FINAL REPORT

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

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Contract SBAHQ-99-C-0011

April 5, 2001
(Revised July 16, 2001)

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Executive Summary

The Office of Advocacy, an agency within the Small Business Administration, sponsored this study. The Office of Advocacy has primary responsibility for government-wide oversight of the Regulatory Flexibility Act of 1980, as amended (RFA). The principal goal of the RFA is to identify and, if possible, lessen the burdens federal regulations place on small entities (firms, nonprofits, and local governments). Advocacy asked CONSAD to assess agency compliance with the RFA, examine changes in compliance over time, and suggest ways to make the RFA more effective at lowering small entity burdens.

Our analysis found a marked increase in federal agency compliance with the RFA between 1995 and 1999. We also found significant patterns of strengths and weaknesses in the compliance by federal agencies with the provisions of the RFA. In our view, the weaknesses identified in this report can be eliminated if federal agencies, in cooperation with the Office of Advocacy, change their practices to better meet the letter and spirit of the RFA. A number of steps can be taken by the Office of Advocacy to encourage improvements.

Overall Performance

Our most general finding is that there have been marked improvements in compliance by some agencies following the passage in 1996 of the Small Business Regulatory Enforcement Fairness Act (SBREFA). One of SBREFA's major purposes was to strengthen the Regulatory Flexibility Act. However, compliance with the Act has been very 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. In other cases, agencies have overreacted to SBREFA and prepared analyses even for rules that should have been certified as having no significant economic impact on a substantial number of small entities. In some cases, these analyses do not estimate the magnitude of the economic burden that the rule imposes and fail to identify alternatives considered to reduce burdens.

Number of Rules with a Significant Impact on a Substantial Number of Small Entities

The RFA requires agencies to prepare Initial Regulatory Flexibility Analyses (IRFAs) for proposed rules that have a significant economic impact on a substantial number of small entities. Final Regulatory Flexibility Analyses (FRFAs) must be prepared for final rules with a significant impact on a substantial number of small entities. Based on the rules reviewed for this 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. There is no apparent evidence that the volume or burden of rulemaking changed markedly in this period. In fact, we found 27 fewer final rules completed in 1999 than in 1995, based on our sample, so the proportionate increase in FRFAs as a share of all final rules was even higher. Therefore, in our view, this change is due to the increased attention that agencies devote to the issue of small entity impacts as a result of the enactment of SBREFA.

Compliance with RFA Requirements For Certification

For rules that do not have a significant impact on a substantial number of small entities, the RFA requires agencies to include language in the notice of proposed rulemaking, and in the preamble to the final rule, that certifies the absence of impact. The statement that a rule does not have significant economic impact on a substantial number of small entities is referred to as a "certification". The RFA also requires an explanation of the "factual basis" for the certification.

We found 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 had been reduced to 32 percent.** For final rules with certification, the proportion that contained a description of the basis for the certification increased from 75 percent in 1995 to 89 percent in 1999.

Preparation of Initial and Final Regulatory Flexibility Analyses

The RFA requires agencies to follow specific guidelines as they prepare their IRFAs and FRFAs. These requirements call for agencies to analyze alternatives that reduce the impact of the rule on small entities, to describe the small entities that will be likely affected by the rule, and meet certain reporting guidelines. In 1995, only 55 percent of all IRFAs we reviewed satisfied all legal requirements of the RFA on a pro forma basis. In 1999, 64 percent of IRFAs satisfied these requirements. Similarly, in 1995, only 50 percent of all FRFAs met the legal requirements of the RFA. In 1999, 65 percent of the FRFAs we reviewed met all the requirements of the RFA.

These improvements have included not only *pro forma* compliance, but also genuine increases in responsiveness to small business issues. However, improvement has not been uniform, and some agencies may not have seen any change in responsiveness. Furthermore, some of the seeming improvement reflects merely the increasing practice of some agencies to create analyses that purport to be IRFAs and FRFAs, but do not contain all required information. These "pseudo-analyses" contain all the right section headings pertaining to requirements in the RFA, but they are devoid of substantive content. Based on our review, many of these pseudo-IRFAs and FRFAs analyze rules that do not even have significant impact on small entities. By preparing a pseudo-IRFA or FRFA, an agency avoids the sometimes difficult job of documenting a certification. In some instances, agencies prepared pseudo regulatory flexibility analyses that appear to comply with the RFA in a *pro forma* manner without actually performing the appropriate analyses.

Our database of pre-SBREFA rules is not large enough to allow us to make definitive conclusions regarding changes in agency-specific compliance pre- and post-SBREFA. However, our overall impressions, supported by our data, are as follows. First, several major regulatory agencies, including the Environmental Protection Agency (EPA) and Food and Drug Administration (FDA)—have continued and, perhaps, strengthened their performance in complying with the RFA. Though these agencies are uneven in performance, we find that they demonstrate a strong level of compliance with the RFA. Several agencies have probably

weakened in performance, likely due to separate factors such as staffing and organizational changes. The Health Care Financing Administration (HCFA) is one of these. And several agencies which were hardly on the horizon five years ago have aggressively moved towards the creation of IRFAs and FRFAs—but unfortunately many of these are pseudo-analyses. These are the Department of the Interior's (DOI's) Fish and Wildlife Service, Federal Acquisition Regulation rules (issued by the General Services Administration, Department of Defense, and National Aeronautics and Space Administration), and the Securities and Exchange Commission. Still other agencies, notably the Federal Communications Commission, have continued a pattern of highly mixed performance. Despite this variable record, overall performance clearly has improved and even some of the weaker agencies have greatly reduced the incidence of inappropriately certified regulations.

Reasons for Improved Compliance

In our view, improved compliance with the requirements of the Regulatory Flexibility Act is likely associated with three factors:

- The passage of SBREFA signaled Congressional dissatisfaction with existing performance. Both through this message, and improvements in the Act (including, significantly, increased legal vulnerability for agency noncompliance), post-SBREFA compliance appears to have improved for most agencies. Even the practice of performing pseudo-analyses demonstrates how SBREFA energized agencies to pay attention to the RFA.
- One of the SBREFA reforms was the creation of mandatory SBREFA review panels for rules promulgated by the Environmental Protection Agency and the Occupational Safety and Health Administration of the Department of Labor (both widely regarded as imposing particularly costly rules). Although fewer than two dozen rules have undergone the panel process, and only a handful of these have been issued as final rules, these rules show marked attention to burden-reducing alternatives and creative utilization of techniques to minimize burden.
- Intervention by the Office of Advocacy in individual rulemakings, particularly at early stages, has often resulted in improved agency oversight of responsiveness. Also, the Office of Advocacy's attention to the RFA compliance of a given rule likely motivates an agency's attention to the RFA with regard to subsequent rules.

Notwithstanding these strong and improved performance factors, we have identified serious patterns of weakness, some apparent causes, and a number of potential reforms. Perhaps the most pervasive problem lies in the failure to identify or to focus early on rulemakings with potentially serious impacts on small entities.

Based on our analyses, we present several recommendations for reform. A more complete description of our recommendations appears in Section 4.0. We recommend that:

- The Office of Advocacy can use even more effectively the tools that SBREFA has given it. Particularly promising among these is to highlight agency non-compliance by clearly documenting procedural, analytic, and decision failures. For example, for all "major" federal rules which require review by the General Accounting Office (GAO) and which

also violate the RFA, Advocacy should contact GAO and request that GAO include in its letters to Congress Advocacy findings and a GAO sentence on non-compliance with either certification or other RFA provisions. That stark GAO sentence, in so public a document, will put substantial pressure on agencies.

- One of the ways that agencies hide weak performance is to fail to publish the IRFA or FRFA as part of the rule's preamble. This greatly impedes meaningful public participation on the vital issue of regulatory burden. The Office of Advocacy should use every technique at its disposal, including letters to agency General Counsels, to GAO, and to the Office of Management and Budget (OMB), in addition to comments on proposed rules, to pressure agencies to publish all IRFAs and FRFAs (in those rare cases where technical appendices are so voluminous as to preclude publication these should be posted on the Internet and the address presented in the preamble). Assisting Advocacy in this effort, the Administrative Procedure Act requires the publication of all information bearing on agency decisions, and the Electronic Freedom of Information Act requires agencies to make all post-1996 government documents available electronically. In no case should Advocacy tolerate an agency's relegation of such a key aspect of public participation solely to the docket room. We also suggest that Advocacy interpret the RFA's language permitting agencies to publish a summary of IRFAs or FRFAs, instead of the entire documents, as pertaining only to cases where an IRFA or FRFA is so thoroughly prepared that it is hundreds of pages long and a summary will suffice to elicit informed public participation.
- Section 610 of the RFA requires periodic review of rules. This has been the weakest and least utilized provision of the statute. Advocacy could take additional steps to raise awareness of this provision. However, since Section 610 does not force an agency to review any particular rule, it is unclear that Section 610 can yield important RFA benefits.
- Advocacy should work with the agencies and the Regulatory Information Service Center to develop procedures to inform Advocacy of significant impact rulemakings as early as is possible in the process so that Advocacy can assist the agency in understanding the implications of the proposed rule for small entities and in fulfilling its obligations.
- Based on our review, the Office of Advocacy has been using its powers under SBREFA effectively. But it can be even more aggressive. As a simple example, Advocacy should routinely request every agency preparing a purported IRFA, or certifying a proposed rule, to include several key facts in its assessment, such as an estimate of the number of small entities significantly affected, and above all the average dollar impact on these affected entities. Agencies that prepare pseudo-analyses should be pursued until they prepare compliance guides. Advocacy should always be ready to use legal intervention to promote RFA compliance, and should develop litigation kits presenting cases it has won to share with agency attorneys. When lower level officials remain obdurate, Advocacy should directly communicate with agency General Counsels, agency heads, agency policy officials, and OMB and GAO. In general, Advocacy should look for ways to make noncompliance with provisions of the RFA more bureaucratically costly than compliance.
- We identified major agency-specific patterns of compliance problems. Advocacy already has done so in some cases, but should build further on this idea. In this regard, adding Advocacy's own letters and reports to the data bases below, all accessible electronically by agency and rule, would give Advocacy, the Congress, and the general public an information base far superior to the agencies' own. Many General Counsels would

welcome a candid presentation of their legal vulnerability and recommendations on effective ways to perform.

- To accomplish these and other reforms, development of a database listing all rules that had or have significant impact on small entities should be a high priority (our report has generated a partial database that can serve as the foundation for this). This database can be used to generate lists of rules that should be revisited under section 610, to create performance comparisons across agencies, to identify patterns of noncompliance, and to identify rules for aggressive follow up efforts. It can even be used to help energize the small business community through a public access World Wide Web site.

The Office of Advocacy, OMB, and GAO have substantial mutual interests in promoting honest and accurate analysis of regulatory impacts. They already work together on many rulemakings. But more can be done. Each agency should work cooperatively with the others to encourage genuine regulatory analysis. Specifically:

- Under the current executive order OMB reviews all "significant" rules. OMB should routinely send any "economically significant" rule back to an agency if the RFA is applicable and the rule does not contain either a well-justified certification or a IRFA/FRFA in the preamble. Moreover, OMB should require agencies, automatically, to send all rules to OMB that have not been certified.
- OMB should also involve Advocacy in pre-publication review of non-certified rules and return these to agencies for additional work in cases where the IRFA or FRFA fails to meet high standards.
- OMB (which issues the annual directions for the *Unified Agenda*) should require that any rules listed in the *Agenda* as requiring an IRFA or FRFA be accompanied by an extra analytic entry addressing the likely magnitude of impact and the alternatives the agency plans to consider. This will not only improve usefulness directly, but raise the bureaucratic price of misidentifying rules without significant impact.
- GAO should routinely include Advocacy comments in its "assessment" of regulatory compliance with the RFA for each major rule, and specifically state when Advocacy has found noncompliance with the letter or spirit of the statute. GAO and OMB should document the agency's failure in the letter to the Congress.

We make no recommendations for immediate legislative action. However, there are obvious possibilities, and we recommend that Advocacy continue to monitor agency compliance and at an appropriate time decide whether to recommend change. For example, the RFA could be amended to require publication of IRFAs and FRFAs in preambles; to eliminate the loophole that allows agencies to avoid preparing IRFAs or FRFAs if a proposed rule is not issued; to clarify that the absence of administrative discretion does not authorize waiving compliance with the RFA; to require agencies to re-propose rules that Advocacy nominates and GAO (an independent referee) determines are not adequately certified or analyzed; and to allow Advocacy to select one rule per year per agency to undergo a reform rulemaking using a panel.

1.0 Overview of the Regulatory Flexibility Act

Congress originally enacted the Regulatory Flexibility Act (RFA)[1] of 1980 in recognition of the problems created by inefficient and unduly burdensome federal government rules on small entities, particularly by "one size fits all" rules designed to apply to large entities. In brief, the RFA requires federal agencies to determine whether their rules would result in economic impacts that are unnecessary or felt disproportionately by small business, and to identify regulatory alternatives that achieve the desired policy goal while reducing the disproportionate impact on small business. The RFA contains provisions that call for federal agencies to perform specified analyses of the estimated regulatory impacts of rules, satisfy specific reporting requirements, and periodically review and evaluate their rules impacting small entities no less than every 10 years. These goals and requirements have been strengthened by subsequent amendments. Pertinent provisions of the RFA, as amended, are as follows.

Regulatory Agendas

Each agency is required to publish in the *Federal Register*, each October and April, a regulatory flexibility agenda that summarizes the subject area of rules that the agency intends to propose or promulgate that are likely to have a significant economic impact on a substantial number of small entities. The summary shall include a description of the objectives and legal basis for the regulation, and an estimated schedule for completing action on any rule for which a general notice of proposed rulemaking has been issued.

Initial Regulatory Flexibility Analyses

Whenever an agency is required to publish a general notice of proposed rulemaking, it shall prepare and make available for public comment an initial regulatory flexibility analysis (IRFA). The initial regulatory flexibility analysis shall describe the estimated impacts of the proposed rule on small entities. Small entities include small business, organizations, and local government agencies. An agency does not have to perform an initial regulatory flexibility analysis if it certifies that the rule will not result in a significant economic impact on a substantial number of small entities (see under *Certification*, below.)

Each initial regulatory flexibility analysis must describe:

- the reasons why the agency is considering the proposed rule;
- the objectives of, and legal basis for, the proposed rule;
- the kinds of, and where possible, an estimate of the number of small entities to which the proposed rule will apply;
- the projected reporting, recordkeeping and other compliance requirements of the proposed rule, an estimate of the classes of small entities which will be subject to the requirements, and the types of skills necessary to prepare reports or records; and
- to the extent possible, relevant federal rules which may duplicate, overlap, or conflict with the proposed rule.

[1] Pub. L. No. 96-354, 94 Stat. 1174 (codified as 5 U.S.C. § 601 *et seq*.)

In addition, the initial regulatory flexibility analysis must describe:

- Any significant alternatives to the proposed rule which accomplish the same policy goals and which minimize any significant economic impact on small entities. The analysis shall discuss significant alternatives which are consistent with the same policy goal, such as:
  - alternative compliance or reporting requirements or timetables that take into account the limited resources available to small entities;
  - the clarification, consolidation, or simplification of compliance and reporting requirements for small entities;
  - the use of performance standards rather than design standards; and
  - the exemption from coverage of the rule, or any part of the rule, for certain small entities.

Final Regulatory Flexibility Analyses

Whenever an agency promulgates a final rule after being required to publish a general notice of proposed rulemaking, it shall prepare a final regulatory flexibility analysis (FRFA). An agency does not have to perform a final regulatory flexibility analysis if it certifies that the rule will not result in a significant economic impact on a substantial number of small entities (see under *Certification*, below.)

Each final regulatory flexibility analysis must describe:

- the need for, and the objectives of, the rule;
- in summary, the significant issues raised by the public comment in response to the initial regulatory flexibility analysis, a summary of the assessment by the agency of these issues, and a statement of any changes made in the proposed rule as a result of the comments;
- the kinds of, and estimated number of, small entities to which the rule will apply, or an explanation of why no such estimate is available;
- the projected reporting, record keeping and other compliance requirements of the proposed rule, an estimate of the classes of small entities which will be subject to the requirements, and the types of skills necessary to prepare reports or records;
- the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated policy goals, including the reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency was rejected.

In addition,

- the agency must make copies of the final regulatory flexibility analysis available to the public, and publish it, or a summary of it, in the *Federal Register*.

Certification

The requirements described above for the preparation of an initial regulatory analysis or a final regulatory flexibility analysis do not apply if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. If the head of the agency certifies a rule, the certification must be published in the *Federal Register* at the

time of publication of the final rule, along with a statement of the factual basis for the certification.

Small Business Regulatory Enforcement Fairness Act

In 1996, Congress passed the Small Business Regulatory Enforcement Fairness Act (SBREFA)[2] to amend the RFA. SBREFA contains provisions that are intended to increase communication between the small business community and the federal agencies during the development of rules, to provide plain language information to firms about how to comply with the rule, and to provide small businesses that claim to be adversely affected by a rule with the option of seeking judicial review of an agency's compliance with the RFA.

Specific requirements introduced by SBREFA include the following:

Small Business Advocacy Review Panels

SBREFA requires the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) of the Department of Labor (DOL) to seek input from representatives of small entities during the development of rules. A Small Business Advocacy Review Panel, made up of federal employees comprised of representatives of the rulemaking agency, the Office of Advocacy in the Small Business Administration, and the Office of Information and Regulatory Affairs within the Office of Management and Budget, must be convened to review and comment on the draft proposed rule and materials developed by the agency. The review panel will collect information and advice from representatives of small entities. The agency will modify the proposed rule, initial regulatory flexibility analyses, or the decision to certify the proposed rule.

Compliance Guides

All federal agencies are required to publish plain language compliance guides for all rules that have a significant economic impact on a substantial number of small entities. The plain language guides must explain how regulated firms can comply with the rule.

Judicial Review

SBREFA added provisions to the RFA that allow for small entities to seek judicial review of the sponsoring agency's compliance with certain provisions of the RFA. The Chief Counsel for Advocacy is authorized to appear as *amicus curiae* and present arguments about noncompliance, the adequacy of the rulemaking record, and the effect on small entities in such actions, even though the defendant is another federal agency.

Ombudsman and Fairness Boards

The Administrator of the U.S. Small Business Administration is required to designate a Small Business and Agriculture Regulatory Enforcement Ombudsman to work with federal

[2] Pub. L. No. 104-121,110 Stat. 857 (codified in part as 5 U.S.C. §601 *et seq*.)

agencies to review issues raised by small businesses concerning the compliance and enforcement activities of agency personnel. In addition, the SBA Administrator is required to establish regional Small Business Regulatory Fairness Boards to advise the Ombudsman on regulatory issues that affect small businesses.

Congressional Review

An agency is required, before a "major" rule can be effective (a major rule is one with an impact on the economy of $100 million or more, or any of several other characteristics) to submit to the House, Senate, and Comptroller General of GAO a report on the rule addressing, among other things, compliance with the RFA. The GAO, in turn, sends a letter to the Congress assessing the agency's compliance with the various statutes and executive orders, prominently including the RFA.

2.0 Design of This Study

The purpose of this research study was to evaluate completed federal agency rules relative to the requirements of the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996. The requirements of the RFA are set out in the previous section. In this section we describe the research methodology used for this study. The sources of data and the types of data collected are described in Section 2.1. The types of research questions we addressed in our analysis are presented in Section 2.2.

