

DEPARTMENT OF HOMELAND SECURITY PROCEDURES FOR COMPLIANCE WITH THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 13272

In General

The purpose of these procedures is to provide the Department of Homeland Security (DHS) with guidance for meeting the requirements of the Regulatory Flexibility Act (RFA)¹ and Executive Order 13272 (E.O. 13272) titled "Proper Consideration of Small Entities in Agency Rulemaking."

Both the RFA and E.O. 13272 require agencies to consider the potential impact of rules on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. Executive Order 13272 reinforces the intent of the RFA by requiring agencies to establish policies and procedures to promote compliance with the RFA. This document fulfills the requirement of Executive Order 13272.

Compliance with RFA and E.O. 13272

DHS intends to take the following steps in connection with each rulemaking to comply with the RFA and E.O. 13272. Please note that not all of these steps are required for each rule; some are required only for rules likely to have a significant economic impact on a substantial number of small entities, and others are required only for rules that do not have such an impact. A more detailed description of the requirements follows the list.

- Step 1. Determine whether the rule is subject to the RFA.

- Step 2. Conduct an informal "screening" analysis to determine whether or not the proposed rule will have a significant economic impact on a substantial number of small entities.

If the proposed rule will **not** have a significant economic impact on a substantial number of small entities, go to step 3. Otherwise go to step 4.

- Step 3. Prepare a certification and a statement of the factual basis supporting the certification (as part of the proposed rule) that the proposed rule will not have a significant economic impact on a substantial number of small entities.

Go to step 6.

- Step 4. Prepare an Initial Regulatory Flexibility Analysis (IRFA).

- Step 5. Notify the Chief Counsel for Advocacy of the Small Business Administration (Advocacy) of any draft rules that may have a significant economic impact on a substantial number of small entities (i) when DHS

submits the draft rule to OMB under Executive Order 12866, or (ii) if submission to OMB is not required, at a reasonable time prior to publication of the rule.

- Step 6. Include with the proposed rule published in the Federal Register either (a) the certification and statement of factual basis, or (b) the IRFA or a summary of the IRFA. Transmit a copy of such certification and statement of factual basis or IRFA to Advocacy.
- Step 7. In preparing the final rule, consider and respond to comments by Advocacy.
- If it is determined that the proposed rule will **not** have a significant economic impact on a substantial number of small entities, go to step 8. Otherwise go to step 9.
- Step 8. Prepare a certification statement and a statement of the factual basis supporting the certification that the final rule will not have a significant economic impact on a substantial number of small entities.
- Go to Step 10.
- Step 9. Prepare a Final Regulatory Flexibility Analysis (FRFA).
- Step 10. Include with the final rule published in the Federal Register either (a) the certification and statement of factual basis, or (b) the FRFA or a summary of the FRFA. Make a copy of the FRFA available to the public.

The following discussion elaborates on what DHS intends to do under each of the above steps.

STEP 1. DETERMINE WHETHER THE RULE IS SUBJECT TO THE RFA

The RFA generally covers all rulemakings where DHS is required to publish a notice of proposed rulemaking (NPRM). If the DHS office initiating the regulatory action is uncertain if the RFA applies, it should contact its Chief Counsel, Principal Legal Advisor, or Judge Advocate General.

STEP 2. CONDUCT AN INFORMAL "SCREENING" ANALYSIS TO DETERMINE WHETHER OR NOT THE PROPOSED RULE WILL HAVE A SIGNIFICANT ECONOMIC IMPACT ON A SUBSTANTIAL NUMBER OF SMALL ENTITIES

In order to determine whether a rule is likely to have a significant economic impact on a substantial number of small entities, it is necessary to coordinate and conduct an informal screening analysis.

The first step in the analysis is to identify what types of small entities would be subject to the rule's requirements – businesses, nonprofit organizations, pension plans, etc.

