

**Appendix B:**

**Evaluative Criteria for Compliance:  
Regulatory Flexibility Act of 1980,  
as Amended by the  
Small Business Regulatory Enforcement, Fairness and Compliance Act of 1996**

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**CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT**

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REGULATORY FLEXIBILITY ACT OF 1980 (PUB. L. 96-354),  
AS AMENDED BY THE SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT OF 1996 (PUB. L. 104-121)  
PROCEDURAL REQUIREMENTS

QX#	EVALUATIVE CRITERION	STATUTORY CITATION
P1	Does the regulation meet the definition of "rule" as set forth in 5 USC 601?	SBREFA §211(1): The terms "rule" and "small entity" have the same meanings as in section 601 of title 5, United States Code.  <u>5 USC 601(2) [T]he term "rule" means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law, including any rule of general applicability governing Federal grants to State and local governments for which the agency provides an opportunity for notice and public comment, except that the term "rule" does not include a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances[.]</u>

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**EVALUATIVE CRITERIA FOR COMPLIANCE: REGULATORY FLEXIBILITY ACT**

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QX#	EVALUATIVE CRITERION	STATUTORY CITATION
		<p>(3) <u>[T]he term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register[.]</u></p> <p>(4) <u>[T]he term "small organization" means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register[.]</u></p> <p>(5) <u>[T]he term "small governmental jurisdiction" means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register[.]</u></p> <p>(6) <u>[T]he term "small entity" shall have the same meaning as the terms "small business", "small organization" and "small governmental jurisdiction" defined in paragraphs (3), (4) and (5) of this section[.]</u></p>

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PROCEDURAL REQUIREMENTS

QX#	EVALUATIVE CRITERION	STATUTORY CITATION
P2	<p>Is the regulation exempt because the agency head certified that it will not have a significant economic impact on a substantial number of small entities?</p> <p>If yes:</p>	<p>SBREFA §243(b) [5 USC 605(b)]: (b) <u>Sections 603 and 604 of this title shall not apply</u> to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, <u>have a significant economic impact on a substantial number of small entities</u>. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of the final rule, along with a statement providing the factual basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration."</p>
P2	<p>a Did the agency publish this certification in the Federal Register at the time of publication of the final rule?</p> <p>If yes:</p>	
P2	<p>a 1 Did the agency publish a statement providing the factual basis for this certification?</p>	

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PROCEDURAL REQUIREMENTS

QX#	EVALUATIVE CRITERION	STATUTORY CITATION
P3	a	Did the agency publish one or more “compliance guides” to assist small entities in complying with the rule?
P3	b	Did the agency publish separate guides covering groups or classes of similarly affected small entities?
P3	c	Do the agency’s compliance guides explain the actions small entities are required to take to comply with a rule or group of rules?
P3	d	Are the agency’s compliance guides written in plain language likely to be understood by affected small entities?
		<p>SBREFA §212(a): COMPLIANCE GUIDE -- For each rule or group of related rules for which an agency is required to prepare a final regulatory flexibility analysis under section 604 of title 5, United States Code, <u>the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as “small entity compliance guides”</u>. The guides shall explain the actions a small entity is required to take to comply with a rule or group of rules. <u>The agency shall, in its sole discretion, taking into account the subject matter of the rule and the language of relevant statutes, ensure that the guide is written using sufficiently plain language likely to be understood by affected small entities. Agencies may prepare separate guides covering groups or classes of similarly affected small entities, and may cooperate with associations of small entities to develop and distribute such guides.</u></p>

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PROCEDURAL REQUIREMENTS

QX#	EVALUATIVE CRITERION		STATUTORY CITATION
P4	a	Did the agency make copies of the final Regulatory Flexibility Analysis available to the public?	5 USC 604(b): <u>The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register such analysis or a summary thereof.</u>
P4	b	Did the agency publish the final Regulatory Flexibility Analysis in the Federal Register?	
P4	c	Did the agency publish a summary of the final Regulatory Flexibility Analysis in the Federal Register?	

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ANALYTIC REQUIREMENTS

QX#	EVALUATIVE CRITERION	STATUTORY CITATION
A1	Did the agency prepare a final Regulatory Flexibility Analysis (RFA)?  If yes:	SBREFA §241(b) [5 USC 604(a)]: When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rule-making, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a), <u>the agency shall prepare a final regulatory flexibility analysis.</u>
A2	a	SBREFA §241(b) [5 USC 604(a)(1)]: <u>[Each final regulatory flexibility analysis shall contain] a succinct statement of the need for, and objectives of, the rule.</u>
A2	b	
A3	a	SBREFA §241(b) [5 USC 604(a)(2)]: <u>[Each final regulatory flexibility analysis shall contain] a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.</u>
A3	b	
A3	c	

