

REGULATORY FLEXIBILITY IMPROVEMENTS ACT OF 2011

NOVEMBER 16, 2011.—Ordered to be printed

Mr. GRAVES of Missouri, from the Committee on Small Business,  
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 Small Business, 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, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

	Page
I. Amendment .....	2
II. Purpose of the Bill and Summary .....	8
III. Background and the Need for Legislation .....	9
IV. Hearings .....	13
V. Committee Consideration .....	14
VI. Committee Votes .....	15
VII. Section-by-Section Analysis of H.R. 527 .....	27
VIII. Congressional Budget Cost Estimate .....	62
IX. Unfunded Mandates .....	65
X. New Budget Authority, Entitlement Authority, and Tax Expenditures .....	65
XI. Oversight Findings .....	65
XII. Statement of Constitutional Authority .....	67
XIII. Congressional Accountability Act .....	67
XIV. Federal Advisory Committee Statement .....	67
XV. Statement of No Earmarks .....	67
XVI. Performance Goals and Objectives .....	67

XVII. Dissenting Views .....	68
XVIII. Changes in Existing Law Made by the Bill, as Reported .....	71

## I. AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

### SEC. 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. Expansion of report of regulatory agenda.
- Sec. 4. Requirements providing for more detailed analyses.
- Sec. 5. Repeal of waiver and delay authority; Additional powers of the Chief Counsel for Advocacy.
- Sec. 6. Procedures for gathering comments.
- Sec. 7. Periodic review of rules.
- Sec. 8. Judicial review of compliance with the requirements of the Regulatory Flexibility Act available after publication of the final rule.
- Sec. 9. Jurisdiction of court of appeals over rules implementing the Regulatory Flexibility Act.
- Sec. 10. Clerical amendments.
- Sec. 11. Agency preparation of guides.

### 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 RULE MAKING.—

(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 rule-making—

“(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. EXPANSION OF REPORT OF REGULATORY AGENDA.

Section 602 of title 5, United States Code, is amended—

(1) in subsection (a)—

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

(B) by redesignating paragraph (3) as paragraph (4); and

(C) by inserting after paragraph (2) the following:

“(3) a brief description of the sector of the North American Industrial Classification System that is primarily affected by any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities; and”; and

(2) in subsection (c), to read as follows:

“(c) Each agency shall prominently display a plain language summary of the information contained in the regulatory flexibility agenda published under subsection (a) on its website within 3 days of its publication in the Federal Register. The Office of Advocacy of the Small Business Administration shall compile and prominently display a plain language summary of the regulatory agendas referenced in subsection (a) for each agency on its website within 3 days of their publication in the Federal Register.”.

### SEC. 4. 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. 5. 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 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.”.

(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. 6. 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 mak-

ing 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, including an assessment of the proposed rule’s impact on the cost that small entities pay for energy, 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. 7. 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) The plan shall include a section that details how an agency will conduct outreach to and meaningfully include small businesses for the purposes of carrying out this section. The agency shall include in this section a plan for how the agency will contact small businesses and gather their input on existing agency rules.

“(d) 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 regu-

latory 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 (e) and a detailed explanation of the reasons for such determination.

“(e) In reviewing a rule pursuant to subsections (a) through (d), 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 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 (d).

“(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.

“(f) 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. 8. 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. 9. 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. 10. 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).

**SEC. 11. AGENCY PREPARATION OF GUIDES.**

Section 212(a)(5) the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 601 note) is amended to read as follows:

“(5) AGENCY PREPARATION OF GUIDES.—The agency shall, in its sole discretion, taking into account the subject matter of the rule and the language of relevant statutes, ensure that the guide is written using sufficiently plain language likely to be understood by affected small entities. Agencies may prepare separate guides covering groups or classes of similarly affected small entities and may cooperate with associations of small entities to distribute such guides. In developing guides, agencies shall solicit input from affected small entities or associations of affected small entities. An agency may prepare guides and apply this section with respect to a rule or a group of related rules.”.

## II. PURPOSE AND BILL SUMMARY

The purpose of H.R. 527, the “Regulatory Flexibility Improvement Act of 2011,” is to amend the Regulatory Flexibility Act (RFA) by eliminating interpretive lacunae that agencies have used to avoid compliance with the Act. The RFA was enacted in 1980 to ensure that federal agencies take into account the disparate impact that regulations have on small businesses and other small entities. Agencies regularly flouted the requirements of the RFA forcing Congress to take action in 1996 with the enactment of the Small Business Regulatory Enforcement Fairness Act (SBREFA). SBREFA made some significant changes to the RFA with the expectation that it would improve agency compliance. Studies by the



General Accounting Office, reports from the Chief Counsel for Advocacy,<sup>1</sup> and Congressional hearings held by the Committees on the Judiciary and the Committee on Small Business demonstrate that agencies are still reluctant to comply with the analytical requirements of the RFA. Further action is evidently needed to force agency compliance.

The bill defines and expands which economic effects are to be examined by agencies, imposes greater detail in performing the analyses, clarifies language concerning the applicability of the RFA to the Internal Revenue Service, subjects all agencies, including the IRS, to the procedures in §609 on the SBREFA panel process, eliminates barriers to judicial review of RFA compliance for agencies that have a statutory exhaustion requirement after a final rule is published before the rule can be challenged in court, and mandates that the Chief Counsel promulgate RFA compliance regulations applicable to all federal agencies.

### III. NEED FOR LEGISLATION

During the 1970s, Congress enacted numerous regulatory statutes. By the end of that decade, businesses, especially small ones, were groaning under the weight of federal regulation. Regulatory requirements were stifling innovation, limiting small business growth, and contributing to the general malaise experienced during the latter half of that decade. The Federal Register, the compendium of federal regulatory actions, had grown from a non-weighty publication for the obscurantia and arcana of the federal government to a 42,000 page blueprint for regulating many of the aspects of modern American life. Small businesses found this crush of federal dictates particularly problematic because those businesses had greater difficulty in complying with regulations than their larger competitors.

In a series of hearings during the late 1970s, Congress began focusing 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.<sup>2</sup>

These findings were supported and reinforced during the 1980 White House Conference on Small Business. Congress reacted with the passage of the RFA. That Act constitutes an additional component of a significantly broader mechanism to control agency decisionmaking—the Administrative Procedure Act (APA). The APA prevents an agency from taking actions which are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. §706(2)(A). This standard presumes that an agency will undertake rational rulemaking to: 1) ascertain the

<sup>1</sup>Pub. L. No. 94-305 created the Office of Advocacy within the United States Small Business Administration and vested management in a Chief Counsel. The RFA assigned monitoring functions to the Chief Counsel. Therefore, this report uses the terms Chief Counsel for Advocacy and Office of Advocacy interchangeably.

<sup>2</sup>The finding on disproportionate impact was substantiated by an Office of Advocacy study in 1984 which found concrete economic evidence of differential impacts of regulation by firm size. That conclusion was affirmed anew in a 2001 economic research study sponsored by the Office of Advocacy. W. Crain & T. Hopkins, *The Impact of Regulatory Costs on Small Business* (Oct. 2001). The full report can be found at <http://www.sba.gov/advo/research/rs207tot.pdf>.

problem to be solved through regulation; 2) develop potential solutions; 3) seek public comment on proposed solutions and alternatives not considered by the agency; and 4) craft a final rule that addresses all relevant criteria. Since the vast majority of entities (businesses, not-for-profit organizations, and governmental jurisdictions) regulated by the federal government are small, a rational rule should be one that achieves the objectives of the agency without unduly burdening small entities. The RFA, by focusing the agency's analysis on the economic effects on small entities, will help the agency promulgate rational rules.

From the time of enactment until 1996, 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, see *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984), and an agency's certification decision could not be challenged in court. See *Colorado State Banking Bd. v. RTC*, 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) (district court determination on RFA not raised on appeal). Without the ability of court orders, agencies only had to comply when it would benefit their rulemaking or could be cajoled by the Chief Counsel for Advocacy or the Office of Information and Regulatory Affairs (OIRA). Both the Committee on Small Business and the Committee on the Judiciary held hearings at which witnesses confirmed the systemic failure by many agencies to comply with the RFA.

Congress responded to this collective disregard by federal agencies with the enactment of SBREFA. The primary change authorized direct judicial review of agency compliance with the RFA, including challenges to agency certifications. SBREFA also mandated that Internal Revenue Service (IRS or Service) interpretative regulations that impose a "collection of information requirement"<sup>3</sup> be subject to the strictures of the RFA.<sup>4</sup> The legislation also recognized that, by the time a proposed rule is published for notice and comment, the agency has substantial intellectual capital invested in the scope of the proposed rule and is unlikely to change the core of its proposal during the notice and comment period.<sup>5</sup> Therefore, SBREFA requires the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to obtain input from representatives of small entities prior to the publication of any proposed rule that would have a significant economic impact on a substantial number of small entities, i.e., any proposed rule for which an initial regulatory flexibility analysis would be prepared.

The changes wrought by SBREFA had some effect on agency compliance. Lawsuits were filed against agencies, although not to

<sup>3</sup>The term "collection of information" is a term of art used in the Paperwork Reduction Act. See 44 U.S.C. § 3502(3).

<sup>4</sup>The RFA only requires agency compliance if the regulation is required to be issued pursuant to notice and comment pursuant to § 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).

<sup>5</sup>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.

the extent feared by critics of judicial review.<sup>6</sup> Due to the litigation, agencies have come to realize that certifications need to be supported by sound economic analysis or face successful challenges to compliance with the RFA. Input by small entities has generated ideas that improved EPA regulations.<sup>7</sup> Despite these ameliorative effects of SBREFA, much still needs to be done to ensure that agencies comply with the RFA.

Despite SBREFA and litigation, agencies continued to ignore the law. President Bush recognized the importance of the RFA and sought to impose greater compliance by the agencies. In a March 19, 2002 speech, President Bush stated:

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.

Subsequent to that speech, President Bush issued Executive Order 13,272, 67 Fed. Reg. 53,462 (Aug. 16, 2002). The order required agencies to adopt standards for complying with the RFA, make those standards known to the public, and give the Office of Advocacy the opportunity to comment on proposed rules that will have a significant economic impact on a substantial number of small entities prior to publication in the Federal Register. While that Executive Order represents a step in the direction of ensuring the pellucidity of agency procedures to comply with the RFA, it does not close the loopholes that currently exist in the Act or prevent agencies from adopting crabbed interpretations of the RFA that enable the agencies to elide the analytical responsibilities imposed by Congress more than 30 years ago.

President Obama also recognized the importance of the RFA. In a memorandum to the Executive Branch on January 18, 2011, the President noted that the RFA “establishes a deep national commitment to achieving statutory goals without imposing unnecessary burdens on the public.”<sup>8</sup> The President went on to direct agencies to “give serious consideration to whether and how it is appropriate . . . to reduce regulatory burdens on small businesses, through increased flexibility.”<sup>9</sup> In the memorandum, the President requested (but could not mandate) independent agencies to comply with its terms.<sup>10</sup>

<sup>6</sup>Since the changes to the RFA went into effect in late June of 1996 through 2006, a Lexis search reveals somewhere around 110 reported cases involving the RFA. By contrast, during the first ten years after the enactment of the National Environmental Policy Act (NEPA), there were 770 reported cases involving that statute. Neither count accurately reflects the true number of cases filed because reported cases may involve appeals and there may be multiple reported cases involving the same litigation. In other instances, cases that were filed during the respective time periods may not have been resolved. Finally, this only represents reported cases and not those that were filed but settled or were disposed of without a reported decision. Nevertheless, the magnitude of litigation under the RFA was significantly less than under NEPA.

<sup>7</sup>There are insufficient circumstances to assess the results of this so-called “panel process” on OSHA regulations.

<sup>8</sup>President Memorandum for the Heads of Executive Departments and Agencies: Regulatory Flexibility, Small Business and Job Creation, 76 Fed. Reg. 3827, 3827 (Jan. 21, 2011).

<sup>9</sup>*Id.* at 3828.

<sup>10</sup>Since the Supreme Court decision in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), independent collegial body agencies, such as the Federal Communications Commission

Coetaneous with the release of the memorandum on the RFA, President Obama issued Executive Order (E.O.) 13,563.<sup>11</sup> While the putative purpose of the Order was to clarify the regulatory analytical requirements set forth in Executive Order 12,866,<sup>12</sup> § 6 of E.O. 13,563 required agencies to prepare plans for periodic review of regulations, including all extant regulations.<sup>13</sup> Of course, there already is an existing requirement for periodic review of regulations, § 610 of the RFA.

Two presidents, in succession, ordered federal agencies to follow the RFA, a law that has been in existence for over 30 years. Every President from Ronald Reagan to Barack Obama has mandated a comprehensive review of existing agency regulations despite the fact that the RFA has required such reviews since its enactment in 1980. Given the fact that presidents must reiterate what is already in the law to agencies over which they have plenary authority starkly demonstrates the need for revision to the RFA. Furthermore, presidential reminders, through memoranda or executive orders, may be ignored with impunity by independent regulatory agencies since presidents are unable to exert regulatory authority over such agencies.

The conclusion that the RFA must be amended despite efforts of five presidents is buttressed by the finding of the Government Accountability Office (GAO). GAO has done numerous studies on agency compliance with various aspects of the RFA and SBREFA.<sup>14</sup> According to GAO, the most significant stumbling block to improved compliance is the lack of definitions for “significant economic impact” and “substantial number of small entities.” GAO also notes that this 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 requirements in the RFA, including periodic review of rules under § 610 and the receipt of small entity input prior to the publication of proposed rules by EPA and OSHA.<sup>15</sup>

Testimony at hearings held by the Committee on Small Business during the 106th, 107th, 108th, 109th, 110th, and 112th Congresses further supports the need for change. Hearings before the Committee found that considerable confusion still reigns on when agencies need to conduct regulatory flexibility analyses. Witnesses testified that agencies still finds ways to avoid compliance with the RFA, even after the enactment of SBREFA and various presi-

---

or Nuclear Regulatory Commission, are not subject to control by the White House or subject to presidential executive orders.

<sup>11</sup> 76 Fed. Reg. 3,821 (Jan. 21, 2010).

<sup>12</sup> Executive Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993), requires federal agencies to perform a cost-benefit analysis for any regulation that will have an impact of more than \$100 million on the economy.

<sup>13</sup> Exec. Order 13,563, § 6, 75 Fed. Reg. at 3822.

<sup>14</sup> SBREFA also requires federal agencies to prepare compliance guides for regulations that have a significant economic impact on a substantial number of small entities. Nothing in the bills being considered at the hearing modifies that requirement.

<sup>15</sup> See Regulatory Flexibility Act: Congress should revisit and clarify elements of the act to improve its effectiveness (2006) (GAO 06-998T); Regulatory Flexibility Act: Clarification of key terms still needed (2002) (GAO-02-491); Regulatory Flexibility Act: Key terms still need to be clarified (2001) (GAO-01-669T); Regulatory Flexibility Act: Implementation in EPA Program Offices and the lead rule (2000) (GGD-00-193); Regulatory Flexibility Act: Agencies’ interpretations of review requirements vary (1999) (GGD-99-55); Regulatory Flexibility Act: Implementation of the Small Business Advocacy Review Panel Requirements (1998) (T-GGD-98-75); Regulatory Flexibility Act: Agencies use of the October 1997 Unified Agenda did not satisfy notification requirements (1998) (GGD-98-61R); Regulatory Flexibility Act: Status of Agencies’ Compliance (1995) (T-GGD-95-112).

dential directives to comply. Finally, the testimony was consentient in finding that agencies continue to impose unnecessary burdens on small businesses as a result of their failure to comply with the RFA.

Nor have the courts been the anodyne that the authors of SBREFA contemplated. 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) even though the authors of SBREFA expected judicial review to have the same impact on agency decisionmaking that court decisions had on agency compliance with NEPA. See *Associated Fisheries of Maine v. Daley*, 127 F.3d 104, 114 (1st Cir. 1997).

Neither the actions of successive presidents, nor the courts, nor congressional oversight have tempered the broad discretion that agencies have in implementing the RFA. This broad discretion enables them to avoid compliance with the RFA's underlying analytical requirements. In order to constrain this discretion and ensure proper consideration is given to the impact that regulatory actions will have on small entities, particularly small businesses, it is necessary to make further amendments to the RFA as set forth in H.R. 527 which are set forth in the next section of this memorandum.

#### IV. HEARINGS

In the 112th Congress, the Committee held two hearings on H.R. 527. On March 30, 2011, the Committee convened a hearing titled "Reducing Federal Agency Overreach: Modernizing the Regulatory Flexibility Act." At the hearing, small business representatives testified about the continued ongoing problems of obtaining adequate analyses under the RFA including situations in which court orders mandated compliance. The Committee then met on June 15, 2011 to receive testimony from outside experts on the bill text at a hearing entitled "Lifting the Weight of Regulations: Growing Jobs by Reducing Regulatory Burdens." The witnesses were consentient in their view that H.R. 527, particularly granting the Office of Advocacy the authority to issue regulations to implement the RFA, would vastly improve agency compliance with the Act.

