

Executive Order 12866, or (ii) if review under E.O. 12866 is not required, at a reasonable time prior to publication of the rule in the **Federal Register**. Section 3(c) of the Executive Order provides that the agency must give appropriate consideration to Office of Advocacy comments on a draft rule and, subject to narrow exceptions, respond in the notice of final rulemaking to any written comments submitted by the Office of Advocacy on the proposed rule.

The procedures and policies in this notice were reviewed by the Office of Advocacy pursuant to section 3(a) of E.O. 13272, and the Secretary of Energy has approved their publication in the **Federal Register**.

Issued in Washington, DC on February 12, 2003.

Lee Liberman Otis,
General Counsel.

On the basis of the foregoing, DOE adopts the following Procedures and Policies:

**Department of Energy (DOE)
Procedures and Policies for
Implementing Executive Order 13272;
Consideration of Small Entities in
Agency Rulemaking**

I. Purpose

These procedures and policies implement Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (Aug. 16, 2002), consistent with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* ("Act").

II. Applicability

These procedures and policies, which have been approved by the Secretary of Energy, apply to the development of any regulation by DOE (including by the National Nuclear Security Administration) that is subject to notice and comment rulemaking under section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553, or any other law. For purposes of these procedures and policies, the Federal Energy Regulatory Commission is not considered to be part of DOE.

III. Procedures and Policies

1. *Preliminary Determination.* In developing a proposed rule, a DOE program office must determine whether an initial regulatory flexibility analysis (IRFA) is required by the Act. The Act requires an agency to prepare and make available for public comment an IRFA for any rule subject to notice and comment requirements (5 U.S.C. 603(a)). The agency must prepare a final regulatory flexibility analysis (FRFA) for a final rule (5 U.S.C. 604(a)). However,

the Act provides that these analysis requirements do not apply if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)).

To make the foregoing determinations, the program office must conduct a preliminary informal analysis to determine if there is any impact on small entities and the magnitude of any impacts. The preliminary analysis must be sufficient to answer the following questions:

a. Does the Act Apply?

The Act applies to any rule subject to notice and comment rulemaking under section 553 of the APA or any other law, including notice and comment rulemaking required by an agency regulation. Among the exemptions from the APA's notice and comment rulemaking requirements are matters relating to agency management or personnel or to public property, loans, grants, benefits, or contracts (5 U.S.C. 553(a)). In addition, the Act does not apply to rules of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances (see definition of "rule," 5 U.S.C. 601(2)). Although exempted from notice and comment requirements under the APA, certain rulemakings involving procurement contracts are subject to notice and comment requirements under 41 U.S.C. 418b, and therefore are subject to the Act.

If a rule is being promulgated in response to an emergency that makes compliance with the analysis requirements of the Act impracticable, DOE may delay the completion of a FRFA for a period of up to 180 days after issuance of the rule (5 U.S.C. 608). If a FRFA is not prepared within the 180-day period, the rule will lapse and have no effect.

Program office staff should direct questions regarding the applicability of the Act to a particular rulemaking or category of rulemaking to program counsel at DOE, who may consult the Assistant General Counsel for Regulatory Law.

b. What Is the Applicable Definition of a Small Entity?

The Act defines three categories of small entities: "small business," "small organization," and "small governmental jurisdiction."

The Act defines a "small business" as having the same meaning as "small business concern" under section 3 of

the Small Business Act (5 U.S.C. 601(3)). Section 3 of the Small Business Act provides that a small business concern includes any firm that is "independently owned and operated" and is "not dominant in its field of operation" (15 U.S.C. 632). In addition, the Small Business Administration (SBA), as authorized by section 3, has developed specific size standards and related regulations (13 CFR 121.201) that further define "small business concern." In performing regulatory flexibility analyses, DOE program staff must use SBA size standards for determining the number of small businesses that would be affected by a proposed rule unless an alternative definition of "small business" is adopted following procedures required by the Act (discussed below). The SBA's size standards generally are based on the total number of employees or on gross annual receipts of an enterprise (including affiliates). Beginning on October 1, 2000, the SBA size standards used the North American Industry Classification System (NAICS) to categorize businesses on an industry-by-industry basis. Previously, the SBA size standards were based on the less-detailed Standard Industrial Classification (SIC) codes.

The Act defines a "small organization" as any not-for-profit enterprise that is independently owned and operated and not dominant in its field (5 U.S.C. 601(4)). The Act defines "small governmental jurisdiction" as governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000 (5 U.S.C. 601(5)).

If an agency wishes to use an alternative definition of "small business," "small organization," or "small governmental jurisdiction" for purposes of its actions required by the Act, it must consult with the Office of Advocacy on an appropriate alternative definition and publish the proposed alternative definition for public comment in the **Federal Register**. In addition, if an agency seeks to change the definition of "small business" for rulemaking purposes (*i.e.*, for purposes of determining how a regulation applies to a business of a certain size), the agency must obtain the approval of the SBA Administrator using the procedures outlined in the Small Business Act (*see* 15 U.S.C. 632(a)(2)(C)(i)-(ii)) and in SBA's regulations (*see* 13 CFR 121.902(b)). The Administrator's approval is not required, however, if a different standard is specifically authorized by statute.