

REGULATORY FLEXIBILITY IMPROVEMENTS ACT OF 2011

NOVEMBER 16, 2011.—Committed to the Committee of the Whole House on the
State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 527]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 527) to amend chapter 6 of title 5, United States Code (commonly known as the Regulatory Flexibility Act), to ensure complete analysis of potential impacts on small entities of rules, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the “Regulatory Flexibility Improvements Act of 2011”.

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Clarification and expansion of rules covered by the Regulatory Flexibility Act.
- Sec. 3. Requirements providing for more detailed analyses.
- Sec. 4. Repeal of waiver and delay authority; additional powers of the Chief Counsel for Advocacy.
- Sec. 5. Procedures for gathering comments.
- Sec. 6. Periodic review of rules.
- Sec. 7. Judicial review of compliance with the requirements of the Regulatory Flexibility Act available after publication of the final rule.
- Sec. 8. Jurisdiction of court of appeals over rules implementing the Regulatory Flexibility Act.
- Sec. 9. Clerical amendments.

SEC. 2. CLARIFICATION AND EXPANSION OF RULES COVERED BY THE REGULATORY FLEXIBILITY ACT.

(a) IN GENERAL.—Paragraph (2) of section 601 of title 5, United States Code, is amended to read as follows:

“(2) RULE.—The term ‘rule’ has the meaning given such term in section 551(4) of this title, except that such term does not include a rule of particular (and not general) applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances.”.

(b) INCLUSION OF RULES WITH INDIRECT EFFECTS.—Section 601 of title 5, United States Code, is amended by adding at the end the following new paragraph:

“(9) ECONOMIC IMPACT.—The term ‘economic impact’ means, with respect to a proposed or final rule—

- “(A) any direct economic effect on small entities of such rule; and
- “(B) any indirect economic effect on small entities which is reasonably foreseeable and results from such rule (without regard to whether small entities will be directly regulated by the rule).”.

(c) INCLUSION OF RULES WITH BENEFICIAL EFFECTS.—

(1) INITIAL REGULATORY FLEXIBILITY ANALYSIS.—Subsection (c) of section 603 of title 5, United States Code, is amended by striking the first sentence and inserting “Each initial regulatory flexibility analysis shall also contain a detailed description of alternatives to the proposed rule which minimize any adverse significant economic impact or maximize any beneficial significant economic impact on small entities.”.

(2) FINAL REGULATORY FLEXIBILITY ANALYSIS.—The first paragraph (6) of section 604(a) of title 5, United States Code, is amended by striking “minimize the significant economic impact” and inserting “minimize the adverse significant economic impact or maximize the beneficial significant economic impact”.

(d) INCLUSION OF RULES AFFECTING TRIBAL ORGANIZATIONS.—Paragraph (5) of section 601 of title 5, United States Code, is amended by inserting “and tribal organizations (as defined in section 4(l) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(l))),” after “special districts,”.

(e) INCLUSION OF LAND MANAGEMENT PLANS AND FORMAL RULEMAKING.—

(1) INITIAL REGULATORY FLEXIBILITY ANALYSIS.—Subsection (a) of section 603 of title 5, United States Code, is amended in the first sentence—

- (A) by striking “or” after “proposed rule,”; and
- (B) by inserting “or publishes a revision or amendment to a land management plan,” after “United States,”.

(2) FINAL REGULATORY FLEXIBILITY ANALYSIS.—Subsection (a) of section 604 of title 5, United States Code, is amended in the first sentence—

- (A) by striking “or” after “proposed rulemaking,”; and
- (B) by inserting “or adopts a revision or amendment to a land management plan,” after “section 603(a),”.

(3) LAND MANAGEMENT PLAN DEFINED.—Section 601 of title 5, United States Code, is amended by adding at the end the following new paragraph:

“(10) LAND MANAGEMENT PLAN.—

“(A) IN GENERAL.—The term ‘land management plan’ means—

- “(i) any plan developed by the Secretary of Agriculture under section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604); and

“(ii) any plan developed by the Secretary of Interior under section 202 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1712).

“(B) REVISION.—The term ‘revision’ means any change to a land management plan which—

“(i) in the case of a plan described in subparagraph (A)(i), is made under section 6(f)(5) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604(f)(5)); or

“(ii) in the case of a plan described in subparagraph (A)(ii), is made under section 1610.5–6 of title 43, Code of Federal Regulations (or any successor regulation).

“(C) AMENDMENT.—The term ‘amendment’ means any change to a land management plan which—

“(i) in the case of a plan described in subparagraph (A)(i), is made under section 6(f)(4) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604(f)(4)) and with respect to which the Secretary of Agriculture prepares a statement described in section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)); or

“(ii) in the case of a plan described in subparagraph (A)(ii), is made under section 1610.5–5 of title 43, Code of Federal Regulations (or any successor regulation) and with respect to which the Secretary of the Interior prepares a statement described in section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)).”

(f) INCLUSION OF CERTAIN INTERPRETIVE RULES INVOLVING THE INTERNAL REVENUE LAWS.—

(1) IN GENERAL.—Subsection (a) of section 603 of title 5, United States Code, is amended by striking the period at the end and inserting “or a recordkeeping requirement, and without regard to whether such requirement is imposed by statute or regulation.”

(2) COLLECTION OF INFORMATION.—Paragraph (7) of section 601 of title 5, United States Code, is amended to read as follows:

“(7) COLLECTION OF INFORMATION.—The term ‘collection of information’ has the meaning given such term in section 3502(3) of title 44.”

(3) RECORDKEEPING REQUIREMENT.—Paragraph (8) of section 601 of title 5, United States Code, is amended to read as follows:

“(8) RECORDKEEPING REQUIREMENT.—The term ‘recordkeeping requirement’ has the meaning given such term in section 3502(13) of title 44.”

(g) DEFINITION OF SMALL ORGANIZATION.—Paragraph (4) of section 601 of title 5, United States Code, is amended to read as follows:

“(4) SMALL ORGANIZATION.—

“(A) IN GENERAL.—The term ‘small organization’ means any not-for-profit enterprise which, as of the issuance of the notice of proposed rulemaking—

“(i) in the case of an enterprise which is described by a classification code of the North American Industrial Classification System, does not exceed the size standard established by the Administrator of the Small Business Administration pursuant to section 3 of the Small Business Act (15 U.S.C. 632) for small business concerns described by such classification code; and

“(ii) in the case of any other enterprise, has a net worth that does not exceed \$7,000,000 and has not more than 500 employees.

“(B) LOCAL LABOR ORGANIZATIONS.—In the case of any local labor organization, subparagraph (A) shall be applied without regard to any national or international organization of which such local labor organization is a part.

“(C) AGENCY DEFINITIONS.—Subparagraphs (A) and (B) shall not apply to the extent that an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions for such term which are appropriate to the activities of the agency and publishes such definitions in the Federal Register.”

SEC. 3. REQUIREMENTS PROVIDING FOR MORE DETAILED ANALYSES.

(a) INITIAL REGULATORY FLEXIBILITY ANALYSIS.—Subsection (b) of section 603 of title 5, United States Code, is amended to read as follows:

“(b) Each initial regulatory flexibility analysis required under this section shall contain a detailed statement—

“(1) describing the reasons why action by the agency is being considered;

“(2) describing the objectives of, and legal basis for, the proposed rule;

“(3) estimating the number and type of small entities to which the proposed rule will apply;

“(4) describing the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report and record;

“(5) describing all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule, or the reasons why such a description could not be provided;

“(6) estimating the additional cumulative economic impact of the proposed rule on small entities beyond that already imposed on the class of small entities by the agency or why such an estimate is not available; and

“(7) describing any disproportionate economic impact on small entities or a specific class of small entities.”.

(b) **FINAL REGULATORY FLEXIBILITY ANALYSIS.**—

(1) **IN GENERAL.**—Section 604(a) of title 5, United States Code, is amended—

(A) in paragraph (4), by striking “an explanation” and inserting “a detailed explanation”;

(B) in each of paragraphs (4), (5), and the first paragraph (6), by inserting “detailed” before “description”; and

(C) by adding at the end the following:

“(7) describing any disproportionate economic impact on small entities or a specific class of small entities.”.

(2) **INCLUSION OF RESPONSE TO COMMENTS ON CERTIFICATION OF PROPOSED RULE.**—Paragraph (2) of section 604(a) of title 5, United States Code, is amended by inserting “(or certification of the proposed rule under section 605(b))” after “initial regulatory flexibility analysis”.

(3) **PUBLICATION OF ANALYSIS ON WEBSITE.**—Subsection (b) of section 604 of title 5, United States Code, is amended to read as follows:

“(b) The agency shall make copies of the final regulatory flexibility analysis available to the public, including placement of the entire analysis on the agency’s website, and shall publish in the Federal Register the final regulatory flexibility analysis, or a summary thereof which includes the telephone number, mailing address, and link to the website where the complete analysis may be obtained.”.

(c) **CROSS-REFERENCES TO OTHER ANALYSES.**—Subsection (a) of section 605 of title 5, United States Code, is amended to read as follows:

“(a) A Federal agency shall be treated as satisfying any requirement regarding the content of an agenda or regulatory flexibility analysis under section 602, 603, or 604, if such agency provides in such agenda or analysis a cross-reference to the specific portion of another agenda or analysis which is required by any other law and which satisfies such requirement.”.

(d) **CERTIFICATIONS.**—Subsection (b) of section 605 of title 5, United States Code, is amended—

(1) by inserting “detailed” before “statement” the first place it appears; and

(2) by inserting “and legal” after “factual”.

(e) **QUANTIFICATION REQUIREMENTS.**—Section 607 of title 5, United States Code, is amended to read as follows:

“§ 607. Quantification requirements

“In complying with sections 603 and 604, an agency shall provide—

“(1) a quantifiable or numerical description of the effects of the proposed or final rule and alternatives to the proposed or final rule; or

“(2) a more general descriptive statement and a detailed statement explaining why quantification is not practicable or reliable.”.

SEC. 4. REPEAL OF WAIVER AND DELAY AUTHORITY; ADDITIONAL POWERS OF THE CHIEF COUNSEL FOR ADVOCACY.

(a) **IN GENERAL.**—Section 608 is amended to read as follows:

“§ 608. Additional powers of Chief Counsel for Advocacy

“(a)(1) Not later than 270 days after the date of the enactment of the Regulatory Flexibility Improvements Act of 2011, the Chief Counsel for Advocacy of the Small Business Administration shall, after opportunity for notice and comment under section 553, issue rules governing agency compliance with this chapter. The Chief Counsel may modify or amend such rules after notice and comment under section 553. This chapter (other than this subsection) shall not apply with respect to the issuance, modification, and amendment of rules under this paragraph.

“(2) An agency shall not issue rules which supplement the rules issued under subsection (a) unless such agency has first consulted with the Chief Counsel for Advo-

cacy to ensure that such supplemental rules comply with this chapter and the rules issued under paragraph (1).

“(b) Notwithstanding any other law, the Chief Counsel for Advocacy of the Small Business Administration may intervene in any agency adjudication (unless such agency is authorized to impose a fine or penalty under such adjudication), and may inform the agency of the impact that any decision on the record may have on small entities. The Chief Counsel shall not initiate an appeal with respect to any adjudication in which the Chief Counsel intervenes under this subsection.

“(c) The Chief Counsel for Advocacy may file comments in response to any agency notice requesting comment, regardless of whether the agency is required to file a general notice of proposed rulemaking under section 553.”.

(b) CONFORMING AMENDMENTS.—

(1) Section 611(a)(1) of such title is amended by striking “608(b).”.

(2) Section 611(a)(2) of such title is amended by striking “608(b).”.

(3) Section 611(a)(3) of such title is amended—

(A) by striking subparagraph (B); and

(B) by striking “(3)(A) A small entity” and inserting the following:

“(3) A small entity”.

SEC. 5. PROCEDURES FOR GATHERING COMMENTS.

Section 609 of title 5, United States Code, is amended by striking subsection (b) and all that follows through the end of the section and inserting the following:

“(b)(1) Prior to publication of any proposed rule described in subsection (e), an agency making such rule shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with—

“(A) all materials prepared or utilized by the agency in making the proposed rule, including the draft of the proposed rule; and

“(B) information on the potential adverse and beneficial economic impacts of the proposed rule on small entities and the type of small entities that might be affected.

“(2) An agency shall not be required under paragraph (1) to provide the exact language of any draft if the rule—

“(A) relates to the internal revenue laws of the United States; or

“(B) is proposed by an independent regulatory agency (as defined in section 3502(5) of title 44).

“(c) Not later than 15 days after the receipt of such materials and information under subsection (b), the Chief Counsel for Advocacy of the Small Business Administration shall—

“(1) identify small entities or representatives of small entities or a combination of both for the purpose of obtaining advice, input, and recommendations from those persons about the potential economic impacts of the proposed rule and the compliance of the agency with section 603; and

“(2) convene a review panel consisting of an employee from the Office of Advocacy of the Small Business Administration, an employee from the agency making the rule, and in the case of an agency other than an independent regulatory agency (as defined in section 3502(5) of title 44), an employee from the Office of Information and Regulatory Affairs of the Office of Management and Budget to review the materials and information provided to the Chief Counsel under subsection (b).

“(d)(1) Not later than 60 days after the review panel described in subsection (c)(2) is convened, the Chief Counsel for Advocacy of the Small Business Administration shall, after consultation with the members of such panel, submit a report to the agency and, in the case of an agency other than an independent regulatory agency (as defined in section 3502(5) of title 44), the Office of Information and Regulatory Affairs of the Office of Management and Budget.

“(2) Such report shall include an assessment of the economic impact of the proposed rule on small entities and a discussion of any alternatives that will minimize adverse significant economic impacts or maximize beneficial significant economic impacts on small entities.

“(3) Such report shall become part of the rulemaking record. In the publication of the proposed rule, the agency shall explain what actions, if any, the agency took in response to such report.

“(e) A proposed rule is described by this subsection if the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, the head of the agency (or the delegatee of the head of the agency), or an independent regulatory agency determines that the proposed rule is likely to result in—

“(1) an annual effect on the economy of \$100,000,000 or more;

“(2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local governments, tribal organizations, or geographic regions;

“(3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets; or

“(4) a significant economic impact on a substantial number of small entities.

“(f) Upon application by the agency, the Chief Counsel for Advocacy of the Small Business Administration may waive the requirements of subsections (b) through (e) if the Chief Counsel determines that compliance with the requirements of such subsections are impracticable, unnecessary, or contrary to the public interest.”.

SEC. 6. PERIODIC REVIEW OF RULES.

Section 610 of title 5, United States Code, is amended to read as follows:

“§ 610. Periodic review of rules

“(a) Not later than 180 days after the enactment of the Regulatory Flexibility Improvements Act of 2011, each agency shall publish in the Federal Register and place on its website a plan for the periodic review of rules issued by the agency which the head of the agency determines have a significant economic impact on a substantial number of small entities. Such determination shall be made without regard to whether the agency performed an analysis under section 604. 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 adverse significant economic impacts or maximize any beneficial significant economic impacts on 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 and subsequently placing the amended plan on the agency’s website.

