



governmentattic.org

"Rummaging in the government's attic"

Description of document: Federal Communications Commission (FCC)
Memorandum on Regulatory Flexibility, 2016 and Small Entity Compliance Guide Manual, 2009

Requested date: 22-January-2017

Released date: 07-March-2017

Posted date: 11-December-2017

Source of document: Freedom of Information Act Request
Federal Communications Commission
445 12th Street, S.W., Room 1-A836
Washington, D.C. 20554
[FOIA Online](#)

The governmentattic.org web site ("the site") is noncommercial and free to the public. The site and materials made available on the site, such as this file, are for reference only. The governmentattic.org web site and its principals have made every effort to make this information as complete and as accurate as possible, however, there may be mistakes and omissions, both typographical and in content. The governmentattic.org web site and its principals shall have neither liability nor responsibility to any person or entity with respect to any loss or damage caused, or alleged to have been caused, directly or indirectly, by the information provided on the governmentattic.org web site or in this file. The public records published on the site were obtained from government agencies using proper legal channels. Each document is identified as to the source. Any concerns about the contents of the site should be directed to the agency originating the document in question. GovernmentAttic.org is not responsible for the contents of documents published on the website.



**FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

March 7, 2017

VIA ELECTRONIC MAIL

Re: Freedom of Information Act (FOIA) Request Nos. 2017-291, 2017-293

This responds to your Freedom of Information Act (FOIA) requests dated January 22, 2017, to the Federal Communications Commission (FCC or Commission) for an electronic copy of the ““Memorandum of Regulatory Flexibility” also called the RFA Memorandum” and the “internal FCC Manual concerning Compliance Guides” from the “employees-only OCBO website.” Your two requests have been consolidated and assigned FOIA Control No. OCBO FOIA 2017-001.

By email dated February 8, 2017, the Office of Communications Business Opportunities (OCBO) advised you that no such FCC Manual concerning Compliance Guides exists on the OCBO internal website and requested that you modify the scope of your request to indicate whether you are seeking a manual concerning compliance guides associated with small entities, women, and minority-owned communications businesses which falls within the scope of OCBO’s role as principal advisor to the Commission on issues involving these entities.¹ In your February 8, 2017 email response you clarified that you are seeking the Compliance Guide Manual drafted by OCBO that is available on the FCC’s internal intranet website.² On February 17, 2017, pursuant to section 0.461(g)(1) of the Commission’s rules, you were notified that the date for responding to your FOIA request has been extended from February 17, 2017, to March 7, 2017.³

OCBO has searched its intranet website and located 2 records, totaling 46 pages, which are responsive to your request. The responsive records, generally described, are (1) OCBO’s

¹ Email from Chana Wilkerson, Office of Communications Business Opportunities, to (Feb. 8, 2017, 4:27PM EST).

² Email to Chana Wilkerson, Office of Communications Business Opportunities (Feb. 8, 2017, 4:46 PM EST).

³ Email from Chana Wilkerson, Office of Communications Business Opportunities, (Feb.17, 2017, 12:05PM EST).

Memorandum of Regulatory Flexibility (RFA Memo) dated February 2016 and (2) OCBO's Small Entity Compliance Guide (SECG) Manual dated June 2009.

The records responsive to your request have been redacted under FOIA Exemption 5.⁴ Exemption 5 protects certain inter-agency and intra-agency records that are normally considered privileged in the civil discovery context. Exemption 5 encompasses a deliberative process privilege intended to "prevent injury to the quality of agency decisions."⁵ To fall within the scope of this privilege the agency records must be both pre-decisional and deliberative.⁶ Pre-decisional records must have been "prepared in order to assist an agency decision maker in arriving at his decision."⁷ Deliberative records must be such that their disclosure "would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions."⁸

We have determined that both documents are pre-decisional recommendations, advice and guidance from OCBO for compliance with the Regulatory Flexibility Act (RFA). The final decision as to the content of final orders and SECGs to comply with the RFA rests with the individual Bureau, Offices, and the Commission. Furthermore, should a Bureau or Office choose not to adopt some or all of OCBO's recommendations OCBO does not have the decisional authority to compel them to do so.

We have also determined that the documents are deliberative records and it is reasonably foreseeable that disclosure would harm the Commission's deliberative processes, which Exemption 5 is intended to protect. Accordingly, it is necessary to withhold certain information contained in these documents to ensure candid communications between OCBO and the FCC's Bureaus and Offices in matters concerning advice on compliance with the provisions of the RFA. Such action is also necessary to preserve OCBO's freedom to convey its mental impressions, thoughts, opinions and recommendations when advising the Bureaus, Offices as well as the Commission. Should OCBO have to temper its communications this will impede the candid exchange of ideas, and the ability of our office to fully perform its advisory functions would be undermined and chilled.

Pursuant to section 0.466(a)(8) of the Commission's rules, you have been classified for fee purposes as category (3), "all other requesters."⁹ As an "all other requester," the Commission assesses charges to recover the full, reasonable direct cost of searching for and reproducing

⁴ 5 U.S.C. § 552(b)(5).

⁵ *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1975).

⁶ *Id.* at 151-52.

⁷ *Formaldehyde Inst. v. Dep't of Health and Human Servs.*, 889 F.2d 1118, 1122 (D.C. Cir. 1989); *see also Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) ("In deciding whether a document should be protected by the privilege we look to whether the document is . . . generated before the adoption of an agency policy and whether . . . it reflects the give-and-take of the consultative process. The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents. . .").

⁸ *Formaldehyde Inst.*, 889 F.2d at 1122 (quoting *Dudman Commc'ns Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)).

⁹ 47 C.F.R. § 0.466(a)(8).

records that are responsive to the request; however, you are entitled to be furnished with the first 100 pages of reproduction and the first two hours of search time without charge under section 0.470(a)(3)(i) of the Commission's rules.¹⁰ There is no fee to process your request.

If you consider this to be a denial of your FOIA request, you may seek review by filing an application for review with the Office of General Counsel. An application for review must be received by the Commission within 90 calendar days of the date of this letter.¹¹ You may file an application for review by mailing the application to Federal Communications Commission, Office of General Counsel, 445 12th St SW, Washington, DC 20554, or you may file your application for review electronically by e-mailing it to FOIA-Appeal@fcc.gov. Please caption the envelope (or subject line, if via e-mail) and the application itself as "Review of Freedom of Information Action."

If you would like to discuss this response before filing an application for review to attempt to resolve your dispute without going through the appeals process, you may contact the Commission's FOIA Public Liaison for assistance at:

FOIA Public Liaison
Federal Communications Commission, Office of the Managing Director, Performance
Evaluation and Records Management
445 12th St SW, Washington, DC 20554
202-418-0440
FOIA-Public-Liaison@fcc.gov

If you are unable to resolve your FOIA dispute through the Commission's FOIA Public Liaison, the Office of Government Information Services (OGIS), the Federal FOIA Ombudsman's office, offers mediation services to help resolve disputes between FOIA requesters and Federal agencies. The contact information for OGIS is:

¹⁰ 47 C.F.R. § 0.470(a)(3)(i).

¹¹ 47 C.F.R. §§ 0.461(j), 1.115; 47 C.F.R. § 1.7 (documents are considered filed with the Commission upon their receipt at the location designated by the Commission).

March 7, 2017
Page 4 of 4

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740-6001
202-741-5770
877-684-6448
ogis@nara.gov
ogis.archives.gov

Sincerely,

A handwritten signature in dark ink, appearing to read "S.S. Williams", with a long horizontal flourish extending to the right.

