

Freedom Through Justice Foundation

2111 Wilson Blvd #700

Arlington, VA 22201

703.875.8625

September 9, 2011

VIA FIRST CLASS MAIL & EMAIL

Thomas G. Hicks, Sr., Esq.
Division of Legislation and Legal Counsel
Office of the Solicitor
Department of Labor
Room N-2428
200 Constitution Avenue, NW
Washington, DC 20210
foiarequest@dol.gov

Re: Freedom of Information Act Request

Dear Mr. Hicks:

We write on behalf of the Freedom Through Justice Foundation, a 501(c)(3) nonprofit corporation that uses public policy and legal reform strategies to ensure greater transparency in government, protect taxpayer interests and promote social and economic freedoms. We are concerned about that many governmental agencies may not be in compliance with the Regulatory Flexibility Act and seek information concerning your agency's compliance with the RFA.

As you know, the RFA was enacted to "establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation."¹ Further, Congress declared that in order to "achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration."²

Unfortunately, many governmental agencies failed and continue to fail to abide by the Act's standards and procedures and continue to promulgate regulations without adequately considering the impact on small businesses.³ Just this year the Court of Appeals for the District of Columbia Circuit invalidated a rule promulgated by the Securities and Exchange Commission, holding that the Commission:

[A]cted arbitrarily and capriciously for having failed once again — as it did most recently in *American Equity Investment Life Insurance Company v. SEC*, 613 F.3d

¹ Regulatory Flexibility Act of 1980, Pub. L. no. 96-354, 94 Stat 1164 (1980).

² *Id.*

³ See e.g. *Northwest Mining Association v. Babbitt*, 5 F.Supp. 2d 9 (D.D.C. 1998); *North Carolina Fisheries Association, Inc. v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1998); *Southern Offshore Fishing Association v. Daley*, 55 F. Supp. 2d 1336 (M.D. Fla. 1999).

166, 167–68 (D.C. Cir. 2010), and before that in *Chamber of Commerce*, 412 F.3d at 136 — adequately to assess the economic effects of a new rule.

Business Roundtable v. SEC, ___ F.3d ___, p.7 (D.C. Cir., 2011). The D.C. Circuit, in evaluating the rule SEC provisions similar to the RFA, found,

[T]he Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.

Id.

The Freedom Through Justice Foundation seeks information regarding your Department's policies and procedures on implementing the provisions of the RFA, as well as specific measures your Department has taken to comply with the analysis required under the Act.

Thus, pursuant to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, the Freedom Through Justice Foundation hereby requests that the Department of Labor produce the following within twenty (20) business days:

1. Any and all documents or materials whatsoever maintained by the Department of Labor which set forth policies, procedures and guidance on the preparation and publication of initial and final regulatory flexibility analyses as required by the Regulatory Flexibility Act, as amended (5 U.S.C. §§ 603 and 605).

2. Any and all calendar entries for the period of January 1, 2010 through the present of Department representatives, employees, or staff regarding meetings held wherein the impact of proposed regulations on small entities, as defined by the 5 U.S.C. § 601 (hereinafter "small entities"), was discussed.

3. Any and all correspondence, including electronic mail, U.S. mail, and facsimiles, between Department representatives, employees, or staff and representatives, employees, or staff from other governmental entities regarding the impact of proposed regulations on small entities for the period of January 1, 2010 through the present.

4. Any and all voice messaging records including but not limited to caller message recordings, digital voice recordings, interactive voice response unit (IVR/VRV) recordings, unified messaging files, and computer-based voice mail files to or from Department representatives, employees, or staff which reference or discuss the impact of proposed regulations on small entities for the period of January 1, 2010 through the present.

5. Any and all documents or materials which set forth the entities or persons, whether governmental or non-governmental, who were contacted by Department representatives, employees, or staff regarding the impact of proposed regulations on small entities during the period of January 1, 2010 through present.

We call your attention to President Obama's January 21, 2009 Memorandum concerning the Freedom of Information Act, in which he states:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA. . . .The presumption of disclosure should be applied to all decisions involving FOIA.

If any responsive record or portion thereof is claimed to be exempt from production under FOIA, please provide sufficient identifying information with respect to each allegedly exempt record or portion thereof to allow us to assess the propriety of the claimed exemption. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). In addition, any reasonably segregable portion of a responsive record must be provided, after redaction of any allegedly exempt material. 5 U.S.C. § 552(b).

Freedom Through Justice Foundation is entitled to a complete waiver of both search fees and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

In an effort to facilitate record production within the statutory time limit, the Freedom Through Justice Foundation prefers to accept documents in electronic format (e.g. e-mail, .pdfs). When necessary, the Freedom Through Justice Foundation will accept the "rolling production" of documents.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact us immediately at (703) 875-8625 or by email at Keith.Gates@ftjfoundation.org. We look forward to receiving the requested documents and a waiver of both search and duplication costs within twenty (20) business days. Thank you for your cooperation.

Very truly yours,



J. KEITH GATES
SENIOR ATTORNEY

Encl.