



June 5, 2020

VIA email

Dr. Shaunta Hill-Hammond,
Designated Federal Officer
U.S. Environmental Protection Agency
hill-hammond.shaunta@epa.gov.

Re: Science Advisory Board Peer Review of EPA's Draft *Guidelines for the Preparing Economic Analyses*

Dear Dr. Hill-Hammond:

The Office of Advocacy (Advocacy) appreciates the opportunity to provide input to the Science Advisory Board (SAB) Economic Guidelines Review Panel on the peer review of the Environmental Protection Agency (EPA) draft *Guidelines for Preparing Economic Analyses* (Guidelines). Advocacy requests that the panel pay special attention to recommendations in the Guidelines on Regulatory Flexibility Act (RFA) compliance, analysis, references, and the consideration of small business impacts. These comments build on, and incorporate, oral comments delivered by Assistant Chief Counsel Tayyaba Zeb on May 18, 2020; attached below.

I. The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),¹ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),² gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

¹ 5 U.S.C. §601 et seq.

² Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

Executive Order 13272 tasks Advocacy with advising agencies with the requirements of the RFA and providing agency training on RFA compliance.³ Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁴

II. Advocacy Comments

Advocacy asks that the panel pay special attention to recommendations to the Guidelines on RFA compliance, analysis, references, and the consideration of small business impacts. Advocacy recommends the following revisions to the draft Guidelines.⁵

A. Chapter 2 misstates the requirements of the RFA.

The legal threshold for the RFA is misstated in Section 2.2.1 in describing the conduct of an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA). All rules that are required by a statute to be published for notice and comment are subject to the RFA,⁶ not only those which the agency makes a finding that there will not be a significant economic impacts on a substantial number of small entities (SISNOSE). This threshold determines whether the agency must prepare an IRFA and FRFA or certify that there is no SISNOSE.⁷ A certification under 5 U.S.C. 605(b) is an act of compliance with the RFA; it is not an assertion that the rule is not subject to the RFA.

Further, the phrase "may have" used in these Guidelines describing the requirements contingent on the threshold gives the reader the impression that the agency may certify under Section 605(b) *unless* the agency makes a SISNOSE finding. Rather, the agency must affirmatively find that there is *no* SISNOSE.

Advocacy also notes that the plain language of the certification in section 605(b) is not limited to adverse economic impacts. A proper certification considers positive and adverse economic impacts.

Advocacy recommends the rewrite below:

Threshold: Regulations [issued through publication of a general notice of proposed rulemaking and general notice of final rulemaking]. ~~that may have a "significant economic impact on a substantial number of small entities,"~~(SISNOSE), ~~including small businesses;~~

³ Executive Order 13272, Sec. 2 (August 13, 2002).

⁴ 5 U.S.C. § 601 note.

⁵ Language additions are denoted with brackets [] and deletions are denoted as stricken.

⁶ See 5 U.S.C. § 601(2), § 603(a), § 604(a).

⁷ 5 U.S.C. § 605(b).

~~governments and non-profit organizations. The RFA does not define the terms significant or substantial.~~

Requirements contingent on threshold: ~~For rules that are expected to have a SISNOSE,~~ [A]gencies are required to prepare an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) examining potential ~~adverse~~ economic impacts on small entities and complying with a number of procedural requirements to solicit and consider flexible regulatory options that minimize adverse economic impacts on small entities and address significant issues raised in public comments. The IRFA and FRFA are published with the proposed and final rules, respectively. [Alternatively, the agency may conduct a screening analysis of the economic impacts on small entities. If supported by a factual basis, the agency may certify that the proposed rule and final rule will not have a significant economic impact on a substantial number of small entities in lieu of conducting an IRFA or FRFA.]

B. RFA certification must be supported by a factual basis.

A finding of no SISNOSE cannot be supported without quantitative or qualitative data to show specifically if and how a proposed or final regulation will affect small entities. When impacts are unknown due to data limitations, Advocacy advises EPA to develop an IRFA based on what is known rather than anticipating a certification. Advocacy recommends the rewrite below for the discussion of impact on small businesses in Section 9.5.2.3:

If the screening analysis reveals that a rule cannot be certified as having no SISNOSE[, or if there is not enough information on affected small entities to conduct the screening analysis,] then the RFA requires a regulatory flexibility analysis be conducted for the rule[. The analysis], ~~which~~ includes a description of the economic impacts on small entities. Further analysis examining other types of impacts, as discussed elsewhere in this chapter, in relation to small businesses, may provide additional information for decision makers.

