Independent Regulatory Agency Compliance with the Regulatory Flexibility Act

by

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entities as a separate class. The regulatory flexibility measures observed, however, did include thresholds and some exemptions of very small businesses with specific characteristics.

The FCC's license data, by contrast, lacked revenue information for size (except for wireline firms) and did not cover all the entities that the FCC regulated. Instead of developing or finding better data, the FCC used (sometimes for the same industry in one regulation) a mélange of several different types of data from several different sources[61] in combination with size standards from three different sources.[62] Problems of incomparability, conflicting data, double-counting, imprecision, and lack of updating, which the FCC did nothing to correct, rendered the data unfit for analysis.[63]

The FCC used six-digit NAICS industries and a set of industry groupings defined in terms of spectrum band or entity characteristics, which were almost completely unrelated to any specific regulation. Most analyses were far too broad, including far more industry groupings than could reasonably be explained. The FCC repeatedly reused boilerplate descriptions that precluded any discussion of the specific regulation being considered. As a result, the FCC failed to characterize clearly the actual scope of impacts.[64]

Compliance Requirements. Discussions of compliance requirements were (as the RFA states) "a description." This varied in depth from a list of compliance requirements[65] to a reasonably clear walk-though of the process of complying. If a form was involved, it was included in the notice; otherwise required information was described. Common topics included records to be kept, procedures to be developed, training, reprograming of operational systems, and (occasionally) modification of business models. For notices, alternative media and formats were often discussed. If multiple compliance alternatives were available – particularly when one alternative was a form – the options and their implications were generally spelled out. There

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- The NCUA has a size standard for credit unions of $10 million in assets. (The corresponding SBA standard is $175 million.) See NCUA, p. 96.
- The CFTC has developed size standards for specific type of non-depository financial entity based on registration, the largest of which is $20 million. See CTFC, p. 20.
- The SEC has developed its own set of size standards for half a dozen types of entities, derived from various authorizing statutes. See SEC, p. 112.

[61] These included:
- Census data for six-digit NAICS industries,
- Data from auctions for FCC licenses (which were extremely fragmentary),
- Subscriber data for cable services, and
- Raw license counts.

[62] These included:
- SBA size standards,
- Size standards developed for FCC license auctions, and
- Statute-based size standards.

[63] See FCC, pp. 44-53.

[64] See FCC, pp. 51-53.

[65] FCC discussions were rarely more than a rather sparse, detached list of compliance activities; sometimes only a recap of provisions of the rule; and occasionally entirely generic. For example: "The rules adopted by this Report and Order impose reporting, recordkeeping and other compliance requirements on small entities." See FCC, pp. 53-55.

were perceptible differences among agencies. Of those with more than half a dozen full FRFAs, the CPSC and the SEC were the most consistently detailed and thorough.

There were very few rules in which any dollar costs were estimated as part of a FRFA.[66] The agencies usually did not attempt even a rough estimate.[67] Indeed, in one rule the Federal Reserve responded to an SBA comment by pointing out that the RFA does not actually require dollar cost estimates.[68] Variation of compliance activities or costs with the size of entity was not generally considered, although the SEC was something of an exception.[69] Where small entities were considered separately, it was usually because a specific type of small entity faced distinctive issues under the rule.

Impact Analysis. A reasonably complete quantitative impact analysis was found in only one rulemaking - a joint rule that set registration requirements for depository institution employees who originate mortgages, as well as oversight requirements for their employers.[70] The rule involved *de minimis* requirements if employees originated fewer than five mortgages each. The agencies were able to estimate numbers of depository institutions that were subject to full requirements, subject to *de minimis* requirements, and not affected by the rule. Beyond that first step, only the FDIC had a complete analysis.[71]

Despite a lack of quantification, agencies did seem usually to have a rough understanding of the severity of burdens and an intuitive sense of what "significant" might mean.[72] In many

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[66] Such estimates were made in Paperwork Reduction Act analysis, but these usually were averages across all sizes. A labeling rule by the FTC is one of the few instances of costs in a FRFA; see FTC, p. 93.

[67] For example: "The [Federal Reserve] Board notes that the precise costs to small entities to conform their open-end credit disclosures to the final rule and the costs of updating their systems to comply with the rule are difficult to predict. These costs depend on a number of factors that are unknown to the Board, including, among other things, the specifications of the current systems used by such entities to prepare and provide disclosures and administer credit card accounts, the complexity of the terms of the credit card products that they offer, and the range of such product offerings." See FRS, p. 86.

[68] See FRS, p. 86.

[69] A few Paperwork Reduction Act estimates were disaggregated by business size. See SEC, p. 114.

[70] The *Secure and Fair Enforcement for Mortgage Licensing (S.A.F.E.) Act* Rule was issued jointly by the FCA, FDIC, FRS, NCUA, Office of the Comptroller of the Currency, and Office of Thrift Supervision.

[71] The rule involved both initial costs and annual costs in subsequent years. Costs differed for institutions subject to the *de minimis* provisions and institutions subject to the full requirements of the rule.

- The FDIC estimated both types of costs for both classes of entities; computed the full-requirement costs as percentages of an average small institution's total non-interest costs; and concluded that impacts (0.7 percent initially and 0.3 percent thereafter) were not significant. See FDIC, p. 64.
- The Federal Reserve made a single cost estimate that covered all affected institutions and declared the impacts to be non-significant. See FRS, p. 88.
- The NCUA did not estimate compliance costs. See NCUA, pp. 98-99.
- The FCA did not do a regulatory flexibility analysis on the grounds that the cooperative system is one large entity. See FCA, p. 33.

[72] For example:

- The CPSC acknowledged that its safety standards could well have very serious impacts on some small entities that were too far out of compliance. Yet the standard essentially was statutory, and these were the cases where compliance was needed most. See CPSC, p. 27.
- The FERC was concerned that the full standards to safeguard critical cyber assets would impose heavy burdens of very small entities that had to comply with all the steps, but compliance in those cases was

cases, the impacts were rather clearly not significant. The analyses used ordinal comparisons: would some provision have less burden than another or how can a particular burden be reduced? On the whole, the agencies seemed willing to consider measures to reduce burdens on small entities when they saw the need of opportunity. In this respect, the agencies usually seemed reasonably responsive to comments. In general, however, the agencies did not visibly seek out such opportunities in a systematic manner.

The FCC, which lacked the data for impact analysis, denied that analysis of impacts was necessary – even for an industry that the rule (predictably) decimated.[73]

Response to Comments

Many of the rulemakings did not require a FRFA, and in a number of rules that had a FRFA no comments on the IRFA were reported.[74] For the most part, agencies appeared to provide considered responses to substantive comments included in the FRFA. Responses fell into several categories:

- The majority of suggestions were rejected – usually with an explanation.[75]
- The agency made changes in response to the comment, either by incorporating a suggestion or by otherwise addressing a concern. Most of the changes reported could be construed as some sort of regulatory flexibility alternative.
- Comments that compliance activities were understated evoked explanations,[76] but estimates were revised in at least one case.[77]
- In the joint rules, most agencies refined their quantitative analysis to some degree in response to SBA comments about the adequacy of the regulatory flexibility analysis.

Most comments evoked a discussion and explanations, but the critical comments on FCC rules routinely brought defiantly argumentative responses.

Steps Taken to Minimize Burdens

Collectively the agencies used a fairly wide range of regulatory flexibility alternatives, including effective use of all types of measures suggested in the RFA. There were, however, some constraints.

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necessary for the objective of the regulation. The FERC was able to define a threshold, however, and it suggested some options to mitigate burdens. See FERC, p. 72.

[73] See FCC, pp. 43-44, 59.

[74] In several rules, the Federal Reserve used a cursory FRFA to confirm its belief that there were not significant impacts, and this lack of response seemed to be interpreted as confirmation. See FRS, p. 84.

[75] The explanation typically was that:

- The suggestion was contrary to statutory requirements,
- An exemption would compromise achievement of the rule's objective, or
- A provision in the regulation already addressed the issue adequately (or at least as well as the suggestion).

The FCC, however, rarely discussed alternatives at all and rejected numerous suggestions with no real explanation.

[76] See, for example, CPSC, p. 30.

[77] See FTC, p. 92.

- Statuory mandates can be so specific that they eliminate most options for regulatory flexibility. Examples encountered include the following:
  - The Consumer Product Safety Improvement Act of 2008 required that CPSC safety standards be at least "substantially the same as such voluntary [industry] standards."[78]
  - The Financial Services Regulatory Relief Act of 2006 required agencies to develop a single joint model form to meet privacy notice requirements.[79]
- The financial regulatory agencies declined to exempt small entities on the grounds that an exemption was incompatible with the law and/or the purposes of the regulation. The agencies expressed this as a matter of principle that occasionally rose to the level of equal protection under the laws.[80]

Differing Compliance Requirements. A number of rules included differing compliance requirements for small business, sometimes devised to address very specific problems.

- **Partial Exceptions.** Some agencies designed specific exceptions or alternate provisions to address impacts on small businesses.
  - The FTC provided a partial exemption to a ban on advanced fees that might have put small firms and sole practitioners owned by lawyers out of business.[81]
  - An SEC rule that prohibited making payment to a third party for soliciting business from any government entity included a carefully crafted limited exception for small businesses, who are relatively likely to contract out marketing activities. In several disclosure rules the SEC retained previous limited exemptions for small businesses and/or added a new one.[82]
  - The NCUA eliminated an exemption but grandfathered credit unions at current levels, but in a way that could only ratchet towards the underlying requirement.[83]
  - Faced with a statutory mandate to create a single universal form, agencies included a menu of specific disclosures to allow customized descriptions of information collection policies of smaller businesses.
  - An FCC rule concerning license auctions, provided small business auction bidding credits (a standard procedure) and auctioned small, partitionable service areas.[84]
- **Alternative Compliance Procedures.** Some rules establish alternative methods for compliance, allowing the regulated entity to choose the less burdensome one.
  - A joint FRS/FTC rule concerning risk-based pricing for credit offerings provided options for notification.[85]

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[78] See CPSC, p. 26.

[79] The *Privacy of Consumer Financial Information* Rule was issued jointly by the FDIC, FRS, FTC, NCUA, SEC, Office of the Comptroller of the Currency, and Office of Thrift Supervision.

[80] As the SEC put it in one rule, "the purpose of the rules is to facilitate the exercise of shareholders' traditional State law rights [and] we believe that shareholders of smaller reporting companies should be able to exercise these rights to the same extent as shareholders of larger reporting companies."

[81] See FTC, p. 93.

[82] See SEC, p. 115.

[83] See NCUA, p. 99.

[84] See FCC, p. 56.

- Some SEC rules provided voluntary alternatives to existing procedures.[86]

- **Timetables.** Some agencies extended compliance timetables to ease regulatory burdens in a variety of ways.
  - The CPSC extended the effective date of its crib safety regulation for two years to reduce the burden of replacing stocks of non-compliant cribs all at once.[87]
  - The SEC delayed compliance dates of two rules for small businesses by two years to allow small businesses to observe how the rule operates and prepare for implementation, and to give the SEC "a further opportunity to consider adjustments."[88]
  - The FRS and FTC also delayed the effective date of a joint rule.[89]

- **Tiering.** Tiered requirements were used in some rules so that smaller entities would bear relatively small burdens.
  - The NRC developed a three-tiered scheme, under which the annual assessment for very small entities was 8.5 percent of the assessment for large entities.[90]
  - A joint S.A.F.E. Mortgage Licensing Act rule included a *de minimis* provision that lowered costs for the smaller entities affected.[91]

Clarification, Consolidation, and/or Simplification of Requirements. Clarification was an ongoing issue. A number of regulations did little more than clarify a previous regulation and supply needed definitions. Clarification and simplification were often mentioned as objectives in developing forms, and in some cases considerable effort was devoted to this end.[92] Specific examples included:

- A FERC rule created an electronic version of a form that was clarified, streamlined, and accompanied by step-by-step instructions, and (the FERC believed) "should substantially reduce the burden of complying with EPAct 2005 cogeneration requirements."[93]

- In Regulation S-K, the SEC allowed small businesses to file an abbreviated report.[94]

- In a disclosure rule requiring a website "landing page," the FTC added the option of including the disclosure on every web page where the offer at issue was mentioned.[95]

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[85] See FTC, p. 94.

[86] See SEC, pp. 115-116.

[87] See CPSC, p. 28.

[88] See SEC, p. 115.

[89] See FRS, p. 87 and FTC, p. 94.

[90] See NRC, p. 104.

[91] See FDIC, p. 65; FRS, p. 88; and FTC, p. 94.

[92] The joint model privacy notification, for example, underwent focus groups, field testing, and a variety of other developmental activities. The agencies developed Online Form Builder to minimize the burden on small businesses of developing, using, and customizing the model form for their individual needs.

[93] See FERC, p. 71.

[94] See SEC, p. 115.

[95] See FTC, p. 92.

Performance Standards. In the context of disclosure or reporting, a performance standard typically meant specifying the information needed without requiring a particular form or format. This approach was used most extensively by the FTC[96] and the SEC.[97] In another sense, CPSC standards were generally defined in terms of how products performed on tests, rather than how products were manufactured.[98]

Exemption. Exemption was not widely used. As noted above, the financial regulators declined on principal to exempt small businesses. The CPSC was constrained by statute from using exemptions, there were technological barriers for many FCC rules, and many other rules did not involve small businesses. Some types of exemption were found.

- Specific forms that were developed were often not mandatory. A joint statutorily mandated privacy notice form developed jointly by financial regulatory agencies was the prime example of a non-mandatory form, but there were others.[99]
- The two FERC rules that affected small businesses both had size thresholds.[100]
- The CPSC does not regulate businesses that are not registered, which coincides with the CPSC definition of "small."

Recap

Most of the independent agencies did reasonably well identifying the small businesses affected, characterizing compliance requirements, and certifying the lack of significant impact on substantial numbers of small businesses. Most of the agencies appeared willing to adopt regulatory flexibility alternatives - sometimes rather creatively – when the need or opportunity became apparent. Quantitative analysis of costs and impacts was almost entirely missing, however, as was the systematic search for and assessment of alternatives, which depends on such analysis.

The FCC, by contrast, did none of these steps with consistency or with enough precision to provide useful information; repeatedly brushed off both commenters' suggested alternatives and the idea of impact analysis; and exhibited a completely horizontal learning curve.

[96] See FTC, p. 94.

[97] See SEC, p. 116.

[98] See CPSC, p. 27.

[99] See, for example, FRS, p. 88.

[100] See FERC, pp. 71-72.

PART II: AGENCY CASE STUDIES

1. Commodity Futures Trading Commission

OVERVIEW

The Commodity Futures Trading Commission (CFTC)[101] is the independent agency responsible for regulating commodity futures and option markets. In 1974, when Congress created the CFTC, the majority of futures trading took place in the agricultural sector. Since then the futures industry has become increasingly varied over time and today encompasses a vast array of highly complex financial futures contracts. Objectives of CFTC regulation include:

- Fostering open, competitive, efficient, and financially sound markets;
- Protecting market participants against fraud, manipulation, abusive trading practices, and systemic risk related to derivatives;
- Ensuring the financial integrity of the clearing process; and
- Enabling the futures markets to serve the important function of providing a means for price discovery and offsetting price risk.

The CFTC requires an intermediary - any person or firm who acts on behalf of another person in connection with futures trading – to register. Intermediary registration categories that are the object of most CTFC regulations include:

- **Futures Commission Merchant (FCM):** An individual, association, partnership, corporation, or trust that solicits or accepts orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any exchange and that accepts payment from or extends credit to those whose orders are accepted.
- **Commodity Pool Operators (CPO):** A person engaged in a business similar to an investment trust or a syndicate and who solicits or accepts funds, securities, or property for the purpose of trading commodity futures contracts or commodity options. The commodity pool operator either itself makes trading decisions on behalf of the pool or engages a commodity trading advisor to do so.
- **Commodity Trading Advisors (CTA):** A persons who, for pay, regularly engages in the business of advising others as to the value of commodity futures or options or the advisability of trading in commodity futures or options, or issues analyses or reports concerning commodity futures or options.
- **Introducing Brokers (IB):** A person (other than a person registered as an associated person of a futures commission merchant) who is engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on an exchange who does not accept any money, securities, or property to margin, guarantee, or secure any trades or contracts that result therefrom.

[101] This overview is based primarily on information from the CTFC website.

- **Derivatives Clearing Organization (DCO):** A clearing organization or similar entity that, in respect to a contract (1) enables each party to the contract to substitute, through novation or otherwise, the credit of the derivatives clearing organization for the credit of the parties; (2) arranges or provides, on a multilateral basis, for the settlement or netting of obligations resulting from such contracts; or (3) otherwise provides clearing services or arrangements that mutualize or transfer among participants in the derivatives clearing organization the credit risk arising from such contracts.

REGULATION

The CFTC promulgated seven distinct[102] rules in the study period. These have included several types of rules:

- Two rules concerned relatively minor changes in reporting requirements for CPOs and FCMs;[103] and
- Two rules pertained principally to commodity brokers in bankruptcy;[104]
- One rule involved setting up a new framework to regulate off-exchange foreign exchange transactions and security-based swaps;[105]
- One interim rule mandated preservation of data pending final implementation of a comprehensive new regulatory framework for swaps and security-based swaps under the Dodd-Frank Act;[106]
- One rule provided a model privacy form,[107] which was adopted jointly with other agencies.[108]

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[102] This includes one interim final rule that had no further action. Some rulemakings had more than one RIN.

[103] *Commodity Pool Operator Periodic Account Statements and Annual Financial Reports*, Final Action published November 9, 2009 (RIN: 3038-AC38).
Electronic Filing of Financial Reports and Notices, Final Action published December 30, 2009 (RIN: 3038-AB87).

[104] *Account Class*, Final Action published April 6, 2010 (RIN: 3038-AC94).
Operation in the Ordinary Course of a Commodity Broker in Bankruptcy, Final Action published July 30, 2010 (RIN: 3038-AC90).

[105] *Retail Off-Exchange Foreign Exchange Transaction Rules*, Final Action published September 10, 2010 (RIN: 3038-AC61).

