

July 23, 2008

Rear Admiral Brian M. Salerno
United States Coast Guard
Assistant Commandant for Policy and Planning
2100 Second Street, S.W.
Washington, DC 20593-0001

Captain Michael M. Rosecrans
United States Coast Guard
Chief, Fishing Vessel Safety Division
2100 Second Street, S.W.
Washington, DC 20593-0001

Electronic Address: www.regulations.gov (Docket No. USCG–2003–16158)

RE: Docket No. USCG–2003–16158 Commercial Fishing Industry Vessels Advance
Notice of Proposed Rulemaking

Dear Rear Admiral Salerno and Captain Rosecrans:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits this comment to the Department of Homeland Security's (DHS) United States Coast Guard (USCG) advance notice of proposed rulemaking on *Commercial Fishing Industry Vessels*. The Office of Advocacy commends the USCG for seeking comments on the potential economic impact of each requirement on small entities. As the USCG moves forward with a notice of proposed rulemaking, the agency should prepare an initial regulatory flexibility analysis (IRFA) pursuant to the Regulatory Flexibility Act (RFA) in order to determine the impact on small entities.

Advocacy Background

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or of the Administration. Section 612 of the RFA requires Advocacy to monitor agency compliance with the Act, as amended by the Small Business Regulatory Enforcement Fairness Act.¹

¹ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

On August 13, 2002, President George W. Bush enhanced Advocacy's RFA mandate when he signed Executive Order 13272, which directs Federal agencies to implement policies protecting small entities when writing new rules and regulations. Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.

The Proposed Rule

On March 31, 2008, the USCG published an advance notice of proposed rulemaking (ANPRM) on amendments to its commercial fishing industry vessel regulations.² The proposed rule would add new requirements for vessel stability and watertight integrity, stability training and assessments, vessel maintenance and self-examinations, immersion suits, crew preparedness, safety training, safety equipment, and additional documentation. The purpose of this action is to enhance maritime safety.

Requirements of the RFA

The RFA requires agencies to consider the economic impact that a proposed rulemaking will have on small entities. Pursuant to the RFA, the agency is required to prepare an IRFA to assess the economic impact of a proposed action on small entities. Under section 601 of the RFA "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act.³ The IRFA must include: (1) a description of the impact of the proposed rule on small entities; (2) the reasons the action is being considered; (3) a succinct statement of the objectives of, and legal basis for the proposal; (4) the estimated number and types of small entities to which the proposed rule will apply; (5) the projected reporting, recordkeeping, and other compliance requirements, including an estimate of the small entities subject to the requirements and the professional skills necessary to comply; (6) all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and (7) all significant alternatives that accomplish the stated objectives of the applicable statutes and minimize any significant economic impact of the proposed rule on small entities.⁴ In preparing its IRFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.⁵ The RFA requires the agency to publish the IRFA or a summary of the IRFA in the Federal Register at the time of the publication of the general notice of proposed rulemaking for the rule.⁶

Pursuant to section 605(b), an agency may prepare a certification in lieu of an IRFA if the head of the agency certifies that the proposed rule will not have a significant economic impact

² 73 Federal Register 16815 (March 31, 2008).

³ 5 USC § 601.

⁴ 5 USC § 603.

⁵ 5 USC § 607.

⁶ 5 USC § 603.

on a substantial number of small entities.⁷ A certification must be supported by a factual basis.

Size Standard

The RFA requires agencies to use SBA's size standards for their analysis of regulations, unless they are authorized by Federal statute to use a different standard. If an agency wants to use an alternate standard, it must first consult with Advocacy and publish the standard in the Federal Register for public comment. The proposed rule involves commercial fishing vessels as defined generally in 46 U.S.C. chapter 45, "Uninspected Commercial Fishing Industry Vessels." SBA's Office of Size Standards indicates that the correct North American Industry Classification System (NAICS) code for this industry is 11411, which includes "Finfish Fishing," "Shellfish Fishing," and "Other Marine Fishing." The size standard for businesses in that industry is \$4 million in average annual receipts.⁸ This is the proper size standard that should be used for this regulation.

