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Advocacy: the voice of small business in government

The RFA in a Nutshell: A Condensed Guide to the Regulatory Flexibility Act

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Contents

Foreword

When government takes small businesses into consideration in developing regulations, it saves time and money for a vital sector of the nation's economy, our small businesses.

This primer on the Regulatory Flexibility Act (RFA) is designed to be used by those interested in the basics of federal regulatory compliance with respect to the RFA and Executive Orders 13272 and 13563, among others. For more detailed guidance on the RFA, federal agency rule writers and policy analysts should refer to the Office of Advocacy's step-by-step manual: *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* which can be found along with this summary on the Office of Advocacy website at **www.sba.gov/advocacy/823.**

The Chief Counsel for Advocacy of the U.S. Small Business Administration has been designated to monitor agency compliance with the Regulatory Flexibility Act.

Introduction to the RFA

The Regulatory Flexibility Act (RFA), enacted in September 1980,[1] requires agencies to consider the impact of their regulatory proposals on small entities, to analyze effective alternatives that minimize small entity impacts, and to make their analyses available for public comment. The RFA applies to three types of small entities:

- ***Small Businesses:*** Defined by section 3 of the Small Business Act.[2]
- ***Small Nonprofits:*** Any nonprofit enterprise that is independently owned and operated and not dominant in its field.
- ***Small Governmental Jurisdictions:*** Governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000.

The RFA does not seek preferential treatment for small entities, require agencies to adopt regulations that impose the least burden on small entities, or mandate exemptions for small entities. Rather, it requires agencies to examine public policy issues using an analytical process that identifies, among other things, barriers to small business competitiveness and seeks a level playing field for small entities, not an unfair advantage.

In essence, the RFA asks agencies to be aware of the economic structure of the entities they regulate and the effect their regulations may have on small entities. It requires agencies to analyze the economic impact of proposed regulations when there is likely to be a significant economic impact on a substantial number of small entities, and to consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on small entities.

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[1] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. § 601).

[2] 15 U.S.C. § 632. The North American Industry Classification System (NAICS) breaks down industry sectors and is used to identify the industry, governmental and nonprofit sectors an agency intends to regulate. Size standard regulations specifying size standards and governing their use are set forth in Title 13, Code of Federal Regulations, 13 CFR §121.

The Small Business Regulatory Enforcement Fairness Act (SBREFA), enacted in March 1996,[3] amended the RFA and provided additional tools to aid small businesses in the fight for regulatory fairness. The most significant amendments made by SBREFA were:

- Judicial review of agency compliance with some of the RFA's provisions.
- Requirements for more detailed and substantive regulatory flexibility analyses.
- Expanded participation by small entities in the development of rules by the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA).

Additional provisions were included in later laws. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[4] established the Consumer Financial Protection Bureau and added it to the agencies required to comply with the panel process in RFA section 9. The Small Business Jobs Act of 2010[5] added a requirement that agencies respond, in their final regulatory flexibility analysis, to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration.

The goal of Congress in creating the RFA was to change the regulatory culture in agencies and mandate that they consider regulatory alternatives that achieve statutory purposes, while still minimizing the impacts on small entities. Regulatory flexibility analyses built into the regulatory development process at the earliest stages will help agency decision makers achieve regulatory goals with realistic, cost-effective, and less burdensome regulations.

This primer should be utilized by anyone interested in commenting on draft federal regulations on behalf of small business and as a short description of the basic requirements of the act.

First Steps: Where Do We Begin?

If you had to break down the RFA into sections, there are really four main parts. It's easiest to think of them as four related questions:

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[3] Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (codified at 5 U.S.C. § 601 et seq.).
[4] Public Law 111-203 (July 21, 2010).
[5] Public Law 111-240 (September 27, 2010).

- Does the RFA apply to this rule?
- Will this rule have a significant economic impact on a substantial number of small entities?
- What is the potential economic impact of the rule on small entities?
- What has been done to minimize the adverse economic impact of the rule on small entities that was described in the proposed rule?

The following sections explain how to answer these important questions.

Does the RFA Apply?

One of the first decisions to make is whether the Regulatory Flexibility Act applies to a particular regulation. The RFA applies to any rule subject to notice and comment rulemaking under section 553(b) of the Administrative Procedure Act (APA)[6] or any other law. However there are times when a regulation or rule can be exempt from the APA notice and comment requirements, thereby exempting it from the RFA as well. Rules are exempt when any of the following is involved: (1) a military or foreign affairs function of the United States, or (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.[7] In addition, except where notice or hearing is required by statute, the APA does not apply (1) to interpretative rules, general statements of policy, or rules of agency organization, procedure or practice; or (2) when the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest.[8]

The RFA presents its own exemptions as well. Section 601(2) states that the RFA does not apply to rules of particular applicability relating to rates, wages, corporate or financial structures, or reorganizations thereof, prices, facilities, appliances, services or allowances.[9]

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[6] 5 U.S.C § 553(b).
[7] *Id* .at § 553(a).
[8] *Id.* at § 553(b)(A).
[9] 5 U.S.C. § 601(2).

