9</sup> U.S. SMALL BUS. ADMIN. OFFICE OF ADVOCACY, A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT, 1 (Aug. 2017), <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/06/21110349/How-to-Comply-with-the-RFA.pdf> [hereinafter RFA COMPLIANCE GUIDE].

<sup>10</sup> 5 U.S.C. § 603.

<sup>11</sup> 5 U.S.C. § 604.

Agency consideration of significant alternatives is the key to the RFA.

Alternatively, if a federal agency determines that a proposed rule would not have a significant economic impact on a substantial number of small entities, the head of that agency may “certify” the rule and bypass the IRFA and FRFA requirements.<sup>12</sup> This is commonly referred to as a “certification” and requires the agency to provide a factual basis for its determination that the rule will not have a significant economic impact on a substantial number of small entities.

In addition, the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and the Consumer Financial Protection Bureau (CFPB) are required to convene a small business advocacy review panel (also referred to as a SBREFA panel) whenever they are developing a rule that is expected to have a significant economic impact on a substantial number of small entities.<sup>13</sup> These agencies must notify Advocacy prior to the publication of an IRFA and provide information on the potential impacts of the proposed rule. The SBREFA panels consist 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.”<sup>14</sup> The panel reviews materials related to the proposal, and, importantly, the advice and recommendation of small entity representatives (SERs) on the rule’s potential effects and possible mitigation strategies. The panel then issues a report on the comments of the SERs and on its own recommendations.<sup>15</sup>

Section 610 of the RFA also requires agencies to review their existing rules that have or will have a significant economic impact on a substantial number of small entities within ten years of their promulgation.<sup>16</sup> The purpose of the review 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 small entities.

Monitoring compliance with the RFA is the primary responsibility of Advocacy’s Office of Interagency Affairs (Interagency). Interagency is Advocacy’s largest operational division, and its attorneys monitor federal regulatory and other activity with potential small entity impacts. They also work to help agencies develop less burdensome rules by providing small entity input early in the regulatory process, allowing the agencies to achieve their regulatory goals. The team uses numerous methods of communication to present the concerns of small entities to federal officials promulgating new regulations. For example, Advocacy holds meetings with officials, participates in OIRA-led review of upcoming rules, writes comment letters to agency directors, conducts outreach to small entities

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<sup>12</sup> 5 U.S.C. § 605(b).

<sup>13</sup> A list of all SBREFA panels that have been convened can be found in our annual report to Congress and in Appendix A of this testimony. It can also be viewed on our website at <https://advocacy.sba.gov/resources/reference-library/sbrefa/>.

<sup>14</sup> 5 U.S.C. Sec. 609(b)(3).

<sup>15</sup> 5 U.S.C. § 609.

<sup>16</sup> 5 U.S.C. § 610.

through roundtables and other methods, and holds training sessions on RFA compliance to help facilitate meaningful participation by all interested parties. RFA training began in 2003, and since then, Advocacy has conducted training for every cabinet-level department and agency, 84 separate component agencies and offices within these departments, 24 independent agencies, and various special groups including congressional staff, business organizations, and trade associations.

One important function of this team is confidential interagency communications. Advocacy's goal is to participate in the regulatory development process as early as possible, both to counsel agencies on potential effects of their actions on small business and to provide RFA compliance expertise as needed. Advocacy believes it is essential that agency policymakers and regulatory development staff are confident that they can share pre-proposal information with Advocacy staff. Disclosing this information could have a variety of adverse consequences and, depending on what is disclosed to whom, could in some cases violate the law. Fortunately, Advocacy's track record in this regard has been exemplary, and the trust that Interagency has built with regulatory agencies is evident as agencies increasingly ask for Advocacy guidance early in the pre-proposal phase of the regulatory process. Because of the confidential nature of most such communications, it is difficult for Advocacy to document the precise regulatory cost savings to small businesses that flow from this important work.

## **B. Agency Compliance with the Regulatory Flexibility Act**

In addition to the RFA's requirements that agencies consider how their regulations will impact small businesses and consider less burdensome alternatives, the RFA also requires Advocacy to monitor and report on how well federal agencies are complying with the law. In addition, Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," which was signed by President George W. Bush in 2002, requires Advocacy to educate federal agency officials on compliance with the RFA, to provide resources to facilitate continued compliance, and to report to OMB on agency compliance with the Executive Order.<sup>17</sup> Every year, Advocacy reports to Congress and OMB on compliance with the RFA and Executive Order 13272. Advocacy published its FY 2021 report in April 2022<sup>18</sup> and sent the report to this Committee.

