



July 30, 2021

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Acting Director Kathleen Salyer
Office of Land and Emergency Management
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Notice of Request for Public Comment; Docket Number EPA-HQ-OLEM-2021-0312

Dear Acting Director Salyer:

Thank you for the opportunity to comment on the Environmental Protection Agency's (EPA) Request for Public Comment on "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act" [hereinafter "RMP rulemaking"].

Advisory Council

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I am a Senior Policy Analyst with the Center for Progressive Reform (CPR), a nonprofit research and advocacy organization that works to build thriving communities on a resilient planet. CPR's mission is to educate, collaborate, and advocate with the goal of driving public policy reform through rigorous and accessible legal analysis. CPR operates with a network of more than 60 leading scholars in various legal academic fields and a professional staff of policy analysts, communication experts, and others. We work together to advance the idea that government regulations are key to social justice and planetary health. Our website is <https://progressivereform.org>.

I have been studying the federal regulatory system for over 13 years, including the role that the Small Business Administration's (SBA) Office of Advocacy plays in the regulatory decision-making process. Responses to the comments below may be sent to me at jgoodwin@progressivereform.org.

I am writing now regarding my concerns about the role the SBA Office of Advocacy might play in the development of any rulemaking that emerges from the RMP action. These concerns stem from the

fact that the SBA Office of Advocacy has historically operated to weaken environmental, public health, and safety rules, and that these are often contrary to the interests of most of the small business stakeholders affected by the particular regulation at issue.¹

Significantly, these problematic dynamics were on full display when the SBA Office of Advocacy's intervened in the 2017 RMP rulemaking, including in particular the Small Business Advocacy Review (SBAR) review panel it helped convene in 2015. The "small entity representatives" that participated in that SBAR review panel included powerful industry lobbying associations such as the Gas Processor Association (GPA), National Association of Chemical Distributors, American Coatings Association, American Fuel and Petrochemical Manufacturers (AFPM), the Society of Chemical Manufacturers & Affiliates (SOCMA), and the American Chemistry Council (ACC).² The ACC's participation was particularly alarming given that its members at the time included some of the largest multinational corporations in the world, such as Chevron Corporation, DuPont, Koch Industries, Halliburton, Royal Dutch Shell, and Dow Chemical Company.

The SBA Office of Advocacy has long been in need of reform of how it operates – both to make its interventions in rulemakings more consistent with the public interest and so that it better serves the unique interests of real U.S. small businesses.³

If the EPA pursues a rulemaking as a result of the RMP action, we anticipate that it will soon begin working with the SBA Office of Advocacy to organize SBAR panel in conjunction with that rulemaking. Accordingly, we call on the Biden administration to take advantage of this opportunity to begin reforming its small business outreach efforts consistent with the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act.

Specifically, the EPA should work with the SBA Office of Advocacy to take the following steps to reform the SBAR panel process:

- Prohibit inclusion on the SBAR panel of any small entity representatives associated with national trade associations that do not have as their primary purpose representing the interests of small businesses; and
- Commit to completing the SBAR panel process in a timely manner.

¹ SIDNEY SHAPIRO & JAMES GOODWIN, DISTORTING THE INTERESTS OF SMALL BUSINESS: HOW THE SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY'S POLITICIZATION OF SMALL BUSINESS CONCERNS UNDERMINES PUBLIC HEALTH AND SAFETY (Ctr. for Progressive Reform, 2013), *available at* http://progressivereform.net/articles/SBA_Office_of_Advocacy_1302.pdf; RENA STEINZOR ET AL., THE SMALL BUSINESS CHARADE THE CHEMICAL INDUSTRY'S STEALTH CAMPAIGN AGAINST PUBLIC HEALTH (Ctr. for Progressive Reform, 2015), *available at* https://cpr-assets.s3.amazonaws.com/documents/Small_Biz_Charade_Silica_1501.pdf.

² See U.S. ENVTL. PROTECTION AGENCY ET AL., FINAL REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON EPA'S PLANNED PROPOSED RULE RISK MANAGEMENT MODERNIZATION RULE 18-19 (2016), *available at* <https://www.regulations.gov/document/EPA-HQ-OEM-2015-0725-0032> (Table 3).

³ U.S. GOVT. ACCOUNTABILITY OFF. SMALL BUSINESS ADMINISTRATION: OFFICE OF ADVOCACY NEEDS TO IMPROVE CONTROLS OVER RESEARCH, REGULATORY, AND WORKFORCE PLANNING ACTIVITIES (GAO-14-525), *available at* <https://www.gao.gov/assets/gao-14-525.pdf>; James Goodwin, *The GAO's Scathing Report on the SBA Office of Advocacy: 15 Big Revelations*, CPRBLOG, July 28, 2014, <https://progressivereform.org/cpr-blog/the-gao-s-scathing-report-on-the-sba-office-of-advocacy-15-big-revelations/> (last visited July 30, 2021).

In addition to these SBAR panel process reform, the EPA and the SBA Office of Advocacy should develop and implement an outreach strategy to obtain the views of small businesses that could potentially *benefit* from a stronger RMP rule. These might include small businesses located within the worst-case chemical release vulnerability zone of one or more RMP-regulated facilities that have had their operations disrupted by a disaster at one of those facilities. Or they might include small businesses that are developing innovative safer alternative chemicals, which might become more widely used in response to a stronger RMP rule.

For too long, the EPA and the SBA Office of Advocacy have operated in a manner that has reinforced the mistaken impression that small businesses are monolithic and inevitably harmed by stronger regulatory protections. A future RMP rule underscores that the reality is quite different. To better appreciate this, however, the EPA and SBA of Advocacy must reform their approach to incorporating small business considerations into the rulemaking process.

Undertaking the reforms outlined above is important. Better accounting for the diverse impacts of regulations will lead to better outcomes for the public in general, and small businesses in particular.

I appreciate your attention to these recommendations, and I look forward to working with you on their development and implementation.

Sincerely,

James Goodwin

Senior Policy Analyst

Center for Progressive Reform



Distorting the Interests of Small Business:

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

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

About the Center for Progressive Reform

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

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

For more information about the authors, see page 29.

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Acknowledgments

**The Center for
Progressive Reform
is grateful to the
Public Welfare
Foundation for its
generous support of
CPR's work.**

Executive Summary

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

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

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

This report shines light on the Office of Advocacy's anti-regulatory work, examining how its participation in the rulemaking process further degrades an already weakened regulatory system. As a preliminary matter, the nominal objective of the Office of Advocacy—subsidizing small businesses through preferential regulatory treatment¹—is based on a needless and destructive tradeoff; the government has several policy options for promoting small businesses without sacrificing public health and safety. The Office of Advocacy nevertheless devotes much of its time and resources to blocking, delaying, or diluting regulatory safeguards or to supporting general anti-regulatory attacks from industry and its allies in Congress. In short, blocking regulations has become the Office of Advocacy's *de facto* top priority, and its commitment to this goal has led the Office to engage in matters that have little or nothing to do with advancing small business interests or with ensuring that federal policy reflects the unique needs of these firms.

