



U. S. Department of Transportation

**Policies and Procedures for
Implementing Executive Order 13272**

**“Proper Consideration of Small
Entities in Agency Rulemaking”**

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Introduction

On August 13, 2002, President Bush issued Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” to improve agency compliance with the Regulatory Flexibility Act, as amended (the “Act”).

This document provides general Department of Transportation (DOT or Department) policies and procedures for complying with E.O.13272. To assist in these efforts, the document also provides summaries of related statutes and an Executive Order. We have appended additional policies and procedures to this document.

The Department already does a very good job in considering the economic impact of our rulemakings on a substantial number of small entities, as required by the Regulatory Flexibility Act (RFA), the Small Business Regulatory Enforcement Fairness Act (SBREFA), Executive Order 12866, “Regulatory Planning and Review”, and other laws and orders. We analyze the costs and benefits of various alternatives (including impact on small entities) in developing **all** of our rules and, where possible, we try to alleviate the disproportionate regulatory burden experienced by small entities. As part of several comprehensive regulatory reviews and continuing RFA section 610 reviews to identify burdensome, duplicative or conflicting regulations, we have identified and, where possible, taken action to reduce or eliminate regulatory burdens on small entities.

Transportation safety is a primary mission of the Department of Transportation. We try, where possible, to accommodate small entities and to respond to their special problems. However, safety considerations do not always permit us to provide relief to smaller entities. In some cases, we cannot exempt small entities from our requirements.

1. Our governing transportation statutes tend to apply to companies in the industries we regulate, regardless of size. In some areas, they give us no discretion - no authority -- to exempt small entities from our requirements or provide lesser standards.

2. Safety considerations often explain a statute's failure to draw distinctions based on the size of a business. A hazardous materials truck operated by a small company poses the same threat to public safety and the environment as a similar truck operated by a large company, if the driver has an accident.
3. We have to keep in mind that there may be less safety supervision of employees in a small business because of fewer available resources.

However, we can do more for small entities and Executive Order 13272 (E.O. 13272) requires additional measures. As discussed in detail below, we can continue to:

- a. Improve our communication with small entities.
- b. Educate our employees to be sensitive to small entity concerns.
- c. Improve the ability of small entities to participate in the DOT rulemaking process.
- d. More widely disseminate information to make it easier for them to understand and comply with our rules.
- e. Continue seeking innovative and flexible approaches to accomplishing our mission in ways that lessen impacts on small entities.
- f. Enforce policies that welcome small entity criticism and dialogue about our rules and our enforcement of them.

In Section III, Improve Evaluation of Economic Impacts and Consideration of Rulemaking Alternatives, below, we discuss a number of alternatives available for lessening the burden on small entities. Even where we have little discretion under a statute, we can and should communicate the nature of the constraints and solicit ideas for more flexible implementation from small entities.

Summary of Executive Order 13272

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2002_register&docid=02-21056-filed.pdf

Pursuant to E.O. 13272:

- Each agency must establish written procedures and policies to promote compliance with the Regulatory Flexibility Act and to ensure that potential impacts of draft rules on small entities will be "properly considered."

- After review by, and consideration of comments from, the Small Business Administration's (SBA) Chief Counsel for Advocacy (Advocacy), each agency must make the final procedures and policies available to the public through the Internet or other easily accessible means.
- Each agency must notify Advocacy of draft rules that may have a "significant economic impact on a substantial number of small entities" (SEIOSNOSE) when submitting a draft rule to the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) or (in the case of rules not reviewed by OIRA) "at a reasonable time prior to publication of the rule by the agency."
- Each agency must give every appropriate consideration to any comments provided by Advocacy regarding a draft rule. "Consistent with applicable law and appropriate protection of executive deliberations and legal procedures," each agency shall include in the preamble or other document accompanying the final rule the agency's response to any written comments submitted by Advocacy on the proposed rule. Inclusion of this response is not required if the head of the agency certifies that it will not serve the public interest.
- Advocacy must publicly disclose information only to the extent that the relevant rulemaking agency or OIRA has disclosed it.
- Advocacy must report to Congress annually on agency compliance with this Executive Order.
- The term, "agency," has the same meaning it does in section 601 of title 5, United State Code.

To help implement this Executive Order, on March 19, 2002, the Administration issued a Memorandum of Understanding between OIRA and Advocacy on improving their working relationship to achieve better compliance with the Regulatory Flexibility Act and other requirements for economic analyses of proposed rules.

Guidance On The Requirements Of Executive Order 13272

I. Coverage

"Agency," as defined in 5 U.S.C. 601, means each agency within the Department. It incorporates the definition in 5 U.S.C. 551(1): " 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by

another agency, ..." Advocacy, however, advised us that it would accept Department-wide policies and procedures covering all of our constituent agencies.

