

February 1, 2011

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Winslow Sargeant, Ph.D
Chief Counsel for Advocacy, U.S. Small Business Administration

SUBJECT: Regulatory Flexibility Act: Recent Developments

As required by Executive Order 13272¹, I am writing to advise you of recent activity related to the Regulatory Flexibility Act (RFA) and provide additional guidance related to these changes.

Since 2007, several amendments to the RFA have become law, and this memorandum describes these changes. President Obama has also recently expressed his renewed commitment to regulatory review and regulatory relief. On January 18, 2011, President Obama issued Executive Order 13563, "Improving Regulation and Regulatory Review,"² and a Memorandum on Regulatory Flexibility, Small Business, and Job Creation.³

The Office of Advocacy strongly endorses these principles and policies and is ready to assist you and your agencies in compliance with the RFA, Executive Order 13563, and the President's memorandum. The Office of Advocacy provides RFA training to agencies as required by Executive Order 13272. Requests for training should be directed to Claudia Rodgers, Deputy Chief Counsel for Advocacy, Claudia.rayford@sba.gov.

The Small Business and Work Opportunity Act of 2007 requires timely publication of small entity compliance guides.

Congress enacted additional requirements for agency compliance guides in 2007, as part of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007.⁴ This statute requires an agency to:

- Publish one or more „small entity compliance guides’ for any rule for which it must prepare a Final Regulatory Flexibility Analysis;⁵

¹ Executive Order 13272, signed August 13, 2002 (67 Fed. Reg. 53,461 (August 16, 2002)). Section 2(a) requires the Chief Counsel for Advocacy to ““notify agency heads from time to time of the requirements of the [Regulatory Flexibility] Act.”

² 76 Fed. Reg. 3821 (January 21, 2011).

³ Memorandum for the Heads of Executive Departments and Agencies, "Regulatory Flexibility, Small Business, and Job Creation" (76 Fed. Reg. 3827 (January 21, 2011)).

⁴ Pub. Law 110-28 (May 27, 2007). See Title VI, Subtitle B, sec. 7005.

⁵ See 5 U.S.C. 604 for the requirements for a Final Regulatory Flexibility Analysis.

- Publish these guides with publication of the final rule, if possible, but before the effective date of the rule;
- Post these guides to its website and distribute to known industry contacts; and
- Report annually to Congress.

The statute also describes generally what should be included in a compliance assistance guide.

The Dodd-Frank Wall Street Reform and Consumer Protection Act requires Small Business Advocacy Panels for CFPB rulemakings.

The Dodd-Frank Wall Street Reform and Consumer Protection Act,⁶ passed July 2010, establishes the Consumer Financial Protection Bureau (CFPB) to supervise certain activities of financial institutions. This Act requires the CFPB to comply with the RFA section 609 panel process, making it the third agency with this responsibility, joining EPA and OSHA.⁷ The Office of Advocacy looks forward to working with this new agency.

The Small Business Jobs Act of 2010 requires Final Regulatory Flexibility Analyses to be more detailed and to respond to Advocacy comments.

On September 27, 2010, President Obama signed into law the Small Business Jobs Act of 2010.⁸ This act amended the RFA by making the following three changes to the requirements for Final Regulatory Flexibility Analyses.

- It struck the word “succinct” from the requirement for “a ~~succinct~~ statement of the need for, and objectives of, the rule.”⁹
- It replaced the word “summary” with the word “statement” in the requirement for “a ~~summary statement~~ of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a ~~summary 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.”¹⁰
- It added a new paragraph to require “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.”¹¹

⁶ Pub. Law 111-203 (July 21, 2010).

⁷ *Id.*, Sec. 1100G. *See* 5 U.S.C. § 609(d).

⁸ Pub. Law 111-240 (September 27, 2010).

⁹ *Id.*, Sec. 1601(1), amending 5 U.S.C. § 604(a)(1).

¹⁰ *Id.*, Sec. 1601(2), amending 5 U.S.C. § 604(a)(2).

