

REGULATORY FLEXIBILITY ACT AMENDMENTS

FEBRUARY 23, 1995.—ordered to be printed

Mrs. MEYERS of Kansas, from the Committee on Small Business,
submitted the following

REPORT

[To accompany H.R. 937]

[Including cost estimate of the Congressional Budget Office]

The Committee on Small Business, to whom was referred the bill (H.R. 937) to amend title 5, United States Code, to clarify procedures for judicial review of Federal agency compliance with regulatory flexibility analysis requirements, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments (stated in terms of the page and line number of the introduced bill) are as follows:

Page 6, line 17, strike the closing quotation marks and the final period and insert the following:

“(4) SPECIAL RULE.—Any proposed rules issued by an appropriate Federal banking agency (as that term is defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), the National Credit Union Administration, or the Office of Federal Housing Enterprise Oversight, in connection with the implementation of monetary policy or to ensure the safety and soundness of federally insured depository institutions, any affiliate of such an institution, credit unions, or government sponsored housing enterprises or to protect the Federal deposit insurance funds shall not be subject to the requirements of this subsection.”.

PURPOSE

The primary purpose of the bill is to provide and clarify procedures for judicial review of agency compliance with the Regulatory

Flexibility Act, P.L. 96-354, 5 U.S.C. §601 et seq. An additional purpose of the bill is to require federal agencies to work more closely with the SBA Chief Counsel for Advocacy, who is charged with monitoring compliance with the Regulatory Flexibility Act, during the drafting of new rules. Finally, the bill contains a “sense of Congress” provision that the SBA Chief Counsel for Advocacy be allowed to appear as *amicus curiae* in any federal court for the purpose of reviewing a federal rule.

SUMMARY

In brief, H.R. 937 is intended to do three basic things.

A. Judicial review

Section 1 would amend Section 611 of Title 5 to allow and clarify the procedures for judicial review of agency compliance with the Regulatory Flexibility Act (RFA). Section 611 as it currently exists prohibits court challenge of an agency determination of the applicability of the RFA, and prohibits court review of any regulatory flexibility analysis or certification prepared under the Act. In practice, this prohibition on judicial challenges has allowed agencies to ignore the letter and spirit of the RFA.

The primary features of the new judicial review provision provided by this bill are:

- (1) A small entity can only seek judicial review arising from a final rule;
- (2) The judicial review can be for either a wrongful certification that the rule will not have a significant economic impact on a substantial number of small entities or a flawed or totally absent final regulatory flexibility analysis;
- (3) The small entity seeking judicial review must do so within 180 days of the effective date of the final rule. However, if some other provision of law requires a lesser time for judicial review of a final agency rulemaking action, then the lesser time prevails. This additional feature is designed to avoid multiple reviews of final agency actions by the courts; and
- (4) Agencies will be allowed a short period (90 days) in which to correct regulatory flexibility defects. After that time, a reviewing court can stay the operation of the rule or provide whatever relief it deems appropriate.

B. Earlier involvement in the rulemaking process by the SBA Chief Counsel for Advocacy

While the primary intention of this legislation is to strengthen agency compliance with the Regulatory Flexibility Act, it is also the intention to require agencies to work more closely with the SBA Chief Counsel for Advocacy,¹ who is charged with monitoring compliance with the Act, during the drafting of new rules.

Section 2 of the legislation would amend Section 612 of Title 5 to require that, when an agency is drafting a new rule, the agency

¹The Office of Advocacy within the Small Business Administration was created in 1976. The management of the Office is vested in a Chief Counsel for Advocacy, who is a Senate-confirmed Presidential appointee. P.L. 94-305, 15 U.S.C. §634a et seq. The original Regulatory Flexibility Act placed oversight responsibility for implementation of the RFA in the hands of the Chief Counsel for Advocacy. 5 U.S.C. §612.

must provide the SBA Chief Counsel for Advocacy with an advance copy of the rule 30 days before publishing a general notice of proposed rulemaking in the Federal Register pursuant to the provisions of the Administrative Procedure Act. See 5 U.S.C. § 553(b).

The purpose behind this provision of the legislation is to attempt to involve the SBA Chief Counsel for Advocacy in securing agency compliance with the Act at the earliest possible time and to allow agencies to benefit from the Chief Counsel's views before the rule is in the public domain. The proponents of this provision believe that in certain circumstances agencies may be reluctant to retreat from certain regulatory approaches once those approaches have become public, even if only in the form of preliminary rules.²

An exception to this advance notification approach is made in this provision for draft proposed rules of certain banking agencies. This exception or special rule is the result of the only amendment to the bill considered by the Committee, which was passed by voice vote.

C. Authority of the SBA Chief Counsel for Advocacy to appear as amicus curiae

The RFA currently gives the Chief Counsel authority to file amicus briefs in litigation involving federal rules, which allows him to express the views of the Chief Counsel with respect to the effect of the rule on small entities. In the history of the RFA, this has only been done once, in the 1986 case of *Lehigh Valley Farmers*. At that time, the Justice Department indicated that this amicus provision was unconstitutional because it would impair the ability of the Executive branch to fulfill its constitutional functions. The SBA Chief Counsel for Advocacy countered this argument with legal arguments of his own. The Justice Department also argued that Executive Order 12146, section 1-402, prevents the Chief Counsel from filing such briefs. Section 1-402 of Executive Order 12146 requires that when such a legal dispute exists between two agency heads which serve at the President's discretion, such dispute shall be submitted to the Attorney General for resolution. The SBA Chief Counsel countered with case law supporting the principle that an Executive Order cannot supersede a statute, and therefore Executive Order 12146 cannot prohibit the SBA Chief Counsel for Advocacy from appearing as amicus curiae since 5 U.S.C. § 612 provided for such action.

After a great deal of debate between the Justice Department and the SBA Chief Counsel for Advocacy, the Chief Counsel eventually withdrew the amicus brief filed in the *Lehigh Valley Farmers* case. No Chief Counsel has filed an amicus brief since.³

²At the Committee's oversight hearing on the Regulatory Flexibility Act held on July 28, 1993, James W. Morrison, appearing on behalf of the National Association for the Self-Employed and the Regulatory Flexibility Act Coalition, stated that this advance notification provision would also serve to remedy the relative inadequacy of the regulatory agendas provided to the SBA Chief Counsel for Advocacy pursuant to the requirements of Section 602 of Title 5 (the RFA).

³See Appendix D to this report, which is a Memorandum prepared by the American Law Division (Congressional Research Service) of the Library of Congress, dated October 22, 1993, which provides an analysis of the constitutional issue raised by the Justice Department concerning 5 U.S.C. § 612(b).

In September of 1994, the SBA Chief Counsel for Advocacy filed notice of intent to file an amicus brief in *Time Warner Entertainment Limited Partnership v. Federal Communications*

The ability to appear as amicus curiae is important to the ability of the SBA Chief Counsel for Advocacy to represent the interests of small businesses in the rulemaking process. Furthermore, if this bill should become law, with its provision to permit judicial review of agency compliance with the Regulatory Flexibility Act, the importance of the Chief Counsel's ability to file amicus briefs will be magnified.

Section 3 of this bill is a "sense of Congress" provision reaffirming what the Congress had already passed in 1980.

NEED FOR LEGISLATION

WHAT IS THE REGULATORY FLEXIBILITY ACT?

The Regulatory Flexibility Act (RFA) was enacted in 1980 to force federal agencies to take into consideration the impact their regulations will have on small entities before they go into effect, and to attempt to minimize that impact.

As stated in the text of the Act, "[i]t is the purpose of this Act * * * that agencies shall endeavor * * * to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration."⁴

Under the RFA, for proposed rules which are subject to publication in the Federal Register and public comment under the Administrative Procedure Act (APA), the rule-writing agency must also prepare an initial regulatory flexibility analysis describing the impact the rule may have on small entities. The analysis must also outline alternatives to the proposed rule which would accomplish the same objectives with a lesser impact on small entities.

At the time of publication of the final rule, the RFA requires agencies to publish a final regulatory flexibility analysis, which summarizes public comments on the initial analysis, the agency response, and changes made to the rule as a result. If the agency did not adopt these less burdensome alternatives, an explanation must be provided.

Proposed or final rules are not subject to these analyses if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This certification must be published in the Federal Register and include an explanation of the reasons for the certification.

In addition to these provisions, which function as part of the regular rulemaking process, the RFA requires agencies to publish regulatory flexibility agendas twice each year, outlining rules which the agency believes it may propose in the future that would significantly affect small entities. The RFA requires agencies to take certain steps to afford small entities the opportunity to participate in the rulemaking process. Finally, the RFA provides for the review

Commission, No. 93-1723 (D.C. Cir.), but came to an accord with the FCC, thereby avoiding the need to file an amicus brief.