[106] *Reporting and Recordkeeping for Post-Enactment Swaps*, Interim Final Rule published December 17, 2010 (RIN: 3038-AD29).

[107] *Privacy of Consumer Financial Information*, Final Action published December 1, 2009 (RIN: 3038-AC04).

[108] The other agencies participating in this rulemaking were the Office of the Comptroller of the Currency (OCC), the Federal Reserve System, the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Office of Thrift Supervision (OTS), the Federal Trade Commission (FTC), and the Securities and Exchange Commission (SEC).

Regulatory Flexibility Analysis

Definition of Small. When the Regulatory Flexibility Act was passed, the CFTC was faced with the issue of determining, for the purposes of the RFA, what was – or was not – a small entity. The CFTC developed its own size, based on two types of considerations:

- Setting its own definition was “premised on the limited usefulness, for Commission purposes, of the size standards for small business currently in use by the Small Business Administration.” The SBA size standard for non-depository financial institutions is defined in terms of revenue. The CFTC considered a revenue standard, but concluded that it would be too unstable: “revenue tests would be subject to annual ‘flip-flops’ without any [change] in the number of customers.”
- A central consideration of the CFTC was that “different regulatory treatment of registered FCMs would be contrary to the [Commodity Exchange] Act.” Thus, it was not compatible with the CFTC’s statutory mandate to have small and large entities under the same set of regulations that included regulatory flexibility alternatives.

To deal with these operational problems, the CFTC adopted a regulation that established a definition of “small entity,” for purposes of the Regulatory Flexibility Act, that excluded any entity registered with the Commission from the definition of “small entity.”[109]

This registration-based definition is operationally easy. It is less easily reduced to a simple number for entities that have a minimum net capital standard[110] that may be increased for an individual entity according to a variety of factors. FCMs, IBs, and OCOs must be registered with the CFTC to conduct business. The CFTC’s view is that an entity that cannot meet the registration requirements has no business in the market. Thus there really is no such thing as a small FCM,[111] or small OCO;[112] CFTC regulations affect only large entities of these types.

CPOs also have a registration requirement, but they are exempt from registration if they are under a certain asset size (currently $400,000). The CPO exemption threshold provides a clear proxy size standard. It also acts as a sort of built-in regulatory flexibility alternative, because CFTC regulations do not affect unregistered CPOs. IBs have relatively low

CTAs do not fit the pattern. They have no assets and no convenient quantitative measure to distinguish between registered and unregistered. The CFTC declined to set a general quantitative size standard for CTAs, equivocating with language about rule-by-rule determination.

Simple Certification. In a majority of the rules reviewed, the CFTC certified that the rule would not have a significant impact on a substantial number of small entities.

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[109] 47 FR 18619.

[110] The minimum net capital standard is $1,000,000 for FCMs and $45,000 for IBs, but in practice the standard is often several times higher.

[111] As one notice states: “The Commission has previously determined that, based on the fiduciary nature of the FCM customer relationships, as well as the requirement that FCMs meet minimum financial requirements, FCMs should be excluded from the definition of small entity.”

[112] IBs are less clear. Some notices refer to small IBs, while others treat them in the same manner as FCMs.

- In three rules,[113] none of the affected entities was small by CFTC definition.
- One rule[114] affected CPOs and did not apply to small CPOs.

Good Cause Exemption. One rule[115] was an interim final rule, for which the CFTC found an exemption from the definition of "rule" used in the Regulatory Flexibility Act "when the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." The CFTC stated:

> That good cause exists under 553(b) because delay in clarifying the scope of 2(h)(5)'s reporting and record preservation obligations will likely result in a substantial loss of material data relating to post-enactment pre-effective swaps that would assist the Commission in performing its oversight functions under the CEA.

The interim rule had little burden, because it merely required the preservation of existing data. A subsequent reporting rule, however, could well have significant impacts and would not be limited to entities that were "not small" by definition.

RFEDs. One rule[116] established a new category of registrant, the "retail foreign exchange dealer" (RFED). Entities within CFTC jurisdiction[117] that offer to be or act as counterparties to retail forex transactions were required to register with the CFTC as RFEDs. Congress set a stringent $20 million minimum net capital standard for registering as an RFED. Entities that engage in or intermediate retail foreign exchange transactions - principally "small" (unregistered) CTAs - were required to register with the CFTC under the appropriate category. The CFTC noted that "small" CTAs would incur relatively minor registration costs (an application, fee, and fingerprinting) but ignored substantial compliance costs of the rule itself, apparently on the grounds that the only entities affected are (after registering) not small.

Paradoxically, small CTAs morphed into large entities by registration, without any change in any size metric. Since these CTAs had to meet financial standards to register, however, they were not among the smallest of entities. In a broader sense, the CFTC was setting entry standards for the market, and if an entity could not meet them it was barred from entry. Technically, small entities were not affected (beyond transitional registration requirements), because:

- All FMCs and IBs are already large, by definition;
- Large CPOs are already large, and small CPOs cannot qualify anyway.[118]
- CTAs that can qualify really aren't very small anyway.

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[113] *Account Class*; *Operation in the Ordinary Course of a Commodity Broker in Bankruptcy*, and *Electronic Filing of Financial Reports and Notices*.

[114] *Commodity Pool Operator Periodic Account Statements and Annual Financial Reports*.

[115] *Reporting and Recordkeeping for Post-Enactment Swaps.*

[116] *Retail Off-Exchange Foreign Exchange Transaction Rules.*

[117] FMCs could engage in retail forex transactions without registering as RFEDs, but they had to meet the $20 million standard.

[118] By definition, a small CPO has under $400,000 in assets, while the capital requirement for an RFED is $20 million.

- One provided temporary grandfathering of a safe harbor provision for securitizations.[242]

- Four rules implemented the provisions of recent statutory changes.
  - Two provided unlimited coverage for noninterest-bearing accounts, in accordance with the Dodd-Frank Act,[243]
  - One joint rule developed and adopted a model privacy notification form, in accordance with the Gramm-Leach-Bliley Act,[244] and
  - One joint rule set registration requirements for financial institution employees who originate mortgages and oversight requirements for their employers, under the Secure and Fair Enforcement for Mortgage (S.A.F.E.) Licensing Act.[245]

- One rule provided an option involving deduction goodwill from type 1 capital.[246]

- Four rules involved what were essentially housekeeping matters.
  - One rule amended interest rate restriction regulations by revising and clarifying some definitions that had become obsolete,[247]
  - One rule incorporated – by cross-reference – recent Securities and Exchange Commission regulations,[248]
  - One rule modified risk-based capital guidelines to remove disincentives to participate in HUD's Making Home Affordable Program,[249] and
  - One rule implemented Dodd-Frank Act provisions concerning the FDIC's role as receiver of a failing major financial company.[250]

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rulemaking included the Federal Reserve System, the Office of the Comptroller of the Currency (Treasury), and the Office of Thrift Supervision (Treasury).

[242] *Transitional Safe Harbor Protection for Treatment by the Federal Deposit Insurance Corporation as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection With a Securitization or Participation*, Final Action published March 18, 2010 (RIN: 3064-AD55).

[243] *Deposit Insurance Regulations; Unlimited Coverage for Noninterest-bearing Transaction Accounts; Inclusion of Interest on Lawyers Trust Accounts*, Final Rule published November 15, 2010 (RIN: 3064-AD65); Final Rule published January 27, 2011 (RIN: 3064-AD72).

[244] *Privacy of Consumer Financial Information*, Final Action published December 1, 2009 (RIN: 3064-AD16). Other agencies participating in this rulemaking included the Federal Reserve System, the National Credit Union Administration (NCUA), the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the Federal Trade Commission (FTC), and the Office of Thrift Supervision (Treasury).

[245] *S.A.F.E. Mortgage Licensing Act*, Final Rule published July 28, 2010 (RIN: 3064-AD43). Other agencies participating in this rulemaking included the Federal Reserve System, the National Credit Union Administration (NCUA), the Farm Credit Administration (FCA), the Office of the Comptroller of the Currency (Treasury), and the Office of Thrift Supervision (Treasury).

[246] *Minimum Capital Ratios; Capital Adequacy Guidelines; Capital Maintenance; Capital: Deduction of Goodwill Net of Associated Deferred Tax Liability*, Final Rule published December 30, 2008 (RIN: 3064-AD32). Other agencies participating in this rulemaking included the Federal Reserve System, the Office of the Comptroller of the Currency (Treasury), and the Office of Thrift Supervision (Treasury).

[247] *Interest Rate Restrictions on Institutions That Are Less Than Well Capitalized*, Final Action published December 3, 2009 (RIN: 3064-AD41).

[248] *Securities of Nonmember Insured Banks* Interim Final Rule published November 30, 2010 (RIN: 3064-AD67).

[249] *Risk-Based Capital Guidelines; Capital Adequacy Guidelines; Capital Maintenance; Capital—Residential Mortgage Loans Modified Pursuant to the Making Home Affordable Program*, Final Rule published December 21, 2009 (RIN: 3064-AD42).

ANALYSIS

Regulatory Flexibility Analysis

Exemption. Three rules were exempt from the RFA because they did not require a NPRM. That is appropriate, as two of these rules updated definitions and the third incorporated SEC regulations by reference.

Three rules pertained to Deposit Insurance Fund assessments. The FDIC stated that these rules were exempt from the RFA by definition.[251]

- In one of these rules the FDIC then proceeded to provide the number of small entities affected, estimate compliance costs for small entities, and provide a benchmark[252] to determine that the impacts were small.
- In another rule, the FDIC explained how the impacts were strictly proportional to institution size.
- In the third, the FDIC estimated that small institutions would benefit from reduced assessments.

The overall effect of these rules was significantly to lower small institutions' share of assessments. This effect stemmed from the third of these rules, which rebalanced the assessment base, rates, and schedules in accordance with recent loss experience – and large banks had been the major source of hits on the Deposit insurance fund.

Certification. All but one of the other FDIC regulations had no more than an initial regulatory flexibility analyses. They concluded with a certification that there will not be a significant impact on a substantial number of small entities. Explanations or analyses – although quite basic - adequately supported this conclusion.

Five rules made no real change in requirements, merely provided clarification, or slightly simplified requirements. The FDIC provided concise explanation as to why there are no impacts.[253]

Five rules were not mandatory, and the FDIC opined that small financial institutions may benefit by taking advantage of the rule.

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[250] *Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, Interim Final Rule published January 5, 2011 (RIN: 3064-AD73).

[251] "Certain types of rules, such as rules of particular applicability relating to rates or corporate or financial structures, or practices relating to such rates or structures, are expressly excluded from the definition of 'rule' for purposes of the RFA."

[252] For assessing impacts on liquidity, assessments were compared to current cash and cash equivalent reserves. Interest foregone was compared to projected interest earnings over the period (less than 0.05 percent).

[253] The FDIC's concise style is illustrated by the rule requiring revised official signs for an increase in the standard maximum insurance amount: "There would not be any compliance costs with displaying the [new] official sign, because it would be provided by the FDIC free of charge."

- Three rules expand the CRA consideration options for financial institutions or ease regulations for participation in a HUD program.
- One joint rule created a model privacy notification form.
- One rule pertained to deduction of goodwill.

Three rules did not have adverse impacts on small banking institutions for various reasons:

- One rule applied to complex financial transactions, which the FDIC believed small banking organizations rarely – if ever participated in.
- One rule clarified rules and procedures for FDIC employees.
- One rule created non-trivial savings in assessments for small banking organizations participating in an FDIC program that was being supplanted.

The rule implementing the S.A.F.E. Mortgage Licensing Act, which was jointly promulgated by six agencies, imposed costs far greater than any other of these regulations. The rule required registration of financial institution employees who act as a residential mortgage loan originators and oversight by their employees. There was a *de minimis* exception for employees,[254] and (by extension) for financial institutions, although institutions with no registered employees still incurred some monitoring and procedural costs. The FDIC did its most careful job here. Compliance costs were estimated based on labor hours and costs. The FDIC estimated costs for the 861 small banks subject to the full regulation and for the 2,255 small banks subject to *de minimis* provisions, and the FDIC distinguished between start-up costs and annual costs thereafter. This was a more detailed analysis than was published by any other agency. Compliance costs were then compared to the institutions' total non-interest costs and were found to be non-significant (0.7 percent in the first year and 0.3 percent thereafter in the full-requirements scenario).[255]

Regulatory Flexibility Alternatives. There was little consideration of regulatory flexibility alternatives as such in most of these rulemakings. The lack of significant impact of the rule on small entities was a factor in many cases. A number of specific factors mitigated against regulatory flexibility alternatives.

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[254] The exception applied to any employee "who has never been registered or licensed through the Registry as a mortgage loan originator if during the past 12 months the employee acted as a mortgage loan originator for 5 or fewer residential mortgage loans."

[255] FDIC estimates were as follows:

- Banks subject only to *de minimis* requirements would incur cost of:
  - $12,922 for set-up and
  - $4,473 annually.
- Banks subject to full requirements would incur cost of:
  - $17,379 (0.7% of total non-interest costs) for set-up and
  - $7,436 (0.3% of total non-interest costs) annually.

- For some rules, there really were no alternatives.[256]
- Some rules did little more than clarify existing regulations.
- In some cases, alternatives were constrained by terms of the enabling statute.[257]

Some of the rules implicitly involved regulatory flexibility alternatives, although they were not necessarily described as such prior to the regulatory flexibility analysis. Some rules were not mandatory.[258] Some rules had, in effect, a small business exemption. A change in the assessment schedule had a proportionately larger impact on large banks, part of one rule applied only to large banks, and another regulated actions practiced almost exclusively by large banks. This is rather natural; practices of large banks have been the source of recent financial turmoil, and one should expect regulations to focus on them.

The rule implementing the S.A.F.E. Mortgage Licensing Act, which had the largest impacts, also had the most explicit consideration of regulatory flexibility. This included a *de minimis* provision and general policy development requirements that were essentially performance-based and adaptable to different sizes of institutions. As this was a joint rule, however, the regulatory flexibility cannot be attributed to any one agency.

Assessment

For a variety of reasons, the FDIC did not have to go beyond an initial regulatory flexibility analysis. The FDIC explained basis for the certifications clearly. Even in rules that were exempt from the RFA, the FDIC discussed effects on small entities, rather than simply asserting the exemption. In the one case where substantial analysis was required to support the certification - the S.A.F.E. Mortgage Licensing Act rule - the FDIC did a very craftsman-like job. Although it is not clear how much of a role the FDIC played in developing them, the rule incorporated significant regulatory flexibility alternatives.

[256] Examples include rules that:

- Made an increase in the standard minimum deposit insurance amount permanent and mandated new signage,
- Revised CRA size definitions, based on the CPI,
- Made assessment changes within a pre-existing risk-based assessment system,
- Temporarily extended existing regulations,
- Incorporated regulations of another agency by cross-referencing.

[257] The best example was the rule on a privacy notice model form, where the statute's mandate for a single standardized form precluded different treatment for small businesses. This form, however, was not mandatory.

[258] These included rules that:

- Provided new options for CRA assessment consideration,
- Facilitated participation in a HUD program, and
- The privacy notice model form.

6. Federal Election Commission

OVERVIEW

The Federal Election Commission (FEC)[259] is the independent regulatory agency charged with administering and enforcing the Federal Election Campaign Act (FECA), the statute that governs the financing of federal elections. The FEC has jurisdiction over the financing of campaigns for the U.S. House, the U.S. Senate, the Presidency and the Vice Presidency. The duties of the FEC are to:

- Ensure public disclosure of funds raised and spent to influence federal elections;
- Enforce limitations and prohibitions on contributions and expenditures made to influence federal elections; and
- Oversee the public financing of Presidential campaigns and administer the Presidential Campaign Fund, which provides public funds to candidates for president and nominating conventions.

The Commission clarifies the FECA and the public funding statutes through regulations, codified in Title 11 of the Code of Federal Regulations.

REGULATIONS

The Federal Election Commission had no regulations listed in the Spring 2010, Fall 2010, or Spring 2011 Unified Agenda as "Final Rule Stage" or "Completed Action." Thus no further analysis was done on FEC regulations.

[259] This overview is based primarily on information from the FEC website.

7. Federal Energy Regulatory Commission

OVERVIEW

The Federal Energy Regulatory Commission (FERC)[260] is an independent agency that regulates the interstate transmission of electricity, natural gas, and oil. FERC also reviews proposals to build liquefied natural gas (LNG) terminals and interstate natural gas pipelines as well as licensing hydropower projects. FERC's mission is to assist consumers in obtaining reliable, efficient and sustainable energy services at a reasonable cost through appropriate regulatory and market means. As part of that mission, FERC:

- Regulates the transmission and wholesale sales of electricity in interstate commerce;[261]
- Protects the reliability of the high voltage interstate transmission system through mandatory reliability standards;
- Reviews the siting application for electric transmission projects under limited circumstances;
- Licenses and inspects private, municipal, and state hydroelectric projects;
- Reviews certain mergers and acquisitions and corporate transactions by electricity companies;
- Regulates the transmission and sale of natural gas for resale in interstate commerce;
- Approves the siting and abandonment of interstate natural gas pipelines and storage facilities;
- Ensures the safe operation and reliability of proposed and operating LNG terminals;
- Regulates the transportation of oil by pipeline in interstate commerce;[262]
- Monitors and investigates energy markets;
- Oversees environmental matters related to natural gas and hydroelectricity projects and other matters;

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[260] This overview is based primarily on information from the FERC website.

[261] Specific responsibilities include:

- Approval of rates for wholesale sales of electricity and transmission in interstate commerce for jurisdictional utilities, power marketers, power pools, power exchanges and independent system operators,
- Review of rates set by the federal power marketing administrations,
- Review of exempt wholesale generator status, and
- Certification of qualifying small power production and cogeneration facilities.

[262] Specific responsibilities include:

- Regulation of rates and practices of oil pipeline companies engaged in interstate transportation;
- Establishment of equal service conditions to provide shippers with equal access to pipeline transportation; and
- Establishment of reasonable rates for transporting petroleum and petroleum products by pipeline.

