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February 2, 2009

Congressional Research Service

Report RL32801

Reexamining Rules: Section 610 of the Regulatory Flexibility Act

Curtis W. Copeland, Government and Finance Division

January 14, 2008

Abstract. Several interest groups have suggested that Congress require agencies to reexamine their existing regulations to determine whether they are still needed or can be made less burdensome. One model that has been suggested for such regulatory "lookbacks" is an expansion of a requirement already in place in Section 610 of the Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. 601-612).

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Congressional Research Service

7-5700

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RL32801

Summary

Section 610 of the Regulatory Flexibility Act (RFA) of 1980 requires each agency to develop a plan for the review of its existing rules that have or will have a “significant economic impact on a substantial number of small entities.” Agencies are required to review any new rules within 10 years of their publication as a final rule, and to provide an annual *Federal Register* notice of rules they have designated for review within the next 12 months. The *Unified Agenda of Federal Regulatory and Deregulatory Actions* is intended to be a compendium of agency rulemaking actions within the next 12 months. Therefore, the number of Section 610 notices in the *Unified Agenda* should provide some indication of the extent to which agencies are conducting the required “lookbacks” under the RFA.

It appears that agencies are carrying out relatively few Section 610 reviews. Several agencies have consistently indicated that they plan to issue dozens of rules each year with a significant impact on small entities, but have published few if any notices of Section 610 reviews in the *Unified Agenda*. The RFA gives agencies a significant amount of discretion to decide which rules are covered by the review requirement. There also appears to be substantial confusion or disagreement among the agencies regarding what Section 610 requires, thereby limiting its effectiveness. For example, some agencies said the *statutes* underlying their rules had a significant impact on small entities, not the *rules* themselves, so they did not have to review them under Section 610. In July 2007, GAO reported that agencies frequently initiated regulatory reviews on their own, and those reviews were more effective in bringing about changes to rules than mandatory review requirements like Section 610.

The poor implementation history of Section 610 of the RFA offers a number of valuable lessons for current advocates of even broader “lookback” reviews. For any such process to work, Congress faces the challenge of clearly specifying what rules should be reviewed and how the reviews should be conducted. Also, some means of tracking the reviews, congressional or executive branch oversight, and a meaningful enforcement mechanism appear important to improving the implementation of the lookback requirement. Otherwise, agencies are unlikely to conduct many more reviews than have occurred pursuant to Section 610. Legislation has been introduced in the 110th Congress (H.R. 4458) that addresses some of the issues regarding the implementation of the RFA and Section 610 reviews.

This report will be updated when additional information about Section 610 or broader lookback reviews become available.

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Introduction

Several interest groups have suggested that Congress require agencies to reexamine their existing regulations to determine whether they are still needed or can be made less burdensome.¹ One model that has been suggested for such regulatory “lookbacks” is an expansion of a requirement already in place in Section 610 of the Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. §§601-612).

Section 610 of the RFA is the only crosscutting statutory requirement that federal agencies reexamine certain rules after they have been issued.² Specifically, Subsection 610(a) of the RFA requires each agency to develop a plan for the review of its existing rules that have or will have a “significant economic impact on a substantial number of small entities.” (Section 601 of the RFA defines a “small entity” as including small businesses, small governmental jurisdictions, or other small organizations.) The Section 610 review plans were to require agencies to review all *existing* rules within 10 years of the effective date of the statute (January 1, 1981), and require any *new* rules to be reviewed within 10 years of their publication as a final rule. According to the RFA, the purpose of the reviews is to determine whether the rules should be continued without change, or should be amended or rescinded to minimize their impact on small entities. Subsection 610(c) of the RFA requires agencies to provide an annual *Federal Register* notice of rules they have designated for review within the next 12 months. In essence, Subsection 610(c) is an advance notice requirement designed to facilitate public input into reviews of existing rules.

Although this statutory “lookback” requirement has been in place since 1981, it is still difficult to determine with any degree of certainty whether agencies are consistently implementing it. However, it appears that agencies are carrying out relatively few Section 610 reviews. One reason why so few reviews are done is that the act gives agencies a significant amount of discretion to decide which rules are covered by the review requirement. There also appears to be substantial confusion among the agencies regarding what Section 610 requires, thereby limiting its effectiveness. This report examines those issues and their implications for future regulatory reforms, but begins with a brief background discussion of the RFA itself.

