

Section 610 of the Regulatory Flexibility Act: Best Practices for Federal Agencies

Introduction

Section 610 of the Regulatory Flexibility Act (RFA)¹ requires federal agencies to review regulations that have a significant economic impact on a substantial number of small entities² within 10 years of their adoption as final rules. These periodic rule reviews are a mechanism for agencies to assess the impact of existing rules on small entities and to determine whether the rules should be continued without change, or should be amended or rescinded, consistent with the objectives of applicable statutes. Agency compliance with section 610's periodic review requirement has varied substantially from agency to agency since 1980.³ While some agencies systematically review all of their existing rules, other agencies review few, if any, of their current rules. Agencies also vary considerably in the amount of public involvement they allow, and the amount of information they provide to the public about their reviews.

The Office of Advocacy, an independent office within the U.S. Small Business Administration (Advocacy), has previously given relatively little guidance to agencies on section 610. In 2003, pursuant to the requirements of Executive Order 13,272,⁴ Advocacy issued a general guide on how to comply with the RFA, including section 610.⁵ The 2003 guide did not, however, address commonly asked questions about section 610, such as the timing and scope of reviews, how the public can be involved, and how agencies should communicate with the public about their reviews. The 2003 guide also did not provide examples of retrospective reviews that were, in Advocacy's view, conducted properly.

¹ 5 U.S.C. § 610 (2000).

² "Small entities" include small businesses that meet the Small Business Administration size standard for small business concerns at 13 C.F.R. § 121.201, small governmental jurisdictions with a population of less than 50,000, and small organizations that are independently owned not-for-profit enterprises and which are not dominant in their field. See 5 U.S.C. §§ 601(3)-(5).

³ See, for example, Government Accountability Office, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews* (GAO-07-791), July 2007; General Accounting Office, *Regulatory Flexibility Act: Agencies' Interpretations Vary* (GAO/GGD-99-55) April 1999. See also Michael R. See, *Willful Blindness: Federal Agencies' Failure to Comply with the Regulatory Flexibility Act's Periodic Review Requirement – and Current Proposals to Invigorate the Act*, 33 Fordham Urb. L.J. 1199-1255 (2006).

⁴ Exec. Order No. 13,272 § 2(a), 67 Fed. Reg. 53,461 (Aug. 13, 2002) ("Advocacy . . . shall notify agency heads from time to time of the requirements of the [RFA], including by issuing notifications with respect to the basic requirements of the Act")

⁵ Office of Advocacy, *How to Comply with the Regulatory Flexibility Act: A Guide for Government Agencies* (May 2003) available at <http://www.sba.gov/advo/laws/rfaguide.pdf>.

This best practices document is intended to provide Advocacy’s interpretation of section 610 of the RFA and answer common questions about conducting retrospective reviews of existing regulations in a transparent manner. Advocacy intends this document to supplement the 2003 RFA guide; like the 2003 guide, it was developed to meet Advocacy’s continuing responsibility under Executive Order 13,272 to “notify agency heads from time to time of the requirements of the [RFA].”⁶

The statutory text of Section 610, 5 U.S.C. § 610

§ 610. Periodic review of rules

- (a) Within one hundred and eighty days after the effective date of this chapter, each agency shall publish in the Federal Register a plan for the periodic review of the rules issued by the agency which will have a significant economic impact upon a substantial number of small entities. Such a plan may be amended by the agency at any time by publishing the revision in the Federal Register. The purpose of the review shall be 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. The plan shall provide for the review of all such agency rules existing on the effective date of this chapter within ten years of that date and for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, he shall so certify in a statement published in the Federal Register and may extend the completion date by one year at a time for a total of not more than five years.

- (b) In reviewing rules to minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes, the agency shall consider the following factors –
 - (1) the continued need for the rule;
 - (2) the nature of complaints or comments received concerning the rule from the public;
 - (3) the complexity of the rule;
 - (4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules: and
 - (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

⁶ Exec. Order No. 13,272 § 2(a), 67 Fed. Reg. 53,461 (Aug. 13, 2002).

- (c) 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.

Legislative history of the RFA relating to section 610.