⁴See Congressional Findings and Declaration of Purpose, Section 2 of P.L. 96-354, now codified in the footnote to 5 U.S.C. § 601.

of rules with a significant impact on small entities within ten years after they have gone into effect.

The RFA charges the SBA Chief Counsel for Advocacy with the responsibility of monitoring agency compliance with the Act.

WHY THE REGULATORY FLEXIBILITY ACT NEEDS TO BE AMENDED?

Currently, Section 611 of Title 5 states in part “* * * any determination by an agency concerning the applicability of the provisions of this chapter to any action of the agency shall not be subject to judicial review.”

The RFA allows agencies to certify that their rules do not have a significant impact on small entities, and therefore avoid conducting regulatory flexibility analyses. The prohibition of judicial review allows no legal challenge to such a determination nor does it allow a challenge to a flawed regulatory flexibility analysis. The result is that compliance with the RFA is voluntary and federal regulators do not face court action for failure to comply.

Replacing the current Section 611 is the single most important step which can be taken to force agencies to fully consider the impact of their rules on small entities. Unless regulators face the possibility of court challenge to their actions they may not comply with the RFA. The Act needs to be amended to provide judicial review so that needed “teeth” are put into the law.

The RFA directs the SBA Chief Counsel for Advocacy to monitor RFA compliance. However, the ability to do so has been limited. The proposed legislation would force agencies to work more closely with the Chief Counsel during the rulemaking process. Agencies would be required to provide the Chief Counsel with copies of rules 30 days before they are proposed, and he would have the opportunity to present the concerns or opposition of small entities to the proposed rule. The agency would then be required to respond to these concerns. It is hoped that the proposed provision will give greater encouragement to regulators to minimize the impact of their rules on small entities before the rules are proposed.

Finally, the RFA as passed in 1980 grants the SBA Chief Counsel for Advocacy the authority to appear as *amicus curiae* in court cases which involve the review of federal rules. However, when the Chief Counsel filed an amicus brief in 1986, the Justice Department challenged the constitutionality of this authority. After much discussion, that brief was withdrawn and the question has never been resolved. The ability of the Chief Counsel to represent small entity views in court is critical. The amendment to the RFA contained in this legislation contains a “sense of Congress” provision reaffirming the position Congress took in passing the original RFA: that the Chief Counsel does have the authority to file amicus briefs in court cases which involve the review of federal rules.

BACKGROUND

A. The Regulatory Flexibility Act

The Administrative Procedure Act (APA)⁵ requires federal agencies to promulgate rational rules. The APA provides the primary mechanism for accomplishing this task—notice and comment rule-making. The Regulatory Flexibility Act, which was signed into law in 1980,⁶ is another tool to assist agencies in fulfilling their statutory mandate under the APA. The regulatory Flexibility Act (RFA) is based on two premises: (1) That federal agencies often do not recognize the impact that their rules will have on small entities;⁷ and (2) that small entities are disproportionately disadvantaged by federal regulations compared to their larger counterparts.

In the late 1970's, a study commissioned by the Office of Advocacy of the U.S. Small Business Administration confirmed that scale economies exist in complying with a diverse variety of federal regulations. In each case, the study revealed that larger firms can comply with various types of governmental regulation at a lower cost than small businesses. The explanation for this finding is simple—if the cost of compliance with a federal regulation is primarily fixed, then the smaller firm will suffer a more severe impact since it has a smaller output over which to recover the costs of regulation.

The RFA was enacted to obtain federal agency recognition of these effects and consequently to reduce them. The intention of the Act is to have agencies approach the entities they regulate with an eye to their size and take this into account in drafting rules rather than approaching rulemaking with a “one size fits all” attitude. If the RFA is properly complied with, the primary goals of the APA

⁵ 5 U.S.C. § 551 et seq.

⁶ The Regulatory Flexibility Act was the result of efforts of many small businesses throughout this country. The issues of regulatory relief and regulatory flexibility were a dominant theme at the 1980 White House Conference on Small Business, and the participants involved in that conference pushed for legislative action. In addition to these grass roots activities, the U.S. Congress spent an extensive amount of time during the late 1970's examining the need for regulatory flexibility. *See generally*, Regulatory Flexibility Act, S. 1974, Part 1: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm., 95th Cong., 1st Sess. (1977); Regulatory Flexibility Act, S. 1974, part 2: Joint Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm. and the Senate Select Comm. on Small Business, 95th Cong., 2d Sess. (1978); H.R. 7739 and H.R. 10632, Small Business Impact Bill, Part 1: Hearings Before the Subcomm. on Special Small Business Problems of the House Small Business Comm., 95th Cong., 2d Sess. (1978); H.R. 7739 and H.R. 10632, Small Business Impact Bill, Part 1: Hearings Before the Subcomm. on Special Small Business Problems of the House Small Business Comm., 95th Cong., 2d Sess. (1978); H.R. 77399 and H.R. 10632, Small Business Impact Bill, Part 2: Hearings Before the Subcomm. on Special Small Business Problems of the House Small Business Comm., 95th Cong., 2d Sess. (1978); Impact of Federal Regulation on Small Business: Hearings Before the Subcomm. on Special Small Business Problems of the House Small Business Comm., 96th Cong., 1st Sess. (1979); Regulatory Reform, Part 3: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm., 96th Cong., 1st Sess. (1979); Regulatory Reform, Part 4: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm., 96th Cong., 1st Sess. (1979); Regulatory Reform Act of 1979, Part 1: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Judiciary Comm., 96th Cong., 1st Sess. (1979); Regulatory Reform Act of 1979, Part 2: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Judiciary Comm., 96th Cong., 1st and 2d Sess. (1979 and 1980).

⁷ Under § 601(6) of Title 5, the “small entities” intended to benefit from the Act are “small organizations,” defined to include any nonprofit enterprise which is independently owned and operated and is not dominant in its field (5 U.S.C. § 601(4)); “small governmental jurisdictions,” defined to include 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)); and “small businesses,” which are the same as “small business concerns” as defined in Section 3 of the Small Business Act (5 U.S.C. § 601(3)). *See* 15 U.S.C. § 632 (as amended).

should also be satisfied because the RFA should cause agencies to write better rules. By mitigating the impact of regulation on small businesses, the viability and health of small businesses will be determined in the marketplace and not in a distant federal office.

The RFA requires federal agencies to assess the impact of their regulatory proposals on small entities. Agencies then have two options under the statute—performing a regulatory flexibility analysis or issuing a certification.

An agency certifies a rule if it determines that the rule will not have a significant economic impact on a substantial number of small entities. Announcement of the certification must be published in the Federal Register and the certification must be accompanied by “a succinct statement explaining the reasons for such certification. * * * ”⁸ Simple boilerplate statements that the rule will not have such an effect are patently inadequate under the RFA. Rather, sufficient analysis must be performed to apprise the regulated community of the reasons for the certification. Moreover, any doubt as to whether a regulatory flexibility analysis should be performed must be resolved in favor of performing the analysis.⁹

An agency determination which reveals that the proposed rule in question will have a significant economic impact on a substantial number of small entities leads to a requirement that the agency prepare an initial regulatory flexibility analysis (IRFA) and publish it in the Federal Register. This analysis must contain: (1) A description of the reasons why the regulatory action is being considered; (2) a succinct statement of the regulatory objectives and legal basis for the proposed rule; (3) a description and estimate of the number of small entities affected by the agency action; (4) a detailed description of the reporting, record keeping, and other compliance requirements of the proposed rule; and (5) an identification of any duplicative, overlapping or conflicting federal regulations.¹⁰

More important than any of these requirements is that the analysis must describe and examine significant alternatives to the proposal which accomplish the objectives of the agency but minimize the economic impact on small entities. Significant alternatives may include, but are not limited to: (1) the establishment of differing compliance or reporting requirements 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 small entities; (3) the use of performance rather than design standards; and (4) exemption of small entities from all or part of the rule.¹¹

When an agency issues its final rule, it must either prepare a final regulatory flexibility analysis (FRFA) or again certify that the rule will not have a significant economic impact on a substantial number of small entities. The FRFA must thoroughly discuss comments received by the agency from the regulated community and others (i.e., trade associations, other agencies or Members of Congress) as well as the alternatives considered by the agency while preparing the final rule. The most important feature of the provi-

⁸ 5 U.S.C. § 605(b).

⁹ Statement of Rep. Andy Ireland, 126 Cong. Rec. 24585 (September 8, 1980).

¹⁰ 5 U.S.C. § 603(b).

