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Congress of the United States

U.S. House of Representatives

Committee on Small Business

2361 Rayburn House Office Building
Washington, DC 20515-6315

To: Members, House Small Business Committee
From: Sam Graves, Chairman
Re: Full Committee Hearing: "Lifting the Weight of Regulations: Growing Jobs by Reducing Regulatory Burdens"
Date: June 8, 2011

On Wednesday, June 15, 2011, at 1:00 pm in Room 2360 of the Rayburn House Office Building, the Small Business Committee will meet for the purposes of examining H.R. 527, the Regulatory Flexibility Improvements Act of 2011, and H.R. 585, the Small Business Size Standard Flexibility Act of 2011. The two bills are designed to remove loopholes in the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), and strengthen the power of the Office of the Chief Counsel for Advocacy.[1] Part I of the memorandum discusses a rationale for the changes made in H.R. 527. Part II is a comprehensive section-by-section analysis of H.R. 527. Part III combines a section-by-section analysis of H.R. 585 with the rationales for why the action described in that bill is being taken. The memorandum assumes a basic knowledge of the RFA as provided in the memorandum distributed on March 23, 2011 for the Committee's first hearing on the subject.

I. Need for Legislation

During the 1970s, Congress enacted numerous regulatory statutes. By the end of that decade, businesses, especially small ones, were groaning under the weight of federal regulation. Regulatory requirements were stifling innovation, limiting small business growth, and contributing to the general malaise experienced during the latter half of that decade. The Federal Register, the compendium of federal regulatory actions, had grown from a non-weighty publication for the obscuranta and arcana of the federal government to a 42,000 page blueprint for regulating many of the aspects of modern American life. Small businesses found this crush of federal dictates particularly problematic because those businesses had greater difficulty in complying with regulations than their larger competitors.

In a series of hearings during the late 1970s, Congress began focusing on the ever-growing burden federal regulation imposed upon small businesses. Small businesses reiterated two major

[1] The Office of the Chief Counsel for Advocacy is an independent office housed in the United States Small Business Administration (SBA). For purposes of this memo, that Office will be referred to as the Chief Counsel, the Chief Counsel for Advocacy or the Office of Advocacy interchangeably.

themes: 1) they were under-represented in federal regulatory proceedings; and 2) federal agency efforts to impose a "one-size-fits-all" body of regulation imposed disproportionate burdens on small businesses.[2]

These findings were supported and reinforced during the 1980 White House Conference on Small Business. Congress reacted with the passage of the RFA. That Act constitutes an additional component of a significantly broader mechanism to control agency decisionmaking – the Administrative Procedure Act (APA). The APA prevents an agency from taking actions which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). This standard presumes that an agency will undertake rational rulemaking to: 1) ascertain the problem to be solved through regulation; 2) develop potential solutions; 3) seek public comment on proposed solutions and alternatives not considered by the agency; and 4) craft a final rule that addresses all relevant criteria. Since the vast majority of entities (businesses, not-for-profit organizations, and governmental jurisdictions) regulated by the federal government are small, a rational rule should be one that achieves the objectives of the agency without unduly burdening small entities. The RFA, by focusing the agency's analysis on the economic effects on small entities, will help the agency promulgate rational rules.

From the time of enactment until 1996, compliance with the RFA was at best sporadic. Agencies faced little threat from non-compliance since judicial review of regulatory flexibility analyses was very limited, *see Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984), and an agency's certification decision could not be challenged in court. *See Colorado State Banking Bd.v. RTC*, 926 F.2d 931, 948 (10th Cir. 1991); *Lehigh Valley Farmers v. Block*, 640 F. Supp. 1497, 1520 (E.D. Pa. 1986), *aff'd on other grounds*, 829 F.2d 409 (3d Cir. 1987) (district court determination on RFA not raised on appeal). Without the ability of court orders, agencies only had to comply when it would benefit their rulemaking or could be cajoled by the Chief Counsel for Advocacy or the Office of Information and Regulatory Affairs (OIRA). Both the Committee on Small Business and the Committee on the Judiciary held hearings at which witnesses confirmed the systemic failure by many agencies to comply with the RFA.

Congress responded to this collective disregard by federal agencies with the enactment of SBREFA. The primary change authorized direct judicial review of agency compliance with the RFA, including challenges to agency certifications. SBREFA also mandated that Internal Revenue Service (IRS or Service) interpretative regulations that impose a "collection of information requirement"[3] be subject to the strictures of the RFA.[4] The legislation also

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[2] The finding on disproportionate impact was substantiated by an Office of Advocacy study in 1984 which found concrete economic evidence of differential impacts of regulation by firm size. That conclusion was affirmed anew in a 2001 economic research study sponsored by the Office of Advocacy. W. CRAIN & T. HOPKINS, THE IMPACT OF REGULATORY COSTS ON SMALL BUSINESS (Oct. 2001). The full report can be found at http://www.sba.gov/advo/research/rs207tot.pdf.

[3] The term "collection of information" is a term of art used in the Paperwork Reduction Act. *See* 44 U.S.C.

(continued...)

recognized that, by the time a proposed rule is published for notice and comment, the agency has substantial intellectual capital invested in the scope of the proposed rule and is unlikely to change the core of its proposal during the notice and comment period.[5] Therefore, SBREFA requires the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to obtain input from representatives of small entities prior to the publication of any proposed rule that would have a significant economic impact on a substantial number of small entities, i.e., any proposed rule for which an initial regulatory flexibility analysis would be prepared.

The changes wrought by SBREFA had some effect on agency compliance. Lawsuits were filed against agencies, although not to the extent feared by critics of judicial review.[6] Due to the litigation, agencies have come to realize that certifications need to be supported by sound economic analysis or face successful challenges to compliance with the RFA. Input by small entities has generated ideas that improved EPA regulations.[7] Despite these ameliorative effects of SBREFA, much still needs to be done to ensure that agencies comply with the RFA.

Despite SBREFA and litigation, agencies continued to ignore the law. President Bush recognized the importance of the RFA and sought to impose greater compliance by the agencies. In a March 19, 2002 speech, President Bush stated:

> Every agency is required to analyze the impact of new regulations on small businesses before issuing them. That is an important law. The problem is it is

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[3](...continued)
§ 3502(3).

[4] The RFA only requires agency compliance if the regulation is required to be issued pursuant to notice and comment pursuant to § 553 of the APA or some other statute. Interpretative regulations are exempt from the notice and comment requirements. 5 U.S.C. § 553(b)(A).

[5] In fact some would argue that the notice and comment period was not a critical component of rational rulemaking but the keystone of "rationale rulemaking" in which the agency uses the public comment process to find further support for the foregone conclusion of its proposed regulation.

[6] Since the changes to the RFA went into effect in late June of 1996 through 2006, a Lexis search reveals somewhere around 110 reported cases involving the RFA. By contrast, during the first ten years after the enactment of the National Environmental Policy Act (NEPA), there were 770 reported cases involving that statute. Neither count accurately reflects the true number of cases filed because reported cases may involve appeals and there may be multiple reported cases involving the same litigation. In other instances, cases that were filed during the respective time periods may not have been resolved. Finally, this only represents reported cases and not those that were filed but settled or were disposed of without a reported decision. Nevertheless, the magnitude of litigation under the RFA was significantly less than under NEPA.

[7] There are insufficient circumstances to assess the results of this so-called "panel process" on OSHA regulations.

> often being ignored. The law is on the books; the regulators do not care that the law is on the books. From this day forward they will care that the law is on the books. We want to enforce the law.

Subsequent to that speech, the President issued Executive Order 13,272, 67 Fed. Reg. 53,462 (Aug. 16, 2002). The order required agencies to adopt standards for complying with the RFA, make those standards known to the public, and give the Office of Advocacy the opportunity to comment on proposed rules that will have a significant economic impact on a substantial number of small entities prior to publication in the Federal Register. While that Executive Order represents a step in the direction of ensuring the pellucidity of agency procedures to comply with the RFA, it does not close the loopholes that currently exist in the Act or prevent agencies from adopting crabbed interpretations of the RFA that enable the agencies to elide the analytical responsibilities imposed by Congress more than 30 years ago.

President Obama also recognized the importance of the RFA. In a memorandum to the Executive Branch on January 18, 2011, the President noted that the RFA "establishes a deep national commitment to achieving statutory goals without imposing unnecessary burdens on the public."[8] The President went on to direct agencies to "give serious consideration to whether and how it is appropriate ... to reduce regulatory burdens on small businesses, through increased flexibility."[9] In the memorandum, the President requested (but could not mandate) independent agencies to comply with its terms.[10]

Coetaneous with the release of the memorandum on the RFA, President Obama issued Executive Order (E.O.) 13,563.[11] While the putative purpose of the Order was to clarify the regulatory analytical requirements set forth in Executive Order 12,866,[12] § 6 of E.O. 13,563 required agencies to prepare plans for periodic review of regulations, including all extant regulations.[13] Of course, there already is an existing requirement for periodic review of regulations, § 610 of the RFA.

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[8] President Memorandum for the Heads of Executive Departments and Agencies: Regulatory Flexibility, Small Business and Job Creation, 76 Fed. Reg. 3827, 3827 (Jan. 21, 2011).

[9] *Id.* at 3828.

[10] Since the Supreme Court decision in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), independent collegial body agencies, such as the Federal Communications Commission or Nuclear Regulatory Commission, are not subject to control by the White House or subject to presidential executive orders.

[11] 76 Fed. Reg. 3,821(Jan. 21, 2010).

[12] Executive Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993), requires federal agencies to perform a cost-benefit analysis for any regulation that will have an impact of more than $100 million on the economy.

[13] Exec. Order 13,563, § 6, 75 Fed. Reg. at 3822.

Two presidents, in succession, ordered federal agencies to follow the RFA, a law that has been in existence for over 30 years. Every President from Ronald Reagan to Barack Obama has mandated a comprehensive review of existing agency regulations despite the fact that the RFA has required such reviews since its enactment in 1980. Given the fact that presidents must reiterate what is already in the law to agencies over which they have plenary authority starkly demonstrates the need for revision to the RFA. Furthermore, presidential reminders, through memoranda or executive orders, may be ignored with impunity by independent regulatory agencies since presidents are unable to exert regulatory authority over such agencies.

The conclusion that the RFA must be amended despite efforts of five presidents is buttressed by the finding of the Government Accountability Office (GAO). GAO has done numerous studies on agency compliance with various aspects of the RFA and SBREFA.[14] According to GAO, the most significant stumbling block to improved compliance is the lack of definitions for "significant economic impact" and "substantial number of small entities." GAO also notes that this threshold determination of whether a rule will have a significant economic impact on a substantial number of small entities is critical to compliance with other requirements in the RFA, including periodic review of rules under § 610 and the receipt of small entity input prior to the publication of proposed rules by EPA and OSHA.[15]

Testimony at hearings held by the Committee on Small Business during the 106th, 107th, 108th, 109th, 110th, and 112th Congresses further supports the need for change. Hearings before the Committee found that considerable confusion still reigns on when agencies need to conduct regulatory flexibility analyses. Witnesses testified that agencies still finds ways to avoid compliance with the RFA, even after the enactment of SBREFA and various presidential directives to comply. Finally, the testimony was consentient in finding that agencies continue to impose unnecessary burdens on small businesses as a result of their failure to comply with the RFA.

Nor have the courts been the anodyne that the authors of SBREFA contemplated. Courts have not given agency compliance with the RFA the same searching scrutiny that they have given to compliance with the National Environmental Policy Act (NEPA) even though the authors of

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[14] SBREFA also requires federal agencies to prepare compliance guides for regulations that have a significant economic impact on a substantial number of small entities. Nothing in the bills being considered at the hearing modifies that requirement.

[15] *See* REGULATORY FLEXIBILITY ACT: CONGRESS SHOULD REVISIT AND CLARIFY ELEMENTS OF THE ACT TO IMPROVE ITS EFFECTIVENESS (2006) (GAO 06-998T); REGULATORY FLEXIBILITY ACT: CLARIFICATION OF KEY TERMS STILL NEEDED (2002) (GAO-02-491); REGULATORY FLEXIBILITY ACT: KEY TERMS STILL NEED TO BE CLARIFIED (2001) (GAO-01-669T); REGULATORY FLEXIBILITY ACT: IMPLEMENTATION IN EPA PROGRAM OFFICES AND THE LEAD RULE (2000) (GGD-00-193); REGULATORY FLEXIBILITY ACT: AGENCIES' INTERPRETATIONS OF REVIEW REQUIREMENTS VARY (1999) (GGD-99-55); REGULATORY FLEXIBILITY ACT: IMPLEMENTATION OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL REQUIREMENTS (1998) (T-GGD-98-75); REGULATORY FLEXIBILITY ACT: AGENCIES USE OF THE OCTOBER 1997 UNIFIED AGENDA DID NOT SATISFY NOTIFICATION REQUIREMENTS (1998) (GGD-98-61R); REGULATORY FLEXIBILITY ACT: STATUS OF AGENCIES' COMPLIANCE (1995) (T-GGD-95-112).

SBREFA expected judicial review to have the same impact on agency decisionmaking that court decisions had on agency compliance with NEPA. *See Associated Fisheries of Maine v. Daley*, 127 F.3d 104, 114 (1st Cir. 1997).

Neither the actions of successive presidents, nor the courts, nor congressional oversight have tempered the broad discretion that agencies have in implementing the RFA. This broad discretion enables them to avoid compliance with the RFA's underlying analytical requirements. In order to constrain this discretion and ensure proper consideration is given to the impact that regulatory actions will have on small entities, particularly small businesses, it is necessary to make further amendments to the RFA as set forth in H.R. 527 which are set forth in the next section of this memorandum.

II. Section-by-Section Analysis of H.R. 527

Section 1. *Short Title*

Designates the bill as the "Regulatory Flexibility Improvements Act of 2011."

Section 2. *Clarification and Expansion of Rules Covered by the RFA*

Subsection (a) – Definition of "Rule"

The RFA currently defines a rule as one that is issued pursuant to the notice and comment provisions of § 553(b) of the APA. This definition is unnecessarily restrictive for no apparent reason. Fundamentally, a rule is any issuance from an agency that does not emanate from an adjudication. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 n.13 (D.C. Cir. 2000), quoting *Batterton v. Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980). The definition of a rule should be consistent, to the extent practicable, with the definitions set forth in the APA. That will permit courts, for purposes of interpreting the RFA, to adopt the interpretations they have developed under the APA. *See White v. Mercury Marine*, 129 F.3d 1428, 1434 (11th Cir. 1997); *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 827 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993); *Doe v. DiGenova*, 779 F.2d 74, 82 (D.C. Cir. 1985) (legislative use of same term in different sections should be given the same meaning and interpretation) Therefore, § 2(a) of H.R. 527 eliminates the distinction between § 551(4) of the APA and § 601(2) of the RFA.

