

# **WILLFUL BLINDNESS: FEDERAL AGENCIES' FAILURE TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT'S PERIODIC REVIEW REQUIREMENT—AND CURRENT PROPOSALS TO INVIGORATE THE ACT**

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## **I. INTRODUCTION**

We live in the age of the bureaucracy. Whether we realize it or not, federal agencies regulate every aspect of our daily lives, including: the cloth in our beds;<sup>1</sup> the fuel for our cars;<sup>2</sup> the way we are paid;<sup>3</sup> and the ingredients in the food we eat.<sup>4</sup> The federal administrative system has the power to dictate to American business how things are done and officials have not hesitated to exercise their power. Recognizing that this wide-ranging power comes with responsibility, Congress passed the Regulatory Flexibility Act (RFA) in 1980<sup>5</sup> to ensure that regulators take into account the individual rights of ordinary small businessmen and women while achieving the policy goals that the legislature has dictated. One of the ways the RFA did this was through section 610, which requires federal agencies to periodically review existing rules and consider reducing the regulatory burden on small business.

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1. *See, e.g.*, Standard for the Flammability (Open Flame) of Mattress Sets, 71 Fed. Reg. 13,472 (Mar. 15, 2006) (to be codified at 16 C.F.R. pt. 1633).

2. *See, e.g.*, Control of Air Pollution From New Motor Vehicles: Tier 2 Motor Vehicle Emissions Standards and Gasoline Sulfur Control Requirements, 65 Fed. Reg. 6,698 (Feb. 10, 2000) (to be codified at 40 C.F.R. pts. 80, 85, 86).

3. *See, e.g.*, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541).

4. *See, e.g.*, Hazard Analysis and Critical Control Point (HACCP); Procedures for the Safe and Sanitary Processing and Importing of Juice, 66 Fed. Reg. 6,138 (Jan. 19, 2001) (to be codified at 21 C.F.R. pt. 120).

5. Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164 (1981) (codified at 5 U.S.C. §§ 601-612), *amended* by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996).

Unfortunately, over the past twenty-five years, federal regulators have often ignored section 610 and have not conducted periodic reviews of their rules. Even those agencies which review some of their existing rules under section 610 rarely act in response to their reviews. Most of these agencies comply with the letter of the law for only a small percentage of their rules, and they rarely take action beyond publishing a brief notice in the *Federal Register*. Ironically, when regulators conduct periodic reviews under section 610, they are far more likely to *increase* the burden of regulation on small entities than to reduce it.<sup>6</sup>

Essentially, since Congress's order to the federal bureaucracy twenty-five years ago to continuously assess the proper balance between regulatory goals and the economic burden on small business, the bureaucracy has responded by ignoring this mandate. Today, Congress is revisiting the history of agency non-compliance and defiance in the face of its order, and is considering legislation to ensure that agencies no longer feel secure regulating the public in perpetuity.<sup>7</sup>

This Article first explains the basic requirements of the Regulatory Flexibility Act, and in particular focuses on the periodic review requirement contained in section 610. It then shares the results of research on agency implementation rates of section 610 of the Act and discusses the problems with agency implementation. Finally, it highlights potential solutions to agency noncompliance, and proposes the adoption of three amendments to the RFA: the proposed legislation in the House of Representatives and Senate, which would amend section 610 of the Regulatory Flexibility Act, and two additional amendments, which target problems that are not addressed in the currently pending legislation.

## II. THE REGULATORY FLEXIBILITY ACT

### A. What is the Regulatory Flexibility Act?

#### 1. *The RFA*

During the Carter Administration, public attention turned towards a number of actions by the federal agencies which inflicted widespread harm on an already fragile economy.<sup>8</sup> Congress re-

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6. See *infra* Part III.B.

7. See *infra* Part V.

8. During the debate over the RFA, Rep. Andrew Ireland discussed abuses of small entities by federal agencies, including a gas station owner who spent 600 hours filling out federal reporting forms and a businessman who chose to pay a \$500 fine (1979 dollars) rather than fill out a sixty-three foot-long federal reporting form. 126

sponded in 1980 with the RFA, the express purpose of which was to make agencies:

[E]ndeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.<sup>9</sup>

The RFA is designed to ensure that agencies consider how their rules will affect small entities.<sup>10</sup> A federal agency must determine whether a rule will result in a “significant economic impact on a substantial number of small entities,” and if so, must conduct regulatory flexibility analyses to accompany its proposed and final rules.<sup>11</sup> The agency’s analysis must include estimates of the impact the rule could have and “a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes,” along with the factual, policy, and legal reasons behind the alternative selected.<sup>12</sup>

While the RFA may seem to be a simple procedural hurdle, requiring only that the agency publish analyses,<sup>13</sup> this analysis is the

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CONG. REC. H. 24, 587 (1980). Later research seemed to confirm these Congressional concerns, including one study by a prominent economist that determined that “about 30 percent of the decline in productivity growth in manufacturing during the 1970’s may be attributable to [OSHA and EPA] regulation.” Wayne B. Gray, *The Cost of Regulation: OSHA, EPA and the Productivity Slowdown*, 77 AM. ECON. REV. 998, 998 (1987). It is not surprising that public attention turned towards regulation, as many of the statutes from which costly federal regulation stems was passed in the 1970s. See Barry A. Pineles, *The Small Business Regulatory Enforcement Fairness Act: New Options in Regulatory Relief*, 5 COMMLAW CONSPICUOUS 29, 29-30 (1997) (providing an excellent discussion of the statutory underpinnings of the call for regulatory reform that led to the RFA).

9. 5 U.S.C. § 601 (“Findings and Purposes”) (2000).

10. For a masterful overview of the RFA, its goals for small business, and its achievements and failures, see the article by Keith Holman in this issue of the *Fordham Urban Law Journal*. Keith W. Holman, *The Regulatory Flexibility Act at 25: Is the Law Achieving Its Goal?*, 33 FORDHAM URB. L.J. 1119 (2006).

11. 5 U.S.C. §§ 605(b) (certification), 603 (initial regulatory flexibility analysis), 604 (final regulatory flexibility analysis).

12. 5 U.S.C. §§ 603, 604.

13. See, e.g., *U.S. Cellular Corp. v. Fed. Comm’n Comm’n*, 254 F. 3d 78, 88 (D.C. Cir. 2001) (“Purely procedural, however, RFA section 604 requires nothing more than that the agency file a FRFA [Final Regulatory Flexibility Analysis] demonstrating a ‘reasonable, good-faith effort to carry out [RFA’s] mandate.’” (second bracket in orig.)).

only statutorily-required, judicially reviewable agency determination on how the agency will deal with small entities. Prior to the passage of the RFA, agencies were under no statutory obligation to even consider regulatory alternatives that could reduce the harm they did to the most vulnerable of regulated entities. Disproportionate regulatory impacts and agency refusal to acknowledge the concerns of small entities were the norm prior to the passage of the RFA.<sup>14</sup> The RFA operates, in conjunction with the APA and other procedural protections, to confer a procedural right that appears almost substantive—that is, the right to prevent agencies from harming small entities arbitrarily.

## 2. Section 610 of the RFA

Section 610 of the RFA requires agencies to review a rule within ten years of the date of its publication for small entity impacts. The RFA instructs agencies to the following effect:

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.<sup>15</sup>

Agencies are also required to publish notice in the *Federal Register* of their intent to perform reviews:

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

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14. S. REP. NO. 96-878, at 3 (1980), as reprinted in 1980 U.S.C.C.A.N. 2788, 2790; see Holman, *supra* note 10, at 1120-24, 1129-32 (explaining the need for the Act in defending the rights of small businesses and discussing its recent successes).

15. 5 U.S.C. § 610(b).

and legal basis of such rule and shall invite public comment upon the rule.<sup>16</sup>

Most agencies began publishing their section 610 lists and notices in the semi-annual *Unified Agenda* publications in the mid-1990s.<sup>17</sup>

According to section 610 of the RFA, the express purpose of the periodic review requirement is “to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities.”<sup>18</sup> Congress was explicit in its aims in passing section 610, not only placing that purpose within the section itself, but declaring that the purpose of the section 610 review is to “to determine whether the rules and regulations of the agency are efficiently and equitably achieving the legislative goals under which they are promulgated.”<sup>19</sup>

In 1998, Congress revisited the RFA with a bill that would have amended section 610, the Regulatory Improvement Act of 1997 (which was referred to in a Senate Report as the Regulatory Improvement Act of 1998).<sup>20</sup> The bill would have reduced the time period of periodic review from ten years to five, and would have required agencies to publish legal and factual determinations upon conclusion of section 610 review, establishing a judicially reviewable administrative record for an agency's decision to leave a rule in place.<sup>21</sup> The bill stemmed from a perceived failure on the part of federal agencies to implement section 610, congressional frustration with the lack of periodic review, and the intent to confer “the

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16. 5 U.S.C. § 610(c).

17. There was, however, no one place the public could go to see all the rules for which agencies had published notice of review under section 610. Then, in the fall of 1997, the *Unified Agenda* started publishing an index with all the section 610 notices for that issue. 62 Fed. Reg. 58,557 (Oct. 29, 1997). Since then, each publication has included an Appendix A, “Index to Entries that Agencies Have Designated for Section 610 Review.”

18. 5 U.S.C. § 610(a).

19. S. REP. NO. 96-878, at 15 (1980), as reprinted in 1980 U.S.C.C.A.N. 2788, 2802. In 2005, the House Committee on Energy and Commerce underlined this purpose by sending a letter to the heads of ten federal agencies demanding proof of compliance with what it described as “the only crosscutting statutory requirement through which federal agencies reexamine certain rules after they have been issued.” Letter from Joe Barton, Chairman, House Committee on Energy and Commerce, to Heads of Ten Federal Agencies (Apr. 4, 2005), available at [http://energycommerce.house.gov/108/Letters/04052005\\_1501.htm](http://energycommerce.house.gov/108/Letters/04052005_1501.htm).

20. Regulatory Improvement Act of 1997, S. 981, 105th Cong. § 3 (1998).

21. *Id.* The relevant subsection heading under section 632 is: Advisory committee on regulations. *Id.*; see also Regulatory Improvement Act of 1998, S. REP. NO. 105-188, at 56-58 (1998).

benefits intended by Congress in 1980.”<sup>22</sup> This bill, however, was ultimately not passed.<sup>23</sup>

Section 610 reflects Congress’s explicit decision to act, even though then-President Carter had acted with his Executive authority to require the same periodic review from agencies.<sup>24</sup> Executive Order 12,044, signed by President Carter, required agencies to consider both the costs of new regulations to small business (as the RFA later would), and to “periodically review their existing regulations,” considering:

- (a) the continued need for the regulation;
- (b) the type and number of complaints or suggestions received;
- (c) the burdens imposed on those directly or indirectly affected by the regulations;
- (d) the need to simplify or clarify language;
- (e) the need to eliminate overlapping and duplicative regulations; and
- (f) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions or other factors have changed in the area affected by the regulation.<sup>25</sup>

This Executive Order was in place and functioning for a full two years before Congress considered the RFA. The legislators who voted for the RFA were fully aware of Executive Order 12,044, addressing it in a Senate Report which stated that the order was insufficient to protect the rights of small entities because it was “not subject to judicial review and the order is not permanent law but may be rescinded by the President at any time,” and because “[a]dherence to the order by the independent regulatory agencies . . . is completely voluntary.”<sup>26</sup>

Despite sitting under a President who shared the goals of the RFA and ordered his agencies to perform the RFA’s periodic review, Congress nonetheless decided that the periodic review provision was so important that it should be required by statute, with a provision for judicial review, and that it should be applicable to every federal regulatory agency.

As discussed below, President George W. Bush has made efforts to review some federal rules.<sup>27</sup> It is unclear whether the current

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22. S. REP. NO. 105-188, at 57 (1998).

23. Library of Cong., Thomas, List of All Congressional Actions Regarding S. 981, <http://thomas.loc.gov/> (last visited Apr. 13, 2006).

24. Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (Mar. 24, 1978).

25. *Id.* at 12,663.

26. S. REP. NO. 96-878, at 8 (1980), as reprinted in 1980 U.S.C.C.A.N. 2788, 2795.

27. See *infra* notes 52-66 and accompanying text.

Congress will decide to defer to the Executive branch's existing efforts to retain a free hand while reviewing regulations, or to act firmly in amending section 610 to create a functional and enforceable periodic review requirement. What is clear is that the reformers of the 96th Congress<sup>28</sup> ultimately chose not to make reasonable regulation contingent on the continuing good will of the nation's Chief Executive.

### B. The Importance of Periodic Review

Periodic review of rules is not merely an academic construct or a dry, procedural hurdle. The review of existing regulations is significant because of the real world consequences of failure to do so, like the "ratchet effect."<sup>29</sup> Because of such consequences, regulatory reviews have been supported for various reasons for more than twenty-five years within the executive branch, with results indicating that such reviews are not only feasible, but also advisable from a regulatory burden-reduction standpoint.

#### 1. *The Ratchet Effect*

The main problem addressed by periodic review of existing agency regulation is the "ratchet effect." Like a ratchet, regulation has the tendency to move in one direction only—that is, becoming more restrictive.<sup>30</sup> In some areas of regulation, such as health, safety, and environmental rules, when technological advances indi-

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28. Interestingly, the refusal to defer to the Executive branch did not result from party politics, and the RFA was not approved by Congress on strict party lines. During the 96th Congress, the House of Representatives, which passed the bill on a voice vote, was comprised of 277 Democrats and 158 Republicans, and was presided over by Speaker of the House Thomas "Tip" O'Neill (D-Mass.). Office of the Clerk, U.S. House of Representatives, Congressional History, [http://clerk.house.gov/histHigh/Congressional\\_History/index.html](http://clerk.house.gov/histHigh/Congressional_History/index.html) (last visited Apr. 13, 2006). Similarly, the Senate was divided 58-41-1 with a Democratic majority. U.S. Senate, Party Division in the Senate, 1789-Present, [http://senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm) (last visited Apr. 13, 2006). Of course, President Carter, who signed the RFA on September 19, 1980, was also a Democrat, and fully intended to remain in the White House for a second term to live with the consequences of the RFA. The members of the 96th Congress truly earned the title of "reformers," as they voted to impose checks on the Executive's power at a time when their party held the White House, thus reducing their own party's political power.

29. See *infra* Part II.B.1.

30. Professional academics and advocates are quick to point out a handful of specific examples of politically-motivated actions which reduced regulatory burdens or minimized a proposed increase in those burdens. It is instructive, however, to consider that the Code of Federal Regulations currently amounts to *more than 100,000 pages* of federal rules. Both the author and the knowledgeable reader would likely find themselves hard-pressed to identify more than a few individual sections per year

cate that benefits are available, the government will regulate. In addition, some statutes, such as the Safe Drinking Water Act, do not allow agencies to reduce regulatory requirements,<sup>31</sup> causing the regulatory agency to set the previous regulation as the “baseline,” below which it does not consider the impact of its actions. Even without statutory mandates, many agencies set the existing burdens they impose on the public as the baseline for regulation whenever they consider additional requirements. Thus, while these new requirements may have only minor incremental effects, the regulation as a whole imposes major economic burdens on the regulated community. Finally, even businesses that expend capital on one-time improvements are sometimes reluctant to see burden reductions, as these expenditures can operate as barriers to entry and reduce competition for existing market players. This is the ratchet effect—the natural tendency of agency officials charged with achieving public benefits to focus on pursuing those benefits and not on reducing the burdens of their regulation to the public.