¹¹ 5 U.S.C. § 603(c).

sion governing final analysis is that in the FRFA agencies must give reasons why they did not adopt the alternatives which were presented to the agency during the rulemaking process.¹² While the FRFA is normally made available at the same time as the final rule is published in the Federal Register, an emergency provision contained in the Act provides that the public availability of the FRFA can be delayed for up to 180 days.¹³

Both the regulatory flexibility analysis and certification process are designed to force federal agencies to articulate the potential effects of proposed rules on small entities. This process should not be viewed in isolation but rather as an integral component of the administrative process and as a procedural tool for assisting in the goal of rational rulemaking.

Other substantive provisions of the RFA provide for regulatory agendas¹⁴ and the periodic review of rules.¹⁵ However, these provisions are not now the subject of amendments to the Act.

During the 1980's, the implementation of the Regulatory Flexibility Act was the subject of several reports by the SBA Chief Counsel for Advocacy, as required by 5 U.S.C. §612(a). The Regulatory Flexibility Act was also the subject of extensive Congressional oversight.¹⁶

B. Recent developments which led to the current legislation

The current legislative effort to amend the RFA has a history which begins almost three years ago.

On May 1, 1992, a day-long hearing was held before the House Republican Research Committee's Task Force on Small Business. The focus of that hearing was the impact of federal regulations on small business and much of the testimony centered on the need to strengthen the Regulatory Flexibility Act (RFA). Shortly after that hearing, Rep. Tom Ewing (R-IL), having analyzed the materials from the May 1, 1992 hearing, began an effort to introduce legislation that would address certain problems with the RFA.

On September 18, 1992, near the end of the 102d Congress, Rep. Ewing introduced H.R. 5977, the Regulatory Flexibility Amendments Act of 1992. With only a few weeks left in the 102d Congress, no action was taken on that measure.

At the beginning of the 103d Congress, on February 4, 1993, Rep. Ewing introduced H.R. 830, the Regulatory Flexibility Amendments Act of 1993. This proposal, which was substantively identical to H.R. 5977 from the previous Congress, eventually garnered 255 bipartisan cosponsors.

¹² 5 U.S.C. § 604(a).

¹³ 5 U.S.C. §§ 604(b) and 608(b).

¹⁴ 5 U.S.C. § 602.

¹⁵ 5 U.S.C. § 610.

¹⁶ See, generally, Oversight of the Regulatory Flexibility Act (Part 1): Hearings before the Subcomm. on Export Opportunities and Special Small Business Problems of the House Comm. on Small Business, 97th Cong., 1st Sess. (1981); Oversight of the Regulatory Flexibility Act (Part 2): Hearings before the Subcomm. on Export Opportunities and Special Small Business Problems of the House Comm. on Small Business, 97th Cong., 2d Sess. (1982); Regulatory Flexibility Act: Joint Hearings Before the Subcomm. on Regulatory Reform of the Senate Judiciary Comm. and the Subcomm. on Government Regulation and Paperwork of the Senate Comm. on Small Business, 97th Cong., 2d Sess. (1982); Implementation of the Regulatory Flexibility Act: Hearings Before the Subcomm. on Export Opportunities and Special Small Business Problems of the House Comm. on Small Business, 99th Cong., 2d Sess. (1986).

On July 28, 1993, the Committee on Small Business held an oversight hearing on the Regulatory Flexibility Act which specifically addressed some of the provisions contained in H.R. 830.¹⁷

Testifying at this hearing were: Rep. Tom Ewing (R-IL); Doris S. Freedman, Acting Chief Counsel for Advocacy, U.S. Small Business Administration; William S. Busker, Senior Vice President for Law and Finance, and General Counsel and Chief Financial Officer, the American Trucking Associations, Inc.; Mark W. Isakowitz, Legislative Representative, National Federation of Independent Business; Frank E. Lawson, President, National Roofing Contractors Association; Leo McDonough, President, TEC/Pennsylvania Small Business United, on behalf of National Small Business United; James W. Morrison, Director of Government Relations, National Association for the Self-Employed, and representing the Regulatory Flexibility Act Coalition.

The months following the Committee's July 28th hearing involved much work by members of the Regulatory Flexibility Act Coalition, who pressed for a hearing on H.R. 830 before the Committee on the Judiciary's Subcommittee on Administrative Law and Governmental Relations.

In September of 1993, the Report of the National Performance Review conducted by Vice President Gore made judicial review for the Regulatory Flexibility Act its number one recommendation for the Small Business Administration.¹⁸

On November 18, 1993, the Judiciary Subcommittee on Administrative Law and Government Relations held a hearing on H.R. 830. In addition to testimony by Rep. Tom Ewing in support of his legislation, Rep. Ike Skelton (D-MO) testified on the need for strengthening the RFA, and in support of H.R. 830.¹⁹ The witnesses testifying at the Judiciary Subcommittee hearing on November 18, 1993 included Ms. Doris Freedman, the Acting Chief Counsel for Advocacy, representatives from the Regulatory Flexibility Act Coalition and some of its member groups, academics and other interested parties.²⁰

No further action was taken on H.R. 830 by the Committee on the Judiciary during the 103d Congress. However, there was substantial other activity involving the issue of strengthening the Regulatory Flexibility Act during the last Congress.

On March 17, 1994, during consideration of S. 4 (the Senate version of the National Competitiveness Act), Senator Malcolm Wallop (R-WY) introduced an amendment which, among other things, provided for judicial review of the RFA. After a motion to table the Wallop amendment was defeated by a vote of 67 to 31, the amendment passed by voice vote. Shortly after provisions amending the

¹⁷Hearing Before the Committee on Small Business on the Regulatory Flexibility Act, 103d Cong., 1st Sess. (1993). Serial No. 103-38.

¹⁸See Appendix C to this report.

¹⁹In his testimony, Rep. Skelton specifically mentioned a Congressional oversight initiative by the Committee on Small Business which led to a report by the Committee which contains the most extensive analysis thus far concerning implementation of the Regulatory Flexibility Act. Rep. Skelton led that effort as Chairman of the Small Business Subcommittee on Exports, Tourism, and Special Problems. See Report of the Committee on Small Business: "Implementation of the Regulatory Flexibility Act—A Five-Year Report," 100th Cong., 1st Sess. (1987). H. Rep. 100-273.

²⁰See Hearing Report on H.R. 830, Regulatory Flexibility Amendments Act of 1993, before Subcommittee on Administrative Law and Governmental Relations, November 18, 1993. Serial No. 69.

Regulatory Flexibility Act were included in the Senate version of the National Competitiveness Act, efforts began in the House to develop a motion to instruct the House conferees that would embrace judicial review for the RFA.²¹

Only July, 19, 1994, the House conferees on the National Competitiveness Act were named. At that time, a motion to instruct the conferees to accept the Senate's approach and provide judicial review for the RFA was offered by Rep. Robert Walker (R-PA). After debate on the House floor, the motion to instruct offered by Rep. Walker passed by a recorded vote of 380 to 36. The National Competitiveness Act died in conference.

COMMITTEE ACTION

On January 4, 1995, H.R. 9 was introduced as one of the bills which makes up the "Contract with America." The bill, entitled the "Job Creation and Wage Enhancement Act of 1995," contained several provisions aimed at improving the regulatory system. Divided into twelve titles, the bill was referred for consideration to several Committees of the House. The Committee on Small Business received a re-referral of Title VI, along with other provisions, on February 9, 1995. Title VI, relating to strengthening the Regulatory Flexibility Act, was the subject of hearings by the Committee on Small Business on January 23 and February 10, 1995.²²

The hearing held by the Committee on Small Business on January 23, 1995 involved the testimony of the following witnesses: the Honorable Jere Glover, Chief Counsel for Advocacy of the U.S. Small Business Administration; Mr. Jack Faris, President and CEO, National Federation of Independent Business; Mr. Charles N. "Rusty" Griffiths, Jr. of Binghamton Slag Roofing Co. Inc., a member of the National Roofing Contractors Association; Mr. James P. Carty, V.P.—Small Manufacturers, National Association of Manufacturers; Mr. Robert Pool, Homestyle Publishing, appearing on behalf of the National Association for the Self-Employed; and Mr. Lee Taddonio, V.P.—TEC/Pennsylvania Small Business United, appearing on behalf of National Small Business United.

The hearing held by the Committee on February 10, 1995 involved the testimony of the Honorable Jere Glover, Chief Counsel for Advocacy of the U.S. Small Business Administration;²³ Mr. John T. Spotila, General Counsel of the U.S. Small Business Administration, appearing on behalf of the Clinton Administration; Mr. Frank S. Swain, the SBA Chief Counsel for Advocacy during the Reagan Administration; and several government representatives who appeared on behalf of several federal regulatory agencies.