Section 2(a) of the bill does make one necessary distinction between rules as defined under the APA and the RFA. The APA definition of a rule includes any rule of particular applicability relating to "rates, wages, corporate or financial structures, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances." 5 U.S.C. § 551(4). The RFA does not apply to any rule that falls within any of the aforementioned categories. *Id.* at § 601(2). Agencies should not be delayed in approving the financial structure or the like of a specific entity as such rule change clearly could not affect a significant number of small entities. In

contradistinction, the rules for how agencies determine rates, wages, or financial structures may have a dramatic impact on small entities.[16] As a result, the appropriate compromise is to define a rule that will cover rates, wages, etc. only if the rule can be applied to more than one entity. For example, the definition of a rule under the Committee's solution would include the Federal Communications Commission's (FCC) regulations for calculating the rates charged by incumbent local exchange carriers for unbundled network elements. A rule would not include the application of those standards for determining the unbundled network element rates for a particular incumbent local exchange carrier. To the extent that the determination of the rates are made in a rulemaking, this definition ensures that the agency cannot use as an excuse for delay the need to comply with the RFA. Furthermore, the amendatory language answers in the affirmative the question of whether the RFA covers rules of general applicability concerning the calculation of rates, wages, etc.

Subsection (b) – Inclusion of Indirect Effects

The RFA requires preparation of a regulatory flexibility analysis if the agency determines that the rule will have a significant economic impact on a substantial number of small entities. The original authors of the RFA did not define the term "economic impact" following the trend in the National Environmental Policy Act (NEPA) in which the term "significant effect on the environment" was left open to interpretation. The scope of the economic impacts that should be considered for compliance with the RFA has been the subject of much discussion and confusion even during the debates on passage. The genesis of the confusion stems from comments made by Senator John Culver (D-IA) (one of the original authors of the RFA). In the section-by-section analysis of the RFA, Senator Culver suggested that agencies should assess both indirect and direct effects of the proposed regulation. 126 Cong. Rec. 21,458-59 (1980).

The issue of indirect effects reappeared when an electric cooperative, Mid-Tex, challenged the Federal Energy Regulatory Commission's determination to permit the inclusion of construction-work-in-progress expenses (CWIP) in the rate base for generating utilities. The inclusion of CWIP forced the Commission to raise the rates for wholesale power purchased by electric cooperatives such as Mid-Tex. The Commission certified that the proposed rule would not have a significant economic impact on a substantial number of small entities because the rule only affected large entities – the generators of electric power. The electric cooperatives, in their challenge to the regulation, alleged that the Commission should have performed a regulatory flexibility analysis on the impact that the decision would have on the purchasers of the power. The D.C. Circuit disagreed with the cooperatives' interpretation of the RFA's legislative history and held that Congressional intent with respect to the analysis of indirect effects was ambiguous.

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[16] From a purely logical standpoint, the approval of rates, wages, etc. for a particular entity looks more like a license as that term is defined in the APA. However, the definition of a "license" under the APA is quite restrictive and approval of various types of corporate structures (such as the approval of a initial public offering by the Securities and Exchange Commission) does not constitute a license under the APA.

The court determined, although it did not have to,[17] that the use of indirect effects by Senator Culver meant referred to the indirect effects on the entities subject to the regulation not the pass-through indirect effects on society in general. *Mid-Tex Elec. Coop. v. FERC*, 773 F.2d 327, 342-43 (D.C. Cir. 1985). This conclusion has been reaffirmed on a number of occasions by the D.C. Circuit, the only circuit that has considered the issue.[18]

By limiting analysis to entities directly regulated, the D.C. Circuit's interpretation of the RFA enables federal agencies to avoid assessing impacts on small entities for some very significant rulemakings. Some examples will elucidate this problem.

The EPA is charged with establishing national ambient air quality standards under the Clean Air Act. Once established, the Clean Air Act then grants to the states the authority to develop plans to meet those standards.[19] Ambient air quality standards can impose significant economic harm on businesses that may have to reduce their activities in order to comply with the state implementation plan and meet the ambient air quality standards. EPA does not comply with the RFA when it develops the standards or during the approval of the state implementation plans.

The EPA argues that the RFA does not apply because the ambient air quality standards and state implementation plans only regulate states which are not small entities under the RFA.[20] Despite this legal legerdemain, a revised ambient air quality standard can have a profound impact on the economy and one that is totally foreseeable. The EPA identified significant economic consequences when it revised its ambient air quality standards for nitrogen oxide and particulate matter in the late 1990s. That regulation underwent substantial economic review, including the development of a cost-benefit analysis pursuant to Executive Order 12,866. As a result, EPA was required to identify the foreseeable costs of imposing stricter ambient air quality standards on the nation, including small entities, even though the exact scope on specific small entities might vary depending based on the state implementation plan. If most of the entities are small that must readjust their behavior to reduce pollution and they cannot comply, the rule is irrational

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[17] Since the decision to certify a rule was not a justiciable claim under the original version of the RFA, the court did not have to decide the issue.

[18] *American Trucking Ass'n v. EPA*, 175 F.3d 1027, 1044-45 (D.C. Cir. 1999), *rev'd on other grounds*, 531 U.S. 457 (2001); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 466 (D.C. Cir. 1998); *United Distr. Cos. v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996). Other courts also have adopted the D.C. Circuit's interpretation. *White Eagle Coop. Ass'n v. Conner*, 553 F.3d 467, 479-81(7th Cir. 2009) (producers indirectly regulated under milk marketing so not able to bring claim under RFA).

[19] If a state does not develop a state implementation plan, the EPA is authorized to develop the implementation plan.

[20] The RFA applies to small businesses, small organizations (not-for-profits), and small governmental jurisdictions which are defined as any governmental entity with a population of less than 50,000. No state has less than 50,000 people. Therefore, states are not small governmental jurisdictions.

because EPA will not meet its goal of cleaner air. Therefore, an analysis of the indirect effects of the ambient air quality standards is a critical element in the development of the APA-mandated rational rule.

Section 303(d) of the Clean Water, 33 U.S.C. § 1313(d), requires states to develop lists of impaired waters, i.e., those waters for which effluent limitations on point sources (such as factories and publicly-owned treatment facilities) do not meet the water quality standards applicable to such body of water. The states are then required to establish total maximum daily load (TMDL) for each impaired body to bring into compliance with the applicable water quality standard. On July 13, 2000, EPA promulgated new regulations to implement the TMDL program. 65 Fed. Reg. 43,585. The EPA certified the final rule because it found that the "rule established requirements applicable only to EPA, states, territories, and Indian tribes. Thus, EPA is not required to prepare a regulatory flexibility analysis."[21] *Id.* at 43,654. EPA reached this conclusion even though it found that the changes in the TMDL program would result in an annual effect on the economy of more than $100 million. In its Executive Order 12,866 analysis, EPA estimated the cost on various industries for complying with updated TMDLs developed by the states. The development and availability of this data under the Executive Order belies any notion that EPA's rules only affected states. As with the ambient air quality standards, the economic consequences were large but foreseeable even though the exact impact on specific entities was not available. Therefore, EPA could and should have developed a regulatory flexibility analysis that assessed the impact on small entities.

If EPA was the only agency where the issue of direct and indirect effects occurred, it would deserve a legislative solution given the impact that EPA regulations have on small entities.[22] However, EPA is not the only agency that has avoided RFA compliance due to the indirect effects of the regulations they promulgate. For example, the Department of Agriculture never complied with the RFA when it promulgated revised regulations for amending forest management plans even though those rules would have significant impact on how the national forests would be managed and would affect thousands of small businesses and rural local governments. The IRS proposed to modify the reporting of non-resident alien interest income which could threaten the availability of capital for small businesses. The Immigration and Naturalization Service proposed reducing the time limit for extensions of visas to foreign visitors which, although not directly regulating any small businesses, could have a significant adverse impact on small businesses that rely on residents of cold climates wintering in places such as Florida or Arizona.

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[21] There are Indian tribes with less populations of less than 50,000. EPA's conclusion that only large governmental entities were being regulated was wrong.

[22] Congress recognized the significance of EPA rules on small entities in SBREFA by creating a mechanism for those entities to provide input into the development of proposed EPA regulations.

To the extent that these rules are significant under Executive Order 12,866, the indirect effects would be analyzed in the development of a cost-benefit analysis. However, the impacts would not be assessed for cost-effectiveness under the RFA – a gap that makes no logical sense and undermines the ability of agencies to craft rational rules as mandated by the APA.

Given the adverse consequences for small entities of indirect effects, it is imperative that agencies consider the foreseeable indirect effects of their regulatory actions on small entities. The Committee does not find that objections raised by the courts and federal agencies – that indirect economic effects cannot be measured with any accuracy – valid. The RFA, as already noted, was modeled on NEPA, in effect forcing agencies to perform an economic impact statement. The Committee believes that the parallels between NEPA and the RFA should include the scope of the effects examined.

According to the regulations promulgated by the Council of Environmental Quality (CEQ),[23] the term "effect" means:

> (a) Direct effects, which are caused by the action and occur at the same time and place.
> (b) Indirect effects, which are caused by the action and are later in time or further removed in distance by are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

40 C.F.R. § 1508.8. The CEQ regulations go on to state that the term "effects" includes economic effects whether direct, indirect, or cumulative. *Id.* Agencies have had to comply with these regulations for nearly a quarter of century. If federal agencies are capable of developing estimates of indirect effects of major federal actions for purposes of NEPA, the agencies should be capable of developing the same estimates for compliance with the RFA. This conclusion is buttressed by the fact that major federal actions, for purposes of NEPA, include rulemakings. *Id.* at § 1508.18; *see also Cellular Telephone Taskforce v. FCC*, 205 F.3d 82, 94 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001). Thus, federal agencies already are estimating the indirect effects, including economic impacts,[24] of some of their regulations in order to comply with NEPA. Given that requirement, the Committee is of the opinion that extending the NEPA

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[23] These regulations are given substantial deference by the courts. *See Robertson v. Methow Valley Citizens Ass'n*, 490 U.S. 332, 356 (1989); *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979). It is important to note that the Court gives these regulations substantial deference even though CEQ issued the rules pursuant to an Executive Order issued by President Carter since NEPA had no statutory authorization for CEQ to do anything other than monitor agency compliance with NEPA.

[24] CEQ regulations define effects of major federal actions to include economic and social impacts. 40 C.F.R. § 1508.8.

requirement to the RFA would not constitute a hardship that federal agencies contend it would be to estimate indirect economic impacts.[25]

Section 2(b) adopts a definition of "economic effect" that parallels the definition of "effect" utilized by CEQ in its NEPA regulations. The definitions of "direct" and "indirect" (especially as it relates to foreseeability of economic consequences) effects have the same meaning as that developed by CEQ and the courts for interpreting the requirements of NEPA.

Subsection (c) – Rule with Beneficial Effects

A regulatory flexibility analysis must be prepared whenever an agency finds that a proposed or final rule will have a significant economic impact on a substantial number of small entities. The statute does not limit the economic impacts to only adverse consequences although § 604 requires a final regulatory flexibility analysis to include a discussion of an agency's efforts to minimize the significant economic impacts of the final rule but requires no discussion of an agency's efforts to maximize beneficial impacts. This limitation on the analysis also falls within the parallelism to NEPA which only requires agencies to examine alternatives that will mitigate adverse environmental consequences.[26] Thus, agencies have interpreted this requirement as obviating the need to perform a regulatory flexibility analysis when the impact of a rule will be significant but beneficial.

This interpretation is incorrect, but it is easy to comprehend how agencies reached the conclusion based on § 604's failure to require a discussion of efforts made to maximize beneficial effects. Despite the absence of such a mandate, such an analysis would be useful because it forces the agency to examine whether it has selected an alternative that maximizes the benefits to small entities. If everything is *ceteris paribus*, an agency should select an alternative that maximizes

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[25] Numerous parties, but especially federal agencies, opined that authorizing direct judicial challenges to RFA compliance would be akin to cracking open Pandora's jar and prevent federal agencies from performing their regulatory functions. As the statistics on estimated number of RFA lawsuits demonstrate, the "sky-is-falling" clamor from federal agencies was nothing more than, as Macbeth might have put it, sound and fury signifying nothing. In short, the contentions of federal agencies are akin to Getrude's sentiment in Hamlet about ladies doth protesting too much.

[26] Even though NEPA refers only to mitigation efforts of adverse environmental consequences, beneficial impacts on the environment from various alternatives of the major federal action are discussed in an environmental impact statement. This especially is true when an agency prepares an environmental impact statement for regulatory changes that have the consequence of lowering the amount of pollutants that can be released into the environment. Furthermore, CEQ regulations contemplate that a cost-benefit analysis might be relevant to the decisionmaking process. 40 C.F.R. § 1502.23.

any beneficial economic effect on small entities[27] because small entities (except in very unusual circumstances) will represent the vast majority of entities subject to a particular regulation.[28]

Section 2(c) eliminates this confusion by requiring that agencies consider the impact of regulations even if they have a beneficial effect. Under this subsection, a regulatory flexibility analysis will be performed whenever the economic impacts of the proposed or final rule is significant without regard to whether the impacts are positive or negative. This amendment will require agencies to assess alternatives that either mitigate negative economic impacts or enhance positive economic effects. Finally, this subsection should be interpreted to prevent agencies from certifying proposed or final rules when the impacts are significant but beneficial.

Subsection (d) – Rules Affecting Tribal Organizations

Under the current definitions in the RFA, small governmental jurisdictions are those with populations of less than 50,000. The definition typically includes governmental bodies whose power is delegated by the state such as municipalities, water districts, etc. Given the intent of the original legislation to focus on the impact of regulations on entities that are creatures of state governments, it is unclear whether the term "governmental jurisdiction" includes tribal organizations. They are sovereign entities that have a special relationship with the federal government. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). The federal government regularly imposes various and often significant regulatory requirements on tribal organizations from those related to the operation of tribal organizations to environmental controls. Despite the imposition of diverse regulatory requirements on tribal organizations, federal agencies fail to perform regulatory flexibility analyses on regulations affecting tribal organizations. The failure to comply with the RFA is particularly troubling because tribal organizations, like many small governments, do not have the infrastructure or resources to interpret and comply with federal regulatory requirements.

Given the adverse consequences on tribal organizations from the failure to comply with the RFA, section 2(d) adds tribal organizations to the list of small governmental entities that fall within the ambit of the RFA. Federal agencies would have to perform a regulatory flexibility analysis on any proposed or final rule if it had significant economic effects on a substantial number of small tribal organizations, i.e., one with a population of less than 50,000. The term tribal organization has the same meaning as that used in § 4(l) of the Indian Self-Determination and Education Assistance Act.