To determine whether there is likely to be a significant economic impact on a substantial number of those small entities, identify the actions a small entity will have to take to

comply with the requirements of the rule. This step will help clarify the nature of the impacts (e.g., installation of new technology, revised recordkeeping system), and may help in determining whether the potential impacts are of sufficient magnitude and scope to warrant preparation of an IRFA. In addition, some agencies have used "rules of thumb" to make the determination of what represents a "significant impact." For example, an agency may decide to prepare an IRFA if the costs of a rule are expected to exceed 1 percent of revenues or 5 percent of profits for the small entities in a given year. In addition, if DHS has other reasons for believing that the rule may have a significant economic impact on small entities, an IRFA should be prepared for the rule.

If the proposed rule will **not** have a significant economic impact on a substantial number of small entities, go to step 3. Otherwise go to step 4.

STEP 3. PREPARE A CERTIFICATION STATEMENT AND A STATEMENT OF THE FACTUAL BASIS SUPPORTING THE CERTIFICATION THAT THE PROPOSED RULE WILL NOT HAVE A SIGNIFICANT ECONOMIC IMPACT ON A SUBSTANTIAL NUMBER OF SMALL ENTITIES

If the rule will not have a significant economic impact on a substantial number of small entities, prepare a certification statement to that effect, along with an explanation of the factual basis for the certification. The certification, which is subject to judicial review, should clearly explain how DHS reached its decision and, where appropriate, describe or provide the information on which DHS relied to make the decision. In its 2002 implementation guidance for agencies, Advocacy cautioned agencies that "Congress intended that agencies should do more than provide boilerplate and unsubstantiated assertions to support their RFA certifications."²

Go to step 6.

STEP 4. PREPARE AN INITIAL REGULATORY FLEXIBILITY ANALYSIS

If the rule may have a significant economic impact on a substantial number of small entities, prepare an IRFA for the rule. In accordance with the RFA, the IRFA must:

- describe the reasons why action by DHS is being considered;
- succinctly state the objectives of, and legal basis for, the proposed rule;
- describe and, where feasible, estimate the number of small entities to which the proposed rule will apply;
- describe the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirements and the type of professional skills necessary for preparation of the report or record;
- identify, to the extent practicable, all relevant Federal rules that may duplicate, overlap or conflict with the proposed rule;
- describe any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant

economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis must discuss significant alternatives such as –

- (1) establishing differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
- (2) clarifying, consolidating, or simplifying compliance and reporting requirements under the rule for such small entities;
- (3) using performance rather than design standards; and
- (4) exempting small entities from coverage of the rule, or any part thereof.

STEP 5. NOTIFY ADVOCACY OF ANY DRAFT RULES THAT MAY HAVE A SIGNIFICANT ECONOMIC IMPACT ON A SUBSTANTIAL NUMBER OF SMALL ENTITIES (I) WHEN DHS SUBMITS THE DRAFT RULE TO OMB UNDER EXECUTIVE ORDER 12866, OR (II) IF SUBMISSION TO OMB IS NOT REQUIRED, AT A REASONABLE TIME PRIOR TO PUBLICATION OF THE RULE

If a draft rule may have a significant economic impact on a substantial number of small entities, E.O. 13272 requires notice to Advocacy of the draft rule. If the rule will be a "significant regulatory action" under E.O. 12866, it must be submitted to OMB for review. In these cases, notify both Advocacy and OMB of the draft rule at the same time.

If notice to OMB is not required, notify Advocacy of the draft rule at a reasonable time prior to publication of the rule.

STEP 6. INCLUDE WITH THE PROPOSED RULE PUBLISHED IN THE FEDERAL REGISTER EITHER THE CERTIFICATION AND STATEMENT OF FACTUAL BASIS, OR THE IRFA. TRANSMIT A COPY OF THE CERTIFICATION AND STATEMENT OF FACTUAL BASIS OR THE IRFA TO ADVOCACY

When preparing the proposed rule for publication in the Federal Register, include in the document either the certification and statement of factual basis, or the IRFA. If the IRFA is lengthy and incorporated into the Regulatory Impact Analysis, summarize it in the Federal Register document. Make the IRFA available for review in the public docket for the regulatory action. Provide a copy of either the certification and statement of factual basis or the IRFA to Advocacy.