Regulatory Flexibility Act

Under the RFA, all agencies (cabinet departments, independent agencies, and independent regulatory agencies) must prepare a regulatory flexibility analysis at the time proposed and certain final rules are issued. The RFA requires the analysis to describe, among other things, (1) the reasons why the regulatory action is being considered; (2) the small entities to which the rule will apply and, where feasible, an estimate of their number; (3) the projected reporting, record-

¹ Paul Singer, “Sunsetting the Beast,” *National Journal*, vol. 37 (January 28, 2005), pp. 296-297; and Rebecca Adams, “GOP Adds New Tactics to War on Regulations,” *CQ Weekly*, vol. 63 (January 31, 2005), pp. 224-226.

² Certain statutes (e.g., Section 812 of the 1990 amendments to the Clean Air Act) require agencies to reexamine the effects of certain provisions. Also, Section 5 of Executive Order 12866 on “Regulatory Planning and Review” (58 *Federal Register* 51735, October 4, 1993) requires covered agencies (not including independent regulatory agencies) to “periodically” review their significant regulations to determine whether they should be revised or eliminated. However, the results of those reviews have not been very impressive. See U.S. General Accounting Office, *Regulatory Reform: Agencies’ Efforts to Eliminate and Revise Rules Yield Mixed Results*, GAO/GGD-98-3, October 2, 1997.

keeping, and other compliance requirements of the rule; and (4) any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities.

However, these analytical requirements are not triggered if the head of the issuing agency certifies that the forthcoming rule would not have a “significant economic impact on a substantial number of small entities.” The RFA does not define “significant economic impact” or “substantial number of small entities,” thereby giving federal agencies substantial discretion to determine when the act’s analytical requirements are initiated.³ Also, the RFA’s analytical requirements do not apply to final rules for which the agency does not publish a proposed rule.⁴ Judicial review of agency compliance with certain provisions of the RFA is available to small entities, including Section 610. Section 612 of the RFA requires the Small Business Administration’s (SBA’s) Chief Counsel for Advocacy to monitor and report at least annually on agencies’ implementation of the act.⁵

The General Accounting Office (GAO, now the Government Accountability Office) has examined the implementation of the RFA several times since its enactment, and a recurring theme in GAO’s reports has been a lack of clarity in the act and a resulting variability in the act’s implementation. For example, in 1991 GAO reported that each of the four federal agencies that it reviewed had a different interpretation of key RFA provisions.⁶ In 1994 GAO again reported that agencies’ compliance with the RFA varied widely from one agency to another and that agencies were interpreting the statute differently.⁷ In a 2000 report on the implementation of the RFA at the Environmental Protection Agency (EPA), GAO concluded that the agency had broad discretion to determine what the statute required—even when EPA concluded that a rule costing more than 5,000 small businesses more than \$5,000 each did not have a “significant economic impact on a substantial number of small entities.”⁸ GAO reported that in the two and one-half years after the enactment of the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (which was intended to strengthen the implementation of the RFA), EPA certified that 96% of its proposed rules would not have a significant impact on small entities—nearly 20 percentage points *higher* than in the two and one-half years before SBREFA was enacted. Two of EPA’s program offices (pesticides and solid waste) said *all 46* of their proposed rules published during this period would not have a significant impact on small entities.

³ Agencies also have discretion regarding other requirements built on this determination. For example, Section 212 of the Small Business Regulatory Enforcement Fairness Act (SBREFA) requires agencies to publish one or more compliance guides for each final rule or group of related rules that triggers the RFA. If an agency certifies a rule as not having a significant impact on small entities, no compliance guide need be developed. See U.S. General Accounting Office, *Regulatory Reform: Compliance Guide Requirement Has Had Little Effect on Agency Practices*, GAO-02-172, December 28, 2001.

⁴ Many agencies are apparently aware of this limitation. The General Accounting Office (GAO, now the Government Accountability Office) estimated that in more than 500 final rules published in 1997 the agencies specifically stated that the RFA was not applicable or that a regulatory flexibility analysis was not required because the action was not preceded by a proposed rule. See U.S. General Accounting Office, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, GAO/GGD-98-126, August 31, 1998, p. 31.

⁵ For copies of the Chief Counsel’s reports, see <http://www.sba.gov/ADVO/laws/flex/>.

⁶ U.S. General Accounting Office, *Regulatory Flexibility Act: Inherent Weaknesses May Limit Its Usefulness for Small Governments*, GAO/HRD-91-16, January 11, 1991.

