United States General Accounting Office

GAO

Report to the Chairman
Committee on Small Business
U.S. Senate

April 1999

REGULATORY FLEXIBILITY ACT

Agencies' Interpretations of Review Requirements Vary

GAO/GGD-99-55

GAO

United States
General Accounting Office
Washington, D.C. 20548

General Government Division

B-282127

April 2, 1999

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

Dear Mr. Chairman:

Section 610 of the Regulatory Flexibility Act (RFA) of 1980 requires each federal 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" (SEISNSE).[1] The purpose of the reviews is to determine whether the rules should be continued without change or should be amended or rescinded to minimize their impact on small entities.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 section 610 reviews within the succeeding 12 months. Subsection 610(c) is basically a notice provision that is designed to facilitate public input into the mandated agency reviews of existing rules.

A number of agencies have used the Unified Agenda of Federal Regulatory and Deregulatory Actions to publish these notices, although subsection 610(c) does not refer to or require the use of the Agenda. The Unified Agenda is published in the Federal Register 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. In April 1997 and February 1998, we 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, and that relatively few of these agencies' entries met the requirements of subsection 610(c).[2]

This report responds to your request that we update and expand our previous reports and testimony on this issue. Our specific objectives were to determine, with regard to the April 1998 and November 1998 editions of the Unified Agenda, (1) how many agencies had no Agenda entries that

[1]Section 601 of the RFA defines a "small entity" as including small businesses, small governmental jurisdictions, or other small organizations.

[2]Regulatory Flexibility Act: Agencies' Use of the November 1996 Unified Agenda Did Not Satisfy Notification Requirements (GAO/GGD/OGC-97-77R, Apr. 22, 1997); Regulatory Flexibility Act: Agencies' Use of the October 1997 Unified Agenda Often Did Not Satisfy Notification Requirements (GAO/GGD-98-61R, Feb. 12, 1998); and Regulatory Reform: Agencies' Section 610 Review Notices Often Did Not Meet Statutory Requirements (GAO/T-GGD-98-64, Feb. 12, 1998).

were characterized as section 610 reviews, whether agencies are interpreting the review requirements consistently, and why certain agencies that appeared subject to the requirements had no entries; (2) how many of the section 610 review entries in these Agendas appeared to meet the notification requirements in subsection 610(c); (3) if the section 610 review entries did not appear to meet the statutory requirements, why certain agencies' entries were characterized as section 610 reviews; and (4) whether any federal agencies had revised their section 610 review plans.

Results in Brief

The April 1998 and November 1998 editions of the Unified Agenda each contained about 4,500 entries that were submitted by 61 federal departments, agencies, and commissions. The April 1998 edition of the Agenda identified 22 entries from 7 agencies as section 610 reviews. The November 1998 edition of the Agenda identified 31 entries from 8 agencies as section 610 reviews. Six of the more than 50 agencies with no section 610 review entries in either edition of the Agenda indicated in these and 19 previous editions of the Agenda that many of their regulatory actions would have a SEISNSE, thereby indicating that the agencies may need to review these rules under section 610. Officials in three of these agencies offered different reasons why their agencies had no section 610 review entries in the April or November editions of the Agenda. However, we could not determine with certainty whether any of the agencies without section 610 review entries in these editions of the Agenda should have had such entries. The absence of section 610 review entries may indicate that the agency does not have any rules that would be potential candidates for review—that is, rules issued within the previous 10 years that have a SEISNSE that had not already been reviewed. Also, no data are readily available to identify such rules and agencies differ in their interpretation of the section 610 review requirements.

Of the 22 entries in the April 1998 Unified Agenda that were characterized as section 610 reviews, only 2 appeared to satisfy all of the public notification requirements of subsection 610(c) of the RFA. Of the 31 section 610 review entries in the November 1998 edition of the Agenda, only 1 appeared to satisfy all of the requirements of subsection 610(c). The entries frequently indicated that the underlying rules would not have a SEISNSE and/or that the rules had already been reviewed.

The Department of Transportation (DOT) and the Environmental Protection Agency (EPA) had the most section 610 review entries in the April 1998 and November 1998 editions of the Unified Agenda. Many of their section 610 review entries did not appear to meet the notice requirements of subsection 610(c) because they used the "Section 610

Review" notation to inform the public about the results of previously conducted reviews, and because of the way in which they interpreted certain entry elements in the Agenda.

One agency—DOT—indicated in the November 1998 edition of the Unified Agenda that it had updated its 1981 section 610 review plan "to accomplish a more systematic review of all of its regulations." DOT said it would review all of its rules between 1998 and 2008 to determine whether any rule published within the previous 10 years had a SEISNSE. For any such rule, DOT said it would then determine whether the impact of the rule could be lessened.

Background

The RFA (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 governmental jurisdictions and to solicit the ideas and comments of such entities for this purpose. Specifically, whenever agencies are required to publish a notice of proposed rulemaking (NPRM), sections 603 and 604 of the RFA require agencies to prepare an initial and a final regulatory flexibility analysis when publishing a proposed and final rule. However, subsection 605(b) of the RFA says that sections 603 and 604 do not apply to any proposed or final rule if the head of the agency certifies that the rule will not have a SEISNSE.

Unified Agenda Requirements

Section 602(a) of the RFA requires each agency to publish a "regulatory flexibility agenda" in the Federal Register every April and October,[3] including 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)."

A number of agencies use the Unified Agenda of Federal Regulatory and Deregulatory Actions to satisfy this and other requirements.[4] The Unified

[3]Although the RFA requires agencies to publish regulatory flexibility agendas in April and October of each year, RISC has not published some of the Unified Agendas until May or November.

Agenda is compiled by RISC for the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (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. RISC instructs the agencies on how the entries are to be prepared, but does not review agencies' entries to determine compliance with statutory or other requirements before they are printed.

Each agency presents its entries in the Unified Agenda under one of five headings according to the rulemaking stage of the entry, which the Agenda defines as follows:

"1. Prerule Stage—actions agencies will undertake to determine whether or how to initiate rulemaking. Such actions occur prior to a Notice of Proposed Rulemaking (NPRM) and may include Advance Notices of Proposed Rulemaking (ANPRMs) and reviews of existing regulations.

"2. Proposed Rule Stage—actions for which agencies plan to publish a Notice of Proposed Rulemaking as the next step in their rulemaking process or for which the closing date of the NPRM Comment Period is the next step.

"3. Final Rule Stage—actions for which agencies plan to publish a final rule or an interim final rule or take other final action as the next step in their rulemaking process.

"4. Long-Term Actions—items under development but for which the agency does not expect to have a regulatory action within the next 12 months after publication of this edition of the Unified Agenda. Some of the entries in this section may contain abbreviated information.

"5. Completed Actions—actions or reviews the agency has completed or withdrawn since publishing its last agenda. This section also includes items the agency began and completed between issues of the Agenda."

Within each entry, agencies are required to provide certain information, including (1) the title of the regulation; (2) a brief description of the problem the regulation will address; (3) the section(s) of the Code of Federal Regulations that will be affected by the action; (4) the dates and citations of the regulatory action's past steps, and a projected date for at

[4]Agencies also use the Unified Agenda 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. Also, section 4(b) of Executive Order 12866 requires agencies to "prepare an agenda of all regulations under development or review."

least the next step; and (5) whether an analysis is required by the RFA because the rule is likely to have a SEISNSE.

Section 610 Requirements and Our Previous Reports

Subsection 610(a) of the RFA required each federal agency to publish in the Federal Register a plan for the periodic review of its rules that "have or will have" a SEISNSE within 180 days after the effective date of the statute (Jan. 1, 1981). The plans were to require agencies to review all existing rules within 10 years of the effective date of the statute, and any new rules within 10 years of their publication as a final rule. Subsection 610(b) specifies the factors that agencies should consider when 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, this subsection says the following:

> "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."

Therefore, it is clear that Congress intended subsection 610(c) to be an advance notice requirement.

The Unified Agenda primarily lists regulatory and deregulatory actions that agencies have decided to take, such as the issuance of upcoming proposed and final rules, or actions the agencies have completed. However, Agenda entries describing regulatory actions that have already been decided or completed cannot satisfy the subsection 610(c) requirement that agencies list existing rules that they will review within the next 12 months to determine whether action is necessary. Similarly, Agenda entries that indicate the rules being reviewed are not likely to have a SEISNSE cannot satisfy the subsection 610(c) requirement that agencies list rules for review that will have such an impact.

