Insight

The Failed Promise of Section 610 Reviews

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EXECUTIVE SUMMARY

- The retrospective regulatory review provision of the Regulatory Flexibility Act (RFA), known as Section 610, has largely failed to live up to its promise over its more than 40 years in existence.
- Section 610 requires agencies to review existing rules that significantly impact a substantial number of small entities (businesses, governments, and organizations) and determine whether to leave the rule as is, improve its effectiveness, or repeal it.
- Section 610 has largely been ineffective because of vague definitions, the fact that it only applies to a small subset of rules, a lack of consequences for agencies that fail to conduct reviews, and a number of other ad hoc regulatory review efforts.
- Possible reforms include defining a key term that is the crux of the RFA and holding agencies more accountable for their failure to satisfactorily conduct reviews.

INTRODUCTION

When government agencies promulgate regulations, a primary goal should be to understand how that regulation will work and affect what is being regulated. Not all regulations result in the intended effect, however. In order for agencies to know whether or not their regulations are effective, they must review them after they are enacted to see if they are working as planned.

To help systematize retrospective review, when Congress passed the Regulatory Flexibility Act (RFA) in 1980 it included a provision requiring agencies to periodically review regulations on the books to see if they have the intended effects and consequences. This provision, known as Section 610, limits reviews to a subset of rules that affect small entities,

specifically businesses, governments, and organizations.

More than four decades later, however, the intended promise of Section 610 to require agencies to retrospectively review regulations has largely failed to materialize. This analysis will explain Section 610, consider its effectiveness, and explore attempts for reform.

SECTION 610 OVERVIEW

The RFA generally requires agencies to consider the impact of their rules on small entities and to evaluate alternatives that would accomplish the objectives of the rule without unduly burdening small entities. Critically, for every rule issued, agencies need to determine if it will "impose a significant economic impact on a substantial number of small entities" (SEISNOSE).

If a rule is determined to have a SEISNOSE, then Section 610 of the RFA is automatically triggered, requiring the rule to be reviewed within 10 years of promulgation. That SEISNOSE determination on the front end of a rulemaking, however, does not preclude an agency from reevaluating the rule for a SEISNOSE when it comes time for the 10-year review. Following the review, the rule can remain as it is, be modified to improve it, or be repealed if it is no longer necessary.

Section 610 specifically calls for agencies to review their regulations that have a SEISNOSE and report on certain criteria. The criteria include:

- The continued need for the rule;
- The nature of complaints and comments about the rule from the public;
- The complexity of the rule;
- The extent to which the rule overlaps, duplicates, or conflicts with other federal rules (or, if applicable, with state and local rules); and
- The length of time since the last review of the rule, or the degree to which technology, economic conditions, or other factors have changed the area affected by the rule.

While Section 610 calls for an initial review of a rule within 10 years of promulgation, it does not specify how often subsequent reviews should take place.

SECTION 610 EFFECTIVENESS

The statutory language of Section 610 explained above may give the impression that the process should be effective in reducing regulatory burdens by identifying unnecessary or outdated requirements. That has not been the case, however. There are four reasons why

the provision has not been as effective as hoped.

The foremost reason is that few rules are classified as SEISNOSE upon promulgation. In the most recent Unified Agenda of Regulatory and Deregulatory Actions, for example, 219 of the 2,551 "active" regulations are marked as SEISNOSE – about 8.5 percent. A primary cause of this low number is that the RFA lacks a definition for SEISNOSE. This ambiguity is not a new revelation. As far back as 1991, the General Accounting Office (now the Government Accountability Office, GAO) found that among four agencies it asked, each offered its own interpretation of "significant economic impact" and "substantial number of small entities."[1]

Without a clear definition, agencies often certify a rule as not having a SEISNOSE except in the most obvious cases, partly because doing the opposite would — in agencies' view — increase the number of rules that would need to be reviewed in the future. Predictably, agencies have come to view the SEISNOSE certification as a checking-the-box exercise, issuing a cursory statement in final rules that they have reviewed the possible small entity effects and believe it has no major impact.[2] Some agencies have decided that if a rule is not considered as having a SEISNOSE when initially finalized then it never needs to be reviewed, meaning these initial determinations have long-term consequences for Section 610 review.

A second reason is that, even of the small subset of SEISNOSE rules, not all are reviewed under Section 610. The Environmental Protection Agency, for example, has listed 388 unique completed actions that affect small entities in Unified Agendas going back to the Fall 1998 edition. According to the agency's Section 610 website, however, it has completed reviews of, or is currently reviewing, 46 rules since 1997 (with plans for six more to begin by the end of 2025).