⁷ U.S. General Accounting Office, *Regulatory Flexibility Act: Status of Agencies’ Compliance*, GAO/GGD-94-105, April 27, 1994.

⁸ U.S. General Accounting Office, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193, September 20, 2000.

In all of these reports, GAO suggested that Congress consider clarifying the act's requirements and/or giving SBA or some other entity the responsibility to develop criteria for whether and how agencies should conduct RFA analyses. In 2001, GAO testified that the promise of the RFA may never be realized until Congress or some other entity defines what a "significant economic impact" and a "substantial number of small entities" mean in a rulemaking setting.⁹ In 2002, GAO testified that the implementation of the RFA was still problematic, and raised even more questions about how the statute should be interpreted.¹⁰ For example, in determining whether a rule has a significant impact on small entities, should agencies take into account the cumulative impact of similar rules in the same area? Should agencies consider the RFA triggered when a rule has a significant *positive* impact on small entities? GAO went on to say the following:

These questions are not simply matters of administrative conjecture within the agencies. They lie at the heart of the RFA and SBREFA, and the answers to the questions can have a substantive effect on the amount of regulatory relief provided through those statutes. Because Congress did not answer these questions when the statutes were enacted, agencies have had to develop their own answers—and those answers differ. If Congress does not like the answers that the agencies have developed, it needs to either amend the underlying statutes and provide what it believes are the correct answers or give some other entity the authority to issue guidance on these issues.¹¹

Similarly, in 2006, GAO testified that "the full promise of RFA may never be realized until Congress clarifies key terms and definitions in the act, such as 'a substantial number of small entities,' or provides an agency or office with the clear authority and responsibility to do so."¹² GAO said "Congress might wish to review the procedures, definitions, exemptions, and other provisions of RFA to determine whether changes are needed to better achieve the purposes Congress intended." Also, GAO said "attention should ... be paid to the domino effect that an agency's initial determination of whether RFA is applicable to a rulemaking has on other statutory requirements, such as preparing compliance guides for small entities and periodically reviewing existing regulations [under Section 610]."

On the other hand, other observers have indicated that the definitions of these terms should remain flexible because of significant differences in each agency's operating environment. For example, the SBA Office of Advocacy said that "[n]o definition could, or arguably should, be devised to apply to all rules given the dynamics of the economy and changes that are constantly occurring in the structure of small-entity sectors."¹³

In August 2002, President George W. Bush issued Executive Order 13272, which was intended to promote compliance with the RFA.¹⁴ The executive order required agencies to issue written

⁹ U.S. General Accounting Office, *Regulatory Flexibility Act: Key Terms Still Need to Be Clarified*, GAO-01-669T, April 24, 2001.

¹⁰ U.S. General Accounting Office, *Regulatory Flexibility Act: Clarification of Key Terms Still Needed*, GAO-02-491T, March 6, 2002.

¹¹ *Ibid.*, pp. 2-3.

¹² U.S. Government Accountability Office, *Regulatory Flexibility Act: Congress Should Revisit and Clarify Elements of the Act to Improve Its Effectiveness*, GAO-06-998, July 20, 2006.

¹³ U.S. Small Business Administration, Office of Advocacy, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies* (Washington, D.C.: 1998), p. 16.

¹⁴ U.S. President (Bush), "Proper Consideration of Small Entities in Agency Rulemaking," Executive Order 13272, 67 *Federal Register* 53461, August 13, 2002.

procedures and policies to ensure that the potential impacts of their draft rules on small entities are properly considered, and required them to notify the Office of Advocacy of any draft rules with a significant economic impact on a substantial number of small entities. Although the order required the Office of Advocacy to provide training on compliance with the RFA and to provide comments on draft rules, it did not define what should be considered a “significant” economic impact or a “substantial” number of small entities.

Implementation of the Section 610 Requirements

SBA’s annual reports on the implementation of the RFA have only occasionally mentioned Section 610 of the statute. However, in April and May 1992, SBA’s Chief Counsel for Advocacy sent letters to the heads of at least 83 executive departments and agencies requesting that they provide information on their implementation of Section 610. Of the 55 agencies that responded, 13 said they had published the required plan for the review of their rules. The remaining 42 respondents indicated that they had not done so, most often saying that none of their rules had a significant economic impact on a substantial number of small entities. In 1994, the Chief Counsel told GAO that SBA did not follow up with these agencies because SBA had no authority to compel agencies to plan for or conduct a review of their rules.¹⁵

In February 1998, the House Committee on Small Business held a hearing on the implementation of Section 610 of the RFA.¹⁶ In general, the witnesses indicated that few Section 610 reviews had been done, and the reasons for this lack of action varied. For example, one witness said certain agencies had effectively written themselves out of portions of the RFA by indicating that their “interpretative rules” are not covered by the act, or by defining a “small business” in such a way that the act was not triggered.

