

DEPARTMENT OF THE TREASURY

POLICY AND PROCEDURES TO ENSURE CONSIDERATION OF POTENTIAL IMPACTS OF REGULATIONS ON SMALL BUSINESSES AND ENTITIES

1. STATEMENT OF POLICY

It is the policy of the Department of the Treasury that all offices and bureaus:

(a) Seek to minimize, consistent with statutory requirements and sound regulatory policy, the compliance and paperwork burdens of all their regulations on small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

(b) Adhere to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and other applicable law when developing regulations subject to that Act.

2. COMPLIANCE WITH THE REGULATORY FLEXIBILITY ACT

(a) In General. The Regulatory Flexibility Act (RFA) applies to all regulations except as provided in paragraph 2(b). The RFA directs each bureau or office that is required by 5 U.S.C. 553 or any other law to publish a notice of proposed rulemaking to consider the impact of the regulation on small entities.

(b) Nonapplicability. Except as may be otherwise required by law, the requirements set forth herein (other than paragraph 2(c)) do not apply to:

(1) Advance notices of proposed rulemaking (ANPRMs);

(2) Except as provided in paragraph 2(f)(1), regulations not required to be issued with notice and opportunity for public comment pursuant to 5 U.S.C. 553, or any other law, even if a NPRM is published at the discretion of an office or bureau;

(3) Final regulations for which the preceding NPRM was published before January 1, 1982;

(4) Regulations of particular applicability relating to rates, wages, corporate or financial structures, or reorganization thereof, prices,

facilities, appliances, services, or allowances therefore, or to valuations, costs or accounting, or practices related to such rates, wages, structures, prices, appliances, services or allowances; and

(5) To the extent provided in paragraph 2(g), regulations that will have a significant economic impact on a substantial number of small entities that are issued in response to an emergency situation or a short-term deadline imposed by statute or judicial order.

Notwithstanding that the RFA may not apply to certain regulations, it is the policy of the Department of the Treasury that offices and bureaus seek to minimize, consistent with statutory requirements and sound regulatory policy, the compliance and paperwork burdens of such regulations on small entities.

(c) Certification or Statement of Nonapplicability:

(1) In General:

(A) (i) The RFA provides that an agency may exempt a regulation from the requirement to prepare regulatory flexibility analyses upon certification that the regulation will not have a significant economic impact on a substantial number of small entities. In order to make this certification, an office or bureau needs to undertake a preliminary analysis of who is affected by the regulation and, if the regulation affects small entities, the nature (quantified to the extent practicable) of that effect.

(ii) In some instances the RFA may not apply to a regulation.

(B) Notwithstanding a certification that a NPRM will not have a significant economic impact on a substantial number of small entities, if a bureau or office, at any time prior to issuing a final regulation, finds that the regulation is likely to have such an impact, the bureau or office shall notify the Senior Advisor to the General Counsel for Regulatory Affairs. Offices and bureaus are advised that preparation of an analysis for the final rule may be required.

(2) Required *Federal Register* Certification or Statement: Offices and bureaus shall include in the preamble to each NPRM, temporary (interim), and final regulation, a statement as follows:

(A) Regulations Subject to the Act and Not Having a Significant Economic Impact on a Substantial Number of Small Entities:
In the case of a regulation subject to the RFA that:

(i) Will not have a significant economic impact on a substantial number of small entities, or

(ii) Implements a statute or other legal authority that imposes a significant economic impact on a substantial number of small entities, to the extent such impact flows directly from such statute or authority,

a certification substantially similar to the following:

"It is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required."

This statement must be followed by a factual explanation of the basis for the certification:

If the regulation does not affect small entities, the statement should explain who is affected by the regulation.

If the effect on small entities flows directly from the statute or other legal authority being implemented, the statement should explain why that is the case.

If the number of small entities affected is not substantial and/or the economic impact on affected small entities is not significant, the statement should explain why, and include, to the extent practicable, a quantification of the number of small entities affected and/or the economic impact.

(B) Regulations Not Subject to the Act: In the case of a regulation not subject to the RFA, a statement explaining why the RFA does not apply.

(C) Regulations Subject to the Act and Having a Significant Economic Impact on a Substantial Number of Small Entities. These regulations require the preparation of an initial or final analysis, depending on the stage of rulemaking.