Can You Certify? The Threshold Analysis

Once an agency determines that the RFA applies to their draft rule, it must decide whether to conduct a full regulatory flexibility analysis or to certify that the proposed rule will not "have a significant economic impact on a substantial number of small entities."[10]

In order to certify a rule under the RFA, an agency should be able to answer the following types of questions:

- Which small entities will be affected?
- Have adequate economic data been obtained?
- What are the economic implications/impacts of the proposal and do the data reveal a significant economic impact on a substantial number of small entities?

If, after conducting an analysis for a proposed or final rule, an agency determines that a rule will not have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may certify, or promise, that the rule will not have this effect. The certification must include a statement providing the ***factual*** **basis** for this determination, and the certification must be published in the *Federal Register* at the time the proposed or final rule is published for public comment. A certification must include, at a minimum, a description of the affected entities and an estimate of the cost of the impacts that clearly justifies the "no impact" certification. The agency's reasoning and assumptions underlying its certification should be explicit in order to obtain public comment and thus receive information that would be used to re-evaluate the certification. Clearly, an agency should identify the scope of the problem and the impact of the solution on affected entities before moving forward with a regulatory proposal.

Developing the Threshold Analysis

Certification analysis does not require the depth of analysis necessary in an initial regulatory flexibility analysis. Still, this "threshold" analysis can offer important insights into the nature of regulatory impacts.

The Office of Advocacy believes that, to support an adequate certification statement, the threshold analysis should include these items:

1. Description of small entities affected

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[10] 5 U.S.C. § 605(b).

- A brief economic and technical statement on the regulated community, describing some of the following types of information:
  a) The diversity in size of regulated entities
  b) Revenues in each size grouping

2. Economic impacts on small entities.
   - A fair, first estimate of expected cost impacts, or a reasonable basis for assuming costs would be insignificant within all economic or size groupings of the "small" regulated community.
   - The rationale for the certification decision, based on the analysis presented.
3. Significant economic impact criteria.
   - The criteria used to examine whether first-estimate costs are significant.
4. Substantial number criteria.
   - The criteria used to examine whether the entities experiencing significant impacts constitute a substantial number of entities in any of the regulated size groupings.
5. Description of assumptions and uncertainties.
   - The sources of data used in the economic and technical analysis.
   - The degree of uncertainty in the cost estimates, when uncertainty is large.

The RFA requires that certifications be supported by a "statement providing the factual basis." In amending the RFA, Congress intended that agencies should do more than provide boilerplate and unsubstantiated statements to support their RFA certifications. Courts will overturn an agency's final certification if it is not adequate.[11] Consequently, certifications that simply state that the agency has found that the proposed or final rule will not have a significant economic impact on a substantial number of small entities are not sufficient under section 605(b) of the RFA.

Definition of "Significant" and "Substantial"

A critical decision point in the threshold analysis is for the agency to determine whether there is a significant economic impact on a substantial

[11] *See* North Carolina Fisheries Ass'n v. Daley, 27 F. Supp. 2d 650 (E.D. Va. 1998).

number of small entities. The RFA does not define "significant" or "substantial." What is "significant" or "substantial" will vary depending on the problem that needs to be addressed, the rule's requirements, and the preliminary assessment of the rule's impact. The agency is in the best position to gauge the small entity impacts of its regulations.

Direct versus Indirect Impact

The courts have held that the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates them. Although it is not required by the RFA, the Office of Advocacy believes it is good public policy for the agency to do a regulatory flexibility analysis even when the impacts of its regulation are indirect. If an agency can accomplish its statutory mission more cost effectively, Advocacy believes it is good public policy to do so.

When More In-depth Analysis is Required: The IRFA

In developing a proposed rule, an agency must prepare an initial regulatory flexibility analysis (IRFA) if it determines that a proposal may impose a significant economic impact on a substantial number of small entities. The RFA requires agencies to publish the IRFA, or a summary, in the *Federal Register* at the same time it publishes the proposed rulemaking.[12] The IRFA must include a discussion of each element required by section 603 of the RFA, and the agency must also send a copy of the IRFA to the Chief Counsel for Advocacy.[13] Executive Order 13272 requires agencies to notify Advocacy when the agency submits a draft proposed or final rule to the Office of Information and Regulatory Affairs (OIRA) under Executive Order 12866, or at a reasonable time prior to publication of the rule by the agency.[14]

Questions To Consider

Section 603 of the RFA requires agencies to perform a detailed analysis of the potential impact of the proposed rule on small entities.[15] Some important questions the agency should address in preparing an IRFA are:

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[12] 5 U.S.C. § 603(a).
[13] *Id*.
[14] Exec. Order No. 13,272, § 3(b).
[15] 5 U.S.C. § 603(b)-(c).

- Which small entities are affected the most? Are all small entities in an industry affected equally or do some experience disparate impacts such that aggregation of the industry data would dilute the magnitude of the economic effect on specific subgroups?
- Are all the required elements of an IRFA present, including a clear explanation of the need for and objectives of the rule?
- Has the agency identified and analyzed all major cost factors?
- Has the agency identified all significant alternatives that would allow the agency to accomplish its regulatory objectives while minimizing the adverse impact or maximizing the benefits to small entities?
- Can the agency use other statutorily required analyses to supplement or satisfy the IRFA requirements of the RFA?
- Are there circumstances under which preparation of an IRFA may be waived or delayed?
- What portion of the problem is attributable to small businesses (i.e., is regulation of small businesses needed to satisfy the statutory objectives)?
- Does the proposed solution meet the statutory objectives in a more cost-effective or cost-beneficial manner than any of the alternatives considered?

