Insight

A Down Year for Small Businesses' Federal Advocate

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EXECUTIVE SUMMARY

- Over the past decade, the Small Business Administration Office of Advocacy – small businesses' internal champion in the rulemaking process – has contributed to regulatory changes that saved small businesses nearly $17 billion in initial costs and $10.7 billion in recurring costs.
- In the most recent fiscal year, however, reported costs savings from Office of Advocacy input translated to only $73.5 million, which marks the lowest such total across the past 10 years despite both a record level of regulatory activity and the agency engaging federal agencies at its highest rate over that span.
- This notable divergence from recent trends provides an opportunity to revisit what policies are in place to ensure federal agencies take more seriously the unique issues facing small businesses in the regulatory process.

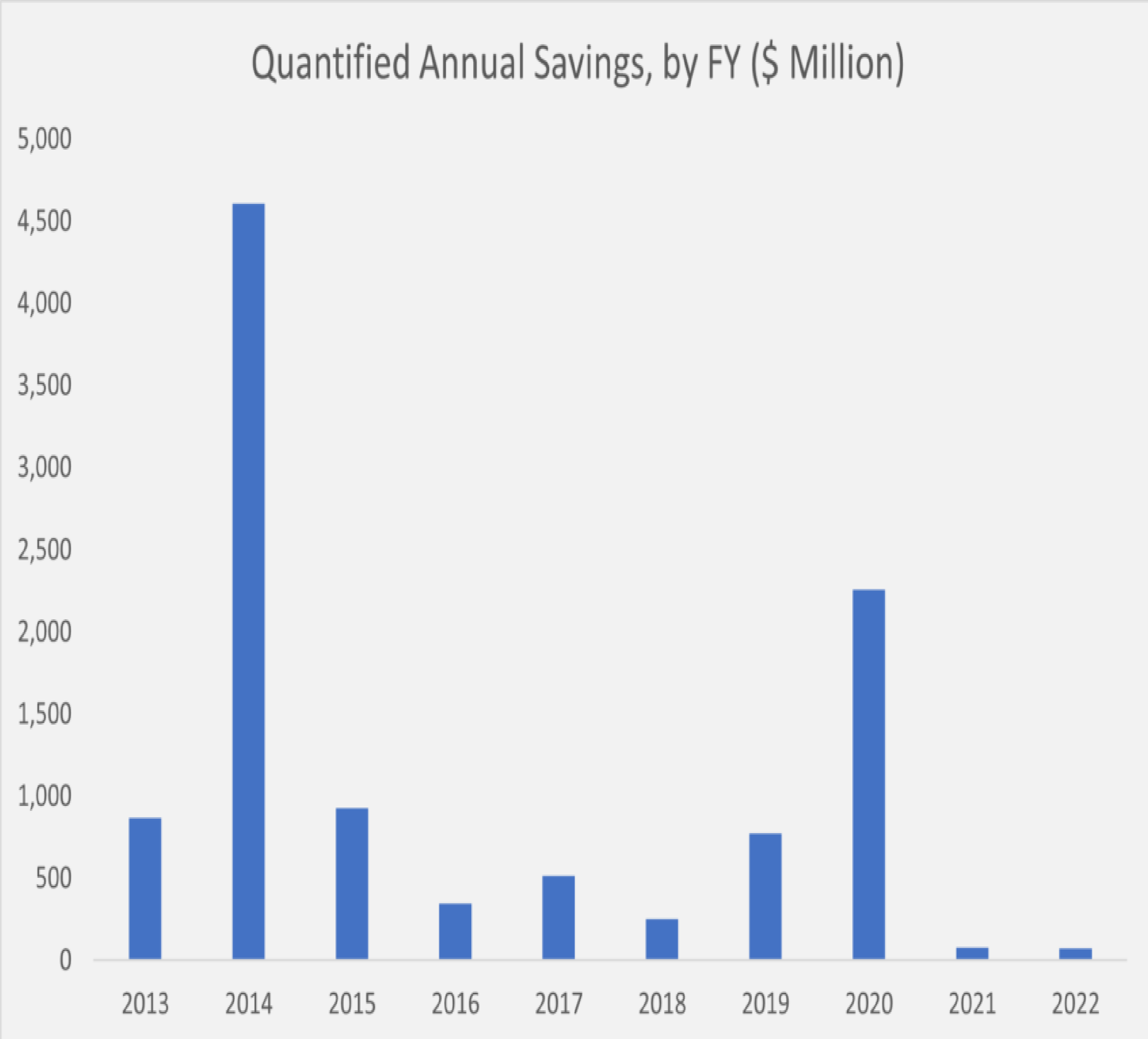
INTRODUCTION

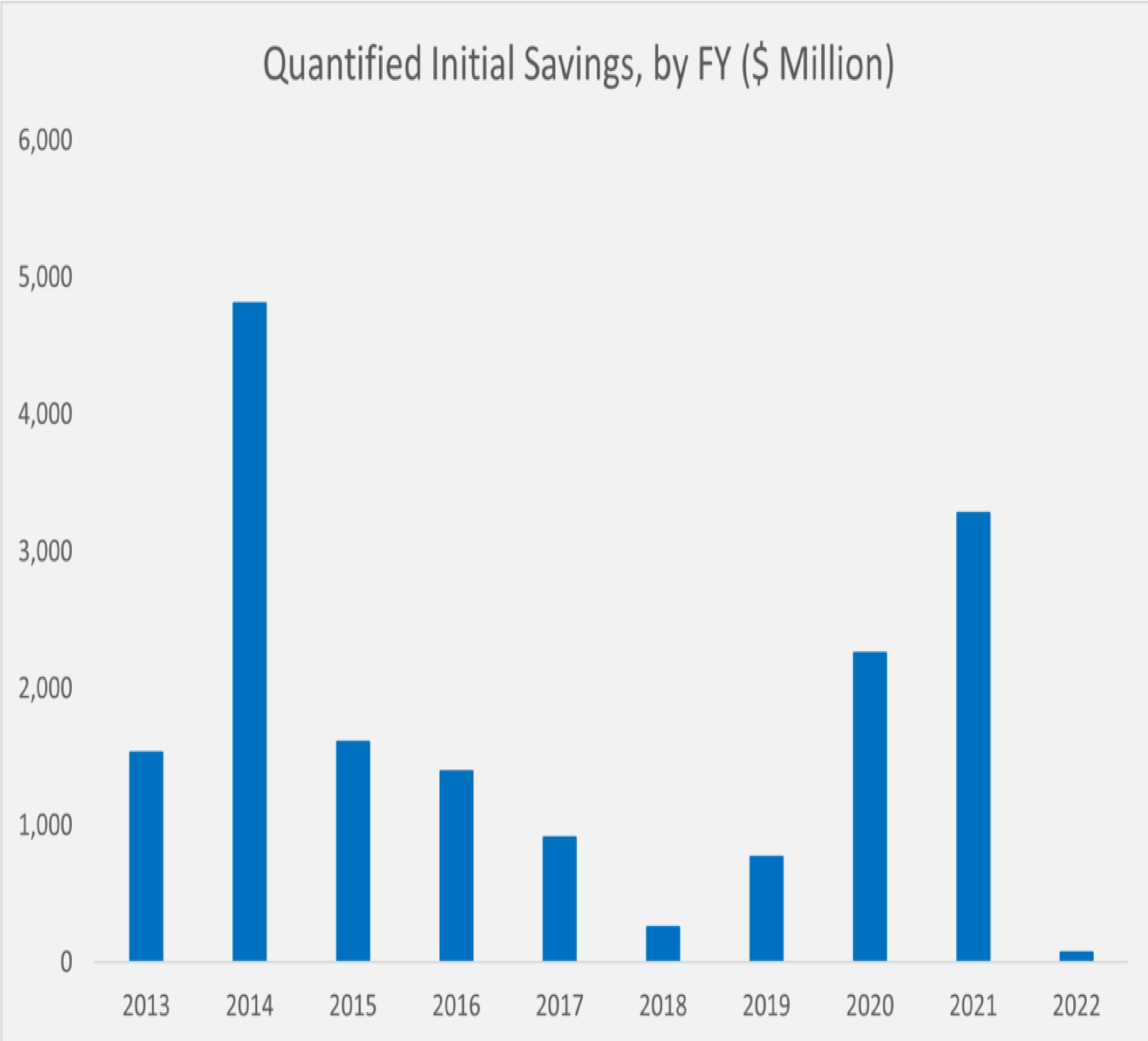
The Office of Advocacy of the Small Business Administration (Advocacy), established in 1976, is a relatively small, obscure agency with a rather unique mission: to be "the independent voice for small business in the federal government." The Regulatory Flexibility Act (RFA) of 1980 further empowered Advocacy, but also tasked it with certain duties, including the production of an annual report (Advocacy RFA Report) on how federal agencies are complying with the RFA, as well as any relevant updates from Advocacy on its efforts in the rulemaking process. Since fiscal year (FY) 2013, Advocacy has been able to claim approximately $17 billion in initial cost savings and $10.7 billion in recurring cost savings for small businesses due to its interaction with agencies. The most recent report, however, saw the lowest per-year savings total across the past decade. An examination of other underlying trends presents troubling concerns that agencies are not taking the regulatory issues of small businesses as seriously as they have in prior years.