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[27] This conclusion is supported by classical welfare economic theory which teaches that given the selection of a particular policy choice, the one selected should have the greatest ratio of benefits to costs. Such a selection constitutes the most efficient resource allocation.

[28] Under definitions utilized by the Small Business Administration, small businesses represent more than 95% of the businesses in nearly all of the industrial classifications established by the North American Industrial Classification System. Similarly, there are far more governmental jurisdictions with populations under 50,000 than those with more than 50,000.

Subsection (e) – Inclusion of Land Management Plans

The long-standing position of the Office of the Chief Counsel for Advocacy has been that land management plans developed by the United States Forest Service (Forest Service) and the Bureau of Land Management (BLM) are rules that are subject to analysis under the RFA.[29] GAO also reached the same conclusion.[30] Nevertheless, the Forest Service and BLM maintain that their resource management plans are not rules.[31] Given the potential consequences on small entities (both businesses that rely on the resources of the public lands and the communities that border those lands), the Forest Service and BLM should assess the impact of these plans on small entities under the RFA.[32]

Section 2(e) of the bill eliminates any questions by requiring the Forest Service and BLM to comply with the RFA when they are developing changes to resource management plans. Compliance is limited to the development of plans and revisions or amendments made thereto but only to the extent that the revisions or amendments require preparation of an environmental impact statement. This limitation is appropriate because minor changes to resource management plans that are not considered major federal actions and are unlikely to impose a significant economic impact on a substantial number of small entities. In contradistinction, preparation of environmental impact statements demonstrate that the proposed changes to the management plan

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[29] Letter from Acting Chief Counsel for Advocacy Mark Hayward to Chief of the Forest Service, F. Dale Robertson at 17 (May 16, 1991) (copy of letter available from the Committee's Chief Counsel). In the 1970s, Congress imposed requirements on BLM and the Forest Service to develop plans to guide and control the actions of the agencies in managing land under their jurisdiction. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 59 (2004) (describing land planning obligations of BLM); *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 729 (1998) (describing land management plans of Forest Service).

[30] GAO, CONGRESSIONAL REVIEW ACT: APPLICATION TO THE TONGASS NATIONAL FOREST LAND AND RESOURCE PLAN 2 (1997) (T-OGC-97-54).

[31] The Forest Service gain some sustenance from the Supreme Court's decision in *Ohio Forestry Ass'n*. In that case, the Court held that a challenge to a forest management plan's logging schedule was not ripe because the logging set forth in the plan was subject to further review and revision, including a site specific analysis. The Court contrasted that with the immediacy and impact of a final rule. 523 U.S. at 737. Given the fact that the Federal Land Management Policy Act uses language very similar to that requiring forest management plans, courts would likely use the Supreme Court's decision in *Ohio Forestry Ass'n* to reach a similar conclusion about BLM's land management plans. *See* text accompanying discussion of subsection 2(a), *supra*. Even though the legal consequences may not satisfy the ripeness requirement under Article III of the Constitution, forest management plans do guide the agency's management of the forests and thus will have economic and policy impacts that need to be weighed, including those on small businesses and small governmental jurisdictions.

[32] Both agencies typically develop environmental impact statements when making major modifications or developing new land management plans. As already noted, CEQ regulations, 40 C.F.R. § 1508.8 requires agencies to consider economic effects (both direct and indirect) in their environmental impact statements. As a result, no rational argument exists for concluding that analysis under the RFA would delay the development of a new plan or the adoption of a major modification to such plan.

will be significant. Since BLM and the Forest Service already will have to collect economic data to prepare an adequate environmental impact statement, analysis under the RFA will not pose any undue burdens on the agencies. Finally, this limitation ensures that BLM and the Forest Service will conserve their analytical resources to focus on those plan changes that would have the greatest significance to small entities.

Subsection (f) – Inclusion of Certain Interpretative Rules of the IRS

The RFA only applies to those regulations that are required to be published pursuant to notice and comment rulemaking by either § 553 of the APA or some other statute. Section 553 of the APA exempts interpretative rules from the notice and comment requirements. The Internal Revenue Service (IRS) issues numerous regulations but styles them as interpretative. Prior to the enactment of the SBREFA, the IRS determined that it was not required to comply with the RFA because their regulations were interpretative and therefore need not be issued pursuant to notice and comment rulemaking.[33]

Congress attempted to rectify the situation with the enactment of SBREFA by requiring IRS compliance with the RFA for any interpretative rule issued that imposes a collection of information requirement on small entities. The IRS has interpreted this amendment by limiting its application, not to any regulation that imposes a collection of information (a term taken directly from the Paperwork Reduction Act), but only on those regulations that require taxpayers to complete a new, never-used form. At a hearing of the Committee on Small Business on May 1, 2003, then Assistant Secretary for Tax Policy, the Honorable Pamela F. Olson, testified that the Department of Treasury and the IRS do not consider that they impose any collection of information requirements; rather collection of information requirements, as well as tax burdens,

[33] The fact that the IRS voluntarily seeks comment on proposed rules does not create a mandate that the agency is required to issue the regulations after notice and comment. *Cf. Chrysler Corp. v. Brown*, 441 U.S. 281, 306-10 (1979) (noting that agency going beyond requirements in statute does not create justiciable right in court).

are imposed by Congress rather than the agencies.[34] This has been a longstanding position of the Treasury Department and the IRS.

The Office of the Chief Counsel for Advocacy has criticized that jejune interpretation. The authors of H.R. 527 also consider the IRS interpretation to violate the letter and the prophylactic intent of SBREFA.[35] The RFA's definition of the term "collection of information" is identical to that used in the Paperwork Reduction Act. There is no evidence that Congress intended the term "collection of information" to mean something different in the RFA than it does in the Paperwork Reduction Act. *Cf. Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932); *United States v. Blasini-Lluberas*, 169 F.3d 57, 63 (1st Cir. 1999) (same term in different statutes have same meaning unless legislative history demonstrates to the contrary). The

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[34] This position is contradicted by the Service's litigation position that its regulations should be given deference that is accorded only to those rules for which the agency intended to have the force and effect of law, i.e., thereby actually making law. *E.g., Landmark Legal Foundation v. IRS*, 267 F.3d 1132 (D.C. Cir. 2001); *Fior D'Italia v. United States*, 242 F.3d 844 (9th Cir. 2001); *Callaway v. Commissioner*, 231 F.3d 106 (2d Cir. 2000); *Snowa v. Commissioner*, 123 F.3d 90 (4th Cir. 1997).

Commentators have noted that the Internal Revenue Code is replete with straightforward delegations requiring the IRS to promulgate regulations. J. COVERDALE, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35 (1995). For example, § 385 of the Code provides: "[t]he Secretary is authorized to prescribe such regulations as may be necessary ... to determine whether an interest in a corporation is to be treated ... as stock or indebtedness...." In response to a question from then-Chairman Donald A. Manzullo (R-IL), Assistant Secretary Olson stated that any regulations implementing § 385 were interpretative. However, no one would doubt that if a corporation did not follow the regulations promulgated pursuant to that section, the Service could find the taxpayer to be in violation of the law. Similarly, if the taxpayer failed to comply with the regulations adopted by the Secretary concerning the time for depositing taxes set forth in regulations adopted by the IRS pursuant to § 6302, the taxpayer would find itself facing significant penalties. Nevertheless, the IRS maintains that the regulations are interpretative despite the fact that the Service is exercising its discretion when taxes are to be deposited or what constitutes indebtedness.

The Service's intransigence and aberrant interpretation of the APA is further placed in stark relief by comparison to similar statutes. For example, Title V, Subtitle A of Gramm-Leach-Bliley provides: [t]he Federal Trade Commission [FTC], ... may prescribe regulations clarifying or describing the types of institutions which shall be treated as financial institutions for purposes of this subchapter." 15 U.S.C. § 6827(4)(E). This permissive authority enables the FTC to include other institutions, including credit reporting agencies, as financial institutions, even though they were not enumerated in the definitions of financial institutions. This authority is no different than the supplementation that the IRS in §§ 385 and 6302 found to be interpretative. Yet, the FTC argued and the court agreed that the regulations classifying credit reporting agencies as financial institutions were valid legislative regulations with the force and effect of law subject to *Chevron* deference. *Individual Services Reference Group v. FTC*, 145 F. Supp. 2d 6 (D.D.C. 2001). There is no rational distinction between the permissive authority in Gramm-Leach Bliley and the permissive authority in the Internal Revenue Code. Thus, many of the regulations implementing the Code are legislative in nature and burdens are imposed by the Service.

Nevertheless, nothing in H.R. 527 attempts to make a priori determinations of what regulations should be considered legislative in nature. Nor do the authors of the bill attempt to resolve the murky administrative law problem of distinguishing between legislative and interpretative rules.

[35] OIRA is charged with interpreting and implementing the Paperwork Reduction Act. 44 U.S.C. § 3504. Thus, the IRS is not the implementing agency. As such, its interpretation of that Act is not entitled to any deference. *Professional Reactor Operator Soc'y v. NRC*, 939 F.2d 1047, 1051 (D.C. Cir. 1991).

evidence of identical treatment of the term in the two statutes is evidenced by Congress incorporating into the RFA the exact definition of the term "collection of information" as it is used in the Paperwork Reduction Act. In addition, it would be illogical to assume that Congress did not intend the term "collection of information" from the two statutes to be coextensive because Congress was making a legislative modification designed to force IRS compliance with the RFA. Clearly, Congress, given the testimony in hearings on RFA compliance and reports of the Chief Counsel for Advocacy concerning IRS compliance, that it would adopt a definition of the term that authorizes the current crabbed interpretation of the term "collection of information." Nor do the authors accept the principle that the IRS does not itself impose collection of information requirements not otherwise specified in statute.

Of all the agencies that have protested and contested the application of the RFA to rulemakings, the IRS remains the most recalcitrant. The Service believes that its obligations to collect revenue supersede any mandates from Congress that the IRS considers interference with its statutory mission. The Constitution vested legislative power with Congress not the IRS and the Service has no authority to ignore those dictates. Hearings before the Committee on Small Business, comments from the Office of the Chief Counsel for Advocacy, comments from the Office of the Chief Counsel for Advocacy, and directives from Presidents Bush and Obama have not changed the intransigent position of the IRS or Treasury Department on RFA compliance. H.R. 527 represents the congressional response to the obstinacy of the IRS.

Section 2(f) eliminates the IRS interpretation that it need only comply with the RFA if it is imposing a new form. The subsection also recognizes that the IRS believes that Congress is imposing the collection of information requirements. Therefore, the bill takes the approach that requires compliance with the RFA whenever the Service intends to codify a regulation in the Code of Federal Regulations and the regulation or statute that the regulation is interpreting imposes a collection of information requirement.

The modifications to § 603 should not be viewed by the IRS as limiting its economic analysis simply to the cost associated with the "collection of information." Rather, the "collection of information" simply acts as a trigger for the broader assessment of economic effects of the proposed and final rule. This would include any increases or decreases in payment of taxes resulting from the rule.

The authors of the bill reject out of hand the IRS' contention that the true economic effect of its regulations stem from the Internal Revenue Code. There are a number of instances in which the IRS argues that its regulations are substantive and deserve *Chevron* deference. *E.g.*, *Bankers Life and Cas. Co. v. United States*, 142 F.3d 973, 978 (7th Cir.), *cert. denied*, 525 U.S. 961 (1998) (explicating cases in which IRS requested *Chevron* deference). Since the Supreme Court accords *Chevron* deference only to agency pronouncements which are intended to have the force and effect of law in order to fill statutory gaps or resolve legislative ambiguities, *United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2001), the IRS cannot be heard to argue that its regulations are unable to create or eliminate the payment of taxes. To give a more recent example, the IRS

decided to propose a regulation that would eliminate an exemption the agency itself created for special mobile machinery. 67 Fed. Reg. 38,913 (June 6, 2002). Eliminating the exemption would add hundreds of millions of dollars in tax burdens to companies not currently paying certain excise taxes. For the IRS to argue that the economic effects of its regulations stem solely from the strictures of Congressional mandates is disingenuous.

Nor is it likely that compliance with the RFA will slow the issuance of IRS regulations. Taking the example of the special mobile machinery exemption, the IRS easily could have determined the total revenue that the Highway Trust Fund would receive from the elimination of the exemption based on the aggregate data it obtains when businesses file for excise tax rebates (this data also would provide an accurate estimate of the revenue impact of excise tax payments for vehicles currently exempt). The IRS should not be exempt from this basic requirement of rulemaking (understanding the scope of the problem and the effect of the proposed solution). Obtaining similar aggregate data to comply with the RFA should not slow the development of regulations.[36] In fact, without this data, the IRS could not make sensible estimates of the amount of revenue gain or loss that would occur with a particular regulatory change. The argument that compliance with the RFA would slow regulatory development is a red herring and certainly is an inadequate rationale for supporting the current IRS practice with respect to RFA compliance.

This conclusion is bolstered by by the testimony of Frank Swain at the Committee's May 1, 2003 hearing on RFA compliance by the IRS in the 108th Congress. At that hearing, Mr. Swain revealed that the Service had in its possession a study it requested from the Federal Highway Administration on the economic impact of removing the special mobile machinery regulation. The study by the Federal Highway Administration was dated 1999 and the IRS did not promulgate a proposed rule on eliminating the exemption until the summer of 2002, nearly three years later. Thus, the assertion that the completion of regulatory analyses will slow the development of regulations is, at best, specious.

The RFA adopted the definitions in the Paperwork Reduction Act for the terms "collection of information" and "recordkeeping requirement." Despite the identical nature of the definitions in the two pieces of legislation, some agencies, particularly the IRS, might argue in court the use of the terms in the two statues have different meanings. *See Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) (noting that Congress may use similar terms in different statutes to have different meanings).

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[36] To the extent that the IRS needs to promulgate a regulation in an emergency situation, it can find good cause to forgo rulemaking and issue its regulation without analysis under the RFA. This exemption should be used sparingly by the Service because compliance with statutory mandates or the agency's own inaction fails to meet the "good cause" exemption in the APA. *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982); *Nat'l Ass'n of Farmworkers Organizations v. Marshall*, 628 F.2d 604, 622 (D.C.Cir. 1980). In fact, the Ninth Circuit has determined that notice and comment rulemaking can be conducted in situations in which an agency is required to issue rules on a weekly basis something the IRS does not have to do. *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1486-87 (9th Cir.), *cert. denied*, 506 U.S. 999 (1992).

