

GAO

Report to the Chairman, Committee on  
Small Business, House of  
Representatives, and the Chairman,  
Committee on Governmental Affairs,  
U.S. Senate

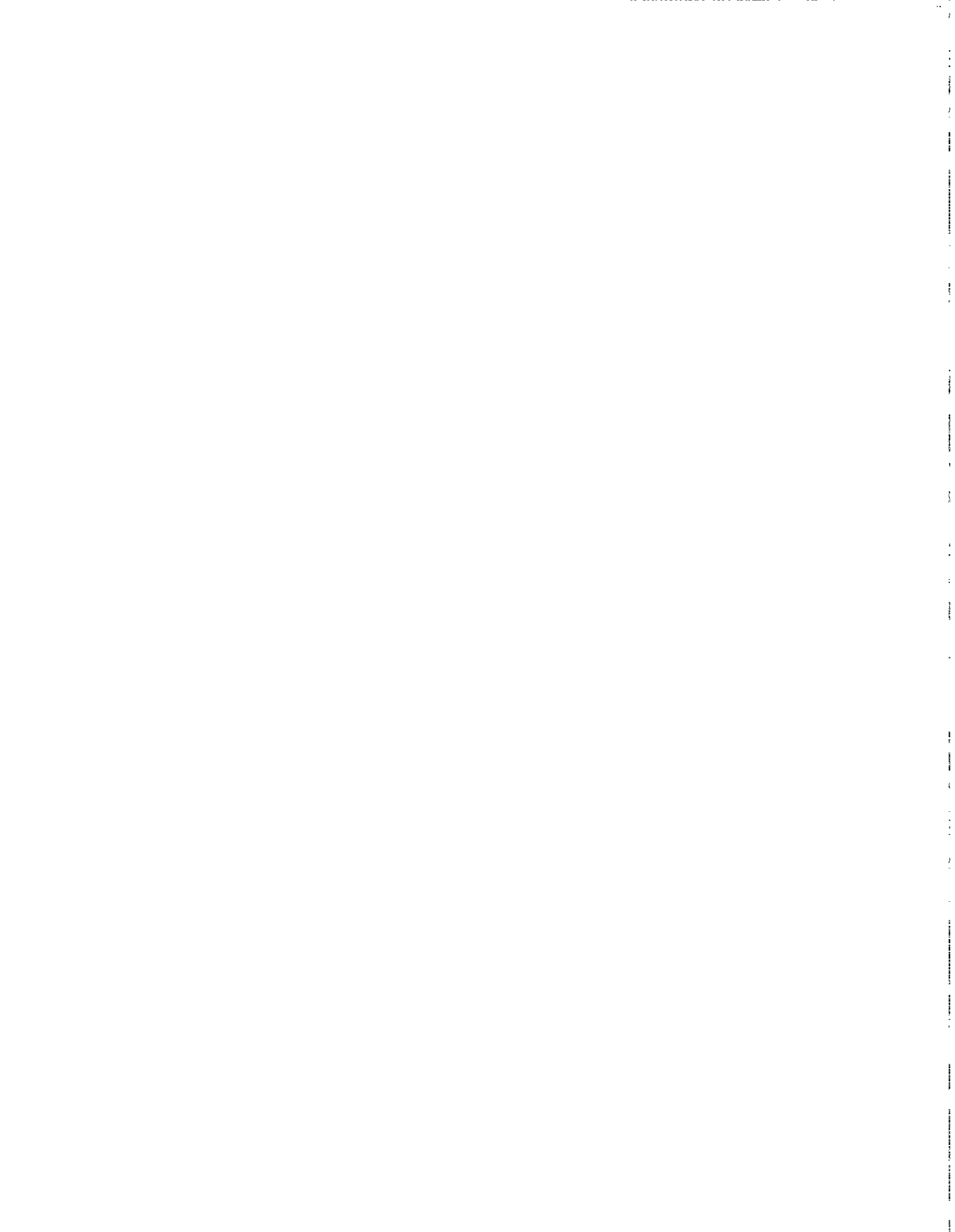
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April 1994

# REGULATORY FLEXIBILITY ACT

## Status of Agencies' Compliance







United States  
General Accounting Office  
Washington, D.C. 20548

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General Government Division

B-255476

April 27, 1994

The Honorable John J. LaFalce  
Chairman, Committee on  
Small Business  
House of Representatives

The Honorable John Glenn  
Chairman, Committee on  
Governmental Affairs  
United States Senate

This letter is in response to your requests that we evaluate federal agencies' implementation of the Regulatory Flexibility Act of 1980 (RFA), codified in Title 5 of the U.S. Code.<sup>1</sup> Specifically, you asked that we (1) review the Small Business Administration's (SBA) annual reports on agency compliance with the RFA and generalize from the reports about which agencies were and were not implementing the RFA in an effective manner and (2) review SBA annual reports and related documents on the extent to which agencies have complied with the RFA requirement that they periodically examine their rules (section 610 of Title 5).

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## Background

The RFA requires federal agencies to assess the effects of their proposed rules on small entities. According to the RFA, small entities include small businesses, small governmental jurisdictions, and small not-for-profit organizations. As a result of their assessments, agencies must either (1) perform a regulatory flexibility analysis describing the impact of the proposed rules on small entities or (2) certify that their rules will not have a "significant economic impact on a substantial number of small entities." The RFA does not define "significant economic impact" or "substantial number," but does require the regulatory flexibility analysis to indicate the objectives of the rule and the projected reporting, recordkeeping, and other compliance requirements. Agencies must also consider alternatives to the proposal that will accomplish the agencies' objectives while minimizing the impact on small entities. The RFA also requires agencies to publish a semiannual regulatory agenda that describes any prospective rule that is likely to have a significant effect on a substantial number of small entities.

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<sup>1</sup>5 U.S.C. 601-612.

Section 612 of Title 5 requires the SBA Chief Counsel for Advocacy to monitor and report at least annually on agency compliance with the RFA.<sup>2</sup> SBA's primary method of monitoring agencies' compliance is to review and comment on proposed regulations when they are published for notice and comment in the Federal Register during the federal rulemaking process. The Chief Counsels have issued 12 annual reports on RFA compliance since 1980.<sup>3</sup> The reports discuss some, but not all, federal agencies' RFA compliance.

## Results in Brief

The SBA annual reports indicated agencies' compliance with the RFA has varied widely from one agency to another. Some agencies (e.g., the Environmental Protection Agency) were repeatedly characterized as satisfying the RFA's requirements, while other agencies (e.g., the Internal Revenue Service) were viewed by SBA as recalcitrant in complying with those requirements. Still other agencies' RFA compliance reportedly varied over time (e.g., the Federal Communications Commission) or varied by subagency (e.g., the U.S. Department of Agriculture). The same lack of uniform compliance is reflected in SBA documents regarding the section 610 requirement that agencies periodically examine their rules. Some agencies had developed plans for the review of their regulations and had acted on those plans, while other agencies had neither developed plans nor taken any action.