The problem of the ratchet effect is not an academic or hypothetical construct; it occurs on a regular basis in large, expensive rulemakings by federal agencies. One prominent example of the ratchet effect in action was the recent rulemaking by the Environmental Protection Agency (EPA) limiting diesel particulate matter emissions from nonroad diesel engines (e.g., bulldozers, generators, and other construction equipment).<sup>32</sup> In that rulemaking, EPA amended an original rule published in 1994 that limited emissions from nonroad diesel engines.<sup>33</sup> This fourth “tier,” or round, of emissions reductions (“the tier IV amendments”) was set to lower emissions from the levels set by previous emissions reduction rules and would require large capital and equipment expenditures by engine and equipment manufacturers.<sup>34</sup> The rule did not consider the overall costs EPA had imposed on regulated entities in all four tiers of regulation, and it did not balance those costs against

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for which sufficient political support existed to actually reduce regulatory burdens below existing levels.

31. Safe Drinking Water Act, Pub. L. No. 93-523, § 2(a), 88 Stat. 1662 (1974) (codified as amended at 42 U.S.C. § 300g-1(b)(9)).

32. Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel, 69 Fed. Reg. 38,958, 38,960 (June 29, 2004) (amending Control of Air Pollution; Determination of Significance for Nonroad Sources and Emission Standards for New Nonroad Compression-Ignition Engines At or Above 37 Kilowatts, 59 Fed. Reg. 31,306 (June 17, 1994)).

33. *Id.*

34. *See, e.g.*, U.S. Env'tl. Prot. Agency, Clean Air Nonroad Diesel-Tier 4 Final Rule, <http://www.epa.gov/nonroad-diesel/2004fr.htm> (last visited Apr. 14, 2006).



the actions it had previously taken.<sup>35</sup> Instead, the rule measured the incremental costs of the tier IV amendments, and considered alternatives to the amendment in process.<sup>36</sup> The EPA has not published a notice of periodic review for its 1994 rule, as required by the RFA and the EPA's own procedures.<sup>37</sup> Further, the amendments to the original emissions restrictions have not considered alternatives by balancing costs and benefits for reducing the existing burdens imposed by the 1994 rule.<sup>38</sup> The amendment of the existing rule did not trigger a public review of the previous rule's requirements and justification. The short conclusion to be drawn is that EPA considers its regulation of the public as a one-way street.<sup>39</sup>

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35. See U.S. ENVTL. PROT. AGENCY, REVISED INTERIM GUIDANCE FOR EPA RULEWRITERS: REGULATORY FLEXIBILITY ACT AS AMENDED BY THE SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT 82-83 (1999), available at <http://www.epa.gov/sbrefa/documents/iguid99.pdf> [hereinafter EPA, REVISED INTERIM GUIDANCE] (guidance document for EPA rule writers stating that the determinative factor for whether section 610 review is required for a rule that was subsequently amended is whether amendment eliminated the rule's impacts).

36. Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel, 69 Fed. Reg. at 39,145-49; U.S. ENVTL. PROT. AGENCY, FINAL REGULATORY ANALYSIS: CONTROL OF EMISSIONS FROM NONROAD DIESEL ENGINES ch.6 (2004), available at <http://www.epa.gov/nonroad-diesel/2004fr/420r04007.pdf> [hereinafter EPA, CONTROL OF EMISSIONS].

37. Though the rule was superceded by later additional regulation, EPA policy is not to review a rule unless subsequent rulemaking eliminates the first rule's impacts. See EPA, REVISED INTERIM GUIDANCE, *supra* note 35, at 82-83. The problem of when an agency must review rules that are subsequently amended is discussed later in this Article.

38. Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel, 69 Fed. Reg. at 39,159-62; Control of Emissions of Air Pollution from Nonroad Diesel Engines, 63 Fed. Reg. 56,968, at 56,977-983, 56,992-993 (Oct. 23, 1998).

39. The EPA cannot claim that it had no choice under the Clean Air Act (CAA) but to impose the regulatory burdens it did. While it is true that section 213 of the CAA instructs the Administrator of EPA to implement standards for nonroad mobile nitrogen oxide emissions that "achieve the greatest degree of emission reduction achievable," the CAA also provides in the same sentence that the Administrator shall only do so, "giving appropriate consideration to the cost of applying such technology within the period of time available to manufacturers and to noise, energy, and safety factors." See 42 U.S.C. § 7547(a)(3) (2000). Further, the "shall" is removed from the similar instructions to the Administrator pertaining to regulation of particulate matter; thus, the EPA "may" regulate emissions of particulate matter (the main culprit in the 2004 rulemaking), but only after considering "costs, noise, safety, and energy factors." 42 U.S.C. § 7547(a)(4). Thus, although EPA has a clear congressional mandate to regulate the emissions that nonroad diesel rules were designed to reduce, it has an equally clear order to adequately balance the costs of said regulation against the emissions reduction benefits sought.

2. *Historical Recognition by the President of the Importance of Periodic Review of Rules*

For more than twenty-five years, the periodic review of existing rules has been supported by both Republican and Democratic Administrations. As discussed below, every president since President Carter has imposed either a temporary moratorium on regulation or a general review of existing regulation to identify individual candidates for reform, and some have instituted both approaches. Every administration since Reagan's has committed the executive branch to a systematic review of all new rules for costs and benefits, and has implemented special procedures for the review of some existing rules.

a. *Temporary Regulatory Moratoriums and General Reviews*

Since the Carter Administration, three of five presidents have imposed regulatory moratoriums on federal agencies, and every administration has engaged in general reviews of existing regulations to identify candidates that are ripe for reform. As discussed above, in 1978, President Carter signed Executive Order 12,044, which for the first time committed federal agencies to periodically reviewing their existing regulations.<sup>40</sup> This marked the first executive action aimed at reviewing rules on systematic bases after their promulgation, with the goal of reducing unnecessary regulatory burdens.

On assuming office in 1981, one of President Reagan's first actions was to delay the effective date of the previous administration's last-minute regulatory actions. His Executive Order 12,291 and memorandum to the heads of federal agencies ordered agencies to delay the effective dates of the proposed rules for sixty days.<sup>41</sup> As discussed below, this order also required for the first time the review of some regulations by the Office of Management and Budget (OMB) prior to their publication.<sup>42</sup>

Then, in 1992, President George H.W. Bush imposed a moratorium on all regulatory actions by his own administration, ordering all regulatory actions to be withheld from publication as final rules

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40. Exec. Order No. 12,044, at § 4, 43 Fed. Reg. 12,663 (Mar. 23, 1978).

41. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981); Memorandum for the Heads of Agencies, Postponement of Pending Regulations, 46 Fed. Reg. 11,227 (Jan. 29, 1981).

42. See *infra* text accompanying note 67; Exec. Order No. 12,291, at § 3, 46 Fed. Reg. 13,194, 13,195 (Feb. 17, 1981).

for ninety days.<sup>43</sup> During this time, the President ordered agencies to identify rules that imposed substantial costs on the economy, and weigh those costs against the rules' benefits, to ensure that the "expected benefits to society of any regulation should clearly outweigh the expected costs it imposes on society."<sup>44</sup> President Bush then extended this ninety-day moratorium another 120-days.<sup>45</sup> From January 28 through October 28, 1992, federal agencies operated under a moratorium on new regulatory actions and were theoretically reviewing some of their existing rules.<sup>46</sup>

The results of this review indicate the importance of periodic review of existing regulations. In response to the President's memorandum, agencies published nineteen final rules which reduced regulatory burdens, either by withdrawing previous publications or amending sections of the Code of Federal Regulations (C.F.R.).<sup>47</sup> This result stands in stark contrast to the results of the periodic review requirement of the RFA, which achieved a smaller number of final rules reducing regulatory burdens over the course of almost eight years.<sup>48</sup>

In 1993, President Clinton signed Executive Order 12,866, which required agencies to:

submit to OIRA a program . . . under which the agency will periodically review its existing regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objective, less burdensome, or in greater alignment with the President's priorities and the principles set forth in this Executive order.<sup>49</sup>

The General Accounting Office (GAO) completed a review of the agency response to the call for periodic review, and determined that four agencies had reviewed a total of 422 rules in the C.F.R. Of these, approximately forty percent constituted actions which

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43. Memorandum on Reducing the Burden of Government Regulation, 1 PUB. PAPERS 166 (Jan. 28, 1992).

44. *Id.* at 167.

45. Memorandum on Implementing Regulatory Reforms, 1 PUB. PAPERS 665 (Apr. 29, 1992).

46. *Id.*

47. To determine the outcome of President Bush's general review order, the author searched *Federal Register* notice publications for citations to "Reducing Burden of Government Regulation" using Westlaw. The results are likely to be conservative in their attribution of any particular action to the President's memorandum, as the rule was not counted unless it specifically referenced the memorandum.

48. *See infra* Part III.B.

49. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,740 (Sept. 30, 1993).

would reduce regulatory burdens to the regulated public.<sup>50</sup> At the same time, agencies reported that they had eliminated many duplicative or unnecessary C.F.R. sections, totaling more than 13,000 pages.<sup>51</sup>

In 2001, President George W. Bush imposed a moratorium on federal regulation that was very similar to President Reagan's.<sup>52</sup> The Bush Administration forbade the publication of pending final rules until they had been reviewed by an Administration appointee, and postponed the effective date of regulations whose effective date was still pending for sixty days.<sup>53</sup> This moratorium postponed the effective date of some Clinton Administration "midnight regulations," including potentially costly rules like the Department of Health and Human Services' (HHS) information privacy rules under the Health Insurance Portability and Accountability Act of 1996.<sup>54</sup> Most of these regulatory requirements were eventually allowed to become final.<sup>55</sup>

President George W. Bush's actions in soliciting and acting on public nominations for regulatory reform have demonstrated the feasibility and advisability of medium-scale periodic reviews. In 1997, before President Bush took office, OMB began submitting reports to Congress on the costs and benefits of federal regulation, including a notice that OMB was seeking nominations from the regulated public on rules which should be reformed.<sup>56</sup> Beginning

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50. U.S. GEN. ACCOUNTING OFFICE, REGULATORY REFORM: AGENCIES' EFFORTS TO ELIMINATE AND REVISE RULES YIELD MIXED RESULTS 2 (1997), available at <http://www.gao.gov/archive/1998/gg98003.pdf> [hereinafter GAO, AGENCIES' EFFORTS TO ELIMINATE].

51. *Id.* at 7. However, this amount did not include pages that were added to the C.F.R. during the same time-period. As a result, when GAO reviewed four agencies' page eliminations, it found that their net page elimination was approximately seventeen percent of the gross elimination they had reported. *Id.*

52. Memorandum for the Heads and Acting Heads of Executive Departments and Agencies; Regulatory Review Plan, 66 Fed. Reg. 7,702 (Jan. 20, 2001), available at <http://www.whitehouse.gov/news/releases/print/20010123-4.html>.

53. *Id.*

54. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,760-61 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164) (Health and Human Services rule estimated to cost more than \$17.5 billion, effective as of February 26, 2001).

55. *See, e.g.*, Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53,182 (Aug. 14, 2002) (codified at 45 C.F.R. pts. 160, 164) (Health and Human Services); Correction of Effective and Compliance Dates, Standards for Privacy of Individually Identifiable Health Information, 66 Fed. Reg. 12,434 (Feb. 26, 2001) (codified at 45 C.F.R. pts. 160, 164) (delaying the effective date of the Health and Human Services rule);

56. *See, e.g.*, Notice and Request for Comments, Draft Report to Congress on the Costs and Benefits of Federal Regulations, 63 Fed. Reg. 44,034 (Aug. 17, 1998) (Of-

in 2001, however, OMB began earnestly soliciting agency input on the suitability of these recommendations for reform, and tracking agency changes to the rules. In 2001 and 2002, OIRA solicited general proposals for regulatory reform.<sup>57</sup> In 2004, OIRA focused on reform proposals designed to provide regulatory relief to the manufacturing sector.<sup>58</sup>

In response to the 2001 public notice, OMB received seventy-one nominations, and designated twenty-three of them a “high priority.”<sup>59</sup> Many nominations simply urged agencies to adopt policies or guidance that would reduce uncertainty, expressed disapproval of agency actions without recommending a course of action, or supported a general withdrawal of a rulemaking that had not yet been completed.<sup>60</sup> In response to these twenty-three “high priority” proposals, agencies acted on many and provided responses to all of them.<sup>61</sup>

In 2002, OMB received recommendations for the reform of 316 separate rules and guidance documents.<sup>62</sup> The overwhelming response to the 2002 call for nominations for reform forced OMB to change its process for identifying those recommendations which should be acted upon. In 2002, OMB forwarded the list of recommendations to the federal agencies themselves and to the Chief

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Office of Management and Budget); Notice and Request for Comments, Draft Report to Congress on the Costs and Benefits of Federal Regulations, 62 Fed. Reg. 39,352 (July 22, 1997) (Office of Management and Budget). These reports were required by appropriations bills, beginning in 1997. Treasury, Postal Services and General Government Appropriations Act, Pub. L. No. 104-208, § 645, 110 Stat. 3009, 3009-366 (1996).

57. Notice and Request for Comments, Draft Report to Congress on the Costs and Benefits of Federal Regulations, 66 Fed. Reg. 22,041, 22,054 (May 2, 2001) (Office of Management and Budget); Notice and Request for Comments, Draft Report to Congress on the Costs and Benefits of Federal Regulations, 67 Fed. Reg. 15,014, 15,033 (Mar. 28, 2002) (Office of Management and Budget).

58. OFFICE OF MGMT. & BUDGET, REGULATORY REFORM OF THE U.S. MANUFACTURING SECTOR (2005), available at [http://www.whitehouse.gov/omb/inforeg/regpol-reports\\_congress.html](http://www.whitehouse.gov/omb/inforeg/regpol-reports_congress.html).

59. See OFFICE OF MGMT. AND BUDGET, STIMULATING SMARTER REGULATION: 2002 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 104-06 (2002), available at [http://www.whitehouse.gov/omb/inforeg/2002\\_report\\_to\\_congress.pdf](http://www.whitehouse.gov/omb/inforeg/2002_report_to_congress.pdf) [hereinafter OMB, STIMULATING SMARTER REGULATION] (status of the twenty-three High-Priority Rules OIRA Suggested for Reform in 2001).

60. OFFICE OF MGMT. & BUDGET, MAKING SENSE OF REGULATION: 2001 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 65-135 (2001), available at <http://www.whitehouse.gov/omb/inforeg/costbenefitreport.pdf>.

61. OMB, STIMULATING SMARTER REGULATION, *supra* note 59, at 70.

62. *Id.* at 4.

Counsel for Advocacy at the Small Business Administration (SBA), with instructions to identify potential candidates for action based on the principles of “efficiency, fairness, and practicality.”<sup>63</sup> Of the more than 300 recommendations, OMB, the Chief Counsel for Advocacy, and the federal agencies themselves identified thirty-four existing rules to be in need of reform.<sup>64</sup>

OMB’s call for recommendations for reform generally mentioned small business, but was not tailored to reducing small entity burdens, as required by section 610 of the RFA.<sup>65</sup> Many of the reforms considered did little more than eliminate duplicative requirements or “clarify” agency policy which impose more regulatory burdens on firms.<sup>66</sup> The OMB nomination process should not be assumed to be a proper substitute for periodic reviews under the RFA. That said, the OMB nomination process demonstrated the feasibility of agency review of existing regulations and the ability of OMB to work closely with the agencies to identify and complete priority reviews of many of the existing rules that affect small entities.

*b. Efforts to Review Rules As They Are Promulgated*

Currently, most major rules are reviewed outside federal agencies, prior to their publication, for their costs and benefits to society. Agencies have proven themselves capable of dealing with the requirement of estimating the costs and benefits of their rules and adopting regulatory approaches which maximize benefits and minimize costs, while meeting the regulatory duties imposed on them by Congress.