The authors of SBREFA, in 1996, always intended that the terms utilized in the Paperwork Reduction Act to have the same meaning as that in the RFA. To eliminate potential confusion, § 2(f)(2-3) repeals the definitions in § 601(7-8) and simply cross-references to the relevant portions of the Paperwork Reduction Act as set forth in title 44 of the United States Code. This eliminates any possibility that a court would apply a different interpretation to the RFA's use of the terms "collection of information" and "recordkeeping requirement." Although used for slightly different purposes,[37] the palliative nature of both statutes, with respect to burdens on regulated entities, clearly justifies the application of the *in pari passu* canon of statutory construction[38] to the terms "collection of information" and "recordkeeping requirement."

Subsection (g) – Definition of Small Organization

As already noted, the RFA covers small entities other than small businesses. The RFA defines a small organization as "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field...." 5 U.S.C. § 601(4). That definition fundamentally makes no sense because there is no rational way to determine a not-for-profit's independence or economic dominance. The definition raises a number of practical questions. For example, on a local level, a rural electric cooperative might be considered dominant in the sense that it is the only provider of electric service in a rural area. However, on a national basis,[39] is the rural electric cooperative dominant? Should the electric cooperative be compared with other electric cooperatives or with all other businesses in the electric utility industry? While some industries may have for-profit analogs, other small entities, such as charitable institutions or trade associations that can be adversely affected by federal regulations, do not. Furthermore, affiliation standards that the SBA uses in its size determinations may not be applicable in the not-for-profit sector, such as whether a trade association should be affiliated, for size determination purposes, with its members or whether a charitable institution is independently owned and operated by its donors.

In a different context, the courts have grappled with the notion of independence of not-for-profit entities. The Equal Access to Justice Act (EAJA) permits certain small entities to recover their legal fees should they prevail in litigation against the federal government. EAJA classifies eligible parties as one that does not have a net worth in excess of $7,000,000 or more than 500

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[37] In the Paperwork Reduction Act, the terms trigger a mandatory review of the paperwork burdens imposed by the government on citizens. In the RFA, it triggers a mandatory review of the economic burdens imposed by the IRS on small entities. Both statutes, therefore, are designed to force agencies to examine ways to reduce burdens on the regulated community.

[38] *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 691 (1983) (applying *in pari passu* construction of various federal attorneys fee shifting statutes).

[39] The Small Business Administrator determines size based on an examination of small businesses on a national basis. 13 C.F.R. § 121.102(b). H.R. 585 addresses the issue of size determinations for purposes of the RFA and other regulatory matters that fall outside the scope of the Small Business Act and Small Business Investment Act of 1958. That legislation will be discussed in Part III of this memorandum.

employees. Under EAJA, the question then becomes whether an entity requesting attorneys fees from the government actually fits within its zone of protection. Courts, in trying to answer this question, have wrestled with the concept of affiliation by assessing whether the small entity is affiliated with larger enterprises in a manner that defeats the purpose of the EAJA – ensuring that only small entities that do not have the financial wherewithal to sue the federal government receive attorneys fees if they prevail in litigation.

One interpretation, adopted by the Sixth Circuit, would require complete aggregation of members net worth and employees to determine EAJA eligibility.[40] The second intepretation, proffered by the federal government on a frequent basis, is that a trade association should be ineligible if any of its members exceed the net worth and employee standards.[41] This interpretation of EAJA has been rejected by the D.C., Fifth, and Seventh Circuits.[42] These circuits determined that EAJA eligibility should be calculated by looking solely at the organization that brings the litigation, its net worth, and number of employees.

Given the prophylactic nature of both the EAJA and the RFA with respect to small entities, it would make sense to apply the interpretations of the EAJA to the RFA. Thus, one definition of "small organization" would be to adopt the definition of small entity used by the Sixth Circuit. However that approach is incompatible with the purposes of the RFA because the capabilities of a small organization to comply with regulations is not based on the resources of its members but rather on the number of employees and net worth the organization controls.[43] Since the small organization does not control or have direct access to the net worth of its members, it should be judged on solely on its resources and not those of its members or donors.

Section 2(g) adopts a two-prong approach to the definition of small entity. First, it recognizes that for many not-for-profit organizations there are small for-profit analogs. If there is an existing Small Business Administration size standard for a small business, the agency should use that definition for small organizations. For example, the size standard for electric utilities is one that generates, transmits, or distributes annually 4 million megawatt hours and a small not-for-profit electric cooperative would be one that generates, transmits or distributes annually 4 million megawatt hours. If an organization does not have an equivalent size standard under Small

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[40] *National Truck Equipment Ass'n v. NHTSA*, 972 F.2d 669, 674 (6th Cir. 1992).

[41] *See* Comment, *Corporate Goliaths in the Costume of David: The Question of Association Aggregation under the Equal Access to Justice Act – Should the Whole be Greater than its Parts?* 26 FLA. ST. U.L. REV. 151 (collecting cases in which federal government argued for aggregation).

[42] *National Ass'n of Manufacturers v. DOL*, 159 F.3d 597, 602 (D.C. Cir. 1998) (discussing circuit split).

[43] While there is some facial appeal to the concept that a small organization could seek assistance from its members (probably through the payment of higher dues), there is no guarantee that it would be able to do so. And even if it did, depending on the makeup of the organization, that could impose additional burdens on small businesses that might be members of the organization which undercuts the palliative purpose of the RFA.

Business Administration regulations, then the size of the entity shall be that under the EAJA – net worth of $7,000,000 and not more than 500 employees. Net worth and number of employees should be calculated by examining the not-for-profit organization without aggregating or affiliating the net worth or employees of any member or donor.

Section 2(g) also provides a definition of small labor organization since they have unique characteristics that do not easily fall into any other category of small organization as used in the RFA or H.R. 527. Agencies do not examine the impact of their regulations on local chapters of national and international labor unions. As with other small organizations, local chapters may not be able to rely on the resources of their of parent organizations for compliance assistance. Therefore, § 2(g) deems that a local chapter of a labor union shall be a small organization for purposes of compliance with the RFA without regard to its affiliation with a national or international labor organization. As a result, if the Department of Labor imposes a regulation on the operation of a labor union, the Department will have to consider its impact on these local chapters even if they are considered to be affiliated with a national or international union. However, the agency need not consider the impact of the regulation on individual members of the local labor union since it is the entity (not the members) subject to the regulation.[44]

Finally, § 3(g) authorizes an agency to adopt a different definition of small organization after the opportunity for notice and comment to the extent such different definition is appropriate. The subsection also requires consultation with the Office of the Chief Counsel for Advocacy. Essentially, the process for defining small organizations would be identical to that already in the RFA for small businesses under § 601(3).

Section 3. *Requirements Providing for More Detailed Analyses*

Senator Culver, in developing the concept for the RFA, was attempting to mirror the type of in-depth analyses that agencies performed under NEPA when assessing the impact of major federal actions that would have a significant impact on the environment. The language of the two statutes are sufficiently parallel to the point that it makes sense to draw a conclusion that the RFA creates a requirement for an economic impact statement for federal rules that will have a significant economic impact on a substantial number of small entities.

This thesis has been accepted by the courts. In *Associated Fisheries of Maine v. Daley*, 127 F.3d 104 (1st Cir. 1997), Judge Selya, writing for the court, stated:

> We think a useful parallel can be drawn between RFA § 604 and the National Environmental Policy Act, which furthers a similar objective by requiring the preparation of an environmental impact statement (EIS).... The EIS requirement is meant to inform the

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[44] Nor would the agency have to consider the indirect effects on the individual members since those individual members are not an entity, i.e., small business, small non-profit, or small governmental jurisdiction.

> agency and the public about potential alternatives prior to a final decision on the fate of a particular project or rule.... Recognizing analogous objectives of the two acts....

Id. at 114. Judge Selya noted that the analogy seemed fair since the EIS requires a detailed statement while the RFA only requires a statement. The rectitude of Judge Selya's reading by D.C. Circuit adoption of the parallelism finding.[45]

NEPA's success in changing agency culture did not occur immediately after enactment because agencies were initially loath to prepare environmental impact statements and upset embedded constituencies that benefitted from various federal projects. Activists who disagreed with the need for a particular project used NEPA to stop the projects from going forward. While the Supreme Court ultimately determined that NEPA is not a substantive statute, *see Stryckers Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980), the litigation losses by the government forced agencies to draft better environmental impact statements. The litigation reinforced the underlying principle of NEPA that "important effects will not be overlooked or underestimated only to be discovered after the resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989).

After a number of hearings before various House and Senate Committees, Congress determined that agencies were ignoring their responsibilities under the RFA. The solution recommended by witnesses and ultimately adopted by Congress was judicial review of agency compliance with the RFA. SBREFA was premised on the threat of judicial review creating an atmosphere that would force agencies to comply with the RFA in the same manner and with the same completeness that agencies considered environmental impacts to avoid challenges of their compliance with NEPA. In other words, the authors of SBREFA expected that important economic consequences to small entities would not be overlooked prior to an agency's commitment to a specific regulatory approach. The end-result is not analysis for analysis sake, but rather more rational rulemaking as dictated by the APA.

The imposition of judicial review has not had the salutary effect that Congress expected. While it has been effective in forcing agencies to perform regulatory flexibility analyses rather than certifications,[46] the majority of analyses are perfunctory. The agencies comply with the bare minimum specifications without really addressing the important issues – impacts on small entities and alternatives to minimize those impacts. However, this minimalist effort appears to satisfy the standard of demonstrating a reasonable effort to comply. A cursory look at a court's

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[45] *National Ass'n of Homebuilders v. United States Army Corps of Eng'rs*, 417 F.3d 1272, 1286 (D.C. Cir. 2005).

[46] Courts have found violations of the RFA when an agency incorrectly certified a rule rather than preparing a regulatory flexibility analysis. *E.g.*, *Harland Land Co. v. USDA*, 186 F. Supp. 2d 1076, 1097 (E.D. Cal. 2001); *North Carolina Fisheries Ass'n v. Daley*, 16 F. Supp. 2d 647, 652 (E.D. Va. 1997).

analysis of the adequacy of an environmental impact statement demonstrates the distinction between a statement pursuant to the RFA and detailed statement required by NEPA.

Judicial review of agency compliance with NEPA is designed to ensure that agencies take a "hard look" at environmental consequences. *Robertson*, 490 U.S. at 350, citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). In turn, courts carefully scrutinize the environmental impact statement to determine whether the agency has addressed each element of the statement:[47] the environmental impact of the proposed action; any unavoidable adverse environmental consequences should the proposed action be implemented; alternatives to the proposed action; relationship between short and long-term uses of the environment; and commitment of any irreversible and irretrievable commitments of resources should the proposal be implemented. 42 U.S.C. § 4332(2)(C). Courts do not look at the statement as whole and determine whether the agency made a reasonable effort to address the requirements of NEPA. Instead, the courts examine, in detail, each requirement to determine whether the statement adequately addresses that element. *E.g.*, *Colorado Env'tl Coalition v. Dombeck*, 185 F.3d 1162, 1171-76 (10th Cir. 1999); *City of Carmel-by-the-Sea v. United States DOT*, 123 F.3d 1142, 1150-60 (9th Cir. 1997). The close scrutiny accorded to environmental impact statements by the courts then ensures significant consideration of environmental consequences.

There can be little doubt that the reasonableness standard is appropriate for judicial review of regulatory flexibility analyses. However, the absence of the "detailed" statement requirement has led courts to provide only a cursory review of compliance with the requirements of § 604 of the RFA. The limited scope of the review to meet the standard of reasonableness has enabled agencies to avoid taking hard look at the economic consequences of their proposed and final rules. Carrying the distinction found by Judge Selya in *Associated Fisheries of Maine*, to its logical conclusion suggests that the difference in the scrutiny between the two statutes rests on the distinction between a "statement" and a "detailed statement."

Section 3 modifies the requirements for preparing a regulatory flexibility analysis in order to ensure that agencies will give the same "hard look" to economic consequences that agencies already give to environmental effects pursuant to NEPA. Adoption of this stronger standard does not transform the RFA into a decision-forcing statute. Once the agency has taken the "hard look" at the economic consequences of its rulemaking action, application of the rational rulemaking standards inherent in the APA would strongly suggest that the agency take those consequences into account when crafting a final rule. However, nothing in the RFA mandates a particular regulatory outcome and nothing in H.R. 527 changes that abecedarian tenet of the RFA. The agency is at liberty to determine that other values outweigh the economic burdens imposed on small entities. *Cf. Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28

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[47] The review is an offshoot of the requirement that agencies must consider all relevant statutory factors in order to satisfy the rational decisionmaking standard of the APA. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 418-19 (1971).

(1980); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978) (holding that NEPA does not require agency to select least environmentally damaging alternative).

Subsection (a) – IRFAs

Section 3(a) amends § 603 by requiring the initial regulatory flexibility analysis (IRFA) to contain a "detailed statement" rather than a statement. This should lead agencies to prepare IRFAs with the same detail and care that are currently required for draft environmental impact statements.

Currently, an agency, in preparing an IRFA, must provide: 1) the rationale for undertaking the proposed rule: 2) a succinct statement of the objectives and legal basis for the rule; 3) a description and estimate, where practicable, of the number of small entities affected by the proposed rule; 4) a description of the reporting and recordkeeping requirements along with an estimate of the skills needed to comply with such requirements; 5) an identification to the extent practicable of overlapping or duplicative federal rules. 5 U.S.C. § 603(b). In addition to these requirements of subsection (b), the IRFA also must contain alternatives that will minimize adverse or maximize beneficial effects of the proposed rule. *Id.* at § 603(c).[48] H.R. 527 makes a number of changes and additions to these analytical requirements as will be outlined below.

H.R. 527 strikes the term "succinct" from § 603(b)(2) to avoid possible confusion between an overall requirement of a detailed statement and the use of a "succinct" statement of the objectives of the rule. Federal agencies will not have to create something new for this statement. Rather, they will be able to simply take the summary of the rule that is prepared for publication in the Federal Register and add the legal basis (if not already incorporated in the summary) and republish it in the IRFA.[49]

Section 603(b)(3) of the RFA currently requires the IRFA contain, when feasible, a description and an estimate of the number of small entities affected by the proposed rule. This requirement provides a substantial loophole for agencies to comply with the RFA. The Office of Advocacy calculates that there are more than 25 million small businesses in the United States based on aggregate data from the IRS. Size standards established by the Small Business Administration demonstrate that more than 95% of the businesses in each industrial classification are small. Thus, most entities subject to any regulation are likely to be small. An agency that fails to provide a relatively accurate estimate of the number of small entities affected by a proposed rule, cannot undertake rational rulemaking because the agency has no idea of the scope of the affected universe. The failure to provide an accurate estimate of the number of small entities affected would be akin to a federal agency stating that it has no way to determine the environmental

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[48] Nothing in H.R. 527 affects the requirements in the IRFA under § 603(c).

