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REGULATORY FLEXIBILITY ACT

Congress Should Revisit and Clarify Elements of the Act to Improve Its Effectiveness

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Highlights

Highlights of GAO-06-998T, a testimony before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives

REGULATORY FLEXIBILITY ACT

Congress Should Revisit and Clarify Elements of the Act to Improve Its Effectiveness

Why GAO Did This Study

Federal regulation is one of the basic tools of government used to implement public policy. In 1980, the Regulatory Flexibility Act (RFA) was enacted in response to concerns about the effect that regulations can have on small entities, including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. Congress amended RFA in 1996, and the President issued Executive Order 13272 in 2002, to strengthen requirements for agencies to consider the impact of their proposed rules on small entities. However, concerns about the regulatory burden on small entities persist, prompting legislative proposals such as H.R. 682, the Regulatory Flexibility Improvements Act, which would amend RFA.

At the request of Congress, GAO has prepared many reports and testimonies reviewing the implementation of RFA and related policies. On the basis of that body of work, this testimony (1) provides an overview of the basic purpose and requirements of RFA, (2) highlights the main impediments to the Act's implementation that GAO's reports identified, and (3) suggests elements of RFA that Congress might consider amending to improve the effectiveness of the Act. GAO's prior reports and testimonies contain recommendations to improve the implementation of RFA and related regulatory process requirements.

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What GAO Found

RFA established a principle that agencies should endeavor to fit their regulatory requirements to the scale of small entities. Among other things, RFA requires regulatory agencies to assess the impact of proposed rules on small entities, consider regulatory alternatives that will accomplish the agencies' objectives while minimizing the impacts on small entities, and ensure that small entities have an opportunity to participate in the rulemaking process. Further, RFA requires agencies to review existing rules within 10 years of promulgation that have or will have a significant impact on small entities to determine whether they should be continued without change or amended or rescinded to minimize their impact on small entities. RFA also requires the Chief Counsel for Advocacy of the Small Business Administration (Office of Advocacy) to monitor agencies' compliance. In response to Executive Order 13272, the Office of Advocacy published guidance in 2003 on how to comply with RFA.

In response to congressional requests, GAO reviewed agencies' implementation of RFA and related requirements on many occasions, with topics ranging from specific statutory provisions to the overall implementation of RFA. Generally, GAO found that the Act's results and effectiveness have been mixed; its reports illustrated both the promise and the problems associated with RFA. On one hand, RFA and related requirements clearly affected how federal agencies regulate and produced benefits, such as raising expectations regarding the analytical support for proposed rules. However, GAO also found that compliance with RFA varied across agencies, within agencies, and over time. A recurring finding was that uncertainties about RFA's requirements and key terms, and varying interpretations by federal agencies, limited the Act's application and effectiveness.

GAO's past work suggests that Congress might wish to review the procedures, definitions, exemptions, and other provisions of RFA to determine whether changes are needed to better achieve the purposes Congress intended. In particular, GAO's reports indicate that the full promise of RFA may never be realized until Congress revisits and clarifies elements of the Act, especially its key terms, or provides an agency or office with the clear authority and responsibility to do so. Attention should also be paid to the domino effect that an agency's initial determination of whether RFA is applicable to a rulemaking has on other statutory requirements, such as preparing compliance guides for small entities and periodically reviewing existing regulations. GAO also believes that Congress should reexamine not just RFA but how all of the various regulatory reform initiatives fit together and influence agencies' regulatory actions. Recent developments, such as the Office of Advocacy's RFA guidance, may help address some of these long-standing issues and merit continued monitoring by Congress.

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to contribute to your review of H.R. 682, the Regulatory Flexibility Improvements Act, and your continuing general agenda to review administrative law, process, and procedure issues. In my statement today, I will summarize findings from our past body of work on the Regulatory Flexibility Act (RFA),[1] which H.R. 682 would amend, and related policies. Specifically, I will provide an overview of the basic purpose and requirements of RFA, highlight the main impediments to the Act's implementation that our work identified, and suggest elements of RFA that Congress might consider amending to improve the effectiveness of the Act.