Sanford S. Williams
Acting Director
Office of Communications Business Opportunities

Enclosures

Non-Public Information
For Internal Use Only

MEMORANDUM
ON REGULATORY FLEXIBILITY

Prepared by the Office of Communications Business
Opportunities (Feb 2016)

<u>Section</u>	<u>Page</u>
I. INTRODUCTION	2
II. CONSIDERATION OF SMALL BUSINESS ISSUES AND COORDINATION WITH OCBO	3
III. OCBO RESPONSIBILITIES	5
IV. DETERMINING THE APPROPRIATE RFA ANALYSIS	5
Chart 1: Five-Step Determination of the Appropriate RFA Analysis	7
V. INSTRUCTIONS AND EXAMPLES TO ASSIST YOU IN WRITING THE RFA ANALYSIS	9
a. Regulatory Flexibility Analyses	11
1. Initial Regulatory Flexibility Analysis	11
2. Final Regulatory Flexibility Analysis	19
b. Regulatory Flexibility Certifications	27
1. Initial Regulatory Flexibility Certification	29
2. Final Regulatory Flexibility Certification	31
c. No RegFlex Analysis or Certification Required	34
VI. THE LAST STEP: PUBLICATION IN THE FEDERAL REGISTER	35

Non-Public Information
For Internal Use Only

MEMORANDUM
ON REGULATORY FLEXIBILITY

I. INTRODUCTION

Over the past few years, many staff members throughout the Commission have worked hard to implement the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which was signed into law as Title II of the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA).¹ Part of SBREFA amended the 1980 Regulatory Flexibility Act (RFA) provisions, requiring regulatory flexibility (RegFlex) analyses and certifications to be more elaborate and precise.

The RFA as amended is of increased importance because it allows judicial review of an agency's compliance with the law. The RFA requires governmental departments and agencies to review regulations to ensure that, while the regulations accomplish their intended purposes, they do not unduly inhibit the ability of small entities to compete. Major goals of the RFA are:

1. to increase agency awareness and understanding of the impact of their regulations on small business;
2. to require that agencies communicate and explain their findings concerning such impact to the public; and
3. to encourage agencies to provide flexibility and regulatory relief to small entities, where appropriate.²

The Office of Communications Business Opportunities (OCBO) oversees the Commission's efforts to comply with the RFA and SBREFA. Unfortunately, contrary to the statutory requirements, too often small business issues have not been considered early enough in the process of drafting items to allow meaningful consideration of the effect of the item on small businesses. As a result, at times the Commission's RegFlex efforts have been severely criticized by both the U. S. Small Business Administration (SBA) and Congress. Problems have arisen and continue to arise as a result of RegFlex analyses and certifications that are perceived to be insufficient in their consideration of small

¹ For further information on the statutory requirements of SBREFA and the amended Regulatory Flexibility Act, see the General Counsel and Managing Director's Memo of April 16, 1996, *Contract With America Advancement Act of 1996*.

² See SBA, Office of Advocacy, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies*, at 2 (1998).

**Non-Public Information
For Internal Use Only**

businesses. In addition, parties have filed for judicial review of Commission decisions and have cited, among other things, the insufficiency of the RegFlex analysis. Therefore, in order to improve the Commission's RegFlex analyses and certifications, OCBO's involvement has expanded to include input and consideration of small business issues early on in the rule writing process.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] To aid the Bureaus and
Offices in preparing RegFlex analyses and certifications, this memorandum provides
internal processing procedures and guidance.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] SBREFA requires that the SBA report to
Congress annually on each agency's efforts to implement the amended RFA and other
SBREFA provisions. With your help, the Commission should have the basis for an
excellent assessment. The SBA should be able to report on the Commission's excellent
job in implementing these Acts and in addressing small businesses needs. Furthermore,
these efforts will help the Commission avoid appellate difficulties.

**II. CONSIDERATION OF SMALL BUSINESS ISSUES AND
COORDINATION WITH OCBO**

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] OCBO's continuing
involvement in the process will help to assure that small business issues are considered
throughout the drafting and adoption process.

Once the item, including a RegFlex analysis or certification, is drafted, it should
be forwarded to OCBO for review and approval. [REDACTED]
[REDACTED]
[REDACTED]

Non-Public Information
For Internal Use Only

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED] The OCBO offices are located in Portals II on the 7th floor by the North Elevators, Room 7C-204. The general phone number for OCBO is (202) 418-0990.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] RFA requirements and small business issues may necessitate specific modifications or additions to the text of the primary item.

[REDACTED]
[REDACTED]
[REDACTED] Occasionally, multiple drafts of the RegFlex analysis or certification are necessary as changes affecting small businesses are made to the primary item. [REDACTED]

[REDACTED]
[REDACTED]

Non-Public Information
For Internal Use Only

III. OCBO RESPONSIBILITIES

will:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

IV. DETERMINING THE APPROPRIATE RFA ANALYSIS

A RegFlex analysis (or, alternatively, a certification that no such analysis is warranted) is required for every federal rule making that requires public notice and comment.³ Except where a certification is appropriate, an analysis discussing the impact of the item on small businesses is required for both Notice of Proposed Rule Makings (Notices), which require an Initial Regulatory Flexibility Analysis (IRFA), and for Reports and Orders, Memorandum Opinions and Orders, or other final notice-and-comment orders (Orders), which require a Final Regulatory Flexibility Analysis (FRFA). In the paragraphs contained herein that are to be included in the RFA analysis, where you see “[Notice]” please insert the name or short name of your primary item as appropriate. Similarly, in the paragraphs that are to be included in the RFA analysis, where you see “[Order]” please insert the name or short name of your primary item.

No analysis or certification is required for Notices of Inquiry or non-notice-and-comment rule makings (these can be silent concerning the RFA). Reconsideration orders and remand orders continue to require a RegFlex analysis if, at that stage, there are additional rule changes of the notice-and-comment sort (unless a certification is

³ We note that Bureaus and Offices occasionally do not include any actual rules as a part of the item; in such cases the policy changes are only included within the text. These notice-and-comment changes still trigger the RFA requirements.

**Non-Public Information
For Internal Use Only**

appropriate).⁴ If no additional notice-and-comment rules are being promulgated or revised within the reconsideration or remand order, then the item may be silent regarding an RFA analysis.⁵

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] In situations involving Petitions for Reconsideration, Remand Orders following judicial review, and clarifications of Commission rules *sua sponte*, the determination concerning an RFA analysis may get complicated. If you need any assistance in determining the appropriateness of a RegFlex Analysis or Certification, please do not hesitate to contact OCBO.

[REDACTED]
[REDACTED]
If no rules are proposed or promulgated, then no RFA analysis is required. [REDACTED]

[REDACTED]
[REDACTED] If the rules are not notice-and-comment rules, then no RFA analysis is required.

[REDACTED] RegFlex analyses and certifications need only address the impact of rules on small entities directly affected by (or directly regulated as a result of) the proposed, adopted, or revised rules.⁶ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁴ See also the discussion included in the first five paragraphs of Section V.b., *Regulatory Flexibility Certifications*, *infra*, at pages 25-26.

⁵ But see, Section V.c., *No RegFlex Analysis or Certification Required*, *infra*.

⁶ See *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327, 342-43 (D.C. Cir. 1985).

⁷ Contact OGC for further guidance in applying the *Mid-Tex* analysis.

**Non-Public Information
For Internal Use Only**

If no small entities are, or may be, directly affected, then there is no need for a RegFlex analysis or certification. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Remember that you need only rely on existing sources of information – the amended RFA does not require the agency to generate any new or updated statistical estimates of small entities solely for RegFlex purposes. If a substantial number of small entities are not affected, then a RegFlex Certification is appropriate.

[REDACTED]
[REDACTED]
[REDACTED] There is currently no case law that identifies the “trigger” level of “significant economic impact.” If the economic impact on the affected small entities is considered by the rule writers to be significant, then a RegFlex Analysis is required.

The SBA has advised that, in its view, a RegFlex Analysis is required whenever a rule’s expected impact on small entities cannot be described as *de minimis*. Because no court has ruled on this issue, it is not clear that a court would agree with this broad requirement. SBA recommends that the agency complete a RegFlex Analysis to analyze any impact, including a positive economic impact. Consistent with SBA’s recommendation, the Commission considers a positive impact to require a RegFlex analysis as well.