I would like to highlight some important items from our most recent reports. Despite Advocacy's operations moving to a full time telework status for most of 2020 and 2021 due to the COVID-19 pandemic, Advocacy has maintained its work output and effectiveness. For example, from FY 2016 through FY 2018, Advocacy submitted 61 comment letters to regulatory agencies. From FY 2019 through FY 2021, Advocacy has submitted 58 formal comment letters to regulatory agencies. The most frequent concerns from FY 2019 to FY 2021 were that agencies had an inadequate analysis of small entity impacts (21 letters), significant alternatives were not considered (19 letters), and other issues

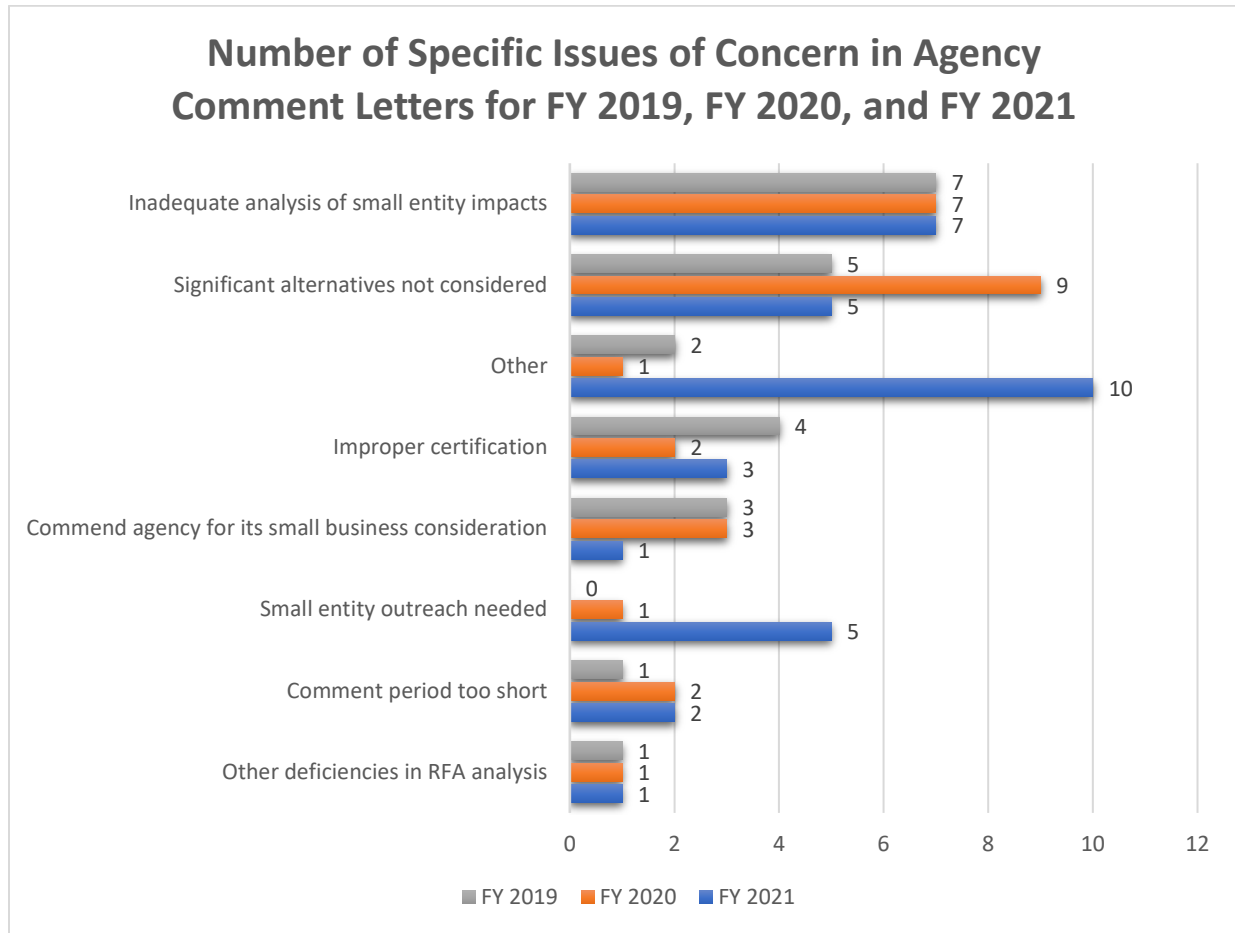
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<sup>17</sup> Exec. Order No. 13,272, 67 Fed. Reg. 53,461 (Aug. 13, 2002).