In brief, RFA was enacted in response to concerns about the effect that federal regulations can have on small entities. Among other things, RFA prompts regulatory agencies to analyze the potential effects of their rules on small entities, consider alternatives to reduce the burden of those rules, and ensure that small entities have an opportunity to participate in the rulemaking process. In response to congressional requests, we have reviewed RFA's implementation on many occasions over the years. Our reports illustrated both the promise and the problems associated with the Act, with a recurring theme being the varying interpretations of RFA's requirements by federal agencies. Although some progress has been made to address issues we identified, the full promise of RFA may never be realized until Congress clarifies key terms and definitions in the Act, such as "a substantial number of small entities," or provides an agency or office with the clear authority and responsibility to do so. It is also important to keep in mind the domino effect that an agency's initial determination of whether RFA is applicable to a rulemaking has on other statutory requirements, such as preparing compliance guides for small entities and periodically reviewing existing regulations.

[1] 5 U.S.C. §§ 601-612.

RFA and Related Requirements Are Intended to Promote Attention to Regulations' Effects on Small Entities

Federal regulation is one of the basic tools of government. Agencies issue thousands of rules and regulations each year to implement statutes enacted by Congress. The public policy goals and benefits of regulations include, among other things, ensuring that workplaces, air travel, foods, and drugs are safe; that the nation's air, water, and land are not polluted; and that the appropriate amount of tax is collected. The costs of these regulations are estimated to be in the hundreds of billions of dollars, and the benefits estimates are much higher.[2] Given the size and impact of federal regulation, Congresses and Presidents have taken a number of actions to refine and reform the regulatory process within the past 25 years.[3]

In September 1980, RFA was enacted in response to concerns about the effect that federal regulations can have on "small entities," defined by the Act as including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. As we have previously noted, small businesses are a significant part of the nation's economy, and small governments make up the vast majority of local governments in the United States.[4] However, there have been concerns that these small entities may be disproportionately affected by federal agencies' regulatory requirements. RFA established the principle that agencies should endeavor, consistent with the objectives of applicable statutes, to fit regulatory and informational requirements to the scale of these small entities.

RFA requires regulatory agencies—including the independent regulatory agencies—to assess the potential impact of their rules on small entities. Under RFA, an agency must prepare an initial regulatory flexibility analysis at the time a proposed rule is issued unless the head of the agency determines that the proposed rule would not have a "significant economic

[2]The Office of Management and Budget reported that the estimated quantified and monetized annual benefits of the major federal regulations it reviewed from October 1995 through September 2005 range from $94 billion to $449 billion, while estimated annual costs range from $37 billion to $44 billion. See Office of Management and Budget, *Draft 2006 Report to Congress on the Costs and Benefits of Federal Regulations* (Washington, D.C.: April 2006).

[3]See GAO, *Regulatory Reform: Prior Reviews of Federal Regulatory Process Initiatives Reveal Opportunities for* Improvements, GAO-05-939T (Washington, D.C.: July 27, 2005) for summary descriptions of major regulatory reform initiatives implemented since 1980.

[4]GAO, *Regulatory Reform: Implementation of the Small Business Advocacy Review Panel Requirements*, GAO/GGD-98-36 (Washington, D.C.: Mar. 18, 1998).

impact upon a substantial number of small entities."[5] Further, agencies must consider alternatives to their proposed rules that will accomplish the agencies' objectives while minimizing the impacts on small entities. The Act also requires agencies to ensure that small entities have an opportunity to participate in the rulemaking process and requires the Chief Counsel for Advocacy of the Small Business Administration (Office of Advocacy) to monitor agencies' compliance. Among other things, RFA also requires regulatory agencies to review, within 10 years of promulgation, existing rules that have or will have a significant impact on small entities to determine whether they should be continued without change or amended or rescinded to minimize their impact on small entities.

