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REGULATORY REFORM

Agencies' Section 610
Review Notices Often Did
Not Meet Statutory
Requirements

Statement of
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Regulatory Reform: Agencies' Section 610 Review Notices Often Did Not Meet Statutory Requirements

Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss our recent studies of federal agencies' attempts to use the Unified Agenda of Federal Regulatory and Deregulatory Actions to satisfy the notification requirements of the Regulatory Flexibility Act (RFA) of 1980. However, before I get into our specific findings, some background is necessary regarding the RFA's notice requirements and the Unified Agenda.

Background

Section 610 of the RFA requires each federal agency to develop 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 The purpose of the review is to determine whether each such rule should be continued without change, amended, or rescinded to minimize its impact on small entities. All rules in existence at the time this section of the RFA became effective generally had to be reviewed within 10 years, and any new rule must be reviewed within 10 years of the date it becomes final.

As part of that review process, section 610 requires federal agencies to publish annually in the Federal Register a list of their existing rules that have a significant effect on small entities and that they plan to review in the next year. Agencies must describe these rules, note why they are needed, and invite public comments on them. Therefore, section 610 of the RFA is essentially a notice requirement that is designed to make it easier for the public to comment on the impact of agencies' existing rules at a time when the greatest opportunity exists for possible changes to those rules.

Although the RFA does not require agencies to use the Unified Agenda to publish the required notices, the Agenda is a convenient and efficient mechanism by which agencies can do so. The Unified Agenda is published in the Federal Register twice each year and consolidates information for the public on all regulatory activities under development throughout the federal government. As a result, the agenda is extremely voluminous—typically covering more than 1,300 pages in the Federal Register. Agencies use the Agenda to satisfy several statutory and executive order notification requirements in addition to the RFA's.

Executive Order 12866 requires the Administrator of the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) to specify how federal agencies should prepare their

Unified Agenda entries. The Regulatory Information Service Center (RISC) within the General Services Administration compiles the Agenda for OIRA and issues instructions to the agencies on how the entries are to be prepared. However, RISC does not review agencies' Agenda entries to determine compliance with statutory or other requirements before they are printed.

Entries in November 1996 Unified Agenda Often Did Not Meet Section 610 Requirements

Because of concerns about whether agencies' use of the Unified Agenda satisfied the notification requirements in the RFA, the Chairman of the Senate Committee on Small Business asked us to review the November 1996 edition of the Agenda. In our April 1997 report resulting from that review we noted that, of the more than 4,600 entries in that edition of the Agenda, the agencies indicated that only 21 of them were section 610 reviews.¹ Those 21 entries were from 3 of the 59 agencies with actions listed in the Agenda—the Departments of Labor (DOL) and Transportation (DOT) and the Small Business Administration (SBA).

We examined all 21 of these entries and concluded that none of them met all of the requirements that section 610 of the RFA established. Some of the entries involved rules that the agencies said would not have a significant effect on small entities. Because section 610 reviews are supposed to be conducted only for rules that have a significant effect on small entities, these entries should not have been identified as section 610 reviews. Most commonly, however, the three agencies had identified new rules they intended to issue or changes they had already decided to make to existing rules, not reviews of existing rules to determine whether changes were needed.

To correct these deficiencies, we recommended that the OIRA Administrator instruct agencies that choose to use the Unified Agenda to satisfy the RFA notification requirements on what the statute requires. In response to our recommendation, the OIRA Administrator issued that guidance to federal departments and agencies in June 1997.

We also concluded in our April 1997 report that the size of the Unified Agenda and the lack of any index or special section in the document made the agencies' section 610 entries difficult for the public to find and comment on. We recommended that the Executive Director of RISC develop an Agenda index that specifically identifies the rules that agencies

¹Regulatory Flexibility Act: Agencies' Use of the November 1996 Unified Agenda Did Not Satisfy Notification Requirements (GAO/GGD/OGC-97-77R, Apr. 22, 1997).

plan to review under section 610 so that the public could comment on those rules. RISC agreed to do so, and the October 1997 edition of the Unified Agenda contained such an index that listed, by agency, the entries the agencies said were section 610 reviews.

Only Three Entries in the October 1997 Unified Agenda Satisfied Section 610 Requirements

Mr. Chairman, at your request we have updated our April 1997 report by examining the October 1997 edition of the Unified Agenda. We are issuing our report to you today on the results of our review.² In this latest edition of the Agenda, there were 34 entries from 7 agencies with a “Section 610 Review” notation following the title. More than half of these 34 entries were from DOT.

We reviewed these 34 entries and concluded that 31 of them did not satisfy all of the notification requirements in the RFA. The same problems that were evident during our earlier review were again prevalent. Fifteen of the 31 entries, according to their plain text, did not involve rules that would have a significant economic impact on a substantial number of small entities. Fifteen of the remaining 16 entries announced regulatory actions the agencies had already taken or planned to take, not a review to determine what actions to take. For example, one of the Environmental Protection Agency’s “section 610” entries announced the pending publication of final rules making more than 50 modifications, additions, and deletions to its existing polychlorinated biphenyls management program. This entry did not involve notifying the public of an upcoming RFA review. The remaining entry did not satisfy the RFA requirement that the agency describe the rule and state why it was needed.

Three Entries Satisfied All Section 610 Requirements

Three of the 34 entries in the October 1997 Unified Agenda that the agencies characterized as section 610 reviews—1 from DOL and 2 from DOT—did appear to satisfy all of the RFA’s notification requirements. Our examination of those entries indicated that satisfying the RFA’s section 610 requirements does not appear to be that difficult. The agencies indicated that the rules at issue would have an impact on small entities and stated that they were planning to review the rules (or continue to review them) in the future. The agencies described the rules, noted why they were needed, and identified an agency contact to whom comments could be addressed.

²Regulatory Flexibility Act: Agencies’ Use of the October 1997 Unified Agenda Often Did Not Satisfy Notification Requirements (GAO/GGD-97-61R, Feb. 12, 1998).

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**Conclusions and New
Recommendation**

The OIRA Administrator's June 1997 guidance to federal agencies on how to use the Unified Agenda to satisfy the requirements of section 610 did not prevent agencies from continuing to mischaracterize Agenda entries as section 610 reviews. Those mischaracterizations, combined with the Agenda index of entries that the agencies characterized as section 610 reviews, can result in the public's being misled about their ability to comment on RFA regulatory reviews.

Therefore, in our report being issued today, we recommend that the Executive Director of RISC, in consultation with OIRA and other agencies, ensure that entries characterized as section 610 reviews in future editions of the Unified Agenda meet the requirements of the RFA. The RISC Executive Director and the Acting OIRA Administrator told us that they agreed with the recommendation, and said that they would explore ways to improve the Agenda's notice provisions.

Mr. Chairman, this completes my prepared statement. I would be pleased to answer any questions.

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