

**STATEMENT OF THE
FEDERAL TRADE COMMISSION
IMPLEMENTATION OF THE REGULATORY FLEXIBILITY ACT
BEFORE THE COMMITTEE ON SMALL BUSINESS
UNITED STATES HOUSE OF REPRESENTATIVES**

FEBRUARY 12, 1998

Good morning, Mr. Chairman and Members of the Committee. I am Debra Valentine, General Counsel of the Federal Trade Commission.⁽¹⁾ I am pleased to be here on behalf of the Commission to present an assessment of the FTC's compliance with Section 610 of the Regulatory Flexibility Act ("RFA")⁽²⁾ and to describe the Commission's expanded regulatory review program -- a program that has resulted in the repeal or revision of many of the Commission's rules and guides.

I. RFA SECTION 610

The Regulatory Flexibility Act, enacted in 1980, requires agencies to consider the impact of their rules and proposed rules on small businesses and other small entities.⁽³⁾ The Act required each federal agency to publish "a plan for the periodic review of rules issued by the agency which have or will have a significant economic impact on a substantial number of small entities."⁽⁴⁾ 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purpose of the review is "to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small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." Section 610 requires agencies to consider specific factors in reviewing existing rules,⁽⁵⁾ and further requires that each agency publish annually in the *Federal Register* a list of the rules it has designated for Section 610 reviews for that year.⁽⁶⁾

II. THE FTC MISSION

Congress has given the FTC responsibility for promoting the efficient functioning of the marketplace by protecting consumers from unfair or deceptive acts or practices and maintaining vigorous competition.⁽⁷⁾ The FTC is primarily a law enforcement agency, not a regulatory agency. Its statutory mandate is broad and responsibilities far-reaching. The Commission enforces the Federal Trade Commission Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.⁽⁸⁾ The Commission also has law enforcement responsibilities under some 37 additional statutes.⁽⁹⁾ The Commission enforces a total of 19 rules mandated by those statutes,⁽¹⁰⁾ and 13 trade regulation rules, promulgated under its discretionary rulemaking

authority,⁽¹¹⁾ that contain specific consumer protection disclosures or other requirements to prevent certain identified deceptive or unfair acts or practices.⁽¹²⁾

The Commission has used its discretionary rulemaking authority sparingly to address those instances where prescriptive standards can efficiently remedy widespread unfair or deceptive practices. Moreover, since 1985 nearly all new regulations issued by the Commission have been promulgated in response to Congressional directives.

III. RFA SECTION 610 AND THE FTC

As a first step in the process of implementing the RFA, on July 7, 1981, the Commission published its initial regulatory review plan in the *Federal Register* in compliance with the requirements of RFA Section 610(a). In that initial plan, the Commission included all rules that it considered *might* have a significant economic impact on a substantial number of small entities. The Commission requested public comment on the Section 610(b) questions about these rules, conducted the required reviews, and in several instances was able, after amendment proceedings, to decrease burdens on businesses.⁽¹³⁾

Since 1992, the Commission has continued to schedule and conduct RFA reviews as appropriate for rules promulgated -- largely in response to statutory directives⁽¹⁴⁾ -- subsequent to the initial plan. Moreover, the Commission has used the RFA reviews as the model for a comprehensive regulatory review program covering all of its rules (including those not subject to RFA review) and all of its industry guides.⁽¹⁵⁾ In April 1992, the Commission announced a rule review program patterned after the reviews conducted under the RFA review process, that would become a permanent feature of the Commission's regulatory oversight responsibilities, with recurring reviews of each rule and guide on a ten-year cycle.⁽¹⁶⁾ In December 1992, the Commission placed a comprehensive ten-year review schedule on the public record. The Commission recognized that flexibility was needed in this review schedule, and reserved the option to adjust the review schedule to meet changing conditions, including resource constraints. The Commission has reviewed that schedule annually and modified it, where appropriate, to consider various factors, such as amendments to existing statutes.

Pursuant to Section 610(c) of the RFA and to this expanded regulatory review program, the Commission publishes in the *Federal Register*, at the beginning of each year, a list of all rules and industry guides to be reviewed during that year. If the Commission believes any of the scheduled rules may have a significant economic impact on a substantial number of small entities, the review is specifically identified as an RFA review. Thus, entities both small and large are given advance notice annually of the regulatory reviews for that year that might affect their interests.⁽¹⁷⁾

The Commission also includes scheduled reviews of rules in its semiannual regulatory agendas, which list all rulemaking and rule amendment proceedings contemplated during the year and specify those that may require regulatory flexibility analysis.⁽¹⁸⁾ The Commission publishes its regulatory agendas as part of the government's Unified

Agendas.