Statements made during the 1980 debate on the Regulatory Flexibility Act demonstrate that Congress intended for section 610 to be a mechanism that requires agencies to periodically re-examine the regulatory burden of their rules vis-à-vis small entities, considered in the light of changing circumstances.⁷ This view was also reflected in Advocacy's initial 1982 guidance explaining the then-new RFA, which stated that

The RFA requires agencies to review all existing regulations to determine whether maximum flexibility is being provided to accommodate the unique needs of small businesses and small entities. Because society is not static, changing environments and technology may necessitate modifications of existing, anachronistic regulations to assure that they do not unnecessarily impede the growth and development of small entities.⁸

Put simply, the objective of a section 610 review is like the goal of many other retrospective rule reviews:⁹ to determine whether an existing rule is actually working as it was originally intended and whether revisions are needed. Has the problem the rule was designed to address been solved? Are regulated entities (particularly small entities) able to comply with the rule as anticipated by the agency? Are the costs of compliance in

⁷ House Debate on the Regulatory Flexibility Act, 142 Cong. Rec. H24,575, H24,583-585 (daily ed. Sept. 8, 1980) (“At least once every 10 years, agencies must assess regulations currently on the books, with a view toward modification of those which unduly impact on small entities.” (Statement of Rep. McDade)) (“[A]gencies must review all regulations currently on the books and determine the continued need for any rules which have a substantial impact on small business.” (Statement of Rep. Ireland)). Similarly, the section-by-section analysis of the periodic review provision of S. 299, which became the RFA, notes that the required factors in a section 610 review mirror the evaluative factors in President Carter’s Executive Order 12,044, *Improving Government Regulations*. Exec. Order 12,044, 43 Fed. Reg. 12,661 (March 24, 1978). Pursuant to that Executive Order, President Carter issued a Memorandum to the Heads of Executive Departments and Agencies in 1979, further instructing federal agencies: “As you review existing regulatory and reporting requirements, take particular care to determine where, within statutory limits, it is possible to tailor those requirements to fit the size and nature of the businesses and organizations subject to them.” President Jimmy Carter, Memorandum to the Heads of Executive Departments and Agencies, November 16, 1979.

⁸ Office of Advocacy, *The Regulatory Flexibility Act* (October 1982).

⁹ Typical agency-initiated retrospective regulatory reviews include post-hoc validation studies, reviews conducted pursuant to petitions for rulemaking or reconsideration, paperwork burden reviews, and reviews undertaken to advance agency policies.

line with the agency's initial estimates? Are small businesses voicing continuing concerns about the difficulty they have complying with the rule? The section 610 review is an excellent way to address these questions.

Is a section 610 review necessary even if the current rule did not impose a significant economic impact on a substantial number of small entities at the time the rule was promulgated?

In some cases, yes. Even if an agency was originally able to certify properly under section 605 of the RFA that a rule would not have a significant economic impact on a substantial number of small entities,¹⁰ changed conditions may mean that the rule now does have a significant impact and therefore should be reviewed under section 610. For example, there may be many more small businesses that are subject to the rule now than when the rule was promulgated. The cost of compliance with a current rule may have sharply increased because of a required new technology. If there is evidence (such as new cost or burden data) that a rule is now having a significant economic impact on a substantial number of small entities, including small communities or small non-profit organizations, Advocacy believes that the agency should conduct a section 610 review.

Advocacy is aware that some agencies interpret section 610 not to require the periodic review of rules that were originally certified when they were promulgated as having no significant economic impact on a substantial number of small entities. This narrow interpretation of the section 610 review requirements discounts several important considerations. First, evidence of significant current impacts to small entities from an existing rule may call into question the accuracy of the original determination that the rule would have no significant impact. Second, as time passes and the agency (along with regulated small entities) are better able to measure and understand the impacts of a regulation, it benefits the agency to use the periodic review process to update their rules and perform regulatory "housekeeping." Third, limiting section 610 reviews only to rules that were found to have a significant economic impact on a substantial number of small entities at the time of promulgation would severely undercut section 610. EPA and OSHA, for example – which between them determine that at most one or two rules each year will have such an impact – will exclude each of the hundreds of other rules promulgated annually which may now significantly impact small entities from section 610 review. Given the legislative history of section 610, it is very difficult to believe that Congress intended this outcome. Finally, a reading of the plain language of section 610 supports Advocacy's interpretation. If Congress meant to limit periodic reviews, it would have simply required agencies to review rules that had a significant impact, rather than rules which have a significant impact.

An agency may learn about the current impacts of an existing rule through complaints from small entities or petitions for a section 610 or other retrospective review of the rule. If these complaints and/or petitions are founded on reliable cost and impact data, the agency will have a clear indication that small entities are now being impacted by the rule.

¹⁰ See 5 U.S.C. § 605(b).

Scope of the review: What should be included?

Once an agency has determined that an existing rule has a significant economic impact on a substantial number of small entities at the present time, the agency's section 610 review should, at a minimum, address each of the five factors listed in section 610(b)(1)-(5):

- Whether or not there a continuing need for this rule, consistent with the stated objectives of the applicable statutes;
- Whether the public has ever submitted comments or complaints about this rule;
- The degree of complexity of this rule;
- Whether some other federal or state requirement accomplishes the same regulatory objective as this rule; and
- The length of time since the agency has reviewed this rule, and/or the extent to which circumstances have changed which may affect regulated entities.