C. Consideration of small entities should go beyond the RFA.

Advocacy strongly encourages the agency to consider the disproportionate impacts of regulations on firms of various sizes in cost-benefit analyses, including those below the small entity size standards. The consideration of impacts on small firms should not be limited to the required analyses under the RFA because IRFA and FRFA focus on the direct compliance costs imposed on small entities. The broader consideration of the costs and benefits due to regulation of businesses of various sizes is crucial in good rulemaking and benefits society through the due consideration of small entities.

For instance, Section 9.5.2.1, “Impacts on Production,” references “firm characteristics” as an important variable to consider in determining impacts resulting from regulatory requirements. However, the term “firm characteristics” is not defined. Advocacy recommends that firm characteristics be clearly defined, and that firm size be included as an important firm characteristic that must be considered to ensure good analyses.

D. Advocacy issues guidance to agencies on the RFA.

Advocacy has developed a guide to assist in developing RFA analyses. Advocacy recommends a cite to the following link for Advocacy’s guidance to agencies in the “Guidance” paragraph of Section 2.2.1.

“A Guide For Government Agencies: How To Comply With The Regulatory Flexibility Act” available at <https://advocacy.sba.gov/resources/the-regulatory-flexibility-act/rfa-data-resources-for-federal-agencies/>

E. The cite to SBA size standards needs to be updated.

The citation to the SBA small business size standard regulations in footnote 346 is outdated. SBA issues size standards through rulemaking and makes frequent updates. The footnote should be revised to read:

13 C.F.R. Part 121. *See also*, § 121.201, “What size standards has SBA identified by North American Industry Classification System codes?” The table of size standards current as of August 19, 2019, is available at <https://www.sba.gov/document/support--table-size-standards>.

III. Conclusion

Advocacy appreciates the opportunity to provide the SAB feedback on EPA’s draft Guidelines for Preparing Economic Analyses. The Guidelines can be improved with a more accurate description of the RFA requirements and a broader invitation to the analysts and policymakers who will use it to consider the small entity impacts more broadly.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Tayyaba Zeb by email at tayyaba.zeb@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Acting Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Tayyaba Zeb
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Attachment

Statement by Tayyaba Zeb
Assistant Chief Counsel for Environment
U.S. Small Business Administration Office of Advocacy

Members of the Science Advisory Board Economic Guidelines Review Panel, thank you for the opportunity to share preliminary views of the SBA Office of Advocacy on the Panel's charge and on EPA's 2020 draft Guidelines for Preparing Economic Analysis.

Advocacy was established in 1976 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

I would like to make three brief points here about (1) the charge question, (2) the requirements of the Regulatory Flexibility Act, and (3) the consideration of the impacts on small entities.

1. Advocacy suggests the panel consider an additional charge question: "Are the statements and analytic recommendations made in the chapter consistent with statutes, executive orders and other policy requirements that mandate or encourage economic analysis?" As evidenced by the extensive list in Chapter 2, there are a lot of requirements that are not necessarily grounded in economic literature. Some panel members have discussed consistency with these requirements in their preliminary responses to charge question 3, but it would be in the public interest for the panel to address these issues specifically and separately.
2. The RFA requires an initial regulatory flexibility analysis for all proposed rules, and a final regulatory flexibility analysis for all subsequent final rules. The agency may avoid this requirement and certify only if there is an affirmative finding and that the rule **will not** have a significant economic impact on a substantial number of small entities (abbreviated by EPA as "SISNOSE"). In other words, a finding of No SISNOSE cannot be supported without quantitative or qualitative data to show specifically if and how a proposed or final regulation will affect small entities.
3. While the RFA has specific requirements for the consideration of impacts on small entities, it is not a benefit-cost analysis. Advocacy strongly encourages the consideration of disproportionate impact of regulations on firms of various sizes below the small entity size standards even when the agency is not required to perform a regulatory flexibility analysis.

It is our intent to follow up on these points with written comments before the June 9th meeting.