As mentioned above, President Reagan’s Executive Order 12,291 required agencies for the first time to submit rules to OMB

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63. John D. Graham, Office of Mgmt. & Budget, Memorandum for the President’s Management Council: Agency Response to Public Regulatory Reform Nominations (Dec. 20 2002), *available at* [http://www.whitehouse.gov/omb/inforeg/pmc\\_agency\\_response\\_regreform.html](http://www.whitehouse.gov/omb/inforeg/pmc_agency_response_regreform.html).

64. OMB, STIMULATING SMARTER REGULATION, *supra* note 59, at 25-28.

65. Notice and Request for Comments, Draft Report to Congress on the Costs and Benefits of Federal Regulations, 66 Fed. Reg. 22,041, 22,054 (May 2, 2001) (Office of Management and Budget).

66. Of seventy-one nominations received in response to the 2001 solicitation, only twenty-three were classified as high-priority actions. OMB, STIMULATING SMARTER REGULATION, *supra* note 59, at 104-06. Of the more than 300 nominations for reform submitted in response to the 2002 notice, only thirty-four were identified as deserving of action. *Id.* at 25-28 tbl.9.

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for review of costs and benefits before publication.<sup>67</sup> President Reagan also ordered agencies to submit to OMB their annual plans for regulation, to ensure that these plans conformed to his Administration's policies and practices, and to assist OMB in identifying opportunities for reducing regulatory burdens.<sup>68</sup>

In 1993, President Clinton signed Executive Order 12,866, which, in addition to mandating pre-publication review of regulations similar to Executive Order 12,291, ordered federal agencies to conduct periodic reviews of their existing regulations to identify rules which had become obsolete or whose regulatory objectives could be achieved in a less burdensome fashion.<sup>69</sup> Less than two years later, President Clinton followed up on this Executive Order with a memorandum that ordered federal agencies to complete a review of existing regulation in four steps.<sup>70</sup> The President required agencies to identify obsolete, overly burdensome, or otherwise unnecessary rules, and to deliver a list of such regulations to OMB's Office of Information and Regulatory Affairs (OIRA).<sup>71</sup> Agencies were also ordered to change their enforcement incentives to cease rewarding employees for "red tape," to consult and meet with regulated industries and entities, and to identify a list of rulemakings to be conducted through negotiated rulemaking.<sup>72</sup> Executive Order 12,866 remains in effect, and agencies continue to submit regulations to OIRA prior to publication for review of costs and benefits.

*c. Ex Post Validation of Cost Estimates*

One current Bush Administration priority is to implement a policy of *ex post* economic impact review.<sup>73</sup> Such reviews would vali-

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67. Exec. Order No. 12,291, at § 3, 46 Fed. Reg. 13,193 (Feb. 17, 1981). Although it is true that President Carter's Executive Order 12,044 was the first measure to explicitly require agency heads to consider costs and select the least burdensome of regulatory alternatives, it did not provide for review of regulations by non-agency personnel prior to publication of final rules. Exec. Order. No. 12,044, 43 Fed. Reg. 12,661-662 (Mar. 23, 1978).

68. Exec. Order No. 12,498, 50 Fed. Reg. 1,036 (Jan. 4, 1985).

69. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

70. Memorandum on Regulatory Reform, 1 PUB. PAPERS 304, 304-06 (Mar. 4, 1995), available at <http://www.gpoaccess.gov/pubpapers/search.html> (search by title and date).

71. *Id.*

72. *Id.*

73. See OFFICE OF MGMT. & BUDGET, VALIDATING REGULATORY ANALYSIS: 2005 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 41-53 (2005), available at [http://www.whitehouse.gov/omb/inforeg/2005\\_cb/final\\_2005\\_cb\\_report.pdf](http://www.whitehouse.gov/omb/inforeg/2005_cb/final_2005_cb_report.pdf) (providing an interesting discussion of the concept).

date *ex ante* agency cost estimates provided to OMB during Executive Order 12,866 cost-benefit review. In its draft 2005 report to Congress on regulatory costs and benefits, OMB outlined the concept of *ex post* validation studies in depth and solicited comments from the public on the value of such studies and their proper scope.<sup>74</sup> OMB also presented a review of the literature regarding existing *ex post* validation studies, indicating that a problem exists with agency underestimation of economic impacts and overestimation of regulatory benefit.<sup>75</sup>

### III. THE HISTORICAL IMPLEMENTATION OF SECTION 610 OF THE RFA

As discussed above, Congress passed section 610 of the RFA for the express purpose of forcing agencies to periodically reexamine their regulation of small business, resulting in cost savings.<sup>76</sup> The periodic review requirement, however, appears to have failed to result in reduced regulatory burdens on small businesses. The record establishes that agencies do not complete section 610 reviews for rules that impose significant economic impacts on a substantial number of small entities.<sup>77</sup> This failure appears to be due to ambiguities found within the RFA itself that allow agencies to defer the consideration of how their actions impact small entities.<sup>78</sup> Finally, even when ambiguities are resolved in the favor of small entities and the agency performs the small entity review required by section 610, this review does not usually result in the reduction of regulatory burdens on small entities.<sup>79</sup>

To determine agency compliance with section 610, the author: (1) reviewed existing literature on agency compliance with section 610, (2) analyzed all final rules promulgated in a year by selected agencies and determined the section 610 review rates for those rules, and (3) reviewed the regulatory outcomes for every section 610 review notice published in the *Federal Register* for a sample period of seven years. This research first included a review of whether agencies were actually posting notice of section 610 reviews, as the RFA requires. Then, for those rules which were sub-

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74. OFFICE OF MGMT. & BUDGET, 2005 DRAFT REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS 35-44 (2005), available at [http://www.whitehouse.gov/omb/infocreg/2005\\_cb/draft\\_2005\\_cb\\_report.pdf](http://www.whitehouse.gov/omb/infocreg/2005_cb/draft_2005_cb_report.pdf).

75. *Id.* at 40-44.

76. See *supra* notes 18-19 and accompanying text.

77. See *infra* Part III.A.

78. See *infra* Part IV.A.

79. See *infra* Part III.B.



ject to section 610 reviews, a determination was made as to whether the section 610 reviews actually resulted in regulatory actions that reduced regulatory burdens to small business, based on the written records.

The results indicate that the review of final rules under section 610 within ten years is not commonplace, and that section 610 reviews rarely result in the reduction of regulatory burdens to small business. The author's regulatory survey and review identified a number of specific reasons for these problems with agency compliance, as well as some shortcomings of section 610 itself with regard to its goal of small business burden reduction.

### **A. Agencies Do Not Appear to Have Reviewed All Rules the RFA Requires**

#### *1. Existing Studies Indicate That Agencies Have Not Reviewed All the Rules as Required*

Existing research shows that there is a disparity between the numbers of final agency actions referenced in each *Unified Agenda* and the number of section 610 review notices by comparing *Unified Agenda* entries for agencies' final rules each year with the number of section 610 reviews the agencies completed in the same period.<sup>80</sup> In 2005, the Congressional Research Service (CRS) found that the 2004 Spring and Summer *Unified Agendas* each had an average of about 400 entries with impacts on small entities, but only about thirty section 610 notices.<sup>81</sup> In another study, GAO reviewed entries from the fall of 1988 through the fall of 1997, finding that six agencies each had an average of more than thirty entries every year which could have a significant economic impact on a substantial number of small entities, and that none of these agencies had section 610 review entries in the 1998 *Federal Register* for the rules they had reported in their regulatory plans over the previous ten years.<sup>82</sup> In fact, for those half-dozen agencies, GAO identified 345 entries in the Fall 1997 edition of the *Unified Agenda* that would

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80. For example, an agency might have 400 entries in the Spring and Summer *Unified Agendas* listed as final rules, but no entries in those same *Unified Agendas* for section 610 reviews.

81. CURTIS COPELAND, CONG. RESEARCH SERV., REEXAMINING RULES: SECTION 610 OF THE REGULATORY FLEXIBILITY ACT 8 (2005).

82. U.S. GEN. ACCOUNTING OFFICE, REGULATORY FLEXIBILITY ACT: AGENCIES' INTERPRETATIONS OF REVIEW REQUIREMENTS VARY 12-14 (1999) [hereinafter GAO, AGENCIES' INTERPRETATIONS], available at <http://www.gao.gov/archive/1999/gg99055.pdf>.

have a significant economic impact on a substantial number of small entities.<sup>83</sup>

2. *Analysis of Public Filings of Selected Agencies Indicates That Agencies Have Not Reviewed All Required Rules*

As discussed above, the existing studies generally indicate that the number of final rules each year is strikingly greater than the number of section 610 reviews,<sup>84</sup> but no study to date has actually reviewed whether agencies actually completed section 610 reviews when required to do so. The reason appears to be that any such study involves an almost inordinate amount of time to: (1) identify actual final rules published in a year, (2) review the regulatory provisions of each individual rule, and (3) “Shepardize” each regulatory provision affecting small entities for at least ten years. Such an approach, however, is necessary. Existing research is helpful and illustrative of the current trend, but agencies can still assert that they have been consistently performing section 610 reviews, and that the existing research is flawed because: (1) the studies examine the number of rulemakings agencies enter into *Unified Agenda* indexes each year, as opposed to the number actually completed;<sup>85</sup> (2) many rules actually completed are no longer still in effect after ten years (and therefore are no longer subject to section 610); and (3) many rules which are still in effect have been so markedly revised that section 610 review would more appropriately be done for the rulemakings amending the original rule; in effect, “resetting the clock.”

To determine the validity of the agencies’ rationale, this author researched agency practice by reading every final rule promulgated in 1993 by select agencies and investigated whether each rule was determined to have a significant economic impact on a substantial number of small entities, thereby triggering the periodic review re-

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83. *See id.*

84. *See supra* Part III.A.1.

85. For example, the 2005 CRS study found that Department of Commerce had thirty-three entries in the June 2004 *Unified Agenda* that it had identified as likely to have a significant economic impact on a substantial number of small entities. COPELAND, *supra* note 81, at 8. Review of *Federal Register* notices published by the Department of Commerce in 1993 shows that the agency published only fourteen final rules through the entire year that were characterized as having a significant economic impact on a substantial number of small entities. *See infra* tbl.1. Though this sample is small, and any discrepancy might be due to statutory changes and the agency’s response to repeated RFA litigation between 1993 and 2005, the discrepancy is still present.

quirement of section 610.<sup>86</sup> These agencies were selected based on existing research that identified them as having the largest numbers of *Unified Agenda* entries for final actions or actions which were likely to impact small entities.<sup>87</sup> The year 1993 was chosen because any reasonable “grace period” would have expired by Summer 2005. To obtain a representative sample, the author reviewed every final rule promulgated in 1993 by Departments of Commerce, Labor, Health and Human Services, as well as the Small Business Administration. The results for 1993 and 1994 are illustrated below in Tables 1 and 2, respectively.

**TABLE 1. SECTION 610 REVIEW RATES FOR ALL FINAL RULES PUBLISHED BY SELECTED AGENCIES (1993)**

Agency	Final Rules	Final Rules agency identified as having significant economic impact on substantial number of small entities	Final Rules for Which the Agency Published Notice of § 610 Review (to Date)
Commerce	82	14 (17.1%)	0
Labor	13	0 (0%)	0
HHS <sup>88</sup>	197	22 (11.1%)	0
SBA	17	1 (5.8%)	0
Total	309	37 (11.9%)	0

As Table 1 illustrates, agencies in the sample ranged from zero to seventeen percent of their final rules being labeled as likely to have a significant economic impact on a substantial number of small entities. *None of the 37 rules labeled as significant under the RFA*

86. Section 610 does not state whether this impact is measured at the time of publication or at the time of periodic review. See 5 U.S.C. § 610 (2005). This discussion assumes that those rules which would impact small business at the time of publication would continue to do so at the time of periodic review, while rules which did not have small business impacts at the time of publication for the most part have not developed new small business impacts.

87. See, e.g., CONSAD RESEARCH CORP., AN EVALUATION OF COMPLIANCE WITH THE REGULATORY FLEXIBILITY ACT BY FEDERAL AGENCIES 24 (2001), available at <http://www.sba.gov/advo/research/rs215tot.pdf> (analyzing the number of final rules issued by agencies from 1995 through 1999 and concluding that three agencies (SEC, HHS, and Commerce) accounted for half of all final rules and that HHS, Commerce, and EPA accounted for half of all final rules that affected small entities—EPA was excluded from this analysis due to time constraints).

88. HHS published twenty-one final rules in the *Federal Register* on the same day: January 6, 1993. These notices could properly be considered as one rulemaking, as they were accompanied by a single FRFA and addressed the same general regulatory framework (food labeling). However, since they were promulgated separately by the agency and some of their provisions separated into separate C.F.R. sections, they were reviewed individually for section 610 reviews and continuing effect.

*promulgated during the sample period were analyzed by the agencies under section 610.*<sup>89</sup> Some of the possible reasons for this outcome are discussed in Part IV.

### **B. Section 610 Has Not Resulted in a Significant Reduction of Regulatory Burdens to Small Entities**

Analysis of agency actions in connection with section 610 leads to the conclusion that agencies are not reducing burdens to small entities in response to section 610 reviews. For the period reviewed, 1997-2005, the author identified notices for 154 separate section 610 reviews, then researched each action to determine whether the agency ultimately acted on the section 610 review by issuing a final rule.<sup>90</sup> Agencies published fifteen final rules in response to section 610 reviews that appeared to reduce small entity burdens. Researching the same period, the author found that agencies published final rules in twenty-six rulemakings identified as part of a section 610 review that appeared to *increase* regulatory burdens on small entities.<sup>91</sup> Much more commonly, agencies did

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89. Clearly, this sample is small, but it does illustrate part of the problem, and invites more intensive research into the question. As discussed below, other agencies have published notices of section 610 review for other years. *See infra* Part III.B. For example, between the fall of 1997 and the summer of 2005, this author identified 154 section 610 reviews being referenced in the *Unified Agenda*.

90. This methodology closely matched that employed by GAO in 1997, when it reviewed regulatory actions by the Clinton Administration to determine if these actions reflected regulatory burden reductions. GAO reviewed *Unified Agenda* descriptions of 422 regulatory actions by four agencies to determine the rule's effect, proposed and final versions of the rules from the *Federal Register*, and, if necessary, interviewed agency officials. GAO, AGENCIES' EFFORTS TO ELIMINATE, *supra* note 50, at 5-6. In preparing this Article, the author skipped the preliminary step of reviewing *Unified Agenda* entries due to the likelihood of oversimplification by those short discussions and went straight to reviewing proposed and final rules. The author then followed up with interviews of affected small entity representatives and agency officials for those rules whose effects were not self-evident.

91. Not surprisingly, there were a few outliers within the sample. Ten final rules appeared to either have no effect on small business due to their being purely technical revisions or because they regulated industries which had no small businesses. In addition, although it was not within the author's expertise to determine whether some rules represented burden reductions or increases, questions were resolved in the favor of agencies, and three rules were included in the "deregulatory" category that were questionable, and two rules were excluded from the "regulatory" category because burden increases were not clear. Further, three rules appeared to both impose and reduce regulatory burdens to small business and were excluded from the analysis entirely in the interest of simplicity. Oddly, four rulemakings appeared to be mistakenly identified by the agency in *Unified Agenda* notices as part of section 610 reviews when they actually were not. In the case of one of these rules, the agency both claimed that the rulemaking was part of a section 610 review and that the rule was exempt from the RFA—hence the agency included no consideration of small business impacts.

not publish final rules in response to section 610 review. Ninety-seven actions ultimately did not result in a final rule.<sup>92</sup> Thus, it appears that the possible outcomes from a section 610 review conducted during the 1997-2005 sample period were (in order of likelihood): (1) no action on the part of the agency, (2) a rulemaking which imposed *greater* regulatory burdens on small entities, and (3) a rulemaking which objectively reduced small entity burdens.