For the past several years, agencies have been able to indicate that they are reviewing rules as part of their periodic reviews of existing rules under the RFA by including the notation "Section 610 Review" after the title of the entries. In our April 1997 letter,[5] we concluded that none of the 21 entries that 3 agencies identified as section 610 reviews in the November 1996 edition of the Unified Agenda satisfied all of the requirements of subsection 610(c). Most of the entries (1) announced regulatory actions the agencies were taking or planned to take and did not identify existing

[5]GAO/GGD/OGC-97-77R.

rules that the agencies were reviewing to assess their impact on small entities or (2) appeared to involve rules that did not have a SEISNSE, or that had an "undetermined" impact. Also, we said that the size of the Agenda and the lack of any index or special section in the document made it difficult for the public to find and comment on the entries identified as section 610 reviews. We recommended that, in fulfilling her responsibilities under Executive Order 12866 to specify how agencies should prepare their agendas, the OIRA Administrator instruct agencies that choose to use the Unified Agenda to satisfy the requirements of subsection 610(c) of the RFA on how to do so. Specifically, we said the Administrator should remind agencies using the Agenda for that purpose that their entries must (1) identify existing rules with a SEISNSE 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.

On June 10, 1997, the OIRA Administrator sent a memorandum to regulatory policy officers at executive branch departments and agencies containing guidelines and procedures for the October 1997 Unified Agenda. In those guidelines and procedures, the Administrator pointed out that recent editions of the Agenda have permitted agencies wishing to use the Agenda to publish subsection 610(c) notices to append the notation "Section 610 Review" to their titles. She also quoted the text of subsection 610(c), noted that agencies should include in the entries a description of the rule and the need for the rule, and pointed out that the agencies' preambles should invite public comment upon the rules. Finally, she noted the issuance of our April 1997 letter on this topic. However, the Administrator's instructions did not specifically note that agencies' section 610 entries should only (1) involve rules that have a SEISNSE and (2) reflect reviews of existing rules that the agencies intend to initiate within the next 12 months.

We also recommended in our April 1997 letter that the Executive Director of RISC develop an index or special section in the Unified Agenda that specifically identifies the rules that agencies plan to review under section 610 to provide the public with adequate notice and opportunity to comment on those rules. The October 29, 1997, edition of the Agenda contained such an index that listed, for each of seven agencies, the entries for which the agencies included a "Section 610 Review" designation. The April 1998 and November 1998 editions of the Agenda also contained such an index.

In our February 1998 letter and testimony,[6] we concluded that most of the entries in the October 1997 edition of the Unified Agenda that the agencies identified as section 610 reviews did not meet the public notification requirements of subsection 610(c). Of the 34 such entries that 7 agencies identified, only 3 satisfied all of the requirements of subsection 610(c). As was the case in the November 1996 edition of the Agenda, most of the section 610 review entries either (1) involved rules that did not appear to have a SEISNSE or had an "undetermined" impact or (2) did not involve rules that the agencies indicated they would be reviewing pursuant to section 610 during the next 12 months.

We recommended in our February 1998 letter 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 subsection 610(c) of the RFA. Specifically, we said those entries should (1) involve rules that the agencies expect will have a SEISNSE; (2) involve existing rules that are to be reviewed pursuant to section 610 in the succeeding 12 months; (3) describe the rules, the need for the rules, and their legal bases; and (4) invite public comment on the rules. To date, RISC has not taken action on this recommendation.

Objectives, Scope, and Methodology

The objectives of our review were to determine, with regard to the April 1998 and November 1998 editions of the Unified Agenda, (1) how many agencies had no entries that were characterized as section 610 reviews, whether agencies are interpreting the review requirements consistently, and why certain agencies that appeared subject to the requirements had no entries; (2) how many of the section 610 review entries in these Agendas appeared to meet the notification requirements in subsection 610(c); (3) if the section 610 review entries did not appear to meet the statutory requirements, why certain agencies' entries were characterized as section 610 reviews; and (4) whether any federal agencies had revised their section 610 review plans.

To address our first objective, we reviewed the April 1998 and November 1998 editions of the Unified Agenda and determined which of the 61 agencies with at least 1 Agenda entry did not have entries in the Agendas' index cataloging agencies' section 610 reviews. However, the absence of section 610 review entries in those indexes does not necessarily mean that an agency is not complying with section 610. For example, an agency may not have any rules that would be potential candidates for review—that is,

[6]GAO/GGD-98-61R and GAO/T-GGD-98-64.

rules issued within the previous 10 years with a SEISNSE that it had not already reviewed. No data are readily available to identify which rules should have been reviewed at a particular point in time, so we were unable to determine which agencies should have had section 610 review entries in the April 1998 and November 1998 editions of the Agenda.

We interviewed officials at EPA and DOT (agencies with the most section 610 review entries in the April 1998 and November 1998 Agendas) to determine whether agencies are interpreting the section 610 review requirements consistently. We also interviewed officials at SBA's Office of Advocacy because of the SBA Chief Counsel for Advocacy's responsibility under section 612 of the RFA to monitor agencies' compliance with the act.

To determine which agencies may have issued rules with a SEISNSE that could be candidates for review, we used the RISC Unified Agenda database to determine which agencies had at least 10 entries in both the April 1998 and November 1998 editions of the Agenda that indicated the associated rules would have a SEISNSE. To determine whether the April 1998 and November 1998 editions were anomalous for those agencies, we also obtained data from the RISC database on the number of such entries from 19 previous editions of the Agenda. We then interviewed officials at three agencies—the Departments of Health and Human Services (HHS) and the Treasury and the Small Business Administration (SBA)—to determine why they had no section 610 entries in the 1998 Agendas. We selected these 3 agencies because they were among 6 agencies that each had at least 10 entries in virtually all 21 editions of the Agenda, and time constraints prevented interviews at all 6 agencies.

To address our second objective, we examined each of the entries in the April 1998 and November 1998 editions of the Unified Agenda that were characterized as section 610 reviews to determine whether the entries met all of the statutory requirements in subsection 610(c) of the RFA. Specifically, we determined whether each of the entries had the following characteristics:

(1) The entry indicated that it involved a rule that had a SEISNSE. The introduction to the April 1998 edition of the Unified Agenda stated that the "Small Entities Affected" field within Agenda entries indicated whether the agencies believed that the associated rule was likely to have a SEISNSE. The introduction to the November edition indicated agencies were to use the field labeled "Regulatory Flexibility Analysis Required" for this purpose. If an entry in the April edition indicated that certain types of small entities would be affected or if an entry in the November edition

indicated that a regulatory flexibility analysis was required, we considered the entry to have met this requirement. However, if an entry did not indicate that small entities would be affected or that a regulatory flexibility analysis was required, we considered the entry not to involve a rule with a SEISNSE and, therefore, not to have met the requirements of subsection 610(c).

(2) The entry described a review of an existing rule within the next 12 months. For example, if an entry indicated that a review of an existing review would begin 2 months after the date the Agenda was published in the Federal Register, we considered the entry to have met this requirement. However, if the entry indicated that the section 610 review was complete, we did not consider the entry to have met the statutory requirements.

(3) The entry described the rule, stated why it was needed, and provided its legal basis. If the narrative portion of the entry contained this information, we considered the entry to have met this requirement. However, if the entry did not contain this information, we did not consider the entry to have met the requirement.

To address our third objective, we interviewed officials in the two agencies that had the largest number of section 610 review entries in the April 1998 and November 1998 editions of the Unified Agenda—EPA and DOT. We also interviewed officials in OIRA and SBA's Office of Advocacy regarding their interpretation of the statutory requirements and the instructions in the Agenda.

To address our fourth objective, we reviewed the preambles to each of the agencies' sections of the April 1998 and November 1998 editions of the Unified Agenda. We also asked officials at RISC, OIRA, and SBA's Office of Advocacy whether they were aware of any agencies that had updated their subsection 610(a) review plans. We did not review previous editions of the Agenda and did not attempt to survey or otherwise contact all agencies regarding revisions to their review plans. Therefore, other agencies may have revised their plans but those efforts are not reflected in this report.

We conducted our work between January 1999 and March 1999 at OMB, EPA, DOT, SBA, Treasury, and HHS headquarters in Washington, D.C., in accordance with generally accepted government auditing standards. We provided a draft of this report to the Director of OMB and the Acting Executive Director of RISC for their review and comment. We also provided relevant portions of the draft report to officials in the

Departments of HHS, Transportation, and the Treasury; EPA; and SBA for their review and comment. Their views are presented at the end of this letter, along with our evaluation. Appendixes I and II contain reprints of the written comments from RISC and EPA.

Most Agencies Did Not Have Section 610 Entries in the April 1998 or November 1998 Unified Agendas

More than 50 of the 61 federal departments, agencies, and commissions that had entries in the April 1998 and November 1998 editions of the Unified Agenda did not have any section 610 review entries. Six of these agencies indicated in these and previous editions of the Agenda that some of their rules would have a SEISNSE, thereby indicating that they issue rules that could be subject to the section 610 review requirement. Officials in three of these agencies offered different reasons why their agencies had no section 610 review entries in the April 1998 or November 1998 editions of the Agenda. However, because of the absence of readily available data and because the RFA's requirements are subject to varying interpretations, we could not determine with certainty whether any of the agencies without section 610 review entries should have had such entries.