II. Written Procedures

A. Existing Documents

In addition to this document, the Department already has a number of documents that impose requirements or provide guidance that effectively implement E.O. 13272's requirement to properly consider the regulatory impacts on small entities. These documents are:

- DOT's Policies and Procedures issued February 26, 1979, (44 FR 11034, as amended May 7, 1979 at 44 FR 28126) and restated in DOT Order 2100.5, issued May 22, 1980 <http://dotnet.dot.gov/fhwarule/Dot21005.htm> ; Although this document predates the RFA/SBREFEA, we update it through emails, memoranda, training courses, and manuals, such as the documents listed below.
- DOT "Guidance Manual on the Small Business Regulatory Enforcement Fairness Act of 1996" (December 1996).
<http://www.uscg.mil/hq/g-m/regs/references/section-a.html> This includes an attachment on size standards.

We also have distributed related guidance from OMB and SBA on RFA and SBREFEA. Advocacy's revised RFA guide, "The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies," provides a comprehensive resource for conducting regulatory flexibility analyses and certifications.
<http://www.sba.gov/advo/laws/rfaguide.pdf>

B. Training and Seminars

The Department has regularly emphasized the requirements of the RFA and related statutes and executive orders concerning small entities. For example, it held a public forum with representatives of small entities and DOT personnel to discuss and gather suggestions on how to do better regulatory flexibility analyses and otherwise consider rulemaking impacts on small entities. In addition, the Department regularly offers training courses for those of its employees – including political appointees – involved in the regulatory process. These courses cover the RFA, SBREFEA, and related executive orders, and emphasize both their requirements and various suggestions for effective compliance. The Department also has developed a compilation and summary of all laws, regulations, directives, and orders that agencies must follow in developing a rulemaking, including the RFA, SBREFEA and related executive orders. Its easy-to-use format allows those involved in the

rulemaking process to fully appreciate the applicable requirements. The Department will continue to monitor the need for any additional guidance or training and provide what is needed. Agency staff should advise the Assistant General Counsel for Regulation and Enforcement of any needs they identify for additional guidance and training.

C. Increased Emphasis

As part of its effort to comply with E.O. 13272, in addition to including references to them in this document, the Department will emphasize the need to increase our attention to these obligations, especially in our training courses and in our review of rulemaking documents.

III. Notification

A. Timing

Each agency must notify Advocacy of draft rules that may have a "significant economic impact on a substantial number of small entities" (SEIOSNOSE) when submitting a draft rule to OIRA for review or (in the case of rules not reviewed by OIRA) "at a reasonable time prior to publication of the rule by the agency." This requirement is new, although, in many cases, DOT agencies have followed it in practice.

In accordance with the General Counsel's memorandum of September 6, 2002, the Assistant General Counsel for Regulation and Enforcement will be responsible for notifying Advocacy of any draft rules covered by E.O. 13272 when that office submits rules to OIRA under E. O. 12866. When your office or agency has a draft rule that has a SEIOSNOSE but meets a rare exception that does not require submission to OIRA, please be sure to advise the attorney in the Office of the Assistant General Counsel for Regulation and Enforcement responsible for the rule in a timely manner so that he or she can provide the "reasonable" notice to Advocacy that is required.

B. Process/Consideration

Advocacy will accept an electronic mail message at <http://sba.gov/advo/> or phone call (202-205-6533) notifying it that the agency has submitted a draft rule for OIRA review. It then may ask the agency to electronically transfer the draft rule, itself, for Advocacy review and comment. The agency must appropriately consider Advocacy's comments and include in the rule's preamble or accompanying documents its response to those comments. The Office of Regulation and Enforcement (C-50) will coordinate this notification/comment process as well as the

agency response to Advocacy comments. This will enable it to also provide additional DOT-wide guidance based on “lessons learned”.

C. Draft Rules

E.O. 13272 uses the term, “draft rule.” Although there may be questions about the meaning of this term, to effectively consider Advocacy comments, we should get its views as early as possible in the rulemaking process. Therefore, DOT agencies should provide Advocacy with notice prior to the issuance of any proposed or final rule with a SEIOSNOSE before its issuance. Advocacy also would prefer working informally with agencies early in the process rather than holding up a rule at an end stage. Advocacy wants to see rules with a possible SEIOSNOSE that are not reviewed by OIRA at a reasonable time prior to publication by the agency. The amount of time that is reasonable will vary by the size and complexity of the documents. We should provide Advocacy at least two weeks - the same amount of time that a senior-level reviewer might take.

D. Ex Parte Communications

Notification under this E.O. does not constitute *ex parte* type communications contemplated by DOT Order on public contacts in rulemaking (DOT Order No. 2100.2). Advocacy is aware of the need for it not to act as a conduit for public comments.