In additions to hearings specifically addressing H.R. 527, the Committee's subcommittees investigated agency compliance with the RFA in the context of hearings on specific rules and their impact on small businesses. Those hearings were: "Green Isn't [sic] Always Gold: Are EPA Regulations Stifling Small Business (May 12, 2011); "Do Not Enter: How Proposed Hours of Service Trucking Rules are a Dead End for Small Businesses (June 14, 2011); and "Regulatory Injury: How USDA's Proposed GIPSA Rule Hurts America's Small Businesses" (July 7, 2011). In each instance, the failure to fully comply with the RFA led to the proposal of rules by the agency that could have a significant deleterious impact on small businesses if those rules were adopted in final form unchanged.

Modifications to improve the RFA were also considered in the 110th Congress when the Committee held a hearing entitled "Legislation to Improve the Regulatory Flexibility Act" (December 6, 2007). At that hearing, the Chief Counsel for Advocacy and Small Businesses testified that improvements were needed to ensure

agencies fully considered the impacts of their proposed and final rules on small businesses. Subsequent to that hearing, the Committee reported out legislation, H.R. 4458, the Small Business Regulatory Improvement Act, that addressed some, but not all, of the matters resolved in H.R. 527.

#### V. COMMITTEE CONSIDERATION

The Committee on Small Business met in open session, with a quorum being present, on July 13, 2011 and ordered H.R. 527 reported, as amended, to the House by a voice vote at 3:54 p.m. During the markup, nine amendments were offered. Four amendments were adopted, four were rejected and one amendment was withdrawn. Disposition of the amendments is addressed below and is based on the order amendments were filed with the Clerk of the Committee and not necessarily in the order that they were considered at the markup.

Amendment Number One filed by Mr. Owens (D-NY) requires the agencies, in drafting compliance guides to contact small businesses. The amendment was adopted by voice vote at 1:20 p.m.

Amendment Number Two filed by Mr. Owens (D-NY) requires agencies to specify, in their periodic review plans, how they will obtain input from small businesses. The amendment was adopted by voice vote at 1:21 p.m.

Amendment Number Three filed by Mr. Schrader (D-OR) requires agencies to provide greater detail about the impacts on small businesses in their semi-annual regulatory agendas. It also requires the agencies to post such material on their websites. The amendment was adopted by voice vote at 1:23 p.m.

Amendment Number Four filed by Ms. Velázquez (D-NY) would prohibit the amendments made by H.R. 527 from going into effect in any year in which the federal deficit exceeded \$500 billion. The amendment was not agreed to on a recorded vote of 10 yeas to 13 noes at 3:53 p.m.

Amendment Number Five filed by Ms. Velázquez (D-NY) was a substitute limiting the changes to a more a detailed statement for regulatory flexibility analyses, requiring agencies to consider indirect effects, and making changes to ensure better periodic review of rules. The amendment was not agreed to on a recorded vote of 9 yeas to 14 noes at 3:54 p.m.

Amendment Number Six filed by Ms. Velázquez (D-NY) was an amendment to require the Chief Counsel to estimate the costs incurred in the panels required by § 5 of H.R. 527. The amendment was not agreed to on a recorded vote of 10 yeas to 13 noes at 3:47 p.m.

Amendment Number Seven filed by Ms. Velázquez (D-NY) would have excluded regulations issued by the SBA relating to government contracts and loans from coverage of H.R. 527. The amendment was not agreed to on a recorded vote of 9 yeas to 14 noes at 3:40 p.m.

Amendment Number Eight filed by Mr. Critz (D-PA) requires agencies specifically to consider energy costs in the report of the panels that will be incorporated into the Federal Register notice of a proposed rule. The amendment was agreed to by voice vote at 1:35 p.m.

Amendment Number Nine filed by Mr. Critz (D-PA) would have established panels to consider the impacts of free trade agreements during the panel process pursuant to § 609 of the RFA as amended by § 5 of H.R. 527. The amendment was withdrawn at 1:37 p.m.

## VI. COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the recorded votes on the motion to report the legislation and amendments thereto.

### **Amendment to H.R. 527 Offered by Mr. Owens of New York**

Add at the end of the bill the following:

#### **SEC. 10. AGENCY PREPARATION OF GUIDES.**

Section 212(a)(5) the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 601 note) is amended to read as follows:

“(5) AGENCY PREPARATION OF GUIDES.—The agency shall, in its sole discretion, taking into account the subject matter of the rule and the language of relevant statutes, ensure that the guide is written using sufficiently plain language likely to be understood by affected small entities. Agencies may prepare separate guides covering groups or classes of similarly affected small entities and may cooperate with associations of small entities to distribute such guides. In developing guides, agencies shall solicit input from affected small entities or associations of affected small entities. An agency may prepare guides and apply this section with respect to a rule or a group of related rules.”.

### **Amendment to H.R. 527 Offered by Mr. Owens of New York**

Page 20, insert after line 5 the following (and redesignate succeeding sections accordingly):

“(c) The plan shall include a section that details how an agency will conduct outreach to and meaningfully include small businesses for the purposes of carrying out this section. The agency shall include in this section a plan for how the agency will contact small businesses and gather their input on existing agency rules”.

### **Amendment to H.R. 527 Offered by Mr. Schrader of Oregon**

Page 9, insert after line 15 the following (and redesignate succeeding sections accordingly):

#### **SEC. 3. EXPANSION OF REPORT OF REGULATORY AGENDA.**

Section 602 of title 5, United States Code, is amended—

(1) in subsection (a)—

(A) in paragraph (2), by striking “and” at the end;

(B) by redesignating paragraph (3) as paragraph (4); and

(C) by inserting after paragraph (2) the following:

“(3) a brief description of the sector of the North American Industrial Classification System that is primarily affected by any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities; and”.

(2) in subsection (c), to read as follows:

“(c) Each agency shall prominently display a plain language summary of the information contained in the regulatory flexibility agenda published under subsection (a) on its website within 3 days of its publication in the Federal Register. The Office of Advocacy of the Small Business Administration shall compile and prominently display a plain language summary of the regulatory agendas referenced in subsection (a) for each agency on its website within 3 days of their publication in the Federal Register.”.

**Amendment to H.R. 527 Offered by Ms. Velázquez of New York**

Add, at the end of the bill, the following:

**SEC. 10. EFFECTIVE DATE.**

This Act and the amendments made by this Act shall take effect on October 1 of the first full fiscal year—

(1) for which no funding is authorized by law for the Office of Advocacy of the Small Business Administration in an amount exceeding the level of funding for the Office for fiscal year 2011; and

(2) that follows any fiscal year for which the actual annual Federal budget deficit did not exceed \$500,000,000,000.



**COMMITTEE ON SMALL BUSINESS**

HR 527

DATE: 7/13/2011

ROLL CALL: 3

AMENDMENT NUMBER: 4

VOTE: 10 (AYE) 13 (NO)

<b>MEMBER</b>	<b>AYE</b>	<b>NO</b>	<b>PRESENT</b>	<b>NOT VOTING</b>
Mr. GRAVES, Chairman		X		
Dr. BARTLETT		X		
Mr. CHABOT		X		
Mr. KING		X		
Mr. COFFMAN		X		
Mr. MULVANEY		X		
Mr. TIPTON		X		
Mr. LANDRY		X		
Ms. HERRERA BEUTLER		X		
Mr. WEST	X			
Mrs. ELLMERS		X		
Mr. WALSH		X		
Mr. HANNA		X		
Mr. BARLETTA		X		
Ms. VELAZQUEZ, Ranking Member	X			
Mr. SCHRADER	X			
Mr. CRITZ	X			
Mr. ALTMIRE	X			
Ms. CLARK	X			
Ms. CHU	X			
Mr. CICILLINE	X			
Mr. RICHMOND				X
Mr. PETERS	X			
Mr. OWENS	X			
Mr. KEATING				X
<b>TOTALS</b>	<b>10</b>	<b>13</b>		

**Amendment to H.R. 527 Offered by Ms. Velázquez of New York**

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Small Business Regulatory Improvement Act of 2011”.

**SEC. 2. FINDINGS.**

Congress finds the following:

(1) Small businesses are frequently the source of new products, methods, and innovations.

(2) A vibrant and growing small business sector is critical to creating jobs in a dynamic economy.

(3) Regulations designed for application to large-scale entities have been applied uniformly to small businesses and other small entities.

(4) Uniform Federal regulatory and reporting requirements in many instances have imposed on small businesses and other small entities disproportionately burdensome demands, including legal, accounting, and consulting costs.

(5) Since 1980, Federal agencies have been required to recognize and take account of the differences in the scale and resources of regulated entities but have failed to do so.

(6) Alternative regulatory approaches that do not conflict with the stated objectives of the statutes the regulations seek to implement may be available and may minimize the significant economic impact of regulations on small businesses and other small entities.

(7) Federal agencies have failed to analyze and uncover less costly alternative regulatory approaches, despite the fact that the chapter 6 of title 5, United States Code (commonly known as the Regulatory Flexibility Act), requires them to do so.

(8) Federal agencies continue to interpret chapter 6 of title 5, United States Code, in a manner that permits them to avoid their analytical responsibilities.

(9) Significant changes are needed in the methods by which Federal agencies develop and analyze regulations, receive input from affected entities, and develop regulatory alternatives that will lessen the burden or maximize the benefits of final rules to small businesses and other small entities.

(10) It is the intention of the Congress to amend chapter 6 of title 5, United States Code, to ensure that all impacts, including foreseeable indirect effects, of proposed and final rules are considered by agencies during the rulemaking process and that the agencies assess a full range of alternatives that will limit adverse economic consequences or enhance economic benefits.

(11) Federal agencies should be capable of assessing the impact of proposed and final rules without delaying the regulatory process or impinging on the ability of Federal agencies to fulfill their statutory mandates.

**SEC. 3. CLARIFICATION AND EXPANSION OF RULES COVERED BY THE REGULATORY FLEXIBILITY ACT.**

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).”.

**SEC. 4. 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 describing—

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

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

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

“(4) the number of small entities to which the proposed rule will apply or why such estimate is not available;

“(5) 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, the costs, and the type of professional skills necessary to comply with the rule; and

“(6) 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.”.

(b) FINAL REGULATORY FLEXIBILITY ANALYSIS.—

(1) Paragraph (4) of such section is amended by striking “an explanation” and inserting “a detailed explanation”.

(2) Paragraph (5) of such section is amended to read as follows:

“(4) a description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement, the costs, and the type of professional skills necessary to comply with the rule; and”.

(c) CERTIFICATION OF NO IMPACT.—Subsection (b) of section 605 of title 5, United States Code, is amended by inserting “detailed” before “statement” both places such term appears.

**SEC. 5. 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 Small Business Regulatory Improvement 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 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 Small Business Regulatory Improvement 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 Small Business Regulatory Improvement 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 and the Congress.

“(c) Each agency shall annually submit a report regarding the results of its review pursuant to such plan to the Congress and, in the case of agencies other than independent regulatory agencies (as defined in section 3502(5) of title 44, United States Code) 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 rules under such plan, 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.

“(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 and local rules.

“(6) 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, and the Regulatory Enforcement Ombudsman concerning the enforcement of the rule.”.

**SEC. 6. CHANGES TO THE REGULATORY FLEXIBILITY ACT TO COM-  
PORT WITH EXECUTIVE ORDER 13272.**

(a) INITIAL REGULATORY FLEXIBILITY ANALYSIS.—Section 603 of title 5, United States Code, is amended by adding at the end the following:

“(e) An agency shall notify the Chief Counsel for Advocacy of the Small Business Administration of any draft rules that may have a significant economic impact on a substantial number of small entities either—

“(1) when the agency submits a draft rule to the Office of Information and Regulatory Affairs at the Office of Management and Budget, if submission is required; or

“(2) if no submission to the Office of Information and Regulatory Affairs is so required, at a reasonable time prior to publication of the rule by the agency.”.

(b) INCLUSION IN FINAL REGULATORY FLEXIBILITY ANALYSIS 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 after “initial regulatory flexibility analysis” the following: “(or certification of the proposed rule under section 605(b))”.

**COMMITTEE ON SMALL BUSINESS**

HR 527

DATE: 7/13/2011

ROLL CALL: 4

AMENDMENT NUMBER: 5

VOTE: 9 (AYE) 14 (NO)

<b>MEMBER</b>	<b>AYE</b>	<b>NO</b>	<b>PRESENT</b>	<b>NOT VOTING</b>
Mr. GRAVES, Chairman		X		
Dr. BARTLETT		X		
Mr. CHABOT		X		
Mr. KING		X		
Mr. COFFMAN		X		
Mr. MULVANEY		X		
Mr. TIPTON		X		
Mr. LANDRY		X		
Ms. HERRERA BEUTLER		X		
Mr. WEST		X		
Mrs. ELLMERS		X		
Mr. WALSH		X		
Mr. HANNA		X		
Mr. BARLETTA		X		
Ms. VELAZQUEZ, Ranking Member	X			
Mr. SCHRADER	X			
Mr. CRITZ	X			
Mr. ALTMIRE	X			
Ms. CLARK	X			
Ms. CHU	X			
Mr. CICILLINE	X			
Mr. RICHMOND				X
Mr. PETERS	X			
Mr. OWENS	X			
Mr. KEATING				X
<b>TOTALS</b>	<b>9</b>	<b>14</b>		<b>2</b>

**Amendment to H.R. 527 Offered by Ms. Velázquez of New York**

Page 17, line 12, insert after “entities.” the following: “Such report shall also include a total cost of conducting the panel described in subsection (c)(2) as well as a detailed report of the components of that total cost, including expenses of officers and employees of the Federal government (at rates authorized for such officers and employees under subchapter I of chapter 57 of title 5, United States Code) who participate in the panel and the rate of salary or basic pay of each officer or employee of the Federal government who participates in the panel, prorated to account for time of service on the panel.”

Page 17, insert after line 12 the following (and redesignate succeeding paragraphs accordingly):

“(3) Not later than 60 days after the end of a fiscal year, the Chief Counsel shall submit a consolidated report detailing the total cost of all panels conducted pursuant to subsection (c)(2) in that fiscal year. This report shall include a detailed description of the components of the total cost, including expenses of officers and employees of the Federal government (at rates authorized for such officers and employees under subchapter I of chapter 57 of title 5, United States Code) who participate in the panel and the rate of salary or basic pay of each officer or employee of the Federal government who participates in the panel, prorated to account for time of service on the panel.”.

**COMMITTEE ON SMALL BUSINESS**

HR 527

DATE: 7/13/2011

ROLL CALL: 1

AMENDMENT NUMBER: 6

VOTE: 10 (AYE) 13 (NO)

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. GRAVES, Chairman		X		
Dr. BARTLETT		X		
Mr. CHABOT		X		
Mr. KING		X		
Mr. COFFMAN		X		
Mr. MULVANEY		X		
Mr. TIPTON		X		
Mr. LANDRY		X		
Ms. HERRERA BEUTLER		X		
Mr. WEST	X			
Mrs. ELLMERS		X		
Mr. WALSH		X		
Mr. HANNA		X		
Mr. BARLETTA		X		
Ms. VELAZQUEZ, Ranking Member	X			
Mr. SCHRADER	X			
Mr. CRITZ	X			
Mr. ALTMIRE	X			
Ms. CLARK	X			
Ms. CHU	X			
Mr. CICILLINE	X			
Mr. RICHMOND				X
Mr. PETERS	X			
Mr. OWENS	X			
Mr. KEATING				X
<b>TOTALS</b>	10	13		2



**Amendment to H.R. 527 Offered by Ms. Velázquez of New York**

Page 3, line 12, insert before the period at the end the following:  
The amendment made by this subsection shall not apply to a rule making by the Administrator of the Small Business Administration regarding the contracting, lending, investment, or entrepreneurial development programs of the Administrator

Page 13, insert after line 6 the following:

(f) APPLICATION TO CERTAIN RULES.—This section and the amendments made by this section shall not apply to a rule making by the Administrator of the Small Business Administration regarding the contracting, lending, investment, or entrepreneurial development programs of the Administrator.

Page 15, insert after line 3 the following:

(c) APPLICATION TO CERTAIN RULES.—This section and the amendments made by this section shall not apply to a rule making by the Administrator of the Small Business Administration regarding the contracting, lending, investment, or entrepreneurial development programs of the Administrator.