STEP 7. IN PREPARING THE FINAL RULE, CONSIDER AND RESPOND TO COMMENTS BY ADVOCACY

During preparation of the final rule, in accordance with E.O. 13272, "give every appropriate consideration" to comments provided by Advocacy, and respond in the final rule preamble to any written comments submitted by Advocacy on the proposed rule. (A response to Advocacy's comments is not needed in the final rule if DHS certifies that inclusion of a response does not serve the public interest.)

If DHS has determined that final rule will **not** have a significant economic impact on a substantial number of small entities, go to step 8. Otherwise go to step 9.

STEP 8. PREPARE A CERTIFICATION STATEMENT AND A STATEMENT OF THE FACTUAL BASIS SUPPORTING THE CERTIFICATION THAT THE FINAL RULE WILL NOT HAVE A SIGNIFICANT ECONOMIC IMPACT ON A SUBSTANTIAL NUMBER OF SMALL ENTITIES³

If DHS has determined that the final rule will not have a significant economic impact on a substantial number of small entities, prepare a certification statement to that effect, along with the factual basis for the certification. The certification is subject to judicial review, so explain clearly how the decision was reached and, where appropriate, describe or provide the information on which DHS relied to make the decision. In its 2002 implementation guidance for agencies, Advocacy cautioned agencies that "Congress intended that agencies should do more than provide boilerplate and unsubstantiated assertions to support their RFA certifications."⁴

Go to step 10.

STEP 9. PREPARE A FINAL REGULATORY FLEXIBILITY ANALYSIS (FRFA)

If the final rule may have a significant economic impact on a substantial number of small entities, prepare a FRFA for the rule. In accordance with the RFA, the FRFA must:

- (1) succinctly state the need for, and objectives of, the rule;
- (2) summarize the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, the assessment of the agency of such issues, and describe any changes made in the proposed rule as a result of such comments;
- (3) describe and estimate the number of small entities to which the rule will apply or explain why no such estimate is available;
- (4) describe the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
- (5) describe the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

STEP 10. INCLUDE IN THE FINAL RULE PUBLISHED IN THE FEDERAL REGISTER EITHER THE CERTIFICATION AND STATEMENT OF FACTUAL BASIS, OR THE FRFA

When preparing the final rule for publication in the Federal Register, include in the document either the certification and statement of factual basis (but see footnote 3), or the FRFA. If the FRFA is lengthy and incorporated into the Regulatory Impact Analysis as

discussed above, summarize it in the Federal Register document. Make a copy of the FRFA available for review in the public docket for the regulatory action.

Participation of small entities in rulemaking

If a rule will have a significant economic impact on a substantial number of small entities, assure that small entities have an opportunity to participate in the rulemaking through techniques such as the following:

- stating in an advance notice of proposed rulemaking, if issued, that the proposed rule may have a significant economic effect on a substantial number of small entities
- publishing the NPRM in publications likely to be obtained by small entities
- directly notifying interested small entities
- conducting open conferences or public hearings concerning the rule for small entities
- using computer networks to solicit and receive comments
- adopting or modifying agency procedural rules to reduce the cost and complexity of participation in the rulemaking for small entities

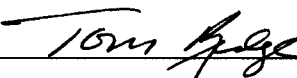
DHS personnel involved in rulemaking must be cognizant of the special considerations involved regarding contacts with persons outside of the Executive Branch of the Federal Government who are interested in a rulemaking. DHS personnel involved in a rulemaking should engage in such open contact with the public as will be helpful in the resolution of questions of substance and justification. This open contact can include interacting with small entities early in the rulemaking process to ensure that the eventual final rule will meet its objectives while minimizing adverse effects on small entities. Early and continued interaction with small entities can help identify and resolve important issues and obtain information useful to the development of the rule. The Chief Counsel for Advocacy can serve as a resource for agencies to facilitate this interaction with between DHS and small entities.

Reservation of Authority

The statements in this document are intended solely as guidance. This document is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States. DHS may decide to follow the guidance provided in this document, or to act at variance with the guidance, based on its analysis of the specific facts presented. This guidance may be revised without public notice to reflect changes in DHS's approach to implementing the Regulatory Flexibility Act or to clarify and update text.