Congress amended RFA with the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). [6] SBREFA made certain agency actions under RFA judicially reviewable. Other provisions in SBREFA added new requirements. For example, SBREFA requires agencies to develop one or more compliance guides for each final rule or group of related final rules for which the agency is required to prepare a regulatory flexibility analysis, and it requires agencies to provide small entities with some form of relief from civil monetary penalties. SBREFA also requires the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration to convene advocacy review panels before publishing an initial regulatory flexibility analysis.

More recently, in August 2002, President George W. Bush issued Executive Order 13272, which requires federal agencies to establish written procedures and policies on how they would measure the impact of their regulatory proposals on small entities and to vet those policies with the Office of Advocacy. The order also requires agencies to notify the Office of Advocacy before publishing draft rules expected to have a significant small business impact, to consider its written comments on proposed rules, and to publish a response with the final rule. The order requires the Office of Advocacy to provide notification of the requirements of the Act and training to all agencies on how to comply with RFA. The Office of

[5]RFA generally applies only where notice and comment rulemaking under the Administrative Procedure Act (APA) is required. When promulgating a final rule, agencies must also prepare a final regulatory flexibility analysis unless the agency finds that the rule will not have a significant economic impact on a substantial number of small entities.

[6]5 U.S.C. § 601 note.

Advocacy published guidance on the Act in 2003 and reported training more than 20 agencies on RFA compliance in fiscal year 2005.[7]

GAO Reviews Found that Varying Interpretations of RFA Requirements Hampered Effective Implementation of the Act

In response to congressional requests, we have reviewed agencies' implementation of RFA and related requirements on many occasions over the years, with topics ranging from specific statutory provisions to the overall implementation of RFA.[8] Generally, we found that the Act's overall results and effectiveness have been mixed. This is not unique to RFA; we found similar results when reviewing other regulatory reform initiatives, such as the Unfunded Mandates Reform Act of 1995.[9] Our past reports illustrated both the promise and the problems associated with RFA. RFA and related requirements have clearly affected how federal agencies regulate, and we identified important benefits of these initiatives, such as increasing attention on the potential impacts of rules and raising expectations regarding the analytical support for proposed rules. However, a recurring theme in our findings was that uncertainties about RFA's requirements and varying interpretations of those requirements by federal agencies limited the Act's application and effectiveness.

Some of the topics we reviewed, and our main findings regarding impediments to RFA's implementation, are illustrated in the following examples:

- We examined 12 years of annual reports from the Office of Advocacy and concluded that the reports indicated variable compliance with RFA across agencies, within agencies, and over time—a conclusion that the Office of Advocacy also reached in subsequent reports on implementation of RFA (on the 20th and 25th anniversaries of RFA's enactment).[10] We noted that some agencies had been repeatedly characterized as satisfying RFA requirements, but other agencies were

[7]See U.S. Small Business Administration, Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* (Washington, D.C.: May 2003).

[8]A list of related GAO products appears at the end of this statement.

[9]2 U.S.C. §§ 658-658(g), 1501-1571. See GAO, *Federal Rulemaking: Past Reviews and Emerging Trends Suggest Issues That Merit Congressional Attention*, GAO-06-228T (Washington, D.C.: Nov. 1, 2005) and GAO-05-939T.

[10]See GAO, *Regulatory Flexibility Act: Status of Agencies' Compliance*, GAO/GGD-94-105 (Washington, D.C.: Apr. 27, 1994).

consistently viewed as recalcitrant. Agencies' performance also varied over time or varied by offices within the agencies. We said that one reason for agencies' lack of compliance with RFA requirements was that the Act did not expressly authorize the Small Business Administration (SBA) to interpret key provisions and did not require SBA to develop criteria for agencies to follow in reviewing their rules.

- We examined RFA implementation with regard to small governments and concluded that agencies were not conducting as many regulatory flexibility analyses for small governments as they might, largely because of weaknesses in the Act.[11] Specifically, we found that each agency we reviewed had a different interpretation of key RFA provisions. We also pointed out that RFA allowed agencies to interpret whether their proposed rules affected small governments and did not provide sufficiently specific criteria or definitions to guide agencies in deciding whether and how to assess the impact of proposed rules on small governments.