(d) Initial Regulatory Flexibility Analysis (IRFA):

(1) Content: In the case of a NPRM that is likely to have a significant economic impact on a substantial number of small entities, the initiating office or bureau shall prepare an IRFA. The analysis shall be approved by the head of the office or bureau and accompany the regulation through all review levels. The analysis shall contain:

(A) A description of the reasons why action by the agency is being considered;

(B) A succinct statement of the objectives of, and the legal basis for, the proposed rule;

(C) A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(D) A description of 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 such requirements and the type of professional skills necessary for preparation of the report or record;

(E) An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap or conflict with the proposed rule; and

(F) A description of 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, including a discussion of significant alternatives such as:

(i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(ii) The clarification, consolidation or simplification of compliance and reporting requirements for small entities;

(iii) If applicable, the use of performance standards rather than design standards; and

(iv) The exemption from the rule, or any part of the rule, for small entities.

(2) Publication: The originating office or bureau shall include the full IRFA either in the preamble to the NPRM or as an appendix to the NPRM.

(3) Public Participation: When an office or bureau publishes in the *Federal Register* a proposed rule for which it has prepared an IRFA, the office or bureau shall take steps to offer affected small entities additional

opportunities to participate in the rulemaking through the reasonable use of techniques such as:

(A) Publishing the NPRM in publications likely to be read by affected small entities;

(B) Directly notifying interested small entities (or trade associations representing such small entities) of the rulemaking;

(C) Holding open conferences or public hearings for affected small entities; and

(D) Posting the NPRM on the Internet and receiving public comments by electronic mail.

(4) Transmittal to Small Business Administration: A copy of each NPRM that includes an IRFA shall be transmitted by the originating office or bureau to the Chief Counsel for Advocacy of the Small Business Administration.

(e) Final Regulatory Flexibility Analysis (FRFA):

(1) Content: In the case of a final regulation for which an IRFA was prepared or for which a FRFA is otherwise required, the originating office or bureau shall prepare a FRFA. The analysis shall be approved by the head of the office or bureau and shall accompany the regulation through all review levels. The analysis shall contain:

(A) A succinct statement of the need for and the objectives of the rule;

(B) A summary of the significant issues raised by the public comments in response to the IRFA, a summary of the assessment of the office or bureau of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(C) A description of, and an estimate of the number of, small entities to which the final rule will apply, or an explanation of why no such estimate is available;

(D) A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to such requirements and the type of professional skills necessary for preparation of the report or record; and

(E) A description of the steps the office or bureau has taken to minimize the significant economic impact of the rule 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, and why each of the other significant alternatives to the rule considered by the agency that affects the impact on small entities was rejected.

(2) Public Availability: The originating office or bureau shall include the full FRFA either in the preamble to the final regulation or as an appendix to the final regulation:

(f) Additional Requirements for the Internal Revenue Service (IRS) and the Alcohol and Tobacco Tax and Trade Bureau (TTB).

(1) Interpretative NPRMs that Contain a Collection of Information:

(A) In General: Section 241 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) amended RFA section 603 to include within the scope of the RFA interpret-tative NPRMs involving the internal revenue laws of the United States to the extent such NPRMs impose on small entities a "collection of information" that is subject to OMB review and approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501) and 5 CFR Part 1320. The amendment to RFA section 603 applies to NPRMs (and succeeding final rules) published after June 27, 1996. Generally, a collection of information includes:

(i) A requirement that a small entity report information to the Federal government;

(ii) A requirement that a small entity maintain specified records, whether or not the information in those records is reported to the Federal government; and

(iii) A requirement that a small entity disclose information to a third party or to the public in general.

(B) Certification or Analysis Required: In the case of a regulation described in paragraph 2(f)(1)(A), IRS or TTB shall either certify that the collection of information imposed on small entities will not have a significant economic impact on a substantial number of small entities or prepare the analyses required by the RFA.

(i) Certification: If a collection of information will not have a significant economic impact on a substantial number

of small entities, the preamble to the NPRM and rule shall include a statement substantially similar to the following:

"It is hereby certified that the collection of information contained in this regulation will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required."

This statement must be followed by a factual explanation of the basis for the certification:

If the number of small entities affected is not substantial, the statement should explain why and include, to the extent practicable, a quantification of the number of small entities affected.

If the economic impact on affected small entities is not significant, the statement should include a discussion of the burden (as reflected in the required submission to OMB) imposed on small entities by the collection of information.

(ii) RFA Analyses:

(I) If a collection of information will have a significant economic impact on a substantial number of small entities, IRS or TTB shall prepare the required regulatory flexibility analyses. See Paragraphs 2(d) and (e) for specific requirements for these analyses.

