

# FMC POLICY AND PROCEDURES REGARDING PROPER CONSIDERATION OF SMALL ENTITIES IN RULEMAKINGS

February 7, 2003

## Overview

The purpose of this guidance is to assist drafters of Federal Maritime Commission (“FMC” or “Commission”) rules in appropriately implementing the requirements of the Regulatory Flexibility Act (“RFA”), as amended by the Small Business Regulatory Enforcement Fairness Act (“SBREFA”). In general, SBREFA amended the RFA to establish certain formal procedural and analytical requirements (described below) for rules the agency may develop which have the potential to impose a significant economic impact on a substantial number of small entities. If a rule will impose significant economic impact on a substantial number of small entities, a more formal analysis of the potential adverse economic impacts on small entities must be prepared. Additionally, Executive Order 13272 of August 13, 2002 (“EO 13272”), requires agencies to issue and publish written procedures and policies for use in considering the potential impact of draft rules on small entities.

This guidance is not a binding Commission procedural rule. In determining and mitigating impacts on small entities, the FMC anticipates that there may be some situations in which agency staff and management must exercise considerable judgment. Nevertheless, we intend this guidance to provide an analytic and sequential structure that should be sufficient for most rulemakings. This guidance will be published on the Commission’s Internet website (<http://www.fmc.gov>) for informational purposes.

The purpose of RFA/SBREFA is “to fit regulatory and informational requirements to the scale of the businesses, organizations and governmental jurisdictions subject to the regulation.” To achieve this objective, 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.” RFA/SBREFA does not require an agency necessarily to minimize a rule’s impact on small entities if there are legal, policy, factual or other reasons for not doing so. RFA/SBREFA requires only that an agency determine, to the extent feasible, the rule’s economic impact on small entities, explore regulatory options for reducing any significant economic impact on a substantial number of such entities, and explain its ultimate choice of regulatory approach.

Since its enactment, RFA has required every federal agency to prepare a regulatory flexibility analysis for any rule for which the agency is required to issue a notice of proposed rulemaking under the Administrative Procedure Act (“APA”) or any other statute, unless the agency certifies that the rule “will not, if promulgated, have a significant economic impact on a substantial number of small entities.” When SBREFA became law in 1996, the FMC developed procedures and guidelines to implement the applicable statutory requirements. The guidelines are being updated below to ensure continuing compliance with RFA/SBREFA requirements, as well as EO 13272.

In general, RFA/SBREFA requirements will apply to the FMC’s rules subject to the notice-and-comment rulemaking requirements under the APA or any other statute. Exempt from the RFA requirement regarding a regulatory flexibility analysis or certification are Commission actions that are not rules (e.g., orders or adjudications), and rules that the Commission is not required by statute to propose before promulgating.

#### RFA/SBREFA Preliminary Analysis: Assessing the Impact on Small Entities

This part describes the procedures to follow for determining whether a regulatory flexibility analysis or certification of no significant economic impact on a substantial number of entities should be prepared for a proposed or final rule. It is a six-step process.

**1. Is the rule subject to notice-and-comment rulemaking requirements?**

As mentioned earlier, most, if not all, FMC proposed and final rules will be subject to notice-and-comment and therefore subject to RFA/SBREFEA.

**2. What types of entities will be subject to the rule's requirement?**

The Commission has adopted small business standards pursuant to the North American Industrial Classification System ("NAICS") published by the Executive Office of the President, Office of Management and Budget.<sup>1</sup> The staff has identified the following NAICS categories and codes defined by the Small Business Administration ("SBA") that fall within the Commission's regulatory jurisdiction:

483111 Deep Sea Foreign Transport of Freight - Vessel Operating Common Carriers  
("VOCCs")

483112 Deep Sea Transportation of Passengers - Passenger Vessel Operators ("PVOs")

488320 Marine Cargo Handling - Marine Terminal Operators ("MTOs")

488510 Arrangement of Transportation of Freight and Cargo - Ocean Transportation  
Intermediaries ("OTIs")

Categories 483111 and 483112 are evaluated by the SBA according to their number of employees. The SBA has determined that if such a business establishment has less than 500 employees, it qualifies as a small business for SBA purposes. Business establishments in categories 488320 and 488510 are evaluated by their annual receipts in millions of dollars. In these categories, SBA determines that business establishments with annual receipts (gross annual