**TABLE 2. RESULTS OF SECTION 610 REVIEWS: 1997-2005**

Reduce Small Entity Burdens	Increase Small Entity Burdens	No Effect on Small Entities	Impacts Uncertain	No Final Agency Action	Listed By Error As § 610 Review	Total
15	26	10	2	97	4	154
10.3%	16.9%	6.5%	1.3%	63%	2.6%	100.6% <sup>93</sup>

The reasons for this outcome are discussed below in Part IV.

**IV. THE REASONS FOR LOW REVIEW RATES AND THE FAILURE OF SECTION 610 TO ACHIEVE REDUCTION IN REGULATORY BURDENS TO SMALL ENTITIES**

There are two sets of problems inherent in the current section 610 which lead to the outcome of low review rates, and to the Act's general failure to encourage agencies to review existing rules in order to reduce regulatory burdens to small entities.

**A. The Causes for Historically Low Review Rates**

Under the current RFA, agencies appear to have three main reasons for not completing section 610 reviews for the rules identified by the author's research. Low review rates may stem from agencies: (1) "restarting the clock" by amending regulations, (2) determining that rules are not actually affecting small entities, and (3) in some cases, simply neglecting to fulfill their statutory duties.

*1. Agencies Often "Restart the Clock" for Rules Through Amendment*

One ambiguity within section 610 that appears to lead to low review rates is the apparent ability of an agency to "restart the

92. Some agencies published notices in the *Federal Register* for some reviews stating that they had reviewed the rule under section 610 and had determined that no change was warranted.

93. Percentages add up to 100.6 percent because they were rounded to the nearest tenth.

clock” for the ten-year deadline for periodic review found in the RFA.<sup>94</sup> Section 610 provides 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.”<sup>95</sup> Section 610 does not discuss whether “rules” refers to only the changes to the C.F.R. published in the “final rule,” the entire C.F.R. section in which those changes are found, or any subsequent amendments. Further, any changes to the amendment may involve RFA determinations of their own, which could trigger incremental effects analysis that fails to capture the true cost of the regulatory provision, but resets the ten-year review cycle. Hence, many agencies take the view that publication of any subsequent amendment to the C.F.R. section altered by the final rule in question “restarts the clock,” allowing the agency another ten years for RFA review from the date of amendment.<sup>96</sup> In fact, some agencies have historically taken the view that any review of a C.F.R. section, even without amending the first final rule or analyzing the C.F.R. section for the elements required by section 610, restarts the clock for purposes of periodic review.<sup>97</sup>

This problem arises commonly in actions that are temporally limited in their effects, but which are promulgated under statutory or regulatory frameworks that recur or require re-promulgation from time to time. Some examples would include Department of Commerce fisheries quotas and other rules that are adjusted from fishing season to fishing season.<sup>98</sup> These rules are often limited by their fishery regulatory regimes to three to five years of applicabil-

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94. 5 U.S.C. § 610(a) (2000).

95. *Id.*

96. *See, e.g.,* NAT'L MARINE FISHERIES SERVS., NATIONAL MARINE FISHERIES SERVICE INSTRUCTION 01-111-03: PROCEDURES FOR PERIODIC REVIEW OF SIGNIFICANT RULES UNDER SECTION 610 OF THE REGULATORY FLEXIBILITY ACT § II (2005) (“Rules Subject to Review”) (exempting from section 610 review “multi-year specifications requiring proposed and final rulemaking,” which are usually amended and retained for additional years, with existing regulatory burdens considered the baseline for regulation), available at <http://reefshark.nmfs.noaa.gov/f/pds/publicsite/documents/procedures/01-111-03.pdf>. *But see* EPA, REVISED INTERIM GUIDANCE, *supra* note 35, at 82-83.

97. For instance, in a 1999 report, GAO stated, “SBA’s [Deputy Chief Counsel for Advocacy] 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, and she said that effort met the spirit and intent of the section 610 review requirement. . . . Because any rules issued after the initiative would have been less than 10 years old in 1998, the [Deputy Chief Counsel] said SBA had no rules with a [significant economic impact on a substantial number of small entities] that required section 610 review.” GAO, AGENCIES’ INTERPRETATIONS, *supra* note 82, at 14-15.

98. *See* Magnuson-Stevens Act, Pub. L. No. 94-265, 90 Stat. 331 (Apr. 13, 1976) (codified as amended at 16 U.S.C. §§ 1801-1883 (2000)).

ity, at the end of which the agency can set more or less burdensome quotas.<sup>99</sup> The agency is usually all but required, however, by fishery reports and the administrative record, to set new rules imposing similar quota limits on small entities.<sup>100</sup>

For example, in a 1993 fisheries rulemaking, the Department of Commerce set pollock fishing seasons that prohibited pollock fishing between April 2nd and May 31st.<sup>101</sup> This season was later amended in 1996 to restrict fishing from April 16th through August 31st, and from November 2nd through December 31st.<sup>102</sup> The current rule is more permissive, containing longer fishing seasons than the 1996 revisions, but it is still more restrictive than the 1993 pollock fishing rule.<sup>103</sup> If one agrees with Commerce's 1993 conclusion that the original pollock fishery season rule could impose significant economic burdens on a substantial number of small entities, and that it would trigger section 610 review responsibilities on the part of the agency, Commerce would likely claim that the 1993 rulemaking was superseded by the 1996 amendment and subsequent actions. Not surprisingly, all fourteen of the final rules published by the Department of Commerce in 1993 were fisheries regulations, and none of these rules appear to have been reviewed under section 610 of the RFA.<sup>104</sup> Many of these rules, however, set baselines for regulatory compliance for subsequent rules, and small entities are still required to comply with them.<sup>105</sup>

## 2. *Agencies Do Not Appear to Review All Rules Which Have a Significant Economic Impact on a Substantial Number of Small Entities*

Section 610 only requires agencies to periodically review those rules that "have or will have a significant economic impact upon a

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99. *See, e.g.*, Proposed Rule and Request for Comments, Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Atlantic Surfclam and Ocean Quahog Fishery; Amendment 13 to the Surfclam and Ocean Quahog Fishery Management Plan, 68 Fed. Reg. 55,358, 55,361 (Sept. 25, 2003) (Section 648.71 of this National Marine Fisheries Service amendment sets authority to adjust quotas and limits length of time to three years.).

100. *See* 16 U.S.C. §§ 1851 (national standards requiring plans to be set to achieve optimum fish yield and be based on the best scientific information available), 1852(h)(5) (requiring fishery management councils to continuously review fish yields), 1853(a) (requiring fishery management plans to take fish status information into account).

101. 58 Fed. Reg. 16,786, 16,787 (Mar. 31, 1993).

102. 61 Fed. Reg. 39,601, 39,602 (July 30, 1996).

103. 50 C.F.R. § 679.23(d)(2) (2005).

104. *See supra* tbl.1.

105. 16 U.S.C. § 1857.

substantial number of small entities.”<sup>106</sup> Agencies interpret this section differently. Some, like EPA, do not review a rule at all unless, at the time of its final publication, the agency had determined that it would have a significant economic impact on a substantial number of small entities.<sup>107</sup> Others, such as Department of Transportation, take a fresh look at the old rule and make a threshold determination as to whether the rule currently has a significant economic impact on a substantial number of small entities.<sup>108</sup>

*a. Agencies Often Originally Certify Rules That Should Not Be Certified*

As illustrated above, agencies promulgate a large number of rules that the agencies certified under the RFA, at the time of their publication, as not likely to have a significant economic impact on a substantial number of small entities.<sup>109</sup> This fact is important because some agencies instruct personnel conducting section 610 reviews that if a rule was certified at the time of its publication, then it should not be considered for section 610 review.<sup>110</sup> This practice leads to rules being excluded from section 610 review which may have actually had a significant economic impact on a substantial number of small entities at the time of their publication. Historically, agencies often denied that their rules harm small entities, even despite contrary evidence.<sup>111</sup> The trigger for an agency’s section 610 duty to periodically review a rule is whether or not the agency has determined the rule would have a “significant economic impact on a substantial number of small entities.”<sup>112</sup> Unfortunately, ambiguity found within the RFA itself has allowed agencies to avoid reviewing rules which arguably harm small entities by routinely certifying rules without adequate factual basis,

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106. 5 U.S.C. § 610(a).

107. EPA, REVISED INTERIM GUIDANCE, *supra* note 35, at 82 (“Only rules that were subject to the RFA and were *not* certified, are subject to § 610 review.”).

108. GAO, AGENCIES’ INTERPRETATIONS, *supra* note 82, at 11-12 (“[O]fficials said DOT must review all of its rules within 10 years of their issuance to determine whether they have a SEISNSE [significant economic impact on a substantial number of small entities] at the time of the review.”).

109. *See supra* tbl.1.

110. *See, e.g.*, NAT’L MARINE FISHERIES SERVS., *supra* note 96, § II (noting that only rules published with FRFAs are subject to section 610 review).

111. *See, e.g.*, GEN. ACCOUNTING OFFICE, REGULATORY FLEXIBILITY ACT: KEY TERMS STILL NEED TO BE CLARIFIED 3-6 (2001), *available at* <http://www.gao.gov/new.items/d01669t.pdf> (GAO analysis of an EPA decision to certify a single rule, as well as a discussion of agency-wide certification practice).

112. 5 U.S.C. § 610(c) (2000).

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and by ignoring the current harmful effects of a rule in favor of agency determinations made before the rule was promulgated.

Under the RFA, agencies make a threshold determination of the potential impacts of a rule on small entities.<sup>113</sup> If the agency determines that the rule would not have a significant economic impact on a substantial number of small entities, then the agency may certify the rule as such, and avoid the regulatory flexibility analyses required by the RFA.<sup>114</sup> Upon such a determination, however, the agency must provide the certification to the public in the *Federal Register* at the same time as the proposed or final rule, along with the factual bases the agency relied on in making the determination.<sup>115</sup> When an agency thus certifies a rule, it is not required to conduct a review of the rule's impact to small entities at a later date.<sup>116</sup> This statutory scheme avoids requiring agencies to spend taxpayer resources and valuable agency time reviewing rules for which such analysis is not likely to benefit small entities. Agencies, however, regularly certify rules under the RFA as not having a significant economic impact to a substantial number of small entities despite indications in favor of a contrary finding.<sup>117</sup>

The problem stems from the lack of definitions in the RFA for the terms "significant economic impact" and "substantial number." Some agencies routinely certify rules by adopting standards for

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113. 5 U.S.C. § 605(b).

114. *Id.*

115. *Id.*

116. 5 U.S.C. § 610(a).

117. For example, the U.S. Fish and Wildlife Service promulgates many rules designating large land areas as critical habitat for endangered species. Although the SBA's Office of Advocacy regularly comments on the impacts of these rules, and has informed the FWS on a number of occasions that rules were not properly certified, the FWS has never completed a regulatory flexibility analysis and continues to certify every designation of land as critical habitat not having a significant economic impact on a substantial number of small entities. *See, e.g.*, Letter from Thomas M. Sullivan, Chief Counsel for Advocacy, U.S. Small Bus. Admin., to Craig Manson, Assistant Sec'y for Fish, Wildlife & Parks, U.S. Dep't of Interior (July 14, 2005), *available at* [http://www.sba.gov/advo/laws/comments/fws05\\_0714.pdf](http://www.sba.gov/advo/laws/comments/fws05_0714.pdf) (recommending withdrawal of designation of critical habitat for the Southwestern willow flycatcher and republication with regulatory flexibility analysis); Letter from Thomas M. Sullivan, Chief Counsel for Advocacy, U.S. Small Bus. Admin., to Craig Manson, Assistant Sec'y for Fish, Wildlife & Parks, U.S. Dep't of Interior (Mar. 29, 2005), *available at* [http://www.sba.gov/advo/laws/comments/fws05\\_0329.pdf](http://www.sba.gov/advo/laws/comments/fws05_0329.pdf) (recommending publication with regulatory flexibility analysis for designation of critical habitat for the Southwestern willow flycatcher); Letter from Thomas M. Sullivan, Chief Counsel for Advocacy, U.S. Small Bus. Admin., to Steven Spangle, Field Supervisor, U.S. Fish & Wildlife Serv. (June 27, 2003), *available at* [http://www.sba.gov/advo/laws/comments/fws03\\_0627.pdf](http://www.sba.gov/advo/laws/comments/fws03_0627.pdf) (recommending publication of regulatory flexibility analysis for designation of critical habitat for the pygmy owl).

these terms which result in every rule being certified.<sup>118</sup> The rationale behind such action is twofold. First, the agency avoids being required to conduct regulatory flexibility analyses which consume agency resources and could support a regulatory alternative other than that which the agency favors. Second, agencies avoid any requirement to ever review their rules, and can conserve agency resources later on.

In 1992, the Chief Counsel for Advocacy of the SBA surveyed federal agencies to determine agency compliance with section 610 of the RFA.<sup>119</sup> Forty-four percent of federal agencies claimed that they had never promulgated rules which would have had a significant economic impact on a substantial number of small entities, and hence, were not required to conduct reviews under section 610.<sup>120</sup> In 2001, CONSAD Research Corporation released a report indicating that agency compliance with the Initial Regulatory Flexibility Analysis (IRFA) and FRFA requirements went up in the years between 1995 and 1999.<sup>121</sup> A representative sample of agency regulators certified a smaller percentage of their rules in 1999 than they did in 1995.<sup>122</sup> In 1995, agencies completed a FRFA for eighteen percent of the final rules sampled, whereas in 1999,

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118. One ongoing example of this practice is again found in the experience of the U.S. Fish and Wildlife Service, which routinely tailors its economic analysis to result in a conclusion that the rule analyzed will not have a significant economic impact on a substantial number of small entities—even in the face of conflicting precedent. *See, e.g., N.C. Fisheries Ass'n, Inc. v. Daley*, 27 F. Supp. 2d 650, 660-61 (E.D. Va. 1998) (stating that RFA certification amounted to “willful blindness” because the agency measured economic impacts as a percentage of income to all fishermen, rather than only those regulated); *Endangered and Threatened Wildlife and Plants; Establishment of Three Additional Manatee Protection Areas in Florida*, 68 Fed. Reg. 16,602, 16,617 (Apr. 4, 2003) (codified at 50 C.F.R. pt. 17) (adopting test for “significant economic impact” that divides the total small business economic impact into the total personal income for every industry in the affected area, predictably finding that, though a rule might force every small business in a specific industry in the area into insolvency, the resulting impacts are “insignificant” with respect to the total gross product of the area); *see also* Letter from Thomas M. Sullivan, Chief Counsel for Advocacy, U.S. Small Bus. Admin., to David Hankla, Field Supervisor, U.S. Fish & Wildlife Serv. (June 3, 2003), *available at* [http://www.sba.gov/advo/laws/comments/fws\\_03\\_0603.pdf](http://www.sba.gov/advo/laws/comments/fws_03_0603.pdf) (informing FWS that a proposed rule had employed an improper test under the RFA to conclude in a finding that there was no significant economic impact).

119. U.S. GEN. ACCOUNTING OFFICE, *REGULATORY FLEXIBILITY ACT: STATUS OF AGENCIES' COMPLIANCE* 13 (1994), *available at* <http://archive.gao.gov/t2pbat3/151400.pdf>.

120. *See id.* at 14-15.