- Administers accounting and financial reporting regulations and conduct of regulated companies; and
- Enforces FERC regulatory requirements through imposition of civil penalties and other means.

FERC does not have jurisdiction over local distribution and retail sale of electricity and gas, which fall under state public utility commissions, or over local facilities, except to the extent that the interstate system may be affected.

The Energy Policy Act of 2005 gave FERC additional responsibilities in the form of initiatives, including:

- **Smart Grid.** Applying digital technologies to the grid, and enabling real-time coordination of information from generation supply resources, demand resources, and distributed energy resources (DER);
- **Demand Response.** Assessing of demand response potential and to developing a national action plan on demand response; and
- **Integration of Renewables.** Allowing all resources, including renewable energy resources, to compete in jurisdictional markets on a level playing field.

REGULATIONS

FERC published 31 final rules that were included in the Unified Agenda in the study period. Of these rules:

- Seven rules dealt with matters that were internal to the Commission;[263]
- Six rules dealt with mandatory reliability standards for the national or a regional transmission grid, which were developed by the North American Electric Reliability Corporation (NERC).[264]

[263] *Delegation for Notices of Penalty*, Final Rule published November 5, 2009 (RIN: 1902-AD91).
Instant Final Rule Transferring Certain Enforcement Hotline Matters to the Dispute Resolution Service, Final Rule published April 26, 2010 (RIN: 1902-AE08).
Delegations to Office of Energy Policy and Innovation, Final Rule published June 9, 2010 (RIN: 1902-AE09).
Delegations to Office of Energy Policy and Innovation, Final Rule published July 26, 2010 (RIN: 1902-AE10).
Submissions to the Commission Upon Staff Intention to Seek an Order To Show Cause, Final Rule published May 21, 2008 (RIN: 1902-AD65).
Service of Interlocutory Appeals, Final Rule published August 14, 2009 (RIN: 1902-AD93).
Supplemental Standards of Ethical Conduct for Employees of the Federal Energy Regulatory Commission, Final Rule published January 10, 2011 (RIN: 1902-AE29).

[264] *Modification of Interchange and Transmission Loading Relief Reliability Standards and Electric Reliability Organization Interpretation of Specific Requirements of Four Reliability Standards*, Final Rule published July 28, 2008; Final Rule published March 24, 2009 (RIN: 1902-AD58).
Western Electricity Coordinating Council Regional Reliability Standard Regarding Automatic Time Error Correction, Final Rule published May 28, 2009 (RIN: 1902-AD67).
Electric Reliability Organization Interpretations of Specific Requirements of Frequency Response and Bias and Voltage and Reactive Control Reliability Standards, Final Rule published May 28, 2009 (RIN: 1902-AD69).

- Six rules involved updating fees, cost limits, or interest rates;[265]
- One rule provided a cost methodology;[266]
- Four rules mandated adoption of consensus business practices standards by the
  - Wholesale Gas Quadrant of the North American Energy Standards Board (2 rules) or the
  - Wholesale Electric Quadrant of the North American Energy Standards Board (2 rules);[267]
- Three rules affected posting, reporting, or filing requirements for natural gas companies;[268]
- Three rules were designed to increase the efficiency of energy markets;[269]
- One rule eased restrictions on access to critical energy infrastructure information;[270]

Mandatory Reliability Standards for the Calculation of Available Transfer Capability, Capacity Benefit Margins, Transmission Reliability Margins, Total Transfer Capability, and Existing Transmission Commitments and Mandatory Reliability Standards for the Bulk-Power System, Final Rule published December 8, 2009 (RIN: 1902-AD76).

Revised Mandatory Reliability Standards for Interchange Scheduling and Coordination, Final Rule published December 24, 2009 (RIN: 1902-AD80).

Version One Regional Reliability Standard for Resource and Demand Balancing, Final Rule published October 20, 2010 (RIN: 1902-AE05).

NERC is the Commission-certified electric reliability organization (ERO).

[265] *Annual Update of Filing Fees*, Final Rule published July 30, 2009 (RIN: 1902-AD85).
Annual Update of Filing Fees, Final Rule published February 25, 2010 (RIN: 1902-AD90).
Annual Update of Filing Fees, Final Rule published February 22, 2011 (RIN: 1902-AE27).
Natural Gas Pipelines; Project Cost and Annual Limits, Final Rule published February 24, 2010 (RIN: 1902-AD99).
Natural Gas Pipelines; Project Cost and Annual Limits, Final Rule published February 14, 2011 (RIN: 1902-AE28).
Interest Rates for Refunds, Final Rule published October 22, 2009 (RIN: 1902-AD98).

[266] *Sales of Electric Power to the Bonneville Power Administration; Revisions to Average System Cost*, Final Rule published September 15, 2009 (RIN: 1902-AD72).

[267] *Standards for Business Practices of Interstate Natural Gas Companies*, Final Rule published March 3, 2009 (RIN: 1902-AD68).

Standards for Business Practices for Interstate Natural Gas Pipelines, Final Rule published April 9, 2010 (RIN: 1902-AD87).

Standards for Business Practices and Communication Protocols for Public Utilities, Final Rule published December 3, 2009 (RIN: 1902-AD79).

Standards for Business Practices and Communication Protocols for Public Utilities, Final Rule published April 22, 2010 (RIN: 1902-AD94).

[268] *Pipeline Posting Requirements Under Section 23 of the Natural Gas Act*, Final Rule published December 2, 2008 (RIN: 1902-AD49).

Revised Filing Requirements for Centralized Service Companies Under the Public Utility Holding Company Act of 2005, the Federal Power Act, and the Natural Gas Act, Final Rule published December 28, 2009 (RIN: 1902-AD86).

Contract Reporting Requirements of Intrastate Natural Gas Companies, Final Rule published May 26, 2010 (RIN: 1902-AD70).

[269] *Wholesale Competition in Regions With Organized Electric Markets*, Final Rule published October 28, 2008 (RIN: 1902-AD39).

Preventing Undue Discrimination and Preference in Transmission Service, Final Rule published March 15, 2007 (RIN: 1902-AD02).

Promotion of a More Efficient Capacity Release Market, Final Rule published June 30, 2008 (RIN: 1902-AD48).

[270] *Critical Energy Infrastructure Information*, Final Rule published November 14, 2007 (RIN: 1902-AD27).

- One rule revised certification of qualifying status for a small power production or cogeneration facility;[271] and
- One rule mandated reliability standards for critical infrastructure protection.[272]

ANALYSIS

Regulatory Flexibility Analysis

FERC did not perform complete formal regulatory flexibility analysis. In most cases the FERC either certified that the rule would not have a significant economic impact on a substantial number of small entities or cited an exemption from the RFA. In a number of cases, however, FERC also discussed some type of measures to reduce burdens. A number of factors contributed to the certification.

No Notice of Proposed Rulemaking. Thirteen of the rules did not have or require an NOPR.[273] Rules that do not require an NOPR are exempt from RFA requirements. Many of these concerned matters of "internal agency procedure" or "a ministerial correction."

Demographics of the Regulation Population. FERC's jurisdiction does not generally include companies that operate only within one state. Very few interstate energy companies, which include electric power transmission and pipelines, are small. FERC consistently cited data that only six small electric companies (out of a total of about 130) and four small gas companies (out of a total of 125) under its jurisdiction meet the SBA definition of "small."[274] As one notice put it succinctly, "The Commission does not consider this [4 or 6] a substantial number." That line of reasoning applies to about half of FERC rules reviewed.[275]

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[271] *Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility*, Final Rule published March 30, 2010 (RIN: 1902-AD92).

[272] *Mandatory Reliability Standards for Critical Infrastructure Protection*, Final Rule published February 7, 2008 (RIN: 1902-AD77).

[273] These included:
- Four rules that delegated or transferred an authority or function,
- Two procedural rules,
- Three rules updated annual filing fees with the Commission, based on the Commission's costs,
- Two rules updated project cost and annual limits for natural gas pipelines blanket construction certificates,
- A rule updating a Federal Reserve interest rate incorporated by reference, and
- A rule concerning FERC employee ethics.

[274] The SBA size standard for electric utilities is four million MWh per year. For gas companies it was $6.5 million in annual revenues in the earlier regulations and $7 million in the later regulations.

[275] That includes:
- Six rules that concerned mandatory electricity transmission reliability standards;
- Four rules that mandated adoption of consensus business practices standards,
- Three rules that affected posting, reporting, or filing requirements for natural gas companies,
- Three rules that were designed to increase the efficiency of energy markets, and
- One rule on critical infrastructure information.

In several of these rules, the regulated population was a subset of all electric transmission companies or gas companies, and this subset included fewer (if any) small entities. Examples included:

- Holding companies of public utilities and/or natural gas companies;
- Regional transmission organizations (RTOs) and independent system operators (ISOs);
- Utilities participating in a Bonneville Power Administration program; and
- The Western Interconnection (the area of the Western Electricity Coordinating Council).

In one rule,[276] a commenter suggested that the FERC regulation would apply to a large number of retail entities and their regulators. FERC took the opportunity to buttress its interpretation of "substantial" – and to clarify that entities regulated by a state authority do not count – by citing two court decisions:

> In *Mid-Tex*, the court accepted the Commission's conclusion that, since virtually all of the public utilities that it regulates do not fall within the meaning of the term ''small entities'' as defined in the RFA, the Commission did not need to prepare a regulatory flexibility analysis in connection with its proposed rule.
>
> In… *American Trucking Associations, Inc. v. EPA*, the U.S. Court of Appeals for the District of Columbia… found that because the states, not EPA, had the direct authority to impose the burden on small entities, EPA's regulation did not have a direct impact on small entities.

Regulations Affecting Small Entities. Two of the FERC regulations did affect substantial numbers of small entities. In both cases, the FERC discussed measures that it had built into the rule to reduce the burden on small entities.

A rule on certification of qualifying facility status for a small power production or cogeneration facility (QFs) replaced an existing form with an electronic version. The FERC identified three types of regulatory changes that the rule made to minimize burdens:

- New information requirements were kept to a minimum to include:
  - Geographical coordinates – only if the facility had no street address, and
  - Information to determine applicability of EPAct 2005 cogeneration requirements.
- The form was clarified, streamlined, and accompanied by step-by-step instructions. The FERC believed that this was easier to complete than the old form and also "should substantially reduce the burden of complying with EPAct 2005 cogeneration requirements."
- Facilities with 1 MW capacity or less were exempt from electronic filing.

[276] *Wholesale Competition in Regions With Organized Electric Markets* (RIN: 1902-AD39).

The Critical Infrastructure Protection (CIP) Standards require "certain users, owners, and operators of the Bulk-Power System" to take measures to safeguard critical cyber assets.[277] For this purpose, FERC's jurisdiction extended to all the local utilities – many of them small - that would normally not concern it. FERC estimated that 632 small utilities (almost all of them municipalities and cooperatives) would be affected.

Like other reliability standards, CIP entailed registration with the ERO.[278] Registration itself was subject to size thresholds.[279] This rule also contained a criterion that the Commission-certified electric reliability organization (ERO) make a determination that a specific small entity has a material impact on the Bulk-Power System. In another rule in the same time frame, FERC adopted a variant definition of bulk-power system "which [FERC believed, would] reduce significantly the number of small utilities responsible for compliance with mandatory Reliability Standards."[280]

Provisions of the regulation included a sort of tiering. The initial issue for a utility is whether it has a critical cyber asset. All registered utilities having a material impact on the Bulk-Power System would have to determine this. FERC estimated that complying with the initial identification standard would be a relatively minor cost, and a registered entity that did not identify any critical cyber assets would have no further compliance obligations.

Utilities that did identify critical cyber assets "would have to expend significant amounts of resources on labor and technology to comply with the CIP Reliability Standards."[281] FERC suggested two approaches to mitigating these costs:

- FERC noted that "small entities could choose to collectively select a single consultant to develop model software and programs to comply with the CIP Reliability

[277] Individual standards addressed:
- Critical Cyber Asset Identification,
- Security Management Controls,
- Personnel & Training,
- Electronic Security Perimeters,
- Physical Security of Critical Cyber Assets,
- Systems Security Management,
- Incident Reporting and Response Planning, and
- Recovery Plans for Critical Cyber Assets.

[278] The North American Electric Reliability Corporation (NERC) is the Commission-certified ERO.

[279] Registration thresholds included the following:
- "The ERO registers only those distribution providers or load serving entities that have a peak load of 25 MW or greater and are directly connected to the bulk electric system or are designated as a responsible entity as part of a required under-frequency load shedding program or a required under-voltage load shedding program."
- "The ERO registers only individual [generator] units of 20 MVA or greater that are directly connected to the bulk electric system [and] generating plants with an aggregate rating of 75 MVA or greater."

[280] One commenter estimated that this step reduced the number of power utilities subject to the Reliability Standard "from nearly 2,000 to approximately 326" (of which an estimated 296 were small).

[281] In the Information Collection Statement, the FERC tentatively estimated that municipal and cooperative utilities subject to all of the standards individually would incur a burden of 1,000 person-hours.

Standards on their behalf [which] could significantly reduce the costs that would be incurred if each company would address these issues independently."

- FERC "also noted that small entities could join a joint action agency or similar organization, which could accept responsibility for compliance with mandatory Reliability Standards on behalf of its members and also may divide the responsibility for compliance with its members."

Several commenters expressed concern about impacts on small entities and questioned whether FERC had paid enough attention to supporting compliance by small entities. Several commenters made suggestions, which the FERC discussed but generally did not adopt – believing that the suggestions were out of scope, did not contribute more than the options suggested, or could create vulnerabilities. FERC directed the ERO to address some concerns through the Reliability Systems development process and to develop guidance for compliance and provide information that would be helpful.

FERC reaffirmed its certification that the rule would not have a significant impact on a substantial number of small entities. It is not clear how the FERC could determine that a substantial number of entities would have to proceed beyond the identification standard, but the FERC may well have made as many accommodations as a full regulatory flexibility analysis would have produced.

Assessment

The interstate nature of the industry that the FERC regulates results in very few small entities being under FERC jurisdiction for most rules. The FERC did not usually take regulatory flexibility analysis beyond the automatic certification stage. When it did it showed a reasonable understanding of the numbers of small entities affected – if not a precise industry profile – and a good enough understanding of impacts to be able to develop and consider alternative measures. Electronic filing is an example. For most businesses, this is likely to represent an efficiency, but some (generally very small) entities do not have the capacity, which the FERC acknowledged. Measures such as alternative reporting options, thresholds and waivers also appeared in other regulations, suggesting that the FERC was mindful of their value. In the one case where impacts on small entities were significant, the FERC also left the door open for possible further burden reduction. The ability to apply regulatory flexibility principles that it usually does not need speaks well of the FERC.

8. Federal Housing Finance Agency

OVERVIEW

The Federal Housing Finance Agency (FHFA) is a new agency created by the Housing and Economic Recovery Act of 2008. FHFA's mission is to provide effective supervision, regulation and housing mission oversight of government-sponsored enterprises in the secondary mortgage markets (GSEs) – the Federal Home Loan Mortgage Corporation (Fannie Mae), the Federal National Mortgage Association (Freddie Mac), and the 12 Federal Home Loan Banks. The Housing and Economic Recovery Act combined the staffs and consolidated the power and regulatory authority of:

- The Office of Federal Housing Enterprise Oversight (OFHEO), whose regulations address capital standards and limitations on the assets, activities, and risk exposures of the two housing GSEs.
- The Federal Housing Finance Board (FHFB), which had regulatory oversight over the Federal Home Loan Banks, and
- The GSE mission office at the Department of Housing and Urban Development (HUD).

REGULATIONS

During the study period, the FMC promulgated 17 final rules that were listed in the Unified Agenda. All of these directly affected some or all of the GSEs:

- Five rules pertained to integrating the Federal Housing Finance Board into the FHFA.[282]
- Two rules set financial requirements for the GSEs;[283]
- Six rules involved management, procedures, and policies of the GSEs;[284] and

[282] *Federal Home Loan Bank Housing Associates, Core Mission Activities and Standby Letters of Credit*, Final Action published April 3, 2010 (RIN: 2590-AA33).

Federal Home Loan Bank Directors' Compensation and Expenses, Final Action published April 5, 2010 (RIN: 2590-AA31).

Board of Directors of Federal Home Loan Bank System Office of Finance, Final Action published May 3, 2010 (RIN: 2590-AA30).

Supplemental Standards of Ethical Conduct for Employees of the Federal Housing Finance Agency, Final Action published August 27, 2010 (RIN: 2590-AA02).

Federal Home Loan Bank Liabilities, Final Action published April 4, 2011 (RIN: 2590-AA36).

[283] *Portfolio Holdings*, Interim Final Rule published January 30, 2009; Final Action published December 28, 2010 (RIN: 2590-AA22).

Minimum Capital-Temporary Increase, Final Action published March 20, 2011 (RIN: 2590-AA01).

[284] *Reporting of Fraudulent Financial Instruments*, Final Action published January 27, 2010 (RIN: 2590-AA11).

Office of Ombudsman, Final Action published February 10, 2011 (RIN: 2590-AA20).

Debt Collection Act, Final Action published March 20, 2011 (RIN: 2590-AA15).

2010 to 2011 Enterprise Affordable Housing Goals; Enterprise Book-Entry Procedures, Final Action published September 14, 2010 (RIN: 2590-AA26).

- Four rules concerned programs, goals, and procedures of the Federal Home Loan Banks.[285]

ANALYSIS

Regulatory Flexibility Analysis

In 15 of the rules, the FHFA certified categorically that the rule would not have a significant economic impact on a substantial number of small businesses. In almost all of these cases, the basis for the certification was the fact that Fannie Mae, Freddie Mac, and Federal Home Loan Banks “do not come within the meaning of small entities” as defined in, or for purposes of, the Regulatory Flexibility Act. Certification was automatic.