<sup>18</sup> U.S. SMALL BUS. ADMIN. OFFICE OF ADVOCACY, REPORT ON THE REGULATORY FLEXIBILITY ACT, FY 2021 (Apr. 2022), <https://advocacy.sba.gov/2022/03/31/report-on-the-regulatory-flexibility-act-fy-2021-annual-report-of-the-chief-counsel-for-advocacy-on-implementation-of-the-regulatory-flexibility-act-and-executive-order-13272/>.



(13 letters). The figure below summarizes Advocacy’s issues of concern from regulatory comment letters during FYs 2019 to 2021:



Advocacy also engages with small business stakeholders in other ways, ensuring that lines of communication remain open and that small business concerns are heard by appropriate contacts within the federal agencies. Part of this engagement is through issue roundtables, which focus on small business regulatory topics. Advocacy holds issue roundtables across the country and often provides opportunities for small business stakeholders to participate remotely by phone or webinar. During the COVID-19 pandemic, Advocacy staff has moved roundtables online for safety and convenience. In addition to our daily engagement with small entities, in FY 2021, Advocacy hosted 20 roundtables on a variety of regulatory issues.<sup>19</sup>

Additionally, Advocacy staff frequently provide briefings to stakeholders and interested groups on the office’s activities. For example, Advocacy staff frequently provide introductory briefings to Congressional staff on our activities and how we work with Congressional offices on regulatory issues,

<sup>19</sup> The list and descriptions of the roundtables can be found in Chapter 3 of our RFA FY 2021 Report.

research and data, and outreach. These briefings have been done one-on-one with individual offices or take place House and Senate-wide. Advocacy staff have also provided briefings to stakeholders and other groups, including international representatives for groups on the Transatlantic Trade and Investment Partnership and the United Kingdom Chamber of Commerce.

### **C. Legislative Proposals to Amend the Regulatory Flexibility Act**

Advocacy's broad experience with the RFA since its original enactment in 1980, together with a growing body of case law, give Advocacy a unique perspective on the RFA's implementation. In the past, previous Chief Counsels have identified areas they believed needed legislative attention if the RFA is to provide small entities with the full consideration that Congress originally intended.

#### **1. Updating Advocacy's Charter**

Public Law 94-305 established the Office of Advocacy and its statutory authority. Section 202 of the law sets forth the primary functions of the Office of Advocacy relating to the study of small business. Currently, it directs Advocacy to "examine the role of small business in the American economy and the contribution which small business can make in improving competition...(and) promoting exports..." Advocacy is also charged with producing reports concerning international trade agreements under the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), but this work is not explicitly reflected in Advocacy's charter. Congress should amend Advocacy's charter to include issues small businesses face in international economies as part of its research functions.

Similarly, Section 203 of Advocacy's charter sets forth the duties of the Office of Advocacy that are performed on a continuing basis. One of these duties is to "represent the views and interests of small businesses before other Federal agencies whose policies and activities may affect small business." It is not explicit regarding Advocacy's authority to represent small business views and interests before foreign governments and international entities. Under TFTEA, Advocacy is already frequently involved in international trade discussions on behalf of America's small businesses, an authority not reflected in Advocacy's charter. Congress should amend Advocacy's charter in Section 203 to clarify Advocacy's ability to represent small business views and interests before foreign governments and other international entities for the purpose of contributing to regulatory and trade initiatives.

Advocacy is aware of H.R. 6454, the Small Business Advocacy Improvements Act, which recently passed this Committee. The bill would accomplish the changes discussed above to clarify Advocacy's authority to research and represent small businesses on international issues. Because Advocacy already does these activities under the TFTEA, we support this change to our charter and support the bill.

## 2. Legislative Priorities

Because Advocacy currently does not have a Senate-confirmed Chief Counsel that can lobby before Congress for legislative solutions, the office has not updated its legislative priorities since 2016. Advocacy acknowledges that these proposals will require more carefully crafted legislative language and analysis to ensure they are appropriately implemented, and our staff is happy to provide technical assistance on legislative proposals concerning the RFA. The 2016 legislative priorities can be found in Appendix B of this testimony, and are briefly explained below:

### i. Indirect Effects

Under the RFA, agencies are not currently required to consider the impact of a proposed rule on small businesses that are not directly regulated by the rule, even when the impacts are foreseeable and often significant. Advocacy believes that indirect effects should be part of the RFA analysis, but that the definition of indirect effects should be specific and limited so that the analytical requirements of the RFA remain reasonable.<sup>20</sup>

### ii. Scope of the RFA

Currently, the requirements of the RFA are limited to those rulemakings that are subject to notice and comment. Section 553 of the Administrative Procedure Act, which sets out the general requirements for rulemaking, does not require notice and comment for interim final rulemakings, so agencies may impose a significant economic burden on small entities through these rulemakings without even conducting an IRFA or FRFA. Advocacy believes the definition of a rule under the RFA needs to be expanded to include interim final rulemakings that have the potential to impose economic burden on small entities.