Eight Agencies Had Section 610 Review Agenda Entries

The April 1998 edition of the Unified Agenda was published in the Federal Register on April 27, 1998, and included agendas from 61 federal departments, agencies, and commissions.[7] Those agendas contained 4,504 entries printed on nearly 1,400 pages of the Federal Register. An index in the Agenda identified 22 entries from 7 agencies with the "Section 610 Review" notation following the title. These seven agencies were the Departments of Agriculture (USDA) (1 entry), Education (2 entries), Labor (DOL) (6 entries), and Transportation (DOT) (6 entries); EPA (4 entries); the Federal Reserve System (2 entries); and the Federal Trade Commission (FTC) (1 entry). Therefore, 54 federal departments, agencies, and commissions did not have any section 610 review entries in the April 1998 edition of the Agenda.

The November 1998 edition of the Unified Agenda was published in the Federal Register on November 9, 1998, and included agendas from 61 federal departments, agencies, and commissions. Those agendas contained 4,560 entries printed on nearly 1,400 Federal Register pages. An index in the Agenda identified 30 entries from 8 agencies with the "Section 610 Review" notation following the title. The 8 agencies were USDA (1 entry), the Departments of Education (2 entries), and Justice (1 entry), DOL (5 entries), DOT (7 entries), EPA (11 entries), the Federal Reserve System (2 entries), and the FTC (1 entry). One additional EPA entry that had the

[7]The April 1998 and November 1998 editions of the Unified Agenda each contained 62 agendas, 1 of which was from 3 agencies with joint authority.

notation "Section 610 Rule" after the title should have been included in the index, thereby raising the total number of section 610 review entries in the November 1998 edition of the Agenda to 31. Twenty-one of these 31 entries had appeared in the April 1998 edition of the Agenda and were updated for this edition. Therefore, 53 federal departments, agencies, and commissions did not have any section 610 review entries in the November 1998 edition of the Agenda.

Agencies Interpret Review Requirements Differently

Under sections 603, 604, and 605 of the RFA, agencies must prepare a regulatory flexibility analysis for any proposed or final rule for which they are required to publish an NPRM unless the head of the agency certifies that the rule will not have a SEISNSE. Under subsection 610(a), agencies are required to publish a plan for the periodic review of agency rules that "have or will have" a SEISNSE. Under subsection 610(c), agencies must publish notices in the Federal Register of rules that they plan to review in the next 12 months that "have" a SEISNSE.

All agencies are not interpreting the subsection 610(c) review requirement in the same manner. For example, EPA officials told us that they interpret the requirement in subsection 610(c) to mean they must review any rule for which the agency prepared a final regulatory flexibility analysis—that is, that had a SEISNSE at the time the final rule was promulgated. Therefore, if EPA issued a final rule on December 31, 1988, that the agency concluded had a SEISNSE and for which it prepared a final regulatory flexibility analysis, the agency would have had to review that rule pursuant to section 610 by December 31, 1998. Alternatively, if EPA issued a rule on December 31, 1988, that it did not believe had a SEISNSE and for which it did not prepare a final regulatory flexibility analysis, the agency would not have to review the rule within 10 years.

However, DOT officials said they interpret the statute's use of the present tense "have" in subsection 610(c) to mean that they must review all rules that have a SEISNSE at the time the agency conducts the review, not rules that had a significant impact years before when they were promulgated. They said a rule that did not have a SEISNSE at the time it was issued might currently have a significant impact due to changes in the regulatory requirements or changes in the external environment. Conversely, a rule that had a SEISNSE at the time of its promulgation may no longer have the same impact. Under this interpretation of section 610, the officials said DOT must review all of its rules within 10 years of their issuance to determine whether they have a SEISNSE at the time of the review. If DOT determines that a rule has a SEISNSE, DOT would then publish a notice of

a section 610 review for those rules, inviting the public to comment on whether the rules should be continued, revised, or eliminated.

The RFA's legislative history does not indicate whether the statute's use of the present tense "have" in subsection 610(c) was intended to require agencies to review all of their rules within 10 years of their issuance, even if the agencies had determined that the rules did not have a SEISNSE at the time they were issued. SBA's Office of Advocacy issued an RFA implementation guide for federal agencies in 1998 to help them determine what is required under the act's provisions, but the Office also noted that the guide "is not the definitive interpretation of the law." However, the guidance does not clarify whether section 610 requires agencies to review rules that had a SEISNSE at the time they were issued or rules that have a SEISNSE at the time of the review. Officials in the Office of Advocacy told us that they had not previously considered this issue, and said either interpretation of section 610 was defensible.

Agencies Offered Different Reasons for No Section 610 Review Entries

It is difficult if not impossible for us to determine which rules an agency should be reviewing pursuant to section 610 of the RFA at a particular point in time. Therefore, we could not determine with certainty whether any of the agencies without section 610 review entries in the April 1998 or November 1998 editions of the Unified Agenda should have had such entries. For example, an agency may not have issued any final rules within the previous 10 years that had a SEISNSE at the time they were published or at the time they were reviewed, depending on which interpretation of section 610 is followed. Alternatively, the agency may have issued final rules with a SEISNSE during that time frame, but published the required review notices elsewhere in the Federal Register during 1998 or at any time after the date the rule was issued. No database exists delineating the rules that agencies issued within the previous 10 years that have or had a SEISNSE or, if so, had already been reviewed. Reviewing thousands of Federal Register notices to determine which rules had a SEISNSE at the time they were issued in more than 50 agencies would require time and resource commitments that were beyond the scope of this review. Determining which rules currently have a SEISNSE would be even more difficult.

Because of these difficulties, we instead attempted to determine which of the more than 50 agencies that had no section 610 review entries in the 1998 editions of the Unified Agenda appeared to develop, propose, or issue rules with a SEISNSE. We asked RISC to identify the agencies that had at least 10 entries in both the April and November editions of the Agenda in which the agencies had indicated that the related rules would have a

SEISNSE. As table 1 shows, RISC indicated that 12 agencies had at least 10 such entries in both editions of the Agenda. Of these 12 agencies, the following 7 had no section 610 review entries in the April and November editions of the Agenda: the Departments of Commerce, HHS, the Interior, and the Treasury; the Federal Communications Commission (FCC); the Securities and Exchange Commission (SEC); and SBA. Three of these 7 agencies (HHS, Treasury, and FCC) had 50 or more entries in both the April 1998 and November 1998 editions of the Agenda that they indicated would have a SEISNSE, but the 3 agencies did not have section 610 review entries in those editions of the Agenda.

Table 1: Twelve Agencies Had at Least 10 Entries With a SEISNSE in the April 1998 and November 1998 Editions of the Unified Agenda

	Number of Unified Agenda entries with a SEISNSE	
Department or agency	April 1998 Unified Agenda	November 1998 Unified Agenda
USDA	67	50
Commerce	**43**	**48**
HHS	**107**	**58**
Interior	**34**	**30**
Justice	27	14
DOL	38	42
DOT	39	33
Treasury	**61**	**64**
EPA	193	21
FCC	**74**	**81**
SBA	**20**	**20**
SEC	**22**	**22**

Note: Bolded agencies had no section 610 review entries in the April 1998 or November 1998 editions of the Unified Agenda.

Source: RISC.

We also reviewed previous editions of the Unified Agenda to determine if the previously mentioned seven agencies had published section 610 review notices. Because agencies did not identify their section 610 reviews with the "Section 610 Review" notation after the entry title until October 1996, our review was limited to the October 1996, April 1997, and October 1997 editions of the Agenda. Of the seven agencies, only SBA had any section 610 review entries—three in the October 1996 edition of the Agenda that were repeated in the April 1997 edition. However, SBA's Chief Counsel for Legislation and Regulation told us during this review that those entries should not be considered section 610 review notices. Therefore, none of these seven agencies had section 610 review entries in the October 1996 through November 1998 editions of the Agenda.

To ensure that the April 1998 and November 1998 editions of the Unified Agenda were not atypical, we also obtained RISC data on how frequently these 7 agencies indicated that the rules related to their entries would have a SEISNSE from 19 previous editions of the Agenda during the previous 10 years: from the fall of 1988 (when agencies first were required to indicate in their entries whether the related rules would have a SEISNSE) to the fall of 1997. As table 2 shows, during the first half of this 10-year period, the Department of the Interior frequently had fewer than 10 entries that met this standard. However, the other 6 agencies almost always had 10 or more such entries, averaging more than 30 Agenda entries each year, in which they indicated that the rules would have a SEISNSE. Therefore, it seems likely that these six agencies would have issued a number of rules during the previous 10 years with a SEISNSE that could have been subject to the section 610 review requirement during 1998.

