

In This Issue

[President Signs Executive Order 13272](#)1

[Text of Executive Order](#) ... 4-5

Message from the Chief Counsel

[Executive Order Reinforces Small Business Role in Federal Rulemaking](#)3

Regulatory News

[What's New with Executive Order 13272?](#)2

[An RFA Chronology](#)6

[IRS Rule Threatens Tax Exemption of Off-Road Mobile Machinery](#)8

Economic News

[2002 State Small Business Profiles](#)7

[Micro-Business-Friendly Banks in the U.S., 2001](#)7

President Bush Signs Executive Order To Relieve Regulatory Burden On Small Business

President George W. Bush delivered on a major piece of his Small Business Plan by signing Executive Order 13272, which requires federal agencies, when writing new rules and regulations, to protect small businesses.

The order requires all federal agencies, including independent agencies, to submit within 90 days to the Office of Advocacy their plans on how they account for small business in their rulemaking process. Agencies have 180 days to execute these plans and must consider Advocacy's comments on their effectiveness before their implementation.

"President Bush has delivered on the promise he made to small businesses when he introduced his

Small Business Plan," said Thomas M. Sullivan, Chief Counsel for Advocacy. "He promised to tear down the regulatory barriers to job creation for small business and give small business owners a voice in the complex and confusing federal regulatory process. This order does just that," he said.

Sullivan also praised President Bush's regulatory advisor, Dr. John Graham, Administrator of the Office of Information and Regulatory Affairs (OIRA). "Dr. Graham's team at OIRA has worked closely with the Office of Advocacy to hold government accountable to small business. They know our research shows

Continued on page 3



President Bush and Vice President Cheney hosted an economic forum in Waco, Texas, on Aug. 13, 2002, and included a number of small business owners in the roundtable discussions. President Bush signed Executive Order 13272 that evening.

Regulatory News

What's New About Executive Order 13272?

Executive Order 13272, signed August 13, 2002, entitled "Proper Consideration of Small Entities in Agency Rulemaking," accomplishes the following:

- Agencies will establish policies on how to measure their impact on small business and will vet those procedures through the Office of Advocacy.

- The Office of Advocacy will train agencies on how to properly account for small business impact when agencies draft regulations.

- Agencies will submit proposed rules to the Office of Advocacy prior to publication and are required to consider the Office of Advocacy's comments (which will reflect small business views) when the rule is finalized.

- The Office of Advocacy will report annually on whether agencies are complying with this executive order.

Section 2(a)

Section 2(a) requires the Office of Advocacy to notify agencies of the requirements of the Regulatory Flexibility Act (RFA) and issue notifications toward that end. Currently, Advocacy's comment letters to agencies serve this purpose. Each time Advocacy issues a comment letter, it notifies an agency about the requirements of the RFA. In addition, Advocacy's RFA guide notifies agencies about RFA requirements.

- **What's new?** This provision places a more affirmative obligation on Advocacy's part to provide agencies with regular notifications regarding how to comply with the RFA. Advocacy is currently updating the RFA guide and expects to offer online compliance guides as well.

Section 2(b)

Section 2(b) requires Advocacy to provide training. Advocacy has offered ongoing training to agen-

cies—particularly after the Small Business Regulatory Enforcement Fairness Act passed. In 1996-97, Advocacy trained over 600 agency personnel on RFA compliance.

- **What's new?** The training is now mandated. Earlier this spring, Advocacy created the position of senior counsel whose major role is to train agencies to assist with their RFA compliance.

Section 2(c)

Section 2(c) permits Advocacy to provide comment on draft rules. Advocacy already provides comment on draft rules, especially during the panel process for the Environmental Protection Agency and the Occupational Safety and Health Administration.

- **What's new?** Advocacy believes this should encourage more agencies to consult with Advocacy earlier in the rulemaking process, which would be an important victory for small business. Advocacy took the lead on this issue earlier this year by signing a memorandum of understanding with the Office of Information and Regulatory Affairs (OIRA) that laid the foundation for earlier intervention.

Section 3(a)

Section 3(a) requires agencies to issue written procedures for RFA compliance within 180 days of the date of the executive order (EO), submit the written procedures to Advocacy for review within 90 days of the EO, consider comments received within 60 days of submission to Advocacy, and make the procedures publicly available. Many agencies already have internal procedures in place and some follow Advocacy's existing written guidance.

- **What's new?** Advocacy is now able to comment on the adequacy of agency procedures that

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will form the basis for evaluating a rule's impact on small business. This makes the procedures public, so that small business stakeholders can now monitor the rulemaking process.