2.1 Data Collection

The data collected for this study was obtained from online *Federal Register* announcements of Notices of Proposed Rulemakings (NPRMs) and final rules, and, where these electronic preambles did not contain the information, from hardcopies of the Initial Regulatory Flexibility Analyses (IRFAs) and Final Regulatory Flexibility Analyses (FRFAs) obtained directly from federal agencies. The type of data collected was selected to provide answers to the research questions set out in section 2.2.

The most difficult problem we faced in designing this study was to identify rules with a significant economic impact on a substantial number of small entities**. No comprehensive listing of such rules currently exists.** In our view, this is a serious impediment to small entities and policy-makers understanding the impacts of individual regulations and the cumulative effects of all regulations affecting specific industry sectors.

Ultimately, we relied primarily on three imperfect sources.

- First, the *Unified Agenda* does at least provide a comprehensive and unduplicated listing and brief descriptions of essentially all federal rules (unduplicated by virtue of the unique Regulation Identification Number (RIN); though each edition of the *Unified Agenda* overlaps by 80 percent or more the coverage of the preceding edition). The *Unified Agenda* is available online at http://www.ciir.cs.umass.edu/ua/.
- Second, the online version of the *Federal Register* (FR) provides the full text of essentially all rules. Once the RIN or FR edition and page number of a rule has been obtained from the *Unified Agenda*, the preamble text relating to regulatory flexibility and impact of proposed or final rule can be found easily in the *Federal Register*. The *Federal Register* is available online at http://www.access.gpo.gov/su_docs/aces/aces140.html.
- Third, the General Accounting Office (GAO) letters to Congress on each major rule promulgated since the enactment of SBREFA's congressional review provisions provide a major detective tool for rules which, because they allegedly have major impact on the entire economy, are more likely to have significant impact on small entities. GAO letters to Congress are available online at http://www.gao.gov.

Even with these valuable sources, however, we could find no simple or efficient way to comprehensively identify all rules that have been subject to an IRFA or FRFA. As a result, we designed an approach intended to select a large sample of rules for inclusion in our analysis. This approach is described below.

A substantial impediment to our research effort lay in errors in *Unified Agenda* entries, the sheer magnitude of which vastly complicated using that source. For example, agencies routinely characterize rules in the *Unified Agenda* as requiring IRFAs or FRFAs even after the agency has certified in the *Federal Register* that the rules do not require these analyses.

An even greater problem arose during this research because so many agencies do not universally publish IRFAs and FRFAs in the preambles to their rules. The failure to publish an entire, multi-hundred page IRFA or FRFA is **not** a legal violation of the Regulatory Flexibility Act, which allows agencies to publish summaries of their analyses in their *Federal Register* preambles. However, since numerous summaries do not set out even legally minimal descriptions of all information that is required to be included in the IRFA or FRFA, it is difficult for us, as it would be for representatives of small entities, to understand the full implications and requirements of, and alternatives to, the rule. Since many IRFA and FRFA summaries (*sic*) did not fully address all requirements of the RFA, we had to request hard copy of dozens of analyses from agencies. Some were unable or unwilling to provide us with these documents in a timely fashion. As a result, our research was both delayed and made more complicated.

We created the sample of rules included in this analysis from one pre-SBREFA year (1995) and one post-SBREFA year (1999) and examined each final rule appearing in the April and October *Unified Agenda* for both years for which the *Agenda* database indicated that a regulatory flexibility analysis was required. Ostensibly, the results of this sample should be those rules that required an IRFA or a FRFA. In fact, for only approximately 18 percent of the sampled rules from 1995 and approximately 66 percent of the rules from 1999 did the agency conclude in the published rule that an IRFA or FRFA was required. The remaining rules, for which an IRFA or FRFA was not required, were reviewed to determine if they were properly certified by the agencies. Based on this approach, we reviewed 120 final rules selected from the 1995 *Unified Agendas*, and 93 final rules selected from the 1999 *Unified Agendas*.

In addition to reviewing rules selected from the 1995 and 1999 *Unified Agendas*, we also reviewed 56 final rules issued from 1996 through 1999 that have been identified by the GAO's Reports on Federal Agency Major Rules (www.gao.gov/decisions/majrule/majrule.htm) as being major rules for which an IRFA or FRFA was produced. In addition, we reviewed five final rules that were the subject of SBREFA review panels.

For each rule in our sample, we collected the following information. First, we documented whether (a) the agency certified that the rule does not have a substantial impact on a significant number of small entities (if it did not prepare an IRFA or FRFA), and (b) whether the certification was accompanied by the required factual explanation. Even this limited exploration was hampered by the fact that agencies routinely include, in the *Unified Agenda*, many routine actions, such as announcements of meetings and government memoranda which are not in fact rules. One primary purpose of the *Unified Agenda* is to provide the Office of Advocacy and affected entities with early warning alerts of regulatory actions that may impose significant and possibly unnecessary costs. Every entry in the *Unified Agenda* that is not a rule adds noise to the information transmitted. Worse, from a research point of view, it can be difficult to figure out whether a particular item is really a rule, and hence subject to the RFA, or not. One reason for this is that nomenclature and practice are not standard across agencies.

Second, if the agency did not certify that the rule does not have a substantial impact on a significant number of small entities, and performed an IRFA or FRFA, we documented whether these analyses complied with the provisions of the RFA. Specifically, we documented if the IRFA included the following information:

- Reasons stated for action.
- Objectives and legal basis.
- Description of, and if feasible, estimate of number of small entities affected.
- Reporting, record keeping, and other compliance requirements described.
- Regulatory duplication identified.
- Significant alternatives identified that minimize burden on small entities.
- Small entity participation and comment procedures used.

For the purpose of this review, an agency was deemed to have used small entity participation and comment procedures if they indicated that they communicated with potentially regulated entities using additional means beyond notice and comment.

We then documented if the FRFA included the following information:

- Objectives of rule.
- Summary of issues raised by public comments, and changes made as a result of comments.
- Description of, and estimate of number of small entities affected, or explanation why estimate is not available.
- Reporting, record keeping, and other compliance requirements described.
- Description of steps taken by agency to minimize signification economic impact on small entities through selection of low burden alternatives.

In addition to the information described above, we also documented, for each rule, descriptive information from the *Unified Agenda* and *Federal Register* descriptions pertaining to the published dates in each source, URL locations for the documents, and other incidental information. All of this data was entered in spreadsheet that serves as the data collection instrument, as well as the data analysis tool. A table containing selected descriptive elements for 130 rules that either had or should have had FRFAs is contained in Appendix A. A table depicting all of the data fields contained in the data collection spreadsheet can be found in Appendix B. Electronic copies of the completed analysis spreadsheet may be obtained from CONSAD by sending a request to info@consad.com.

2.2 Evaluation of Information

We analyzed the data described in the previous section in order to address specific research questions that address the issue of agency compliance with the RFA. These research questions are set out in this section. The results of our analysis are described in Section 4.0. Specific findings and conclusions are presented in Section 5.0.

The discussion below identifies the research questions that established the scope of this analysis. We summarize the analyses used to respond to each research question. The data used as the basis of the evaluation is described in the previous section.

1. Are federal agencies complying with the Regulatory Flexibility Act?

In order to evaluate agency compliance with the RFA, we first reviewed the data to determine if the proposed rule received a certification from the agency to establish that it would not have a significant impact on a substantial number of small entities. We determined if certification language is present in the FR notice for the proposed rule, and whether an explanation of the basis for the certification is also present.

If the agency did not specify a certification for the proposed rule, we next reviewed the information from the FR notice to determine if an IRFA was performed, and if the entire IRFA or a summary was included in the FR notice for the proposed rule. If the IRFA was not presented in the FR notice, we requested a copy of it from the agency. Then, we reviewed the summary of the IRFA and the full IRFA to identify if they have addressed all elements required by the RFA, as described in the previous section.

Then, we performed the same evaluation of the FRFA as was performed for the IRFA.

The analyses described above are performed: for each RFA requirement, for all agencies combined, for 1995 and 1999; and for each RFA requirement, for each agency individually, for 1995 and 1999.

2. Has the Small Business Regulatory Enforcement Fairness Act of 1996 affected rulemaking?

One issue of interest addresses the question of what impact the Small Business Regulatory Enforcement Fairness Act of 1996, which amended the original Regulatory Flexibility Act, has had on agency compliance with the RFA. To address this question we have compared results describing the compliance of agencies in 1995 and 1999. We have looked at changes between these two years in agency compliance with each RFA requirement. In addition, we have examined the number of rules that required an IRFA and FRFA, and the number of certifications for the pre-SBREFA and post-SBREFA periods.

3. What role has the SBA Office of Advocacy played in the process of rulemaking?

Congress established the Office of Advocacy to represent the views and interests of small business within the federal government. Advocacy monitors agency compliance with the Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, and reports this to Congress. Advocacy's statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, developing proposals for changes in federal agencies' policies, and communicating these proposals to the agencies. One specific role for the Office of Advocacy is to assist the Environmental Protection Agency and the Occupational Safety and Health Administration of the

Department of Labor in holding Small Business Advocacy Review Panels for their proposed rules.

In order to review the potential impact of the activities of the Office of Advocacy on agency compliance, we have reviewed comment letters issued by SBA Office of Advocacy for all rules that we included in our analysis database, as well as for some other rules. We have attempted to examine the impact of these comments, and the use of the Small Business Advocacy Review Panels, on compliance issues and the extent to which low burden alternatives are adopted.

4. Other items of interest

The data we have collected to analyze agency compliance with the RFA can also be used to address additional issues of interest. Some of these issues are:

- The extent to which the *Unified Agenda* is helpful in identifying regulations with substantial impact on small businesses.
- The extent to which agencies make IRFAs and FRFAs available to small businesses and the general public in the *Federal Register* notices for NPRMs and final rules. And,
- the characteristics of particularly burdensome rules.

The results of our analysis are presented in the following section.

3.0 Results of Analysis

As described above, we worked with an electronic version of the *Unified Agenda* to examine final rules that appeared in the April and October *Unified Agendas* of 1995 and 1999. To keep the analysis manageable, we worked only with rules completed in each *Unified Agenda*, and not rules to be proposed or recently proposed or waiting final decision. Because there is often an extended time period between when a rule is proposed and when it is issued as a final rule, a typical rule appears in one stage or another in up to six editions of the semiannual *Unified Agenda.* We only examined rules for which the final rule has appeared in the *Federal Register*.

We label as a 1995 rule any rule that appears as a final rule in either the April or October *Unified Agenda* of that year. We label 1999 rules in a similar fashion. This approach allows us to evaluate rules issued during an entire 12-month period. However, as a result of this approach we include as 1995 (1999) rules some newly recorded rules from the latter part of 1994 (1998), and omit some rules issued at the end of 1995 (1999).

In addition to evaluating rules from the 1995 and 1999 *Unified Agenda*, we also consulted two other sources to identify rules to be included in our analysis. First, we consulted the GAO "Reports on Federal Agency Major Rules" database. From this database, we selected many (but not all) rules issued between the second half of 1996 and the end of 1999 that have been identified as major rules (e.g., rules with an estimated economic impact of $100 million or more in any year) and which required a FRFA. Second, we identified final rules for which Small Business Advocacy review panels were held between 1996 and 1999.

Our analysis of final rules identified in the 1995 and 1999 *Unified Agenda* is described in Section 3.1. Our analysis of major rules and rules for which a Small Business Advocacy review panel (SBREFA panel) was held is described in Section 3.3.

Overall, federal agency compliance with the provisions of the RFA improved considerably between 1995 and 1999. One important development between 1995 and 1999 was the implementation of the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, which amended the Regulatory Flexibility Act and called for additional reporting by agencies for rules that have a significant impact on a substantial number of small entities. In addition, SBREFA sets out a process of judicial review of federal rules. A summary of SBREFA provisions can be found in Section 1.0 of this report. In our view, much of the improvement observed in agency compliance with the RFA between 1995 and 1999 is due to the passage of SBREFA, and the active monitoring of agency compliance with the RFA by the Office of Advocacy.

3.1 Comparison of 1995 and 1999 Proposed Rules

A comparison of the results of our analysis of NPRMs for final rules from 1995 and 1999 is presented in Table 3.1.

Table 3.1: Regulatory Flexibility Act Data for 1995 and 1999 Rules: Proposed Rule Stage

		1995 Rules		1999 Rules	
		Total Number	Percent	Total Number	Percent
1.	NPRMs analyzed	120		91	
a.	NPRMs for which no IRFA was prepared	98	82%	41	45%
b.	NPRMs for which an IRFA was performed	22	18%	50	55%
2.	NPRMs for which no IRFA was prepared	98		41	
a.	NPRMs lacking both IRFA and certification	4	4%	1	2%
b.	NPRMs with certification	94	96%	40	98%
3.	NPRMs with certification:	94		40	
a.	Factual basis for certification explained	76	81%	37	93%
b.	Factual basis not explained	18	19%	3	8%
4.	NPRMs for which IRFA was prepared:	22		50	
a.	IRFA required	21	95%	36	72%
b.	IRFA voluntary	1	5%	14	28%
5.	Total IRFAs	22		50	
a.	Reasons stated for action (603b1)	19	86%	47	94%
b.	Objectives and legal basis provided (603b2)	18	82%	47	94%
c.	Small entities described (603b3)	19	86%	45	90%
d.	Compliance Requirements described (603b4)	13	59%	46	92%
e.	Regulatory duplication identified (603b5)	17	77%	38	76%
f.	Significant alternatives analyzed (603c)	12	55%	35	70%
g.	IRFAs that meet all legal requirements	12	55%	32	64%
6.	Total IRFAs	22		50	
a.	Complete IRFA published in *Federal Register*	1	5%	8	16%
b.	Summary of IRFA published in *Federal Register*	21	95%	42	84%
c.	Complete IRFA readily obtainable	18	82%	48	96%

Includes cases where the statute does not apply; e.g., rules for which an NPRM is not required.

We reviewed 120 NPRMs for 1995 final rules, and 91 NPRMs for 1999 final rules. Of the 1995 rules, IRFAs were prepared for 22, comprising 18 percent of the total. No IRFA was prepared for the other ninety-eight. Of the 98 rules with no IRFA, four lacked an appropriate certification of no significant impact on a substantial number of small entities, and 94 were certified. Of the 1999 rules, 50 included IRFAs (55 percent of the total), and 41 did not include and IRFA (45 percent of the total). Of the 41 that did not include an IRFA, only one lacked an appropriate certification, and 40 included a certification.

Certification at the Proposed Rule Stage

For NPRMs with certification, the proportion that contained a description for the basis of the certification increased from 81 percent in 1995 to 93 percent in 1999. This shift reflects the increase in attention that agencies paid to potential small entity impacts between 1995 and 1999.

RFA Requirements for IRFAs

Between 1995 and 1999, the preparation of IRFAs has seen an increase in the attention paid to the provisions of the RFA, although there is a need for much greater improvement. The proportion of IRFAs that meet all requirements of the RFA has increased from 55 percent in 1995 to 64 percent in 1999. One very important provision of the RFA is that IRFAs contain a description of significant alternatives that achieve the same policy goal while mitigating potential impacts on small entities. For this provision, 55 percent of IRFAs reviewed complied in 1995, while 70 percent complied in 1999. In 1995, 59 percent of IRFAs described compliance requirements, while in 1999 92 percent described compliance requirements. And in 1995, 86 percent of IRFAs described the small entities that would be subject to the provisions of the proposed rules, whereas 90 percent of IRFAs reviewed contained a description of regulated small entities in 1999. Overall, there was an increase in the proportion of IRFAs that complied with the provisions of the RFA, although there is still much need for further improvements. There are no serious barriers we perceive that prevent any agency from complying with all provisions of the RFA.

Publishing of IRFAs in the *Federal Register*

In many instances during our research, we found it to be time-consuming and problematic to obtain copies of agency IRFAs. In our view, small entities likely experience the same difficulties when they try to learn about the potential impacts of proposed rules. Although it is not a provision of the RFA, we analyzed how many complete IRFAs were published in the *Federal Register* in both years 1995 and 1999. When agencies publish their entire IRFAs (and FRFAs) in the *Federal Register,* it greatly improves the effectiveness of communication with small entities. In 1995, only one of the 22 IRFAs we reviewed, or five percent of the total, was published in its entirety in the *Federal Register*. The remaining 21 IRFAs were summarized in the NPRM entry in the *Federal Register*. In 1999, eight out of 50 IRFAs, or 16 percent of the total, were published in their entirety in the NPRM entry in the *Federal Register*. We see this as a welcome trend in agency communication with the small entity community.

Before describing the results of our analyses of compliance with specific provisions of the RFA, we note that in the preambles to final rules from 1995, discussions of impacts on small entities tended to be perfunctory and brief. **In the preamble to final rules from 1999, much more discussion and analysis was devoted to the effects of the rules on small entities for rules with and without a significant impact on a substantial number of small entities**. In our view, this shift has resulted because the federal agencies paid more attention to the impacts that rules have on small entities and the need to evaluate and document these impacts in their NPRMs.

3.2 Comparison of 1995 and 1999 Final Rules

A comparison of the results of our analysis of final rules from 1995 and 1999 is presented in Table 3.2.

Table 3.2: Regulatory Flexibility Act Data for 1995 and 1999 Rules: Final Rule Stage

		1995 Rules		1999 Rules	
		Total Number	Percent	Total Number	Percent
1.	Final Rules analyzed	120		93	
a.	Final Rules for which no FRFA was prepared	98	82%	47	51%
b.	Final Rules for which a FRFA was performed	22	18%	46	49%
2.	Final Rules for which no FRFA was prepared	98		47	
a.	Final Rules lacking both FRFA and certification	18	18%	11	23%
b.	Final Rules with certification	80	82%	36	77%
3.	Final Rules with certification:	80		36	
a.	Factual basis for certification explained	60	75%	32	89%
b.	Factual basis not explained	20	25%	4	11%
4.	Final Rules for which FRFA was prepared:	22		46	
a.	FRFA required	21	95%	32	70%
b.	FRFA voluntary	1	5%	14	30%
5.	Total FRFAs	22		46	
a.	Reasons stated for action (604a1)	19	86%	44	96%
b.	Objectives and legal basis provided (604a2)	18	82%	44	96%
c.	Small entities described (604a3)	n/a	n/a	41	89%
d.	Compliance Requirements described (604a4)	n/a	n/a	43	93%
e.	Significant alternatives analyzed (604a5)	11	50%	30	65%
f.	FRFAs that meet all legal requirements	11	50%	30	65%
6.	Total FRFAs	22		46	
a.	Complete FRFA published in *Federal Register*	1	5%	10	22%
b.	Summary of IRFA published in *Federal Register*	21	95 %	36	78%
c.	Complete IRFA readily obtainable	18	82%	4	98%

Includes cases where the statute does not apply; e.g., rules for which an NPRM is not required.

Certification at the Final Rule Stage

From 1995 to 1999, there was a dramatic reduction in the number of final rules that contained a certification. For the final rules we reviewed for these two years, the proportion that contained a certification decreased from 67 percent in 1995 to 39 percent in 1999. Several factors contribute to this reduction. First we note that our research methodology involved using the *Unified Agenda* entries to identify rules with a significant economic impact on a substantial number of small entities. If all *United Agenda* entries were correct, all of the rules we reviewed

would have had a small entity impact and a FRFA. The rules with a certification in our database were incorrectly labeled in the *Unified Agenda*. Thus, part of the decrease in the proportion of final rules with a certification is due to an improvement in accuracy of *Unified Agenda* entries.