In two rules, the FHFA hedged slightly, saying that the rule was “not likely” to have such an effect. In these notices, the FHFA identified some entities beyond the agencies that might be affected but stated that their number was “not… substantial” or “limited.” The circumstances of the cases suggest that there would not have been significant adverse impacts either:

- The *Equal Access to Justice Act* rule to established procedures for the submission and consideration of applications for awards of fees and other expenses by prevailing parties in adjudications against FHFA. There are not many such parties, and the procedures likely benefitted them.
- The *Debt Collection Act* rule affected persons or entities that owed debts to the FHFA (or some other agency). Payment of debt and related expenses are not normally considered impacts for purposes of regulatory analysis.

Assessment

The FHFA is essentially exempt from the RFA and made no significant attempt to do analysis beyond a boilerplate certification. The FHFA did, however, manage to note instances where their rules would have direct effects on some non-federal entities. In these cases, it refrained from using its boilerplate certification and at least considered whether the numbers of entities involved were small.

Equal Access to Justice Act Implementation, Final Action published October 22, 2010 (RIN: 2590-AA29).
Minority and Women Inclusion, Final Action published December 28, 2010 (RIN: 2590-AA28).

[285] *Members of the Banks, Amendments — Community Development Financial Institutions Membership Eligibility*, Final Action published January 5, 2010 (RIN: 2590-AA18).

Affordable Housing Program Amendments: Federal Home Loan Bank Mortgage Refinancing Authority, Interim Final Rule published October 17, 2008; Second Interim Final Rule published August 8, 2009; Final Action published May 28, 2010 (RIN: 2590-AA04).

Use of Community Development Loans by CFIs To Secure Advances; Secured Lending by FHL Banks to Members and Their Affiliates; Transfer of Advances and New Business Activity Regulations, Final Action published December 9, 2010 (RIN: 2590-AA24).

Federal Home Loan Bank Housing Goals, Final Action published December 27, 2010 (RIN: 2590-AA16).

9. Federal Maritime Commission

OVERVIEW

The Federal Maritime Commission (FMC) is an independent regulatory agency responsible for the regulation of oceanborne transportation in the foreign commerce of the U.S. The Federal Maritime Commission:

- Monitors activities of ocean common carriers, marine terminal operators, conferences, ports, and ocean transportation intermediaries (OTIs) who operate in the U.S. foreign commerce to ensure they maintain just and reasonable practices, and oversees the financial responsibility of passenger vessel operators;
- Maintains a trade monitoring and enforcement program designed to assist regulated entities in achieving compliance, and to detect and appropriately remedy malpractices and violations set forth in section 10 of the Shipping Act;
- Monitors the laws and practices of foreign governments which could have a discriminatory or otherwise adverse impact on shipping conditions in the U.S;
- Enforces special regulatory requirements applicable to ocean common carriers owned or controlled by foreign governments (controlled carriers);
- Processes and reviews agreements and service contracts;
- Reviews common carriers' privately published tariff systems for accessibility and accuracy;
- Issues licenses to qualified OTIs in the U.S. and ensures all maintain evidence of financial responsibility; and
- Ensures passenger vessel operators demonstrate adequate financial responsibility for casualty and non-performance.

REGULATIONS

During the study period, the FMC promulgated five final rules, one of which concluded a long-term action.

- Three rules were exempt from the APA notice and comment requirements – and had no NOPR – because they pertained to FMC management structure,[286] security of sensitive agency information,[287] and other agency practices and procedures.[288]

[286] *Federal Maritime Commission Reorganization*, Final Rule published May 26, 2010 (RIN: 3072-AC39).

[287] *Information Security Program*, Final Rule published February 24, 2011 (RIN: 3072-AC40).

[288] *Amendments to Commission's Rules of Practice and Procedure*, Final Rule published February 24, 2011 (RIN: 3072-AC41).

- One rule repealed an exemption from a statutory waiting period after filing a marine terminal agreement (MTA) out of concern that the immediate anti-trust immunity the exemption granted could have anticompetitive consequences.[289]
- One rule marked the end of a long-term action concerning Japanese port restrictions and requirements. The FMC had adopted a rule imposing countervailing costs, which was subsequently withdrawn in favor of reporting requirements on five oceangoing common carriers (two American and three Japanese).[290]

ANALYSIS

Regulatory Flexibility Analysis

These rules did not raise significant regulatory flexibility issues; all were either exempt or had a virtually automatic certification. In most cases, however, the FMC did not make even these easy points.

- In the MTA rule, the FMC certified that there would not be a significant impact on a substantial number of small businesses because the regulated entities that would be affected – marine terminal operators and ocean common carriers – did not qualify as small under SBA guidelines.
- In the port restrictions rule, the FMC made no such certification, although it was entirely clear that only large ocean carriers were affected.
- In the three rules that were exempt from the RFA, the FMC did not bring up the RFA or mention the exemption.

Assessment

The FMC is lax in tying up the loose ends of regulatory flexibility analysis. This may be from lack of practice in cases where attention to detail and analytical procedure really matter. If marine terminal operators and ocean common carriers (some of them foreign) are all large, it appears that a considerable majority of the FMC's regulations may not require much RFA scrutiny.

[289] *Repeal of Marine Terminal Agreement Exemption*, Final Action published December 10, 2009 (RIN: 3072-AC35). Commenters, including representatives of small business, shared these concerns and supported this action.

[290] *Port Restrictions and Requirements in the United States/Japan Trade*, Final Rule published March 4, 1997; Final Rule removed June 7, 1999; Requirement for reporting revised August 15, 2001; Reporting requirements terminated January 26, 2011 (RIN: 3072-AB97).

10. Federal Mine Safety and Health Review Commission

OVERVIEW

The Federal Mine Safety and Health Review Commission (FMSHRC) is an independent adjudicative federal agency that provides administrative trial and appellate review of legal disputes arising under the Mine Act of 1977. Under the Mine Act, the U.S. Department of Labor issues regulations covering health and safety in the nation's mines. Mine Safety and Health Administration (MSHA) mine inspectors enforce these regulations by issuing citations and orders to mine operators.

The FMSHRC is an not a federal court; was established as an independent agency to ensure its impartiality in providing administrative review of MSHA's actions. The FMSHRC functions much like a court, however, and issues decisions – including determinations of appropriate penalties - after trial-like hearings conducted by FMSHRC administrative law judges. Certain FMSHRC ALJ decisions are reviewed by the Review Commission. Decisions of the Review Commission can be appealed to the United States Court of Appeals.

REGULATIONS

The Mine Safety and Health Administration’s regulations are codified in Title 30 of the Code of Federal Regulations, Part 1 to 199. The FMSHRC itself does not regulate mining or enforce the Mine Act. It is concerned solely with the adjudication of disputes under the Mine Act.

11. Federal Reserve System

OVERVIEW

Structure

The Federal Reserve System,[291] which was created by the Federal Reserve Act in 1913, is an unusual mixture of public and private elements.

Board of Governors. The Board of Governors, which is the national component of the Federal Reserve System, provides the leadership for the System. Guiding monetary policy action and analyzing domestic and international economic and financial conditions are among the responsibilities of the Board. The Board's most important responsibility is participating in the Federal Open Market Committee (FOMC), which conducts our nation's monetary policy

The Board also exercises broad supervisory control over the financial services industry, administers certain consumer protection regulations, and oversees the nation's payments system. The Board oversees the activities of Reserve Banks, sets reserve requirements for depository institutions, and approves changes in discount rates recommended by Reserve Banks.

Federal Reserve Banks. A network of 12 regional Federal Reserve Banks and 25 branches make up the Federal Reserve System under the general oversight of the Board of Governors. Reserve Banks are the operating arms of the central bank - serving banks, the U.S. Treasury, and, indirectly, the public. A Reserve Bank is often called a "banker's bank," storing currency and coin, and processing checks and electronic payments. Reserve Banks supervise commercial banks in their regions. They also handle the Treasury's payments, sell government securities and assist with the Treasury's cash management and investment activities.

Member Banks. Approximately 38 percent of the 8,039 commercial banks in the United States are members of the Federal Reserve System. National banks must be members; state-chartered banks may join if they meet certain requirements. The member banks are stockholders of the Reserve Bank in their District and as such, are required to hold 3 percent of their capital as stock in their Reserve Banks. Banks cannot sell or trade their Fed stock.

Other Depository Institutions. In addition to the approximately 3,000 member banks, about 17,000 other depository institutions provide checkable deposits and other banking services. These depository institutions include nonmember commercial banks, savings banks, savings and loan associations, and credit unions. Although not formally part of the Federal Reserve System, these institutions are subject to System regulations, including reserve requirements, and they have access to System payments services.

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[291] This overview is based primarily on information from the Federal Reserve System website.

Activities

Banking Supervision & Regulation. The Federal Reserve System supervises and regulates a wide range of financial institutions and activities. The Federal Reserve works with other agencies to ensure that financial institutions safely manage their operations and provide fair and equitable services to consumers. Bank supervision involves monitoring and examining the condition of banks and their compliance with laws and regulations.

Several federal and state authorities regulate banks along with the Federal Reserve. The Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision (OTS) and the banking departments of various states also regulate financial institutions. The OCC charters regulates and supervises nationally chartered banks. The FDIC, the Federal Reserve and state banking authorities regulate state-chartered banks. Bank holding companies and financial services holding companies, which own or have controlling interest in one or more banks, are also regulated by the Federal Reserve. The OTS examines federal and many state-chartered thrift institutions, which include savings banks and savings and loan associations.

Consumer Protection. The Federal Reserve System administers consumer protection laws related to the banking system. Banks are required to provide customers clear and accurate information about services - such as savings accounts, loans and credit cards – and related requirements, rates, and fees. A bank's brochure for a savings account, for example, should include information on any minimum balance required, monthly service fee and the average percentage yield. In addition, the Truth in Lending Act requires banks to disclose the finance charge and the annual percentage rate so that a consumer can compare the prices of credit from different sources. It also limits liability on lost or stolen credit cards. These laws ensure that consumers and banks make decisions based on the same information.

Community Reinvestment. In accordance with the Community Reinvestment Act, the Federal Reserve reviews a bank's attempt to meet the credit and development needs of its entire community, sometimes including its efforts to lend in including low- and moderate- income areas. When deciding whether to approve an application for a bank acquisition or merger or for the formation of a bank holding company, the Federal Reserve takes into account an institution's performance under the CRA.

REGULATIONS

The Board of Governors of the Federal Reserve System promulgated 18 distinct rules in the study period. Six of these were joint rules with other regulatory agencies. Of these rules:

- Seven (the majority related to the Truth in Lending Act) had disclosure or notification as the principal element, although some of these involved some degree of change in the practice that was disclosed;[292]

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[292] *Regulation V: Fair Credit Reporting Risk-Based Pricing*, Final Rule published January 10, 2010 (RIN: 7100-AD22). This rule was issued jointly with the Federal Trade Commission.

- Two expanded activities that qualified for Community Reinvestment Act consideration;[293]
- Two were essentially accounting matters;[294] and
- The other seven dealt with diverse topics, including:
  - Restrictions on credit card penalties and fees,[295]
  - Registration of mortgage originators under the S.A.F.E. Act,[296]
  - Modification of capital guidelines and risk-weight requirements to encourage participation in HUD's Making Home Affordable Program,[297]
  - Extensions for compliance dates with respect to another rule,[298]
  - Establishment of term accounts in the Federal Reserve System,[299]

Regulation Z: Truth in Lending Act Private Education Loans, Final Rule published August 14, 2009 (RIN: 7100-AD38).

Regulation Z: Truth in Lending Credit Card Fees and Interest Rate Changes, Final Rule published June 29, 2010. (RIN: 7100-AD36).

Regulation Z: Truth in Lending Credit Card Fees and Interest Rate Changes, Final Rule published June 29, 2010 (RIN: 7100-AD49).

Regulation Z: Truth in Lending Disclosures for Closed-end Mortgages, Final Rule published September 24, 2010 (RIN: 7100-AD33).

Regulation Z: Truth in Lending Consumer Notification of Mortgage Transfer, Final Rule published October 18, 2010 (RIN: 7100-AD46).

Regulation E: Electronic Funds Transfers, Final Rule published April 1, 2010; Final Rule published October 29, 2010 (RIN: 7100-AD47).

[293] *Regulation BB - Community Reinvestment Act*, Final Action published October 4, 2010 (RIN: 7100-AD39). Other agencies participating in this rulemaking included by the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (Treasury), and the Office of Thrift Supervision (Treasury).

Regulation BB: Proposed Rule to Revise CRA Regulations to Support Activities Under the Neighborhood Stabilization Program, Final Rule published December 20, 2010 (RIN: 7100-AD50). Other agencies participating in this rulemaking included by the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (Treasury), and the Office of Thrift Supervision (Treasury).

[294] *Regulation H and Y: Deduction of Goodwill Net of Associated Deferred Tax Liability*, Final Rule published December 30, 2008 (RIN: 7100-AD29). Other agencies participating in this rulemaking included the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (Treasury), and the Office of Thrift Supervision (Treasury).

Regulation D: Reserve Requirements of Depository Institutions, Final Rule published October 28, 2010 (RIN: 7100-AD57).

[295] *Regulation E: Electronic Fund Transfers Overdraft Fee for ATM Withdrawals and One-time Card Transactions*, Final Rule published November 17, 2009 (RIN: 7100-AD27).

[296] *Regulation H--Registration of Mortgage Loan Originators*, Final Rule published July 28, 2010 (RIN: 7100-AD32). Other agencies participating in this rulemaking included the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Farm Credit Administration (FCA), the Office of the Comptroller of the Currency (Treasury), and the Office of Thrift Supervision (Treasury).

[297] *Regulation H & Y: Risk-Based Capital Guidelines; Capital Adequacy Guidelines; Capital Maintenance; Capital—Residential Mortgage Loans Modified Pursuant to the Making Home Affordable Program*, Final Rule published December 21, 2009 (RIN: 7100-AD41). Other agencies participating in this rulemaking included by the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (Treasury), and the Office of Thrift Supervision (Treasury).

[298] *Regulation Y: Conformance Period for Entities Engaged in Prohibited Proprietary Trading or Private Equity Fund or Hedge Fund Activities*, Final Rule published February 14, 2011 (RIN: 7100-AD58).

- SEC registration for credit rating agencies,[300] and
- Internal agency procedures related to information requests under the Privacy Act.[301]

These rules can also be classified by the circumstances or objectives surrounding their promulgation:

- Ten rules[302] were promulgated specifically to implement requirements of the provisions of a recent statute;
- One rule[303] restricted practices but did not have a recent statute as the proximate cause;
- Three rules[304] expanded options of financial institutions (and were not mandatory), with the objective of benefitting distressed parts of the economy;
- Two rules[305] expanded options for financial institutions within the banking system;
- One rule[306] potentially expanded options for credit rating agencies; and
- One rule[307] was a simple housekeeping matter.

Federal Reserve regulations are somewhat unusual among independent regulatory agencies in that their scope can be much broader than the population that the agency directly regulates or supervises. Many Federal Reserve regulations apply to all depository institutions, not just to banks that are members of the Federal Reserve System. Some – particularly the Truth in Lending rules related to credit – apply to non-depository financial institutions (e.g., mortgage brokers) and to wide segments of the economy that happen to provide credit, such as retail trade, services, and utilities.

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[299] *Regulation D: Reserve Requirements of Depository Institutions Policy on Payment System*, Final Rule published May 5, 2010 (RIN: 7100-AD48).

[300] *Regulation A: Extensions of Credit by Federal Reserve Banks*, Final Rule published December 12, 2009 (RIN: 7100-AD44).

[301] *Rules Regarding Access and Personal Information Under the Privacy Act of 1974*, Final Rule published October 18, 2010 (RIN: 7100-AD24).

[302] This included all seven disclosure/notification rules and all five rules issued under the Truth in Lending Act.

[303] This rule limited the ability of a financial institution to assess an overdraft fee for paying ATM withdrawals and one-time card transactions.

[304] This included both rules related to CRA consideration and the rule related to the HUD program.

[305] These included provision of term accounts and an option for handling deduction of goodwill.

[306] This rule set an eligibility requirement – registration with the SEC as a "nationally recognized statistical rating agency" – for providing credit ratings for the Term Asset-Backed Securities Loan Facility.

[307] This rule made an annual indexing adjustment for reserve requirements.

ANALYSIS

Regulatory Flexibility Analysis

Exemption. The Board of Governors identified two rules as being exempt from RFA requirements.

- One rule had not had a NPRM and, if anything, benefitted the affected institutions;[308] and
- One rule, which adjusted reserve requirements, was exempt from the RFA definition of "rule."

Certification. The Board certified that five rules would not have a significant impact on a substantial number of small entities:

- One rule applied to internal agency procedures, not to business;
- One rule was elective and did not require the computational procedure that it allowed;
- One rule "does not require a financial institution to engage in these [CRA] activities;"
- One rule allowed several "potentially less burdensome alternatives" for compliance but did not address costs in the regulatory flexibility analysis;[309] and
- In one rule (S.A.F.E. Act) cited alternatives that had been adopted but did not explicitly discuss costs.

In one rule, the Board stated no conclusion about impacts, although this rule (the other CRA rule) clearly qualified for certification.

Certification is a checkpoint in regulatory flexibility analysis. If an agency can make this certification, the analysis ends; if the agency cannot make the certification, the analysis moves on to a new level of detail. The Board did not follow this pattern. Of the five rules certified (above), for example, the last two reported a FRFA.

In six other rules, the Board went through steps of a regulatory flexibility analysis after having stated a belief (4 rules) or an expectation (2 rules) that there would not be a significant impact on a substantial number of small entities. In the two "expect" instances, the Board referenced an IRFA and a request for comments. In three cases the basis for the belief (and certification) was clearly stated at the outset and was known in advance (two rules applied very narrowly, and one offered an extension of an exemption). Four of the analyses provided no additional findings to support a conclusion of no significant impacts on a substantial number of

[308] This rule eased capital requirements and risk-weight requirements to encourage participation in a HUD program.