Particular attention should be paid to changes in technology, economic circumstances, competitive forces, and the cumulative burden faced by regulated entities. Has the impact of the rule on small entities remained the same?

Section 610(b) requires an agency to evaluate and minimize “any significant economic impact of a rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes.” To accomplish this, agencies may want to use an economic analysis similar to the Initial Regulatory Flexibility Analysis (IRFA) under section 603 of the RFA, taking into account the limitations on data availability and limited agency resources.¹¹ Agencies have the discretion to place significant weight on other relevant factors, in addition to the types of economic data required by an IRFA. These other factors include an agency's experience in implementing the rule, as well as the views expressed over time by the public, regulated entities, and Congress. With the benefit of actual experience with a rule, the agency and other interested parties should be in a good position to evaluate potential improvements to the rule. Several factors deserve attention here such as the benefits achieved by the regulation, unintended market effects and market distortions, unusually high firm mortality rates in specific industry sub-sectors, and widespread noncompliance with reporting and other paperwork requirements. Thus, a useful review should go beyond obvious measures such as ensuring that regulatory requirements are expressed in plain language and that paperwork can be filed electronically. The analysis should be aimed at understanding and reducing burdens that unnecessarily impact small entities.

¹¹ See 5 U.S.C. § 603. Indeed, the legislative history of S.299, which became the RFA, notes that “[i]n reviewing existing rules, agencies should follow the procedures described in sections 602-609 [of the RFA] to the extent appropriate.” 142 Cong. Rec. H24,575, H24,583-585 (daily ed. Sept. 8, 1980). In the context of a section 610 review, the elements of an IRFA analysis that should be present include: a discussion of the number and types of small entities affected by the rule, a description of the compliance requirements of the rule and an estimate of their costs, identification of any duplicative or overlapping requirements, and a description of possible alternative regulatory approaches. See also Office of Advocacy, *How to Comply with the Regulatory Flexibility Act: A Guide for Government Agencies* (May 2003) at 29-40, available at <http://www.sba.gov/advo/laws/rfaguide.pdf>.

As a matter of good practice, the section 610 analysis should be based on relevant data, public comments, and agency experience. The agency should make use of available data and data supplied by the public, and indicate the sources of the data. To the extent that an agency relies on specific data to reach a conclusion about the continuing efficacy of a rule, the agency should be able to provide that data. The agency should explain its assumptions so that stakeholders can understand its analysis.

Timing of the review: When does the agency have to start and finish?

The language of section 610 specifies that the review should take place within 10 years after the date a rule is promulgated. While agencies need to gain some experience with a rule before undertaking a retrospective review, the review may take place prior to the 10-year mark. If an agency substantially revises a rule after its initial promulgation, it is arguable as to whether the 610 review may be delayed to correspond to the revision date. Advocacy would not likely object to a revision of the date, but agencies should seek input from Advocacy on this point.

Section 610 does not specifically set a limit on the amount of time for a rule review. Some agencies have reported that they spend more than a year on each section 610 review. It is within an agency's discretion to determine how much time it needs to spend on retrospective rule reviews. Advocacy recognizes that section 610 reviews may take more than a year in order to permit adequate time to gather and analyze data, to allow public comment, and to consider those comments in the review. Of course, some reviews could take less time, based on the complexity of the issues and the nature of the regulated industry.

Agencies may wish to take advantage of the opportunity afforded in section 605(c) of the RFA to consider a series of "closely related rules" as one rule for periodic review purposes. An agency can accomplish a comprehensive section 610 review of closely related rules, satisfying the requirements of the RFA while potentially reducing the agency resources required.

How should agencies communicate with interested entities about section 610 reviews they are conducting?

Section 610(c) of the RFA requires agencies to publish in the *Federal Register* a list of the rules they plan to review in the upcoming year. Agencies use the *Unified Regulatory Agenda* for this purpose.¹² This listing requirement is intended to give small entities early notice of the section 610 reviews so that they will be ready and able to provide the agency with comments about the rule under review. As a practical matter, however, agencies often give stakeholders no other information about the ongoing status of a section 610 review, what factors an agency is considering in conducting the review, how

¹² The *Unified Regulatory Agenda* can be accessed at www.reginfo.gov.

comments can be submitted to the agency, or, ultimately, the factual basis on which the agency made its section 610 review findings.

Agencies should communicate with interested entities about the status of ongoing section 610 reviews, as well as those they have completed, to enhance transparency. This information may be most efficiently communicated via an agency website or other electronic media, and should inform interested parties of their ability to submit comments, as well as the agency's commitment to consider those comments. Several agencies already utilize web-based communications as an outreach tool during section 610 reviews.¹³

Insights about an existing regulation received from regulated entities and other interested parties should be a key component of a retrospective rule review. By making the review process transparent and accessible, agencies are more likely to identify improvements that will benefit all parties at the conclusion of the review. Advocacy can help agencies who wish to communicate with small entity stakeholders – by hosting roundtables, working through trade groups, and getting a specific message to a targeted audience. Advocacy is ready to assist agencies in their outreach efforts.