In addition, however, the reduction is also partly due to **an increasing propensity to prepare FRFAs for rules that do not in fact have a significant impact on small entities**. In these cases, the agencies would prepare an "analysis" that appears to meet the requirements of the RFA in a pro-forma manner, but does not actually include estimates of the type and/or magnitude of burden on small entities. Although we have not interviewed the agencies directly, we believe that several agencies have found it both bureaucratically easier and politically and legally safer to prepare a cursory document in a "canned" format that purports to analyze impacts, than to do the hard work to actually determine impacts and then place the agency's judgment on the line through an agency head certification that the rule has no significant impact.

Likewise, there was a substantial reduction in the number of final rules that received a certification between 1995 and 1999. In 1995, 67 percent of final rules analyzed received a certification indicating that an agency concluded the rules had no significant economic impact on a substantial number of small entities. In 1999, 39 percent of final rules received a certification. Again, this may well result from increased accuracy of *Unified Agenda* entries used in this review.

For final rules with certification, the proportion that contained an appropriate description of the basis for the certification increased from 75 percent in 1995 to 89 percent in 1999. This is an unambiguous improvement.

RFA Requirements for FRFAs

Between 1995 and 1999, the preparation of FRFAs has seen a marked increase in the attention paid to the provisions of the RFA. The proportion of FRFAs that meet all requirements of the RFA has increased from 50 percent in 1995 to 65 percent in 1999. There is still, however, obviously room for improvement. Whereas in 1995 only 50 percent of FRFAs we reviewed described significant alternatives intended to reduce impacts on small entities, 65 percent did so in 1999. And whereas 82 percent of FRFAs in 1995 described the objectives and legal basis for the rulemaking, 96 percent did so in 1999.

Publishing of FRFAs in the *Federal Register*

As described above for IRFAs, we believe that when agencies publish their entire FRFAs in the *Federal Register*, it greatly improves the effectiveness of communication with small entities. In 1995, only one of the 22 FRFAs we reviewed, or five percent of the total, were published in its entirety in the *Federal Register*. The remaining 21 FRFAs were summarized in the preamble to the final rule entry in the *Federal Register*. In 1999, 10 out of 46 FRFAs, or 22 percent of the total, were published in their entirety in the preamble to the *Federal Register* entry in the *Federal Register*.

3.3 Major Rules Identified by GAO Reports, and Rules Subject to SBREFA Panels

In addition to reviewing final rules appearing in the *Unified Agenda* in 1995 and 1999, as described in the previous two sections, we also reviewed a set of final rules identified by the GAO as being major rules for which an IRFA or FRFA was produced. These rules were identified based on information in the GAO Reports on Federal Agency Major Rules. For some of these rules, the IRFA or FRFA was voluntary, and the agency explained that the rule had no significant impact on a substantial number of small entities. We identified a total of 56 final rules from this source to be included in our analysis (we actually identified many more, but many of these were "pseudo" or unnecessary to our analysis, and were omitted.) These final rules were issued between July of 1996 and December of 1999.

In addition, we identified five rules that were subject to Small Business Advocacy review panels (or SBREFA review panels), which have been promulgated as final rules. These are included in our database. EPA sponsored all five of these final rules. Other SBREFA review panels (including review panels for OSHA rules) have been held, but the associated final rules have not been promulgated. A list of the rules that we analyzed that were subject to SBREFA review panels can be found in the appendix.

In total, we analyzed 61 final rules that were major rules or SBREFA review panel rules. The results of the analysis of the NPRMs for these final rules appear in Table 3.3, found below. In addition, we combined the tabulations for all final rules in our database that were promulgated post-SBREFA (e.g., after March of 1996). These rules consist of the rules identified in the 1999 *Unified Agenda*, the major rules identified in the GAO Reports on Federal Agency Major Rules, and the SBREFA review panel rules. The results of the analysis of the NPRMs for these final rules also appear in Table 3.3.

Certification at the Proposed Rule Stage

As shown in Table 3.3, we reviewed 61 final rules that were identified by GAO as major rules issued between 1996 and 1999 for which an IRFA or FRFA was created, or which were subject to a SBREFA review panel. Among the NPRMs, only three did not require an IRFA, generally because the agency claimed there would be no significant impact on a substantial number of small entities. Of these, 100 percent had the requisite certification. Of those rules with a certification, 100 percent contained an explanation of the basis for the certification.

Of the total of 152 post-SBREFA rules included in our analysis, 44 NPRMs did not contain an IRFA. Of the 44 NPRMs without an IRFA, only one lacked certification language. The remaining 43 were certified. Of the 43 NPRMs with certification, 40 contained an appropriate description of the factual basis for the certification. Three NPRMs, or 7 percent, did not contain an appropriate description of the factual basis for the certification.

RFA Requirements for IRFAs

Among the 61 NPRMs analyzed from this sample, we found 58 with IRFAs. Twenty-two of the IRFAs were prepared for NPRMs with no significant economic impact on a substantial

number of small entities. Although the analyses were labeled as IRFAs, the IRFAs in these cases were voluntary, and were included in the NPRM to support the factual basis for the certification.

Table 3.3: Regulatory Flexibility Act Data for Post-SBREFA Rules: Proposed Rule Stage

		Major Rules and SBREFA Panel Rules Analyzed		All Post-SBREFA Rules Analyzed	
		Total Number	Percent	Total Number	Percent
1.	NPRMs analyzed	61		152	
a.	NPRMs for which no IRFA was prepared	3	5%	44	29%
b.	NPRMs for which an IRFA was performed	58	95%	108	71%
2.	NPRMs for which no IRFA was prepared	3		44	
a.	NPRMs lacking both IRFA and certification	0	0%	1	2%
b.	NPRMs with certification	3	100%	43	98%
3.	NPRMs with certification:	3		43	
a.	Factual basis for certification explained	3	100%	40	93%
b.	Factual basis not explained	0	0%	3	7%
4.	NPRMs for which IRFA was prepared:	58		108	
a.	IRFA required	36	62%	72	67%
b.	IRFA voluntary	22	38%	36	33%
5.	Total IRFAs	58		108	
a.	Reasons stated for action (603b1)	58	100%	105	97%
b.	Objectives and legal basis provided (603b2)	58	100%	105	97%
c.	Small entities described (603b3)	56	97%	101	94%
d.	Compliance Requirements described (603b4)	50	86%	96	89%
e.	Regulatory duplication identified (603b5)	50	86%	88	81%
f.	Significant alternatives analyzed (603c)	47	81%	82	76%
g.	IRFAs that meet all legal requirements	41	71%	73	68%
6.	Total IRFAs	58		108	
a.	Complete IRFA published in *Federal Register*	28	48%	36	33%
b.	Summary of IRFA published in *Federal Register*	30	52 %	72	67%
c.	Complete IRFA readily obtainable	52	90%	100	93%

Includes cases where the statute does not apply; e.g., rules for which an NPRM is not required.

Of the 58 IRFAs that we reviewed from major rules and SBREFA review panel rules, 71 percent of the total meet all pro forma legal requirements of the RFA. All of the IRFAs described the reasons stated for the regulatory action. The objectives and legal basis for the proposed rules also appeared in all of the IRFAs reviewed. Descriptions of the small entities affected appeared in 97 percent of the IRFAs. In 86 percent of the IRFAs, compliance requirements were described. In 66 percent of IRFAs reviewed, regulatory duplication was described. Alternative approaches to reducing impacts on small entities while achieving the desired policy goal were described in 81 percent of the IRFAs. In total, 41 of the 58 IRFAs

reviewed from this sample of major rules and SBREFA review panel rules met all requirements of the RFA. This corresponds to a 71 percent compliance rate with the requirements of the RFA.

Reviewing the IRFAs for all post-SBREFA rules appearing in our analysis, 68 percent met all legal requirements of the RFA. The RFA provision that is most often neglected is the requirement to analyze significant alternatives that would limit small entity burdens. For this provision, only 76 percent of the IRFAs met this requirement. The results for each remaining provision of the RFA can be found in Table 3.3.

Publishing of IRFAs in the *Federal Register*

Among the 58 IRFAs we analyzed for major rules and SBREFA panel rules, 28 were published in their entirety in the *Federal Register*. Thus nearly one-half of these IRFAs were published in the *Federal Register*. The remaining 30 IRFAs were summarized in the preamble to the NPRM entry in the *Federal Register*. For all post-SBREFA rules we analyzed, 36 out of 108 IRFAs, or 33 percent of the total, were published in their entirety in the preamble to the NPRM entry in the *Federal Regist*er.

A comparison of the results of our analysis of final rules for this sample of rules is presented in Table 3.4.

Certification at the Final Rule Stage

As shown in Table 3.4, we reviewed 61 final rules that were either identified by GAO as major rules issued between 1996 and 1999 for which an IRFA or FRFA was created, or rules subject to a SBREFA review panel. We analyzed 58 final rules for certification language. In the preambles of the final rules reviewed from this sample, we identified three final rules with no FRFA. Of these three, one final rule contained a certification, and two lacked certifications. The one final rule notice with the certification language lacked an explanation of the basis for the certification. **Thus, all three of the final rule notices from this sample for which a FRFA was not prepared failed to comply with the RFA's factual requirements pertaining to certification.**

RFA Requirements for FRFAs

Among the 61 final rules analyzed from this sample, we found 58 with FRFAs. Twenty of the FRFAs were prepared for final rules that didn't show a significant impact on a substantial number of small entities. The FRFAs in these cases were voluntary, and were included in the preamble to the final rules to support the certification.

Of the 58 FRFAs that we reviewed from this sample, 78 percent of the total meet all legal requirements of the RFA. All of the FRFAs that we reviewed appropriately described the reasons stated for the action, and the objectives and legal basis for the final rules. Descriptions of the small entities affected also appeared in all of the FRFAs. Compliance requirements were described in 98 percent of the final rules. A description of significant alternatives intended to minimize small entity burdens while achieving the desired policy goal were described in 78

percent of the IRFAs. In total, 45 out of 58 FRFAs, or 78 percent of the total, met all requirements of the RFA.

Table 3.4: Regulatory Flexibility Act Data for Post-SBREFA Rules: Final Rule Stage

		Major Rules and SBREFA Panel Rules Analyzed		All Post-SBREFA Rules Analyzed	
		Total Number	Percent	Total Number	Percent
1.	Final Rules analyzed	61		154	
a.	Final Rules for which no FRFA was prepared	3	5%	50	32%
b.	Final Rules for which a FRFA was performed	58	95%	104	68%
2.	Final Rules for which no FRFA was prepared	3		50	
a.	Final Rules lacking both FRFA and certification	2	67%	13	26%
b.	Final Rules with certification	1	33%	37	74%
3.	Final Rules with certification:	1		37	
a.	Factual basis for certification explained	0	0%	32	86%
b.	Factual basis not explained	1	100%	5	14%
4.	Final Rules for which FRFA was prepared:	58		104	
a.	FRFA required	38	66%	70	67%
b.	FRFA voluntary	20	34%	34	33%
5.	Total FRFAs	58		104	
a.	Reasons stated for action (604a1)	58	100%	102	98%
b.	Objectives and legal basis provided (604a2)	58	100%	102	98%
c.	Small entities described (604a3)	58	100%	99	95%
d.	Compliance Requirements described (604a4)	57	98%	100	96%
e.	Significant alternatives analyzed (604a5)	45	78%	75	72%
f.	FRFAs that meet all legal requirements	45	78%	75	72%
6.	Total FRFAs	58		104	
a.	Complete FRFA published in *Federal Register*	27	47%	37	36%
b.	Summary of FRFA published in *Federal Register*	34	59%	70	67%
c.	Complete FRFA readily obtainable	58	100%	103	99%

Includes cases where the statute does not apply; e.g., rules for which an NPRM is not required.

Reviewing the FRFAs for all 104 post-SBREFA rules appearing in our analysis, 72 percent met all legal requirements of the RFA. The RFA provision that is most often neglected is the requirement to analyze significant alternatives that would limit small entity burdens. For this provision, only 72 percent of the FRFAs met the RFA's requirements. The results for each remaining provision of the RFA can be found in Table 3.4.

Publishing of FRFAs in the *Federal Register*

Among the 58 FRFAs we analyzed for major rules and SBREFA panel rules, 27 were published in their entirety in the *Federal Register*. Thus nearly one-half of these FRFAs were published in the *Federal Register*. The remaining 34 FRFAs were summarized in the preamble to the final rule. Among the 104 FRFAs we analyzed for post-SBREFA rules, 37 were published in their entirety in the *Federal Register*. This corresponds to 36 percent of the total FRFAs. The remaining 70 FRFAs were summarized in the preamble to the NPRM entry in the *Federal Register*.

3.4 Agency Compliance with the RFA

We analyzed 130 final rules for which Final Regulatory Flexibility Analyses were prepared or required over the time period 1995 through 1999 (see Table 3.5, below).[3] As described in Section 2.1, these rules consist of: (a) final rules appearing in the April and October *Unified Agendas* from 1995 and 1999, for which the *Unified Agenda* states that an IRFA or FRFA was prepared; (b) major rules from mid-1996 through 1999 identified from the GAO's

Table 3.5: Number of FRFAs Prepared or Required by Agency 1995-1999 for Rules Analyzed in this Analysis

Department or Agency Name	*Unified Agenda* Code	**Number of Rules**
Departments		
Agriculture	USDA	8
Commerce	DOC	17
Defense	DOD	3
Education	ED	0
Health and Human Services	HHS	22
Housing and Urban Development	HUD	1
Interior	DOI	10
Justice	DOJ	0
Labor	DOL	3
Transportation	DOT	4
Treasury	TREAS	1
Veterans Affairs	VA	0
Independent Agencies		
EPA	EPA	14
Federal Acquisitions Regulations	FAR	5
Federal Communications Commission	FCC	10
Federal Maritime Commission	FMC	1
Nuclear Regulatory Commission	NRC	4
Securities and Exchange Commission	SEC	25
Small Business Administration	SBA	2

[3] Three of these rules – two from the EPA and one from the SEC – were actually promulgated in 2000 (see Appendix A).

All other federal agencies	0
Total	**130**

Note: Total differs slightly from other tables because it includes rules for which a FRFA was, in CONSAD's view, required but not prepared.

database of Federal Agency Major Rules for which an IRFA or FRFA was produced; and (c) rules that were subject to SBREFA review panels and which have been promulgated as final rules from 1996 through September 2000. These rules were prepared by 16 different agencies. This agency total counts Federal Acquisition Regulations (FAR) as an agency. FAR rules are issued jointly by the General Services Administration, DOD, and NASA.

The largest numbers of final rules we reviewed were issued by the Securities and Exchange Commission, the Department of HHS (mostly HCFA rules affecting Medicare providers), and the Department of Commerce (all rules of the National Marine Fisheries Service concerning fishing rights in coastal waters). These three agencies accounted for one-half of these rules. As explained below, few of the SEC (or DOI or FAR) rules in fact had a significant impact on a substantial number of small entities. Ignoring these rules, a more accurate portrayal would be to say that HHS, Commerce (National Marine Fisheries Service), and EPA accounted for about half of the approximately 100 rules for which a FRFA was required. In contrast, in our sample, five cabinet departments (Education, Housing and Urban Development, Justice, Treasury, and Veterans Affairs) either issued no such rules or no more than one over the five-year period. Likewise, of the numerous independent agencies of the federal government, the overwhelming majority issued not a single rule with significant impact. In short, a relative handful of departments and agencies accounted for almost all of the rules requiring preparation of FRFAs.

Of course, as explained earlier in this report, we did not attempt to trace every such rule over the five-year period. And, as explained below, we deliberately did not include a dozen or more Interior Department rules for which significant impact was incorrectly claimed, or all FCC or FAR rules. But there is no reason to think that our research methods were biased against finding rules of smaller agencies. The conclusion is clear: a relative handful of departments and agencies account for the overwhelming majority of rules with a significant economic impact on a substantial number of small entities.

The Department or agency which prepared a rule can be misleading as a marker of propensity for creating regulatory burden. Seeing a table with over a dozen entries for (say) the Commerce Department might lead the reader to believe that this Department had some broad role in imposing costs on business. However, the impacts of these rules are often overstated.

To better describe the patterns of rules with significant impact, we have categorized all 130 of these rules by subject (see Table 3.6, below). Over two thirds of these rules fall into three broad categories: fishing or hunting, banking and finance, and safety and health. Surprisingly, rules dealing with the environment and market regulation are a distant fourth and fifth, and rules related to government grants and loans, procurement (contracting), and health insurance even fewer.

Even these broad categories hide important distinctions. As discussed further below, large fractions of the banking and finance and hunting or fishing rules appear to have no significant impacts. However, recharacterizing banking and finance rules as just one type of market regulation, and fishing or hunting rules (almost all of which seek primarily to preserve viable

wild populations) as environmental rules, market regulation and environmental rules would account for over half of those with significant impacts.

Table 3.6: Number of FRFAs Prepared or Required by Subject 1995-1999

Subject	Number of Rules
Banking and Finance	26
Environment	12
Fishing or Hunting	27
Grant and Loan	3
Health Insurance	12
Market Regulation	16
Procurement	11
Safety and Health	22
Transportation	1
Total	130

As previously discussed, we have found that about 20 percent of all FRFAs are prepared for rules that have no significant impact on a substantial number of small entities, and thus were not legally required by the RFA. In such case, the agency convincingly showed either that few or no small entities would be affected, or that economic impact would not be significant, or both. Some voluntary FRFAs are potentially desirable under the RFA, since some rules might be controversial due to an incorrect perception of impact, or the agency may not be confident that it has identified all costs the rule imposes. And a voluntary FRFA should be prepared if the agency takes the view that large positive impacts do not trigger a legal obligation. Advocacy's policy advice is that FRFAs are required for positive and negative impacts. HHS has a policy encouraging voluntary FRFAs in such cases, and recently prepared one when its organ allocation rule was accused (falsely according to HHS' analysis) of harming small entity transplant centers.

However, as discussed below most of the voluntary FRFAs were issued by the Securities and Exchange Commission or the Department of Interior's Fish and Wildlife Service, and involved rules with negligible effects on small entities and no apparent controversy. These are not truly voluntary FRFAs, but result from the agency not conducting a careful screening analysis which, if performed correctly, would result in a certification under section 605(b) of the RFA. The most charitable interpretation of these seeming FRFAs is that they reflect unnecessary caution.

One problem they present is that while they appear to follow the form of a FRFA, they cannot really comply with such requirements as the identification of less burdensome alternatives since the rule creates no burden to begin with. These pseudo-analyses use a format that appears to analyze the economic burdens imposed by rules, but in fact do no such thing. They can be identified because they do not present an estimate of the number of small entities that would suffer from a substantial economic impact, nor an estimate of the magnitude of the economic impact. Moreover, they do not analyze alternatives intended to reduce burdens on small entities. It is impossible to compare the burden of alternative forms of a rule when no analyses of economic impacts has been prepared.

In the analysis below, we summarize and comment on individual agency performance, in the same agency order and for the same rules as in Table 3.5. Given that the samples are in some cases so small, we generally comment only on agencies that prepared more than five FRFAs.

Department of Agriculture (USDA)

The Department of Agriculture rules are a diverse set (see Table 3.7). They come from several different agencies within the Department. Of the USDA rules we reviewed, most IRFAs/FRFAs are published in preambles. In general, the IRFAs/FRFAs that we reviewed are competently prepared and some are well above average in the sophistication of their analysis. The rules dealing with meat imports from South America, of significant concern to U.S. farmers, are especially careful in their analysis of likely market effects. However, we were told by Advocacy that they found that the analysis contained in the HACCP regulation was inadequate and failed to take into account actual impact and significant alternatives.