One reason for this lack of compliance with the RFA's requirements is that the RFA does not expressly authorize SBA to interpret key provisions in the statute. Also, the RFA does not require SBA to develop criteria for agencies to follow in reviewing their rules, and SBA has not issued any guidance to federal agencies defining key statutory provisions. Finally, the RFA does not authorize SBA or any other agency to compel rulemaking agencies to comply with the act's provisions. The Office of Management and Budget (OMB) said that it has helped to ensure RFA compliance during the rulemaking process whenever SBA has notified OMB of SBA's concerns regarding an agency's RFA compliance. However, OMB's ability to ensure RFA compliance has been limited because SBA does not normally notify OMB of SBA's RFA concerns when it comments on agencies' proposed rules. Also, OMB has no established procedures in its review process to determine

<sup>2</sup>There have been several Chief Counsels since the RFA was enacted, some of whom served as Acting Chief Counsels. In this report, the Acting Chief Counsels are referred to as "Chief Counsels."

<sup>3</sup>The first report for 1981 was provided on October 7, 1981, in testimony before the Subcommittee on Export Opportunities and Special Small Business Problems of the House Committee on Small Business. Reports for 1989 and 1990 were not prepared until 1992. All other reports were prepared the year after the subject year. The report for 1993 is scheduled to be published in mid-1994.

whether agencies have complied with the RFA. Finally, OMB cannot review rules from independent regulatory agencies or agricultural marketing orders.

## Objectives, Scope, and Methodology

The objectives of our review were to determine which agencies SBA's annual reports and other documents (1) frequently indicated were and were not implementing the RFA in an effective manner and (2) indicated were and were not complying with section 610 of Title 5. To accomplish these objectives, we reviewed the annual reports of the SBA Chief Counsel for Advocacy for 1981 through 1992; correspondence from SBA and various agencies regarding section 610 activities; and related hearing records, reports, and other RFA-related materials. We also obtained information on the RFA and the regulatory process from officials at both SBA and OMB. We did not make an independent determination of agencies' RFA compliance. Any characterizations of particular agencies in this report are directly attributable to SBA. We discussed the results of our work with the SBA Chief Counsel for Advocacy and officials, including the Deputy Administrator, from the Office of Information and Regulatory Affairs at OMB in March 1994 and incorporated their comments where appropriate. We conducted our review from September 1993 to February 1994 at the Washington, D.C., headquarters offices of SBA and OMB. The review was conducted in accordance with generally accepted government auditing standards.

## SBA Reports Indicate Variable Agency Compliance With the RFA

The SBA annual reports we reviewed did not evaluate all federal agencies' compliance with the RFA.<sup>4</sup> Only the Environmental Protection Agency's compliance record was specifically mentioned in all 12 reports. Five other agencies—the U.S. Department of Agriculture (certain subagencies), the U.S. Department of Labor, the Federal Communications Commission, the Internal Revenue Service, and the Securities and Exchange Commission—were mentioned in at least 8 of the 12 reports. At the other extreme, some agencies (e.g., the U.S. Departments of Education, Energy, Housing and Urban Development, Justice, State, and Veterans Affairs) were either not mentioned in any annual reports or were only rarely mentioned. The SBA Chief Counsel said that differences in the degree to which agencies were mentioned in the reports are primarily due to differences between the agencies in their levels of regulatory activity. For example, the State Department issues very few regulations that affect small entities.

<sup>4</sup>All but the first report contained an appendix listing selected comments filed by the Office of Advocacy regarding agencies' proposed rules during the year. These listings did not, however, evaluate agencies' compliance with the RFA.

Compliance with the RFA varied widely among those agencies that were discussed in the SBA annual reports. As the Chief Counsel testified before the Senate Committee on Small Business in 1989, "(a)gency compliance with the RFA runs the gamut from near total compliance to near total disregard for this Act."<sup>6</sup> Some agencies were consistently viewed by SBA as reluctant to comply with the RFA, while other agencies' compliance records were considered exemplary virtually throughout this 12-year period. Still others were characterized differently at different points in time, with some improving their compliance record over time and others evidencing no particular pattern of compliance.

### SBA Considered Agencies Not in Compliance With the RFA for a Variety of Reasons

The SBA annual reports indicated that certain agencies have failed to comply with the RFA for a variety of reasons. Some agencies reportedly did not consider the RFA applicable to their regulations, and therefore did not perform the analyses that the act prescribes. SBA said other agencies have erroneously certified that their rules did not have a significant economic impact on a substantial number of small entities. Still other agencies accepted the fact that the RFA applied to their rules and that they affected small entities, but reportedly still did not fully comply with either the letter or intent of the law.

### IRS and DOD Believed the RFA Was Not Applicable to Their Regulations

The RFA requires federal agencies to consider the effect of proposed rules on small entities whenever the agency is required to issue notice and receive comments under the Administrative Procedures Act (APA)<sup>6</sup> or some other law. Because of restrictions in the APA, the RFA does not pertain to regulations involving certain issues, such as military or foreign affairs, agency management or personnel matters, or government loans. Also, except when notice of hearing is required by statute, the RFA does not cover such issues as interpretive rules or general statements of policy.

The SBA annual reports repeatedly indicated that the Internal Revenue Service (IRS) did not believe that the RFA was applicable to most of IRS' rules. IRS considered the vast majority of its rules to be "interpretative," and therefore not subject to the requirements of the RFA. IRS also said that its "pronouncements" (notices, revenue rulings, and revenue procedures or circulars) were not "rules," and therefore were not subject to the RFA requirements.

<sup>6</sup>U.S. Senate, Committee on Small Business, "The Regulatory Flexibility Act of 1980: An Essential Protection for Small Business," October 17, 1989, page 49.

<sup>6</sup>5 U.S.C. 553.

SBA said that many of IRS' "interpretative" rules have the same impact on small entities as rules requiring notice and comment, and therefore should have been considered subject to the RFA's provisions. Eight of the 12 SBA annual reports we reviewed noted this problem. For example, the first annual report in 1981 stated that IRS' position was "unacceptable" and "effectively circumvents the spirit or intent of the law." The 1985 and 1986 SBA reports stated that IRS had used an "arbitrary distinction" between interpretative and legislative rules to avoid RFA analysis. In the report for 1992, the Chief Counsel said that IRS had "provided no guidelines by which the Service determines whether a particular rule is interpretative" and had generally "avoided its responsibilities to consider the impact of its rules on small businesses." SBA also took a stand against IRS' contention that its "pronouncements" could avoid RFA requirements. In the report for 1987, the Chief Counsel said that IRS pronouncements may have a "profound effect" on small businesses and that IRS should have performed an RFA analysis.