**Non-Public Information
For Internal Use Only**

In summary, a RegFlex Analysis is required whenever, in notice-and-comment rule makings, there is a direct, significant economic impact on a substantial number of small entities. If the impact is not a direct impact on small entities, then no RFA analysis is required. If the proposed, adopted, or revised rules do not affect a substantial number of entities, or if the economic impact is not significant, then a RegFlex Certification is appropriate.

**V. INSTRUCTIONS AND EXAMPLES TO ASSIST YOU IN
WRITING THE RFA ANALYSIS**

This section of the RegFlex memo contains five parts. Each part is designed to help you draft a particular RFA analysis or certification or a paragraph that indicates no RFA analysis is required. The RegFlex memo should be read in its entirety; however, we have drafted the Memo so that each part of this section, to the extent possible, stands alone. Therefore, if you read the entire Memo you may notice that some explanations and discussions are repeated. Choose the part of this section that matches your need – Initial Regulatory Flexibility Analysis, Final Regulatory Flexibility Analysis, Initial Regulatory Flexibility Certification, Final Regulatory Flexibility Certification, or the “no RegFlex Analysis or Certification” paragraph. If you need help determining which part applies, call OCBO.

RFA analyses may be included in either the “Procedural Section” of the primary item, or as a separate appendix. Often, certifications are included in the “Procedural Section” because they are brief, usually only two or three paragraphs. IRFAs and FRFAs are usually included as appendices, because they tend to be several pages in length. If the RFA analysis is included in an appendix, then the primary item should include a reference to the appropriate appendix. For your ease, the following are several examples of reference paragraphs.

Example 1

The Supplemental Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act,⁸ is contained in Appendix D.

Example 2

Pursuant to the Regulatory Flexibility Act of 1980, as amended,⁹ the Commission’s Final Regulatory Flexibility Certification in this Report and Order is attached as Appendix C.

⁸ See 5 U.S.C. § 604.

**Non-Public Information
For Internal Use Only**

Example 3

As required by the Regulatory Flexibility Act,¹⁰ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities of the proposals addressed in this Notice. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the Notice, and they should have a separate and distinct heading designating them as responses to the IRFA. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.¹¹

RegFlex analyses and certifications should be written using plain language.¹² Include references and cites in footnotes, when possible. Be sure to cross-reference as much as possible to the primary item.

[REDACTED]

For ease of reference, OCBO has attached to hard copies of this memo, documents that we believe are good examples of RegFlex analyses and certifications. If you wish to do so, use Westlaw to search for other examples that may be more current or more specific to your Bureau or item topic. To search Westlaw, log-on and at the Database Identification prompt type "fcc." [REDACTED]

[REDACTED]

[REDACTED]

⁹ 5 U.S.C. § 601 *et. seq.*

¹⁰ *See* 5 U.S.C. § 603.

¹¹ *See* 5 U.S.C. § 603(a).

¹² *See Federal Communications Commission Style Manual (December 2015)*
<http://intranet.fcc.gov/omd/osec/index.html>.

**Non-Public Information
For Internal Use Only**

After finding an appropriate example, you may open the document and download it in full or in part. Remember to check for either footnotes or endnotes.

Please remember that both the attached analyses and any analyses you obtain from Westlaw are not necessarily current, *i.e.* they may not contain the most recent standard paragraphs or footnotes. If you find inconsistencies between an old analysis and the Memo, please use the format and information set forth in the Memo. In addition, realize that these examples may not contain the most recent size standards, definitions, or numbers of small entities affected. These parameters can change on a regular basis. The most current information is the information included or referenced in the Memo.

a. Regulatory Flexibility Analyses

1. Initial Regulatory Flexibility Analysis

[REDACTED]

RegFlex analyses may be included in either the “Procedural Section” of the primary item, or as a separate appendix. IRFAs, as well as FRFAs, are usually included as appendices, because they tend to be several pages in length. If the RegFlex Analysis is included in an appendix, accordingly include a reference to the appropriate appendix in the primary item. For your ease of reference, several examples of reference paragraphs are included *supra* in Section V, at pages 8 and 9.

Below in bold are standard headings A through F that must be used in IRFAs, along with some instructions as to what each section should address and additional standard language. These headings are taken from the statute and mirror the requirements of 5 U.S.C. § 603. The highlighted paragraphs and footnotes indicated by headings in *Italics* and the parenthetical language “to be included” are designed, for your ease, to be copied and pasted directly from this memo into your RegFlex draft. Where you see the word [Notice] in brackets please insert the name or the short name of your item, as appropriate.

For the required publication in the Federal Register, the statute permits summaries of an IRFA. [REDACTED] When summarizing an analysis for Federal Register publication, please use all standard RegFlex headings and summarize

**Non-Public Information
For Internal Use Only**

the contents under each. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Introductory Paragraph and Footnotes (to be included):

As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹⁴ the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this [Notice]. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the [Notice] provided in paragraph [#] of the item. The Commission will send a copy of the [Notice], including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).¹⁵ In addition, the [Notice] and IRFA (or summaries thereof) will be published in the Federal Register.¹⁶

A. Need for, and Objectives of, the Proposed Rules

In this section, describe the basic purpose of the Notice. [REDACTED]
[REDACTED]

[REDACTED] Write the description of the primary item in plain language. Be sure the summary of the primary item is thorough and covers all small business-related issues.

B. Legal Basis

Describe the legal basis for the proposed rule, with full citations to the Communications Act and other relevant statutes. The citations here should be consistent with those contained in the Ordering Clause section of the primary item.

¹⁴ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

¹⁵ See 5 U.S.C. § 603(a).

¹⁶ See 5 U.S.C. § 603(a).

**Non-Public Information
For Internal Use Only**

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

The statute requires that all small entities affected by the proposed rules be included in the RegFlex Analysis.¹⁷ RegFlex analyses, however, need only address the impact of rules on small entities directly regulated by those rules.¹⁸ [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Discussions of small entities not directly affected by the proposed rules may be included in the IRFA to assist the public, but in such cases it should be made clear that these additional entities are “merely indirectly” affected by the Commission’s action, and that including them has been voluntary on the Commission’s part.

[REDACTED]
[REDACTED] Bureaus and Offices should identify the small entities that will be impacted by their proposed rules and include the relevant statistics in the IRFA. Much of this information can be found in previous IRFAs drafted by the respective Bureau or Office. However, before using this information in your item you should ensure that the statistics are the most current available. OCBO will also review the information to ensure that it is accurate based upon current U.S. Census data.

[REDACTED]
[REDACTED] If that is the case, OCBO has information from the SBA and the Census Bureau to assist you in developing new small entity descriptions. While it is your responsibility to determine the appropriate small entities affected by the proposed rules and to draft the estimate of the number of small businesses impacted, including being up-to-date on statistics generated by your Bureau or Office, OCBO is available to assist you in this process. Note that we need only rely on existing sources of information – the amended RFA does not require the agency to generate any new or updated statistical estimates of small entities solely for RegFlex purposes.

¹⁷ 5 U.S.C. § 603(b)(3).

¹⁸ See *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327, 342-43 (D.C. Cir. 1985).

**Non-Public Information
For Internal Use Only**

Lastly, keep in mind the need to seek prior approval from SBA for newly developed small business size standards. Size standards are situations in which the proposed rules would apply differently to some entities because of their size. [REDACTED]

The importance of including all potentially affected small entities in the IRFA cannot be overstated. [REDACTED]

Introductory Paragraph and Footnotes (to be included):

The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.¹⁹ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”²⁰ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.²¹ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).²²

Paragraph and Footnotes for Small Incumbent Local Exchange Carriers (to be included when appropriate):

We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”²³ The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such

¹⁹ 5 U.S.C. § 603(b)(3).

²⁰ 5 U.S.C. § 601(6).

²¹ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “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.”

²² 15 U.S.C. § 632.

²³ 15 U.S.C. § 632.