Table 3.7: Department of Agriculture FRFAs Prepared or Required 1995-1999

Title	RIN	Final Rule Date	Final Rule FR Cite	Major Rule*	Type of Rule	FRFA Required **	FRFA Published
End-Use Certificate System for Wheat and Barley	0560-AD77	1/26/95	60 FR 5087	No	Market Regulation	Yes	Summary
Lender Buyback of Repurchased Guaranteed Loans	0560-AF38	2/12/99	64 FR 7358	No	Grant and Loan	Yes	n/a
Importation of Beef from Argentina	0579-AA71	06/26/97	62 FR 34385	Yes	Safety and Health	Yes	Yes
Karnal Bunt Disease; Domestic Plant-related Quarantine	0579-AA83	10/04/96	61 FR 52189	No	Safety and Health	Yes	No
Performance Standards for Certain Meat Products and Poultry Products	0583-AB94	1/6/99	64 FR 732	No	Safety and Health	Yes	Yes
Importation of Pork from Sonora, Mexico, OGC-97-43	0579-AA71	05/09/97	62 FR 25439	Yes	Market Regulation	Yes	Yes
Pathogen Reduction: Hazard Analysis and Critical Control Point (HACCP) Systems	0583-AB69	07/25/96	61 FR 38806	Yes	Safety and Health	Yes	Yes
Child and Adult Care Food Program: Improved Targeting of Home Reimbursements	0584-AC42	02/24/98	63 FR 9087	Yes	Grant and Loan	Yes	Yes

Note: The rules in this table include final rules appearing in the April and October 1995 and April and October 1999 *Unified Agendas*, as well as major rules identified by GAO between 1996 and 1999.

* As defined by the Congressional Review Act (CRA) and determined by CONSAD, based on the information developed and presented by the Agency in the preamble to the Final Rule published in the *Federal Register*.

** Assessment made by CONSAD, based on the information developed and presented by the Agency in the preamble to the Final Rule published in the *Federal Register*.

n/a Indicates that the Agency said an FRFA was not needed (because the Agency certified the rule) but where CONSAD determined that a FRFA should have been prepared.

We also note that the Department has had difficulties in appropriately certifying rules not covered in the table below. We identified a number of Advocacy comment letters issued between 1999 and 2000 that criticized certification language for USDA rules; generally for failing to provide a clear or accurate rationale for the conclusion that there is no significant economic impact on a substantial number of small entities. Also, the Department's Agricultural Marketing Service (AMS) is one of the few agencies attempting to comply with the section 610 review requirement, reflecting its major effects on farmers. However, a number of Advocacy comment letters in recent years have addressed the fact AMS has not considered meaningful regulatory alternatives intended to reduce burdens on small entities. These comment letters did not address the rules selected in our sampling scheme.

Department of Commerce (DOC)

The Department of Commerce comprises several agencies, such as the Census Bureau, Patent and Trademark Office, International Trade Administration, and National Oceanic and Atmospheric Administration (NOAA). The National Marine Fisheries Service (NMFS), an agency within NOAA, is one of the handful of important environmental agencies within the federal government. NMFS is responsible for reconciling the need to maintain the coastal fisheries of the United States with the economic well being of the fishing industry, an industry predominantly composed of small businesses. All of the Department of Commerce rules we reviewed deal with fishing regulations (see Table 3.8). There are seventeen final rules with FRFAs included in our database. While there are many defects in these analyses, they generally meet both the letter and spirit of the RFA. We also reviewed nine NOAA proposed rules for endangered species listings in the past two years. These proposed rule were certified by the agency as having no significant economic impact on a substantial number of small entities.

The Magnuson-Stevens Fishery Conservation and Management Act (MFCMA), first enacted in 1976, and amended later, provides the statutory basis for NMFS authority to issue regulations governing the management of fisheries outside coastal state waters to 200 miles offshore. The MFCMA contains provisions that set guidelines for the creation of fishery conservation and management measures. In the last three decades, improvements in fishing technology have led to the severe depletion of many of the most important fisheries. At the same time, the livelihoods of fishermen and fishing communities rely on the income derived from fishing harvests. The balancing of short term fishing rights with sustainable fisheries management is a classic example of the "tragedy of the commons", in which lack of ownership rights in jointly exploited fishery resources leads to rampant depletion. The MFCMA provides guidelines for the balancing of ecological concerns with concerns regarding the impacts of conservation measures on the fishing industry. The RFA, with its provisions calling for rational analysis of economic burdens on small entities, and regulatory alternatives and options intended to reduce these burdens, provides NMFS with an opportunity to support its policy decisions with quantitative information and analysis of how ecological concerns and economic burdens on small entities were considered in its rulemakings.

Hampering the ability of NMFS both to manage fisheries properly and to analyze options properly are severe weaknesses in underlying information on the economic impact of harvestable fishing quotas on fishing communities, on the ecology of the ocean and of the health of fishing

stocks at any one time.[4] Also, the NMFS decision process is decentralized, and relies on the deliberations of eight Fishery Management Councils responsible for specific fisheries to gather information, hold hearings, and make decisions regarding the fishery industry. Based on the rules included in our review, it has not been uncommon for implementation options to be accepted or rejected before subjecting them to economic analysis.[5] However, according to Advocacy staff, as of 1999, NMFS staff has been instructed to perform, the economic analysis first.

Unfortunately, in several cases we reviewed, weaknesses have led to some serious problems for the agency. In two instances, it has lost court cases over its failure to properly analyze regulatory options and/or minimize burden on fishermen. For example, in the regulation involving Atlantic shark fishing, NMFS issues a proposed rule in 1996 that would reduce the annual catch by 50 percent. NMFS certified the proposal would not have a significant economic impact on a substantial number of small entities. The Office of Advocacy filed comments questioning certification.[6] Upon review, the court found that NMFS had not complied with the RFA and ordered NMFS to conduct a proper analysis of the rule on the shark fishing industry.[7]

Our own review of selected IRFAs and FRFAs from NMFS, for final rules issued in 1995 and 1999, indicates some recurring problems.[8] First, in most cases we reviewed, the preamble to the proposed or final rule contained a summary of the regulatory flexibility analysis was not sufficient to determine compliance with the provisions of the RFA. Thus, we needed to request the complete IRFAs and FRFAs to perform our review. Many of the IRFAs and FRFAs are incorporated into a single document for each rule that combines a number of legally required analyses, including an environmental impact statement, regulatory impact review, regulatory flexibility analysis, and social impact assessment. In these documents, the small business impacts often receive only a limited analysis. Moreover, in our experience, it can take weeks or months to get copies of these analyses. As a result, potentially affected entities, the public at large, and NMFS itself fail to get the benefit of comment and response on the key options and issues regarding impact on fishermen and their communities.

Second, in some cases, it appears that the agency does not have a deep understanding of economic analysis or the RFA. In one case, the agency concluded that an action that would prevent all new entrants into a particular fishery "could" have significant economic impacts. In another case, a FRFA said that the RFA itself established, by law, 20 percent of small businesses as a threshold for "substantial number" and a 5 percent change in costs or revenue as a "significant" impact.[9,10] Advocacy comment letters have pointed out a number of additional problems with NMFS analyses and certifications.

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[4] U.S. General Accounting Office. Fishery Management: Problems Remain with National Marine Fisheries Service's Implementation of the Magnuson-Stevenson Act. Letter Report, 04/06/2000, GAO/RCED-00-69.

[5] Ibid. Page 19.

[6] Letter from Jere Glover to William T. Hogarth of February 6, 1997, concerning the proposed rule for Atlantic Shark Fisheries of December 20, 1996, 61 FR 67295.

[7] U.S. GAO, op cit. Page 21.

[8] We were told by Advocacy that, since 1999, they have been working with NMFS and significant improvements have been reported.

[9] New England Fishery Management Council. Amendment 7 to the Atlantic Sea Scallop Fishery Management Plan, Volume 1. October 7, 1998. Page 127.

[10] According to the Office of Advocacy, as of 2000, NMFS no longer uses a numerical standard.

Finally, the range of regulatory alternatives considered by NMFS is often limited, and most options receive only cursory attention. Unlike some agencies' rulemakings, fishery management plans have direct impacts on identifiable small businesses, many of whose livelihoods and lives are at issue. Many of the management options used lead to bizarre outcomes, such as fishing boats outfitted to catch the most possible fish in a few days because fishing rights are allocated by time-slots rather than by tonnage caught over an extended period of time. Nor do these analyses appear to deal with preventing death at sea, a dimension on which options may vary widely. The provisions of fishing regulations have direct effects not just on tonnage of fish caught (and thus the income of fishermen), but also on the types of boats and equipment they use, and what days or months fishing boats may fish This last factor determines in what weather conditions fishermen are at sea, and thus the chances of their returning home safely. As recently documented in the popular book and movie *The Perfect Storm*[11], the timing of when fishing boats are at sea is a life and death safety issue. Although the IRFAs and FRFAs prepared by NMFS that we reviewed attempted to estimate the impact of fishing quotas on fishing boat revenue, they did not attempt to estimate the direct economic consequences of the safety factors associated with fixed season quotas, or consider alternative regulatory standards that would not dictate the timing of when fishing occurs. At least one analysis by a third party credits an innovative fishery management approach called "Individual Transferable Quotas" (ITQs) with saving a substantial number of fishing vessels in the mid-Atlantic surf clam and ocean quahog fishery.[12] Similarly, the use of ITQs in the halibut fishery in Alaska has enabled fishermen to avoid leaving port in bad weather and greatly reduced search and rescue missions for halibut fishers by the Coast Guard.[13] In this context, the failure to analyze ITQs seems especially limiting. (If ITQs are in some cases precluded by legal barriers, the analysis should address them and explain why the agency cannot adopt them, but should not ignore them as options.)

Another regulatory role of NOAA deals with the designation of endangered and threatened species, in coordination with the Fish and Wildlife Service of the Department of the Interior. In reviewing major rules and Advocacy letters for this report, we noticed that NOAA has proposed at least 9 endangered species listings in the past two years. In those proposed rules, the agency has declined to include either a certification or an IRFA, in apparent violation of the RFA. In some cases the agency simply said it would later determine economic impact and later decide whether to prepare an IRFA. This is not a legal option unless the agency head declares an emergency (see section 608 of the RFA). In other cases, the agency flatly refused to comply with the law. In a 1999 proposed rule, NOAA attempted to excuse its noncompliance with the following explanation:

> *As noted in Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of species.*

[11] Sebastian Junger. *The Perfect Storm*. Harper 1998. See pages 82 to 86.

[12] Donald R. Leal. Homesteading the Oceans: The Case for Property Rights in U.S. Fisheries. August 2000. Political Economy Research Center. Downloadable from www.perc.org.

[13] Ibid. Page 14.

Therefore, the economic analysis requirements of the Regulatory Flexibility Act (RFA) are not applicable to the listing process.[14]

On its face this language contradicts the RFA. The RFA contemplates that there will be rules for which the least economically burdensome alternative will not be chosen, and requires in those cases that the agency provide an explanation why a different alternative is selected. For example, section 604 says that the agency must state "the factual, policy, and legal reasons for selecting the alternative adopted in the final rule." The statutory scheme appears clear: prepare, in a timely manner, the required IRFA/FRFA and then as appropriate (conference report language is rarely if ever legally conclusive) explain the legal or other basis for selecting one option over another, e.g., in this instance, for ignoring economic impacts. In this regard, it is especially important in cases where law constrains an agency to notify the Congress as to the effects of this constraint. (The agency also says that this same rule "is exempt" from EO 12866. This is incorrect. Under the Executive Order, a rule with economic impact of $100 million or more requires a regulatory impact analysis, whether or not the agency is allowed to select the option that minimizes social costs.)

Table 3.8: Department of Commerce FRFAs Prepared or Required 1995-1999

Title	RIN	Final Rule Date	Final Rule FR Cite	Major Rule*	Type of Rule	FRFA Required **	FRFA Published
Amendment 31 to the Fishery Management Plan for Groundfish of the Gulf of Alaska and Amendment 35 for Groundfish of the Bering Sea/Aleutian Islands	0648-AE79	10/7/94	59 FR 51135	No	Fishing or Hunting	Yes	No
Atlantic Shark Fishery Quota Adjustment	0648-AF63	5/2/95	60 FR 21468	No	Fishing or Hunting	Yes	No
Amendment 2 to the Fishery Management Plan for Coral and Coral Reefs of the Gulf of Mexico and South Atlantic	0648-AF85	12/28/94	59 FR 66776	No	Fishing or Hunting	Yes	No
Regulatory Adjustments to 1994-1995 Atlantic Tuna Fisheries	0648-AG14	7/27/95	60 FR 38505	No	Fishing or Hunting	Yes	No
Regulatory Amendment To Establish the Bering Sea And Aleutian Islands "A" Season Framework	0648-AG92	12/16/94	59 FR 64867	No	Fishing or Hunting	Yes	No
Regulatory Amendment Under the FMP for the Reef Fish Resources of the Gulf of Mexico	0648-AH33	12/30/94	59 FR 67647	No	Fishing or Hunting	Yes	No
Fishery Management Plan for the Groundfish Fishery of Barent Sea/Aleutian Islands Amendment 23 revision, Rev. Amend. 28 to the FMP for Groundfish of the Gulf of Alaska, & Rev. Amend. 4 to FMP for Commercial King/Tanner Crab Fisheries	0648-AH62	8/10/95	60 FR 40763	No	Fishing or Hunting	Yes	No

[14] This particular example is from "Endangered and Threatened Species: Threatened Status for Two ESUs of Chum Salmon in Washington and Oregon, for Two ESUs of Steelhead in Washington and Oregon, and for Ozette Lake Sockeye Salmon in Washington", RIN 0648-AK53. March 25, 1999. 64 FR 14507.

Table 3.8: Department of Commerce FRFAs Prepared or Required 1995-1999 (continued)

Title	RIN	Final Rule Date	Final Rule FR Cite	Major Rule*	Type of Rule	FRFA Required **	FRFA Published
Amendment 35 to the FMP for the Groundfish Fishery of the Barents Sea Aleutian Islands	0648-AH69	7/5/95	60 FR 34904	No	Fishing or Hunting	Yes	No
Fishery Management Plan for the Scallop Fishery off Alaska; Closure of Federal Waters To Protect Scallop Stocks	0648-AI00	8/15/95	60 FR 42070	No	Fishing or Hunting	Yes	No
Amendment 7 to the Fishery Management Plan for the Atlantic Sea Scallop Fishery	0648-AJ33	3/29/99	64 FR 14835	No	Fishing or Hunting	Yes	No
Fishery Management Plan (FMP) for Atlantic Highly Migratory Species, Amendment 1 to the Billfish FMP and Consolidation of Regulations	0648-AJ67	5/28/99	64 FR 29090	No	Fishing or Hunting	Yes	Summary
Amendment 9 to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic	0648-AK05	1/25/99	64 FR 3624	No	Fishing or Hunting	Yes	No
FMP Amendments for the Groundfish Fishery of the Bering Sea and Aleutian Islands and for the Groundfish of the Gulf of Alaska	0648-AK12	1/25/99	64 FR 3653	No	Fishing or Hunting	Yes	No
Western Pacific Crustacean Fisheries; Bank-Specific Harvest Guidelines	0648-AK61	7/8/99	64 FR 36820	No	Fishing or Hunting	Yes	Summary
Amendment 45 to the Fishery Management Plan for the Bering Sea and Aleutian Islands Area	0648-AL22	1/26/99	64 FR 3877	No	Fishing or Hunting	Yes	No
Regulatory Amendment - Pacific Coast Groundfish Fishery; Final 1999 ABC, Optimum Yield and Tribal and Nontribal Allocations for Pacific Whiting	0648-AM19	5/24/99	64 FR 27928	No	Fishing or Hunting	Yes	Summary

Note: The rules in this table include final rules appearing in the April and October 1995 and April and October 1999 *Unified Agendas*, as well as major rules identified by GAO between 1996 and 1999.

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Department of Health and Human Services (HHS)

HHS has two major regulatory agencies: the Health Care Financing Administration (HCFA) and the Food and Drug Administration (FDA). Our database includes 22 HHS rules for which FRFAs were prepared, almost all from these two agencies. It has long been the HHS practice to combine RIA and IRFA/FRFA analyses, and to publish the entire analysis in the preamble at both proposed and final rule stage.[15] HHS internal guidance emphasizes that agencies should not waste time on sterile attempts to estimate the precise number of affected small entities, but to focus the analysis on adverse economic impacts and options to mitigate

[15] Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, *Handbook on Developing Low Burden and Low Cost Regulatory Proposals—Regulatory Analysis and Regulatory Flexibility Analysis in the Department of Health and Human Services*. February 1984.

these. (Upon enactment of the RFA, HHS analyzed its universe of regulated entities, and determined that with only very rare exceptions, virtually all entities affected by its rules are small as defined by the SBA size standards or qualified as small entities under the RFA's protection of not-for-profit institutions.) Based on the rules we reviewed, when the Department prepares an IRFA or FRFA, it almost always does a good job of analyzing impact.

We identified several recent instances where HCFA issued Interim Final Rules with comment periods, without first issuing a NPRM with an IRFA. HCFA claimed that it was legally exempt from normal notice and comment process based on the exceptions to the Administrative Procedure Act (APA). It is legally problematic to skip the issuance of a NPRM in all but emergency situations, or other situations specifically outlined in the APA. Advocacy has criticized HCFA on numerous occasions for overusing the APA exceptions. Moreover, this practice is in conflict with the Department's established policy of not using the loophole for rules that did not require a proposed rule stage, but always to prepare a FRFA in these cases (commonly termed in HHS "Interim Final Rule with Comment Period"). Finally, the Department chose to always opt for preparing an IRFA or FRFA on a voluntary basis when there was likely to be controversy over impact or where a threshold impact determination was potentially ambiguous. HHS has disagreed with the SBA interpretation of the RFA as covering rules with significantly positive impacts, but as a policy matter decided to voluntarily prepare an analysis in these cases. It is common for HHS preambles to say that the Secretary certifies the rule as having no significant adverse impact, but has nonetheless decided to include an IRFA or FRFA.[16]

Unfortunately, while HHS still relies on its *Handbook on Developing Low Burden and Low Cost Regulatory Proposals*, it has not revised its policy guidance in sixteen years. The guidance is therefore out of date with respect to SBREFA changes, both to the RFA and to the Congressional Review process.[17]

Table 3.9, below, lists the HCFA rules that we reviewed for this analysis.

Table 3.9: HCFA FRFAs Prepared or Required 1995-1999

Title	RIN	Final Rule Date	Final Rule FR Cite	Major Rule*	Type of Rule	FRFA Required **	FRFA Published
Survey and Certification of Skilled Nursing Facilities and Nursing Facilities and Enforcement Procedures (HSQ-156-F)	0938-AD94	11/10/94	59 FR 56116	No	Safety and Health	Yes	Yes
Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 1998 Rates; Final Rule	0938-AH55	5/12/98	63 FR 26318	Yes	Health Insurance	Yes	Yes

[16] In a recent example, the Department's final rule on the Organ Transplantation Network contained both a certification and a full FRFA. RIN 0906-AA32. April 2, 1998. 63 FR 16296.

[17] The 1984 *Handbook* does not even reflect the replacement of EO 12291 with EO 12866. Furthermore, in recent years the regulatory review unit in the Office of the Assistant Secretary for Planning and Evaluation has been reduced from a full division to one person, and there has been significant attrition in HCFA's regulatory analysis unit. (FDA, however, still has two strong regulatory analysis units.) Current performance is not as strong as in previous years.