The preparation of an IRFA should be coordinated with the development of the data and analysis the agency will use in preparing the proposed rule under the requirements of the Administrative Procedure Act. In doing so, the agency should be mindful of the requirements of the RFA and collect data based on size. The development of a rational rule will require the acquisition of data that describe the scope of the problem, the entities affected, and the extent of those effects. Without such information, the agency will be unable to develop a rational rule. When data are not readily available, the agency should consult with industry sources or other third parties to collect data. If the data

collection is inadequate, then agencies should solicit the data as part of the proposed rulemaking. [16]

Elements of an IRFA

Under sections 603(b) and 603(c) of the RFA, an IRFA must describe the impact of the proposed rule on small entities and contain the following information:

1. A description of the reasons why the action by the agency is being considered.
2. A succinct statement of the objectives of, and legal basis for, the proposed rule.
3. A description—and, where feasible, an estimate of the number—of small entities to which the proposed rule will apply.
4. A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for preparation of the report or record.
5. An identification, to the extent practicable, of all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule.
6. A description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

The principal issues an agency should address in an IRFA are the impact of a proposed rule on small entities and the comparative effectiveness and costs of alternative regulatory options.

Significant Alternatives are the Key

The keystone of the IRFA is the description of any significant alternatives to the proposed rule that accomplish the stated objectives of

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[16] Bowen v. AHA, 476 U.S. 610, 643 (186); National Ass'n of Home Health Agencies v. Schweiker, 690
F.2d 932, 949 (D.C. Cir. 1982); Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098, 1103 (4th Cir. 1985).

applicable statutes and that minimize the rule's economic impact on small entities. It is the development and adoption of these alternatives that provide regulatory relief to small entities.

Analyzing alternatives establishes a process for the agency to evaluate proposals that achieve the regulatory goals efficiently and effectively without unduly burdening small entities, erecting barriers to competition, or stifling innovation. This process provides another filter by which the agency conducts rational rulemaking required by the APA.

Rather than focus on the overall costs and benefits of a particular regulation (as might be required by statute, such as the best achievable control technology, or by the regulatory analysis requirements of E.O. 12866), the RFA requires the agency to undertake an analysis that determines the impacts of the rule on small entities and then considers alternatives that reduce or minimize those impacts. Instead of analyzing the impacts of its regulatory actions on all relevant sectors of the economy, the IRFA narrows the scope of the particular review to small entities. The premise underpinning the IRFA is that, everything else being equal, the most rational alternative is often the one that achieves the objective of the agency at the lowest cost. Since small entities often have the highest costs to comply with a rule, while contributing the least to the problem the rule addresses, it makes sense to analyze them separately from all other regulated entities to determine if the rule can be made more cost effective through alternative standards for small entities.

The kinds of alternatives that are possible will vary based on the particular regulatory objective and the characteristics of the regulated industry. However, section 603(c) of the RFA gives agencies some alternatives that they must consider, at a minimum:

- Establishment of different compliance or reporting requirements for small entities or timetables that take into account the resources available to small entities.
- Clarification, consolidation, or simplification of compliance and reporting requirements for small entities.
- Use of performance rather than design standards.
- Exemption for certain or all small entities from coverage of the rule, in whole or in part.

Additional alternatives include adopting different standards based on the sizes of businesses or modifying the types of equipment required for large and small entities. In short, the agency should consider a variety of mechanisms to reach the regulatory objective.

Consistent with an agency's obligations under section 609 of the RFA, agencies should perform outreach to interested groups to help develop regulatory solutions. In doing so, agency personnel should recognize that different sectors of an industry may have very different perspectives on a particular regulatory approach. The agency should ensure that it contacts small entities and their representatives.

The Final Rule Stage: The FRFA

When it comes time to draft the final rule, the RFA requires agencies to either publish a certification statement with a factual basis as in the proposed rule, or a final regulatory flexibility analysis (FRFA). Agencies must prepare a FRFA unless the agency finds that the final rule will not have a significant economic impact on a substantial number of small entities or the final rule is issued under the APA provision allowing for good cause to forego notice and comment rulemaking.

The RFA requires agencies to revise their initial regulatory flexibility analysis based on the public comments received. Agencies routinely create a summary of the public's comments to be published along with the final rules. In developing this summary, the agency should specifically summarize comments from small entities. Once the agency determines that it cannot certify the final rule under section 605(b), the agency must prepare a FRFA. If the agency determines that the rulemaking will not result in a significant economic impact on a substantial number of small entities, the head of the agency may so certify under section 605(b) of the RFA, and provide a copy of the certification to the Chief Counsel for Advocacy.

Questions to Consider

A number of important questions will assist the agency in preparing a final regulatory flexibility analysis under the RFA:

- Have all significant issues raised in the public comments regarding the IRFA been summarized and assessed and have any changes been made to the rule as a result of those comments or the comments of the Chief Counsel for Advocacy?
- Has the number of small entities been estimated? If not, did the agency explain why?
- Has the adverse economic impact on small entities been minimized?
- Have all significant alternatives been reviewed?