FY 2022 VERSUS RECENT TRENDS

Least Successful Year in a Decade

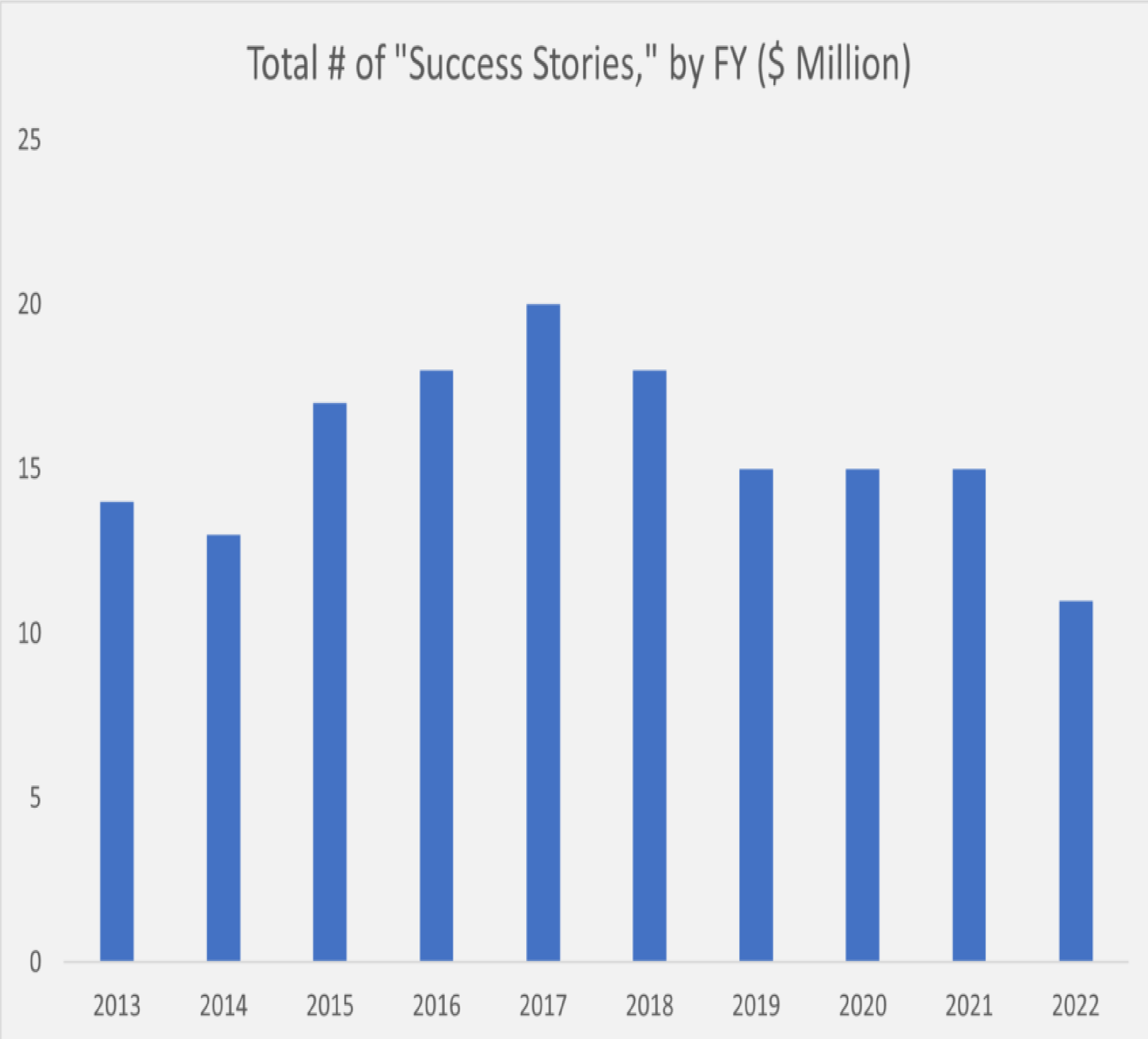
In FY 2022, Advocacy was able to claim credit for a total of $73.5 million in cost savings (both in terms of initial and ongoing annual costs[1]) for small businesses across three rules and non-quantifiable "regulatory success stories" in another eight rules. While these savings likely represent welcome news to the businesses affected by those rules, as the following tables show, FY 2022 marks the least successful year for Advocacy in the past decade.