- We reviewed implementation of small business advocacy review panel requirements under SBREFA and found that the panels that had been convened were generally well received.[12] However, we also said that implementation was hindered—specifically, that there was uncertainty over whether panels should have been convened for some proposed rules—by the lack of agreed-upon governmentwide criteria as to whether a rule has a significant impact.

- We examined other related requirements regarding agencies' policies for the reduction and/or waiver of civil penalties on small entities and the publication of small entity compliance guides.[13] Again, we found that implementation varied across and within agencies, with some of the ineffectiveness and inconsistency traceable to definitional problems in RFA. All of the agencies' penalty relief policies that we reviewed were within the discretion that Congress provided, but the

[11]See GAO, *Regulatory Flexibility Act: Inherent Weaknesses May Limit Its Usefulness for Small Governments*, GAO/HRD-91-16 (Washington, D.C.: Jan. 11, 1991).

[12]See GAO, *Regulatory Reform: Implementation of the Small Business Advocacy Review Panel Requirements*, GAO/GGD-98-36 (Washington, D.C.: Mar. 18, 1998).

[13]See GAO, *Regulatory Reform: Implementation of Selected Agencies' Civil Penalty Relief Policies for Small Entities*, GAO-01-280 (Washington, D.C.: Feb. 20, 2001), and *Regulatory Reform: Compliance Guide Requirement Has Had Little Effect on Agency Practices*, GAO-02-172 (Washington, D.C.: Dec. 28, 2001).

policies varied considerably. Some policies covered only a portion of agencies' civil penalty enforcement actions, and some provided small entities with no greater penalty relief than large entities. The agencies varied in how key terms were defined. Similarly, we concluded that the requirement for small entity compliance guides did not have much of an impact, and its implementation also varied across, and sometimes within, agencies.

- RFA is unique among statutory requirements with general applicability in having a provision, under section 610, for the periodic review of existing rules. However, it is not clear that this look-back provision in RFA has been consistently and effectively implemented. In a series of reports on agencies' compliance with section 610, we found that the required reviews were not being conducted.[14] Meetings with agencies to identify why compliance was so limited revealed significant differences of opinion regarding key terms in RFA and confusion about what was required to determine compliance with RFA. At the request of the House Committee on Energy and Commerce, we have begun new work examining the subject of regulatory agencies' retrospective reviews of their existing regulations, including those undertaken in response to Section 610, and will report on the results of this engagement in the future.

We have not yet examined the effect of Executive Order 13272 and the Office of Advocacy's subsequent guidance and training for agencies on implementing RFA. Therefore, we have not done any evaluations that would indicate whether or not those developments are helping to address some of our concerns about the effectiveness of RFA.

Key Terms and Provisions of RFA Should Be Revisited and Clarified

While RFA has helped to influence how agencies regulate small entities, we believe that the full promise of the Act has not been realized. The results from our past work suggest that the Subcommittee might wish to review the procedures, definitions, exemptions, and other provisions of RFA, and related statutory requirements, to determine whether changes are needed to better achieve the purposes Congress intended. The central theme of our prior findings and recommendations on RFA has been the need to revisit and clarify elements of the Act, particularly its key terms. Although more recent developments, such as the Office of Advocacy's

[14] See, for example, GAO, *Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary*, GAO/GGD-99-55 (Washington, D.C.: Apr. 2, 1999).

detailed guidance to agencies on RFA compliance, may help address some of these long-standing issues, current legislative proposals, such as H.R. 682, make it clear that concerns remain about RFA's effectiveness—for example, that agencies are not assessing the impacts of their rules or identifying less costly regulatory approaches as expected under RFA—and the impact of federal regulations on small entities.

