

REGULATORY FLEXIBILITY ANALYSIS

The Regulatory Flexibility Act (RFA), as amended at 5 U.S.C. 601 et seq., requires that agencies consider the impact of their rulemakings on small entities and, consistent with applicable statutes, consider alternatives to minimize these impacts on the businesses, organizations, and government jurisdictions to which they apply.

The U.S. Nuclear Regulatory Commission (NRC) has established standards for determining which NRC licensees qualify as small entities (§ 2.810 of Title 10 of the *Code of Federal Regulations* (10 CFR)). These standards were based on the Small Business Administration's most common receipts-based size standards and provides for business concerns that are manufacturing entities. The NRC uses the size standards to reduce the impact of annual fees on small entities by establishing a licensee's eligibility to qualify for a maximum small entity fee. The small entity fee categories in §171.16(c) of this proposed rule are based on the NRC's size standards.

The NRC is required each year, under the Omnibus Budget Reconciliation Act of 1990 (OBRA-90), as amended, to recover approximately 90 percent of its budget authority (less amounts appropriated from the Nuclear Waste Fund and for other activities specifically removed from the fee base), through fees to NRC licensees and applicants. The OBRA-90 requires that the schedule of charges established by rulemaking should fairly and equitably allocate the total amount to be recovered from the NRC's licensees based on the principle that licensees who require the greatest expenditure of agency resources pay the greatest annual charges. Since fiscal year (FY) 1991, the NRC has complied with OBRA-90 by issuing a final rule that amends its fee regulations. These final rules have established the methodology used by the NRC in identifying and determining the fees to be assessed and collected in any given FY.

The Commission is proposing to rebaseline its 10 CFR Part 171 annual fees in FY 2018. Compared with the FY 2017 annual fees, the FY 2018 rebaselined fees would increase for operating reactors, spent fuel storage and reactor decommissioning, fuel facilities, and some

materials users, and would decrease for test and research reactors, U.S. Department Energy transportation activities, and for uranium recovery licensees.

The Small Business Regulatory Enforcement Fairness Act (SBREFA) provides Congress with the opportunity to review agency rules before they go into effect. Under this legislation, the NRC annual fee rule is considered a "major" rule and must be reviewed by Congress and the Comptroller General before the rule becomes effective.

The SBREFA also requires that an agency prepare a written compliance guide to assist small entities in complying with each rule for which a RFA is prepared. As required by law, this guide was prepared for the FY 2017 fee rule and was relabeled for the FY 2018 proposed rule. The small entity compliance guide is publicly available in the NRC's Agencywide Documents Access and Management System (Accession No. ML17319A291). For the FY 2018 fee rule, the small entity fees remain unchanged at \$4,100 for the upper-tier fee and \$850 for the lower-tier fee. The next regulatory flexibility analysis will be performed during the next small entity biennial review scheduled for FY 2019.

I. Impact on Small Entities.

The fee rule results in substantial fees charged to those individuals, organizations, and companies licensed by the NRC, including those licensed under the NRC materials program. Comments received on previous proposed fee rules and the small entity certifications in response to previous final fee rules indicate that licensees qualifying as small entities under the NRC's size standards are primarily materials licensees. Therefore, this analysis will focus on the economic impact of fees on materials licensees. In FY 2017, about 27 percent of all licenses under the materials program (approximately 692 licenses) were held by licensees qualifying as small entities.

As no comments were received on this topic for the 2017 rulemaking, the NRC considered comments on previous fee rulemakings. Commenters have consistently indicated that the following would occur if the proposed annual fees were not modified:

1. Large firms would gain an unfair competitive advantage over small entities.

Commenters noted that small and very small companies ("Mom and Pop" operations) would find it more difficult to absorb the annual fee than a large corporation or a high-volume type of operation. In competitive markets, such as soil testing, annual fees would put small licensees at an extreme competitive disadvantage with their much larger competitors because the proposed fees would be identical for both small and large firms.

2. Some firms would be forced to cancel their licenses. A licensee with receipts of less than \$500,000 per year stated that the proposed rule would, in effect, force it to relinquish its soil density gauge and license, thereby reducing its ability to do its work effectively. Other licensees, especially well-loggers, noted that the increased fees would force small businesses to abandon the materials license altogether. Commenters estimated that the proposed rule would cause roughly 10 percent of the well-logging licensees to terminate their licenses immediately and approximately 25 percent to terminate before the next annual assessment.

