



UNITED STATES
 CONSUMER PRODUCT SAFETY COMMISSION
 WASHINGTON, DC 20207

CPSC/OFFICE OF
 THE SECRETARY

2003 FEB -4 A 7 32

BALLOT VOTE SHEET

DATE: FEB 3 2003

TO: The Commission
 Todd A. Stevenson, Secretary

THROUGH: Patricia Semple, Executive Director *PS*
 Jacqueline Elder, Acting Assistant Executive Director *je*
 Office of Hazard Identification and Reduction

FROM: W.H. DuRoss, III, General Counsel *W.D.III*
 Stephen Lemberg, Assistant General Counsel for Administrative Law *SL*
 Lowell F. Martin, Attorney-Advisor, GCAL (ext. 2217) *L.F.M.*

SUBJECT: Policies and Procedures for Compliance with the Regulatory Flexibility Act

Ballot Vote Due: FEB 10 2003

Executive Order No. 13272, *Proper Consideration of Small Entities in Agency Rulemaking*, 67 Fed. Reg. 53,461 (2002), copy attached, requires that federal agencies, including the CPSC, develop written policies and procedures to be followed to comply with the requirements of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 601, *et seq.* As specified in the Executive Order, the draft version of the policies and procedures, after being approved by ballot vote of the Commission, was provided to the Chief Counsel for Advocacy of the Small Business Administration (Advocacy) for review and comment. Advocacy responded within 60 days thereafter by letter of January 9, 2003, copy attached, to the CPSC General Counsel.

As specified in the Executive Order, the Directorate for Economics has considered Advocacy's comments in preparing the attached draft final version of the policies and procedures. The Executive Order requires that the policies and procedures be finalized by February 10, 2003. They are then to be made available to the public through the Internet or other easily accessible means.

The Office of the General Counsel recommends that the Commission approve the policies and procedures document as drafted for posting on the CPSC world wide web site.

Please indicate your vote on the following options.

NOTE: This document has not been reviewed or accepted by the Commission
 Initial *rh* Date *2/3/03*
 CPSC Hotline: 1-800-638-CPSC(2772) ★ CPSC's Web Site: <http://www.cpsc.gov>

CPSC 6 (b)(1) Cleared *2-3-03*
 No Mfrs./PrvtLbrs or Products Identified
 Excepted by _____

I. Approve the policies and procedures document as drafted for posting on the CPSC world wide web site.

(Signature)

(Date)

II. Approve the draft policies and procedures document with the following changes for posting on the CPSC world wide web site. (Please specify).

(Signature)

(Date)

III. Do not approve the draft policies and procedures document.

(Signature)

(Date)

Attachments:

1. E.O. 13272, *Proper Consideration of Small Entities in Agency Rulemaking*, 67 Fed. Reg. 53,461 (August 16, 2002)
2. Comment letter of January 9, 2003 from U.S. Small Business Administration Office of Advocacy to W.H. DuRoss, III, CPSC General Counsel.
3. Draft Final Policies and Procedures for Ensuring Proper Consideration of Small Entities in CPSC Rulemaking, January __, 2003

Presidential Documents

Title 3—

Executive Order 13272 of August 13, 2002

The President

Proper Consideration of Small Entities in Agency Rulemaking

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. General Requirements. Each agency shall establish procedures and policies to promote compliance with the Regulatory Flexibility Act, as amended (5 U.S.C. 601 *et seq.*) (the "Act"). Agencies shall thoroughly review draft rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the Act. The Chief Counsel for Advocacy of the Small Business Administration (Advocacy) shall remain available to advise agencies in performing that review consistent with the provisions of the Act.

Sec. 2. Responsibilities of Advocacy. Consistent with the requirements of the Act, other applicable law, and Executive Order 12866 of September 30, 1993, as amended, Advocacy:

(a) shall notify agency heads from time to time of the requirements of the Act, including by issuing notifications with respect to the basic requirements of the Act within 90 days of the date of this order;

(b) shall provide training to agencies on compliance with the Act; and

(c) may provide comment on draft rules to the agency that has proposed or intends to propose the rules and to the Office of Information and Regulatory Affairs of the Office of Management and Budget (OIRA).

