



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

February 13, 2003

Thomas M. Sullivan, Esq.  
Chief Counsel for Advocacy  
Small Business Administration  
409 3rd Street, S.W.  
Washington, D.C. 20416

Re: Executive Order 13272

Dear Mr. Sullivan:

I am pleased to provide you a copy of applicable procedures from the Federal Trade Commission's Rules of Practice and the Operating Manual for agency compliance with the Regulatory Flexibility Act, as revised to take account of comments transmitted by your office by letter dated January 17, 2003.

Your comments encourage the agency to provide a more detailed explanation of how the agency satisfies the certification and final regulatory flexibility act analysis requirements of the Regulatory Flexibility Act, as amended by the Small Business Regulatory Reform Act of 1996, as well agency consideration of comments, if any, provided by the Office of Advocacy on draft agency rules. Accordingly, clarifying and conforming changes are being made to sections .3.11.2.2, .3.21, .3.24.3, and .3.24.5 in Chapter 7 (Rulemaking) of the FTC's Operating Manual, which is made available on the agency's public record, expanding and supplementing the guidance and procedures set forth in the agency's Rules of Practice.

Should you have any questions regarding these procedures, or any suggestions for clarifications, additions, or other changes, your staff may contact Christian S. White, Deputy General Counsel for Legal Counsel, may be reached at 202/326-2476, [cwhite@ftc.gov](mailto:cwhite@ftc.gov), and Alex Tang, Attorney, may be reached at 202/326-2447, [atang@ftc.gov](mailto:atang@ftc.gov).

Sincerely,

William E. Kovacic  
General Counsel

Enclosure

ENCLOSURE

FEDERAL TRADE COMMISSION  
RULES OF PRACTICE AND OPERATING MANUAL PROCEDURES  
THAT IMPLEMENT THE REGULATORY FLEXIBILITY ACT

RULES OF PRACTICE

[Full text available at <http://www.ftc.gov/os/rules/index.htm>]

TITLE 16, CODE OF FEDERAL REGULATIONS (16 C.F.R.)  
PART 1—GENERAL PROCEDURES

\* \* \*

Subpart B—Rules and Rulemaking Under Section 18(a)(1)(B) of the FTC Act

**§ 1.11 Commencement of a rulemaking proceeding.**

\* \* \*

(b) Preliminary regulatory analysis. Except as otherwise provided by statute, the Commission shall, when commencing a rulemaking proceeding, issue a preliminary regulatory analysis which shall contain:

- (1) A concise statement of the need for, and the objectives of, the proposed rule;
- (2) A description of any reasonable alternatives to the proposed rule which may accomplish the stated objective of the rule in a manner consistent with applicable law;
- (3) For the proposed rule, and for each of the alternatives described in the analysis, a preliminary analysis of the projected benefits and any adverse economic effects and any other effects, and of the effectiveness of the proposed rule and each alternative in meeting the stated objectives of the proposed rule; and
- (4) The information required by the Regulatory Flexibility Act, 5 U.S.C. 601-612, and the Paperwork Reduction Act, 44 U.S.C. 3501-3520, if applicable.

**§ 1.14 Promulgation.**

(a) \* \* \*

- (2) Final regulatory analysis. Except as otherwise provided by statute, if the Commission determines to promulgate a final rule, it shall issue a final regulatory analysis relating to the final rule. Each final regulatory analysis shall contain:

- (i) A concise statement of the need for, and the objectives of, the final rule;
  - (ii) A description of any alternatives to the final rule which were considered by the Commission;
  - (iii) An analysis of the projected benefits and any adverse economic effects and any other effects of the final rule;
  - (iv) An explanation of the reasons for the determination of the Commission that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen;
  - (v) A summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues; and
  - (vi) The information required by the Regulatory Flexibility Act, 5 U.S.C. 601-612, and the Paperwork Reduction Act, 44 U.S.C. 3501-3520, if applicable.
- (3) Small entity compliance guide. For each rule for which the Commission must prepare a final regulatory flexibility analysis, the Commission will publish one or more guides to assist small entities in complying with the rule. Such guides will be designated as “small entity compliance guides.”