[49] This also comports with the change made by the Small Business Jobs Act of 2010 in which the reference to term "succinct" were deleted from § 604. Pub. L. No. 111-240, § 1601, 124 Stat. 2504, 2551.

consequences of building a dam on a river and therefore cannot complete an environmental impact statement. Such a rationale would not be accepted by any court and agencies should not be able to shirk their duty to understand the scope of the regulated universe simply because they might have to gather actual data on the number of small entities. As a result, § 3(a) strikes the term "where feasible." in its redraft of § 603(b)(3).[50]

The current requirement for completion of an IRFA requires the agency to identify, to the extent practicable, all relevant duplicative, overlapping, and conflicting rules. 5 U.S.C. § 603(b)(5). As with the requirement for estimating the number of small entities, the proviso "to the extent practicable" creates a loophole that allows the agency to prepare an irrational rule. Two classic examples elucidate the problem. The ergonomics standard established by the Department of Labor in 2000 (and subsequently overturned by a joint resolution pursuant to the Congressional Review Act) mandated that businesses develop plans to eliminate musuclo-skeletal disorders. One way to perform this task in skilled nursing facilities is to purchase mechanical lifts for patients. However, regulations promulgated by the Centers for Medicare and Medicaid Services (CMS) permit a patient to reject being lifted by mechanical device. Nothing in the final ergonomics rule or the final regulatory flexibility analysis (FRFA) addresses this potential conflict because the Department of Labor never identified the CMS rules as creating a problem. Another example involves the requirement for notifying communities of underground storage facilities pursuant to § 312/313 of the Emergency Planning and Community Right to Know Act. EPA required gas stations to notify EPA that they had underground storage tanks with gasoline so EPA could provide that information to local communities. However, this information already was being provided to local fire departments under other regulatory regimes. The Office of the Chief Counsel for Advocacy had to intervene before EPA redressed the duplicative reporting requirement. Had EPA actually made the effort to comply with the RFA, it would have identified the duplication and avoided promulgation of an additional reporting burden on small businesses.

It is difficult to understand how an agency can draft rational rules without knowing how its proposed or final regulatory solution will mesh with other existing federal requirements imposed by itself or other agencies. While the Office of Information and Regulatory Affairs in the Office of Management and Budget (OIRA) can play a role in identifying these overlaps and conflicts, the primary role must be the agency drafting the regulation because it is the agency that has the obligation to create a rational rule – not OIRA or the Office of Advocacy. Section 3(a) resolves

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[50] An agency might not be able to estimate the number of small entities when the agency is preparing a rule that opens up existing markets to new entrants or creates a new market. In such circumstances, there are no statistics on the number of small entities in that market. In such circumstances, it is probable that the agency, in preparing the proposed rule, has some sense of the number of potential new entrants from discussions with industry. Of course, such estimates will not have the precision that an agency should have when proposing a modification to an existing rule or imposing a new rule on a well-established industry. Nevertheless, an inaccurate estimate (with appropriate caveats concerning the lack of precision) is better than no estimate. Furthermore, the agency should recognize the lack of confidence in the estimate and make a specific request in its notice of proposed rulemaking for data on the number of small entities.

this problem by striking the "extent practicable" from the existing § 603(b)(5). Thus, an agency, in drafting proposed regulations, will have to identify duplicative, overlapping, and conflicting regulations. Obviously, agencies will need to start an interagency dialog in order to identify duplicative, overlapping, or inconsistent regulatory requirements. This should improve the rationality of agency rulemaking and prevent the tunnel-vision (the agency has to promulgate this rule so why concern itself with what other agencies have done) that federal regulators currently wear in implementing the directives of Congress. The new requirement in the IRFA also should assist OIRA in carrying out its regulatory coordination function set forth in E.O. 12,866.

Section 3(a) adds a new requirement for preparation of an IRFA. One of the biggest problems that small entities face is not the imposition of any one particular regulatory requirement; rather it is the accumulation of burdens from many regulatory requirements from all federal agencies that can have a significant effect on the capital available for small businesses to expand their enterprises. Any assessment of the impact of a rule on small entities, particularly small businesses, cannot be even reasonably accurate without understanding how the proposed rule interplays with the already extant burden on the entities subject to the regulation. To be sure, this assessment will be difficult. Section 3(a) adds a new paragraph (6) to § 603(b) that requires an evaluation of the cumulative impact or an explanation why such cumulative impact is not possible. It is likely that an agency would have to inquire with OIRA, the Office of Advocacy and other federal agencies to compile the cumulative economic impact data. As with other provision of the RFA, as amended by H.R. 527, nothing in the cumulative impact evaluation prevents an agency from determining that other factors are more significant than the costs imposed on small entities and continue with the rulemaking process. Identification will provide the agency, the affected public, and Congress with a better assessment of the implementation of statutory mandates. Furthermore, the identification may help the agency develop alternatives that impose less cumulative impact while still achieving an agency's statutory objective.

While the RFA requires identification of impacts on small entities, not all small entities are necessarily equally affected by a proposed rule. For example, many of the marketing orders established by the United States Department of Agriculture (USDA) pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608c,[51] will have different effects on producers, handlers (essentially wholesalers), and processors. Even within one class of growers, the regulations implementing marketing orders may have disparate impacts between independent growers and those associated with agricultural cooperatives. This simply represents one example of numerous regulations in which a proposed rule might have very different consequences on different classes of small businesses. In fact, the Office of the Chief Counsel for Advocacy criticized USDA for conflating various impacts of its rules on marketing orders to find that the proposed rule would not have a significant economic impact on a substantial number of small entities even though a class of small businesses would be severely harmed. To rectify this

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[51] A detailed discussion of marketing orders and the Regulatory Flexibility Act can be found in Pineles, *Marketing Orders and the Administrative Process: Fitting Round Fruit into Square Baskets*, 5 SAN JOAQUIN AG. L. REV. 89 (1995).

situation and force agencies to better understand the potential consequences of their proposed rules, § 3(a) of H.R. 527 adds a new paragraph (7) to § 603(b) of the RFA by requiring agencies to describe any disproportionate impact on small businesses[52] or a specific class of small businesses.

Subsection (b) – FRFAs

Section 3(b) amends the requirements for completing a FRFA. The changes made by the Committee to § 604 ensure the development of a detailed statement that forces agencies to give a "hard look" at the final rule stage to the economic consequences of the final rule. The bill adds the term "detailed" to the statement requirement where currently only a statement is required.[53] Use of the detailed statement in the preparation of a FRFA does not mandate any particular outcome in an agency rulemaking. Rather, it simply assures that an agency, the public, Congress, and the courts fully understand the scope and impact of a final rule on small entities. Furthermore, § 3(b) requires that the same seven analytical elements required in the IRFA by the amended § 603(b) be incorporated into the FRFA mandated by the amended § 604(b).

The changes made by § 3(b) also comports with the parallelism between the RFA and NEPA as noted by the First and D.C. Circuits. The expectation that the agencies, after the regulations issued by the Chief Counsel pursuant to § 4 of H.R. 527, and the courts will interpret in the same manner the term "detailed statement" currently contained in NEPA. The FRFA should evidence the agency's hard look at the economic consequences of the final rule and provide appropriate grist for the mill of judicial review.

Current law mandates the agency summarize, in the FRFA, the comments received in response to an IRFA. While it is true that all IRFAs lead to the preparation of a FRFA, not all FRFAs are developed in response to an IRFA. An agency may initially certify a rule pursuant to § 605(b) and then receive sufficient comment that the rule will have a significant economic impact on a substantial number of small entities. The agency then would prepare a FRFA. However, the agency would be under no obligation to summarize the comments that it received in response to the certification in the FRFA. This simply represents an oversight by the authors of the RFA and

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[52] The classic example of this situation occurred when the EPA was trying to determine whether to control volatile organic chemicals associated with filling gasoline tanks in cars. Evaporation of volatile organic chemicals from gasoline is a major contributor to ground level ozone and smog. There are two primary mechanisms for controlling such evaporation – modification of gasoline tanks in cars or by reconfiguring the fuel pump to prevent the escape of gasoline vapors as an automobile's gas tank is being filled. Modification of the fuel pump would disproportionately fall on small businesses while modifying the gas tank in cars would fall on big businesses. Although EPA ultimately selected the reconfiguration of gasoline station pumps (ergo the reason for the rubber hoses on the nozzles of gas pumps), had it needed to specifically identify the disproportionate impact on small businesses, it might have selected a different regulatory approach.

[53] In addition to removing the term "succinct" as already noted, *see* note 48, *supra*, the Small Business Jobs Act of 2010, also removed the term "summary" from § 604 of the RFA. Pub. L. No. 111-240, § 1601, 124 Stat. 2504, 2551.

SBREFA. An adequate FRFA should entail the summarization of comments received in response to a certification at the proposed rule stage. The process of summarization assists the Congress, the courts, and the regulated community in identifying those cost considerations that the agency failed to recognize at the proposed rule stage. The simple step of making an affirmative identification will help agencies perform better cost assessments at the initial stage of rulemaking and avoid unnecessary delays in the development of a final rule. Section 3(b) rectifies this problem by requiring the summarization of comments on a certification made at the proposed rule stage.

Current requirements in the RFA mandate federal agencies to publish the FRFA in the Federal Register or, in lieu thereof, a summary with information specifying where an individual can obtain the full analysis. Since the enactment of SBREFA in 1996, numerous initiatives within the government have utilized the explosive growth of the Internet and Internet-based communication. Many agencies participate in the general website for regulatory matters, www.regulations.gov. Agencies that do not participate in that website (many of the independent agencies, such as the Commodities Futures Trading Commission or the Securities and Exchange Commission) have their own electronic interfaces for accepting and publishing regulatory material on the web. Continued growth of electronic availability of rulemaking documents and dockets is beneficial for both small entities and federal agencies. Since the RFA has not been amended since the growth of Internet-based rulemaking access, § 3(b) updates the publication requirements for the FRFA by requiring that it be placed on the agency website. Publication on the agency's website and publication of the link to a website in the Federal Register notice of the final rule does not obviate the obligation that currently exists in the RFA to publish the FRFA or summary thereof in the Federal Register along with the final rule.[54]

Subsection (c) – Cross References to Other Analyses

In an effort to avoid duplication, federal agencies can use other analyses to meet the requirements of the RFA but only if that analysis satisfies the requirements of the RFA. For example, a federal agency can use an environmental impact statement to the extent that analysis assesses alternatives which would be less burdensome or more beneficial to small entities. *See Associated Fisheries of Maine*, 127 F.3d at 115. Utilization of existing analyses is beneficial by reducing the work done by the agencies and the documentation that small entities must review during the rulemaking process. Unfortunately, agencies fail to provide adequate cross-references to these other documents. For example, some agencies will state in their IRFA or FRFA that alternatives were examined to reduce the adverse consequences and a discussion can be found in the statement of basis and purpose. Generic cross-references then force interested small entities to wade through dozens, if not hundreds, of pages in the Federal Register or on an agency website to determine whether the IRFA or FRFA was adequate. The indefiniteness of the cross-

[54] H.R. 527 does not address whether publication on www.regulations.gov satisfies the requirements of the amended § 604. That issue is best left to the regulations that will be developed by the Office of the Chief Counsel for Advocacy.

references is especially problematic at the proposed rule stage because the inability to quickly identify alternatives will tend to dissuade small entities from filing comments. Section 3(c) resolves this problem by mandating that agencies make sufficiently specific cross-references to other analyses that satisfy the requirements of the IRFA or FRFA. The expectation is that the specificity must be sufficient so that a small entity can turn directly to the part of the cross-referenced analysis that addresses the component of the IRFA or FRFA.

Subsection (d) – Certifications

The RFA authorizes an agency head or delegatee to certify that a proposed rule will not have a significant economic impact on a substantial number of small entities. Certification obviates the need for preparation of an IRFA or FRFA[55] in the same way that a finding of no significant environmental impact (FONSI) eliminates an agency's preparation of an environmental impact statement.[56] After the enactment of the RFA in 1980, agencies frequently issued boilerplate certifications that merely reiterated the language of § 605(b).[57] Small entities had no way of ascertaining why these certifications were issued and courts were prohibited from even examining the certification as part of the rulemaking record.[58]

Congress attempted to rectify the problem of boilerplate certifications with the enactment of SBREFA. Since July 1, 1996, agencies are required to provide a factual basis for the certification. This amendment has not improved agency certifications. Many still reiterate the statutory language without further exegesis. Some refer back to other material in the statement of basis and purpose without identifying the cross-referenced material. Still others provide some factual basis for the certification. No agency provides the detail in its certification that can be found in an environmental assessment accompanying a FONSI. Given the fact that the RFA parallels NEPA (as already noted), it is appropriate for agencies to supply in their certifications, the same detail that accompanies an environmental assessment. Furthermore, requiring greater specificity and detail in the certification will force the agency to develop a better assessment of the potential economic effects on small entities before they publish a proposed rule. This should lead to improved agency decisionmaking.

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[55] Preparation of a certification at the proposed rule stage does not foreclose an agency from preparing a FRFA at the final rule stage due to comments filed after the proposed rule was published. The change in the agency position cannot be considered a failure; rather it demonstrates the principle of agency edification by the public inherent in the notice and comment process.

[56] 40 C.F.R. § 1508.13; *see Grand Canyon Trust v. FAA*, 290 F.3d 339, 342 (D.C. Cir. 2002).

[57] CHIEF COUNSEL FOR ADVOCACY, UNITED STATES SMALL BUSINESS ADMINISTRATION, ANNUAL REPORT OF THE CHIEF COUNSEL FOR ADVOCACY ON THE IMPLEMENTATION OF THE REGULATORY FLEXIBILITY ACT: CALENDAR YEAR 1993 15-16 (1994).

[58] *Lehigh Valley Farmers v. Block*, 640 F. Supp. 1497, 1520 (E.D. Pa. 1986) (district court determination on RFA was not addressed on appeal).

Section 3(d) amends § 605(b) by requiring the preparation of a detailed statement supporting the certification decision. The section also mandates that the agency provide the legal rationale for any certification as well as a factual basis. This requirement is unfortunately necessary because agencies frequently certify proposed and final rules based on the inapplicability of the RFA to the rulemaking process in the first instance. For example, agencies often certify a rule in which the agency has forgone notice and comment under the APA. The Committee believes that it is appropriate for an agency to explain to the both the small entity community and any reviewing court these legal conclusions about the basis for its decision.[59] If the FRFA is to be reviewed under the same standard as a final EIS prepared pursuant to NEPA, then the logical conclusion to the statutes' parallelism is for the certification under the RFA to be reviewed by a court under the same scrutiny that it would apply to a FONSI under NEPA.