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

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

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

Table 1: Recommendations for Reforming the Office of Advocacy

<p>A New Mission: Promote “Win-Win” Regulatory Solutions that Ensure Both Small Business Competitiveness and Strong Protections for People and the Environment</p>	<ul style="list-style-type: none"> • Congress should amend the Office of Advocacy’s authorizing statutes to focus on promoting small business “competitiveness” instead of on reducing regulatory impacts or burdens. • Congress should provide the SBA with additional legal authorities to establish new subsidy programs that affirmatively assist small businesses meet effective regulatory standards without undermining their competitiveness. • Congress should establish and fully fund a network of small business regulatory compliance assistance offices. • Congress should significantly increase agency budgets so that they can effectively account for small business concerns in rulemakings without hindering their ability to move forward with needed safeguards. • The Office of Advocacy should identify and implement regulatory solutions that will enable small businesses to meet strong public health and safety standards while remaining competitive with larger firms. At a minimum, these solutions should include regulatory compliance assistance, finding opportunities to partner small businesses in mutually beneficial ways, and securing subsidized loans to cover compliance costs. • The Office of Advocacy should develop new guidance that helps agencies better address small business concerns in rulemakings by working toward win-win regulatory solutions. • The President should revoke Executive Order 13272, which empowers the Office of Advocacy to work with OIRA to interfere in agency rules.
<p>Restored Focus: Helping Truly Small Businesses Only</p>	<ul style="list-style-type: none"> • Congress should revise the Office of Advocacy’s small business size standards so that they (1) focus on truly small businesses (<i>i.e.</i>, those with 20 or fewer employees) and (2) prevent the Office from working on behalf of all firms, regardless of size, that work in industrial sectors that pose a high risk to public health and safety. • Congress should prohibit the Office of Advocacy from working with non-small businesses and should establish legal mechanisms for ensuring that this prohibition is observed. • Congress should conduct more frequent and thorough oversight of the Office of Advocacy.

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

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

Background: The Pervasive Problem of Under-Regulation

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

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

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

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

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

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

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

A Flawed Mission: Needlessly Sacrificing Public Health and Safety

Preferential regulatory treatment for small business can include regulatory exemptions; less stringent or delayed regulatory requirements; and relaxed enforcement for regulatory violations, such as waived or reduced penalties. As with other subsidies that small businesses receive—such as subsidized loans, tax breaks, and preferential government procurement and contracting policies⁹—preferential regulatory treatment makes it easier for people to start and sustain small businesses. But it also enables these businesses to avoid taking responsibility for pollution, workplace risks, or any other socially harmful byproducts of their activities. In other words, preferential regulatory treatment involves an explicit policy choice to shift the costs of these social harms from small businesses to the general public.

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

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

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

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

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

The Office of Advocacy Creates Roadblocks to Effective Regulation

Passed by Congress in 1976, Pub. L. 94-305¹⁴ created the Office of Advocacy and charged it with representing small businesses before federal agencies. With the passage of the Regulatory Flexibility Act¹⁵ (Reg-Flex) in 1980, Congress made preferential regulatory treatment of small businesses an explicit goal of the rulemaking process and empowered the Office to push agencies to pursue this goal. The enactment of the Small Business Regulatory Enforcement Fairness Act (SBREFA) in 1996 and the issuance of Executive Order 13272 by George W. Bush in 2002 has further strengthened the Office's role as an opponent of effective regulation.

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

The Regulatory Flexibility Act's Analytical Requirements

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

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

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

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

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

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

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

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

Guidance on Complying with the Regulatory Flexibility Act

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

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

Regulatory Comments

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

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

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

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

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

Reports to Congress and Congressional Testimony

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

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

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

Small Business Regulatory Enforcement Fairness Act Panels

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

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

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

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

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

SBREFA panel-related delays can add up to a year to the rulemaking process if not longer. These delays come on top of the several months of delay that the other Reg-Flex requirements introduce into the rulemaking process. By law, the formal panel period is supposed to last around two months. But, eager to avoid extensive criticism during the SBREFA panel process, agencies frequently spend months revising their planned rules and any underlying economic analyses prior to convening the formal panel. For example, preparations for the SBREFA panel process appear to have delayed OSHA's work on the Injury and Illness Prevention Program (I2P2) rule by more than a year. In June of 2011, the agency had planned to convene a SBREFA panel for its rule by the end of the month. Eventually, OSHA pushed this date back to January of 2012 and then March of 2012.²⁹ According to Office of Advocacy records, OSHA still has not convened this panel,³⁰ bringing the total delay to 16 months and counting.

Centralized Regulatory Review at the Office of Information and Regulatory Affairs

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

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

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

Participation in Lawsuits Challenging Rules

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

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

The Office of Advocacy Bolsters Political Attacks on Regulations

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

Sponsoring Anti-Regulatory Research

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

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

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

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

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

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

Participating in Anti-Regulatory Congressional Hearings

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

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

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

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

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

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

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

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

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

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

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

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

The Office of Advocacy Interferes with Agency Scientific Determinations

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

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

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

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

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

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

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

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

A New Mission: Promoting Win-Win Regulatory Solutions

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

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

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

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

- **Providing monetary assistance to truly small businesses so that they can meet higher regulatory standards.** Monetary assistance could include direct subsidies to cover part or all of the costs of equipment upgrades required for regulatory compliance. Alternatively, the Office could work to obtain subsidized loans to help small businesses defray regulatory compliance costs.
- **Expanding regulatory compliance assistance programs.** SBREFA established several compliance assistance programs, including requiring agencies to produce “compliance guides” for each of their rules that have a significant impact on small businesses.⁵⁹ These compliance guides describe the rule and explain what actions small businesses need to take to comply. Congress can help improve the effectiveness of compliance guides by providing agencies with full funding to produce and distribute them. In addition, Congress can establish local offices throughout the country staffed with compliance consultants that can help small businesses understand their obligations under different regulations. To be effective, Congress must ensure that the network of compliance consultant offices is fully funded.
- **Partnering small businesses to promote beneficial synergies on regulatory compliance.** The Office could explore different ways of partnering small businesses that will help them meet regulatory obligations in mutually beneficial ways. For example, the Office could help establish a cooperative of small businesses within a given location, which could share the cost of compliance assistance services, such as those provided by accountants or engineering consultants. Alternatively, the Office could establish partnerships that build off the Small Business Administration’s (SBA) preferential government procurement and contracting policies for helping small businesses. For example, if a small business requires special services, such as accounting, to comply with a regulation, then the Office could explore ways to partner that business with another small firm that provides those special services. In this way, the Office can assure that one small business’s compliance with regulations help to create a profitable market for another small business.

To achieve these reforms, Congress will need to:

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

In addition, the Office will need to:

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

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

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

Restored Focus: Helping Truly Small Businesses Only

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

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

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

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

Endnotes

- ¹ We borrow term the “preferential regulatory treatment” with slight modification from a 1998 law review article by administrative law professor Richard Pierce. See Richard J. Pierce Jr., *Small is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 ADMIN. L. REV. 537 (1998). The term includes regulatory exemptions; less stringent or delayed regulatory requirements; and relaxed enforcement for regulatory violations, such as waived or reduced penalties. See *id.* at 542-43.
- ² PUBLIC CITIZEN, THE FEDERAL RULEMAKING PROCESS, available at <http://www.citizen.org/documents/Regulations-Flowchart.pdf>.
- ³ Sidney Shapiro et al, *Regulatory Dysfunction: How Insufficient Resources, Outdated Laws, and Political Interference Cripple the “Protector Agencies”* 6-8 (Ctr. for Progressive Reform, White Paper 906, 2009), available at http://www.progressivereform.org/articles/RegDysfunction_906.pdf [hereinafter Shapiro et al, *Regulatory Dysfunction*].
- ⁴ *The “Regulatory Accountability Act of 2011”: Hearing on H.R. 3010 Before the H. Comm. on the Judiciary*, 112th Cong. 6 (2011) (statement of Sidney A. Shapiro, University Distinguished Chair in Law, Wake Forest University School of Law, and Member Scholar and Vice President, Center for Progressive Reform), available at http://www.progressivereform.org/articles/Shapiro_RAA_Tesimony_102511.pdf.
- ⁵ Shapiro et al, *Regulatory Dysfunction*, *supra* note 3, at 12-14.
- ⁶ Rena Steinzor et al., *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment* (Ctr. for Progressive Reform, White Paper 1111, 2011), available at http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf [hereinafter Steinzor et al, *Behind Closed Doors*]. Specifically, the study found that OIRA routinely meets corporate interests behind closed doors during the review process and then delays or changes rules that are subject of such meetings at a disproportionately higher rate.
- ⁷ To illustrate the Office’s independence, the SBA’s organizational chart presents the Office as a “floating box” without any lines denoting a chain of command to the rest of the agency. See U.S. SMALL BUS. ADMIN., ORGANIZATION CHART, available at <http://www.sba.gov/sites/default/files/SBA%20Organization%20Chart%2003-16-2012.pdf>.
- ⁸ See *Office of Advocacy Fiscal Year 2012 Budget: Hearing Before the S. Comm. on Small Bus. & Entrepreneurship*, 112th Cong. (statement of Winslow Sargeant, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin.), available at http://www.sba.gov/sites/default/files/test11_0331.pdf; *The Small Business Office of Advocacy Improvements: Hearing Before the Subcomm. on Workforce, Empowerment, & Gov’t Programs and the Subcomm. on Regulatory Reform & Oversight of the H. Comm. on Small Bus.*, 108th Cong. (statement of Thomas M. Sullivan, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin.), available at http://www.sba.gov/sites/default/files/files/test03_0401.pdf; *Strengthening the Office of Advocacy, Hearing Before the H. Comm. on Small Bus.*, 107th Cong. (statement of Thomas M. Sullivan, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin.), available at http://www.sba.gov/sites/default/files/files/test02_0320.pdf; *Improving the Office of Advocacy, Hearing Before the H. Comm. on Small Bus.*, 106th Cong. (statement of Jere W. Glover, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin.), available at http://www.sba.gov/sites/default/files/files/test00_0621.pdf.
- ⁹ See Pierce, *supra* note 1, at 540-42.
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- ¹⁴ 15 U.S.C. §§634a-634g.
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- ²⁴ OFF. OF ADVOC. FY 2011 RFA REPORT, *supra* note 19, at 23.
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- ⁴³ *Hearing on the Regulatory Flexibility Improvements Act - H.R. 682 Before the Subcomm. on Com. & Admin L. of H. Comm. on the Judiciary*, 109th Cong. 4 (statement of Thomas M. Sullivan, Chief Counsel for Advocacy., Off. of Advoc., U.S. Small Bus. Admin.), available at http://www.sba.gov/sites/default/files/files/test06_0720.pdf.
- ⁴⁴ Section 601(3) of Reg-Flex defines a “small business” as having “the same meaning as the term ‘small business concern’ under section 3 of the Small Business Act.” 5 U.S.C. §601(3). Pursuant to Section 3 of the Small Business Act, the Small Business Administration has developed size standards for defining small businesses according to different industrial sectors of the economy, which are catalogued at 13 C.F.R. §121.201.
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The Small Business Charade *The Chemical Industry's Stealth Campaign* *Against Public Health*

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©Center for Progressive Reform Issue Alert #1501
February 2015

The Small Business Charade: The Chemical Industry's Stealth Campaign Against Public Health

Executive Summary

The Small Business Administration's Office of Advocacy is tiny and largely unaccountable, but it wields surprising power over the federal regulatory system. A steady stream of statutes and executive orders issued over the past three decades have imbued the Office of Advocacy with powerful supervisory authority over analytical and procedural requirements that regulatory agencies must satisfy before issuing rules on everything from worker safety to air pollution. In important ways, the Office of Advocacy's role in the regulatory system bears a striking resemblance to that played by the White House Office of Information and Regulatory Affairs (OIRA). Both operate to similar effect, functioning as an anti-regulatory force from within the regulatory structure, blocking, delaying, and diluting agency efforts to protect public health and safety.

Congress did not create the Office of Advocacy to play this role. Instead, by statute, the Office of Advocacy is supposed to advance the interests of small businesses that may lack the resources or expertise to field expansive lobbying efforts in Washington, especially in light of the lobbying efforts conducted on behalf of large corporations and trade associations, whose interests rarely align with those of real small businesses. The Office of Advocacy enjoys a privileged role in the rulemaking process because the law requires agencies to pay special attention to its objections and modify regulations to make them small businesses-friendly (*i.e.*, by not putting small businesses at a competitive disadvantage to larger firms within their sector) without sacrificing protections for public health, worker and consumer safety, and the environment.

To carry out this intended role, the Office of Advocacy could reach out to actual small business owners across the country to learn about the real challenges that government policies might pose for them. It could develop good working relationships with agency officials to help them achieve their statutory mission without unduly burdening small businesses. But in actual practice, the Office of Advocacy has pursued another agenda, focusing on forming alliances with big businesses, and especially trade associations that lobby on behalf of large corporate interests, and working to block any regulations that they might find inconvenient to their bottom line, even at the cost of properly safeguarding people and the environment.

The Occupational Safety and Health Administration's (OSHA's) ongoing efforts to draft new rules covering worker exposure to crystalline silica offer a striking example of how the strong ties between the Office of Advocacy and big-business trade associations threaten public health. In developing its response to OSHA's proposed silica standard, the Office of Advocacy has leaned heavily on the leading trade association representing multi-billion-dollar chemical companies inside the Beltway, the American Chemistry Council (ACC). For example:

- One-quarter of the small entity representatives who participated in the Small Business Advocacy Review Panel were nominated by advocates linked to ACC.

- ACC and its affiliates led discussions at “roundtable” meetings sponsored by the Office of Advocacy, which the Office of Advocacy later described as the primary source of information for its formal comments to OSHA.
- OIRA granted ACC-affiliated advocates eight closed-door meetings to discuss the proposed rule. Representatives from Advocacy participated in six of the eight meetings.
- One-third of the specific points that Advocacy raised in its formal comments on the rule overlap with points that ACC made in its formal comments.

For such behavior, the Government Accountability Office (GAO) recently issued a report that took the Office of Advocacy to task for failing to follow the basic policies and recordkeeping standards that would prove Advocacy’s formal rulemaking comments actually reflect input received from small business representatives. The disturbing portrait portrayed in the GAO report aligns with the evidence laid out in this Issue Alert, reflecting the deep ties between the Office of Advocacy and the American Chemistry Council.

In order for the Office of Advocacy to comply with its statutory mandate and end its persistent misuse of taxpayer dollars, reforms are in order:

- Advocacy should establish and abide by new policies that ensure its staff work to advance the unique interests of small businesses within the bounds of occupational-safety, environmental, and consumer-protection laws.
- Congress should increase its oversight of the Office of Advocacy.
- The President should revoke Executive Order 13272, which gives the Office of Advocacy too much sway over other agencies’ rulemaking processes.

Introduction

Silica dust is a slow, silent killer. Workers who cut concrete, brick, or tile, who put the finishing touches on drywall, or who mine sand or attend to fracking operations inhale the tiny crystalline particles throughout the day. Roughly 2 million U.S. workers in dozens of different industries toil in workplaces with silica levels high enough to threaten their health. As the dust swirls through workers' lungs, it causes lung tissue to swell and become inflamed. Workers experience difficulty breathing and, over time, develop scarring and stiffening of the lungs. The resulting condition, called silicosis, is debilitating, and the lung damage that comes with it can increase a person's risk of tuberculosis and even lung cancer. OSHA estimates that thousands of workers die every year because of silica exposures that are within legal limits.

In September 2013, after decades of research and 17 years of administrative wrangling, the Occupational Safety and Health Administration (OSHA) proposed updating its outdated exposure limits for crystalline silica with a comprehensive rule that would require employers to limit their workers' exposure to silica dust and provide other protections like exposure monitoring and free medical exams when workers are exposed to dangerous levels of the dust. Thus began an intense period of lobbying in which workers' advocates have urged OSHA to strengthen its proposal and business community lobbyists have expressed everything from qualified support to outright hostility.