Table 2: Six Agencies Generally Had at Least 10 Entries With a SEISNSE in Previous Editions of the Unified Agenda

	Number of SEISNSE entries by department or agency						
Unified Agenda edition	Commerce	HHS	Interior	Treasury	SBA	FCC	SEC
Fall 1988	10	41	<10	<10	31	56	17
Spring 1989	17	43	<10	12	32	57	11
Fall 1989	16	51	<10	20	27	54	19
Spring 1990	29	63	<10	56	22	54	19
Fall 1990	32	68	<10	60	34	61	28
Spring 1991	37	70	14	65	43	61	17
Fall 1991	35	84	12	75	50	57	23
Spring 1992	26	70	<10	65	50	51	<10
Fall 1992	39	76	<10	87	56	52	23
Spring 1993	38	91	<10	83	55	56	34
Fall 1993	33	86	12	75	61	48	29
Spring 1994	40	82	25	78	47	45	35
Fall 1994	47	85	27	73	44	47	32
Spring 1995	35	49	18	49	47	48	35
Fall 1995	38	74	23	52	60	43	34
Spring 1996	37	90	30	59	49	65	33
Fall 1996	46	103	22	53	17	75	48
Spring 1997	37	111	20	58	15	68	41
Fall 1997	29	113	32	54	13	70	34

Note: The "<10" character indicates the agency had less than 10 entries with a SEISNSE in that edition of the Unified Agenda.

Source: RISC.

We contacted officials at SBA, Treasury, and HHS to determine why they did not have section 610 review entries in the April 1998 or November 1998 editions of the Unified Agenda (or in the three previous editions) despite consistently having many Agenda entries during the previous 10 years that indicated the related rules had or would have a SEISNSE. SBA's Chief Counsel for Legislation and Regulation told us that SBA had reviewed and

revised all of its rules in the mid-1990s as part of the Clinton Administration's regulatory reform initiative,[8] and she said that effort met the spirit and intent of the section 610 review requirement. As a result of that effort, she said SBA clarified, simplified, and shortened its sections of the Code of Federal Regulations but did not change the substantive requirements of the rules. Because any rules issued after the initiative would have been less than 10 years old in 1998, the Chief Counsel said SBA had no rules with a SEISNSE that required section 610 review announcements in the April 1998 or November 1998 editions of the Agenda. The Chief Counsel said SBA announced its intention to "reinvent" all of its rules in its October 1995 regulatory plan on the basis of public input from meetings with small business owners and trade associations. However, the October 1995 regulatory plan announcement indicated that SBA had already conducted its review and that, as a result, the agency had already decided to reinvent its regulations. Also, SBA subsequently published NPRMs that invited public comments on the results of its review and its decision to rewrite its regulations. Therefore, although SBA believes that it met the spirit of the section 610 review requirement, neither SBA's regulatory plan announcement or these Federal Register notices met the specific requirement of subsection 610(c) of the RFA that the agency publish a list of rules with a SEISNSE that it planned to review in the next 12 months to determine whether they should be continued without change, amended, or rescinded.

Officials from the Department of the Treasury told us that Treasury did not have section 610 review entries in the April 1998 or November 1998 editions of the Unified Agenda because the Department has issued only two final rules during the previous 10 years with a SEISNSE—a rule issued by the Bureau of Alcohol, Tobacco and Firearms (BATF) in 1990 and another BATF rule issued in 1996. They said Treasury announced its intention to review the 1990 rule in the January 10, 1997, edition of the Federal Register.[9] As a result of that review, the officials said Treasury plans to issue proposed amendments to the rule in June 1999. The officials said Treasury has not announced its intention to review the 1996 BATF rule, but said the review will be completed within the 10-year time limit prescribed in section 610.

[8]SBA's initiative was part of a governmentwide initiative by many federal agencies, not just SBA. For an analysis of that initiative, see Regulatory Reform: Agencies' Efforts to Eliminate and Revise Rules Yield Mixed Results (GAO/GGD-98-3, Oct. 2, 1997).

[9]As previously noted, agencies are not required to publish section 610 review notices in the Unified Agenda and the Department of the Treasury did not do so for this action.

Treasury officials said that most of the Department's regulations subject to the RFA do not have a SEISNSE because they generally (1) amend and fine-tune existing rules (and therefore have only an incremental effect, not a "significant" effect on a "substantial number" of small entities) or (2) interpret statutory requirements and do not impose any significant new requirements themselves. The officials said they now realize that Treasury had mischaracterized a number of its Agenda entries during the previous 10 years as involving rules with a SEISNSE. They said some Treasury components thought the "Small Entities Affected" field should be used to indicate rules that had any impact on small entities, not just a SEISNSE (as RISC's instructions indicated).

HHS officials said that the Department issues a number of rules each year that have a SEISNSE (e.g., most of the rules issued by the Health Care Financing Administration). However, they said HHS did not have section 610 review entries in the April 1998 or November 1998 editions of the Unified Agenda because they had not interpreted the guidance to require a separate listing. The officials said they believed that HHS had satisfied the requirements of subsection 610(c) by listing rules to be promulgated or revised in the Unified Agenda and explicitly indicating which of these rules were expected to have a SEISNSE. The HHS officials said they now understand that this interpretation may not have been correct and will make an effort in future editions of the Agenda to delineate which rules they plan to review pursuant to section 610 of the RFA within the succeeding 12 months.

Few Agenda Entries Appeared to Satisfy Subsection 610(c) Requirements

Only a few of the section 610 review entries in the April 1998 and November 1998 editions of the Unified Agenda appeared to satisfy all of the notification requirements of subsection 610(c). As was the case in the two previous editions of the Agenda that we reviewed, the entries frequently indicated that (1) the reviews did not involve rules that would have a SEISNSE or (2) the rules had already been reviewed.

Only Two Entries in the April 1998 Agenda Appeared to Meet Subsection 610(c) Requirements

On January 7, 1998, the OIRA Administrator sent a memorandum to regulatory policy officers at executive departments and agencies describing guidelines and procedures for publishing the April 1998 edition of the Unified Agenda. In the attachment to that memorandum, she repeated the observations in her June 10, 1997, memorandum regarding the use of the Agenda to satisfy the subsection 610(c) requirement. Specifically, she noted that some agencies have chosen to use the Agenda to publish subsection 610(c) notices, and quoted the text of subsection 610(c) in the attachment. She also noted that agencies should include in the entries a description of the rule and the need for the rule, and pointed

out that the agencies' preambles should invite public comment on the rules. Finally, she again noted the issuance of our April 1997 letter on this topic. However, as was the case in the June 1997 memorandum, she did not specifically note that agencies' section 610 entries should involve rules with a SEISNSE and should describe forthcoming reviews, not reviews that the agencies had already completed.

As previously mentioned, the April 1998 edition of the Unified Agenda contained 4,504 entries that were printed on nearly 1,400 pages of the Federal Register. The Agenda's index identified 22 entries from 7 agencies with the "Section 610 Review" notation following the title. We examined these 22 entries and concluded that only 2 of them appeared to satisfy all of the notification requirements in subsection 610(c). In 12 of the entries, the "Small Entities Affected" field was coded "No" (7 entries) or "Undetermined" (5 entries).[10] Because this field was intended to identify rules with a SEISNSE, and because section 610 reviews are, by definition, reviews of existing rules, we concluded that (1) the existing rules being reviewed did not have a SEISNSE (either at the time the rule was issued or at the time of the review) and (2) these entries should not have been identified as subsection 610(c) entries.

Seven of the 10 remaining "Section 610 Review" entries in the April 1998 Unified Agenda did not appear to satisfy the notification requirements in subsection 610(c) because they announced regulatory actions the agencies had taken, were taking, or planned to take (sometimes as a result of a previous review), not a review to determine what actions to take. Therefore, we concluded that these entries did not involve an existing rule that was "to be reviewed" pursuant to section 610 during the succeeding 12 months. These entries included the following examples:

- A USDA Agenda entry indicated that the Department's Agricultural Marketing Service planned to issue a final rule consolidating federal milk marketing orders. The entry indicated that an NPRM was published in January 1998 and that the comment period for the proposed rule ended on March 31, 1998—nearly a month before the "Section 610 Review" entry was published in the April 1998 edition of the Agenda.
- A DOT entry indicated that the Department's Office of the Secretary of Transportation (OST) planned to issue an NPRM in July 1998 regarding its

[10]The agencies indicated that the remaining 10 entries involved rules that would have a significant economic impact on a substantial number of small businesses (5 entries); businesses and governments (2 entries); businesses and other organizations (1 entry); or businesses, governments, and other organizations (2 entries).

drug and alcohol procedural rules "that will not include major substantive changes to how we test but rather to update and clarify provisions of the rules." The entry also noted that the comment period for a previously published advance notice of proposed rulemaking (ANPRM) that announced the review had ended in July 1996.

