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**Notice**

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March 3, 1998

Subject: Regulatory Flexibility Act Cancellation Date: August 30, 1998

The following material replaces existing section 531 of the Regulations Handbook regarding background and procedures to be followed in ensuring compliance with the Regulatory Flexibility Act. The updated material incorporates changes to the Regulatory Flexibility Act made by the Small Business Regulatory Enforcement Fairness Act.

#### 531.4 Regulatory Flexibility Act

##### 531.41 Background and Discussion

1. The purpose of the Regulatory Flexibility Act (RFA) is to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. See Pub. L. 96-354, § 2(b). Consistent with this purpose, in drafting and formulating regulations, consideration should be given to alternative approaches that satisfy the statutory requirements while reducing burdens, if any, imposed on small entities.
2. Regulations to which the RFA applies. The RFA generally applies to two types of regulations issued by the Service:
  - A. legislative regulations, i.e., regulations for which notice of proposed rulemaking is required to be published in the Federal Register pursuant to 5 U.S.C. 553(b); and
  - B. interpretative regulations to the extent the regulations impose a collection of information on small entities.

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5 U.S.C. 601(2), 603. Because interpretative regulations are covered only "to the extent" of the collection of information, only the portion of the interpretative regulations that imposes a collection of information on small entities is subject to the RFA. See 5 U.S.C. 603(a). Prior to the Small Business Regulatory Enforcement Fairness Act (SBREFA), the RFA did not apply to interpretative regulations. The SBREFA amendments generally are effective June 27, 1996, but under a transition rule interpretative regulations that were proposed prior to March 29, 1996 and are finalized on or after June 27, 1996 are not required to contain a final regulatory flexibility analysis.

3. Collection of Information. "Collection of information" has the same definition in all meaningful respects under the RFA as under the Paperwork Reduction Act (PRA), and thus generally should be given the same meaning under both statutory provisions. Compare 5 U.S.C. 601(7) and 44 U.S.C. 3502(3). The definition of a "small entity" includes small businesses, small organizations, and small governmental jurisdictions. 5 U.S.C. 601(3)-(6). The term "small business" includes businesses that satisfy the Small Business Administration's (SBA's) size standards. See 15 U.S.C. 632; 13 C.F.R. Part 121. These size standards vary for different industries, but most businesses likely will be classified as "small" under the standards. (A 1994 report prepared by SBA estimated that, of the 21.5 million business tax returns filed in the U.S., only about 14,000 of the businesses were "large.") The businesses may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative. 13 C.F.R. 121.105.
4. Content and Preparation of Analysis. If regulations are subject to the RFA, a regulatory flexibility analysis must be prepared for the regulations both when the regulations are proposed and when they are issued as final regulations. 5 U.S.C. 603, 604. The analysis must be published in the Federal Register, and must include the information set forth in 5 U.S.C. 603(b) and (c) (for proposed regulations) or in 5 U.S.C. 604(a) (for final regulations). An example of the type of information required to be included in the analysis is a description and estimate, where feasible, of the number of small entities to which the regulations will apply. See 5 U.S.C. 603(b)(3).
5. Exception for cases in which IRS can certify. A regulatory flexibility analysis is not required if the head of the agency certifies that a regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). Any such certification must be

published in the Federal Register, along with a statement providing the factual basis for the certification. Id.

- A. Substantial Number of Small Entities. Although in 1996 the SBA estimated that there are 22 million small businesses, neither the statute nor the legislative history defines the term "substantial number" of small entities. Until issuance of guidance by OMB, whether a number of affected small entities is substantial will be based on all relevant facts and circumstances. The higher the number of affected small entities, the more likely that such number may be "substantial." In addition, regulations are more likely to be considered to affect a substantial number of small entities if the regulations are targeted at a specific industry and the regulations affect a high percentage of small entities in that industry.
  - B. Significant Economic Impact. The applicable statute and legislative history also do not define the term "significant economic impact." With respect to interpretative regulations, any possible revenue impact of the regulations is inherently part of the revenue impact of the underlying statute, and thus is not considered in measuring any economic impact attributable to the regulations. Also, because the RFA applies only to the portion of interpretative regulations that imposes a collection of information, the relevant economic impact of such regulations is only the economic impact of the collection of information. See 5 U.S.C. 603(a). The economic impact of a collection of information should be estimated in a manner consistent with similar estimates that are required for purposes of the PRA. The estimate generally should be determined on an annual basis and should be based on all relevant facts and circumstances, including the hours necessary to comply with the collection of information, the costs of purchasing equipment that is necessary to comply with the collection of information, etc. Cf. 44 U.S.C. 3502(2) (definition of "burden" for purposes of the PRA). Burden estimates under the PRA generally are stated in terms of a number of hours. One possible method of estimating the economic impact of a collection of information is to multiply the PRA estimate of burden hours times an hourly rate.
6. Judicial Review. Most agency actions pursuant to the RFA are subject to judicial review. See 5 U.S.C. 611. The RFA provides broad discretion to courts to fashion appropriate remedies (e.g., remanding the rule to the agency, deferring

enforcement of the rule, etc.) in the event of noncompliance with the requirements of the RFA. Id.