At the extreme anti-regulatory end of the spectrum is the American Chemistry Council (ACC), which has gone so far as to assert that OSHA has failed to make the basic showing that silica presents a "significant risk" to workers' health at current exposure levels. Extensive scientific assessments by OSHA,

What is the American Chemistry Council and why do they care about silica?

ACC is a highly influential trade association comprising more than 180 companies that manufacture, import, and use chemicals. These companies include the biggest names in the chemical industry, from AkzoNobel to DuPont to W.R. Grace & Co., and a limited cadre of small businesses. The trade association employs a stable of lobbyists, risk assessment experts, economists, and consultants who operate on behalf of ACC's member companies to fight new government regulations that might cut into their bottom lines. As discussed in more detail below, ACC and its affiliates lobby Congress, litigate against regulatory agencies, and fund public relations campaigns aimed at forestalling regulations that would protect the public health.

Many of ACC's member companies use or manufacture silica-containing products. Its natural abundance and physicochemical properties make it useful for everything from hydraulic fracturing in natural gas fields to sandblasting finishes off of bridges and other major structures. ACC is also acting as a coordinator for non-members who want to weaken OSHA's proposed silica rules. U.S. Silica, for instance, is a leading manufacturer of silica, and although it is not a member of ACC, it is participating in the ACC Crystalline Silica Panel – a formal coalition of groups advocating against the rule, supported by ACC staff and consultants.

the National Institute for Occupational Safety and Health, the World Health Organization, and other neutral parties repudiate ACC's claim.¹ Drawing on its vast resources and political clout, ACC has been heavily involved at every step of the rule's development. For example, at OSHA's multi-day public hearing on the proposal, an event that is in many respects central to the agency's rulemaking process, ACC was a featured attraction, reserving an entire afternoon for testimony from its spokespeople and coordinating testimony with its member organizations that took up additional bits and pieces of eight more days. In total, testimony from lobbyists and other people affiliated with ACC and its members consumed more than 14 hours of the hearing, or about a quarter of the total hearing time. That is nearly as much as all of the unions, public interest groups, and their allies combined (that total was just under 18 hours).

The Small Business Administration's Office of Advocacy (Advocacy) is also taking part in the campaign to undermine OSHA's work on the silica rule. Congress's purpose in establishing the Office of Advocacy was to ensure that the unique small business perspective on such federal policies as OSHA's silica rule was accounted for. The extraordinary step of creating what amounts to a taxpayer funded lobbying shop reflects Congress's conclusion that the small business perspective might otherwise be overlooked because small businesses—genuinely small businesses, at least—lack the resources and sophistication to participate in the federal decision-making processes. But in the case of the silica rule, Advocacy's arguments against the proposal and those offered by the ACC are conspicuously similar. The evidence indicates that this similarity is not a coincidence, or even the result of parallel analysis and conclusions. Rather, it is the result of coordination between ACC and Advocacy. Email communications between Office of Advocacy staff and outside parties show that the agency, contrary to its clear statutory mission, takes its cues mostly from the major trade associations that are funded by and that primarily represent big businesses. Meanwhile, the true voice of small businesses is largely unheard.

This Issue Alert focuses on the connection between the Office of Advocacy and ACC with respect to one rule at one agency, but the problems run deeper than that. CPR's January 2013 White Paper, *Distorting the Interests of Small Business*,² documents Advocacy's pattern of hostility to proposed regulations that protect the public from a variety of environmental, health, workplace, and other hazards. Released at the same time, the Center for Effective Government's report, *Small Businesses, Public Health, and Scientific Integrity: Whose Interests Does the Office of Advocacy at the Small Business Administration Serve?*,³ highlights how Advocacy has even fought against environmental and public health agencies' efforts to develop the basic risk assessment documents that form the basis for rules on the use of toxic chemicals.

The Mouse that Roared

Congress established the Office of Advocacy in 1976 with the primary goal of establishing a team of experts who could assess how government subsidies, regulations, taxes, and financial market manipulations affect small businesses. To promote small business interests, Congress directed Advocacy to serve as a clearinghouse for small business complaints, criticisms, and suggestions about federal regulations and to represent the small business community in federal regulatory proceedings. The office has a budget of less than \$9 million and a small staff working on regulatory issues,⁴ yet it wields outsized power over the rulemaking processes at important protector agencies such as OSHA, the Environmental Protection Agency (EPA), and the Consumer Financial Protection Bureau (CFPB).

The Office of Advocacy's power over the federal rulemaking process expanded significantly when President Carter signed the Regulatory Flexibility Act (the "Reg-Flex Act")⁵ in 1980. That law required federal regulatory agencies to undertake a thorough analysis of any proposed rule's potential effect on small businesses.⁶ If an agency determines that its proposal has the potential to have a "significant economic impact on a substantial number of small businesses," the agency must conduct two rounds of formal "regulatory flexibility" analysis—an initial analysis, and a final analysis that takes into consideration comments from the public and Advocacy. In 1996, Congress amended the Reg-Flex Act to make agency compliance with these analytical requirements judicially reviewable.⁷ This amendment makes the analyses part of the record for judicial review, and it authorizes reviewing courts to reject a rule on the sole basis that the agency had failed to adequately carry out one of the analyses in accordance with the law's requirements.

Congress has singled out OSHA, EPA, and CFPB for enhanced supervision by the Office of Advocacy by requiring them to jump through additional hoops whenever their proposed rules might significantly affect a substantial number of small businesses. The Clinton-era Small Business Regulatory Enforcement Fairness Act (SBREFA) requires those agencies to establish a Small Business Advocacy Review Panel (SBAR Panel) for those rules. The SBAR panel consists of representatives from Advocacy, the White House Office of Management and Budget, and the regulatory agency responsible for the rule (OSHA, EPA, or CFPB). The SBAR panel asks a number of individuals from small businesses potentially affected by the rule to provide input on a draft shared by the regulatory agency. The Office of Advocacy is intimately involved in the selection of small business representatives and, as described below, often takes cues on its nominees from big business's advocates. The SBAR panel process occurs well before the agency publicly releases its draft proposal, giving Advocacy and its allies the first crack at critiquing the rule. Since this privileged opportunity comes so early in the decision-making process, the SBAR panel process gives Advocacy and the small business representatives involved enormous influence over what the rule will look like, and indeed whether the rule ever sees the light of day.

In 2002, President Bush further strengthened the Office of Advocacy's power over executive branch agencies. In Executive Order 13272, Bush instructed Advocacy to "train" other agencies on how to comply with the Reg-Flex Act. With the blessing of a White House plainly hostile to federal regulation, the Office of Advocacy developed a guidance document that has the effect of

expanding the Act's reach (thereby giving Advocacy additional power to slow down new rules) and demanding that agencies conduct unreasonable levels of analysis (including analyses of alternative regulatory approaches that go beyond the agency's statutory authority). These changes, combined with Advocacy's power to essentially pass judgment on whether an agency has complied with the Reg-Flex and SBREFA procedures, gives the small office incredible power over regulatory agencies.

In addition to the Reg-Flex and SBREFA powers that the Office of Advocacy wields, it has a number of other tools at its disposal that it can use to derail other agencies' regulatory agendas. Advocacy submits formal comments to agencies during the normal "notice-and-comment" procedures; a recent amendment to Reg-Flex requires agencies to respond to these comments when justifying their final rules, ensuring that Advocacy's comments receive special attention. Sometimes these comments are supported in part by formal research studies conducted by contractors, although the office has a track record of sponsoring biased and flawed research.⁸ In addition, Advocacy's comments are supposed to be informed by small business views, although GAO found that Advocacy lacks sufficient documentation to prove that its comments are developed in that way.⁹

Representatives from the Office of Advocacy are regularly called before congressional oversight committees to give their views on other agencies' rules and compliance with Reg-Flex and SBREFA. They rarely fail to use these opportunities to shame agencies whose rules they do not support, and they echo these complaints in statutorily mandated annual reports to Congress.