“(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 of 2011 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 of 2011 within 10 years after the publication of the final rule in the Federal Register. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, the head of the agency shall so certify in a statement published in the Federal Register and may extend the review for not longer than 2 years after publication of notice of extension in the Federal Register. Such certification and notice shall be sent to the Chief Counsel for Advocacy of the Small Business Administration and the Congress.

“(c) Each agency shall annually submit a report regarding the results of its review pursuant to such plan to the Congress, the Chief Counsel for Advocacy of the Small Business Administration, and, in the case of agencies other than independent regulatory agencies (as defined in section 3502(5) of title 44) to the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget. Such report shall include the identification of any rule with respect to which the head of the agency made a determination described in paragraph (5) or (6) of subsection (d) and a detailed explanation of the reasons for such determination.

“(d) In reviewing a rule pursuant to subsections (a) through (c), the agency shall amend or rescind the rule to minimize any adverse significant economic impact on a substantial number of small entities or disproportionate economic impact on a specific class of small entities, or maximize any beneficial significant economic impact of the rule on a substantial number of small entities to the greatest extent possible, consistent with the stated objectives of applicable statutes. In amending or rescinding the rule, the agency shall consider the following factors:

“(1) The continued need for the rule.

“(2) The nature of complaints received by the agency from small entities concerning the rule.

“(3) Comments by the Regulatory Enforcement Ombudsman and the Chief Counsel for Advocacy of the Small Business Administration.

“(4) The complexity of the rule.

“(5) The extent to which the rule overlaps, duplicates, or conflicts with other Federal rules and, unless the head of the agency determines it to be infeasible, State, territorial, and local rules.

“(6) The contribution of the rule to the cumulative economic impact of all Federal rules on the class of small entities affected by the rule, unless the head of the agency determines that such calculations cannot be made and reports that determination in the annual report required under subsection (c).

“(7) 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.

“(e) The agency shall publish in the Federal Register and on its website a list of rules to be reviewed pursuant to such plan. Such publication shall include a brief

description of the rule, the reason why the agency 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 request comments from the public, the Chief Counsel for Advocacy of the Small Business Administration, and the Regulatory Enforcement Ombudsman concerning the enforcement of the rule.”.

SEC. 7. JUDICIAL REVIEW OF COMPLIANCE WITH THE REQUIREMENTS OF THE REGULATORY FLEXIBILITY ACT AVAILABLE AFTER PUBLICATION OF THE FINAL RULE.

(a) **IN GENERAL.**—Paragraph (1) of section 611(a) of title 5, United States Code, is amended by striking “final agency action” and inserting “such rule”.

(b) **JURISDICTION.**—Paragraph (2) of such section is amended by inserting “(or which would have such jurisdiction if publication of the final rule constituted final agency action)” after “provision of law,”.

(c) **TIME FOR BRINGING ACTION.**—Paragraph (3) of such section is amended—

(1) by striking “final agency action” and inserting “publication of the final rule”; and

(2) by inserting “, in the case of a rule for which the date of final agency action is the same date as the publication of the final rule,” after “except that”.

(d) **INTERVENTION BY CHIEF COUNSEL FOR ADVOCACY.**—Subsection (b) of section 612 of title 5, United States Code, is amended by inserting before the first period “or agency compliance with section 601, 603, 604, 605(b), 609, or 610”.

SEC. 8. JURISDICTION OF COURT OF APPEALS OVER RULES IMPLEMENTING THE REGULATORY FLEXIBILITY ACT.

(a) **IN GENERAL.**—Section 2342 of title 28, United States Code, is amended—

(1) in paragraph (6), by striking “and” at the end;

(2) in paragraph (7), by striking the period at the end and inserting “; and”; and

(3) by inserting after paragraph (7) the following new paragraph:

“(8) all final rules under section 608(a) of title 5.”.

(b) **CONFORMING AMENDMENTS.**—Paragraph (3) of section 2341 of title 28, United States Code, is amended—

(1) in subparagraph (D), by striking “and” at the end;

(2) in subparagraph (E), by striking the period at the end and inserting “; and”; and

(3) by adding at the end the following new subparagraph:

“(F) the Office of Advocacy of the Small Business Administration, when the final rule is under section 608(a) of title 5.”.

(c) **AUTHORIZATION TO INTERVENE AND COMMENT ON AGENCY COMPLIANCE WITH ADMINISTRATIVE PROCEDURE.**—Subsection (b) of section 612 of title 5, United States Code, is amended by inserting “chapter 5, and chapter 7,” after “this chapter,”.

SEC. 9. CLERICAL AMENDMENTS.

(a) Section 601 of title 5, United States Code, is amended—

(1) in paragraph (1)—

(A) by striking the semicolon at the end and inserting a period; and

(B) by striking “(1) the term” and inserting the following:

“(1) AGENCY.—The term”;

(2) in paragraph (3)—

(A) by striking the semicolon at the end and inserting a period; and

(B) by striking “(3) the term” and inserting the following:

“(3) SMALL BUSINESS.—The term”;

(3) in paragraph (5)—

(A) by striking the semicolon at the end and inserting a period; and

(B) by striking “(5) the term” and inserting the following:

“(5) SMALL GOVERNMENTAL JURISDICTION.—The term”; and

(4) in paragraph (6)—

(A) by striking “; and” and inserting a period; and

(B) by striking “(6) the term” and inserting the following:

“(6) SMALL ENTITY.—The term”.

(b) The heading of section 605 of title 5, United States Code, is amended to read as follows:

“§ 605. Incorporations by reference and certifications”.

(c) The table of sections for chapter 6 of title 5, United States Code, is amended—

(1) by striking the item relating to section 605 and inserting the following new item:

“605. Incorporations by reference and certifications.”;

(2) by striking the item relating to section 607 and inserting the following new item:

“607. Quantification requirements.”;
and

(3) by striking the item relating to section 608 and inserting the following:

“608. Additional powers of Chief Counsel for Advocacy.”

(d) Chapter 6 of title 5, United States Code, is amended as follows:

(1) In section 603, by striking subsection (d).

(2) In section 604(a) by striking the second paragraph (6).

Purpose and Summary

On February 8, 2011, Chairman Lamar Smith introduced H.R. 527, the Regulatory Flexibility Improvements Act of 2011 (“the Act” or “the Bill”). The Bill reforms the Regulatory Flexibility Act of 1980 (“RFA”) and the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”). The RFA and SBREFA were passed to require agencies to account for the impacts of proposed regulations on “small entities”—and on small businesses in particular—and to tailor final regulations to minimize the impact on small business.

The need for reform is apparent from the increasing number and scope of regulations issued by Federal regulatory agencies; the disproportionate burden these regulations place on small businesses; and, the failure of agencies heretofore to comply fully with the RFA and SBREFA.¹ The Act updates the RFA and SBREFA to close loopholes and to reduce the disproportionate burden that over-regulation places on small businesses, thereby enhancing job creation and hastening economic recovery.

Background and Need for the Legislation

Genesis and Early History of the RFA

During the 1970’s, Congress enacted numerous regulatory statutes that dramatically increased the regulatory burden on businesses—and especially on small businesses. Regulatory requirements stifled innovation, limited small business growth, and contributed to the general economic malaise that permeated the latter half of the decade. Between 1970 and 1980, the Federal Register more than quadrupled from a 20,000-page publication for the arcana of the Federal Government to a nearly 90,000-page blueprint for regulating many aspects of modern American life.²

In a series of hearings during the late 1970’s, Congress began to focus on the ever-growing burden Federal regulation imposed upon small businesses. Small businesses reiterated two major themes: (1) they were under-represented in Federal regulatory proceedings; and (2) Federal agency efforts to impose a “one-size-fits-all” body of regulation imposed disproportionate burdens on small businesses.³ These findings were supported and reinforced during the 1980 White House Conference on Small Business.

¹ See, e.g., U.S. General Accounting Office, *Regulatory Flexibility Act: Agencies’ Interpretations of Review Requirements Vary*, GAO/GGD-99-55 (Apr. 2, 1999); U.S. General Accounting Office, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, GAO/GGD-98-126 (Aug. 31, 1998); U.S. General Accounting Office, *Regulatory Flexibility Act: Status of Agencies’ Compliance*, GAO/T-GGD-95-112 (Mar. 8, 1995).

² See Figure 2: Federal Register Pages: 1940–2010, in Susan E. Dudley, “Prospects for Regulatory Reform in 2011,” ENGAGE 11:1 (June 2011).

³ The finding on disproportionate impact was substantiated by an Office of Advocacy study in 1984; this was re-affirmed by a 2010 study. See Nicole V. Crain & W. Mark Crain, “The Impact

To address these concerns, Congress enacted the RFA as an additional component of a significantly broader mechanism to control agency decision-making: The Administrative Procedure Act of 1946 (“APA”). In general, the RFA requires Federal agencies, when proposed and final rules are published in the Federal Register, to prepare a regulatory flexibility analysis that describes the rule’s impact on small entities, including on small businesses.⁴ These analytical requirements are not triggered, however, if the head of the agency issuing the rule certifies, under Section 605(b) of the RFA that the rule would not have a “significant economic impact on a substantial number of small entities,”⁵ an undefined term of art in the RFA. The lack of a uniform definition for this term is a shortcoming that the U.S. Government Accountability Office (“GAO,” formerly the U.S. General Accounting Office) repeatedly has found contributes to inconsistent compliance across Federal agencies.⁶ Further, although the Congressional Research Service advises that the annual total number of certifications by all agencies is not known (or even knowable), the GAO has found that in the 3-year period after SBREFA was enacted the certification rate at four EPA offices increased from 78% to 96%.⁷ Thus, the EPA avoided complying with the RFA and SBREFA by certifying more of its rules pursuant to Section 605(b). Finally, agencies only need to assess a new regulation’s direct impact on small entities; courts have held that indirect impacts are irrelevant under the RFA.⁸

The RFA also requires each Federal agency to publish a “regulatory flexibility agenda” in the Federal Register twice a year,⁹ similar to the *Unified Agenda of Federal Regulatory and Deregulatory Actions* required by Executive Order 12866. The Small Business Administration (“SBA”) Chief Counsel for Advocacy is required to monitor and report on agency compliance, and is authorized to appear as *amicus curiae* “in any action brought in a court of the United States to review a rule” and to present his or her views regarding the agency’s compliance with the RFA and the rule’s impact on small entities.¹⁰ The RFA also requires agencies to conduct decennial rule reviews to identify whether the impact of rules on small entities can be mitigated further.¹¹ The extent of this requirement remains unclear, however, as indicated by inconsistent agency practice.¹²

of Regulatory Costs on Small Firms,” (Sept. 2010), available at <http://www.sba.gov/sites/default/files/rs371tot.pdf> (last accessed July 25, 2011).

⁴ See 5 U.S.C. §§ 603, 604.

⁵ See *id.* § 605(b).

⁶ See, e.g., U.S. General Accounting Office, *Regulatory Flexibility Act: Key Terms Still Need to Be Clarified*, GAO-01-669T (Apr. 24, 2001), at 2 (“Over the past decade, we have recommended several times that Congress provide greater clarity with regard to these terms, but to date Congress has not acted on our recommendations.”).

⁷ U.S. General Accounting Office, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO-GGD-00-193 (Sept. 2000), at 16.

⁸ See, e.g., *Mid-Tex Elec. Co-op., Inc. v. FERC*, 773 F.2d 327, 343 (D.C. Cir. 1985) (“the legislative history [of the RFA] . . . also gives rise to an inference that Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy.”).

⁹ See 5 U.S.C. § 602.

¹⁰ See *id.* § 612(a), (b).

¹¹ See *id.* § 610.

¹² For example, the EPA only reviews rules that it previously concluded had a significant economic impact on a substantial number of small entities when the final rules were promulgated. The Department of Transportation, on the other hand, interprets this section to require a review of all of its rules. See U.S. General Accounting Office, *Regulatory Flexibility Act: Agencies’ Interpretations of Review Requirements Vary*, GAO/GGD-99-55 (Apr. 2, 1999), at 24.

From the time of enactment until 1996, agency compliance with the RFA was at best sporadic. Agencies faced little threat from non-compliance since judicial review of regulatory flexibility analyses was very limited, and an agency's certification decision could not be challenged in court.¹³ Without the possibility of court orders, agencies only had to comply when it would benefit their rulemakings or when they could be cajoled by the Chief Counsel for Advocacy or the Office of Management and Budget's ("OMB") Office of Information and Regulatory Affairs ("OIRA"). Both the Committee on the Judiciary and the Committee on Small Business held hearings at which witnesses confirmed the systemic failure by many agencies to comply with the RFA.¹⁴

Enactment of SBREFA and Subsequent History

Congress enacted SBREFA in response to this collective disregard by Federal agencies, adding several important features to the RFA: compliance guides, advocacy review panels, and judicial review. Agencies must develop and publish compliance guides for all rules for which the agency is required to develop a final regulatory flexibility analysis. The compliance guide explains the steps a small entity must take to comply with new regulations.¹⁵ SBREFA also authorized direct judicial review of agency compliance with the RFA, including challenges to agency certifications that a rule would not have a "significant economic impact on a substantial number of small entities."¹⁶ SBREFA also subjected certain Internal Revenue Service interpretative regulations to the RFA.¹⁷

Congress recognized that, by the time a proposed rule is published for notice and comment, the agency has substantial intellectual capital invested in the proposed rule and is unlikely to change the core of its proposal during the notice and comment period.¹⁸ Thus, under SBREFA, Congress required the Environmental Protection Agency ("EPA") and the Occupational Safety and Health Administration ("OSHA")—two of the agencies that most affect small entities—to obtain input from small entities before publishing a proposed rule that would have a significant economic impact on a substantial number of small entities.¹⁹ The Dodd-Frank Wall Street Reform and Consumer Protection Act further required

¹³ See, e.g., *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984); *Colo. State Banking Bd. v. Resolution Trust Corp.*, 926 F.2d 931, 948 (10th Cir. 1991); *Lehigh Valley Farmers v. Block*, 640 F. Supp. 1497, 1520 (E.D. Pa. 1986), *aff'd on other grounds*, 829 F.2d 409 (3d Cir. 1987).

¹⁴ See, e.g., *Strengthening the Regulatory Flexibility Act: Hearing on H.R. 9 Before H. Comm. on Small Business*, 104th Cong., Serial No. 104-5, at 45-46 (Jan. 23, 1995) (statement of James P. Carty, Vice President, Small Manufacturers, National Association of Manufacturers) (identifying instances where the EPA and Pension Benefit Guaranty Corporation failed to comply with the RFA); *Job Creation and Wage Enhancement Act of 1995: Hearing on H.R. 9 Before the Subcomm. on Comm. and Admin. Law of the H. Comm. on the Judiciary*, 104th Cong., Serial No. 104-3, at 76 (Feb. 3 & 6, 1995) (statement of Benny L. Thayer, President, National Association for the Self-Employed) (noting that confusion under the RFA "has led to an apparent belief on the part of some agencies that compliance with the RFA is entirely voluntary").

¹⁵ See "Contract with America Advancement Act," 104 P.L. 141, § 212 (Mar. 29, 1996); see also 5 U.S.C. § 601 note.

¹⁶ 5 U.S.C. § 610(a).

¹⁷ The RFA only requires agency compliance if the regulation is required to be issued pursuant to notice and comment pursuant to Section 553 of the APA or some other statute. Interpretative regulations are exempt from the notice and comment requirements. 5 U.S.C. § 553(b)(A).