**Non-Public Information
For Internal Use Only**

dominance is not “national” in scope.²⁴ We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

Your analysis should estimate the costs of complying with the proposed rules [REDACTED]

Describe, with as much particularity as possible, the compliance burdens that might result from the rules. [REDACTED]

If it is not readily apparent, indicate the classes of small entities that are subject to the compliance requirements described in this section.

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

This section should describe any significant alternatives to the proposed rule raised by the Bureau or Office which accomplish the stated objectives of applicable statutes and minimize any significant economic impact of the proposed rule on small entities. [REDACTED]

SBA has filed numerous responses and reports to Congress criticizing the Commission for failing to consider alternatives that might assist small entities. [REDACTED]

[REDACTED] Alternatives either proposed or considered must be discussed here. [REDACTED]

²⁴ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

**Non-Public Information
For Internal Use Only**

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] Because every rule context is different, the level, scope, and complexity of this type of analysis may vary significantly among IRFAs. Some brief examples of alternative discussions are provided.

Example 1

This *Notice* invites comment on a number of alternatives to modify or eliminate the newspaper/broadcast cross-ownership rule. The Commission will also consider additional significant alternatives developed in the record.

With respect to modification of the rule, the *Notice* proposes five specific options. First, the Commission might redefine the geographic area in which the rule operates to allow broadcast stations and newspapers to combine if they are in different markets, without regard to whether the station's service contour encompasses the newspaper's city of publications (the current standard). This option might permit more entities, including small newspapers and stations, to combine. In the second option, the "market concentration" standard, the Commission would allow newspapers and stations to combine, provided their combined market share would not exceed a defined limit. Under the third option, the "voice count" standard, the Commission would permit combinations so long as a certain number of independently owned media "voices" would remain in the market. The fourth option would combine the "market concentration" and the "voice count" standards. In each of these several options, the Commission would limit the number and type of combinations in any market to ensure that no market participant attains unconstrained or unrivaled market power or otherwise controls the information sources available. These options would thus permit some smaller businesses to combine to realize economic efficiencies and strengthen their ability to compete, but at the same time ensure that the markets in which they operate do not become too concentrated. Under the fifth option, the Commission would permit newspapers and stations to combine, subject to a structural separations approach. This would permit newspapers and stations to combine and realize economic efficiencies but preserve editorial diversity.

**Non-Public Information
For Internal Use Only**

In addition to, or as an alternative to, modifying the current rule, the circumstances under which the newspaper/broadcast cross-ownership rule should be waived could be enhanced. In particular, the *Notice* seeks comment on whether a waiver should be granted if one of the parties to the combination has failed, is failing, or if a new service would result. This would benefit small entities that wish to combine with another in order to save their business, compete more efficiently, or better realize economic efficiencies through economies of scale.

As an alternative to modifying the current rule and/or adding to the list of circumstances under which the rule should be waived, the rule could be eliminated entirely. The *Notice* seeks comment on this alternative. Under this alternative, entities, including small entities, would be subject only to the antitrust laws and the Commission's general public interest review when granting, renewing, or transferring a license.

Example 2 (footnotes omitted)

In order to overcome entry barriers for smaller entities, we adopt here flexible partitioning and disaggregation rules. Parties to partitioning and disaggregation agreements may negotiate whether one party or both will be responsible for demonstrating fulfillment of pertaining construction requirements. Parties may also combine partitioning and disaggregation agreements. Any such agreements are treated, however, as a form of license assignment and therefore require Commission approval via filing FCC Form 603. Licensees who received bidding credits at auction and who subsequently partition or disaggregate are also subject to the unjust enrichment provision contained in our Rules. We believe that these recordkeeping and unjust enrichment restrictions are the minimum needed, when weighed against the significant benefits to small entities that result from the flexible approach we are adopting here.

In the *Report and Order*, we adopt a ten-day period for filing petitions to deny long-form applications. We decline to adopt a five-day period in order to give small businesses more flexibility in challenging license awards. We also adopt a third level of small business bidding credits in addition to those proposed in the *NPRM*. Finally, we adopt attribution rules based on a "controlling interest" standard to determine eligibility for our small business provisions. We believe these rules, along with our affiliation rules, will prevent larger firms from illegitimately seeking status as a small business. All of these decisions regarding competitive bidding procedures will work to the benefit of small entities.

**Non-Public Information
For Internal Use Only**

[REDACTED]

The following paragraph tracks the statute, 5 U.S.C. § 603(c), and lists four possible alternatives (although alternative 3 usually applies only in manufacturing situations). [REDACTED]

[REDACTED]

[REDACTED] This section is only concerned with alternatives that affect small entities.

Introductory Paragraph and Footnotes (to be included):

The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables 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 such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”²⁵

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

Please indicate whether any such rules apply, or put “None.”

Ordering Clause (to be included even though partially redundant to the IRFA introductory paragraph):

IT IS FURTHER ORDERED that the Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this [Notice], including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

²⁵ 5 U.S.C. § 603(c)(1) – (c)(4).

Non-Public Information
For Internal Use Only

1. Final Regulatory Flexibility Analysis

[REDACTED]

As noted in the previous IRFA discussion, for the required Federal Register publication, the statute permits summaries of IRFAs and FRFAs. When summarizing an analysis for Federal Register publication, please use all standard RegFlex headings and summarize the contents under each. [REDACTED]

[REDACTED]

Below in bold are standard headings A through F that must be used in FRFAs, along with some instructions as to what each section should address and additional standard language. These headings mirror the statute and requirements of 5 U.S.C. § 604. The highlighted paragraphs and footnotes indicated by headings in *Italics* and the parenthetical language “to be included” are designed, for your ease, to be copied and pasted directly from this memo into your RegFlex draft. Where you see the word [Notice] in brackets please insert the name or the short name of the initiating item, as appropriate. Where you see the word [Order] in brackets please insert the name or the short name of your item.

Introductory Paragraph and Footnotes (to be included):

As required by the Regulatory Flexibility Act of 1980, as amended (RFA),²⁶ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the [full name of Notice].²⁷ The Commission sought written public comment on the proposals in the [Notice], including comment on the IRFA. [The comments received are discussed below.] This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.²⁸

²⁶ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

²⁷ [Give full citation to the initiating item, including a specific page cite to the IRFA.]

²⁸ See 5 U.S.C. § 604.

**Non-Public Information
For Internal Use Only**

A. Need for, and Objectives of, the [Order]

Describe the basic purpose of the Order. [REDACTED]
[REDACTED] Write the description of the primary item in plain language. Be sure the summary of the primary item is thorough and covers all small business-related issues.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

In this section discuss all comments filed directly in response to the IRFA. Include in this discussion a summary of the significant issues raised by the comments, a summary of the Commission's assessment of the issues, and an indication of any changes made to the rule as a result of the comments.²⁹ Also, discuss or cross-reference (to the primary item) any general comments submitted in response to the Notice, which concern issues that may impact small entities. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

If there were no comments submitted specifically in response to the IRFA (or specifically regarding small entities), say so. [REDACTED]
[REDACTED]
[REDACTED]

Example 1 No comments filed on IRFA

There were no comments raised that specifically addressed the proposed rules and policies presented in the IRFA. Nonetheless, the agency considered the potential impact of the rules proposed in the IRFA on small entities and reduced the compliance burden for all small entities (as discussed in paragraph [#]) in order to reduce the economic impact of the rules enacted herein on such entities.

Example 2 No comments filed on IRFA

There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

**Non-Public Information
For Internal Use Only**

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Note that the Commission need only rely on existing sources of information – the amended RFA does not require the agency to generate any new or updated statistical estimates of small entities solely for RFA purposes.

If the Commission has used any other definition of the particular service in rule makings, the author must include that definition and cite to the order that first adopted the definition. Please state whether the SBA has approved the definition, or whether such approval is pending. Be sure to provide citations to these approvals. If the definition is not relevant in the context of the adopted or revised rules, please state so.