¹¹ *Id.*, Sec. 1601(3), inserting 5 U.S.C. § 604(a)(3). This codifies the requirement from E.O. 13272, Sec. 3(c) without an exemption for a public interest.

Executive Order 13563 requires consultation with affected entities and reviews of existing regulations.

Executive Order 13563, Improving Regulation and Regulatory Review,¹² reaffirms the principles of Executive Order 12866, including the consideration of alternatives, cost-benefit analysis, and the consideration of distributional and cumulative economic impacts. These principles reinforce the agencies' obligations under the RFA.

This new Executive Order instructs agencies to seek the views of affected entities prior to proposed rulemaking.¹³ The Office of Advocacy strongly urges agencies to ensure their consultations include small entities. We are available to assist you in arranging these consultations or identifying appropriate small entities with which to consult.

The Executive Order also calls on agencies to engage in periodic reviews of existing regulations.¹⁴ Agencies already have an existing obligation to periodically review regulations under the RFA.¹⁵ In your development of plans for reviews of existing regulations, I strongly encourage you to consider your obligations under the RFA and integrate the two efforts. The Office of Advocacy is available to consult with you on your agency's plans.

The President's Memorandum on Regulatory Flexibility, Small Business, and Job Creation reaffirms the purposes of the RFA.

On January 18, 2011, President Obama signed a memorandum¹⁶ to you in which he stated:

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.

He emphasized the importance of compliance with the RFA and its purposes. The President also expanded the existing requirement for an agency to document its decision to reject an alternative that may reduce regulatory burdens on small entities. The RFA currently requires agencies to explain in the Final Regulatory Flexibility Analysis accompanying final rules why significant alternatives were not selected.¹⁷ The President has directed that a similar explanation be provided for proposed rules as well.¹⁸

¹² 76 Fed. Reg. 3821 (January 21, 2011).

¹³ E.O. 13563, Sec. 2(c).

¹⁴ *Id.*, Sec. 6.

¹⁵ *See* 5 U.S.C. § 610.

¹⁶ Memorandum for the Heads of Executive Departments and Agencies, "Regulatory Flexibility, Small Business, and Job Creation" (76 Fed. Reg. 3827 (January 21, 2011)).

¹⁷ *See* 5 U.S.C. § 604(a)(5) ("... 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.")

¹⁸ *See* 76 Fed. Reg. 3827 ("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

I remind you that alternatives include, but are not limited to, the flexible approaches described in section 4 of E.O. 13563, and the alternatives enumerated in the RFA¹⁹ and the President's memorandum. Alternatives under the RFA may include reasonable regulatory alternatives that relieve burden on all affected entities, not just small entities. I encourage agencies to consider all reasonable regulatory alternatives that impact small entities in their RFA analyses.

Regulatory Flexibility Analyses should be readily available to and easily identified by the public.

In light of the President's renewed commitment to the principles of Executive Order 12866 and the RFA, and in the spirit of transparency in decisionmaking, I want to remind you that Regulatory Flexibility Analyses must be available to the public at the same time as the proposed or final rule.²⁰ While Advocacy generally encourages agencies to publish Regulatory Flexibility Analyses or summaries in a separate RFA section within the rule preamble for transparency purposes, your agency is not required to prepare a wholly separate analysis to comply with the RFA.²¹ However, your agency should make sure that those sections of the preamble or other supporting documents intended to demonstrate compliance with the RFA are labeled as such. For example, in responding to public comments filed by the Chief Counsel for Advocacy, I recommend you separately identify Advocacy comments and label your response as being presented in compliance with the RFA.

If you have any questions about this memorandum or your agency's compliance with the RFA, please contact Charles Maresca, Director of Interagency Affairs, SBA Office of Advocacy, at (202) 205-6978 or Charles.Maresca@sba.gov.

cc: Cass R. Sunstein, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

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.”)

¹⁹ See § 603(c).

²⁰ See 5 U.S.C. § 603(a) and § 604(c).

²¹ See 5 U.S.C. § 605(a).