Unclear terms and definitions can affect the applicability and effectiveness of regulatory reform requirements. We have frequently cited the need to clarify the key terms in RFA, particularly "significant economic impact on a substantial number of small entities." RFA's requirements do not apply if an agency head certifies that a rule will not have a "significant economic impact on a substantial number of small entities." However, RFA neither defines this key phrase nor places clear responsibility on any party to define it consistently across the government. It is therefore not surprising, as I mentioned earlier, that we found compliance with RFA varied from one agency to another and that agencies had different interpretations of RFA's requirements.

We have recommended several times that Congress provide greater clarity concerning the key terms and provisions of RFA and related requirements, but to date Congress has not acted on many of these recommendations. The questions that remain unresolved on this topic are numerous and varied, including:

- Does Congress believe that the economic impact of a rule should be measured in terms of compliance costs as a percentage of businesses' annual revenues, the percentage of work hours available to the firms, or other metrics?

- If so, what percentage or other measure would be an appropriate definition of "significant?"

- Should agencies take into account the cumulative impact of their rules on small entities, even within a particular program area?

- Should agencies count the impact of the underlying statutes when determining whether their rules have a significant impact?

- What should be considered a "rule" for purposes of the requirement in RFA that agencies review rules with a significant impact within 10 years of their promulgation?

- Should agencies review rules that had a significant impact at the time they were originally published, or only those that currently have that effect?

- Should agencies conduct regulatory flexibility analyses for rules that have a positive economic impact on small entities, or only for rules with a negative impact?

It is worth noting that the Office of Advocacy's 2003 RFA compliance guide, while reiterating that RFA does not define certain key terms, nevertheless provides some suggestions on the subject. Citing parts of RFA's legislative history, the guidance indicates that exact standards for such definitions may not be possible or desirable, and that the definitions should vary depending on the context of each rule and preliminary assessments of the rule's impact. For example, the guidance points out that "significance" can be seen as relative to the size of a business and its competitors, among other things. However, the guidance does identify factors that agencies might want to consider when making RFA determinations. In some ways, this mirrors other aspects of RFA, such as section 610, where Congress did not explicitly define a threshold for an agency to determine whether an existing regulation should be maintained, amended, or eliminated but rather identified the factors that an agency must consider in its reviews.[15] We do not yet know whether or to what extent the guidance and associated training has helped agencies to clarify some of the long-standing confusion about RFA requirements and terms. Additional monitoring of RFA compliance may help to answer that question. Congress might also want to consider whether the factors that the Office of Advocacy suggested to help agencies define key terms and requirements are consistent with congressional intent or would benefit from having a statutory basis.

I also want to point out the potential domino effect of agencies' determinations of whether or not RFA applies to their rules. This is related to the lack of clarity on key terms mentioned above, the potential for agencies to waive or delay analysis under RFA, and the limitation of RFA's

[15]In conducting their reviews of existing rules under section 610, agencies are to consider the following factors: (1) the continuing 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 government 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 since adoption of the rule.

applicability to only rules for which there was a notice of proposed rulemaking. The impact of an agency head's determination that RFA is not applicable is not only that the initial and final regulatory flexibility analyses envisioned by the Act would not be done, but also that other related requirements would not apply. These requirements include, for example, the need for agencies to prepare small entity compliance guides, convene SBREFA advocacy panels, and conduct periodic reviews of certain existing regulations. While we recognize, as provided by the Administrative Procedure Act, that notices of proposed rulemaking are not always practical, necessary, or in the public interest, this still raises the question of whether such exemptions from notice and comment rulemaking should preclude future opportunities for public participation and other related procedural and analytical requirements. Our prior work has shown that substantial numbers of rules, including major rules (for example, those with an impact of $100 million or more), are promulgated without going through a notice of proposed rulemaking.[16]

We also believe it is important for Congress to reexamine, not just RFA, but how all of the various regulatory reform initiatives fit together and influence agencies' regulatory actions. As I previously testified before this Subcommittee, we have found the effectiveness of most regulatory reform initiatives to be limited and that they merit congressional attention.[17] In addition, we have stated that this is a particularly timely point to reexamine the federal regulatory framework, because significant trends and challenges establish the case for change and the need to reexamine the base of federal government and all of its existing programs, policies, functions, and activities.[18]

Our September 2000 report on EPA's implementation of RFA illustrated the importance of considering the bigger picture and interrelationships between regulatory reform initiatives.[19] On the one hand, we reported about concerns regarding the methodologies EPA used in its analyses and

[16]See, for example, GAO, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, GAO/GGD-98-126 (Washington, D.C.: Aug. 31, 1998).