Elements of a FRFA

Section 604(a) of the RFA outlines the central issues the agency must address in the FRFA. In short, agencies must evaluate the impact of a rule on small entities and describe their efforts to minimize the adverse impact. Agencies are required to publish a small entity compliance guide whenever they publish a rule that contains a FRFA. This must be done at the same time the final rule is published in the *Federal Register*.

The requirements, outlined in section 604(a)(1)–(5), are highlighted in italics below:

1. *A statement of the need for, and objectives of, the rule.* The agency can cross-reference to a similar statement in the supplementary information if the cross reference lets small entities easily identify the need for and objectives of the rule.

2. *A statement of the significant issues raised by the public comments in response to the IRFA, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.* Under the APA, agencies are required to respond to comments addressing relevant statutory considerations. Since the RFA constitutes a relevant statutory consideration, the agency is obligated under the APA to respond to comments on the RFA and relate how it changed the proposal, if at all, in response to the comments.

3. *The response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule , and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments.*

4. *A description and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.*

5. *A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for preparation of the report or record.*

6. *A description of the steps the agency has taken to minimize the significant adverse economic impact on small entities*

consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency was rejected.

6.[17] *For a covered agency, as defined in section 609(d)(2), a description of the steps the agency has taken to minimize any additional cost of credit for small entities.*

A Word on Regulatory Panels

In 1996, SBREFA amended the RFA to include a number of important provisions. One of those was section 609, which requires, among other things, that certain agencies conduct special outreach efforts to ensure that small entity views are carefully considered prior to the issuance of a proposed rule. This outreach is accomplished through the work of small business advocacy review panels, often referred to as SBREFA panels.

Who Must Hold SBREFA Panels?

The statute requires that the Environmental Protection Agency (EPA), the Consumer Finance Protection Bureau (CFPB), and the Occupational Safety and Health Administration (OSHA) evaluate their regulatory proposals to determine whether SBREFA panels should be convened.

Conclusion

The RFA does not seek preferential treatment for small entities, does not require agencies to adopt regulations that impose the least burden on small entities, and does not mandate exemptions for small entities. Rather, as this guide has illustrated, the RFA establishes an analytical process for determining how public policy issues can best be achieved without erecting barriers to competition, stifling innovation, or imposing undue burdens on small entities. In so doing, it seeks a level playing field for small entities.

[17] Nearly simultaneous enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Small Business Jobs Act resulted in the creation of two sections 6.

Appendix A: The Regulatory Flexibility Act

The following text of the Regulatory Flexibility Act of 1980, as amended, is taken from Title 5 of the United States Code, sections 601–612. The Regulatory Flexibility Act was originally passed in 1980 (P.L. 96-354). The act was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (P.L. 104-121), the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203), and the Small Business Jobs Act of 2010 (P.L. 111-240).

Congressional Findings and Declaration of Purpose

(a) The Congress finds and declares that —

(1) when adopting regulations to protect the health, safety and economic welfare of the Nation, Federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public;

(2) laws and regulations designed for application to large scale entities have been applied uniformly to small businesses, small organizations, and small governmental jurisdictions even though the problems that gave rise to government action may not have been caused by those smaller entities;

(3) uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources;

(4) the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;

(5) unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;

(6) the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation;

(7) alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes may be available which minimize

the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions;

(8) the process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions to examine the impact of proposed and existing rules on such entities, and to review the continued need for existing rules.

(b) It is the purpose of this Act [enacting this chapter and provisions set out as notes under this section] to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

Regulatory Flexibility Act[18]

§ 601 Definitions [CITE: 5 USC 601]

For purposes of this chapter —

[18] Source: Title 5, Part I, Chapter 6 from U.S. Code Online via GPO Access *[wais.access.gpo.gov]*

(1) the term “agency” means an agency as defined in section 551(1) of this title;

(2) the term “rule” means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law, including any rule of general applicability governing Federal grants to State and local governments for which the agency provides an opportunity for notice and public comment, except that the term “rule” does not include a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances;

(3) the term “small business” has the same meaning as the term “small business concern” under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

(4) the term “small organization” means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

(5) the term “small governmental jurisdiction” means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register;

(6) the term “small entity” shall have the same meaning as the terms “small business,” “small organization” and “small governmental jurisdiction” defined in paragraphs (3), (4) and (5) of this section; and

(7) the term “collection of information” —

(A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either —

(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, 10 or more persons, other than agencies, instrumentalities, or employees of the United States; or

(ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes; and

(B) shall not include a collection of information described under section 3518(c)(1) of title 44, United States Code.

(8) Recordkeeping requirement — The term "recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified records.

§ 602. Regulatory agenda [CITE: 5 USC 602]

(a) During the months of October and April of each year, each agency shall publish in the Federal Register a regulatory flexibility agenda which shall contain —

(1) a brief description of the subject area of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities;

(2) a summary of the nature of any such rule under consideration for each subject area listed in the agenda pursuant to paragraph (1), the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking, and

(3) the name and telephone number of an agency official knowledgeable concerning the items listed in paragraph (1).

(b) Each regulatory flexibility agenda shall be transmitted to the Chief Counsel for Advocacy of the Small Business Administration for comment, if any.