[309] The Paperwork Reduction Act estimated an average 40 hours for start-up and five hours per month for implementation. Since costs were mostly related to staff (training) or loan volume, they probably were roughly proportional to entity size and relatively small for smaller entities.

small entities,[310] and in one case an assumption about zero costs played a role in the findings. Only two rules drew comments (neither one that had mentioned requests for comments). None of these analyses discussed regulatory flexibility alternatives. These discussions were strikingly uninformative, and the analysis often was haphazard. These rules presented a pattern of weak analyses, most of which did no more than a certification with a short crisp explanatory paragraph would have done.

Need and Objectives. Discussion under this heading often began with the general objectives of the statute. Often the discussion really went no farther.[311] Sometimes the Board also cited statutory authority and/or summarized provisions of the rule. There were some clear statements of objective,[312] but these were generally on rules that were not directly implementing statutes. While about half of the rules were explicitly made to implement specific provisions of statutes, it was generally not clear whether and how the regulation went beyond the actual requirements of the statute. There was no sense of how much leeway for regulatory alternatives there might be.

Issues in Comments. The Board generally interpreted "comments" narrowly for purposes of regulatory flexibility analysis. For example: "The Board received no comments specifically addressing the initial regulatory flexibility analysis." As in that instance, the Board often reported receiving no comments. The lack of comments was often cited in support of the finding of no significant impacts on small businesses. The Board also cited the lack of information or data submitted in comments as a reason for not going into greater depth in its analysis. In a some cases, the Board accepted commenter's suggestion. In several cases where comments had contained objections, the Board (without going into detail) responded that the provisions to which the commenters objected were required by statute.

There was only one rule where the Board responded to comments in detail. In that case, SBA Advocacy submitted comments. The Board's responses are discussed further below.

Small Entities. The Board consistently made estimates of the number of small entities affected. Often this included detail such as the number of financial institutions in classes that might be affected by the rule; the total number and the number of small entities in a class; and the number of small entities affected by the rule.[313]

Where possible, the Board made use of available data, such as the number of banks it supervised or the number of entities filing a particular report. In some cases, an estimate from another rulemaking was cited. In some cases various sources were used, and the estimates were

[310] In three rules the estimated number of affected small entities exceeded 10,000, and in a fourth it was unknown but probably even larger.

[311] For example: "The final rule implements new substantive requirements and updates to disclosure provisions in the Credit Card Act, which establishes fair and transparent practices relating to the extension of open-end consumer credit plans."

[312] For example: "It is desirable to expand eligibility for favorable CRA consideration to NSP-eligible areas and activities in order to provide financial institutions incentives to leverage NSP funding by providing loans, investments, and services in areas with high foreclosure or vacancy rates."

[313] In a disclosure rule on mortgages, for example, the number of small entities extending mortgage credit was estimated.

described as “tentative.” In two cases, the percentage of small entities affected was estimated by a rough percentage estimate. In some regulations, (e.g., a rule affecting any business that might issue a gift card), the Board faced a herculean task, and it produced an estimate that was so broad that it was almost meaninglessly.[314]

While the estimates were nominally precise, the Board showed a limited inclination to refine their accuracy. In one rule, the IRFA contained two estimates of the number of mortgage brokers – 17,041 (Census data) and 53,000 (National Association of Mortgage Brokers estimate) – as well as the Board’s own estimate,[315] and simply published them all with no attempt at reconciliation. In this case, the Board noted “the SBA also commented that the Board failed to provide sufficient information about the number of small mortgage brokers that may be impacted by the rule.” The Board responded that the RFA required it to provide “*where feasible*, an estimate of the number of small entities to which the proposed rule will apply” (emphasis in the original).

In a sense, the accuracy of the estimates was not very important. When tens of thousands of small entities are affected, there is no question about the “substantial number” prong of the certification test or that the impacts of the rule are widespread. The key question then becomes the size of impact on an individual small entity. Where impacts were not easily identifiable as small, the analyses were weak in this area, as there was rarely any quantitative analysis.

Reporting, Recordkeeping, and Other Compliance Requirements. A number of the rules had no compliance requirements – either inherently or because they were elective[316] – and some conferred positive benefits. The Board identified this sort of situation. In one case, the Board noted that the rule really did not apply to small businesses.[317]

In other cases, the Board identified the type of requirements (reporting, recordkeeping, or other). In one rule, the Board’s discussion delimited the burden to “providing the disclosure itself.” In most instances, the discussion generally recapitulated the provisions of the rule (among other topics) and provided general descriptions of such activities, but gave only a general operational description of compliance activities and their scope and did not estimate costs.

[314] “The Small Business Administration (SBA) has defined a small business as one whose annual receipts do not exceed $7 million or who have fewer than 500 employees. The Board expects that well over 90 percent of all businesses qualify as small businesses under the SBA’s standards. Consequently a very large number of small entities could be subject to the final rules to the extent that they issue or sell gift certificates, store gift cards, or general-use prepaid cards.”

[315] The Board estimated that mortgage credit was extended by approximately:

- 8,848 small depository institutions,
- 1,507 small non-depository institutions, and
- 17,041 mortgage brokers.

[316] This sort of situation characterized three rules certified as having no significant impact, four rules that the Board believed had no significant impact, and the two rules where an exemption from the RFA was claimed.

[317] “As a general matter, the Board’s general risk-based capital rules apply only to a bank holding company that has consolidated assets of $500 million or more. Therefore, the changes to the Board’s capital adequacy guidelines for bank holding companies will not affect small bank holding companies.”

> Some small entities will be required, among other things, to alter certain business practices, develop new business models, re-train staff, and reprogram operational systems to ensure compliance [but] the effect of the final rule on small entities is unknown. The final rule could affect how loan originators are compensated and will impose certain related recordkeeping requirements on creditors. The precise costs that the final rule will impose on mortgage creditors and loan originators are difficult to ascertain.

The board compounded this lack of clarity in requirements by its inability to provide an estimate of baseline practices. The following (which appeared *verbatim* in preambles to two rules) is illustrative:

> The Board notes that the precise costs to small entities to conform their open-end credit disclosures to the final rule and the costs of updating their systems to comply with the rule are difficult to predict. These costs depend on a number of factors that are unknown to the Board, including, among other things, the specifications of the current systems used by such entities to prepare and provide disclosures and administer credit card accounts, the complexity of the terms of the credit card products that they offer, and the range of such product offerings.

While such variability is common, this is the sort of situation where some type of sensitivity analysis using representative entities would be useful in assessing the significance of impacts, and there was none.

In one rule, SBA Advocacy commented the Board had not adequately assessed impacts of the proposed rule or proved that there was insufficient information about the impact for public comment. The Board stated:

> The RFA… requires the IRFA to contain certain information including 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… The RFA does not require that the Board be able to project the specific dollar amount that a rule will cost small entities in order to implement the rule; rather it requires a description of the projected impact of the rule on small entities and of reporting, recordkeeping, or compliance requirements… Accordingly, the Board described the projected impact of the proposed rule and sought comments from small entities themselves on the effect the proposed rule would have on their activities. First, the Board described the impact of the proposed rule on small entities by describing the rule's proposed requirements in detail throughout the supplementary information for the proposed rule. Second, the Board described the projected compliance requirements of the rule in its IRFA, noting the need for small entities to comply with recordkeeping requirements, and update systems and loan origination practices.[318]

[318] Regulation Z: Truth in Lending Disclosures for Closed-end Mortgages, *Response to the SBA* (75 FR 58531).

Most of the Board's FRFAs contained no more information about impacts than this. The Board provided an actual cost estimate for only one rule.

Partial cost estimates were sometimes available in the Paperwork Reduction Act analysis, where the Board tended to base its estimates on the number of small banks it supervised. Two factors, however, substantially limited the usefulness of the PRA estimates.

- **Rounding.** When 40 person-hours appears in several diverse rules as the estimate for revision of policies and documents and related training – as well as twice in the same rule for activities under different sections – the estimate's accuracy seems questionable.
- **Averaging.** Averages for all sizes of entity and are useless for assessment on impacts on small entities. [319] Disproportionate impacts on small entities usually occur because diseconomies of small scale heighten impacts on very small businesses and/or some small businesses have to undertake more (or more costly) compliance activities.[320] Averaging obscures these differences in impacts,

Developing cost estimates has a variety of analytical benefits. The process helps an agency think through the impacts of the rule, including which small entities may be most seriously affected. Cost estimates are quite helpful in conveying the scope of the rule. Where costs are non-trivial, estimating them to some extent is an important tool for determining whether the economic impact will be significant. When a large number of entities are affected, an understanding of costs is critical for certification. The lack of cost information may be one reason that the Board only stated a belief about significant impacts in a majority of the rules.

Cost estimates also serve as grist for discussion. The Board stated repeatedly that there were no comments about the regulatory flexibility analysis. When one looks at the treatment of costs in these IRFAs (or FRFAs), however, there really is not a lot to comment about – except the lack of substance to comment about.

Minimization of Economic Impact on Small Entities. The Board believed or concluded that four of the rules (three of them truth-in-lending disclosure rules) would have a significant impact on a substantial number of small entities. Three of these rules incorporated explicit measures to minimize burdens:

- In two rules the Board developed (and in one case subsequently simplified) optional model forms "which can be used to ease compliance with the final rule."
- In one rule, the Board extended the rule's effective date for 100 days after the underlying Act went into effect.
- In one rule, the Board permitted institutions to rely on merchant, other institution, or other third party's coding of a transaction as a one-time or recurring debit card transaction.

[319] PRA estimates are intended to be averages over the whole population of respondents and are thus generally inappropriate for regulatory flexibility analysis, but in a most rules the Board made no other cost estimates.

[320] This phenomenon occurs both when using industry-wide average data to assess impacts on small businesses and when using average data on all small businesses (by SBA standards) to assess impacts on very small businesses (e.g., smaller than the SBA standard by a factor of 5 or 10).

- In one rule, the Board adopted (as commenters suggested) an alternative that permitted loan originator compensation to be based on loan amount.

In the fourth rule, the Board offered vague generalities:

> The Board sought to avoid imposing additional burden, while effectuating the statute in a manner that is beneficial to consumers… The Board did not receive any comment on any significant alternatives, consistent with the Credit Card Act, which would minimize impact of the final rule on small entities.

The S.A.F.E. Act. The S.A.F.E. Act rule provided the most quantitative analysis. Ironically, this was one of the rules that the Board certified as not having a significant impact on a substantial number of small entities.

The S.A.F.E. Act rule was a joint effort by six agencies. The rule required persons who act as a residential mortgage loan originators to be registered and required institutions that employ them to develop a policy and provide supervision. A *de minimis* provision provided a partial exemption from registration for certain employees,[321] and thus a substantial reduction in burden for their employers. Since the *de minimis* provision was only a partial exemption, institutions that originate mortgages still incurred compliance costs, but they were lower than costs of mortgage originators that did not qualify. Because of the structure of the partial exemption, the institutions that qualified tended to be among the smallest.

The Board produced an estimate of the number of small state member banks[322] affected (433) and an aggregate dollar estimate of compliance cost ($7.6 million). A thorough analysis would differentiate between small entities that were subject to *de minimis* requirements and those that were subject to full requirements and between initial (first-year) and ongoing (out-year) costs. The Board made neither distinction.[323] On a per-entity basis, the Board's estimate was comparable to the aggregate estimates of the OCC and OTS, and at the lower end for estimates of costs of entities subject to full regulation.[324]

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[321] The exception applied to any employee "who has never been registered or licensed through the Registry as a mortgage loan originator if during the past 12 months the employee acted as a mortgage loan originator for 5 or fewer residential mortgage loans."

[322] For purposes of this rule, federal member banks were considered to be under FDIC jurisdiction.

[323] For comparison:

- The FDIC analysis made both distinctions,
- The NCUA did not estimate compliance costs,
- The FCA did not do a regulatory flexibility analysis on the grounds that the system is one large entity, and
- The two executive agencies (OCC and OTS) differentiated between entities subject to *de minimis* requirements and those subject to full requirements, but only in response to SBA comments.

[324] The Board's aggregate cost estimate worked out to $17,552 per small bank. By comparison:

- OCC's aggregate cost estimate was $18,600 per small national bank and $25,000 for full-requirement banks,
- OTS's aggregate cost estimate was $17,085 per small savings association and $17,441 for full-requirement savings associations, and
- FDIC's estimate for full-requirement banks was $17,379 for set-up and $7,436 annually.

The OCC and FDIC concluded that the costs of full compliance were not significant; the OTS concluded that they were significant.[325] In supporting its conclusion that costs were not significant, the Board stated that the aggregate cost was less than one percent of aggregate revenues of the affected banks. The aggregate cost that the Board reported ($7.6 million), however, was actually 3.2 percent of the aggregate revenue that the Board reported ($2.4 billion). For full-requirement banks, it appears that these costs were significant.

During the rulemaking, as a result of the comments and the subsequent analysis, the agencies made a number of modifications to address the economic impact on small entities:

- A second requirement for a *de minimis* exception – a threshold of mortgage loans originated for the institution – was removed;
- Detailed requirements for the written policies and procedures were trimmed;
- The amount of information required from a mortgage loan originator was reduced; and
- Loan modification actions and loss mitigation efforts were explicitly excluded from the definition of loan origination.

Assessment

The Board's regulatory flexibility analysis was often too incomplete to support any conclusion that was not fairly obvious. In most instances, where impacts probably were not significant, the effect may have been no worse than inefficiency. The Board followed the standard RFA format but at times appeared to be doing little more than going through the motions.

The Board was consistent in developing estimates of small entities and those that were affected by a regulation. The number of affected small entities usually was large. Corresponding estimates of impacts were usually lacking however, although types of compliance activities were usually well identified. Where quantitative estimates (including PRA) were made, they tended to be rough and lack detail.

The Board seemed reasonably responsive to public comments, sometimes incorporating them into rule modifications, although there seemed to be a lack of analytical initiative in the absence of public comments. Comments by SBA advocacy were another matter; the Board seemed largely to shrug them off. The rulemakings contained a number of modifications and alternatives, which clearly reflect a degree of awareness and concern about regulatory burdens.

The picture is somewhat blurred by the number of rules that were made jointly. In such circumstances, for example, it is not really possible to identify the initiative for regulatory flexibility alternatives. At least one rule provides a basis for comparison, however, and here the Board's analysis was less complete than that of either executive branch an one other independent agency that were involved.

[325] The OCC and OTS stated a standard of 5.0 percent of labor costs or 2.5 percent of non-interest expenses. The FDIC did not cite a standard estimate but estimated that first year full-requirement costs were less than 1 percent of revenue.

12. Federal Trade Commission

OVERVIEW

The Federal Trade Commission (FTC)[326] is an independent agency, established in 1914 by the Federal Trade Commission Act. The FTC's mission includes both anti-trust activities and consumer protection. Over the years, Congress has directed the FTC to administer a wide variety of other consumer protection laws and has expanded its regulatory authority. The bureaus that make up the Commission reflect its mission.

Bureau of Consumer Protection. The Bureau of Consumer Protection works to protect consumers against unfair, deceptive, or fraudulent practices in the marketplace. The Bureau conducts investigations, sues companies and people who violate the law, develops rules to protect consumers, and educates consumers and businesses about their rights and responsibilities. The Bureau's seven divisions reflect the diversity of the FTC's consumer protection activities:

- **Advertising Practices** protects consumers by enforcing the nation's truth-in-advertising laws.
- **Consumer and Business Education** plans, develops, and implements national campaigns to alert consumers to their rights and to explain compliance to industry.
- **Enforcement** litigates civil contempt and civil penalty actions to enforce FTC federal court injunctions and administrative orders that address consumer protection issues.
- **Financial Practices** protects consumers from deceptive and unfair practices in the financial services industry.
- **Marketing Practices** leads the Commission's response fraud and related practices that utilize the mails, the Internet, and other telecommunications.
- **Planning & Information** collects and analyzes complaints about consumer fraud and identity theft and makes them available to law enforcement agencies.
- **Privacy and Identity Protection** safeguards consumers' financial privacy.

Bureau of Competition. The FTC's Bureau of Competition promotes and protects free and vigorous competition by:

- Reviewing mergers and acquisitions, and challenging those that would likely lead to higher prices, fewer choices, or less innovation;
- Seeking out and challenging anticompetitive conduct in the marketplace, including monopolization and agreements between competitors;
- Promoting competition in industries where consumer impact is high, such as health care, real estate, oil & gas, technology, and consumer goods; and

[326] This overview is based primarily on information from the FTC website.

- Providing information, and holding conferences and workshops, for consumers, businesses, and policy makers on competition issues and market analysis.

Bureau of Economics. The Bureau of Economics provides economic analysis and support to antitrust and consumer protection investigations and rulemakings. The Bureau also analyzes the economic impact of government regulation, and makes policy recommendations relating to competition and consumer protection.

REGULATIONS

The FTC published 10 final rules that were included in the Unified Agenda in the study period.[327] One final rule was issued jointly with other financial regulatory agencies. Of these rules:

- Five rules (including one rescission) dealt with labeling or similar information requirements;[328]
- Four rules imposed or amended disclosure requirements and covered related business practices to some extent;[329] and
- One created a new optional form (jointly with other agencies).[330]

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[327] Three of the United Agenda listings contained multiple final rules, as the FTC gives the same RIN to similar rulemakings that stem from the same (recent) statute. Most of these final rules dated from the period 2003 through 2006, which was clearly outside the reference period. Three rules fell in the period 2007 through mid 2009. Those rules were not reviewed in detail because:

- Two final rules were joint rules with all the agencies that do financial regulation. These rules were early enough that they did not appear on any other agency's United Agenda listings from the target period. They regulated extremely diverse populations that were difficult to identify precisely. Moreover, such joint rules make the role of one agency difficult to discern.
- One final rule covered practices with affiliates. Because of their affiliations, the FTC doubted that any of the affected affiliated entities would qualify as "small." Small unaffiliated entities were not affected by the rule.

[328] *Trade Regulation Rule Relating to Power Output Claims for Amplifiers Utilized in Home Entertainment Products*, Confirmation of Rule published January 26, 2010 (RIN: 3084-AB09).
Rescission of Regulations Under the Comprehensive Smokeless Tobacco Health Education Act of 1986, Final Action published September 9, 2010 (RIN: 3084-AB23).
Appliance Labeling Rule (Light Bulbs), Final Rule published July 19, 2010 and April 12, 2011 (RIN: 3084-AB15).
Appliance Labeling Rule (Televisions), Final Rule published January 6, 2011 (RIN: 3084-AB15).
Automotive Fuel Ratings, Certification, and Posting, Final Action published April 8, 2011 (RIN: 3084-AB14).