121. CONSAD RESEARCH CORP., *supra* note 87, at 1.

122. *Id.* at 18.

agencies completed FRFAs in forty-nine percent of the rules.<sup>123</sup> At the same time, Congress amended the RFA in 1996 to require agencies to provide the factual bases for their certification statements and to provide the right of judicial review to regulated small entities regarding those certification decisions.<sup>124</sup>

*b. Some Rules That Were Originally Certified Currently Have Significant Economic Impacts on Substantial Numbers of Small Entities*

The second reason for the disproportionate number of section 610 reviews is that agencies often claim that an original rule turned out not to have a significant economic impact on small entities. Agencies are required by the RFA to implement plans for periodic regulatory review,<sup>125</sup> but some, like the EPA, have adopted plans for review which require agency officials to review only those rules which were not certified at the time of their publication.<sup>126</sup> Other agencies, like the Department of Transportation, claim to review their rules at the time of the periodic reviews in an initial screening analysis to determine if the rule *currently* has a significant economic impact on a substantial number of small entities.<sup>127</sup> Given the very low level of section 610 reviews, it is likely that some rules are mischaracterized by agency officials during the section 610 review “screening” as not significant or affecting an insubstantial number of small entities.

*3. Agencies May Simply Neglect (or be Unable) to Fulfill Their Statutory Duties*

Third, some rules may have been neglected due to a lack of institutional memory at agencies, an unfamiliarity with the RFA, or an absence of staff necessary to complete section 610 reviews. Since it is impossible to provide evidence to prove such assumptions, it would appear proper to assume that this would account for very few section 610 review failures. Since, however, even the agency that deals with small business issues on a daily basis appeared astoundingly unfamiliar with the RFA in the early 1990s,<sup>128</sup> it is not

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123. *Id.*

124. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 857.

125. 5 U.S.C. § 610(a) (2000).

126. *See supra* note 107 and accompanying text.

127. *See supra* note 108 and accompanying text.

128. The SBA published one rule in 1993 which the agency identified as likely to have a significant economic impact on a substantial number of small entities. For this

unreasonable to believe that at least a handful of rules were not reviewed as a result of some institutional shortcoming or oversight.

### **B. The Causes for the Failure of Section 610 to Achieve Regulatory Burden Reduction for Small Entities**

Even when agencies correctly identify rules which harm small business and agree to review them, these reviews are often not sufficiently detailed to produce the benefits the RFA envisioned. In other instances, reviews have the exact opposite effect of that intended by the RFA, where the agency labels a regulatory action a section 610 review, even though the purpose of the rulemaking is to impose further burdens on small entities.

#### *1. Agencies Are Not Required to Act in Response to Section 610 Reviews*

Section 610 requires agencies to conduct a “review” of rules ten years after their final publication. Agencies are instructed to the following effect:

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.<sup>129</sup>

Thus, section 610 does not require the agency to re-promulgate rules, nor does it require the agency to even publish the results of its “review.” In fact, in almost all cases, the only indicator to the public that a rule was actually reviewed is the notice published in the *Unified Agenda*.<sup>130</sup> It is unsurprising, then, that the vast major-

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rule, the agency misidentified its regulatory flexibility analysis as a “regulatory eligibility [sic] analysis” and appears to have simply copied its “initial regulatory eligibility [sic] analysis,” typo included, into its *final* rule. SBA Small Business Size Standards; Business Loan Program; Alternative Size Standard, 58 Fed. Reg. 12,334 (Mar. 4, 1993).

129. 5 U.S.C. § 610(c) (2000).

130. The notable exception to the rule is the Occupational Safety and Health Administration, which publishes lengthy reports on the results of its completed section 610 reviews on its website. U.S. Dep’t of Labor, Occupational Safety & Health Admin., Lookback Reviews (2005), [http://www.osha.gov/dcsp/compliance\\_assistance/lookback.html](http://www.osha.gov/dcsp/compliance_assistance/lookback.html). While these reports invariably conclude that the rule could not be adjusted to reduce burdens on small entities, and do not acknowledge that the rules impose costs on the regulated public, they are informative and go into great detail on the benefits of the regulation. See, e.g., Regulatory Review of the Occupational

ity of section 610 reviews conclude with no agency action—and hence, no small entity regulatory relief.<sup>131</sup>

2. *Agencies Are Not Required to Provide Meaningful Opportunity for Public Involvement During Section 610 Review*

The law as currently constituted does not appear to provide a meaningful opportunity for public involvement in the section 610 review process. Section 610 does not require agencies to provide the public with notice that a review is currently underway, nor is the agency required to alert the public as to when the review will be completed. Agencies must only annually “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.”<sup>132</sup>

As a result, most agencies do not publish notices in the *Federal Register* informing the public that rule review is currently underway, apart from a notice that the rule may be reviewed sometime within the next twelve months, nor do the agencies actively solicit comments on issues being reviewed.<sup>133</sup> Section 610 reviews carry

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Safety and Health Administration’s Ethylene Oxide Standard, 29 C.F.R. § 1910.1047 (2005), available at [http://www.osha.gov/dcsp/compliance\\_assistance/lookback/ethylene\\_oxide\\_lookback.pdf](http://www.osha.gov/dcsp/compliance_assistance/lookback/ethylene_oxide_lookback.pdf).

131. Even starker, the majority of actions agencies actually do identify as being taken in response to a section 610 review should probably not be classified as such. As Part III outlines, it appears far more likely that an agency action that is claimed to be in response to a section 610 review will increase small entity burdens, rather than decrease them. See *supra* Part III.B. This leads to the conclusion that at least some of these rules were not actually promulgated in the course of an agency effort to reduce existing small entity burdens. Hence, agencies appear to be truly acting to reduce small entity burdens in response to a very small percentage of completed section 610 reviews (approximately ten percent). See *supra* tbl.2.

132. 5 U.S.C. § 610(c) (2000).

133. Some agencies occasionally publish notices in the *Federal Register* alerting the public to an open 610 review, but this is not common practice, and even when agencies publish notices, they do not do so consistently. See, e.g., OSHA Notice of a Regulatory Flexibility Act Review of Lead in Construction, 70 Fed. Reg. 32,739 (June 6, 2005) (to be codified at 29 C.F.R. pt. 1926). Such notices must also be balanced against agencies that take a different approach to soliciting public participation, declining to include their notices in the *Unified Agenda* to make sure the notices are reflected in the index to section 610 reviews, and instead occasionally publishing all their section 610 review notices as a long list of C.F.R. sections that might be reviewed sometime in the future. The FCC Possible Revision or Elimination of Rules, 70 Fed. Reg. 33,416 (June 8, 2005), provides a pertinent example. It provides a massive list of C.F.R. sections which reached their respective ten-year anniversaries sometime between 2002 and 2005, with no discussion of the extent each section had a continuing need, and no discussion of the agency’s thoughts on changed circumstances. Further,

forward from one *Unified Agenda* to the next, with some agencies putting off section 610 reviews time and again.<sup>134</sup> In addition, because the section 610 review notices are only published in the *Federal Register*, they may go unnoticed by large numbers of potentially affected small entities.

3. *Agencies Often Label Regulatory Action as Rulemaking in Response to Section 610 Review to Satisfy the Letter of the Law, Though the Rulemaking is Intended to Impose New Burdens on Small Entities*

The weakness of the actual requirements of section 610 becomes apparent when one surveys the results of section 610 reviews. As discussed above, agencies report that they have conducted a large number of reviews over the past twenty-five years, but regulatory actions in response to these reviews are few and far between.<sup>135</sup> When agencies do propose an action that is identified as a response to a section 610 review, however, most often it will actually *increase* the regulatory burden on small business.

A prime example of such improper labeling is the Federal Motor Carrier Safety Administration's (FMCSA) 2003 final rule, Transportation of Household Goods.<sup>136</sup> In this rulemaking, the agency did not explain how the rule incorporated the non-public section 610 review that the agency claimed the rule was in response to. In fact, the rule introduced new requirements that, among other things, increased the paperwork burden for each small entity by five hundred hours, approximately a sixty percent increase, even though it was certified as not having a significant economic impact on a substantial number of small entities.<sup>137</sup> FMCSA did not discuss what regulatory alternatives were available to reduce the new

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there was no mention of any complaints received about each section, apart from a statement of purpose that appears copied and pasted from each original rule.

134. One notable example is OSHA, which twice published section 610 review notices for two separate rules in every *Unified Agenda* for four years. See, e.g., Semiannual Agenda of Regulations, 65 Fed. Reg. 23,014, 23,081 (Apr. 24, 2000) (OSHA "Control of Hazardous Energy Sources (Lockout/Tagout) (Completion of a Section 610 Review)"); Semiannual Agenda of Regulations, 61 Fed. Reg. 62,748, 62,778 (Nov. 29, 1996) (OSHA "Control of Hazardous Energy Sources (Lockout/Tagout) (Section 610 Review)"). While such extended dedication to considering small entity impacts is surely commendable, it is likely that the extended nature of these notices reduced their value to the public in alerting regulated entities that the agency was actually in the process of reviewing the rule.

135. See *supra* Part III.B.

136. FMCSA Transportation of Household Goods; Consumer Protection Regulations, 68 Fed. Reg. 35,064 (June 11, 2003) (codified at 49 C.F.R. pts. 375 & 377).

137. *Id.* at 35,088.

rule's impacts on small entities or why the agency did not adopt those alternatives. The rulemaking record did not support the conclusion that the agency was acting to reduce the existing regulation's impact on small entities, nor that the agency had previously completed a periodic review with the goal of reducing burdens to small entities. It is difficult to conclude that the agency was acting on the results of a completed section 610 review, rather than simply imposing new regulatory obligations under the auspices of a section 610 review that should have been completed prior to the rulemaking.<sup>138</sup>

## V. CURRENT LEGISLATIVE EFFORTS TO REFORM SECTION 610

### A. The House and Senate Bills

There are currently two bills pending in the House of Representatives and the Senate which are designed in part to address the ongoing issues with section 610 review. As discussed above, Congress has attempted in the past to address the serious problems with implementation of section 610 of the RFA.<sup>139</sup>

The Regulatory Flexibility Improvements Act<sup>140</sup> was introduced in the House of Representatives by Small Business Committee Chairman Donald Manzullo (Ill.-16) on February 9, 2005. The Senate Small Business Committee Chairwoman, Senator Olympia Snowe (ME), introduced the Regulatory Flexibility Reform Act of

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138. It seems almost unfair to single FMCSA out for promulgating such rules "in response to a section 610 review." Other agencies also often claim that large or disproportionately costly rules are actually the result of a section 610 review. *See, e.g.*, Veterinary Diagnostic Services User Fees, 69 Fed. Reg. 25,305 (May 6, 2004) (after issuing a rule that increased inspection fees to small entities, agency responded to a comment from an export inspector who claimed that the rule would make his operation unprofitable by telling him if the increase put him out of business, another exporter would be able to take over for him); FCC Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 68 Fed. Reg. 44,144 (July 25, 2003) (rule introduced wide-ranging new prohibitions on small entities soliciting business by phone and fax that imposed major costs, including new "do not call" lists businesses would be required to purchase, blanket prohibitions on faxes, record keeping requirements, and other provisions); Government Contractors: Affirmative Action Requirements, 65 Fed. Reg. 68,022 (Nov. 13, 2000) (after issuing final rule imposing new reporting requirement for all small business government contractors estimated to impose more than 1,000,000 hours of annual paperwork burden, agency certified rule as not having significant economic impact on substantial number of small entities and dismissed comments challenging agency's characterization of existing burdens).

139. *See supra* text accompanying notes 20-23, 124.

140. Regulatory Flexibility Improvements Act, H.R. 682, 109th Cong. (2005).

2005 on July 13, 2005.<sup>141</sup> The bills amend section 610 in an almost identical fashion.

House Bill 682 would provide for a new regulatory authority for the Chief Counsel for Advocacy of the SBA to issue regulations that interpret the provisions of the RFA, including section 610.<sup>142</sup> This regulatory authority could be exercised to adopt some of the recommendations made below regarding how the RFA should be interpreted. For example, some clear authority could be provided on the subject of whether amending existing rules “restarts the clock” for purposes of section 610 review.<sup>143</sup> For some of these recommendations, the existing statute does not make clear that they could be adopted properly through regulation. Therefore, this Article not only highlights the potential application of House Bill 682’s regulatory authority provision, but because the legislation is pending and Congress currently has an opportunity to directly address the ongoing problems with section 610, the majority of these recommendations focus on direct action by Congress.

### **B. The Potential Effects of Pending Legislation on Low Review Rates**

The pending legislation would appear to resolve the agency certification issue and make strides towards reducing agency neglect of section 610 responsibilities. Neither Act, however, appears to directly solve the issue of when the time frame for review begins running, or whether it is tolled by amendments to final rules, or otherwise affected by subsequent agency actions.

#### *1. Pending Legislation Does Not Directly Address the Problem of “Restarting the Clock”*

Neither bill directly addresses the issue of what a “rule” is for the purposes of section 610 review. Both retain the language of the current section 610, for which the term “rule” would continue to be defined in 5 U.S.C. § 601 as an agency action required to be promulgated through notice and comment rulemaking.<sup>144</sup> House

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141. Regulatory Flexibility Reform Act of 2005, S. 1388, 109th Cong. (2005).

142. See H.R. 682 § 10 (amending Chapter 6 of Title 5 to add 5 U.S.C. § 613).

143. See *id.*

144. See S. 1388 § 5; H.R. 682 § 7. H.R. 682, however, would expand the definition of “rule” to include a number of specialized agency actions not currently considered by those agencies to be “rules.” See H.R. 682 § 3.



Bill 682 would appear to grant the Chief Counsel for Advocacy the authority to further define “rule” for purposes of section 610.<sup>145</sup>

2. *Pending Legislation Would Answer the Question as to When Agencies Should Determine If a Rule Has a Significant Economic Impact on a Substantial Number of Small Entities*

Both House Bill 682 and Senate Bill 1388 would address the open question as to whether a rule must be reviewed under section 610 if it was originally published with a certification. House Bill 682 and Senate Bill 1388 provide that an agency must review any rule that “the head of the agency determines has a significant economic impact on a substantial number of small entities” and further state that “[s]uch determination shall be made without regard to whether the agency performed an analysis under section 604.”<sup>146</sup>

Thus, the bills would require all agencies to review all rules to determine whether the rule was currently having a significant economic impact on a substantial number of small entities.

3. *Pending Legislation Addresses Agency Neglect by Requiring Publication of Agency Plans to Conduct Section 610 Reviews*

The pending legislation sets a definite timetable for the rectification of agency neglect of section 610 reviews. Under both bills, agencies would be required to publish a plan for review of all existing regulations within the next ten years.<sup>147</sup> In addition, they both contain provisions which would require every agency to “annually submit a report regarding the results of its review . . . to Congress and, in the case of agencies other than independent regulatory agencies . . . to the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget.”<sup>148</sup> Assuming that Congress and OIRA followed up with at least minimal oversight of the reports, this reporting provision can be anticipated to persuade agencies to devote more attention to the need for section 610 reviews and to greatly reduce inadvertent non-compliance. In addition, the oversight would encourage agencies to devote agency resources to reviewing rules, thus reduc-

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145. See H.R. 682 § 10 (“[T]he Chief Counsel for Advocacy shall . . . issue rules governing agency compliance with this chapter.”).

146. S. 1388 § 5 (amending 5 U.S.C. § 610(a)); H.R. 682 § 7 (same).

147. S. 1388 § 5 (amending 5 U.S.C. § 610(b)); H.R. 682 § 7 (same).

148. S. 1388 § 5 (amending 5 U.S.C. § 610(c)); H.R. 682 § 7 (same).

ing the number of agencies that engage in pro forma exercises labeled as section 610 reviews.