Section 3(b)

Section 3(b) requires agencies to notify Advocacy of rules that may have a significant economic impact on a substantial number of small entities when the rules go to OIRA for Executive Order 12866 review,

Continued on page 6

Message from the Chief Counsel

Executive Order 13272 Reinforces Importance of Small Business Impact in Federal Rulemaking

by Thomas M. Sullivan, Chief Counsel for Advocacy

President Bush made good on his commitment to small business in August by signing Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking." With a stroke of his pen, the President has affirmed the importance of small business in this administration.

Since its founding in 1976, the Office of Advocacy has pursued its mission in two ways: by creating research products that help lawmakers understand the contribution of small businesses to the U.S. economy and through regulatory experts who work to convince federal agencies to consider the impact of their rules on small businesses before those rules take effect.

Advocacy has had mixed success in this second area. Although the Regulatory Flexibility Act (RFA), passed in 1980, requires agencies to consider the impact of their rules on small businesses, and the 1996 Small Business Regulatory Enforcement Act provides the legal means to challenge rules that don't, federal agencies have heeded these directives with varying degrees of care. Our office's annual reports to Congress on the RFA catalog this varied success, and current research shows that much work is still needed. An Advocacy study published in October 2001 showed that firms with fewer than 20 employees spend twice as

much per employee on regulatory compliance as large firms do (those with more than 500 employees).

President Bush recognizes the key contribution small businesses make to the U.S. economy. His Small Business Plan, announced in March 2002, stated as a goal "Tearing down the regulatory barriers to job creation for small businesses and giv[ing] small business owners a voice in the complex and confusing federal regulatory process." The plan laid out the steps for reinforcing small business consideration in agency rulemaking and promised an executive order to direct agencies to more seriously consider the impact on small businesses in the regulatory process.

Now, with Executive Order 13272, President Bush has delivered on that promise. Through his leadership, he has directed his cabinet and regulatory agencies to be accountable and more effective at considering small businesses before regulations are written.

The executive order establishes several new steps to ensure agencies weigh the small business impact in their rulemaking.

- Agencies will establish policies on how to measure their impact on small business and will vet those procedures through the Office of Advocacy.

- The Office of Advocacy will train agencies on how to properly

account for small business impact when agencies draft regulations.

- Agencies will submit proposed rules to the Office of Advocacy prior to publication and are required to consider the Office of Advocacy's comments (which will reflect small business views) when the rule is finalized.

- The Office of Advocacy will report annually on whether agencies are complying with this executive order.

Under the executive order, the Office of Advocacy, mandated with independently representing the views of small business, will oversee the government's response to President Bush's charge of treating small business more fairly. This action by the President shows that he listened to small business owners at his Economic Forum in Waco, Texas, and he is holding his cabinet accountable to small business's needs and concerns.

For More Information

In the next few months, Advocacy will release instructions and training manuals for federal agencies to guide them in implementing Executive Order 13272. Senior Counsel Claudia Rayford Rodgers will direct these efforts. She can be reached at (202) 205-6804 or claudia.rayford@sba.gov.

Executive Order, from page 1

small businesses create close to 75 percent of the net new jobs, yet regulatory compliance costs them 60 percent more per employee than their big business counterparts. Adding more regulations to already

overburdened small businesses makes this worse. With this order, OIRA and Advocacy will work even closer together to correct this imbalance," he said.

Strengthening the Office of Advocacy was also a recommendation made by small business own-

ers at the President's Economic Forum held last month in Waco, Texas. The order meets the recommendation and makes a difference because the President is holding his cabinet accountable to the needs and concerns of small business.

Presidential Documents

Executive Order 13272 of August 13, 2002

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.

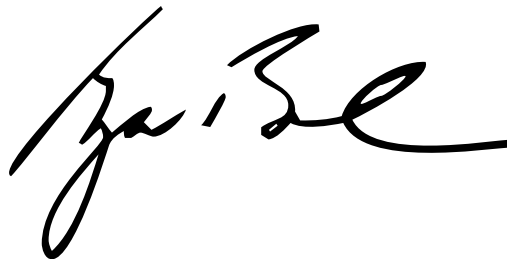
Sec. 4. Definitions. Terms defined in section 601 of title 5, United States Code, including the term “agency,” shall have the same meaning in this order.

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.

For More Information

The entire text of Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” is located at www.whitehouse.gov/news/releases/2002/08/20020814-2.html.