Officials from Advocacy also frequently participate in White House meetings about proposed rules, where potentially regulated parties present their arguments to the Office of Information and Regulatory Affairs (OIRA)—the "gatekeepers" whose approval must be won before a rule can be formally proposed or finalized. Indeed, during the Bush Administration, the Office of Advocacy and OIRA entered into a Memorandum of Understanding in which the two agencies agree to work closely together on what amounted to blocking, delaying, and diluting agency rules. A 2011 CPR study documents the overwhelming influence that OIRA meetings can have in shaping the substance of final rules.¹⁰ The Office of Advocacy's privileged role in these meetings thus gives it another powerful lever for influencing agency rulemakings.

With this array of procedures and other tools available to it, the Office of Advocacy can be a powerful force standing in the way of a regulatory agency that wants to establish new rules.

ACC, the Office of Advocacy, and OSHA’s Silica Rule

OSHA has been working on its new silica standard since 1997, and it has been dealing with ACC and Office of Advocacy opposition since the beginning. Not long after OSHA began working on the rule, ACC established a workgroup to fight OSHA’s efforts to better protect workers from the harmful effects of silica exposure. The Crystalline Silica Panel, as it is known, is an association of associations, with key players representing businesses that both produce and use a full range of silica-containing products. The Crystalline Silica Panel comprises eight major corporate interests, at least eight other trade associations, and a single “small” business—an industrial sand mining company with two processing plants and separate corporate office.

<i>Trade associations</i>	<i>Big businesses</i>	<i>‘Small’ business</i>
American Foundry Society	ExxonMobil Corporation	Badger Mining Corporation
American Petroleum Institute	Fairmount Minerals Ltd.	
Concrete and Masonry Silica Coalition	Lafarge North America	
International Diatomite Producers Association	Aggregates and Concrete	
National Industrial Sand Association	Lehigh Hanson	
National Stone Sand & Gravel Association	Specialty Granules Inc.	
North American Insulation Manufacturers Association	Unimin Corporation	
The Refractories Institute	U.S. Silica Company	
	Vulcan Materials Company	

In the silica rulemaking, ACC has manipulated Advocacy’s role in the rulemaking process, and it has done so in a way that threatens critical worker protections. For instance, the Office of Advocacy helps to select the small business representatives who will provide advice to the SBAR Panel and takes part in the development of the Panel’s final report to OSHA. These early-in-the-process decisions can have an enormous impact on the eventual shape and breadth of rules, and can even derail the process altogether. In theory, an SBAR Panel could ask for advice from mostly small business owners, who could report that they would benefit from a strong rule and who would encourage OSHA to forge ahead (e.g., industrial hygiene consultants, control-equipment manufacturers, or occupational health specialists). But in practice, the Advocacy has tended to work with trade associations to identify “small entity representatives” (SERs) who toe an anti-regulatory line and use their advance knowledge of a proposed rule’s content to get a leg up on their advocacy in opposition. During the SBAR panel for the silica rule, SERs demanded access to OSHA’s background research at the behest of trade associations.¹¹ The trade associations were then in a position to conduct biased “re-analysis” of information obtained through SBAR Panel participants and use it to lobby Members of Congress.¹² SERs who engage in this behavior skew the SBAR Panel proceedings toward a combative experience for OSHA, also peppering the agency with detailed questions about the economic and technological research

that supports the proposal and demanding that OSHA conduct unnecessarily detailed follow-up analyses.

The SBAR Panel's final report, drafted in part by the Office of Advocacy and reflecting the combative tone of the Panel's proceedings, puts OSHA in a defensive posture and strengthens the position of anti-regulatory advocates in several ways. Standard rulemaking procedures do not include a parallel process for obtaining input from the workers, unions, or other intended beneficiaries of an OSHA rule at that stage in the process, so the SBAR Panel's final report is released into a vacuum in which it becomes the starting point for all subsequent discussion regarding the proposed rule. The report is not released for public comment before being submitted to OSHA, so it may include misleading information. And OSHA responds directly to the report's recommendations, but not until a proposed rule is published in the *Federal Register*. Sometimes that can take years—just under 10 years, in fact, in the case of the silica proposal—all the while leaving the unchallenged SBAR Report “in the wild” to provide ammunition for groups fighting the rule.

After helping draft the SBAR Panel's final report, Advocacy takes on a role akin to that of a lobbying firm, participating directly in the rulemaking process, including the submission of written comments to the agency and testimony in relevant congressional oversight hearings. Unlike traditional lobbying firms, the Office of Advocacy's participation commands special attention from OSHA and other federal agencies, since its actions are backed by explicit congressional and presidential authority and since agencies are legally required to account for the office's views in their final rules, as described above. Regulatory agencies are reluctant to disregard the Office of Advocacy's comments, particularly with regard to the adequacy of the Reg-Flex Act analyses, since the Office of Advocacy's criticism can provide a reviewing court with sufficient grounds for rejecting a rule once it has been challenged in court. Many courts take the Office of Advocacy's comments as powerful evidence that an agency has or has not failed to comply with applicable Reg-Flex Act requirements, though these courts are otherwise not obliged to defer to the Office's interpretations of Reg-Flex's provisions.¹³

Here is what ACC's manipulation of Advocacy looks like in practice, in rough chronological order:

- The Office of Advocacy's official nominees to act as SERs for the silica SBAR Panel included at least eight individuals whose names were submitted by advocates linked to ACC's Crystalline Silica Panel. *One-quarter of the SERs were nominated by advocates linked to ACC.*
- Emails obtained through the Freedom of Information Act show that *trade associations did much of the legwork for the SERs in preparation for the SBAR Panel's two-day conference in November 2003,* including reviewing the draft rule and coordinating with the Office of Advocacy regarding follow-up information requests to OSHA.
- Following the two-day conference, SERs were provided the opportunity to submit formal comments to the SBAR Panel, which would use the comments in drafting its final report. OSHA is required by statute to address the concerns raised in the SBAR Panel's report when finalizing a rule. Emails obtained from the Office of Advocacy through the Freedom of Information Act suggest that *the Crystalline Silica Panel was intimately*

involved in the development of at least three SERs' comments—the two SERs who were nominated by the National Industrial Sand Association (NISA), and one SER who was nominated by the National Stone, Sand, and Gravel Association (NSSGA). Both NISA and NSSGA are key members of ACC's Crystalline Silica Panel. The SBAR Panel report cites the NISA-drafted comments more than a dozen times and includes extensive quotes from the document. The report also references points made in the NSSGA-drafted comments more than a dozen times.

- When OSHA sent its revised draft to the White House for final review (the last step before a proposed rule is published in the *Federal Register*), a flurry of activity began, including eight meetings at OIRA, requested by members of ACC's Crystalline Silica Panel. The Office of Advocacy's OSHA specialist attended six of those eight meetings. Emails obtained from the Office of Advocacy through the Freedom of Information Act indicate that trade associations considered Advocacy to be a critical ally in their efforts to sway the White House to water down the rule. In urging an Advocacy lawyer to attend one such meeting, one lobbyist said that trade associations “can always use reinforcements.”¹⁴
- As noted above, Advocacy regularly hosts “roundtable” events, which it cites in its formal rulemaking comments as a source of small business views on the rule at issue. Between the 2003 SBAR panel and the 2014 OSHA hearings on the proposed silica rule, Advocacy hosted numerous roundtables at which the rule was a central point on the agenda. Documents obtained through the Freedom of Information Act show that ACC's Crystalline Silica Panel drove those discussions, giving presentations that presaged many of the arguments the Office of Advocacy later submitted to OSHA as concerns raised by the small business community.
- When the White House finally approved the proposed rule's publication and OSHA opened a formal comment period in September 2013, Advocacy submitted two formal comments, both of which conspicuously align with the ACC Crystalline Silica Panel's advocacy efforts.
 - In October 2013, Advocacy urged OSHA to extend the comment period and expand the hearing that was set to begin a few months later. The Crystalline Silica Panel and its member organizations were also major proponents of delay. In 2013 and the first quarter of 2014, organizations that are part of the Crystalline Silica Panel donated more than \$80,000 to the campaign chests of 16 Senators who sent a letter to OSHA demanding delay in the rulemaking process.
 - In February 2014, Advocacy submitted its comments on the substance of OSHA's proposed rule. Of the 29 specific points raised in Advocacy's comments, roughly one-third have direct connections to points that the Crystalline Silica Panel made in its formal comments. The connections appear to be more than mere coincidence, given that several of Advocacy's key points, especially on economic issues, echo concerns raised in a draft economic analysis that was sponsored by ACC and shared with Office of Advocacy staff in 2011.¹⁵