IV. Proper Consideration

A. Process

During development of a rule, each agency should properly consider impacts on small entities, work within the existing department rulemaking process to alert decision makers and reviewing offices to a potential SEIOSNOSE, consider and present alternatives that will reduce the SEIOSNOSE, and justify its chosen alternative. In the next section of this document, we provide detailed guidance on meeting this objective.

B. Advocacy Assistance

Advocacy can provide advice on identification of “small entities” within an industry, offers expertise and guidance on determining whether an economic impact is significant or what constitutes a substantial number in a given population, and maintains useful statistical information. It also serves as a clearinghouse for alternative solutions that other agencies have found successful.

V. Confidentiality

Advocacy can publicly disclose information in a rulemaking only to the extent that the relevant rulemaking agency or OIRA has disclosed it. In this regard, we need to keep in mind that Advocacy has the authority to file amicus briefs in any Federal Court action brought to review a rule; Advocacy can present its views concerning compliance with the RFA, as amended by SBREFA, as well as “the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities.” (5 U.S.C. 12(b) note) If we provide Advocacy with early notification and take advantage of its ability to provide us with helpful information and guidance, and give appropriate consideration to its comments, it is unlikely that Advocacy will find it necessary to use this authority.

A SUMMARY OF PROCEDURES FOR REGULATORY FLEXIBILITY ANALYSES

I. Applicability of the Regulatory Flexibility Act (RFA)

1. Under the RFA, agencies must consider the impact of their rulemakings on "small entities" to alleviate the disproportionate regulatory burden experienced by small entities, to consider alternative approaches, and to scale the scope, application, and impact of their regulations to fit the affected entities.
2. The RFA requires the agency to conduct a regulatory flexibility analysis when it cannot certify that the rule will not have a significant economic impact on a substantial number of small entities (SEIOSNOSE) subject to the requirements of the rule.
3. Agency actions that qualify as rulemakings under the Administrative Procedure Act (APA) <http://www4.law.cornell.edu/uscode/5/ch5.text.html> and that affect small entities or small entity interests trigger the RFA.
4. The agency must consider a regulatory flexibility analysis if it is required to publish a notice of proposed rulemaking (NPRM).
5. DOT policies and procedures generally encourage notice and comment even for rules that are exempt from APA notice and comment requirements. DOT also encourages its agencies to

develop economic analyses and to make early certifications, where feasible, at the advance notice of proposed rulemaking stage (ANPRM). Although the RFA does not require a final regulatory flexibility analysis (FRFA) when no NPRM is required, we encourage our agencies, when issuing an emergency rule, to subsequently prepare the FRFA.

II. What is a Small Entity?

1. Small entities include: small businesses, small not-for-profit organizations, and small governmental jurisdictions, such as cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.
2. Small entities are defined by the SBA in 13 CFR 121.201 or by individual agencies through the consultation procedures outlined in Section 601(3) of the RFA.

III. The Decision Process

1. During the development of the rule, the agency or office initiating the rulemaking must conduct an initial analysis of the potential effects of the rule. It must ascertain, to the extent possible, the number of small entities subject to the requirements of the rule, whether the number is substantial in terms of the total number of small entities, and whether the economic impact on covered entities is significant. In determining whether the numbers are “substantial,” the agency should consider such things as whether the rule’s geographical impact is limited (and then examine the number in that area and not the whole country). In determining whether the impact is “significant,” the agency should look at such things as effects on profits.
2. As part of this phase, the agency should consider exemption of small entities or lesser requirements, if it is possible to do so while achieving the goals of the rule.
3. If the number or impact is not known, the agency should seek that information from commenters by asking questions in the rule’s preamble. The agency can consult with SBA to obtain any relevant information that it may have.

4. During the Department-wide review of the agency's approach to the rule, the agency can seek more information on potential impacts and solicit ideas on useful alternatives that other DOT agencies have used to alleviate the regulatory burden on small entities. This phase of our internal coordination process acts as a "peer review" of the rule.

IV. Regulatory Flexibility Analyses.

1. Agencies or offices initiating the rulemaking must prepare and publish regulatory flexibility analyses that examine the economic impacts on small entities for both the proposed and final stages of any rule that could "have a significant economic impact on a substantial number of small entities." In these analyses, they must consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on small entities and explain the factual, legal and policy reasons for selecting the chosen alternative.
2. The agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) for each proposed rule that has a SEIOSNOSE.
3. The IRFA should lay the foundation for developing a proper Final Regulatory Flexibility Analysis (FRFA) for the final rule by eliciting public comments and seeking additional economic data and information on the regulated industry's profile and regulatory impacts.
4. Without an adequate IRFA, small entities cannot provide informed comments on regulatory alternatives that the IRFA does not address.
5. In developing a FRFA, the agency should identify, among other things, barriers to small business competitiveness that prevent a level playing field for small entities, and to take into account the economic structure of the industry it regulates to help determine and minimize the effect its rule may have on small entities.
6. A FRFA must contain:
 - a. A succinct statement of the need for, and objectives of, the rule;
 - b. A summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the agency's assessment of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

- c. A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.
- d. A description of the projected reporting, record keeping and other compliance requirements of the rule, including an estimate of the classes of small entities, which will be subject to the requirements and the type of professional skills necessary for preparation of the report or record.
- e. 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 that affect the impact on small entities was rejected.