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<sup>1</sup>The code was changed in February 2002 from the Standard Industrial Classification System to NAICS. The FMC will follow the guidelines set forth by the NAICS. For an explanation of NAICS, see <http://www.sba.gov/size/Table-of-Small-Business-Size-Standards-from-final-rule.html>.

revenues) of less than \$21.5 million are small businesses. The Commission will use SBA's determinations in its review of the impact of its regulatory undertakings on small businesses.

**3. What types of small entities, if any, are subject to the rule's requirements?**

VOCCs, PVOs, and MTOs generally are very large companies with far in excess of 500 employees, in the case of VOCCs and PVOs, and \$21.5 million in gross revenues, in the case of MTOs. These companies, as well as conferences or associations of such companies, generally are represented by retained counsel. They frequently raise informal, complex issues, and the Commission exerts considerable time and effort responding to them. Such entities are not the intended small business beneficiaries of SBREFA. OTIs, on the other hand, will be considered small businesses by the Commission.

Therefore, the Commission makes a refutable presumption that VOCCs, PVOs and MTOs are not small businesses encompassed within the programs and policies mandated by SBREFA. Nevertheless, a VOCC, PVO, or MTO that falls under SBA guidelines and seeks to be treated as a small business for Commission regulatory purposes may submit a request for such treatment to the Commission, along with payroll or gross annual revenue evidence, as applicable, to substantiate its claim and rebut the presumption.

**4. What if no small entities are affected by the rule?**

If a proposed rule does not affect any small entity (based on the definition of small entity provided above) RFA authorizes the Commission's Chairman to make a negative certification with respect to the rulemaking. This will be published in the *Federal Register* and be accompanied by the factual basis for certification as prepared by the originating Bureau/Office. This certification is subject to judicial review.

At the proposed rule stage, the affected parties have an opportunity to petition the Commission to be treated as small entities. If no such requests are received, the Chairman makes the negative certification in the final rule. If requests are received, the originating Bureau/Office, in conjunction with the Bureau of Trade Analysis (“BTA”), must determine if the petitioning entities should be treated as small businesses. If the originating Bureau/Office and BTA determine that these entities should, in fact, be treated as small businesses, the analysis set forth in step 5 will be conducted.

**5. If small businesses are affected, is there a significant impact on a substantial number?**

If a proposed rule is expected to have an effect on one or more small entities, a threshold analysis will be initiated by BTA with the assistance of the originating Bureau/Office. The threshold analysis is conducted to determine the extent of the impact and the number of small entities that would be affected by the proposed rule. It has been determined by the Commission that collection and maintenance of current financial data on every entity regulated by the FMC would cause undue cost and burden on the entities. Therefore, the threshold analysis is based on extrapolation of data and information from current economic trends and statistics, and the Commission’s industry expertise. The results or findings of each threshold analysis are evaluated on a case-by-case basis to determine whether the proposed rule will have a significant impact on a substantial number of small businesses. In addition, any comments received on the proposed rule once it has been published in the *Federal Register* would be taken into consideration.

If it is determined that the proposed rule will not have a significant impact on a substantial number of small entities, a negative certification by the Commission’s Chairman may be made. The certification should be published and explained in the supplementary information

section of the proposed and final rules and supported in the rulemaking record as appropriate.

The originating Office/Bureau, working with BTA as necessary, prepares a memorandum containing its analyses and explaining the negative certification. No further analysis is required to support the certification, unless the agency receives comments on the proposed rule's certification that raise issues about the basis of its analysis.