In the early years of the RFA's implementation, the U.S. Department of Defense (DOD) also claimed that its rules were not subject to the act's requirements. The APA exempts military functions from the notice and comment provisions. DOD argued that all of its functions, including procurement, are military functions and, therefore, exempt from the RFA. DOD also contended that, since the APA does not require an agency to follow notice and comment proceedings for rules relating to contracts, it was not covered by RFA in its contracting regulations.

In the first SBA annual report in 1981, the Chief Counsel said that "(e)xcept for the U.S. Army Corps of Engineers (ACE), DOD has totally ignored the RFA." However, in that same report, the Chief Counsel said "it is not entirely clear whether the Regulatory Flexibility Act (RFA) applies to [DOD] regulations." By the report for 1982, though, the Chief Counsel clearly disagreed with DOD's arguments. For example, the Chief Counsel stated that DOD's use of the APA military function exemption for all DOD functions, including procurement, was "overbroad." He also said that DOD was required by a law other than the APA to obtain comments on its contracting regulations, and therefore those regulations were covered by the RFA. In 1984, Congress resolved the issue by making most significant procurement policies, regulations, procedures, and forms relating to the expenditure of appropriated funds covered by the RFA.<sup>7</sup>

<sup>7</sup>Small Business and Federal Procurement Competition Enhancement Act of 1984 (41 U.S.C. 418b). These requirements can be waived if "urgent and compelling circumstances make compliance with such requirements impracticable."

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## Several Agencies Certified That Their Rules Have Little Impact

Section 605 (b) of Title 5 allows an agency to avoid any regulatory flexibility analyses if the head of the agency certifies that the proposed rule will not have a significant economic effect on a substantial number of small entities. The certification and a brief explanation are required to be published in the Federal Register and provided to the SBA Chief Counsel for Advocacy. Section 611 (a) of Title 5 prohibits judicial review of agency certifications.

Agency certifications are common and SBA has usually considered them proper. In 1988, the Chief Counsel testified that for 80 to 85 percent of the rules the Office of Advocacy reviewed, agency heads had certified that they would not have a significant impact on small entities and "in most cases we agree with that."<sup>8</sup>

However, a number of agency certifications have been criticized by SBA. For example, the Agricultural Marketing Service (AMS) within the Agriculture Department has been repeatedly criticized by the Chief Counsel for issuing inadequate certifications. AMS oversees the issuance of marketing orders controlling the shipment of certain agricultural products. The orders and rules affecting the shippers are issued by the Secretary of Agriculture after development and input by producers. In the SBA report for 1982, the Chief Counsel said AMS had shown a "lack of concern for the RFA" in not preparing a regulatory analysis of its marketing order rules. In the report for 1987, the Chief Counsel said AMS certified that its regulations have no significant impact on small businesses even though it had not examined the rules' impact. This, he said, constituted a "failure to comply with the RFA." The Chief Counsel said in SBA's report for 1992 that the certifications AMS issues with regard to these orders and rules are "boilerplate certifications representing nothing more than a post hoc rationalization for actions that the Service wants to take." She said AMS' "lack of compliance demonstrates a cavalier disregard of the analytical requirements of the RFA," and that its certifications "are a model of conclusory findings supported by little or no analysis."

SBA's views regarding the inadequacy of agency certifications were not confined to AMS. For example, from 1989 through 1991, more than half of the 494 certifications issued by the Agriculture Department as a whole were considered inadequate by SBA. The Chief Counsel said in SBA's report for 1992 that boilerplate certifications similar to those issued by AMS have also been provided by the Bureau of Land Management, the Federal

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<sup>8</sup>U.S. Senate, Committee on Governmental Affairs, "Regulatory Reform: Federalism and the Regulatory Flexibility Act," September 14, 1988, page 62.



Energy Regulatory Commission (FERC), the Food and Nutrition Service, and the U.S. Department of Energy. She said that these agencies often failed to perform a regulatory analysis when rules will have a significant beneficial impact on small businesses, or failed to consider the entire universe of small entities covered by the RFA. IRS has also been criticized for improper certifications. In a 1986 hearing before a subcommittee of the House Committee on Small Business, the SBA Chief Counsel testified that even though IRS agreed that one of its rules was not "interpretative" and was therefore subject to the RFA's requirements, IRS opted out of doing a regulatory analysis by certifying that the rule had no impact on small firms.<sup>9</sup> SBA disagreed and said IRS should have performed a regulatory analysis.

#### SBA Considered Some Agencies Not in Compliance for Other Reasons

Other agencies have been described in the SBA annual reports as not in compliance with the RFA for a variety of reasons. For example, in the report for 1986 the Chief Counsel said the General Services Administration (GSA) had "sidestepped the need to perform a regulatory flexibility analysis" as it revised one of its regulations. The Chief Counsel challenged GSA's certification and recommended that an analysis of the proposed rule change be conducted.<sup>10</sup> In the SBA report for 1989, the Chief Counsel again challenged GSA for noncompliance with the RFA and for the substantive content of a proposed rule. The Chief Counsel also considered two of GSA's initial regulatory flexibility analyses "inadequate" in that report.

Other agencies (such as IRS) have also been criticized for inadequate regulatory flexibility analyses. The Chief Counsel testified in a hearing before the Senate Governmental Affairs Committee in 1988 that about half of the Office of Advocacy's time is spent trying to convince agencies to go further in their analysis of regulatory impact or to make the regulatory decision more flexible.<sup>11</sup>

#### SBA Considered Other Agencies in Compliance With the RFA

On the other hand, SBA's annual reports have often described certain agencies as in compliance with the RFA. The Chief Counsel has repeatedly considered the Environmental Protection Agency (EPA) to be in compliance with the RFA. In SBA's first report on RFA compliance in 1981,

<sup>9</sup>U.S. House of Representatives, Committee on Small Business, Subcommittee on Export Opportunities and Special Small Business Problems, April 16, 1986, page 5.

<sup>10</sup>The Chief Counsel did note in this report that GSA issued "very good semi-annual agendas covering proposed procurement rules quite comprehensively."

<sup>11</sup>U.S. Senate, Committee on Governmental Affairs, "Regulatory Reform: Federalism and the Regulatory Flexibility Act," September 14, 1988, page 62.