Notes:

1. All references to the Regulatory Flexibility Act refer to the RFA as amended by the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. § 601 *et. seq.*
2. U.S. Small Business Administration, Office of Advocacy, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies*, 2002, p. 11.
3. The RFA is not clear regarding certifying the final rule if the proposed rule had been certified. However, SBA recommends that agencies certify twice to demonstrate that the certification remains valid after public comments.
4. U.S. Small Business Administration, Office of Advocacy, 2002, p. 11.

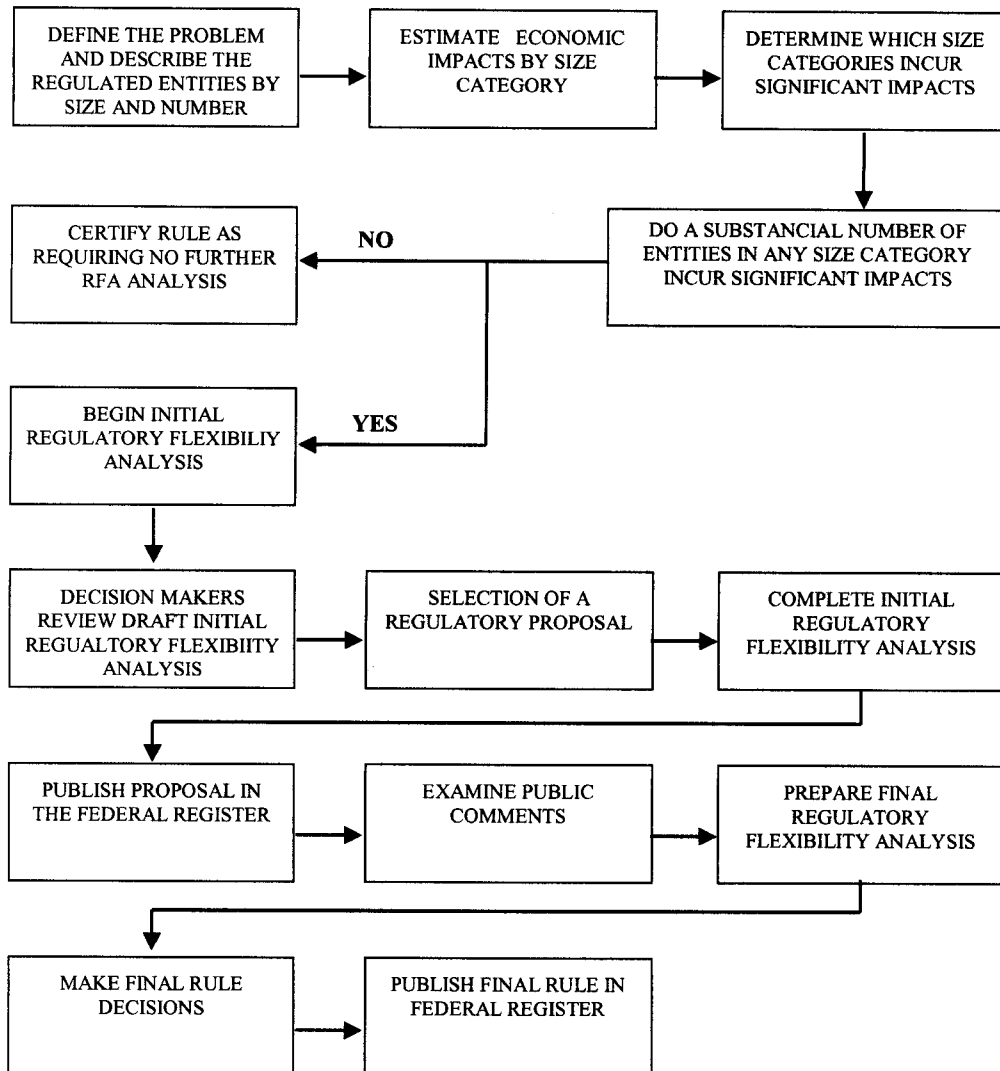


Dated: *Nov. 3, 2004*

Tom Ridge,

Secretary of Homeland Security.

RFA DECISION PROCESS



Note: This chart has been taken from page 4 of the SBA publication "A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act," 2003. Some changes have been made to the chart to reflect more accurately the process specifically applicable to DHS.