¹⁸ In fact, some would argue that the notice and comment period was not a critical component of rational rulemaking but the keystone of rationale rulemaking in which the agency uses the public comment process to find further support for the foregone conclusion of its proposed regulation.

¹⁹ See 5 U.S.C. § 609.

the new Consumer Financial Protection Bureau to convene advocacy review panels.²⁰ Before publishing an initial regulatory flexibility analysis, the agency is required to notify the SBA's Chief Counsel for Advocacy and provide information on the draft rule's potential impacts on small entities. The Chief Counsel for Advocacy then assembles a panel consisting of representatives from OIRA, the agency promulgating the rule and the SBA. The panel gathers input from small entities' representatives and issues a report within 60 days, which becomes part of the record.

Congressional intent notwithstanding, SBREFA's changes have had only a modest effect on agency compliance.²¹ According to the GAO, the most significant stumbling block to improved compliance is the lack of definitions in the RFA and SBREFA for the terms "significant economic impact" and "substantial number of small entities." GAO also noted that the threshold determination of whether a rule will have a significant economic impact on a substantial number of small entities is critical to compliance with other RFA requirements, including periodic review of rules under Section 610 and the receipt of small-entity input under SBREFA prior to the publication of proposed rules by EPA and OSHA.

President George W. Bush also recognized the problems with RFA and SBREFA compliance in a 2002 speech:

Every agency is required to analyze the impact of new regulations on small businesses before issuing them. That is an important law. The problem is it is often being ignored. The law is on the books; the regulators do not care that the law is on the books. From this day forward they will care that the law is on the books. . . . We want to enforce the law.²²

Subsequently, the President issued Executive Order 13272,²³ which required agencies to adopt standards for complying with the RFA, to make those standards known to the public and to give the Office of Advocacy the opportunity to comment on proposed rules prior to

²⁰ See P.L. 111-203, § 1100G(a) (July 21, 2010).

²¹ See, e.g., Sarah E. Shive, *If You've Always Done It That Way, It's Probably Wrong: How the Regulatory Flexibility Act Has Failed To Change Agency Behavior, and How Congress Can Fix It*, 1 ENTREPREN. BUS. L.J. 153, 164 (2006) ("While one Department of Labor official noted that the judicial review permitted by the SBREFA would likely result in a 'significant impact,' judges have rarely ruled in favor of small businesses, granting substantial deference to agencies in all but the most egregious of cases."); Christopher M. Grengs, *Making the Unseen Seen: Issues and Options in Small Business Regulatory Reform*, 85 MINN. L. REV. 1957, 1973 (June 2001) ("Some observers expressed high optimism about SBREFA's prospects for holding Federal agencies more accountable for their treatment of small businesses. Although this optimism was perhaps not entirely deserved, SBREFA has spurred moderate progress in improving the regulatory treatment of small businesses. In particular, since SBREFA's enactment in 1996, judicial review of Federal agency action under SBREFA has proved to be a promising lynchpin for remedying irrational or glaringly mistaken agency action."); Jeffrey J. Polich, *Judicial Review and the Small Business Regulatory Enforcement Fairness Act: An Early Examination of When and Where Judges Are Using Their Newly Granted Power Over Federal Regulatory Agencies*, 41 WM. & MARY L. REV. 1425, 1426, 1461 (Apr. 2000) ("A review of existing case law demonstrates that small entities have prevailed using SBREFA in cases in which there was a gross violation of Federal rulemaking procedures by an agency, but failed when using SBREFA in cases in which the agency made some effort to comply with those requirements. . . . The SBREFA amendments succeed in refining the requirements of the RFA and, in particular, the judicial review provision grants small businesses a weapon to insure that Federal agencies comply with the RFA. Judicial deference to agency decisions, however, limits the power of judicial review. *In the end, true regulatory relief depends upon the agencies' own commitment to fairness and balance for the small businesses they regulate.*") (Emphasis added.)

²² "President Unveils Small Business Plan at Women's Entrepreneurship Summit," (Mar. 19, 2002), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/03/20020319-2.html> (last accessed July 25, 2011).

²³ 67 Fed. Reg. 53,462 (Aug. 16, 2002).

publication in the Federal Register. The Executive Order, however, did not address the RFA's loopholes or prevent agencies from adopting strained interpretations to avoid doing the required analysis.

Courts similarly have not been the antidotes that the authors of SBREFA contemplated. For example, courts have not given agency compliance with the RFA the same searching scrutiny that they have given to compliance with the National Environmental Policy Act ("NEPA"),²⁴ even though it was expected that judicial review would have the same impact on agency decision-making that it had on agency compliance with NEPA.²⁵ Agencies still have broad latitude to interpret and implement the RFA.

Testimony at hearings held by the Committee on Small Business during the 106th, 107th and 108th Congresses support additional reform,²⁶ revealing that considerable confusion still reigns among agencies and that agencies still find ways to avoid complying with the RFA, even after the enactment of SBREFA.²⁷ In the 109th Congress, H.R. 682 sought to achieve most of the reforms contained in H.R. 527. This Committee's Subcommittee on Commercial and Administrative Law, and the Committee on Small Business, both held hearings on H.R. 682.²⁸

The Obama Administration and the Continuing Need for Reform

On January 18, 2011, President Obama issued a Presidential Memorandum to agency heads entitled "Regulatory Flexibility, Small Business, and Job Creation," stating that his "Administration is firmly committed to eliminating excessive and unjustified

²⁴*Compare Associated Fisheries v. Daley*, 127 F.3d 104, 112–18 (1st Cir. 1997) (holding SBREFA does not mandate courts to conduct a substantive judicial review of final decisions), and *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001) ("Regulatory Flexibility Act, which requires Federal agencies to assess the impact of their regulations on small businesses, is purely procedural in nature, requiring nothing more than filing of statement demonstrating good-faith effort to carry out its mandate.") with *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1285 (1st Cir. 1996) (reviewing an agency's compliance to NEPA requires a "thorough, probing, in-depth [sic] review" and a "searching and careful" inquiry into the record").

²⁵*Regulatory Flexibility Amendments Act of 1995 on S. 350: Hearing Before S. Comm. on Small Business*, 104th Cong., Serial No. 104–103, at 24 (Mar. 8, 1995) (statement of Jere W. Glover, Chief Counsel for Advocacy, U.S. Small Business Administration) ("A more substantial and ongoing threat, potential judicial review of agency compliance with the RFA, would certainly lead to scrupulous compliance with the RFA, just as similar attentiveness is paid to the impact statement requirements of the [NEPA].").

²⁶*IRA Compliance with the Regulatory Flexibility Act: Hearing Before the H. Comm. on Small Business*, 108th Cong., 108–10 (May 1, 2003); *Improving the Regulatory Flexibility Act: H.R. 2345: Hearing Before the H. Comm. on Small Business*, 108th Cong., Serial No. 108–62 (May 5, 2004); *Can Improved Compliance with the Regulatory Flexibility Act Resuscitate Small Healthcare Providers?: Hearing Before the H. Comm. on Small Business*, 107th Cong., Serial No. 107–53 (Apr. 10, 2002); *Regulatory Reform Initiatives and Their Impact on Small Business: Hearing Before the H. Comm. on Small Business*, 106th Cong., Serial No. 106–60 (June 7, 2000).

²⁷See, e.g., *IRS Compliance with the Regulatory Flexibility Act: Hearing Before the H. Comm. on Small Business*, 108th Cong., Serial No. 108–10, at 38 (May 1, 2003) (statement of Juanita Millender-McDonald, Member, House Comm. on Small Business) ("The IRS has generally avoided the requirements of SBREFA, even though the law was, in part, specifically written to address IRS compliance with the RFA."); *Can Improved Compliance with the Regulatory Flexibility Act Resuscitate Small Healthcare Providers?: Hearing Before the H. Comm. on Small Business*, 107th Cong., Serial No. 107–53, at 15 (Apr. 10, 2002) (statement of Zachary Evans, President, National Association of Portable X-Ray Providers) ("CMS refuses to consider the impact upon our industry of their rulemaking, consult with us during the rulemaking process, or in any way evaluate industry costs prior to setting our reimbursement rates."); *Regulatory Reform Initiatives and Their Impact on Small Business: Hearing Before the Comm. on Small Business*, 106th Cong., Serial No. 106–60, at 40 (June 7, 2000) (statement of Duncan Thomas, President, National Association of Convenience Stores) (explaining that SBREFA "leads often to confusion, inadvertent noncompliance and considerable expense").

²⁸*The RFA at 25: Needed Improvements for Small Business Regulatory Relief: Hearing on H.R. 682 Before the H. Comm. on Small Business*, 109th Cong., Serial No. 109–5 (Mar. 16, 2005); *Regulatory Flexibility Improvements Act: Hearing on H.R. 682 Before the H. Comm. on the Judiciary*, 109th Cong., Serial No. 109–134 (July 30, 2006).

burdens on small businesses, and to ensuring that regulations are designed with careful consideration of their effects, including their cumulative effects, on small businesses.”²⁹ The President also directed agency heads to publish explanations of their decisions not to provide regulatory flexibility for small businesses, if those decisions were not based on legal limitations. The President’s memorandum, however, added nothing meaningful to existing agency requirements, and it explicitly stated that the memorandum did not create any legal rights. Even if it had, any of its provisions could be revoked at any time, as it is merely an executive memorandum, not a law.

Meanwhile, the need for additional RFA reform has grown. In 2010, for example, Federal agencies promulgated 3,312 final rules, while Congress passed and the President signed into law only 385 statutes. Recently, the SBA reported that Federal rulemaking now imposes a cumulative burden of \$1.75 trillion on our economy—a figure that equals 14 percent of national income.³⁰ That burden, moreover, falls disproportionately on small businesses:

While all citizens and businesses pay some portion of these costs, the distribution of the burden of regulations is quite uneven. The portion of regulatory costs that falls initially on businesses was \$8,086 per employee in 2008. Small businesses, defined as firms employing fewer than 20 employees, bear the largest burden of Federal regulations. As of 2008, small businesses face an annual regulatory cost of \$10,585 per employee, which is 36 percent higher than the regulatory cost facing large firms (defined as firms with 500 or more employees).³¹

Another recent study found that “[e]ach million-dollar increase in the regulatory budget costs the economy 420 private sector jobs.”³²

The future threat of excessive Federal regulation—such as under the waves of regulation intended to implement the Patient Protection and Affordable Care Act³³ and the Dodd-Frank Wall Street Reform and Consumer Protection Act³⁴—have created immense regulatory burdens and uncertainty for the economy, chilling job creation, investment and economic growth and suppressing America’s economic freedom and standing among the world’s economies.³⁵ These effects are particularly burdensome on small busi-

²⁹“Presidential Memoranda—Regulatory Flexibility, Small Business, and Job Creation,” (Jan. 18, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/18/presidential-memoranda-regulatory-flexibility-small-business-and-job-cre> (last accessed July 25, 2011).

³⁰Crain, *supra* note 3, at 6, 48.

³¹*See id.* at iv.

³²T. Randolph Beard et al., *Regulatory Expenditures, Economic Growth and Jobs: An Empirical Study*, Phoenix Center Policy Bulletin No. 28 (Apr. 2011), at 5, available at <http://www.phoenix-center.org/PolicyBulletin/PCPB28Final.pdf> (last accessed July 25, 2011).

³³111 P.L. 148 (Mar. 23, 2010).

³⁴111 P.L. 203 (July 21, 2010).

³⁵*See, e.g.,* Editors, *The Uncertainty Principle*, WALL STREET JOURNAL (July 14, 2010), available at <http://online.wsj.com/article/SB10001424052748704288204575363162664835780.html?KEYWORDS=rulemakings> (last accessed July 25, 2011); Chamber of Commerce, *Jobs for America: an Open Letter to the President of the United States, the United States Congress, and the American People* (July 14, 2010) (stating, e.g., that, substantially due to regulatory uncertainty, American corporations are sitting on well over \$1 trillion that they could otherwise invest); Terry Miller & Kim R. Holmes, “*Mostly Free*”—*The Startling Decline of America’s Economic Freedom and What to Do About It*, Heritage Foundation (July 14, 2010), available at <http://www.heritage.org/Research/Reports/2010/07/Mostly-Free-The-Startling-Dilemma-of-America-Economic-Freedom-and-What-to-Do-About-It> (summary) (last accessed July 25, 2011); http://thf_media.s3.amazonaws.com/2010/pdf/sr0082.pdf (full report) (last accessed July 25, 2011);

nesses—and since start-up firms are the source of net job creation in the U.S. economy, it is only logical that the impact of these effects on small businesses contributes substantially to the economy’s inability to create sufficient levels of new jobs.³⁶ OIRA currently has under its review 22 economically significant rules, which translates into a minimum potential economic impact of \$2.2 billion.³⁷ In the past 12 months, since the Dodd-Frank financial legislation was enacted on July 21, 2010, OIRA has reviewed 125 economically significant rules.³⁸

Agencies continue to ignore their obligations under the RFA. For example, EPA has found carbon dioxide to be a threat to public health and welfare³⁹ and initiated an inexorable series of additional regulatory actions that, under existing environmental laws, will impose large adverse impacts on small businesses. EPA, however, refused to comply with the RFA—even when the Chief Counsel for Advocacy pointed out to the EPA Administrator (and, by copy, to OIRA) that EPA had failed to convene advocacy review panels before imposing its rules, failed to develop and evaluate regulatory alternatives to minimize its actions’ impacts on small businesses, and inappropriately certified that its actions will not affect small businesses.⁴⁰ When Chairman Smith and Small Business Committee Chairman Sam Graves brought to OIRA’s attention their concerns over these violations, the potential for EPA’s regulations to impose particularly heavy burdens on small businesses, and the need for OIRA to intervene and assure RFA compliance, OIRA’s response was simply to refer the matter to EPA.⁴¹

Similarly, on January 25, 2011, OSHA announced that it had temporarily withdrawn from OMB review a proposed rule on injury-related employer recordkeeping. The stated reason for the withdrawal was to “seek greater input from small businesses on the impact of the proposal.”⁴² Yet, rather than commit itself to full RFA/SBREFA compliance, OSHA promised to hold a meeting “to engage and listen to small businesses about the agency’s proposal” and to “conduct a stakeholder meeting with other members of the

Terry Miller, *The U.S. loses Ground on Economic Freedom*, WALL STREET JOURNAL (Jan. 13, 2011), available at http://online.wsj.com/article/SB10001424052748703779704576074193214999486.html?utm_source=Newsletter&utm_medium=Email&utm_campaign=Heritage%2BHotSheet (last accessed July 25, 2011); Heritage Foundation and Wall Street Journal, *2011 Index of Economic Freedom: Executive Highlights* (Jan. 2011) at 6 (placing America as ninth in economic freedom among countries surveyed and recording a further decline in U.S. economic freedom).

³⁶Tim Kane, *The Importance of Start-ups in Job Creation and Job Destruction*, Ewing Marion Kaufmann Foundation (July 2010) at 6, available at http://www.kauffman.org/uploadedFiles/firm_formation_importance_of_startups.pdf (last accessed July 25, 2011).

³⁷Office of Information and Regulatory Affairs, *List of Regulatory Actions under Review*, Reginfo.gov, available at <http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp> (last accessed July 22, 2011).