Page 18, line 17, insert before the period at the end the following:

The amendment made by this section shall not apply to a rule making by the Administrator of the Small Business Administration regarding the contracting, lending, investment, or entrepreneurial development programs of the Administrator

**COMMITTEE ON SMALL BUSINESS**

HR 527

DATE: 7/13/2011

ROLL CALL: 2

AMENDMENT NUMBER: 7

VOTE: 9 (AYE) 14 (NO)

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. GRAVES, Chairman		X		
Dr. BARTLETT		X		
Mr. CHABOT		X		
Mr. KING		X		
Mr. COFFMAN		X		
Mr. MULVANEY		X		
Mr. TIPTON		X		
Mr. LANDRY		X		
Ms. HERRERA BEUTLER		X		
Mr. WEST		X		
Mrs. ELLMERS		X		
Mr. WALSH		X		
Mr. HANNA		X		
Mr. BARLETTA		X		
Ms. VELAZQUEZ, Ranking Member	X			
Mr. SCHRADER	X			
Mr. CRITZ	X			
Mr. ALTMIRE	X			
Ms. CLARK	X			
Ms. CHU	X			
Mr. CICILLINE	X			
Mr. RICHMOND				X
Mr. PETERS	X			
Mr. OWENS	X			
Mr. KEATING				X
<b>TOTALS</b>	<b>9</b>	<b>14</b>		<b>2</b>

**Amendment to H.R. 527 Offered by Mr. Critz of  
Pennsylvania**

Page 17, line 9, insert after “small entities” the following: “, including an assessment of the proposed rule’s impact on the cost that small entities pay for energy,”.

**Amendment to H.R. 527 Offered by Mr. Critz of  
Pennsylvania**

Page 18, insert after line 11 the following (and redesignate succeeding subsections accordingly):

“(f)(1) If Congress approves a trade agreement under section 2191 of title 19, United States Code, then the Chief Counsel for Advocacy of the Small Business Administration shall—

“(A) 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 rules implementing or pertaining to such trade agreement; and

“(B) convene a review panel consisting of an employee from the Office of Advocacy of the Small Business Administration, an employee from relevant agencies or, if appropriate, an employee from the Office of Information and Regulatory Affairs of the Office of Management and Budget to review the advice, input, and recommendations provided to the Chief Counsel under subparagraph (A).

“(2) Not later than 60 days after the review panel described in paragraph (1) 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 Congress. Such report shall include an assessment of the economic impact of rules implementing or pertaining to the trade agreement 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.”.

VII. SECTION-BY-SECTION ANALYSIS OF H.R. 527

*Section 1. Short title*

Designates the bill as the “Regulatory Flexibility Improvements Act of 2011.”

*Section 2. Clarification and expansion of rules covered by the RFA*

*Subsection (a)—Definition of “Rule”*

The RFA currently defines a rule as one that is issued pursuant to the notice and comment provisions of § 553(b) of the APA. This definition is unnecessarily restrictive for no apparent reason. Fundamentally, a rule is any issuance from an agency that does not emanate from an adjudication. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 n.13 (D.C. Cir. 2000), quoting *Batterton v. Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980). The definition of a rule should be consistent, to the extent practicable, with the definitions set forth in the APA. That will permit courts, for purposes of interpreting the RFA, to adopt the interpretations they have developed under the APA. See *White v. Mercury Marine*, 129 F.3d 1428, 1434

(11th Cir. 1997); *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 827 (1st Cir. 1992), cert. denied, 506 U.S. 1052 (1993); *Doe v. DiGenova*, 779 F.2d 74, 82 (D.C. Cir. 1985) (legislative use of same term in different sections should be given the same meaning and interpretation) Therefore, § 2(a) of H.R. 527 eliminates the distinction between § 551(4) of the APA and § 601(2) of the RFA.

Section 2(a) of the bill does make one necessary distinction between rules as defined under the APA and the RFA. The APA definition of a rule includes any rule of particular applicability relating to “rates, wages, corporate or financial structures, 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.” 5 U.S.C. § 551(4). The RFA does not apply to any rule that falls within any of the aforementioned categories. *Id.* at § 601(2). Agencies should not be delayed in approving the financial structure or the like of a specific entity as such rule change clearly could not affect a significant number of small entities. In contradistinction, the rules for how agencies determine rates, wages, or financial structures may have a dramatic impact on small entities.<sup>16</sup> As a result, the appropriate compromise is to define a rule that will cover rates, wages, etc. only if the rule can be applied to more than one entity. For example, the definition of a rule under the Committee’s solution would include the Federal Communications Commission’s (FCC) regulations for calculating the rates charged by incumbent local exchange carriers for unbundled network elements. A rule would not include the application of those standards for determining the unbundled network element rates for a particular incumbent local exchange carrier. To the extent that the determination of the rates are made in a rulemaking, this definition ensures that the agency cannot use as an excuse for delay the need to comply with the RFA. Furthermore, the amendatory language answers in the affirmative the question of whether the RFA covers rules of general applicability concerning the calculation of rates, wages, etc.

*Subsection (b)—Inclusion of Indirect Effects*

The RFA requires preparation of a regulatory flexibility analysis if the agency determines that the rule will have a significant economic impact on a substantial number of small entities. The original authors of the RFA did not define the term “economic impact” following the trend in the National Environmental Policy Act (NEPA) in which the term “significant effect on the environment” was left open to interpretation. The scope of the economic impacts that should be considered for compliance with the RFA has been the subject of much discussion and confusion even during the debates on passage. The genesis of the confusion stems from comments made by Senator John Culver (D-IA) (one of the original authors of the RFA). In the section-by-section analysis of the RFA, Senator Culver suggested that agencies should assess both indirect and direct effects of the proposed regulation. 126 Cong. Rec. 21,458–59 (1980).

<sup>16</sup> From a purely logical standpoint, the approval of rates, wages, etc. for a particular entity looks more like a license as that term is defined in the APA. However, the definition of a “license” under the APA is quite restrictive and approval of various types of corporate structures (such as the approval of a initial public offering by the Securities and Exchange Commission) does not constitute a license under the APA.

The issue of indirect effects reappeared when an electric cooperative, Mid-Tex, challenged the Federal Energy Regulatory Commission's determination to permit the inclusion of construction-work-in-progress expenses (CWIP) in the rate base for generating utilities. The inclusion of CWIP forced the Commission to raise the rates for wholesale power purchased by electric cooperatives such as Mid-Tex. The Commission certified that the proposed rule would not have a significant economic impact on a substantial number of small entities because the rule only affected large entities—the generators of electric power. The electric cooperatives, in their challenge to the regulation, alleged that the Commission should have performed a regulatory flexibility analysis on the impact that the decision would have on the purchasers of the power. The D.C. Circuit disagreed with the cooperatives' interpretation of the RFA's legislative history and held that Congressional intent with respect to the analysis of indirect effects was ambiguous. The court determined, although it did not have to,<sup>17</sup> that the use of indirect effects by Senator Culver meant referred to the indirect effects on the entities subject to the regulation not the pass-through indirect effects on society in general. *Mid-Tex Elec. Coop. v. FERC*, 773 F.2d 327, 342–43 (D.C. Cir. 1985). This conclusion has been reaffirmed on a number of occasions by the D.C. Circuit, the only circuit that has considered the issue.<sup>18</sup>

By limiting analysis to entities directly regulated, the D.C. Circuit's interpretation of the RFA enables federal agencies to avoid assessing impacts on small entities for some very significant rulemakings. Some examples will elucidate this problem.

The EPA is charged with establishing national ambient air quality standards under the Clean Air Act. Once established, the Clean Air Act then grants to the states the authority to develop plans to meet those standards.<sup>19</sup> Ambient air quality standards can impose significant economic harm on businesses that may have to reduce their activities in order to comply with the state implementation plan and meet the ambient air quality standards. EPA does not comply with the RFA when it develops the standards or during the approval of the state implementation plans.

The EPA argues that the RFA does not apply because the ambient air quality standards and state implementation plans only regulate states which are not small entities under the RFA.<sup>20</sup> Despite this legal legerdemain, a revised ambient air quality standard can have a profound impact on the economy and one that is totally foreseeable. The EPA identified significant economic consequences when it revised its ambient air quality standards for nitrogen oxide and particulate matter in the late 1990s. That regulation under-

<sup>17</sup> Since the decision to certify a rule was not a justiciable claim under the original version of the RFA, the court did not have to decide the issue.

<sup>18</sup> *American Trucking Ass'n v. EPA*, 175 F.3d 1027, 1044–45 (D.C. Cir. 1999), rev'd on other grounds, 531 U.S. 457 (2001); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 466 (D.C. Cir. 1998); *United Distr. Cos. v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996). Other courts also have adopted the D.C. Circuit's interpretation. *White Eagle Coop. Ass'n v. Conner*, 553 F.3d 467, 479–81 (7th Cir. 2009) (producers indirectly regulated under milk marketing so not able to bring claim under RFA).

<sup>19</sup> If a state does not develop a state implementation plan, the EPA is authorized to develop the implementation plan.

<sup>20</sup> The RFA applies to small businesses, small organizations (not-for-profits), and small governmental jurisdictions which are defined as any governmental entity with a population of less than 50,000. No state has less than 50,000 people. Therefore, states are not small governmental jurisdictions.

went substantial economic review, including the development of a cost-benefit analysis pursuant to Executive Order 12,866. As a result, EPA was required to identify the foreseeable costs of imposing stricter ambient air quality standards on the nation, including small entities, even though the exact scope on specific small entities might vary depending based on the state implementation plan. If most of the entities are small that must readjust their behavior to reduce pollution and they cannot comply, the rule is irrational because EPA will not meet its goal of cleaner air. Therefore, an analysis of the indirect effects of the ambient air quality standards is a critical element in the development of the APA-mandated rational rule.

Section 303(d) of the Clean Water, 33 U.S.C. § 1313(d), requires states to develop lists of impaired waters, i.e., those waters for which effluent limitations on point sources (such as factories and publicly-owned treatment facilities) do not meet the water quality standards applicable to such body of water. The states are then required to establish total maximum daily load (TMDL) for each impaired body to bring into compliance with the applicable water quality standard. On July 13, 2000, EPA promulgated new regulations to implement the TMDL program. 65 Fed. Reg. 43,585. The EPA certified the final rule because it found that the “rule established requirements applicable only to EPA, states, territories, and Indian tribes. Thus, EPA is not required to prepare a regulatory flexibility analysis.”<sup>21</sup> *Id.* at 43,654. EPA reached this conclusion even though it found that the changes in the TMDL program would result in an annual effect on the economy of more than \$100 million. In its Executive Order 12,866 analysis, EPA estimated the cost on various industries for complying with updated TMDLs developed by the states. The development and availability of this data under the Executive Order belies any notion that EPA’s rules only affected states. As with the ambient air quality standards, the economic consequences were large but foreseeable even though the exact impact on specific entities was not available. Therefore, EPA could and should have developed a regulatory flexibility analysis that assessed the impact on small entities.

If EPA was the only agency where the issue of direct and indirect effects occurred, it would deserve a legislative solution given the impact that EPA regulations have on small entities.<sup>22</sup> However, EPA is not the only agency that has avoided RFA compliance due to the indirect effects of the regulations they promulgate. For example, the Department of Agriculture never complied with the RFA when it promulgated revised regulations for amending forest management plans even though those rules would have significant impact on how the national forests would be managed and would affect thousands of small businesses and rural local governments. The IRS proposed to modify the reporting of non-resident alien interest income which could threaten the availability of capital for small businesses. The Immigration and Naturalization Service proposed reducing the time limit for extensions of visas to foreign visi-

<sup>21</sup> There are Indian tribes with less populations of less than 50,000. EPA’s conclusion that only large governmental entities were being regulated was wrong.

<sup>22</sup> Congress recognized the significance of EPA rules on small entities in SBREFA by creating a mechanism for those entities to provide input into the development of proposed EPA regulations.

tors which, although not directly regulating any small businesses, could have a significant adverse impact on small businesses that rely on residents of cold climates wintering in places such as Florida or Arizona.

To the extent that these rules are significant under Executive Order 12,866, the indirect effects would be analyzed in the development of a cost-benefit analysis. However, the impacts would not be assessed for cost-effectiveness under the RFA—a gap that makes no logical sense and undermines the ability of agencies to craft rational rules as mandated by the APA.

Given the adverse consequences for small entities of indirect effects, it is imperative that agencies consider the foreseeable indirect effects of their regulatory actions on small entities. The Committee does not find that objections raised by the courts and federal agencies—that indirect economic effects cannot be measured with any accuracy—valid. The RFA, as already noted, was modeled on NEPA, in effect forcing agencies to perform an economic impact statement. The Committee believes that the parallels between NEPA and the RFA should include the scope of the effects examined.

According to the regulations promulgated by the Council of Environmental Quality (CEQ),<sup>23</sup> the term “effect” means:

- (a) Direct effects, which are caused by the action and occur at the same time and place.
- (b) Indirect effects, which are caused by the action and are later in time or further removed in distance by are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

40 C.F.R. § 1508.8. The CEQ regulations go on to state that the term “effects” includes economic effects whether direct, indirect, or cumulative. *Id.* Agencies have had to comply with these regulations for nearly a quarter of century. If federal agencies are capable of developing estimates of indirect effects of major federal actions for purposes of NEPA, the agencies should be capable of developing the same estimates for compliance with the RFA. This conclusion is buttressed by the fact that major federal actions, for purposes of NEPA, include rulemakings. *Id.* at § 1508.18; see also *Cellular Telephone Taskforce v. FCC*, 205 F.3d 82, 94 (D.C. Cir. 2000), cert. denied, 531 U.S. 1070 (2001). Thus, federal agencies already are estimating the indirect effects, including economic impacts,<sup>24</sup> of some of their regulations in order to comply with NEPA. Given that requirement, the Committee is of the opinion that extending the NEPA requirement to the RFA would not constitute a hardship

<sup>23</sup> These regulations are given substantial deference by the courts. See *Robertson v. Methow Valley Citizens Ass’n*, 490 U.S. 332, 356 (1989); *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979). It is important to note that the Court gives these regulations substantial deference even though CEQ issued the rules pursuant to an Executive Order issued by President Carter since NEPA had no statutory authorization for CEQ to do anything other than monitor agency compliance with NEPA.

<sup>24</sup> CEQ regulations define effects of major federal actions to include economic and social impacts. 40 C.F.R. § 1508.8.

that federal agencies contend it would be to estimate indirect economic impacts.<sup>25</sup>

Section 2(b) adopts a definition of “economic effect” that parallels the definition of “effect” utilized by CEQ in its NEPA regulations. The definitions of “direct” and “indirect” (especially as it relates to foreseeability of economic consequences) effects have the same meaning as that developed by CEQ and the courts for interpreting the requirements of NEPA.

*Subsection (c)—Rule with Beneficial Effects*

A regulatory flexibility analysis must be prepared whenever an agency finds that a proposed or final rule will have a significant economic impact on a substantial number of small entities. The statute does not limit the economic impacts to only adverse consequences although § 604 requires a final regulatory flexibility analysis to include a discussion of an agency’s efforts to minimize the significant economic impacts of the final rule but requires no discussion of an agency’s efforts to maximize beneficial impacts. This limitation on the analysis also falls within the parallelism to NEPA which only requires agencies to examine alternatives that will mitigate adverse environmental consequences.<sup>26</sup> Thus, agencies have interpreted this requirement as obviating the need to perform a regulatory flexibility analysis when the impact of a rule will be significant but beneficial.

This interpretation is incorrect, but it is easy to comprehend how agencies reached the conclusion based on § 604’s failure to require a discussion of efforts made to maximize beneficial effects. Despite the absence of such a mandate, such an analysis would be useful because it forces the agency to examine whether it has selected an alternative that maximizes the benefits to small entities. If everything is *ceteris paribus*, an agency should select an alternative that maximizes any beneficial economic effect on small entities<sup>27</sup> because small entities (except in very unusual circumstances) will represent the vast majority of entities subject to a particular regulation.<sup>28</sup>

Section 2(c) eliminates this confusion by requiring that agencies consider the impact of regulations even if they have a beneficial effect. Under this subsection, a regulatory flexibility analysis will be performed whenever the economic impacts of the proposed or final rule is significant without regard to whether the impacts are posi-

<sup>25</sup> Numerous parties, but especially federal agencies, opined that authorizing direct judicial challenges to RFA compliance would be akin to cracking open Pandora’s jar and prevent federal agencies from performing their regulatory functions. As the statistics on estimated number of RFA lawsuits demonstrate, the “sky-is-falling” clamor from federal agencies was nothing more than, as Macbeth might have put it, sound and fury signifying nothing. In short, the contentions of federal agencies are akin to Getrude’s sentiment in Hamlet about ladies doth protesting too much.

<sup>26</sup> Even though NEPA refers only to mitigation efforts of adverse environmental consequences, beneficial impacts on the environment from various alternatives of the major federal action are discussed in an environmental impact statement. This especially is true when an agency prepares an environmental impact statement for regulatory changes that have the consequence of lowering the amount of pollutants that can be released into the environment. Furthermore, CEQ regulations contemplate that a cost-benefit analysis might be relevant to the decisionmaking process. 40 C.F.R. § 1502.23.

<sup>27</sup> This conclusion is supported by classical welfare economic theory which teaches that given the selection of a particular policy choice, the one selected should have the greatest ratio of benefits to costs. Such a selection constitutes the most efficient resource allocation.

