

SMALL BUSINESS RESEARCH SUMMARY

An Evaluation of Compliance with the Regulatory Flexibility Act by Federal Agencies

by Consad Research Corporation.
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Purpose

The Regulatory Flexibility Act (RFA), enacted in 1980, requires federal agencies to determine whether their rules would result in economic impacts that are felt disproportionately by small businesses and other small entities and to identify regulatory alternatives that achieve the desired policy goal while reducing the disproportionate impact on small business. In 1996, the Small Business Regulatory Enforcement Act (SBREFA) was enacted as an enforcement tool for the RFA. This research sets out to assess agency compliance with the RFA and examine changes in compliance over time and since the passage of the SBREFA. It also suggests ways to make the RFA more effective at lowering small entity burdens.

Scope and Methodology

A total sample of 274 final rules was used in this analysis:

- 120 final rules were selected from the 1995 *Unified Agendas* (a comprehensive listing of federal rules);
- 93 final rules were selected from the 1999 *Unified Agendas*;
- 56 final rules issued from 1996 through 1999 that had been identified by GAO's *Reports on Federal Agency Major Rules* as being major rules for which an initial regulatory flexibility analysis (IRFA) or a final regulatory flexibility analysis (FRFA) was produced;
- 5 final rules that were the subject of SBREFA review panels.

Three main research questions were studied, among other items of interest:

- Are federal agencies complying with the RFA?
- Has the SBREFA affected rulemaking?
- What role has SBA's Office of Advocacy played in the process of rulemaking?

Overall Findings

Looking at a relatively large sample of actual rules, this study painstakingly identifies patterns and changes in compliance since the SBREFA was introduced to increase the incentives for agencies to comply. Although the study identifies improvements in compliance, it also warns that noncompliance was a serious problem. The researchers observed that the most pervasive problem lies in the failure of agencies to identify or to focus early on rulemakings with potentially serious impacts on small entities.

An array of remedies is provided that could possibly improve the ratio of compliant to noncompliant agencies. Of noticeable significance is the recommendation that the agencies should also do a better job of complying with the Administrative Procedure Act (APA) and the Electronic Freedom of Information Act (EFIA). The APA requires the publication of all information bearing on agency rulemaking. The EFIA requires that agencies make all post-1996 government documents available electronically. The added transparency will vastly increase analysis and public participation in the vital issue of regulatory burdens.

Highlights

- The researchers found a marked increase in federal agency compliance with the RFA between 1995 and 1999. Within that increase, they identified significant patterns of strengths and weaknesses in the compliance by federal agencies with the provisions of the RFA.

- Some agencies showed marked improvements in compliance following the passage of the SBREFA (which overlaps the overall period in which rules were analyzed for this study).

- Based on the rules reviewed for the study, the number of proposed rules for which IRFAs were prepared rose from 22 in 1995 to 50 in 1999. The number of final rules for which FRFAs were prepared rose from 22 in 1995 to 46 in 1999. The researchers suggest that this change is attributable to the attention that agencies devote to the issue of small entity impacts as a result of the enactment of the SBREFA.

- There was a substantial improvement in compliance with the RFA's requirements for certification and explanation of rules that do not have a significant economic impact on a substantial number of small entities. In 1995, about 39 percent of final rule notices failed to comply with either or both of these requirements. In 1999, the rate of noncompliance was reduced to 32 percent.

- The researchers nevertheless recognize that compliance with the RFA has been generally mixed, with many identifiable problems in meeting almost all requirements of the law. In addition to a continued lack of technical compliance in some cases, there are other cases where the letter of the law is met, but the goal of lowering regulatory burdens on small entities is not fully achieved. Specifically, in numerous instances, federal agencies have not adopted regulatory alternatives that achieve their stated policy goals while reducing small entity burdens, even when the Office of Advocacy or the general public has informed the agency of these alternatives.

Comments from Advocacy

Given the lack of data on this matter, the task undertaken by the researchers at Consad was undoubtedly intricate and difficult. They managed to pull together a database of rules from a variety of sources, and derive trends and patterns of agency behavior vis-à-vis the RFA and the SBREFA. In addition to its present utility, this study is certainly a good foundation for future analysis and action.

Ordering Information

The full text of this report and summaries of other studies performed under contract with the U.S. Small Business Administration's Office of Advocacy are available on the Internet at www.sba.gov/advo/research.

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