



May 1, 2012

H. Russell Frisby, Jr, Chair
Committee on Regulation
Administrative Conference of the United States
1120 20th Street, NW
Suite 706 South
Washington, DC 20036

Dear Mr. Frisby:

The Small Business Administration Office of Advocacy (Advocacy) would like to offer comments on the Administrative Conference of the United States (ACUS) Review of Regulatory Analysis Requirements and the April 24 draft Recommendations. We believe that this project presents an opportunity to make a stronger statement about the role of regulatory analysis in policymaking and the value of early public engagement.

Advocacy was created by statute in 1976 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (SBA), so the views expressed in this letter do not necessarily represent the views of SBA or the Administration.

Advocacy believes that the overall purpose of regulatory analysis is to inform and guide policy decisions. The ACUS report aptly focuses on the ways in which agencies communicate the current wide range of analytical requirements to the public. However, it does not emphasize the important role these tools also play in forming policy. Agencies should begin developing supporting analysis, including the identification and consideration of significant alternatives, in advance of identifying regulatory provisions, or even, if possible, choosing a regulatory strategy. Analysis that focuses only on informing the public misses an opportunity to improve the quality of regulatory decisions when they are being made. In the case of the Regulatory Flexibility Act, Advocacy advises agencies to develop economic analyses early in the process, so impacts on small entities can be presented to agency leaders before a preferred alternative is selected. Similarly, Executive Order (EO) compliance for issues such as energy supply and children's

health should be part of the supporting documents presented to policymakers rather than relegated to boilerplate in the preamble.

Advocacy therefore suggests that ACUS recommend agency best practices to incorporate analytical requirements into the earliest stages of policy development. This should include early consultation with the public, for example through Advance Notices of Proposed Rulemaking, Requests for Information, or Notices of Data Availability that inform the public of the analyses that the agency anticipates conducting and the data currently available to support those analyses. This approach is also consistent with OIRA Administrator Cass Sunstein's recent memorandum on Cumulative Effects of Regulations (March 20, 2012). Advocacy believes this approach offers the dual benefit of encouraging robust analysis in advance of policy formation while minimizing the burden of multiple analytic requirements. Early planning and consideration of all requirements is the most effective way to reduce the overall burden of the individual requirements without compromising their underlying purpose.

With respect to particular draft Recommendations, Advocacy offers the following thoughts:

- Draft Recommendation 5 may unfortunately encourage the idea that compliance with an EO dealing with particular policy priorities is in fact a 'checkbox' exercise, rather than a statement of the Administration's policy preference in decisionmaking. Advocacy believes that, even when the applicability of a particular EO appears obvious, the agency should explain to the public its reasoning. Assertions that the data indicate a particular outcome, as in the draft example, should be supported and available to the public for comment. Therefore, Advocacy suggest that a tabular format include cross-references to any analysis performed to support the requirement, whether it be a complete analysis or a screening analysis.
- In the context of draft Recommendation 6, Advocacy has recommendations for statutory revisions to the RFA. These legislative priorities are attached.
- Advocacy recommends that the last sentence of Recommendation 8 be deleted. Even regulations that stimulate consumer spending should be supported by an analysis of alternatives to demonstrate that the agency has maximized net benefits and that the distribution of those benefits do not disproportionately favor large businesses at the expense of small businesses.

Thank you for the Committee's attention to regulatory analysis requirements. If you have questions or require additional information, you may contact Assistant Chief Counsel David Rostker, at (202) 205-6966 or david.rostker@sba.gov, or Economist Christine Kymn, at (202) 205-6972 or christine.kymn@sba.gov. I am looking forward to the continuing dialogue on this important matter.

Sincerely,

/s/

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

/s/

Christine Kymn
Economist

/s/

David J. Rostker
Assistant Chief Counsel

Attachment: Legislative Priorities for the 112th Congress, Office of Advocacy, U.S. Small Business Administration



Legislative Priorities

Advocacy: the voice of small business in government

Legislative Priorities for the 112th Congress Office of Advocacy, U.S. Small Business Administration

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.

The Office of Advocacy's top legislative priority is to give small businesses a voice in the regulatory process.

Advocacy's research shows that small firms generate 60-80 percent of all net new jobs, represent 99.7 percent of employers, and employ about half of all private sector employees. Small patenting firms produce about 16 times more innovations per employee than larger firms. Executive Order 13563 calls for regulations that protect public health, welfare, safety, and the environment, while promoting economic growth, innovation, competitiveness, and job creation.

Advocacy works to reduce the burden of regulation on small business through its role as the guardian of the Regulatory Flexibility Act (RFA). For more than 30 years, the RFA has required that agencies examine their proposed regulations for the effects on small entities and consider less burdensome approaches as appropriate.

In July 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act established the Consumer Financial Protection Bureau (CFPB) to supervise certain activities of financial institutions. The act required the CFPB to comply with the RFA section 609 small business advocacy review (SBAR) panel process, making it the third agency given this responsibility, along with the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA). In September 2010, the Small Business Jobs Act gave Advocacy increased budgetary independence by creating a separate account for the office in the Treasury's General Fund. The law also requires agencies to provide more detailed analysis in response to comments from the Chief Counsel for Advocacy.

The federal government has saved small entities billions of dollars by following the RFA's direction and minimizing the impact of regulatory mandates on small business. History has shown that regulatory sensitivity toward small entities can be achieved without sacrificing the underlying purposes of environmental protection, workplace safety, border security, and other governmental priorities.

The 112th Congress has placed a strong emphasis on reducing barriers and promoting small business. The following amendments represent Chief Counsel for Advocacy Winslow Sargeant's legislative priorities.

1. Review of Existing Rules With the promulgation of new regulations each year, the cumulative impact can be extremely burdensome on small business. Evaluating existing regulations periodically helps minimize this impact. Advocacy believes there should be additional triggers for such reviews.

Amendment: Strengthen section 610 of the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (RFA), that currently requires federal agencies to review regulations at the ten-year mark to assess their present-day impact. Section 610 should provide for public petitions for review and analysis of burdensome regulations without regard for how long the rules have been in place. Additionally, the list of scheduled section 610 reviews should be incorporated into the section 602 Regulatory Agenda.

2. Improve SBAR Panels. The SBAR panel process plays an important role in allowing for small business comment at EPA, OSHA, and CFPB. If small business panels are to work efficiently and to allow maximum input from small businesses, at least two months' notice of an impending panel is required. Over the years, disagreements have arisen about the amount and quality of information provided to the small entity representatives in the SBAR panels. Amending section 609 of the RFA would address these issues and help achieve better panels.

Amendment: Modify section 609 of the RFA to require more detailed notification in advance of convening a panel and to specify information that must be provided to small entity representatives to the panel.

3. Narrowly Analyze Indirect Economic Impacts. 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.

Amendment: 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.

Additional Improvements to the RFA or Other Legislation to Help Small Business

While this list represents Advocacy's top legislative priorities, Advocacy is prepared to work with Congress on other ideas for improving the RFA or on other legislation to support small business. The RFA has been an increasingly effective tool over the years, and Advocacy is wary of any changes that would potentially overwhelm its unique purpose or undermine its effectiveness. However, we do believe that a number of measured and technical changes could improve the RFA.