Both bills, however, would alter the current requirement that agencies publish a list of rules “to be reviewed pursuant to this section during the succeeding twelve months,”<sup>149</sup> and replace it with language which does not set a time restraint on the agency.<sup>150</sup> While this notice requirement could be read to require agencies to publish notice at the same time as their section 610 review, it is unclear if this will occur, as current OIRA and Regulatory Information Service Center guidance instructs agencies to submit their section 610 review notices to the *Unified Agenda* twice per year.<sup>151</sup>

### C. The Potential Shortcomings of Pending Legislation on the Overall Failure of Section 610 to Result in Any Reduction of Unnecessary Regulatory Burdens

Although the legislative changes proposed would be a helpful first step, they would likely actually do little to encourage agency action to reduce small entity burdens beyond that incorporated in the current, ineffective version of section 610. No provisions of the House and Senate bills require agencies to act—or even to provide the public with the contents of final decisions to not act—under section 610. While the web page publication requirement may increase small entity exposure to section 610 reforms, the lack of a requirement tying notice to an actual, ongoing review reduces the notice’s value in facilitating a forum for meaningful public comment. The legislation introduces no new requirements limiting agency designation of regulatory acts as in response to a completed section 610 review.

#### 1. *Pending Legislation Does Not Require Agencies to Take Any Action in Response to Completed Reviews*

The pending legislation would not require agencies to act in response to their section 610 reviews.<sup>152</sup> While both would require new reports to Congress and OIRA on the results of these reviews,

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149. 5 U.S.C. § 610(c) (2000).

150. S. 1388 § 5 (amending 5 U.S.C. § 610(c)); H.R. 682 § 7 (same).

151. See, e.g., Memorandum from the Office of Info. & Regulatory Affairs to the Regulatory Policy Officers at Exec. Dep’ts and Agencies and Managing and Exec. Dirs. of Certain Agencies and Comm’ns, Attachment 1 (June 10, 1997) (offering guidelines for agencies with respect to the creation of an index for section 610 reviews) (on file with author).

152. Both bills retain the simple requirement to file notice of intent to review a rule with no subsequent post-review publication requirements, though both require a new

neither requires agencies to publish a regulatory proposal based on the results of the review or any notice to the public upon the completion of the review. Since the bills would make no change as to post-review publication requirements, the current practice of filing notice of intent to review a rule would continue to suffice for purposes of section 610 compliance.<sup>153</sup>

2. *Pending Legislation Does Not Add a Meaningful Opportunity for Public Involvement in Section 610 Reviews*

The legislation would not require agencies to allow the public to comment with a notice that the review was currently underway. As with the current section 610, the bills would only require the publication of notice that a rule would be subject to review at some point.<sup>154</sup> Furthermore, there is no provision to prevent agencies from carrying over notices from year to year (other than the ten-year review deadline itself), and the message of the need for small entities to become involved could be diluted.

The bills, however, take a very positive step in the direction of providing the public with information on ongoing reviews. House Bill 682 and Senate Bill 1388 would both require agencies to post their notices online, thus affording the public more reasonable notice.<sup>155</sup> Depending on the popularity and usability of agency web sites, this provision should increase the visibility of section 610 reviews.

3. *Pending Legislation Does Not Address the Agency Use of Regulatory Actions to Satisfy the Review Requirement*

It is unclear whether the proposed legislation would do much to deter agencies from labeling regulatory actions as satisfying section 610 review requirements or arising from section 610 reviews. As discussed above, the legislation would introduce no new requirement for agency action in response to completed internal reviews.<sup>156</sup> Section 610 currently already states that the “purpose of the review shall be to determine whether rules should be continued without change, or should be amended or rescinded . . . to mini-

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report to Congress and/or the OIRA on the results of reviews. See S. 1388 § 5; H.R. 682 § 7.

153. See 5 U.S.C. § 610(c) (2000); see also S. 1388 § 5; H.R. 682 § 7.

154. See S. 1388 § 5 (adding 5 U.S.C. § 610(e): “The agency shall publish in the *Federal Register* and on its Web site a list of rules to be reviewed pursuant to such plan.”); H.R. 682 § 7 (same).

155. See S. 1388 § 5; H.R. 682 § 7.

156. See *supra* text accompanying notes 152-53.

mize any significant economic impacts of the rules on a substantial number of small entities.”<sup>157</sup> The House and Senate bills retain this language, with the House bill adding a second purpose, to “maximize any significant beneficial economic impacts.”<sup>158</sup>

## VI. RECOMMENDATIONS FOR LEGISLATION TO ADDRESS THE IMPLEMENTATION PROBLEMS IDENTIFIED IN THIS ARTICLE

The currently pending legislation addresses some of the problems underlying the general low rates of agency review under section 610. This Article makes additional recommendations based on the results of its review of agency practices and the general failure of the current section 610 to result in any significant benefit to small entities.

### A. Recommendation to Address Low Review Rates: Legislation Should Directly Address the Question of How Subsequent Amendment of a Rule Affects the Ten-Year Periodic Review Timetable

Regardless of the method chosen to address the problem of no reductions of regulatory burdens, legislation should solve the problem of low review rates by including a clause explicitly stating when the tolling of the ten-year period begins, and what rulemakings are to be included within the review. This Article also recommends tailoring the remedies available for agency noncompliance to ensure that agencies conduct the reviews required of them.

#### 1. *Legislation Should Further Clarify When the Ten-Year Period Begins and Ends*

The following sentence originates from the legislation’s proposed section 610(b), with additional text by the author in brackets and italics:

(b) The plan shall provide for the review of all such agency rules existing on the date of the enactment of the Regulatory Flexibility Improvements Act within 10 years of the date of publication of the plan in the *Federal Register* and for review of rules adopted after the date of enactment of the Regulatory Flexibility Improvements Act within 10 years after the publication of the final rule in the *Federal Register*.<sup>159</sup> [*Should subsequent amendment of the rule impose a significant economic burden on*

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157. 5 U.S.C. § 610(a) (2000).

158. S. 1388 § 5 (amending 5 U.S.C. § 610(a)); H.R. 682 § 7 (same).

159. See H.R. 682 § 7 (amending 5 U.S.C. § 610(b)).

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*a substantial number of small entities, the later action shall be reviewed in conjunction with the original final rule ten years after the promulgation of the original final rule and every ten years thereafter.]*

Such a provision would allow for efficient review of all the regulation as it currently exists, make clear the timetable for the review, and establish a baseline date for estimating future reviews of the code sections.

Since the problem of “restarting the clock” stems from agencies’ interpretations of the language in section 610, House Bill 682’s grant of regulatory authority could also indirectly address the issue. Upon passage of the current version of House Bill 682, the Chief Counsel for Advocacy could clarify the effect of subsequent amendment of a final rule on the way agencies are to calculate the ten-year period referred to in the statute, using language similar to that proposed here for inclusion in pending legislation. Such implementing regulation would not establish new duties for agencies not found in the statute itself, so it would appear equally appropriate to address the issue either through express statutory language or through the grant of regulatory authority to the Chief Counsel for Advocacy. Since the opportunity is present for Congress to address the issue directly, however, this Article recommends that Congress itself act to resolve ambiguity.

2. *Legislation Should Improve Available Remedies to Ensure Agencies Conduct Required Reviews*

What penalty should be imposed for agency refusal to implement section 610? Agencies’ compliance patterns demonstrate that they are willing to routinely ignore the RFA’s section 610 requirement, although it is judicially reviewable.<sup>160</sup> Small entities and their trade associations are currently not willing to devote hundreds of thousands of dollars to forcing *pro forma* section 610 review notices to be published in the *Unified Agenda*, but would they enforce their rights if a challenge could force the agencies to provide meaningful public participation through notice and comment rulemaking?

Currently, it is not clear whether small entities or their trade associations would challenge agency failure to comply with section 610 if notice and comment rulemaking were required. It is instruc-

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160. See 5 U.S.C. § 611(a) (2000) (“For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of [section] 610 . . .”).

tive to recall that today, small entities and trade associations are permitted to petition for rulemaking under the Administrative Procedures Act,<sup>161</sup> yet they do not do so. The current remedy for a section 610 violation—a judicial order to an agency to publish a notice in the *Unified Agenda* that, at some point in the next twelve months, the agency will complete an internal review—could not possibly justify the expense of retaining counsel, filing an action, and following up with the agency to ensure that the agency complied with a court order. Once the remedy becomes a reopening of the rulemaking and public participation, it may be that more trade associations are willing to expend funds to challenge onerous regulatory requirements.

This Article concludes, however, that the agency section 610 compliance patterns demonstrate a widespread and continuing problem. Forcing small entities to seek a court order to force review is unlikely to provide sufficient incentive to regulated entities, as agencies currently face just such a remedy,<sup>162</sup> but have ignored their responsibilities. The main remedy for complete failure to complete a periodic review under section 610 should not be a court order to complete section 610 review. Rather, agencies should be put on notice that failure to review rules under section 610 will be fatal to the underlying rule itself.

Thus, the remedy section of the RFA should specify that a vacation of the underlying rule is the sole remedy for violation of section 610, with no judicial discretion to allow the agency to continue enforcing the rule pending an allegedly forthcoming section 610 review. To this end, as discussed below, I recommend the addition of a new subsection (f) of section 610 which reads as follows:

(f) Rules for which the agency has not published a general notice of proposed rulemaking upon the expiration of ten years or final rule upon the expiration of eleven years from the date of their initial publication in the *Federal Register* shall lapse and become unenforceable. Provided, an agency may continue enforcement of a lapsed rule once for a period of not more than twelve months from the publication of a determination in the *Federal Register* stating that the lapse of the rule would have a significant negative impact to human health or safety, along with the factual basis for such determination.<sup>163</sup>

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161. 5 U.S.C. § 553(e) (2000).

162. 5 U.S.C. § 611(a) (2000) (providing for review of agency failure to comply with section 610 and setting basic remedy as remand of rule with deferred enforcement against small entities).

163. See *infra* Part VI.B.1.

The purpose of this subsection would be to “sunset” those rules for which the agency ignored its responsibility to conduct periodic review, and the language would ensure compliance with the notice and comment requirement suggested below. The provision would allow an agency to publish its notice of proposed rulemaking sometime before the expiration of ten years, but to delay publication of the final rule for up to one year after the statutory ten-year review period, allowing for more than adequate time for timely and sufficient consideration of the record. Also, for those significant rules that the agency has overlooked and inadvertently allowed to lapse, the agency may keep them in effect, provided the agency can show that the absence of the rule would have a significant negative impact on human health or safety.

While sunsetting a rule for which an agency has refused to conduct periodic review may seem an overly harsh penalty, analysis of the record shows that traditional judicial remedies have proven almost completely ineffective at ensuring that agencies conduct such reviews. Legal challenges to agencies' failures to comply may increase in number once judicial remedies become more likely to encourage public participation, but given that agencies have had a quarter of a century to bring themselves into compliance, it is unlikely that agencies will adopt better compliance regimes without more substantive penalties. Further, for those rules which temporarily lapse and during that time could have serious implications, the new language would provide a mechanism for an agency to immediately reinstitute the effectiveness of the rule, pending forthcoming periodic review.

**B. Recommendation to Address Section 610's Overall Failure to Reduce Unnecessary Regulatory Burdens: Legislation Should Introduce a Requirement for Agencies to Conduct Some Public Process in Response to a Completed Section 610 Review**

As illustrated above, the most likely current outcome of a section 610 review conducted internally within an agency is no action.<sup>164</sup> It is clear that federal agencies are unlikely to reduce regulatory burdens on small entities following section 610 reviews. For section 610 to be a truly effective periodic review requirement, however, it must contain a provision which requires agencies to open their process to the public in some fashion and come to a final public and judicially-reviewable decision. This Article identifies

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164. *See supra* Part III.B.

four such options: (1) notice and comment rulemaking every ten years, (2) notice and comment rulemaking in response to a petition from the Chief Counsel for Advocacy, (3) small entity review panels similar to those currently conducted in EPA and OSHA rulemakings, and (4) a combination of section 610 reviews and Paperwork Reduction Act reviews, and oversight by OMB and the SBA's Office of Advocacy.<sup>165</sup> The Article concludes that the adoption of option (1), requiring notice and comment rulemaking for periodic reviews, would be the most effective and efficient option available, but leaves open the possibility of combining this rulemaking process with small entity review panels discussed in option (3).

Since all of these options would introduce new duties on agencies not currently found in section 610, it appears that the adoption of any of them would require legislation, as opposed to relying on House Bill 682's grant of regulatory authority to the Chief Counsel for Advocacy.

1. *Mandatory Notice and Comment Rulemaking Every Ten Years*

One option to ensure agency action is to require the agency to reopen every rulemaking to notice and comment every ten years, with the stated goal of minimizing the significant economic impact of the rules on a substantial number of small entities. This would be accomplished by tying section 610 review to the Administrative Procedure Act section 553 "notice and comment" procedure, and suspending the effect of those rules which are not thus reopened to public participation within a set time frame. Such a rulemaking would consist of the agency identifying all significant regulatory alternatives which would reduce small entity burdens and requesting comment on the alternatives. Since the proposed and final rule would be required to comply with section 553 of the Administrative Procedure Act, the action would also trigger the RFA's analysis requirements.

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165. In a 1996 paper on periodic review of existing rules, Neil Eisner and Judith Kaleta discussed a number of options for periodic review, including periodic "clean up" reviews, multiagency reviews, reviews by broad categories, and reviews by affected groups. See Neil R. Eisner & Judith S. Kaleta, *Federal Agency Reviews of Existing Regulations*, 48 ADMIN. L. REV. 139, 160-61 (1996). Although these categories of review have much to recommend them, this Article is focused on changes to existing law which could bring about a legally enforceable review requirement, and these categories are not reviewed here.



This option has a number of benefits. First, agencies would be forced to explain, in a form subject to judicial review, their reasoning as to why rules should remain in effect without change. Currently, agencies are not required to publish any final results or explanation of the outcome of a section 610 review.<sup>166</sup> Hence, most publish nothing on completed reviews, and those agencies that do so rarely publish more than a general statement that “[t]he agency received no comment on the action and has concluded that the rule needs no revisions to minimize impacts on small entities.”<sup>167</sup> In a notice and comment rulemaking, agencies would be held to at least an arbitrary and capricious standard that required them to explain why they felt no revisions were necessary in the face of industry comments to the contrary. Though this standard is not difficult to meet, current agency explanations as to why small entity burden reductions are unnecessary or impracticable would probably not even meet the arbitrary and capricious standard if used in notice and comment rulemaking.

Second, small entities would be guaranteed an opportunity to provide written comments and participate in the review. Currently, agencies only provide one notice that a review will be conducted *sometime* in the next twelve months.<sup>168</sup> Small entities are not aware whether the review is scheduled for the following week or the last week of the eleventh month after the notice. Nor are they provided answers to their comments, as agencies are not required to publish any formal response. Agencies are unlikely to provide reasonable consideration to public comments to which they are not required to respond.

Third, an agency required to conduct a notice and comment rulemaking is also required to comply with the regulatory flexibility analysis requirements of the RFA. Sections 603 and 604 require agencies to evaluate the impacts their actions could have on small entities, unless the rule is certified under section 605(b).<sup>169</sup> This analysis would ensure that agencies attempt to evaluate the *current*

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166. Review under the current section 610 is akin to the long-neglected requirements found in some agency manuals ordering periodic reviews with no public input or released results. *See, e.g.*, U.S. DEP'T OF INTERIOR, DEPARTMENTAL MANUAL 8.2A (1998), available at [http://elips.doi.gov/elips/DM\\_word/3212.doc](http://elips.doi.gov/elips/DM_word/3212.doc) (“You must review each CFR part at least every five years.”).

167. EPA Spring 2005 Regulatory Agenda, 70 Fed. Reg. 27,509, 27,615 (May 16, 2005) (“Pesticide Worker Protection Standard (WPS) Rule (Completion of a Section 610 Review)”); *see also* EPA Fall 2004 Regulatory Agenda, 69 Fed. Reg. 73,875, 73,879 (Dec. 13, 2004) (listing completed section 610 reviews with no comments).