Subsection (e) – Quantification Requirement

Section 3(e) modifies the existing requirements in § 607 of the RFA concerning the quantification of effects on small entities. Agencies are required to provide a numerical or descriptive analysis of the effects on small entities. Rational rulemaking requires an agency to understand the scope of the regulated community, the costs currently faced by those entities, and the economic consequences of any regulatory action. Under § 607, agencies can avoid developing sound numerical data and can provide general descriptions, such as the regulation will increase costs to small entities. The absence of objective numerical data makes it more difficult for small entities to assess the significance of any regulatory change. Agencies should make every effort to obtain objective data supporting a regulatory change including the estimated consequences to small entities.[60] Section 3(e) amends § 607 by making quantification of impacts the default in developing an assessment of impacts on small entities.

There may be circumstances in which it is difficult, if not impossible, to provide accurate quantification of a rule's impact on small entities. For example, if a regulation is opening a new market, the agency may not be able to determine the universe of potential market entrants. The agency then should not be forced to develop highly suspect numerical estimates of the impacts.[61]

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[59] Technically, it would be incorrect for the agency to certify a rule for which notice and comment is not required because the RFA trigger is notice and comment. Nevertheless, many agencies, out of an abundance of caution, certify these rules. If they are going to do so, then the agencies should be required to explain what they are doing and why they are doing it.

[60] The amendment set forth in § 3(e) is further supported by the enactment in 2000 of the Data Quality Act and that Act's requirement that agencies provide accurate data in all of their functions, including rulemaking. The Data Quality Act requires the Office of Management and Budget to issue guidelines to all agencies ensuring that the soundness of the data they present to the public. 44 U.S.C. § 3516 note.

[61] The inaccurate estimates would be subject to challenge under the Data Quality Act in any event. If the quantifiable effects are sufficiently suspect simply due to the paucity of available data, it makes no logical sense for

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New subsection (b) of § 607 of the RFA authorizes agencies to provide a more general description of the impacts on small entities if quantification is not practicable or reliable. The reliability factor in new subsection (b) should incorporate the standards of data established by each agency pursuant to the Data Quality Act. If an agency determines that it is unable to provide a quantification and still meet the criteria of the Data Quality Act, the agency shall provide a detailed statement explaining why it cannot provide the quantification. Ultimately, the quality and accuracy of the data will be the subject of regulations drafted by the Office of the Chief Counsel for Advocacy.

Section. 4. *Repeal of Waiver Authority and Additional Powers of Chief Counsel*

This section repeals the provision in § 608 authorizing the head of an agency to waive completion of a FRFA for up to 180 days if the agency cannot complete the FRFA by the time the rule needs to be published. In lieu of that waiver, H.R. 527 grants additional powers to the Office of the Chief Counsel for Advocacy.

Repeal of Waiver Authority

The RFA allows an agency to waive the requirements for an IRFA and delay for up to 180 days the preparation of a FRFA. This provision is unnecessary. Notice and comment rulemaking is not required if the agency, for good cause finds it impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. § 553(b)(B). The courts have interpreted this provision as authorizing an agency to forgo notice and comment rulemaking in true emergencies in which delayed promulgation would do real harm.[62] An agency that establishes good cause to forgo notice and comment need not comply with the RFA because the analytical requirements are only triggered if the rule must be promulgated pursuant to notice and comment rulemaking. The conditions under which a waiver would issue under § 608 of the RFA also satisfies the impracticable, unnecessary, or contrary to the public interest standard of § 553(b)(B) of the APA. Since agencies would not be required to comply with the RFA under such circumstances no good rationale exist to have such a waiver provision.

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[61](...continued)
the agency to quantify such effects only to have them challenged under the Data Quality Act and adds no benefit to an agency's rulemaking, its analyses under the RFA or to the small entities.

[62] *E.g.*, *NRDC v. Evans*, 316 F.3d 904, 911 (9th Cir. 2003); *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 754-55 (D.C. Cir. 2001); *Levesque v. Block*, 723 F.2d 175, 185 (1st Cir. 1983).

Revised § 608 – Additional Powers for the Office of the Chief Counsel for Advocacy

In two hearings on the Office of Advocacy, the Committee received testimony suggesting that the Chief Counsel for Advocacy's findings on compliance with the RFA should be accorded some type of deference.[63] The witnesses were responding to the D.C. Circuit's decision in *American Trucking Association v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *rev'd in part and aff'd in part, Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001). In that case, the D.C. Circuit stated: "[t]he SBA, however, neither administers nor has any policymaking role under the RFA; at most its role is advisory....Therefore we do not defer to the SBA's interpretation of the RFA." 175 F.3d at 1044, citing *Scheduled Airlines Traffic Offices v. Department of Defense*, 87 F.3d 1356, 1361 (D.C. Cir. 1996).[64] Absent some action by Congress, courts are unlikely to grant the Chief Counsel's interpretations of the RFA any deference. And if the courts do not do so, it also is highly improbable that other federal agencies will do so.

The situation clearly needs to be rectified. Obtaining deference of the RFA will substantially change the balance between the Chief Counsel and agencies in developing regulations. Currently, the Office of Advocacy simply must cajole the agencies to make regulatory modifications or otherwise revise their certifications or regulatory flexibility analyses. The Chief Counsel has little power to coerce changes that would be beneficial to small businesses or other small entities. However, an Office of Advocacy accorded deference in interpreting the RFA can represent, in conjunction with its authority to file amicus briefs in court, a substantial power to coerce regulatory modifications. If an agency does not comply properly with the RFA, the threat of the Chief Counsel "intervening" in court and expressing an opinion, which the court will give substantial deference, that the agency did not comply with the RFA could lead to a remand of the regulation. Therefore, the agency is likely to negotiate changes in RFA compliance that might in turn result in subsequent modifications to the rule that would reduce burdens on small entities.

One potential option would be to amend the RFA by mandating that courts and agencies give substantial deference to the views of the Chief Counsel concerning compliance with the RFA. This appears to be the tersest solution to the D.C. Circuit's dismissal of Advocacy's comments. However, brevity in this circumstance is unworkable for a variety of reasons. First, the personnel of the Office of the Chief Counsel for Advocacy can change at the behest of the President. Each new Chief Counsel can adopt different interpretations of the RFA. If that is the case, then it is possible that an agency may receive inconsistent interpretations of the RFA; in turn, that makes it

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[63] *Improving and Strengthening the Office of Advocacy*: Hearing before the Committee on Small Business, United States House of Representatives, 107th Cong. 1st Sess. (2001) 11 (statement of Giovanni Coratolo); 65 (statement of Deputy Chief Counsel for Advocacy Kay Ryan); *Improving the Office of Advocacy*: Hearing before the Committee on Small Business, 106th Cong., 2d Sess. (2000) 12 (statement of James Morrison).

[64] Although the D.C. Circuit referred to the SBA, it clearly meant the Chief Counsel for Advocacy.

more difficult for the agency to develop a consistent methodology for assessing the impact on small entities. Furthermore, the courts have held that the level of deference afforded an agency is dramatically reduced if the agency is constantly changing the interpretation of a statute. *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 515 (1994). And the constantly shifting sands of Chief Counsel interpretations is not the gravest barrier to achieving deference; the Chief Counsel's interpretations still must overcome the standards established by the Supreme Court in *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984) and *United States v. Mead Corp.*, 533 U.S. 218 (2001).

Courts start an analysis of a statute by first determining whether Congress spoke explicitly and clearly on the point in question. If so, *Chevron* dictates that the courts go no further; interpretations offered by the agency that are inconsistent with a clear mandate from Congress receive no deference and are invalid. 467 U.S. at 842-43. If the agency interpretation is consistent with the clear language of the statute, courts must uphold the agency interpretation. *Id.* This is often referred to as "*Chevron* Part One" analysis. The real deference accorded the agency comes pursuant to the so-called "*Chevron* Part Two" analysis. Under that standard, an agency's interpretation of an ambiguous statute or statutory lacuna filled by the agency is accorded substantial deference if the interpretation or gap-filling regulation is rational. *Id.* In essence, as between two equally valid or rational interpretations of an ambiguity in a statute, the agency's interpretation wins under "*Chevron* Part Two."

Not all pronouncements from an agency are eligible for deference under the "*Chevron* Part Two" test. For the answer to that question, one must look to the Court's decision in *United States v. Mead Corp.* According to that case, *Chevron* deference exists not on some inflexible line, but rather on a continuum depending on the intent of Congress and the agency's procedures for developing the interpretation. 533 U.S. at 227-31. The keystone for *Chevron* deference is whether Congress "would expect the agency to be able to speak with the force of law." *Id.* at 229. The Court noted that "a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking ... that produces regulations ... for which deference is claimed." *Id.* Since notice and comment rulemaking represents a formal administrative procedure to reach an agency decision, the Court concluded that it would be logical to assume Congress intended the agency pronouncement in such circumstances to have the force and effect of law. *Id.* at 230. Thus, regulations arising from notice and comment rulemaking would be afforded full *Chevron* deference.

Given the state of the caselaw and the objectives of empowering the Chief Counsel, the best alternative for ensuring the Chief Counsel's interpretation of the RFA would be given *Chevron* deference is to require the Chief Counsel to promulgate government-wide rules which all agencies must follow in complying with the RFA. This is a well-trodden path followed by federal agencies in the implementation of the RFA's parallel statute – NEPA. After enactment of NEPA, all federal agencies developed their own, often inconsistent approaches, to compliance. In 1977, President Carter issued an executive order mandating the Council of Environmental Quality (CEQ) to "issue regulations to Federal agencies for the implementation of the procedural

provisions of the Act [NEPA] (42 U.S.C. 4332(2))." E.O. No. 11,991 (May 24, 1977), *reprinted in* 42 Fed. Reg. 26,967 (1977). Even though Congress, in NEPA, did not delegate to CEQ any power to issue regulations,[65] the regulations developed by it are accorded substantial deference by the courts. *Robertson v. Methow Valley Citizens Ass'n*, 490 U.S. 332, 356 (1990).

New § 608(a) provides that the Chief Counsel for Advocacy shall promulgate regulations governing agency compliance with the RFA. The Chief Counsel should follow the pattern established by CEQ – draft baseline regulations that all agencies must follow but grant the agencies the authority to supplement those regulations to meet their own needs. These regulations promulgated by the Chief Counsel must be done pursuant to notice and comment rulemaking because it ensures adequate participation of all interested parties and comports with the Supreme Court's determination in *United States v. Mead* that notice and comment rulemaking assures the agency (in this case the Chief Counsel) will be granted *Chevron* deference.

The revised § 608 also authorizes federal agencies to supplement the Chief Counsel's rules. However, these supplemental regulations cannot conflict with the regulations promulgated by the Chief Counsel. To ensure the absence of conflict, federal agencies wishing to supplement the rules must consult with the Chief Counsel in an effort to eliminate conflicts but may issue the rules without the approval of the Chief Counsel. H.R. 527 could have taken the approach that supplemental agency rules could not be adopted unless the Chief Counsel approved them. That path represents bad policy for two reasons. First, one agency should not have the authority to disapprove another agency's regulations; if the delegation of power was improper, Congress should act by passing legislation modifying the delegation of authority. Second, Chief Counsel approval would be an executive branch employee interfering with the operation of independent agencies such as the Federal Communications Commission, the Nuclear Regulatory Commission, and the Federal Trade Commission. Even though these agencies must obtain approval of their collection of information requests from OIRA, Congress recognized their independence from the executive branch by granting them the power to override a disapproval by simply majority vote of the commissioners. 44 U.S.C. § 3507(f)(1). It sets a bad precedent to authorize, on an ad hoc basis, an executive branch agency, approving or disapproving the actions of an independent collegial body regulatory commission.[66]

New § 608(b) provides the Chief Counsel with the same power to intervene in individual agency adjudications that the Chief Counsel has to file an amicus brief under § 612 of the RFA. There have been instances in which the Chief Counsel attempted to intervene in adjudications before federal agencies due to the significance of the issues raised by the adjudication but was rebuffed

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[65] In fact, the powers and functions of CEQ remarkably parallel those of the Office of Advocacy.

[66] The Supreme Court considers these independent regulatory commissions, at least in part, creatures of Congress. *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935). Therefore, Congress can restrict their independence by requiring them to comply with the regulations adopted by the Chief Counsel.

because the administrative law judge determined that the Chief Counsel was not a proper party to the proceeding. This is particularly important because some agencies, such as the Agricultural Marketing Service, the Federal Energy Regulatory Commission, and the National Labor Relations Board make significant policy determinations in adjudicatory proceedings. The clear grant of a right to intervene will eliminate this problem.

The section also makes clear that the right to intervene as a party in an adjudication does not grant the Chief Counsel the authority to appeal any decision by the administrative law judge either to another body in the agency (such as an appeal to the full Commission) or to federal court. The role of the Chief Counsel in adjudicatory proceedings is vital but limited to advising the decisionmakers of the significance of the issues to small entities rather than as a real party in interest. Given these concerns and the possibility that small entities might request the assistance of the Chief Counsel in an individual adjudication, the better policy is to exclude the Chief Counsel from intervening in adjudications in which the agency is authorized to impose a fine or penalty. It is the expectation that the Chief Counsel will refer to this restriction when a small entity requests intervention in an individual enforcement proceeding to deny that request. In sum, the intervention rights granted in this subsection are not designed to allow the small entity to substitute the Chief Counsel for adequate retention of private counsel.[67]

Amended § 608(c) authorizes the Chief Counsel to file comments on any notice of proposed rulemaking without regard to whether the notice had been issued pursuant to § 553 of the APA. This language ensures the Chief Counsel's role as the primary advocate for small entities in federal agency decisionmaking and not just on agency compliance with the RFA.

Section 5. *Procedures for Gathering Comments*

SBREFA required two federal agencies, the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA), to consider, prior to publication of a proposed rule in which an IRFA will be prepared, the concerns of small entities. Section 609(b) of the RFA establishes the procedures for obtaining the input of small entities. The procedures require the formation of a panel of federal employees, including a representative from the Office of Advocacy (the organizer of the panel) who then obtain input on the potential economic impacts from selected small entity representatives. After receiving the input, the panel submits a report to the agency and requires the agency to respond to the panel report in the proposed rule. The agency is at liberty to modify the proposal according to the recommendations of the panel report but is not required to do so.