Until recently, for example, the IRS promulgated its rules, many of which were costly and complicated for small businesses, without complying with the RFA's analytical requirements. Generally, the IRS contended that it had no discretion under the implementing legislation and that the agency had little authority to consider less costly alternatives under the RFA. However, since 2016, progress has been made on this issue to ensure small business impacts are considered.<sup>21</sup>

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<sup>20</sup> Advocacy's RFA Compliance Guide states that agencies "should examine the reasonably foreseeable effects on small entities that purchase products or services from, sell products or services to, or otherwise conduct business with entities directly regulated by the rule." RFA COMPLIANCE GUIDE, *supra* note 9, at 23.

<sup>21</sup> On April 11, 2018, the Department of the Treasury and OMB signed a Memorandum of Agreement outlining the general terms for OIRA within OMB to review tax regulatory actions under Executive Order 12866. The MOA went into immediate effect except for the additional information required under section 6(a)(3)(C) of E.O. 12866 pertaining to tax regulatory actions that would have an annual non-revenue effect on the economy of \$100 million or more, measured against a no-action baseline, which went into effect in April 2019.

Finally, the RFA has its own definition of information collection. However, this definition is identical to the Paperwork Reduction Act. A cross-reference to the Paperwork Reduction Act would allow Advocacy to rely on OMB's existing implementing regulations and guidance.

### **iii. Quality of Analysis**

The Office of Advocacy has been concerned that some agencies are not providing the information required in the IRFA and FRFA in a transparent and easy-to-access manner.<sup>22</sup> This hinders the ability of small entities and the public to comment meaningfully on the impacts on small entities and possible regulatory alternatives. Agencies should be required to include an estimate of the cost savings to small entities in the FRFA. In addition, agencies should have a single specific section in the preamble of the notice of proposed rulemaking and notice of final rulemaking that lays out clearly the substantive contents of the IRFA or FRFA, including a specific narrative for each of the required elements.

### **iv. Quality of Certification**

Some agencies' improper certifications under the RFA have been based on a lack of information in the record about small entities, rather than data showing that there would not be a significant impact on a substantial number of small entities. A clear requirement for threshold analysis would be a stronger guarantee of the quality of the certifications.<sup>23</sup>

### **v. SBREFA Panels**

The Department of Interior's Fish and Wildlife Service consistently promulgates regulations without proper economic analyses. Advocacy believes the rules promulgated by this agency would benefit from being added as a covered agency subject to Small Business Advocacy Review Panels.

Advocacy also believes that some recent SBREFA panels have been convened prematurely. SBREFA panels work best when small entity representatives have sufficient information to understand the purpose of the potential rule, likely impacts, and preliminary assessments of the costs and benefits of various alternatives. With this information, small entities are better able to provide meaningful input on the ways in which an agency can minimize impacts on small entities consistent with the agency mission. Therefore, the RFA should be amended to require that prior to convening a panel, agencies should be required to provide, at a minimum, a clear description of the goals of the rulemaking, the type and number of affected small entities, a preferred alternative, a series of viable alternatives, and projected costs and benefits of compliance for each alternative.

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<sup>22</sup> Advocacy believes the information should be at the level of detail necessary to understand the rule's impact on all affected entities, such as identifying all the different types of affected small businesses by industry and assessing the rule's impact on each type of affected small business.

<sup>23</sup> Advocacy's RFA Compliance Guide walks through the certification in detail and the items that should be included in any certification, including the requirements of a factual basis for the certification. RFA COMPLIANCE GUIDE, *supra* note 9, at 11-30.

## **vi. Retrospective Review**

In addition to the existing required periodic review, agencies should accept and prioritize petitions for review of final rules. They should be required to provide a timely and effective response in which they demonstrate that they have considered alternative means of achieving the regulatory objective while reducing the regulatory impact on small entities. This demonstration should take the form of an analysis similar to a FRFA.