- Another DOT/OST entry indicated that the Department was reexamining its regulations on computer reservation systems to "see whether they should be readopted and, if so, whether they should be changed." However, the entry indicated that the extended comment period for the ANPRM announcing the review had ended in February 1998, and that an NPRM was planned in April 1998.
- Another entry indicated that DOT's Research and Special Programs Administration (RSPA) planned to issue a proposed rule in September 1998 amending the Hazardous Materials Regulations in several specific ways. For example, the entry said RSPA would (1) provide for the manufacture of compressed gas cylinders to certain new DOT specifications; (2) revise requirements applicable to the maintenance, requalification, and repair of all DOT specification cylinders; and (3) simplify the requirements for filling cylinders. Although the entry said that a small entities review under section 610 would be included as part of this action, the entry indicated that the agency had already decided what actions it would take and was not soliciting public comments to determine whether the existing rule should be continued, eliminated, or revised.
- An FTC entry indicated that the agency was conducting a review of a rule related to imitation political and imitation numismatic items, and that it had requested comments on the rule "with particular emphasis on the effect on small businesses." However, the entry also indicated that the comment period for the review ended on May 27, 1997—11 months before the date this "Section 610 Review" notice was printed in the Agenda.

One of the three remaining "Section 610 Review" entries in the April 1998 Unified Agenda did not appear to satisfy the subsection 610(c) requirement that the agency describe the rule to be reviewed and state why it was needed. The Federal Reserve System indicated in one of its Agenda entries that it was reviewing its regulations in response to the requirements of section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994. The entry also indicated that the Board was reviewing "Regulation B, Equal Credit Opportunity" and "Regulation Z, Truth in Lending." However, the entry did not otherwise describe these regulations or explain why they were needed.

The two remaining entries—one each from DOL and EPA—appeared to satisfy all of the subsection 610(c) notification requirements. For example, the EPA entry indicated that the agency was initiating a review of its 1988 rule on standards of performance limiting emissions of particulate matter from new residential wood heaters. EPA said the review would be completed by March 1999 and was intended to "determine if the rule should be continued without change, or should be amended or rescinded, to minimize adverse economic impacts on small entities." EPA also described why the rule was necessary (wood heaters were said to cause or contribute significantly to air pollution) and said that it had determined that the rule would have a significant impact on a substantial number of small entities. Finally, EPA said that it was soliciting comments on a number of factors, including the rule's complexity, overlap with other rules, and the degree to which technology or other factors have changed.

Only One of the November 1998 Agenda Entries Appeared to Satisfy Subsection 610(c) Requirements

On July 8, 1998, the Acting Administrator of OIRA sent a memorandum to regulatory policy officers at executive departments and agencies describing guidelines and procedures for publishing what eventually became the November 1998 edition of the Unified Agenda. In the memorandum attachment, he repeated the observations in OIRA's June 1997 and January 1998 memorandums regarding the use of the Agenda to satisfy the subsection 610(c) requirement. Although the memorandum referenced our April 1997 report, it did not specifically note that agencies' section 610 entries should involve rules with a SEISNSE and should describe forthcoming reviews, not reviews that the agencies had already completed.

As previously mentioned, the November 1998 edition of the Unified Agenda contained 4,560 entries that were printed on nearly 1,400 pages of the Federal Register. We identified 31 entries from 8 agencies with the "Section 610 Review" or "Section 610 Rule" notation after the title. We examined these 31 entries and concluded that only 1 of them appeared to satisfy all of the notification requirements in subsection 610(c). In 24 of the entries, the "Regulatory Flexibility Analysis Required" field was coded "No" (17 entries) or "Undetermined" (7 entries).[11] Because this field was intended to identify rules with a SEISNSE, and because section 610 reviews are, by definition, reviews of existing rules, we concluded that (1) the existing rules being reviewed did not have a SEISNSE (either at the

[11]The agencies indicated that the other entries involved rules that would have a significant economic impact on a substantial number of small businesses (2 entries); businesses and governments (1 entry); businesses and other organizations (1 entry); or businesses, governments, and other organizations (2 entries). EPA indicated in one of its entries that the rule would affect small entities, but did not indicate what type(s) of entities would be affected.

time the final rules were published or at the time of the review) and (2) the entries should not have been identified as subsection 610(c) entries.

Six of the seven remaining "Section 610 Review" entries in the November 1998 Unified Agenda did not appear to satisfy the notification requirements in subsection 610(c) because they did not involve an existing rule that was to be reviewed pursuant to section 610 during the succeeding 12 months. These entries announced regulatory actions the agencies had taken, were taking, or planned to take, not a review to determine what actions to take, and included the following examples:

- A USDA section 610 review entry indicated that the Department's Agricultural Marketing Service would be issuing a final rule consolidating federal milk marketing orders. The entry was exactly the same as it was in the April 1998 edition of the Agenda except that the November entry indicated the comment period for the proposed rule ended on April 30, 1998, not March 31, 1998.
- Similarly, an FTC section 610 review entry updated an April 1998 entry on imitation numismatic and imitation political items, noting that the Commission had completed its review of the rule and took final action on July 7, 1998—more than 4 months before the publication of the November 1998 edition of the Agenda.
- A Department of Justice entry indicated that the Department's Immigration and Naturalization Service (INS) was planning to issue a final rule implementing a section in the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) that requires a reduction in the number of documents that may be accepted in the employment verification process. The entry stated that INS had published the proposed rule in February 1998, and that the comment period for the proposal closed in April 1998. The entry also said that INS was conducting a section 610 review "in conjunction with IIRIRA implementation." However, section 610 reviews are intended to focus on existing rules, not rules that are in the process of being promulgated.

The remaining entry was EPA's update of its April 1998 announcement of a review of its standards of performance limiting emissions of particulate matter from new residential wood heaters. As was true of its April 1998 announcement, the entry appeared to satisfy all of the subsection 610(c) notification requirements. The entry indicated that EPA was initiating a review of the rule under section 610 of the RFA to determine whether it should be continued, amended, or rescinded and again indicated that the review would be completed in March 1999. Although the entry's

"Regulatory Flexibility Analysis Required" field was coded "No," the abstract portion of the entry said that EPA had performed the analysis and determined that the rule would have a significant impact on a substantial number of small entities.

EPA and DOT Officials Said Section 610 Entries Were Appropriate

We discussed our findings regarding the previous objective with officials in EPA and DOT—the two agencies that had the most section 610 review entries in the April 1998 and November 1998 editions of the Unified Agenda. These agencies' efforts are noteworthy in that their entries indicate an attempt to review their existing rules with a SEISNSE as required by the RFA. However, these agencies also had the most entries that we determined had been incorrectly labeled as section 610 reviews. Officials in both agencies said they used some of their section 610 review entries to inform the public about the results of previously conducted reviews. Although the intent behind this effort is laudable, labeling these entries as section 610 reviews is inconsistent with OIRA's guidance and RISC's instructions and could lead to misinterpretation by the public. The officials also said that they viewed certain fields in the Agendas differently than we did, but RISC's instructions are not clear regarding how these fields should be completed.

Agencies' Officials Said They Attempted to Inform Public of Results of Reviews

Officials in both EPA and DOT said that they did not view the "Section 610 Review" notations after the titles of their entries or the section 610 review indexes in both editions of the Unified Agenda as being limited to the announcements of forthcoming reviews. They said they also used the notations and the indexes to indicate the results of reviews that had already been completed, thereby "closing the loop" and allowing the public to determine whether previously announced reviews had led to a subsequent regulatory action (e.g., a proposed or final rule) or no change in the underlying requirement. They also said that their entries make clear which entries announce reviews in advance and which entries carry out the agency's practice of informing the public that a previously announced review is complete. DOT officials said the RFA does not preclude conducting a section 610 review after an agency announces its plans to issue, or after issuing, an NPRM. In fact, they said a section 610 review can be very effective at this stage. They said it was RISC that decided to characterize entries with the "Section 610 Review" notation after the titles as subsection 610(c) notices, and that RISC's instructions do not preclude using these entries to describe the results of previous reviews. They also said that the preamble to their section of the Agenda says that their agenda "includes those regulations to be reviewed under the RFA or those for which review has been concluded since the last agenda." Similarly, EPA

officials said RISC's approach of indexing announcements of both EPA's forthcoming and completed reviews together has created confusion.

Although EPA's and DOT's intent to keep the public informed about the results of previously conducted section 610 reviews is laudable, that approach is not consistent with RISC's instructions in the front of the April 1998 and November 1998 editions of the Unified Agenda. RISC's instructions clearly stated that "[t]he notation 'Section 610 Review' following the title indicates that the agency has selected the rule for its periodic review of existing rules under the Regulatory Flexibility Act (5 U.S.C. 610[c])." Subsection 610(c) of the RFA requires agencies to publish a list of rules "which are to be reviewed." Also, the introduction to the section 610 indexes in these Agenda editions said an agency that uses the "Section 610 Review" notation after the titles of certain entries indicates "the rules that it plans to review in the next year." The introduction also said, "the following index lists the regulatory actions for which agencies included this designation." RISC has used the same approach in its instructions and in the introduction to the index in several editions of the Agenda. Also, OIRA's June 1997, January 1998, and June 1998 memorandum attachments describing guidelines and procedures for publishing the Unified Agenda have similarly indicated that "Section 610 Review" entries would be used to identify "rules that your agency has selected for review under section 610(c)." Therefore, DOT and EPA should have been aware of how the "Section 610 Review" notation would be interpreted.