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the Chief Counsel said that EPA had a "good track record in implementing regulatory flexibility" and that its initial regulatory flexibility analysis was "very comprehensive and professional." In SBA's report for 1986, the Chief Counsel said EPA had "maintained its lead role in giving real meaning to the RFA" during the act's first 5 years and said the agency was "highly attuned to the potential adverse impacts its regulations may have on the competitive situation of small entities." In a 1986 hearing before a subcommittee of the House Committee on Small Business, the Chief Counsel said EPA was a "model agency in utilizing the Regulatory Flexibility Act."<sup>12</sup> He said EPA accepts that its rules have an impact on small firms, determines what the impact will be, and tailors their regulations to minimize or even exempt small businesses from their effects. Therefore, he said, "we feel that the legislation is working well at EPA."

In a 1988 hearing before the Senate Committee on Governmental Affairs that focused on environmental policy as a case study of regulatory reform, the Chief Counsel said "EPA has been absolutely tops in the federal government in trying to incorporate not only the Regulatory Flexibility Act but also general principles of regulatory analysis onto its procedures."<sup>13</sup> In SBA's annual report for 1992, the Chief Counsel said EPA had adopted agencywide procedures for complying with the RFA that "favor the performance of a regulatory flexibility analysis in almost all but the most routine rulemakings." The Chief Counsel said "this emphasis on analysis, as opposed to methods for skirting the analytical requirements of the RFA, will result in rules more closely tailored to entity size and will achieve greater compliance with the broad statutory mandates imposed on the EPA."

The SBA annual report for 1992 also singled out the Securities and Exchange Commission (SEC) and the Federal Aviation Administration (FAA) as having sound RFA programs. SEC was reportedly the only agency involved in finance and investment regulatory matters that consistently sought comments specifically related to the impact of its proposed rules on small business. SBA has long considered SEC one of the best agencies at RFA compliance. In SBA's first annual report in 1981, the Chief Counsel said SEC had "embraced the intent of the Regulatory Flexibility Act" and had done a thorough review of its major laws that "epitomizes the initiative that all agencies should be taking in the area." Likewise, FAA reportedly undertook a major effort to comply with the RFA in the early 1980s. The

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<sup>12</sup>U.S. House of Representatives, April 16, 1986, page 3.

<sup>13</sup>U.S. Senate, September 14, 1988, page 63.

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agency clarified the definition of small entities and developed guidelines for determining when a regulatory flexibility analysis was needed.

Several agencies responsible for regulating financial institutions were praised for their RFA compliance in early SBA annual reports, but were not mentioned in any reports after 1985. For example, the SBA report for 1982 said that the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Home Loan Bank Board, and the Federal Deposit Insurance Corporation (FDIC) "have been in compliance with the RFA and have been reasonably thorough in analyzing the impact of their activities on those entities they regulate." In the SBA report for 1983, the Chief Counsel said that FDIC "consistently complies with the RFA," and said that the Reserve Board clearly identified small business impacts and carefully examines its regulatory burdens on smaller banks. In the SBA report for 1984, FDIC was praised by the Chief Counsel for incorporating RFA safeguards in its manual for drafting regulations. In the SBA report for 1985, the Chief Counsel stated that these financial regulatory agencies had "generally been considering small business concerns," but said opportunities for improvement still existed.

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### SBA Said Some Agencies Had Improved Their Compliance With the RFA

The SBA annual report for 1992 noted several agencies that had responded to suggestions from the Office of Advocacy and/or had improved their RFA compliance record. For example, SBA reported:

- In the early 1980s the National Marine Fisheries Service within the U.S. Department of Commerce considered the RFA to apply only to its overall fishery management plan, not the specific measures within the plan. In the mid-1980s, however, the Service began applying the RFA to the specific measures. In 1992, the Service developed guidelines for RFA compliance for all fishery councils. The Chief Counsel stated that the new guidelines "have resulted in substantially improved compliance with the RFA."
- The Federal Emergency Management Agency (FEMA) was not complying with RFA procedural requirements. In 1992, the Office of Advocacy met with representatives of the FEMA General Counsel's office. Since then, the SBA Chief Counsel said, FEMA issuances have shown "remarkable improvement."
- The Office of Surface Mining and Enforcement within the U.S. Department of the Interior and the Consumer Product Safety Commission had improved their agency certifications as a result of discussions with the Office of Advocacy.

Other agencies that the Chief Counsel said did not have exemplary programs in 1992 but were making a concerted effort to comply with RFA procedural requirements included the Federal Crop Insurance Corporation, the United States Patent and Trademark Office, the Fish and Wildlife Service, and the Agricultural Stabilization and Conservation Service.

### SBA Said Other Agencies Had Variable Compliance Records

The SBA annual reports indicated that other agencies have had a checkered record of RFA compliance. For example, in 1981 the Federal Communications Commission (FCC) was described by the Chief Counsel as exhibiting a "fair" level of compliance. In the 1982 annual report, the Chief Counsel said FCC's overall compliance had "improved noticeably" and that it had "become more responsive to the RFA." By 1983, however, FCC's regulatory agenda was described as "flawed in many respects" and its certifications were considered improper. In 1986 hearings before the House Committee on Small Business, the Chief Counsel said that FCC "has avoided regulatory flexibility analysis by attempting to exclude groups of small businesses from RFA coverage." In the reports for both 1987 and 1988, the Chief Counsel said FCC's compliance with the RFA "continues to be inadequate." In 1988 hearings before the Senate Committee on Governmental Affairs, the Chief Counsel said FCC "is an example of an agency that in a couple of instances seeks to certify rules as having no impact, where we think they broadly do have an impact, and we have a hard time in some cases convincing them that they need to do some further analysis." In the SBA report for 1992, however, the Chief Counsel said FCC's compliance record was "improved," and said FCC personnel regularly contacted SBA to discuss RFA compliance.

FERC and the U.S. Department of Transportation (DOT) have also been described as having a variable history of compliance. FERC was described in the SBA reports for both 1987 and 1988 as having made "a strong effort to comply with the letter and spirit of the Regulatory Flexibility Act." The Chief Counsel cited examples in both reports in which the Commission followed the RFA's procedures. As noted previously, however, FERC was criticized in the SBA report for 1992 for having issued boilerplate certifications. DOT was described as "exemplary" in the 1981 SBA report, and in the report for 1983 the Chief Counsel said DOT "consistently does a good job of identifying the small business impact of its planned actions." In the report for 1987, however, DOT's record was described as "mixed," with the Coast Guard and the Federal Highway Administration cited for

failing to heed SBA suggestions regarding their proposed rules. DOT as a whole was not mentioned in any subsequent SBA reports, although the report for 1992 said FAA's program was one of the best in the government.