[329] *Free Annual File Disclosures*, Final Rule published March 3, 2010 (RIN: 3084-AA94).
Fair Credit Reporting Risk-Based Pricing Regulations, Final Rule published January 10, 2010 (RIN: 3084-AA94). This rule was issued jointly with the Federal Reserve System.
Disclosures for Non-Federally Insured Depository Institutions Under the Federal Deposit Insurance Corporation Improvement Act, RIN: 3084-AA99. Final Action published June 4, 2010.
Mortgage Assistance Relief Services, Final Action published December 1, 2010 (RIN: 3084-AB18).

[330] *Privacy of Consumer Financial Information*, Final Action published December 1, 2009 (RIN: 3084-AA97). Other agencies participating in this rulemaking were the Federal Reserve System, the National Credit Union Administration (NCUA), the Federal Deposit Insurance Corporation (FDIC), the Commodity Futures Trading Commission (CTFC), the Securities and Exchange Commission (SEC), the Office of the Comptroller of the Currency (Treasury), and the Office of Thrift Supervision (Treasury).

ANALYSIS

Regulatory Flexibility Analysis

Exemption. Two of these final rules were treated as exempt from requirements of the RFA.

- One rule (a rescission) was exempt because it was published directly without a NPRM and public comment.
- One rule was issued as the result of a periodic review and did not entail any change to the existing regulation.

Certification. The FTC also certified that there was not a significant economic impact on a substantial number of small entities in half of the rulemakings.

- One rule provided an alternative, non-mandatory method of rating automotive fuel.
- Most depository institutions, the FTC opined in one instance, were already in compliance with the disclosure requirements of a new statute being implemented.
- In two labeling rules, the FTC included a FRFA "to explain the impacts of the amendments on small entities."

As these last two rules illustrate, the FTC tended to make a certification and then present a FRFA anyway. In two rules, the FTC was unable precisely to identify or to count the small entities, so that the "substantial number" could not be pinned down. In some instances the FTC said that the FRFA was done "to ensure that no such impact, if any, has been overlooked."

Need and Objectives. The FTC generally cited the statute, with the force of the statute ranging from an authorization to a mandatory requirements. Most of the rules seemed to be pretty direct implementations of statutory provisions. In most cases, the FTC also included a brief statement of purpose, such as:

> The objective of the proposed rule is to curb deceptive and unfair practices occurring in the MARS [mortgage assistance relief services] industry... [It] is based on evidence in the record that deceptive and unfair acts are common in the provision of MARS to consumers.

Issues Raised by Commenters. In three of these regulations, the FTC reported that it had received no comments about the impacts on small businesses. In two cases, the FTC cited statutory requirements to demonstrate that it could not accommodate the comment. Overall, however, the FTC seemed fairly responsive to comments and often made some type of adjustment in response. In some rules, cost estimates were increased considerably in response to comments. Two other examples:

- In a disclosure rule, commenters expressed concern about the proposed requirement of a separate internet "landing page." The FTC changed the requirement to including the disclosure on every web page where this particular offer was announced.

- In a regulation covering the mortgage assistance relief services (MARS) industry, the FTC had proposed a ban on advance fees. There was considerable concern about the impact on small entities, particularly attorneys. The FTC noted that "several small firms and sole practitioners owned by attorneys asserted that they would go out of business if the Commission imposed an advance fee ban." The FTC responded by providing an exemption from recordkeeping and compliance requirements for small attorney providers who meet certain conditions, and by allowing them to receive payments from a client trust account (a mechanism for avoiding the advanced fee ban) – in effect an alternative standard.

Small Entities to Which the Rule Applies. In two instances (both related to consumer finance) the FTC was unable to identify small entities, for lack of data, adding in one case:

> the entities under the Commission's jurisdiction are so varied that there is no way to identify them in general and, therefore, no way to know how many of them qualify as small businesses.

In the other rules, the FTC gave concise descriptions of the entities covered. Estimates of the numbers varied from quite precise (one rule), a rough round number (three rules), to really not thinking there were any (one rule). In two instances, the FTC cited data from past warnings or enforcement actions of analogous rules in estimating the numbers of entities affected.

For two of the reporting rules involving product labeling, the affected population was divided into manufacturers and catalogue retailers. Most (in one case, probably all) of the small businesses were retailers, and costs for them were relatively minor.

Projected Reporting, Recordkeeping, and Other Compliance Requirements. The FTC was generally clear in describing the outlines, and in some cases the details, of the requirements. In some instances cost estimates were available from the Paperwork Reduction Act analyses. Although these were not representative of small businesses, they were clear, logically constructed, and fairly detailed.[331] In several instances the general size of a cost was indicated, and estimated costs usually were minimal. These discussions, while not precise, were generally adequate to support the proposition that costs were not particularly significant.

Steps taken to Minimize Significant Impact on Small Businesses. The FTC fairly consistently identified some measures. There was one exception[332]:

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[331] For one of the labeling requirements, for example, estimated costs to manufacturers were:

- Changing package and product labeling would result in one-time costs of:
  - $2,270 per manufacturer in labor costs,
  - $1,335 per product model for package label changes, and
  - $200 per product model for product labeling.
- Testing would result in one-time costs of $19.90 per product model.

Costs to catalog sellers were presumed to be quite small, as new catalogues have to be published periodically.

[332] A rule on disclosures for non-federally insured depository institutions under the Federal Deposit Insurance Corporation Improvement Act.

> The amendments closely track the prescriptive requirements of the statute, and thus leave little room for significant alternatives to decrease the burden on regulated entities.

Some labeling requirements specified the format. Other disclosure and other information requirements, however, were usually performance standards – what information to provide, not how. In two instances the use of forms was optional, not mandatory.

The FTC also took a number of specific steps to make rules less burdensome. The general techniques included:

- Use of delayed (and thoughtfully timed) effective dates – extended in one rule;
- Substitution of less burdensome provisions;
- Provision of multiple options for compliance, including optional model forms;[333]
- Limiting specific provisions to entities to which they were most relevant;
- A conditional, but fairly extensive, exemption (the MARS rule described above).

The FTC was unwilling to adopt an across-the-board exemption for small entities. The reasoning was similar to that of financial regulation agencies:

> The protections afforded to consumers are equally important regardless of the size of the MARS provider with whom they transact. Indeed, small MARS providers have no unique attributes that would warrant exempting them from provisions, such as the required disclosures or conduct prohibitions. The information provided in the disclosures is material to the consumer regardless of the size of the entity offering the services.

Assessment

The FTC has been fairly consistent in the use of regulatory flexibility concepts and techniques. Certifications of no significant impact on substantial numbers of small entities are well supported in cases where they are not obvious. Affected entities were clearly identified and enumerated where practical. Compliance activities were usually adequately described. Estimates of cost from (from related analyses) are sometimes broken down on a per-entity basis and by type of cost instead of just aggregates, which is particularly useful when the number of entities affected is not clear. The FTC seemed generally responsive to comments, in adjusting cost estimates as well as in making modifications to reduce burdens. Alternatives to provide options or otherwise reduce burdens were often incorporated. Overall, the FTC's performance was relatively solid.

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[333] A rule concerning risk-based pricing for credit offerings, for example:

- Offered several different ways that businesses can perform a risk-based pricing analysis, including:
  - Make individual, consumer-to-consumer comparisons,
  - Use the tiered pricing method to conduct the risk-based pricing analysis, and
  - Utilize a credit score notice; and
- Provided optional model notices and model credit score disclosures, which automatically qualified businesses for a safe harbor, to facilitate compliance.

13. National Credit Union Administration

OVERVIEW

The National Credit Union Administration (NCUA)[334] is the independent federal agency that charters and supervises federal credit unions. The Federal Credit Union Act (1934) – designed to make credit available and promote thrift through a national system of nonprofit, cooperative credit unions - authorized the formation of federally chartered credit unions in all states. The Bureau of Federal Credit Unions originally was housed at the Farm Credit Administration. Regulatory responsibility shifted over the years as the agency moved from the Federal Deposit Insurance Corporation to the Federal Security Agency, and then the Department of Health, Education and Welfare.

In 1970, the National Credit Union Administration was reconstituted as an independent agency, and the National Credit Union Share Insurance Fund (NCUSIF) was formed to insure credit union deposits. In 1977, legislation expanded services available to credit union members, including share certificates and mortgage lending. In 1979, Congress created the Central Liquidity Facility, the credit union lender of last resort. In 1985, Congress authorized recapitalization of the NCUSIF. Federally insured credit unions deposited 1 percent of their shares into the Share Insurance Fund, and since then the NCUA Board has only charged credit unions a premium when the Fund dropped to a 1.25 percent equity ratio. The NCUSIF is backed by the "full faith and credit of the United States Government."

REGULATIONS

NCUA published 15 final rules that were included in the Unified Agenda in the study period.

- Three relaxed existing regulations in a way that allowed credit unions to participate in a Federal program or provide a new service (to the benefit of the credit unions);[335]
- Five made minor changes involving clarifications, definitions, or other technical matters;[336]

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[334] This overview is based primarily on information from the NCUA website.

[335] *Exception to the Maturity Limit on Second Mortgages*, Final Action published December 24, 2009 (RIN: 3133-AD64).

Short-Term, Small Amount Loans, Final Action published September 24, 2010 (RIN: 3133-AD71).

Secondary Capital Accounts, Final Action published September 23, 2010 (RIN: 3133-AD67).

[336] *National Credit Union Share Insurance Fund Premium and One Percent Deposit*, Final Action published November 19, 2009 (RIN: 3133-AD63).

Privacy of Consumer Financial Information, Final Action published December 1, 2009 (RIN: 3133-AC84). Other agencies participating in this rulemaking are the Office of the Comptroller of the Currency (OCC), the Federal Reserve System, the Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision (OTS), the Federal Trade Commission (FTC), the Commodity Futures Trading Commission (CTFC), and the Securities and Exchange Commission (SEC).

Chartering and Field of Membership for Federal Credit Unions, Final Action published June 25, 2010 (RIN: 3133-AD65).

- Two affected only corporate credit unions, which are virtually all large businesses;[337]
- Two were joint involving half a dozen agencies rules mandated by legislation, of which:
  - One was voluntary and had costs that were probably minor,[338] and
  - One had possibly significant costs on nearly 10 percent of small credit unions;[339]
- One pertained to procedures used only for mergers and conversions;[340]
- One withdrew the substance of a previous rule;[341] and
- One rescinded four "RegFlex" exemptions for well-performing credit unions.[342]

Most of these rules appeared to have little or no adverse impact on small credit unions. The rule with the greatest impacts applied only to large credit unions – which seems fitting, as recent financial turmoil has been due to practices of large financial institutions. At least two others clearly did have adverse impacts.

ANALYSIS

Small Entities

The NCUA uses a size threshold of $10 million in assets. By contrast, the SBA standard for depository financial institutions,[343] which is used by other financial regulatory agencies, is $175 million in assets. Credit Unions are generally much smaller than banks and savings

Low-Income Definition, Final Action published December 23, 2010 (RIN: 3133-AD75).
Truth In Savings, Final Action published January 20, 2011 (RIN: 3133-AD72).

[337] *Corporate Credit Unions*, Final Action published October 20, 2010 (RIN: 3133-AD58).
Corporate Federal Credit Union Chartering Guidelines, Final Action published February 24, 2011 (RIN: 3133-AD80).

[338] *Display of Official Sign; Permanent Increase in Standard Maximum Share Insurance Amount*, Final Action published September 2, 2010 (RIN: 3133-AD78).

[339] *S.A.F.E. Mortgage Licensing Act*, Final Rule published July 28, 2010 (RIN: 3133-AD59). Other agencies participating in this rulemaking were the Federal Reserve System, the Federal Deposit Insurance Corporation (FDIC), the Federal Trade Commission (FTC), the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), and the Office of the Comptroller of the Currency (Treasury), the Office of Thrift Supervision (Treasury).

[340] *Fiduciary Duties at Federal Credit Unions; Mergers and Conversions of Insured Credit Unions*, Final Action published December 28, 2010 (RIN: 3133-AD40).

[341] *Unfair or Deceptive Acts or Practices; Clarifications*, Final Action published February 10, 2010 (RIN: 3133-AD62).

[342] *Fixed Assets, Member Business Loans, and Regulatory Flexibility Program*, Final Action published October 28, 2010 (RIN: 3133-AD68).

[343] NAICS 522110 (Commercial Banking); NAICS 522120 (Savings Institutions); NAICS 522130 (Credit Unions); and NAICS 522190 (Other Depository Credit Intermediation).

institutions. The NCUA estimated that just over half (3,056 of 7,710) of the credit unions[344] that it regulates are small by this definition.[345]

Regulatory Flexibility Analysis

Certification. Thirteen rules were – or could have been - certified[346] by the NCUA as not having a significant economic impact on a substantial number of small entities. Eight of these certifications were based on a brief – often one-sentence - explanation, which generally did appear reasonable.

- Three rules were certified because they imposed no burden and gave credit unions added flexibility;
- Two rules were certified because they applied only to corporate credit unions, only one of which fits NCUA's definition of small;
- Two rules were certified because the rule was only a clarification;[347] and
- One rule on mergers and conversions of credit unions was certified because very few credit unions merge or convert in any given year.[348]

In two other instances no basis was given for the certification, although any impacts of the rule were pretty clearly minor.

- One rule revised two definitions, defined a third term, and clarified some existing requirements; and
- One rule amended regulations and staff interpretations to conform to other rules, including a Federal Reserve regulation.

In two instances, the NCUA did not even make a certification, although it was fairly clear that a certification would have been justified.

- One rule simply withdrew a former rule; and
- One rule required a change in signage to reflect a statutory increase in the standard maximum share insurance.

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[344] About 98 percent of these are federally insured. In another rulemaking, the NCUA estimated that 3,168 federally-insured, state-chartered credit unions were small.

[345] In rulemakings on Deposit Insurance Fund assessments, by comparison, the FDIC reported that about 55 percent of financial institutions were small, but the size standard was 17.5 times the credit union standard.

[346] In some cases, the conclusion was stated without using the word "certify."

[347] In one of these rules the FDIC also referred to the analysis of the rule being clarified, which had shown no significant impacts; estimated that 692 credit unions would be affected; and provided a five-year phase-in period.

[348] This rule also had provisions concerning fiduciary responsibility and indemnification of individual credit union officials, but these did not affect credit unions as institutions.

In one rule, the NCUA rescinded four exemptions that had been granted to federal credit unions that qualified for a RegFlex program by virtue of being demonstrably well capitalized. In lieu of a regulatory flexibility analysis, the NCUA stated:

> This rule enhances safety and soundness without additional regulatory burden. Accordingly, this will not have a significant economic impact on a substantial number of small credit unions, and therefore, no regulatory flexibility analysis is required.

A majority of commenters objected to two of the rescissions, pointing out clear business advantages of the exemption. The NCUA did not make any attempt to describe or estimate impacts of loss of these exemptions, although a sort of phase-in was incorporated. An NCUA representative explained that small credit unions are too small to engage in the sort of practices where the exemptions would have created a business advantage. Thus only large credit unions were actually affected. The analysis should have included this explanation and some estimates of the number of small credit unions (if any) that participated in the RegFlex Program.

Analysis. Two of the rules were promulgated jointly with several other federal agencies.

- Development of a standard form for privacy notices under the Gramm-Leach-Bliley Act ("GLB Act"); and
- Registration and procedural requirements under the S.A.F.E. Mortgage Licensing Act.

Both rulemakings included relatively extensive regulatory flexibility analyses, but regulatory flexibility issues were addressed in differing degrees by different agencies. Because of the joint authorship, it is not possible to tell what NCUA's role may have been in devising regulatory flexibility alternatives.

In the GLB Act regulation, the NCUA was one of the least visible of all agencies. Under the heading "Small Entities Subject to the Rules," the NCUA "estimate[d] that 3,168 federally-insured, state-chartered credit unions are small entities for purposes of the RFA." The NCUA appears only one other time in the text of the notice.[349] The consensus conclusion of the agencies was that there would not be significant impacts on small entities because use of the form was not mandatory.

The S.A.F.E. Mortgage Licensing Act regulation required registration of financial institution employees who act as a residential mortgage loan originators and oversight of their employees. There was a *de minimis* exception for employees,[350] and (by extension) for credit unions, although credit unions with no registered employees still incurred some monitoring and procedural costs. The NCUA did a detailed analysis of how many small credit unions would be

[349] The NCUA "determined that this rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act."

[350] The exception applied to any employee "who has never been registered or licensed through the Registry as a mortgage loan originator if during the past 12 months the employee acted as a mortgage loan originator for 5 or fewer residential mortgage loans."

subject to the rule and how many of those would qualify for a *de minimis* exemption. The analysis concluded that 1,073 small credit unions (25.8 percent of all small credit unions) would be subject to the regulation because the originated loans, and 280 small credit unions (9.2 percent) would be subject to the full impact of the rule. Without making cost estimates, NCUA then cited the "above reasons" as the basis for certification that there would not be a significant impact on a substantial number of small credit unions. Other agencies (prodded by SBA to improve their analysis) estimated that the costs for small banks and savings institutions subject to the full rule would be $17,000 to $25,000, although the agencies differed in their conclusions about the significance of these costs.

Regulatory Flexibility Alternatives. Whatever its role in the joint regulations, the NCUA did devise a creative accommodation in its rule rescinding the RegFlex exemptions.[351] Credit unions that were actively using exemptions were grandfathered at their current levels, but in a way that could only ratchet downwards (with no fixed deadline). Thus, for example, if a credit union exceeded the limit on fixed assets, its level of fixed assets could fall toward the limit but never increase. The NCUA also promised to make a waiver process more accessible.