This timeline illustrates that the Office of Advocacy has been highly dependent upon the ACC Crystalline Silica Panel and its members to guide its participation in the silica rulemaking process. As noted above, Advocacy has come under fire from independent auditors at GAO for failing to use standardized procedures to obtain input from small businesses when developing

comments.¹⁶ The timeline above shows that the Office of Advocacy's weak internal controls leave staff susceptible to manipulation by major trade associations. The Office of Advocacy's dependency on ACC in the silica rulemaking raises three major public policy concerns:

- **This approach covers ACC's tracks and undermines the rulemaking process.** A fundamental principle of U.S. administrative law is that the regulatory process must be open and transparent to work effectively. If powerful players in the process use government reports as Trojan Horses to attack rulemaking agencies, then the decisionmakers at the agency—and, later, the judges reviewing the rulemaking record—will not be able to accurately assess the potential biases in the reports. This secrecy also undermines the efforts of other stakeholders to participate meaningfully in the rulemaking process. If these stakeholders are not able to accurately ascertain the real source of information in the Office of Advocacy's rulemaking comments, then they will be hindered in their ability to effectively respond to any arguments raised in those comments.
- **The Office of Advocacy becomes redundant and a waste of taxpayer money.** If the Office of Advocacy adds nothing new to the process—if their comments cover the same ground as well-financed industry groups—then scarce public resources should not be allocated to them. Every year, the Office of Advocacy's nearly \$9-million budget goes toward amplifying the voices of big businesses in rulemaking process where they already being heard and heeded.
- **By relying on well-heeled trade associations, the Office of Advocacy perpetuates the problem of small businesses still not having their unique concerns represented.** (This, of course, assumes they have any legitimate unique concerns in the first place.) As OSHA works toward a final rule, its rulemaking staff still have no idea what impact the rule will have on real small businesses. The blame for that must fall squarely on the Office of Advocacy's shoulders.

ACC: A Deeper Look

Three features of ACC's advocacy model make it a powerful player inside the Beltway and a threat to public health: how ACC raises and spends money; the issues that make up ACC's agenda; and ACC's close ties to powerful anti-regulatory forces inside the government.

Dark Money

Since former U.S. Representative Cal Dooley took the helm at ACC in 2008, the trade association has flourished financially and spread its bounty wide. Even while the chemical industry suffered economic contraction as a result of the Great Recession, ACC has brought in new members and increased its revenues and assets. In 2012, the last year for which data are available, ACC brought in over \$111 million in reportable revenues and had over \$121 million in total reportable assets.

ACC's primary source of revenues is dues assessed to the 182 companies that comprise its membership. Over the period 2004-2012, ACC took in between \$75 million and \$84 million in membership dues annually.

Some of ACC's basic financial information is public record because it operates under Internal Revenue Service (IRS) nonprofit regulations, but the amount of money that individual companies and trade associations contribute is protected by privacy laws. Nonetheless, occasional tidbits of information leak out from other sources. For instance, although The Dow Chemical Company does not release information about the dues it pays to ACC, the company reports that ACC spent more than \$1.3 million of Dow's contributions on reportable federal lobbying expenditures in 2012. That year, ACC reported a total of \$9.07 million in federal lobbying expenditures, 14 percent of which was apparently derived from Dow's contributions alone.

ACC contributes directly to politicians and their campaign committees in the small reportable quantities common among major lobbying groups, and evidence suggests that ACC also plays a role in directing its constituent companies where and when to make their political donations. For example, Members of Congress have published two open letters criticizing the silica rule, one from Republican Senators to OSHA chief David Michaels in November 2013 and one from House Republicans to Secretary of Labor Tom Perez in February 2014.

- The signatories on the Senate letter collectively received more than \$80,000 in campaign contributions from ACC's political action committee (PAC) and the PACs of individual ACC Crystalline Silica Panel members.
- The signatories on the House letter collectively received more than \$230,000 in campaign contributions from those same PACs.

Beyond the political arena, ACC funnels substantial sums of money to researchers whose work adds the patina of neutral legitimacy to the trade association's biased scientific and economic arguments. ACC's IRS filings provide a glimpse into this marketplace. Until 2007, ACC reported certain expenses that were classified as "consulting and research." ACC's expenses for this work hovered around \$50 million per year. Individual recipients were not named, but their

work crops up in ACC's advocacy efforts regularly. In the silica rulemaking, for instance, ACC's argument that OSHA failed to make adequate "significant risk" findings relies heavily on the work of Louis Anthony Cox, Jr., Ph.D., President of the Denver-based Cox Associates, and a fixture in the congressional hearings, agency stakeholder meetings, and myriad other forums in which his detailed scientific analysis of agency regulatory efforts invariably weigh in favor of more research and less action by the agency. Cox is Editor-in-Chief of *Risk Analysis: An International Journal*, which is published by the industry-dominated Society for Risk Analysis, and which has long supported research aimed at either weakening safeguards or manufacturing doubt about the hazards those safeguards are intended to address.

Dangerous Agenda

ACC's member companies are responsible for soil and groundwater contamination across the country.

- According to EPA's Toxic Release Inventory, in 2012, ACC member companies reported releasing into the environment a total of roughly 30 million pounds of carcinogens.
- Roughly half of ACC's member companies are found on EPA's Superfund program "List 11," meaning they have been identified as potentially responsible parties (PRPs) for heavily polluted lands in need of complex and expensive cleanup efforts. The PRP designation is significant because it means that a company could be on the hook for millions of dollars in cleanup costs associated with removing decades-old contamination.

With these groups paying ACC's bills, it is no wonder that the trade association's agenda is primarily focused on exonerating chemicals that are widely recognized as being dangerous, much as the tobacco industry sought to do while evidence of the dangers of smoking and second-hand exposure to smoking continued to mount. Silica, though perhaps not as well-known as formaldehyde, BPA, and the other organic and synthetic chemicals produced by ACC's members, is nonetheless an important industrial mineral and a major occupational hazard.

As part of its overarching agenda to forestall government regulation, ACC has worked hard in opposition to OSHA's silica standard, as detailed above. This rulemaking is also of special concern because the standard proposes limiting worker exposure to silica by requiring ACC's member companies to invest in new safety equipment and provide other services to workers to improve their health and safety. ACC's Crystalline Silica Panel has attacked the rule by focusing mostly on the costs associated with these changes, without acknowledging or accounting for the important benefits that will accrue to workers.

Multi-front Battles and Government Accomplices

Like other successful advocates, ACC pushes its agenda in Congress, in the courts, in regulatory agencies, and in the media. It is certainly within its rights to do so. But ACC has an additional tool that is not available to all other advocates: close coordination with the SBA's Office of Advocacy. ACC's connection to the Office of Advocacy is particularly insidious because of the outsized role that Advocacy can play in the rulemaking process. As described above, Congress has passed several laws that require regulatory agencies such as EPA and OSHA to go through additional analytical steps to formally address concerns raised by small businesses and the Office of Advocacy. When those procedures are manipulated by big businesses and their trade

associations, the result inevitably undercuts the principal missions of the agencies—in the case of OSHA, working to protect public health.