GAO Reviews of Section 610: 1997-1999

Section 602 of the RFA requires each agency to publish in the *Federal Register* a “regulatory flexibility agenda” describing each rule the agency intends to promulgate that is likely to have a significant economic impact on a substantial number of small entities. As noted previously, Subsection 610(c) of the RFA requires agencies to publish a notice in the *Federal Register* of rules that they plan to review within the next 12 months. A number of agencies have used the *Unified Agenda of Federal Regulatory and Deregulatory Actions* to publish these notices, although the statute does not refer to or require its use.¹⁷ The *Unified Agenda* is published twice each year in the *Federal Register* by the Regulatory Information Service Center, and provides uniform reporting of data on regulatory activities under development throughout the federal government. In essence, the *Agenda* is intended to be a compendium of agency rulemaking actions within the next 12 months. Therefore, the number of Section 610 notices in the *Unified*

¹⁵ GAO/GGD-94-105, pp. 12-16.

¹⁶ U.S. Congress, House Committee on Small Business, *Federal Agency Compliance With Section 610 of the Regulatory Flexibility Act*, 105th Congress, 2nd sess., February 12, 1998 (Washington: GPO, 1998).

¹⁷ Notably, Section 4 of Executive Order 12866 requires all agencies to prepare an “agenda” of all regulations under development or review. Also, Section 5 of the executive order requires covered agencies to include any significant rules selected for review in the agencies’ regulatory plans, which are required to be published in the *Unified Agenda*.

Agenda should provide some indication of the extent to which agencies are conducting the required “lookbacks” under the RFA.

GAO used the *Unified Agenda* to examine the implementation of Section 610 of the RFA several times, and each time concluded that its implementation appeared flawed. For example, in April 1997 and February 1998, GAO reported that relatively few agencies had entries in the November 1996 and October 1997 editions of the *Unified Agenda* that they characterized as Section 610 reviews.¹⁸ Also, where present, the agencies’ entries frequently did not meet the specific requirements of Subsection 610(c).

In April 1999, GAO examined the April 1998 and November 1998 editions of the *Unified Agenda*, and again reported that few regulatory agencies indicated that they were conducting Section 610 reviews—even among agencies that indicated they issued a large number of rules with a significant economic impact on a substantial number of small entities.¹⁹ For example, of the 61 federal departments and agencies with entries in the November 1998 *Unified Agenda*, only eight agencies indicated that they were reviewing rules under Section 610, and most of them were reviewing only one or two rules each. Several of the agencies with no Section 610 review entries had indicated in 20 successive editions of the *Agenda* that many of their regulatory actions would have a significant economic impact on small entities—thereby strongly indicating that they would need to review many of their rules under Section 610.

Issues Affecting Section 610 Implementation

However, in that 1999 report, GAO said it could not definitively determine whether more rules should have been reviewed under Section 610, or which rules, because no authoritative database existed delineating (1) the final rules that agencies determined would have a significant impact on small entities or (2) the rules for which Section 610 reviews had already been conducted. Also, GAO determined there were significant differences of opinion among federal agencies regarding the act’s requirements, or misunderstandings of those requirements. For example:

- Subsection 610(c) requires agencies to publish notices in the *Federal Register* of rules that “have” a significant economic impact on a substantial number of small entities. Some agencies (e.g., EPA) indicated that this language required a review of any rule that had such an impact *at the time the final rule was promulgated* (i.e., any rule for which they had prepared a final regulatory flexibility analysis). In contrast, other agencies (e.g., the Department of Transportation) said that the impact of rules can change dramatically over a 10-year period, and said they interpreted the statute’s use of the present tense “have” to mean they must review rules that have such an impact *at the time the agency conducts the review*. Under this reading of the statute, agencies cannot rely on their previous determinations

¹⁸ U.S. General Accounting Office, *Regulatory Flexibility Act: Agencies’ Use of the November 1996 Unified Agenda Did Not Satisfy Notification Requirements*, GAO/GGD/OGC-97-77R, April 22, 1997; and *Regulatory Flexibility Act: Agencies’ Use of the October 1997 Unified Agenda Often Did Not Satisfy Notification Requirements*, GAO/GGD-98-61R, February 12, 1998.