Quantified Annual Savings, by FY ($ Million)
5,000
4,500
4,000
3,500
3,000
2,500
2,000
1,500
1,000
500
0
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022



The high-water mark for Advocacy came in FY 2014 with roughly $4.8 billion in small business savings for both categories, mostly attributed to the agency's involvement in a lawsuit that resulted in the repeal of an Environmental Protection Agency rule on "Effluent Limitation Guidelines (ELGs) for the construction and development industry." FY 2022's $73.5 million in quantified savings, however, is easily the lowest across this 10-year period. The runner-up year for lowest savings would be FY 2018 with roughly $250 million in either initial or annual savings. To put this past year's total into even starker perspective, this $73.5 million total is merely 4 percent of the average initial cost savings (nearly $1.7 billion) and 7 percent of the average annual cost savings (roughly $1.1 billion) across this 10-year period.

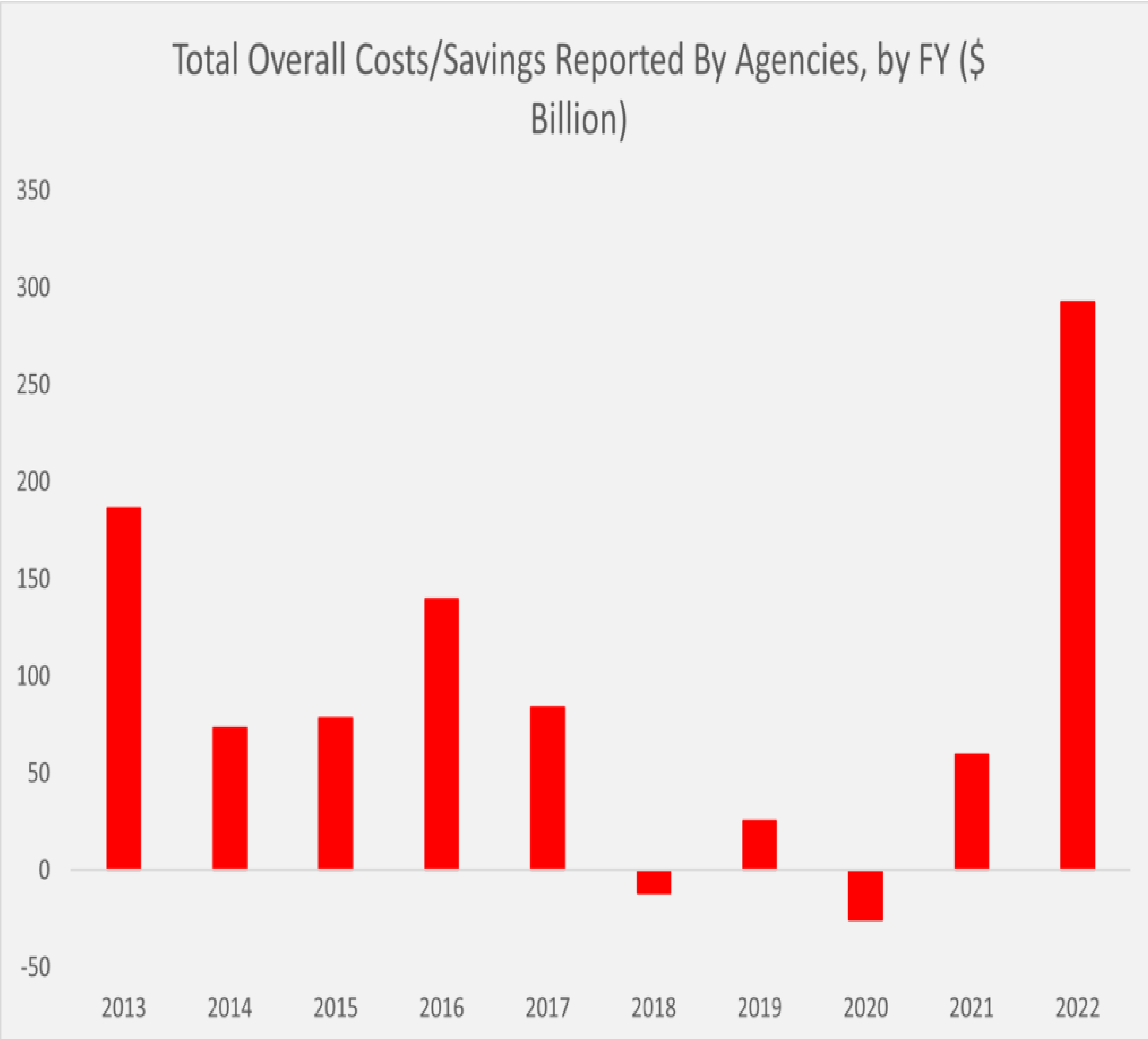
As the following graph shows, it was also a down year for average cost savings even when one factors in the non-quantifiable interventions by Advocacy.