Table 3.9: HCFA FRFAs Prepared or Required 1995-1999 (continued)

Title	RIN	Final Rule Date	Final Rule FR Cite	Major Rule*	Type of Rule	FRFA Required **	FRFA Published
Health Insurance Reform: Parity in the Application of Certain Limits to Mental Health Benefits (HCFA-2891-IFC)	0938-AI05	12/22/97	62 FR 66931	Yes	Health Insurance	Voluntary	Yes
Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities. (HCFA-1913-IFC)	0938-AI47	7/30/99	64 FR 41644	Yes	Health Insurance	Yes	n/a
Medicare and Medicaid Programs; Salary Equivalency Guidelines for Physical Therapy, Respiratory Therapy, Speech Language Pathology, and Occupational Therapy Services	0938-AG70	1/30/98	63 FR 5106	Yes	Health Insurance	Yes	Summary
Changes to the Medicare Hospital Inpatient Prospective Payment Systems and Fiscal Year 1997 Rates	0938-AH34	8/30/96	61 FR 46166	Yes	Safety and Health	Yes	Yes
Medicare Revisions to Payment Policies and Five-Year Review of and Adjustments to the Relative Value Units Under the Physician Fee Schedule for Calendar Year 1997, Final Rule	0938-AH40	11/22/96	61 FR 59489	Yes	Health Insurance	Yes	Yes
Medicare Physician Fee Schedule for Calendar Year 1998; Payment Policies and Relative Value Unit Adjustments and Clinical Psychologist Fee Schedule	0938-AH94	10/31/97	62 FR 59048	No	Health Insurance	Yes	Yes
Establishment of the Medicare+Choice Program	0938-AI29	2/17/99	64 FR 7967	No	Health Insurance	Yes	No
Revisions to Payment Policies Under the Medicare Physician Fee Schedule for Calendar Year 1999	0938-AI52	11/2/98	63 FR 58813	Yes	Health Insurance	Yes	Yes
Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2000 Rates	0938-AJ50	7/30/99	64 FR 41490	Yes	Health Insurance	Yes	Yes
Revisions to Payment Policies Under the Medicare Physician Fee Schedule for Calendar Year 2000	0938-AJ61	11/2/99	64 FR 59380	Yes	Health Insurance	Yes	Yes
Medicare Inpatient Disproportionate Share Hospital (DSH) Adjustment Calculation: Change in the Treatment of Certain Medicaid Patient Days in States With 1115 Expansion Waivers	0938-AJ92	2/20/00	65 FR 3136	Yes	Health Insurance	Yes	Yes

Note: The rules in this table include final rules appearing in the April and October 1995 and April and October 1999 *Unified Agendas*, as well as major rules identified by GAO between 1996 and 1999.

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** Assessment made by CONSAD, based on the information developed and presented by the Agency in the preamble to the Final Rule published in the *Federal Register*.

n/a Indicates that the Agency said an FRFA was not needed (because the Agency certified the rule) but where CONSAD determined that a FRFA should have been prepared.

HCFA's performance in regulatory flexibility analysis is very mixed. In several areas, particularly the annually recurring revisions to the hospital and physician payment rules, the agency generally attempts to publish thorough and complete analyses, distinguishing where the

Department has discretionary authority and where it does not, and presenting options for some of the rules' requirements and rationales for those rejected and selected. However, some recent preambles have actually stated that HCFA has not determined and cannot determine regulatory impact, followed by a certification that is necessarily without foundation.[18] In a recent instance covered in our data base, HCFA proposed to establish a prospective payment system for skilled nursing facilities".[19] This rule reduces Medicare payments by about 17 percent on average and has a $5 billion annual (fifth year) revenue impact on skilled nursing facilities. HCFA claimed, incorrectly, that because the average reduction in total revenue is only 1.7 percent, a substantial number of small entities are not significantly affected. The HHS *Handbook* actually uses as an example a hypothetical rule that might affect skilled nursing facilities on average 3 percent or less. The *Handbook* says, "if the rule will result in a disproportional economic impact on a subset of affected small entities (for example, hospital-based as compared with free-standing SNFs), a determination must be made whether the impact on them will be significant. A low average impact on all small entities should not be used to disguise a significant impact on a subset."[20] Finally, HCFA falsely asserts that it cannot determine the impacts on individual SNFs. Clearly, some facilities will be affected much more than average (others much less) and HCFA should be able, using data in its possession on facility sizes, Medicare facility-specific caseload, and Medicare facility-specific reimbursements, to develop estimates of these impacts and explored options to reduce burden. Alternatively, the agency could have analyzed alternatives to reduce burden even without precise estimates of impact. (If the law allowed no amelioration, this should have been explained.) In sum, HCFA failed either to certify or to provide the full analysis required by the RFA.

Table 3.10, below, depicts the rules in our database for other HHS agencies, mainly from FDA.

FDA is one of the few federal agencies with the staff expertise and tradition of excellence, coupled with regulatory experience and analytic sophistication, to excel routinely at regulatory development. However, agency performance, while better than most agencies, is mixed. And FDA has a tradition of interpreting regulatory analysis requirements as narrowly as possible. Some years ago FDA declined (arguing it had limited legal authority) to exempt the very smallest businesses from nutrition labeling requirements. FDA's final rule would, in effect, have required roadside stands selling apple butter to hire laboratories to assay their products and calculate the vitamin and mineral content. The Congress reacted to this decision by legislating a small business exemption. In its final rule implementing this legislation,[21] FDA prepared what it termed a voluntary FRFA and estimated that small businesses would save $300 million, at no cost to public health. But FDA declined to say that the FRFA was required, arguing instead that when it had no legal discretion the RFA did not apply.

[18] See, for example, the Advocacy letter on a recent proposal to Amend Medicare Participation Requirements for Rural Health Clinics. February 28, 2000. 65 FR 10450.

[19] Prospective Payment System and Consolidated Billing System for Skilled Nursing Facilities. RIN 0938-AI47. July 30, 1999. 64 FR 41644.

[20] HHS Handbook, op cit. Page 10.

[21] RIN 0910—AA19. August 7, 1996. 61 FR 40963.

Table 3.10: Other HHS FRFAs Prepared or Required 1995-1999

Title	RIN	Final Rule Date	Final Rule FR Cite	Major Rule*	Type of Rule	FRFA Required **	FRFA Published
Medical Facility Construction and Modernization Requirements for Provision of Services to Persons Unable to Pay (Nursing Homes)	0905-AE33	3/31/95	60 FR 16753	No	Grant and Loan	Yes	No
Tamper-Evident Packaging Requirements for Over-the-Counter Human Drug Products	0910-AA26	11/4/98	63 FR 59463	No	Safety and Health	Yes	Yes
Over-the-Counter Human Drugs; Labeling Requirements	0910-AA79	3/17/99	64 FR 13254	Yes	Safety and Health	Voluntary	Yes
Organ Procurement and Transplantation Network	0906-AA32	4/2/98	63 FR 16296	No	Market Regulation	Voluntary	Yes
Medical Devices; Current Good Manufacturing Practice (CGMP) Final Rule; Quality System Regulation	0910-AA09	10/7/96	61 FR 52601	Yes	Safety and Health	Yes	Yes
Food Labeling; Nutrition Labeling, Small Business Exemption	0910-AA19	8/7/96	61 FR 40963	No	Safety and Health	Yes	No
Quality Mammography Standards	0910-AA24	10/28/97	62 FR 55851	Yes	Safety and Health	Yes	Summary
Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents	0910-AA48	8/28/96	61 FR 44395	Yes	Safety and Health	Yes	Yes
Substances Prohibited From Use in Animal Food or Feed; Animal Proteins Prohibited in Ruminant Feed	0910-AA91	6/5/97	62 FR 30935	No	Safety and Health	Yes	Summary

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** Assessment made by CONSAD, based on the information developed and presented by the Agency in the preamble to the Final Rule published in the *Federal Register*.

Much of the time FDA produces exceptionally well-analyzed, thorough, and responsive regulations. In our database, FDA rules on Quality Mammography Standards[22] and on Labeling of Over the Counter Drugs[23] both evidenced great care in dealing with small business problems and concerns and appear exemplary. On the other hand, as demonstrated by many Advocacy letters over the years, the agency sometimes misses, and sometimes resists, tailoring rules to minimize burden on small entities.

[22] RIN 0910—AA24. October 28, 1997. 62 FR 55851.
[23] RIN 0910—AA79. March 17, 1999. 64 FR 13254.

As noted elsewhere in this report, HHS is one of the agencies that has been dilatory in section 610 reviews, with its 23 year old Hill Burton rule a prime example of a then and now burdensome rule that has not been reformed.

Department of the Interior (DOI)

Our database includes 10 DOI rules (see Table 3.11) for the 1995-2000 period. It could have included many more, because we found that since the passage of SBREFA, the Department's Fish and Wildlife Service has routinely asserted that a half-dozen bird hunting regulations annually are both major rules and require preparation of IRFAs/FRFAs. For reasons described below, including all of these rules in the database would simply have added meaningless clutter.

We have only identified one arguably significant impact rule that is not hunting-related. In revisions to general forestry regulations pertaining to Indian tribal use, the Department identified what appear to be very significant positive benefits to small businesses.[24] No FRFA was prepared. Surprisingly, despite the widespread and economically important activities of the Department in mining, mineral extraction, and oil and gas leasing, none of the Department's actions in those areas appear to have involved rules requiring an IRFA or FRFA in our research period. We note, however, that Advocacy has identified over the years a considerable number of such rules that did not provide an evidentiary basis for their certifications; so there may be significant impacts that were not identified by DOI.[25]

Shortly after enactment of SBREFA, someone in authority in the Fish and Wildlife Service apparently decided that the bureaucratically safest way to deal with the new Congressional review and RFA changes was to label every rule as a "major" rule and to prepare an IRFA and FRFA for every rule. Since then, each year's half dozen hunting season regulations have been transmitted to the GAO and the Congress as "major", for a 60-day review period, and have been labeled as having a significant impact on a substantial number of small entities. As a result, such rules as the annual "Youth Waterfowl Day" have been duly listed in the GAO list of major rules. None of the alleged IRFAs or FRFAs is published in the preambles.

After waiting months, and after numerous letters and phone calls, we finally obtained copies of the alleged IRFAs and FRFAs prepared for these rules. These documents are no more and no less than estimates of the amounts of money bird hunters spend, by state. They are undated, combine IRFA and FRFA, and can and do serve for every rule in a given year, and apparently for rules in the next year if the agency does not bother to update them. They are not written specifically for each rule, and are obviously not consulted by the authors of each rule, but instead remain as file cabinet documents to "prove" that the agency complies with the RFA. Every year or two they are revised. The analytic quality of these documents is best understood by the following quote, which constitutes the entire analysis of alternatives regarding hunting dates,

[24] RIN 1018—AC79. September 29 1995. 60 FR 50745.

[25] We were told by Advocacy that one such rule resulted in a lawsuit, *Northwest Mining Association vs. Babbitt*, 5 F.Supp. 2d 9 (D.D.C. 1998). The court agreed with Advocacy's position that the hard rock mining rule promulgated by the Bureau of Land Management at DOI had not complied with the RFA. The rule's certification violated the RFA by failing to incorporate a correct definition of "small entity". The court did not address the issue of impact, but Advocacy believed the impact would have been great and that the rule was certified improperly.

Table 3.11: Department of the Interior FRFAs Prepared or Required 1995-1999

Title	RIN	Final Rule Date	Final Rule FR Cite	Major Rule*	Type of Rule	FRFA Required **	FRFA Published
Final Frameworks for Late-Season Migratory Bird Hunting Regulations	1018-AD69	8/26/96	61 FR 50661	No	Fishing or Hunting	Voluntary	No
Final Frameworks for Early-Season Migratory Bird Hunting Regulations	1018-AD69	8/29/96	61 FR 45835	No	Fishing or Hunting	Voluntary	No
Youth Waterfowl Hunting Day for the 1996-97 Migratory Game Bird Hunting Season	1018-AD69	9/18/96	61 FR 49231	No	Fishing or Hunting	Voluntary	No
Migratory Bird Hunting Regulations on Certain Federal Indian Reservations and Ceded Lands for the 1996-97 Late Season	1018-AD69	9/27/96	61 FR 50940	No	Fishing or Hunting	Voluntary	No
Migratory Bird Hunting: Late Seasons and Bag and Possession Limits for Certain Migratory Game Birds 1996-1997	1018-AD69	9/27/96	61 FR 50738	No	Fishing or Hunting	Voluntary	No
Migratory Bird Hunting: Early and Late Seasons and Bag and Possession Limits for Certain Migratory Game Birds and on Certain Federal Indian Reservations and Ceded Lands 1997-1998 (multiple rules)	1018-AE14	8/29/97	62 FR 50660	No	Fishing or Hunting	Voluntary	No
Migratory Bird Hunting: Early and Late Seasons and Bag and Possession Limits for Certain Migratory Game Birds and on Certain Federal Indian Reservations and Ceded Lands 1998-1999 (multiple rules)	1018-AE93	8/31/98	63 FR 63580	No	Fishing or Hunting	Voluntary	No
Migratory Bird Hunting: Early and Late Seasons and Bag and Possession Limits for Certain Migratory Game Birds and on Certain Federal Indian Reservations and Ceded Lands 1999-2000 (multiple rules)	1018-AF24	9/23/99	64 FR 47134	No	Fishing or Hunting	Voluntary	No
Migratory Bird Hunting	1018-AC79	9/29/95	60 FR 50745	No	Fishing or Hunting	Voluntary	No
General Forest Regulations Pertaining to Indian Tribal Use	1076-AC44	10/5/95	60 FR 52249	No	Fishing or Hunting	Yes	No

Note: The rules in this table include final rules appearing in the April and October 1995 and April and October 1999 *Unified Agendas*, as well as major rules identified by GAO between 1996 and 1999.

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species-specific decisions, special flyway rules, and other decisions made each year for **all** of the various bird hunting rules:

> *Alternatives to the Proposed Rule. As the migratory bird hunting regulations are largely beneficial to small entities, no special treatment has been considered for them. Alternative methods of regulation are continually under consideration. Formal analysis of alternatives is undertaken in the annual environmental assessment of the regulations.*[26]

Six of the 10 pages in this document present numbingly detailed tables, by state, estimating what hunters spend on food, lodging, and equipment. The relevance of these tables to any regulatory impact question is neither asserted nor explained. Perhaps in embarrassment, the successor document, apparently written in 1997 and used at least into 2000, actually lists several generic alternatives, equally unrelated to the content of the rules, such as "Alternative 1… closed season on all ducks". This document uses more sophisticated methods of estimating table data, but presents the same irrelevant information in equally numbing detail.[27] The relevance of that information to the RFA is nowhere demonstrated. The document claims to be a benefit-cost analysis, but calculations of the amounts of money hunters spend on their hobby, and claiming economic welfare benefits for that spending, does not begin to be a regulatory impact benefit-cost analysis as those concepts are understood by regulatory economists. Indeed, by definition this document cannot be an economic analysis in support of a particular rulemaking, since it is in no way specific to any particular rulemaking. It may be useful for public relations purposes, but fails to have any other relevance to these rules or to hunting season decisions made by the Department.

Nothing in any of these rules or either of these documents suggests that the Department should have done anything but certify these rules as having no significant impact on a substantial number of small entities. There is absolutely no showing that minor changes in hunting dates, youth hunting days, or other matters these rules deal with have any consequential effects even on those few small entities (commercial duck blinds?) that presumably exist and depend predominantly on duck hunting for revenues. Alternatively, if there are such significant, differential impacts based on the specific details of the rules, the Department has failed in its legal obligation to analyze those impacts. And it has failed in its obligation to assess the impacts of alternatives (e.g., alternative dates for the beginning of hunting season, abolishing youth hunting day, changing the age of youth eligible for youth hunting day).

Likewise, there is no reason alleged or apparent why the Department of the Interior should forward these rules to GAO as "major", or why the GAO should accept that classification. (Interestingly, OMB does not classify these rules as "economically significant", require a cost-benefit analysis, or even bother to review them). In fact, although GAO letters generally lean over backwards to defer to agency views, it would seem untoward for GAO to say that these hunting rules "complied with the applicable requirements". These rules' preambles fail to demonstrate that they are major or have significant impacts, no cost-benefit analysis of the specific rules has been prepared, and they are not appropriately categorized under the respective statutes.

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[26] Undated document entitled "C. Small Entity Analysis—Regulatory Flexibility Act—5 U.S.C. 601."

[27] Undated document entitled "Cost-Benefit and Economic Analysis of the Waterfowl Hunting Regulations for 1998."

Environmental Protection Agency (EPA)

In our sample, EPA promulgated 14 rules accompanied by FRFAs (see Table 3.12). EPA generally prepares thorough and sophisticated regulatory documents. Most EPA analyses are models. However, like FDA and OSHA, EPA has its own approach to complying with the RFA, reflecting its own experiences and incentives. For example, for a number of years EPA used an elaborate and liberal set of threshold criteria for deciding when a rule had significant impacts on a substantial number of small entities. (In one case, EPA prepared an IRFA/FRFA for a rule affecting only **one** small business significantly, out of 14 affected by the rule.)[28] Then it changed strategy and decided to avoid those complexities by treating every rule affecting any small entities as requiring an IRFA/FRFA. After passage of SBREFA, which imposed on EPA (and OSHA) a new requirement to convene SBREFA panels for these rules, EPA has become far more cautious in finding such impact.

Another EPA position, and one well reflected in the rules in our database, is to certify rules with foreseeable draconian economic impacts because these rules will be implemented through future actions taken by other parties, such as states. In such cases, EPA argues, the adverse impacts are caused not by its rule, but by future rules. EPA takes this position even when the adverse consequences will be directly triggered by its rule.[29]

Table 3.12: Environmental Protection Agency FRFAs Prepared or Required 1995-1999

Title	RIN	Final Rule Date	Final Rule FR Cite	Major Rule*	Type of Rule	FRFA Required **	FRFA Published
Revisions to the Underground Injection Control Regulations for Class V Injection Wells	2040-AB83	12/7/99	64 FR 68545	No	Environment	Yes	Summary
Effluent Guidelines and Standards for the Transportation Equipment Cleaning Category	2040-AB98	8/14/00	65 FR 49665	No	Environment	No	No
Accidental Release Prevention Requirements: Risk Management Programs Under Clean Air Act Section 112(r)(7)	2050-AD26	6/20/96	61 FR 31668	Yes	Environment	Yes	Summary
Regulation of Fuels and Fuel Additives: Certification Standards for Deposit Control Gasoline Additives	2060-AG06	7/5/96	61 FR 35309	Yes	Environment	Voluntary	No
Findings of Significant Contribution and Rulemaking on Section 126 Petitions for Purposes of Reducing Interstate Ozone Transport	2060-AH88	5/25/99	64 FR 28250	Yes	Safety and Health	Yes	Summary

[28] National Emission Standards for Hazardous Air Pollutants: Magnetic Tape Manufacturing Operations. RIN 2060-AD99. December 15, 1994. 69 FR 59480.

[29] See, for example Addition of Facilities in Certain Industry Sectors; Revised Interpretation of Otherwise Use; Toxic Release Inventory; Community Right-to-Know. RIN 2070-AC71. May 1, 1997. 62 FR 23834.