Subsequent to hearings by the Committee, and re-referral of Title VI of H.R. 9, H.R. 937 was introduced on February 14, 1995 by Mrs. Meyers and was referred to the Committee on the Judici-

²¹ In addition to these efforts to fashion a motion to instruct for use when House conferees were chosen, efforts continued to attempt to move Rep. Ewing's legislation, H.R. 830. Rep. Ewing filed a discharge petition in May of 1994, which was ultimately signed by 100 Members.

²² Title VI was among several titles of H.R. 9 referred to the Committee on the Judiciary on January 4, 1995 and was the subject of a hearing held before the Judiciary Subcommittee on Commercial and Administrative Law on February 3, 1995.

²³ In connection with the hearing held on February 10, 1995, Committee staff reviewed the Annual Reports of the Chief Counsel for Advocacy on implementation of the Regulatory Flexibility Act for the years 1981 through 1993. See 5 U.S.C. §612(a).

ary and the Committee on Small Business. The bill contains the substance of Title VI of H.R. 9 as revised and improved, taking into consideration comments offered by witnesses at the hearings and suggestions proposed by other Members.

On February 15, 1995, the Committee on Small Business, with a quorum present, reported H.R. 937 by voice vote, after having adopted one amendment, also by voice vote.

SECTION-BY-SECTION ANALYSIS

SECTION 1—JUDICIAL REVIEW

Currently, 5 U.S.C. §611 generally prohibits judicial review of agency compliance with the Regulatory Flexibility Act (RFA). Judicial review is provided only in those limited instances when a petition for judicial review is instituted on other grounds, and only to the extent that the regulatory flexibility analysis has been made part of the record of agency action to be considered by the reviewing court. An agency's certification that a regulatory flexibility analysis is not required is not reviewable by a court, nor is the adequacy of a regulatory flexibility analysis unless it is considered as a part of a larger challenge.

Section 1 of H.R. 937 creates a new 5 U.S.C. §611, which in subsection (a)(1) grants judicial review of compliance with the RFA to affected small entities, but requires that they must petition for review within 180 days after the effective date of the final rule they seek to challenge. The challenge must be brought to the court having jurisdiction, or which would have jurisdiction, to review such rule for compliance with the provisions of the Administrative Procedure Act or any other provision of law.

Subsection (a)(2)(A) provides that where another provision of law requires that an action challenging a final agency regulation be commenced before 180 days, a regulatory flexibility challenge must be brought within that shorter time period. Subsection (a)(2)(B) covers those situations where an agency has delayed the issuance of a final regulatory flexibility analysis because it was operating under an emergency situation. In those cases, an affected small entity has 180 days from the date the analysis is made available to the public or within a shorter period if another provision of law requires a challenge be brought in a shorter time.

Subsection (a)(3) defines "affected small entity" as one that is or will be adversely affected by the final rule.

Subsection (a)(4) states that nothing in subsection (a) of Section 611 shall be construed to affect a court's authority to stay the effective date of any rule because of any other provision of law.

Subsection (a)(5)(A) gives a court reviewing a challenge under the RFA the authority to order an agency to prepare a regulatory flexibility analysis if the agency has improperly certified that a proposed rule would not have a significant economic impact on a substantial number of small entities. The standard that the court is to follow is that, on the basis of the rulemaking record, the certification was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This standard is identical to the standard of review for the Administrative Procedure Act.

If the agency has prepared a final regulatory flexibility analysis, subsection (a)(5)(B) authorizes the court to order the agency to take corrective action consistent with Section 604 of Title 5 (the section describing what should be in a final regulatory flexibility analysis).

Subsection (a)(6) gives agencies a 90 day grace period in which to take corrective action as a result of an order of the court pursuant to subsection (a)(5). If after that period the agency has not complied, the court may stay the rule or grant such other relief as it deems appropriate.

Subsection (a)(7) requires the court to take due account of the rule of prejudicial error.

Subsection (b) of the new Section 611 provides that in an action for judicial review of a rule, any regulatory flexibility analysis for such rule shall be considered part of the whole record of agency action in connection with such review.

Subsection (c) of the new Section 611 states that nothing contained in Section 611 of Title 5 bars judicial review of any other impact statement or analysis required or permitted by any other law.

The effective date of the amended judicial review provisions contained in the new Section 611 applies to final agency rules issued after the date of enactment of H.R. 937.

SECTION 2—RULES COMMENTED ON BY SBA CHIEF COUNSEL FOR ADVOCACY

It is the intention of this legislation to strengthen agency compliance with the RFA. It is also the intention to require agencies to work more closely with the SBA Chief Counsel for Advocacy, who is charged with monitoring RFA compliance, during the drafting of new rules.

Section 2 of H.R. 937 would amend Section 612 of the RFA to require that when an agency is drafting a new rule, the agency must provide the SBA Chief Counsel for Advocacy with an advance copy of the rule 30 days before publishing a general notice of proposed rulemaking in the Federal Register. (General Notices of Proposed Rulemaking are required under the APA, 5 U.S.C. § 553(b).) At that time, the agency must also provide the SBA Chief Counsel for Advocacy with a draft of the initial regulatory flexibility analysis for the rule or if the agency determines that a regulatory flexibility analysis will not be necessary the agency must provide an explanation for that determination.

Following receipt of the above information, the SBA Chief Counsel for Advocacy may review the proposed rule and regulatory flexibility analysis or other explanation. The SBA Chief Counsel for Advocacy will have 15 days to transmit, in writing, to the agency, any opposition or comments on the proposed rule or regulatory flexibility analysis or agency determination that an analysis is not necessary.

If the SBA Chief Counsel for Advocacy submits such a statement, the agency shall publish that statement, together with the response to the agency, if the Federal Register at the same time the general notice of the proposed rulemaking for the rule is published. The failure of the SBA Chief Counsel for Advocacy to submit any statement to an agency during this advance notification procedure

should not be construed as an approval by the Chief Counsel of the agency's initial regulatory flexibility analysis or certification.

New Section 612(d)(4) of Title 5, which was added by the amendment adopted in the Committee by voice vote, contains a narrowly drawn exception for any proposed rules issued in connection with implementation of monetary policy or actions taken to ensure the safety and soundness of federally insured depository institutions, affiliates of such institutions, credit unions, or government sponsored housing enterprises (as the term "enterprise" is defined in § 1303(6) of the Housing and Community Development Act of 1992 or to protect the deposit insurance funds. Safety and soundness regulations are designed to ensure proper supervision of banking operations and promote prudential standards designed to guard against undue risk or loss to banking institutions and, potentially, the deposit insurance funds. The SBA Chief Counsel for Advocacy's review could add considerable time to the rulemaking process, thereby delaying the promulgation of regulations necessary to ensure that safety and soundness of the nation's financial institutions or actions taken in connection with monetary policy. A delay in promulgating these type of regulations, which in some instances may require expeditious treatment, could put the taxpayer-backed deposit insurance funds at risk.

SECTION 3—SENSE OF CONGRESS REGARDING THE SBA CHIEF COUNSEL FOR ADVOCACY

Section 3 of this bill is a "sense of Congress" provision reaffirming what is presently contained in 5 U.S.C. § 612(b).

The Regulatory Flexibility Act currently gives the SBA Chief Counsel for Advocacy authority to file amicus briefs in litigation involving federal rules. In the history of the RFA this has only been done once, in the 1986 case of *Lehigh Valley Farmers*. At that time, the Justice Department indicated that this amicus authority was unconstitutional because it would impair the ability of the Executive branch to fulfill its constitutional functions.

After a great deal of wrangling between the Department of Justice and the Chief Counsel, the Chief Counsel eventually withdrew the amicus brief filed in the *Lehigh Valley Farmers* case.

The ability to appear as amicus curiae is important to the ability of the SBA Chief Counsel for Advocacy to represent the interests of Small businesses in the rulemaking process. Furthermore, if H.R. 937 becomes law, with its provision to permit judicial review of agency compliance with the Regulatory Flexibility Act, the importance of the SBA Chief Counsel's ability to file amicus briefs will be magnified.

DISCUSSION

At the two hearings held by the Committee on the regulatory flexibility provisions contained in Title VI of H.R. 9, several witnesses and many Members of the Committee, including the Chair, the Ranking Member, and Reps. Wyden and Sisisky, raised concerns over a provision contained in Title IV of H.R. 9.

Title IV of H.R. 9 was designed to provide for federal regulatory budget cost control through amendments to the Congressional

Budget Act of 1974. However, the last provision in this Title, Section 4003, goes substantially beyond this goal. Section 4003 of H.R. 9 would make substantive changes to the Regulatory Flexibility Act which would expand the protections of the Act to big business.