\* \* \* \* \*

**Subpart C—Rules Promulgated Under Authority  
Other Than Section 18(a)(1)(B) of the FTC Act**

**§ 1.26 Procedure.**

\* \* \*

- (d) Promulgation of rules or orders. \* \* \* The FEDERAL REGISTER publication will contain the information required by the Paperwork Reduction Act, 44 U.S.C. 3501-3520, and the Regulatory Flexibility Act, 5 U.S.C. 601-612, if applicable. For each rule for which the Commission must prepare a final regulatory flexibility analysis, the Commission will publish one or more guides to assist small entities in complying with the rule. Such guides will be designated as “small entity compliance guides.” \* \* \* \*

**SUBPART M–Submissions Under the Small Business  
Regulatory Enforcement Fairness Act**

**§ 1.99 Submission of rules, guides, interpretations and policy statements to Congress and the Comptroller General.**

Whenever the Commission issues or substantively amends a rule or industry guide or formally adopts an interpretation or policy statement that constitutes a “rule” within the meaning of 5 U.S.C. 804(3), a copy of the final rule, guide, interpretation or statement, together with a concise description, the proposed effective date, and a statement of whether the rule, guide, interpretation or statement is a “major rule” within the meaning of 5 U.S.C. 804(2), will be transmitted to each House of Congress and to the Comptroller General. The material transmitted to the Comptroller General will also include any additional relevant information required by 5 U.S.C. 801(a)(1)(B). This provision generally applies to rules issued or substantively amended pursuant to § 1.14(c), § 1.15(a), § 1.19, or § 1.26(d); industry guides issued pursuant to § 1.6; interpretation and policy statements formally adopted by the Commission; and any rule of agency organization, practice or procedure that substantially affects the rights or obligations of non-agency parties.

## **FTC OPERATING MANUAL**

[Full text of Operating Manual available on-line at <http://www.ftc.gov/foia/adminstaffmanuals.htm>]

[Changes made to sections **.3.11.2.2**, **.3.21**, **.3.24.3**, and **.3.24.5** in response to comments, dated January 17, 2003, from the Small Business Administration Office of Advocacy appear in textual **bold**.]

### **CHAPTER 7–RULEMAKING**

#### **.2. STATUTORY AUTHORITY FOR SUBSTANTIVE RULEMAKING**

##### **.2.1 Specific Statutory Authority In Narrowly Defined Substantive Areas**

\* \* \* Procedures for promulgating rules under these specific statutory grants are in Subpart C of Part 1 of the Commission Rules of Practice [16 C.F.R. Part 1, supra] \* \* \* . In addition, the Commission must comply with \* \* \* the Regulatory Flexibility Act (see .3.11.2.2, .3.11.2.4, .3.24.2.3, and .3.24.2.5 below).

#### **.3 PROCEDURES FOR MAGNUSON-MOSS RULEMAKING**

\* \* \*

##### **.3.8 The Initial Staff Report and Accompanying Materials**

\* \* \*

###### **.3.8.1.1 Preparation and Contents**

\* \* \* The report [i.e., regarding the commencement of a rulemaking] should provide the Commission with adequate grounds to determine whether a rulemaking proceeding is warranted and contain:

\* \* \*

- (6) A description of, and where feasible, an estimate of the number of small businesses to which the proposed rule will apply, and the type of professional skills that are necessary for compliance with the proposed rule.
- (7) A description of any alternatives to the proposed rule that would minimize any significant economic impact on small businesses, such as different compliance

requirements, the use of performance rather than design standards, and exemption from coverage or all of part of the proposed rule.