When initiating the regulatory review of each rule or guide, the Commission asks for public comment on the issues raised in the RFA: whether there is a continuing need for the rule; whether its costs outweigh its benefits; how its costs might be reduced and its benefits increased, if it is retained; whether it duplicates or conflicts with other regulations; and how the operation of the rule or guide has been affected by changes in the economy or in technology. The Commission reviews all comments submitted and determines whether to modify, repeal, or retain the rule or guide without change. The Commission publishes these determinations in the *Federal Register*.

In 1995, the Commission accelerated its regulatory review process and adopted streamlined procedures to facilitate the rescission of rules that have outlived their useful purpose and therefore generated little public interest. Using these streamlined procedures, the Commission then quickly repealed six trade regulation rules in seven months.

When the Commission adopted its expanded regulatory review program in 1992, 41 rules -- 16 of them required by statute -- were in effect. As a result of its regulatory reform program, the Commission has repealed 13 rules to date (more than 30% percent of those in effect in 1992). This number includes almost 50% of its discretionary trade regulation rules. In 1992, the Commission also had 40 industry guides in effect. Fifteen of these have been repealed as obsolete or otherwise no longer needed, and others have been revised or consolidated. Altogether, one-third of the Commission's rules and guides in the 1992 Code of Federal Regulations have been revoked and another 25% revised. The Commission is now just over half-way through the first 10-year cycle of its more comprehensive rule review program. By the end of this fiscal year, however, the Commission anticipates that it will have accomplished more than 80% of the reviews of rules and guides existing in 1992.

A number of Commission rules have been revised by streamlining and simplifying disclosure requirements. Labeling requirements have been changed to promote international harmonization and thus facilitate trade. Such regulatory revisions are important to companies of all sizes, but they are particularly important to small businesses. For example:

The Commission adopted a conditional exemption to its Rule on Care Labeling of Textile Wearing Apparel⁽¹⁹⁾ to allow the use of symbols in place of words, thus relieving apparel manufacturers and distributors of the need to translate care instructions into multiple languages for purposes of trade among NAFTA countries.

Recent streamlining revisions to the Rules and Regulations under the Textile Fiber Products Identification Act⁽²⁰⁾ have eliminated unnecessary words on labels and simplified requirements for arrangement and placement of required information. These amendments are likely to result in smaller labels, thus lowering costs in an industry where many manufacturers and distributors are small businesses.

Amendments to the Commission's Used Motor Vehicle Rule⁽²¹⁾ have made it easier for used car dealers, many of which are small businesses, to comply with the Rule's disclosure requirements. Warranty information, formerly required to be placed on a side window, may now be posted in any conspicuous location on the vehicle.

Amendments to the Funeral Industry Practices Rule⁽²²⁾ eliminated an affirmative telephone disclosure requirement that many funeral providers considered awkward and burdensome.⁽²³⁾

IV. OTHER FTC OUTREACH TO SMALL BUSINESSES

In addition to working with small businesses in rulemaking proceedings and in reviews of existing rules and industry guides, the Commission engages in considerable additional industry outreach to small businesses and other industry interests. The Commission's industry outreach efforts have two goals. The first is to educate industry members on how they can comply with the various laws and regulations enforced by the Commission. To accomplish this goal, the Commission publishes simple, straightforward Business Guides to the rules and laws most likely to affect small businesses, which assist small businesses and other industry members in understanding their responsibilities under the law. These Business Guides are also available on the BusinessLine section of the Commission's website, at <http://www.ftc.gov>, and on the U.S. Business Advisor website available through the Small Business Administration. The Commission's website also displays other forms of business guidance, including policy statements, staff advice, and speeches on both competition and consumer protection issues. In addition, the Commission's staff both responds to informal business inquiries, and meets frequently with industry groups to answer their questions and promote voluntary compliance.⁽²⁴⁾

The second goal is to educate small businesses and other industry members about potential scams that could injure them. The FTC believes that the most effective way to prevent fraud, such as office supply scams, is to arm businesses and their employees with knowledge about how these schemes typically operate and of their rights under federal law. In one recent project, for example, the Commission asked numerous organizations and associations to help educate their members, many of whom are small businesses that are often susceptible to office supply scams. The Commission developed and sent educational pamphlets and copy-ready materials to approximately 1,800 associations, chambers of commerce, and national organizations, for re-publication and dissemination to their hundreds or thousands of members.