Section 4003 of H.R. 9 adds requirements calling for monetary cost assessments to be provided as an additional product of the analyses required by Sections 603 and 604 of Title 5 of the U.S. Code (the RFA). However, instead of limiting the assessment of costs of compliance with a proposed or final rule to the costs to small entities, Section 4003 of H.R. 9 goes further and requires the cost assessment to set forth the monetary costs to "small entities, other businesses, and individuals." Since the term "small entities" contained in the RFA is defined to include small businesses, the new term "other businesses" set forth in Section 4003 must include big businesses.

Since this "cost assessment" provision contained in Section 4003 of H.R. 9 is designed to amend the two substantive, analytical sections of the RFA, it was perceived by Members of the Committee that the intent of Section 4003 was to expand the reach of the RFA to big business.

At both of the Committee's hearings on the regulatory flexibility provisions of H.R. 9, the Committee heard universal disapproval concerning expanding the reach of the Regulatory Flexibility Act to big businesses. This included testimony by the Honorable Jere Glover, the Chief Counsel for Advocacy of the U.S. Small Business Administration, who is charged by statute with overseeing implementation of the RFA, and testimony by Mr. John T. Spotila, General Counsel of the U.S. Small Business Administration, who appeared before the Committee to provide the Clinton Administration's position on the regulatory flexibility provisions contained in H.R. 9.

At the Committee mark-up on February 15, 1995, Chair Meyers represented to the Members of the Committee that it was her understanding from the House Leadership that Section 4003 of H.R. 9 would not be reported out by any committee of the House.

It is the position of the Committee on Small Business that the benefits of the Regulatory Flexibility Act should be preserved solely for small entities as that term is currently defined in the Act and that the RFA should not be extended to big business.

Another issue which was raised during the Committee's consideration of H.R. 937 (and Title VI of H.R. 9) concerns what standards should be applied by courts in their review of agency compliance with the Regulatory Flexibility Act. The simple answer is that reviewing courts should draw upon precedents and decisions interpreting the Administrative Procedure Act and, specifically, its judicial review provisions. See 5 U.S.C. § 701 et seq.²⁴ For example, if H.R. 937 becomes law, the new Section 611 (a)(7) of Title 5 of the U.S. Code will refer to the "rule of prejudicial error." The "rule of prejudicial error" is also referred to in 5 U.S.C. § 706 (the APA) and its definition and application can be found throughout the case law

²⁴ While reviewing courts should give the deference to agency judgments required by APA precedents, the Committee believes that real and effective review within these limits is necessary to accomplish the purposes of the Regulatory Flexibility Act.

analyzing principles of administrative law both before and after adoption of the Administrative Procedure Act in 1946.²⁵

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the House of Representatives, the Committee sets forth, with respect to H.R. 937, the following statement received from the Director of the Congressional Budget Office under Section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 23, 1995.

Hon. JAN MEYERS,
*Chair, Committee on Small Business,
House of Representatives, Washington, DC.*

DEAR MADAM CHAIR: The Congressional Budget Office has reviewed H.R. 937, a bill to amend title 5, United States Code, to clarify procedures for judicial review of Federal agency compliance with regulatory flexibility analysis requirements, and for other purposes, as ordered reported by the House Committee on Small Business on February 15, 1995. CBO estimates that implementing the provisions of H.R. 937 would cost the Federal Government approximately \$1 million over the next five years, assuming appropriation of the necessary funds. Because enactment of H.R. 937 could affect direct spending, pay-as-you-go procedures would apply to the bill. Enacting H.R. 937 would not affect the budgets of State or local governments.

H.R. 937 would permit small entities to petition for judicial review of a Federal agency's compliance with the requirements of the Regulatory Flexibility Act. The bill also would require that a Federal agency transmit to the Small Business Administration (SBA) a copy of any proposed rule (and the agency's initial regulatory flexibility analysis, if required) at least 30 days prior to the publication of the notice of proposed rulemaking. The SBA would be permitted to transmit to the proposing agency the SBA's analysis of the proposed rule's effects on small businesses.

Federal agencies required to file regulatory flexibility analyses would incur some additional costs in transmitting the required documents to the SBA, but CBO does not expect these costs to be significant. Based on information from the SBA, CBO estimates that reviewing proposed rules and preparing analyses of their effects on small businesses would cost the Federal Government approximately \$200,000 per year over the next five years, assuming appropriation of the necessary amounts.

Enactment of H.R. 937 could result in additional lawsuits against the Federal Government requesting judicial review of Federal agency compliance with the requirements of the Regulatory Flexibility Act. To the extent that the additional lawsuits were successful and the plaintiffs were awarded attorney's fees, enactment

²⁵ See, Generally, *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479 (9th Cir. 1992); *Shelton v. Marsh*, 902 F.2d 1201 (6th Cir. 1990); and *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506 (D.C. Cir. 1986).

of H.R. 937 could result in additional direct spending because these fees are paid from the Claims, Judgments and Relief Acts account. CBO cannot estimate either the likelihood or the magnitude of the direct spending, because there is no basis for predicting either the outcome of possible litigation or the amount of potential compensation.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is John Webb.

Sincerely,

JAMES L. BLUM
(For Robert D. Reischauer, Director).

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the House of Representatives, the Committee estimates that H.R. 937 will have no inflationary impact on prices and costs in the operation of the national economy.

OVERSIGHT FINDINGS

In accordance with clause 2(l)(3)(D) of rule XI of the House of Representatives, the Committee states that no oversight findings or recommendations have been made by the Committee on Government Reform and Oversight with respect to the subject matter contained in H.R. 937.

In accordance with clause 2(l)(3)(A) of rule XI and clause 2(b)(1) of rule X of the House of Representatives, the oversight findings and recommendations of the Committee on Small Business with respect to the subject matter contained in H.R. 937 are incorporated into the descriptive portions of this report.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

* * * * *

PART I—THE AGENCIES GENERALLY

* * * * *

CHAPTER 6—THE ANALYSIS OF REGULATORY FUNCTIONS

* * * * *

§ 603. Initial regulatory flexibility analysis

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, the agency shall prepare and make available

for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration *in accordance with section 612(d)*.

* * * * *

【§611. Judicial review

[(a) Except as otherwise provided in subsection (b), any determination by an agency concerning the applicability of any of the provisions of this chapter to any action of the agency shall not be subject to judicial review.

[(b) Any regulatory flexibility analysis prepared under sections 603 and 604 of this title and the compliance or noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review. When an action for judicial review of a rule is instituted, any regulatory flexibility analysis for such rule shall constitute part of the whole record of agency action in connection with the review.

[(c) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise provided by law.]

§611. Judicial review

(a)(1) Except as provided in paragraph (2), not later than 180 days after the effective date of a final rule with respect to which an agency—

(A) certified, pursuant to section 605(b) of this title, that such rule would not have a significant economic impact on a substantial number of small entities; or

(B) prepared a final regulatory flexibility analysis pursuant to section 604 of this title,

an affected small entity may petition for the judicial review of such certification or analysis in accordance with the terms of this subsection. A court having jurisdiction to review such rule for compliance with the provisions of section 553 or under any other provision of law shall have jurisdiction to review such certification or analysis.

(2)(A) Except as provided in subparagraph (B), in the case where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 180 day period provided in paragraph (1), such lesser period shall apply to a petition for the judicial review under this subsection.

(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section 608(b) of this title, a petition for judicial review under this subsection shall be filed not later than—

(i) 180 days; or

(ii) in the case where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 180 day period provided in paragraph (1), the number of days specified in such provision of law, after the date the analysis is made available to the public.

(3) For purposes of this subsection, the term “affected small entity” means a small entity that is or will be adversely affected by the final rule.

(4) Nothing in this subsection shall be construed to affect the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law.

(5)(A) In the case where the agency certified that such rule would not have a significant economic impact on a substantial number of small entities, the court may order the agency to prepare a final regulatory flexibility analysis pursuant to section 604 if the court determines, on the basis of the rulemaking record, that the certification was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(B) In the case where the agency prepared a final regulatory flexibility analysis, the court may order the agency to take corrective action consistent with the requirements of section 604 if the court determines, on the basis of the rulemaking record, that the final regulatory flexibility analysis was prepared by the agency without observance of procedure required by section 604 of this title.

(6) If, by the end of the 90-day period beginning on the date of the order of the court pursuant to paragraph (5) (or such longer period as the court may provide), the agency fails, as appropriate—

(A) to prepare the analysis required by section 604 of this title; or

(B) to take corrective action consistent with the requirements of section 604 of this title,

the court may stay the rule or grant such other relief as it deems appropriate.

