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February 12, 1998

The Honorable James M. Talent
Chairman, Committee on Small Business
House of Representatives

Subject: Regulatory Flexibility Act: Agencies' Use of the October 1997
Unified Agenda Often Did Not Satisfy Notification Requirements

Dear Mr. Chairman:

This letter responds to your request that we update our April 1997 report on whether federal agencies' entries in the Unified Agenda of Federal Regulatory and Deregulatory Actions satisfy the notification requirements of subsection 610(c) of the Regulatory Flexibility Act of 1980, 5 U.S.C. 610(c).¹ The Unified Agenda is published in the Federal Register twice each year by the Regulatory Information Service Center (RISC) and provides for uniform reporting of data on regulatory activities under development throughout the federal government. Subsection 610(c) of title 5 requires federal agencies to publish in the Federal Register and solicit public comments on a list of existing rules that have a significant economic impact on a substantial number of small entities and that they plan to review in the next year and possibly eliminate or change. Although subsection 610(c) does not refer to or require the use of the Unified Agenda, the Agenda is a convenient mechanism by which agencies can publish the required notices.

To update our April 1997 report, we reviewed our previous findings and agencies' actions related to our recommendations, reviewed the most recent edition of the Unified Agenda, and discussed the Agenda's preparation with the Executive Director of RISC. At the conclusion of our review, we discussed our findings with officials at RISC and the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA). We conducted our review in January and February 1998 in accordance with generally accepted government auditing standards.

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

159888

RESULTS IN BRIEF

Pursuant to recommendations in our last report, the OIRA Administrator issued guidance in June 1997 on how to use the Unified Agenda to satisfy the notification requirements, and the most recent edition of the Agenda contains an index listing all of the section 610 reviews by agency. Nevertheless, most of the agencies' entries in the most recent edition of the Agenda did not meet the public notification requirements of subsection 610(c). Of the thousands of entries in the Agenda submitted by 59 federal departments, agencies, and commissions, 7 agencies identified a total of 34 entries as section 610 reviews. Of these, only three satisfied all of the requirements of subsection 610(c).

BACKGROUND

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires federal agencies to examine the impact of proposed and existing rules on small businesses, small organizations, and small governments, and to solicit the ideas and comments of such entities for this purpose. Section 602(a) of title 5 requires each agency to publish a "regulatory flexibility agenda" in the Federal Register every April and October, including the following:

"(1) a brief description of the subject area of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities;

"(2) a summary of the nature of any such rule under consideration for each subject area listed in the agenda pursuant to paragraph (1), the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking; and

"(3) the name and telephone number of an agency official knowledgeable concerning the items listed in paragraph (1)."

The Unified Agenda of Federal Regulatory and Deregulatory Actions is used to satisfy this and other requirements.² The Unified Agenda is compiled by RISC for OIRA, and has been published twice each year since 1983. Section 4(b) of Executive Order 12866 requires that each agency's agenda contain certain elements and that it be prepared in a manner specified by the Administrator of OIRA. RISC issues instructions to the agencies on how the entries are to be prepared, but does not review agencies' entries to determine compliance with statutory or other requirements before they are printed.

²The Unified Agenda is also used to satisfy the requirement in the Office of Federal Procurement Policy Act Amendments of 1988 (41 U.S.C. 421[g]) that the Office of Federal Procurement Policy publish a Procurement Regulatory Activity Report. Section 4(b) of Executive Order 12866 requires agencies to "prepare an agenda of all regulations under development or review."

In the Unified Agenda, each agency presents its entries under the following five headings according to the rulemaking stage of the entry: (1) prerule stage, (2) proposed rule stage, (3) final rule stage, (4) long-term actions, and (5) completed actions. The most recent edition of the Unified Agenda, which was published in the Federal Register on October 29, 1997, included agendas from 59 federal departments, agencies, and commissions.³ That edition of the Agenda contained more than 4,400 entries printed on more than 1,300 pages of the Federal Register.