■ [REDACTED]
[REDACTED]

**Non-Public Information
For Internal Use Only**

Introductory Paragraph and Footnotes (to be included):

The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein.³¹ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”³² In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.³³ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).³⁴

Paragraph and Footnotes for Small Incumbent Local Exchange Carriers (to be included when appropriate):

We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”³⁵ The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not “national” in scope.³⁶ We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

Your analysis should estimate the costs of complying with these requirements

³¹ 5 U.S.C. § 604(a)(3).

³² 5 U.S.C. § 601(6).

³³ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “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.”

³⁴ 15 U.S.C. § 632.

³⁵ 15 U.S.C. § 632.

³⁶ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

**Non-Public Information
For Internal Use Only**

[REDACTED]
[REDACTED]
[REDACTED]
Describe, with as much particularity as possible, the compliance burdens that might result from the rules. [REDACTED]
[REDACTED]
[REDACTED]

If it is not readily apparent, indicate the classes of small entities that are subject to the compliance requirements described in this section.

F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Because every rule context is different, the level, scope, and complexity of this type of analysis may vary significantly among FRFAs. For instance, the level of detail in this section will reflect the nature of the comments received. It is important to discuss any pertinent comments, especially those which influenced the Commission's adoption or revision of the rules.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] An agency must not only describe its reasoning to support decisions affecting small entities, it must describe why it rejected other significant alternatives. [REDACTED]

[REDACTED]
[REDACTED] In general, if no commenters raised alternatives, the Commission may simply say so. [REDACTED]

³⁷ 5 U.S.C. § 604(a)(5).

**Non-Public Information
For Internal Use Only**

[REDACTED]
[REDACTED]

Introductory Paragraph and Footnote (to be included):

The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables 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 such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”³⁸

Example 1

This *Notice* invites comment on a number of alternatives to modify or eliminate the newspaper/broadcast cross-ownership rule. The Commission will also consider additional significant alternatives developed in the record.

With respect to modification of the rule, the *Notice* proposes five specific options. First, the Commission might redefine the geographic area in which the rule operates to allow broadcast stations and newspapers to combine if they are in different markets, without regard to whether the station’s service contour encompasses the newspaper’s city of publications (the current standard). This option might permit more entities, including small newspapers and stations, to combine. In the second option, the “market concentration” standard, the Commission would allow newspapers and stations to combine, provided their combined market share would not exceed a defined limit. Under the third option, the “voice count” standard, the Commission would permit combinations so long as a certain number of independently owned media “voices” would remain in the market. The fourth option would combine the “market concentration” and the “voice count” standards. In each of these several options, the Commission would limit the number and type of combinations in any market to ensure that no market participant attains unconstrained or unrivaled market power or otherwise controls the information sources available. These options would thus permit some smaller businesses to combine to realize economic efficiencies and strengthen their ability to compete, but at the same time ensure that the markets in which they operate do not become too concentrated. Under the fifth option, the Commission would permit newspapers and stations to combine, subject to

³⁸ 5 U.S.C. § 603(c)(1) – (c)(4).

**Non-Public Information
For Internal Use Only**

a structural separations approach. This would permit newspapers and stations to combine and realize economic efficiencies but preserve editorial diversity.

In addition to, or as an alternative to, modifying the current rule, the circumstances under which the newspaper/broadcast cross-ownership rule should be waived could be enhanced. In particular, the *Notice* seeks comment on whether a waiver should be granted if one of the parties to the combination has failed, is failing, or if a new service would result. This would benefit small entities that wish to combine with another in order to save their business, compete more efficiently, or better realize economic efficiencies through economies of scale.

As an alternative to modifying the current rule and/or adding to the list of circumstances under which the rule should be waived, the rule could be eliminated entirely. The *Notice* seeks comment on this alternative. Under this alternative, entities, including small entities, would be subject only to the antitrust laws and the Commission's general public interest review when granting, renewing, or transferring a license.

Example 2 (footnotes omitted)

In order to overcome entry barriers for smaller entities, we adopt here flexible partitioning and disaggregation rules. Parties to partitioning and disaggregation agreements may negotiate whether one party or both will be responsible for demonstrating fulfillment of pertaining construction requirements. Parties may also combine partitioning and disaggregation agreements. Any such agreements are treated, however, as a form of license assignment and therefore require Commission approval via filing FCC Form 603. Licensees who received bidding credits at auction and who subsequently partition or disaggregate are also subject to the unjust enrichment provision contained in our Rules. We believe that these recordkeeping and unjust enrichment restrictions are the minimum needed, when weighed against the significant benefits to small entities that result from the flexible approach we are adopting here.

In the *Report and Order*, we adopt a ten-day period for filing petitions to deny long-form applications. We decline to adopt a five-day period in order to give small businesses more flexibility in challenging license awards. We also adopt a third level of small business bidding credits in addition to those proposed in the *NPRM*. Finally, we adopt attribution rules based on a "controlling interest" standard to determine eligibility for our small business provisions. We believe these rules, along with our affiliation rules, will prevent larger firms from illegitimately seeking status

**Non-Public Information
For Internal Use Only**

as a small business. All of these decisions regarding competitive bidding procedures will work to the benefit of small entities.

Final Paragraph and Footnotes (to be included):

Report to Congress: The Commission will send a copy of the [Order], including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.³⁹ In addition, the Commission will send a copy of the [Order], including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the [Order] and FRFA (or summaries thereof) will also be published in the Federal Register.⁴⁰

Ordering Clause (to be included even though partially redundant to the FRFA closing paragraph):

IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this [Order], including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

b. Regulatory Flexibility Certifications

If the rules from a notice-and-comment rule making are not expected to have "a significant economic impact" on "a substantial number of small entities," the Commission need not complete a RegFlex Analysis and may instead complete a RegFlex Certification.⁴¹ A certification is appropriate at both the Notice and Order stages. In a certification, the Commission must state the factual basis for the certification, using the above-quoted standard for its threshold analysis.⁴² Final Certifications are judicially reviewable and must be approved by the Commission.

Initial Certifications should only be used when it is abundantly clear that there is no "significant economic impact" or that there are not a "substantial number of small entities" affected. As a note of caution, if an item is certified at the Notice stage, then in theory it must be certified at the Order stage. For instance, if a certification is completed at the Notice stage and subsequent comments demonstrate that an IRFA was actually needed, then it would be necessary to publish an IRFA in order to allow for comments by potentially affected small entities on the proposed rules or modifications, before a FRFA may be published. In summary, you may go from either an IRFA or an Initial

³⁹ See 5 U.S.C. § 801(a)(1)(A).

⁴⁰ See 5 U.S.C. § 604(b).

⁴² 5 U.S.C. § 605(b).

**Non-Public Information
For Internal Use Only**

Certification to a Final Certification; you may not go from an Initial Certification to a FRFA.

[REDACTED]

There is currently no case law that identifies the “trigger” level of “significant economic impact” or “substantial number of small entities.” The SBA advises that, in its view, a RegFlex Analysis is required whenever a rule’s expected impact on small entities cannot be described as *de minimis*. [REDACTED]

[REDACTED] In addition, please note that “small entities” here means specifically described, regulated entities that are “small” within the context of the particular item – not all small entities seemingly affected by the rule.⁴⁴

Indirectly affected entities are often clients, customers, or end users, and the effect on them, although sometimes substantial, is created only through regulatory action taken directly toward others that are Commission licensees or regulatees. [REDACTED]

[REDACTED]

Certifications are typically short (a page or two) and are usually placed in the Procedural Matters section of the item. The SBA Office of Advocacy must receive a copy of the certification.⁴⁵ To accomplish this, the Consumer and Governmental Affairs Bureau, Reference Information Center, sends the SBA a copy of the entire item, including the certification. Note especially that certifications must be published in full in the Federal Register.⁴⁶ It is legally insufficient to publish summaries of certifications.