(7) In making any determination or granting any relief authorized by this subsection, the court shall take due account of the rule of prejudicial error.

(b) In an action for the judicial review of a rule, any regulatory flexibility analysis for such rule (including an analysis prepared or corrected pursuant to subsection (a)(5)) shall constitute part of the whole record of agency action in connection with such review.

(c) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise provided by law.

§612. Reports and intervention rights

(a) * * *

* * * * *

(d) ACTION BY SBA CHIEF COUNSEL FOR ADVOCACY.—

(1) TRANSMITTAL OF PROPOSED RULES AND INITIAL REGULATORY FLEXIBILITY ANALYSIS TO SBA CHIEF COUNSEL FOR ADVOCACY.—On or before the 30th day preceding the date of publication by an agency of general notice of proposed rulemaking

for a rule, the agency shall transmit to the Chief Counsel for Advocacy of the Small Business Administration—

(A) a copy of the proposed rule; and

(B)(i) a copy of the initial regulatory flexibility analysis for the rule if required under section 603; or

(ii) a determination by the agency that an initial regulatory flexibility analysis is not required for the proposed rule under section 603 and an explanation for the determination.

(2) *STATEMENT OF EFFECT.*—On or before the 15th day following receipt of a proposed rule and initial regulatory flexibility analysis from an agency under paragraph (1), the Chief Counsel for Advocacy may transmit to the agency a written statement of the effect of the proposed rule on small entities.

(3) *RESPONSE.*—If the Chief Counsel for Advocacy transmits to an agency a statement of effect of a proposed rule in accordance with paragraph (2), the agency shall publish the statement, together with the response of the agency to the statement, in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule.

(4) *SPECIAL RULE.*—Any proposed rules issued by an appropriate Federal banking agency (as that term is defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), the National Credit Union Administration, or the Office of Federal Housing Enterprise Oversight, in connection with the implementation of monetary policy or to ensure the safety and soundness of federally insured depository institutions, any affiliate of such an institution, credit unions, or government sponsored housing enterprises or to protect the Federal deposit insurance funds shall not be subject to the requirements of this subsection.

* * * * *

APPENDIX A

[Letter from Representative Tom Ewing to President Clinton, dated February 4, 1993]

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, February 4, 1993.

The PRESIDENT,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: I was excited to learn of your commitment during a September 30 speech at Clinton, Maryland to "enforce the Regulatory Flexibility Act's requirements" as a way to help small businesses cope with federal regulation. I would like to work with you on this issue.

As you know the Regulatory Flexibility Act (RFA) was designed to minimize the impact of federal regulations on small businesses. The RFA requires agencies to prepare analyses of the potential effect, including compliance costs of proposed rules on small businesses and develop final rules which minimize that impact. However, agencies in many cases have not complied with the spirit or letter of the RFA, in part because of some flaws in the original legislation. The most glaring problem is that there is no method to force agencies to heed the RFA as the Act contains a provision prohibiting judicial review of agency compliance.

Over the past year I have developed legislation to improve the RFA, which is being introduced today. This bill has received strong bi-partisan support so far in Congress, including the Chairman and Ranking Member of the House Small Business Committee. It has also received strong support from the small business community.

I would be honored to work with you in a bi-partisan spirit to pass this legislation which is critically important to small businesses if we are to ease the burden of excessive and costly federal regulations. Enclosed is detailed information about the Regulatory Flexibility Amendments Act of 1993.

Thank you for your consideration.

Sincerely,

THOMAS W. EWING,
Member of Congress.

APPENDIX B

[Letter from President Clinton to Representative Tom Ewing, dated April 22, 1993]

THE WHITE HOUSE,
Washington, DC, April 22, 1993.

Hon. THOMAS W. EWING,
House of Representatives,
Washington, DC

DEAR REPRESENTATIVE EWING: Thank you for your letter informing me that you had introduced H.R. 830, the "Regulatory Flexibility Amendments Act of 1993."

The Regulatory Flexibility Act (RFA) has played an important role in many rulemakings by ensuring that the effects on small businesses and small governmental entities are considered during the rulemaking process. However, experience with the RFA suggests that improvements may be needed in its implementation, particularly in agency compliance with the requirements to perform adequate regulatory flexibility analysis.

My Administration looks forward to working with you and the Congress on this important issue. I appreciate your interest in small business, and want you to know that the concerns of small business are a very high priority in my Administration.

With best wishes,
Sincerely,

BILL CLINTON.

APPENDIX C

[Excerpt from the Report of the National Performance Review, dated September, 1993]

SBA01: ALLOW JUDICIAL REVIEW OF THE REGULATORY FLEXIBILITY ACT

BACKGROUND

Small businesses often feel overwhelmed by well-intentioned regulations that burden them with needless costs. Congress and the President recognized this problem in 1980 and enacted the Regulatory Flexibility Act (RFA). The RFA requires agencies to seek alternative regulatory solutions when their rules have a disproportionately severe impact on small entities, including small businesses and nonprofit organizations and relatively small government jurisdictions. However, most agencies have failed to perform the required RFA analysis. Rules continue to be issued even though the harm that resulted could have been alleviated had they been examined according to RFA guidelines.¹

For example, in 1986, Congress enacted the Emergency Planning and Community Right-To-Know Act, requiring local reporting of hazardous chemicals. The initial Environmental Protection Agency (EPA) implementation instructions required reporting "any amount" of hazardous chemicals. The potential impact on small business was staggering. Even hot-dog stands would have been required to report bottles of solvent or metal polish.

The Small Business Administration's (SBA's) Office of Advocacy, which is directed by law to monitor compliance with the RFA, coordinated small business comments with EPA, which explored less burdensome alternatives. As a result of this process, EPA raised the threshold for reporting to 10,000 pounds of hazardous chemicals. This threshold eliminated hundreds of thousands of unnecessary reports, yet still covered more than 95 percent of the total quantity of stored chemicals and 100 percent of those in quantities likely to produce the sort of hazard that was the concern of the legislation.

The RFA, which works in conjunction with the fundamental agency rulemaking law, the Administrative Procedure Act (APA), leads rulemakers to one of two outcomes:

(1) For rules that will have a significant economic impact upon a substantial number of small entities, the agency is required to perform a regulatory flexibility analysis. This analysis defines the burdens of the rule and examines alternatives that will lessen those burdens for small entities.

(2) For rules that will not have a significant economic impact upon a substantial number of small entities, the agency must so

certify, with a brief statement explaining the rationale behind this conclusion.

While SBA's Office of Advocacy can ask agencies to follow the RFA, no mechanism for enforcing compliance exists. As a result, federal agency compliance is spotty at best. A few agencies, such as the EPA, the Food Safety Inspection Service, and the Nuclear Regulatory Commission, now consistently use the RFA to reduce the regulatory burden imposed on small entities. Most agencies employ simplistic analysis that barely meet even the minimal requirements of the RFA. Others, including the Internal Revenue Service, define their rulemaking activities in the Federal Register as "interpretative, a category excluded from RFA responsibilities."

Several administrative efforts have been made to improve the level of responsiveness to the RFA, but with little success. The fundamental solution is judicial review, an approach favored by small business. Such review is permitted for agency rulemaking under the APA. However, the RFA itself prohibits judicial review of agency compliance with the RFA. Courts have further restricted the use of RFA analysis as evidence in suits brought under the APA.

For the RFA to succeed at its goal of avoiding needless government regulatory burdens on small entities, sanctions for non-compliance with the RFA must be created.

With judicial review, small entities could challenge an agency's failure to perform an RFA review or a flawed RFA review. They could sue in the appropriate federal court and, if they won, the court could order the agency to explain its RFA determination or develop appropriate alternatives under the RFA. A credible threat of lawsuits would give agencies a strong motive to ensure that the RFA is followed.

Judicial review is supported by all major small business associations, including the American Small Business Association, the American Trucking Association, the National Association for the Self-Employed, the National Association of Manufacturers, the National Federation of Independent Business, National Small Business United, the National Society of Public Accountants, the Small Business Legislative Council, and the U.S. Chamber of Commerce.²

To create better compliance with the RFA and avoid needless lawsuits, the availability of judicial review must be accompanied by systematic compliance guidelines for agencies concerning how to conduct RFA reviews. For more than a decade, most agencies have failed to develop such guidelines on their own.

ACTIONS

1. The Regulatory Flexibility Act of 1980 should be amended to allow for judicial review of agency determinations under the RFA.³

This approach would allow small entities that have been injured by an agency action to seek judicial relief. This would be possible only after an agency has published a final rule, not at any earlier point in the rulemaking process.