(c) Each agency shall endeavor to provide notice of each regulatory flexibility agenda to small entities or their representatives through direct notification or publication of the agenda in publications likely to be obtained by such small entities and shall invite comments upon each subject area on the agenda.

(d) Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda.

§ 603. Initial regulatory flexibility analysis [CITE: 5 USC 603]

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration. In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules published in the Federal Register for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement.

(b) Each initial regulatory flexibility analysis required under this section shall contain —

(1) a description of the reasons why action by the agency is being considered;

(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as —

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) the use of performance rather than design standards; and

(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

(d) (1) For a covered agency, as defined in section 609(d)(2), each initial regulatory flexibility analysis shall include a description of—

(A) any projected increase in the cost of credit for small entities;

(B) any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any increase in the cost of credit for small entities; and

(C) advice and recommendations of representatives of small entities relating to issues described in subparagraphs (A) and (B) and subsection (b).

(2) A covered agency, as defined in section 609(d)(2), shall, for purposes of complying with paragraph (1)(C)—

(A) identify representatives of small entities in consultation with the Chief Counsel for Advocacy of the Small Business Administration; and

(B) collect advice and recommendations from the representatives identified under subparagraph (A) relating to issues described in subparagraphs (A) and (B) of paragraph (1) and subsection (b).

§ 604. Final regulatory flexibility analysis [CITE: 5 USC 604]

(a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a), the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain —

(1) a statement of the need for, and objectives of, the rule;

(2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response

to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;

(4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(5) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(6) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected;

(6)[1] for a covered agency, as defined in section 609(d)(2), a description of the steps the agency has taken to minimize any additional cost of credit for small entities.

(b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register such analysis or a summary thereof..

[1]So in original. Two paragraphs (6) were enacted.

§ 605. Avoidance of duplicative or unnecessary analyses [CITE: 5 USC 605]

(a) Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.

(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such

certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

(c) In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of sections 602, 603, 604 and 610 of this title.

§ 606. Effect on other law [CITE: 5 USC 606]

The requirements of sections 603 and 604 of this title do not alter in any manner standards otherwise applicable by law to agency action.

§ 607. Preparation of analyses [CITE: 5 USC 607]

In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.

§ 608. Procedure for waiver or delay of completion [CITE: 5 USC 608]

(a) An agency head may waive or delay the completion of some or all of the requirements of section 603 of this title by publishing in the Federal Register, not later than the date of publication of the final rule, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes compliance or timely compliance with the provisions of section 603 of this title impracticable.

(b) Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the completion of the requirements of section 604 of this title for a period of not more than one hundred and eighty days after the date of publication in the Federal Register of a final rule by publishing in the Federal Register, not later than such date of publication, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes timely compliance with the provisions of section 604 of this title impracticable. If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days from the date of publication of the final rule, such rule shall lapse and have no effect. Such rule shall not be

repromulgated until a final regulatory flexibility analysis has been completed by the agency.

§ 609. Procedures for gathering comments [CITE: 5 USC 609]

(a) When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques such as—

(1) the inclusion in an advance notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;

(2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;

(3) the direct notification of interested small entities;

(4) the conduct of open conferences or public hearings concerning the rule for small entities including soliciting and receiving comments over computer networks; and

(5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.

(b) Prior to publication of an initial regulatory flexibility analysis which a covered agency is required to conduct by this chapter—

(1) a covered agency shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with information on the potential impacts of the proposed rule on small entities and the type of small entities that might be affected;

(2) not later than 15 days after the date of receipt of the materials described in paragraph (1), the Chief Counsel shall identify individuals representative of affected small entities for the purpose of obtaining advice and recommendations from those individuals about the potential impacts of the proposed rule;

(3) the agency shall convene a review panel for such rule consisting wholly of full time Federal employees of the office within the agency responsible for carrying out the proposed rule, the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel;

(4) the panel shall review any material the agency has prepared in connection with this chapter, including any draft proposed rule, collect advice and recommendations of each individual small entity representative identified by the agency after consultation with the Chief Counsel, on issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c);

(5) not later than 60 days after the date a covered agency convenes a review panel pursuant to paragraph (3), the review panel shall report on the comments of the small entity representatives and its findings as to issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c), provided that such report shall be made public as part of the rulemaking record; and

(6) where appropriate, the agency shall modify the proposed rule, the initial regulatory flexibility analysis or the decision on whether an initial regulatory flexibility analysis is required.

(c) An agency may in its discretion apply subsection (b) to rules that the agency intends to certify under subsection 605(b), but the agency believes may have a greater than de minimis impact on a substantial number of small entities.

(d) For purposes of this section, the term "covered agency" means

(1) the Environmental Protection Agency,

(2) the Consumer Financial Protection Bureau of the Federal Reserve System; and

(3) the Occupational Safety and Health Administration of the Department of Labor.

(e) The Chief Counsel for Advocacy, in consultation with the individuals identified in subsection (b)(2), and with the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, may waive the requirements of subsections (b)(3), (b)(4), and (b)(5) by including in the rulemaking record a written finding, with reasons therefor, that those requirements would not advance the effective participation of small entities in the rulemaking process. For purposes of this subsection, the factors to be considered in making such a finding are as follows:

(1) In developing a proposed rule, the extent to which the covered agency consulted with individuals representative of affected small entities with respect to the potential impacts of the rule and took such concerns into consideration.