<sup>28</sup> Under definitions utilized by the Small Business Administration, small businesses represent more than 95% of the businesses in nearly all of the industrial classifications established by the North American Industrial Classification System. Similarly, there are far more governmental jurisdictions with populations under 50,000 than those with more than 50,000.



tive or negative. This amendment will require agencies to assess alternatives that either mitigate negative economic impacts or enhance positive economic effects. Finally, this subsection should be interpreted to prevent agencies from certifying proposed or final rules when the impacts are significant but beneficial.

*Subsection (d)—Rules Affecting Tribal Organizations*

Under the current definitions in the RFA, small governmental jurisdictions are those with populations of less than 50,000. The definition typically includes governmental bodies whose power is delegated by the state such as municipalities, water districts, etc. Given the intent of the original legislation to focus on the impact of regulations on entities that are creatures of state governments, it is unclear whether the term “governmental jurisdiction” includes tribal organizations. They are sovereign entities that have a special relationship with the federal government. *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). The federal government regularly imposes various and often significant regulatory requirements on tribal organizations from those related to the operation of tribal organizations to environmental controls. Despite the imposition of diverse regulatory requirements on tribal organizations, federal agencies fail to perform regulatory flexibility analyses on regulations affecting tribal organizations. The failure to comply with the RFA is particularly troubling because tribal organizations, like many small governments, do not have the infrastructure or resources to interpret and comply with federal regulatory requirements.

Given the adverse consequences on tribal organizations from the failure to comply with the RFA, section 2(d) adds tribal organizations to the list of small governmental entities that fall within the ambit of the RFA. Federal agencies would have to perform a regulatory flexibility analysis on any proposed or final rule if it had significant economic effects on a substantial number of small tribal organizations, i.e., one with a population of less than 50,000. The term tribal organization has the same meaning as that used in §4(l) of the Indian Self-Determination and Education Assistance Act.

*Subsection (e)—Inclusion of Land Management Plans*

The long-standing position of the Office of the Chief Counsel for Advocacy has been that land management plans developed by the United States Forest Service (Forest Service) and the Bureau of Land Management (BLM) are rules that are subject to analysis under the RFA.<sup>29</sup> GAO also reached the same conclusion.<sup>30</sup> Nevertheless, the Forest Service and BLM maintain that their resource management plans are not rules.<sup>31</sup> Given the potential con-

<sup>29</sup> Letter from Acting Chief Counsel for Advocacy Mark Hayward to Chief of the Forest Service, F. Dale Robertson at 17 (May 16, 1991) (copy of letter available from the Committee’s Chief Counsel). In the 1970s, Congress imposed requirements on BLM and the Forest Service to develop plans to guide and control the actions of the agencies in managing land under their jurisdiction. See *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 59 (2004) (describing land planning obligations of BLM); *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 729 (1998) (describing land management plans of Forest Service).

<sup>30</sup> GAO, Congressional Review Act: Application to the Tongass National Forest Land and Resource Plan 2 (1997) (T-OGC-97-54).

<sup>31</sup> The Forest Service gains some sustenance from the Supreme Court’s decision in *Ohio Forestry Ass’n*. In that case, the Court held that a challenge to a forest management plan’s logging schedule was not ripe because the logging set forth in the plan was subject to further review and revision, including a site specific analysis. The Court contrasted that with the immediacy

sequences on small entities (both businesses that rely on the resources of the public lands and the communities that border those lands), the Forest Service and BLM should assess the impact of these plans on small entities under the RFA.<sup>32</sup>

Section 2(e) of the bill eliminates any questions by requiring the Forest Service and BLM to comply with the RFA when they are developing changes to resource management plans. Compliance is limited to the development of plans and revisions or amendments made thereto but only to the extent that the revisions or amendments require preparation of an environmental impact statement. This limitation is appropriate because minor changes to resource management plans that are not considered major federal actions and are unlikely to impose a significant economic impact on a substantial number of small entities. In contradistinction, preparation of environmental impact statements demonstrate that the proposed changes to the management plan will be significant. Since BLM and the Forest Service already will have to collect economic data to prepare an adequate environmental impact statement, analysis under the RFA will not pose any undue burdens on the agencies. Finally, this limitation ensures that BLM and the Forest Service will conserve their analytical resources to focus on those plan changes that would have the greatest significance to small entities.

*Subsection (f)—Inclusion of Certain Interpretative Rules of the IRS*

The RFA only applies to those regulations that are required to be published pursuant to notice and comment rulemaking by either § 553 of the APA or some other statute. Section 553 of the APA exempts interpretative rules from the notice and comment requirements. The Internal Revenue Service (IRS) issues numerous regulations but styles them as interpretative. Prior to the enactment of the SBREFA, the IRS determined that it was not required to comply with the RFA because their regulations were interpretative and therefore need not be issued pursuant to notice and comment rulemaking.<sup>33</sup>

Congress attempted to rectify the situation with the enactment of SBREFA by requiring IRS compliance with the RFA for any interpretative rule issued that imposes a collection of information requirement on small entities. The IRS has interpreted this amendment by limiting its application, not to any regulation that imposes a collection of information (a term taken directly from the Paperwork Reduction Act), but only on those regulations that require

---

and impact of a final rule. 523 U.S. at 737. Given the fact that the Federal Land Management Policy Act uses language very similar to that requiring forest management plans, courts would likely use the Supreme Court's decision in *Ohio Forestry Ass'n* to reach a similar conclusion about BLM's land management plans. See text accompanying discussion of subsection 2(a), *supra*. Even though the legal consequences may not satisfy the ripeness requirement under Article III of the Constitution, forest management plans do guide the agency's management of the forests and thus will have economic and policy impacts that need to be weighed, including those on small businesses and small governmental jurisdictions.

<sup>32</sup> Both agencies typically develop environmental impact statements when making major modifications or developing new land management plans. As already noted, CEQ regulations, 40 C.F.R. § 1508.8 requires agencies to consider economic effects (both direct and indirect) in their environmental impact statements. As a result, no rational argument exists for concluding that analysis under the RFA would delay the development of a new plan or the adoption of a major modification to such plan.

<sup>33</sup> The fact that the IRS voluntarily seeks comment on proposed rules does not create a mandate that the agency is required to issue the regulations after notice and comment. Cf. *Chrysler Corp. v. Brown*, 441 U.S. 281, 306–10 (1979) (noting that agency going beyond requirements in statute does not create justiciable right in court).

taxpayers to complete a new, never-used form. At a hearing of the Committee on Small Business on May 1, 2003, then Assistant Secretary for Tax Policy, the Honorable Pamela F. Olson, testified that the Department of Treasury and the IRS do not consider that they impose any collection of information requirements; rather collection of information requirements, as well as tax burdens, are imposed by Congress rather than the agencies.<sup>34</sup> This has been a long-standing position of the Treasury Department and the IRS.

The Office of the Chief Counsel for Advocacy has criticized that jejune interpretation. The authors of H.R. 527 also consider the IRS interpretation to violate the letter and the prophylactic intent of SBREFA.<sup>35</sup> The RFA's definition of the term "collection of information" is identical to that used in the Paperwork Reduction Act. There is no evidence that Congress intended the term "collection of information" to mean something different in the RFA than it does in the Paperwork Reduction Act. Cf. *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932); *United States v. Blasini-Lluberas*, 169 F.3d 57, 63 (1st Cir. 1999) (same term in different statutes have same meaning unless legislative history demonstrates to the contrary). The evidence of identical treatment of the term in the two statutes is evidenced by Congress incorporating into the RFA the exact definition of the term "collection of information" as it is used in the Paperwork Reduction Act. In addition, it would be illogical to assume that Congress did not intend the term "collection of information" from the two statutes to be coextensive

<sup>34</sup>This position is contradicted by the Service's litigation position that its regulations should be given deference that is accorded only to those rules for which the agency intended to have the force and effect of law, i.e., thereby actually making law. E.g., *Landmark Legal Foundation v. IRS*, 267 F.3d 1132 (D.C. Cir. 2001); *Fior D'Italia v. United States*, 242 F.3d 844 (9th Cir. 2001); *Callaway v. Commissioner*, 231 F.3d 106 (2d Cir. 2000); *Snowa v. Commissioner*, 123 F.3d 90 (4th Cir. 1997).

Commentators have noted that the Internal Revenue Code is replete with straightforward delegations requiring the IRS to promulgate regulations. J. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 Geo. Wash. L. Rev. 35 (1995). For example, § 385 of the Code provides: "[t]he Secretary is authorized to prescribe such regulations as may be necessary . . . to determine whether an interest in a corporation is to be treated . . . as stock or indebtedness. . . ." In response to a question from then-Chairman Donald A. Manzullo (R-IL), Assistant Secretary Olson stated that any regulations implementing § 385 were interpretative. However, no one would doubt that if a corporation did not follow the regulations promulgated pursuant to that section, the Service could find the taxpayer to be in violation of the law. Similarly, if the taxpayer failed to comply with the regulations adopted by the Secretary concerning the time for depositing taxes set forth in regulations adopted by the IRS pursuant to § 6302, the taxpayer would find itself facing significant penalties. Nevertheless, the IRS maintains that the regulations are interpretative despite the fact that the Service is exercising its discretion when taxes are to be deposited or what constitutes indebtedness.

The Service's intransigence and aberrant interpretation of the APA is further placed in stark relief by comparison to similar statutes. For example, Title V, Subtitle A of Gramm-Leach-Bliley provides: "[t]he Federal Trade Commission [FTC], . . . may prescribe regulations clarifying or describing the types of institutions which shall be treated as financial institutions for purposes of this subchapter." 15 U.S.C. § 6827(4)(E). This permissive authority enables the FTC to include other institutions, including credit reporting agencies, as financial institutions, even though they were not enumerated in the definitions of financial institutions. This authority is no different than the supplementation that the IRS in §§ 385 and 6302 found to be interpretative. Yet the FTC argued and the court agreed that the regulations classifying credit reporting agencies as financial institutions were valid legislative regulations with the force and effect of law subject to Chevron deference. *Individual Services Reference Group v. FTC*, 145 F. Supp. 2d 6 (D.D.C. 2001). There is no rational distinction between the permissive authority in Gramm-Leach-Bliley and the permissive authority in the Internal Revenue Code. Thus, many of the regulations implementing the Code are legislative in nature and burdens are imposed by the Service.

Nevertheless, nothing in H.R. 527 attempts to make a priori determinations of what regulations should be considered legislative in nature. Nor do the authors of the bill attempt to resolve the murky administrative law problem of distinguishing between legislative and interpretative rules.

<sup>35</sup>OIRA is charged with interpreting and implementing the Paperwork Reduction Act. 44 U.S.C. § 3504. Thus, the IRS is not the implementing agency. As such, its interpretation of that Act is not entitled to any deference. *Professional Reactor Operator Soc'y v. NRC*, 939 F.2d 1047, 1051 (D.C. Cir. 1991).

because Congress was making a legislative modification designed to force IRS compliance with the RFA. Clearly, Congress, given the testimony in hearings on RFA compliance and reports of the Chief Counsel for Advocacy concerning IRS compliance, that it would adopt a definition of the term that authorizes the current crabbed interpretation of the term “collection of information.” Nor do the authors accept the principle that the IRS does not itself impose collection of information requirements not otherwise specified in statute.

Of all the agencies that have protested and contested the application of the RFA to rulemakings, the IRS remains the most recalcitrant. The Service believes that its obligations to collect revenue supersede any mandates from Congress that the IRS considers interference with its statutory mission. The Constitution vested legislative power with Congress not the IRS and the Service has no authority to ignore those dictates. Hearings before the Committee on Small Business, comments from the Office of the Chief Counsel for Advocacy, comments from the Office of the Chief Counsel for Advocacy, and directives from Presidents Bush and Obama have not changed the intransigent position of the IRS or Treasury Department on RFA compliance. H.R. 527 represents the congressional response to the obstinacy of the IRS.

Section 2(f) eliminates the IRS interpretation that it need only comply with the RFA if it is imposing a new form. The subsection also recognizes that the IRS believes that Congress is imposing the collection of information requirements. Therefore, the bill takes the approach that requires compliance with the RFA whenever the Service 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.

The modifications to § 603 should not be viewed by the IRS as limiting its economic analysis simply to the cost associated with the “collection of information.” Rather, the “collection of information” simply acts as a trigger for the broader assessment of economic effects of the proposed and final rule. This would include any increases or decreases in payment of taxes resulting from the rule.

The authors of the bill reject out of hand the IRS’ contention that the true economic effect of its regulations stem from the Internal Revenue Code. There are a number of instances in which the IRS argues that its regulations are substantive and deserve Chevron deference. E.g., *Bankers Life and Cas. Co. v. United States*, 142 F.3d 973, 978 (7th Cir.), cert. denied, 525 U.S. 961 (1998) (explicating cases in which IRS requested Chevron deference). Since the Supreme Court accords Chevron deference only to agency pronouncements which are intended to have the force and effect of law in order to fill statutory gaps or resolve legislative ambiguities, *United States v. Mead Corp.*, 533 U.S. 218, 230–31 (2001), the IRS cannot be heard to argue that its regulations are unable to create or eliminate the payment of taxes. To give a more recent example, the IRS decided to propose a regulation that would eliminate an exemption the agency itself created for special mobile machinery. 67 Fed. Reg. 38,913 (June 6, 2002). Eliminating the exemption would add hundreds of millions of dollars in tax burdens to companies not currently paying certain excise taxes. For the IRS to argue that the

economic effects of its regulations stem solely from the strictures of Congressional mandates is disingenuous.

Nor is it likely that compliance with the RFA will slow the issuance of IRS regulations. Taking the example of the special mobile machinery exemption, the IRS easily could have determined the total revenue that the Highway Trust Fund would receive from the elimination of the exemption based on the aggregate data it obtains when businesses file for excise tax rebates (this data also would provide an accurate estimate of the revenue impact of excise tax payments for vehicles currently exempt). The IRS should not be exempt from this basic requirement of rulemaking (understanding the scope of the problem and the effect of the proposed solution). Obtaining similar aggregate data to comply with the RFA should not slow the development of regulations.<sup>36</sup> In fact, without this data, the IRS could not make sensible estimates of the amount of revenue gain or loss that would occur with a particular regulatory change. The argument that compliance with the RFA would slow regulatory development is a red herring and certainly is an inadequate rationale for supporting the current IRS practice with respect to RFA compliance.

This conclusion is bolstered by the testimony of Frank Swain at the Committee's May 1, 2003 hearing on RFA compliance by the IRS in the 108th Congress. At that hearing, Mr. Swain revealed that the Service had in its possession a study it requested from the Federal Highway Administration on the economic impact of removing the special mobile machinery regulation. The study by the Federal Highway Administration was dated 1999 and the IRS did not promulgate a proposed rule on eliminating the exemption until the summer of 2002, nearly three years later. Thus, the assertion that the completion of regulatory analyses will slow the development of regulations is, at best, specious.

The RFA adopted the definitions in the Paperwork Reduction Act for the terms "collection of information" and "recordkeeping requirement." Despite the identical nature of the definitions in the two pieces of legislation, some agencies, particularly the IRS, might argue in court the use of the terms in the two statutes have different meanings. See *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) (noting that Congress may use similar terms in different statutes to have different meanings).

The authors of SBREFA, in 1996, always intended that the terms utilized in the Paperwork Reduction Act have the same meaning as that in the RFA. To eliminate potential confusion, § 2(f)(2–3) repeals the definitions in § 601(7–8) and simply cross-references to the relevant portions of the Paperwork Reduction Act as set forth in title 44 of the United States Code. This eliminates any possibility that a court would apply a different interpretation to the RFA's use of the terms "collection of information" and "recordkeeping requirement." Although used for slightly different pur-

<sup>36</sup>To the extent that the IRS needs to promulgate a regulation in an emergency situation, it can find good cause to forgo rulemaking and issue its regulation without analysis under the RFA. This exemption should be used sparingly by the Service because compliance with statutory mandates or the agency's own inaction fails to meet the "good cause" exemption in the APA. *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982); *Nat'l Ass'n of Farmworkers Organizations v. Marshall*, 628 F.2d 604, 622 (D.C. Cir. 1980). In fact, the Ninth Circuit has determined that notice and comment rulemaking can be conducted in situations in which an agency is required to issue rules on a weekly basis; something the IRS does not have to do. *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1486–87 (9th Cir.), cert. denied, 506 U.S. 999 (1992).

poses,<sup>37</sup> the palliative nature of both statutes, with respect to burdens on regulated entities, clearly justifies the application of the *in pari passu* canon of statutory construction<sup>38</sup> to the terms “collection of information” and “recordkeeping requirement.”