Like DOT, the SBA reports indicated other agencies' compliance records varied by subagency. For example, in the report for 1988 the Chief Counsel said the Food Safety and Inspection Service and the Animal and Plant Health Inspection Service within the U.S. Department of Agriculture were "cognizant of their RFA responsibilities, while other parts of the agency ignore the Act." In the SBA report for 1992, the Food Safety Inspection Service was described as responsive to SBA comments and, as noted previously, the Federal Crop Insurance Corporation and the Agricultural Stabilization and Conservation Service were seen as making an effort to comply with the RFA. However, AMS was again viewed as recalcitrant in the 1992 SBA report.<sup>14</sup>

The SBA annual reports also indicated RFA compliance within the U.S. Department of Labor varied by subagency. In the report for 1987, the Chief Counsel said that the Labor Department "has not been consistent in its application of Regulatory Flexibility Act procedures to its various regulatory responsibilities." The report cited the Occupational Safety and Health Administration (OSHA) for failing to evaluate the most significant consumer products alternatives and failing to perform a regulatory flexibility analysis. The Wage and Hour Division, however, was congratulated for its regulatory flexibility analysis. The Chief Counsel made similar comments regarding the Labor Department, OSHA, and the Wage and Hour Division in the SBA annual report for 1988.

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## SBA Annual Reports and Survey Showed Many Agencies Had Not Planned for or Conducted Review of Rules

Section 610 of Title 5 required each agency to publish a plan for the periodic review of its rules that "have or will have a significant economic impact upon a substantial number of small entities." The plan was required to be published in the Federal Register within 180 days after the RFA's effective date of January 1, 1981, and could be amended at any time by publishing the revision in the Federal Register. According to the RFA, the purpose of the agencies' reviews was to determine whether their rules should be continued without change, amended, or rescinded. The plan was required to provide for the review of all such agency rules in effect on January 1, 1981, within 10 years of that date. The plan was also required to provide for the review of all rules adopted after that date within 10 years of their publication as a final rule. In reviewing their rules, agencies were

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<sup>14</sup>However, the SBA report for 1992 also noted that AMS did accept certain SBA recommendations.

required to consider such factors as the continued need for the rule, its complexity, and any complaints or comments from the public.<sup>15</sup> However, any agency that certified that its rules did not have a significant impact on a substantial number of small entities was not required to develop a plan or to conduct a review.

### SBA Annual Reports Rarely Noted Agencies' Section 610 Compliance

Only a few of the SBA annual reports commented on agencies' compliance with section 610, and those that did indicated certain agencies were not complying. For example, the SBA report for 1982 stated that, although the RFA as a whole was working well, "(t)he one area where much more work remains to be done . . . is in the area of review of existing regulations affecting small business." The report said that many agencies had not planned a review of existing regulations as required by the RFA. Furthermore, "(m)any of the review plans that have been submitted are inadequate, and most importantly, little or no follow-up action to the plans has been undertaken." The Chief Counsel specifically noted that the U.S. Departments of Commerce and Interior had not published a review plan in the Federal Register.

The SBA report for 1983 noted several agencies' actions and inactions regarding the section 610 requirement:

- The U.S. Department of Health and Human Services' review plan was described as "very general" and, as a result, "it is difficult to measure progress and to make recommendations with respect to future review."
- The Labor Department had reportedly developed a good periodic review plan and "is making excellent progress on the plan every year."
- EPA had reportedly published its periodic review plan on July 16, 1981, soliciting comments from interested groups on which rules to review. The report said that EPA responded to the comments in March 1982, identifying the rules selected for review and when they would be reviewed.
- SEC was described as "adhering closely to its periodic review plan, and making good progress."
- FDIC was said to have made "good progress on its periodic review plan." Also, FDIC reportedly reviewed its existing regulations at least once every 5 years.
- The former Federal Home Loan Bank Board reportedly published a plan for periodic review on August 4, 1981. For a variety of reasons, though, the Board was said to have believed it would be premature to establish a

<sup>15</sup>Executive Order 12866 (Sept. 30, 1993) also requires agencies to submit a program to OMB under which the agencies will "periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated."

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schedule for review of all existing regulations. Instead, the Board “will publish periodically a list of the regulations then under review as part of its semiannual agenda.”

The SBA annual reports for 1984 through 1992 did not comment on specific agencies’ section 610 compliance records.

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**SBA’s 1992 Survey to Determine Agencies’ Section 610 Compliance**

In April and May 1992, the Chief Counsel for Advocacy sent letters to the heads of all 14 executive departments and at least 69 other federal organizations requesting that they furnish a copy of their original periodic review plan and any amendments.<sup>16</sup> These 83 federal entities were also requested to provide a summary of the results of their regulatory reviews. Finally, they were also asked to submit a copy of their agencies’ plan to review any regulations issued subsequent to 1981 and the results of any such review.

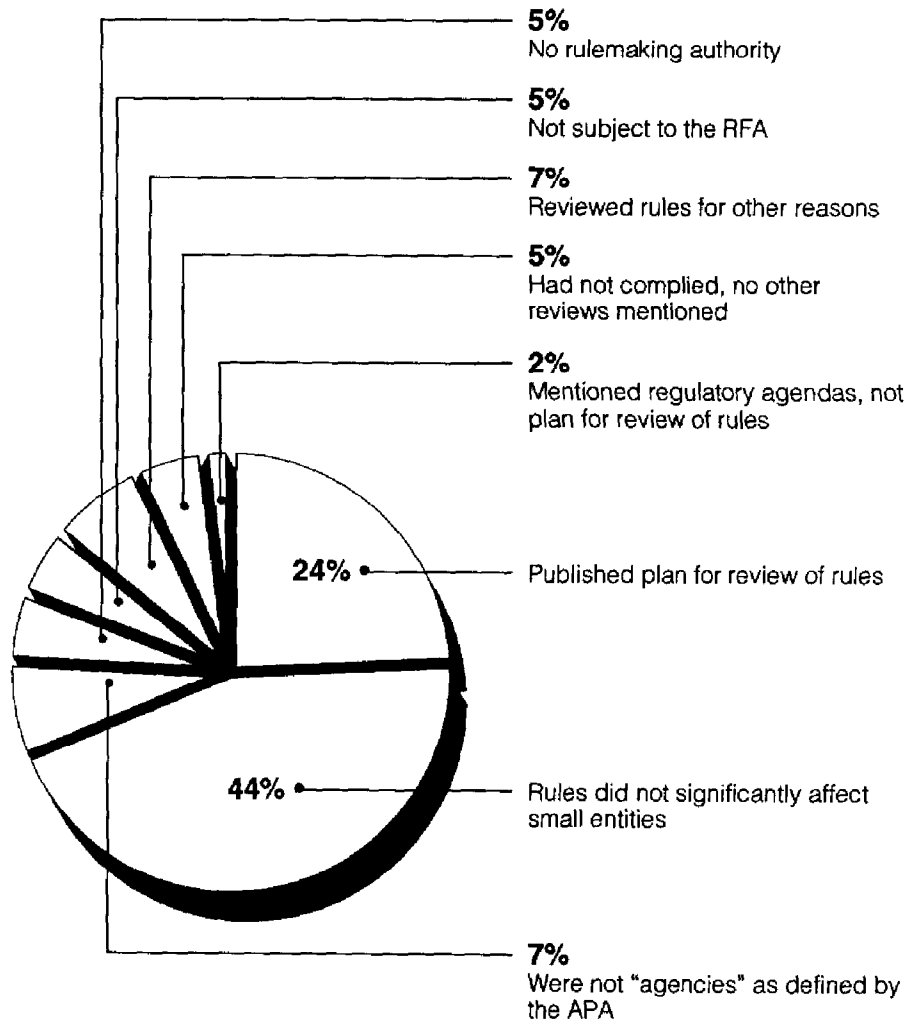
At least 55 executive departments and other federal organizations responded to the Chief Counsel’s request.<sup>17</sup> A graphic breakdown of these responses is shown in figure 1, and a listing of which agencies responded by type of response is in appendix I.