2. An Executive Order should be issued requiring the SBA Office of Advocacy to issue governmentwide guidance on appropriate processes for complying with the analytical requirements of RFA.⁴

This approach would provide consistent technical guidance—the foundation for avoiding lawsuits.

IMPLICATIONS

The potential for judicial review would give agencies greater incentive to meet their present statutory obligations to consider the impact of their rules on small entities. Agency lawyers would ensure that the agency would properly comply with the RFA to avoid the valid threat of litigation.

Judicial review is not expected to lead to a large number of lawsuits. No basis for suits would exist if agencies conducted an appropriate RFA review. As a practical matter, most regulations to which small entities have significant objections are already in litigation; judicial review of RFA would at most add another ground to these challenges. A few new cases based solely on RFA failure might result, in instances in which the impact of rules on small entities is sufficiently negative to impose greater costs than the cost of litigation—a fairly high threshold. In these rare cases, a challenge may be in the nation's best interests.

In the most extreme cases, judicial review of RFA could lead to an initial flurry of lawsuits. Once the first few cases are decided, however, the boundaries between acceptable and unacceptable agency behavior under RFA would become well-known to agency attorneys and the administrative law bar. After that, legal challenges could be expected to fall off dramatically.

Both the process for developing SBA guidance and the guidance itself would help achieve compliance with the RFA. The notice, comment, and public hearings phase would raise the level of awareness in federal agencies about the RFA. Furthermore, the Office of Advocacy expects that the guidance ultimately developed will provide agencies with a map sufficiently detailed to allow them to navigate their way through the RFA with minimal effort.

The RFA does not impose a requirement for an agency to collect additional data except in rare instances in which data originally collected was insufficient to understand the problem the rule was trying to solve. In such cases, the additional task of information collection should not be attributed to the RFA but to an agency's failure to meet its obligations for reasoned decisionmaking.

FISCAL IMPACT

Judicial review of the RFA imposes no costs outside the government. In rare cases where there is no court challenge of regulations on grounds other than the RFA and the cost of unnecessary or overly burdensome regulations is greater than the cost of litigation, small entities may choose to incur the cost of bringing suit based solely on an RFA violation. The cost to these entities cannot be estimated but would be seen by them as a net savings.

Procedures to implement the RFA would be limited to federal agencies. The costs inside the federal government are difficult to estimate because the costs of rulemaking are not a line item and are generally not well-measured. The best estimates available suggest a maximum average of one work day per rule when there is no substantial impact on small entities, a total effort that should be absorbed in the current personnel ceiling. Over the years, SBA has found that only 30 to 50 rules a year have significant negative impact on small entities.

If agencies do not comply with RFA, costs for litigation would certainly accrue. The marginal cost of RFA suits cannot be calculated in advance. Additional funds should not be budgeted for such costs.

ENDNOTES

¹See annual reports on the implementation of the Regulatory Flexibility Act, U.S. Small Business Administration, Office of Advocacy, 1981–1992.

²U.S. Congress, House Committee on Small Business, testimony of James Morrison, July 28, 1993. The organizations listed are the Regulatory Flexibility Act Coalition, which supports judicial review of RFA.

³Judicial review can be established with the following language: (a) Section 611 of title 5, United States Code is amended by striking subsections (a), (b), and (c) and inserting a new subsection (a): “For purposes of section 702 of title 5, determinations made pursuant to this chapter shall only be reviewable upon publication or service of a rule as required by section 553(d) of title 5.”

⁴Implementing instructions for complying with the analytical requirements in sections 603, 604, and 605 of the RFA can be brought about by the following executive order: “The Small Business Administration Office of Advocacy shall: Issue guidance to federal agencies for the implementation of the Regulatory Flexibility Act. Such guidance shall be developed after consultation with affected agencies and after such public hearings as may be appropriate. The guidance will be designed to ensure that the analysis conducted under the Act provide data and reasonable alternatives.” This approach was used successfully in 1977 to provide a framework for all federal agencies in meeting the requirement to examine environmental impacts of federal actions mandated by the National Environmental Policy Act of 1969 (NEPA). This approach was tested in the Supreme Court, and has been favorably commented on by that court several times. Such guidance would help agencies defend their actions in any legal challenges under the RFA.

APPENDIX D

[Memorandum of the American Law Division (Congressional Research Service) of the Library of Congress, dated October 22, 1993]

Subject: Constitutional Analysis of § 612(b) of the Regulatory Flexibility Act Authorizing the Chief Counsel for Advocacy of the Small Business Administration to Appear as Amicus Curiae in Any Court Action to Review an Agency Rule.

Author: John Contrubis.

This memorandum has been prepared in order to analyze the constitutionality of § 612(b) of the Regulatory Flexibility Act¹ which authorizes the Chief Counsel for Advocacy (the Chief Counsel) of the Small Business Administration to appear as amicus curiae in any court action to review an agency rule. Specifically, this memorandum responds to past determinations by the Department of Justice (DOJ) indicating that § 612(b) is limited to certain circumstances.²

Traditionally, DOJ has based its opposition on two theories. The first theory states that the Chief Counsel's authority to appear as amicus curiae may, in certain circumstances, interfere with the President's constitutional obligation to "take care that the laws be faithfully executed." * * *³ The second theory suggests that intrabranch litigation would create a nonjusticiable issue, thus, running afoul of the Constitution's requirement that a case or controversy exist before a matter be presented before a United States court.⁴ Neither of these theories are likely to be held to limit the Chief Counsel's authority to appear as amicus curiae in any court action to review an agency rule.

In advocating the "take care" clause of Article II, DOJ is relying on the assumption that the executive power is hierarchical in nature and uniquely vested in the President alone (the unitary executive theory⁵). However, a pure unitary executive theory has argu-

¹ U.S.C.A. § 601 et seq.

² DOJ has stated that "the litigation authority granted to the Chief Counsel by § 612(b) is limited to litigation challenging rules promulgated by independent agencies, and then, only if the Attorney General, or any other Executive Branch officer, has not already taken a position in the litigation on behalf of the United States, which is inconsistent with that which the Chief Counsel seeks to present. In litigation involving Executive Branch agencies, the Chief Counsel's authority to present his views to the court is limited to the presentation of views which would not conflict with those presented by the defendant agency." Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, to J. Paul McGrath, Assistant Attorney General, Civil Division, re: "*Amicus Curiae* Role of the Small Business Administration's Chief Counsel for Advocacy under the Regulatory Flexibility Act" (May 17, 1983).

³ U.S. CONST. art. II, § 3.

⁴ U.S. CONST. art. III.

⁵ See Rosenberg, "Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive," 57 Geo. Wash. L. Rev. 627 (1989).

ably been undermined by the Supreme Court's rulings in *Morrison v. Olson*⁶ and *Mistretta v. United States*.⁷

In *Morrison*, the appellees argued that since an independent counsel is removable by the executive, through the Attorney General, only for "good cause," such statutory limitation on the President's at-will removal authority of an officer who is exercising purely executive functions unduly interferes with the President's constitutional duties and prerogatives and thereby violates separation of powers principles. The Court held that the validity of insulating an inferior officer from at-will removal by the President can no longer turn on whether such an officer is performing "purely executive" or "quasi legislative" or "quasi judicial" functions.⁸ Instead, the "good cause" removal limitation will turn on whether such limitation interferes with the President's ability to perform his constitutional duty.⁹ Addressing the independent counsel's powers, the Court noted that the exercise of prosecutorial discretion is not "central" to the functioning of the executive branch.¹⁰ Moreover, since the independent counsel could be removed by the Attorney General, this is sufficient to ensure that he is performing his statutory duties, which is all that is required by the "take care" clause.¹¹ Furthermore, the limited ability of the President to remove the independent counsel, through the Attorney General, was also seen as leaving enough control in his hands to reject the argument that the scheme of the Ethics in Government Act impermissibly undermines executive powers or disrupts the proper constitutional balance by preventing the executive from performing his functions.¹²

The Court's support for broad congressional authority over agency structure was furthered in *Mistretta*. Here, the Court was presented with a broad ranging separation of powers challenge to the United States Sentencing Commission. Petitioners argued that the Commission, an independent agency in the judicial branch vested with power to promulgate binding sentencing guidelines, violated the separation doctrine by its placement in the judicial branch, by requiring federal judges to serve on the Commission and to share their authority with nonjudges, and by empowering the President to appoint Commission members but limiting his power to remove them only for cause. The Court, in describing this separation of powers dilemma, explained that the issue involved whether there exists "the accumulation of excessive authority in a single branch" through encroachment and aggrandizement by one branch against another.¹³ In cases where statutory provisions commingled the functions of the Branches, but pose no danger of either aggrandizement or encroachment¹⁴ the Court has developed a balancing test. This test determines whether the challenged arrangement "'prevents the Executive Branch from accomplishing its assigned functions,'" ¹⁵ and if so, "whether that impact is justified by an over-

⁶ *Morrison v. Olson*, 487 U.S. 654 (1988).