## **IV. Advocacy's Activity During the COVID-19 Pandemic**

Throughout the COVID-19 pandemic, Advocacy has maintained its mission of being an independent voice for small businesses within the federal government by producing timely research on the impact of the pandemic. Advocacy has continued to focus on both regulatory solutions that can help struggling businesses and educating regulators who craft rules that could disproportionately impact small business. Since the pandemic began in 2020, Advocacy and federal agencies have implemented processes to ensure that, despite being unable to meet small businesses face-to-face, stakeholders continue to be involved in the regulatory process. As a result, Advocacy continues to produce important gains for American small businesses.

Advocacy's research mandate has become more important than ever as small businesses in nearly every industry have experienced significant negative financial impacts. During the pandemic, OER has worked to provide timely analysis of the economic impacts on small businesses and assist federal agencies in analyzing small business impacts in relief efforts. Additionally, previous research from OER has served as a foundation in understanding small business needs and trends. To date, OER has published nine research products regarding the pandemic and its impact on small businesses. These products include fact sheets, issue briefs, and economic studies. Advocacy continues to monitor the pandemic as more data becomes available. OER also responds to numerous data requests from small business stakeholders and media on understanding small business pandemic impacts and presents to stakeholders frequently on small business economic trends and data available. Advocacy has produced a new page on our website dedicated to all our research and other activity regarding the COVID-19 pandemic.<sup>24</sup>

Advocacy continues to conduct outreach to small business stakeholders during the pandemic, including moving in-person meetings and roundtables online, to great success. Advocacy also continues to offer training on the RFA to federal agencies and has moved its training sessions online. In FY 2021, Advocacy held nine training sessions for 290 federal officials, all of which took place online.

Advocacy also receives numerous inquiries from small business owners, their representatives, and congressional offices regarding the status of COVID-19 funding and applications for SBA programs, including the Paycheck Protection Program, Economic Injury Disaster Loan, Shuttered Venue Operator Grants, and the Restaurant Revitalization Fund. While Advocacy is an independent office

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<sup>24</sup> Advocacy's COVID-19 page can be found at <https://advocacy.sba.gov/tag/covid-19/>.

that is not involved in these programs, Advocacy staff have coordinated with the SBA program offices to direct these inquiries to the appropriate offices.

**V. Conclusion**

Thank you for the opportunity to testify today. Advocacy looks forward to continuing to work with you and other Members of Congress to be the voice for small businesses in the federal government and work with agencies to reduce small businesses' regulatory burdens during the rulemaking process. I would be happy to answer any questions you may have.



## Appendix A

### SBREFA Panels Convened

## SBREFA Panels Convened

### Consumer Financial Protection Bureau

Rule	Date Convened	Date Completed	Notice of Proposed Rulemaking	Final Rule Published
Automated Valuation Model (AVM)	03/14/22			
Small Business Lending Data Collection	10/15/20	12/14/20	10/08/21	
Debt Collection	08/25/16	10/19/16	05/21/19. Supplemental rule published 03/03/20.	11/30/20
Arbitration Clauses	10/20/15	12/11/15	05/24/16	Rule published 07/19/17. Repealed under Congressional Review Act, 11/22/17
Limit Certain Practices for Payday, Vehicle Title, and Similar Loans	04/27/15	06/25/15	07/22/16	Rescinded in part 07/07/20
Home Mortgage Disclosure Act	02/27/14	04/24/14	08/29/14	10/15/15
Loan Originator Compensation Requirements under Regulation Z	05/09/12	07/12/12	09/07/12	02/15/13
Mortgage Servicing under the Real Estate Settlement Procedures Act (RESPA or Regulation X) and Truth in Lending Act (TILA or Regulation Z)	04/09/12	06/11/12	09/17/12	02/14/13
Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (RESPA or Regulation X) and Truth in Lending Act (TILA or Regulation Z)	02/21/12	04/23/12	08/23/12	12/31/13



**Department of Labor, Occupational Safety and Health Administration**

Rule	Date Convened	Date Completed	Notice of Proposed Rulemaking	Final Rule Published
Tree Care Operations	03/23/20	05/22/20		
Telecommunications Towers	08/15/18	10/11/18		
Process Safety Management Standard	06/02/16	08/01/16		
Occupational Exposure to Infectious Diseases in Healthcare and Other Related Work Settings	10/14/14	12/22/14		
Occupational Exposure to Diacetyl and Food Flavorings Containing Diacetyl	05/05/09	07/02/09		
Occupational Exposure to Beryllium	09/17/07	01/15/08	08/07/15	01/09/17
Cranes and Derricks in Construction	08/18/06	10/17/06	10/09/08	08/09/10
Occupational Exposure to Hexavalent Chromium	01/30/04	04/20/04	10/04/04	02/28/06
Occupational Exposure to Crystalline Silica	10/20/03	12/19/03	09/12/13	03/25/16
Confined Spaces in Construction	09/26/03	11/24/03	11/28/07	05/04/15
Electric Power Generation, Transmission, and Distribution	04/01/03	06/30/03	06/15/05	04/11/14
Ergonomics Program Standard	03/02/99	04/30/99	11/23/99	11/14/00
Safety and Health Program Rule	10/20/98	12/19/98		
Tuberculosis	09/10/96	11/12/96	10/17/97	Withdrawn 12/31/03