*Subsection (g)—Definition of Small Organization*

As already noted, the RFA covers small entities other than small businesses. The RFA defines a small organization as “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. . . .” 5 U.S.C. § 601(4). That definition fundamentally makes no sense because there is no rational way to determine a not-for-profit’s independence or economic dominance. The definition raises a number of practical questions. For example, on a local level, a rural electric cooperative might be considered dominant in the sense that it is the only provider of electric service in a rural area. However, on a national basis,<sup>39</sup> is the rural electric cooperative dominant? Should the electric cooperative be compared with other electric cooperatives or with all other businesses in the electric utility industry? While some industries may have for-profit analogs, other small entities, such as charitable institutions or trade associations that can be adversely affected by federal regulations, do not. Furthermore, affiliation standards that the SBA uses in its size determinations may not be applicable in the not-for-profit sector, such as whether a trade association should be affiliated, for size determination purposes, with its members or whether a charitable institution is independently owned and operated by its donors.

In a different context, the courts have grappled with the notion of independence of not-for-profit entities. The Equal Access to Justice Act (EAJA) permits certain small entities to recover their legal fees should they prevail in litigation against the federal government. EAJA classifies eligible parties as one that does not have a net worth in excess of \$7,000,000 or more than 500 employees. Under EAJA, the question then becomes whether an entity requesting attorneys fees from the government actually fits within its zone of protection. Courts, in trying to answer this question, have wrestled with the concept of affiliation by assessing whether the small entity is affiliated with larger enterprises in a manner that defeats the purpose of the EAJA—ensuring that only small entities that do not have the financial wherewithal to sue the federal government receive attorneys fees if they prevail in litigation.

One interpretation, adopted by the Sixth Circuit, would require complete aggregation of members’ net worth and employees to determine EAJA eligibility.<sup>40</sup> The second interpretation, proffered by the federal government on a frequent basis, is that a trade association should be ineligible if any of its members exceed the net worth

<sup>37</sup>In the Paperwork Reduction Act, the terms trigger a mandatory review of the paperwork burdens imposed by the government on citizens. In the RFA, it triggers a mandatory review of the economic burdens imposed by the IRS on small entities. Both statutes, therefore, are designed to force agencies to examine ways to reduce burdens on the regulated community.

<sup>38</sup>See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 691 (1983) (applying *in pari passu* construction of various federal attorneys fee shifting statutes).

<sup>39</sup>The Small Business Administrator determines size based on an examination of small businesses on a national basis. 13 CFR § 121.102(b). H.R. 585 addresses the issue of size determinations for purposes of the RFA and other regulatory matters that fall outside the scope of the Small Business Act and Small Business Investment Act of 1958. That legislation will be discussed in Part III of this memorandum.

<sup>40</sup>*National Truck Equipment Ass’n v. NHTSA*, 972 F.2d 669, 674 (6th Cir. 1992).

and employee standards.<sup>41</sup> This interpretation of EAJA has been rejected by the D.C., Fifth, and Seventh Circuits.<sup>42</sup> These circuits determined that EAJA eligibility should be calculated by looking solely at the organization that brings the litigation, its net worth, and number of employees.

Given the prophylactic nature of both the EAJA and the RFA with respect to small entities, it would make sense to apply the interpretations of the EAJA to the RFA. Thus, one definition of “small organization” would be to adopt the definition of small entity used by the Sixth Circuit. However, that approach is incompatible with the purposes of the RFA because the capabilities of a small organization to comply with regulations is not based on the resources of its members but rather on the number of employees and net worth the organization controls.<sup>43</sup> Since the small organization does not control or have direct access to the net worth of its members, it should be judged solely on its resources and not those of its members or donors.

Section 2(g) adopts a two-prong approach to the definition of small entity. First, it recognizes that for many not-for-profit organizations there are small for-profit analogs. If there is an existing Small Business Administration size standard for a small business, the agency should use that definition for small organizations. For example, the size standard for electric utilities is one that generates, transmits, or distributes annually 4 million megawatt hours and a small not-for-profit electric cooperative would be one that generates, transmits or distributes annually 4 million megawatt hours. If an organization does not have an equivalent size standard under Small Business Administration regulations, then the size of the entity shall be that under the EAJA—net worth of \$7,000,000 and not more than 500 employees. Net worth and number of employees should be calculated by examining the not-for-profit organization without aggregating or affiliating the net worth or employees of any member or donor.

Section 2(g) also provides a definition of small labor organization since they have unique characteristics that do not easily fall into any other category of small organization as used in the RFA or H.R. 527. Agencies do not examine the impact of their regulations on local chapters of national and international labor unions. As with other small organizations, local chapters may not be able to rely on the resources of their parent organizations for compliance assistance. Therefore, § 2(g) deems that a local chapter of a labor union shall be a small organization for purposes of compliance with the RFA without regard to its affiliation with a national or international labor organization. As a result, if the Department of Labor imposes a regulation on the operation of a labor union, the Department will have to consider its impact on these local chapters even if they are considered to be affiliated with a national or inter-

<sup>41</sup> See Comment, *Corporate Goliaths in the Costume of David: The Question of Association Aggregation under the Equal Access to Justice Act—Should the Whole Be Greater Than Its Parts?* 26 Fla. St. U.L. Rev. 151 (collecting cases in which federal government argued for aggregation).

<sup>42</sup> *National Ass’n of Manufacturers v. DOL*, 159 F.3d 597, 602 (D.C. Cir. 1998) (discussing circuit split).

<sup>43</sup> While there is some facial appeal to the concept that a small organization could seek assistance from its members (probably through the payment of higher dues), there is no guarantee that it would be able to do so. And even if it did, depending on the makeup of the organization, that could impose additional burdens on small businesses that might be members of the organization which undercuts the palliative purpose of the RFA.

national union. However, the agency need not consider the impact of the regulation on individual members of the local labor union since it is the entity (not the members) subject to the regulation.<sup>44</sup>

Finally, § 3(g) authorizes an agency to adopt a different definition of small organization after the opportunity for notice and comment to the extent such different definition is appropriate. The subsection also requires consultation with the Office of the Chief Counsel for Advocacy. Essentially, the process for defining small organizations would be identical to that already in the RFA for small businesses under § 601(3).

### *Section 3. Requirements Providing for More Detailed Analyses*

Senator Culver, in developing the concept for the RFA, was attempting to mirror the type of in-depth analyses that agencies performed under NEPA when assessing the impact of major federal actions that would have a significant impact on the environment. The language of the two statutes are sufficiently parallel to the point that it makes sense to draw a conclusion that the RFA creates a requirement for an economic impact statement for federal rules that will have a significant economic impact on a substantial number of small entities.

This thesis has been accepted by the courts. In *Associated Fisheries of Maine v. Daley*, 127 F.3d 104 (1st Cir. 1997), Judge Selya, writing for the court, stated:

We think a useful parallel can be drawn between RFA § 604 and the National Environmental Policy Act, which furthers a similar objective by requiring the preparation of an environmental impact statement (EIS). . . . The EIS requirement is meant to inform the agency and the public about potential alternatives prior to a final decision on the fate of a particular project or rule. . . . Recognizing analogous objectives of the two acts. . . .

*Id.* at 114. Judge Selya noted that the analogy seemed fair since the EIS requires a detailed statement while the RFA only requires a statement. The rectitude of Judge Selya's reading by D.C. Circuit adoption of the parallelism finding.<sup>45</sup>

NEPA's success in changing agency culture did not occur immediately after enactment because agencies were initially loath to prepare environmental impact statements and upset embedded constituencies that benefitted from various federal projects. Activists who disagreed with the need for a particular project used NEPA to stop the projects from going forward. While the Supreme Court ultimately determined that NEPA is not a substantive statute, see *Stryckers Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980), the litigation losses by the government forced agencies to draft better environmental impact statements. The litigation reinforced the underlying principle of NEPA that "important effects will not be overlooked or underestimated only to be discovered after the resources have been committed or the die otherwise

<sup>44</sup>Nor would the agency have to consider the indirect effects on the individual members since those individual members are not an entity, i.e., small business, small non-profit, or small governmental jurisdiction.

<sup>45</sup>*National Ass'n of Homebuilders v. United States Army Corps of Eng'rs*, 417 F.3d 1272, 1286 (D.C. Cir. 2005).



cast.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989).

After a number of hearings before various House and Senate Committees, Congress determined that agencies were ignoring their responsibilities under the RFA. The solution recommended by witnesses and ultimately adopted by Congress was judicial review of agency compliance with the RFA. SBREFA was premised on the threat of judicial review creating an atmosphere that would force agencies to comply with the RFA in the same manner and with the same completeness that agencies considered environmental impacts to avoid challenges of their compliance with NEPA. In other words, the authors of SBREFA expected that important economic consequences to small entities would not be overlooked prior to an agency’s commitment to a specific regulatory approach. The end-result is not analysis for analysis’ sake, but rather more rational rulemaking as dictated by the APA.

The imposition of judicial review has not had the salutary effect that Congress expected. While it has been effective in forcing agencies to perform regulatory flexibility analyses rather than certifications,<sup>46</sup> the majority of analyses are perfunctory. The agencies comply with the bare minimum specifications without really addressing the important issues—impacts on small entities and alternatives to minimize those impacts. However, this minimalist effort appears to satisfy the standard of demonstrating a reasonable effort to comply. A cursory look at a court’s analysis of the adequacy of an environmental impact statement demonstrates the distinction between a statement pursuant to the RFA and detailed statement required by NEPA.

Judicial review of agency compliance with NEPA is designed to ensure that agencies take a “hard look” at environmental consequences. *Robertson*, 490 U.S. at 350, citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). In turn, courts carefully scrutinize the environmental impact statement to determine whether the agency has addressed each element of the statement:<sup>47</sup> the environmental impact of the proposed action; any unavoidable adverse environmental consequences should the proposed action be implemented; alternatives to the proposed action; relationship between short and long-term uses of the environment; and commitment of any irreversible and irretrievable commitments of resources should the proposal be implemented. 42 U.S.C. § 4332(2)(C). Courts do not look at the statement as a whole and determine whether the agency made a reasonable effort to address the requirements of NEPA. Instead, the courts examine, in detail, each requirement to determine whether the statement adequately addresses that element. E.g., *Colorado Env’tl Coalition v. Dombeck*, 185 F.3d 1162, 1171–76 (10th Cir. 1999); *City of Carmel-by-the-Sea v. United States DOT*, 123 F.3d 1142, 1150–60 (9th Cir. 1997). The close scrutiny

<sup>46</sup> Courts have found violations of the RFA when an agency incorrectly certified a rule rather than preparing a regulatory flexibility analysis. E.g., *Harland Land Co. v. USDA*, 186 F. Supp. 2d 1076, 1097 (E.D. Cal. 2001); *North Carolina Fisheries Ass’n v. Daley*, 16 F. Supp. 2d 647, 652 (E.D. Va. 1997).

<sup>47</sup> The review is an offshoot of the requirement that agencies must consider all relevant statutory factors in order to satisfy the rational decisionmaking standard of the APA. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 418–19 (1971).

accorded to environmental impact statements by the courts then ensures significant consideration of environmental consequences.

There can be little doubt that the reasonableness standard is appropriate for judicial review of regulatory flexibility analyses. However, the absence of the “detailed” statement requirement has led courts to provide only a cursory review of compliance with the requirements of § 604 of the RFA. The limited scope of the review to meet the standard of reasonableness has enabled agencies to avoid taking a hard look at the economic consequences of their proposed and final rules. Carrying the distinction found by Judge Selya in *Associated Fisheries of Maine*, to its logical conclusion suggests that the difference in the scrutiny between the two statutes rests on the distinction between a “statement” and a “detailed statement.”

Section 3 modifies the requirements for preparing a regulatory flexibility analysis in order to ensure that agencies will give the same “hard look” to economic consequences that agencies already give to environmental effects pursuant to NEPA. Adoption of this stronger standard does not transform the RFA into a decision-forcing statute. Once the agency has taken the “hard look” at the economic consequences of its rulemaking action, application of the rational rulemaking standards inherent in the APA would strongly suggest that the agency take those consequences into account when crafting a final rule. However, nothing in the RFA mandates a particular regulatory outcome and nothing in H.R. 527 changes that abecedarian tenet of the RFA. The agency is at liberty to determine that other values outweigh the economic burdens imposed on small entities. Cf. *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–28 (1980); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978) (holding that NEPA does not require agency to select least environmentally damaging alternative).

#### *Subsection (a)—IRFAs*

Section 3(a) amends § 603 by requiring the initial regulatory flexibility analysis (IRFA) to contain a “detailed statement” rather than a statement. This should lead agencies to prepare IRFAs with the same detail and care that are currently required for draft environmental impact statements.

Currently, an agency, in preparing an IRFA, must provide: (1) the rationale for undertaking the proposed rule; (2) a succinct statement of the objectives and legal basis for the rule; (3) a description and estimate, where practicable, of the number of small entities affected by the proposed rule; (4) a description of the reporting and recordkeeping requirements along with an estimate of the skills needed to comply with such requirements; (5) an identification to the extent practicable of overlapping or duplicative federal rules. 5 U.S.C. § 603(b). In addition to these requirements of subsection (b), the IRFA also must contain alternatives that will minimize adverse or maximize beneficial effects of the proposed rule. *Id.* at § 603(c).<sup>48</sup> H.R. 527 makes a number of changes and additions to these analytical requirements as will be outlined below.

H.R. 527 strikes the term “succinct” from § 603(b)(2) to avoid possible confusion between an overall requirement of a detailed state-

<sup>48</sup> Nothing in H.R. 527 affects the requirements in the IRFA under § 603(c).

ment and the use of a “succinct” statement of the objectives of the rule. Federal agencies will not have to create something new for this statement. Rather, they will be able to simply take the summary of the rule that is prepared for publication in the Federal Register and add the legal basis (if not already incorporated in the summary) and republish it in the IRFA.<sup>49</sup>

Section 603(b)(3) of the RFA currently requires the IRFA contain, when feasible, a description and an estimate of the number of small entities affected by the proposed rule. This requirement provides a substantial loophole for agencies to comply with the RFA. The Office of Advocacy calculates that there are more than 25 million small businesses in the United States based on aggregate data from the IRS. Size standards established by the Small Business Administration demonstrate that more than 95% of the businesses in each industrial classification are small. Thus, most entities subject to any regulation are likely to be small. An agency that fails to provide a relatively accurate estimate of the number of small entities affected by a proposed rule, cannot undertake rational rule-making because the agency has no idea of the scope of the affected universe. The failure to provide an accurate estimate of the number of small entities affected would be akin to a federal agency stating that it has no way to determine the environmental consequences of building a dam on a river and therefore cannot complete an environmental impact statement. Such a rationale would not be accepted by any court and agencies should not be able to shirk their duty to understand the scope of the regulated universe simply because they might have to gather actual data on the number of small entities. As a result, § 3(a) strikes the term “where feasible” in its re-draft of § 603(b)(3).<sup>50</sup>

The current requirement for completion of an IRFA requires the agency to identify, to the extent practicable, all relevant duplicative, overlapping, and conflicting rules. 5 U.S.C. § 603(b)(5). As with the requirement for estimating the number of small entities, the proviso “to the extent practicable” creates a loophole that allows the agency to prepare an irrational rule. Two classic examples elucidate the problem. The ergonomics standard established by the Department of Labor in 2000 (and subsequently overturned by a joint resolution pursuant to the Congressional Review Act) mandated that businesses develop plans to eliminate musculoskeletal disorders. One way to perform this task in skilled nursing facilities is to purchase mechanical lifts for patients. However, regulations promulgated by the Centers for Medicare and Medicaid Services (CMS) permit a patient to reject being lifted by mechanical device. Nothing in the final ergonomics rule or the final regulatory flexibility analysis (FRFA) addresses this potential conflict because the

<sup>49</sup>This also comports with the change made by the Small Business Jobs Act of 2010 in which the references to the term “succinct” were deleted from § 604. Pub. L. No. 111–240, § 1601, 124 Stat. 2504, 2551.

<sup>50</sup>An agency might not be able to estimate the number of small entities when the agency is preparing a rule that opens up existing markets to new entrants or creates a new market. In such circumstances, there are no statistics on the number of small entities in that market. In such circumstances, it is probable that the agency, in preparing the proposed rule, has some sense of the number of potential new entrants from discussions with industry. Of course, such estimates will not have the precision that an agency should have when proposing a modification to an existing rule or imposing a new rule on a well-established industry. Nevertheless, an inaccurate estimate (with appropriate caveats concerning the lack of precision) is better than no estimate. Furthermore, the agency should recognize the lack of confidence in the estimate and make a specific request in its notice of proposed rulemaking for data on the number of small entities.

Department of Labor never identified the CMS rules as creating a problem. Another example involves the requirement for notifying communities of underground storage facilities pursuant to § 312/313 of the Emergency Planning and Community Right to Know Act. EPA required gas stations to notify EPA that they had underground storage tanks with gasoline so EPA could provide that information to local communities. However, this information already was being provided to local fire departments under other regulatory regimes. The Office of the Chief Counsel for Advocacy had to intervene before EPA redressed the duplicative reporting requirement. Had EPA actually made the effort to comply with the RFA, it would have identified the duplication and avoided promulgation of an additional reporting burden on small businesses.