- (8) An identification, to the extent practicable, of all relevant federal rules or statutes that may duplicate, overlap, or conflict with the proposed rule.

\* \* \* \* \*

.3.8.2.3 Advance Notice of Proposed Rulemaking

\* \* \* When appropriate, the notice should state that the proposed rule or alternative formulations might have a significant economic effect on a substantial number of small businesses. \* \*

.3.8.2.4 Letters to Congress, OMB, and SBA

\* \* \* If the proposed rule or alternative formulations might have a significant economic effect on a substantial number of small businesses, a letter should also be prepared transmitting a copy of the notice to the Chief Counsel for Advocacy of the Small Business Administration. \* \* \* \* \*

.3.9. Publication of Advance Notice

\* \* \* The Office of the Secretary is responsible for sending the copies of the notice to the Congressional Committees, OMB, and the Small Business Administration.

3.11 Supplemental Staff Report

[.3.11.2.1 Draft Initial Notice of Proposed Rulemaking]

.3.11.2.2. Preliminary Regulatory and Initial Regulatory Flexibility Analyses

FTCA [Federal Trade Commission Act] § 22(b)(1) and Rule 1.11(b) [16 C.F.R. § 1.11(b), supra] list the required contents of the preliminary regulatory analysis. The analysis should also contain the information identified in items 3-8 of .3.8.1.1 above and a succinct statement of the legal basis for the proposed rule. However, if neither the rule nor the alternatives that the Commission proposes to promulgate will have a significant economic impact on a substantial number of small businesses, then items 6-8 and the statement of legal basis (i.e., the initial regulatory flexibility analysis) may be omitted. In such a case, staff must prepare a certification for publication in the Federal Register and transmittal to the Small Business Administration stating that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.

**The certification must include a statement providing the “factual basis” for the**

**determination. 5 U.S.C. 605(b). The certification should describe the affected entities and impacts that clearly justify the certification, including: a brief economic and technical statement on the regulated community (e.g., diversity of company size, revenues, profitability); the criteria used to whether the economic impact is significant and whether the number of affected entities is substantial; and a description of the assumptions and uncertainties (e.g., data sources, cost estimates).**

For rules that may have a significant economic impact on a substantial number of small businesses, the initial regulatory flexibility analysis must be published or summarized in the Federal Register. Rarely will it be convenient for the flexibility analysis to be a separate section of the preliminary analysis required by § 22 of the FTC Act. Thus, as a practical matter, the entire regulatory analysis will nearly always be published or summarized in the Federal Register notice. If the entire analysis is not published, then the initial notice must explain how the public may obtain copies. \* \* \*

#### .3.11.2.4 Letters to Congress, OMB, and SBA

\* \* \*

A cover letter should be prepared to submit the initial notice and regulatory analysis to the Office of Management and Budget at the same time that those items are sent to the Federal Register, as well as a letter to the Chief Counsel for Advocacy of the Small Business Administration transmitting the same documents and, where appropriate, a certification that the rule will not, if promulgated have a significant economic impact on a substantial number of small entities.

#### .3.21 The Final Staff Report

Pursuant to Rule 1.13(f) [16 C.F.R. 1.13(f)], the staff shall prepare a report to the Commission. The final staff report should be limited to no more than 300 pages, double-spaced, including single-spaced footnotes. The report should contain:

- (1) A summary and analysis of the entire rulemaking record, including recommended findings of fact and conclusions on the designated issues.
- (2) Recommendation for final Commission action, including the final proposed form of a rule, if recommended.
- (3) An analysis of the significant alternatives to the proposed TRR [trade regulation rule] including those that might minimize any significant economic impact on small business and including, to the extent practicable, alternatives beyond the authority of the Commission to effect.

