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General Government Division

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April 22, 1997

The Honorable Christopher S. Bond
Chairman, Committee on Small Business
United States Senate

Subject: Regulatory Flexibility Act: Agencies' Use of the November 1996
Unified Agenda Did Not Satisfy Notification Requirements

Dear Mr. Chairman:

This letter responds to your request that we determine whether federal agencies' entries in the Unified Agenda of Federal Regulatory and Deregulatory Actions satisfy the notification requirements of subsection 610(c) of the Regulatory Flexibility Act of 1980, 5 U.S.C. 610(c). The Unified Agenda is published twice each year by the Regulatory Information Service Center (RISC) and provides for uniform reporting of data on regulatory activities under development throughout the federal government. Subsection 610(c) of title 5 requires federal agencies to publish and solicit public comments on a list of rules that affect small entities and that they plan to review and possibly eliminate or change in the next year.

To conduct this review, we analyzed and researched the Regulatory Flexibility Act and its legislative history, reviewed the most recent edition of the Unified Agenda, and discussed the Agenda's preparation with the Executive Director of RISC. At the conclusion of our review, we discussed our findings with officials from the Small Business Administration (SBA) and the Environmental Protection Agency (EPA) and obtained agency comments from officials at RISC and the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA). We conducted our review from March 1997 through April 1997 in accordance with generally accepted government auditing standards.

RESULTS IN BRIEF

Although there is no legal barrier to an agency using the Unified Agenda of Federal Regulatory and Deregulatory Actions to satisfy the public notification requirements of subsection 610(c), we do not believe that agencies' entries in

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the most recent edition of the Agenda met those notification requirements. Of the thousands of entries in the Unified Agenda submitted by 58 federal departments, agencies, and commissions, 3 agencies identified a total of 21 entries as section 610 reviews. None of those 21 entries satisfied all of the requirements of subsection 610(c). Furthermore, the size of the Unified Agenda and the lack of any index or special section in the document make the entries identified as section 610 reviews difficult for the public to find and comment on.

BACKGROUND

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires federal agencies to examine the impact of proposed and existing rules on small businesses, small organizations, and small governments, and to solicit the ideas and comments of such entities for these purposes. Section 602(a) of title 5 requires each agency to publish a "regulatory flexibility agenda" in the Federal Register every April and October. The agenda must contain the following:

"(1) a brief description of the subject area of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities;

(2) a summary of the nature of any such rule under consideration for each subject area listed in the agenda pursuant to paragraph (1), the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking; and

(3) the name and telephone number of an agency official knowledgeable concerning the items listed in paragraph (1)."

The Unified Agenda of Federal Regulatory and Deregulatory Actions is used to satisfy this and other requirements.¹ The Unified Agenda is compiled by RISC for OIRA, and has been published twice each year since 1983. Section 4(b) of Executive Order 12866 requires that each agency's agenda contain certain elements and that it be prepared in a manner specified by the Administrator of OIRA.

In the Unified Agenda, each agency presents its entries under one of the following five headings according to the rulemaking stage of the entry: (1) prerule stage, (2) proposed rule stage, (3) final rule stage, (4) long-term actions, and (5) completed actions. The most recent edition of the Unified Agenda, which was published in the

¹The Unified Agenda is also used to satisfy the requirement in the Office of Federal Procurement Policy Act Amendments of 1988 (41 U.S.C. 421[g]) that the Office of Federal Procurement Policy publish a Procurement Regulatory Activity Report. Section 4(b) of Executive Order 12866 requires agencies to "prepare an agenda of all regulations under development or review."

Federal Register on November 29, 1996, included agendas from 58 federal departments, agencies, and commissions.² That edition of the Agenda contained more than 4,600 entries printed on more than 1,300 pages of the Federal Register.

Subsection 610(a) of title 5 requires each federal agency to publish a plan for the periodic review of its rules that have or will have a significant economic impact on a substantial number of small entities. The purpose of the review is "to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities." Subsection 610(b) specifies the factors to be considered by agencies in conducting reviews of existing rules. Subsection 610(c) requires agencies to provide an annual Federal Register notice of rules designated for section 610 reviews. Specifically, the subsection says:

"Each year, each agency shall publish in the Federal Register a list of the rules which have a significant economic impact on a substantial number of small entities, which are to be reviewed pursuant to this section during the succeeding twelve months. The list shall include a brief description of each rule and the need for and legal basis of such rule and shall invite public comment upon the rule."

AGENCIES' USE OF THE NOVEMBER 1996 UNIFIED AGENDA DID NOT SATISFY SUBSECTION 610(c) REQUIREMENTS

The requirements of subsection 610(c) of title 5 are straightforward. Each agency must publish in the Federal Register each year a list of its existing rules having a significant economic impact on a substantial number of small entities that the agency plans to review within the next 12 months in accordance with the agency's plan under subsection 610(a). The published list should describe the rules that the agencies plan to review and invite public comment. Basically, subsection 610(c) is a notice provision that is designed to facilitate public input into the mandated agency reviews of existing rules. The subsection's requirements can be satisfied through any published notice in the Federal Register, including but not limited to the Unified Agenda.

