

November 21, 2001

Mr. Thomas G. McKenzie
Director, Regulation and Policy Division, Office of Policy and Analysis
Farm Credit Administration
1501 Farm Credit Drive
McLean, Virginia 22102-5090

RE: Electronic Commerce Proposed Rule

Dear Mr. McKenzie:

The Office of Advocacy of the U.S. Small Business Administration was created in 1976 to represent the views and interests of small business in Federal policy making activities.¹ The Chief Counsel participates in rulemakings and other Federal agency activities when he or she deems it necessary to ensure proper representation of small business interests. In addition, the Chief Counsel has a particular interest in ensuring that laws and regulations do not have an adverse impact on competition among businesses of differing sizes. The Chief Counsel also monitors agencies' compliance with the Regulatory Flexibility Act (RFA)² and works with Federal agencies to ensure that their rulemakings are supported by analyses of the impact that their decisions will have on small businesses. This letter is in response a proposed regulation published on October 22, 2001, in the *Federal Register*.³ The proposed regulation is entitled, "Electronic Commerce; Disclosure to Shareholders." The proposed rule is "designed to remove regulatory barriers to E-commerce and create a flexible regulatory environment that facilitates the safe and sound use of new technologies by Farm Credit System (System or FCS) institutions and their customers."⁴

Regulatory Flexibility Act Requirements

The RFA requires regulatory agencies to consider the effect of their actions on small entities, including small businesses, small non-profit enterprises, and small local governments. See 5 U.S.C. §§ 601, et seq.; *Northwest Mining Association v. Babbitt*, 5 F. Supp. 2d 9 (D.D.C. 1998). When an agency issues a proposed rule, the RFA requires the agency to either certify that the rule will not have a significant economic impact on a substantial number of small entities, or prepare and make available for public comment an initial regulatory flexibility analysis which describes the impact of the proposed rule on small entities. See 5 U.S.C. § 603(a), 605; *Id.*

Initial Regulatory Flexibility Analysis

¹ Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§ 634a-g, 637).

² Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§ 601-612).

³ 66 Fed. Reg. 53348.

⁴ *Id.* at 53348.

If the proposed rule is expected to have a significant economic impact on a substantial number of small businesses, an initial regulatory flexibility analysis (IRFA) must be prepared and published with the proposed rule. The required IRFA is prepared in order to ensure that the agency has considered all reasonable regulatory alternatives that would minimize the rule's economic impact on affected small entities. In accordance with Section 603(b) of the RFA, each IRFA must address the reasons that an agency is considering the action; the objectives and legal basis of the rule; the type and number of small entities to which the rule will apply; the projected reporting, record keeping, and other compliance requirements of the proposed rule; and the agency must identify all Federal rules that may duplicate, overlap or conflict with the proposed rule.

Certification

Section 605 of the RFA allows an agency to certify a rule in lieu of preparing an IRFA if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. If the head of the agency makes such a certification, the agency shall publish such a certification in the *Federal Register* at the time of the publication of the general notice of proposed rulemaking for the rule along with a statement providing the factual basis for the certification. (Emphasis added) *Id.*

RFA Non-Compliance in Proposed Rulemakings

In the above referenced proposed rule, the Farm Credit Administration did not prepare an IRFA or a certification. Small businesses and small entities have a legal right to know the extent of the economic impact of the rulemaking. The requirements of the RFA are not intended to prevent an agency from fulfilling its statutory mandate. Rather, the RFA is intended to assure that the economic impacts are fairly weighed in the regulatory decision making process. Failure to give the RFA adequate attention may lead to judicial review of the agency's actions. Therefore, the proposed rule should be republished in order to comply with the requirements of the RFA.

If you would like to discuss this matter or if this office can be of any further assistance, please contact Major L. Clark, III, Assistant Advocate for Procurement Policy. He may be reached by telephone at (202) 205-7150.

Sincerely,

Susan M. Walthall
Acting Chief Counsel of Advocacy