3. Some companies would go out of business.

4. Some companies would have budget problems. Many medical licensees noted that, along with reduced reimbursements, the proposed increase of the existing fees and the introduction of additional fees would significantly affect their budgets. Others noted that, in view of the cuts by Medicare and other third party carriers, the fees would produce a hardship difficult for some facilities to meet.

Over 4,753 requests to terminate licenses, approvals, or registration terminations have been received since the NRC first established annual fees for materials licenses. Although some terminations were requested because the license was no longer needed or could be combined with registrations, indications are that the economic impact of the fees caused other terminations.

To alleviate the significant impact of the annual fees on a substantial number of small entities, the NRC considered the following alternatives in accordance with the RFA in developing each of its fee rules since FY 1991.

1. Base fees on some measure of the amount of radioactivity possessed by the licensee (e.g., number of sources).
2. Base fees on frequency of use of licensed radioactive material (e.g., volume of patients).
3. Base fees on the NRC size standards for small entities.

The NRC has reexamined its previous evaluations of these alternatives and continues to believe that a maximum fee for small entities is the most appropriate and effective option for reducing the impact of fees on small entities.

II. Maximum Fee.

The SBREFA and its implementing guidance do not provide specific guidelines on what constitutes a significant economic impact on a small entity. Historically, in developing the maximum small entity annual fee, the NRC has examined 10 CFR Part 170 licensing and inspection fees and Agreement State fees for fee categories which were expected to have a substantial number of small entities. In 1991, six Agreement States (Washington, Texas, Illinois, Nebraska, New York, and Utah) were used as benchmarks in the establishment of the maximum small entity annual fee.

Since that time, the NRC conducted an in-depth biennial review of the FY 2009 small entity fees. The review noted significant changes between FY 2000 and FY 2008 in both the external and internal environment which impacted fees for NRC's materials users' licensees. Based on that review, the NRC changed the methodology for reviewing small entity fees. The NRC determined that the maximum small entity fee should be adjusted each biennial year using a fixed percentage of 39 percent applied to the prior 2-year weighted average of materials users fees for all fee categories which have small entity licensees. The 39 percent was based on the small entity annual fee for 2005, which was the first year the NRC was required to recover only 90 of its budget authority. This methodology remains in place, however, the NRC does also consider whether or not implementing an increase will have a disproportionate impact on the

NRC's small licensees when compared to other licensees.

In FY 2017, the NRC staff performed a biennial review using the fee methodology developed in FY 2009 that applies a fixed percentage of 39-percent to the prior 2-year weighted average of materials users' fees. As a result, the upper tier small entity fee increased from \$3,400 to \$4,500 and the lower-tier fee increased from \$700 to \$900. This constituted a 32-percent and 29-percent increase, respectively. However, implementing this increase would have resulted in a disproportionate impact upon the NRC's small licensees compared to other licensees. Therefore, for FY 2017 the increase for the upper tier fees was limited to \$4,100, a 21-percent increase. The lower tier fee increased to \$850, also a 21-percent increase.

In FY 2018, the fees are unchanged from FY 2017 values. The NRC staff will perform a biennial review in FY 2019.

III. Summary.

The NRC has determined that the 10 CFR Part 171 annual fees significantly impact a substantial number of small entities. A maximum fee for small entities strikes a balance between the requirement to recover 90 percent of the NRC budget and the requirement to consider means of reducing the impact of the fee on small entities. Based on its RFA, the NRC concludes that a maximum annual fee of \$4,100 for small entities and a lower-tier small entity annual fee of \$850 for small businesses and not-for-profit organizations with gross annual receipts of less than \$485,000, small governmental jurisdictions with a population of fewer than 20,000, small manufacturing entities that have fewer than 35 employees, and educational institutions that are not State or publicly supported and have fewer than 35 employees, reduces the impact on small entities. At the same time, these reduced annual fees are consistent with the objectives of OBRA-90. Thus, the fees for small entities maintain a balance between the objectives of OBRA-90 and the RFA.