#### **531.42 Procedures for Ensuring Compliance with the RFA**

1. The principal author of regulations should assess whether the RFA applies to the regulations, and, if so, should take steps to ensure that the regulations fully comply with the RFA. The steps should include:
  - A. The author should determine whether the regulations are one of the two types of regulations described above to which the RFA applies: legislative regulations, and interpretative regulations that impose a collection of information on small entities.
  - B. If the RFA applies to the regulations, the author should prepare a regulatory flexibility analysis unless it is determined that the regulations will not have a significant economic impact on a substantial number of small entities (see (C) below). Statistical and other data concerning the number of affected small entities may be obtained through a number of resources, including the IRS Statistics of Income Division, the IRS Forms and Publications Division, the IRS Office of Small Business Affairs, tax practitioners, small businesses, Treasury's Office of Tax Analysis, revenue estimates and other legislative history of the underlying statute, and other resources available in the Chief Counsel library.
  - C. If it is determined that the regulations will not have a significant economic impact on a substantial number of small entities, the factual basis for such determination should be documented. See (B) above for potential sources to consult in determining the number of affected small entities.
  - D. The regulatory flexibility analysis or other language, as appropriate, should be inserted into the preamble of the regulations. See Appendix A for model language.
  - E. The principal author should prepare a RFA Checklist as described below.

#### **531.43 RFA Checklist**

1. A RFA Checklist should be prepared for all regulations, regardless of whether the regulations are subject to the



## APPENDIX A

I. Model Language: Analysis not required because the regulation is a final (interpretative) regulation for which an NPRM was issued prior to March 29, 1996.

It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the notice of proposed rulemaking preceding the regulations was issued prior to March 29, 1996, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply.

II. Model Language: Analysis not required because the regulation is an interpretative regulation that does not impose a collection of information on small entities

It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply.

III. Model Language: Analysis required.

A. Interpretative regulations.

i. NPRM.

An initial regulatory flexibility analysis has been prepared required for the collection of information in this notice of proposed rulemaking under 5 U.S.C. § 603. A summary of the

analysis is set forth below under the heading 'Summary of Initial Regulatory Flexibility Analysis.'

ii. Temporary Regulations.

Because no preceding notice of proposed rulemaking is required for this temporary regulation, the provisions of the Regulatory Flexibility Act do not apply. However, an initial Regulatory Flexibility Analysis was prepared for the proposed regulations published elsewhere in this issue of the Federal Register.

iii. Final regulations.

A final regulatory flexibility analysis has been prepared for the collection of information in this Treasury Decision under 5 U.S.C. § 604. A summary of the analysis is set forth below under the heading 'Summary of Final Regulatory Flexibility Analysis.'

B. Legislative regulations.

i. NPRM.

An initial regulatory flexibility analysis has been prepared for this notice of proposed rulemaking under 5 U.S.C. § 603. A summary of the analysis is set forth below under the heading 'Summary of Initial Regulatory Flexibility Analysis.'

ii. Temporary Regulations.

Because no preceding notice of proposed rulemaking is required for this temporary regulation, the provisions of the Regulatory Flexibility Act do not apply. However, an initial Regulatory Flexibility Analysis was prepared for the proposed regulations published elsewhere in this issue of the Federal Register.

iii. Final regulations.

A final regulatory flexibility analysis has been prepared for this Treasury Decision under 5 U.S.C. § 604. A summary of the analysis is set forth below under the heading 'Summary of Regulatory Flexibility Analysis.'

IV. Model Language: Analysis not required because the regulations will not impose a significant economic impact on a substantial number of small entities; certification and factual support provided

A. Interpretative regulations.

It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that [insert factual support]. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required.

B. Legislative regulations.

It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that [insert factual support]. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required.

**Appendix B**

**REG FLEX CHECKLIST**

**Regulations Project (number and title):** \_\_\_\_\_  
\_\_\_\_\_

**1. Legislative/Interpretative Regulations**

**Check one of the following, whichever is applicable:**

- a.  Legislative Regulations (RFA applies; go to 3. below)
- b.  Interpretative Regulations (RFA applies to the extent a collection of information is imposed on small entities; go to 2. below)
- c.  Other; explain

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**2. Collections of Information (complete for interpretative regulations)**

- a. Does the regulation contain a collection of information?
  - i. Yes. (Go to 2.b. below)
  - ii. No. The RFA does not apply. (Go to 4. below.)
- b. Is any collection of information in 2.a. imposed on "small entities"?
  - i. Yes. (Go to 3. below.)
  - ii. No. The RFA does not apply (Go to 4. below.)

**3. Regulations Subject to RFA**

If the regulations are legislative (see 1.a.) or are interpretative and impose a collection of information on small entities (see 2.b.i.), complete either a. or b. below, whichever applies.

- a. **RegFlex Analysis Prepared.** Has a regulatory flexibility analysis been prepared?
- \_\_\_ i. Yes. (Go to 4. below.)
- \_\_\_ ii. No. (Go to 3.b. below.)
- b. **Certification.** Do the regulations contain a certification that the regulations (if legislative) or the collection of information imposed by the regulations (if interpretative) do not impose a significant economic impact on a substantial number of small entities?
- \_\_\_ i. Yes. (Go to 4. below.)
- \_\_\_ ii. No. Explain why the regulations do not contain a regulatory flexibility analysis:
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#### 4. Alternative Approaches

- a. Regardless of whether the regulations are subject to the RFA, were other alternative regulatory approaches considered in an attempt to minimize the burden on small entities?
- \_\_\_ i. Yes. (Checklist is complete.)
- \_\_\_ ii. No. (Go to 4.b. below.)
- b. Other alternatives were not considered because:
- \_\_\_ i. The statute and/or legislative history prevented consideration of other alternatives.
- \_\_\_ ii. Other. Explain.
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