Sec. 3. Responsibilities of Federal Agencies. Consistent with the requirements of the Act and applicable law, agencies shall:

(a) Within 180 days of the date of this order, issue written procedures and policies, consistent with the Act, to ensure that the potential impacts of agencies' draft rules on small businesses, small governmental jurisdictions, and small organizations are properly considered during the rulemaking process. Agency heads shall submit, no later than 90 days from the date of this order, their written procedures and policies to Advocacy for comment. Prior to issuing final procedures and policies, agencies shall consider any such comments received within 60 days from the date of the submission of the agencies' procedures and policies to Advocacy. Except to the extent otherwise specifically provided by statute or Executive Order, agencies shall make the final procedures and policies available to the public through the Internet or other easily accessible means;

(b) Notify Advocacy of any draft rules that may have a significant economic impact on a substantial number of small entities under the Act. Such notifications shall be made (i) when the agency submits a draft rule to OIRA under Executive Order 12866 if that order requires such submission, or (ii) if no submission to OIRA is so required, at a reasonable time prior to publication of the rule by the agency; and

(c) Give every appropriate consideration to any comments provided by Advocacy regarding a draft rule. Consistent with applicable law and appropriate protection of executive deliberations and legal privileges, an agency shall include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule that preceded the

final rule; provided, however, that such inclusion is not required if the head of the agency certifies that the public interest is not served thereby. Agencies and Advocacy may, to the extent permitted by law, engage in an exchange of data and research, as appropriate, to foster the purposes of the Act.

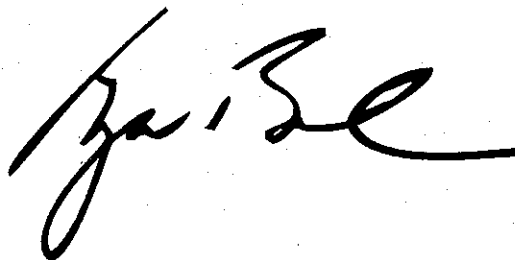
Sec. 4. Definitions. Terms defined in section 601 of title 5, United States Code, including the term "agency," shall have the same meaning in this order.

Sec. 5. Preservation of Authority. Nothing in this order shall be construed to impair or affect the authority of the Administrator of the Small Business Administration to supervise the Small Business Administration as provided in the first sentence of section 2(b)(1) of Public Law 85-09536 (15 U.S.C. 633(b)(1)).

Sec. 6. Reporting. For the purpose of promoting compliance with this order, Advocacy shall submit a report not less than annually to the Director of the Office of Management and Budget on the extent of compliance with this order by agencies.

Sec. 7. Confidentiality. Consistent with existing law, Advocacy may publicly disclose information that it receives from the agencies in the course of carrying out this order only to the extent that such information already has been lawfully and publicly disclosed by OIRA or the relevant rulemaking agency.

Sec. 8. Judicial Review. This order is intended only to improve the internal management of the Federal Government. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.



THE WHITE HOUSE,
August 13, 2002.



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

OFFICE OF THE CHIEF COUNSEL FOR ADVOCACY

Interagency Communication
Privileged FOIA(b)(5) Exempt

January 9, 2003

Via Facsimile and First-Class Mail

William H. DeRoss, III
General Counsel
U.S. Consumer Product Safety
Commission
4330 East-West Highway
Suite 700
Bethesda, MD 20814-4408

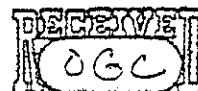
Re: Consumer Product Safety Commission's (CPSC) *Draft Policies and Procedures for Compliance with the Regulatory Flexibility Act*

Dear Mr. DeRoss:

On August 13, 2002, President Bush signed Executive Order 13272 requiring federal agencies to implement policies protecting small entities when writing new rules and regulations. The purpose of the Executive Order is to ensure that regulatory agencies and the Office of Advocacy work closely together as early as possible in the regulation writing process to address disproportionate impacts on small entities and reduce their regulatory burden.

Section 3 (a) of the Executive Order required agencies to issue written procedures and policies to Advocacy by November 13, 2002, consistent with the Regulatory Flexibility Act (RFA), to ensure that the potential impacts of draft rules on small businesses, small governmental jurisdictions, and small organizations are properly considered during the rulemaking process. According to the Executive Order, Advocacy has sixty (60) days to comment on agency submissions. This letter is Advocacy's response to the CPSC's October 28th submission under Executive Order 13272. Following consideration of Advocacy's comments, agencies are required to make their final procedures and policies available to the public through the Internet, or other easily accessible means, by February 13, 2003.