## Environmental Protection Agency

Rule	Date Convened	Date Completed	Notice of Proposed Rulemaking	Final Rule Published
Cyclic Aliphatic Bromide Cluster (HBCD) Risk Management Rulemaking Under the Toxic Substances Control Act	01/06/22			
Standards of Performance for New, Reconstructed, and Modified Sources: Oil and Natural Gas Sector Review	07/15/21	09/20/21	11/15/21	
1-Bromopropane; Rulemaking under TSCA §6(a)	04/27/21			
Methylene Chloride; Rulemaking under TSCA §6(a)	01/07/21	11/03/21		
National Emission Standards for Hazardous Air Pollutants: Ethylene Oxide Commercial Sterilization and Fumigation Operations	11/25/20	04/26/21		
Financial Responsibility Requirements for Hard Rock Mining	08/24/16	12/01/16	12/01/16	Withdrawn 02/21/18
Regulation of Trichloroethylene for Vapor Degreasers under Section 6(a) of the Toxic Substances Control Act	06/01/16	09/26/16	01/19/17	
Regulation of N-Methylpyrrolidone and Methylene Chloride in Paint and Coating Removal under Section 6(a) of the Toxic Substances Control Act	06/01/16	09/26/16	01/19/17	
Risk Management Program Modernization	11/04/15	02/19/16	03/14/16	01/13/17
Emission Standards for New and Modified Sources in the Oil and Natural Gas Sector	06/16/15	08/13/15	09/18/15	06/3/16
Federal Plan for Regulating Greenhouse Gas Emissions from Electric Generating Units	04/30/15	07/28/15	10/23/15	Withdrawn 04/03/17
Greenhouse Gas Emissions Standards for Medium- and Heavy-Duty Vehicles	10/22/14	01/15/15	07/13/15	10/25/2016
PCB (Polychlorinated Biphenyls) Use Authorizations Update Rule	02/07/14	04/07/14		
Review of New Source Performance Standards and Amendments to Emission Guidelines for Municipal Solid Waste Landfills	12/05/13	07/21/15	07/17/14 08/27/15	08/29/16
National Emissions Standards for Hazardous Air Pollutants (NESHAP): Brick and Structural Clay Products and Clay Products	06/12/13	01/16/14	12/18/14	10/26/15
Long Term Revisions to the Lead and Copper Rule	08/14/12	08/16/13	-	-
Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards	08/04/11	Rule proposed rule w/o completion of SBREFA panel report	06/30/14	12/01/15
Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards	08/04/11	10/14/11	05/21/13	04/28/14

Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards	08/04/11	10/14/11	05/21/13	04/28/14
Rule	Date Convened	Date Completed	Notice of Proposed Rulemaking	Final Rule Published
Greenhouse Gas Emissions from Electric Utility Steam Generating Units	06/09/11	Rule proposed rule w/o completion of SBREFA panel report	04/14/13	04/13/12 01/08/14 06/02/14
National Emission Standards for Hazardous Air Pollutants (NESHAP) Risk and Technology Review for the Mineral Wool and Wool Fiberglass Industries	06/02/11	10/26/11	11/12/11	07/29/15
Formaldehyde Emissions from Pressed Wood Products	02/03/11	04/04/11	06/10/13	12/12/16
Stormwater Regulations Revision to Address Discharges from Developed Sites	12/06/10	10/04/11	-	Withdrawn 06/06/17
National Emission Standards for Hazardous Air Pollutants for Coal- and Oil-fired Electric Utility Steam Generating Units	10/27/10	03/02/11	05/03/11	02/16/12
Revision of New Source Performance Standards for New Residential Wood Heaters	08/04/10	10/26/11	02/03/14	03/16/15
Pesticides; Reconsideration of Exemptions for Insect Repellents	11/16/09	01/15/10		
National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers: Major and Area Sources	01/22/09	03/23/09	06/04/10	03/21/11
Pesticides; Certification of Pesticide Applicators (Revisions)	09/04/08	11/03/08	08/24/15	01/04/17
Pesticides; Agricultural Worker Protection Standard Revisions	09/04/08	11/03/08	03/19/14	11/02/15
Renewable Fuel Standards 2	07/09/08	09/05/08	05/26/09	03/26/10
Total Coliform Monitoring	01/31/08	01/31/08	07/14/10	2/13/2013
Non-Road Spark-Ignition Engines/Equipment	08/17/06	10/17/06	05/18/07	10/08/08
Mobile Source Air Toxics	09/07/05	11/08/05	03/29/06	02/26/07
Federal Action Plan for Regional Nitrogen Oxide/Sulfur Dioxide (2005 Clean Air Interstate Rule)	04/27/05	06/27/05	08/24/05	04/28/06
Section 126 Petition (2005 Clean Air Interstate Rule)	04/27/05	06/27/05	08/24/05	04/28/06
Cooling Water Intake Structures Phase III Facilities	02/27/04	04/27/04	11/24/04	06/16/06
Nonroad Diesel Engines – Tier IV	10/24/02	12/23/02	05/23/03	06/29/04
Lime Industry – Air Pollution	01/22/02	03/25/02	12/20/02	01/05/04