¹⁹ U.S. General Accounting Office, *Regulatory Flexibility Act: Agencies’ Interpretations of Review Requirements Vary*, GAO/GGD-99-55, April 2, 1999.

and must reexamine all of their rules within 10 years of their issuance to determine their current economic effect on small entities.²⁰

- Other agencies (e.g., the Department of Health and Human Services) said they believed they had met the public notice requirements of Subsection 610(c) by simply listing rules in the *Unified Agenda* that they believed would have a significant impact on small entities. (Department officials said they subsequently understood that interpretation was wrong.)
- Still other agencies (e.g., the Small Business Administration) said they had not done any Section 610 reviews at the time of GAO's study because they had reviewed and revised all of their rules in the mid-1990s as part of the Clinton Administration's regulatory reform initiative. Therefore, they argued, the agencies had no rules more than 10 years old that had not been reviewed. (Notably, GAO examined SBA's announcements of these reviews and concluded that they did not meet the requirements of the RFA.)

At a meeting at GAO in February 2000, regulatory agencies raised a number of other issues regarding the interpretation of the RFA's Section 610 "lookback" requirement that have affected its implementation. For example:

- Some agencies indicated that they had established a "high threshold" for what constituted a "significant economic impact on a substantial number of small entities." By designating few of their rules as having that level of impact, the number of rules from those agencies that were subject to reexamination was small.
- Some agencies said their rules often only implemented the requirements in the underlying statutes. Therefore, they considered the underlying *statutes* to have a significant impact on small entities, not their *regulations*, so they believed that few of their rules were subject to Section 610.
- Similarly, some agencies said that while the actions of states and other parties *implementing* certain federal rules (e.g., health standards) would likely have a significant impact on small entities, the federal rules *themselves* would not have that impact.
- Other agencies indicated that it was unclear whether amending all or part of a rule within the 10-year period provided in Section 610 would "restart the clock." If so, they said agencies could prevent any "lookbacks" simply by making changes to their rules at least once every 10 years.
- Still other agencies questioned what was considered a "rule" under Section 610. For example, if a *Federal Register* provision amended an existing part in the *Code of Federal Regulations* (CFR), they said it was unclear whether the agency should review the CFR part as a whole within 10 years or only the portion that was amended by the *Federal Register* provision.

²⁰ Because DOT interprets the RFA in this manner, for the past 10 years it has been systematically reviewing all of its rules to determine their current impact on small entities.

Agencies' Section 610 Reviews in 2004

By 2004, GAO had not examined the implementation of Section 610 of the RFA during the past five years. Therefore, it was unclear whether agencies have improved their implementation of Section 610 or whether the same basic pattern is evident. Using the same methodology that GAO employed, CRS examined agencies' implementation of the review requirement during calendar year 2004.

The *Unified Agendas* published in June 2004 and December 2004 each contained more than 4,000 entries (e.g., notices of forthcoming proposed rules and final rules) from more than 60 regulatory agencies. In each volume, the agencies indicated that about 400 of the regulatory actions identified in those entries could have a significant economic impact on a substantial number of small entities. As **Table 1** indicates, the agencies with the largest number of such entries were the Federal Communications Commission (FCC); the Securities and Exchange Commission (SEC); the Small Business Administration (SBA); and the Departments of Commerce (DOC), Health and Human Services (HHS), Agriculture (USDA), Transportation (DOT), and Labor (DOL). Those eight departments and agencies accounted for about 90% of the regulatory actions in the *Agendas* that the agencies expected to trigger the RFA. The same departments and agencies also indicated they issued many RFA-related rules when GAO did its study examining the *Unified Agendas* from 1988 through 1998.²¹ Therefore, it would be reasonable to expect that, since they indicated that they intended to issue a large number of rules each year with a significant effect on small entities, those same agencies would need to reexamine a large number of rules each year under Section 610.

Table 1. Agencies Announced Few Section 610 Reviews in 2004

Department/Agency	June 2004 <i>Unified Agenda</i>		December 2004 <i>Unified Agenda</i>	
	Entries with impact on small entities	Section 610 notices	Entries with impact on small entities	Section 610 notices
USDA	33	7	38	4
DOC	97	0	61	0
HHS	65	1	68	1
DOL	12	4	8	5
DOT	16	1	17	3
SBA	14	0	10	0
FCC	110	2	111	2
SEC	24	0	18	0

²¹ GAO/GGD-99-55, pp. 13-14. GAO reported that several other agencies also indicated that they issued a significant number of rules with a significant impact on small entities, including EPA and the Departments of the Interior and the Treasury.