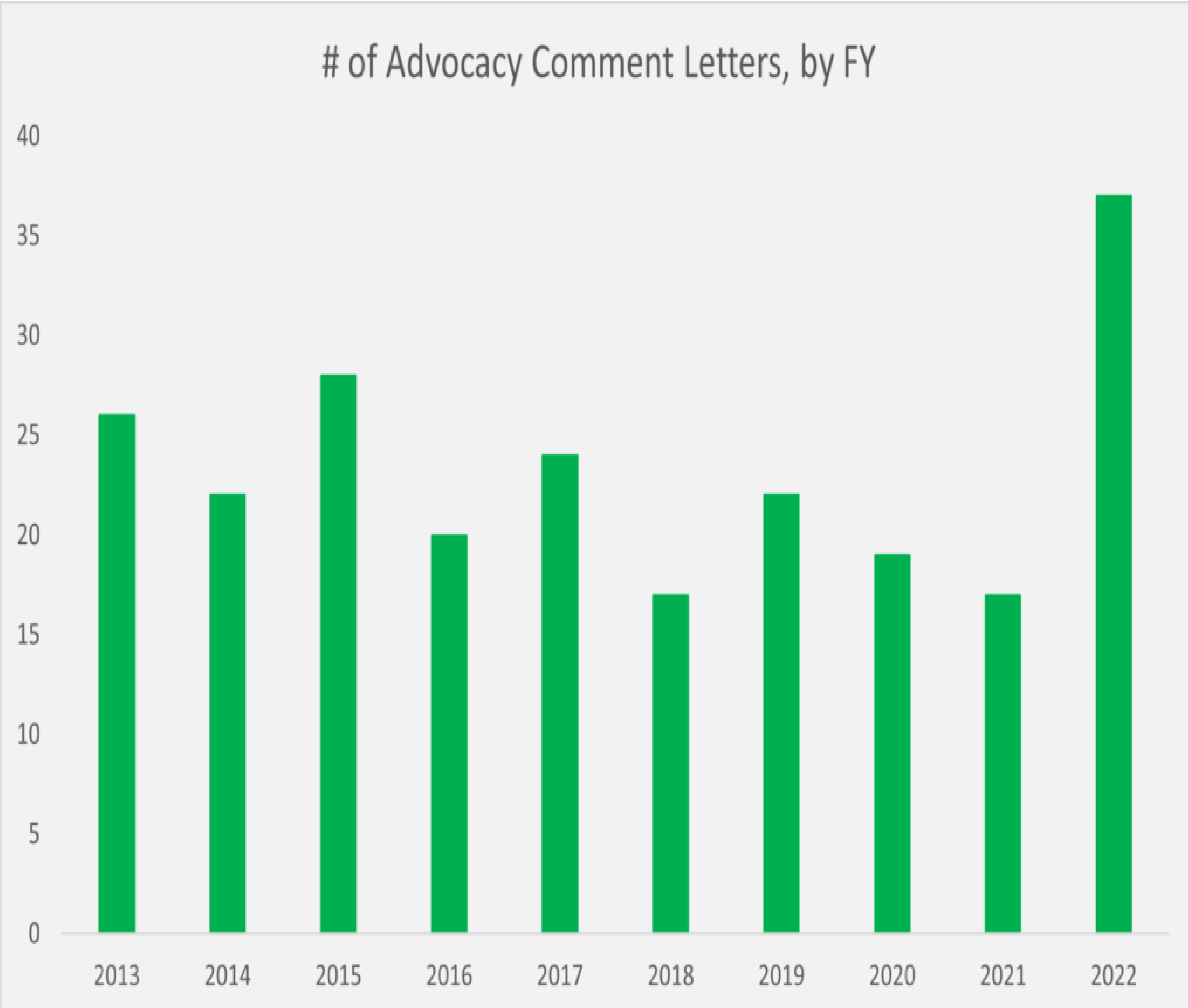
In FY 2022, Advocacy was able to claim 11 specific “regulatory success stories” between the three actions with quantifiable savings and eight with more qualitative effects. This also represents the lowest mark of the decade, albeit far less dramatically. The next closest would be the 13 actions recorded in FY 2014. Across the 10-year window, Advocacy could point to an average of roughly 16 instances in a given year in which its actions contributed toward some kind of regulatory relief for small businesses.