Aquatic Animal Production Industry	01/22/02	06/19/02	09/12/02	08/23/04
Rule	Date Convened	Date Completed	Notice of Proposed Rulemaking	Final Rule Published
Construction and Development Effluent Limitations Guidelines	07/16/01	10/12/01	06/24/02	Withdrawn 04/26/04
Nonroad Large Spark Ignition 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
Stage 2 Disinfectant Byproducts; Long Term 2 Enhanced Surface Water Treatment	04/25/00	06/23/00	08/18/03	01/04/06
Reinforced Plastics Composites	04/06/00	06/02/00	08/02/01	04/21/03
Concentrated Animal Feedlots	12/16/99	04/07/00	01/12/01	02/12/03
Metals Products and Machinery	12/09/99	03/03/00	01/03/01	05/13/03
Lead Renovation and Remodeling Rule	11/23/99	03/03/00	01/10/06	04/22/08
Diesel Fuel Sulfur Control Requirements	11/12/99	03/24/00	06/02/00	01/18/01
Recreational Marine Engines	06/07/99	08/25/99	10/05/01 08/14/02	11/08/02
Arsenic in Drinking Water	03/30/99	06/04/99	06/22/00	01/22/01
Light Duty Vehicles/Light Duty Trucks Emissions and Sulfur in Gas	08/27/98	10/26/98	05/13/99	02/10/00
Filter Backwash Recycling	08/21/98	10/19/98	04/10/00	06/08/01
Long Term 1 Enhanced Surface Water Treatment	08/21/98	10/19/98	04/10/00	01/14/02
Radon in Drinking Water	07/09/98	09/18/98	11/02/99	
Section 126 Petitions	06/23/98	08/21/98	09/30/98	05/25/99
Phase I (FIP) To Reduce the Regional Transport of Ozone in the Eastern United States	06/23/98	08/21/98	10/21/98	Withdrawn 05/06/05
Ground Water	04/10/98	06/09/98	05/10/00	11/08/06
Underground Injection Control (UIC) Class V Wells	02/17/98	04/17/98	07/29/98	12/07/99
Centralized Waste Treatment Effluent Guideline	11/06/97	01/23/98	09/10/03 01/13/99	12/22/00
Transportation Equipment Cleaning Effluent Guidelines	07/16/97	09/23/97	06/25/98	08/14/00
Stormwater Phase II	06/19/97	08/07/97	01/09/98	12/08/99
Industrial Laundries Effluent Guidelines	06/06/97	08/08/97	12/17/97	Withdrawn 08/18/99
Nonroad Diesel Engines	03/25/97	05/23/97	09/24/97	10/23/98



## Appendix B

Office of Advocacy Legislative Priorities for Chief  
Counsel Darryl L. DePriest, 2016



# LEGISLATIVE PRIORITIES

## Office of Advocacy

### Legislative Priorities for Chief Counsel Darryl L. DePriest

#### Indirect Effects

Under the RFA, agencies are not currently required to consider the impact of a proposed rule on small businesses that are not directly regulated by the rule, even when the impacts are foreseeable and often significant. Advocacy believes that indirect effects should be part of the RFA analysis, but that the definition of indirect effects should be specific and limited so that the analytical requirements of the RFA remain reasonable.

- Amend section 601 of the RFA to define “impact” as including the reasonably foreseeable effects on small entities that purchase products or services from, sell products or services to, or otherwise conduct business with entities directly regulated by the rule; are directly regulated by other governmental entities as a result of the rule; or are not directly regulated by the agency as a result of the rule but are otherwise subject to other agency regulations as a result of the rule.

