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August 16, 2021

The Regulatory Flexibility Act: An Overview

Congress enacted the Regulatory Flexibility Act (RFA; 5 U.S.C. §§601-612) in 1980 to require federal agencies to consider the effects of their regulations on small businesses and other small entities. If a regulation is expected to have a "significant economic impact on a substantial number of small entities," the RFA requires the issuing agency to consider regulatory impacts and alternatives, with the goal of minimizing significant economic impacts on small entities. In 1996, Congress amended the RFA in the Small Business Regulatory Enforcement Fairness Act, adding judicial review for some of the act's provisions, a requirement for a limited number of agencies to hold small business advocacy review panels, and a requirement for agencies to produce regulatory compliance guides.

Overview of the Regulatory Flexibility Act

The RFA requires federal agencies to assess the effects of their regulations on small entities, which it defines as including small businesses, small governmental jurisdictions, and certain small nonprofit organizations.

The RFA applies to all regulatory agencies, including Cabinet agencies and the statutorily designated "independent regulatory agencies," which have sometimes been exempted from other procedural rulemaking requirements.

As noted above, the RFA is triggered if the head of the issuing agency certifies that the rule will have a significant economic impact on a substantial number of small entities. This threshold determination is key: If an agency certifies that this type of impact is not expected to occur, the RFA is not triggered. The RFA does not define *significant economic impact* or *substantial number of small entities*, however, and agencies generally have a fair amount of discretion to determine its applicability. The lack of clarity of the specific meaning of these phrases, and the resulting amount of discretion agencies have to determine when the act is triggered, have sometimes led to criticism over its implementation.

Regulatory Flexibility Analyses

The RFA may be viewed primarily as an analytical statute. When triggered by the criteria identified above, the agency is to conduct a specified regulatory impact analysis during the proposed and final rule stages. These two analyses are distinct and are referred to as the initial regulatory flexibility analysis (IRFA) and final regulatory flexibility analysis (FRFA), respectively.

Initial Regulatory Flexibility Analysis

When issuing a proposed rule that triggers its analytical requirements, the RFA requires an agency to analyze a number of specific factors relating to the proposed rule's potential impact on small entities. Section 603 requires agencies to include in each IRFA "(1) a description of the reasons why action by the agency is being considered; (2) a succinct statement of the objectives of, and legal basis for, the proposed rule; (3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply; (4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule …; [and] (5) an identification, to the extent practicable, of all relevant federal rules which may duplicate, overlap or conflict with the proposed rule."

IRFAs are also required to contain "a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."

Further, the agency must discuss different types of flexibilities that could be included in the rule, such as "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."

The IRFA, or a summary of the IRFA, must be published in the *Federal Register* when the proposed rule is published. This allows the public an opportunity for input on the IRFA while the agency is already taking comment on the proposed rule as required by the Administrative Procedure Act (APA).

The RFA does not require agencies to choose any particular outcome based on an IRFA. Rather, it requires agencies to consider the impacts of a rule on small entities and whether more flexible alternatives may be appropriate.

Final Regulatory Flexibility Analysis

When an agency promulgates a final rule after having issued a covered proposed rule, it must conduct a FRFA under Section 604 (unless the IRFA led the agency to determine that the rule will not have the requisite impact on small entities). Whereas the IRFA requires the agency to consider regulatory impacts and alternatives for small entities, the FRFA requires that the agency justify its actions and regulatory choices, including an explanation of why any more flexible regulatory alternatives were rejected.

The FRFA must contain "(1) a statement of the need for, and objectives of, the rule; (2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; (3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration [SBA] in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments; (4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available; (5) a description of the projected reporting, recordkeeping and other compliance requirements of the rule ...; (6) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected; and (7) for [the Consumer Financial Protection Bureau (CFPB)], a description of the steps the agency has taken to minimize any additional cost of credit for small entities."

Notably, the requirements for an IRFA and a FRFA are triggered only in rules where the agency is required to issue a proposed rule under the APA. The APA contains several exemptions for its requirement for an agency to issue a proposed rule, including when an agency invokes "good cause" to forgo notice and comment. As a practical matter, this has led to some criticism of the RFA's implementation, as a significant number of final rules are issued without first having had a proposed rule. A 2012 Government Accountability Office study found over a third of rules issued from 2003 through 2010 were not preceded by proposed rules.

Agencies' IRFAs and FRFAs are often conducted in conjunction with other regulatory impact analyses, most notably the requirements for cost-benefit analysis of economically significant rules under Executive Order 12866.

Small Business Review Panels

Prior to issuing rules subject to the RFA, agencies must notify the Chief Counsel for Advocacy of the SBA (hereinafter, Chief Counsel) for possible comment. In addition, Section 609 requires three agencies—the Environmental Protection Agency, the CFPB, and the Occupational Safety and Health Administration in the Department of Labor—to hold small business advocacy review panels, which are a supplemental means for obtaining input on the proposed rule and IRFA.

Within 15 days of receiving that notification from these three agencies, the Chief Counsel is to identify individuals that are representative of affected small entities. The agency is then to convene a "review panel" for the rule consisting of employees from the rulemaking agency, the Office of Management and Budget's Office of Information and Regulatory Affairs, and the Chief Counsel. The panel is to review relevant materials the agency has collected pertaining to the rule's anticipated impacts on small entities and collect advice and recommendations of the small entity representatives on issues related to components of the IRFA. Within 60 days, the panel is to report on the comments it received and its findings and make the report public as part of the rulemaking record. The RFA then directs the agency to modify the proposed rule and the IRFA as appropriate.

Retrospective Review of Rules

Section 610 requires agencies to establish a plan for reviewing rules that have or will have a significant economic impact on a substantial number of small entities. The purpose of the review is to determine whether any modifications to each rule are necessary to minimize impacts on small entities. The agency is to review the rule within 10 years of issuance of the rule, but the completion of the review may be extended by one year at a time for up to five additional years.

The RFA specifies five factors agencies are to consider in these retrospective reviews: (1) the continued need for the rule; (2) the nature of any public feedback on the rule; (3) the complexity of the rule; (4) the extent to which the rule overlaps or conflicts with other federal, state, or local rules; and (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other relevant factors have changed.

Small Entity Compliance Guides

The RFA also requires agencies to publish one or more "small entity compliance guides" to assist small entities in complying with rules covered by the act. The guides are to be posted in an "easily identified location" on the agency's website and distributed to industry contacts.

Regulatory Agenda

Section 602 requires that all agencies publish semiannual regulatory agendas in the *Federal Register* describing regulatory actions that they are developing that may have a significant economic impact on a substantial number of small entities. The RFA also requires that agencies "endeavor to provide notice" of the regulatory agendas to small entities and "invite comments upon each subject area on the agenda." These regulatory agendas are published each fall and spring as part of the Unified Agenda of Federal Regulatory and Deregulatory Actions.

Annual Reports on Compliance

Section 612 requires the Chief Counsel to monitor agency compliance with the RFA and to provide an annual report to Congress and the President. Those reports are available on the SBA's Office of Advocacy's website.

Section 612 also authorizes the Chief Counsel to appear as *amicus curiae* (i.e., "friend of the court") in the case of judicial review of a rule.

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