**6. What if the rule would have a significant impact on a substantial number of small entities?**

The primary purpose of the Initial and Final Regulatory Flexibility Analyses (“IRFA/FRFA”) is to identify and consider regulatory alternatives “which **minimize** any significant economic impact of the proposed [or final] rule on small entities.” (Sections 603 and 604 of RFA, emphasis added.) Therefore, if the threshold analysis shows that a proposed rule would have a significant impact on a substantial number of small businesses, the FMC must take the following steps:

1. Assure that small entities have been given an opportunity to participate in the rulemaking through various possible techniques. The originating Bureau/Office will implement one of the following, or possible additional, measures:

- a. State in an advance notice prior to issuance of the proposed rulemaking that the rule may have a significant economic effect on a substantial number of small entities;
- b. Publish a general notice of the proposed rulemaking in publications that small entities are likely to receive;
- c. Directly notify small entities about the rule; or
- d. Hold “open conference or public hearings” about the rule.

2. Prior to publishing the proposed rule, the Commission will notify SBA (and the Office of Information and Regulatory Affairs at the Office of Management and Budget (“OMB”) as required by EO 12866).

3. Complete an IRFA, and publish it with the proposed rule. The IRFA, prepared by the originating Bureau/Office and BTA, must contain:

- a. Reasons why the Commission is considering the action – this currently is in the preamble to all proposed regulations.
- b. The objectives and legal basis for the proposed rule – this currently is included in a proposed rule.
- c. The kind and number of small entities to which the rule will apply – to the extent possible, the originating Bureau/Office describes the industry and economic sector in total and its small and large entity segments, and explains any existing dynamics, such as trends in employment.
- d. The projected recording, record keeping, and other compliance requirements of the proposed rule – this description should include an estimate of the classes of small entities that will be subject to the requirements and the type of professional skills necessary for the preparation of the report or record. A cost analysis should describe each item and estimate the costs, comparing large and small entities. It should distinguish the initial costs from recurring or operating costs. This information may be available from the paperwork burden analysis prepared under the requirements of the Paperwork Reduction Act.
- e. Identify all federal rules that may duplicate, overlap, or conflict with the proposed rule – given the Commission’s specific regulatory responsibility, it is extremely

unlikely that any of its rules will duplicate, overlap, or conflict with the rules of other agencies. Should the situation arise, however, the Commission would need to include information for regulated entities on other rules governing the same activities. In some instances, the existence of relevant rules of other agencies will be known to the originating Bureau/Office. When legal research is required, it will be done by the Bureau of Enforcement (“BOE”).

4. The FMC then must produce an FRFA with the final rule. This analysis, prepared by the originating Bureau/Office and BTA, must contain the comments, if any, of SBA. It also must contain:

- a. A succinct statement of the need for and objectives of the rule;
- b. A summary of significant issues raised by public comments in response to the initial regulatory flexibility analysis, and a summary of the originating Bureau/Office’s assessment of such comments;
- c. The Commission’s written response to any written comments submitted by SBA, unless the Chairman certifies that the public interest is not served thereby.
- d. A description and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
- e. A description of the projected reporting, record keeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirements and the type of professional skills necessary for the preparation of the report record; and,
- f. A description of the steps the FMC has taken to minimize the significant economic impacts on small entities consistent with the stated objectives of

applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule, and the reasons for rejecting each of the other viable alternatives.

#### Small Entity Compliance Guide

If a final regulatory flexibility analysis is necessary, a compliance guide also must be created. Each rule promulgated by the Commission that significantly affects a substantial number of small businesses will include a “compliance guide” that facilitates their compliance with applicable requirements. This guide will be drafted by the originating Bureau/Office.

#### Periodic Review

SBREFA requires that any promulgated rules that have or will have a significant economic impact on a substantial number of small entities be reviewed periodically. There currently is one Commission rule which falls under this category. The agency conducted an IRFA and FRFA for Docket No. 98-28, *Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries*. The Commission is revising Form FMC-18, which is used in the licensing process to collect information about OTI applicants, and also is planning for an electronically-submitted version.<sup>2</sup> The Commission will review the impact of the involved rule in conjunction with that effort.

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<sup>2</sup>Form FMC-18 currently is assigned OMB control number 3072-0018, through August 2005.