■
44

See discussion of *Midtex* case, [REDACTED]

**Non-Public Information
For Internal Use Only**

1. Initial Regulatory Flexibility Certification

General Introductory Paragraph and Footnotes (to be included):

The Regulatory Flexibility Act of 1980, as amended (RFA),⁴⁷ requires that an initial regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”⁴⁸ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁴⁹ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁵⁰ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁵¹

Background information paragraph containing a discussion of the purpose of the primary item and the direct, pertinent, previous RegFlex history in this proceeding, if any (to be written by rule writer)

Substantive information paragraph as to why certification is appropriate (to be written by rule writer)

Example 1 No significant economic impact paragraph

Background Information

In this Notice, the Commission proposes to prescribe a prediction technique for determining the ability of individual households to receive television signals broadcast over-the-air by local stations. The proposals apply exclusively to the sources of data for certain engineering calculations and to the manner in which these calculations are made.

⁴⁷ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

⁴⁸ 5 U.S.C. § 605(b).

⁴⁹ 5 U.S.C. § 601(6).

⁵⁰ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “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.”

⁵¹ 15 U.S.C. § 632.

**Non-Public Information
For Internal Use Only**

Television station licensees, Direct Broadcast Satellite operators, and other Direct to Home Satellite operators may use the proposed technique to establish the eligibility or non-eligibility of individual households for satellite delivery of distant television programming. These determinations will usually be made at the point of sale of satellite receiving equipment for homes and will tend to increase the number of eligible customers.

Substantive Information

The changes we propose are of a purely electrical engineering, scientific nature, without a substantial economic impact. In addition, the primary economic impact of these proposals will be their indirect effect on individual consumers.

Example 2 No substantial number of small entities paragraph

Background Information (footnotes omitted)

In this Notice of Proposed Rulemaking, we seek comment on certain of our rules pertaining to the National Exchange Carrier Association (NECA), which operates pooling mechanisms to collect and distribute revenues among its participating carriers. In particular, we propose to eliminate the annual election requirements for NECA's board of directors under section 69.602 and seek comment on whether other measures, such as staggered terms and term limits are necessary. We also propose to streamline the average schedule formula process under section 69.609.

Substantive Information

NECA is a non-profit, quasi-governmental association created to administer the Commission's interstate access tariff and revenue distributions processes. Because the proposed rule amendments affect only NECA directly, we find that no substantial number of small entities is potentially affected by our action.

Conclusory Certification Language (to be included):

Therefore, we certify that the proposals in this [Notice], if adopted, will not have a significant economic impact on a substantial number of small entities.

**Non-Public Information
For Internal Use Only**

Copy to SBA and Publication Language and Footnotes (to be included):

The Commission will send a copy of the [Notice], including a copy of this Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the SBA.⁵² This initial certification will also be published in the Federal Register.⁵³

Ordering Clause (to be included):

IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this [Notice], including the Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

2. Final Regulatory Flexibility Certification

General Introductory Paragraph and Footnotes (to be included):

The Regulatory Flexibility Act of 1980, as amended (RFA),⁵⁴ requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."⁵⁵ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁵⁶ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁵⁷ A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁵⁸

⁵² 5 U.S.C. § 605(b).

⁵³ 5 U.S.C. § 605(b).

⁵⁴ The RFA, *see* 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

⁵⁵ 5 U.S.C. § 605(b).

⁵⁶ 5 U.S.C. § 601(6).

⁵⁷ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "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."

⁵⁸ 15 U.S.C. § 632.

**Non-Public Information
For Internal Use Only**

Background information paragraph containing a discussion of the purpose of the primary item and the direct, pertinent, previous RegFlex history in this proceeding, if any (to be written by the rule writer)

Substantive information paragraph as to why certification is appropriate (to be written by rule writer)

Example 1 No significant economic impact paragraph

Background Information

In this Order, the Commission prescribes a prediction technique for determining the ability of individual households to receive television signals broadcast over-the-air by local stations. The prediction technique applies exclusively to the sources of data for certain engineering calculations and to the manner in which these calculations are made. Television station licensees, Direct Broadcast Satellite operators, and other Direct to Home Satellite operators may use the technique to establish the eligibility or non-eligibility of individual households for satellite delivery of distant television programming. These determinations will usually be made at the point of sale of satellite receiving equipment for homes and will tend to increase the number of eligible customers. As noted in paragraph 3, *supra*, the statute requires that we increase the accuracy of the prediction model based on technical data regarding terrain and land cover variations.

Substantive Information

Thus, the prediction technique we prescribe is of a purely electrical engineering, scientific nature, and our aim is to improve its scientific accuracy. Moreover, the changes we are prescribing in the technique are small and will have only a minor effect on the proportion of households that are eligible to receive distant network signals. The number of viewers served by network affiliate stations will not be significantly reduced, and hence the economic effect on network affiliates and satellite carriers will not be significant.

Example 2 No substantial number of small entities paragraph

Background Information

The *Order* gives additional facility siting flexibility to noncommercial educational (NCE) FM stations by modifying the second-adjacent channel

**Non-Public Information
For Internal Use Only**

interference standard to more closely conform to the less restrictive commercial FM standard. (*See Order*, Section III.E.1.) It also establishes, on a going-forward basis, an NCE principal community coverage standard. These rule changes impose no cost or reporting burdens on existing stations. The change in the second adjacent channel interference protection standard will give certain NCE stations additional flexibility in locating their technical facilities. The establishment of an NCE FM community of license signal coverage requirement may restrict siting options for certain stations.

Substantive Information

Although impossible to predict, the Commission anticipates that it will receive approximately 10 to 20 facility modification applications, from a total of over 2,500 NCE FM stations, which take advantage of this increased technical flexibility. Although impossible to predict, the Commission anticipates that the new NCE FM community of license signal coverage requirement will impact fewer than five stations per year.

Example 3 No substantial number of small entities and no significant economic impact paragraph

The rules adopted in this Report and Order requiring stations to provide video descriptions on video programming will affect no more than 10 small broadcasters, which are affiliates of the top four networks in the top 25 Nielsen Designated Market Areas, in the amount of \$5,000 to \$25,000 each. We recognize that the upper end of the possible economic impact might constitute a significant impact for some small broadcasters, but, as noted, this impact will reach, at most, 10 entities, and we have provided an exemption (upon application) for those small entities for which the cost is burdensome. The pass-through of programming will have no economic effect on small entities because they are only required to pass through the programming if they receive it. The Commission believes that the emergency notification requirement will have a negligible effect on small entities as well because it does not require any special equipment. In addition, if this requirement should prove burdensome to small entities, they may apply for exemptions.

Conclusory Certification Language (to be included):

Therefore, we certify that the requirements of the [Order] will not have a significant economic impact on a substantial number of small entities.

**Non-Public Information
For Internal Use Only**

Copy to SBA and Publication Language and Footnotes (to be included):

The Commission will send a copy of the [Order], including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act.⁵⁹ In addition, the [Order] and this final certification will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the Federal Register.⁶⁰

Ordering Clause (to be included):

IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this [Order], including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

c. No RegFlex Analysis or Certification Required

Petitions for Reconsideration and remand orders continue to require a RegFlex Analysis if, at that stage, there are additional rule changes of the notice-and-comment sort (unless a certification is appropriate). If no additional notice-and-comment rules are being promulgated or revised, then the item may be silent regarding the RFA; however, often Bureaus or Offices wish to include a paragraph to avoid public confusion on this point. If you wish to include such a paragraph, several sample paragraphs are provided.

Example 1 References previous RegFlex Certification

In the *Non-Accounting Safeguards Order*,⁶¹ the Commission concluded and certified that the rules adopted in that Order would not, under the Regulatory Flexibility Act of 1980, as amended (RFA),⁶² have a “significant economic impact on a substantial number of small entities.”⁶³ The rules then adopted pertained only to Bell Operating Companies, which, because of their size, do not qualify as small entities. We received no petitions for reconsideration of that Final Regulatory Flexibility Certification. In this present *Third Order on Reconsideration*, the Commission promulgates no additional final rules, and our present action is, therefore, not an RFA matter.

⁵⁹ See 5 U.S.C. § 801(a)(1)(A).