An important tool in the Commission's efforts to reach out to small businesses in recent years has been the use of numerous public workshops and conferences, often held around the country. They have been used in connection with rulemaking or rule amendment proceedings and in other contexts as well. From these workshops and conferences, the Commission obtains valuable input about the benefits and burdens of its enforcement and regulatory programs, as well as broader concerns, from small businesses, other industry interests, consumers, federal and state law enforcement agencies, and other interested parties. In turn, industry members become better educated about their legal

responsibilities and about their role in the regulatory and enforcement processes. ⁽²⁵⁾

V. CONCLUSION

In conclusion, the Commission wishes to emphasize that it treats its obligation to consider the needs and interests of small businesses very seriously, and it has worked vigorously during the past 17 years to comply with the requirements of the Regulatory Flexibility Act. The Commission has made regulatory review and reform a high priority since enactment of the RFA, and particularly in the 1990's, the Commission has adopted an aggressive, comprehensive regulatory review program that not only meets but exceeds the requirements of the RFA.

1. The prepared statement reflects the views of the Federal Trade Commission. My responses to any questions you may have are my own and do not necessarily reflect the views of the Commission or any individual Commissioner.

2. 5 U.S.C. § 610.

3. In addition to the rule review provisions of Section 610, the RFA requires agencies, when promulgating a new rule or amending an existing rule, to prepare initial and final regulatory flexibility analyses, if the rule is expected to have a significant impact on a substantial number of small entities. The FTC routinely analyzes both costs and benefits when promulgating or substantively amending rules. Moreover, the Commission always considers the impact of its regulatory actions on small entities, whether or not the action triggers the need to conduct an RFA analysis.

If a significant impact on a substantial number of small entities is considered likely, or even possible, an initial regulatory flexibility analysis, describing that impact, is prepared and published in the *Federal Register*. If no such impact is anticipated, the Commission certifies that the rule will not have a "significant economic impact on a substantial number of small entities" and therefore regulatory flexibility analysis is not required. Pursuant to the amendment to the RFA contained in Section 243 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, the Commission publishes the factual basis on which it makes this determination. Even when the Commission makes this determination, however, its Notice of Proposed Rulemaking requests public comment on the possible effects on small entities. The Commission recognizes that, even though its initial determination may be well-founded, information submitted by the public may reveal a need for further analysis. Moreover, the Commission seeks this information regardless of whether it proposes to expand the requirements of a rule or to eliminate or simplify it.

4. Section 610(a) of the Regulatory Flexibility Act, 5 U.S.C. § 610(a), provides:

Within one hundred and eighty days after the effective date of this chapter, each agency shall publish in the Federal Register a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities. Such plan may be amended by the agency at any time by publishing the revision in the Federal Register. The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. The plan shall provide for the review of all such agency rules existing on the effective date of this chapter within ten years of that date and for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule. If the head of the agency determines that completion of the review of existing rules is not

feasible by the established date, he shall so certify in a statement published in the Federal Register and may extend the completion date by one year at a time for a total of not more than five years.

5. Section 610(b) of the Regulatory Flexibility Act, 5 U.S.C. § 610(b), provides:

In reviewing rules to minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes, the agency shall consider the following factors:

(1) the continued need for the rule;

(2) the nature of complaints or comments received concerning the rule from the public; (3) the complexity of the rule;

(4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and

(5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

6. Section 610(c) of the Regulatory Flexibility Act, 5 U.S.C. § 610(c), provides:

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.

7. The Commission's testimony is focused almost exclusively on its consumer protection mission because most of the FTC's regulatory efforts are conducted by its Bureau of Consumer Protection.

8. 15 U.S.C. § 45(a).

9. *E.g.*, the Clayton Act, 15 U.S.C. § 12, which prohibits various anticompetitive practices; the Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4401, which requires the FTC to regulate warning labels on smokeless tobacco products; the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, which mandates disclosure of credit terms; the Fair Credit Billing Act, 15 U.S.C. § 1666 *et seq.*, which provides for the correction of billing errors on credit accounts; the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, which establishes consumer rights with respect to their credit reports; and the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*, which provides disclosure standards for consumer product warranties.

10. *E.g.*, Rule pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 (900 Number Rule), 16 C.F.R. Part 308; Labeling Requirements for Alternative Fuels and Alternative Fueled Vehicles, 16 C.F.R. Part 309; Telemarketing Sales Rule, 16 C.F.R. Part 310; and Test Procedures and Labeling Standards for Recycled Oil, 16 C.F.R. Part 311.