³⁸*See id.*

³⁹“Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act,” EPA Docket No. EPA-HQ-OAR-2009-0171, RIN 2060-ZA14 (Dec. 7, 2009).

⁴⁰Letter from Susan Walthall, Acting Chief Counsel, Office of the Chief Counsel for Advocacy, Small Business Administration to the Honorable Lisa Jackson, EPA Administrator, (Dec. 23, 2009) (letter on file).

⁴¹Letter from Reps. Lamar Smith and Sam Graves to Cass R. Sunstein, OIRA Administrator (Jan. 21, 2010); response letter from Administrator Sunstein to Reps. Smith and Graves (Apr. 29, 2010) (letters on file).

⁴²U.S. Dep’t of Labor, Office of Public Affairs, *News Release: US Labor Department’s OSHA temporarily withdraws proposed column for work-related musculoskeletal disorders, reaches out to small businesses* (Jan. 25, 2011).

public if requested.”⁴³ This response falls well short of convening the advocacy review panel that OSHA is required by law to hold.⁴⁴

Hearings

On February 10, 2011, the Subcommittee on Courts, Commercial and Administrative Law held a legislative hearing on H.R. 527.⁴⁵ Testimony was received from Rich Gimmell, President of Atlas Machine & Supply, Inc.; Thomas M. Sullivan, Counsel for Nelson, Mullins, Riley, Scarborough LLP; J. Robert Shull, Program Officer of Worker Right’s for the Public Welfare Foundation; and, Karen R. Harned, Executive Director of the National Federation of Independent Business (NFIB).

Mr. Gimmell, also representing the National Association of Manufacturers, noted that the current recession had to that point resulted in a loss of 2.2 million jobs in the manufacturing sector.⁴⁶ Mr. Gimmell called for “more detailed statements in the RFA process and requirements to identify redundant, overlapping, or conflicting regulations.”⁴⁷ Incorporating this sort of “lean thinking” into the regulatory process would change the current wasteful policy practices of most agencies and, in turn, improve the economy by allowing businesses to create jobs and expand.⁴⁸

Mr. Sullivan testified, “One size fits all Federal mandates do not work when applied to small business; second, small business face higher costs per employee to comply with Federal regulation than their larger competitors, and, third, small business is critically important to the American economy.”⁴⁹ According to Mr. Sullivan, H.R. 527 would enable the Office of Advocacy to ensure that agencies properly consider how their regulations impact small businesses, and would provide clarity to courts on judicial review.⁵⁰

According to Ms. Harned, “[o]verzealous regulation is a perennial cause for concern for small business owners and is particularly burdensome in times like these when the Nation’s economy remains sluggish.”⁵¹ Including a \$1.75 trillion cost of regulations on the economy every year, Ms. Harned stated that “small businesses face an annual regulatory cost of \$10,585 per employee which is 36 percent more than the regulatory cost facing businesses with more than 500 employees.”⁵² In opposition to H.R. 527, Mr. Shull alleged the bill would “paralyze the regulatory agencies we need to protect the public and keep them from getting things done to protect the public.”⁵³

The Committee on Small Business also held a legislative hearing on H.R. 527.⁵⁴ Testimony was received from Bill Squires, Senior Vice President and General Counsel for Blackfoot Telecommuni-

⁴³ *Id.*

⁴⁴ See 5 U.S.C. § 609.

⁴⁵ See “Regulatory Flexibility Improvements Act of 2011”—*Unleashing Small Businesses to Create Jobs: Hearing on H.R. 527 Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary*, 112th Cong., Serial No. 112–16 (Feb. 10, 2011).

⁴⁶ *Id.* at 56.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 65.

⁵⁰ *Id.* at 66.

⁵¹ *Id.* at 85.

⁵² *Id.*

⁵³ *Id.* at 77.

⁵⁴ See *Reducing Federal Agency Overreach: Modernizing the Regulatory Flexibility Act Before the H. Comm. on Small Business*, 112th Cong., Serial No. 112–007 (Mar. 30, 2011).

cations Group; David Frulla of Kelley Drye & Warren LLP; Craig Fabian, Vice President of Regulatory Affairs and Assistant General Counsel at the Aeronautical Repair Station Association; and, Rich D. Draper, CEO of the Ice Cream Club, Inc.

Committee Consideration

On July 7, 2011, the Committee met in open session and ordered the bill H.R. 527 favorably reported with an amendment, by a rollcall vote of 18 to 8, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 527.

1. Amendment #7, offered by Mr. Cohen. The amendment requires that a member of the public or a representative of a public interest organization who is able to provide relevant information about the economic and non-economic impact of a proposed rule be added as a member of the review panels contemplated in H.R. 527. Failed by a rollcall of 9–13.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren			
Mr. Chabot		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes			
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross			
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt			
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley			
Ms. Chu		X	
Mr. Deutch			
Ms. Sánchez			

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Ms. Wasserman Schultz			
Total	9	13	

2. Amendment #6, offered by Ms. Jackson Lee. The amendment requires a GAO study of the potential impact of implementation on agencies' resources, the rulemaking process and the rulemaking in the event of an emergency. Failed by a rollcall of 11–15.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble		X	
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley			
Ms. Chu	X		
Mr. Deutch			
Ms. Sánchez			
Ms. Wasserman Schultz			
Total	11	15	

3. Amendment #9, offered by Mr. Johnson. The amendment creates an exception for any rulemaking to carry out the FDA Food Safety Modernization Act. Failed by a rollcall of 10–16.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Smith, Chairman		X	

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Sensenbrenner, Jr.			
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley			
Ms. Chu	X		
Mr. Deutch			
Ms. Sánchez			
Ms. Wasserman Schultz			
Total	10	16	

4. Amendment #10, offered by Mr. Johnson. The amendment creates an exception for any rulemaking to carry out the Patient Protection and Affordable Care Act. Failed by a rollcall of 10–15.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks			
Mr. Gohmert			
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz		X	

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley			
Ms. Chu	X		
Mr. Deutch			
Ms. Sánchez			
Ms. Wasserman Schultz			
Total	10	15	

5. Amendment #12, offered by Mr. Nadler. The amendment requires an agency to consider the direct and indirect benefits of proposed rules. Failed by a rollcall of 8–17.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungen		X	
Mr. Chabot		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan		X	
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt			
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Cohen	X		

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. Johnson	X		
Mr. Pierluisi			
Mr. Quigley			
Ms. Chu	X		
Mr. Deutch			
Ms. Sánchez			
Ms. Wasserman Schultz			
Total	8	17	

6. Reporting H.R. 527 as amended. The bill ensures complete analysis of potential impacts on small entities of rules, and for other purposes. Reported by a rollcall of 18–8.

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Smith, Chairman	X		
Mr. Sensenbrenner, Jr.			
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren	X		
Mr. Chabot	X		
Mr. Issa	X		
Mr. Pence			
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert			
Mr. Jordan	X		
Mr. Poe			
Mr. Chaffetz	X		
Mr. Griffin	X		
Mr. Marino	X		
Mr. Gowdy	X		
Mr. Ross	X		
Ms. Adams	X		
Mr. Quayle	X		
Mr. Conyers, Jr., Ranking Member		X	
Mr. Berman			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt			
Ms. Lofgren		X	
Ms. Jackson Lee			
Ms. Waters		X	
Mr. Cohen		X	
Mr. Johnson		X	
Mr. Pierluisi			
Mr. Quigley			
Ms. Chu		X	
Mr. Deutch			
Ms. Sánchez			
Ms. Wasserman Schultz			
Total	18	8	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings

and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 527, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 24, 2011.

Hon. LAMAR SMITH, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 527, the “Regulatory Flexibility Improvements Act of 2011.”

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 527—Regulatory Flexibility Improvements Act of 2011.

SUMMARY

H.R. 527 would amend the Regulatory Flexibility Act (RFA). The bill would expand the number of rules covered by the RFA and require agencies to perform additional analysis of regulations that affect small businesses. Finally, the legislation would provide new authorities to the Small Business Administration’s (SBA’s) Office of Advocacy to intervene in agency rulemaking.

CBO estimates that implementing H.R. 527 would cost \$80 million over the 2012–2016 period to expand the RFA, assuming appropriation of the necessary funds. Enacting the bill could affect direct spending by agencies not funded through annual appropriations; therefore, pay-as-you-go procedures apply. CBO estimates, however, that any net increase in spending by those agencies would not be significant. Enacting H.R. 527 would not affect revenues.

H.R. 527 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA)

and would not affect the budgets of State, local, or tribal governments.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of H.R. 527 is shown in the following table. The costs of this legislation fall within budget functions 370 (commerce and housing credit), 800 (general government), and all budget functions that include agencies that issue regulations affecting small businesses.

By Fiscal Year, in Millions of Dollars

	2012	2013	2014	2015	2016	2012– 2016
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorization Level	10	15	20	20	20	85
Estimated Outlays	8	14	18	20	20	80

BASIS OF ESTIMATE

For this estimate, CBO assumes that the legislation will be enacted near the end of fiscal year 2011, that the necessary amounts will be appropriated near the start of each fiscal year, and that spending will follow historical patterns for similar activities.

CBO is unaware of any comprehensive information on the current costs of spending for regulatory activities governmentwide. However, according to the Congressional Research Service, Federal agencies issue 3,000 to 4,000 final rules each year. Most are promulgated by the Departments of Transportation, Homeland Security, and Commerce, and the Environmental Protection Agency (EPA). Agencies that issue the most major rules (those with an estimated economic impact on the economy of more than \$100 million per year) include the Department of Health and Human Services, the U.S. Department of Agriculture, and EPA.

H.R. 527 would broaden the definition of a “rule” for rulemaking purposes to include agency guidance documents and policy statements. The bill also would expand the scope of the regulatory analysis for proposed and final rules to examine any indirect economic effects on small businesses and to provide a more detailed analysis of the possible economic consequences of the rule to small businesses. The legislation equates indirect economic effects with any impact that is reasonably foreseeable. The legislation also would require agencies to publicly report on the cumulative economic impact of any new regulations on the costs of existing regulations to small businesses. Implementing H.R. 527 would increase the number of agencies that need to prepare regulatory analysis and also would increase the role of the SBA’s Office of Advocacy and the Office of Information and Regulatory Affairs (OIRA) in the rulemaking process. Finally, the legislation would require more Federal agencies to use panels of experts to evaluate regulations and to prepare reports on the economic impact of proposed regulations on small business.

Information from OIRA, SBA, and some Federal regulatory agencies indicates that the new requirements under the bill would increase the cost to issue a few hundred of the thousands of Federal

regulations issued annually. Based on that information, CBO estimates that requiring the additional analysis would increase administrative costs to regulatory agencies, the SBA's Office of Advocacy, and OIRA by \$20 million annually, subject to the availability of appropriated funds. We expect that it would take about three years to reach that level of effort.

Under current law and executive orders, all agencies must prepare a regulatory analysis prior to issuing a final rule. That analysis includes the purpose of the regulatory action, the number and types of small businesses to which the rule will apply, the projected reporting and compliance costs of the rule, and any significant alternatives that would accomplish the objectives of the rule while minimizing the economic impact on small business and other activities.

An agency can waive the requirement for a part of the regulatory analysis if it can certify that the proposed rule will not have a significant economic impact on a substantial number of small businesses. If a proposed rule is expected to have a significant economic impact, the agency is required to notify the Small Business Administration's Office of Advocacy and provide it with an opportunity to comment on the rule. In addition, EPA, the Occupational Safety and Health Administration, and the Consumer Financial Protection Bureau are required to convene panels of experts to evaluate any proposed regulation that may have a significant economic impact. Those panels consist of Federal employees from the rulemaking agency, the Office of Management and Budget, and SBA who work to ensure that small business viewpoints are considered prior to the issuance of a final rule. Moreover, under current law, agencies are required to periodically review the economic impact of existing rules that may have an impact on small businesses.

PAY-AS-YOU-GO CONSIDERATIONS

The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. Enacting H.R. 527 could affect direct spending by agencies not funded through annual appropriations; therefore, pay-as-you-go procedures apply. CBO estimates, however, that any net increase in spending by those agencies would not be significant.

INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

H.R. 527 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of State, local, or tribal governments.

PREVIOUS CBO ESTIMATE

On August 24, 2011, CBO transmitted a cost estimate for H.R. 527 as ordered reported by the House Committee on Small Business on July 13, 2011. The pieces of legislation are similar, and the CBO cost estimates are the same.

ESTIMATE PREPARED BY:

Federal Spending: Matthew Pickford
Impact on State, Local, and Tribal Governments: Melissa Merrell

Impact on the Private Sector: Paige Piper/Bach

ESTIMATE APPROVED BY:

Peter H. Fontaine
Assistant Director for Budget Analysis

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 527 will update the RFA and SBREFA to close loopholes and reduce the disproportionate burden that over-regulation places on small businesses thereby enhancing job creation and hastening America's economic recovery.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 527 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

Section 1. Short title; table of contents.

This Act may be cited as the "Regulatory Flexibility Improvements Act of 2011."

Section 2. Clarification and Expansion of Rules Covered by the Regulatory Flexibility Act.

Section 2(a) expands the RFA and SBREFA to apply to all rules within the meaning of 5 U.S.C. § 551(4), except for certain rules of particular applicability. The RFA currently defines a "rule" as one that is issued pursuant to the notice and comment rulemaking provisions of Section 553(b) of the APA. The Committee believes this definition is unjustifiably narrow; the definition of a "rule" under the RFA should be the same as under the APA.

Section 2(b) clarifies the term "economic impact." The RFA requires agencies to prepare a regulatory flexibility analysis if the agency determines that the rule will have a "significant economic impact on a substantial number of small entities." But this term is not defined in current law, and courts have held that agencies do not need to consider indirect economic impacts on small entities. The Committee doubts that Congress originally intended the regulatory flexibility analysis to be so limited.⁵⁵ Indirect effects are no less burdensome on small entities than direct effects. Moreover, agencies already measure their regulations' indirect effects under the National Environmental Policy Act,⁵⁶ upon which the RFA is modeled, and when performing the cost-benefit analysis required by Executive Order 12,866. Section 2(b) thus clarifies that the term

⁵⁵ See 126 CONG. REC. S21458 (daily ed. Aug. 6, 1980) (section-by-section analysis of S. 299, the Regulatory Flexibility Act of 1980: "Agencies should not give a narrow reading to what constitutes a 'significant economic impact' for purposes of this section or other sections in which the term is used.").

⁵⁶ See 40 C.F.R. § 1508.8.

“economic impact” covers both direct and indirect effects that are reasonably foreseeable.

Section 2(c) clarifies that an agency must perform a regulatory flexibility analysis when a proposed rule’s effects are significant but beneficial. Agencies interpret the current law to require a regulatory flexibility analysis only when a proposed rule has significant costs to small entities. Requiring a regulatory flexibility analysis when a proposed rule has significant benefits will encourage agencies to pick the most beneficial alternative.

Section 2(d) adds tribal organizations to the list of “small entities” within the RFA’s purview. The same considerations that necessitate requiring agencies to perform regulatory flexibility analyses when small governmental bodies are concerned apply with equal force to tribal organizations.