What's New, from page 2

or at a reasonable time prior to publication (for independent agencies not subject to 12866 review). Section 603 of the RFA already requires agencies to give the chief counsel for advocacy a copy of their initial regulatory flexibility analysis (IRFA) when the rule will have a significant economic impact on a substantial number of small entities. Also, agencies must publish a list of rules that will significantly affect small entities in the semi-annual *Unified Agenda*.

• **What's new?** The *Unified Agenda* listings are generally unreliable and do not contain a sufficient description of impact. Section 603 of the RFA doesn't say when agencies have to give a copy of the IRFA to the chief counsel, so agencies usually send it after it's been published in the *Federal Register*. It is better for Advocacy, small business, and agencies if Advocacy sees the proposed regulations early in the process so small business concerns can be addressed before the rules are published.

Section 3(c)

Section 3(c) requires agencies to give "appropriate consideration" to Advocacy's comments regarding a draft rule. It also requires agencies to respond to Advocacy's comments in the *Federal Register* at the time the final rule is published. Section 604 of the RFA already requires agencies to address in the final rule comments raised during the proposed rule.

• **What's new?** Agencies must publicly address, in writing, Advocacy's comments raised during the draft stage of the rule. This will result in earlier consideration of small business concerns.

Section 6

Section 6 requires Advocacy to submit a report to the director of the Office of Management and Budget (OMB) on the extent of compliance with the EO by agencies.

Section 612 of the RFA already requires Advocacy to report to the President and the Committees on the Judiciary and Small Business of the Senate and House of Representatives on agency RFA compliance.

• **What's new?** This report will be more extensive, covering things like whether agencies have issued written procedures. In addition, the report will go to OMB. This means that agencies will now be publicly graded on how they are following the law in responding to the needs and concerns of small businesses.

Section 7

Section 7 permits Advocacy to disclose information it receives from agencies as long as the information has first been disclosed by OIRA or the promulgating agency.

• **What's new?** This is a reiteration of Freedom of Information Act requirements to make it clear that Advocacy will not share non-public deliberative information shared internally during the rulemaking process.

The complete executive order is located at <http://www.sba.gov/advo>.

Important Dates in the Evolution of the RFA

President Bush's executive order spells out the steps that federal agencies must take to consider small business impact in rulemaking, another step forward in strengthening the Regulatory Flexibility Act (RFA) and toward equal treatment of small businesses in federal rulemaking. Here is a brief chronology of the RFA.

June 1976

Congress enacts Public Law 94-305, creating an Office of Advocacy within the U.S. Small Business Administration charged, among other things, to "measure the direct costs and other effects of federal regulation on small businesses and make legislative and non-legislative proposals for eliminating excessive or unnecessary regulation of small businesses."

September 1980

Congress passes the Regulatory Flexibility Act (RFA), requiring agencies to analyze the impact of proposed rules on small business, consider and analyze meaningful alternatives, and publish their analyses for public comment.

March 1996

The Small Business Regulatory Enforcement Fairness Act (SBREFA), is signed into law, giving courts jurisdiction to review agency compliance with the RFA, requiring the Environmental Protection Agency and the Occupational Safety and Health Administration to convene small business advocacy review panels, and affirming and expanding the chief counsel for advocacy's authority to file *amicus curiae* briefs in appeals brought by small entities from final agency actions.

Jan. 7, 1998

Advocacy files its first *amicus curiae* brief and the court remands the challenged rule to the agency on March 13, 1998.

Aug. 13, 2002

President George W. Bush signs Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," strengthening the Office of Advocacy and the RFA.

Economic News

2002 State Small Business Profiles Released

by Jaime K. Raczka, Office of Advocacy

In August the Office of Advocacy released the *2002 State Small Business Profiles*, one of the office's core annual reports. Taking a statistical look at the role of small business in local economies, the profiles provide a snapshot of the nation as a whole, as well as a look at each state individually.

Number of Businesses

In the 2002 state profiles, as in the past, one fact has made itself pointedly clear: no matter where you look across the nation, small business is playing a prevalent role in local economies. As of last year, there were 5.8 million small employer businesses in the United States. Another 9.8 million people were self-employed. A large portion of every state's total businesses were made up of small business, from 99.1 percent in California to a respectable 93.5 percent in the District of Columbia. In the nation as a whole, this number reaches 99.7 percent. The U.S. economy received \$745.1 billion of income from small businesses, a 4 percent boost from the previous year.