#### Scope of the RFA

Currently, the requirements of the RFA are limited to those rulemakings that are subject to notice and comment. Section 553 of the Administrative Procedure Act (APA), which sets out the general requirements for rulemaking, does not require notice and comment for interim final rulemakings, so agencies may impose a significant economic burden on small entities through these rulemakings without conducting an Initial Regulatory Flexibility Analysis (IRFA) or Final Regulatory Flexibility Analysis (FRFA). Advocacy believes the definition of a rule needs to be expanded to include interim final rulemakings that have the potential to impose economic burden on small entities.

Further, the IRS regularly promulgates rules that are costly and complicated for small businesses. However, the IRS contends that it has no discretion in implementing legislation and that the agency has little authority to consider less costly alternatives under the RFA. Therefore, the IRS often does not analyze the cost of its rules to small business under the RFA. In the absence of the IRS considering the impact of its rules under the RFA, Congress should require the Congressional Budget Office (CBO) to provide small business cost and paperwork burden estimates for pending tax legislation.

This would help ensure that tax writers and the public are aware of the compliance burden in addition to the fiscal consequences.

Finally, the RFA has its own definition of information collection. However, this definition is identical to the Paperwork Reduction Act (PRA) (35 USC 3501, et. seq.). A cross-reference to the PRA would allow Advocacy to rely on OMB's existing implementing regulations (5 CFR 1320) and guidance.

- Require RFA analysis for all interim final rulemakings with a significant economic impact on a substantial number of small entities.
- Require CBO to score proposed tax legislation for the estimated costs and paperwork burden to small business.
- Amend the conditions for IRS rulemakings to require an IRFA/FRFA to reference the PRA.

### **Quality of Analysis**

The Office of Advocacy is concerned that some agencies are not providing the information required in the IRFA and FRFA in a transparent and easy-to-access manner. This hinders the ability of small entities and the public to comment meaningfully on the impacts on small entities and possible regulatory alternatives. Agencies should be required to include an estimate of the cost savings to small entities in the FRFA. In addition, agencies should have a single section in the preamble of the notice of proposed rulemaking and notice of final rulemaking that lays out clearly the substantive contents of the IRFA or FRFA, including a specific narrative for each of the required elements.

- Require agencies to develop cost savings estimates.
- Require a clearly delineated statement of the contents of the IRFA and FRFA in the preamble of the proposed and final rule.

### **Quality of Certification**

Some agencies' improper certifications under the RFA have been based on a lack of information in the record about small entities, rather than data showing that there would not be a significant impact on a substantial number of small entities. A clear requirement for threshold analysis would be a stronger guarantee of the quality of certifications.

- Require agencies to publish a threshold analysis, supported by data in the record, as part of the factual basis for the certification.

## **SBREFA Panels**

The Department of Interior's Fish and Wildlife Service consistently promulgates regulations without proper economic analyses. Advocacy believes the rules promulgated by this agency would benefit from being added as a covered agency subject to Small Business Advocacy Review Panels.

Advocacy also believes that some recent SBREFA panels have been convened prematurely. SBREFA panels work best when small entity representatives have sufficient information to understand the purpose of the potential rule, likely impacts, and preliminary assessments of the costs and benefits of various alternatives. With this information small entities are better able to provide meaningful input on the ways in which an agency can minimize impacts on small entities consistent with the agency mission. Therefore, the RFA should be amended to require that prior to convening a panel, agencies should be required to provide, at a minimum, a clear description of the goals of the rulemaking, the type and number of affected small entities, a preferred alternative, a series of viable alternatives, and projected costs and benefits of compliance for each alternative.

- Require SBREFA panels under RFA Section 609(b) for the Department of the Interior's Fish and Wildlife Service.
- Require better disclosure of information including at a minimum, a clear description of the goals of the rulemaking, the type and number of affected small entities, a preferred alternative, a series of viable alternatives, and projected costs and benefits of compliance for each alternative to the small entity representatives.

## **Retrospective Review**

In addition to the existing required periodic review, agencies should accept and prioritize petitions for review of final rules. They should be required to provide a timely and effective response in which they demonstrate that they have considered alternative means of achieving the regulatory objective while reducing the regulatory impact on small businesses. This demonstration should take the form of an analysis similar to a FRFA.

- Strengthen section 610 retrospective review to prioritize petitions for review that seek to reduce the regulatory burden on small business and provide for more thorough consideration of alternatives.



*The Office of Advocacy was established by Public Law 94-305 to represent the views of small businesses before federal agencies and the U.S. Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.*