Section 2(e) clarifies that the RFA applies to land management plans developed by the U.S. Forest Service and the Bureau of Land Management. This clarification reflects the GAO’s view of current law,⁵⁷ although the Forest Service and the BLM disagree. Because these agencies already collect economic data for NEPA reports, this clarification will not be burdensome.

Section 2(f)(1) clarifies that the IRS must comply fully with the RFA. The IRS has previously concluded that it is not required to follow the RFA when issuing an “interpretative” rule outside of the notice-and-comment process. Adopted in 1996, SBREFA required the IRS to comply with the RFA when an interpretative rule imposes a collection-of-information requirement on a small entity. The IRS misinterprets this statute to apply only when the taxpayer is required to complete a brand new, never-used form. Section 2(f)(1) makes clear that the IRS is required to comply with the RFA whenever the IRS intends to codify a regulation in the Code of Federal Regulations and the regulation (or statute that the regulation is interpreting) imposes a collection-of-information requirement. Moreover, the ensuing regulatory flexibility analysis should not be limited to the cost associated with the “collection of information;” rather, the “collection of information” is a trigger for a full analysis of the rule’s economic effects. Section 2(f)(2)-(3) establishes that the terms “collection of information” and “recordkeeping requirement” have the same meaning under the RFA as under the Paperwork Reduction Act.

Section 2(g) adopts the definition of “small organization” under the RFA that the Equal Access to Justice Act uses, focusing on the resources available to the organization, i.e., its net worth and number of employees. The current definition of “small organization” is unwieldy. Like the RFA, one purpose of the EAJA is to protect small entities from overzealous regulatory enforcement. Thus, both statutes should define “small organization” in the same way. Section 2(g) extends the RFA’s protections to local labor organizations as well.

Section 3. Requirements for Providing More Detailed Analyses.

The NEPA, which was the model when Congress adopted the RFA in 1980, requires agencies to develop a “detailed statement”

⁵⁷U.S. General Accounting Office, *Congressional Review Act: Application to the Tongass National Forest Land and Resource Plan*, T-OGC-97-54 (1997), at 2.

regarding the environmental impact of a proposed rule. Courts have interpreted the NEPA to require agencies to take a “hard look” at environmental impacts.⁵⁸ The RFA, however, only requires agencies to develop a “statement” regarding the impact of a new regulation on small entities.

After finding that agencies were not fulfilling their responsibilities under the RFA, Congress amended it in 1996 to allow for judicial review, to create the same compliance incentives that exist under the NEPA. Unfortunately, courts reviewing agency compliance with SBREFA and RFA have not applied the same level of searching scrutiny as they have given to compliance with the NEPA. Consequently, agencies are performing the bare minimum of analysis to satisfy judicial review, without focusing on the most important issue: how to minimize the negative economic impact of regulations on small entities.

Section 3 is intended to increase agency scrutiny directly, by amending the statute, rather than indirectly, as was attempted in SBREFA by adding a judicial review component. Thus, Section 3(a) amends Section 603 by requiring the initial regulatory flexibility analysis (“IFRA”) to contain a “detailed statement” rather than merely a “statement;” by striking the term “succinct” from Section 603(b)(2); by striking the term “where feasible” from Section 603(b)(3); and, by striking the phrase “to the extent practicable” from Section 603(b)(5). Agencies exploit these terms to avoid following the law’s clear purpose. Section 3(a) also adds a new paragraph (6) to Section 603(b), requiring agencies to consider the cumulative economic impact of the proposed rule in light of existing rules. Finally, recognizing that a rule could affect some small entities more than others, Section 3(a)(7) requires agencies to describe any disproportionate economic impact on a specific class of small entities.

Regarding the final regulatory flexibility analysis (“FRFA”), Section 3(b)(1) amends Section 604 to require the “description” and “explanation” required by Section 604(b)(4), (5) and (6) to be “detailed.” This new requirement comports with the “detailed statement” required of agencies by NEPA. The bill also requires agencies to describe in the FRFA any disproportionate economic impact on a class of small entities. Section 3(b)(2) closes an oversight in the RFA to require an agency, when preparing an FRFA, to summarize all comments received throughout the process, not just comments received in response to an IFRA. Section 3(b)(3) updates the RFA technologically by requiring agencies to post FRFAs online.

Section 3(c) allows agencies to satisfy the RFA by making reference to already-completed analyses (for example, under NEPA) that satisfy the RFA’s criteria. If the necessary analysis already has been completed, then there is no reason to force an agency to go through the rote exercise of performing it again. Nevertheless, agencies must cite to the pre-existing analysis with specificity; vague or casual references will not suffice. Thus, Section 3(c) requires the agency to identify the “specific portion of another agenda or analysis.” In the same vein, when an agency certifies that a proposed rule will not have a “significant economic impact on a sub-

⁵⁸See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

stantial number of small entities,” Section 3(d) requires the agency to give a “detailed statement” and to identify the supporting “factual and legal” basis for the certification.

Finally, Section 3(e) makes quantifiable data (of the caliber required under the Information Quality Act⁵⁹) the standard for measuring the economic impact of a proposed rule on small entities. This will make agencies’ IRFAs and FRFAs more transparent, including for courts at the judicial review stage. If quantifiable data is unavailable then the agency must provide a “detailed statement explaining why quantification is not practicable or reliable” as well as “a more general descriptive statement” of the rule’s effects. The Chief Counsel for Advocacy will have the authority to promulgate regulations fleshing out these data quality standards.

Section 4. Repeal of Waiver Authority and Additional Powers of Chief Counsel.

Section 4 empowers the Chief Counsel for Advocacy to make rules governing agency compliance with the RFA. The status quo of agency compliance with the RFA is best described as inconsistent and recalcitrant. To address this problem, the Chief Counsel will promulgate rules regarding agency compliance within 270 days of enactment. This parallels the authority of the Council on Environmental Quality to issue regulations governing agency compliance with the NEPA.⁶⁰ The Chief Counsel’s regulations will be promulgated according to notice-and-comment rulemaking and consequently will receive *Chevron* deference. Agencies can issue supplementary compliance protocols, but no agency can overturn the Chief Counsel’s compliance rules.

Section 4 clarifies that the Chief Counsel may intervene in agency adjudications, like an *amicus curiae*, to advise the agency of how its decision will affect small entities. The Chief Counsel is not authorized to appeal any decision or otherwise to act as counsel for the small entity concerned. Section 4 also allows the Chief Counsel to file comments on any notice of proposed rulemaking, which will strengthen the Chief Counsel’s role as the main advocate for small entities in all Federal agency decision-making (not just when the RFA is concerned).

Section 4 repeals agencies’ authority to waive IRFAs and delay FRFAs by 180 days in emergency situations. The waiver provision of Section 608 of the RFA is redundant with Section 553 of the APA. The entire RFA process for determining the impact of a rule on small entities—advocacy review panels, IRFAs and FRFAs—is triggered by notice and comment rulemaking.⁶¹ The RFA’s current waiver provision is unnecessary in light of 5 U.S.C. § 553(b)(B), which allows an agency to bypass notice and comment rulemaking “for good cause,” which would apply in an emergency.

⁵⁹ See “Consolidated Appropriations Act, 2001,” 106 P.L. 554, § 515 (Dec. 21, 2000).

⁶⁰ See Exec. Order 11,991, 42 Fed. Reg. 26,967 (May 24, 1977).

⁶¹ See 5 U.S.C. § 609(b) (Advocacy review panels: “Prior to publication of an initial regulatory flexibility analysis which a covered agency is required to conduct. . . .”); 5 U.S.C. § 603(a) (IRFAs: “Whenever an agency is required by [5 U.S.C. § 553], or any other law, to publish general notice of proposed rulemaking for any proposed rule. . . .”); 5 U.S.C. § 604(a) (FRFAs: “When an agency promulgates a final rule under [5 U.S.C. § 553], after being required by that section or any other law to publish a general notice of proposed rulemaking. . . .”).

Section 5. Procedures for Gathering Comments.

Section 5 clarifies, improves and expands the advocacy review panel process. Currently, as amended by SBREFA, Section 609 requires OSHA and the EPA to hold advocacy review panels before publishing an IRFA, to receive input directly from small entities. The new Consumer Financial Protection Bureau also is required to conduct advocacy review panels.

Building on these reforms, Section 5 expands the use of advocacy review panels to all Federal agencies, including independent regulatory agencies, for any major rule (as defined by the Congressional Review Act) or for any rule that will have a significant economic impact on a substantial number of small entities. Section 5 clarifies the type of information the agency must provide to the Office of Advocacy (with an appropriate accommodation made for IRS rules) and describes the content and focus of the report itself, which is to be drafted by the Chief Counsel for Advocacy in consultation with other panel members. Rather than simply listing concerns raised by small entities in the panel process, the report should discuss in detail the regulation's economic impact and analyze alternatives that will minimize costs or maximize benefits. Section 5 slightly reforms the panel's composition and clarifies that the Office of Advocacy is solely responsible for selecting small entity representatives to advise the panel. Finally, Section 5 empowers the Chief Counsel for Advocacy to waive the panel process when it is "impractical, unnecessary, or contrary to the public interest."

Section 6. Periodic Review of Rules.

Section 6 of H.R. 527 reforms Section 610 to clarify how agencies must perform the periodic regulatory review. The law as currently written contains a number of ambiguities and shortcomings that warrant clarification and revision. Section 6 requires agencies to develop new periodic review plans within 180 days and to publish these plans online. Section 6 clarifies that the agency must review *all* rules that have a significant economic impact on a substantial number of small entities—regardless of whether the agency originally prepared an FRFA for the rule. The trigger is whether the rule *currently* has a significant economic impact on a substantial number of small entities.

Pursuant to this periodic review, the agency should amend the rule as necessary to maximize its benefits or minimize its costs to small entities, considering the factors given in the new Section 610(d). Finally, the agency must report the results of the review and publish in the Federal Register a list of rules to be reviewed and request comments.

Section 7. Judicial Review of Compliance with the RFA.

Under Section 7, judicial review is available when the agency publishes the final rule; the current law requires small entities to wait until the "final agency action" is complete before bringing suit alleging a violation of the RFA. Taken together, Sections 7(a) and (b) ensure that small entities will have prompt access to judicial review without procedural delays from agency-imposed exhaustion requirements. Section 7(c) makes appropriate conforming and technical corrections to Section 611. Lastly, Section 7(d) clarifies the

Chief Counsel for Advocacy’s authority to file an amicus brief regarding agency compliance with the RFA.

Section 8. Jurisdiction of Court of Appeals for Challenges to Rules Implementing RFA.

Section 8(a) grants jurisdiction to the U.S. Courts of Appeals to review challenges by small entities to rules promulgated by the Chief Counsel for Advocacy to implement the RFA. Section 8(b) makes technical conforming amendments. Section 8(c) clarifies the Chief Counsel’s authority to file an amicus brief in a lawsuit challenging an agency’s compliance with the Chief Counsel’s rules implementing the RFA.

Section 9. Clerical Amendments.

Section 9 contains necessary clerical amendments to make the U.S. Code consistent with the foregoing changes.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

* * * * *

PART I—THE AGENCIES GENERALLY

* * * * *

CHAPTER 6—THE ANALYSIS OF REGULATORY FUNCTIONS

Sec.

601. Definitions.

* * * * *

[605. Avoidance of duplicative or unnecessary analyses.]

605. Incorporations by reference and certifications.

* * * * *

[607. Preparation of analyses.

[608. Procedure for waiver or delay of completion.]

607. Quantification requirements.

608. Additional powers of Chief Counsel for Advocacy.

§ 601. Definitions

For purposes of this chapter—

[(1) the term]

(1) AGENCY.—The term “agency” means an agency as defined in section 551(1) of this title [;].

[(2) the term “rule” means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law, including any rule of general applicability governing Federal grants to State and local governments for which the agency provides an oppor-

tunity for notice and public comment, except that the term “rule” does not include a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances;】

(2) *RULE.*—*The term “rule” has the meaning given such term in section 551(4) of this title, except that such term does not include a rule of particular (and not general) applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances.*

【(3) the term】

(3) *SMALL BUSINESS.*—*The term “small business” has the same meaning as the term “small business concern” under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register [;].*

【(4) the term “small organization” means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;】

(4) *SMALL ORGANIZATION.*—

(A) *IN GENERAL.*—*The term “small organization” means any not-for-profit enterprise which, as of the issuance of the notice of proposed rulemaking—*

(i) in the case of an enterprise which is described by a classification code of the North American Industrial Classification System, does not exceed the size standard established by the Administrator of the Small Business Administration pursuant to section 3 of the Small Business Act (15 U.S.C. 632) for small business concerns described by such classification code; and

(ii) in the case of any other enterprise, has a net worth that does not exceed \$7,000,000 and has not more than 500 employees.

(B) *LOCAL LABOR ORGANIZATIONS.*—*In the case of any local labor organization, subparagraph (A) shall be applied without regard to any national or international organization of which such local labor organization is a part.*

(C) *AGENCY DEFINITIONS.*—*Subparagraphs (A) and (B) shall not apply to the extent that an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions for such term which are appropriate to the activities of the agency and publishes such definitions in the Federal Register.*

[(5) the term]

(5) *SMALL GOVERNMENTAL JURISDICTION.*—The term “small governmental jurisdiction” means governments of cities, counties, towns, townships, villages, school districts, or special districts, and tribal organizations (as defined in section 4(l) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(l))), with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register[;].

[(6) the term]

(6) *SMALL ENTITY.*—The term “small entity” shall have the same meaning as the terms “small business”, “small organization” and “small governmental jurisdiction” defined in paragraphs (3), (4) and (5) of this section [; and].

[(7) the term “collection of information”—

[(A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either—

[(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, 10 or more persons, other than agencies, instrumentalities, or employees of the United States; or

[(ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes; and

[(B) shall not include a collection of information described under section 3518(c)(1) of title 44, United States Code.

[(8) *RECORDKEEPING REQUIREMENT.*—The term “recordkeeping requirement” means a requirement imposed by an agency on persons to maintain specified records.]

(7) *COLLECTION OF INFORMATION.*—The term “collection of information” has the meaning given such term in section 3502(3) of title 44.

(8) *RECORDKEEPING REQUIREMENT.*—The term “recordkeeping requirement” has the meaning given such term in section 3502(13) of title 44.

(9) *ECONOMIC IMPACT.*—The term “economic impact” means, with respect to a proposed or final rule—

(A) any direct economic effect on small entities of such rule; and

(B) any indirect economic effect on small entities which is reasonably foreseeable and results from such rule (without regard to whether small entities will be directly regulated by the rule).

(10) *LAND MANAGEMENT PLAN.*—

(A) *IN GENERAL.*—The term “land management plan” means—

(i) any plan developed by the Secretary of Agriculture under section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604); and

(ii) any plan developed by the Secretary of Interior under section 202 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1712).

(B) REVISION.—The term “revision” means any change to a land management plan which—

(i) in the case of a plan described in subparagraph (A)(i), is made under section 6(f)(5) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604(f)(5)); or

(ii) in the case of a plan described in subparagraph (A)(ii), is made under section 1610.5–6 of title 43, Code of Federal Regulations (or any successor regulation).