Assessment

The NCUA did little or no real regulatory flexibility analysis. In most cases, impacts seem minor enough that the NCUA probably reached a reasonable conclusion of no significant impacts on a substantial number of small entities. Presentation was formulaic and minimalist, usually consisting of a single paragraph stating the certification and basis, and sometimes not even that. The NCUA showed itself capable of estimating the number of small credit unions affected by a regulation with reasonable precision but did not do that consistently. None of the write-ups reflected any attempt to describe or assess impacts on credit unions, even in response to comments. At best, the analysis was rudimentary and incomplete.

[351] As noted above, this was a regulation that the NCUA did not believe affected small credit unions.

14. National Indian Gaming Commission

OVERVIEW

The National Indian Gaming Commission (NIGC)[352] was established as an independent federal regulatory agency pursuant to the Indian Gaming Regulatory Act of 1988 (Act). The NIGC has the general duty to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of" the Act. The Commission's primary mission is to

- Regulate gaming activities on Indian lands for the purpose of shielding Indian tribes from organized crime and other corrupting influences;
- Ensure that Indian tribes are the primary beneficiaries of gaming revenue; and
- Assure that gaming is conducted fairly and honestly by both operators and players.

To achieve these goals, the Commission is authorized to

- Conduct investigations;
- Undertake enforcement actions, including the issuance of violation, assessment of civil fines, and/or issuance of closure orders;
- Conduct background investigations;
- Conduct audits; and
- Review and approve Tribal gaming ordinances.

The NIGC's regulations are codified in Title 25 of the Code of Federal Regulations, Part 501 to 599.

REGULATIONS

All of the NIGC "Completed Actions" listed in the Spring 2010, Fall 2010, or Spring 2011 Unified Agenda were withdrawals of reviews, previous Interim Rules or NPRMs. Thus no further analysis was done on NIGC regulations.

[352] This overview is based primarily on information from the NGIC website.

15. National Labor Relations Board

OVERVIEW

The National Labor Relations Board (NLRB)[353] is an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions. The NLRB:

- **Conducts elections** to determine whether a majority of employees want to form or join a union, or to decertify an existing union;
- **Investigates charges** alleging unfair labor practices under Section 8 of the National Labor Relations Act;
- **Facilitates settlements of meritorious charges of unfair labor practices to avoid** litigation whenever possible;
- **Decides cases on unfair labor practices through hearings before** Administrative Law Judges, with appeals heard by the Board;
- **Enforces orders** in the U.S. Courts of Appeals, as necessary.

The National Labor Relations Board's regulations are codified in Title 29 of the Code of Federal Regulations, Part 100 to 199.

REGULATIONS

The National Labor Relations Board had no regulations listed in the Spring 2010, Fall 2010, or Spring 2011 Unified Agenda as "Final Rule Stage" or "Completed Action." Thus no further analysis was done on NLRB regulations.

[353] This overview is based primarily on information from the NLRB website.

16. Nuclear Regulatory Commission

OVERVIEW

The U.S. Nuclear Regulatory Commission (NRC)[354] was created as an independent agency by Congress in 1974, replacing the Atomic Energy Commission. The Commission's mission is to regulate the nation's civilian use of byproduct, source, and special nuclear materials to ensure adequate protection of public health and safety, to promote the common defense and security, and to protect the environment. NRC's regulatory mission covers three main areas:

- **Reactors**: Commercial reactors for generating electric power and research and test reactors used for research, testing, and training;
- **Waste**: Transportation, storage, and disposal of nuclear materials and waste, and decommissioning of nuclear facilities from service; and
- **Materials**: Uses of nuclear materials in medical, industrial, and academic settings and facilities that produce nuclear fuel.

Specific NRC regulatory objectives include:

- Provision of an ample margin of safety from radiation that was generated by the activities of its licensees;
- Prevention of a major reactor accident that would result in a massive release of radiation that could threaten public health and safety;
- Safe management of high-level and low-level radioactive waste; and
- Protection of nuclear materials from theft or diversion.

REGULATIONS

NRC published 17 final rules that were included in the Unified Agenda in the study period. Of these rules:

- Five rules dealt with administrative matters or clarifications and were not subject to the APA notice and review process.[355]

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[354] This overview is based primarily on information from the NRC website.

[355] *Miscellaneous Administrative Changes*, Final Rule published November 30, 2010 (RIN: 31950-AH49).
Administrative Changes: Clarification of the Location of Guidance for Electronic Submission and OtherMiscellaneous Corrections, Final Rule published December 1, 2009 (RIN: 3150-AI73).
Nonprocurement Debarment and Suspension, Final Rule published May 19, 2010 (RIN: 3150-AI76).
NRC Region II Address and Main Telephone Number Changes, Final Rule published April 27, 2010 (RIN: 3150-AI80).
Public Records, Final Rule published July 16, 2010 (RIN: 3150-AI87).

- One rule reduced the range of circumstances requiring an Environmental Assessment.[356]
- Five rules concerned storage of spent nuclear fuel.[357]
- Three rules affected the operation of nuclear power plants.[358]
- Two rules concerned transportation of nuclear materials.[359]
- One rule set annual fees for NRC licensees.[360]

ANALYSIS

Regulatory Flexibility Analysis

In all but one of the rulemakings, NRC certified that the rule would not have a significant economic impact on a substantial number of small entities. In most cases, this certification was straightforward:

- The five rules concerning NRC administrative changes were not subject to the notice and comment provisions of the Administrative Procedures Act rule. Thus they were exempt from the RFA.
- Neither nuclear power plants nor independent spent fuel storage installations are small business by either SBA size standards[361] or the size standards established by the

[356] *Categorical Exclusions From Environmental Review*, Final Rule published April 19, 2010 (RIN: 31950-AI27).

[357] *List of Approved Spent Fuel Storage Casks: HI-STORM 100 Revision 7*, Final Rule published December 11, 2009 (RIN: 3150-AI71).

List of Approved Spent Fuel Storage Casks: MAGNASTOR System, Revision 1, Final Rule published June 16, 2010 (RIN: 3150-AI86).

List of Approved Spent Fuel Storage Casks: NAC-MPC System, Revision 6, Final Rule published July 21, 2010 (RIN: 3150-AI88).

Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, Final Rule published December 23, 2010 (RIN: 31950-AI47.

List of Approved Spent Fuel Storage Casks: NUHOMS® HD System, Revision 1, Final Rule published January 13, 2011 (RIN: 3150-AI89).

[358] *Alternate Fracture Toughness Requirements for Protection Against Pressurized Thermal Shock Events*, Final Rule published January 4, 2010 (RIN: 31950-AI01).

Increase in the Primary Nuclear Liability Insurance Premium, Final Rule published April 2, 2010 (RIN: 3150-AI74).

Domestic Licensing of Production and Utilization Facilities; Updates to Incorporation by Reference of Regulatory Guide, Final Rule published October 5, 2010 (RIN: 31950-AI37).

[359] *Export and Import of Nuclear Equipment and Materials; Updates and Clarifications*, Final Rule published July 28, 2010 (RIN: 31950-AI16).

License and Certificate of Compliance Terms, Final Rule published February 16, 2011 (RIN: 31950-AI09).

[360] *Revision of Fee Schedules; Fee Recovery for FY 2010*, Final Rule published December 23, 2010 (RIN: 31950-AI70).

[361] A firm in NAICS 221113 (Nuclear Electric Power Generation) "is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours."

NRC at 10 CFR 2.810."[362] Thus certification was virtually automatic for the eight rules that applied only to these entities.

- For one of the transportation-related rules, the NRC stated that, because of the companies regulated, "this rule… does not fall within the scope of the definition of 'small entities'." In the other it said only that "a majority of companies" are small. In both cases the rule changes were relatively small. They lacked any obvious significant adverse impacts and may on balance have been helpful.

- The rule on categorical exclusions from environmental review clearly eased regulatory requirements, although it was not entirely clear whether the chief beneficiary was private business or the NRC itself.[363]

One rule set annual fees for all NRC licensees.[364] The total amount of fees to be collected was tied to NRC's budget.[365] Based on recent data, NRC estimated that "about 26 percent of these licensees (approximately 1,000 licensees) qualified as small entities" – predominantly nuclear materials users. Based on comments and review of license termination data, NRC concluded that adverse impacts of a single fee could be substantial. After considering several fee structures, NRC selected a maximum fee for small entities. NRC subsequently added a second tier of very small entities,[366] with a much lower cap to the fee. Originally the annual fee caps for small entities and for small entities were set in dollar terms. Eventually NRC evolved a system in which:

- The small-entity maximum annual fee was set at 39 percent of the average for all fee categories for the previous two years; and

- The very-small-entity maximum annual fee was set as 22 percent of the small-entity maximum (8.6 percent of the overall two-year fee average).

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[362] "A small business is a for-profit concern and is a --

(1) Concern that provides a service or a concern not engaged in manufacturing with average gross receipts of $6.5 million or less over its last 3 completed fiscal years; or

(2) Manufacturing concern with an average number of 500 or fewer employees based upon employment during each pay period for the preceding 12 calendar months."

These size standards are much the same as the size standards most widely used by the SBA throughout industry. More general standards are necessary because some entities regulated by the NRC are outside the electric power industry.

[363] A NPRM was published, so that exemption from the NPRM notice and comment requirements was not claimed, but otherwise the rule read rather like an internal agency matter.

[364] Licensees under 10 CFR part 171, which include power reactors, non-power reactors, spent fuel storage/reactor decommissioning, transportation, uranium recovery, and materials users.

[365] Originally, the statute required NRC to recover through fees 100 percent of its budget authority - not including amounts appropriated from the Nuclear Waste Fund (NWF), amounts appropriated for Waste Incidental to Reprocessing (WIR), and amounts appropriated for generic homeland security activities. Prior to this rule, the recovery level was reduced to 90 percent.

[366] This category currently includes:

- Manufacturing entities with fewer than 35 employees,
- Other businesses and non-profit organizations with annual gross receipts of less than $450,000,
- Governmental jurisdictions with a population less than 20,000, and
- Educational institutions that are not publicly supported that have fewer than 35 employees.

Assessment

Nuclear reactors and nuclear waste handlers regulated by the NRC are virtually all large entities. Thus, even when a regulation is not exempt from the RFA, little analysis is really needed by the NRC. The picture changes for materials users, many of which are small. In the one rule reviewed where this was an issue, the MNRC executed the basic elements of a regulatory flexibility analysis and developed a classic regulatory flexibility alternative – a tiered fee schedule – to fit the situation.

17. Occupational Safety and Health Review Commission

OVERVIEW

The Occupational Safety and Health Review Commission (OSHRC)[367] is an independent federal agency that provides administrative trial and appellate review under the Occupational Safety and Health Act of 1970. The OSHRC was created to decide contests of citations or penalties under the OSH Act resulting from Occupational Safety and Health Administration (OSHA) inspections of American work places. The Review Commission functions as a two-tiered administrative court, with established procedures for:

- Conducting hearings, receiving evidence and rendering decisions by its Administrative Law Judges (ALJs); and
- Discretionary review of ALJ decisions by a panel of Commissioners.

Decisions of the three OSHRC Commissioners may be appealed to an appropriate United States Court of Appeals.

REGULATIONS

The Occupational Safety and Health Administration's regulations are codified in Title 29 of the Code of Federal Regulations, Part 1900 to 1999. The OSHRC itself does not regulate industry or enforce the OSH Act. It is concerned solely with the adjudication of disputes under the OSH Act.

[367] This overview is based primarily on information from the OSHRC website.

18. Postal Regulatory Commission

OVERVIEW

The Postal Regulatory Commission is an independent agency that has exercised regulatory oversight over the U. S. Postal Service (USPS) since its creation by the Postal Reorganization Act of 1970. The Postal Accountability and Enhancement Act (PAEA) enacted on December 20, 2006, significantly strengthened the Commission's authority to serve as a counterbalance to new flexibility granted to the Postal Service in setting postal rates.

The Act requires the Commission to develop and maintain regulations for a modern system of rate regulation, consult with the Postal Service on delivery service standards and performance measures, consult with the Department of State on international postal policies, prevent cross-subsidization or other anticompetitive postal practices, promote transparency and accountability, and adjudicate complaints. The law also assigns new and continuing oversight responsibilities to the PRC, including annual determinations of Postal Service compliance with applicable laws, development of accounting practices and procedures for the Postal Service, review of the Universal Service requirement, and assurance of transparency through periodic reports. [368]

REGULATIONS

The PRC promulgated two regulations in 2010. Both pertain to reports by the USPS to the PRC concerning the quality of service. One regulation prescribed the content and form of the reports.[369] The other designated specific services that are exempted from reporting requirements.[370]

ANALYSIS

The PRC's regulations apply only to the USPS. Accordingly, the PRC did not conduct any economic impact analysis or regulatory flexibility.

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[368] This overview is based primarily on information from the PRC website.

[369] *Periodic Reporting of Service Performance Measurements and Customer Satisfaction,* Final Action Notice published July 6 2010 (RIN: 3211-AA05).

[370] *Periodic Reporting Exceptions*, Final Action Notice published September 23, 2010 (RIN: 3211-AA06).

19. Recovery Accountability and Transparency Board

OVERVIEW

The Recovery Accountability and Transparency Board (RATB)[371] was created by the American Recovery and Reinvestment Act of 2009. Its mission is:

> To promote accountability by coordinating and conducting oversight of Recovery funds to prevent fraud, waste, and abuse and to foster transparency on Recovery spending by providing the public with accurate, user-friendly information.

The Board has two principal goals:

- To provide transparency of Recovery-related funds and
- To detect and prevent fraud, waste, and mismanagement.

REGULATIONS

The three regulations that RATB promulgated in the study period were essentially housekeeping rules related to the start-up status of the agency. These regulations pertained to public access to RATB records under the Privacy Act of 1974[372] and the Freedom of Information Act.[373] Most of the substance of these rules concerned internal RATB operations. They had impacts on the public only in the sense of setting requirements for access – providing identifying information and paying actual costs of access or duplication - which were minimal.

ANALYSIS

To the extent that there were any effects outside the agency, these rules affected only the general public. Accordingly, the RATB did not perform economic impact or regulatory flexibility analysis.

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[371] This overview is based primarily on information from the RATB website.

[372] *Implementation of the Privacy Act of 1974*, Final Action Notice published November 20, 2009 (RIN: 0430-AA00). *Privacy Act Regulations*, Final Action Notice published June 29, 2010 (RIN: 0430-AA03).

[373] *Rule Implementing the Freedom of Information Act*, Final Action Notice published November 20, 2009 (RIN: 0430-AA01).

20. Securities and Exchange Commission

OVERVIEW

The U.S. Securities and Exchange Commission (SEC)[374] is an independent federal agency, which holds primary responsibility for enforcing the federal securities laws and regulating the securities industry, the nation's stock and options exchanges, and other electronic securities markets in the United States, as well as participants in those markets, including securities brokers and dealers, investment advisors, and mutual funds. The mission of the SEC is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.

The SEC's operating principle is that all investors, whether large institutions or private individuals, should have access to certain basic facts about an investment prior to buying it, and so long as they hold it. To achieve its mandate, the SEC requires public companies to submit quarterly and annual reports, as well as other periodic reports, which disclose meaningful financial and other information to the public. This provides a common pool of knowledge for all investors to use to judge for themselves whether to buy, sell, or hold a particular security. Disclosure of financial and other information about the issuer and the security itself also increases public scrutiny and helps reduce insider trading and fraud.

The SEC maintains an online database called EDGAR (the Electronic Data Gathering, Analysis, and Retrieval system), from which investors can access this and other information filed with the agency. The SEC also has the authority to bring civil enforcement actions against individuals or companies alleged to have committed accounting fraud, provided false information, or engaged in insider trading or other violations of the securities law.

The SEC is responsible for administering eight major laws that govern the securities industry:

- **The Securities Act of 1933** has a dual objective:
  - Require that investors receive financial and other significant information concerning securities being offered for public sale; and
  - Prohibit deceit, misrepresentations, and other fraud in the sale of securities.

  Disclosure of important financial information through the registration of securities is a primary means of accomplishing these goals
- **The Securities Exchange Act of 1934** created the Securities and Exchange Commission and gave it broad authority over the securities industry, including the power to:
  - Register, regulate, and oversee brokerage firms, transfer agents, clearing agencies, self-regulatory organizations (SROs),[375]
  - Discipline regulated entities that engage in conduct prohibited by the Act, and
  - Require periodic reporting of information by companies with publicly traded securities.

[374] This overview is based primarily on information from the SEC website.

[375] The various stock exchanges, such as the New York Stock Exchange, and American Stock Exchange are SROs. The Financial Industry Regulatory Authority, which operates the NASDAQ system, is also an SRO.

- **The Trust Indenture Act of 1939** sets standards that apply to debt securities such as bonds, debentures, and notes that are offered for public sale.
- **The Investment Company Act of 1940** regulates the organization of companies, including mutual funds, that engage primarily in investing, reinvesting, and trading in securities, and whose own securities are offered to the investing public. The Act requires these companies to disclose their financial condition and investment policies to investors when stock is initially sold and, subsequently, on a regular basis.
- **The Investment Advisers Act of 1940** requires that firms or sole practitioners compensated for advising others about securities investments must register with the SEC and conform to regulations designed to protect investors.
- **The Sarbanes-Oxley Act of 2002** mandates a number of reforms to enhance corporate responsibility, enhance financial disclosures and combat corporate and accounting fraud.
- **The Credit Rating Agency Reform Act of 2006** requires nationally recognized statistical rating organizations (NRSROs) to register with the Securities and Exchange Commission (SEC) and otherwise sought to improve ratings quality for the protection of investors by fostering accountability, transparency, and competition in the credit rating agency industry.
- **The Dodd-Frank Wall Street Reform and Consumer Protection Act** has a variety of provisions designed to prevent another significant financial crisis by creating new financial regulatory processes that enforce transparency and accountability while implementing rules for consumer protection. The Dodd-Frank act is the basis for most recent SEC rulemakings.