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<sup>16</sup>SBA officials provided documentation showing that letters were sent to 14 executive departments and 69 other federal organizations. They said that more than 69 other federal organizations may have been sent letters inquiring about section 610 compliance, but copies of those letters had been lost.

<sup>17</sup>SBA officials said that more than 55 agencies may have responded, but their responses may have been lost. Other documentation (e.g., copies of agencies’ plans) also could not be located.

**Figure 1: Variances in the 55 Responses to SBA's Request for Information on Section 610 Compliance**



Note: The percentages do not total 100 due to rounding.

Source: SBA. SBA provided 55 letters from agencies, but said other letters may have been received but lost.

Of the 55 respondents, 13 (24 percent) stated that they had published the required plan for the review of their rules. A number of these agencies also indicated in their responses the results of their reviews and/or how rules issued subsequent to 1981 were reviewed. For example, the U.S.



Department of Education said that, as a result of its review, many of its regulations “were revised to reduce regulatory burden or complexity, to increase flexibility, or to eliminate unnecessary requirements.”

The remaining 42 respondents did not say that they had published a plan for regulatory review pursuant to section 610. A breakdown of the 42 respondents’ comments follows.

- Twenty-four (44 percent of the 55 responses) indicated that their agencies were not required to comply with section 610 because none of their regulations had a significant economic impact on a substantial number of small entities.<sup>18</sup>
- Four (7 percent) said that they were not required to comply with section 610 because they were not federal “agencies.”
- Three (5 percent) said that they had no rulemaking authority and, therefore, had no rules to review.
- Three (5 percent) said that they were not subject to the RFA at all.<sup>19</sup>
- Four (7 percent) indicated that they had reviewed their regulations for reasons other than section 610’s requirements.<sup>20</sup>
- Three (5 percent) admitted that they had not complied with section 610’s requirements.<sup>21</sup>
- One (2 percent) referred to the agendas it published regarding upcoming regulatory actions, but did not say that it had published a review plan pursuant to section 610’s requirements.

<sup>18</sup>Among these was a response from GSA, which said that “since the inception of the Act in 1981, GSA has not published a rule that fits the criteria of the Regulatory Flexibility Act.” This characterization is puzzling given the fact that SBA’s 1989 annual report indicated that GSA did eight initial regulatory flexibility analyses in 1989, none of which would have been done had GSA determined that these rules did not have a significant economic impact on a substantial number of small entities.

<sup>19</sup>DOD’s assertion that it is not required to comply with the RFA is puzzling given that the Small Business and Federal Procurement Competition Act of 1984 made most significant procurement policies, regulations, procedures, and forms, including DOD’s, covered by the RFA. Also, the U.S. Information Agency said it was exempt because of its “foreign affairs mission,” but the State Department did not claim this exemption.

<sup>20</sup>For example, FDIC said it had originally published its plan for the review of its regulations in 1979, before the enactment of the RFA. The agency said it had also reviewed its regulations and policy statements under the regulatory standards set forth in the President’s January 28, 1992, memorandum on reducing the burden of government regulation.

<sup>21</sup>Each of these agencies did, however, offer some type of explanation. The Department of Energy responded on behalf of the Alaska Natural Gas Transportation System and said that the Office of the Federal Inspector was vacant and that legislation was pending to abolish the agency. FERC said it was “currently reviewing all Commission regulations.” The Federal Housing Finance Board said it was a new agency and, as a result, “we have not focused on the requirement of section 610 to establish a review process.”

The SBA Chief Counsel said SBA had not contacted any of these agencies regarding their compliance with section 610 since the information was collected in 1992 because SBA has no authority to compel agencies to plan for or conduct a review of their rules. SBA is required to monitor and report on agency compliance with the RFA, but did not include information on agencies' section 610 compliance in its annual report for 1992.

## Interpretation of the RFA Varies and Enforcement Processes Need Improvement

The RFA does not expressly authorize SBA to interpret key provisions in the statute and does not require SBA to develop criteria for agencies to follow in reviewing their rules. Neither does the RFA authorize SBA or any other agency to compel rulemaking agencies to comply with the act's provisions. By requiring the Chief Counsel to monitor compliance with the RFA, the act presumably permits SBA to at least provide agencies with nonbinding guidance on how it believes the RFA should be implemented. SBA issued some general guidance in 1981, but did not attempt to define terms in the RFA. SBA has not issued any further guidance on RFA compliance since 1981.

Because of this lack of clarity, different rulemaking agencies are interpreting the statute differently. In our 1991 report on the RFA and small governments, we found that each of the four federal agencies we reviewed had a different interpretation of key RFA provisions.<sup>22</sup> The report pointed out that the RFA provided neither a mechanism to enforce compliance with the act nor guidance on implementing it. We concluded that OMB could help SBA ensure compliance by applying methods similar to those OMB used for other regulatory activities. We recommended that Congress consider amending the RFA to (1) require that, in consultation with OMB, SBA develop criteria as to whether and how federal agencies should conduct RFA analyses for small governments and (2) expand SBA's authority to review and comment on proposed agency regulations affecting small governments. As part of this expansion, we recommended that SBA be directed to work with OMB to ensure agency compliance with the RFA's provisions.

Although Congress has not acted on our recommendations, Executive Order 12866, issued on September 30, 1993, provides a mechanism by which OMB can help ensure agency compliance with the RFA. The executive order allows OMB to review and comment on most agencies' "significant

<sup>22</sup>Regulatory Flexibility Act: Inherent Weaknesses May Limit Its Usefulness for Small Governments (GAO/HRD-91-16, Jan. 11, 1991).

regulatory actions” as part of the rulemaking process.<sup>23</sup> In that process, a rulemaking agency covered by the executive order must submit any significant regulatory action to OMB along with descriptive and explanatory materials and an assessment of the potential costs and benefits. If OMB does not object, the rulemaking agency may then publish the proposed rule in the Federal Register for notice and comment. The executive order says this comment period is intended to seek the comments of those who are intended to benefit from or be burdened by any regulation and, in most cases, should be not less than 60 days. At the conclusion of the comment period, the rulemaking agency makes whatever changes it believes are needed to address the comments received and again submits the proposed rule to OMB. If OMB does not object, the agency may then publish the final rule in the Federal Register.