Conclusion and Recommendations

ACC is using the Office of Advocacy as a pawn in its broad effort to prevent public health agencies from achieving their missions. The ACC's ongoing control of the Office of Advocacy's interventions in agency rulemakings—such as OSHA's silica rule—serves to waste taxpayer dollars, neglect the interests of actual small businesses, and undermine critical safeguards for workers and the public. To prevent this from happening, several things could be done:

- ❖ ***The Office of Advocacy should take steps to document that its comments on rules are informed by the views of real small businesses and account for the unique interests of those businesses that would be impacted by the rule.*** When an agency rule does not implicate the legitimate and unique interests of small businesses, the Office of Advocacy should refrain from participating in the rulemaking.
- ❖ ***The President should revoke Executive Order 13272.*** The Executive Order set the stage for the Office of Advocacy to expand its reach into a broader class of agency regulatory efforts. As a result, trade associations can manipulate the Reg-Flex and SBREFA processes in more rules and thwart even more actions than would have been possible before the Executive Order. To cut bureaucratic red tape that threatens public health, Executive Order 13272 should be revoked.
- ❖ ***Agencies should be empowered to marginalize the Office of Advocacy's comments when they are not based on statistically valid sampling of small businesses.*** Regulatory agencies are held to a high standard when they develop regulations, and they face severe criticism if their evidence is not based on sound data-gathering and analysis. The Office of Advocacy should hold its own work to similar standards, and the agencies should hold Advocacy to them as well—only altering proposed regulations to account for small business concerns where those concerns are well documented, independently verified as necessary, and related to significant impacts that actually threaten the ability of small firms to compete against larger ones.
- ❖ ***Congress should commit to conducting routine and thorough oversight of the Office of Advocacy.*** Additional oversight will ensure that the Office of Advocacy does not continue to stray from its mission, wasting taxpayer dollars and undermining the implementation of important public health laws. The relevant committees in Congress can begin this task by looking specifically into the Office of Advocacy's interference in OSHA's silica rulemaking on behalf of the ACC. Congress should also consider requesting follow-up GAO audits of the Office of Advocacy's activities, with a particular focus on its policies and procedures for obtaining the views and concerns of a wide array of small businesses.

These reforms will go a long way toward halting and potentially reversing the dangerous “mission creep” that has led the Office of Advocacy to maintain a reactionary, anti-regulation viewpoint that mirrors the simplistic rhetoric of the big-business trade associations. These are achievable goals in the short term and they could have a significant effect on the operations of the federal agencies that are often stymied in their efforts to protect public health by an Office of Advocacy that is being unduly manipulated by big business advocates.

Endnotes

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² Shapiro et al., *Distorting the Interests of Small Business: How the Small Business Administration Office of Advocacy's Politicization of Small Business Concerns Undermines Public Health and Safety*, Center for Progressive Reform White Paper #1302 (Jan. 2013), available at http://www.progressivereform.org/articles/SBA_Office_of_Advocacy_1302.pdf (accessed Aug. 18, 2014).

³ Rabinowitz et al., *Small Businesses, Public Health, and Scientific Integrity: Whose Interests Does the Office of Advocacy at the Small Business Administration Serve?* (Jan. 2013), available at <http://www.foreffectivegov.org/files/regs/office-of-advocacy-report.pdf> (accessed Aug. 18, 2014).

⁴ See GOV'T ACCOUNTABILITY OFFICE, *SMALL BUSINESS ADMINISTRATION: Office of Advocacy Needs to Improve Controls over Research, Regulatory, and Workforce Planning Activities* (July 2014), available at <http://www.gao.gov/products/GAO-14-525> (accessed Aug. 18, 2014) (hereinafter GAO 2014 Report on Advocacy).

⁵ 5 U.S.C. §§ 601-612.

⁶ Pub. L. 96-354.

⁷ Pub. L. 104-121.

⁸ See GAO 2014 Report on Advocacy, 10-16, *supra n.4* and Shapiro et al., *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs*, Center for Progressive Reform White Paper #1103 (Feb. 2011), available at http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf (accessed Aug. 18, 2014).

⁹ See GAO 2014 Report on Advocacy, 17-18, *supra n.4*.

¹⁰ Steinzor et al., *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment*, Center for Progressive Reform White Paper #1111 (Nov. 2011), available at http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf (accessed Aug. 18, 2014).

¹¹ Email from Bob Glenn, National Industrial Sand Association, to Lee Cole, C.E.D. Enterprises, Inc., Nov. 19, 2003, *on file with authors (obtained through Center for Effective Government Freedom of Information Act request)*.

¹² Letter from the John Smith, Jr., Mason Contractors Association of America, to The Honorable Jim Talent, United States Senate, Nov. 18, 2003, *on file with authors (obtained through CEG Freedom of Information Act request)*.

¹³ *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1044 (D.C. Cir. 1997), *modified in other respect*, 195 F.3d 4 (D.C. Cir. 1999), *reversed in other respect*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001). In one case, a federal district court rejected a National Marine Fisheries Service (NMFS) rule setting commercial fishing quotas for Atlantic shark species after finding that the agency had failed to comply with various Reg-Flex procedures. *Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1436 (M.D. Fla. 1998). The court's analysis in support of this finding relied heavily on the comments that the Office submitted during the rulemaking process. See *id.* at 1435.

¹⁴ Email from MJ Marshall, Mason Contractors Association of America, to Charles A. Maresca, SBA Office of Advocacy, Dec. 9, 2003, *on file with authors (obtained through CEG Freedom of Information Act request)*.

¹⁵ *Compare* Environomics, Inc. and URS Corporation, *Estimated Costs and Adverse Economic Impacts of a Potential New OSHA Occupational Exposure Standard for Crystalline Silica With a PEL of 50 µg/m³ and Ancillary Requirements*, *Draft Final Report for the American Chemistry Council Crystalline Silica Panel*, pp. 9, 36-37 (July 2011), *on file with authors (obtained through CEG Freedom of Information Act request)*, with Letter from Winslow Sargeant and Bruce E. Lundegren, SBA Office of Advocacy, to The Honorable David Michaels, OSHA, re: Comments on OSHA's Proposed Occupational Exposure to Respirable Crystalline Silica Rule, Feb. 11, 2014.

¹⁶ GAO 2014 Report on Advocacy, 16-18, *supra n.4*.

About the Center for Progressive Reform

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

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Acknowledgements

This Issue Alert is a collaborative effort of the following CPR Member Scholars and staff:

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Thanks to the Center for Effective Government, especially Regulatory Policy Analyst Katie Weatherford, for sharing the documents obtained via the Freedom of Information Act that were essential to this Issue Alert.



THE GAO'S SCATHING REPORT ON THE SBA OFFICE OF ADVOCACY: 15 BIG REVELATIONS

James Goodwin Bio

July 28, 2014

As I noted [here](#) last week, the Government Accountability Office (GAO) published a [report](#) that delivered a scathing review of the Small Business Administration's (SBA) Office of Advocacy. The GAO report's general objective was to assess whether and to what extent the SBA Office of Advocacy is fulfilling its core mission of serving as a "voice for small businesses within the federal government," and accordingly looked at two of its most important activities for carrying out that core mission: sponsoring small business-centered economic research and participating in individual rulemakings that have a significant impact on small business interests.