(II) Public Participation: When IRS or TTB publishes in the *Federal Register* a proposed rule for which it has prepared an IRFA, IRS or TTB shall take steps to offer affected small entities additional opportunities to participate in the rulemaking through the reasonable use of techniques such as:

(a) Publishing the NPRM in publications likely to be read by affected small entities;

(b) Directly notifying interested small entities (or trade associations representing such small entities) of the rulemaking;

(c) Holding open conferences or public hearings for affected small entities; and

(d) Posting the NPRM on the Internet and receiving public comments by electronic mail.

(2) Submission of Certain Regulations to Chief Counsel for Advocacy:

(A) In General: Section 7805(f) of title 26, United States Code, prescribes additional requirements for notices of proposed rulemaking, temporary (interim) regulations, and final regulations not preceded by a notice of proposed rulemaking that are issued by the IRS or TTB. Section 7805(f) applies if any such regulation:

(i) Is issued pursuant to authority contained in title 26, United States Code; and

(ii) Is not subject to the Regulatory Flexibility Act.

(B) NPRMs and Temporary (Interim) Regulations:

(i) Submission to Chief Counsel for Advocacy, SBA: Immediately following the publication of a NPRM or temporary (interim) regulation in the *Federal Register*, the IRS or TTB shall transmit a copy of such regulation to the Chief Counsel for Advocacy of the SBA.

(ii) Federal Register Statement: With respect to each such regulation, the preamble to such regulation shall contain a statement substantially similar to the following:

"Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business."

(C) Final Regulations Superseding NPRMs or Temporary (Interim) Regulations:

(i) Comments Submitted by the Chief Counsel for Advocacy of the SBA: In developing any final regulation that supersedes a NPRM or temporary regulation, the IRS or TTB shall consider any comments submitted by the Chief Counsel for Advocacy of the SBA within four weeks of the submission and shall respond to such comments in the preamble to the final rule.

(ii) Federal Register Statement: With respect to each such final regulation, the preamble to such regulation shall contain a statement substantially similar to the following:

"Pursuant to section 7805(f) of the Internal Revenue Code, the [NPRM/temporary regulation] preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business. [The Chief Counsel for Advocacy submitted comments on the regulation, which are discussed elsewhere in this preamble]."

(D) Final Rules Not Superseding NPRMs or Temporary (Interim) Rules:

(i) Submission to Chief Counsel for Advocacy, SBA: The IRS or TTB shall transmit a copy of a final rule that does not supersede a NPRM or temporary (interim) rule to the Chief Counsel for Advocacy of the SBA at least four weeks prior to publication in the *Federal Register*.

(ii) Comments Submitted by the Chief Counsel for Advocacy of the SBA: The IRS or TTB shall consider any comments submitted by the Chief Counsel for Advocacy of the SBA within four weeks of the submission and shall discuss any response to such comments in the preamble to the final rule.

(iii) Federal Register Statement: .With respect to each such regulation, the preamble to such regulation shall contain a statement substantially similar to the following:

"Pursuant to section 7805(f) of the Internal Revenue Code, this regulation was submitted to the Chief Counsel for Advocacy of the SBA for comment on its impact on small business. [The Chief Counsel for Advocacy submitted comments on the regulation, which are discussed elsewhere in this preamble]."

(g) Delay or Waiver of Initial and Final Regulatory Flexibility Analyses.

(1) Initial Regulatory Flexibility Analysis (IRFA):

(A) When a NPRM responds to an emergency situation or statutory or judicial deadline, and if the NPRM otherwise would require a IRFA, the bureau or office head, with the concurrence of the appropriate policy official and the Senior Advisor to the General Counsel for Regulatory Affairs, may determine that the preparation of an IRFA is impracticable. In such case, the transmittal memorandum to the Executive Secretary shall explain why preparation of the analysis is impractical and the preamble to the NPRM shall include a finding and explanation that the NPRM is being issued in response to an emergency or statutory or judicial deadline and that compliance with the requirements of the RFA concerning preparation of an IRFA is impracticable.

(B) Unless the provisions of paragraph 2(g)(2) apply, the bureau or office is required to prepare a Final Regulatory Flexibility Analysis (FRFA) at the time the final rule is published.