On the basis of RISC's instructions, the introduction to the section 610 review index in the Unified Agenda, and the statute, a member of the public could reasonably assume that entries with the "Section 610 Review" notation after the title and the section 610 index in the back of the Unified Agenda would identify forthcoming reviews on which the public could comment regarding whether the underlying rule should be continued without change, amended, or eliminated. We made the same assumption when we reviewed the April 1998 and November 1998 editions of the Agenda, as well as when we reviewed the October 1996 and November 1997 editions of the Agenda. However, many of the agencies' section 610 review entries appeared to indicate that the agencies had already determined whether the underlying rule should be continued, amended, or eliminated. As a result, we concluded that many of the agencies' section 610 review entries were incorrectly labeled and did not meet the requirements of the statute.

Agency Officials Said They Identified Effect of Actions Being Announced, Not Underlying Rules

In the April 1998 edition of the Unified Agenda, agencies were required to complete a field within each entry entitled "Small Entities Affected." RISC's introduction to the Agenda said this field indicated "whether the rule is expected to have a significant economic impact on a substantial number of 'small entities' as defined by the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) and, if so, whether the small entities are businesses, governmental jurisdictions, or organizations." In the November 1998 edition of the Agenda, agencies had to complete a field entitled "Regulatory Flexibility Analysis Required," which the RISC instructions said indicated whether an analysis is required by the RFA because "the rule" is likely to have a SEISNSE.

EPA and DOT officials said they did not view the "Small Entities Affected" or the "Regulatory Flexibility Analysis Required" fields as referring to the underlying rule on which the agencies' section 610 reviews were conducted. They viewed these fields as referring to whatever regulatory action was being announced by the Unified Agenda entry. Therefore, if an entry announced a forthcoming review of an existing rule, they said the "Small Entities Affected" or "Regulatory Flexibility Analysis Required" field within that entry referred to the review being conducted. However, DOT officials said that because the RFA does not require a regulatory flexibility analysis at the review stage, the Agenda should allow agencies a "not applicable" response.

Neither RISC's instructions in the Unified Agendas nor OIRA's memorandums instructing agencies on how the Agendas should be prepared were clear regarding how these fields should be completed. Nevertheless, DOT and EPA's interpretation of this field is confusing when taken in combination with the agencies' characterization of these entries as announcing section 610 reviews. A section 610 review is, by definition, a review of an existing rule that has or had a SEISNSE. A notice under subsection 610(c) identifies an existing rule with a SEISNSE that the agency intends to review within the next 12 months. However, many of the EPA and DOT entries that were characterized as section 610 reviews were also characterized as either not having a SEISNSE or having an "Undetermined" impact on small entities. As a result, we concluded that these entries did not meet the requirements of subsection 610(c).

DOT Updated Its 1981 Review Plan

Subsection 610(a) of the RFA required agencies to publish a plan in the Federal Register for the review of rules issued by the agencies that "have or will have" a SEISNSE. The statute says the plan must provide for the review of all such rules "existing on the effective date of this chapter" (Jan. 1, 1981) within 10 years of that date and for the review of such rules

adopted after the effective date within 10 years of their publication as final rules. A congressional review of agencies' actions regarding this requirement indicated that nearly all of the major agencies had established these review plans. The statute says that the plans "may be amended by the agency at any time by publishing the revision in the Federal Register," but it does not require such amendments.

Our review of the April 1998 and November 1998 editions of the Unified Agenda and our discussions with officials from RISC and OIRA indicated that one agency—DOT—had updated its review plan. DOT published its original plan on June 29, 1981, and published an updated plan in the preamble to its agenda in the November 1998 edition of the Agenda.[12] DOT said it updated the plan "to accomplish a more systematic review of all of its regulations." DOT officials told us that the update reflects their understanding of how the RFA should be interpreted—that is, that the RFA calls for a review of all agency rules issued within the past 10 years that "have" a SEISNSE.

In the updated plan, DOT said that its OST and all but one of the Department's operating administrations (e.g., the Federal Aviation Administration, Coast Guard, and the National Highway Traffic Safety Administration) developed a plan for the analysis and review of all their rules between 1998 and 2008, although some administrations with smaller regulatory programs expected to complete the reviews in less than 10 years. Generally, the agencies divided their rules into 10 different groups and planned to analyze 1 group each year, requesting public comment on the timing of the reviews. The analysis is to first determine whether any rule published in the previous 10 years has a SEISNSE, and the results of the reviews will be published in each October's Unified Agenda. For any rules that have a SEISNSE, DOT plans to indicate that it will do a section 610 review to determine whether the impact of the rules can be lessened and will describe the review in detail.

EPA officials said they do not believe that their 1981 review plan needs to be updated. They said they understand the RFA to require review of all rules that had a SEISNSE at the time the final rule was promulgated, and that their plan reflects that understanding. They also noted that the RFA does not require agencies to update their review plans.

Conclusions

Only a few agencies had any entries in the April 1998 and November 1998 editions of the Unified Agenda that they characterized as section 610

[12]For a copy of the plan, see 63 FR 62030.

reviews. Our analysis of previous editions of the Agenda indicated that some of the agencies that did not have section 610 entries appeared to engage in rulemaking with a SEISNSE and therefore could be subject to the review requirements. However, it is impossible to know whether certain rules issued within the past 10 years with a SEISNSE still remain to be reviewed. Agencies differ regarding which rules need to be reviewed—those that had a SEISNSE at the time they were published as final rules or those that have a SEISNSE at the time of the review. Also, no data are readily available to identify which rules should be reviewed or have already been reviewed.

For several years, RISC's instructions in the front of the Unified Agenda, its introduction to the Agenda's section 610 index, and OIRA's guidelines have indicated that entries with "Section 610 Review" notations after the titles will be viewed as announcements of forthcoming reviews of existing rules on which the public can comment. However, RISC's and OIRA's instructions have not prevented some Agenda entries from being incorrectly labeled as section 610 reviews even though those entries did not meet the requirements of subsection 610(c).

We do not believe that the agencies intentionally attempted to mislead the public. Part of the problem appears to be that some agencies want to inform the public about the results of previously conducted section 610 reviews. Although this intent is laudable, it contributes to confusion regarding which of the agencies' "Section 610 Review" entries are actually subsection 610(c) notices of forthcoming reviews on which the public can comment. Also, RISC instructions are unclear regarding whether the "Regulatory Flexibility Analysis Required" field within the entries refers to the underlying rule being reviewed or to the action described in the entry (e.g., the section 610 review itself).

Matter for Congressional Consideration

If Congress is concerned that section 610 of the RFA has been subject to varying interpretations, it may wish to consider specifying whether section 610 reviews should be done of rules that had a SEISNSE at the time they were published as final rules or whether such reviews should be done of rules that, at the time of the review, have a SEISNSE.

Recommendations

In fulfilling his responsibilities under Executive Order 12866 to specify how agencies should prepare their agendas, we recommend that the Acting OIRA Administrator instruct agencies that choose to use the Unified Agenda to satisfy the requirements of subsection 610(c) of the RFA on how to do so. Specifically, the Acting OIRA Administrator should require agencies to indicate in the notation after the entry titles whether their

section 610 review entries are forthcoming reviews (e.g., with the notation "New Section 610 Review") or report the results of previously conducted reviews (e.g., with the notation "Results of Section 610 Review").

We also recommend that the Acting Executive Director of RISC reflect this difference between forthcoming and completed section 610 reviews in the Unified Agenda's index to entries that agencies have designated for section 610 review. Finally, we recommend that the Acting Executive Director clarify whether the "Regulatory Flexibility Analysis Required" field in a section 610 review entry refers to the underlying rule being reviewed or to the effect of the review itself.

Agency Comments and Our Evaluation

On March 8, 1999, we sent a draft of this report to the Director of OMB and the Acting Executive Director of RISC for their review and comment. On March 16, 1999, the Acting Administrator of OIRA provided OMB's comments on the draft report. He said that he agreed with the concerns we raised in the report, and he also said OIRA is working with RISC and the agencies so that the format of the Unified Agenda more clearly differentiates between the subsection 610(c) notices and the results of section 610 reviews.