V. The Internal Review/Coordination Process

1. In seeking a designation of significance or non-significance for the rule within DOT and OMB through the Regulatory Agenda and the E.O.12866 "60-day List," agencies should take the rule's potential SEIOSNOSE into account.
2. If the rule has or is likely to have a SEIOSNOSE, it must be designated as significant, and as such, will undergo OST and OMB review. The agency should notify Advocacy that this rule has a potential SEIOSNOSE and use available SBA resources.
3. Designating the rulemaking as significant will ensure its inclusion in the Department's "Report on Significant Rulemakings," which is posted on the Internet <http://regs.dot.gov/report2.htm> . This will allow the public to more easily learn about the rulemaking and its status, since the report is updated monthly. This Report is also tied into the Department's Rulemaking Docket System <http://dms.dot.gov/> , and List Serve <http://dms.dot.gov/emailNotification/> , which allows users to receive email notifications of substantive documents that Departmental agencies place in the docket. These, in turn, allow the public to more efficiently and effectively participate in the rulemaking process for rules with a SEIOSNOSE, including commenting on regulatory flexibility analyses.

4. “Significant rule” under E.O. 12866 and DOT’s Policies and Procedures includes any rule that:
 - i. Requires a Regulatory Impact Analysis or is otherwise costly
 - ii. Concerns a matter on which there is substantial public interest or controversy
 - iii. Has a major impact on another operating administration or other part of DOT or another Federal agency
 - iv. Has a substantial effect on state and local governments
 - v. Has a substantial impact on a major transportation safety problem
 - vi. Initiates a substantial regulatory program or change in policy
 - vii. Is substantially different from international requirements or standards; or otherwise involves important DOT policy.
5. The agency must develop an initial or final regulatory flexibility analysis (IRFA or FRFA) for any rule with a potential SEIOSNOSE.
6. The agency must coordinate proposed and final significant regulations with other affected Federal agencies and other operating administrations and organizational elements within the Department. Coordination of rulemakings with a SEIOSNOSE with SBA Advocacy should be part of this process.
7. As part of DOT’s regulatory review process, the Office of the General Counsel (OGC) reviews the proposed designation of the rule through the Regulatory Agenda and E.O. 12866 60-day list process, ensures that the rulemaking is entered into and tracked through the Department’s Rulemaking Management System database, and ensures that the initiating agency has completed all necessary accompanying documents, such as regulatory evaluations and regulatory flexibility analyses.
8. OGC then circulates the rule and accompanying documents for review within the Secretary’s Office and other interested or affected elements of the Department.
9. This Departmental review of the rule and supporting documents includes legal and economic sufficiency, including whether the initiating agency has complied with the RFA/SBREFEA requirements. If, for example, OGC believes the agency failed to provide a factual justification for a statement of no SEIOSNOSE,

OGC discusses the failure with the agency and works with the initiating office to address the concerns.

10. At this stage, OGC may recommend consultation with SBA Advocacy, if that is appropriate and has not yet occurred.
11. Upon completion of OST review, the rule and supporting documents go to OMB and SBA Advocacy for review.

VI. The Certification Statement of “No SEIOSNOSE”

1. The agency must conduct an analysis demonstrating that it has considered the potential effects of the rule and available alternatives.
2. The agency may certify that no regulatory flexibility analysis is necessary, if it determines that the rule will not have a SEIOSNOSE on small entities subject to the requirements of the rule. However, it must include a factual basis for the certification; a simple statement that the rule will have no SEIOSNOSE is not sufficient.
3. The agency’s certification should include information such as the number of entities affected by the rule; the size of those entities as determined by reference to SBA’s tables of size standards, or to a size standard authorized by the Chief Counsel for Advocacy; and the economic burden to be borne by small entities in various size categories, and any other information that would provide an adequate basis for a certification.

Guidance To Improve Consideration Of Rulemaking Impacts On Small Entities

It must be stressed that the consideration of a rule’s impact does not end with its issuance. It is very important that DOT agencies not only effectively consider the impact of proposed rules, but also monitor the effectiveness of their rules after they are issued and, where necessary, make changes. Similarly, DOT agencies must take appropriate follow-up action to ensure that rules are effectively implemented to keep burdens manageable and must also consider such things as the size of the regulated entity when trying to enforce compliance. For example, effective agency training or guidance may keep small entity compliance costs lower than they would otherwise be. The following guidance takes this into account. We have attached Appendices of related guidance.