Subsection 610(a) of title 5 requires each federal agency to publish a plan for the periodic review of its existing rules that have or will have a significant economic impact on a substantial number of small entities. The purpose of the review is "to determine whether 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." Subsection 610(b) specifies the factors to be considered by agencies in conducting reviews of existing rules. Subsection 610(c) requires agencies to provide an annual Federal Register notice of rules designated for section 610 reviews. Specifically, the subsection says:

"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."

In our April 1997 report, we reported that none of the 21 entries that were identified as section 610 reviews in the November 1996 edition of the Unified Agenda satisfied all of the requirements of subsection 610(c). Also, we said that the size of the Agenda and the lack of any index or special section in the document made these entries identified as section 610 reviews difficult for the public to find and comment on. We recommended that, in fulfilling her responsibilities under Executive Order 12866 to specify how agencies should prepare their agendas, the OIRA Administrator instruct agencies that choose to use the Unified Agenda to satisfy the requirements of subsection 610(c) of title 5 on how to do so.

On June 10, 1997, the OIRA Administrator sent a memorandum to regulatory policy officers at executive branch departments and agencies containing guidelines and procedures for the October 1997 Unified Agenda. In those guidelines and procedures, the Administrator pointed out that recent editions of the Unified Agenda have permitted agencies wishing to use the Agenda to publish subsection 610(c) notices to append the notation "Section 610 Review" to their titles. She also quoted the text of subsection 610(c), noted that agencies should include in the entries a description of the rule and the

³The Unified Agenda published on October 29, 1997, contained a total of 60 agendas, one of which was from 3 agencies with joint authority.

need for the rule, and pointed out that the agencies' preambles should invite public comment upon the rules. Finally, she noted the issuance of our April 1997 report on this topic.

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

ONLY THREE ENTRIES IN THE OCTOBER 1997 UNIFIED AGENDA SATISFIED SUBSECTION 610(c) REQUIREMENTS

The requirements of subsection 610(c) of title 5 are straightforward. Each agency must publish in the Federal Register each year a list of its existing rules that have a significant economic impact on a substantial number of small entities and that the agency plans to review within the next 12 months in accordance with the agency's plan under subsection 610(a). The published list should describe the rules that the agencies plan to review and invite public comment on them. Basically, subsection 610(c) is a notice provision that is designed to facilitate public input into the mandated agency reviews of existing rules. The subsection's requirements can be satisfied through any published notice in the Federal Register, including but not limited to the Unified Agenda.

The Unified Agenda primarily lists regulatory and deregulatory actions that agencies have decided to take, such as the issuance of proposed and final rules, or actions the agencies have completed. However, Unified Agenda entries that describe only regulatory actions that have already been decided or completed cannot satisfy the subsection 610(c) requirement that agencies list existing rules that they will review within the next 12 months to determine whether action is necessary. Similarly, Agenda entries that involve actions that the agencies do not expect will have a significant economic impact on a substantial number of small entities cannot satisfy the subsection 610(c) requirement that agencies list rules for review that will have such an impact.

Our review of the October 29, 1997, edition of the Unified Agenda indicated that relatively few agencies identified rules with the "Section 610 Review" notation. Of those entries that did contain that notation, only three satisfied all of the notification requirements of subsection 610(c).

Most of the Section 610 Entries Did Not Satisfy Notification Requirements

As a result of our examination of the October 29, 1997, edition of the Unified Agenda, we were able to identify 34 entries from 7 agencies with the "Section 610 Review" notation following the title. The seven agencies were the Departments of Agriculture (1 entry), Education (1 entry), Labor (DOL) (6 entries), and Transportation (DOT) (18 entries); the

Environmental Protection Agency (EPA) (4 entries); the Small Business Administration (SBA) (3 entries); and the Federal Trade Commission (1 entry).