⁶⁰ See 5 U.S.C. § 605(b).

⁶¹ *Non-Accounting Safeguards Order* at ¶¶ 357-61.

⁶² The RFA, see 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

⁶³ 5 U.S.C. § 605(b).

**Non-Public Information
For Internal Use Only**

Example 2 Limits RegFlex Analysis to matters considered in Order on Reconsideration

We note that the Supplemental FRFA addresses only the matters considered in the Order on Reconsideration portion of the Second Report and Order and Order on Reconsideration. No FRFA is necessary for the Second Report and Order because we have decided not to make any changes to the Commission's rules.

Example 3 Other reasons a RegFlex Analysis or Certification might be unnecessary

Section 213 of the Consolidated Appropriations Act, 2000 states that the Regulatory Flexibility Act (as well as certain provisions of the Contract with America Advancement Act of 1996 and the Paperwork Reduction Act) shall not apply to the rules and competitive bidding procedures governing the frequencies in the 746-806 MHz band (currently used for television broadcasts on Channels 60-69). Because the policies and rules adopted in this Order on Reconsideration of the Third Report and Order relate only to assignments of those frequencies, no Final Regulatory Flexibility Analysis or Paperwork Reduction Analysis is necessary.

VI. THE LAST STEP: PUBLICATION IN THE FEDERAL REGISTER

The last but crucial step in complying with the RFA is publication of the analysis or certification in the Federal Register. Statutory requirements differ for certifications and analyses. All certifications must be included in the Federal Register in their entirety,⁶⁴ for IRFAs and FRFAs summaries are sufficient.⁶⁵

[REDACTED]
[REDACTED] When summarizing the analysis, please use all standard RegFlex headings and summarize the contents under each. Use cross-references to the full item to facilitate further research by small entities. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁶⁴ 5 U.S.C. § 605(b). See Section V.b., *Regulatory Flexibility Certifications*, *supra*.

⁶⁵ 5 U.S.C. § 603(a) (IRFA); 5 U.S.C. § 604(b) (FRFA).

**Non-Public Information
For Internal Use Only**

[REDACTED]
[REDACTED]
[REDACTED] OCBO is available if you have questions concerning the level of information to be included in the Federal Register.

In addition, you may want to keep in mind the general Administrative Procedures Act standard for Federal Register summaries: any requirement intended to be binding must be set forth in the Federal Register summary and/or the rules printed in the Federal Register.⁶⁶ Although RFA analyses do not create additional binding requirements, they do contain certain types of statutorily required information.

⁶⁶ See generally OGC, *What Every Attorney Should Know: An Overview*, at Section III (G) (rev. ed. January 2007), <http://intranet.fcc.gov/ogc/handbook>.

Small Entity Compliance Guide Manual



Office of Communications Business Opportunities

June 2009

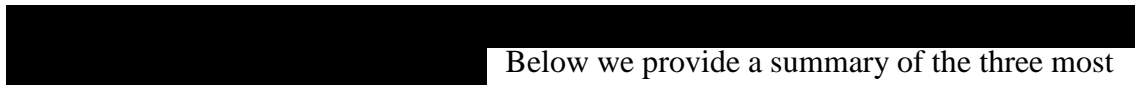
I. Introduction

Rule-writing agencies are required to create a “small entity compliance guide” (SECGs) for each final order that contains a Final Regulatory Flexibility Analysis (FRFA) under the Regulatory Flexibility Act of 1980, as amended (RFA).¹ Compliance guides are intended to explain, in plain language, what actions a small entity² must take to comply with a rule or group of rules. The RFA was amended in 2007 to, *inter alia*, create deadlines for the publication of compliance guides, require agencies to publish the guides on their agency website, and require agencies to provide an annual status report to Congress.

This present Manual describes the internal procedures for creating, reviewing, and publishing the guides. Below, the law is set forth, followed by a discussion of certain requirements and a timetable of deadlines for Bureau and Office action on each guide. The manual then discusses separately the responsibilities of the originating Bureau/Office, Office of Communications Business Opportunities (OCBO), Enforcement Bureau (EB), Office of General Counsel (OGC), and Office of the Chairman (OCH). The Manual closes with some requirements concerning format, including the boilerplate agency disclaimer.

To see examples of the format for compliance guides, you can view the FCC’s published guides on OCBO’s website, <http://www.fcc.gov/ocbo/complianceguides.html>. OCBO is also available for help with questions.³

II. The Law – Sections 211(3), 212, and 215⁴

 Below we provide a summary of the three most pertinent sections, with Section 212 being primary.

Sec. 211. Definitions.

¹ The RFA as codified is found at 5 U.S.C. §§ 601–612. The compliance guide provisions are found as a Note to Section 601. (The current text of these provisions, as codified, is also provided in the text of this Manual.) The original compliance guide provisions were enacted as 1996 RFA amendments, as Sections 211(3), 212, and 215 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The compliance guide provisions were then amended in the “Small Business and Work Opportunity Act of 2007,” Pub. L. No. 110-28, 121 Stat. 112, 188 (2007).

² “Small entities” here are those under the RFA: small businesses, non-profits, and small governmental jurisdictions. *See* Section 211(1), SBREFA; 5 U.S.C. § 601(3)-(6) (RFA).

³ OCBO is coordinator for the compliance guides program. *See FCC Directive*, Number FCCINST 1158.1 (effective date Sept. 2006; expiration date Sept. 2011), at Sections VI(A)(1)(b), VI(B)(9).

⁴ For the source and citation of these provisions (SBREFA), see note 1, *supra*.

For purposes of this subtitle –

* * *

(3) the term “small entity compliance guide” means a document designated and entitled as such by an agency.

Sec. 212. Compliance guides.

(a) Compliance guide.--

(1) **In general.**--For each rule or group of related rules for which an agency is required to prepare a final regulatory flexibility analysis under section 605(b) of title 5, United States Code, the agency shall publish 1 or more guides to assist small entities in complying with the rule and shall entitle such publications “small entity compliance guides.”

(2) **Publication of guides.**--The publication of each guide under this subsection shall include—

(A) the posting of the guide in an easily identified location on the website of the agency; and

(B) distribution of the guide to known industry contacts, such as small entities, associations, or industry leaders affected by the rule.

(3) **Publication date.**--An agency shall publish each guide (including the posting and distribution of the guide as described under paragraph (2))--

(A) on the same date as the date of publication of the final rule (or as soon as possible after that date); and

(B) not later than the date on which the requirements of that rule become effective.

(4) Compliance actions.--

(A) **In general.**--Each guide shall explain the actions a small entity is required to take to comply with a rule.

(B) **Explanation.**--The explanation under subparagraph (A)--

(i) shall include a description of actions needed to meet the requirements of a rule, to enable a small entity to know when such requirements are met; and

(ii) if determined appropriate by the agency, may include a description of possible procedures, such as conducting tests, that may assist a small entity in meeting such requirements, except that, compliance with any procedures described pursuant to this section does not establish compliance with the rule, or establish a presumption or inference of such compliance.

(C) **Procedures.**--Procedures described under subparagraph (B)(ii)--

(i) shall be suggestions to assist small entities; and

(ii) shall not be additional requirements, or diminish requirements, relating to the rule.

(5) Agency preparation of guides.--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. An agency may prepare guides and apply this section with respect to a rule or a group of related rules.

(6) Reporting.--Not later than 1 year after the date of enactment of the Fair Minimum Wage Act of 2007, and annually thereafter, the head of each agency shall submit a report to the Committee on Small Business and Entrepreneurship of the Senate, the Committee on Small Business of the House of Representatives, and any other committee of relevant jurisdiction describing the status of the agency's compliance with paragraphs (1) through (5).

(b) Comprehensive source of information.--Agencies shall cooperate to make available to small entities through comprehensive sources of information, the small entity compliance guides and all other available information on statutory and regulatory requirements affecting small entities.