It is difficult to understand how an agency can draft rational rules without knowing how its proposed or final regulatory solution will mesh with other existing federal requirements imposed by itself or other agencies. While the Office of Information and Regulatory Affairs in the Office of Management and Budget (OIRA) can play a role in identifying these overlaps and conflicts, the primary role must be the agency drafting the regulation because it is the agency that has the obligation to create a rational rule—not OIRA or the Office of Advocacy. Section 3(a) resolves this problem by striking the “extent practicable” from the existing § 603(b)(5). Thus, an agency, in drafting proposed regulations, will have to identify duplicative, overlapping, and conflicting regulations. Obviously, agencies will need to start an interagency dialog in order to identify duplicative, overlapping, or inconsistent regulatory requirements. This should improve the rationality of agency rulemaking and prevent the tunnel-vision (the agency has to promulgate this rule, so why concern itself with what other agencies have done) that federal regulators currently wear in implementing the directives of Congress. The new requirement in the IRFA also should assist OIRA in carrying out its regulatory coordination function set forth in E.O. 12,866.

Section 3(a) adds a new requirement for preparation of an IRFA. One of the biggest problems that small entities face is not the imposition of any one particular regulatory requirement; rather it is the accumulation of burdens from many regulatory requirements from all federal agencies that can have a significant effect on the capital available for small businesses to expand their enterprises. Any assessment of the impact of a rule on small entities, particularly small businesses, cannot be even reasonably accurate without understanding how the proposed rule interplays with the already extant burden on the entities subject to the regulation. To be sure, this assessment will be difficult. Section 3(a) adds a new paragraph (6) to § 603(b) that requires an evaluation of the cumulative impact or an explanation why such cumulative impact is not possible. It is likely that an agency would have to inquire with OIRA, the Office of Advocacy and other federal agencies to compile the cumulative economic impact data. As with other provisions of the RFA, as amended by H.R. 527, nothing in the cumulative impact evaluation prevents an agency from determining that other factors are more significant than the costs imposed on small entities and continuing with the rulemaking process. Identification will provide the agency, the affected public, and Congress with a better assessment

of the implementation of statutory mandates. Furthermore, the identification may help the agency develop alternatives that impose less cumulative impact while still achieving an agency's statutory objective.

While the RFA requires identification of impacts on small entities, not all small entities are necessarily equally affected by a proposed rule. For example, many of the marketing orders established by the United States Department of Agriculture (USDA) pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608c,<sup>51</sup> will have different effects on producers, handlers (essentially wholesalers), and processors. Even within one class of growers, the regulations implementing marketing orders may have disparate impacts between independent growers and those associated with agricultural cooperatives. This simply represents one example of numerous regulations in which a proposed rule might have very different consequences on different classes of small businesses. In fact, the Office of the Chief Counsel for Advocacy criticized USDA for conflating various impacts of its rules on marketing orders to find that the proposed rule would not have a significant economic impact on a substantial number of small entities even though a class of small businesses would be severely harmed. To rectify this situation and force agencies to better understand the potential consequences of their proposed rules, § 3(a) of H.R. 527 adds a new paragraph (7) to § 603(b) of the RFA by requiring agencies to describe any disproportionate impact on small businesses<sup>52</sup> or a specific class of small businesses.

*Subsection (b)—FRFAs*

Section 3(b) amends the requirements for completing a FRFA. The changes made by the Committee to § 604 ensure the development of a detailed statement that forces agencies to give a “hard look” at the final rule stage to the economic consequences of the final rule. The bill adds the term “detailed” to the statement requirement where currently only a statement is required.<sup>53</sup> Use of the detailed statement in the preparation of a FRFA does not mandate any particular outcome in an agency rulemaking. Rather, it simply assures that an agency, the public, Congress, and the courts fully understand the scope and impact of a final rule on small entities. Furthermore, § 3(b) requires that the same seven analytical elements required in the IRFA by the amended § 603(b) be incorporated into the FRFA mandated by the amended § 604(b).

The changes made by § 3(b) also comport with the parallelism between the RFA and NEPA as noted by the First and D.C. Circuits.

<sup>51</sup>A detailed discussion of marketing orders and the Regulatory Flexibility Act can be found in Pineles, Marketing Orders and the Administrative Process: Fitting Round Fruit into Square Baskets, 5 San Joaquin Ag. L. Rev. 89 (1995).

<sup>52</sup>The classic example of this situation occurred when the EPA was trying to determine whether to control volatile organic chemicals associated with filling gasoline tanks in cars. Evaporation of volatile organic chemicals from gasoline is a major contributor to ground level ozone and smog. There are two primary mechanisms for controlling such evaporation—modification of gasoline tanks in cars or by reconfiguring the fuel pump to prevent the escape of gasoline vapors as an automobile's gas tank is being filled. Modification of the fuel pump would disproportionately fall on small businesses while modifying the gas tank in cars would fall on big businesses. Although EPA ultimately selected the reconfiguration of gasoline station pumps (ergo the reason for the rubber hoses on the nozzles of gas pumps), had it needed to specifically identify the disproportionate impact on small businesses, it might have selected a different regulatory approach.

<sup>53</sup>In addition to removing the term “succinct” as already noted, see note 48, *supra*, the Small Business Jobs Act of 2010 also removed the term “summary” from § 604 of the RFA. Pub. L. No. 111-240, § 1601, 124 Stat. 2504, 2551.

The expectation is that the agencies, after the regulations issued by the Chief Counsel pursuant to § 4 of H.R. 527, and the courts will interpret in the same manner the term “detailed statement” currently contained in NEPA. The FRFA should evidence the agency’s hard look at the economic consequences of the final rule and provide appropriate grist for the mill of judicial review.

Current law mandates the agency summarize, in the FRFA, the comments received in response to an IRFA. While it is true that all IRFAs lead to the preparation of a FRFA, not all FRFAs are developed in response to an IRFA. An agency may initially certify a rule pursuant to § 605(b) and then receive sufficient comment that the rule will have a significant economic impact on a substantial number of small entities. The agency then would prepare a FRFA. However, the agency would be under no obligation to summarize the comments that it received in response to the certification in the FRFA. This simply represents an oversight by the authors of the RFA and SBREFA. An adequate FRFA should entail the summarization of comments received in response to a certification at the proposed rule stage. The process of summarization assists the Congress, the courts, and the regulated community in identifying those cost considerations that the agency failed to recognize at the proposed rule stage. The simple step of making an affirmative identification will help agencies perform better cost assessments at the initial stage of rulemaking and avoid unnecessary delays in the development of a final rule. Section 3(b) rectifies this problem by requiring the summarization of comments on a certification made at the proposed rule stage.

Current requirements in the RFA mandate federal agencies to publish the FRFA in the Federal Register or, in lieu thereof, a summary with information specifying where an individual can obtain the full analysis. Since the enactment of SBREFA in 1996, numerous initiatives within the government have utilized the explosive growth of the Internet and Internet-based communication. Many agencies participate in the general website for regulatory matters, *www.regulations.gov*. Agencies that do not participate in that website (many of the independent agencies, such as the Commodities Futures Trading Commission or the Securities and Exchange Commission) have their own electronic interfaces for accepting and publishing regulatory material on the web. Continued growth of electronic availability of rulemaking documents and dockets is beneficial for both small entities and federal agencies. Since the RFA has not been amended since the growth of Internet-based rulemaking access, § 3(b) updates the publication requirements for the FRFA by requiring that it be placed on the agency website. Publication on the agency’s website and publication of the link to a website in the Federal Register notice of the final rule does not obviate the obligation that currently exists in the RFA to publish the FRFA or summary thereof in the Federal Register along with the final rule.<sup>54</sup>

*Subsection (c)—Cross References to Other Analyses*

In an effort to avoid duplication, federal agencies can use other analyses to meet the requirements of the RFA but only if that anal-

<sup>54</sup> H.R. 527 does not address whether publication on *www.regulations.gov* satisfies the requirements of the amended § 604. That issue is best left to the regulations that will be developed by the Office of the Chief Counsel for Advocacy.

ysis satisfies the requirements of the RFA. For example, a federal agency can use an environmental impact statement to the extent that analysis assesses alternatives which would be less burdensome or more beneficial to small entities. See *Associated Fisheries of Maine*, 127 F.3d at 115. Utilization of existing analyses is beneficial by reducing the work done by the agencies and the documentation that small entities must review during the rulemaking process. Unfortunately, agencies fail to provide adequate cross-references to these other documents. For example, some agencies will state in their IRFA or FRFA that alternatives were examined to reduce the adverse consequences and a discussion can be found in the statement of basis and purpose. Generic cross-references then force interested small entities to wade through dozens, if not hundreds, of pages in the Federal Register or on an agency website to determine whether the IRFA or FRFA was adequate. The indefiniteness of the cross-references is especially problematic at the proposed rule stage because the inability to quickly identify alternatives will tend to dissuade small entities from filing comments. Section 3(c) resolves this problem by mandating that agencies make sufficiently specific cross-references to other analyses that satisfy the requirements of the IRFA or FRFA. The expectation is that the specificity must be sufficient so that a small entity can turn directly to the part of the cross-referenced analysis that addresses the component of the IRFA or FRFA.

*Subsection (d)—Certifications*

The RFA authorizes an agency head or delegatee to certify that a proposed rule will not have a significant economic impact on a substantial number of small entities. Certification obviates the need for preparation of an IRFA or FRFA<sup>55</sup> in the same way that a finding of no significant environmental impact (FONSI) eliminates an agency's preparation of an environmental impact statement.<sup>56</sup> After the enactment of the RFA in 1980, agencies frequently issued boilerplate certifications that merely reiterated the language of §605(b).<sup>57</sup> Small entities had no way of ascertaining why these certifications were issued and courts were prohibited from even examining the certification as part of the rulemaking record.<sup>58</sup>

Congress attempted to rectify the problem of boilerplate certifications with the enactment of SBREFA. Since July 1, 1996, agencies are required to provide a factual basis for the certification. This amendment has not improved agency certifications. Many still reiterate the statutory language without further exegesis. Some refer back to other material in the statement of basis and purpose without identifying the cross-referenced material. Still others provide some factual basis for the certification. No agency provides the detail in its certification that can be found in an environmental as-

<sup>55</sup> Preparation of a certification at the proposed rule stage does not foreclose an agency from preparing a FRFA at the final rule stage due to comments filed after the proposed rule was published. The change in the agency position cannot be considered a failure; rather it demonstrates the principle of agency edification by the public inherent in the notice and comment process.

<sup>56</sup> 40 C.F.R. §1508.13; see *Grand Canyon Trust v. FAA*, 290 F.3d 339, 342 (D.C. Cir. 2002).

<sup>57</sup> Chief Counsel for Advocacy, United States Small Business Administration, Annual Report of the Chief Counsel for Advocacy on the Implementation of the Regulatory Flexibility Act: Calendar Year 1993 15–16 (1994).

<sup>58</sup> *Lehigh Valley Farmers v. Block*, 640 F. Supp. 1497, 1520 (E.D. Pa. 1986) (district court determination on RFA was not addressed on appeal).

assessment accompanying a FONSI. Given the fact that the RFA parallels NEPA (as already noted), it is appropriate for agencies to supply in their certifications, the same detail that accompanies an environmental assessment. Furthermore, requiring greater specificity and detail in the certification will force the agency to develop a better assessment of the potential economic effects on small entities before they publish a proposed rule. This should lead to improved agency decisionmaking.

Section 3(d) amends § 605(b) by requiring the preparation of a detailed statement supporting the certification decision. The section also mandates that the agency provide the legal rationale for any certification as well as a factual basis. This requirement is unfortunately necessary because agencies frequently certify proposed and final rules based on the inapplicability of the RFA to the rulemaking process in the first instance. For example, agencies often certify a rule in which the agency has forgone notice and comment under the APA. The Committee believes that it is appropriate for an agency to explain to the both the small entity community and any reviewing court these legal conclusions about the basis for its decision.<sup>59</sup> If the FRFA is to be reviewed under the same standard as a final EIS prepared pursuant to NEPA, then the logical conclusion to the statutes' parallelism is for the certification under the RFA to be reviewed by a court under the same scrutiny that it would apply to a FONSI under NEPA.

*Subsection (e)—Quantification Requirement*

Section 3(e) modifies the existing requirements in § 607 of the RFA concerning the quantification of effects on small entities. Agencies are required to provide a numerical or descriptive analysis of the effects on small entities. Rational rulemaking requires an agency to understand the scope of the regulated community, the costs currently faced by those entities, and the economic consequences of any regulatory action. Under § 607, agencies can avoid developing sound numerical data and can provide general descriptions, such as the regulation will increase costs to small entities. The absence of objective numerical data makes it more difficult for small entities to assess the significance of any regulatory change. Agencies should make every effort to obtain objective data supporting a regulatory change including the estimated consequences to small entities.<sup>60</sup> Section 3(e) amends § 607 by making quantification of impacts the default in developing an assessment of impacts on small entities.

There may be circumstances in which it is difficult, if not impossible, to provide accurate quantification of a rule's impact on small entities. For example, if a regulation is opening a new market, the agency may not be able to determine the universe of potential mar-

<sup>59</sup>Technically, it would be incorrect for the agency to certify a rule for which notice and comment is not required because the RFA trigger is notice and comment. Nevertheless, many agencies, out of an abundance of caution, certify these rules. If they are going to do so, then the agencies should be required to explain what they are doing and why they are doing it.

<sup>60</sup>The amendment set forth in § 3(e) is further supported by the enactment in 2000 of the Data Quality Act and that Act's requirement that agencies provide accurate data in all of their functions, including rulemaking. The Data Quality Act requires the Office of Management and Budget to issue guidelines to all agencies ensuring that the soundness of the data they present to the public. 44 U.S.C. § 3516 note.



ket entrants. The agency then should not be forced to develop highly suspect numerical estimates of the impacts.<sup>61</sup>

New subsection (b) of § 607 of the RFA authorizes agencies to provide a more general description of the impacts on small entities if quantification is not practicable or reliable. The reliability factor in new subsection (b) should incorporate the standards of data established by each agency pursuant to the Data Quality Act. If an agency determines that it is unable to provide a quantification and still meet the criteria of the Data Quality Act, the agency shall provide a detailed statement explaining why it cannot provide the quantification. Ultimately, the quality and accuracy of the data will be the subject of regulations drafted by the Office of the Chief Counsel for Advocacy.

*Section. 4. Repeal of waiver authority and additional powers of Chief Counsel*

This section repeals the provision in § 608 authorizing the head of an agency to waive completion of a FRFA for up to 180 days if the agency cannot complete the FRFA by the time the rule needs to be published. In lieu of that waiver, H.R. 527 grants additional powers to the Office of the Chief Counsel for Advocacy.

*Repeal of Waiver Authority*

The RFA allows an agency to waive the requirements for an IRFA and delay for up to 180 days the preparation of a FRFA. This provision is unnecessary. Notice and comment rulemaking is not required if the agency, for good cause finds it impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. § 553(b)(B). The courts have interpreted this provision as authorizing an agency to forgo notice and comment rulemaking in true emergencies in which delayed promulgation would do real harm.<sup>62</sup> An agency that establishes good cause to forgo notice and comment need not comply with the RFA because the analytical requirements are only triggered if the rule must be promulgated pursuant to notice and comment rulemaking. The conditions under which a waiver would issue under § 608 of the RFA also satisfies the impracticable, unnecessary, or contrary to the public interest standard of § 553(b)(B) of the APA. Since agencies would not be required to comply with the RFA under such circumstances no good rationale exist to have such a waiver provision.

*Revised § 608—Additional Powers for the Office of the Chief Counsel for Advocacy*

In two hearings on the Office of Advocacy, the Committee received testimony suggesting that the Chief Counsel for Advocacy's findings on compliance with the RFA should be accorded some type

<sup>61</sup> The inaccurate estimates would be subject to challenge under the Data Quality Act in any event. If the quantifiable effects are sufficiently suspect simply due to the paucity of available data, it makes no logical sense for the agency to quantify such effects only to have them challenged under the Data Quality Act and adds no benefit to an agency's rulemaking, its analyses under the RFA or to the small entities.

<sup>62</sup> E.g., *NRDC v. Evans*, 316 F.3d 904, 911 (9th Cir. 2003); *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 754–55 (D.C. Cir. 2001); *Levesque v. Block*, 723 F.2d 175, 185 (1st Cir. 1983).

of deference.<sup>63</sup> The witnesses were responding to the D.C. Circuit's decision in *American Trucking Association v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), rev'd in part and aff'd in part, *Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001). In that case, the D.C. Circuit stated: "[t]he SBA, however, neither administers nor has any policymaking role under the RFA; at most its role is advisory. . . . Therefore we do not defer to the SBA's interpretation of the RFA." 175 F.3d at 1044, citing *Scheduled Airlines Traffic Offices v. Department of Defense*, 87 F.3d 1356, 1361 (D.C. Cir. 1996).<sup>64</sup> Absent some action by Congress, courts are unlikely to grant the Chief Counsel's interpretations of the RFA any deference. And if the courts do not do so, it also is highly improbable that other federal agencies will do so.