REGULATIONS

The SEC published 23 final sets of rules that were included in the Unified Agenda in the study period. Six of these rules were interim final rules, temporary rules, or extensions of interim final rules. One final rule was issued jointly with other financial regulatory agencies. Of these rules:

- Six concerned disclosure requirements, including:
  - Three setting disclosure requirements for securities,[376]
  - One setting disclosure requirements for shareholder proxy materials,[377] and
  - One requiring disclosures about nationally recognized statistical rating organizations;[378]

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[376] *Amendments to Form ADV*, Final Action published August 12, 2010 (RIN: 3235-AI17).
Amendment to Municipal Securities Disclosure, Final Action published June 1, 2010 (RIN: 3235-AJ66).
Disclosure for Asset-Backed Securities Required by Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Final Action published January 26, 2011 (RIN: 3235-AK75).

[377] *Proxy Solicitation Enhancements*, Final Action published December 23, 2009 (RIN: 3235-AK28).

[378] *Rules for Nationally Recognized Statistical Rating Organizations*, Final Action published December 12, 2009 (RIN: 3235-AK14).

- Five concerned operations and practices of regulated entities (usually including records);[379]
- Four concerned requirements for reporting to or filing with the SEC;[380]
- Two concerned requirements for registering with the SEC;[381]
- Two primarily included requirements for shareholder votes (with some disclosure);[382]
- Three concerned some aspect of a form or notification, including:
  - Creation (with other agencies) of a standardized (optional) privacy notice form,[383]
  - Modification of information given on a form related to NRSROs,[384] and
  - Permitting proxy information to be provided over the internet;[385]
- One allowed a limited exemption to SEC rules for tactical purposes;[386] and
- One concerned only internal procedures.[387]

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[379] *Custody of Funds or Securities of Clients by Investment Advisers*, Final Action published January 11, 2010 (RIN: 3235-AK32).
Amendments to Regulation SHO, Final Action published March 10, 2010 (RIN: 3235-AK35).
Political Contributions by Certain Investment Advisers, Final Action published July 14, 2010 (RIN: 3235-AK39).
Management Controls for Brokers or Dealers With Market Access, Final Action published November 15, 2010 (RIN: 3235-AK53).
Temporary Rule Regarding Principal Trades With Certain Advisory Clients, Final Action published December 30, 2010 (RIN: 3235-AJ96).

[380] *Extension of Filing Accommodation for Static Pool Information in Filings With Respect to Asset-Backed Securities*, Final Action published December 21, 2009 (RIN: 3235-AK44);
Final Action published December 22, 2010 (RIN: 3235-AK70).
Money Market Funds, Final Action published March 4, 2010 (RIN: 3235-AK33).
Interim Rule for Reporting Pre-Enactment Security-Based Swap Transactions, Interim Final Rule published October 20, 2010 (RIN: 3235-AK73).

[381] *Transitional Registration as a Municipal Advisor*, Interim Final Rule published September 8, 2010 (RIN: 3235-AK69).
Issuer Review of Assets in Offerings of Asset-Backed Securities, Final Action published January 25, 2011 (RIN: 3235-AK76).

[382] *Facilitating Shareholder Director Nominations*, Final Action published September 16, 2010 (RIN: 3235-AK27).
Shareholder Approval of Executive Compensation and Golden Parachute Compensation, Final Action published February 2, 2011 (RIN: 3235-AK68).

[383] *Model Privacy Form Under the Gramm-Leach-Bliley Act*, Final Action published December 1, 2009 (RIN: 3235-AJ06). The other agencies participating in this rulemaking were the Office of the Comptroller of the Currency (OCC), the Federal Reserve System, the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Office of Thrift Supervision (OTS), the Federal Trade Commission (FTC), and the Commodity Futures Trading Commission (CFTC).

[384] *References to Ratings of Nationally Recognized Statistical Rating Organizations*, Final Action published October 9, 2009 (RIN: 3235-AK17; RIN: 3235-AK19).

[385] *Amendments to Rules Requiring Internet Availability of Proxy Materials*, Final Action published February 27, 2010 (RIN: 3235-AK25).

[386] *Temporary Exemptions for Eligible Credit Default Swaps To Facilitate Operation of Central Counterparties To Clear and Settle Credit Default Swaps*, Interim Final Rule published January 22, 2009; extended September 17, 2009 and November 26, 2010. (RIN: 3235-AK26).

ANALYSIS

Small Entities and the Regulated Population

The SEC has set – by regulation – its own definitions of small entities for purposes of the Regulatory Flexibility Act. These are quite different from the SBA size standard, which is $7 million in revenues for the relevant industries.[388] In addition to not being affiliated with or controlled by an entity that is not "small," SEC size thresholds, which are defined under different authorizing acts, include:

- An "issuer" or "person"[389] other than an investment company: $5 million in assets;[390]
- A broker or dealer: $500,000 in total capital;[391]
- A municipal securities dealer:
  - $10 million in total assets and
  - $100,000 per month in municipal securities transaction;[392]
- An exchange: Has been exempted from reporting requirements of Exchange Act Rule 601;[393]
- Investment company or group of investment companies: $50 million in net assets;[394]
- An investment advisor:
  - $5 million in total assets and
  - $25 million in assets under management;[395]
- A security clearing agency:
  - $500 million in securities transactions and
  - $200 million of funds and securities in its custody or control.[396]

The size distribution of the population of financial entities that the SEC regulates is different from that of the general business population, which is highly skewed. In absolute or

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[387] *Amendments to the Informal and Other Procedures, Rules of Organization and Program Management, and Rules of Practice; Interim Commission Review of Public Company Accounting Oversight Board*, Final Action published August 6, 2010 (RIN: 3235-AJ34).

[388] NAICS 523 (Financial Investments and Related Activities); NAICS 524 (Insurance Carriers and Related Activities – except Direct Property and Casualty Insurance Carriers, for which it is 1,500 employees); and NAICS 525 (Funds, Trusts and Other Financial Vehicles).

[389] This definition is applied to businesses in general (where needed), to NRSROs, and to alternative trading systems, which must register as broker-dealers.

[390] 17 CFR 240.0-10(a) (Securities Exchange Act) and 17 CFR 230.157 (Securities Act)

[391] 17 CFR 240.0-10(c) (Securities Exchange Act)

[392] 17 CFR 240.0-10(f) (Securities Exchange Act)

[393] 17 CFR 240.0-10(e) (Securities Exchange Act)

[394] 17 CFR 270.0-10 (Investment Company Act)

[395] 17 CFR 275.0-10 (Investment Advisors Act)

[396] 17 CFR 240.0-10(d) (Securities Exchange Act)

relative terms – or both - few entities of most types registered with the SEC are small. SEC estimates[397] in these rulemakings included the following:

- Public companies (or issuers): 1,100 to 1,229 are small.
- Brokers and dealers: 890 to 915 (17 percent) are small.
- Investment Advisors: 680 to 781 (6 percent) are small.
- Business development companies: 31 to 33 are small.
- Sponsors of asset-backed securities: One small entity was identified.
- Nationally recognized statistical rating organizations: 2 (out of 30) are small.
- Non-SRO trading centers: 5 (out of 407) are small.
- SROs: None is small.

Many SEC rules apply to specific activities or types of transactions that typically are done by large entities. Because of their limited application, some of the rules affected only a fraction of the small entities of their type. One rule, for example, affected an estimated 21 broker-dealers. For investment advisors, three rules were estimated to affect 38, 61, and 73, respectively.

Regulatory Flexibility Analysis

Certification. The SEC made conservative use of the certification that there would not be a significant impact on a substantial number of small entities. Seven of the rules reviewed were certified. Of these:

- Two were extensions of an existing rule that had no impacts, and they presented an alternative compliance mechanism that was voluntary.
- Two affected a very small number of entities: Two NRSROs in both instances, plus a sponsor of asset-backed securities in one case.
- Two affected no small entities.
- No explanation was given in one case.

There were also two rules for which no regulatory flexibility analysis was done, but which were not formally certified.

- One affected only recipients of TARP funds.
- One affected only internal SEC procedures.

Need For and Objectives of Rule. The SEC generally provided reasonably concise summaries of the objectives of the rule. While many of these rules were required by statute (particularly the Dodd-Frank Act), the SEC avoided just giving a formulaic statement of that fact.

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[397] Estimates vary in part because they were based on data at different points in time.

In a temporary rule promulgated to meet an imminent statutory deadline, for example, the SEC stated: "This rule and form are necessary so that municipal advisors can meet this Congressional mandate and continue to function as municipal advisors."

Significant Issues Raised in Public Comments. There were comments on most of the rules for which the SEC did a regulatory flexibility analysis. Many of these comments explicitly or implicitly suggested a complete or partial exemption for small businesses. Some did little more than state that small businesses would be burdened; some explained why. Some offered suggestions on how to modify the rule.

The SEC was generally responsive. Often the response was that the commenter was addressing something that was necessary to the regulation or required by law. (See discussion below about exemptions.) In some cases, the SEC explained something about the regulation that mitigated the impact the commenter was addressing. Where there was an operational suggestion, the SEC did appear to have considered it. In some cases it was rejected. In several cases, however, the SEC modified the rule to address the problem.

Small Entities Subject to the Rule. The SEC consistently identified types of entities that would be affected[398] and estimated the number actually affected – not just the number of small entities. This job was doubtless simplified by the fact that – in most cases – the effected entities were registered with the Commission, but the SEC made good use of these data.

Reporting, Recordkeeping, and Other Reporting Requirements. The nature of this discussion varied with the type of rule. In the majority of cases, the SEC provided a fairly clear recap of the information to be provided (disclosures), the forms to fill out and/or types of records to be kept, the procedures to be developed, and/or the actions to be taken. The information was specific but not detailed.

In several cases, there was virtually no reported impact. This included an extension of an existing rule and a rule changing information provided on a form, among others. In a few cases the discussion veered off into the number of small entities that would be affected and/or measures to minimize small business impacts.

Further detail was provided in Paperwork Reduction Act and Benefit-Cost analyses. In most cases it was difficult to cross-walk this information into the regulatory flexibility analysis because it was based on analysis of the affected entities as a whole (most of which were large), and because the analysis appeared to use a subset of the affected population for most specific costs. In a several cases, however, the numbers were small enough to confirm that small-business impacts would be small. In one of these cases the SEC segmented the paperwork analysis by three sizes of entity, using a standard for "small" that was much larger than the RFA standard.

[398] In the rule for a model privacy form under the Gramm-Leach-Bliley Act, for example, "the SEC estimate[d] that 915 broker-dealers, 212 investment companies registered with the Commission, and 781 investment advisers registered with the Commission are small entities for purposes of the RFA.

Exemption. The SEC consistently declined to exempt small entities. This was one area in which it consistently rejected comments. In some instances, the discussion addressed specific implications of an exemption. In the end (and usually at the beginning) the SEC gave some variant of the argument that an exemption was incompatible with the law and/or the purposes of the regulation. At times, the SEC suggested that an exemption would violate equal protection under the laws. In one instance, for example, the SEC declined to exempt small entities, because:

> the purpose of the rules is to facilitate the exercise of shareholders' traditional State law rights [and] we believe that shareholders of smaller reporting companies should be able to exercise these rights to the same extent as shareholders of larger reporting companies.

Different Reporting or Compliance Requirements or Timetables. The SEC took a similar stance about differential compliance requirements as it did on exemptions – but not as reflexively or absolutely. For example:

> We considered different compliance standards for the small entities that will be affected by the amendments [but] we are not aware of any different standards that would be consistent with the purposes of the amendments.

Having taken that default stance, the SEC then proceeded to make modifications in a number of cases that either were explicitly for small businesses or addressed concerns that had been raised with respect to small businesses:

- Regulation S-K allowed small businesses to file an abbreviated report on executive compensation. Two new rules added to disclosure requirements, but retained the previous allowance – thus in effect exempting them from some aspects of the new disclosure requirements.
- Another rule referred to an existing limited exception, which was retained, and added a new one.
- Two rules delayed the compliance date for small businesses by two years.[399]
- Another rule allowed a two-year phase-in for shareholder voting requirements.
- One rule, which was designed to curb "pay to play" practices, prohibited making payment to a third party for soliciting business from any government entity. A carefully crafted limited exception was provided for small businesses, who are relatively likely to contract out marketing activities.
- Use of the form developed in one rule was voluntary, and some provisions in two rules represented voluntary alternatives to existing procedures.

[399] The SEC noted that "a delayed compliance date for smaller reporting companies

- will allow those companies to observe how the rule operates for other companies and may allow them to better prepare for the implementation of the rules, and…
- will give the [SEC] a further opportunity to consider adjustments for smaller reporting companies."

In some instances, the SEC had limited flexibility because the statutory requirements were quite specific. Nevertheless, the SEC appeared willing to make some exceptions for small businesses where it saw the need and could figure out how to do it consistent with objectives.

Clarification, Consolidation, or Simplification of Reporting and Compliance Requirements. The SEC made no measures of this type for small businesses. On the other hand, the SEC frequently asserted that it had made the requirements as simple as possible for everyone. In several of the rules, clarification was an objective,[400] and providing clearer information for the investor was a general objective of many of them.

Performance Rather than Design Standards. The SEC's position on performance standards varied. To the extent that the rule involved a specific form, the scope for performance standards was limited. In some rules, the SEC used design standards for reasons that were explained.[401] In many instances, however, the SEC stated that it was using performance standards, citing such things as the absence of specification of format or details of content of required notices. It seems clear that the SEC was aware of and considering performance standards.

Assessment

The SEC consistently followed and reported in the standard format of a regulatory flexibility analysis – in substance as well as form. Development of an extensive and varied set of small business standards provided a solid foundation for analysis of small entities. Although quantitative impacts on small entities were not generally estimated, the nature and scope were fairly well delineated, and the entities affected were consistently identified and counted. Certifications of no significant impact on a substantial number of small entities were well documented. Given the tendency for SEC regulations to target large entities, the SEC seemed conservative in its use of certification. Discussions, explanations, and responses to comments were generally clear and reasonable. The SEC's use of regulatory flexibility alternatives is constrained by the specifics of the statutes and by its own sense of fiduciary responsibility, which (as with other financial regulatory agencies) construes exemption as inherently contrary to its mandate. Nevertheless, the SEC seemed generally aware of the issues, included regulatory flexibility alternatives in a number of cases, and showed itself capable (in the "pay to play") regulation of creativity in this area. Over all, the SEC's regulatory flexibility analysis is quite creditable.

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[400] For example, although the provisions were not limited to small businesses, the SEC noted in one rule:

- "The amendments clarify when an investment adviser, including a small adviser, has custody."
- "We are providing updated guidance for accountants that modernize the procedures for the surprise examination and should provide clarification to investment advisers, including small entities, and accountants on certain issues regarding the surprise examination."

[401] For example, "based on our past experience, we believe the amendments will be more useful to investors if there are specific disclosure requirements… In addition, the specific disclosure requirements in the amendments will promote consistent and comparable disclosure among all companies."

21. Surface Transportation Board

OVERVIEW

The Surface Transportation Board (STB) was created in the ICC Termination Act of 1995 and is the successor agency to the Interstate Commerce Commission. The STB is an economic regulatory agency that Congress charged with resolving railroad rate and service disputes and reviewing proposed railroad mergers. The STB is independent in its decisions, although it is administratively affiliated with the Department of Transportation.

The STB serves as both an adjudicatory and a regulatory body. The agency has jurisdiction over railroad rate and service issues and rail restructuring transactions (mergers, line sales, line construction, and line abandonments); certain trucking company, moving van, and non-contiguous ocean shipping company rate matters; certain intercity passenger bus company structure, financial, and operational matters; and rates and services of certain pipelines not regulated by the Federal Energy Regulatory Commission. Within the STB:

- The Office of the General Counsel provides legal advice and defends STB actions in court;
- The Office of Economics gathers and reports data; performs economic and policy analysis in support of Board decisions and applied economic analysis, most notably the development of the STB's costing system; and audits Class I railroads;
- The Office of Environmental Analysis undertakes environmental reviews of actions; and
- The Office of the Managing Director handles agency administrative matters.

REGULATIONS

During the study period, the STB promulgated two rules, both of which involved jurisdiction over rail carriers.

- One rule - adopted in response to legislation, which removed most STB jurisdiction over waste rail transfer facilities in favor of state regulation - established land-use-exemption permits for siting as an alternative to state siting requirements.[402]
- One rule concerned the methods used for compilation and submission of data on state taxes that Class 1 railroads submitted annually to the STB for Revenue Shortfall Allocation Method (RSAM) computations.[403]

[402] *Solid Waste Rail Transfer Facilities*, Interim Final Rule published January 27, 2009. Correction published December 22, 2009 (RIN: 2140-AA92).

[403] *Annual Submission of Tax Information for Use in the Revenue Shortfall Allocation Method*, Final Action Notice published February 26, 2010 (RIN: 2140-AA98).

ANALYSIS

Regulatory Flexibility Analysis

Waste Transfer Facilities Rule. The notice for the waste transfer facility rule included a certification that there would not be a significant impact on a substantial number of small entities. Although some of the formal elements of an initial regulatory flexibility analysis (particularly the number of small entities affected) were not included, there was a substantive discussion of the effects of the rule, and the discussion covered several key aspects of regulatory flexibility alternatives:

- Except for one provision,[404] a carrier is not required to obtain a land-use-exemption permit; it may operate under a state siting permit. In effect, the land-use-exemption permit provided a sort of regulatory alternative - an appeal to a state denial of a siting permit if the state requirements are "unduly burdensome to interstate commerce [or] discriminate against rail carriers."
- The regulation included a waiver provision to mitigate any significant negative impact on small entities.
- No alternative would adequately achieve the objectives of the Clean Railroads Act of 2008.

RSAM Rule. The RSAM notice contained neither any regulatory flexibility analysis nor a certification. The rule, however:

- Involved minor procedural changes that had minimal impacts; and
- Affected only Class 1 railroads – the seven largest U.S. rail carriers.[405]

Assessment

This very limited sample of rulemakings suggests that the STB understood and practiced the essence of regulatory flexibility, even if all the formalities were not observed.

[404] A governor of a state may petition the STB to require that a facility obtain a land-use-exemption permit.

[405] Two Canadian and two Mexican rail carriers were also affected.