We would like to commend the CPSC for its submission to the Executive Order (E.O.) and its commitment to considering the impacts of its regulations on small businesses, small governmental jurisdictions, and small organizations. In response to



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E.O. 13272, the CPSC submitted a draft document entitled, *Procedures and Policies to Account for Small Business in the Rulemaking Process*. Below are Advocacy's recommendations in an effort to bring the CPSC into better compliance with the requirements of E.O. 13272 and the RFA.

Advocacy encourages the CPSC to provide the public with a more detailed and comprehensive description of the procedures the CPSC follows in compliance with the RFA during the rule development process.

In paragraph one of the draft document, the CPSC notes that the Directorate for Economic Analysis will prepare a preliminary economic assessment for the consideration of the Commission using Section 603 of the RFA as a guide in making its determination as to whether the Notice of Proposed Rulemaking (NPRM) will likely have a significant impact on a substantial number of small entities. This paragraph should be expanded to include the fact that the preliminary economic assessment will assess such considerations as the number and size of the entities to be regulated and an estimate of economic impact by size category. Paragraph two of the draft indicates that if the CPSC determines that the NPRM may have a significant impact on a substantial number of small entities, then it will prepare an initial regulatory flexibility analysis (IRFA) in accordance with 5 U.S.C. § 603. Advocacy recommends that the CPSC expand paragraph two by adding a description of the procedures and considerations the CPSC will use in drafting the IRFA. For example, the reasons for, and objectives of, the rule, an estimate of the number of small entities to which the rule will apply, the compliance requirements and significant alternatives considered.

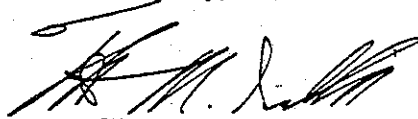
The aforementioned suggestions can also be applied to paragraphs four and five which discuss CPSC's development of a final rule. Further, Advocacy is unsure why there a distinction in paragraph two as to when "special efforts" will be made by the CPSC to ensure that adequate opportunity is provided for small entities to comment on the NPRM only when it is determined that it will (as opposed to may) have a significant impact on a substantial number of small entities. Advocacy suggests that the CPSC should use the public dissemination mechanisms outlined in the draft as outreach to small entities for comment under § 609 of the RFA. In doing so, CPSC will greatly increase the amount of information it obtains for the preparation of a final regulatory impact analysis when the rule is published as final in the *Federal Register*.

Advocacy is available to work with the CPSC to answer any questions it may have in the development of its final policies and procedures for complying with the RFA. Advocacy's recently revised RFA guide, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies*, would be most helpful to the CPSC in the development of its final procedures under E.O. 13272. Although this guide is currently in draft form, it should be useful to the CPSC and can be referenced in footnote two of the draft policies and procedures as a resource for its staff. This guide can be found on Advocacy's website, <http://www.sba.gov/advo/laws/rfaguide.pdf>. Specifically, we encourage the CPSC to review Chapters 1-3 of the guide, which focus on certifying a rule under the RFA, and when and how to prepare both an initial regulatory flexibility

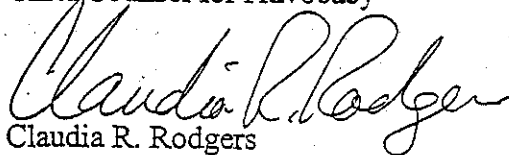
analysis and a final regulatory flexibility analysis. By providing details of the CPSC's RFA analysis process in its final RFA policy document, the CPSC will ensure that it provides the public with the transparency needed to demonstrate compliance with the RFA and E.O. 13272.

Advocacy would be happy to review another draft prior to the February 13, 2003 deadline for the CPSC to have its policies and procedures publicly available. If you have any questions regarding these comments, please feel free to contact Linwood L. Rayford, III at (202) 401-6880.

Sincerely,



Thomas M. Sullivan
Chief Counsel for Advocacy



Claudia R. Rodgers
Senior Counsel



Linwood L. Rayford, III
Assistant Chief Counsel for
Food, Drug and Health Policy

Cc: Mr. Lowell Martin
U.S. Consumer Product Safety Commission
Office of the General Counsel

DRAFT (01/30/03)

U.S. Consumer Product Safety Commission Procedures and Policies to Account for Small Business in the Rulemaking Process¹

The U.S. Consumer Product Safety Commission (CPSC) fully considers the potential impact of its draft rules on small entities. The CPSC thoroughly reviews its draft rules to assess and take appropriate account of their potential impact on small businesses, small governmental jurisdictions, and small organizations. The CPSC ensures maximum notice to and participation by small entities in its rulemaking process.