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QX#	EVALUATIVE CRITERION		STATUTORY CITATION
A4	a	Does the final RFA contain a description of the small entities to which the rule will apply?	SBREFA §241(b) [5 USC 604(a)(3)]: <u>[Each final regulatory flexibility analysis shall contain] a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.</u>
A4	b	Does the final RFA contain an estimate of the number of small entities to which the rule will apply?  If not:	
A4	b	1	
A5	a	Does the final RFA contain a description of the projected reporting, recordkeeping and other compliance requirements of the rule?	SBREFA §241(b) [5 USC 604(a)(4)]: <u>[Each final regulatory flexibility analysis shall contain] a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.</u>
A5	b	Does the final RFA disaggregate by class of small entity its estimates of projected reporting, recordkeeping and other compliance requirements of the rule?	
A5	c	Does the final RFA contain a description of the type of professional skills necessary to fulfill the projected reporting, recordkeeping and other compliance requirements of the rule?	

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ANALYTIC REQUIREMENTS

QX#	EVALUATIVE CRITERION	STATUTORY CITATION
A6	a	<p>SBREFA §241(b) [5 USC 604(a)(5)]: [Each final regulatory flexibility analysis shall contain] a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.</p>
A6	b	
A6	c	

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DECISION MAKING REQUIREMENTS

QX#	EVALUATIVE CRITERION	STATUTORY CITATION
	None	None

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JUDICIAL REVIEW

QX#	EVALUATIVE CRITERION	STATUTORY CITATION
J1	What is the deadline for seeking judicial review of this rule?	<p>5 USC 611(a)(3)(A) <u>A small entity may seek [judicial] review during the period beginning on the date of final agency action and ending one year later, except that where a provision of law requires that an action challenging a final agency action be commenced before the expiration of one year, such lesser period shall apply to an action for judicial review under this section.</u></p>
J2	How is this deadline determined?	<p>(B) <u>In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to [5 USC 608(b)], an action for judicial review under this section shall be filed not later than--</u></p> <p style="padding-left: 40px;">(i) <u>one year after the date the analysis is made available to the public, or</u></p> <p style="padding-left: 40px;">(ii) <u>where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 1-year period, the number of days specified in such provision of law that is after the date the analysis is made available to the public.</u></p> <p>5 USC 608(b): Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the completion of the requirements of section 604 of this title for a period of not more than one hundred and eighty days after the date of publication in the Federal Register of a final rule by publishing in the Federal Register, not later than such date of publication, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes timely compliance with the provisions of section 604 of this title impracticable. If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days from the date of publication of the final rule, such rule shall lapse and have no effect. Such rule shall not be repromulgated until a final regulatory flexibility analysis has been completed by the agency.</p>

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QX#	EVALUATIVE CRITERION	STATUTORY CITATION
J3	Has any small entity adversely affected or aggrieved by the rule sought judicial review of agency compliance with section 601 [definitions]; section 604 [final regulatory flexibility analysis]; section 605(b) [agency certification of no significant impact]; section 608(b) [delayed compliance for emergency actions]; and section 610 [periodic review of rules]?	<p>SBREFA §3 [5 USC 611]:</p> <p>(a)(1) For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of [5 USC 601, 604, 605(b), 608(b), and 610] in accordance with [5 USC chapter 7]. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.</p> <p>(2) Each court having jurisdiction to review such rule for compliance with [5 USC 553], or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with [5 USC 601, 604, 605(b), 608(b), and 610] in accordance with [5 USC chapter 7]. Agency compliance with [5 USC 607 and 609(a)] shall be judicially reviewable in connection with judicial review of [5 USC 604]</p>

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QX#	EVALUATIVE CRITERION	STATUTORY CITATION
J4	Has a court granted relief?  If yes:	SBREFA §3 [5 USC 611]:  <u>(a)(4) In granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with [5 USC chapters 6 and 7], including, but not limited to--</u>
J4	a      What is the nature of the relief granted?	<p style="margin-left: 40px;">(A) <u>remanding the rule to the agency</u>, and</p> <p style="margin-left: 40px;">(B) <u>deferring the enforcement of the rule against small entities</u> unless the court finds that continued enforcement of the rule is in the public interest.</p> <p style="margin-left: 40px;">(5) <u>Nothing in this subsection shall be construed to limit the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law or to grant any other relief in addition to the requirements of this section.</u></p> <p>(b) In an action for the judicial review of a rule, the regulatory flexibility analysis for such rule, including an analysis prepared or corrected pursuant to paragraph (a)(4), shall constitute part of the entire record of agency action in connection with such review.</p> <p>(c) Compliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section.</p> <p>(d) 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 permitted by law.</p>

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