168. 5 U.S.C. § 610(c) (2000).

169. 5 U.S.C. §§ 603, 604, 605.

impacts of the rule, as opposed to falling back on a pre-rulemaking economic analysis conducted ten years prior.

Finally, notice and comment rulemaking requires the commitment of resources. Agencies currently reduce the cost of section 610 review by assigning small numbers of otherwise unoccupied staff to review rules. Sometimes these staff members are knowledgeable of the ten-year-old rules they are reviewing and are thus able to devote adequate consideration to the problems small entities are facing, but usually they are not. The result is *pro forma* review with boilerplate language, inadequate consideration of the rule's impact on regulated small entities, and no agency action to reduce small entity regulatory burdens.<sup>170</sup> Notice and comment rulemaking, on the other hand, exposes the agency to possible legal liability and public scrutiny.<sup>171</sup> Agency officials will be forced to assign staff to rulemaking who are capable of actually reviewing existing regulations in an informed and conscientious manner. This is no small benefit, and would likely prove to be the most important aspect of any notice and comment rulemaking requirement.

Amending the RFA to order notice and comment rulemaking in section 610 reviews would not necessarily require large changes. The section 610 language of the currently pending legislation could be amended to add the following new sections (e) and (f):

(e) The agency shall publish rules to be continued through notice and comment rulemaking pursuant to section 553(b) of this title. The agency shall publish in the *Federal Register* general notices of proposed rulemaking and provide interested persons no less than sixty days to participate in the rulemaking through submission of written data, views, or arguments, with or without opportunity for oral presentation. In addition to any other required information, general notices of proposed rulemaking shall include a section title, "Section 610 Review," that includes:

- (1) a brief description of the rule,
- (2) the reason why the agency has determined that it has a significant economic impact on a substantial number of small entities (without regard to whether it had prepared a final regulatory flexibility analysis for the rule), and

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170. *See supra* Part III.B.

171. One could argue that noncompliance with section 610 should also result in legal liability. Due to the bare notice requirement of the current section 610, however, no small entity is likely to expend the funds necessary to obtain a court order forcing an agency to publish a short notice in the *Unified Agenda* that the rule will be reviewed internally sometime within the next twelve months. Notice and comment rulemaking, on the other hand, results in a final, public agency decision and a public administrative record which must support the agency's final decision.

(3) regulatory alternatives the agency is considering with the objectives of minimizing any significant economic impacts or maximizing any significant beneficial economic impacts on a substantial number of small entities.

(f) Rules for which the agency has not published a general notice of proposed rulemaking upon the expiration of ten years or final rule upon the expiration of eleven years from the date of their initial publication in the *Federal Register* shall lapse and become unenforceable. Provided, an agency may continue enforcement of a lapsed rule once for a period of not more than twelve months from the publication of a determination in the *Federal Register* stating that the lapse of the rule would have a significant negative impact to human health or safety, along with the factual basis for such determination.

Further, as discussed below, section 611 should also be amended to include an entirely new sub-section:

(e) In granting relief in an action alleging violation of section 610 of this section, the court shall vacate the rule, prohibit agency enforcement of the rule against small entities, and remand it to the agency for notice and comment rulemaking. The court shall not provide for continued enforcement of the rule.

There are a number of considerations which arise with a notice and comment rulemaking requirement, which I address below.

*a. Effects of the Recommendation on Agency Resources*

One of the more prevalent arguments forwarded by agency officials in response to the current RFA requirement that they at least determine how much their rules could cost the regulated public is that their staff and budget resources are limited, and that the agency is unable to afford the cost of making such estimates. It does not appear, however, that the proposed amendments for section 610 review would necessarily entail large agency expenditures.

First, it must be remembered that section 610's periodic review requirement applies only to those rules which an agency has identified as having a significant economic impact on a substantial number of small entities.<sup>172</sup> For most agencies, the vast majority of their rules are not designated as such (in many cases, properly so). For example, in the 1993 regulatory sample discussed in Part III, agencies promulgated 309 final rules, of which only thirty-seven were accompanied by a determination that the rule would have a significant economic impact on a substantial number of small enti-

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172. See 5 U.S.C. § 610(a); see also *supra* Part III.A.2.

ties.<sup>173</sup> The current approach contemplated in House Bill 682 would require the agency to determine at the time of periodic review whether the rule has a significant economic impact on a substantial number of small entities for purposes of determining whether section 610 review was required, and it is likely that agencies would find roughly the same proportion of rules to have such impact.<sup>174</sup> Thus, even though it may be reasonable to believe that reviewing a rule could impose some costs on agencies, the simple fact is that the large majority of agency regulation would not trigger section 610 review requirements.

Second, given agency regulatory goals, the most common outcome for a notice and comment requirement would be that the agency would propose very few changes. Subject to the arbitrary and capricious standard, the agency would only update its estimates on how the rule is affecting small entities, while providing discussion of regulatory alternatives to the status quo and defensible reasons for not adopting those alternatives. This would not require the same level of staff time as a substantive amendment to the regulation, nor would it likely impose large publication costs. For those few rules which would require in-depth consideration of alternatives and adoption of a new regulatory approach, such rules would most likely be central to the agency's core mission and regulatory burdens, and section 610 review would not be likely to greatly increase their administrative costs.

Finally, even should agencies reasonably believe that amendment of the RFA as discussed will impose significant costs in some cases, these costs must also be weighed against the nature of agency regulation. Federal agency rules are not industry "best practices." They are federal law, and must be complied with by those who are regulated. A violation of these rules carries civil and criminal penalties, and small entities with less resources than federal agencies can quickly fall into traps for the unwary, where they will not be permitted to plead that determination of their responsibilities under the rules would have cost too much. As Congress ultimately concluded during its consideration of the RFA:

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173. *See supra* tbl. 1. The difference becomes even more apparent when the reader takes into account the fact that the sample includes twenty-one separate notices from HHS for what appears to be one very large food labeling action. *See supra* note 88.

174. H.R. 682, 109th Cong. § 7 (2005) (proposing 5 U.S.C. § 610(e), mandating agencies to publish a list of rules with significant economic impacts to substantial numbers of small entities, without regard to whether they were accompanied by final regulatory flexibility analyses when originally published).

The Committee is aware that the workload of some agencies may increase during rulemaking. Such temporary increases in costs to the government must be seen in the perspective of long-run reductions in cost to the society, however. An agency which ignores less burdensome alternatives, conversely, is in effect, putting a substantial cost upon certain individuals and groups in the society.<sup>175</sup>

Thus, citing the fundamental unfairness of a situation where agency officials claim to lack the funds to determine the effects of their actions, Congress enacted the RFA and chose to prohibit willful blindness. It appears that even if the RFA should impose some costs on some agencies for a handful of contentious rules, the agencies should respect Congress' expressed will, and ensure that their actions do not unnecessarily harm those who are least able to protect themselves.

*b. Effects of the Recommendation on the Predictability of Regulation*

One interesting concern brought up by a solid periodic review requirement is the role of predictability in the regulation of industry. A rule may require large equipment or capital expenditures upfront, with costs to be recovered slowly over the course of twenty or more years. Again, a prominent example of a long-term regulatory requirement with significant initial sunk costs is the recent nonroad diesel emissions rule promulgated by the EPA.<sup>176</sup> This rule is estimated to cost engine and equipment manufacturers approximately \$1.3 billion in fixed costs, mainly in retooling and redesign.<sup>177</sup> EPA weighs these costs over the agency's estimate of "recovered" costs over a period of thirty years.<sup>178</sup> If, after ten years, EPA was required to reopen the rulemaking to public comment, and the evidence showed that those capital expenditures were not likely to reduce emissions, or that the types of pollution being reduced were not actually as harmful as EPA had originally assumed, and EPA eliminated the requirements, companies that had expended large amounts of capital at the outset of the rule would be in a greatly reduced competitive position to companies which had not.<sup>179</sup>

175. S. REP. NO. 96-878, at 9 (1980), as reprinted in 1980 U.S.C.C.A.N. 2788, 2796.

176. EPA, CONTROL OF EMISSIONS, *supra* note 36, at 6-74, 77.

177. *Id.*

178. *Id.*

179. Although it may seem an ancillary concern, it could be important. After all, an agency such as EPA, faced with a new periodic review requirement, may decide

We must balance the concept of fair regulation of industries with the underlying economic principles behind the feel-good goal of forcing the government to refrain from imposing unnecessary burdens on small entities. Judged from the point of view of existing companies, it would be a fundamentally unfair market if they were forced to endure round after round of massive capital expenditures which agencies later reduced, giving competitors a cost advantage. The concept of free and competitive markets, however, forces us to balance the economics of government regulation. It is true that the RFA operates to force agencies to consider the complaints of *existing* small entities of the type that commonly contact their congressmen, and are glad to have the legal protections of the RFA for their constituents. Protecting existing small entities, however, is not the RFA's only goal. Rather, the RFA operates as an important check to government-produced barriers to market entry, and keeps our free markets competitive and open to future entrepreneurs.<sup>180</sup>

Additionally, as a practical matter, protecting competition may serve to protect small entities. Agencies do not regulate only small entities, but entire industries. Generally, small firms represent over ninety-nine percent of all firms, but due to their sheer size, the small proportion of large firms actually account for almost half of nonfarm private gross domestic product.<sup>181</sup> Allowing existing market players to claim the need for predictability allows agencies to impose eternal high-cost regulations, and has potential to allow large players to spread regulatory costs and prohibit any entrepreneurial small firm from entering that market. This may not only allow large firms to dominate industries due to their ability to better spread regulatory costs, but it could hurt consumers by giving those large firms more market power than they would have had if small company entry were possible. Regulation serves as a way to protect large firms from the smaller firms nipping at their heels.

Thus, the concept of predictability requires serious consideration. Removing regulatory burdens after the expenditure of capital costs would work a fundamental unfairness to the small entities

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that the best way to impose regulatory requirements would be to impose the maximum amount of regulatory costs immediately, rather than spread them over a term of years in which the agency is not sure that it will be authorized to regulate.

180. See, e.g., George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 7-9 (1971) (discussing capture of regulation by rail carriers to erect barriers to entry for new trucking entrants).

181. Office of Advocacy, U.S. Small Bus. Admin., Frequently Asked Questions 1 (2005), <http://www.sba.gov/advo/stats/sbfaq.pdf>.

that choose to stay in a market, and may serve as a disincentive to them to stay when faced with large regulatory costs. Allowing agencies to consider their existing regulatory burden on industry as the “baseline,” however, could erect barriers to entry by smaller firms who are not capable of spreading large regulatory costs, and thus cause harm to both small entities and consumers.

The author believes that large-scale agency vacation of existing regulatory standards is unlikely, regardless of whether agencies are required to engage in notice and comment rulemaking. Agencies should be expected to reduce burdens somewhat, but any regulatory relief would probably not reach the level that would cause small entities to believe they were unfairly forced to expend capital, or dissuade small entities from remaining in markets upon learning of new regulation. Moreover, meaningful review with public participation, of the sort that would be guaranteed by notice and comment rulemaking, would bring such competition issues to light.

*c. Timing Considerations in Notice and Comment Rulemaking*

One important factor to consider in any notice and comment rulemaking requirement would be timing. Has ten years proven to be a reasonable time frame for review, or would some other time frame be more appropriate? Also, section 610 currently states that agencies must conduct review ten years after the rule is published as final.<sup>182</sup> Many rules, however, such as the EPA nonroad diesel rule discussed above, are implemented over the course of many years, and regulatory burdens are sometimes not being imposed until close to the time when the agency would be required to conduct its ten-year section 610 review.<sup>183</sup> Should agencies be forced to review rules that have only been in effect for a year or two, or would it be too confusing to tie the review period to dates that burdens are imposed?

Ten years appears to be an appropriate time frame for current reform efforts. Using the language proposed here for amending section 610(b) to clarify when the review period begins tolling, it would appear that a large number of rules exist which would be

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182. 5 U.S.C. § 610(a) (2000).

183. For example, the EPA's nonroad diesel emissions rule was promulgated on June 29, 2004, and required major reductions in particulate matter emissions from nonroad diesel engines between twenty-five and seventy-five horsepower beginning in 2013. See EPA Final Rule: Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel, 69 Fed. Reg. 38,958, 38,971 (June 29, 2004).

required to be reviewed and would likely occupy agency review personnel for the foreseeable future.<sup>184</sup> Also, ten years may seem like a long time frame, but it is useful because a long time frame guarantees that any evolution of the regulation which could occur has already done so. While it could be argued that after five or seven years, the rule's impacts on small entities would be clear, after ten years, almost all changes in compliance burdens due to litigation and agency interpretations of a rule would surely have occurred. For the time being, ten years would seem an appropriate time frame for review.

As far as when the ten-year period should begin, it appears that publication may be the best compromise. It makes little sense to require a periodic review of a regulatory burden that has only been in effect a year or two. The rule's effects are not yet quantifiable, small entities may not even be aware of the rule's requirements, and the regulation may experience significant evolution due to agency interpretation or litigation that reduces or increases its effects on small entities dramatically. Yet, it is difficult to state that section 610 review should be conducted separately for individual regulations on the event of their ten-year anniversaries. While it is usually not a persuasive argument to claim that agencies should not be required to conduct reviews due to limited resources, neither should the agencies be required to conduct annual reviews for a single rulemaking, budgeting for separate personnel to conduct each one, opening and closing comment periods one after the other, and generally wasting the taxpayers' money on something that could have been done over the course of a few years. One review for each rulemaking would appear appropriate, to be completed ten years after the publication of the final rule in the *Federal Register*.

## 2. *Notice and Comment Rulemaking in Response to a Petition*

As discussed above, mandatory notice and comment rulemaking in response to section 610 reviews appears to be the only way to ensure meaningful public participation, and such public reviews would not likely present an unreasonable drain on agency resources. Should it appear, however, that such an option would be overly burdensome or if it proves likely to lead to regulatory mayhem, a variation on the idea could solve concerns. Instead of requiring notice and comment every ten years for every rulemaking

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184. See *supra* Part VI.A.



which the agency determines has a significant economic impact on a substantial number of small entities, section 610 could be revised to require notice and comment only in such cases where sufficient interest exists to petition the agency for rulemaking. Such an option would appear to be useful because it would: (1) reduce the number of rules treated thusly, and hence, the cost to the reviewing agency, and (2) ensure public participation for those rules which imposed sufficient burden on small entities to petition for its change.

This option would appear to address any agency cost concerns about opening section 610 reviews for public participation. As discussed above, only a small percentage of rules each year are found by agencies to have significant economic impacts on a substantial number of small entities.<sup>185</sup> Should this subset of rules be further limited to those rules for which the agency receives a petition for notice and comment, it is likely that the number of petitions in any given year would be quite small. It is instructive to note the relatively small number of rules involved in responses to OIRA's calls for regulatory reform proposals.<sup>186</sup> Since many of the proposals for reform received by OIRA over the past four years involve rules which do not significantly affect small entities, agencies would be likely to receive even fewer requests based on a revised section 610 than they already currently receive through OIRA's regulatory reform process.

Second, an option involving a basic petition based on specific parameters would ensure that all issues with valid small entity concerns were publicly addressed by an agency. The current APA petition process would not ensure that agencies actually allow for public participation in any more rulemakings than they already do, mainly because of the cost of the process and the narrow standard of review for agency denials of such petitions.<sup>187</sup> By adopting a

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185. *See supra* Part III.A.2.

186. *See supra* text accompanying notes 57-66.

