

June 18, 1999

Mr. David Donaldson
U.S. Department of Transportation
Research and Special Programs Administration
Room PL 401
400 Seventh Street, S.W.
Washington, DC 20590-0001

Subject: Hazardous Materials Transportation Registration and Fee Assessment Program; Docket # RSPA-99-5137 (HM-208C).

Dear Mr. Donaldson:

On April 15, 1999, the Research and Special Programs Administration (RSPA) published a Notice of Proposed Rulemaking (NPRM) on its Registration and Fee Assessment Program for the transportation of hazardous materials. The RSPA proposal would increase the number of persons required to register and also increase the annual registration fee for shippers and carriers who transport hazardous materials.

The Office of the Chief Counsel for Advocacy of the U.S. Small Business Administration (SBA) was created in 1976 to represent the views and interests of small businesses in federal policy making activities.¹ The Chief Counsel participates in rulemakings when he deems it necessary to ensure proper representation of small business interests. In addition to these responsibilities the Chief Counsel monitors compliance with the Regulatory Flexibility Act (RFA), and works with federal agencies to ensure that their rulemakings analyze and substantiate the impact that their decisions will have on small businesses.

A technical review of the Regulatory Flexibility Act certification contained in RSPA's Registration and Fee proposal was done by one of our economic analysts on staff. This review uncovered a deficiency in RSPA's RFA certification which should be corrected in the Final Rule.

As discussed below, RSPA failed to provide a factual basis sufficient to certify the rule properly. Nevertheless, while the rule would impact a substantial number of small entities, it would not impose a significant economic impact. Failure to provide the factual basis, including the basis for its economic impact criterion, opens the rule to a valid charge of non-compliance with 5 U.S.C. § 605 (b). Because the rule would not appear to impose a significant economic impact on the small entities, however, non-compliance with the RFA is not fatal to the proposal, especially if addressed in the preamble to the Final Rule.

¹ Regulatory Flexibility Act, 5 U.S.C. § 601, as amended by the Small Business Regulatory Flexibility Act, Pub. L. No. 104-121, 110 Stat. 866 (1996).

A Substantial Number of Small Entities

The Regulatory Flexibility Act requirement to prepare an Initial Regulatory Flexibility Analysis (IRFA) does not apply to a proposed rule when a federal agency certifies the rule will not have a significant economic impact on a substantial number of small entities, and publishes a statement providing the factual basis for such certification. RSPA published this certification but did not provide an adequate factual basis for concluding the rule does not affect a substantial number of small entities. To the contrary, the rule clearly impacts a substantial number of small entities.

The RSPA proposal seeks to modify the existing registration and fees associated with transportation of certain hazardous materials. RSPA notes that under the proposed rule the registration and fee program will affect 42,000 to 45,000 entities, an increase in registrations under the rule of 15,000 to 18,000. *See* 64 FR 18793. RSPA estimates that 97 % of those entities meet the SBA criteria for a small business. Thus, the baseline of regulated entities is 42,000 to 45,000 entities, 97% of which are small entities. The new rule will not affect approximately two-thirds of the small entities as RSPA plans no change in the registration or fees for previously regulated small entities. The remaining one-third now covered by the rule would have to absorb the new costs. One-third of a market is certainly a substantial percentage of the market, and RSPA has no basis to conclude that 97% of 15,000 to 18,000 new registrants does not constitute a substantial number of small entities.

RSPA stated that the new registrants constitute a small percentage of the 4.25 million small carriers that comprise the “for-hire and commercial business services sector of the national economy.” These 4.25 million small carriers do not, however, seek registration. Under the new rule, only about 45,000 will do so. That 45,000 is the universe of regulated entities RSPA should examine to determine whether their rule would affect a substantial number of small entities. The factual basis provided by RSPA offers no conclusion other than that the rule would affect a substantial number of small entities.

Significant Economic Impact

RSPA specifically announces in its Federal Register notice (at 18793) that it plans no change in the requirements or fees to those entities meeting the SBA definition of small business. Elsewhere in its preamble, however, the Agency estimates that the rule will require 15,000 to 18,000 additional entities to enter the registration program and pay a \$300 fee, and that nearly all of these are small entities. *See* 18794. Thus, RSPA cannot certify its rule based on the argument that the rule would not alter the impacts on small entities as clearly the rule would expand the universe of small haz-mat carriers required to register and pay a fee.

RSPA presents additional information suggesting that the \$300 fee constitutes less than one-half of 1% of current costs. In and of itself, this fact does not evidence a lack of economic significance. Rather RSPA should have placed this cost in the context of

impact on profits, and should have indicated whether this cost would have any impact on business closure.

A comparison of the \$300 fee to typical profit margins in this transportation industry suggests that the fee constitutes no more than 6 to 8 % of profits for the smallest two-thirds of the affected corporations (based on 1993 IRS tax returns). *See IRS, Statistics of Income Source Book 1993* (1996). Further, 60 % or more of the small corporations in this industry report a profit and the average profit rate for the entire industry is greater than 3% (of revenues). As a rule of thumb, a regulatory impact of less than 10 % of profits may not constitute a significant economic impact in a healthy industry. The high rate of profitability within the industry described in the NPRM may suggest that it is not an economically challenged industry. This, however, needs to be spelled out in any final certification.

RSPA should be cautioned to establish and publish for comment a theoretical basis for a valid “significant economic impact” criterion. In the absence thereof, the public has no means by which to evaluate an agency assertion that regulatory impacts are not significant. In this case, it appears the impacts may not be significant. Thus, although the rule would affect a substantial number of small entities, if the impact is properly determined not to be significant, RSPA may certify the rule under the Regulatory Flexibility Act.

These procedural errors in the certification of the proposed rule should be addressed by RSPA in the preamble to the Final Rule in order to avoid a valid charge of non-compliance with 5 U.S.C. § 605 (b).

Please do not hesitate to contact our office if you require further clarification of this letter or any other assistance, 202-205-6533.

Sincerely,

Jere W. Glover
Chief Counsel for Advocacy

Claudia Rayford
Assistant Chief Counsel for Advocacy