OMB can return most regulatory actions to agencies for further consideration either before the notice and comment period or before final publication if it believes the agencies' actions are inconsistent with applicable law, the president's priorities, or the executive order's principles. The executive order specifically mentions the RFA as one of the laws with which agencies must comply. OMB officials said that they consider the effect of agencies' proposed rules on small entities as part of their regulatory reviews, but said that they have no established procedures to determine whether agencies have complied with the RFA. They said one reason why OMB has not established procedures is because SBA has not issued any guidance interpreting key provisions in the RFA. OMB officials said that if SBA notified them that it believed an agency's rules were not in compliance with the RFA, OMB would consider the rule appropriate for OMB review.

There are also legal limits to OMB's regulatory review authority. According to OMB officials, Congress has attached a rider to OMB's appropriation for each of the past 9 years forbidding it to return agricultural marketing orders to AMS for further consideration. Also, OMB's authority to review and, if necessary, return regulatory actions to agencies does not cover all agencies. Specifically excluded from coverage under the executive order are all independent regulatory agencies or commissions, such as FCC, FDIC, FERC, or SEC.

<sup>23</sup>Similar review authority was given to OMB in Executive Order 12291, which was revoked by Executive Order 12866. According to Executive Order 12866, "significant regulatory action" means any action that is likely to result in a rule that may, among other things, adversely affect a sector of the economy, productivity, competition, jobs, or state, local, or tribal governments or communities. A proposed rule may be designated as a "significant regulatory action" by either the rulemaking agency or OMB.

The Chief Counsel said SBA normally becomes aware of the specifics of a proposed rule when it is published for notice and comment. If SBA believes the rulemaking agency has not adequately considered the effect of the proposed rule on small entities, the Chief Counsel said SBA will send the agency written comments. However, the Chief Counsel said that SBA does not usually send OMB a copy of their compliance concerns. OMB officials said that SBA officials have occasionally called them on the telephone regarding certain agencies' RFA compliance and, in those instances, OMB has taken SBA's views into consideration during its reviews and helped ensure RFA compliance. For example, they said that if SBA officials told them that a rulemaking agency should have conducted an RFA analysis, OMB would ask the agency to show why an analysis was not done before permitting the proposed rule to be published in its final form.

## Conclusions

Our review of SBA's annual reports and other documentation indicated that some agencies have not complied with the RFA as interpreted by the SBA Chief Counsel for Advocacy. We believe that the reasons for this apparent lack of compliance include the following: (1) the RFA does not expressly authorize SBA to interpret the act's key provisions, (2) the RFA does not require SBA to develop criteria for agencies to follow in reviewing their rules, (3) SBA has not issued any guidance to federal agencies defining key statutory provisions in the RFA, and (4) the RFA does not authorize SBA or any other entity to compel rulemaking agencies to comply with the act's provisions.

OMB can help ensure certain rulemaking agencies' compliance with the RFA by reviewing and commenting on those agencies' significant regulatory actions pursuant to its responsibilities under Executive Order 12866. OMB can return most regulatory actions to agencies for further consideration if it believes the actions are inconsistent with the RFA. However, OMB's authority to play an enforcement role is limited in several respects. OMB cannot review rules proposed by independent regulatory agencies and cannot return agricultural marketing orders to AMS. Also, OMB does not have established criteria or procedures to determine whether agencies have complied with the RFA. Finally, while SBA reportedly notifies rulemaking agencies in writing of its RFA concerns during the rulemaking notice and comment period, it does not normally provide OMB with a copy of those concerns and only occasionally telephones OMB about SBA's compliance concerns. Therefore, OMB's ability to ensure agencies' RFA compliance is diminished because it is often unaware of SBA's concerns regarding an agency's compliance.

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## Matters for Consideration of Congress

If Congress wishes to strengthen the implementation of the RFA, it should consider amending the act to (1) provide SBA with clearer authority and responsibility to interpret the RFA's provisions and (2) require SBA, in consultation with OMB, to develop criteria as to whether and how federal agencies should conduct RFA analyses. Congress could also consider focusing its RFA oversight on the independent regulatory agencies and agricultural marketing orders over which OMB's review and comment authority is limited.

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## Recommendations

We recommend that the OMB Director, in consultation with SBA, establish procedures OMB can use to determine agencies' compliance with the RFA. These procedures should be incorporated into OMB's processes for reviewing regulations before they are published for notice and comment and before they are published in final. We also recommend that the SBA Administrator direct the SBA Chief Counsel for Advocacy to send OMB a copy of any written notification of RFA noncompliance the Chief Counsel sends to an agency.

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## Agency Comments and Our Evaluation

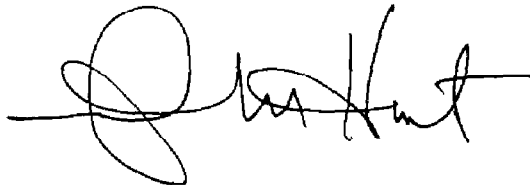
We provided a draft of this report to the SBA Chief Counsel for Advocacy and discussed the report with her on March 23, 1994. She suggested certain technical changes, which were incorporated into the final report. Overall, she said she agreed with the report's conclusions and recommendations. She said SBA welcomes clarification of its authority to interpret RFA provisions and will work with OMB to develop criteria and procedures for agency compliance with the act. The Chief Counsel also said that she will send OMB a copy of any written notifications of RFA noncompliance she sends to agencies during the rulemaking process.

We also provided a draft of the report to the Administrator of the Office of Information and Regulatory Affairs at OMB and discussed the report with her staff on March 3, 1994. The Deputy Administrator said OMB has no objection to any changes in the statute or in the rulemaking process that would strengthen its position in ensuring RFA compliance. He also said OMB would work with SBA to develop criteria and procedures for determining RFA compliance. Finally, he said that if the SBA Chief Counsel notifies OMB during the rulemaking process that an agency is not complying with the RFA, OMB would discuss the issue with the agency before concluding its review of any final regulations.

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We are sending copies of this report to the SBA Administrator, the SBA Chief Counsel for Advocacy, the OMB Director, the Administrator of the Office of Information and Regulatory Affairs at OMB, interested congressional committees, and others who may have an interest in this matter. Copies will also be made available to others upon request.