(C) AMENDMENT.—The term “amendment” means any change to a land management plan which—

(i) in the case of a plan described in subparagraph (A)(i), is made under section 6(f)(4) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604(f)(4)) and with respect to which the Secretary of Agriculture prepares a statement described in section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)); or

(ii) in the case of a plan described in subparagraph (A)(ii), is made under section 1610.5–5 of title 43, Code of Federal Regulations (or any successor regulation) and with respect to which the Secretary of the Interior prepares a statement described in section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)).

* * * * *

§ 603. Initial regulatory flexibility analysis

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, [or] publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, or publishes a revision or amendment to a land management plan, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration. In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules published in the Federal Register for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement[.] or a recordkeeping requirement, and

without regard to whether such requirement is imposed by statute or regulation.

[(b) Each initial regulatory flexibility analysis required under this section shall contain—

[(1) a description of the reasons why action by the agency is being considered;

[(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

[(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

[(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

[(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.]

(b) Each initial regulatory flexibility analysis required under this section shall contain a detailed statement—

(1) describing the reasons why action by the agency is being considered;

(2) describing the objectives of, and legal basis for, the proposed rule;

(3) estimating the number and type of small entities to which the proposed rule will apply;

(4) describing the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report and record;

(5) describing all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule, or the reasons why such a description could not be provided;

(6) estimating the additional cumulative economic impact of the proposed rule on small entities beyond that already imposed on the class of small entities by the agency or why such an estimate is not available; and

(7) describing any disproportionate economic impact on small entities or a specific class of small entities.

(c) [Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.] *Each initial regulatory flexibility analysis shall also contain a detailed description of alternatives to the proposed rule which minimize any adverse significant economic impact or maximize any beneficial significant economic impact on small entities.* Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as—

(1) * * *

* * * * *

[(d)(1) For a covered agency, as defined in section 609(d)(2), each initial regulatory flexibility analysis shall include a description of—

[(A) any projected increase in the cost of credit for small entities;

[(B) any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any increase in the cost of credit for small entities; and

[(C) advice and recommendations of representatives of small entities relating to issues described in subparagraphs (A) and (B) and subsection (b).

[(2) A covered agency, as defined in section 609(d)(2), shall, for purposes of complying with paragraph (1)(C)—

[(A) identify representatives of small entities in consultation with the Chief Counsel for Advocacy of the Small Business Administration; and

[(B) collect advice and recommendations from the representatives identified under subparagraph (A) relating to issues described in subparagraphs (A) and (B) of paragraph (1) and subsection (b).]

§ 604. Final regulatory flexibility analysis

(a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, [or] promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a), *or adopts a revision or amendment to a land management plan*, the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain—

(1) * * *

(2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis (*or certification of the proposed rule under section 605(b)*), a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

* * * * *

(4) a *detailed* description of and an estimate of the number of small entities to which the rule will apply or [an explanation] *a detailed explanation* of why no such estimate is available;

(5) a *detailed* description of the projected reporting, record-keeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(6) a *detailed* description of the steps the agency has taken to [minimize the significant economic impact] *minimize the adverse significant economic impact or maximize the beneficial significant economic impact* on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of

the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected; and

[(6) for a covered agency, as defined in section 609(d)(2), a description of the steps the agency has taken to minimize any additional cost of credit for small entities.]

(7) describing any disproportionate economic impact on small entities or a specific class of small entities.

[(b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register such analysis or a summary thereof.]

(b) The agency shall make copies of the final regulatory flexibility analysis available to the public, including placement of the entire analysis on the agency's website, and shall publish in the Federal Register the final regulatory flexibility analysis, or a summary thereof which includes the telephone number, mailing address, and link to the website where the complete analysis may be obtained.

[§ 605SEC. 605. AVOIDANCE OF DUPLICATIVE OR UNNECESSARY ANALYSES]

§ 605. INCORPORATIONS BY REFERENCE AND CERTIFICATIONS

[(a) Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.]

(a) A Federal agency shall be treated as satisfying any requirement regarding the content of an agenda or regulatory flexibility analysis under section 602, 603, or 604, if such agency provides in such agenda or analysis a cross-reference to the specific portion of another agenda or analysis which is required by any other law and which satisfies such requirement.

(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a *detailed* statement providing the factual *and legal* basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

* * * * *

[§ 607. Preparation of analyses

[In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.

§ 608. Procedure for waiver or delay of completion

[(a) An agency head may waive or delay the completion of some or all of the requirements of section 603 of this title by publishing in the Federal Register, not later than the date of publication of the final rule, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes compliance or timely compliance with the provisions of section 603 of this title impracticable.

[(b) Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the completion of the requirements of section 604 of this title for a period of not more than one hundred and eighty days after the date of publication in the Federal Register of a final rule by publishing in the Federal Register, not later than such date of publication, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes timely compliance with the provisions of section 604 of this title impracticable. If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days from the date of publication of the final rule, such rule shall lapse and have no effect. Such rule shall not be repromulgated until a final regulatory flexibility analysis has been completed by the agency.]

§ 607. Quantification requirements

In complying with sections 603 and 604, an agency shall provide—

- (1) a quantifiable or numerical description of the effects of the proposed or final rule and alternatives to the proposed or final rule; or*
- (2) a more general descriptive statement and a detailed statement explaining why quantification is not practicable or reliable.*

§ 608. Additional powers of Chief Counsel for Advocacy

(a)(1) Not later than 270 days after the date of the enactment of the Regulatory Flexibility Improvements Act of 2011, the Chief Counsel for Advocacy of the Small Business Administration shall, after opportunity for notice and comment under section 553, issue rules governing agency compliance with this chapter. The Chief Counsel may modify or amend such rules after notice and comment under section 553. This chapter (other than this subsection) shall not apply with respect to the issuance, modification, and amendment of rules under this paragraph.

(2) An agency shall not issue rules which supplement the rules issued under subsection (a) unless such agency has first consulted with the Chief Counsel for Advocacy to ensure that such supplemental rules comply with this chapter and the rules issued under paragraph (1).

(b) Notwithstanding any other law, the Chief Counsel for Advocacy of the Small Business Administration may intervene in any agency adjudication (unless such agency is authorized to impose a fine or penalty under such adjudication), and may inform the agency of the impact that any decision on the record may have on small entities. The Chief Counsel shall not initiate an appeal with respect

to any adjudication in which the Chief Counsel intervenes under this subsection.

(c) The Chief Counsel for Advocacy may file comments in response to any agency notice requesting comment, regardless of whether the agency is required to file a general notice of proposed rulemaking under section 553.

§ 609. Procedures for gathering comments

(a) * * *

[(b) Prior to publication of an initial regulatory flexibility analysis which a covered agency is required to conduct by this chapter—

[(1) a covered agency shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with information on the potential impacts of the proposed rule on small entities and the type of small entities that might be affected;

[(2) not later than 15 days after the date of receipt of the materials described in paragraph (1), the Chief Counsel shall identify individuals representative of affected small entities for the purpose of obtaining advice and recommendations from those individuals about the potential impacts of the proposed rule;

[(3) the agency shall convene a review panel for such rule consisting wholly of full time Federal employees of the office within the agency responsible for carrying out the proposed rule, the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel;

[(4) the panel shall review any material the agency has prepared in connection with this chapter, including any draft proposed rule, collect advice and recommendations of each individual small entity representative identified by the agency after consultation with the Chief Counsel, on issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c);

[(5) not later than 60 days after the date a covered agency convenes a review panel pursuant to paragraph (3), the review panel shall report on the comments of the small entity representatives and its findings as to issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c), provided that such report shall be made public as part of the rulemaking record; and

[(6) where appropriate, the agency shall modify the proposed rule, the initial regulatory flexibility analysis or the decision on whether an initial regulatory flexibility analysis is required.

[(c) An agency may in its discretion apply subsection (b) to rules that the agency intends to certify under subsection 605(b), but the agency believes may have a greater than de minimis impact on a substantial number of small entities.

[(d) For purposes of this section, the term “covered agency” means—

[(1) the Environmental Protection Agency;

[(2) the Consumer Financial Protection Bureau of the Federal Reserve System; and

[(3) the Occupational Safety and Health Administration of the Department of Labor.

[(e) The Chief Counsel for Advocacy, in consultation with the individuals identified in subsection (b)(2), and with the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, may waive the requirements of subsections (b)(3), (b)(4), and (b)(5) by including in the rulemaking record a written finding, with reasons therefor, that those requirements would not advance the effective participation of small entities in the rulemaking process. For purposes of this subsection, the factors to be considered in making such a finding are as follows:

[(1) In developing a proposed rule, the extent to which the covered agency consulted with individuals representative of affected small entities with respect to the potential impacts of the rule and took such concerns into consideration.

[(2) Special circumstances requiring prompt issuance of the rule.

[(3) Whether the requirements of subsection (b) would provide the individuals identified in subsection (b)(2) with a competitive advantage relative to other small entities.]

(b)(1) Prior to publication of any proposed rule described in subsection (e), an agency making such rule shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with—

(A) all materials prepared or utilized by the agency in making the proposed rule, including the draft of the proposed rule; and

(B) information on the potential adverse and beneficial economic impacts of the proposed rule on small entities and the type of small entities that might be affected.

(2) An agency shall not be required under paragraph (1) to provide the exact language of any draft if the rule—

(A) relates to the internal revenue laws of the United States; or

(B) is proposed by an independent regulatory agency (as defined in section 3502(5) of title 44).

(c) Not later than 15 days after the receipt of such materials and information under subsection (b), the Chief Counsel for Advocacy of the Small Business Administration shall—

(1) identify small entities or representatives of small entities or a combination of both for the purpose of obtaining advice, input, and recommendations from those persons about the potential economic impacts of the proposed rule and the compliance of the agency with section 603; and

(2) convene a review panel consisting of an employee from the Office of Advocacy of the Small Business Administration, an employee from the agency making the rule, and in the case of an agency other than an independent regulatory agency (as defined in section 3502(5) of title 44), an employee from the Office of Information and Regulatory Affairs of the Office of Management and Budget to review the materials and information provided to the Chief Counsel under subsection (b).

(d)(1) Not later than 60 days after the review panel described in subsection (c)(2) is convened, the Chief Counsel for Advocacy of

the Small Business Administration shall, after consultation with the members of such panel, submit a report to the agency and, in the case of an agency other than an independent regulatory agency (as defined in section 3502(5), United States Code), the Office of Information and Regulatory Affairs of the Office of Management and Budget.

(2) Such report shall include an assessment of the economic impact of the proposed rule on small entities and a discussion of any alternatives that will minimize adverse significant economic impacts or maximize beneficial significant economic impacts on small entities.

(3) Such report shall become part of the rulemaking record. In the publication of the proposed rule, the agency shall explain what actions, if any, the agency took in response to such report.

(e) A proposed rule is described by this subsection if the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, the head of the agency (or the delegatee of the head of the agency), or an independent regulatory agency determines that the proposed rule is likely to result in—

(1) an annual effect on the economy of \$100,000,000 or more;

(2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local governments, tribal organizations, or geographic regions;

(3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets; or

(4) a significant economic impact on a substantial number of small entities.

(f) Upon application by the agency, the Chief Counsel for Advocacy of the Small Business Administration may waive the requirements of subsections (b) through (e) if the Chief Counsel determines that compliance with the requirements of such subsections are impracticable, unnecessary, or contrary to the public interest.

* * * * *

[§ 610. Periodic review of rules

[(a)] 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.

[(b) 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.

[(c) 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.]

§610. Periodic review of rules

(a) Not later than 180 days after the enactment of the Regulatory Flexibility Improvements Act of 2011, each agency shall publish in the Federal Register and place on its website a plan for the periodic review of rules issued by the agency which the head of the agency determines have a significant economic impact on a substantial number of small entities. Such determination shall be made without regard to whether the agency performed an analysis under section 604. 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 adverse significant economic impacts or maximize any beneficial significant economic impacts on 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 and subsequently placing the amended plan on the agency's website.

(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 of 2011 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 of 2011 within 10 years after the publication of the final rule in the Federal Register. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, the head of the agency shall so certify in a statement published in the Federal Register and may extend the review for not longer than 2 years after publication of notice of extension in the Federal Register. Such certification and notice shall

be sent to the Chief Counsel for Advocacy of the Small Business Administration and the Congress.

(c) Each agency shall annually submit a report regarding the results of its review pursuant to such plan to the Congress, the Chief Counsel for Advocacy of the Small Business Administration, and, in the case of agencies other than independent regulatory agencies (as defined in section 3502(5) of title 44) to the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget. Such report shall include the identification of any rule with respect to which the head of the agency made a determination described in paragraph (5) or (6) of subsection (d) and a detailed explanation of the reasons for such determination.

(d) In reviewing a rule pursuant to subsections (a) through (c), the agency shall amend or rescind the rule to minimize any adverse significant economic impact on a substantial number of small entities or disproportionate economic impact on a specific class of small entities, or maximize any beneficial significant economic impact of the rule on a substantial number of small entities to the greatest extent possible, consistent with the stated objectives of applicable statutes. In amending or rescinding the rule, the agency shall consider the following factors:

- (1) The continued need for the rule.
- (2) The nature of complaints received by the agency from small entities concerning the rule.
- (3) Comments by the Regulatory Enforcement Ombudsman and the Chief Counsel for Advocacy of the Small Business Administration.
- (4) The complexity of the rule.
- (5) The extent to which the rule overlaps, duplicates, or conflicts with other Federal rules and, unless the head of the agency determines it to be infeasible, State, territorial, and local rules.
- (6) The contribution of the rule to the cumulative economic impact of all Federal rules on the class of small entities affected by the rule, unless the head of the agency determines that such calculations cannot be made and reports that determination in the annual report required under subsection (c).
- (7) 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.

(e) The agency shall publish in the Federal Register and on its website a list of rules to be reviewed pursuant to such plan. Such publication shall include a brief description of the rule, the reason why the agency 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 request comments from the public, the Chief Counsel for Advocacy of the Small Business Administration, and the Regulatory Enforcement Ombudsman concerning the enforcement of the rule.

§ 611. Judicial review

(a)(1) For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by [final agency action] such rule is entitled to judicial review of agency compliance with the re-

quirements of sections 601, 604, 605(b), [608(b),] and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(2) Each court having jurisdiction to review such rule for compliance with section 553, or under any other provision of law, *(or which would have such jurisdiction if publication of the final rule constituted final agency action)* shall have jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), [608(b),] and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

[(3)(A) A small entity]

(3) A *small entity* may seek such review during the period beginning on the date of [final agency action] *publication of the final rule* and ending one year later, except that, *in the case of a rule for which the date of final agency action is the same date as the publication of the final rule*, where a provision of law requires that an action challenging a final agency action be commenced before the expiration of one year, such lesser period shall apply to an action for judicial review under this section.

[(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section 608(b) of this chapter, an action for judicial review under this section shall be filed not later than—

[(i) one year after the date the analysis is made available to the public, or

[(ii) where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 1-year period, the number of days specified in such provision of law that is after the date the analysis is made available to the public.]

* * * * *

§ 612. Reports and intervention rights

(a) * * *

(b) The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as *amicus curiae* in any action brought in a court of the United States to review a rule *or agency compliance with section 601, 603, 604, 605(b), 609, or 610*. In any such action, the Chief Counsel is authorized to present his or her views with respect to compliance with this chapter, *chapter 5, and chapter 7*, the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities.