On March 16, 1999, the Acting Executive Director of RISC provided written comments on the draft report, which are reproduced in appendix I. The Acting Executive Director agreed with our first recommendation that the Unified Agenda's index reflect the difference between forthcoming and completed section 610 reviews. He suggested creating a separate field within each agenda entry showing whether the entry is a section 610 review or the result of a previously completed review. We believe this approach would address the underlying problem that we identified. The RISC Acting Executive Director also agreed with our second recommendation that he clarify whether the "Regulatory Flexibility Analysis Required" field in a section 610 review entry refers to the underlying rule being reviewed or to the effect of the review itself. He proposed adding a general statement in the data call guidelines, the instructions for submitting data, and the RISC preamble that the information agencies provide in the Unified Agenda applies to the activity being reported and not the underlying rule being reviewed or amended. Again, we believe this approach would address the underlying problem we identified.

On March 8, 1999, we also provided relevant portions of the draft report to officials in the Departments of HHS, Transportation, and the Treasury; EPA; and SBA for their review and comment. Each of the agencies

provided suggestions to clarify particular sections of the report, which we included in this report as appropriate. DOT officials offered a number of substantive comments clarifying and elaborating their position regarding the RFA's requirements, which we incorporated as appropriate. For example, we noted that DOT believes the RFA does not preclude conducting a section 610 review after announcing its plans to issue, or after issuing, an NPRM. We also added a sentence indicating that we did not believe that the agencies intentionally misled the public regarding the nature of their section 610 review announcements. After reviewing those changes, the DOT officials said they agreed with the need to clarify how the Unified Agenda should be used to reflect section 610 reviews, but had no further comment. Officials in HHS, Treasury, and SBA generally agreed with our characterizations of their section 610 review actions in the draft report.

The Director of EPA's Office of Regulatory Management and Information provided written comments on the draft report, which are reproduced in appendix II. The Director said our report documented that the requirements of section 610 are open to several legitimate interpretations, and that members of the public could be confused by the "distinct and mutually inconsistent compliance procedures" that agencies have established. He said the report reflects the elements of EPA's implementation of section 610, and he also said EPA agreed with its general thrust that agencies need more consistent guidance and coordination. Specifically, he said EPA (1) agrees with the recommendation that RISC clarify the Agenda's instructions concerning labeling of section 610 reviews and (2) favors creating a new index that would identify certain actions as the "Results of Section 610 Reviews." He said RISC's current indexing procedure creates confusion by mixing forthcoming and completed reviews together without distinguishing them from one another.

Regarding our second recommendation, the Director said a section 610 review is not a regulation and therefore cannot have a SEISNSE. Nevertheless, he said EPA would welcome a consistent policy from RISC on whether the "Regulatory Flexibility Analysis Required" field refers to the current action or the underlying rule.

However, the Director said he was concerned that relevant context is missing from the discussion of many of EPA's actions that would fundamentally alter the reader's evaluation of EPA's procedures. He said EPA's entries make clear which ones comply with the agency's responsibility to announce section 610 reviews in advance and which ones

carry out the agency's practice of informing the public that a previously announced review is complete. He suggested (1) editing the draft report to eliminate "potentially misleading statements" that make it appear that EPA makes unsubstantiated claims about its compliance with section 610 and (2) eliminating EPA's announcements of completed reviews from our count of announcements of forthcoming reviews that comply with the statute. He suggested that we recommend procedures to identify rulemakings that are developed as a result of section 610 reviews or to restrict such notations.

We agree that the text of EPA's entries indicated that the agency had completed its reviews. However, the "Section 610 Review" notations after the titles of those entries and the placement of those entries in an index of subsection 610(c) notice entries also indicated that EPA was announcing forthcoming reviews. RISC and OIRA notified EPA and the other agencies that any entries with "Section 610 Review" after the title and entries in the Agenda's section 610 review index would be regarded as subsection 610(c) notices.[13] Therefore, EPA and the other agencies should have been aware that these "Section 610 Review" entries could be interpreted as announcements of forthcoming reviews. We do not believe that EPA or the other agencies intended to mislead the public regarding these reviews, and we have added a statement to that effect in our conclusions in the final report. We also more clearly reflected EPA's position regarding these issues, but did not change our count of announcements of forthcoming reviews that comply with the statute.

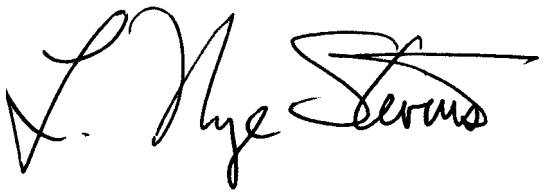
As agreed, unless you announce the contents of this report earlier, we plan no further distribution until 30 days from the date of this letter. At that time, we will send copies of this report to Senator John F. Kerry, Ranking Minority Member of this Committee; and Representative James M. Talent, Chairman, and Representative Nydia M. Velazquez, Ranking Minority Member, House Committee on Small Business. We are also sending copies to the Honorable Jacob Lew, Director of OMB; the Honorable Donna E. Shalala, Secretary of HHS; the Honorable Rodney E. Slater, Secretary of

[13]For example, OIRA's June 1997, January 1998, and June 1998 memorandum attachments describing guidelines and procedures for publishing the Unified Agenda indicated that "Section 610 Review" entries would be used to identify "rules that your agency has selected for review under section 610(c)." For several editions of the Agenda, RISC's instructions in the front of the Agendas clearly stated that "[t]he notation 'Section 610 Review' following the title indicates that the agency has selected the rule for its periodic review of existing rules under the Regulatory Flexibility Act (5 U.S.C. 610[c])." Subsection 610(c) of the RFA requires agencies to publish a list of rules "which are to be reviewed." Also, the introduction to the section 610 indexes in these Agenda editions said an agency that uses the "Section 610 Review" notation after the titles of certain entries indicates "the rules that it plans to review in the next year." The introduction also said, "the following index lists the regulatory actions for which agencies included this designation."

Transportation; the Honorable Robert E. Rubin, Secretary of the Treasury; the Honorable Carol M. Browner, Administrator of EPA; the Honorable Aida Alvarez, Administrator, SBA; and Ronald C. Kelly, Acting Executive Director, RISC. We will make copies available to others on request.

Major contributors to this report were Curtis Copeland, Assistant Director; Theresa Roberson, Evaluator-in-Charge; and Alan N. Belkin, Assistant General Counsel. Please contact me at (202) 512-8676 if you or your staff have any questions.

Sincerely yours,



L. Nye Stevens
Director
Federal Management
and Workforce Issues

Contents

Abbreviations

ANPRM	Advance Notice of Proposed Rulemaking
DOL	Department of Labor
DOT	Department of Transportation
EPA	Environmental Protection Agency
FCC	Federal Communications Commission
FTC	Federal Trade Commission
HHS	Department of Health and Human Services
IIRIRA	Illegal Immigration Reform and Immigration Responsibility Act of 1996
INS	Immigration and Naturalization Service
NPRM	Notice of Proposed Rulemaking
OIRA	Office of Information and Regulatory Affairs
OST	Office of the Secretary of Transportation
RFA	Regulatory Flexibility Act
RISC	Regulatory Information Service Center
RSPA	Research and Special Programs Administration (Transportation)
SBA	Small Business Administration
SEISNSE	Significant Economic Impact on a Substantial Number of Small Entities

Comments From the Regulatory Information Service Center

REGULATORY INFORMATION SERVICE CENTER
General Services Administration
18th and F Streets, NW.
Suite 3033
Washington, DC 20405

MAR 16 1999

L. Nye Stevens
Director
Federal Management and Workforce Issues
United States General Accounting Office
Washington, DC 20548

Dear Mr. Stevens:

Thank you for the opportunity to comment on the draft of the GAO Report on Agencies' Interpretations of Review Requirements of the Regulatory Flexibility Act. Our comments will address your two recommendations that suggest actions the Regulatory Information Service Center (RISC) should take.

Your first recommendation states, "We also recommend that the Acting Executive Director of RISC reflect this difference between forthcoming and completed section 610 reviews in the Unified Agenda's index to entries that agencies have designated for section 610 review. For example, RISC could create two sections in the index, one for entries designating rules the agencies plan to review in the next 12 months and another for entries reflecting the results or status of previously announced reviews."

We agree that it would be helpful to differentiate between forthcoming or current reviews and completed reviews if agencies are going to continue reporting follow-on actions under the 610 review heading. The idea of creating a separate index or partitioning the 610 review index creates problems for RISC. We are already concerned about the proliferation of indices (currently five) in the Unified Agenda. We would resist adding another index. Partitioning the current index is more workable. However, from the viewpoint of a Unified Agenda reader, having two separate sections of the index for the same agency may be confusing and could result in the reader missing the second section of the index. We believe the following will satisfy GAO's recommendation as well as RISC's concerns about the Unified Agenda structure and the reader's understanding of what is being reported:

1) Create a separate 610 field which asks whether an entry is a 610 review or the result of a previously completed 610 review.
2) If the answer is YES and the entry is in the prerule stage, the computer will append to the title **(Section 610 Review)**.
3) If the answer is YES and the entry is in a stage other than prerule, the computer will append to the title **(Result of a Completed Section 610 Review)**.
4) The index for 610 reviews will contain the above parenthetical notations and the index will be moved to the front of the index section of the Unified Agenda.