I. Communication And Outreach

To help small employers understand our programs and proposed and final regulations, we need to continue communication and outreach efforts. Even where we have little discretion under a statute, we can and should communicate the nature of the constraints and solicit ideas for more flexible implementation from small entities. There are a number of ways we can do this, including the following:

A. Status Report

Continue to maintain and regularly update on a monthly basis the “Status Report on DOT Significant Rulemakings” that is provided on the Internet (ADD LINK). This report provides current information on all DOT significant rulemakings, including such things as the “scheduled” and “actual” publication dates, whether a regulatory flexibility analysis is currently planned or has been done, and when a proposed rule comment period will close.

B. Rules of Interest

Continue to maintain, regularly update, and provide on the Internet (ADD LINK), a list of all current DOT rulemakings that may be of interest to small entities even if a regulatory flexibility analysis will not be required. This will help small entities more effectively use the DOT DMS List Serve to get notification of our regulatory issuances.

C. Regulatory Reform.

Agencies should continue their efforts to review their policies and regulations and streamline their procedures and to relieve the burdens on their regulated industries.

D. Dissemination of Information

Disseminate information through press releases, conferences, videotapes, simple brochures, computer disks and CD-ROMs, speeches, radio broadcasts, Internet websites, and guidance materials to help small entities learn about and understand our programs and proposed and final regulations. To ensure wide dissemination, when appropriate, specifically disseminate information to interest groups representing small entities.

E. Training

Provide training and other educational opportunities. E.g., provide training materials and modules that can be reproduced and conducted by interested entities.

F. Hotlines

Use more Hotlines. E.g., National Highway Traffic Safety Administration (NHTSA) – 800 number for car recalls, Research and Special Programs Administration (RSPA) hazardous materials hotline.

G. One-Stop Shopping

Support “One-Stop Shopping” for small entities to obtain information and to apply for services using one contact point.

H. Docket Management System

Promote greater use of DOT’s internet-accessible, electronic Docket Management System (DMS) <http://www.dms.dot.gov>, which consolidates all the rulemaking, adjudicatory and data quality dockets in DOT, and allows electronic access to users within and outside the Federal Government. Users can file comments and retrieve rulemaking and other information from the system electronically.

I. List Serve

Spread the word about our new electronic notification system, the DMS List Serve, which offers users the option of being notified every time a substantive, government document is posted in the docket. Users can select specific rulemakings, adjudicatory proceedings, or data quality filings by its Regulatory Identification Number (RIN), docket number, or agency. The system also allows users to specifically select regulatory documents that have federalism, tribalism or small entity impacts. Users may sign up for the list serve by going to <http://dms.dot.gov/emailNotification/>.

J. Electronic Bulletin Boards

Use more electronic bulletin boards to provide electronic Question and Answer capability, information on implementation issues, and provide electronic access to documents.

K. Guidance

Prepare more, helpful guidance for individual rules, ensure that it is in plain language (See DOT plain language website

<http://www.dot.gov/ost/ogc/plain.htm> , and make the guidance available on the Internet). As resources permit, create links between Internet sites containing agency statutes, regulations, and guidance/interpretations, to make it easier for small entities to understand how to comply with your rules.

L. DOT Responsibilities

Continue to maintain a list of DOT agency areas of responsibilities and provide it on the Internet to help small entities determine which agencies' rules may affect them. The list found at this link **ADD LINK** provides these areas of responsibility.

II. Encourage Greater And Earlier Small Entity Participation In Rulemaking

A. Docket Management System, Agenda, and List Serve

In all rulemaking documents and any public activities related to them (e.g., press releases and public hearings) clearly advise the public about DOT's internet-accessible, electronic Docket Management System (DMS). DMS allows users to file comments and retrieve rulemaking information from the system electronically. This makes it easier for small entities physically located outside of D.C. to participate in the rulemaking process. The public, for example, can gain easy access to background documents (e.g., regulatory flexibility analyses and environmental analyses), as well as public comments. DMS also provides easy access to DOT's portion of the Regulatory Agenda and Plan online and DOT's new List Serve to give small entities earlier notice of proposed actions.

B. ANPRMs, Comment Periods, and Reply Comments

Where there is sufficient time available, increase the use of advance notices of proposed rulemaking (ANPRMs) and lengthy comment periods to allow earlier and fuller involvement in the rulemaking process. In addition, where appropriate, provide an opportunity for a reply comment period.

C. Public Meetings

To the extent resources permit, increase use of public hearings, meetings, or conferences around the country to ensure that small entities have an opportunity to talk to agency officials. Among other things:

1. Evening Hearings

Use evening hearings so that operators of small entities do not have to interrupt their work to attend.

2. Informal Public Meetings

Use informal public meetings to discuss issues (not to receive testimony) and gather information from affected entities before developing rulemaking proposals.