- (4) A summary and analysis of the public comments, **including comments from Small Business Advocacy**, made in response to the preliminary regulatory analysis and initial regulatory flexibility analysis.
- (5) For the proposed rule and for each alternative identified, an analysis of the projected benefits and any adverse economic effects and any other effects, and an analysis of the effectiveness of the proposed rule and each alternative in meeting the objectives of the proposed rule. These analyses should identify those likely to receive the benefits and those likely to bear the adverse effects of the proposed rule and each alternative. To the extent practicable, benefits and adverse effects should be quantified in monetary terms, and the potential net benefits should be determined.
- (6) A discussion of any federal rules or statutes that may duplicate, overlap, or conflict with the proposed rule.
- (7) A discussion of the effects the proposed rule would have on state and local laws.
- (8) Additional legal and policy analysis, as needed.
- (9) Discussion of enforcement considerations and problems posed by the proposed rule.

\* \* \*

#### .3.24.2 Promulgation of a TRR

If the Commission decides to promulgate a rule, it must publish the text and a Statement of Basis and Purpose in the Federal Register. \* \* \* Staff must also prepare a final regulatory analysis and a final regulatory flexibility analysis, except as explained in .3.24.2.3 below. The analyses must be published in the Federal Register, or the notice must explain how the public may obtain copies. If the rule was not listed in each of the Commission's regulatory agendas published in the last 12 months, the notice must contain an explanation of the reasons why it was omitted. (See FTCA [FTC Act] § 22(d)(4).)

#### .3.24.2.3 Final Regulatory Analysis and Final Regulatory Flexibility Analysis

The final regulatory analysis [pursuant to section 22 of the FTC Act] should contain a detailed analysis of the costs and benefits of the rule and any alternatives that were considered by the Commission. To the extent practicable, costs and benefits should be quantified in monetary terms and the potential net benefits should be determined. Rule 1.14(a)(2).



If the rule may have a significant economic impact on a substantial number of small businesses, then a final regulatory flexibility analysis [pursuant to the Regulatory Flexibility Act] must also be prepared containing:

- (1) A succinct statement of the need for, and the objectives of, the rule.
- (2) A summary of the issues raised by the public comments, **including comments, if any, of the Small Business Administration Chief Counsel for Advocacy**, in response to the initial regulatory flexibility analysis, a summary of the assessment by the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.
- (3) **A description of, and estimate of the number of, small entities to which the rule will apply or an explanation of why no such estimate is available.**
- (4) **A description of the projected reporting, recordkeeping, or other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills, if any, necessary for preparation of any reports or records.**
- (5) A description of each of the significant alternatives to the rule that are consistent with the stated objective of applicable statutes and designed to minimize any significant economic impact of the rule on small entities and that were considered by the agency, and a statement of the reasons why each such alternative was rejected, **as well as the factual, policy, and legal reasons for selecting the alternative that is being adopted in the final rule.**

\* \* \*

The Commission need not prepare a final regulatory flexibility analysis if it certifies that the rule will not have a significant economic impact on a substantial number of small entities. **See .3.11.2.2 of this chapter for the factual basis to be included in the certification.** The certification must be published in the Federal Register and provided to the Small Business Administration. **See .3.24.2.5.**

#### .3.24.2.5 Letters to OMB and SBA

Staff should prepare a cover letter submitting the statement of Basis and Purpose and regulatory analysis to the Office of Management and Budget \* \* \* . A letter to the Chief Counsel for Advocacy of the Small Business Administration should also be prepared transmitting the same documents and, where appropriate, a certification (**see .3.24.2.3 and .3.11.2.2 of this chapter**) that the rule will not, if promulgate, have a significant economic impact on a substantial number of small entities.

#### .4 Procedures for Rulemaking Regarding Unfair Methods of Competition

\* \* \*

Advance notice of competition rules should also be included in the Commission's regulatory agenda. \* \* \*

In addition, the Commission must comply in all rulemakings with \* \* \* the Regulatory Flexibility Act (see .3.11.2.2, .3.11.2.4, .3.24.2.3, and .3.24.2.5 above). \* \* \* \* \*