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TITLE 28, UNITED STATES CODE

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PART VI—PARTICULAR PROCEEDINGS

* * * * *

CHAPTER 158—ORDERS OF FEDERAL AGENCIES; REVIEW

§ 2341. Definitions

As used in this chapter—

(1) * * *

* * * * *

(3) “agency” means—

(A) * * *

* * * * *

(D) the Secretary, when the order is under section 812 of the Fair Housing Act; **[and]**

(E) the Board, when the order was entered by the Surface Transportation Board**[.]; and**

(F) *the Office of Advocacy of the Small Business Administration, when the final rule is under section 608(a) of title 5.*

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) * * *

* * * * *

(6) all final orders under section 812 of the Fair Housing Act; **[and]**

(7) all final agency actions described in section 20114(c) of title 49**[.]; and**

(8) *all final rules under section 608(a) of title 5.*

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

* * * * *

Dissenting Views

I. INTRODUCTION

H.R. 527, the “Regulatory Flexibility Improvements Act of 2011,” amends the Regulatory Flexibility Act¹ (RFA) in ways that will sig-

¹ Pub. L. No. 96–354, 94 Stat. 1164 (codified at 5 U.S.C. §§601–612). The RFA requires Federal agencies to assess the impact of proposed rules on “small entities,” which it defines as either a small business, small organization, or small governmental jurisdiction. The RFA requires agencies to prepare a regulatory flexibility analysis at the time certain proposed and final rules are promulgated. The analysis must: (1) describe the reasons why action by the agency is necessary; (2) include a succinct statement of the regulation’s objectives and legal basis; (3) describe which small entities are affected by the rule as well as provide an estimate of the number of such entities so affected; (4) describe anticipated reporting, recordkeeping, and other compliance requirements; (5) identify any relevant Federal regulations that may duplicate, overlap, or conflict with the rule, and (6) identify any significant alternatives to the rule. This analysis is not

Continued

nificantly hinder the promulgation of critical public health and safety rules by Federal administrative agencies—even in emergency situations—while failing to help small businesses and other small entities reduce compliance costs or to ensure agency compliance with the RFA. Specifically, we oppose H.R. 527 because: (1) it is based on a faulty study; (2) taken as a whole, it will severely undermine Federal agency rulemaking, thereby threatening public health and safety; (3) it fails to address shortcomings in current law; (4) it offers no real assistance to small businesses in complying with regulations; and (5) it imposes additional duties on agencies while failing to provide any additional resources to agencies.

Without question, small businesses play a major role in our Nation's economy and in our society. They employ more than half of all private sector workers² and are among the principal drivers of innovation and economic growth, producing 13 times more patents than larger firms.³ Indeed, according to the Small Business Administration (SBA), the vast majority of our Nation's businesses are small businesses.⁴ Like their larger counterparts, however, small businesses can substantially impact the health and safety of their workers as well as that of the general public.⁵ Accordingly, attempts to undermine the ability of Federal agencies charged with protecting public health and safety through the rulemaking process should be strongly opposed.

H.R. 527 must also be viewed as part of the Majority's broader anti-regulatory agenda in the 112th Congress. To date, the Committee's Subcommittee on Courts, Commercial and Administrative Law (CCAL) has already held eight hearings focusing on various ways to hobble Federal agency rulemaking and to increase the influence of business interests over the rulemaking process without actually improving the quality of proposed rules.⁶ While the pro-

required, however, if the agency certifies that the rule will not have a "significant economic impact on a substantial number of small entities."

In 1996, the RFA was amended by Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, § 242, 110 Stat. 847, 857 (1996), to permit judicial review under certain circumstances of, among other matters, an agency's regulatory flexibility analysis for a final rule and any certification by an agency averring that a rule will not have a significant economic impact on a substantial number of small entities.

²Small Business Administration, *How Important Are Small Businesses to the U.S. Economy?* available at <http://www.sba.gov/advocacy/7495/8420>.

³Id.

⁴In all, there are 29.6 million businesses in the United States, of which 99.9% are "small" businesses. See U.S. Small Business Administration, *How Many Small Businesses Are There?*, available at <http://www.sba.gov/content/how-many-small-businesses-are-there>. It should also be noted that not all small businesses are "mom and pop" operations. According to the SBA, a "small business" can be a firm with up to 500 employees, although the definition varies by industry. SBA looks to two different factors for determining what is a "small business" based on the North American Industry Classification System (NAICS) codes, which vary by industry. For some industries, the number of employees over the past 12 months (e.g., "petrochemical manufacturers" can have 1,000 employees and still be small businesses) is determinative, and for other industries, SBA looks to revenue over the past 3 years (e.g., "packing and crating" services can have \$25.5 million in revenue and still be small businesses). The full table is available at: http://www.sba.gov/sites/default/files/size_standards_methodology.pdf.

⁵Workplace safety rules may impact tens of millions of Americans who work for small businesses. As of 2008, there were 5.93 million small firms employing 120,903,551 workers, including 5,294,970 firms of 20 or fewer employees, employing 21,461,733 workers and 5,684,120 firms of 50 or fewer employees, employing 33,453,284 workers, according to the SBA. See U.S. Census Bureau, *Statistics of U.S. Businesses, U.S. NAICS Sectors, small employment sizes, 2008*, available at <http://www.census.gov/econ/susb/>.

⁶The Role of Social Security Administrative Law Judges: Hearing Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary and Subcomm. on Social Security of the H. Comm. on Ways and Means, 112th Cong. (2011); Formal Rulemaking and Judicial Review: Protecting Jobs and the Economy with Greater Regulatory Transparency and Accountability: Hearing Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary, 112th Cong. (2011); Cost-Justifying Regulations:

ponents of H.R. 527 claim that the bill's purpose is to ease the burden of regulatory compliance on small businesses and other small entities, an examination of the bill's provisions makes clear that the bill is really intended to slow down, if not halt, most agency rulemaking. This explains why the Coalition for Sensible Safeguards strongly opposes the bill. The Coalition consists of nearly 60 labor and consumer organizations, including the AFL-CIO, AFSCME, the American Lung Association, the Center for Science in the Public Interest, the Consumer Federation of America, the Consumers Union, the Economic Policy Institute, the Environmental Defense Fund, Free Press, Friends of the Earth, International Brotherhood of Teamsters, the UAW, the National Council for Occupational Safety and Health, the National Women's Law Center, Natural Resources Defense Council, OMB Watch, People for the American Way, Public Citizen, the Service Employees International Union, the Union of Concerned Scientists, the United Food and Commercial Workers International Union, and U.S. PIRG.⁷

For these reasons, and those discussed below, we respectfully dissent and urge our colleagues to reject this seriously flawed legislation.

II. DESCRIPTION OF H.R. 527

H.R. 527 expands the type of rules covered by the RFA to include those that have a reasonably foreseeable indirect effect on small entities. It also includes documents like land management plans and certain guidance documents under the definition of "rule." Additionally, H.R. 527 would heighten the level of detail that agencies must provide in their initial and final regulatory analyses and adds additional analytical requirements. H.R. 527 also repeals agencies' emergency authority to waive or delay an initial regulatory flexibility analysis or to delay a final regulatory flexibility analysis and

Protecting Jobs and the Economy by Presidential and Judicial Review of Costs and Benefits: Hearing Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary, 112th Cong. (2011); Raising the Agencies' Grades—Protecting the Economy, Assuring Regulatory Quality and Improving Assessments of Regulatory Need: Hearing Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary, 112th Cong. (2011); The Regulations From the Executive in Need of Scrutiny Act of 2011: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary, 112th Cong. (2011); The APA at 65—Is Reform Needed to Create Jobs, Promote Economic Growth and Reduce Costs?: Hearing Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary, 112th Cong. (2011); The Regulatory Flexibility Improvements Act of 2011—Unleashing Small Businesses to Create Jobs: Hearing on H.R. 527 Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary, 112th Cong. (2011) (hereinafter "H.R. 527 Legislative Hearing"); The REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations Hearing Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary, 112th Cong. (2011).

⁷The other members of the Coalition, as of July 2, 2011, were: Ability Production, Alliance for Justice, American Association of University Professors, American Rivers American Values Campaign, ATTIC, Inc., BlueGreen Alliance, Campaign for Contract Agriculture Reform (CCAR), Center for Food Safety, Center for Independent Living of South Florida, Inc., Citizens for Sludge-Free Land, Clean Air Watch, Consortium for Citizens with Disabilities, CounterCorp, Cumberland Countians for Peace & Justice, Demos, Edmonds Institute, Health Care for America Now, In the Public Interest, International Center for Technology Assessment, Jam On! Music Production & Recording, League of Conservation Voters, Los Angeles Alliance for a New Economy, National Center for Healthy Housing, National Consumers League, National Employment Law Project, National Lawyers Guild, Louisville Chapter, National Women's Health Network, Network for Environmental & Economic Responsibility of United Church of Christ, New Jersey Work Environment Council, New York Committee for Occupational Safety and Health (NYCOSH), Oregon PeaceWorks, Protect All Children's Environment, Reproductive Health Technologies Project, STOP Foodborne Illness (Formerly known as Safe Tables Our Priority), Southern Illinois Committee for Occupational Safety and Health, The Partnership for Working Families, Union Plus, Worksafe.

grants additional power to the SBA's Chief Counsel for Advocacy to promulgate rules governing agencies' RFA compliance, intervene in agency adjudications, and file comments on proposed rules. H.R. 527 expands the use of advocacy review panels to cover rules with a significant economic impact on a substantial number of small entities that are proposed by all agencies and would also apply to rules that would be considered "major rules." H.R. 527 also amends the RFA's requirement that agencies periodically review rules to also require that agencies review all rules that exist on H.R. 527's enactment date and amend or rescind those rules, regardless of the review's findings. H.R. 527 expands the availability of judicial review to include any agency action taken to comply with the RFA, and not just "final agency action," as is the case under current law. Finally, H.R. 527 grants exclusive jurisdiction to the Federal courts of appeals to enjoin, set aside, suspend, or determine the validity of all final rules concerning RFA implementation that have been promulgated by the SBA's Chief Counsel for Advocacy under the authority granted to it by H.R. 527.

III. H.R. 527 IS BASED UPON A FAULTY STUDY

H.R. 527 is based on the faulty premise that regulation imposes overwhelmingly burdensome costs on small businesses that ultimately hamper economic growth and job creation. In particular, H.R. 527's supporters rely almost exclusively on a study by economists Nicole and Mark Crain (Crain study)⁸ that concluded that Federal regulations impose a \$1.75 trillion cost on all businesses and that a disproportionate share of these costs are borne by small businesses.⁹

The Crain study, however, has been roundly criticized for exaggerating the costs of Federal rulemaking on small businesses. For example, the Center for Progressive Reform (CPR) notes that the \$1.75 trillion cumulative burden cited by the study fails to account for any benefits of regulation.¹⁰ CPR observes that the Office of Management and Budget (OMB) estimated in 2008 that major rules imposed \$46 billion to \$54 billion in costs, but also produced \$122 billion to \$656 billion in benefits.¹¹ Moreover, the study's methodology is flawed with respect to how it calculated economic costs. The study, which relied on international public opinion polling by the World Bank on how friendly a particular country was to business interests, ignored actual data on costs imposed by Federal regulation in the United States.¹²

The Congressional Research Service (CRS) also conducted an extensive examination of the Crain study and criticized much of its

⁸Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, Rep. No. SBAHQ-08-M-0466 (Sept. 2010), available at <http://archive.sba.gov/advo/research/rs371tot.pdf>.

⁹H.R. 527 Legislative Hearing (prepared statements of Richard Gimmel, President, Atlas Machine & Supply, Inc., on behalf of the National Association of Manufacturers, pp. 4–5; Thomas Sullivan, former Chief Counsel for Advocacy, Small Business Administration, p. 3; and Karen R. Harned, Executive Director, Small Business Legal Center, National Federation of Independent Businesses, unnumbered p. 1).

¹⁰Sid Shapiro, Ruth Ruttenberg, & James Goodwin, *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs*, Center for Progressive Reform White Paper #1103 (Feb. 2011).

¹¹*Id.*

¹²*Id.*

methodology.¹³ Moreover, CRS noted that the authors of the Crain study themselves told CRS that their study was “not meant to be a decision-making tool for lawmakers or Federal regulatory agencies to use in choosing the ‘right’ level of regulation. In no place in any of the reports do we imply that our reports should be used for this purpose. (How could we recommend this use when we make no attempt to estimate the benefits?)”¹⁴ CRS concluded that “a valid, reasoned policy decision can only be made after considering information on both costs and benefits” of regulation.¹⁵

The Crain study’s failure to account for the net benefits of regulation in general was particularly shortsighted given evidence that regulation can result in net economic benefits for business. For example, promulgation of OSHA’s Cotton Dust Standard resulted in the affected industry growing and prospering in the aftermath of the rule’s promulgation.¹⁶ Much of that growth and prosperity was the result of business innovations relating to compliance with the rule.¹⁷ Indeed, the costs of the rule ended up being much smaller than predicted because of these innovations.¹⁸

Sally Katzen, a former Administrator of the Office of Information and Regulatory Affairs (OIRA) during the Clinton Administration, noted in testimony before the CCAL Subcommittee that OMB regularly finds that the aggregate benefits of Federal regulation outweigh its costs.¹⁹ In words that are apt with respect to consideration of H.R. 527, Katzen noted the following in her prepared statement:

OMB’s Report to Congress does include data on benefits, and the numbers are striking: according to OMB, the benefits from the regulations issued during the 10-year period ranged from \$128 billion to \$616 billion. Therefore, even if one uses OMB’s highest estimate of costs and its lowest estimate of benefits, the regulations issued over the past 10 years have produced net benefits of \$73 billion to our society. This cannot be dismissed as a partisan report by the current administration, because OMB issued reports with similar results (benefits greatly exceeding costs) throughout the George W. Bush Administration (e.g., for FY 1998–2008, major regulations cost between \$51 and \$60 billion, with benefits estimated to be \$126 to \$663 billion dollars). Given that the benefits of regulations consistently exceed the costs, the need for any legislation that would make the

¹³ Curtis W. Copeland, Analysis of an Estimate of the Total Costs of Federal Regulations, Congressional Research Service Report for Congress, R41763 (Apr. 6, 2011).

¹⁴ Id. at 26 (quoting an e-mail from Nicole and W. Mark Crain to the author of the CRS report).

¹⁵ Id. The Economic Policy Institute also issued a critique of the Crain study outlining additional concerns with the study’s methodology and data. See John Irons and Andrew Green, Flaws Call for Rejecting Crain and Crain Model: Cited \$1.75 Trillion Cost of Regulations Is Not Worth Repeating, Economic Policy Institute, July 19, 2011, available at <http://w3.epi-data.org/temp2011/IssueBrief308.pdf>.

¹⁶ Occupational Safety and Health Administration, Regulatory Review of OSHA’s Cotton Dust Standard, at 35–38 (Sept. 2000), available at <http://www.osha.gov/dea/lookback/cottondust-final2000.pdf>.

¹⁷ Id.

¹⁸ Id. at 38–39.