Can other agency retrospective rule reviews satisfy the requirements of section 610?

Yes. Agencies that undertake retrospective rule reviews to satisfy other agency objectives may also be able to satisfy the periodic review requirement of section 610, as long as the rule reviews are functionally equivalent. For example, agencies that evaluated a current regulation pursuant to the Office of Management and Budget's 2002 publicly-nominated rule reform process¹⁴ or OMB's manufacturing rule reform process¹⁵ could qualify as section 610 reviews, if they otherwise met the criteria for section 610 review. Similarly, agencies that undertook retrospective reviews of their regulatory programs because of complaints or petitions from regulated entities could qualify as section 610 reviews – as long as the review includes the minimum factors required by section 610. The best way for agencies to get "credit" for a section 610 review in these circumstances is to communicate adequately with stakeholders, and with Advocacy.

Examples: In Advocacy's view, what are some recent retrospective rule reviews (conducted pursuant to section 610 or otherwise) that have been successful?

- **Federal Railway Administration's Section 610 Review of Railroad Workplace Safety** – On December 1, 2003, the Department of Transportation's

¹³ See, e.g., www.osha.gov, www.epa.gov, and www.dot.gov and search for "RFA section 610."

¹⁴ See Table 9, "New Reforms Planned or Underway – Regulations" and Table 10, "New Reforms Planned or Underway – Guidance Documents" in *Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (September 2003) at 26-34; available at www.whitehouse.gov/omb/inforeg/2003_cost_ben_final_rept.pdf.

¹⁵ See *Regulatory Reform of the U.S. Manufacturing Sector* (2005).

Federal Railroad Administration completed a section 610 review of its railroad workplace safety regulations. After determining that the workplace safety regulations had a significant economic impact on a substantial number of small entities, the FRA examined the rules in light of section 610's review factors. Although the FRA did not recommend any regulatory change as a result of this review, they provided a good description of its analysis of the workplace safety regulations under each review factor and the agency's conclusions. *See* www.fra.dot.gov/downloads/safety/railroad_workplace_safety.pdf.

- **EPA's RCRA Review** - As a result of public nominations for reforms to the Environmental Protection Agency's hazardous waste management program under the Resource Conservation and Recovery Act (RCRA), EPA evaluated the program and identified duplicative requirements, such as forcing filers to submit reports to multiple locations when one location is adequate. By reducing or eliminating these procedures after public notice and comment, EPA enabled regulated entities to collectively save up to \$3 million per year while preserving the protections of the RCRA program. The retrospective review was successful because it involved a detailed review of the program's requirements and their costs, based on years of practical experience. The agency considered technical changes such as computerization that have made some of the older paperwork requirements redundant, and found ways to modernize the program to reflect current realities. *See* 71 Fed. Reg. 16,862 (April 4, 2006).
- **OSHA Excavations Standard** – In March 2007, the Occupational Safety and Health Administration (OSHA) completed a section 610 review of its rules governing excavations and trenches. These standards had been in place since 1989, and were designed to ensure that trenches do not collapse on workers and that excavated material does not fall back into a trench and bury workers. In the review, OSHA did a good job of seeking public input on how and whether the rule should be changed. While the agency ultimately decided that no regulatory changes to the standard were warranted, it did determine that additional outreach and worker training would help continue the downward trend of fewer deaths and injuries from trench and excavation work. OSHA concluded that its current Excavations standard has reduced deaths from approximately 90 per year to about 70 per year. *See* 72 Fed. Reg. 14,727 (March 29, 2007).
- **FCC Section 610 Review of 1993-1995 Rules** – In May 2005, the Federal Communications Commission undertook a section 610 review of rules the Commission adopted in 1993, 1994, and 1995 which have, or might have, a significant economic impact on a substantial number of small entities. The FCC solicited public comment on the rules under review, explained the criteria it was using to review the rules, and gave instructions on where to file comments. This approach was transparent because the agency allowed adequate time for comments (three months) and gave interested parties sufficient information to prepare useful comments. *See* 70 Fed. Reg. 33,416 (June 8, 2005).

How can agencies get section 610 assistance from the Office of Advocacy?

The Office of Advocacy is ready to assist agencies that are planning a retrospective review of their regulations, to ensure that the review fully meets the requirements of section 610. Discussions with the Office of Advocacy are confidential interagency communications, and the Advocacy staff is ready to assist you. For more information about this guidance, or for other questions about compliance with section 610, please contact Advocacy at (202) 205-6533.

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