Women-Owned Businesses

Of the total small businesses in the United States, 26 percent are owned by women. Collectively, they generated \$818.7 billion in revenue last year. The largest states held the greatest portions of this revenue, including California (\$121.2 billion), Texas (\$65.1 billion), and New York (\$59.5 billion). Wyoming closed the list with revenues of only \$0.9 billion, yet it led the nation in share of women-owned businesses with employees, at 19.8 percent. Delaware and Rhode Island followed close behind with numbers also in the nineteenth percentile. Women business owners, as a percent of all small business

owners, have emerged strongest in the District of Columbia (30.9 percent), New Mexico (29.4 percent) and Maryland (28.9 percent).

Minority-Owned Businesses

Minorities own 3.04 million, or 14.6 percent, of the nation's small businesses. Far ahead of other states, Hawaii is an outlier with 57.8 percent of its small businesses owned by minorities. At a distant 33.6 percent, yet still topping the list is the District of Columbia. Wyoming has the highest percentage of minority-owned small businesses with employees at 28.6 percent; nationwide, 20.2 percent do.

Employees

Aside from small business' contribution to the U.S. economy in terms of dollars, they also make up a significant portion of the country's employers. Collectively, they employ 50.3 percent of the country's employees. Montana's employees, more so than any other state, are employed by small businesses at a rate of 70.6 percent. At the low end, Georgia's small busi-

nesses employ 43.7 percent of the state's employees.

Business Turnover

In light of recent economic events, small businesses have faced some tough times. The past year ended with a 6.5 percent increase in the number of small business terminations across the United States, with that number reaching as high as 58.9 percent in Alabama. In New Hampshire, however, the number of small business terminations fell by 28.3 percent. The number of new businesses started in the United States dropped 5 percent to 574,500. At the low end, New Jersey saw a 34.1 percent decrease in number of new businesses. Only 14 states across the nation had an increase in the number of new small businesses last year. The fact that U.S. small businesses are in the midst of challenges is evident in the 39,719 small business bankruptcies last year, an increase of 12.8 percent. Indiana was hit hardest with a 51.8 percent increase. Bankruptcies decreased in only nine states.

The entire report can be found on Advocacy's website, www.sba.gov/advo/research.

New Micro-Lending Report Available

American banks increased their micro-business loans by 10 percent in 2001, according to *Micro-Business Friendly Banks in the United States*, a recent report issued by the Office of Advocacy. Designed to help small firms in their search for capital, the report identifies banks in each state that are micro-business-friendly in their lending of amounts under \$100,000.

The 10 percent increase in the number of micro-business loans compares to a 6 percent increase in loans of \$100,000 to \$250,000 and a 7 percent increase in loans of

\$250,000 to \$1 million. The dollar value of small business lending increased as well with micro-business loans outstanding, as of June 2001, increasing by \$5.4 billion to a total of \$126.8 billion.

The complete report, which ranks small and large micro-business-friendly banks in each state, can be found on the Office of Advocacy website at www.sba.gov/advo/research. For further information contact Dr. Charles Ou, senior economist, at (202) 205-6966, or by email at charles.ou@sba.gov.

Large Mobile Machinery Could Lose Tax Exemption

Since 1956, federal highway construction has been supported through highway use taxes. Certain kinds of off-road mobile machinery have been exempt from paying a variety of fuel and highway-vehicle excise taxes, but a new regulation

proposed by the Internal Revenue Service (IRS) threatens to withdraw this longstanding exemption. Equipment used in drilling, heavy construction, utility maintenance, logging and mining would be subject to these taxes, which could

pose a significant hardship on many small businesses. Businesses and other concerned groups have until Dec. 4, 2002, to comment on how the proposed rule would affect them.

For More Information on the Mobile Machinery Tax

If businesses would like more information, please contact Assistant Chief Counsel Russell Orban at (202) 205-6946 or russell.orban@sba.gov. Several relevant documents can be found at the following sites.

- Advocacy's letter to the IRS: http://www.sba.gov/advo/laws/comments/irs02_0813.html
- Sen. Kit Bond's Aug. 1, 2002, letter to the Treasury Department and the IRS: <http://sbc.senate.gov/republican/agencies/irs/irs27.pdf>
- Proposed Regulations (REG-103829-99, 67 *Fed. Reg.* 38,913 [June 6, 2002]): <http://sbc.senate.gov/republican/agencies/irs/frvol67no109.pdf>
- Notice of Extended Comment Period (67 *Fed. Reg.* 53,539 [August 16, 2002]): <http://sbc.senate.gov/republican/agencies/irs/frvol67no159.pdf>

Address for Comments

To comment on the proposed rule, send submissions to: CC:ITA:RU (REG-103829-99), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Comments can also be filed electronically at the following site:

<http://www.irs.gov/app/scripts/ct.jsp?regTitle=Definition%20of%20Highway%20Vehicle>.

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