Table 3.12: Environmental Protection Agency FRFAs Prepared or Required 1995-1999 (continued)

Title	RIN	Final Rule Date	Final Rule FR Cite	Major Rule*	Type of Rule	FRFA Required **	FRFA Published
Tier II Light-Duty Vehicle and Light-Duty Truck Emission Standards and Gasoline Sulfur Standards	2060-AI23	2/10/00	65 FR 6697	Yes	Environment	Yes	Summary
Addition of Facilities in Certain Industry Sectors; Revised Interpretation of Otherwise Use; Toxic Release Inventory; Community Right-to-Know	2070-AC71	5/1/97	62 FR 23834	Yes	Environment	Yes	Summary
National Primary Drinking Water Regulations: Stage I Disinfectant/Disinfection By-Products Rule	2040-AB82	12/16/98	63 FR 69389	Yes	Safety and Health	Yes	Summary
National Emission Standards for Hazardous Air Pollutants: Petroleum Refining - Other Sources Not Distinctly Listed	2060-AD94	8/18/95	60 FR 43243	Yes	Environment	Yes	Summary
National Emission Standards for Hazardous Air Pollutants: Magnetic Tape Manufacturing Operations	2060-AD99	12/15/94	59 FR 64580	No	Environment	Voluntary	Summary
National Emission Standards for Hazardous Air Pollutants: Secondary Lead Smelting	2060-AE04	6/23/95	60 FR 32587	No	Environment	Yes	Summary
VOC Regulation for Architectural Coatings	2060-AE55	9/11/98	63 FR 48848	No	Environment	Voluntary	Summary
Control of Emissions of Air Pollution From Highway Heavy-Duty Engines and Diesel Engines	2060-AF76	10/23/98	63 FR 56967	Yes	Environment	Yes	Summary
Air Pollutant Emission Regulations for Spark-Ignited Nonroad Engines 25 Horsepower and Below - Phase I	2060-AF78	7/3/95	60 FR 34581	Yes	Environment	Yes	Summary

Note: The rules in this table include final rules appearing in the April and October 1995 and April and October 1999 *Unified Agendas*, as well as major rules identified by GAO between 1996 and 1999 and final rules that were subject to SBREFA review panels.

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The big news about EPA rules is that the new panel reviews appear to have greatly influenced the willingness of the agency to creatively consider, and adopt, burden-reducing options. In our database, there are five EPA rules for which a SBREFA panel was invoked that are now final. In each case there are convincing explanations of regulatory innovations that reduced final rule burden. In two of these cases, the burden reduction was so great that in our view the FRFA prepared for the final rule was voluntary. In the case of industrial laundries, EPA withdrew the proposal entirely and will not be regulating the industry.

The most troubling problem that we have observed for EPA rules is that the agency certifies some rules as without significant small entity impact in cases in which the question is close, or the conclusion appears to be erroneous. In at least two of these cases Advocacy has

vigorously challenged EPA's conclusions. Moreover, the GAO has reported that for three EPA rules, one on levels of lead release[30], and two on clean water[31], that the agency's underlying economic analyses have limitations that "raise questions about their reasonableness and about the determinations that EPA has based on them."[32] In these cases the agency used inferior estimating methods that greatly reduced the claimed magnitude of impact on small entities. Had alternative methods been used, IRFAs and FRFAs would have been required.

Federal Communications Commission (FCC)

In an age of telecommunications revolution, it is not surprising that the FCC has a heavy agenda of economically significant regulations. Our sample of rules from 1995, 1999, and major rules only captures a small number of the many FCC rules in recent years that have significant economic impact on a substantial number of small entities (see Table 3.13).

There are so many FCC rules affecting small entities significantly in recent years that we did not attempt to locate and list them all. Our sample suggests the range of issues they address.

Based on our review of rules and of comment letters from the Office of Advocacy, it is clear that many FCC rulemaking proceedings have a significant economic impact on small businesses. But generally, the FCC does not consider the impact its rules or proposed rules would have on small business, as the Regulatory Flexibility Act requires. In addition, the FCC's policies sometimes appear to place more confidence in the competitive abilities of larger companies.

We identified 73 Advocacy comment letters issued between 1995 and 2000 that criticize FCC's attention to small entity impacts during their non-rulemaking proceedings, as well as the lack of compliance with the RFA during their development of rules. These Advocacy comment letters have focused most often on the lack of appropriate factual support for certifications, the inadequacy of IRFAs and FRFAs at addressing alternatives intended to reduce small entity impacts, and the procedures that the agency uses to request and consider comments from small entities.

Securities and Exchange Commission (SEC)

Our database includes 25 SEC rules (see Table 3.14). These rules evidence an unfortunate pattern similar to FAR and the Fish and Wildlife Service, although not as egregious. The SEC seems to have decided, as a policy matter, to generally claim that its rules are major (as defined by the CRA) and have significant impacts on small entities[33] (as defined by the RFA), even when its own analyses appear to show otherwise. As a result, the SEC preambles often stop short of certifying those rules where the SEC's own analysis shows no significant economic impact on a

[30] U.S. General Accounting Office, "Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule." September, 2000.

[31] U.S. General Accounting Office. "Clean Water Act: Proposed Revisions to EPA Regulations to Clean Up Polluted Waters." June 21, 2000.

[32] Ibid. Page 3.

[33] One exception is the rule for Reporting Requirements for Brokers or Dealers, RIN 3235—AF91, February 7, 1997, 62 FR 6469, where the agency certified that the rule would have no impact.

Table 3.13: Federal Communications Commission FRFAs Prepared or Required 1995-1999

Title	RIN	Final Rule Date	Final Rule FR Cite	Major Rule*	Type of Rule	FRFA Required **	FRFA Published
Assessment and Collection of Regulatory Fees for Fiscal Year 1998	3060-AG66	7/1/98	63 FR 35847	Yes	Market Regulation	Yes	Yes
Assessment and Collection of Regulatory Fees for Fiscal Year 1997	n/a	7/11/97	62 FR 37407	Yes	Market Regulation	Yes	Yes
Assessment and Collection of Regulatory Fees for Fiscal Year 1999	n/a	7/1/99	64 FR 35831	Yes	Market Regulation	Yes	Yes
Advanced Television Service (MM Docket 87-268)	3060-AE24	1/28/99	64 FR 4322	No	Market Regulation	Yes	Summary
Revision of Marketing and Authorization Process	3060-AF29	6/10/98	63 FR 31645	No	Market Regulation	Voluntary	Summary
Radio Frequency Exposure Standard	3060-AF32	9/12/97	62 FR 47960	No	Safety and Health	Yes	No
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 (Second Report and Order)	3060-AG64	2/4/99	64 FR 13701	No	Market Regulation	Yes	No
Main Studio/Public File Requirements for Broadcasters (MMB Docket 97-138)	3060-AG68	9/16/98	63 FR 49487	No	Market Regulation	Voluntary	Summary
Elimination of Part 41: Telegraph and Telephone Franks	3060-AH04	3/23/99	64 FR 13916	No	Market Regulation	Voluntary	No
Streamlined Contributor Reporting Requirements for Carriers	3060-AH06	7/14/99	64 FR 41320	No	Market Regulation	Voluntary	Summary

Note: The rules in this table include final rules appearing in the April and October 1995 and April and October 1999 *Unified Agendas*, as well as major rules identified by GAO between 1996 and 1999.

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substantial number of small entities, and the IRFAs and FRFAs often fail to analyze alternatives with potential to reduce burden, simply because there is little or no burden to reduce.[34] Thus, the Agency systematically misclassifies rules and does not meet the intent of the RFA either to certify a rule as having no significant impact or, if its impact is substantial, to analyze burden-reducing alternatives. In fairness, the SEC faces excruciatingly difficult problems in analyzing impact. Its rules, by and large, are intended to promote competition and improve the functioning of markets. They focus on honest information, an intangible, rather than on direct command and control approaches. Having said this, the RFA requires the agency, as the expert, to make the sometimes difficult determination as to the amount of burden, and either to certify or analyze as

[34] CONSAD has been informed by Advocacy that its staff encouraged the SEC not to certify if there was any reasonable doubt about the impact or if the SEC lacked complete data. Thus, the SEC may have opted to prepare IRFAs and solicit data through comments. However, our analysis above focuses on completed rules for which the SEC FRFA makes clear no consequential burden was identified either by the SEC's IRFA or by commenters.

appropriate. Preparing necessarily incomplete pseudo-IRFAs and FRFAs for rules without significant impact serves no useful purpose.

A few examples from our list should suffice. In a rule called "Transition Rule for Ohio Investment Advisers", the preamble states that the rule "will not have a significant effect on the regulatory burden borne by investment advisers" and that the "net costs imposed by the new rule … are negligible." In fact, the only cost of any kind identified by the SEC is the need for each advisor to write a letter to the State of Ohio. If there truly is no significant impact, the RFA expects the SEC to certify this, as long as the agency provides the factual basis for its conclusion. Instead, the SEC prepared a pseudo-IRFA/FRFA which reasonably demonstrates that the rule imposes no significant burden and fails to deal with alternatives designed to reduce that negligible burden.[35] In other words, an IRFA/FRFA that does not (and cannot) analyze substantial burdens and real alternatives (because there is only negligible burden) is not an IRFA/FRFA as intended under the RFA. In another example, the SEC states that a rule would have no impact other than a trivial paperwork burden.[36] The SEC again prepared a pseudo-IRFA/FRFA, rather than certify that the rule would have no impact. The SEC also submitted this rule to GAO and Congress as a major rule in apparent violation of the CRA standards. As shown by the "voluntary" entries in our table on the SEC, these misclassifications are common.

Although the SEC often classifies minor rules as major,[37] and rules with negligible impact on small entities as having significant impact, we found no instances among the 25 SEC rules we reviewed where the SEC incorrectly certified a rule that had a significant **adverse** economic impact on a substantial number of small entities. In one case, an SEC rule was declared major that would save some 475 firms an average of $250,000 annually. The rule was correctly submitted to GAO as major, but the SEC certified that the rule would have no significant impact and prepared no IRFA/FRFA.[38] SEC staff have asserted that the rule does not require a IRFA/FRFA because the regulation is voluntary. Notwithstanding, GAO estimated that the rule would result in a $159 million savings to the industry. Regardless of whether a rule is voluntary or not, if it is expected to result in a significant economic impact on a substantial number of small entities (either negative or positive), the Office of Advocacy has interpreted the RFA as requiring that the agency prepare an IRFA and FRFA. This rule clearly meets the Advocacy interpretation and an IRFA and FRFA should have been prepared.

Finally, in contrast to the FAR and Fish and Wildlife, there were a small number of rules that significantly impacted small business, where the SEC did prepare IRFAs/FRFAs which identified and seriously considered regulatory alternatives that could minimize small business impacts. But, there were other cases where the SEC imposed substantial burdens, prepared an IRFA/FRFA, but failed to consider, properly, alternatives designed to reduce the impact, consistent with its regulatory goals. On balance, the agency clearly analyzes all rules for potential burden, and where that burden is substantial usually identifies and often adopts cost-

[35] RIN 3235—AH60. April 1, 1999. 64 FR 15680.

[36] Requirements Relating to Codes of Ethics With Respect to Registered Investment Companies; Records To Be Maintained by Investment Advisers. RIN 3235—AG27. August 20, 1999. 64 FR 61381.

[37] As indicated in Table 3.15, CONSAD's assessment, based on the SEC's own analyses presented in the preambles to Final Rules, indicates that the rules are not major. Nevertheless, the SEC transmitted most of them to GAO as major rules under the CRA.

[38] Reporting Requirements for Brokers or Dealers. RIN 3235—AF91. February 7, 1997. 62 FR 6469.

reducing alternatives. Thus, its errors largely involve technical non-compliance rather than the substantive non-compliance that is common in some other agencies.

Other Agencies

The analysis above deals with the dozen Departments and agencies that account for the overwhelming majority of rules with significant impact on a substantial number of small entities promulgated over the last five years. A handful of cabinet Departments and dozens of independent agencies apparently had no rules, and certainly no more than a few, that required preparation of IRFAs or FRFAs. In reaching these conclusions, we analyzed not only rules that claimed significant impacts (many incorrectly), but also many rules that certified no such impacts. We found very few false certifications, and almost none from these other agencies. Accordingly, a larger sample in our database would be very unlikely to change this overall picture.

Nonetheless, we do wish to point out that other agencies, perhaps most notably the Architectural and Transportation Barriers Compliance Board, do unnecessarily create major adverse impacts on small businesses, and do so with virtual impunity. In this regard, the arguably single most egregious example of a rule that escaped scrutiny came from the Wage and Hour Administration within the Labor Department. That rule, discussed elsewhere in this report, forces

Table 3.14: Securities and Exchange Commission FRFAs Prepared or Required 1995-1999

Title	RIN	Final Rule Date	Final Rule FR Cite	Major Rule*	Type of Rule	FRFA Required **	FRFA Published
Technical Revisions to the Rules and Forms Regulating Money Market Funds	3235-AE17	12/9/97	62 FR 64967	No	Banking and Finance	Voluntary	Summary
Registration Form Used by Open-End Management Investment Companies and New Disclosure Option for Open-End Management Investment Companies; Final Rules	3235-AE46	3/23/98	63 FR 13916	No	Banking and Finance	Voluntary	Summary
Anti-manipulation Rules Concerning Securities Offerings	3235-AF54	1/3/97	62 FR 519	No	Banking and Finance	Yes	Summary
Reporting Requirements for Brokers or Dealers	3235-AF91	2/7/97	62 FR 6469	Yes	Banking and Finance	Yes	n/a
Offshore Offers and Sales	3235-AG34	2/25/98	63 FR 9631	No	Banking and Finance	Voluntary	Yes
Revision of Holding Period Requirements in Rules 144 and 145	3235-AG53	2/28/97	62 FR 9242	No	Banking and Finance	Yes	Yes
Exemption for the Acquisition of Securities During the Existence of An Underwriting or Selling Syndicate	3235-AG61	8/7/97	62 FR 42401	No	Banking and Finance	Voluntary	Summary
Rule 11AC1-4 (Limit Order Display Rule) and Amendments to Rule 11 AC1-1 (Quote Rule),	3235-AG66	9/12/96	61 FR 48290	No	Banking and Finance	Yes	Summary
Disclosure of Accounting Policies for Derivative Financial Instruments and Derivative Commodity Instruments	3235-AG77	2/10/97	62 FR 6044	No	Banking and Finance	Voluntary	Summary
Regulation of Takeovers and Security Holder Communications, OGC-00-12, November 19, 1999	3235-AG84	11/10/99	64 FR 61408	No	Banking and Finance	Voluntary	Yes
Rules Implementing Amendments to the Investment Advisers Act of 1940 (Rule 203A-2)	3235-AH07	5/22/97	62 FR 28112	No	Banking and Finance	Yes	Summary
Privately Offered Investment Companies	3235-AH09	4/9/97	62 FR 17512	No	Banking and Finance	Voluntary	Summary
Registration of OTC Derivatives Dealers	3235-AH16	11/3/98	63 FR 59362	No	Banking and Finance	Voluntary	Summary

Table 3.14: Securities and Exchange Commission FRFAs Prepared or Required 1995-1999 (continued)

Title	RIN	Final Rule Date	Final Rule FR Cite	Major Rule*	Type of Rule	FRFA Required **	FRFA Published
Adoption of Amendments to the Intermarket Trading System Plan to Expand the ITS/Computer Assisted Execution System Linkage to All Listed Securities	3235-AH49	12/9/99	64 FR 70297	No	Banking and Finance	Voluntary	Summary
Privacy of Consumer Financial Information (Regulation S-P)	3235-AH90	6/29/00	65 FR 40334	No	Banking and Finance	Voluntary	Summary
Exemptions for International Tender and Exchange Offers	3235-AD97	11/10/99	64 FR 61381	No	Banking and Finance	Yes	Summary
Requirements Relating to Codes of Ethics With Respect to Registered Investment Companies; Records To Be Maintained by Investment Advisers	3235-AG27	8/20/99	64 FR 46821	No	Banking and Finance	Voluntary	Summary
Amendments to Rule 8f-1 and Deregistration Form N-8F, and Rule 101 of Regulation S-T	3235-AG29	4/15/99	64 FR 19469	No	Banking and Finance	Voluntary	Summary
Increase in Dollar Amounts in Rule 701, the Exemption for Offers and Sales by Certain Compensatory Benefit Plans	3235-AH21	3/8/99	64 FR 11095	No	Banking and Finance	Yes	Summary
Rule 504 of Regulation D	3235-AH35	3/8/99	64 FR 11090	No	Banking and Finance	Yes	Summary
Reports To Be Made by Certain Brokers and Dealers	3235-AH36	11/3/98	63 FR 59208	No	Banking and Finance	Yes	Summary
Purchases of Certain Equity Securities by the Issuer and Others	3235-AH48	9/23/99	64 FR 52428	No	Banking and Finance	Voluntary	Summary
Transition Rule for Ohio Investment Advisers	3235-AH60	4/1/99	64 FR 15680	No	Banking and Finance	Voluntary	Summary
Year 2000 Operational Capability Requirements of Registered Broker-Dealers and Transfer Agents	3235-AH61	8/3/99	64 FR 42012	No	Banking and Finance	Voluntary	Yes
Broker-Dealer Registration and Reporting	3235-AH73	7/12/99	64 FR 37586	No	Banking and Finance	Yes	Summary

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n/a Indicates that the Agency said an FRFA was not needed (because the Agency certified the rule) but where CONSAD determined that a FRFA should have been prepared.

every business that wants a service contract with the federal government as a precondition to raise its fringe benefits, such as health insurance, to a floor established by the government. The preamble of that rule completely omitted any discussion of the anti-competitive effects of this rule on the ability of the government to obtain competitive bids, or on the economic survival of the companies if they are forced to raise their cost structure to obtain government contracts, and then cannot compete locally. This consequence is likely to be especially severe in relatively low wage and economically depressed areas, which the government is trying to favor in other procurement rules.

3.5 Periodic Review of Rules

Section 610 of the RFA[39] requires agencies to create a plan for the periodic review of rules which "have or will have a significant economic impact …" and to conduct reviews of these rules. "The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded … to minimize any significant economic impact of the rules upon a substantial number of small entities." The law requires that all such rules in place in 1980 be reviewed within 10 years, and that all rules subsequently issued be reviewed within 10 years of promulgation. It also requires that each agency publish in the *Federal Register* each year "a list of the rules which have a significant economic impact … which are to be reviewed … during the succeeding twelve months."

There are a number of ambiguities in the statute, several of which are documented in a recent GAO report.[40] For example, agencies differ in whether they interpret the word "have" as meaning current impact or impact at the time the rule was issued. Interestingly, the Office of Advocacy has taken the view that either interpretation is defensible.[41]

In addition, the RFA does not require that all periodic reviews be identified as such, either prospectively or *ex post facto*. For example, the Department of Health and Human Services periodic review plan, published in 1981, stated that the agency frequently reviewed almost all of its rules due to Congressional changes to the underlying statutes. HHS said that these legally required revisions would address unnecessary burden and thereby include a section 610 review. A number of agencies took the occasion of a government-wide regulatory review ordered by President Clinton in 1995 to say that this review had covered all of their rules and met the requirements of section 610 for all of their rules. To our knowledge, neither HHS nor other agencies have ever identified any consequential number of rules so reviewed that meet either interpretation of the RFA's criterion of "significant economic impact on a substantial number of small entities."

In fact, the RFA does not even require that a section 610 review lead to a regulatory reform proposal. Hypothetically, an agency could review one hundred CFR chapters and conclude, without notice to the public, that although dozens of these were found to have significant economic impact, not one needed to be reformed or modified in any way.

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[39] Pub. L. No. 96-354, 94 Stat. 1174 (codified as 5 U.S.C. § 601 *et seq.*)

[40] U.S. General Accounting Office. "Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary." Washington, D.C. April 1999.