Determining Impact on Small Entities

In the ANPRM, DHS and the USCG requested information about the potential economic impact on several groups, including small businesses and local governments. Advocacy applauds the agencies' efforts to solicit this information. Census data indicates that the total number of firms for NAICS Code 11411 is 1901. Of this total, 1842 firms or 96.8% have estimated annual receipts of less than \$5 million. In addition, 29.4% of these entities have average annual receipts of less than \$100,000; 49.4% have average annual receipts of less than \$500,000.⁹

The new stability and watertight integrity requirements, except for training, would apply only to vessels of 50 to 79 feet. The number of small entities owning vessels 50 to 79 feet with annual receipts of less than \$4 million would need to be determined to understand how many small entities are affected by this proposed rule. Advocacy encourages the USCG to review its licensing data or data available from other agencies to make this determination.

New monthly self-examination and documentation requirements would apply to vessels that "operate beyond the boundary line, with more than 16 persons on board, or that are fish-tender vessels in the Aleutian trade." In addition, the proposed rule would establish new crew preparedness requirements for these vessels including training, drills, safety officers, and on board drill conductors. Advocacy encourages the USCG to assess the additional costs for labor, training, and documentation to be incurred by vessels subject to these requirements and evaluate the economic impact on small entities.

Likewise, under the new regulations, vessels operating in seasonally-cold waters as defined in the 1993 notice of proposed rule making (NPRM) are required to carry immersion suits for

⁷ 5 USC § 605.

⁸ Information about NAICS codes and their respective size standards can be found at https://eweb1.sba.gov/naics/dsp_naicssearch2.cfm.

⁹ U.S. all industries data by receipt size for 2002 can be found at http://www.sba.gov/advo/research/us_rec02.txt.

their crew members.¹⁰ These suits range in price from \$300 to \$800 each and the purchase of such equipment could be a substantial expense for some small firms given their average annual receipts.

Under the proposed regulations, compliance with most of the measures under consideration would include new documentation requirements including documentation of the registration of emergency position indicating radio beacons with the National Oceanic and Atmospheric Administration. Advocacy urges the USCG to determine the cost of the labor necessary for this new documentation requirement given the different requirements based on vessel size, operational locations, and equipment, drills, and personnel involved.

Conclusion

The RFA requires agencies to consider the economic impact on small entities prior to proposing a rule and to provide the information on those impacts to the public for comment. Advocacy recommends that the Coast Guard perform an IRFA based on this and other public comments it receives, particularly with respect to the appropriate size standard used to determine the number of small businesses that will be affected, the projected costs of the proposed rule, and less costly alternatives that still meet the objectives for maritime safety.

In its analysis, Advocacy suggests the USCG assess the numbers and types of vessels likely to be affected by these new requirements, summarize the laws and associated regulations that already cover these requirements, provide an economic analysis of the commercial fishing industry, the cost of compliance associated with each of the requirements specified at the vessel level, and the implications in terms of the financial impact to the firms subject to the new requirements.

Thank you for the opportunity to comment on this important proposal and for your consideration of Advocacy's comments. Advocacy is available to assist the Coast Guard in its RFA compliance. If you have any questions, please feel free to contact the Office of Advocacy at (202) 205-6533.

Sincerely,

/s/

Thomas M. Sullivan
Chief Counsel for Advocacy

/s/

Joan R. Rothenberg
Mercatus Fellow

¹⁰ 58 Federal Register 29506 (May 20, 1993), Table 28.110(c) *Cold Water Areas, Coastal Waters and Beyond, Offshore of the United States (Atlantic Ocean, Pacific Ocean and the Great Lakes)*.

cc: The Honorable Susan E. Dudley, Administrator,
Office of Information and Regulatory Affairs