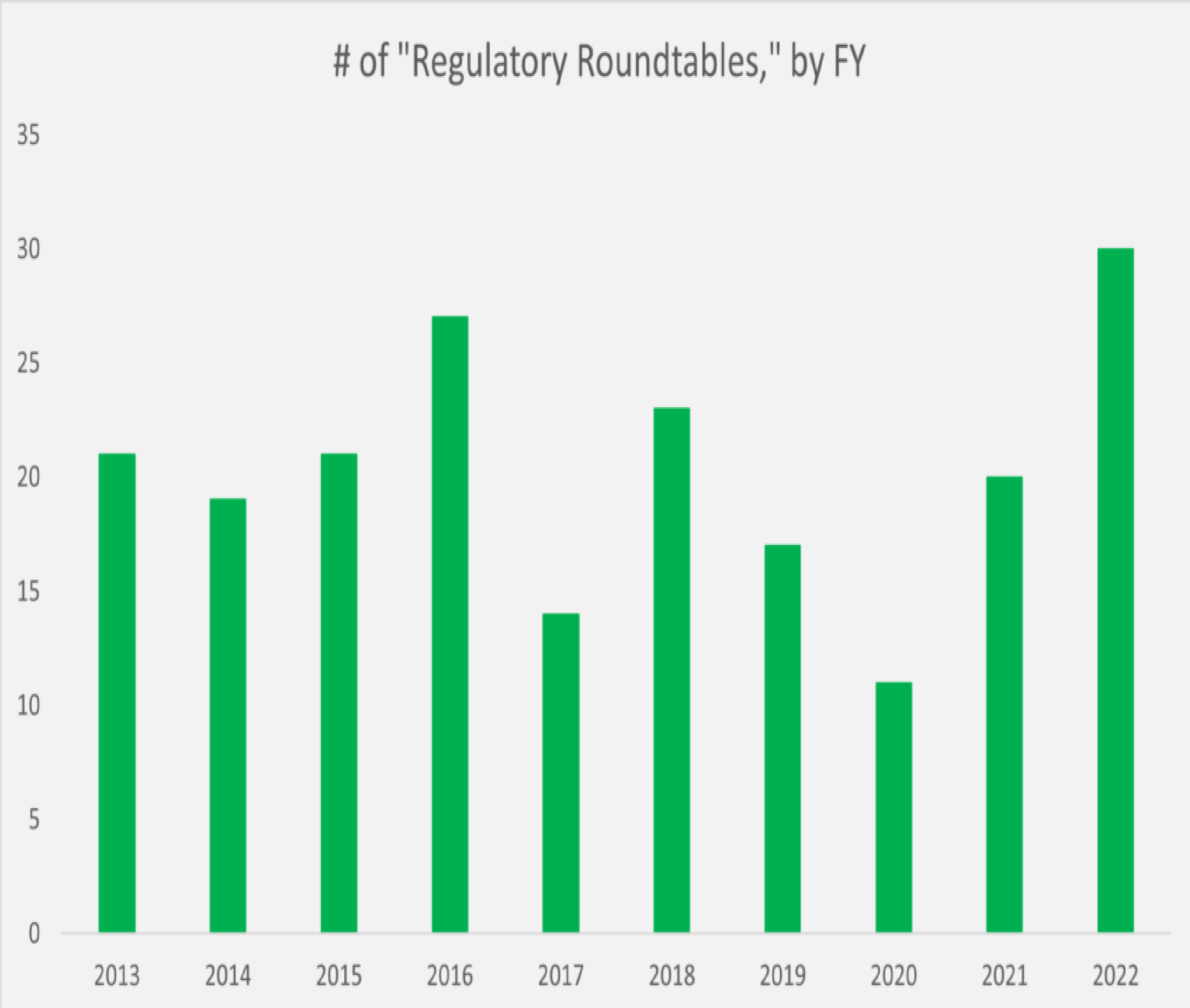
Potential Explanations

Why was FY 2022 so low? One might guess that there was simply not much in the way of regulatory activity for Advocacy to address. As the data in the following graph show, however, that could not be further from the truth.

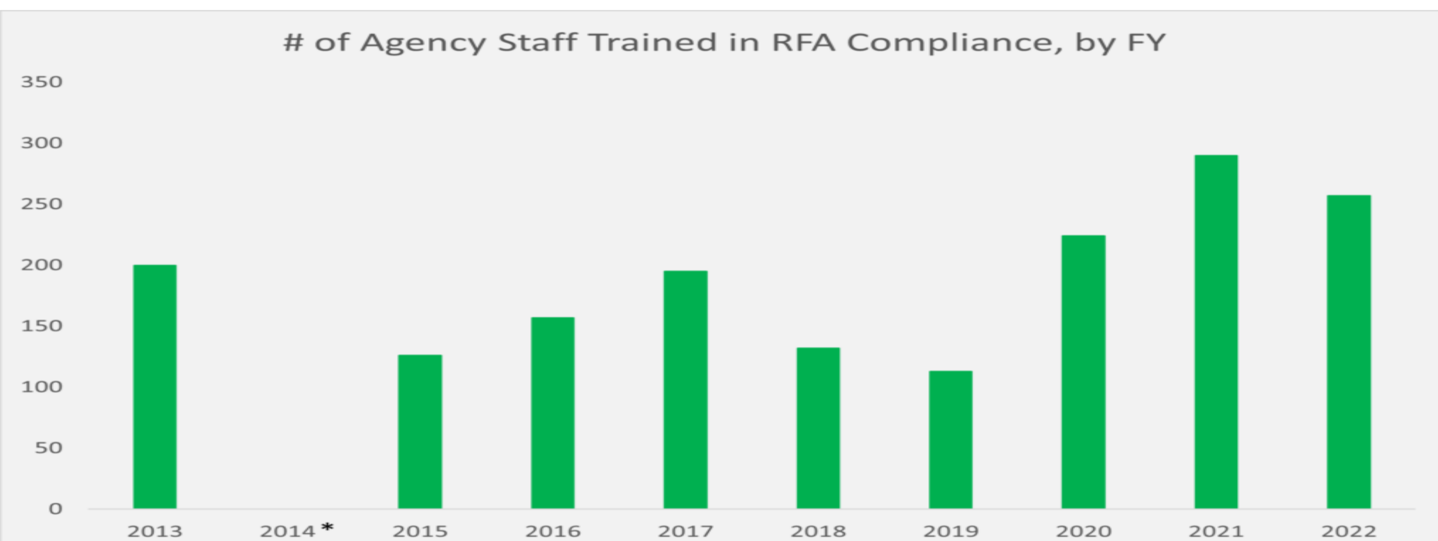


According to data compiled in the American Action Forum's ongoing RegRodeo project, the $292.7 billion in total estimated costs from rules published in FY 2022 (October 1, 2021, through September 30, 2022) easily dwarfed any of the nine previous fiscal years. If it was not for lack of potential targets, was it then perhaps due to a lack of rigor and effort on Advocacy's part? That contention also begins to fall apart upon further scrutiny. The Advocacy RFA Reports contain data on certain actions taken by the agency to further its mission "to monitor federal regulatory compliance with the Regulatory Flexibility Act." These items include: 1) direct comment letters from Advocacy to the various agencies regarding aspects of a given rulemaking, 2) "regulatory roundtables” wherein Advocacy moderates a meeting between small business stakeholders and agencies, and 3) annual training of federal agency staff on how to comply with the RFA. As the following graphs illustrate, this FY 2022 dip was not for lack of trying on Advocacy’s part.





of "Regulatory Roundtables," by FY
35
30
25
20
15
10
5
0
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022