Specifically:

1. Whenever a Notice of Proposed Rulemaking (NPRM) is being considered, the CPSC Directorate for Economic Analysis (EC) prepares a preliminary economic assessment of the draft rule. The preliminary economic assessment provides a preliminary regulatory flexibility assessment that includes a description of the small entities that might be affected by the proposed rule, an estimate of the economic impact of the proposed rule by size of entity category, and the staff's assessment of whether the rule is likely to have a significant economic impact on a substantial number of small entities.² This assessment is provided to the Commission as part of a staff briefing package that contains the information developed by the CPSC staff that is pertinent to

¹ These procedures and policies are a response to Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," August 13, 2002.

² The provisions of Section 603 of the Regulatory Flexibility Act (RFA) of 1980 as amended, 5 U.S.C. § 603, will be used as a guide in making this determination. In addition, the November 2002 draft document prepared by The Office of Advocacy of the U.S. Small Business Administration that is titled *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies* will be used as a resource when preparing economic assessments and regulatory analyses of proposed rules.

the proposed rule. The Commission uses this information in its consideration of what action to take with respect to the merits of the proposal.

2. If the preliminary regulatory flexibility assessment concludes that the draft rule may have a significant economic impact on a substantial number of small entities, and the Commission elects to issue an NPRM, then the preamble to the NPRM will include a discussion of that impact. In this case, the CPSC will prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) in accordance with 5 U.S.C. § 603. The IRFA will describe the reasons the agency is considering the proposed rule; the objectives and legal basis for the proposed rule; the number of small entities to which the proposed rule will apply; the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; the comparative effectiveness and costs of alternative regulatory options; and relevant federal rules that may duplicate, overlap, or conflict with the proposed rule. The CPSC will make a special effort to ensure that adequate opportunity is provided for small entities to comment on the NPRM. As required by 5 U.S.C. § 609 (a) in this instance, opportunity for comment by small entities, and others, will be provided by one or more of the following, as appropriate, in addition to publication of the NPRM in the *Federal Register*: placing the NPRM on the Commission's world wide web site, directly notifying small entities of the NPRM, publishing the NPRM in publications likely to be obtained by small entities, or by conducting public meetings about the proposed rule. If the preliminary economic assessment concludes that the proposal will not have a significant economic impact on a substantial number of small entities, then the preamble to the NPRM will include a discussion of the basis for that

conclusion and a certification by the Commission that the rule, if published in final form as proposed, will not have a significant economic impact on a substantial number of small entities.

3. When the NPRM is published in the *Federal Register*, the Commission will submit a copy of the NPRM and the initial regulatory flexibility analysis or statement of basis and certification of no significant impact, as applicable, to the U.S. Small Business Administration's (SBA's) Office of Advocacy for comment. The NPRM will invite comments to be submitted from all parties, including small entities.
4. If the Commission votes to continue rulemaking and directs the staff to develop a final rule, then the CPSC EC staff will prepare a final regulatory flexibility analysis or final statement of basis for a Commission certification of no significant impact, as appropriate, taking into account comments received from all parties, including small entities and SBA's Office of Advocacy. If a draft final regulatory flexibility analysis (FRFA) is prepared, it will be done in accordance with section 604(a) of the Regulatory Flexibility Act and will include a succinct statement of the need for, and the objectives of, the final rule; a summary of significant issues raised by the public comments in response to the IRFA, an assessment by CPSC staff of those issues, and a statement of any changes made to the proposed rule as a result of such comments; a description and an estimate, if available, of the number of small entities to which the final rule will apply or an explanation of why no such estimate is available; a description of the projected recordkeeping, reporting, and other compliance requirements of the rule; and a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated

- objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the final rule considered by the agency was rejected.
5. If the Commission elects to publish a final rule, the comments received from SBA's Office of Advocacy will be discussed in the preamble to the final rule, unless the CPSC Chairman certifies that it is not in the public interest to do so. The preamble to the final rule will incorporate a discussion of the final regulatory flexibility analysis as approved by the Commission or a final statement of basis for the Commission certification of no significant impact, as appropriate. If a final regulatory flexibility analysis has been prepared, then copies of it will be made available to the public via the CPSC Office of the Secretary and the Commission's world wide web site.