⁷ *Mistretta v. United States*, 488 U.S. 361 (1989).

⁸ *Morrison*, supra at 687.

⁹ *Id.* at 687-91.

¹⁰ *Id.* at 691-92.

¹¹ *Id.* at 692-93.

¹² *Id.* at 695-96.

¹³ 488 U.S. at 381.

¹⁴ *Id.* at 382.

¹⁵ *Id.* (quoting *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1979)).

riding need to promote objectives within the constitutional authority of Congress.’”¹⁶ Applying this test, the Court found that although the Commission is located in the judicial branch, its rule-making powers are separate from those of the judiciary. Moreover, the Commission is an independent agency accountable to Congress, which can revoke any or all of the guidelines at any time, its members are subject to the President’s limited removal powers, and its rules are subject to the notice and comment requirements of the Administrative Procedure Act. Thus, the Court concluded, “because Congress vested the power to promulgate sentencing guidelines in an independent agency, not a court, there can be no serious argument that Congress combined legislative and judicial power within the Judicial Branch.”¹⁷

Similar to the situation in *Morrison* and *Mistretta*, the Small Business Administration Act also arguably leaves enough control in the President’s hands so that it does not undermine the executive’s powers or disrupt the proper constitutional balance by preventing the executive from performing his functions. Comparing the independent counsel in *Morrison* to the Chief Counsel of the SBA demonstrates that the President actually has more control over the latter.¹⁸ Moreover, since the exercise of prosecutorial discretion is not “central” to the functioning of the executive branch, the Chief Counsel’s appearance as amicus curiae may not interfere with the executive’s “take care” responsibilities. The fact that the Chief Counsel would appear simply as amicus curiae is further evidence that the executive’s power is not likely to be waived as being usurped.¹⁹ Therefore, opposition to the Chief Counsel’s statutorily authorized appearance as amicus curiae will likely fail.

Furthermore, the proposition that executive powers are solely vested in the President has been discounted well before this century. In *Kendall v. United States ex rel. Stokes*, the Court was quick to point out that Congress may impose upon an officer statutory duties that “grow out of and are subject to the control of the law, and not to the direction of the president.”²⁰ The Court also rejected the proposition that “every officer in every branch of [the executive] department is under the exclusive direction of the president. * * * Such a principle, we apprehend, is not, and certainly cannot be claimed by the president.”²¹ In a more recent case, the Tenth Circuit stated that “[i]t is a matter of fundamental law that the Constitution assigns to Congress the power to designate duties of particular officers. The President is not obligated under the Constitution to exercise absolute control over our government executives. The President is not required to execute laws; he is required to take care they be executed faithfully.”²²

Upon forming the SBA, Congress authorized the Chief Counsel to appear as amicus curiae in any court action to review an agency

¹⁶ *Id.*

¹⁷ *Id.* at 383.

¹⁸ The Chief Counsel of the SBA, unlike an independent counsel, is appointed by the President, by and with the advice and consent of the Senate, and is subject to removal at will. 15 U.S.C.A. §634a.

¹⁹ An amicus curiae is not a litigant to a suit, but an interested party who wishes to convey its views upon the court.

²⁰ *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838).

²¹ *Id.*

²² *SEC v. Blinder & Co.*, 855 F.2d 677 (10th Cir. 1988). cert. denied 109 S. Ct. 1172 (1989).

rule.²³ In pursuance of his “take care” responsibilities, the President may not limit the Chief Counsel’s authority to appear as *amicus curiae*. Instead, the President is required to take care that the Chief Counsel’s right to appear as *amicus curiae* be faithfully executed.

Another issue which need be briefly mentioned is the argument that the SBA’s appearance as *amicus curiae* may create litigation between SBA and DOJ which would be held to be nonjusticiable because one executive agency suing another would not present the requisite constitutional “case or controversy.”²⁴ This issue is moot in the present situation since the SBA would not be a party to the action, but instead would appear as a friend of the court (*amicus curiae*). Thus, where a party (X) challenges an agency rule, DOJ represents the United States and SBA appears as an *amicus curiae*, the litigation are X and DOJ, and SBA and DOJ. In other words, the only parties in litigation are X and DOJ. Even if SBA and DOJ were opposing parties, an article III challenge would likely be unsuccessful.²⁵ There are innumerable instances in which Congress has specifically authorized litigation between executive agencies, none of which have been challenged on constitutional grounds.²⁶

In sum, it is not likely to be held that Congress may not vest in the Chief Counsel the authority to appear as an *amicus curiae* should a court action to review an agency rule arise.

JOHN CONTRUBIS, *Legislative Attorney*.

²³ *Supra* at n.1.

²⁴ *Supra* at n.4.

²⁵ See *United States v. Nixon*, 418 U.S. 683 (1974).

²⁶ See, e.g., *Mail Order Association of America v. United States Postal Service*, 986 F.2d 509 (D.C. Cir. 1993); and Rosenberg, *supra* n.5 at pp. 662–688.

APPENDIX E

[Letter from the Honorable Leon E. Panetta, White House Chief of Staff, to Senator Malcolm Wallop, dated October 7, 1994]

THE WHITE HOUSE,
Washington, DC, October 7, 1994.

Hon. MALCOLM WALLOP,
U.S. Senate,
Washington, DC.

DEAR SENATOR WALLOP: Your particular question about the Administration's position on judicial review of actions taken under the Regulatory Flexibility Act has come to my attention.

As you have discussed with Senator Bumpers, the Administration supports such judicial review of "Reg Flex."

The Administration supports a strong judicial review provision that will permit small business to challenge agencies and receive meaningful redress when they choose to ignore the protections afforded by this important statute.

In fact, the National Performance Review endorsed this policy to ensure that the Act's intent is achieved and the regulatory and paperwork burdens on small business, states, and other entities are reduced.

Ironically, Phil Lader, our nominee for Administrator of the Small Business Administration (whose nomination was voted favorably today by a 22-0 vote of the Senate Small Business Committee) has been a principal champion of judicial review of "Reg Flex." In his capacity as Chairman of the Policy Committee on the National Performance Review, Phil vigorously advocated this position. I know that, if confirmed, as SBA Administrator, he would join us in continued efforts to win Congressional support for such judicial review.

Sincerely,

LEON E. PANETTA,
Chief of Staff.

APPENDIX F

[Letter from the Honorable Philip Lader, Administrator-Designate, Small Business Administration, to Senator Malcolm Wallop, dated October 8, 1994]

OCTOBER 8, 1994.

Hon. MALCOLM WALLOP,
U.S. Senate,
Washington, DC.

DEAR SENATOR WALLOP: The Administration supports strong judicial review of agency determinations under the Regulatory Flexibility Act that will permit small businesses to challenge agencies and receive strong remedies when agencies do not comply with the protections afforded by this important statute.

In fact, the National Performance Review publicly endorsed this policy to ensure that the Act's intent is achieved and the regulatory and paperwork burdens on small businesses, states, and other entities are reduced.

As Chairman of the Policy Committee of the National Performance Review, under Vice President Gore's leadership I vigorously advocated this position. I have continued to champion this policy within the Administration.

If confirmed as Administrator of the U.S. Small Business Administration, I will join the Congress and the small business community in continued efforts to pass legislation for such judicial review.

Thank you for your leadership on this important issue to small business.

Sincerely,

PHILIP LADER,
Administrator-Designate,
Small Business Administration.

APPENDIX G

[Letter from President Clinton to Senator Malcolm Wallop, dated October 8, 1994]

THE WHITE HOUSE
Washington, DC, October 8, 1994.

Hon. MALCOLM WALLOP,
U.S. Senate,
Washington, DC.

DEAR SENATOR WALLOP: My Administration strongly supports judicial review of agency determinations under the Regulatory Flexibility Act, and I appreciate your leadership over the past years in fighting for this reform on behalf of small business owners.

Although legislation establishing such review was not enacted during the 103rd Congress, my Administration remains committed to securing this very important reform. Toward that end, my Administration will continue to work with the Congress and the small business community next year for enactment of a strong judicial review that will permit small businesses to challenge agencies and receive meaningful redress when agencies ignore the protections afforded by this statute.

As you know, the National Performance Review endorsed this policy to ensure that the Act's intent is achieved and the regulatory and paperwork burdens on small business, states, and other entities are reduced.

Again, thank you for your continued leadership in this area.

Sincerely,

BILL CLINTON.

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