# of Agency Staff Trained in RFA Compliance, by FY
350
300
250
200
150
100
50
0
2013
2014 *
2015
2016
2017
2018
2019
2020
2021
2022

**Comparable data was not included in the FY 2014 report*

For the first two metrics, Advocacy logged the highest totals of the decade at 37 comments submitted and 30 roundtables convened. Each total is well above the respective 10-year averages of 23 and 20. For the third metric, FY 2022 saw Advocacy train 257 federal agency staff on the finer points of the RFA, second only to the 290 trained during FY 2021. On that count, one would hope that most of those trained in FY 2021 could retain such information one year later. The fact that Advocacy saw such diminished results despite a spike in overall regulatory activity and clearly vigorous efforts on Advocacy's part raises concerns about how seriously federal agencies are considering regulatory impacts on small businesses.

IMPLICATIONS AND POTENTIAL SOLUTIONS

The dynamics revealed in the FY 2022 Advocacy RFA Report seem to suggest that, for reasons that are not immediately clear, federal agencies are not as inclined as they once were to adjust aspects of their rulemakings to better accommodate the needs and interests of small businesses. Perhaps this is merely a one-year aberration that will regress back to the mean in coming years. Even if it is, this instance provides a chance to look at ways to improve the underlying policy framework to ensure small business concerns are properly handled in the regulatory process.

On the executive side, there is opportunity for the administration to incorporate a greater commitment to the consideration of small business issues in the development of its "Modernizing Regulatory Reform" effort. While there is limited direct mention of small businesses across the various documents implementing those new rulemaking policies, one principle of the effort stands out: increased public engagement. Per the implementation guidance, the administration is encouraging agencies to "identify opportunities to increase public engagement early in the regulatory process, including when they are still considering regulatory options and developing priorities," as well as further building out the capacity for agencies to receive and consider regulatory petitions from the public seeking to address specific regulatory provisions. The spirit of these items is not dissimilar to aspects of the Small Business Regulatory Enforcement Fairness Act (SBREFA) process. Yet SBREFA procedures formally apply to only three agencies, and panels convened under the law's provisions are relatively rare. The administration should consider voluntarily expanding SBREFA-like practices across all executive agencies as a part of its modernization effort.

On the legislative side, there is at least one bill that could potentially help bolster Advocacy efforts in the RFA analysis process. The "Small Business Regulatory Flexibility Improvements Act" (SBRFI Act) would mark the most significant update of the RFA since SBREFA was enacted in 1996. While much of the bill focuses on expanding the level of analysis an agency needs to conduct on a rule's small business impacts, the most critical aspect as it relates to Advocacy is how it reframes the engagement dynamic. Under the current framework, Advocacy is essentially just another stakeholder – albeit a more notable one than most – that contributes input to agencies which, as the above data show, will largely do with it what they will. Under the SBRFI Act, "Prior to publication of any proposed rule described in subsection (e)[2], an agency making the rule *shall* [emphasis added] notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with" details on how the proposed rule would affect small businesses. In mandating that the agencies initiate the process of examining a major rule's small business implications, this bill could potentially help close the sort of consideration gap laid out in the FY 2022 Advocacy RFA Report.

CONCLUSION

The typical “Annual Report of The Chief Counsel for Advocacy On Implementation Of The Regulatory Flexibility Act And Executive Order 13272” usually comes and goes with little fanfare. While it is relatively obscure and mundane – even as government reports go – it does present the chance to highlight the special considerations agencies need to take regularly with regard to regulatory impacts on small businesses. The most recent edition stands out for showing how unfruitful Advocacy’s actions on these issues have been over the past fiscal year, despite relatively vigorous efforts by the agency. One hopes this report is a wake-up call for policymakers to bolster procedural frameworks to assist small businesses in getting a fair hearing during the often opaque and complicated federal rulemaking process

[1] Per Advocacy: “Cost savings for a given rule are captured in the fiscal year in which the agency finalizes changes in the rule because of Advocacy’s intervention. These are best estimates to illustrate reductions in regulatory costs to small businesses. Initial cost savings consist of capital or recurring costs foregone that may have been incurred in the rule’s first year of implementation by small businesses. Recurring cost savings are listed where applicable as annual or annualized values as presented by the agency.”

[2] For reference, the language in “subsection (e)” largely mirrors that of the criteria for a “major rule” under the Congressional Review Act.