Thirty-one of these 34 "Section 610 Review" entries in the Unified Agenda did not satisfy all of the notification requirements in subsection 610(c). Of these 31 entries, 15 did not involve rules "which have a significant economic impact on a substantial number of small entities." The agencies indicated that the rules related to 11 of the entries would have no such impact, and the agencies described 4 other entries as having an "undetermined" impact in this regard. Therefore, these entries should not have been identified as subsection 610(c) entries.⁴

Fifteen other "Section 610 Review" entries in the Unified Agenda did not satisfy the notification requirements in subsection 610(c) because they did not involve an existing rule that was to be reviewed pursuant to section 610 during the succeeding 12 months. Many of these 15 entries announced regulatory actions the agencies had taken, were taking, or planned to take, not a review to determine what actions to take. For example, entries mistakenly characterized as section 610 reviews included the following.

- The Department of Agriculture indicated that a notice of proposed rulemaking would be published in October 1997 establishing, among other things, national standards for the organic production and handling of agricultural products.
- DOT's Federal Highway Administration (FHWA) said it would propose to remove its regulations on the transportation of migrant workers, expand the definition of "commercial motor vehicle" in another part of the Code of Federal Regulations (CFR), and transfer certain definitions and driving requirements within the CFR.
- DOT's National Highway Traffic Safety Administration (NHTSA) said it was proposing to establish new conditions under which a vehicle may be modified to accommodate a person's disability. In another entry, NHTSA said it was publishing final rules requiring that motor vehicles and add-on child restraints be equipped with a means independent of vehicle safety belts for securing the child restraints to vehicle seats.
- DOT's Research and Special Programs Administration announced the completion of rulemaking action extending the application of the hazardous materials regulations to all intrastate transportation of hazardous materials in commerce.
- Pursuant to a December 1994 notice of proposed rulemaking, EPA announced the pending publication of final rules making more than 50 modifications, additions, and deletions to its existing polychlorinated biphenyls management program. EPA

⁴The agencies indicated that 19 of the 34 entries involved rules that would have a significant economic impact on a substantial number of small businesses (13 entries); governments (1 entry); businesses and governments (3 entries); or businesses, governments, and other organizations (2 entries).

also announced plans to publish proposed rules revising its asbestos model accreditation program and amending its asbestos-containing materials in schools rule.

- SBA said it anticipated final action in December 1997 on a complete revision and streamlining of its regulations pertinent to the provision of contractual and managerial assistance to small businesses owned and operated by socially and economically disadvantaged individuals.

One "Section 610 Review" entry in the Unified Agenda announced the agency's intent to review an existing rule that had a significant economic impact on a substantial number of small businesses, but the entry did not satisfy the subsection 610(c) requirement that the agency describe the rule to be reviewed and state why it was needed. DOL's Occupational Safety and Health Administration said its cotton dust standard "will be reviewed to determine impacts on small entities . . ." and said the review would cover, among other things, the continued need for the rule, its complexity, and the extent to which it overlaps with other federal rules. However, nowhere in the Unified Agenda entry did the agency describe what the cotton dust standard was or why the standard was needed.

Three Entries Satisfied All Subsection 610(c) Requirements

The remaining three Unified Agenda entries that were characterized as section 610 reviews—one from DOL and two from DOT—appeared to satisfy all of the subsection 610(c) notification requirements. DOL's Mine Safety and Health Administration said it would review its requirements for training miners "as part of its Regulatory Flexibility review to determine if changes are appropriate." The Unified Agenda entry indicated that the rule affected small businesses and small governmental jurisdictions, and that its review of the rule would be conducted between October 1997 and September 1998. The entry also noted that the Mine Act required all mine operators to have approved training plans (thereby establishing a need for the regulations) and that the plans set forth requirements for training miners (thereby minimally describing the regulations). Although the entry did not explicitly invite the public to comment on the rule, the entry provided the name, title, mailing address, telephone number, fax number, and E-mail address of an agency contact to whom public comments could be addressed.⁵

DOT's Office of the Secretary said it would reexamine its rules on computer reservation systems owned by airlines or airline affiliates and used by travel agencies "to determine