187. *See, e.g.,* *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 809 (D.C. Cir. 1981) (“[T]he decision to institute rulemaking is one that is largely committed to the discretion of the agency, and . . . the scope of review of such a determination must, of necessity, be very narrow.”). Further, it is possible that small entities that did not participate in rulemakings conducted more than ten years prior could later be blocked from raising arguments central to the rulemaking in their petition. *See, e.g.,* *Nader v. Nuclear Regulatory Comm’n*, 513 F.2d 1045, 1054 (D.C. Cir. 1975) (“[I]t is incumbent ‘upon an interested person to act affirmatively to protect himself’ in administrative proceedings, and ‘such a person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated.’”) (quoting *Red River Broad. v. F.C.C.*, 98 F.2d 282, 286 (D.C. Cir.

standard form for petitions, and making it mandatory for agencies to respond to such petitions with opportunities for public participation, section 610 could ensure that agencies conduct meaningful reviews of existing regulations.

An interesting question attached to this option is the following: Who would actually petition agencies for the section 610 notice and comment rulemaking? One possibility would be to simply adopt a provision similar to the APA, allowing any party to petition the agency for section 610 notice and comment process.<sup>188</sup> This would ensure the maximum number of affected small entities had an opportunity to make themselves heard. Limiting the petition right to an advocate for small business, however, could have the effect of focusing the advocate's attention on the petition process and ensuring that at least one entity developed expertise in the petition process. By designating an established small entity advocate, such as the Chief Counsel for Advocacy of the SBA, section 610 could ensure active pursuit of small entity reviews by an office of advocates who are in continuous contact with regulated small entities. Either option appears to have benefits, and neither presents any significant drawback, yet the option of investing a permanent office within the federal government with the responsibility and authority to file petitions for rulemaking on behalf of small entities could be a slightly more reliable guarantee.

Hence, a slightly altered section 610(e) (with potential changes from the language previously proposed in italics) would begin:

(e) *Within one year of receipt of a petition from the chief counsel for advocacy of the U.S. Small Business Administration, the agency shall publish rules to be continued through notice and comment rulemaking pursuant to section 553(b) of this title.*<sup>189</sup>

To reflect the difference between a ten-year mandatory review and a review in response to petition, the proposed section (f) from Part VI.B.1 would also be revised (with potentially revised language in italics):

(f) *Rules for which the agency has not published a general notice of proposed rulemaking within 180 days and a final rule within*

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1938)); *Henley v. F.D.A.*, 873 F. Supp. 776, 785 (E.D.N.Y. 1995) (citing to *Nader* in dicta, concluding that citizen petition brought six years after completed rulemaking "essentially sought review" of a rule for which the citizen did not originally participate).

188. 5 U.S.C. § 553(e) (2000) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.").

189. *Cf. supra* Part VI.B.1.

*twelve months of receipt of a petition for rulemaking from the chief counsel for advocacy of the U.S. Small Business Administration shall lapse and become unenforceable.* Provided, an agency may continue enforcement of a lapsed rule once for a period of not more than twelve months from the publication of a determination in the *Federal Register* stating that the lapse of the rule would have a significant negative impact to human health or safety, along with the factual basis for such determination.<sup>190</sup>

This Article does not recommend a provision for notice and comment periodic reviews only in response to petitions. As discussed above, such petition-driven reviews would likely result in confusion and agency non-compliance, and notice and comment reviews would not overly tax agency resources.

### 3. *Public Participation Through Mandatory Small Entity Review Panels*

One way to ensure public participation would be the introduction of small entity review panels for purposes of periodic review. Without concurrent adoption of notice and comment process in section 610 periodic reviews, however, such panels would be likely to waste agency resources and unlikely to result in regulatory burden reduction.

In 1996, Congress amended the RFA to require two agencies to conduct small entity review panels for proposed rules.<sup>191</sup> These panels consist of the agency, as well as representatives of the SBA's Office of Advocacy and OIRA, and are advised by small entity representatives from the affected industries. These panels review pre-decisional proposals for regulation and make recommendations for revisions to reduce small entity burdens, which are indirectly judicially reviewable.<sup>192</sup>

As discussed above, GAO's study of more than fifty federal agencies identified six that consistently had more than ten entries per year that were identified as likely to impose significant economic impacts on a substantial number of small entities.<sup>193</sup> Specifically, the GAO identified the Departments of Commerce, the Interior, Treasury, and Health and Human Services, the Small Business Administration, the Federal Communications Commission,

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190. *Cf. supra* Part VI.B.1.

191. Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, § 244(a), 110 Stat. 847, 867-68 (codified at 5 U.S.C. § 609).

192. 5 U.S.C. §§ 609(b), 611(a) (2000).

193. GAO, AGENCIES' INTERPRETATIONS, *supra* note 82, at 13-14.

and the Securities and Exchange Commission.<sup>194</sup> Singling out these agencies, in a fashion similar to 1996 RFA amendments' treatment of small entity review panels, would reduce potentially unnecessary administrative burdens to less active agencies while ensuring that the majority of rulemakings have some public participation and reach judicially reviewable and public decisions.

This idea has merit, but also presents a number of problems. First, small entity review panels consume vast agency resources, and would likely overwhelm not only the agencies, but also the small staffs of both the SBA's Office of Advocacy and OIRA.<sup>195</sup> As federal personnel became less able to devote time to the panels, small entity review panels could lose their main recommending benefit, which is that they provide for the in-depth exchange of technical and economic data between small entities and agency officials.

Second, without an attached rulemaking, small entity review panels would be simple collectors of information, issuing a report which has no meaning and could not be meaningfully reviewed by a court. Currently, the small entity review panel reviews a regulatory approach the agency has not yet published as a proposed rule. The panel serves as a check on the rule before it is made public. If there is no regulatory approach being considered, and no required post-panel rulemaking, the panel itself becomes an academic exercise, unlikely to spur agency action. In addition, small entity representatives would be hesitant to devote resources to such an exercise. Granted, the RFA could be amended to also require a notice and comment rulemaking, but this begs the following question: If the agency is already required to open the rule to public participation through notice and comment rulemaking, is a small entity review panel going to provide for justifiably increased small entity participation?

Third, even though GAO identified six agencies as particularly active, other agencies occasionally impose massive burdens on

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194. *Id.* at 14.

195. This is a serious concern. For example, the Office of Advocacy currently has fewer than fifteen attorneys devoted to reviewing every federal agency's compliance with the RFA, who handle less than a handful of small entity review panels each year. See Office of Advocacy, Small Bus. Admin., Advocacy Staff List, available at <http://www.sba.gov/advo/staff.html>. OIRA has a similar level of staffing. GAO, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 19, fig.2 (2003) ("Organization of OIRA"), available at <http://www.gao.gov> (search "GAO-03-929"). This would not appear to be an adequate staffing level to absorb the responsibility of dozens of additional panels without drastically reducing the level of participation each office currently provides.

small entities. For example, one of the smallest federal agencies, the Architectural and Transportation Barriers Compliance Board (“Access Board”), sets the architectural standards that small entities must attain in public accommodations and commercial facilities to be considered accessible under the Americans with Disabilities Act.<sup>196</sup> The agency regulates very infrequently, but when it does adjust its standards, regulated industries estimate that the Access Board’s rule changes could cost *billions* of dollars to small entities.<sup>197</sup> Expanding the panel requirement to all agencies would completely overwhelm both the Office of Advocacy and OIRA. A petition provision could require an agency to convene a small entity review panel in response to petitions, but such petitions would be unlikely to be used, as the current lack of petitions for section 610 review can attest. Given the questions which would remain as to the implementation and cost of small entity review panels for the purpose of periodic review, it would appear more cost-effective, and in keeping with the burden-reduction goals of the RFA, to introduce a basic requirement for the notice and comment process, rather than to expand section 609’s review panel requirement into the realm of periodic review. Should Congress later determine that notice and comment procedures were not encouraging agencies to reduce regulatory burdens, small entity review panels could be added to existing notice and comment process in periodic reviews.

4. *Combined Section 610 and Paperwork Reduction Act Reviews into Single Interagency Review Overseen by Both OMB and the SBA’s Office of Advocacy*

A third possible reform proposal to ensure public participation arises from the need to ensure that agencies conduct meaningful reviews of rules, and act when necessary, but stay within budget parameters. Notice and comment rulemaking, as described in option one, is open to the public, and is likely to result in policy decisions that properly balance competing interests. Notice and comment rulemaking can be expensive in some cases, however, and could require major devotion of agency resources for the pur-

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196. 29 U.S.C. § 792(b)(3) (2000); 42 U.S.C. § 12204 (2000).

197. See Letter from Thomas M. Sullivan, Chief Counsel for Advocacy, U.S. Small Bus. Admin., to Alexander Acosta, Assistant Attorney Gen. for Civil Rights, U.S. Dep’t of Justice (May 23, 2005), available at [http://www.sba.gov/advo/laws/comments/doj05\\_0523.pdf](http://www.sba.gov/advo/laws/comments/doj05_0523.pdf) (discussing the potential costs of the rule and citing to industry studies).

poses of periodic review. If a more streamlined and less costly approach could be found which did not sacrifice too much public participation, such an option might be preferable to notice and comment rulemaking. One possible solution could be to tie section 610 reviews to reviews already being conducted by OMB under its information collection request renewal process, but this idea does not seem to bear out on further examination.

OMB is required by the Paperwork Reduction Act of 1995 (PRA) to review existing regulatory paperwork burdens with an eye towards minimizing them.<sup>198</sup> To this end, OMB's regulations require agencies to resubmit their information collection requests to OMB review and public comment every three years.<sup>199</sup> During this process, OMB reviews the rule for at least sixty days. Further, agencies are required to make a "reasonable effort" to seek public comment prior to submitting the collection of information to OMB for review, and must publish a notice in the *Federal Register* at the same time the rule is sent to OMB, requesting the public's input and directing it to OMB.<sup>200</sup>

Incorporating section 610 reviews into this process could help to ensure that section 610 reviews are meaningful and public. OMB's ample oversight authority under the PRA, and its expertise in reviewing agency regulatory alternatives under Executive Order 12,866 could make it an effective and helpful partner in section 610 review. Also, by combining the notice requirement of OMB's PRA review with a notice of section 610 review, agencies would provide effective notice that a section 610 review was imminent. Finally, the SBA's Office of Advocacy, an office that works closely with small business groups, would represent small business concerns during any interagency discussions on the section 610 review. The review periods do not match perfectly (three years for the PRA<sup>201</sup> and ten for the RFA<sup>202</sup>), but the difference is minor, as initiating a section 610 review in the ninth year of a rule's effectiveness would ensure that rules did not exceed ten years of effectiveness before they were reviewed.

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198. Paperwork Reduction Act of 1995, 44 U.S.C. § 3504 (2000).

199. OMB Controlling Paperwork Burdens on the Public, 5 C.F.R. §§ 1320.11(j) (2006) (restricting collection of information approvals to three years in duration), 1320.12(e)(1) (setting the length of a collection of information renewal at three years).

200. 5 C.F.R. §§ 1320.12(a)(2), 1320.12(c).

201. 44 U.S.C. § 3507(g) (2000).

202. 5 U.S.C. § 610(a) (2000).

There are multiple drawbacks, however, to such an approach. First and foremost, without further regulation by OMB, there would be no requirement that agencies issue final regulatory actions in response to section 610 reviews. Agencies could continue to perform section 610 reviews without public participation.

Second, should small entities feel that the final product (or lack of final product) of such a review was arbitrary or capricious, there is no recourse under the PRA for judicial review.<sup>203</sup> This is no minor matter, as agencies routinely ignored the RFA's requirements until it was amended in 1996 to provide small entities with the express authority to make a claim against an agency.<sup>204</sup>

Third, though the Office of Advocacy's involvement could help represent small entity interests in the interagency review process, that process would remain confidential and exempt from the Freedom of Information Act (FOIA). All documents produced during the discussions would presumably remain out of the reach of the public, and under FOIA, OMB and the Office of Advocacy would be prohibited from sharing with the public the actual regulatory alternatives the agency put forward without the agency's express written authorization.<sup>205</sup>

Fourth, the PRA and Executive Order 12,866 do not appear to grant OMB sufficient authority in the case of independent regulatory agencies, such as the Federal Communications Commission and the Securities and Exchange Commission. The PRA itself provides that an independent agency can override an OMB disap-

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203. 44 U.S.C. § 3507(d)(6) ("The decision by the Director [of the Office of Management and Budget] to approve or not act upon a collection of information contained in an agency rule shall not be subject to judicial review."); *see also* *Tozzi v. E.P.A.*, 148 F. Supp. 2d 35, 47-48 (D.D.C. 2001) (dismissing a challenge to an Information Collection Request approval decision, citing statutory bar to review).

204. *See, e.g.*, Unanimous Consent Request, 142 CONG. REC. S1636-01, S1637 (Mar. 7, 1996) (statement of Senator Bond in support of scheduling a vote on the 1996 SBREFA amendments to the RFA, concluding that, "[r]egulatory agencies have routinely ignored the impact on small business . . . . We need to give them some enforcement powers so that they will be heard"), available at [http://www.sba.gov/advo/laws/bb\\_s1636.html](http://www.sba.gov/advo/laws/bb_s1636.html).

205. *See* *Wolfe v. Dep't of Health & Human Servs.*, 839 F.2d 768, 776 (D.C. Cir. 1988) (agency documents forwarded to OMB for approval were subject to deliberative process privilege and not properly released); *see generally* U.S. Dep't of Justice, FOIA Guide: Deliberative Process Privilege (2004), <http://www.usdoj.gov/oip/exemption5.htm#deliberative>.

proval of an information collection.<sup>206</sup> Further, these agencies are not subject to OMB review under Executive Order 12,866.<sup>207</sup>

Finally, such an approach would be of limited value for rules that do not impose paperwork burdens and are not subject to regular review under the PRA. For example, environmental restrictions on development or requirements to make public facilities handicapped-accessible may not require approvals of collections of information, as no information is actually collected. In both instances, however, small entities would still shoulder regulatory burdens subject to section 610 review.

This option has much to recommend it, in that it offers partners with sufficient expertise to oversee agency compliance with section 610. Also, the existing public notice process for PRA review could be adapted to include section 610 notices for better public participation at reduced costs from stand-alone agency section 610 notices. The approach's many shortcomings, however, not the least of which being that the PRA does not apply to all agency actions, means that it would be better to ensure public participation through an APA public notice and comment procedure, rather than through PRA's information collection review procedure. Therefore, this Article does not recommend this option as a stand-alone response to agency failures to reduce regulatory burdens, though OIRA's PRA reviews and periodic reviews could be combined with the recommended notice and comment periodic review to ensure that federal officers outside the regulatory agencies participated more fully in the periodic review process.

## VII. CONCLUSION

This Article attempts to describe the widespread agency non-compliance with section 610 of the RFA, analyze current efforts to reform the provision, and put forth several methods for improving agency compliance and reduction of small entity regulatory burdens. House Bill 682 and Senate Bill 1388 represent reasonable efforts to solve problems with widespread agency refusal to complete section 610 reviews, and bear promise for reforming the contents of the small entity periodic review. The additional amendments recommended in this Article include: (1) clarification of the time when a rule must be reviewed to eliminate confusion concerning the effects of subsequent amendment on a final rule's

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206. 44 U.S.C. § 3507(f) (2000).

207. See Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,737 (Sept. 30, 1993) (exempting independent agencies, defined in then-44 U.S.C. § 3502(10)).



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periodic review, and (2) requiring notice and comment rulemaking for continuation of rules through periodic review, attached to a concrete timetable for such review. The adoption of House Bill 682 and Senate Bill 1388, along with the additional recommendations made here, will invigorate the periodic review requirement of the RFA, and ensure that agencies rationally evaluate their existing regulatory burden on American small business.