(2) Final Regulatory Flexibility Analysis (FRFA):

(A) When a final rule responds to an emergency situation or statutory or judicial deadline, and if such rule otherwise requires a FRFA, the bureau or agency head may, with the concurrence of the appropriate policy official and the Senior Advisor to the General Counsel for Regulatory Affairs, delay preparation of the FRFA. In such case, the transmittal memorandum to the Executive Secretary shall explain the need to delay preparation of the analysis, and the preamble shall include a statement that the regulation is being issued in response to an emergency, or statutory or judicial deadline, which makes timely compliance with the requirement of a FRFA impracticable.

(B) The originating bureau or office may delay publication of the FRFA for a period of not more than 180 days after the date of publication of the final rule in the *Federal Register*.

(C) The bureau or office shall prepare and transmit a FRFA to the Senior Advisor to the Counsel for Regulatory Affairs for review not later than 120 days after publication of the final rule.

(D) Offices and bureaus are advised that the RFA provides that failure to publish the FRFA (or advise the public how copies may be obtained) within 180 days after publication of the final rule will cause the regulation to lapse and have no effect (5 U.S.C. 608(b)).

(h) Periodic Review of Rules.

(1) In General: Not later than 10 years after the date of publication of a final rule that was determined to have a significant economic impact on a substantial number of small entities, and not later than every 10 years thereafter, the issuing office or bureau shall complete a review of the rule to assess its impact on small entities and determine whether the rule should be continued without change, amended or rescinded. In making such a determination the office or bureau shall consider:

(A) The continued need for the rule;

(B) The comments filed by the public pursuant to the notice required by paragraph 2(h)(2)(A) and other comments or complaints received from the public concerning the rule;

(C) The complexity of the rule;

(D) The extent to which the rule overlaps, duplicates or conflicts with other Federal rules and, to the extent feasible, with State or local government rules; and

(E) The length of time since the rule was previously reviewed pursuant to this paragraph or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

(2) Federal Register Publications:

(A) At least 9 months before the date a review required by paragraph 2(h)(1) must be completed, the issuing office or bureau shall publish a notice in the *Federal Register* soliciting comments on the continued need for the rule, its impact on small entities and whether the rule should be continued, amended or rescinded.

(B) Not later than the date a review required by paragraph 2(h)(1) must be completed, the issuing office or bureau shall publish in the *Federal Register*:

(i) A notice of its determination to continue the rule without change, together with an explanation of that determination; or

(ii) Consistent with the requirements of 5 U.S.C. 553, a proposed or final (or interim) rule to amend or rescind the rule.

These notices shall be forwarded to the Senior Advisor to the General Counsel for Regulatory Affairs for review prior to publication.

(i) Judicial Review.

(1) In General: Offices and bureaus are advised that section 242 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) amended RFA section 611 to provide for judicial review of agency compliance with the RFA provisions governing:

(A) Certifications that a proposed or final rule does not have a significant economic impact on a substantial number of small entities, and determinations that the RFA does not apply to all or part of a particular regulation;

(B) The content of a final regulatory flexibility analysis, including whether quantification of the effects on small business is practicable or reliable;

(C) Determinations to waive or delay completion of an initial regulatory flexibility analysis, or to delay completion of a final analysis;

(D) The periodic review of rules determined to have a significant economic impact on a substantial number of small entities; and

(E) Office or bureau efforts to solicit public comments on a proposed rule that will have a significant economic impact on a substantial number of small entities from affected small entities by means other than publishing the proposed rule in the *Federal Register* for comment.

(2) Remedies: If a court finds that an office or bureau did not comply with the RFA, remedies available include remanding the rule to the agency and suspending enforcement of the rule with respect to small entities.

3. Prepublication Notification of Certain Rules to the Chief Counsel for Advocacy.

(a) In General. To facilitate the review by the Chief Counsel for Advocacy of proposed rules that require the preparation of an IRFA, EO 13272 (August 13, 2002) requires that agencies notify the Chief Counsel of such proposed rules prior to publication.

(b) Notification Procedures. As soon as an office or bureau determines that a proposed rule will require an IRFA, the office or bureau shall notify the Senior Advisor to the General Counsel for Regulatory Affairs, who will coordinate notification to the Chief Counsel for Advocacy.

4. Small Business Compliance Guides.

(a) In General: For each final rule (or group of final rules) that was determined to have a significant economic impact on a substantial number of small entities, the issuing office or bureau shall publish one or more guides to assist small entities in complying with the rule. These publications shall be designated "small entity compliance guides." (See section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121).)

(b) Contents: Each small entity compliance guide shall:

(1) Explain the actions a small entity is required to take to comply with the rule (or group of rules); and

(2) Be written in plain language, taking into account the subject matter of the rule and the language of applicable statutes.