¹⁹ The REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations Hearing Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary, 112th Cong. 3 (2011) (prepared statement of Sally Katzen, former Administrator of the Office of Information and Regulatory Affairs).

issuance of regulations more difficult or time consuming is certainly in question.²⁰

An amendment offered by Rep. Jerrold Nadler (D-NY) would have required agencies to assess the indirect benefits of a rule as part of the required regulatory flexibility analysis under H.R. 527. The amendment was opposed by the Majority and was not adopted.

IV. H.R. 527 WILL CAUSE FEDERAL AGENCY RULEMAKING TO BE SEVERELY UNDERMINED, THEREBY THREATENING PUBLIC HEALTH AND SAFETY

H.R. 527 will overwhelm regulatory agencies with unnecessary analytical requirements, reduced agency discretion and flexibility, and numerous opportunities for business interests to hamstring the rulemaking process. By shifting resources to a more complex, costly, and time-consuming rulemaking process, this legislation will prevent agencies from effectively promulgating regulations designed to protect the health and public safety of Americans.

The bill's onerous requirements will prevent agencies from engaging in effective rulemaking. As the Minority witness testified at the legislative hearing on H.R. 527, these new mandates will prevent agencies from being able to engage in effective rulemaking.²¹ Consumer advocates likewise are concerned that H.R. 527 generally "adds yet another analytical layer to the rulemaking process, further complicating agencies' abilities to implement statutes, fulfill their missions, and serve the public interest."²²

In recognition of these problems, Rep. Hank Johnson (D-GA) offered at markup two amendments that would have exempted rules implementing the FDA Food Safety Modernization Act and the Patient Protection and Affordable Care Act from H.R. 527. The Majority opposed both amendments and neither was adopted.

V. H.R. 527 FAILS TO ADDRESS SHORTCOMINGS IN CURRENT LAW UNDER THE RFA

Whether a rule has a "significant economic impact on a substantial number of small entities" is the threshold inquiry for determining whether the RFA applies to a proposed or final rule. The RFA does not define "significant economic impact" or "substantial number of small entities." These terms are left to agencies to determine. Some critics suggest that because of the undefined standard and the discretion that agencies have to determine whether the standard is met, agencies are essentially able to "game the system" and avoid triggering RFA obligations.

To the extent that proponents of H.R. 527 contend that it is needed because agencies currently do not apply the RFA in a consistent manner, H.R. 527 does nothing to address that concern. The Government Accountability Office (GAO) has on several occasions noted that "Congress may need to clearly delineate—or have some other organization delineate—what is meant by the terms 'significant economic impact' and 'substantial number of small enti-

²⁰ Id.

²¹ H.R. 527 Legislative Hearing (prepared statement of J. Robert Shull) (hereinafter "Shull statement").

²² OMB Watch, Statement on the Regulatory Flexibility Improvements Act of 2011, on file with the House Committee on the Judiciary, Minority staff.

ties.’”²³ H.R. 527, however, fails to clarify either of these terms. Instead, the bill serves to institutionalize a pro-business regime at the expense of public health and safety. H.R. 527 does not concern agency compliance with the RFA or assist small entities with regulatory compliance. Rather, H.R. 527 is intended simply to slow down rulemaking.

VI. H.R. 527 OFFERS NO REAL ASSISTANCE TO SMALL BUSINESSES IN COMPLYING WITH REGULATIONS

H.R. 527 does nothing to alleviate the burden on small entities of complying with Federal regulations. It includes no provision that offers assistance to small entities, whether through subsidies, government-guaranteed loans, preferential tax treatment for small firms, or fully funded compliance assistance offices. Instead, the bill merely aggrandizes the power of the SBA’s Office of Advocacy and of the professional lobbying class in Washington. If the proponents of H.R. 527 were serious about helping small entities deal with the regulatory system, they would support instituting mechanisms for small entities that actually help them participate directly in rulemaking, without having to rely on Washington-based intermediaries.

VII. H.R. 527 IMPOSES ADDITIONAL DUTIES AND COSTS ON AGENCIES, BUT FAILS TO AUTHORIZE ANY ADDITIONAL FUNDING OR OFFSET IMPLEMENTATION COST

H.R. 527 substantially increases the responsibilities of agencies with respect to rulemaking. For example, section 3 of the bill requires agencies, with respect to final regulatory analyses, to:

- describe significant issues raised by any public comments submitted in response to the initial regulatory flexibility analysis, provide the agency’s assessment of the issues, and explain any changes made in the proposed rule as a result of such comments;²⁴
- describe in detail why an agency did not provide an estimate of the number of small entities anticipated to be affected by the rule;²⁵
- specify that the required descriptions be detailed;²⁶
- describe any disproportionate economic impact on small entities or a specific class of small entities;²⁷
- supply a detailed statement—including the factual and legal bases—of the reasons why an agency has determined that a proposed or final rule will not have a significant economic impact;²⁸ and
- provide in every instance (rather than simply making discretionary, as under current law) a quantifiable or numerical

²³ SBREFA Compliance—Is It the Same Old Story?: Hearing Before the H. Comm. on Small Business, 107th Cong. 51 (2002) (statement of Victor Rezendes, Managing Director—Strategic Issues Team, U.S. Government Accountability Office).

²⁴ H.R. 527, 112th Cong., § 3(b)(1)(B) (2011).

²⁵ H.R. 527, 112th Cong., § 3(b)(1)(C) (2011).

²⁶ H.R. 527, 112th Cong., § 3(b)(1)(D) (2011).

²⁷ H.R. 527, 112th Cong., § 3(b)(1)(E) (2011).

²⁸ H.R. 527, 112th Cong., § 3(d) (2011).

description of the effects of a proposed rule and alternatives to a proposed rule or a general description of such effects with a detailed statement explaining why quantification is not practicable or reliable.²⁹

These heightened responsibilities and other duties imposed by the bill will force agencies—and, therefore, taxpayers—to incur considerable costs to implement H.R. 527. In fact, the Congressional Budget Office estimates that implementing H.R. 527 will cost taxpayers \$80 million over fiscal years 2012 through 2016. H.R. 527, however, fails to authorize any funding for agencies to pay for the additional responsibilities imposed on them by the bill. Moreover, it violates House rules by failing to include any offset for its \$80 million cost. Unfortunately, the Majority refused to even consider how much implementation of H.R. 527 would cost taxpayers when it rejected an amendment offered by Rep. Sheila Jackson Lee (D-TX) that would have merely required a GAO study on the cost impact on agencies of implementing H.R. 527.

VIII. OTHER CONCERNS WITH H.R. 527

A. H.R. 527's Elimination of Agencies' Waiver and Delay Authority Undermines the Agencies' Ability To Respond To Emergencies

Section 4 of H.R. 527 eliminates agencies' ability to waive or delay any required initial regulatory flexibility analysis or to delay any required final regulatory flexibility analysis in the event of an emergency. By eliminating this safeguard, H.R. 527 threatens to undermine an agency's ability to respond to emergency situations.

In place of the emergency waiver or delay authority, the bill empowers the Chief Counsel for Advocacy to issue regulations about how agencies in general should comply with the Act. The absurdity of this scheme is evident with this illustration: in the event of an epidemic E. coli or listeria infection caused by some item in our Nation's food distribution network, or if there is an imminent environmental disaster that could be addressed systemically through regulation, H.R. 527 mandates that an agency's response must be to ask the Chief Counsel for Advocacy at SBA for guidance on whether and how to respond.

This override of an agency's authority to respond to emergencies without having to first go through the arduous and time-consuming task of review and analysis is simply wrong. Federal agencies are charged with promulgating regulations that impact virtually every aspect of our lives, including the air we breathe, the water we drink, the food we eat, the cars we drive, and the play toys we give our children.

Small businesses, like all businesses, provide services and goods that also affect our lives. It makes no difference to someone who is breathing dirty air or drinking poisoned water, whether the hazards come from a small or large business.

At the Committee markup, Rep. John Conyers, Jr., the Committee's Ranking Member, offered an amendment that would have restored the waiver or delay authority that allowed agencies to quickly respond to emergencies without being hampered or second-

²⁹ H.R. 527, 112th Cong., § 3(e) (2011).

guessed by others. The Majority opposed this amendment and it was not adopted.

B. H.R. 527's Expanded Use of SBREFA Review Panels Creates a Serious Impediment To Agency Rulemaking

SBREFA amended the RFA in 1996 to require proposed rules of the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) be subject to an advocacy review panel consisting of representatives of the agency promulgating the rule, the Chief Counsel for Advocacy of SBA, and OIRA.³⁰ Section 5 of H.R. 527 expands this requirement to major rules. As a result, this provision will greatly slow down the rulemaking process and substantially empower business interests to throw sand into the gears of rulemaking. While the Majority argues that there is a need for greater public participation in the rulemaking process, section 5 evidences what they actually mean, namely, that they want to give a greater opportunity to business interests to influence the rulemaking process.

The use of SBREFA panels is already cumbersome. SBA's Office of Advocacy, essentially a taxpayer-funded lobby for businesses and small entity representatives, is already able to delay the issuance of final EPA and OSHA rules and to shape them in industry-friendly ways. Expanding the use of these panels to include all agencies and rules that do not necessarily have a significant economic effect on a substantial number of small entities would guarantee that most rulemaking would grind to a halt. Moreover, expanding review panels to rules that do not necessarily have a significant economic effect on a substantial number of small entities takes this review panel process beyond the scope of the RFA.

In an effort to lessen the pernicious impact of this provision, Rep. Steve Cohen (D-TN), Ranking Member of the CCAL Subcommittee, offered two amendments at markup. One amendment would have required that the panels include a representative of the public or a public interest organization to ensure that a consumer perspective be heard in the consideration of proposed rules by these review panels. The second amendment would have raised the dollar threshold contained in section 5 from \$100 million in annual economic effect to \$250 million because the \$100 million threshold for determining what would constitute a "major rule" was set back in 1981. The \$250 million threshold reflected an adjustment for inflation, but would have captured the same universe of rules as those that would have been captured by the \$100 million threshold in 1981. The Majority opposed both amendments and they were not adopted.

C. H.R. 527 Forces Agencies To Engage in Wasteful, Speculative Analyses

Section 2 of H.R. 527 defines, among other things, "economic impact" to include any reasonably foreseeable "indirect economic effect" that a proposed rule may have on a small entity. This provision would force agencies to conduct highly speculative and labor-intensive assessments, all of which could be subject to litigation by well-financed business interests. The bill effectively would require

³⁰ 5 U.S.C. § 609(b) (2010).

an agency to engage in a virtual guessing game to divine the indirect effects of a proposed regulation, which, of course, would be subject to judicial review. In effect, H.R. 527 could kill a rule-making as a result of “paralysis by analysis.”

D. H.R. 527 Would Overwhelm Agencies by Requiring Them To Conduct Exhaustive Reviews of All Existing Rules

Section 6 of H.R. 527 threatens to undermine ability of the agencies to fulfill their regulatory responsibilities because of its requirement that agencies review all rules existing on bill’s enactment date. The review must consist of a determination of whether these rules have a significant economic impact on a substantial number of small entities, regardless of whether they already went through a final regulatory flexibility analysis previously.

As a result of this provision, agencies would be forced to re-justify safeguards like regulations designed to ensure clean air, clean water, food safety, automobile safety, ensure workplace safety. Moreover, this unlimited look-back requirement is a wasteful expenditure of taxpayer dollars as it forces agencies to redirect their scarce resources to meet this unhelpful and burdensome requirement. This substantial increase in the workload of the agencies would occur while Congress continues to slash funding for critical child welfare, indigent assistance, and law enforcement programs.

To put this requirement in context, it should be noted that there are currently more than 165,000 pages of regulations in the Code of Federal Regulations, as well as several hundred thousand guidance documents, some of which could also be subjected to H.R. 527’s look-back requirement.

In addition, section 2 of H.R. 527 expands the scope of rules subject to the RFA by including amendments to land management plans as well as Indian tribes and Internal Revenue Service record-keeping requirements. These types of guidance documents traditionally are not “rules” subject to the RFA. Expanding the scope of regulations subject to review will require resources to go to the review process that would otherwise be used by the agency to carry out their duties as delegated by Congress.

E. H.R. 527 Imposes an Absurd and Wasteful Requirement that Agencies Amend or Rescind all Existing Regulations, Even If They Are Not Burdensome or Unnecessary

Section 6 of H.R. 527 requires agencies to review all existing rules to determine whether they should be amended or rescinded to minimize significant adverse impacts on small entities. The section also requires that agencies amend or rescind a rule, regardless of the findings of its review.³¹

On its face, this appears to be an absurd and wasteful requirement. Why require agencies to engage in a review to determine whether a rule should be amended or rescinded if amending or rescinding the rule is required regardless of what the review would find? Taken literally, this provision would require agencies to: (1) review all rules existing on H.R. 527’s enactment date, and (2) amend or rescind every rule in existence on that date regardless of the review’s findings. While we find much of H.R. 527’s provi-

³¹H.R. 527, 112th Cong, § 6 (2011).

sions to be wasteful, surely, the sponsors of H.R. 527 could not have intended to include this absurd and monumental waste of taxpayer resources.

Giving the sponsors the benefit of the doubt, Rep. Nadler offered an amendment to change the “shall” to a “may” to correct this apparent drafting error. The Majority inexplicably opposed Rep. Nadler’s amendment. In opposing the amendment, the Chairman claimed that agencies must be given less discretion to determine their course of conduct under H.R. 527.

While reasonable minds can differ as to the extent to which Congress should give agencies decision-making discretion, in this case, the Chairman’s contention is misplaced, as this amendment had nothing to do with agency discretion. Rather, it simply sought to avoid either requiring a pointless review of rules or pointless changes to all existing rules.

F. The Expansion of Judicial Review to Include All Agency Actions, and Not Just “Final Agency Action,” Allows Special Interests To Obstruct Rulemaking by Challenging Agency Action Before a Rule Is Finalized

Section 7 of H.R. 527 creates the opportunity for well-funded anti-regulatory business interests to engage in frivolous litigation. It does this by expanding judicial review to include review of agency actions prior to final agency action. At the hearing before the Subcommittee, the Minority witness expressed concern that H.R. 527’s expansion of judicial review to include challenges to the adequacy of regulatory flexibility analyses would simply open the door to endless litigation.³² Current law limits judicial review to final agency actions.

Cass Sunstein, the current OIRA Administrator, aptly summarized concerns about expanding judicial review of agency rule-making when he stated that

while there is an important role for judicial review of regulations, a significant expansion of judicial review in rule-making could create unintended complexity in the regulatory system, preventing important rules from taking effect. An increase in litigation and judicial authority might also increase regulatory uncertainty, which would be most unwelcome in the current economic situation. At the same time, additional litigation and uncertainty can undermine important safeguards of public health, welfare, and safety, including safeguards that prevent illnesses and deaths.³³

IX. CONCLUSION

For the numerous reasons stated above, H.R. 527 is a flawed piece of legislation. There are more meaningful ways to assist small businesses and other small entities in navigating the regulatory landscape without threatening agencies’ ability to protect public health and safety. We urge our colleagues to shift their attention to these alternatives.

³² Shull statement, unnumbered p. 5.

³³ Federal Regulation: A Review of Legislative Proposals, Part I: Hearing Before the S. Comm. on Homeland Security and Government Affairs, 112th Cong. 3 (2011) (statement of the Honorable Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget).

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