A third reason — a lack of consequences for agencies failing to conduct Section 610 reviews — may help explain the first two issues. The RFA contains no penalties for agencies that fail to comply. Amendments passed in 1996 allow for final decisions on Section 610 reviews to be judicially reviewed, though such challenges rarely occur (a search failed to find any challenges on Section 610 grounds). And to date, no federal court has struck down a rule for failing to comply with any section of the RFA, let alone Section 610.

A fourth reason is the hodgepodge of federal regulatory retrospective review requirements. In addition to Section 610, many recent administrations — Carter, Reagan, Clinton, and Obama — have issued executive orders with some components of periodic lookbacks at existing rules. These efforts may complicate Section 610 reviews, as agencies believe they have fulfilled their Section 610 requirements, even though these reviews do not necessarily

focus on the elements required by the RFA.

Beyond executive orders, some statutes require that specific regulations be reviewed. These may be the most effective review mechanisms because they are specific and prioritized.[3] Their effectiveness, however, may come at the expense of Section 610, as they divert review resources at agencies. In addition, when Congress specifically mandates an agency to review a rule, it sends a signal that other rules that may be candidates for Section 610 reviews are a far lower priority.

REFORM OPPORTUNITIES AND ATTEMPTS

The obvious lack of success of the Section 610 review process means there are clear opportunities to improve it. These include defining SEISNOSE, creating consequences for agencies that fail to satisfactorily comply, and clarifying that a rule does not need to be declared as having a SEISNOSE when initially finalized in order to be reviewed within 10 years.

Congress has attempted reforms several times, though these have primarily been included in attempts to reform the RFA more broadly. Despite some bipartisan support, however, the reforms have ultimately fallen short of enactment. In addition, none of these efforts has included meaningful accountability for agencies that fail to review rules.

One of the earliest efforts was the Small Business Regulatory Improvement Act of 2007 (H.R. 4458). This bill defined "economic impact" to include direct and indirect economic effects that are "reasonably foreseeable and [result] from each rule." This definition would have made it easier for agencies to determine which impacts to consider in their SEISNOSE analysis at the front end of a rulemaking, which would lead to better assessment of whether a Section 610 review is necessary. The bill also would have amended Section 610 directly by requiring agencies to publish their plans to review rules in the Federal Register and on their websites, in addition to submitting an annual report to Congress and the Office of Information and Regulatory Affairs. Additionally, the bill would have clarified that, regardless of a SEISNOSE decision at the final rule stage, rules should be reviewed in no later than 10 years. Despite 10 Democrats co-sponsoring the bill, the bill never reached a floor vote in the Democratically controlled House.

Another similar bill, the Regulatory Flexibility Improvements Act of 2011 (H.R. 527) passed the Republican controlled House, but never came to the floor in the Senate. Versions of the bill also passed the House in the next two Congresses, with the same result.

The most recent effort was a bill introduced in the Senate in 2019, the Small Business Regulatory Flexibility Improvements Act (S. 1120). The legislation not only added a

definition of SEISNOSE like the previous bills, but it also increased the requirements agencies must follow in an attempt to close the loopholes they use to avoid Section 610 reviews by increasing the factors agencies needed to consider in determining whether to go forward with a review. The bill failed to advance out of committee.

Opposition to these reforms stems from two areas. The first is inextricably linked with Section 610 and the RFA in general, which is the definition of economic impact. Opponents argue the inclusion of reasonably foreseeable indirect impacts is overly broad and would lead to the inclusion of too many rules than agencies could appropriately handle; they even contend it could open the door to additional corporate lobbying on the rules in question. Many of these opponents also believe the Section 610-specific reforms would have a similar effect on agencies.

The second area comes from some of the non-Section 610 reforms of these bills. One is giving the Small Business Administration's Office of Advocacy rulemaking authority to prescribe regulations for other agencies on how to comply with RFA in its entirety. Another is increasing the steps agencies need to take on the front end of the rulemaking process to ensure they adequately consider the impacts of the rule on small entities.

CONCLUSION

Section 610 of the RFA promised to help systematize retrospective review of federal regulations. Unfortunately, that promise has failed to materialize more than four decades later. Vague definitions of the key term of the RFA have given agencies too much latitude in determining what rules apply. In addition, a lack of consequences for failing to comply means that agencies do not take the process as seriously as they should.

Congress needs to finally approve reforms that would strengthen the process, including defining SEISNOSE and holding agencies accountable when they fail to review rules satisfactorily.

[1] U.S. General Accounting Office, *Regulatory Flexibility Act: Inherent Weaknesses May Limit Its Usefulness for Small Governments*. 1991 (Report GAO/HRD-91-16). p. 6.

[2] Lori S. Bennear & Jonathan B. Wiener, *Periodic Review of Agency Regulation*. 2021 (draft report to the Admin. Conf. of the U.S.). p. 50.

[3] *Ibid*. p. 6.