(c) Limitation on judicial review.--An agency's small entity compliance guide shall not be subject to judicial review, except that in any civil or administrative action against a small entity for a violation occurring after the effective date of this section, the content of the small entity compliance guide may be considered as evidence of the reasonableness or appropriateness of any proposed fines, penalties or damages.

Sec. 215. Cooperation on guidance.

Agencies may, to the extent resources are available and where appropriate, in cooperation with the States, develop guides that fully integrate requirements of both Federal and State regulations where regulations within an agency's area of interest at the Federal and State levels impact small entities. Where regulations vary among the States, separate guides may be created for separate States in cooperation with State agencies.

III. Discussion of Certain SECG Requirements

The law gives broad discretion to agencies in the drafting style used to create compliance guides. However, the following highlights of the above-quoted law should be kept in mind when drafting a guide (the issue of deadlines is discussed later):

- The Commission must now provide a Report to Congress annually in late May, starting in 2008. Thus it is imperative that we prepare and publish compliance guides throughout the year in a timely manner.

- We should expect to publish a compliance guide for every order that contains a FRFA; reconsideration orders with a FRFA also require a guide, and this second effort can take the form of simply updating the previously published compliance guide. Each guide need only cover the current rules at issue,

Also, we are not required to update older guides on a regular basis,
- "Each guide shall explain the actions a small entity is required to take to comply with a rule." This includes describing the actions necessary for the affected small entity to comply with the rule, and an explanation enabling the small entity "to know when such [rule] requirements are met." Note that the discussion of substantive compliance requirements and the text of the rules should be based on the final language published in the *Federal Register*.
 - Federal agencies are required to write guides "using sufficiently plain language" and may take into account the particular audience and the nature of the rule. How we do this is left to the agency's "sole discretion."
 - SECGs must be entitled explicitly as "Small Entity Compliance Guides."
 - The Commission must publish compliance guides on our agency website, and are encouraged to publish elsewhere as well. OCBO handles agency website publication,
 - The originating Bureaus and Offices will identify interested parties to whom the SECGs will be distributed. OCBO must then "distribut[e] ... the guide to known industry contacts, such as small entities, associations, or industry leaders affected by the rule." Since this is not optional, OCBO tracks the distributions to assist with the next annual Report to Congress and to collect helpful precedent.
 - The FCC's Consumer Center handles routine requests from small entities seeking further information. The Consumer Center also handles requests for copies of compliance guides in alternative formats such as Braille, Spanish language, or large print.

IV. Deadlines for Publishing Compliance Guides

The 2007 amendments tightened up the deadlines for publishing (and now distributing) compliance guides. Agencies must publish each guide (on their website):

- (A) on the same date as the date of [*Federal Register*] publication of the final rule⁵ (or as soon as possible after that date); and
- (B) not later than the date on which the requirements of that rule become effective.⁶

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁵ The law is assumed to refer to *Federal Register* publication. This is because the RFA generally tracks Administrative Procedure Act (APA) procedures, *see generally* 5 U.S.C. § 553 (APA) and 5 U.S.C. §§ 601, 603-604 (RFA), and the APA specifies *Federal Register* publication for notice-and-comment rulemakings. Also, many agencies do not have their own publishing organ (such as the *FCC Record*), and rely solely on the *Federal Register* for publishing their actions.

⁶ While these deadlines should be met, it appears that, because Congress did not amend Section 212(c) concerning the limitations on judicial review, the agency cannot be sued as a result of a missed deadline. Similarly, it appears that missing the “effective date” deadline will not affect the validity of the rule.

- I [REDACTED]
- I [REDACTED]
- I [REDACTED]
- I [REDACTED]

V. Responsibilities

[REDACTED]

OCBO is responsible for oversight of the Small Entity Compliance Guide Program. In this role, OCBO is responsible for:

- Advising and assisting the Chairman, Commissioners, and the Bureaus and Offices regarding compliance with the law;
- Developing and maintaining formal procedures for all Bureaus and Offices regarding the creation and publication of plain language compliance guides;
- Assisting the efforts of Bureaus and Offices, as part of the Regulatory Flexibility Analysis review process, to identify rulemakings that require compliance guides;
- Creating a hyperlink on the Commission's internet website leading to a Compliance Guide Internet Webpage containing all published compliance guides;
- Conducting training for Bureaus and Offices engaged in rulemaking regarding the creation and publication of compliance guides; and
- Providing training and outreach to small entities through participation in small business forums and industry and trade association conferences to explain the FCC's Small Entity Compliance Guide Program and to solicit input and feedback.

Bureaus and Offices (compliance guide originators) are responsible for:

- Creating and publishing plain language compliance guides for notice-and-comment rulemaking proceedings that have a significant economic impact on a substantial number of small entities.
- Appointing a Front Office contact, plus a backup contact as needed, to ensure that the B/O:
 - (1) Coordinates the development and publication of plain language compliance guides with OCBO, EB, OGC, and OCH.
 - (2) Writes the required compliance guide draft, and sends the full draft to OCBO on the day that the B/O also transmits the underlying order to the *Federal Register*.
 - (3) Creates a hyperlink on the opening page of the Bureau or Office's internet website leading to the Commission's Compliance Guide Internet Webpage.
 - (4) Responds to requests from the FCC's Consumer Center for additional information regarding compliance guides.

EB and OGC will review the draft compliance guides, making good faith efforts to meet the described deadlines required by the new provisions in the law. EB and OGC should appoint a contact person and backup contact to provide timely review, on a continuing basis.

The FCC's Consumer Center is responsible for:

- Assisting representatives of small entities to obtain information and, in coordination with other Bureaus and Offices and OCBO, providing additional guidance and assistance pertaining to compliance guides.
- Providing copies of compliance guides, as requested, in alternative formats (e.g., Braille, Spanish language, or large print).
- Sharing with other Bureaus and Offices and OCBO incoming comments, suggestions, and other expressions of interest from small entities.

VI. Covering Page

A covering page, designating the document as a "Small Entity Compliance Guide," shall contain the DA number for the compliance guide, the name and FCC release number of

the final rule, and contact information for the FCC's Consumer Center. The date of the guide will be listed as the day, month, and year of the release of the guide. The SECG covering page format has become routine, and is designed to ensure that the reader can easily tell the difference between the citation of the compliance guide and the citation of the underlying item. Here is a good sample:

http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-1321A1.pdf (CPNI order)

The covering page will also contain the following disclaimer, at the end:

This Guide is prepared in accordance with the requirements of Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It is intended to help small entities—small businesses, small organizations (non-profits), and small governmental jurisdictions—comply with the new rules adopted in the above-referenced FCC rulemaking docket(s). This Guide is not intended to replace the rules and, therefore, final authority rests solely with the rules. Although we have attempted to cover all parts of the rules that might be especially important to small entities, the coverage may not be exhaustive. This Guide may, perhaps, not apply in a particular situation based upon the circumstances, and the FCC retains the discretion to adopt approaches on a case-by-case basis that may differ from this Guide, where appropriate. Any decisions regarding a particular small entity will be based on the statute and regulations.

In any civil or administrative action against a small entity for a violation of rules, the content of the Small Entity Compliance Guide may be considered as evidence of the reasonableness or appropriateness of proposed fines, penalties or damages. Interested parties are free to file comments regarding this Guide and the appropriateness of its application to a particular situation; the FCC will consider whether the recommendations or interpretations in the Guide are appropriate in that situation. The FCC may decide to revise this Guide without public notice to reflect changes in the FCC's approach to implementing a rule, or to clarify or update the text of the Guide. Direct your comments and recommendations, or calls for further assistance, to the FCC's Consumer Center:

**1-888-CALL-FCC (1-888-225-5322)
TTY: 1-888-TELL-FCC (1-888-835-5322)
Fax: 202-418-0232
fccinfo@fcc.gov**

VII. Optional Elements and Sample Guides

A Table of Contents is optional. [REDACTED]

As noted earlier, you can get sample SECGs from the FCC's online listing of (published) guides, at <http://www.fcc.gov/ocbo/complianceguides.html>.

[END]