Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA)

Environmental Protection Agency's (EPA) Small Business Advocacy Review Panel Process

February 21, 2008

Purpose of Presentation

- To Provide an Overview of the Regulatory Flexibility Act and EPA's Small Business Advocacy Review Panel Process to the Total Coliform Rule Distribution System Advisory Committee (TCRDSAC)

RFA/SBREFA

- The Small Business Regulatory Enforcement Fairness Act (SBREFA)
  - Enacted in 1996
  - Amended the RFA of 1980
    - established certain formal procedural and analytical requirements for rules that have the potential to impose a **significant economic impact on a substantial number of small entities (SISNOSE).**

RFA/SBREFA (continued)

- Purpose of RFA:
  - To ensure that agencies identify and consider ways of tailoring regulations to the size of the regulated entities.
  - To provide small entities with an expanded opportunity to participate in the development of certain regulations.

- Scope:
  - All rules subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act (APA) or any other statute are subject to the RFA.

General RFA/SBREFA Requirements

The RFA generally requires that for certain (non-SISNOSE) rules, the Agency:

- ***determine***, to the extent feasible, the rule's ***economic impact*** on small entities,
- ***explore regulatory options*** for reducing any significant economic impact on a substantial number of such entities, and
- ***explain*** ultimate choice of regulatory approach.

Small Entities

- RFA definitions:
  - **small businesses**; defined by SBA's size standards under North American Industry Classification System (NAICS);
  - **small governmental jurisdictions**; the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000; and,
  - **small organizations**; any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

Small Entities (continued)

- Under the RFA the Agency can adopt alternative definitions for the three types of entities provided that the Agency follows procedures prescribed by the statute.
  - Pursuant to 5 USC 601(3), EPA has previously established an alternative small entity definition for traditional, stationary public water systems as “a public water system that serves 10,000 or fewer people.” (*See* EPA’s Consumer Confidence Reports regulation, 63 FR 44511, August 19, 1998).

Specific RFA/SBREFA Rulemaking Requirements

- **Proposed Rules**
  - a) Certify no SISNOSE or
  - b) Conduct General Outreach, Convene Small Business Advocacy Review Panel, and Prepare Initial Regulatory Flexibility Analysis (IRFA)
- **Final Rules**
  - a) Certify no SISNOSE or
  - b) Conduct General Outreach, Prepare Final Regulatory Flexibility Analysis (FRFA), and Complete Small Entity Compliance Guides (SECG)

- **Certification** of no SISNOSE is judicially reviewable
  - Must have statement of factual basis

RFA Requirements for Proposed Rules

- Unless EPA certifies no SISNOSE (i.e., the proposed rule will not have a Significant economic Impact on a Substantial Number of Small Entities):
  - EPA must convene a **Small Business Advocacy Review (SBAR) Panel** prior to the NPRM (section 609(b)); Section 609(b) covers the EPA and the Occupational Safety and Health Administration.
  - Prepare an **Initial Regulatory Flexibility Analysis** (IRFA) for the NPRM (section 603); *and*
  - Include the IRFA or a summary of the IRFA analysis, in the NPRM preamble, except in emergencies (sections 603(a) & 608(a)).

Small Business Advocacy Review Panels

- Prior to proposing a rule, EPA engages its small entity stakeholders in a dialog to learn more about their concerns and ideas regarding the rule under development. If the Agency believes that the rule may have a significant economic impact on a substantial number of small entities, EPA will begin the SBAR Panel process.

- This process is intended to provide a special opportunity for small entities to participate in the rulemaking.

Small Business Advocacy Review Panel Members

- Representatives of the EPA lead office developing the rule, EPA's Small Business Advocacy Chair, Chief Counsel for Advocacy of the Small Business Administration, and the Office of Information and Regulatory Affairs within the Office of Management and Budget

Small Entity Representatives (SERs)

- A SER is a person appointed by the Small Business Advocacy Chair (SBAC) as a participating representative of small entities likely to be subject to the requirements of a specific proposed rule under development.

- A small entity stakeholder is eligible to be a SER if he or she is directly subject to the particular proposed regulation that is under development and meets one of the small entity definitions as defined in RFA section 601.

EPA's SBAR Panel Process

EPA notifies SBA Office of Advocacy of rule, potential impacts on small entities, and the type of small entities that may be impacted.

Within 15 days, SBA Office of Advocacy identifies potential representatives of small entities that may be impacted by rule. The SBAC considers these recommendations and appoints a group of official SERs.

EPA convenes and chairs the SBAR Panel. The Panel reviews material prepared by EPA, and collects advice and recommendations of SERs regarding potential impacts on small entities, as well as significant alternatives to the rule.

EPA's SBAR Panel Process (continued)

- Each Panel has 60 days to consider SER comments in addition to other rule-related materials prepared by EPA and prepare a report to the Administrator of EPA on the potential small entity impacts of the rule and on possible ways to reduce those impacts.

- EPA considers the Panel Report as it drafts the proposed rule, prepares the IRFA, and makes a final SISNOSE determination.

- EPA makes Panel Report publicly available by including it in the rulemaking record (e.g., docket) once the NPRM is issued.

RFA and FACA

- TCRDSAC Protocols state:
  - EPA, as a member of the Committee, agrees to use the agreement in principle as the basis for a Notice of Proposed Rulemaking to the maximum extent possible consistent with the Agency's legal obligations. (Section 3.b.)
- RFA requires the Agency to consider the Panel Report in selecting proposed regulatory options to address small entity concerns.
  - This is one of the legal obligations the Agency must comply with when it considers the basis of the proposed rule recommended by the TCRDSAC FAC and develops the proposed rule.

Where to Find More Information

- More information on the RFA/SBREFA can be found on EPA's RFA/SBREFA website: www.epa.gov/sbrefa.

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