Department/Agency	June 2004 Unified Agenda		December 2004 Unified Agenda	
	Entries with impact on small entities	Section 610 notices	Entries with impact on small entities	Section 610 notices
All other agencies	45	20	41	16
Total	416	35	408	31

Source: *Unified Agenda of Federal Regulatory and Deregulatory Actions*, 69 Federal Register 38677-38688 and 74291-74301. The number of entries with impact on small entities does not include Section 610 reviews. The number of Section 610 reviews does not include entries noting the completion of reviews or rulemaking associated with those reviews.

However, as **Table 1** also illustrates, the June 2004 edition of the *Unified Agenda* contained only 35 notices of upcoming Section 610 reviews, and the December edition contained only 31.²² Some of the agencies that indicated they planned to issue the most rules affecting small entities had either no Section 610 notices (DOC, SBA, and SEC) or had only one or two such notices (HHS and FCC). GAO reported the same pattern for the same five agencies in its 1999 report.²³ Therefore, if the *Unified Agenda* really is the compendium of forthcoming regulatory activity that it purports to be, it appears that agencies are still not conducting many reviews under Section 610 of the RFA.

In fact, the number of Section 610 reviews that federal agencies conduct each year is actually much less than the above table suggests. All but four (two from DOL and two from DOT) of the 31 Section 610 notices listed in the December 2004 edition of the *Unified Agenda* were previously listed among the 35 notices in the June edition. Likewise, all but nine of the 35 notices in the June 2004 edition had been listed in the December 2003 edition of the *Agenda*. The same type of overlap exists with regard to the number of rules expected to have a significant impact on small entities. For example, of the 38 USDA entries in the December 2004 edition of the *Unified Agenda* with an impact on small entities, all but six were in the June 2004 edition of the *Agenda*. Overall, though, if the *Unified Agenda* is a valid general indication of agencies' activities in this area, it appears that agencies are reviewing less than 10% of their rules with an impact on small entities.

GAO's 2007 Report on "Lookback" Reviews

In July 2007, GAO reported on a broad examination of agency "lookback" reviews, including mandatory reviews like those conducted under Section 610 of the RFA and reviews initiated at the agencies' discretion.²⁴ GAO said that, from 2001 through 2006, the selected agencies²⁵

²² These editions of the *Unified Agenda* also contained several other entries indicating that Section 610 reviews had been completed, or that rulemaking had resulted from a review—but those entries are not the same as public notices of upcoming reviews.

²³ GAO/GGD-99-55, pp. 13-14. GAO also reported that the Departments of the Interior and the Treasury also had no Section 610 review entries despite having dozens of entries with a significant economic impact on a substantial number of small entities.

²⁴ U.S. Government Accountability Office, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-791, July 16, 2007.

²⁵ The agencies included in GAO's review were the Departments of Agriculture, Justice, Labor, and Transportation; the Consumer Product Safety Commission; the Environmental Protection Agency; the Federal Communications Commission; the Federal Deposit Insurance Corporation; and the Small Business Administration.

completed over 1,300 reviews of existing regulations. The mix of reviews conducted, in terms of impetus (mandatory or discretionary) and purpose, varied among agencies. GAO reported that mandatory requirements were sometimes the impetus for reviews, but agencies more often exercised their own discretionary authorities to review regulations. The main purpose of most reviews was to examine the effectiveness of the implementation of regulations, but agencies also conducted reviews to identify ways to reduce regulatory burdens and to validate the original estimates of benefits and costs.

GAO also said that the processes and standards guiding reviews varied across agencies and the impetus and phase of the review process. For example, while almost all agencies had standards for conducting mandatory reviews, only about half of the agencies had such standards for conducting discretionary reviews. The extent of public involvement varied across review phases, with the public having relatively more of a role in the selection process for discretionary reviews. GAO also reported that discretionary reviews more often resulted in changes to rules and related documents than mandatory reviews. Among other things, GAO recommended that agencies incorporate various elements into their policies and procedures to improve the effectiveness and transparency of retrospective regulatory reviews and that they identify opportunities for Congress to revise and consolidate existing requirements.

