

**Office of Advocacy****Legislative Priorities for Chief Counsel Darryl L. DePriest****Indirect Effects**

Under the RFA, agencies are not currently required to consider the impact of a proposed rule on small businesses that are not directly regulated by the rule, even when the impacts are foreseeable and often significant. Advocacy believes that indirect effects should be part of the RFA analysis, but that the definition of indirect effects should be specific and limited so that the analytical requirements of the RFA remain reasonable.

- Amend section 601 of the RFA to define "impact" as including the reasonably foreseeable effects on small entities that purchase products or services from, sell products or services to, or otherwise conduct business with entities directly regulated by the rule; are directly regulated by other governmental entities as a result of the rule; or are not directly regulated by the agency as a result of the rule but are otherwise subject to other agency regulations as a result of the rule.

Scope of the RFA

Currently, the requirements of the RFA are limited to those rulemakings that are subject to notice and comment. Section 553 of the Administrative Procedure Act (APA), which sets out the general requirements for rulemaking, does not require notice and comment for interim final rulemakings, so agencies may impose a significant economic burden on small entities through these rulemakings without conducting an Initial Regulatory Flexibility Analysis (IRFA) or Final Regulatory Flexibility Analysis (FRFA). Advocacy believes the definition of a rule needs to be expanded to include interim final rulemakings that have the potential to impose economic burden on small entities.

Further, the IRS regularly promulgates rules that are costly and complicated for small businesses. However, the IRS contends that it has no discretion in implementing legislation and that the agency has little authority to consider less costly alternatives under the RFA. Therefore, the IRS often does not analyze the cost of its rules to small business under the RFA. In the absence of the IRS considering the impact of its rules under the RFA, Congress should require the Congressional Budget Office (CBO) to provide small business cost and paperwork burden estimates for pending tax legislation. This would help ensure that tax writers and the public are aware of the compliance burden in addition to the fiscal consequences.

Finally, the RFA has its own definition of information collection. However, this definition is identical to the Paperwork Reduction Act (PRA) (35 USC 3501, et. seq.). A cross-reference to the PRA would allow Advocacy to rely on OMB's existing implementing regulations (5 CFR 1320) and guidance.

- Require RFA analysis for all interim final rulemakings with a significant economic impact on a substantial number of small entities.

- Require CBO to score proposed tax legislation for the estimated costs and paperwork burden to small business.
- Amend the conditions for IRS rulemakings to require an IRFA/FRFA to reference the PRA.

Quality of Analysis

The Office of Advocacy is concerned that some agencies are not providing the information required in the IRFA and FRFA in a transparent and easy-to-access manner. This hinders the ability of small entities and the public to comment meaningfully on the impacts on small entities and possible regulatory alternatives. Agencies should be required to include an estimate of the cost savings to small entities in the FRFA. In addition, agencies should have a single section in the preamble of the notice of proposed rulemaking and notice of final rulemaking that lays out clearly the substantive contents of the IRFA or FRFA, including a specific narrative for each of the required elements.

- Require agencies to develop cost savings estimates.
- Require a clearly delineated statement of the contents of the IRFA and FRFA in the preamble of the proposed and final rule.

Quality of Certification

Some agencies' improper certifications under the RFA have been based on a lack of information in the record about small entities, rather than data showing that there would not be a significant impact on a substantial number of small entities. A clear requirement for threshold analysis would be a stronger guarantee of the quality of certifications.

- Require agencies to publish a threshold analysis, supported by data in the record, as part of the factual basis for the certification.

SBREFA Panels

The Department of Interior's Fish and Wildlife Service consistently promulgates regulations without proper economic analyses. Advocacy believes the rules promulgated by this agency would benefit from being added as a covered agency subject to Small Business Advocacy Review Panels.

Advocacy also believes that some recent SBREFA panels have been convened prematurely. SBREFA panels work best when small entity representatives have sufficient information to understand the purpose of the potential rule, likely impacts, and preliminary assessments of the costs and benefits of various alternatives. With this information small entities are better able to provide meaningful input on the ways in which an agency can minimize impacts on small entities consistent with the agency mission. Therefore the RFA should be amended to require that prior to convening a panel, agencies should be required to provide, at a minimum, a clear description of the goals of the rulemaking, the type and number of affected small entities, a preferred alternative, a series of viable alternatives, and projected costs and benefits of compliance for each alternative.

- Require SBREFA panels under RFA Section 609(b) for the Department of the Interior's Fish and Wildlife Service.
- Require better disclosure of information including at a minimum, a clear description of the goals of the rulemaking, the type and number of affected small entities, a preferred alternative, a series of viable alternatives, and projected costs and benefits of compliance for each alternative to the small entity representatives.

Retrospective Review

In addition to the existing required periodic review, agencies should accept and prioritize petitions for review of final rules. They should be required to provide a timely and effective response in which they demonstrate that they have considered alternative means of achieving the regulatory objective while reducing the regulatory impact on small businesses. This demonstration should take the form of an analysis similar to a FRFA.

- Strengthen section 610 retrospective review to prioritize petitions for review that seek to reduce the regulatory burden on small business and provide for more thorough consideration of alternatives.

The Office of Advocacy was established by Public Law 94-305 to represent the views of small businesses before federal agencies and the U.S. Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.