[41] U.S. General Accounting Office, ibid, page 12.

Most fundamentally, section 610 rests on the implicit assumption that agencies know which of their existing rules create "significant economic impact." In fact, most agencies have no such information. Indeed, most agencies do not possess something as seemingly simple as a complete list of their "rules." The *Code of Federal Regulations* does not use the concept of a "rule", but instead relies on "parts", "chapters" and "sections" which may or may not correspond to any particular conception of what is a "rule." In many cases, sections are more general than chapters, even though the latter are supposed to be a broader category. (Similarly, and equally surprisingly, there is no such thing as a list of federal "programs." The closest thing to such a list, the *Catalog of Federal Domestic Assistance*, does not include many hundreds of programs that are not "assistance".) Even if agencies had a list of rules, they have no way of knowing which pre-1980 ones had "significant impact" at the time of issuance, and could only determine that information for post-1980 rules by laborious searches of the *Federal Register*. Nor, of course, do they have information on the current burden of rules issued post-1980. A rule that had huge effects on small business a decade ago may have no current cost if, for example, formerly burdensome functions are now automated on personal computers or if the costs were essentially one-time. Thus, while agencies with relatively few regulatory actions may fairly readily be able to create a list of "rules" and figure out which few of these have current significant economic impact, agencies such as HHS or USDA would face a formidable task to do so.

As recommended later in this report, creation of a list of rules that, when issued, had significant economic impacts on a substantial number of small entities would help immensely both with the practical problem of identifying such rules for compliance purposes, and with the problems of interpretation and enforcement.

Quite apart from these problems of interpretation and assemblage of information, there is the issue of willingness to comply. The 1999 GAO report documented that overall agency compliance with section 610 was quite poor. For example, the GAO found that in the April, 1998 edition of the *Unified Agenda* some 61 agencies submitted about 4,500 entries for rulemakings in progress. Of these, only 7 agencies identified one or more rules as a section 610 review, and these 7 agencies identified in total only 22 such rules. Of these 22 rules, only 2 appeared to satisfy all the public notification requirements of the RFA.[42] In the October 1998 edition, 8 agencies identified 31 entries according to the GAO.

Since then, and presumably reflecting the embarrassment caused by the 1999 GAO report, matters may have improved slightly. In April of 2000, 6 agencies identified 25 rules as undergoing section 610 reviews. In November of 2000, 9 agencies identified 38 rules. However, 19 of these had been identified in the April 2000 *Agenda*, and were therefore not new entries. Moreover, 11 of the 38 had been identified in the April 1998 *Agenda* as undergoing a section 610 review. In total, only about a dozen rules were newly selected for review in November of 2000. Furthermore, this record shows that section 610 reviews were often listed over and over again, with no action over a period of years.

As an additional check, we identified rules in our database when the preamble indicated clearly that the rule was receiving a zero-base review. Of the 126 rules that we identified for

[42] U.S. GAO, ibid, page 2.

which FRFAs were prepared over the five-year period 1995 through 1999, only 11 were identified as periodic reviews.

As a final check on section 610-review activity, we searched the online version of the *Federal Register* for 1997 through 2000, a four-year period, for explicit references to section 610. We found that four agencies published plans or requests for nominations for review: DOJ once, DOT once for each of several major component bureaus, and SEC (repeatedly). We also found a number of individual rulemakings referring specifically to section 610. DOL's OSHA published eight such reviews, the USDA's Agricultural Marketing Service four, and DOJ, HUD, and the Federal Reserve Board one each. A more in-depth search would likely have found a few more.

Taking these varied sources into account, it is clear that for most federal agencies a section 610 review is a rare occurrence.

Offsetting these published numbers is a key reality: revisions of existing rules are frequent, but are rarely officially counted as section 610 reviews. For example, the Health Care Financing Administration revises each year two new rules with significant impact: prospective payments for hospitals, and for physicians. Each year, the previous regulation is revisited and changes in underlying requirements are often made. Only a few of these HHS rulemakings are labeled as section 610 reviews, even though each underlying rule is revised to some extent almost every year. Similarly, the National Marine Fisheries Service in the Department of Commerce revises several fishery plans every year. None of these rules are officially listed as section 610 reviews, yet all reflect to at least some degree an updating and review of previous issuances.

The GAO conducted an in-depth study of the Clinton Administration's 1995 regulatory review effort that led to a claimed reduction or elimination of over 11,000 CFR pages and revisions to over 13,000 pages.[43] The GAO found that four major agencies undertook 4222 CFR revision actions. The GAO characterized 40 percent of these as substantively reducing burdens by such actions as reducing paperwork or increasing compliance flexibility. The GAO did not characterize these actions by whether or not the rules affected small entities or reduced an economically "significant" burden. In our review of 1995 and 1999 rules, we found that about one third of completed final rules were required to have FRFAs prepared. However, one sample was heavily biased towards rules with impact potential, and the proportion of all rules with FRFAs is well under 10 percent. Nonetheless, it appears likely that the 1995 exercise did involve at least *pro forma* reviews of several dozen rules with significant economic impact. Unfortunately, we have no way of knowing how many of these received a serious review addressed to fundamental issues, and of these how many were revised in ways that had significant real world effect.

Moreover, we do know that many of the most famously burdensome rules have not been revised to reduce burden. For example:

[43] U.S. General Accounting Office, Regulatory Reform: Agency's Efforts to Eliminate and Revise Rules Yield Mixed Results. Washington, D.C. October 1997.

One little known agency, the Architectural and Transportation Barriers Compliance Board, has issued many major rules setting highly prescriptive design standards for handicap access to buildings, parks, playgrounds, transportation, etc., with compliance costs running into the billions of dollars annually. All of these rules contain both low-cost and high-cost standards. To the best of our knowledge, none of these rules has ever been reviewed to determine ways to eliminate unnecessarily costly requirements or to increase flexibility for entities large or small. Moreover, the Board has historically certified its rules as having no small entity impact, even though it knows that they will become national standards. (The Board justifies this action by claiming that it does not itself issue the standards—but agencies who issue the standards are often required to follow Board guidelines). We note that on May 12, 2000, the Office of Advocacy wrote the Board concerning its certification of a proposed rule to Revise Accessibility Guidelines raising essentially this same issue.

Of course, all is not negative. We have found a number of genuinely careful section 610 reviews that show careful attention to the letter and spirit of the RFA. Among the agencies, OSHA is notably diligent.

However, considering that we estimate that on the order of 30 - 50 rulemakings annually are subject to a final regulatory flexibility analysis, the cumulative total of burdensome rules for the last 10 years may total several hundreds (allowing for rules revised more than once). There may also be hundreds or more pre-1980 rules with a significant economic impacts on a substantial number of small entities. Against these totals, the number of reviews identified by agencies is modest at best. In fact, it appears that the net backlog of unreviewed rules grows substantially each year.

4.0 Findings and Conclusions

The Regulatory Flexibility Act (RFA) was enacted in 1980. It requires federal agencies, among other things, to analyze proposed and final rules for economic effect and to identify alternative approaches that mitigate adverse impact. Starting approximately in 1975 and formalized most significantly by Executive Order 12291 in 1981 (and its successor , EO 12866, in 1993), the last five Presidents have required that proposed and final rules be analyzed for economic effect and alternatives to mitigate adverse impact. Both requirements use threshold criteria to identify which rules are to be subject to in-depth analysis. The primary focus of the RFA and of the Executive Order differs. The RFA focuses on economic effects on small businesses and other small entities. EO 12866 focuses on economic effects on the economy as a whole. Each has different thresholds (e.g., "significant" economic effects on a "substantial" number of small entities versus "major" economic effects on the economy). However, the methods of analysis needed for these requirements are similar, and the federal government now has more than 20 years of experience in analyzing proposed and final rules for economic impacts.

Recent testimony before the Subcommittee on Regulatory Reform and Paperwork Reduction of the House Committee on Small Business by the experts at the AEI-Brookings Joint Center for Regulatory Studies[44] indicates that compliance with Executive Order 12866 has been frequently weak, particularly in the identification of all economic costs, and in the analysis of alternatives for cost-effectiveness. Hahn and Litan found that fewer than one-half of all major regulations pass a cost-benefit test, and fewer than one-half meaningfully analyze alternatives. Based on our analysis described in the previous section, we have found similar weakness in the analyses required under the RFA.

Overall Agency Performance

Our most general finding is that compliance with the RFA has been very mixed, with many identifiable problems in meeting almost all requirements of the RFA. However, there have been marked improvements in compliance by some agencies between 1995 and 1999. These improvements have included not only *pro forma* compliance, but also genuine increases in responsiveness to small business issues. However, improvement has not been uniform, and some agencies still do not comply with all requirements of the RFA.

We found an improvement in compliance with the RFA's requirements for certification and explanation of rules that do not have a substantial economic impact on a significant number of small entities. For the final rules we reviewed from 1995, about 18 percent of rulemakings for rules with no significant impact on a substantial number of small entities failed to properly certify. In 1999, the percentage that failed to properly certify was 23 percent, although the total number had dropped. For the final rules that agencies certified in 1995, 25 percent did not explain the factual basis for the certification. In 1999, only 11 percent failed to provide a factual basis for the certification. For all post-SBREFA rules, 14 percent of rules with certifications failed to provide a factual basis for the certification.

[44] Robert W. Hahn and Robert E. Litan, "Improving Regulation: Start with the Analysis and Work from There", June 2000

In 1995, only 50 percent of all FRFAs prepared by agencies met all pro forma requirements of the RFA. In 1999, 65 percent of all FRFAs met all legal requirements. For all post-SBREFA rules that we reviewed, 72 percent of FRFAs met all requirements of the RFA. Overall, we believe this represents a substantial increase in compliance between 1995 and 1999. However, there is no apparent reason why all rules cannot comply with these requirements.

In our view, improved agency compliance with the RFA is associated with three factors:

- The passage of SBREFA signaled Congress's dissatisfaction with existing performance regarding compliance with the RFA. Both through this message, and amendments in the RFA (including, significantly, judicial review of potential agency noncompliance), post-SBREFA compliance appears to have improved for most agencies.
- One of the SBREFA reforms was the creation of mandatory SBREFA Panels for rules promulgated by EPA and OSHA. These two agencies are widely regarded as imposing particularly costly rules on U.S. businesses. Although fewer than twenty proposed rules have undergone the panel process, and only a few of these have been issued as final rules, these rules show marked attention to burden-reducing alternatives and creative utilization of techniques to minimize burden.
- Intervention by the Office of Advocacy in individual rulemakings, particularly at early stages, has often resulted in improved agency responsiveness.

Early Identification of Rules Impacting Small Entities

Notwithstanding these strong and improved performance factors, we have identified serious patterns of weakness, some apparent causes, and a number of potential reforms. Perhaps the most pervasive problem lies in the failure to identify or to focus early on rulemakings with potentially serious impacts on small entities. **We recommend that the Office of Advocacy work with the agencies to develop procedures to inform Advocacy of rulemakings with potential significant economic impact on a substantial number of small entities as early as is possible in the process so that Advocacy can assist the agency in understanding the implications of the proposed rule for small entities and in fulfilling its obligations under the RFA.** We also recommend that the agencies hold training sessions, with the assistance of the Office of Advocacy, for the agency staff to learn the requirements of the RFA and ways to analyze the small entity impacts of rules.

Section 602 of the RFA requires the preparation of a semiannual regulatory agenda (in April and October of each year) to identify and describe "any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities." Agencies must transmit this information to the Chief Counsel for Advocacy and "endeavor to provide notice" of these rules to affected entities. In practice, the resulting document (the *Unified Agenda of Federal Regulatory and Deregulatory Actions*) has not performed these functions. It is a massive document, with the October 2000 *Agenda* comprising over 1800 typeset pages that, if typewritten, would exceed 6000 pages. It purports to identify rules requiring a regulatory flexibility analysis, but in fact **only about 10 to 20 percent of the rules so labeled turn out to involve significant impact** (in fact, a sizeable number of the *Agenda* entries are not even rules). And the entries do not describe potential burdens in enough detail to alert affected entities as to whether they should even be concerned. Agencies have

simply found that having clerks check boxes alleging small business impact is bureaucratically easier than making a considered judgment or providing useful information. OMB is in charge of design and policy decisions on the *Unified Agenda* and should take steps to improve its usefulness.

In preparing this report we found many rules listed in the *Agenda* as requiring regulatory flexibility analysis even after they were published with a well-documented certification. As a practical matter, the *Agenda* is virtually unusable as a notification or alert mechanism unless or until agencies greatly improve the accuracy and thoroughness of their submissions. We even found it cumbersome and time-wasting as a research tool to identify regulatory flexibility analyses for this report. (In this regard, despite the fact that the *Agenda* is cumbersome to use as a research tool, it is far superior to the alternatives, and the staff at the Regulatory Information Service Center are exceptionally cooperative in making electronic versions of the underlying database available to researchers.)

Relatedly, many agencies rely on the simple fact of *Federal Register* publication to meet the statutory requirement that each agency "transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy", in cases where the full IRFA appears in the preamble of the proposed rule. However effective this may be as a matter of minimizing arguably unnecessary paperwork, it means that as practical matter the Office of Advocacy learns of a rule impacting small entities only if, and when, someone reads the fine print of the *Federal Register*, finds such a rule, and calls it to its attention.

This might not be a serious matter if it were easy to find regulatory flexibility analyses in the *Federal Register*. It is not. While an Internet search of each day's issuance is possible, the words "regulatory flexibility" are used in almost all regulations whether or not a full analysis has been prepared, and it is arguably speedier and more effective simply to page through the daily document.

In sharp contrast, under Executive Order 12866 rules of any consequence are all transmitted, together with economic analysis, to the Office of Management and Budget for informal review **prior** to publication. If OMB has serious concerns, rules are delayed until those concerns are resolved. As explained in more detail below, we find that many of the best examples of compliance with the Act involve identifying alternatives to reduce burden **prior** to publication. As a result, the government's compliance with the letter and spirit of the RFA is hampered by the current lack of a proactive procedure for identifying and resolving regulatory flexibility problems.

There are several possible solutions to this problem. It is possible that the Office of Advocacy could independently take action, through improved collaboration with the agencies or establishment of consultation procedures to improve compliance. In this regard we note that the RFA does not say that agency transmittal of an Initial Regulatory Flexibility Analysis need wait until publication, or say that letting the Office of Advocacy read the *Federal Register* is an acceptable notification method. It is possible that the *Unified Agenda* (currently housed at the General Services Administration) could be given an overhaul and raised in importance and usefulness through improvements in listing and editing criteria. **We recommend that any rules listed in the *Unified Agenda* as requiring an IRFA or FRFA be accompanied by an extra**

analytic entry addressing the likely magnitude of impact and the alternatives the agency plans to consider. This will not only improve usefulness directly, but raise the bureaucratic price of misidentifying rules without significant impact. In addition, **OMB should require that the descriptions of rules so listed be grouped together in a special section of the document to allow ready access by Advocacy, the public, small entities, and the agencies themselves.** (These could be duplicative entries, with the main entries remaining organized by agency, buried in 6,000 pages). If OMB will not make these changes timely, Advocacy can create its own special edition using electronic text from the relevant *Agenda* sections and publish a regulatory flexibility edition unilaterally.

Most importantly, we recommend that the Office of Advocacy and OMB develop, in collaboration, a process for reviewing rules with a significant economic impact on a substantial number of small entities before publication of major rules in OMB review. The involvement of Advocacy in this process will stress the importance of analyzing small entity burdens. Alternatively, the RFA could be revised to require agency notification and consultation **prior** to publication. Perhaps a combination of steps is needed.

Improved Information Availability

While pre-publication consultation is often ideal, the purposes of the Act can still be achieved if the public comment period (usually 30 to 60 days) is used for review and comment by the Office of Advocacy and affected entities on IRFAs accompanying proposed rules. This requires not only access to the IRFA (a serious problem discussed below), but also timely attention to the proposed rule.

In our research we found several rules which were improperly analyzed without any apparent input from the affected small entities or the Office of Advocacy, almost certainly because they were not identified for attention. One of these rules had the effect of mandating increases in fringe benefit levels for hundreds of thousands of small businesses without any apparent awareness on the part of the promulgating agency that it was reducing the competitiveness of these firms, not just for government contracts, but in their private sector business as well (Department of Labor, Wage and Hour Division, *Labor Standards for Federal Service Contracts under the Service Contract Act*, RIN 1215-AA78, 61 FR 68647, issued December 30, 1996).

We also recommend creating a comprehensive database of rules with significant economic impact on small entities. Such a database should be available on the World Wide Web, preferably with links to *Federal Register* pages and other key documents such as letters on individual rules. This would greatly facilitate actions by the agencies themselves, the small business community, the Office of Advocacy, and others to review rules or develop improved processes. It would also facilitate GAO review, under the provisions of the recently enacted "Truth in Regulating Act of 2000". Under that Act, an independent review is triggered only if a member of Congress requests it; a request can only be made if the member is aware of the rule. Finally, the database would facilitate research by the Office of Advocacy, affected entities, agencies, or others to determine patterns of compliance, problem areas, and needs for periodic reviews.

For many of its comments, the Office of Advocacy refers to the title of a rule or the *Federal Register* notice for identification. This is sufficient for the purpose of communicating with the agencies, however it makes it cumbersome and difficult for third party observers or regulated entities to associate specific Advocacy comments with specific rules. Quite apart from other problems, rule titles are often unclear, and many rules have similar titles. **We recommend that the Office of Advocacy ensure that Regulatory Identification Numbers (RINs), *Federal Register* publication dates are included in every document that it prepares discussing or listing individual rules.** This would include, at a minimum, letters to agencies and annual reports to the President and the Congress. Without these references, it is very difficult to determine which comments or lists relate to which actual rules.

Online Publication of Regulatory Flexibility Analyses

Almost 90 percent of all regulatory flexibility analyses are **not** published as part of the preamble in the *Federal Register*. This is legally permissible under the Act, which allows agencies the option of publishing either the complete analysis or a summary (sections 603 and 604). However, it is arguably legally impermissible under the Administrative Procedure Act, and is certainly contrary to the spirit of the Regulatory Flexibility Act. How can the purposes of either Act be met if the identification of lower burden alternatives, which inform the agency's decisions and provide a basis for public comment, is not available to affected parties and commenters? Further, under a little-known and little-enforced statute, the recently amended Freedom of Information Act (termed colloquially "E-FOIA" for "Electronic Freedom of Information") requires all government records created after November 1, 1996, to be made available electronically to the public, throughout the nation. Placing a document in the docket room in Washington, D.C., absent an electronic version, is an act of non-compliance. Any agency that does not include the full IRFA and FRFA in the preamble is failing to support any of these three statutes (long technical appendices can be made available electronically through linking, without encumbering the preamble). **We recommend that all agencies publish their IRFAs and FRFAs in the *Federal Register* in the preamble to their rules. We also recommend that Advocacy consider taking a strong interpretive position that publication of a summary as an alternative to the complete regulatory flexibility analysis is only permissible when the underlying regulatory flexibility analysis is hundreds of pages long and the summary can completely describe the burden-reducing alternatives that were considered by the agency, as well as the magnitude of economic burden imposed under the selected form of the rule.**

Relatedly, agencies are required to make copies of records available to requesters in any "readily reproducible" format requested by that person, including the World Wide Web's HTML format. As it happens, any document produced in such commonly used software as WordPerfect or Microsoft Word can be "readily reproduced" in HTML format with a mouse click. In other words, any agency which complies with E-FOIA and which values its budget should routinely provide requestors with HTML copies of IRFAs and FRFAs. And what better way to do so than to make these documents available as part of the preamble or through links provided in the preamble? Advocacy, of course, can hurry compliance by filing E-FOIA requests for all IRFAs and FRFAs prepared since late 1996. Advocacy can post them on its own Web site (as part of the database we recommend), with appropriate comments and names of responsible agency officials, if agencies refuse to make them available on their Web sites and, in the future, in preambles. This is still another example of raising the bureaucratic price of noncompliance.