The situation clearly needs to be rectified. Obtaining deference of the RFA will substantially change the balance between the Chief Counsel and agencies in developing regulations. Currently, the Office of Advocacy simply must cajole the agencies to make regulatory modifications or otherwise revise their certifications or regulatory flexibility analyses. The Chief Counsel has little power to coerce changes that would be beneficial to small businesses or other small entities. However, an Office of Advocacy accorded deference in interpreting the RFA can represent, in conjunction with its authority to file amicus briefs in court, a substantial power to coerce regulatory modifications. If an agency does not comply properly with the RFA, the threat of the Chief Counsel "intervening" in court and expressing an opinion, which the court will give substantial deference, that the agency did not comply with the RFA could lead to a remand of the regulation. Therefore, the agency is likely to negotiate changes in RFA compliance that might in turn result in subsequent modifications to the rule that would reduce burdens on small entities.

One potential option would be to amend the RFA by mandating that courts and agencies give substantial deference to the views of the Chief Counsel concerning compliance with the RFA. This appears to be the tersest solution to the D.C. Circuit's dismissal of Advocacy's comments. However, brevity in this circumstance is unworkable for a variety of reasons. First, the personnel of the Office of the Chief Counsel for Advocacy can change at the behest of the President. Each new Chief Counsel can adopt different interpretations of the RFA. If that is the case, then it is possible that an agency may receive inconsistent interpretations of the RFA; in turn, that makes it more difficult for the agency to develop a consistent methodology for assessing the impact on small entities. Furthermore, the courts have held that the level of deference afforded an agency is dramatically reduced if the agency is constantly changing the interpretation of a statute. *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 515 (1994). And the constantly shifting sands of Chief Counsel interpretations is not the gravest barrier to achieving deference; the Chief Counsel's interpretations still

<sup>63</sup>Improving and Strengthening the Office of Advocacy: Hearing before the Committee on Small Business, United States House of Representatives, 107th Cong. 1st Sess. (2001) 11 (statement of Giovanni Coratolo); 65 (statement of Deputy Chief Counsel for Advocacy Kay Ryan); Improving the Office of Advocacy: Hearing before the Committee on Small Business, 106th Cong., 2d Sess. (2000) 12 (statement of James Morrison).

<sup>64</sup>Although the D.C. Circuit referred to the SBA, it clearly meant the Chief Counsel for Advocacy.

must overcome the standards established by the Supreme Court in *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984) and *United States v. Mead Corp.*, 533 U.S. 218 (2001).

Courts start an analysis of a statute by first determining whether Congress spoke explicitly and clearly on the point in question. If so, *Chevron* dictates that the courts go no further; interpretations offered by the agency that are inconsistent with a clear mandate from Congress receive no deference and are invalid. 467 U.S. at 842–43. If the agency interpretation is consistent with the clear language of the statute, courts must uphold the agency interpretation. *Id.* This is often referred to as “*Chevron Part One*” analysis. The real deference accorded the agency comes pursuant to the so-called “*Chevron Part Two*” analysis. Under that standard, an agency’s interpretation of an ambiguous statute or statutory lacuna filled by the agency is accorded substantial deference if the interpretation or gap-filling regulation is rational. *Id.* In essence, as between two equally valid or rational interpretations of an ambiguity in a statute, the agency’s interpretation wins under “*Chevron Part Two*.”

Not all pronouncements from an agency are eligible for deference under the “*Chevron Part Two*” test. For the answer to that question, one must look to the Court’s decision in *United States v. Mead Corp.* According to that case, *Chevron* deference exists not on some inflexible line, but rather on a continuum depending on the intent of Congress and the agency’s procedures for developing the interpretation. 533 U.S. at 227–31. The keystone for *Chevron* deference is whether Congress “would expect the agency to be able to speak with the force of law.” *Id.* at 229. The Court noted that “a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rule-making . . . that produces regulations . . . for which deference is claimed.” *Id.* Since notice and comment rulemaking represents a formal administrative procedure to reach an agency decision, the Court concluded that it would be logical to assume Congress intended the agency pronouncement in such circumstances to have the force and effect of law. *Id.* at 230. Thus, regulations arising from notice and comment rulemaking would be afforded full *Chevron* deference.

Given the state of the caselaw and the objectives of empowering the Chief Counsel, the best alternative for ensuring the Chief Counsel’s interpretation of the RFA would be given *Chevron* deference is to require the Chief Counsel to promulgate government-wide rules which all agencies must follow in complying with the RFA. This is a well-trodden path followed by federal agencies in the implementation of the RFA’s parallel statute—NEPA. After enactment of NEPA, all federal agencies developed their own, often inconsistent approaches, to compliance. In 1977, President Carter issued an executive order mandating the Council of Environmental Quality (CEQ) to “issue regulations to Federal agencies for the implementation of the procedural provisions of the Act [NEPA] (42 U.S.C. 4332(2)).” E.O. No. 11,991 (May 24, 1977), reprinted in 42 Fed. Reg. 26,967 (1977). Even though Congress, in NEPA, did not

delegate to CEQ any power to issue regulations,<sup>65</sup> the regulations developed by it are accorded substantial deference by the courts. *Robertson v. Methow Valley Citizens Ass'n*, 490 U.S. 332, 356 (1990).

New § 608(a) provides that the Chief Counsel for Advocacy shall promulgate regulations governing agency compliance with the RFA. The Chief Counsel should follow the pattern established by CEQ—draft baseline regulations that all agencies must follow but grant the agencies the authority to supplement those regulations to meet their own needs. These regulations promulgated by the Chief Counsel must be done pursuant to notice and comment rulemaking because it ensures adequate participation of all interested parties and comports with the Supreme Court's determination in *United States v. Mead* that notice and comment rulemaking assures the agency (in this case the Chief Counsel) will be granted Chevron deference.

The revised § 608 also authorizes federal agencies to supplement the Chief Counsel's rules. However, these supplemental regulations cannot conflict with the regulations promulgated by the Chief Counsel. To ensure the absence of conflict, federal agencies wishing to supplement the rules must consult with the Chief Counsel in an effort to eliminate conflicts but may issue the rules without the approval of the Chief Counsel. H.R. 527 could have taken the approach that supplemental agency rules could not be adopted unless the Chief Counsel approved them. That path represents bad policy for two reasons. First, one agency should not have the authority to disapprove another agency's regulations; if the delegation of power was improper, Congress should act by passing legislation modifying the delegation of authority. Second, Chief Counsel approval would be an executive branch employee interfering with the operation of independent agencies such as the Federal Communications Commission, the Nuclear Regulatory Commission, and the Federal Trade Commission. Even though these agencies must obtain approval of their collection of information requests from OIRA, Congress recognized their independence from the executive branch by granting them the power to override a disapproval by simply majority vote of the commissioners. 44 U.S.C. § 3507(f)(1). It sets a bad precedent to authorize, on an ad hoc basis, an executive branch agency, approving or disapproving the actions of an independent collegial body regulatory commission.<sup>66</sup>

New § 608(b) provides the Chief Counsel with the same power to intervene in individual agency adjudications that the Chief Counsel has to file an amicus brief under § 612 of the RFA. There have been instances in which the Chief Counsel attempted to intervene in adjudications before federal agencies due to the significance of the issues raised by the adjudication but was rebuffed because the administrative law judge determined that the Chief Counsel was not a proper party to the proceeding. This is particularly important because some agencies, such as the Agricultural Marketing Service, the Federal Energy Regulatory Commission, and the National Labor Relations Board make significant policy determinations in

<sup>65</sup>In fact, the powers and functions of CEQ remarkably parallel those of the Office of Advocacy.

<sup>66</sup>The Supreme Court considers these independent regulatory commissions, at least in part, creatures of Congress. *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935). Therefore, Congress can restrict their independence by requiring them to comply with the regulations adopted by the Chief Counsel.

adjudicatory proceedings. The clear grant of a right to intervene will eliminate this problem.

The section also makes clear that the right to intervene as a party in an adjudication does not grant the Chief Counsel the authority to appeal any decision by the administrative law judge either to another body in the agency (such as an appeal to the full Commission) or to federal court. The role of the Chief Counsel in adjudicatory proceedings is vital but limited to advising the decisionmakers of the significance of the issues to small entities rather than as a real party in interest. Given these concerns and the possibility that small entities might request the assistance of the Chief Counsel in an individual adjudication, the better policy is to exclude the Chief Counsel from intervening in adjudications in which the agency is authorized to impose a fine or penalty. It is the expectation that the Chief Counsel will refer to this restriction when a small entity requests intervention in an individual enforcement proceeding to deny that request. In sum, the intervention rights granted in this subsection are not designed to allow the small entity to substitute the Chief Counsel for adequate retention of private counsel.<sup>67</sup>

Amended § 608(c) authorizes the Chief Counsel to file comments on any notice of proposed rulemaking without regard to whether the notice had been issued pursuant to § 553 of the APA. This language ensures the Chief Counsel's role as the primary advocate for small entities in federal agency decisionmaking and not just on agency compliance with the RFA.

#### *Section 5. Procedures for gathering comments*

SBREFA required two federal agencies, the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA), to consider, prior to publication of a proposed rule in which an IRFA will be prepared, the concerns of small entities. Section 609(b) of the RFA establishes the procedures for obtaining the input of small entities. The procedures require the formation of a panel of federal employees, including a representative from the Office of Advocacy (the organizer of the panel) who then obtain input on the potential economic impacts from selected small entity representatives. After receiving the input, the panel submits a report to the agency and requires the agency to respond to the panel report in the proposed rule. The agency is at liberty to modify the proposal according to the recommendations of the panel report but is not required to do so.

The Committee on Small Business received testimony in hearings that the panel process needs expansion to other federal agencies and requires technical changes to ensure optimal participation by small entities. The process established in § 609(b) makes a valuable contribution to agency understanding of the impacts of its proposals on small entities. In fact, during a hearing on the H.R. 2345 (a predecessor bill), during the 108th Congress, the Chief Counsel for Advocacy, Tom Sullivan, recommended that the process be expanded to all agencies. The argument of the Chief Counsel (whose employees would have to deal with the SBREFA panels) makes

<sup>67</sup>The Chief Counsel has neither the resources nor the expertise to represent private parties in federal administrative enforcement proceedings.

sense and H.R. 527 adopts the recommendation to expand the SBREFA panel process to all agencies when they are proposing a rule that will have a significant economic impact on a substantial number of small entities or the proposed rule qualifies as a major rule under the Congressional Review Act. The SBREFA procedures will increase the value of the prepublication input to federal agencies and enhance the rationality of the rulemaking process.

Section 5 modifies the standards for determining which proposed rules will be subject to the panel process. Current law limits the rules to those for which EPA and OSHA will prepare an IRFA. This parameter unnecessarily narrows the regulations that should be the subject of a § 609 panel and allows the agencies to make a self-interested determination to avoid the panel process. A more appropriate standard would be any rule for which the covered agencies decide to prepare an IRFA or for any rule that a covered agency or OIRA determines to be a major rule under standards identical to those found in § 804 of the Congressional Review Act. Except in the most unusual circumstances (such as a regulation on natural gas pipelines or automobile manufacturers), a major rule will affect a substantial number of small entities and the agency preparing the rule will benefit from small entity input.

The Committee on Small Business has heard informally from the Office of the Chief Counsel for Advocacy that questions remain concerning the kind of material made available by the covered agencies. Section 5 clarifies that the agency provide the Chief Counsel and the employees of that Office all materials prepared or utilized in developing the proposed rule including a copy of the draft rule. The covered agencies also are required to provide information on the impacts, whether positive or negative, on small entities. Agencies should be as forthcoming with material as possible. To the extent that information utilized by the agency is not subject to disclosure as proprietary information under the Freedom of Information Act (FOIA), appropriate non-disclosure agreements with the Office of Advocacy would be appropriate. The Office of Advocacy is an executive branch agency within the federal government and should be assumed to operate under the same prohibitions against the release of predecisional documents or proprietary information that apply to all federal agencies under FOIA.

Special procedures must be applied with respect to rules drafted by the IRS. If certain small entities receive the actual draft of a proposed tax rule, those entities may be able to take advantage of that information in tax planning or through business transactions. Clearly, this is a legitimate concern and H.R. 527 does not require the IRS provide the exact language of any draft proposed rule. For example, the IRS would state it is planning to modify the calculation of certain depreciable assets but would not be required to provide the exact date for the regulation to take effect. However, the IRS would be expected to provide sufficient information to enable the small entities to make sensible comments to the panel.

Provision of draft regulations by independent regulatory agencies (those collegial body organizations set forth in 44 U.S.C. § 3502(5)) also raises potential problems. Under their organic statutes, these collegial bodies only can take action if a majority of the members of the collegial body approve the action. The Government in Sunshine Act prohibits the members from conducting business except

in an open meeting. 5 U.S.C. § 552(b). If an agency set forth in 44 U.S.C. § 3502(5) was to submit a draft regulation to the Office of Advocacy, prior to a meeting, that could be taken as akin to the conduct of business not in an open meeting. The importance of the Government in Sunshine Act should not be underestimated. Therefore, the agencies are not required to submit the draft proposed rule to the Office of Advocacy. Under the revised § 609, collegial bodies only should submit sufficient information so that small entities understand the scope of the proposed regulation in order to make their input to the panel worthwhile.<sup>68</sup>

The Committee also recognizes that E.O. 12,866 by its own terms does not cover these independent regulatory agencies. Since the Supreme Court's decision in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), these agencies are not considered part of the executive branch and their regulatory activities are not considered subject to oversight by OIRA. To avoid any entanglement between the executive branch and these independent regulatory agencies, the panel reports are prepared by an employee of the agency and an employee of the Office of Advocacy. OIRA employees only will be a part of the panel process for those agencies not set forth in 44 U.S.C. § 3502(5).

Disputes have arisen between the Office of Advocacy and agencies over the definition of small entity representative. The conflict stems from an inconsistency in the drafting of § 609(b). The Office of Advocacy is to identify individuals representative of small entities for obtaining advice but the panel is only required to collect advice and recommendations from individual small entity representatives identified by the agency after consultation with the Office of Advocacy. For example, EPA limits its universe of small entity representatives only to actual businesses affected; in contrast, the Office of Advocacy is willing to hear from trade association executives and lawyers who represent small entities.

The language in § 609 is not a model of clarity and requires amendment to ameliorate disputes between the Office of Advocacy and other federal agencies that serve on the panel. New subsection 609(c) that accords to the Office of Advocacy the sole responsibility of selecting the small entity representatives. The Office of Advocacy has the greatest contact with small entities and is least likely to select biased representatives.<sup>69</sup> The Office of Advocacy should use the discretion granted to it in § 609 in a balanced manner by finding small entity representatives that can provide diverse views on a particular proposed regulation. The amendment to § 609 also ends the dispute over the universe of potential small entity representative by authorizing the Office of Advocacy to select either small entities or their representatives for providing advice to the panel. Under this language, the Office of Advocacy may select individual small entities, lawyers or consultants who represent small entities, or officials from trade associations whose members include small entities.

<sup>68</sup>In many instances rules from these collegial bodies, such as the FCC, tend not to have very specific regulatory language. More often than not, the proposed rules read more akin to advanced notices of proposed rulemaking without even tentative conclusions.

<sup>69</sup>Federal agencies promulgating regulations would have a bias to select small entity representatives, to the extent possible, that would support the regulatory position of the agency.

Section 609 currently requires the panel to receive recommendations and draft a report that becomes part of the rulemaking record. The panel should receive advice and recommendations from small entities. The panel should discuss these issues but it is inappropriate for a panel to write a report conveying the concerns of small entities. H.R. 527's rewrite of § 609 adds a new subsection (d) that mandates the Chief Counsel for Advocacy to draft the report. In drafting the report, the Chief Counsel must consult with the other panel members to ensure that the report accurately reflects the views of small entities. This change ensures that the Office of Advocacy, being an independent voice for small entities, will provide a more robust representation of small entity views than a report from a panel that includes personnel from the agency that crafted the rule and the agency that might review the rule—OIRA. Furthermore, the small entities are more likely to participate if they know that the Chief Counsel is charged with conveying their views to the rulemaking record.

The panels that currently convened under § 609 are not subject to the strictures of the Federal Advisory Committee Act. The amendments to that section made by H.R. 527 should not be construed as requiring the General Services Administration to comply with the Federal Advisory Committee Act.

