

- A succinct statement of the objectives of, and legal basis for, the proposed rule;
- A description of and, if feasible, an estimate of the number of small entities to which the proposed rule would apply;
- A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that would be subject to the requirements and the type of professional skills needed to comply; and
- An identification, to the extent practicable, of all federal rules that may duplicate, overlap or conflict with the proposed rule.

Section 603(c) of the Act provides that the IRFA also must contain:

- A description of any significant alternatives to the proposed rule that would minimize the economic impact on small entities while accomplishing the stated objectives of the applicable statutes; and
- Consistent with applicable statutes, a discussion of significant alternatives such as: (1) Differing compliance or reporting requirements or timetables for small entities; (2) the clarification, consolidation or simplification of compliance and reporting requirements for small entities; (3) the use of performance rather than design standards; and (4) exemption from coverage of the rule, or any part thereof, for small entities.

To estimate the number of small entities to which the proposed rule would apply, DOE program staff should identify each of the affected classes of small businesses according to its NAICS code. They can then use the NAICS code in combination with U.S. Census data to arrive at an estimate of the number of entities in each class. To help agencies with this element of the IRFA, the Office of Advocacy provides a full listing of NAICS codes along with the U.S. Census data for each class on its web page (http://www.sba.gov/advo/stats/us99_n6.pdf).

The Act requires the IRFA to provide either quantifiable or numerical estimates of the impacts of a proposed rule and alternatives to the proposed rule, although more general descriptive statements concerning effects may be provided if quantification is not practicable or reliable (5 U.S.C. 607). The level of the analysis in the IRFA also will depend on such factors as the quality and quantity of available information and the anticipated severity of a rule's impacts on small entities that will be affected by the rule. Generally, the agency must examine the costs and

other economic impacts for the industry sectors targeted by the rule. Impacts examined may include economic viability (including closure), competitiveness, productivity, and employment. The analysis should identify cost burdens for the industry sector and for the individual small entities affected. Costs might include engineering and hardware acquisition, maintenance and operation, employee skill and training, and administrative practices (including recordkeeping and reporting). The results of the analysis should allow interested persons to compare the impacts of regulatory alternatives on the differing sizes and types of entities targeted or affected by the rule. The results should enable direct comparison of small and large entities to determine the degree to which the alternatives chosen disproportionately affect small entities or a targeted sector. Furthermore, the analysis should examine whether the alternatives are effectively designed to capture benefits to the public and accomplish the purposes of the statute authorizing the regulations.

The Act provides that agencies may prepare regulatory flexibility analyses in conjunction with, or as a part of, any other analysis required by law as long as the Act's requirements are met (5 U.S.C. 605(a)). For significant regulatory actions requiring preparation of a regulatory impact analysis under Executive Order 12866, the IRFA and the regulatory impact analysis may be prepared together. Program staff must, however, explicitly explain how the requirements of the Act are satisfied.

The DOE program office also must include in the Supplementary Information portion of the notice of proposed rulemaking a summary of the actions that have been or will be taken to assure that small entities are given an opportunity to participate in the rulemaking. Examples of the techniques for accomplishing this are set forth in 5 U.S.C. 609 and include: (1) A statement in an advance notice of proposed rulemaking alerting small entities that the rulemaking may have a significant impact on them; (2) publication of the notice of proposed rulemaking in publications likely to be obtained by small entities; (3) direct notification; (4) conferences or workshops targeted to small entities; and

(5) modification of procedural rules to reduce the cost or complexity of small entity participation in the rulemaking. In addition, for any rulemaking that may significantly or uniquely affect small governments, program offices must follow DOE's policy on intergovernmental consultation under

the Unfunded Mandates Reform Act of 1995. See Notice of Final Statement of Policy, 62 FR 12820 (March 19, 1997), which is posted on the Office of General Counsel's Web site: <http://www.gc.doe.gov>.

Program staff may obtain additional guidance on how to prepare an IRFA from the Office of Advocacy's Internet site: <http://www.sba.gov/advo/>. Chapter 2 of the Office of Advocacy Guide deals with IRFAs.

3. *The Final Regulatory Flexibility Analysis.* A FRFA must be prepared for any final rule that will have a significant economic impact on a substantial number of small entities (5 U.S.C. 604). The elements of the FRFA resemble, but are somewhat different than, those for an IRFA. Section 604(a)(1)-(5) of the Act requires that the FRFA include:

- A succinct statement of the need for, and objectives of, the rule;
- A response to significant issues raised by the public comments in response to the IRFA, including a statement of any changes made in the rule as result of public comments;
- A description and an estimate of the number of small entities to which the rule would apply or an explanation of why no such estimate is provided;
- A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirements and the types of professional skills needed to comply; and
- A description of the steps taken by the agency to minimize the significant economic impact on small entities consistent with applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency was rejected.

In addition, section 3(c) of E.O. 13272 provides that, subject to narrow exceptions, an agency must respond in the notice of final rulemaking to any written comments submitted by the Office of Advocacy on the proposed rule.

Section 604(b) of the Act provides that an agency must publish the FRFA, or a summary, in the **Federal Register** and make it available to the public. In most cases, this publication will be included in the notice of final rulemaking. An agency may delay, but not waive, the completion of a FRFA for up to 180 days after issuance of a rule if the rule is being promulgated in response to an emergency that makes compliance with the Act impracticable