Advocacy, directly or through a grant, can establish a special Web site for posting of IRFAs, FRFAs, Advocacy letters, and other materials on rules that are undergoing public comment. The originating agency need not have the final say on what documents are made available. Indeed, Advocacy can use the time delays occasioned by attempts to obtain these documents as ammunition in requesting agencies to reopen or postpone closing dates that did not give the affected public the full 60 days to review and comment on the complete set of information on small business impacts.

Ours is not the only report to reach the conclusion that public exposure through publication on the Internet is vital to improving the quality of economic analysis in support of rulemakings. The recently completed study by Hahn and Litan presents as its first recommendation that "Congress should require that agencies make each regulatory impact analysis and supporting documents available on the Internet before a proposed or final regulation can be considered in the regulatory review process."[45]

Finally, the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) has strongly endorsed electronic dissemination of regulatory information that affects citizens, such as regulatory flexibility analyses. As articulated by the chairperson of the OIRA-sponsored OMB/White House "Task Force on Electronic Information Technology and Rulemaking", every government document that could potentially improve regulatory decision making should be available on the Internet.[46]

Statistics on Regulatory Flexibility Analyses

Prior to this report, virtually no quantitative information on the number of rules requiring regulatory flexibility analyses existed. We have identified only one such study and it relies on the *Unified Agenda* entries that we have found to be so inaccurate.[47] Time and resource limitations associated with our effort did not permit us to create a database covering many years. However, we did find that in the two years we most exhaustively researched, 1995 and 1999, there were a total of 68 completed final rules for which an analysis was prepared, an average of 34 a year. However, 1995 only produced 22 such rules, and 1999 46 such rules. We also identified an additional 58 completed major final rules for the years 1998, 1997, and 1996, an average of 19 per year, primarily relying on a partial sample of the incomplete listings found at the GAO Web site "Reports on Federal Agency Major Rules". In 1999, approximately one fourth of rules with significant impacts on a substantial number of small entities were also major rules.

Our rough estimate is that there are currently about 50 rules a year either proposed or completed with a significant economic impact on a substantial number of small entities. Probably all but a handful of these are so identified. Probably another 25 rules a year that do not have such an impact nonetheless have a pseudo-IRFA or FRFA prepared. These are manageably small numbers. Therefore, **we recommend that the Office of Advocacy create an "official list" of**

[45] Robert W. Hahn and Robert E. Litan. op cit. Page 9.

[46] Walton Francis, "Electronic Rulemaking: Outline of Opportunities and Issues", June 1997, at http://www.policynet.com or http://globe.lmi.org/erm/.

[47] C.W. Crews, Jr. "Ten Thousand Commandments: An Annual Policymaking Snapshot of the Federal Regulatory Study." Competitive Enterprise Institute. 2000 edition.

such rules, going back at least a decade and appropriately categorized, and make it available to the public. This is another variant of our database recommendation, and can be accomplished through the same database that includes IRFAs and FRFAs, Advocacy comments, and other information.

Agency Certification

One of the simplest requirements of the Act is that for each proposed or final rule that the agency determines does not have a significant economic impact on a substantial number of small entities, agencies so certify, "along with a statement providing the factual basis for such certification" (section 605 of the RFA). We found that approximately one out of twenty preambles lacks such certification language, and that in approximately one in ten preambles certified, the factual statement has not been provided. We believe that such failures are evidence that most agencies do not have in place either well-trained drafting staffs or robust review procedures at the agency head level to assure compliance with this statute. Given the decentralized approach to regulatory drafting taken in almost all agencies, and decentralized issuance procedures in some, strong review procedures are vital to compliance with the Act. **We recommend that the Office of Advocacy continue to identify such instances and in most cases draft letters to agency heads, policy offices, and general counsels alerting them to such problems.** If agencies continue to ignore this requirement of the RFA, and no improvement to agency attention to the issue of appropriate certification of rules occurs, more draconian measures (e.g., requiring agencies to reissue corrected proposals for NPRMs that fail to meet the statutory standard) may be warranted.

Agency Use of Loopholes to Avoid Preparing Analyses for Rules with Known Impacts

Some agencies are increasingly using a loophole in the RFA to avoid drafting regulatory flexibility analyses for rules with significant impacts. The RFA says that "whenever an agency is required [by law] to publish a general notice of proposed rulemaking for any proposed rule" (section 603) it must either prepare the requisite analysis or certify the rule. Some agencies make routine use of so-called "Interim Final" rulemakings to put rules in place without delaying for public comment. The provisions of the RFA only apply to regulatory actions for which the agency publishes a general notice of proposed rulemaking. Thus, some agencies have concluded that if they publish an interim final rule without first having published a notice of proposed rulemaking, or if they otherwise bypass the ordinary notice and comment procedures of the Administrative Procedure Act, that they are not required to prepare a regulatory flexibility analysis. This is often a practice necessary to meet tight rulemaking schedules imposed by Congress.

Agencies do not have the excuse of inadequate time to prepare an analysis, because the Act provides for emergency situations followed by a delay of as much as six months in completing the analysis (section 608). Unless the Office of Advocacy can persuade agencies to forgo this loophole, the only solution may be an amendment to the Act. Achieving the underlying purposes of the Act should not depend on whether a burdensome rule was legally required to undergo a proposal step. **We recommend that Advocacy seek to persuade every major rulemaking agency to forgo the use of the loophole, without exception. In cases where a true emergency precludes a timely analysis, the agency should commit in advance to using**

the section 608 procedure and, in addition, to reopening the comment period and publishing a revised final rule. Any agency which refuses to make this commitment should be identified as recalcitrant in the Annual Report to the Congress. Further, Advocacy should request a section 610 review on every rule it can identify that has used this loophole in recent years.

As a last resort, and only if the agencies fail to willingly comply, we recommend that consideration be given to amending the RFA to require *ex post facto* regulatory flexibility analyses and reopening of the public comment period subsequent to the publication date of a rule that had bypassed the notice and comment procedures. This would allow agencies to first implement certain rules on an expedited schedule, but would then provide the opportunity for public review and comment, and the consideration of alternatives intended to reduce impacts. Agencies could then make revisions to the rule at a later date based on the improved understanding of the rule's economic impacts on small entities that is intrinsically derived from the process of preparing a FRFA.

In addition, some agencies seek to use as a loophole the argument that the agency has no legal discretion in issuing the rule or is forbidden by law from taking into account the economic burden of the rule in selecting alternatives. These are spurious arguments. The RFA contains no exclusion for such rules and, as discussed above in section 3.4, specifically contemplates preparing analyses that identify low burden alternatives which are legally precluded. Our belief is that in such cases the agency almost always has some discretion, but is using a legal excuse to avoid a candid presentation of that discretion. **We strongly recommend that Advocacy use every tool at its disposal to expose these apparently illegal practices and to make the agencies comply with the RFA retrospectively if not prospectively.** At the very least, there is no excuse for every such rule not being used to notify the public and the Congress of the legal impediment, and of the cost of that impediment. OMB and GAO can be very helpful in this regard; and the former should be especially helpful because agencies sometimes try to make the same argument regarding EO 12866. One simple device that Advocacy can use is to list each year in its annual report a special scorecard giving the number of rules for which each agency has apparently violated the RFA through spurious claims that the RFA excuses non-discretion, and the number of years over which the agency has failed to reopen the rulemaking to deal with economic impacts.

Periodic Review of Rules

Government-wide, the number of rules identified in the *Federal Register* for new section 610 reviews appears to be no more than a dozen annually, and the number of such reviews identified as completed to be fewer than a half dozen annually. Some agencies do not appear ever to have completed such a review, and any list of burdensome rules would probably find that a very small fraction has been revised. (Agencies, of course, can "review" a rule and decide to change nothing, to publish nothing, and to do nothing more—but such decisions need not be accepted passively and left unchallenged.) Assuming the accuracy of our estimate above that approximately 50 rules a year are completed that have significant economic impact, we would expect that in a "steady state" of good compliance the number of identified and completed section 610 reviews, surely half or more with new rulemakings, would approximate 50 annually.

There are a number of ways to improve compliance with section 610 of the RFA. **One of the most important of these is purely instrumental: the creation of a historical database of rules that were, either at the time of publication or through subsequent review, recognized as significantly impacting small entities.** (The database should include burdensome rules that predate the original passage of the RFA, as emphasized in the Act.) Such a database would allow Advocacy to keep a score card of agency compliance with section 610, to write agency heads requesting that particular rules be reviewed, and otherwise to keep pressure on for full compliance with the letter and spirit of the Act. Such a database would be particularly useful in helping Advocacy to target on the most egregious, burdensome, or problematic rules, and to keep doing so until relief was obtained.

For example:

In 1996 the Department of Labor's Wage and Hours Administration issued a final rule that would create a new methodology for establishing minimum health and welfare benefits requirements for federal contractors covered under the McNamara-O'Hara Service Contract Act.[48] In this rule, the Department also prohibited issuing prevailing fringe benefit determinations separately for classes of employees and localities, and instead required identical fringe benefit floors nationally (in other words, the Department refused to set size standards to ease the compliance burden). The Department did prepare an IRFA/FRFA, but its analysis of effects on small business totally ignored competitive effects. Businesses do not pay employees in a vacuum. If fringe benefits are raised in order to bid on one contract, they will have to remain at that level for others. This will lead some businesses to give up government contracts, and others to lose private contracts through having to charge for higher costs. Businesses in areas where lower fringe benefit levels are prevalent, such as economically disadvantaged areas, will be hit the hardest. It is hard to believe that a rule with these kinds of consequences could have been issued had the Department properly analyzed its effects.

For these rules, and others, an **immediate** section 610 review may be vital to eliminate regulatory burden before it is cemented in place through implementing actions. Nothing in section 610 suggests that reviews await unnecessary destruction of small business, particularly when agencies have abused the RFA in issuing the rule.

A number of agency rules have been issued without FRFAs. The agencies have justified the bypassing of the APA and FRFA requirements based on legal loopholes. Some of these loopholes have been genuine, others spurious. Some may have been valid at the time—e.g., Congressional deadlines preventing issuance of an NPRM—but in no way impede a section 610 review. Whatever the original excuse, there is absolutely no reason for those agencies not to analyze all of these rules retrospectively, and propose revisions, in order to identify adverse impacts and appropriately reform these rules.

One of the devices used by agencies to deal with the section 610 requirements is to publish a notice asking for public comment on which, if any, existing rules should be revised. Invariably, there are few comments on these notices, since affected entities rarely spend their

[48] Service Contract Act: Labor Standards for Federal Service Contracts. RIN 1215-AA78. 61 FR 68647, December 30, 1996.

time reading the Notice section of the *Federal Register* for items that on their face do not apply to them. And even if the entities did read these ritual FR Notices, they would realistically expect that responses would not be likely to be acted upon. The Office of Advocacy is not so hampered. In combination with a database of rules identified as having a significant economic impact on a substantial number of small entities, it could forcefully respond to every agency section 610 Notice naming specific rules that it expects to be subject to review and possible reform. Instances of agency failures to respond appropriately could also be documented in the database, for use in future reports, testimony, and proceedings.

As these examples suggest (and many more could be provided), there is a fertile field with many opportunities for Advocacy to use in getting agencies to comply with the letter and spirit of section 610. Chief among these is that section 610 reviews are a potentially powerful tool in getting agencies to revisit rules that they did not appropriately craft or analyze when originally issued. That, in turn, would increase compliance when making decisions on future rules, with the shadow of potential section 610 reviews strengthening incentives to comply with sections 603 and 604.

Publishing of IRFAs and FRFAs in the Preambles To Rules

Virtually all agencies decline to publish the complete text of their IRFAs and FRFAs in the preambles to proposed and final rules. This makes it difficult for small entities to obtain information regarding the potential impacts of rules. Moreover, our experience has been that it is almost always both difficult and untimely to obtain a copy from the docket room or regulatory staff. While agencies almost always publish a summary of IRFAs and FRFAs, this is rarely an adequate substitute. Indeed, many such summaries are so cursory that they fail to identify responsible alternatives or to compare the burden of those alternatives with that of the chosen alternative, or provide a plausible rationale, as required by the RFA. Thus, the routine agency practice is to deprive the public in general and affected small entities in particular a meaningful chance to comment on vital issues of burden and on meaningful alternatives to reduce burden. The main exceptions to this generally bleak finding are the Departments of HHS and Agriculture (although their IRFAs may not have complied with the RFA). Also, the summaries prepared by OSHA are so complete and thorough that they are generally better than the complete analyses of other agencies. **We recommend that all agencies publish their full IRFAs and FRFAs in the *Federal Register* in the preamble to their rules, and publish any voluminous appendices on the Internet, to better communicate the possible impacts of regulatory actions and alternatives to the small entity community.** At a minimum, all agencies should publish full FRFAs and IRFAs on the Internet.

Pseudo-IRFAs and FRFAs

The one arguably bad effect of SBREFA has been its apparent encouragement of agency claims that a rule has significant impacts, and preparation of a cookie-cutter IRFA or FRFA that has all the correct headings but no real content. By following this course, agencies such as Fish and Wildlife, FAR, and SEC do not have to develop a factually based certification, or the hard work of developing a true IRFA or FRFA that analyzes meaningful lower burden alternatives. In our analysis, we call these “pseudo” IRFAs and FRFAs because they mimic the real thing

through intoning the words of the statute while failing to present any rule-specific information of any relevance under the RFA.

Of course, rules with real impacts sometimes receive pseudo-analyses.

Two crucial characteristics are shared by all pseudo-IRFAs and FRFAs. First, they do not estimate the magnitude of the burden the rule imposes in real world dollar terms. They never do so because the authors do not know the effects of the rule (and, in many cases, the rule has no consequential effects). Second, they do not explore in depth, or compare in any coherent way, any real world alternatives either as to operational consequences or as to dollar burden on small entities that are actually affected. Every pseudo-IRFA or FRFA they prepare fails either to estimate and total the "significant economic effects" the rule imposes or how the "steps the agency has taken selected minimize" those significant effects and reduce that total.

The problem with pseudo-analyses, typically for rules with minimal impact, is not just or even mainly that they directly violate the letter and spirit of the RFA. They also enable agencies to hide rules with genuine impact, by intent or more likely inadvertently. When every FRFA from an agency uses essentially meaningless boilerplate, how do reviewers and the public identify the rules that really matter? In the case of FAR, some rules have genuine impact. Yet the analyses of these follow the same ritualistic formula as those without impact. And these important analyses remain essentially inaccessible because they are not published as an integral part of the preamble.

There is a fairly straightforward strategy for Advocacy to use in dealing with these pseudo-analyses. First, in cases where agencies are making repeated use of this approach, Advocacy should seek to end the practice by negotiation. Second, where the agency fails to reform, or in isolated individual cases, Advocacy should continue to inform the agency that it is failing either to certify or to prepare a legally sufficient analysis of alternatives. If the agency persists, Advocacy should insist on preparation of a compliance guide, insist that its comments be quoted verbatim in the final rule preamble, and transmit appropriate comments to OMB and GAO. Particularly effective will be GAO quoting Advocacy to the Congress as finding that the agency is violating the RFA. In cases where there is genuine doubt, Advocacy should ask the agency to perform a section 610 review through new rulemaking. **We recommend that Advocacy take these or other steps to end the practice of pseudo-IRFAs and FRFAs.**

Analysis of Lower Burden Alternatives

Agencies always prepared a FRFA when they had identified significant impact. However, of the 104 post-SBREFA final rules we analyzed, only 75 FRFAs appeared to us to deal convincingly with the requirement under section 604 (a5) that lower burden alternatives are analyzed and that the rejection of lower burden alternatives be justified (see Table 3.4). This is arguably the most important requirement in the Act, since the central purpose of the certification and IRFA/FRFA requirements is for agencies to identify and adopt lower burden approaches to regulation. Many of the comment letters submitted by the Office of Advocacy to agencies in have identified that the agencies' IRFAs or FRFAs did not consider important regulatory alternatives that would achieve the same policy goal while minimizing small entity burdens. **We recommend that the Office of Advocacy continue to promote the adoption of lower burden alternatives, work with the agencies to identify such alternatives, and, where nothing else will work,**

force the agencies to comply with the RFA. In this regard, Advocacy should use its strongest weapons, such as repeated exposure and use of score cards to record agency failures to reopen burdensome rules.

This problem is closely related to that of pseudo-analyses, and identical in cases in which a superficial analysis hides the real burden and/or responsible alternatives (see our discussion above of handicap access and fringe benefit rules). The same panoply of remedies apply. Further, the possibility of legal action should always be included when a rule has genuine impacts on small entities who were deprived of a meaningful opportunity for relief through the agency's failure to analyze alternatives properly. **For burdensome rules that fail to identify and analyze lower burden alternatives and to select these (absent some compelling excuse), we especially recommend that Advocacy work with OMB and GAO, notifying these agencies that it regards the rules as out of compliance.** Where "major" rules are involved, Advocacy should be sure that the Congress is so notified in GAO letters.

SBA Comment Letters

By and large, we found that Advocacy comment letters identified and dealt forthrightly with the kinds of problems that we have analyzed in this report. And in many cases they clearly brought results. But despite hundreds of letters over the past decade, patterns of noncompliance, and all too many individual instances, still recur. What could be done to strengthen the effect of these interventions?

Based on our review of Advocacy comment letters, we observe that in many cases, these comment letters were addressed to lower level staff at the agency promulgating the regulation. In order to increase the visibility and recognition of the criticisms and recommendations of the Office of Advocacy, **we recommend that most correspondence be directed not only to the contact individuals identified in the *Federal Register,* but also be sent to General Counsel, the central policy staff, and the head of the agency.** In many cases, the lower level staff identified in the *Federal Register* as the official recipients of comments lack the ability, will or authority to remedy noncompliance failures. But elsewhere in the agency are people who can bring about the needed change—provided that they are alerted to the problem and its gravity.

Relatedly, Advocacy should continue and intensify the practice of joining small business groups in identifying and challenging rules that fail to comply with the RFA. It appears that most of the court victories over agency noncompliance have involved genuinely aggrieved parties, and true hardship cases are usually if not always effective with agencies during the public comment period.

The effectiveness of individual communications will also be greatly enhanced if accompanied by the kinds of databases, score cards, and collaboration with the OMB and GAO processes that we recommend above. (And, in addition, communication effectiveness will be enhanced by the litigation result kits that we recommend be liberally provided to agency attorneys). Agency staff always seek to balance competing demands on their time, energy, and resources. A compliance requirement that can be ignored without cost is a requirement that often will not be met. Conversely, the knowledge that a failure will be met with public exposure, bureaucratic inconvenience (section 610 review, compliance guide, humiliation, etc.), and at least

the possibility of an upper level official's anger provides a great incentive to do it right in the first place or to quickly correct errors.

In conclusion, we find that the existing legal and practical tools available to Advocacy, if used to reinforce desirable agency practices, to reward compliance, and to penalize noncompliance, can greatly increase the already improved results of SBREFA and build on the previous efforts of the Office of Advocacy to assure that federal rules do not unduly or unwittingly burden small businesses and other small entities.

Appendix A:

Final Rules for which a FRFA was Prepared or Required

Appendix B

Data Elements in the Database