The Unified Agenda primarily lists regulatory and deregulatory actions that agencies have decided to take, such as the issuance of proposed and final rules, or actions the agencies have completed. However, Unified Agenda entries that only describe regulatory actions that have already been decided or completed cannot satisfy the

²The Unified Agenda published on November 29, 1996, contained a total of 59 agendas, one of which was from 3 agencies with joint authority. Also, although Section 602(a) of title 5 provides that agencies' agendas be published every April and October, the Executive Director of RISC said that the last several editions of the Unified Agenda were published in May and November because of numerous logistical considerations.

subsection 610(c) requirement that agencies list existing rules that they will review within the next 12 months to determine whether action is necessary.

On August 23, 1996, the Executive Director of RISC sent a memorandum to agency contacts for the Unified Agenda noting that several agencies had expressed interest in using the Agenda to indicate compliance with section 610. The memorandum asked any agency wishing to do so to include the notation "Section 610 Review" following the title of any such entry. The introduction to the Unified Agenda that was published on November 29, 1996, stated that agencies could use the Unified Agenda to indicate those rules they were reviewing as part of their periodic review of existing rules under section 610. The introduction also stated that any such entry would have the notation "Section 610 Review" after the title. According to the Executive Director of RISC, this notation had not been included in previous editions of the Unified Agenda.

Our review of the November 29, 1996, edition of the Unified Agenda indicated that relatively few agencies identified rules with the "Section 610 Review" notation and, of those that did, none of the entries satisfied all of the notification requirements of subsection 610(c). We also believe that some other agencies misunderstood the requirements of subsection 610(c). Finally, we believe that the size and construction of the Unified Agenda made it difficult for the public to easily determine which rules were the subject of section 610 reviews.

None of the Section 610 Entries Satisfied Notification Requirements

As a result of our examination of the November 29, 1996, edition of the Unified Agenda and discussions with the RISC Executive Director, we were able to identify 21 entries from 3 agencies (the Department of Labor, the Department of Transportation, and SBA) with the "Section 610 Review" notation following the title. However, 14 of these 21 entries announced regulatory actions the agencies were taking or planned to take and did not identify existing rules that the agencies were reviewing to assess their impact on small entities. Thirteen of these 14 entries were regulatory actions at the final or proposed rule stages. For example, SBA's three "Section 610 Review" entries were proposed rules to

- "revise the definition of affiliation to permit small business investment companies and institutional investors to more easily coinvest in small businesses without being presumed to impermissibly control the investee;"
- "modify present regulations to permit depository as well as nondepository lenders to borrow against and securitize the unguaranteed portions of SBA guaranteed loans;"
- completely revise and streamline "the regulations pertinent to the provision of contractual and managerial assistance to small businesses owned and operated by socially and economically disadvantaged individuals."

SBA's Deputy General Counsel told us that these entries meet both the letter and the spirit of section 610. He said SBA had previously reviewed its regulations and, by designating the agency's regulatory changes as a "Section 610 Review," SBA was informing the public that it was changing its current regulations. However, subsection 610(c) requires agencies to publish a list of rules "that are to be reviewed," not changes that the agencies were making pursuant to a review. SBA's section 610 notices identified those rules that it had already decided to change, and did not provide the public with a meaningful opportunity to comment on whether those rules should be continued, eliminated, or revised. Therefore, we believe SBA's entries, as well as the other agencies' entries that announced regulatory actions that they were taking or planned to take, did not comply with section 610.

Of the remaining seven Unified Agenda entries, the agencies characterized four as not having a significant impact on a substantial number of small entities or of having an "undetermined" impact, and that therefore these entries should not have been considered for review under section 610.³ The remaining three entries did not describe the rule or rules to be reviewed or did not invite the public to comment on the rules. Therefore, none of the 21 entries satisfied all of the notification requirements of subsection 610(c).

Other Agencies Appeared to Misunderstand Notification Requirements

Other agencies appeared to misunderstand the purpose of the subsection 610(c) requirements. For example, the "supplementary information" section to EPA's portion of the November 29, 1996, Unified Agenda stated the following:

"Section 610 of the RFA [Regulatory Flexibility Act] requires that agencies review within 10 years of promulgation those regulations that have or will have a significant economic impact on a substantial number of small entities. A number of actions in this edition of the agenda are the result of EPA's line-by-line review of existing regulations, and several propose to analyze and, where appropriate, amend or withdraw regulatory requirements that we believe may impose undue burdens on small entities. We also invite you to identify any existing rules for future review that you believe to have a significant economic impact on a substantial number of small entities. Please provide your comments in the following format:

- Title
- Authorizing statute and Code of Federal Regulations citation

³Overall, only 9 of the 21 entries indicated that the rules at issue would have a significant impact on a substantial number of small entities—the threshold for inclusion in the list required by subsection 610(c).