3. Teleconferencing

Increase use of teleconferencing of public hearings/ meetings on rulemakings to increase small entity participation, particularly from distant geographic locations, such as Alaska.

D. Advisory Committees/Regulatory Negotiations

Increase use of Advisory Committees and Regulatory Negotiations to permit direct public participation in regulatory and other policy decisions.

E. Chat Rooms

Increase or provide opportunity for “chat rooms” on the Internet to provide for on-line discussions about proposed rules.

III. Improve Evaluation Of Economic Impacts And Consideration Of Rulemaking Alternatives

A. Lessen Impacts

There are a number of things that DOT agencies can do to lessen the impact of proposed or existing rules. Where appropriate and safety would not be adversely affected, DOT agencies could:

1. Exemptions

Exempt small entities from regulations, especially if they do not contribute to the problem being addressed, or where imposing the regulation could threaten their existence.

2. Tiering

Tier or reduce regulatory requirements for smaller entities, particularly where they could have a disproportionate impact on small entities.

3. Delays or Phase-Ins

Delay or phase-in the implementation of rules based on the size of entities to give them more time to comply or to join consortia with other entities to reduce their compliance costs.

4. Performance Standards

Provide small entities with flexibility in meeting requirements through the use of performance standards, rather than specific design standards.

5. Consensus Standards

Where feasible, use consensus standards.

6. Alternative Compliance

Allow alternative means of compliance that achieve equivalent levels of protection.

7. Duplicative, Overlapping, or Inconsistent Rules

Consider whether your requirements would duplicate, overlap, or be inconsistent with those of other agencies; coordinate with those agencies as necessary to eliminate these problems.

B. Innovative Approaches

Agencies should look for innovative approaches that will help reduce compliance costs.

C. Use Existing Tools.

1. Existing Analytical Aids/Guidance

DOT and others have prepared guidance documents to help with economic analyses and regulatory flexibility analyses. (See “Economic Analysis of Federal Regulations Under Executive Order 12866” prepared by the Regulatory Working Group and distributed by OMB on January 11, 1996, and OMB memorandum of March 22, 2000, on “Guidelines to Standardize Measures of Costs and Benefits

and the Format of Accounting Statements.”) DOT agencies have also prepared agency-specific guidance, e.g., U.S. Coast Guard and Federal Aviation Administration.

2. Training

DOT has provided - - and will continue to offer - - training courses on a variety of economic analysis issues. It has also conducted roundtable discussions with the public to gather suggestions on how it could improve its economic analyses, including, specifically, regulatory flexibility analyses. Agency staff should advise the Assistant General Counsel for Regulation and Enforcement of any training needs in this area.

D. Meeting Objectives

After a rule has gone into effect, DOT agencies should ensure that it is achieving its objective without causing undue burdens. It should consider a number of things:

1. Monitor results

Monitor the results of your rules. Is a rule doing what it is supposed to do? Do the estimated costs and benefits track the actual costs and benefits? Has technology improved? Ask small entities about their experience with the rule. What problems have they identified?

2. Watch Problems

Pay attention to signs of significant problems that small entities may be having with a rule. These include problems with implementation or enforcement, numerous requests for interpretations, litigation, complaints, petitions, and exemption requests. These signs should trigger a review of the rule.

E. Reviews Of Existing Rules

1. Past Reviews

DOT agencies have conducted several regulatory reviews of all of their regulations to review the necessity for the rules, to remove old or redundant rules, and to streamline their requirements. They have conducted these reviews in response to Presidential directives, agency policies and procedures, and E.O. 12866 and earlier executive orders.

2. Current, Ongoing Reviews

Under section 610 of SBREFA, DOT agencies are now conducting continuing reviews of their existing regulations on a ten-year cycle. The schedule for and results of these reviews are published each year in the fall edition of the DOT Regulatory Agenda and Plan. Through this process, the DOT agencies not only provide entities with an organized approach to facilitate their participation in the reviews, but seek their comment on the order and timing of the reviews. They also specifically invite the public, including small entities, to identify the rules that burden them the most. DOT agencies should continue placing a high priority on these reviews.

3. Crosscutting Problems

Identify crosscutting problems affecting small businesses. DOT agencies should review overlapping Federal rules in conjunction with other Federal agencies to eliminate duplication, conflict or inconsistency.

4. Plain Language

DOT's continuing reviews of its rules include determining whether the existing rules need to be rewritten in plain language. Agencies should use plain language in all documents to help all readers understand them. For assistance, see <http://www.plainlanguage.gov/>. DOT has established a website that provides information on and links to many valuable plain language resources: <http://www.dot.gov/ost/ogc/plain.htm>

5. Effective Communication

Ensure effective communication with people with disabilities, through the use of auxiliary aids when needed. This can include such techniques as the provision of materials in alternative formats. Also be aware of the need to communicate with persons who are not proficient in English.