Implications for Regulatory Reform

The failure of Section 610 of the RFA to get many agencies to review the impact of their existing rules on small entities offers a number of valuable lessons for current advocates of even broader “lookback” requirements. In general, the drafters of any regulatory review legislation should be sure that the requirements for review are clear in terms of which rules need to be reviewed, and how the reviews are to be conducted. Giving agencies the discretion to decide which rules meet certain broad criteria for review appears (in many cases) to be an invitation for the agencies to declare that few if any of their rules meet that threshold.

Clearly, many of the problems associated with the implementation of Section 610 are traceable to problems associated with the RFA as a whole. Agencies have substantial discretion to certify rules as not having a significant economic impact on a substantial number of small entities. Agencies that so certify all or most of their rules (e.g., EPA) would never even appear in a listing like **Table 1** of agencies that issue a large number of rules that require reexamination under Section 610. It is ironic that SBREFA, a statute intended to strengthen the RFA, may have had the unintended effect of making fewer rules subject to the RFA’s analytical requirements, including Section 610.

One way to address this problem in the context of any new statutory “lookback” requirement could be to eliminate agency discretion entirely and require the agencies to review all of their existing rules, or all rules they had issued within a set period of time prior to the enactment of any review requirement (e.g., within the past 10 years). However, these sorts of all-encompassing reviews would likely be very difficult and time-consuming for the agencies to conduct. Also, most of the thousands of final rules that agencies issue each year are routine or administrative (e.g., bridge opening schedules or air worthiness directives), and are not likely to be the type of rules considered burdensome or in need of reform by the public. One way to make such a comprehensive review requirement more manageable could be to require agencies to review all final rules that both the Office of Management and Budget (OMB) and the agencies considered

“significant” under Executive Order 12866 (about 300 final rules each year) or “major” under SBREFA (about 70 final rules each year).²⁶ However, even this approach would include some rules that are somewhat ministerial in nature (e.g., major rules establishing migratory bird hunting seasons or Medicare reimbursement rates). OMB or some other entity outside of the regulatory agencies could be authorized to waive the review requirement for such rules.

Another approach could be to solicit suggestions from the public regarding the rules they believe should be reviewed. However, some would argue that this approach is already underway. The “Regulatory Right to Know Act” (Section 624 of the Treasury and General Government Appropriations Act of 2001) required that OMB report on “recommendations for reform.” In response to that requirement, OMB has been asking the public to nominate rules that they believe are in need of review. Initially, OMB asked the public to suggest rules that could be “rescinded or changed” to increase net benefits to the public. In response, OMB received 71 suggestions from the public. Subsequently, though, OMB broadened the request to include revisions that would increase net benefits by either eliminating or modifying existing rules, or by extending or expanding existing regulatory programs. In response to that request, OMB received 316 suggestions from the public, and referred those suggestions to the agencies for their consideration.²⁷ OMB is continuing to obtain suggestions from the public regarding rules in need of review.

Whichever approach is taken, federal agencies’ experience with Section 610 of the RFA suggests that Congress be as clear as possible regarding its expectations for these reviews. For example, Congress faces the challenge of clearly indicating:

- what should be considered a “rule” to be reviewed (e.g., an entire CFR part or only certain provisions that are changed through a *Federal Register* notice);
- whether any “burden” that is associated with a rule’s underlying statute (or subsequent implementation by state governments or other parties) should be considered part of the rule; and
- whether any revisions to a rule would “restart the clock” for any requirement that rules be revised within a particular period of time.

Also, in order to permit the public to be involved in these reviews and to permit tracking of which rules are still in need of review, agencies could be required to post their upcoming and completed reviews in the *Unified Agenda* or on the agency’s website. As a result, Congress and the public would know which rules were required to be reviewed, which ones had been reviewed, and which ones were still in need of review.

²⁶ Executive Order 12866 defines a “significant regulatory action” as any rule that may (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the order. However, E.O. 12866 does not include rules issued by independent regulatory agencies. SBREFA includes all agencies, and defines a “major” rule essentially as in the first criterion in the order (e.g., \$100 million impact on the economy).

²⁷ OMB reported on the status of these recommendations in a December 2004 report to Congress on the costs and benefits of regulations. To view a copy of that report, see http://www.whitehouse.gov/omb/inforeg/2004_cb_final.pdf.