(2) Special circumstances requiring prompt issuance of the rule.

(3) Whether the requirements of subsection (b) would provide the individuals identified in subsection (b)(2) with a competitive advantage relative to other small entities.

§ 610. Periodic review of rules [CITE: 5 USC 610]

(a) Within one hundred and eighty days after the effective date of this chapter, each agency shall publish in the Federal Register a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities. Such plan may be amended by the agency at any time by publishing the revision in the Federal Register. The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. The plan shall provide for the review of all such agency rules existing on the effective date of this chapter within ten years of that date and for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, he shall so certify in a statement published in the Federal Register and may extend the completion date by one year at a time for a total of not more than five years.

(b) In reviewing rules to minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes, the agency shall consider the following factors—

(1) the continued need for the rule;

(2) the nature of complaints or comments received concerning the rule from the public;

(3) the complexity of the rule;

(4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and

(5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

(c) Each year, each agency shall publish in the Federal Register a list of the rules which have a significant economic impact on a substantial

number of small entities, which are to be reviewed pursuant to this section during the succeeding twelve months. The list shall include a brief description of each rule and the need for and legal basis of such rule and shall invite public comment upon the rule.

§ 611. Judicial review [CITE: 5 USC 611]

(a) (1) For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(2) Each court having jurisdiction to review such rule for compliance with section 553, or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(3) (A) A small entity may seek such review during the period beginning on the date of final agency action and ending one year later, except that where a provision of law requires that an action challenging a final agency action be commenced before the expiration of one year, such lesser period shall apply to an action for judicial review under this section.

(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section 608(b) of this chapter, an action for judicial review under this section shall be filed not later than—

(i) one year after the date the analysis is made available to the public, or

(ii) where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 1-year period, the number of days specified in such provision of law that is after the date the analysis is made available to the public.

(4) In granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with this chapter and chapter 7, including, but not limited to —

(A) remanding the rule to the agency, and

(B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.

(5) Nothing in this subsection shall be construed to limit the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law or to grant any other relief in addition to the requirements of this section.

(b) In an action for the judicial review of a rule, the regulatory flexibility analysis for such rule, including an analysis prepared or corrected pursuant to paragraph (a)(4), shall constitute part of the entire record of agency action in connection with such review.

(c) Compliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section.

(d) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise permitted by law.

§ 612. Reports and intervention rights [CITE: 5 USC 612]

(a) The Chief Counsel for Advocacy of the Small Business Administration shall monitor agency compliance with this chapter and shall report at least annually thereon to the President and to the Committees on the Judiciary and Small Business of the Senate and House of Representatives.

(b) The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as amicus curiae in any action brought in a court of the United States to review a rule. In any such action, the Chief Counsel is authorized to present his or her views with respect to compliance with this chapter, the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities.

(c) A court of the United States shall grant the application of the Chief Counsel for Advocacy of the Small Business Administration to appear in any such action for the purposes described in subsection (b).

(Added Pub. L. 96-354, Sec. 3(a), Sept. 19, 1980, 94 Stat. 1170; amended Pub. L. 104-121, title II, Sec. 243(b), Mar. 29, 1996, 110 Stat. 866.)

Appendix B: Executive Order 13272

Presidential Documents

Executive Order 13272 of August 13, 2002

The President

Proper Consideration of Small Entities in Agency Rulemaking

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *General Requirements.* Each agency shall establish procedures and policies to promote compliance with the Regulatory Flexibility Act, as amended (5 U.S.C. 601 *et seq.*) (the ''Act''). Agencies shall thoroughly review draft rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the Act. The Chief Counsel for Advocacy of the Small Business Administration (Advocacy) shall remain available to advise agencies in performing that review consistent with the provisions of the Act.

Sec. 2. *Responsibilities of Advocacy.* Consistent with the requirements of the Act, other applicable law, and Executive Order 12866 of September 30, 1993, as amended, Advocacy:

(a) shall notify agency heads from time to time of the requirements of the Act, including by issuing notifications with respect to the basic requirements of the Act within 90 days of the date of this order;

(b) shall provide training to agencies on compliance with the Act; and

(c) may provide comment on draft rules to the agency that has proposed or intends to propose the rules and to the Office of Information and Regulatory Affairs of the Office of Management and Budget (OIRA).

Sec. 3. *Responsibilities of Federal Agencies.* Consistent with the requirements of the Act and applicable law, agencies shall:

(a) Within 180 days of the date of this order, issue written procedures and policies, consistent with the Act, to ensure that the potential impacts of agencies' draft rules on small businesses, small governmental jurisdictions, and small organizations are properly considered during the rulemaking process. Agency heads shall submit, no later than 90 days from the date of this order, their written procedures and policies to Advocacy for comment. Prior to issuing final procedures and policies, agencies shall consider any such comments received within 60 days from the date of the submission of the agencies' procedures and policies to Advocacy. Except to the extent otherwise specifically provided by statute or Executive Order, agencies shall make the final procedures and policies available to the public through the Internet or other easily accessible means;

(b) Notify Advocacy of any draft rules that may have a significant economic impact on a substantial number of small entities under the Act. Such notifications shall be made (i) when the agency submits a draft rule to OIRA under Executive Order 12866 if that order requires such submission, or (ii) if no submission to OIRA is so required, at a reasonable time prior to publication of the rule by the agency; and

(c) Give every appropriate consideration to any comments provided by Advocacy regarding a draft rule. Consistent with applicable law and appropriate protection of executive deliberations and legal privileges, an agency shall include, in any explanation or discussion accompanying publication in the **Federal Register** of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule that preceded the

final rule; provided, however, that such inclusion is not required if the head of the agency certifies that the public interest is not served thereby. Agencies and Advocacy may, to the extent permitted by law, engage in an exchange of data and research, as appropriate, to foster the purposes of the Act.