F. Paperwork Reduction

DOT agencies should continue to lessen the impact on small entities through paperwork reduction efforts.

1. Lessen paperwork

Eliminate unnecessary paperwork and simplify requirements. Consolidate multiple reports, licenses, and other documentation where possible. See the Paperwork Reduction Act (44 U.S.C. 3501-3520).
<http://www.rdc.noaa.gov/~pra/pralaw.htm> OMB Guidance.

2. Allow Electronic Information

a. Government Paperwork Elimination Act

The Government Paperwork Elimination Act (44 U.S.C. 3504 note) requires that, by October 21, 2003, agencies allow “electronic maintenance, submission, or disclosure of information, when practicable as a substitute for paper” and “for the use and acceptance of electronic signatures, when practicable.”

http://www.cio.gov/Documents/paperwork_elimination_act.html

b. Electronic Maintenance and Submission

DOT agencies should permit entities to electronically maintain and submit reports and tariffs to the maximum extent possible.

c. Electronic Signature

The Electronic Signature in Global and National Commerce Act (15 U.S.C. §§7001-7031) establishes the legal equivalence, in private commerce, between legally required written and electronic documents and “pen-and-ink” and electronic signatures. To the extent Federal law or regulation requires the retention of a document or information, this Act allows electronic retention; agencies are permitted to require paper records in certain circumstances.

<http://www.ftc.gov/os/2001/06/esign7.htm>

3. Single Point of Contact

The Small Business Paperwork Relief Act of 2002,

<http://www.sba.gov/ombudsman> requires agencies to designate a single point of contact for small entities. This person is to act as a liaison between the agency and small business concerns with respect to the collection of information and the control of paperwork. The DOT contact person is Eugene K. Taylor, Jr., Acting Chief Information Officer. He can be reached at 202-366-9201.

4. Additional Information

For additional information: See also OMB regulations at 5 C.F.R. Part 1320, "Controlling Paperwork Burdens on the Public," for supplemental requirements. In addition, see OMB/OIRA memorandum of May 22, 1995, on "Preparing to Implement S.244, the 'Paperwork Reduction Act of 1995'"; OMB memorandum of April 25, 2000, on "OMB Procedures and Guidance on Implementing the Government Paperwork Elimination Act"; OMB/OIRA memorandum of July 25, 2000, on "Achieving Electronic Government: Instruction for Plans to Implement the Government Paperwork Elimination Act"; and OMB memorandum of September 19, 2000, on "OMB Guidance on Implementing the Electronic Signatures in Global and National Commerce Act."

Related Statutory Requirements and Executive Order

The Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), (5 U.S.C. 601 *et seq.*), enacted September 19, 1980, requires the consideration and appropriate mitigation of the impacts of rules on smaller entities. <http://www.sba.gov/advo/laws/regflex.html>

- Under the RFA, agencies must consider the impact of their rulemakings on "small entities" (small businesses, small organizations, and local governments) to alleviate the disproportionate regulatory burden experienced by small entities, to consider alternative approaches, and to scale the scope, application, and impact of their regulations to fit the affected entities.
- Agencies must review existing rules periodically and publish a semi-annual agenda of planned regulatory activities.
- Agencies must prepare and publish regulatory flexibility analyses that examine the economic impacts on small entities for both the proposed and final stages of any rule that could "have a significant (either positive or negative) economic impact on a substantial number of small entities." In these analyses, they must consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on small entities and explain the rationale for their chosen alternative.

Some of the reasons Congress passed the RFA include:

- regulations designed for large entities are imposed on small entities without consideration as to whether small entities contribute to the problems that give rise to the need for regulation;
- uniform compliance requirements impose disproportionate burdens on small entities;
- differences in the scale and resources of regulated entities adversely affect competition, innovation, and productivity, and create market-entry barriers;
- alternative regulatory approaches may exist that can minimize the significant impact of rules on small entities without conflicting with the objectives of proposed regulations; and

- regulatory reform is needed in regulation development to solicit the ideas and comments of small entities to examine the impact of proposed and existing rules on those entities.

The RFA does not seek preferential treatment for small entities, require agencies to adopt regulations that impose the least burden on small entities, nor mandate exemptions for small entities. Rather, the RFA encourages agencies to identify, among other things, barriers to small business competitiveness that prevent a level playing field for small entities, and to take into account the economic structure of the industry they regulate to help determine and minimize the effect their regulations may have on small entities.

For more detailed guidance on the RFA, see the Small Business Administration's Office of Advocacy Guidance, "The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies" (1998). <http://www.sba.gov/gils/SBA1998Jun05.082416.html>

**Executive Order 12866 "Regulatory Planning and Review"
(1993) (As amended by E.O. 13258 (2002))**

Executive Order 12866 (E.O. 12866) requires agencies to analyze the costs and benefits of various alternatives (including impact on small entities) in developing rules and to conduct a comprehensive regulatory review to identify burdensome, duplicative or conflicting regulations.