In contrast to most GAO reports—which are conspicuous for avoiding controversy and their dry, moderate tone—this one offered some uncharacteristically strong criticisms of the SBA Office of Advocacy. For example, after rejecting the SBA Office of Advocacy's feeble excuses for not taking any steps to verify the quality of information contained in a series of controversial studies on regulatory costs that the agency had sponsored, the GAO report opined, "We acknowledge that these reports may not necessarily be representative of all Advocacy's research efforts, but not substantiating the quality of the information in even one study could call into question the credibility of Advocacy's research program." (See page 15.) Elsewhere, the GAO report took the SBA Office of Advocacy to task for its complete failure to document their roundtable discussions, noting that this failure made it "difficult to determine the extent to which small businesses and related entities were represented at these events." (See page 18.)

If the GAO seems frustrated, it's for good reason. Their review of the SBA Office of Advocacy's activities produced the following 15 disturbing revelations:

1. Even though the SBA Office of Advocacy has neither the institutional scientific expertise nor the legal authority to evaluate questions of science, it has nonetheless issued comment letters for the explicit purpose of challenging other agencies' scientific research. (See page 8.) These exercises are particularly perplexing since questions of science have nothing to do with the unique concerns of small businesses; after all, it's not like there's one law of gravity that applies to just small businesses and another that applies to everyone else.
2. The SBA Office of Advocacy has no policies defining how its staff should select peer reviewers for the research projects it sponsors. (See page 10.) The lack of such policies gives rise to the appearance that SBA Office of Advocacy staff are free to choose peer reviewers who are unqualified or who would be unduly biased in favor of the project undergoing review.
3. The GAO reviewed 20 different research projects that the SBA Office of Advocacy had sponsored, and, of those, 16 lacked any documentation demonstrating that they had been subject to any peer review process, even though such documentation is required by both SBA Office of Advocacy internal guidelines and federal internal control standards. (See page 11.) Without such documentation, it is impossible to confirm whether these research projects underwent any peer review at all.
4. The SBA Office of Advocacy lacks any policies or procedures for ensuring that research projects are properly revised to reflect substantive comments from peer reviewers prior to being published. Of 10 research projects that the GAO reviewed, only 1 "included evidence that the peer reviewer comments were incorporated into the final report. (See page 12.) A [2011 CPR white paper](#) documented this problem in the now infamous "Crain and Crain" report on total regulatory costs, which the SBA released in 2010. There, one of the peer reviewers had raised a significant criticism on the methodology used to calculate the costs of economic regulations, but the final report made no effort to respond to this criticism.
5. The SBA Office of Advocacy did not retain any of the "original data or underlying computer codes" for three studies on regulatory costs—including the 2010 Crain and Crain report—even though this step is required by both Office of Management and Budget (OMB) data quality guidelines and by the SBA's internal data quality guidelines. (See page 13.) By failing to retain these data and codes, it is impossible for the general public to independently verify the quality of these studies.
6. The SBA Office of Advocacy attempted to provide the GAO with a feeble excuse for not retaining the data and computer codes for those three studies, which the GAO easily dismantled. The SBA Office of Advocacy attempted to claim that retaining the data and



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codes would have been prohibitively expensive. Performing its own calculations, however, the GAO concluded that the “cost would not have been prohibitive.” (See pages 13-14.)

7. The SBA Office of Advocacy also failed to take any additional steps—in lieu of retaining the underlying data and computer codes—to attempt to substantiate the quality of the information contained in two major studies on total regulatory costs (including the Crain and Crain report), even though such steps are required by OMB data quality guidelines. When pressed on the matter by the GAO, the SBA Office of Advocacy could offer no explanation for this failure, but instead sought to direct the GAO’s investigators to the authors of the two studies who also declined to cooperate. (See pages 14-15.)
8. The GAO determined that the SBA Office of Advocacy had taken actions that would lead the public to conclude that it agreed with the findings contained in the two major studies on total regulatory costs. These actions include maintaining the studies on their website and citing one of the studies in their comment letters. (See page 16.) Because of the fierce controversy surrounding these studies, the SBA Office of Advocacy has sought to distance itself from them, but the GAO suggests that these efforts have been insufficient. Notably, CPR has in the past [repeatedly called](#) on the SBA Office of Advocacy to completely disavow the studies and remove them from their website due to the ongoing public perception that the SBA Office of Advocacy endorses the studies and their conclusions.
9. The SBA Office of Advocacy fails to ensure that their staff have an appropriate basis for their decisions to intervene in individual rulemakings. In particular, the GAO found that the SBA Office of Advocacy’s policies do not require staff to demonstrate that they have actually met with relevant small business representatives who would be able to verify that they have sufficient information and data to justify intervening in particular rules. (See page 17.) Without such policies, there is no way to ensure that the SBA Office of Advocacy is actually intervening in those rules that are of unique concern to real small businesses.
10. Of the 11 comment letters that GAO reviewed that purported to incorporate input from small business representatives, the SBA Office of Advocacy was unable to provide the GAO any evidence—such as emails or notes of conversations—of this input. (See page 17-18.) Without this evidence, it is impossible to verify whether these comment letters actually reflect the unique views and concerns of real small businesses.
11. Internal agency guidelines require that the head of the SBA Office of Advocacy—the Chief Counsel—approve the agenda, speakers, and discussion topics for all proposed roundtables before participants are invited, but the GAO found that these policies do not require any documentation of such prior approval. (See page 18.) Without such policies, there is no way to ensure that roundtables are organized for only appropriate matters related to genuine concerns of small businesses.
12. Of the comment letters that the GAO reviewed, 19 percent purported to incorporate input from roundtables, but the SBA Office of Advocacy failed to provide the GAO with any written evidence—such as meeting minutes—that could demonstrate that the views expressed in the comment letters were actually based on discussions that took place at roundtables. (See page 18.) Without this evidence, it is impossible to verify whether these comment letters actually reflect the unique views and concerns of real small businesses that were expressed at roundtables.
13. The SBA Office of Advocacy does not consistently take attendance at roundtables. (See page 18.) Without any attendance lists for roundtables, it is impossible to verify whether small business representatives are actually present (as opposed to just lobbyists representing large corporations and trade associations) and that the viewpoints that are shared at the roundtables actually reflect the unique concerns of real small businesses.
14. The SBA Office of Advocacy’s internal policies require that roundtable agendas and presentations be posted on the agency’s website, but these policies have never been followed. (See page 19.)
15. The SBA Office of Advocacy blames the Americans with Disabilities Act (ADA) for its ongoing failure to abide by its internal policies requiring that roundtable agendas and presentations be posted on the agency’s website. Specifically, the SBA Office of Advocacy claims that it does not know how to post these documents in a way that would satisfy the ADA’s readability and accessibility requirements. The GAO was skeptical of this excuse, noting that the SBA Office of Advocacy has been able to post a wide variety of other reports and publications in ways that satisfy the ADA. (See page 19.)

The picture the GAO report paints of the SBA Office of Advocacy is a disturbing one. It depicts an agency that is at best sloppy and at worst willfully indifferent to whether or not its actions actually help small businesses. Instead, one is left with the impression that the SBA Office of Advocacy staff has become too focused on attacking those regulations opposed by large corporations and trade associations to properly address the unique concerns of real small businesses in accordance with the agency’s clear statutory mission.

The upshot is that small businesses are left in a worse position than they would be if the SBA Office of Advocacy didn’t exist at all: Real small businesses continue to lack a meaningful spot at the decision-making table while the large corporations they compete against are able to have their already loud voice further amplified by what amounts to a taxpayer-funded lobby shop. Under the circumstances, one would think that the GAO report on the SBA Office of Advocacy would be of particular interest to the antiregulatory members of Congress, especially given their obvious fondness for both lambasting flagrant misuses of taxpayer money and extolling the virtues of small businesses. Indeed, the sanctimonious majority leadership of the House Oversight and Small Business Committees should be chomping at the bit to conduct intensive oversight hearings on the SBA Office of Advocacy based on the GAO report. The ball is in their court; let’s see if it actually happens.

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July 19, 2021

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