The Committee on Small Business received testimony in hearings that the panel process needs expansion to other federal agencies and requires technical changes to ensure optimal participation by small entities. The process established in § 609(b) makes a valuable

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[67] The Chief Counsel has neither the resources nor the expertise to represent private parties in federal administrative enforcement proceedings.

contribution to agency understanding of the impacts of its proposals on small entities. In fact, during a hearing on the H.R. 2345 (a predecessor bill), during the 108th Congress, the Chief Counsel for Advocacy, Tom Sullivan, recommended that the process be expanded to all agencies. The argument of the Chief Counsel (whose employees would have to deal with the SBREFA panels) makes sense and H.R. 527 adopts the recommendation to expand the SBREFA panel process to all agencies when they are proposing a rule that will have a significant economic impact on a substantial number of small entities or the proposed rule qualifies as a major rule under the Congressional Review Act. The SBREFA procedures will increase the value of the prepublication input to federal agencies and enhance the rationality of the rulemaking process.

Section 5 modifies the standards for determining which proposed rules will be subject to the panel process. Current law limits the rules to those for which EPA and OSHA will prepare an IRFA. This parameter unnecessarily narrows the regulations that should be the subject of a § 609 panel and allows the agencies to make a self-interested determination to avoid the panel process. A more appropriate standard would be any rule for which the covered agencies decide to prepare an IRFA or for any rule that a covered agency or OIRA determines to be a major rule under standards identical to those found in § 804 of the Congressional Review Act. Except in the most unusual circumstances (such as a regulation on natural gas pipelines or automobile manufacturers), a major rule will affect a substantial number of small entities and the agency preparing the rule will benefit from small entity input.

The Committee on Small Business has heard informally from the Office of the Chief Counsel for Advocacy that questions remain concerning the kind of material made available by the covered agencies. Section 5 clarifies that the agency provide the Chief Counsel and the employees of that Office all materials prepared or utilized in developing the proposed rule including a copy of the draft rule. The covered agencies also are required to provide information on the impacts, whether positive or negative, on small entities. Agencies should be as forthcoming with material as possible. To the extent that information utilized by the agency is not subject to disclosure as proprietary information under the Freedom of Information Act (FOIA), appropriate non-disclosure agreements with the Office of Advocacy would be appropriate. The Office of Advocacy is an executive branch agency within the federal government and should be assumed to operate under the same prohibitions against the release of predecisional documents or proprietary information that apply to all federal agencies under FOIA.

Special procedures must be applied with respect to rules drafted by the IRS. If certain small entities receive the actual draft of a proposed tax rule, those entities may be able to take advantage of that information in tax planning or through business transactions. Clearly, this is a legitimate concern and H.R. 527 does not require the IRS provide the exact language of any draft proposed rule. For example, the IRS would state it is planning to modify the calculation of certain depreciable assets but would not be required to provide the exact date for the regulation to take effect. However, the IRS would be expected to provide sufficient information to enable the small entities to make sensible comments to the panel.

Provision of draft regulations by independent regulatory agencies (those collegial body organizations set forth in 44 U.S.C. § 3502(5)) also raises potential problems. Under their organic statutes, these collegial bodies only can take action if a majority of the members of the collegial body approve the action. The Government in Sunshine Act prohibits the members from conducting business except in an open meeting. 5 U.S.C. § 552b(b). If an agency set forth in 44 U.S.C. § 3502(5) was to submit a draft regulation to the Office of Advocacy, prior to a meeting, that could be taken as akin to the conduct of business not in an open meeting. The importance of the Government in Sunshine Act should not be underestimated. Therefore, the agencies are not required to submit the draft proposed rule to the Office of Advocacy. Under the revised § 609, collegial bodies only should submit sufficient information so that small entities understand the scope of the proposed regulation in order to make their input to the panel worthwhile.[68]

The Committee also recognizes that E.O. 12,866 by its own terms does not cover these independent regulatory agencies. Since the Supreme Court's decision in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), these agencies are not considered part of the executive branch and their regulatory activities are not considered subject to oversight by OIRA. To avoid any entanglement between the executive branch and these independent regulatory agencies, the panel reports are prepared by an employee of the agency and an employee of the Office of Advocacy. OIRA employees only will be a part of the panel process for those agencies not set forth in 44 U.S.C. § 3502(5).

Disputes have arisen between the Office of Advocacy and agencies over the definition of small entity representative. The conflict stems from an inconsistency in the drafting of § 609(b). The Office of Advocacy is to identify individuals representative of small entities for obtaining advice but the panel is only required to collect advice and recommendations from individual small entity representatives identified by the agency after consultation with the Office of Advocacy. For example, EPA limits its universe of small entity representatives only to actual businesses affected; in contrast, the Office of Advocacy is willing to hear from trade association executives and lawyers who represent small entities.

The language in § 609 is not a model of clarity and requires amendment to ameliorate disputes between the Office of Advocacy and other federal agencies that serve on the panel. New subsection 609(c) that accords to the Office of Advocacy the sole responsibility of selecting the small entity representatives. The Office of Advocacy has the greatest contact with small entities and is least likely to select biased representatives.[69] The Office of Advocacy should use the

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[68] In many instances rules from these collegial bodies, such as the FCC, tend not to have very specific regulatory language. More often than not, the proposed rules read more akin to advanced notices of proposed rulemaking without even tentative conclusions.

[69] Federal agencies promulgating regulations would have a bias to select small entity representatives, to the (continued...)

discretion granted to it in § 609 in a balanced manner by finding small entity representatives that can provide diverse views on a particular proposed regulation. The amendment to § 609 also ends the dispute over the universe of potential small entity representative by authorizing the Office of Advocacy to select either small entities or their representatives for providing advice to the panel. Under this language, the Office of Advocacy may select individual small entities, lawyers or consultants who represent small entities, or officials from trade associations whose members include small entities.

Section 609 currently requires the panel to receive recommendations and draft a report that becomes part of the rulemaking record. The panel should receive advice and recommendations from small entities. The panel should discuss these issues but it is inappropriate for a panel to write a report conveying the concerns of small entities. H.R. 527's rewrite of § 609 adds a new subsection (d) that mandates the Chief Counsel for Advocacy to draft the report. In drafting the report, the Chief Counsel must consult with the other panel members to ensure that the report accurately reflects the views of small entities. This change ensures that the Office of Advocacy, being an independent voice for small entities, will provide a more robust representation of small entity views than a report from a panel that includes personnel from the agency that crafted the rule and the agency that might review the rule – OIRA. Furthermore, the small entities are more likely to participate if they know that the Chief Counsel is charged with conveying their views to the rulemaking record.

The panels that currently convened under § 609 are not subject to the strictures of the Federal Advisory Committee Act. The amendments to that section made by H.R. 527 should not be construed as requiring the General Services Administration to comply with the Federal Advisory Committee Act.

New § 609(d) also modifies the contents of the report. Currently, the report simply provides a litany of issues raised by small entity representatives as filtered by the panel. While this information is useful, reasoned decisionmaking, including appropriate consideration of all statutory factors (one of which is the impact on small entities), requires a report of greater detail. A requirement has been added that the report contain an assessment of the proposed rule on small entities and a discussion of alternatives that will maximize beneficial or minimize adverse economic consequences. By requiring this information at a preproposal stage, the agency will have the opportunity to modify the regulation or amend its IRFA should it wish to do so. Furthermore, the inclusion of this report early in the rulemaking record will provide small entities with a base of ideas upon which to suggest other alternatives during the rulemaking process. The inclusion of alternatives also can assist the agency in demonstrating to the courts that it approached the rulemaking process with an open mind. *PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1002 (D.C. Cir. 1999); *United Steelworkers of American v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980). The report need not be an exhaustive peroration of alternatives but

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[69](...continued)
extent possible, that would support the regulatory position of the agency.

should be sufficient to provide both the agency and the regulated community with some ideas on what alternatives are available. However, the report should include alternatives, to the extent possible, that are not being considered by the agency in the preparation of its IRFA.

There may be exceptional circumstances where an agency finds it impracticable, unnecessary or contrary to the public interest to receive input at the prepoposal stage. New § 609(f) creates a procedure by which the agency can seek a waiver of the panel process. Waivers only should be granted in the same exceptional circumstances similar to those that would permit an agency to forgo notice and comment rulemaking pursuant to § 553(b)(B) of the APA. For example, EPA may need to deal with an imminent public health problem and has sufficient time to issue a rule for a brief notice and comment period but does not have the lead time to conduct a panel process. That would be the type of circumstance in which the Chief Counsel might consider a waiver of the panel process.

Section 6. *Periodic Review of Rules*

Section 610 of the RFA mandates that agencies periodically review their rules that have a significant economic impact on a substantial number of small entities. GAO has done a number of studies of agency compliance with § 610 and found compliance sorely lacking.[70] GAO concludes that the problem relates back to the threshold determination of whether the regulation will have a significant economic impact on a substantial number of small entities. While GAO's conclusion is correct, the problems with § 610 compliance are far more pervasive and endemic. Unfortunately, § 610 was not a paragon of clear statutory drafting; the language is easily interpreted in a manner by which agencies can avoid compliance. Nevertheless, periodic review of regulations is an excellent idea because it forces agencies to examine their regulatory structures given changes in the marketplace. Rather than trying to correct unclear drafting, H.R. 527 completely revises the section through the development of procedures that ensure agencies will periodically review those regulations which have a significant economic impact on small entities.

When § 610 was first enacted, agencies were required to develop plans for periodic review. These plans are now more than 30 years old. An investigation by the Committee on Small Business in 1997 and 1998 found that many agencies cannot find their plans; given the passage of time, it is less likely that those plans can be unearthed. Rather than having agencies dig through archives for 30 year old plans, revised § 610 requires the development of new plans for periodic review within 180 days after the enactment. In addition to publication of the plan in the Federal Register, agencies are required to place these plans on their websites.[71]

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[70] *See* note 15, *supra*.

[71] This should not be a substantial burden on agencies since all executive branch agencies had to come up with a plan to review all existing reviews pursuant to President's Obama's revisions to E.O. 12,866.

The trigger for periodic review in the revision to § 610 will be whether the agency head determines that the regulation has a significant economic impact on a substantial number of small entities. The language is written in the present tense meaning that the regulation is subject to review if at the time of review of the regulation, the rule has a significant economic impact on a substantial number of small entities. The provision grants the agency appropriate flexibility in determining when to conduct periodic review based on current circumstances not events that happened a number of years before the review. In ensuring that the review occurs based on current conditions, language in the amended § 610 makes it explicit that the decision for review is independent of whether the agency developed a FRFA at the time of the rule's original promulgation. Despite the flexibility provided by § 610, there is an expectation that the full compliance will with the periodic review will be based on the regulations promulgated by the Chief Counsel pursuant to the authority of § 608.

Although the revised § 610 tracks the scope of the review currently in the RFA, there were a number of modifications designed to make the review more thorough. The review know must include comments from the Regulatory Enforcement Ombudsman and the Office of Advocacy to ensure that the agency receives the most current information on the affect of a rule including how agencies may be enforcing (or abusing) the regulation. The revision also requires the agency to consider the rule's contribution to the cumulative impact of federal regulatory burden on small businesses. However, given the complexity of such calculation, § 610(d)(6) allows the head of the agency to explain why such calculation cannot be made and include such statements in the report that the agency files pursuant to new § 610(e). These amendments to the scope of review also comport with those made to the FRFA under § 3 of H.R. 527.

Periodic review commences from the date of enactment of the Act. The plan must provide for review of all regulations in force at the time of enactment within ten years of the date of enactment. A regulation in effect on enactment may not have a significant economic impact on a substantial number of small entities and should not be reviewed. However, five years after enactment the regulation may have that impact; if the agency had not previously reviewed the regulation or made a determination that the regulation did not have a significant economic impact on a substantial number of small entities after publication of the plan of review, the head of the agency would determine at the time the regulation came up for review whether it should be reviewed. In short, the determination of "significance" and "substantial" should be made as close to the review date as possible and based on the most current information available. Regulations promulgated after enactment of the legislation must be reviewed within ten years after the publication of the final rule in the Federal Register. Agencies are authorized to extend the review process for no more than 2 years. Agencies have the resources to complete the review within 12 years. Unlike the current statute, the agency head delaying the review must notify the Chief Counsel for Advocacy because of the Chief Counsel's responsibility to monitor agency compliance with the RFA.

A new mandate in § 610 requires the agency to report annually on the results of its periodic reviews. The current version of § 610 can be interpreted as allowing a review to take place

without it being memorialized. Submission of a report will enable the Office of Advocacy, House and Senate Committees, and OIRA to take appropriate action to ensure compliance or question the determinations on specific rules. To protect the independence of collegial body commissions (such as the SEC or CFTC), the agencies identified in § 3502(5) of Title 44, United States Code need not submit reports to OIRA.

Revised subsection 610(e) requires the agency to place on its website a list of rules to be reviewed annually as well as a brief description of the rule, the agency's preliminary determination on why the regulation has a significant economic impact on a substantial number of small entities, and a request for comments from the public, the Chief Counsel and the Regulatory Enforcement Ombudsman. Utilization of the Internet[72] should maximize input from affected small entities. The Committee also requires publication of the Federal Register and the agency can combine the publication of the list of rules for review in conjunction with its semi-annual agenda in the Federal Register[73] prior to the start of the next calendar year.

Nothing in the changes made by H.R. 527 modifies the ability of adversely affected entities to challenge agency compliance with the periodic review requirements. Given the procedures established in the revised § 610 and the regulations to be promulgated by the Chief Counsel pursuant to amended § 608, the determination of whether a particular regulation should be reviewed is subject to judicial challenge and *is not* committed to agency discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985) and its progeny.

Section 7. *Judicial Review of Compliance with the RFA*

Section 7(a) modifies the current requirement that judicial review of the RFA is limited to "final agency action." Instead, judicial review will be available when the agency publishes the final rule. Section 7(b) modifies the jurisdiction of courts by inserting the parenthetical "or which would have such jurisdiction if publication of the final rule constituted final agency action."

The changes are made due to concerns that certain procedural requirements for challenging agency regulations could dramatically delay small entity challenges to the agency compliance with the RFA. For example, under the Medicare program, challenges to CMS regulations must first run the gauntlet of the Department of Health and Human Services administrative law judges and departmental appeals boards. *See Shalala v. Illinois Council on Long Term Care, Inc.*,

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[72] It would be up to the Office of the Chief Counsel for Advocacy to determine how www.regulations.gov fits into the Internet publication requirement of § 610.

[73] Publication of the list in the April or May Federal Register's semi-annual agenda would not provide sufficient notice to small entities on the rules for which the agency has already commenced review since the beginning of the calendar year.