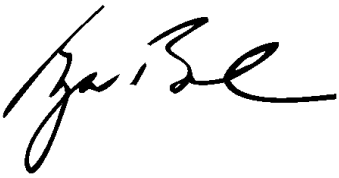
Sec. 4. *Definitions.* Terms defined in section 601 of title 5, United States Code, including the term "agency," shall have the same meaning in this order.

Sec. 5. *Preservation of Authority.* Nothing in this order shall be construed to impair or affect the authority of the Administrator of the Small Business Administration to supervise the Small Business Administration as provided in the first sentence of section 2(b)(1) of Public Law 85–09536 (15 U.S.C. 633(b)(1)).

Sec. 6. *Reporting.* For the purpose of promoting compliance with this order, Advocacy shall submit a report not less than annually to the Director of the Office of Management and Budget on the extent of compliance with this order by agencies.

Sec. 7. *Confidentiality.* Consistent with existing law, Advocacy may publicly disclose information that it receives from the agencies in the course of carrying out this order only to the extent that such information already has been lawfully and publicly disclosed by OIRA or the relevant rulemaking agency.

Sec. 8. *Judicial Review.* This order is intended only to improve the internal management of the Federal Government. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.



THE WHITE HOUSE,
August 13, 2002.

Appendix C: Executive Order 13563 and Memoranda

Improving Regulation and Regulatory Review

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to improve regulation and regulatory review, it is hereby ordered as follows:

Section 1. General Principles of Regulation. (a) Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements.

(b) This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993. As stated in that Executive Order and to the extent permitted by law, each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage

the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(c) In applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Sec. 2. Public Participation. (a) Regulations shall be adopted through a process that involves public participation. To that end, regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.

(b) To promote that open exchange, each agency, consistent with Executive Order 12866 and other applicable legal requirements, shall endeavor to provide the public with an opportunity to participate in the regulatory process. To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days. To the extent feasible and permitted by law, each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.

(c) Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.

Sec. 3. Integration and Innovation. Some sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. Greater coordination across agencies could reduce these requirements, thus reducing costs and

simplifying and harmonizing rules. In developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote such coordination, simplification, and harmonization. Each agency shall also seek to identify, as appropriate, means to achieve regulatory goals that are designed to promote innovation.

Sec. 4. Flexible Approaches. Where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible.

Sec. 5. Science. Consistent with the President's Memorandum for the Heads of Executive Departments and Agencies, "Scientific Integrity" (March 9, 2009), and its implementing guidance, each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions.

Sec. 6. Retrospective Analyses of Existing Rules. (a) To facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible.

(b) Within 120 days of the date of this order, each agency shall develop and submit to the Office of Information and Regulatory Affairs a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.

Sec. 7. General Provisions. (a) For purposes of this order, "agency" shall have the meaning set forth in section 3(b) of Executive Order 12866.

(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department or agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

BARACK OBAMA

THE WHITE HOUSE,
January 18, 2011

The White House

Office of the Press Secretary

For Immediate Release
January 18, 2011

Memorandum for the Heads of Executive Departments and Agencies

Subject: Regulatory Flexibility, Small Business, and Job Creation

Small businesses play an essential role in the American economy; they help to fuel productivity, economic growth, and job creation. More than half of all Americans working in the private sector either are employed by a small business or own one. During a recent 15-year period, small businesses created more than 60 percent of all new jobs in the Nation.

Although small businesses and new companies provide the foundations for economic growth and job creation, they have faced severe challenges as a result of the recession. One consequence has been the loss of significant numbers of jobs.

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612, establishes a deep national commitment to achieving statutory goals without imposing unnecessary burdens on the public. The RFA emphasizes the importance of recognizing "differences in the scale and resources of regulated entities" and of considering "alternative regulatory approaches . . . which minimize the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions." 5 U.S.C. 601 note.

To promote its central goals, the RFA imposes a series of requirements designed to ensure that agencies produce regulatory flexibility analyses that give careful consideration to the effects of their regulations on small businesses and explore significant alternatives in order to minimize any significant economic impact on small businesses. Among other things, the RFA requires that when an agency proposing a rule with such impact is required to provide notice of the proposed rule, it must also produce an initial regulatory flexibility analysis that includes discussion of significant alternatives. Significant alternatives include the use of

performance rather than design standards; simplification of compliance and reporting requirements for small businesses; establishment of different timetables that take into account the resources of small businesses; and exemption from coverage for small businesses.