It requires each agency to regulate in the "most cost-effective manner," to make "a reasoned determination that the benefits of the intended regulation justify its costs," and to develop regulations that "impose the least burden on society." It also requires each agency to prepare a (semiannual) Agenda of all regulations under development or review; as part of the October Agenda, the agency prepares a Plan of its most important significant regulatory actions. It also requires each agency to submit to OMB a program for periodic review of existing significant regulations to determine whether to modify or eliminate them.

Before issuing an NPRM, agencies should seek involvement of those intended to benefit or be burdened. Agencies should provide a meaningful opportunity to comment, including a 60-day comment period in most cases. Where appropriate, agencies must use consensual mechanisms.

Agencies must prepare an assessment, including analyses, of benefits and costs, quantified to the extent feasible, of the anticipated action and "potentially effective and reasonably feasible alternatives," including an explanation of why the planned action is preferable. (See "Economic Analysis of Federal Regulations Under Executive Order

12866” prepared by the Regulatory Working Group and distributed by OMB on January 11, 1996, and OMB memorandum of March 22, 2000, on “Guidelines to Standardize Measures of Costs and Benefits and the Format of Accounting Statements.”)

Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)

<http://www.osha.gov/SmallBusiness/SBREFAOverview.html>

On March 29, 1996, Congress enacted the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) to address some of the deficiencies of the RFA that it had identified in previous oversight hearings – primarily, the lack of judicial review of agency action under the RFA and a history of uneven agency compliance with the Act. SBREFA’s amendments include:

- Judicial review of agency compliance with some of the RFA provisions.
- Requirements for more detailed and substantive regulatory flexibility analyses.

The 1980 RFA listed three things that a final regulatory flexibility analysis (FRFA) must contain; SBREFA modified two of those and added two new ones. The new requirements for a FRFA follow, with the changes noted in bold:

- A succinct statement of the need for, and objectives of, the rule;
- A summary of the **significant** issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary 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;
- **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**
- **A description of the projected reporting, record keeping and other compliance requirements of the rule, including an estimate of the classes of small entities, which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.**
- 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 that affect the impact on small entities was rejected.

- A requirement that the agency publish the FRFA or a summary of it in the *Federal Register* rather than just a statement of how the public could obtain copies, as was permitted under the 1980 RFA.
- When certifying that a rule does not have a significant economic impact on a substantial number of small entities, the agency must provide "the factual basis for such certification," rather than just "the reasons" for the certification.

Enforcement Appendices

The Rights Of Small Entities To Enforcement Fairness And Policy Against Retaliation

DOT has a policy regarding the rights of small entities to regulatory enforcement fairness and an explicit DOT policy against retaliation for exercising these rights. Our operating administrations have circulated and should continue to circulate this information to their regulated entities through several means, including: their Internet websites, rulemaking documents, inspection handouts, guidance materials, pamphlets, and information materials disseminated to trade associations. They should circulate the updated language through several of these means as soon as possible and include it in pamphlets and other periodically published documents when they republish them. The policy is as follows:

Your Rights To Enforcement Fairness

Our objective is to ensure a fair regulatory enforcement environment. If you feel you have been treated unfairly or unprofessionally, you may contact (Agency representative and telephone/e-mail address). You also have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR or www.sbs.gov/ombudsman regarding the fairness of the compliance and enforcement activities by this agency.

Policy Against Retaliation

The (agency name) strictly forbids retaliatory acts by its employees. As such, you should feel confident that you will not be penalized for expressing your concerns about compliance and enforcement activities.

Reduction Or Waiver Of Penalties When Appropriate

1. Policy

Under SBREFA, each agency that regulates small entities must have a policy or program "to provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity."

2. Ability to Pay

“Under appropriate circumstances, an agency may consider ability to pay in determining penalty assessments on small entities.” Subject to other statutes, the agency policy or program must have conditions or exclusions.

3. DOT Guidance

DOT Guidance on these requirement can be found in DOT “Guidance Manual on the Small Business Regulatory Enforcement Fairness Act of 1996” (December 1996). <http://www.uscg.mil/hq/g-m/regs/references/section-a.html>

Enforcement Reporting

The "Small Business Paperwork Relief Act of 2002" (SBPR) www.sba.gov/ombudsman requires agencies to report to the Office of the Small Business and Agriculture Regulatory Enforcement Ombudsman on:

1. The number of enforcement actions in which a civil penalty is assessed.
2. The number of enforcement actions in which a civil penalty is assessed against a small entity.
3. The number of enforcement actions described under subparagraphs (a) and (b) in which the civil penalty is reduced or waived; and
4. The total monetary amount of the reductions or waivers referred to.