5) Instructions for completing the 610 field will include:
   a) A description of the requirements of section 610 (c);
   b) A statement indicating that "some agencies have elected to continue reporting the results of previously completed 610 reviews throughout the subsequent rulemaking. If you choose this option, then see 3 above.

Your second recommendation states, "Finally, we recommend that the Acting Executive Director clarify whether the "Regulatory Flexibility Analysis Required" field in a section 610 review entry refers to the underlying rule being reviewed or to the effect of the review itself."

We agree that there should be a clear understanding of what is being reported in the Unified Agenda so that agencies can provide the appropriate information and so that readers will know the basis for the information being reported. To accomplish this we propose to add a general statement in the data call guidelines, in the instructions for submitting data, and in the RISC Preamble that the information agencies provide in the Unified Agenda applies to the current Agenda activity being reported and not the underlying rule in the CFR being reviewed or amended.

We trust that these actions on RISC's part will satisfactorily address what the draft GAO report identifies as shortcomings in the reporting of 610 reviews in the Unified Agenda. If you have any questions, please feel free to contact us.

Sincerely,

Ronald C. Kelly

Ronald C. Kelly
Acting Executive Director

Comments From the U.S. Environmental Protection Agency

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 16 1999

OFFICE OF
POLICY, PLANNING AND EVALUATION

Mr. L. Nye Stevens, Director
Federal Management and Workforce Issues
U.S. General Accounting Office
Washington, DC 20548

Dear Mr. Stevens,

Thank you for the opportunity to comment on your draft report on implementation of section 610 of the Regulatory Flexibility Act. The value of your report is evident in its documentation that the requirements of Section 610 are open to several legitimate interpretations. Since agencies have set up distinct and mutually inconsistent compliance procedures, it is certainly possible that the members of the public could be confused when informing themselves of Section 610 actions compiled in the Federal Register.

Before offering specific comments on the report, I want to outline EPA's approach to Section 610 compliance. We believe it is simple, sensible, and goes well beyond the strict requirements of the statute in offering the public full information about our activities under this section of the Regulatory Flexibility Act. It is only with clear knowledge of our current practice that one might appreciate our concern that straightforward procedures to fully inform the public might be construed instead as misleading.

Under Section 610 EPA reviews existing rules for which the Agency performed a Final Regulatory Flexibility Analysis. We announce each review that will take place in the succeeding twelve months in the Pre-Rule Section of the Regulatory Agenda. The review is a study, not a regulation. We therefore indicate in the required check-box that the action does not impose a significant impact on a substantial number of small entities (SISNOSE). On the other hand, the existing rule we will review is subject to the Regulatory Flexibility Act by definition, since it is specifically for that reason it is selected for review under the terms of Section 610. Although the statute does not require agencies to announce the results of its completed Section 610 reviews, EPA does this routinely. We publish a notice in the Completed Rules section of the Federal Register to explain what we have learned and what we intend to do as a result of a just-completed review. To ensure the public can relate this announcement to the Section 610 process, we label these entries "Completed 610 Reviews."

Your report shows that confusion arises if one reads EPA's checkmarks as referring to the underlying rule, rather than the 610 Review itself. Further confusion ensues because the Regulatory Information Service Center (RISC) bases its index of Section 610 reviews on the titles of entries, and not on their location. For this reason the Regulatory Agenda has indexed announcements of both EPA's

forthcoming and completed reviews together without distinguishing them from one another. While your report points out the potential for misleading the public through such double-counting, I believe it is important to emphasize that it is the indexing procedure that creates the confusion. The titles and text of EPA's Federal Register entries make perfectly clear which entries comply with our statutory responsibility to announce reviews in advance, and which carry out our practice of informing the public that a previously announced review is now complete.

Overall, the report does reflect the elements of EPA's implementation of section 610, and we agree with its general thrust that agencies need more consistent guidance and coordination if we are to avoid confusion arising from even the best-intended practices. We are concerned, however, that relevant context is missing from the discussion of many of EPA's actions that would, we think, fundamentally alter the reader's evaluation of EPA's procedures. At the risk of repeating myself from time to time, I offer more detailed comments below with reference to specific statements from the report.

When we identify completed 610 reviews in the "Completed Actions" section of the Agenda, there is no intent to achieve anything other than informing the public of the results of our review. We were not trying to "legitimately claim" that we are complying with 610 requirements by so doing (*see* page 21). The report makes no mention that the content of the Completed Action entry references the original Pre-rule announcement and leaves no doubt about our intent to communicate the results of a completed 610 review, which we had initiated in a prior Regulatory Agenda. In the absence of this context, the report makes it appear that we make unsubstantiated claims about our compliance. We suggest that you:

- edit the report to eliminate these potentially misleading statements; and
- eliminate EPA's announcements of completed reviews from your count of announcements of forthcoming reviews that comply with the statute. EPA knows post-hoc announcements are not required by statute, and we do not claim 610 compliance credit for them.

As a result of this confusion, we agree with the recommendation that RISC clarify Regulatory Agenda instructions concerning appropriate labeling of section 610 reviews. We specifically favor creating a new index that would identify certain actions as "Results of Section 610 Reviews." Further, the report suggests that if the current "610 Review" notation can be used to characterize the results of a review when announced in the Completed Action Section, the notation might also designate proposed and final rules resulting from a completed review. The report worries that the use of this notation might give rise to an "illegitimate claim" to compliance with the statute. While the intent of this observation may be to argue against the use of the term "610 Review" anywhere other than in the Prerule section, there is no recommendation addressing the issue. Again, we believe that if the appearance of an "illegitimate claim" arises in the indexing process, and not in the agency's actions, it should be a fairly simple matter to adjust the index. In the spirit of public information, you may want to recommend procedures for appropriately identifying rulemakings that are developed as a result of 610 reviews. Or, alternatively, be specific about restricting such notations. Except for our desire to inform the public that certain actions proceed from the proper performance of 610 reviews, EPA has no substantive opinion on the matter and could abide with either decision.

Our second comment involves GAO's conclusion that many of our entries do not comply with section 610 requirements because we did not indicate the rule had a SISNOSE in the entry (*see* page 8). We believe this is an incorrect standard because "rule" in this context is synonymous with "action." The action being announced is not a regulation, but a review, and therefore cannot conceivably have a

SISNOSE. In truth, we may have contributed to this issue because in a few instances we checked the action as "undetermined" instead of "no" with respect to SISNOSE. I believe this reflected uncertainty by some EPA program personnel as to whether the results of the review might lead to changes in the regulation under review. I regret we did not correct even this minor error in editing entries for submission to RISC. I trust you will agree it is a slim basis for a finding of non-compliance with Section 610 requirements. We would welcome a consistent policy from RISC on whether the "Regulatory Flexibility Required" field in a 610 entry refers to the current action or the underlying rule. EPA will be glad to follow whatever consistent guidance is given. In the absence of such guidance, we believe EPA's interpretation is permissible and should not be the basis for a conclusion of "non-compliance."

Finally, in the discussion of our wood heaters 610 review (*see* page 20), we suggest you place in context the "inconsistency" you note concerning the need for a Regulatory Flexibility Analysis. EPA's responses were consistent with our understanding that the underlying rule had a SISNOSE while the 610 review did not.

Again, thank you for the opportunity to review the draft, and we look forward to your final report.

Sincerely,

for Paul Gilly

Tom Kelly, Director
Office of Regulatory Management
and Information

Ordering Information

The first copy of each GAO report and testimony is free. Additional copies are $2 each. Orders should be sent to the following address, accompanied by a check or money order made out to the Superintendent of Documents, when necessary. VISA and MasterCard credit cards are accepted, also. Orders for 100 or more copies to be mailed to a single address are discounted 25 percent.

Order by mail:

U.S. General Accounting Office
P.O. Box 37050
Washington, DC 20013

or visit:

Room 1100
700 4th St. NW (corner of 4th and G Sts. NW)
U.S. General Accounting Office
Washington, DC

Orders may also be placed by calling (202) 512-6000 or by using fax number (202) 512-6061, or TDD (202) 512-2537.

Each day, GAO issues a list of newly available reports and testimony. To receive facsimile copies of the daily list or any list from the past 30 days, please call (202) 512-6000 using a touch-tone phone. A recorded menu will provide information on how to obtain these lists.

For information on how to access GAO reports on the INTERNET, send e-mail message with "info" in the body to:

info@www.gao.gov

or visit GAO's World Wide Web Home Page at:

http://www.gao.gov

PRINTED ON RECYCLED PAPER

United States
General Accounting Office
Washington, D.C. 20548-0001

Bulk Rate
Postage & Fees Paid
GAO
Permit No. G100

Official Business
Penalty for Private Use $300

Address Correction Requested

(410411)