Consistent with the goal of open government, the RFA also encourages public participation in and transparency about the rulemaking process. Among other things, the statute requires

agencies proposing rules with a significant economic impact on small businesses to provide an opportunity for public comment on any required initial regulatory flexibility analysis, and generally requires agencies promulgating final rules with such significant economic impact to respond, in a final regulatory flexibility analysis, to comments filed by the Chief Counsel for Advocacy of the Small Business Administration.

My Administration is firmly committed to eliminating excessive and unjustified burdens on small businesses, and to ensuring that regulations are designed with careful consideration of their effects, including their cumulative effects, on small businesses. Executive Order 12866 of September 30, 1993, as amended, states, "Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations."

In the current economic environment, it is especially important for agencies to design regulations in a cost-effective manner consistent with the goals of promoting economic growth, innovation, competitiveness, and job creation.

Accordingly, I hereby direct executive departments and agencies and request independent agencies, when initiating rulemaking that will have a significant economic impact on a substantial number of small entities, to give serious consideration to whether and how it is appropriate, consistent with law and regulatory objectives, to reduce regulatory burdens on small businesses, through increased flexibility. As the RFA recognizes, such flexibility may take many forms, including:

- extended compliance dates that take into account the resources available to small entities;
- performance standards rather than design standards;
- simplification of reporting and compliance requirements (as, for example, through streamlined forms and electronic filing options);
- different requirements for large and small firms; and
- partial or total exemptions.

I further direct that whenever an executive agency chooses, for reasons other than legal limitations, not to provide such flexibility in a proposed or final rule that is likely to have a significant economic impact on a substantial number of small entities, it should explicitly justify its decision not to do so in the explanation that accompanies that proposed or final rule.

Adherence to these requirements is designed to ensure that regulatory actions do not place unjustified economic burdens on small business owners and other small entities. If regulations are preceded by careful analysis, and subjected to public

comment, they are less likely to be based on intuition and guesswork and more likely to be justified in light of a clear understanding of the likely consequences of alternative courses of action. With that understanding, agencies will be in a better position to protect the public while avoiding excessive costs and paperwork.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Nothing in this memorandum shall be construed to impair or otherwise affect the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the *Federal Register*.

BARACK OBAMA

The White House

Office of the Press Secretary

For Immediate Release
January 18, 2011

PRESIDENTIAL MEMORANDA - REGULATORY COMPLIANCE

Memorandum for the Heads of Executive Departments and Agencies

Subject: Regulatory Compliance

My Administration is committed to enhancing effectiveness and efficiency in Government. Pursuant to the Memorandum on Transparency and Open Government, issued on January 21, 2009, executive departments and agencies (agencies) have been working steadily to promote accountability, encourage collaboration, and provide information to Americans about their Government's activities.

To that end, much progress has been made toward strengthening our democracy and improving how Government operates. In the regulatory area, several agencies, such as the Department of Labor and the Environmental Protection Agency, have begun to post online (at ogesdw.dol.gov and www.epa-echo.gov), and to make readily accessible to the public, information concerning their regulatory compliance and enforcement activities, such as information with respect to administrative inspections, examinations, reviews, warnings, citations, and revocations (but excluding law enforcement or otherwise sensitive information about ongoing enforcement actions).

Greater disclosure of regulatory compliance information fosters fair and consistent enforcement of important regulatory obligations. Such disclosure is a critical step in encouraging the public to hold the Government and regulated entities accountable. Sound regulatory enforcement promotes the welfare of Americans in many ways, by increasing public safety, improving working conditions, and protecting the air we breathe and the water we drink. Consistent regulatory enforcement also levels the playing field among regulated entities, ensuring that those that fail to comply with the law do not have an unfair

advantage over their law-abiding competitors. Greater agency disclosure of compliance and enforcement data will provide Americans with information they need to make informed decisions. Such disclosure can lead the Government to hold itself more accountable, encouraging agencies to identify and address enforcement gaps.

Accordingly, I direct the following:

First, agencies with broad regulatory compliance and administrative enforcement responsibilities, within 120 days of this memorandum, to the extent feasible and permitted by law, shall develop plans to make public information concerning their regulatory compliance and enforcement activities accessible, downloadable, and searchable online. In so doing, agencies should prioritize making accessible information that is most useful to the general public and should consider the use of new technologies to allow the public to have access to real-time data. The independent agencies are encouraged to comply with this directive.

Second, the Federal Chief Information Officer and the Chief Technology Officer shall work with appropriate counterparts in each agency to make such data available online in searchable form, including on centralized platforms such as data.gov, in a manner that facilitates easy access, encourages cross-agency comparisons, and engages the public in new and creative ways of using the information.

Third, the Federal Chief Information Officer and the Chief Technology Officer, in coordination with the Director of the Office of Management and Budget (OMB) and their counterparts in each agency, shall work to explore how best to generate and share enforcement and compliance information across the Government, consistent with law. Such data sharing can assist with agencies' risk-based approaches to enforcement: A lack of compliance in one area by a regulated entity may indicate a need for examination and closer attention by another agency. Efforts to share data across agencies, where appropriate and permitted by law, may help to promote flexible and coordinated enforcement regimes.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Nothing in this

memorandum shall be construed to impair or otherwise affect the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

The Director of OMB is authorized and directed to publish this memorandum in the *Federal Register*.

BARACK OBAMA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