- Description of economic effects on small entities, especially on the commenting person or organization
- Recommendations for changes

When we complete our review of an existing rule, we will indicate in the agenda whether that rulemaking will be continued without change or will be amended or rescinded consistent with the stated objectives of applicable statutes to minimize any significant economic impact on a substantial number of small entities."

EPA's practice as described here does not meet the requirements of subsection 610(c). EPA did not list any specific rules selected for section 610 review in accordance with its plan, and it did not invite public comment with respect to the review of any rule. On the contrary, EPA simply stated that the results would be announced upon completion of the review. The public was invited only to propose rules for future review. Although soliciting public proposals may be desirable, clearly EPA—not the public—has the burden of selecting and scheduling rules for review as part of its section 610(a) plan.

The Director of EPA's Office of Regulatory Management and Information told us that, although he concurred with our characterization of his agency's approach to section 610 reviews in the November 1996 Unified Agenda, EPA has subsequently recognized the need to more fully comply with that section. Therefore, he said that EPA's April 1997 agenda would list rules that are subject to review under section 610 and solicit public comment on them.

Section 610 Entries Were Difficult for the Public to Locate

Finally, the November 29, 1996, edition of the Unified Agenda was not constructed to permit the public to easily determine which rules were the subject of section 610 reviews. There was no index or special section that specifically identified the section 610 review entries. Although the Unified Agenda had an index of entries that might affect small entities, 12 of the 21 "Section 610 Review" entries were not in the index because the agencies indicated either that the proposed action would not have a significant impact on a substantial number of small entities or that its potential impact was undetermined.

As a result, the only way for the public to identify all of the section 610 entries was by searching the entire Unified Agenda—a massive document. The full text of the Unified Agenda could be searched on the World Wide Web, but only by individuals with access to the Internet. In addition, our Web search of the Unified Agenda identified

only 18 of the 21 "Section 610 Review" entries.⁴ In the absence of a discrete index or some other means of readily identifying section 610 rules, the Unified Agenda cannot be regarded as providing meaningful and reasonable public notice as contemplated by subsection 610(c).

RECOMMENDATIONS

In fulfilling her responsibilities under Executive Order 12866 to specify how agencies should prepare their agendas, we recommend that the OIRA Administrator instruct agencies that choose to use the Unified Agenda to satisfy the requirements of subsection 610(c) of title 5 on how to do so. Specifically, the OIRA Administrator should remind agencies using the Unified Agenda for that purpose that, to be in compliance with subsection 610(c), Agenda entries must (1) identify existing rules with a significant economic impact on a substantial number of small entities that the agencies expect to review during the next 12 months, (2) describe the rules and note the need for and legal bases of the rules, and (3) invite public comment on the rules.

We also recommend that the Executive Director of RISC develop an index or a special section in the Unified Agenda that specifically identifies the rules that agencies plan to review under section 610 in order to provide the public with adequate notice and the opportunity to comment on those rules.

AGENCY COMMENTS

We obtained agency comments on a draft of this report from the OIRA Administrator and the RISC Executive Director. Both officials said they agreed in principle with the report's message and our recommendations. They said they believed that the Unified Agenda could be used constructively by agencies to provide the public with notice to satisfy their procedural obligations under subsection 610(c). Both also said they were willing to clarify how agencies, if they chose, could use the Unified Agenda to this end. For example, the RISC Executive Director said that the April 1997 edition of the Unified Agenda would place the words "Section 610 Review" in boldface type in both the agencies' tables of content for their entries and in the common indexes that appear at the end of the Agenda. He also said that RISC plans to have a specific index for the section 610 entries in the near future.

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As we arranged with your office, we plan no further distribution of this letter until 15 days from its date unless you publicly announce its contents earlier. We will then send copies to the Ranking Minority Member of your Committee, other interested congressional committees, the Administrator of OIRA, the Executive Director of RISC,

⁴The Executive Director of RISC said that three of the "Section 610 Review" entries were inadvertently not identified as such in the electronic file.

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the SBA Administrator, and the EPA Administrator. We will make copies available to others on request.

Major contributors to this letter were Henry Wray, Senior Associate General Counsel, and Curtis Copeland, Assistant Director. Please contact me at (202) 512-8676 if you or your staff have any questions.

Sincerely yours,

A handwritten signature in black ink that reads "L. Nye Stevens". The signature is written in a cursive style with a large, stylized initial "L" and "S".

L. Nye Stevens
Director
Federal Management and
Workforce Issues

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