[17]GAO-06-228T.

[18]See GAO, *21st Century Challenges: Reexamining the Base of the Federal Government*, GAO-05-325SP (Washington, D.C.: February 2005) and GAO-05-939T.

[19]See GAO, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193 (Washington, D.C.: Sept. 20, 2000).

its conclusions about the impact on small businesses of a proposed rule to lower certain reporting thresholds for lead and lead compounds.[20] The bigger picture, though, was our finding that after SBREFA took effect EPA's four major program offices certified that almost all (96 percent) of their proposed rules would not have a significant impact on a substantial number of small entities. EPA officials told us this was because of a change in EPA's RFA guidance prompted by the SBREFA requirement to convene an advocacy review panel for any proposed rule that was not certified. Prior to SBREFA, EPA's policy was to prepare a regulatory flexibility analysis for any rule that the agency expected to have any impact on small entities. According to EPA officials, the SBREFA panel requirement made continuation of the agency's more inclusive RFA policy too costly and impractical. In other words, a statute Congress enacted to strengthen RFA caused the agency to use the discretion permitted in RFA to conduct fewer regulatory flexibility analyses.[21]

In closing, I would reiterate that we believe Congress should revisit aspects of RFA and that our prior reports have indicated ample opportunities to refine the Act. Despite some progress in implementing RFA and other regulatory reform initiatives since 1980, it is clear from the introduction of H.R. 682 and related bills that Members of Congress remain concerned about the impact of regulations on small entities and the extent to which the rulemaking process encourages agencies to consider ways to reduce the burdens of new and existing rules, while still achieving the objectives of the underlying statutes.

Mr. Chairman, this concludes my prepared statement. Once again, I appreciate the opportunity to testify on these important issues. I would be pleased to address any questions you or other Members of the Subcommittee might have at this time.

[20]EPA had certified that the proposed rule would not have a significant impact and, therefore, did not trigger RFA's analytical and procedural requirements. Although we raised questions, we concluded that the analytic methods that EPA's program office used in its original and revised economic analysis, as well as the conclusions the office drew as a result of those analyses, were within the discretion provided by both RFA and EPA guidance.

[21]We made no new recommendations in GAO/GGD-00-193, but we referred to our prior recommendations, noting that clarifying what Congress intends the term "significant economic impact on a substantial number of small entities" to mean would make the implementation of RFA more consistent and help to prevent concerns about how agencies are implementing the Act.

Contact and Acknowledgements

If additional information is needed regarding this testimony, please contact J. Christopher Mihm, Managing Director, Strategic Issues, on (202) 512-6806 or at mihmj@gao.gov. Tim Bober, Jason Dorn, Andrea Levine, Latesha Love, Joseph Santiago, and Michael Volpe contributed to this statement.

Related GAO Products

Federal Rulemaking: Past Reviews and Emerging Trends Suggest Issues That Merit Congressional Attention. GAO-06-228T. Washington, D.C.: November 1, 2005.

Regulatory Reform: Prior Reviews of Federal Regulatory Process Initiatives Reveal Opportunities for Improvements. GAO-05-939T. Washington, D.C.: July 27, 2005.

Regulatory Flexibility Act: Clarification of Key Terms Still Needed. GAO-02-491T. Washington, D.C.: March 6, 2002.

Regulatory Reform: Compliance Guide Requirement Has Had Little Effect on Agency Practices. GAO-02-172. Washington, D.C.: December 28, 2001.

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