529 U.S. 1 (2000).[74] Similarly, regulations issued to implement marketing orders under the Agricultural Marketing Agreement Act must go through a statutory exhaustion process before an administrative law judge and then the Chief Judicial Officer. *United States v. Ruzicka*, 329 U.S. 287 (1946). These formal statutory exhaustion requirements, often the vestiges of legislation enacted prior to the APA, are an anachronism in the context of informal rulemaking. These agencies are utilizing a pre-APA decisionmaking process to determine if the regulation complied with the APA by building a record supplemental to the one developed during the rulemaking. These statutory exhaustion requirements enable covered agencies to take a second look at its own regulatory issuances.[75] While that process may be beneficial to the agency in building a record to demonstrate the rationality of their rules, it enables the agencies to cavalierly dismiss the requirements of the APA and RFA by ensuring those assessments are addressed in a formal adjudication ***after*** the regulation is promulgated. Due to the cost involved of essentially conducting two separate litigations (an adjudication within the agency and a challenge at the federal court level), small entities generally will be foreclosed from challenging an agency's RFA analysis. It certainly takes a courageous small entity to absorb the cost of dual litigation in order to get into federal court recognizing the likelihood that the original challenge before a federal agency will almost certainly favor the federal agency.[76] This severely undermines the rationale used by the drafters of SBREFA to mandate judicial review – the threat of a relatively quick, unbiased review of agency action in federal court would lead to improved compliance with the RFA. If an agency can avoid that (due to cost) in order to supplement its record *ex post facto* then the deterrent effect of judicial review is negated. Not surprisingly, CMS and the Agricultural Marketing Service remain two of the agencies that have had the worst record of complying with the RFA. As a result, the changes set forth in § 7(a)-(b) ensure access to judicial review of challenges to agency compliance with the RFA without having to exhaust any *post-promulgation* internal agency adjudication on the underlying rule.

The amendments could lead to piecemeal litigation on the final rule; judicial review on RFA compliance would then be followed at some later date by a challenge to the rationality of the rule. However, the response to this contention is the Supreme Court's finding that "procedural rights"

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[74] There are cases in which the courts, after much judicial prestidigitation, found that exhaustion was not required. *E.g.*, *Furlong v. Shalala*, 238 F.3d 227 (2d Cir. 2001); *American Lithotripsy Soc'y v. Thompson*, 215 F. Supp. 2d 23 (D.D.C. 2002). However, these court cases are not sufficiently definitive with respect to the availability of review outside the Departmental appeals process to ensure small entity access to federal courts for RFA challenges. Therefore, these cases do not militate against making the change to the RFA.

[75] The Chief Judicial Officer at the Department of Agriculture acts as the Secretary when hearing appeals pursuant to § 15(A) of the Agricultural Marketing Agreement Act of 1937. If they Secretary thought the rule was irrational, the Secretary should not have issued it in the first instance. Upon further reflection, it is highly unlikely that the Secretary would find his or her initial decision to be irrational.

[76] For example, the Chief Judicial Officer within the Department of Agriculture has, with one exception, never overturned the Secretary's regulation implementing a marketing order. And the only circumstance in which that was done was to be benefit the largest central marketing organization of oranges and lemons grown in California (a marketing order that no longer exists).

are special, *Lujan v. Defenders of the Wildlife*, 504 U.S. 55, 572 n.7 (1992) and someone complaining of an agency's failure to comply with NEPA "may complain of that failure at the time the failure takes place for the claim can never get riper." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998). Given the parallels between the RFA and NEPA already recognized by the courts, then a challenge to agency compliance with the RFA can never be riper than it is when the agency promulgates the final rule, irrespective of whether the substance of the underlying rule requires review through some additional agency procedures.[77] Furthermore, the likelihood of duplicative litigation is constrained by the limited number of agencies at which further agency appeals are required to challenge a final rule. Finally, it is important to note that the agencies that can take advantage of this statutory exhaustion process are among the worst in complying with the RFA – the Agricultural Marketing Service (AMS) and CMS. Therefore, the benefits of speeding judicial review of RFA compliance and the need to protect the "special procedural rights inherent in the RFA" outweigh the costs to the federal judiciary of piecemeal litigation.

The amendments made in § 7(a)-(b) are not intended to authorize challenges to either the agency's RFA compliance or the underlying regulation prior to the issuance of a final rule. Principles of exhaustion of administrative remedies remains the most prudent course by allowing the agency to correct deficiencies with its RFA compliance in the final rule. However, once the agency has had the opportunity to make corrections in the final rule, it seems foolhardy to allow the agency to get another crack at correcting its RFA compliance after issuance of the final rule. The amendment is intended to allow federal courts to do what they do best – review agency compliance with statutes governing agency decisionmaking. Federal courts will not benefit from any supplementation of the record because federal courts have nearly 60 years of determining compliance with the APA, more than 30 years of reviewing environmental impact statements under NEPA, and about 35 years of ensuring adequate agency release of information under the Freedom of Information Act. RFA compliance is no more difficult and additional agency adjudication under the principle of exhaustion past the final rule simply will be of no benefit to the court. Finally, recalcitrant agencies like CMS and AMS, rather than risking immediate litigation over RFA compliance, will take the initiative, to improve their RFA compliance during the rulemaking process.

Section 7(c) of the bill makes conforming technical corrections to § 611. The trigger for any challenge is modified from the date of final agency action to publication of the final rule.

Section 7(d) clarifies the Chief Counsel's amicus authority. In the past, the Department of Justice has challenged the scope of the Chief Counsel's brief on the occasions that the Chief Counsel has prepared a brief under § 612. In one instance (prior to the enactment of SBREFA), the Department of Justice questioned whether the brief could address the rationality of the rule and compliance with the RFA. The authors of SBREFA attempted to clarify this by authorizing

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[77] *See National Association of Homebuilders v. United States Army Corps of Eng'rs*, 417 F.3d 1272, 1286 (D.C. Cir. 2005).

the amicus brief to address the adequacy of the rulemaking record with respect to small entities. Given the changes being made in § 4 of the H.R. 527 concerning the promulgation of implementing rules by the Office of Advocacy, it is appropriate to specify that the Chief Counsel has the authority to address compliance with §§ 601, 604, 605(b), 609, and 610 of the RFA.

Section 8. *Jurisdiction of Court of Appeals for Challenges to Rules Implementing RFA*

Section 8 recognizes that certain actions taken by the Chief Counsel may adversely affect the rights of small entities. The regulations concerning the implementation of the RFA, and any subsequent changes to those rules should be subject to judicial review by small entities that believe the rules do not properly implement the RFA. Any small entity would be entitled to challenge the Chief Counsel's decision pursuant to the requirements of the Administrative Orders Review Act, 28 U.S.C. §§ 2341-51. Given the importance of these rules and their impact on federal rulemaking, a federal appeals court appears to be the most appropriate venue for review. In some instances, challenges to agency decisions, such as those concerning ambient air quality standards under the Clean Air Act or licenses for use of spectrum under the Communications Act of 1934, as amended, must be brought in the D.C. Circuit. It would be inappropriate to force small entities to retain counsel and prosecute an appeal solely in the District of Columbia. In addition to authorizing challenges to Chief Counsel regulations, § 10(b) also makes appropriate technical and conforming changes to the RFA and the Administrative Orders Review Act.

As already noted, the Department of Justice has argued that limitations should exist on the scope of the amicus brief filed by the Chief Counsel. The RFA simply represents one component of the necessary considerations for developing a rational rule as mandated by the APA. A limitation on the scope of the amicus brief would place the Chief Counsel in the odd position of arguing that the agency did not comply with the RFA but could then not draw the obvious conclusion – the procedural failure constitutes a violation of the rational rulemaking mandated by the APA. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 418-19 (1971). Furthermore, the analysis performed by the agency pursuant to the RFA can demonstrate that the rule itself is irrational even if the agency complied with the RFA. *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984). The Chief Counsel should not be prohibited from reaching conclusions of law concerning the rationality of an agency's rule in an amicus brief. Section 8(c) clarifies that the Chief Counsel has the authority in its amicus briefs to comment on compliance with the rationality of the rule as well as the procedures for complying with the APA and the RFA.

Section 9. *Clerical Amendments*

Section 9 contains appropriate clerical amendments needed to make the United States Code consistent with the changes sought by the Committee.

III. H.R. 585 – The Small Business Size Standard Flexibility Act of 2011

Section 1. *Short Title*

Provides a short title for H.R. 585.

Section 2. *Establishment and Approval of Small Business Concern Size Standards by the Chief Counsel for Advocacy*

In 1992, Senators Dale Bumpers (D-AR) and Malcolm Wallop (R-WY) were incensed at actions taken by the Nuclear Regulatory Commission (NRC) to increase fees for byproduct users of fissile material under the Atomic Energy Act. The NRC did not perform an adequate assessment of these fee increases on small entities as required by the RFA. In establishing these fees, the NRC utilized a different set of definitions than had been set by the SBA under § 3 of the Small Business Act. Senators Bumpers and Wallop sponsored an amendment to the Small Business Act requiring that federal agencies wishing to adopt a definition of small business that varied from those promulgated by the Small Business Administration (SBA) pursuant to its § 3 authority must issue the new size standard for notice and comment and then obtain approval of the Administrator of the SBA.

While the Administrator has significant acumen in setting size standards, that expertise is limited to the use of size standards for purposes of the Small Business Act and Small Business Investment Act of 1958. As a result, the Administrator is not the proper official to determine size standards for purposes of other agencies' regulatory activities. The Administrator is not fluent with the vast array of federal regulatory programs, is not in constant communication with small entities that might be affected by another federal agency's regulatory regime, and does not have the analytical expertise to assess the regulatory impact of a particular size standard on small entities. Furthermore, the Administrator's standards are: very inclusive, not developed to comport with other agencies' regulatory regimes, and lack sufficient granularity to examine the impact of a proposed rule on a spectrum of small businesses. When other agencies have sought the approval of the Administrator under the amendments made to § 3 of the Small Business Act by Senators Bumpers and Wallop, the Office of Size Standards consulted with personnel in the Office of Advocacy on the rectitude of an agency's definition of small business that varied from those set forth in the SBA's regulations interpreting the Small Business Act.

Given this rationale, it is appropriate to split the size standard functions in the Small Business Act. Section 2 of H.R. 585 provides that the Administrator shall establish size standards to carry out the purposes of the Small Business Act or Small Business Investment Act of 1958. Section 2 then delegates the authority to approve a size standard for purposes of all other statutes to the Chief Counsel. The Chief Counsel is only entitled to rule on size standards for definitions of small business concerns if the agency issuing the regulation does not adopt a size standard

approved by the Administrator for carrying out the purposes of the Small Business Act or Small Business Investment Act. This will constrain the number of size standard decisions by the Chief Counsel and allow agencies to utilize already established standards rather than have to go through the Chief Counsel for approval of each standard. If a federal agency adopts, as a definition of small business, a size standard approved by the Administrator, the federal agency need not seek approval of the Chief Counsel pursuant to § 3 of the Small Business Act as amended by H.R. 585. The determination of a size standard for other regulatory purposes has no effect on the requirements of an agency that wishes to develop a definition of small business as set forth in § 601(3) of the RFA. Thus, there are two different size standard approvals that the Chief Counsel may be forced to make: 1) the size determination for analyzing the proposed and final rule pursuant to the RFA; and 2) the definition of a small business that may be included in the text of the final rule.

Nothing in the legislation requires that the agency promulgating a regulation must utilize the size standards in its rules for purposes of complying with the RFA. However, it would be logical for the agency to explain the rationale for adopting different definitions in the statement of basis and purpose as well as any FRFA or certification. To be sure, an agency may use a different definition of small business for purposes of compliance with the RFA if the agency adopts the Administrator's definition of small business in the rule at issue.

An alternative to the approach taken in H.R. 585 would be for the Administrator to make all size standard determinations with the concurrence of the Chief Counsel on those size standards developed to implement statutes other than the Small Business Act or Small Business Investment Act. Adoption of that regulatory regime could lead to the anomalous result of the Chief Counsel and Administrator making different determinations on the same size standard. Under § 601 of the RFA, the default size standard for agency compliance with the RFA are the ones adopted by the Administrator and set forth in Part 121 of Title 13, Code of Federal Regulations. However, the RFA permits the agency to utilize a different standard in complying with the RFA after consultation with the Chief Counsel for Advocacy. The agency then uses that standard for its initial and final regulatory flexibility analyses which results in the agency adopting a small business exemption identical to the definition of a small business in its regulatory flexibility analyses. Since that definition is different than the one adopted by the Administrator, the agency must seek the approval of the Administrator. If the Administrator disapproves that standard, then a small business exemption that the Chief Counsel and the agency thought was appropriate would not be put into effect.[78] H.R. 585 avoids these potentially anomalous results by vesting the Chief Counsel with the sole authority to make size decisions for the purposes of other regulatory programs.

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[78] This could be particularly problematic if the size standard adopted by the agency with the concurrence of the Chief Counsel is larger than the size standard promulgated by the Administrator. The Administrator might feel such an expansion of the term "small business" inappropriate.

Section 2(c) makes conforming changes in § 3(a)(3). The Chief Counsel is added to ensure that size standards vary from industry to industry as is appropriate given the context of the rulemaking for which the Chief Counsel has been asked to approve a definition of small business.

The Chief Counsel's decision on size standards should be rational and subject to judicial review. Section 2(d) authorizing judicial review eliminates litigation over whether Congress intended a private right of action under *Cort v. Ash*, 422 U.S. 66 (1975), or whether the decision was left to the discretion of the agency pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985).

To be sure, the Office of Advocacy could be placed in the odd circumstance of being a respondent in an action in which it is defended by the Department of Justice while at the same time filing an amicus brief against the Department of Justice on whether the agency complied with the RFA. Given the fact, the Chief Counsel's "intervention" in the RFA compliance aspect of the case is as an amicus rather than as a party, the Committee does not believe the odd litigation stance will prove problematic to the court reviewing the case or the Department of Justice's defense of the Chief Counsel. The odd alignment of defendants and friends of the court should not complicate judicial review because courts often face challenges in which one party challenging an agency action may agree with the agency in opposition to a stance taken by another party challenging the same rules. Despite the potential alignment of interests, the Department of Justice should be able to fulfill its obligations to defend the Chief Counsel on the size standard decision[79] even though the Chief Counsel may be filing an amicus brief in opposition to the Justice Department's other agency defendant. Finally, given the nature of the claims and the record on review, the Department of Justice's defense of the action will reveal client confidences concerning the development of the rule to a "party" opposed to the rule.

Nothing in these changes made by H.R. 585 are designed to authorize a specific challenge to the size determination made by the agency and the Office of Advocacy pursuant to § 601(3). To the extent that a party believes that the size standard utilized in complying with the RFA was unreasonable, the adversely affected small entity may challenge the agency's compliance with the RFA as set forth in § 611.

[79] It is very unlikely that the Chief Counsel will condemn an agency's compliance with the RFA because of a size standard used in the regulation was approved by the Chief Counsel. That actually would be the height of irrational decisionmaking.