11. Section 18 of the FTC Act, 15 U.S.C. § 57a.

12. *E.g.*, the Care Labeling Rule, 16 C.F.R. Part 423, which requires labels with care instructions for wearing apparel; the Mail Or Telephone Order Merchandise Rule, 16 C.F.R. Part 435, which gives consumers certain rights when ordering products through the mail and over the telephone; the Franchise Rule, 16 C.F.R. Part 436, which requires disclosure of information to prospective franchisees; and the Funeral Rule, 16 C.F.R. Part 453, which requires disclosure of price and other information to consumers

making funeral arrangements.

13. E.g., Presale Availability of Written Warranty Terms, 16 C.F.R. Part 702 (simplified methods of compliance); Retail Food Store Advertising and Marketing Practices, 16 C.F.R. Part 424 (permitted "rainchecks" and other options for compliance) .

14. *See supra* note 10.

15. Industry guides are administrative interpretations of the FTC Act, designed to provide the public with the Commission's views about which acts or practices are likely to violate Section 5 of that Act, 15 U.S.C. § 45(a). 16 C.F.R. §§ 1.5, 1.6. For example, in 1992, the Commission issued Guides for the Use of Environmental Marketing Claims (the "green guides"), 16 C.F.R. Part 260. These guides were adopted in response to a growing consumer interest in the environmental attributes of consumer products, as well as increased advertising of "green" claims. 57 Fed. Reg. 36363 (1992). There was considerable industry support for these guides when they were adopted. A review of the guides, initiated in 1995, showed general agreement that there is a continuing need for these guides, that they benefit both consumers and industry, and that they accomplish their goals without undue burden on industry. 61 Fed. Reg. 53311, at 53312-13 (1996).

16. In January 1992, a Presidential Memorandum requested that all departments and agencies conduct evaluations of existing regulations. In April 1992, the Commission submitted a report to the President entitled *Regulatory Review Activities At the Federal Trade Commission*, in which it announced its more comprehensive regulatory review program.

17. Small businesses benefit from the entire notice, as rules and guides under review are frequently of interest to them even without an anticipated significant economic impact.

18. This agenda is published in compliance with RFA § 602(a), 5 U.S.C. § 602(a), and Sections 22(b) and (d)(1) of the FTC Act, 15 U.S.C. § 57b-3(b) and (d)(1), which require similar information.

19. 16 C.F.R. Part 423.

20. 16 C.F.R. Part 303.

21. 16 C.F.R. Part 455.

22. 16 C.F.R. Part 453.

23. In addition to revising the Rule, the Commission is experimenting with an innovative approach to enforcing the Funeral Rule. Under the Funeral Rule Offenders Program (FROP), certain funeral homes that appear not to be in compliance with price disclosure requirements are offered the opportunity to make a payment to the U.S. Treasury (at a lower amount than might be assessed in a civil penalty action) and enter a training and testing program conducted by the National Funeral Directors Association. This is a joint Commission and industry initiative, aimed at increasing compliance with the Rule at a lower cost to the government than bringing traditional federal court enforcement actions.

24. The Small Business Regulatory Enforcement Fairness Act (SBREFA), *supra* note 9, required that agencies regulating the activities of small entities establish a program to answer inquiries and provide information and advice on compliance with the law. The Commission has had such programs in place for most of its history and, in recent years, has taken a number of steps to enhance these efforts. As a result of SBREFA, the Commission developed a policy statement describing the various forms of assistance available; sought public comment on its assistance program; and monitored use of its program. (62 Fed. Reg. 16809 and 46363 (1997)). The Commission will report to Congress on this program, as required by

SBREFA, at the end of March.

25. Workshops and conferences have served a variety of purposes in recent years. (1) In November 1995, the Commission convened a series of public hearings to examine broadly whether antitrust and consumer protection laws and policies require reform in light of increasingly global and technology-based competition. One issue was how current policies, in light of economic globalization, technological changes and deregulation, affect small businesses. (2) In June 1997, the Commission held a four-day Public Workshop on Consumer Privacy. The workshop addressed issues relating to computer databases and online solicitations that affect small businesses as well as others. (3) In June 1997, Commission staff held a public workshop in connection with its review of the Telephone Disclosure and Dispute Resolution Rule ("900-Number Rule"), 16 C.F.R. Part 308.