The major contributors to this report are Charles I. Patton, Jr., Associate Director, Federal Management Issues, General Government Division; Curtis W. Copeland, Assistant Director, Federal Management Issues, General Government Division; and V. Bruce Goddard, Senior Attorney, Office of the General Counsel. If you have any questions or require any additional information, please call me on (202) 512-8676.

A handwritten signature in black ink, appearing to read "William M. Hunt". The signature is fluid and cursive, with a large initial "W" and "H".

William M. Hunt  
Director, Federal  
Management Issues



# Agencies' Responses to SBA Request for Information Regarding Compliance With Section 610 of the RFA

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## Published Plan for Review of Rules

Agency for International Development  
Consumer Product Safety Commission  
Equal Employment Opportunity Commission  
Federal Communications Commission  
Federal Maritime Commission  
Federal Trade Commission  
National Credit Union Administration  
Nuclear Regulatory Commission  
U.S. Department of Education  
U.S. Department of Health and Human Services  
U.S. Department of the Interior  
U.S. Department of Justice  
U.S. Department of the Treasury

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## Rules Did Not Significantly Affect Small Entities

ACTION  
Administrative Conference of the United States  
African Development Foundation  
Council on Environmental Quality  
Farm Credit Administration  
Federal Election Commission  
Federal Retirement Thrift Investment Board  
General Services Administration  
Inter-American Foundation  
National Aeronautics and Space Administration  
National Mediation Board  
National Science Foundation  
National Transportation Safety Board  
Occupational Safety and Health Review Commission  
Office of Government Ethics  
Office of Management and Budget  
Office of Special Counsel  
Panama Canal Commission  
Peace Corps  
Resolution Trust Corporation  
Thrift Depositor Protection Oversight Board  
U.S. Arms Control and Disarmament Agency  
U.S. Commission on Civil Rights  
U.S. Merit Systems Protection Board



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**Appendix I  
Agencies' Responses to SBA Request for  
Information Regarding Compliance With  
Section 610 of the RFA**

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**Were Not "Agencies"  
as Defined by the APA**

Appalachian Regional Commission  
Legal Services Corporation  
Smithsonian Institution  
Susquehanna River Basin Commission

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**No Rulemaking  
Authority**

Federal Financial Institutions Examination Council  
Office of the United States Nuclear Waste Negotiator  
U.S. National Commission on Libraries and Information Science

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**Not Subject to the  
RFA**

U.S. Department of Defense  
U.S. Information Agency  
U.S. Postal Service

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**Reviewed Rules for  
Other Reasons**

Commodity Futures Trading Commission  
Federal Deposit Insurance Corporation  
Federal Reserve System  
U.S. Department of Housing and Urban Development

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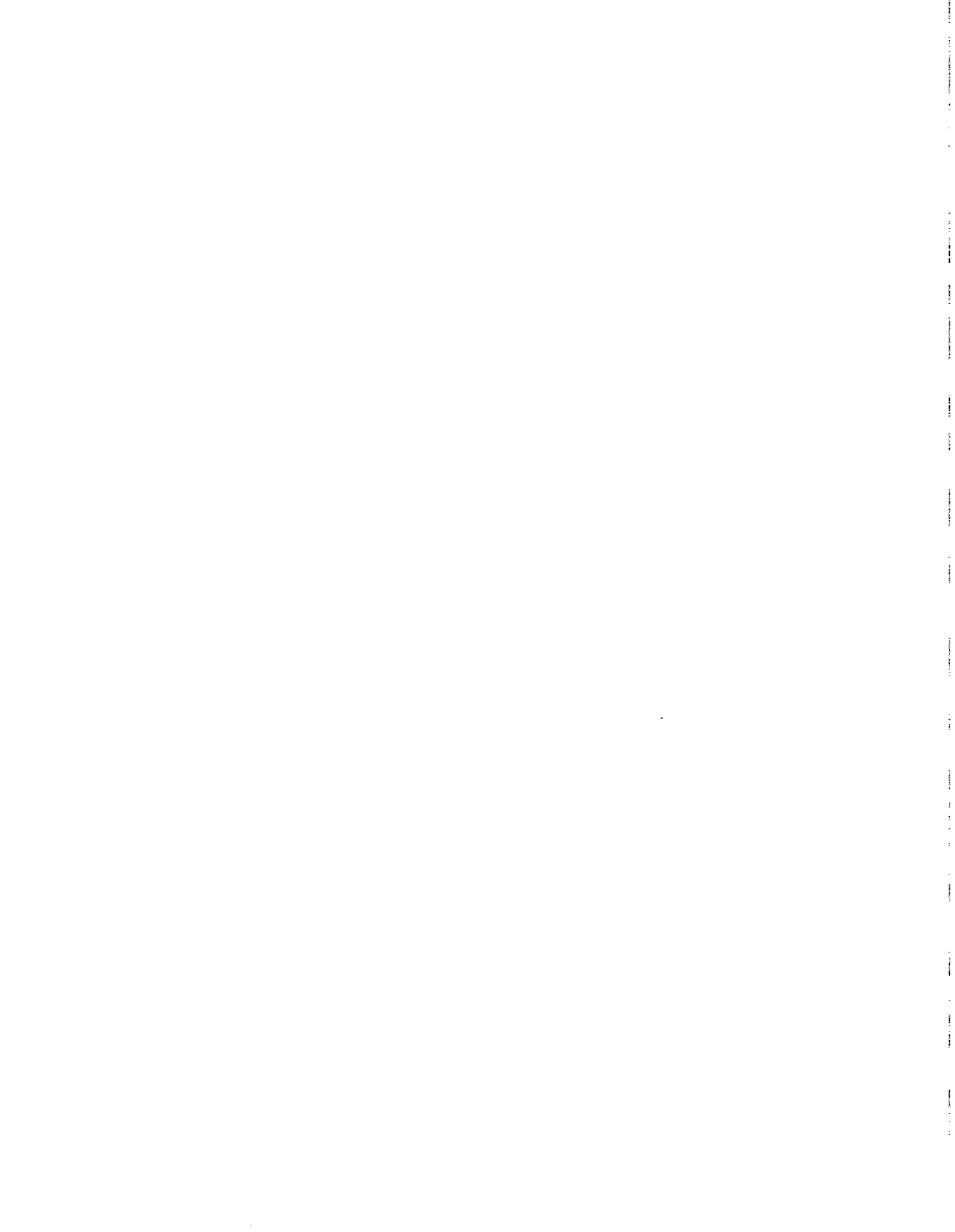
**Had Not Complied, No  
Other Reviews  
Mentioned**

Alaska Natural Gas Transportation System  
Federal Energy Regulatory Commission  
Federal Housing Finance Board

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**Mentioned Regulatory  
Agendas, Not Plan for  
Review of Rules**

U.S. Department of State



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