⁵In the supplementary information section of the preamble to DOL's part of the Unified Agenda, the Secretary of Labor also said that "[a]ll interested members of the public are invited and encouraged to let departmental officials know how our regulatory efforts can be improved and, of course, to participate in and comment on the review or development of regulations listed on the agenda."

whether they should be readopted and, if so, whether they should be changed." The Unified Agenda entry stated that the rules are designed to prevent the systems from unreasonably prejudicing the competitive position of other airlines and to ensure that travel agencies can provide accurate and unbiased information to the public (thereby both describing and establishing the need for the rules). The entry also indicated that the advanced notice of proposed rulemaking was published in the Federal Register on September 10, 1997, and that the comment period would end on November 10, 1997. Therefore, although the review had already begun, it appeared to be in compliance with subsection 610(c) requirements because the review period extended into part of the succeeding 12 months. Although the entry did not explicitly invite the public to comment on the rule, the entry provided the name, title, mailing address, telephone number, and fax number of an agency contact to whom public comments could be addressed.⁶

DOT's FHWA said it was interested in obtaining the results of research that could be used by the agency in developing a revised program for its regulation involving the hours of service of commercial motor vehicle drivers. The Unified Agenda entry indicated that the agency had extended a previous comment period associated with a previously published advanced notice of proposed rulemaking, and expected to issue a proposed rule in June 1998. The entry also stated that the action was mandated by the Interstate Commerce Commission Termination Act of 1995.

CONCLUSION

The OIRA Administrator instructed agencies that choose to use the Unified Agenda to satisfy the requirements of subsection 610(c) of title 5 on how to do so. However, those instructions did not prevent agencies from continuing to mischaracterize rules as subject to section 610 reviews even though they did not meet the requirements of that subsection. Those mischaracterizations, combined with the now available index of entries characterized as section 610 reviews, can result in the public's being misled about their ability to comment on regulatory reviews. RISC compiles the information in the Unified Agenda for OIRA and issues instructions to the agencies on how the entries are to be prepared. However, RISC does not review agencies' entries to determine compliance with statutory or other requirements.

RECOMMENDATION

We recommend that the Executive Director of RISC, in consultation with OIRA and other agencies, ensure that entries characterized as section 610 reviews in future editions of the Unified Agenda meet the requirements of subsection 610(c) of title 5. Specifically, those entries should (1) involve rules that the agencies expect will have a significant economic

⁶In the supplementary information section of the preamble to DOT's part of the Unified Agenda, the Secretary of Transportation said that "[t]he Department is particularly interested in obtaining information on requirements that have a 'significant economic impact on small entities' and, therefore, must be reviewed under the Regulatory Flexibility Act."

impact on a substantial number of small entities; (2) involve existing rules that are to be reviewed pursuant to section 610 in the succeeding 12 months; (3) describe the rules, the need for the rules, and their legal bases; and (4) invite public comment on the rules.

AGENCY COMMENTS

We obtained agency comments on a draft of this report from the Acting OIRA Administrator and the RISC Executive Director. Both officials agreed in principle with the report's message and our recommendation. They said that they believed the Unified Agenda could be used constructively by the agencies to provide the public with notice to satisfy their procedural obligations under subsection 610(c), and that they would explore ways to improve the Unified Agenda's ability to do so.

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We are sending copies of this report to the Executive Director of RISC; the Director of OMB; the Secretaries of Agriculture, Education, Labor, and Transportation; the Administrators of EPA and the Small Business Administration, and the Chairman of the Federal Trade Commission. We are also sending copies to the Ranking Minority Member of your Committee and other interested committees. We will make copies available to others on request.

Major contributors to this letter were Curtis Copeland, Assistant Director, and Alan Belkin, Associate General Counsel. Please contact me at (202) 512-8676 if you or your staff have any questions.

Sincerely yours,



L. Nye Stevens
Director
Federal Management
and Workforce Issues

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