Finally, Congress could consider including some type of enforcement mechanism to any generalized lookback requirement, either through the budget (e.g., withholding some portion of the appropriations of agencies that have not carried out the required reviews), by including judicial review provisions that do more than just require agencies to do the reviews that they neglected to do in the first place, or through some other approach. Regular scrutiny of agencies' implementation of any lookback requirement by Congress, OMB, or some other entity could also raise the requirement's profile. Without some type of enforcement of the review requirement, agencies are unlikely to conduct many more reviews than have occurred pursuant to Section 610.

Developments During the 110th Congress

On December 12, 2007, H.R. 4458—the “Small Business Regulatory Improvement Act”—was introduced by Representative Brad Ellsworth and nine cosponsors, and the bill was referred to the House Committee on the Judiciary and the House Committee on Small Business. On December 13, 2007, the House Small Business Committee unanimously reported the bill. No action on H.R. 4458 has been scheduled by the House Committee on the Judiciary, and no comparable legislation has been introduced in the Senate. Similar legislation was introduced in the 109th Congress (H.R. 682 and S. 1388), but was not acted upon.

H.R. 4458 would make a number of changes to the RFA—all of which are supported by the SBA Office of Advocacy and small business representatives.²⁸ For example, Section 3 of the bill would amend Section 601 of the RFA and define “economic impact” to include direct economic effects of a rule on small entities as well as any indirect effect “which is reasonably foreseeable and results from such rule.” Section 4 of the bill would make several changes to the RFA's requirements—adding new analytical or reporting requirements, and adding to the level of detail in existing requirements. For example, whereas the RFA currently requires an initial regulatory flexibility analysis to contain a “description” of the reasons why the agency action is being considered and a “succinct statement” of the objectives of and legal basis for the proposed rule, H.R. 4458 would require a “detailed statement” describing those elements.

Section 5 of H.R. 4458 would amend Section 610 of the RFA and establish new requirements for the periodic review of rules. Specifically, within 180 days after enactment, the bill would require agencies to publish in the *Federal Register* and on their websites a plan for reviewing all existing rules that the agency heads determine have a “significant economic impact on a substantial number of small entities”—regardless of whether the agency published a final regulatory flexibility analysis under Section 604 of the RFA at the time the rule was promulgated. The plan would have to provide for the review of all existing rules within 10 years after the enactment of the legislation (although the agency head could extend that deadline by two years if completion of the review was not feasible), and for the review of rules issued after enactment within 10 years of their publication in the *Federal Register*. Also, each agency would have to publish a list of the rules to be reviewed pursuant to the plan, including why the agency determined each rule has a

²⁸ Ralph Lindeman, “SBA Advocacy Chief Urges Legislation To Strengthen Regulatory Flexibility Act,” *BNA Daily Report for Executives*, December 7, 2007, p. A-28. The Office of Advocacy has supported similar provisions in other legislation. See testimony of SBA Chief Counsel for Advocacy Thomas M. Sullivan, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Regulatory Flexibility Improvements Act—H.R. 682*, hearings, 109th Cong., 2nd sess., July 20, 2006. Individuals from SBA have also written in support of similar provisions. See Keith W. Holman, “The Regulatory Flexibility Act at 25: Is the Law Achieving Its Goal?,” *Fordham Urban Law Journal*, vol. 33 (May 2006), pp. 1119-1137.

significant impact, and would have to request comments from the public, the SBA Chief Counsel for Advocacy, and the Regulatory Enforcement Ombudsman on the “enforcement” of the rule. Finally, the bill would require agencies to submit a report annually to Congress and, for agencies other than independent regulatory agencies, to the OIRA Administrator. The annual report is to include (1) the identification of any rule for which the agency head had “made a determination” regarding whether the rule overlaps or conflicts with other rules, and the length of time since the rule had previously been evaluated; and (2) a “detailed explanation of the reasons for such determination.”

Analysis

H.R. 4458 would clarify how agencies’ reviews under Section 610 of the RFA should be conducted. As a result, agencies would be required to review all of their rules to determine if they currently have a “significant economic impact on a substantial number of small entities,” and could not simply rely on their previous determinations when the final rule was published in the *Federal Register*. Enactment of this change may result in substantially more Section 610 reviews, but with a concomitant increase in time and effort required by federal agencies. Still unclear, however, is what would constitute a “rule” under this requirement (e.g., only the provision published in the *Federal Register* or the entire *Code of Federal Regulations* part that the provision amended). Also, because the legislation does not clarify what constitutes a “significant” economic impact on a “substantial” number of small entities, federal agencies would appear to continue to have a great deal of discretion to decide when those reviews would need to be conducted.

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