New § 609(d) also modifies the contents of the report. Currently, the report simply provides a litany of issues raised by small entity representatives as filtered by the panel. While this information is useful, reasoned decisionmaking, including appropriate consideration of all statutory factors (one of which is the impact on small entities), requires a report of greater detail. A requirement has been added that the report contain an assessment of the proposed rule on small entities and a discussion of alternatives that will maximize beneficial or minimize adverse economic consequences. By requiring this information at a preproposal stage, the agency will have the opportunity to modify the regulation or amend its IRFA should it wish to do so. Furthermore, the inclusion of this report early in the rulemaking record will provide small entities with a base of ideas upon which to suggest other alternatives during the rulemaking process. The inclusion of alternatives also can assist the agency in demonstrating to the courts that it approached the rulemaking process with an open mind. *PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1002 (D.C. Cir. 1999); *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980). The report need not be an exhaustive peroration of alternatives but should be sufficient to provide both the agency and the regulated community with some ideas on what alternatives are available. However, the report should include alternatives, to the extent possible, that are not being considered by the agency in the preparation of its IRFA.

There may be exceptional circumstances where an agency finds it impracticable, unnecessary or contrary to the public interest to receive input at the preproposal stage. New § 609(f) creates a procedure by which the agency can seek a waiver of the panel process. Waivers only should be granted in the same exceptional circumstances similar to those that would permit an agency to forgo notice and comment rulemaking pursuant to § 553(b)(B) of the APA. For example, EPA may need to deal with an imminent public



health problem and has sufficient time to issue a rule for a brief notice and comment period but does not have the lead time to conduct a panel process. That would be the type of circumstance in which the Chief Counsel might consider a waiver of the panel process.

#### *Section 6. Periodic review of rules*

Section 610 of the RFA mandates that agencies periodically review their rules that have a significant economic impact on a substantial number of small entities. GAO has done a number of studies of agency compliance with § 610 and found compliance sorely lacking.<sup>70</sup> GAO concludes that the problem relates back to the threshold determination of whether the regulation will have a significant economic impact on a substantial number of small entities. While GAO's conclusion is correct, the problems with § 610 compliance are far more pervasive and endemic. Unfortunately, § 610 was not a paragon of clear statutory drafting; the language is easily interpreted in a manner by which agencies can avoid compliance. Nevertheless, periodic review of regulations is an excellent idea because it forces agencies to examine their regulatory structures given changes in the marketplace. Rather than trying to correct unclear drafting, H.R. 527 completely revises the section through the development of procedures that ensure agencies will periodically review those regulations which have a significant economic impact on small entities.

When § 610 was first enacted, agencies were required to develop plans for periodic review. These plans are now more than 30 years old. An investigation by the Committee on Small Business in 1997 and 1998 found that many agencies cannot find their plans; given the passage of time, it is less likely that those plans can be unearthed. Rather than having agencies dig through archives for 30 year old plans, revised § 610 requires the development of new plans for periodic review within 180 days after the enactment. In addition to publication of the plan in the Federal Register, agencies are required to place these plans on their websites.<sup>71</sup>

The trigger for periodic review in the revision to § 610 will be whether the agency head determines that the regulation has a significant economic impact on a substantial number of small entities. The language is written in the present tense meaning that the regulation is subject to review if at the time of review of the regulation, the rule has a significant economic impact on a substantial number of small entities. The provision grants the agency appropriate flexibility in determining when to conduct periodic review based on current circumstances not events that happened a number of years before the review. In ensuring that the review occurs based on current conditions, language in the amended § 610 makes it explicit that the decision for review is independent of whether the agency developed a FRFA at the time of the rule's original promulgation. Despite the flexibility provided by § 610, there is an expectation that the full compliance will with the periodic review will

<sup>70</sup> See note 15, *supra*.

<sup>71</sup> This should not be a substantial burden on agencies since all executive branch agencies had to come up with a plan to review all existing reviews pursuant to President's Obama's revisions to E.O. 12,866.

be based on the regulations promulgated by the Chief Counsel pursuant to the authority of § 608.

Although the revised § 610 tracks the scope of the review currently in the RFA, there were a number of modifications designed to make the review more thorough. The review now must include comments from the Regulatory Enforcement Ombudsman and the Office of Advocacy to ensure that the agency receives the most current information on the affect of a rule including how agencies may be enforcing (or abusing) the regulation. The revision also requires the agency to consider the rule's contribution to the cumulative impact of federal regulatory burden on small businesses. However, given the complexity of such calculation, § 610(d)(6) allows the head of the agency to explain why such calculation cannot be made and include such statements in the report that the agency files pursuant to new § 610(e). These amendments to the scope of review also comport with those made to the FRFA under § 3 of H.R. 527.

Periodic review commences from the date of enactment of the Act. The plan must provide for review of all regulations in force at the time of enactment within ten years of the date of enactment. A regulation in effect on enactment may not have a significant economic impact on a substantial number of small entities and should not be reviewed. However, five years after enactment the regulation may have that impact; if the agency had not previously reviewed the regulation or made a determination that the regulation did not have a significant economic impact on a substantial number of small entities after publication of the plan of review, the head of the agency would determine at the time the regulation came up for review whether it should be reviewed. In short, the determination of "significance" and "substantial" should be made as close to the review date as possible and based on the most current information available. Regulations promulgated after enactment of the legislation must be reviewed within ten years after the publication of the final rule in the Federal Register. Agencies are authorized to extend the review process for no more than 2 years. Agencies have the resources to complete the review within 12 years. Unlike the current statute, the agency head delaying the review must notify the Chief Counsel for Advocacy because of the Chief Counsel's responsibility to monitor agency compliance with the RFA.

A new mandate in § 610 requires the agency to report annually on the results of its periodic reviews. The current version of § 610 can be interpreted as allowing a review to take place without it being memorialized. Submission of a report will enable the Office of Advocacy, House and Senate Committees, and OIRA to take appropriate action to ensure compliance or question the determinations on specific rules. To protect the independence of collegial body commissions (such as the SEC or CFTC), the agencies identified in § 3502(5) of Title 44, United States Code need not submit reports to OIRA.

Revised subsection 610(e) requires the agency to place on its website a list of rules to be reviewed annually as well as a brief description of the rule, the agency's preliminary determination on why the regulation has a significant economic impact on a substantial number of small entities, and a request for comments from the public, the Chief Counsel and the Regulatory Enforcement Om-

budsman. Utilization of the Internet<sup>72</sup> should maximize input from affected small entities. The Committee also requires publication of the Federal Register and the agency can combine the publication of the list of rules for review in conjunction with its semi-annual agenda in the Federal Register<sup>73</sup> prior to the start of the next calendar year.

Nothing in the changes made by H.R. 527 modifies the ability of adversely affected entities to challenge agency compliance with the periodic review requirements. Given the procedures established in the revised §610 and the regulations to be promulgated by the Chief Counsel pursuant to amended §608, the determination of whether a particular regulation should be reviewed is subject to judicial challenge and is not committed to agency discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985) and its progeny.

#### *Section 7. Judicial review of compliance with the RFA*

Section 7(a) modifies the current requirement that judicial review of the RFA is limited to “final agency action.” Instead, judicial review will be available when the agency publishes the final rule. Section 7(b) modifies the jurisdiction of courts by inserting the parenthetical “or which would have such jurisdiction if publication of the final rule constituted final agency action.”

The changes are made due to concerns that certain procedural requirements for challenging agency regulations could dramatically delay small entity challenges to the agency compliance with the RFA. For example, under the Medicare program, challenges to CMS regulations must first run the gauntlet of the Department of Health and Human Services administrative law judges and departmental appeals boards. See *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000).<sup>74</sup> Similarly, regulations issued to implement marketing orders under the Agricultural Marketing Agreement Act must go through a statutory exhaustion process before an administrative law judge and then the Chief Judicial Officer. *United States v. Ruzicka*, 329 U.S. 287 (1946). These formal statutory exhaustion requirements, often the vestiges of legislation enacted prior to the APA, are an anachronism in the context of informal rulemaking.

These agencies are utilizing a pre-APA decisionmaking process to determine if the regulation complied with the APA by building a record supplemental to the one developed during the rulemaking. These statutory exhaustion requirements enable covered agencies to take a second look at its own regulatory issuances.<sup>75</sup> While that

<sup>72</sup>It would be up to the Office of the Chief Counsel for Advocacy to determine how [www.regulations.gov](http://www.regulations.gov) fits into the Internet publication requirement of §610.

<sup>73</sup>Publication of the list in the April or May Federal Register's semi-annual agenda would not provide sufficient notice to small entities on the rules for which the agency has already commenced review since the beginning of the calendar year.

<sup>74</sup>There are cases in which the courts, after much judicial prestidigitation, found that exhaustion was not required. E.g., *Furlong v. Shalala*, 238 F.3d 227 (2d Cir. 2001); *American Lithotripsy Soc'y v. Thompson*, 215 F. Supp. 2d 23 (D.D.C. 2002). However, these court cases are not sufficiently definitive with respect to the availability of review outside the Departmental appeals process to ensure small entity access to federal courts for RFA challenges. Therefore, these cases do not militate against making the change to the RFA.

<sup>75</sup>The Chief Judicial Officer at the Department of Agriculture acts as the Secretary when hearing appeals pursuant to §15(A) of the Agricultural Marketing Agreement Act of 1937. If they Secretary thought the rule was irrational, the Secretary should not have issued it in the first instance. Upon further reflection, it is highly unlikely that the Secretary would find his or her initial decision to be irrational.

process may be beneficial to the agency in building a record to demonstrate the rationality of their rules, it enables the agencies to cavalierly dismiss the requirements of the APA and RFA by ensuring those assessments are addressed in a formal adjudication after the regulation is promulgated. Due to the cost involved of essentially conducting two separate litigations (an adjudication within the agency and a challenge at the federal court level), small entities generally will be foreclosed from challenging an agency's RFA analysis. It certainly takes a courageous small entity to absorb the cost of dual litigation in order to get into federal court recognizing the likelihood that the original challenge before a federal agency will almost certainly favor the federal agency.<sup>76</sup> This severely undermines the rationale used by the drafters of SBREFA to mandate judicial review—the threat of a relatively quick, unbiased review of agency action in federal court would lead to improved compliance with the RFA. If an agency can avoid that (due to cost) in order to supplement its record *ex post facto* then the deterrent effect of judicial review is negated. Not surprisingly, CMS and the Agricultural Marketing Service remain two of the agencies that have had the worst record of complying with the RFA. As a result, the changes set forth in § 7(a)–(b) ensure access to judicial review of challenges to agency compliance with the RFA without having to exhaust any post-promulgation internal agency adjudication on the underlying rule.

The amendments could lead to piecemeal litigation on the final rule; judicial review on RFA compliance would then be followed at some later date by a challenge to the rationality of the rule. However, the response to this contention is the Supreme Court's finding that "procedural rights" are special, *Lujan v. Defenders of the Wildlife*, 504 U.S. 55, 572 n.7 (1992) and someone complaining of an agency's failure to comply with NEPA "may complain of that failure at the time the failure takes place for the claim can never get riper." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998). Given the parallels between the RFA and NEPA already recognized by the courts, then a challenge to agency compliance with the RFA can never be riper than it is when the agency promulgates the final rule, irrespective of whether the substance of the underlying rule requires review through some additional agency procedures.<sup>77</sup> Furthermore, the likelihood of duplicative litigation is constrained by the limited number of agencies at which further agency appeals are required to challenge a final rule. Finally, it is important to note that the agencies that can take advantage of this statutory exhaustion process are among the worst in complying with the RFA—the Agricultural Marketing Service (AMS) and CMS. Therefore, the benefits of speeding judicial review of RFA compliance and the need to protect the "special procedural rights inherent in the RFA" outweigh the costs to the federal judiciary of piecemeal litigation.

The amendments made in § 7(a)–(b) are not intended to authorize challenges to either the agency's RFA compliance or the underlying

<sup>76</sup> For example, the Chief Judicial Officer within the Department of Agriculture has, with one exception, never overturned the Secretary's regulation implementing a marketing order. And the only circumstance in which that was done was to benefit the largest central marketing organization of oranges and lemons grown in California (a marketing order that no longer exists).

<sup>77</sup> See *National Association of Homebuilders v. United States Army Corps of Eng'rs*, 417 F.3d 1272, 1286 (D.C. Cir. 2005).

regulation prior to the issuance of a final rule. Principles of exhaustion of administrative remedies remains the most prudent course by allowing the agency to correct deficiencies with its RFA compliance in the final rule. However, once the agency has had the opportunity to make corrections in the final rule, it seems foolhardy to allow the agency to get another crack at correcting its RFA compliance after issuance of the final rule. The amendment is intended to allow federal courts to do what they do best—review agency compliance with statutes governing agency decisionmaking. Federal courts will not benefit from any supplementation of the record because federal courts have nearly 60 years of determining compliance with the APA, more than 30 years of reviewing environmental impact statements under NEPA, and about 35 years of ensuring adequate agency release of information under the Freedom of Information Act. RFA compliance is no more difficult and additional agency adjudication under the principle of exhaustion past the final rule simply will be of no benefit to the court. Finally, recalcitrant agencies like CMS and AMS, rather than risking immediate litigation over RFA compliance, will take the initiative, to improve their RFA compliance during the rulemaking process.

Section 7(c) of the bill makes conforming technical corrections to § 611. The trigger for any challenge is modified from the date of final agency action to publication of the final rule.

Section 7(d) clarifies the Chief Counsel's amicus authority. In the past, the Department of Justice has challenged the scope of the Chief Counsel's brief on the occasions that the Chief Counsel has prepared a brief under § 612. In one instance (prior to the enactment of SBREFA), the Department of Justice questioned whether the brief could address the rationality of the rule and compliance with the RFA. The authors of SBREFA attempted to clarify this by authorizing the amicus brief to address the adequacy of the rulemaking record with respect to small entities. Given the changes being made in § 4 of the H.R. 527 concerning the promulgation of implementing rules by the Office of Advocacy, it is appropriate to specify that the Chief Counsel has the authority to address compliance with §§ 601, 604, 605(b), 609, and 610 of the RFA.

*Section 8. Jurisdiction of Court of Appeals for challenges to rules implementing RFA*

Section 8 recognizes that certain actions taken by the Chief Counsel may adversely affect the rights of small entities. The regulations concerning the implementation of the RFA, and any subsequent changes to those rules should be subject to judicial review by small entities that believe the rules do not properly implement the RFA. Any small entity would be entitled to challenge the Chief Counsel's decision pursuant to the requirements of the Administrative Orders Review Act, 28 U.S.C. §§ 2341–51. Given the importance of these rules and their impact on federal rulemaking, a federal appeals court appears to be the most appropriate venue for review. In some instances, challenges to agency decisions, such as those concerning ambient air quality standards under the Clean Air Act or licenses for use of spectrum under the Communications Act of 1934, as amended, must be brought in the D.C. Circuit. It would be inappropriate to force small entities to retain counsel and prosecute an appeal solely in the District of Columbia. In addition

to authorizing challenges to Chief Counsel regulations, § 10(b) also makes appropriate technical and conforming changes to the RFA and the Administrative Orders Review Act.

As already noted, the Department of Justice has argued that limitations should exist on the scope of the amicus brief filed by the Chief Counsel. The RFA simply represents one component of the necessary considerations for developing a rational rule as mandated by the APA. A limitation on the scope of the amicus brief would place the Chief Counsel in the odd position of arguing that the agency did not comply with the RFA but could then not draw the obvious conclusion—the procedural failure constitutes a violation of the rational rulemaking mandated by the APA. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 418–19 (1971). Furthermore, the analysis performed by the agency pursuant to the RFA can demonstrate that the rule itself is irrational even if the agency complied with the RFA. *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984). The Chief Counsel should not be prohibited from reaching conclusions of law concerning the rationality of an agency’s rule in an amicus brief. Section 8(c) clarifies that the Chief Counsel has the authority in its amicus briefs to comment on compliance with the rationality of the rule as well as the procedures for complying with the APA and the RFA.

#### *Section 9. Clerical amendments*

Section 9 contains appropriate clerical amendments needed to make the United States Code consistent with the changes made by the Committee in H.R. 527.

### VIII. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

H.R. 527 would amend the RFA to require federal agencies to provide more detailed analyses of the impacts of their proposed and final rules on small entities, including small businesses. The bill also requires federal agencies to seek out the input of small entities prior to publication of significant proposed rules. Finally, the legislation revises the already extant requirement of agencies to review periodically their existing regulations.

Based on information from the Office of the Chief Counsel for Advocacy and other agencies, the Congressional Budget Office estimates that implementing H.R. 527 would cost \$80 million over the 2012–2016 period subject to appropriation of the necessary amounts. Pay-as-you go procedures do not apply to this legislation because it would not affect direct spending or revenues.

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

Hon. SAM GRAVES,  
*Chairman, Committee on Small Business,*  
*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.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

*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 state-

ments. 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 rule-making 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 the Judiciary on July 7, 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.

#### IX. UNFUNDED MANDATES

H.R. 527 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act, Pub. L. No. 104-4, and would impose no costs on state, local or tribal governments.

#### X. NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House, the Committee provides the following opinion and estimate with respect to new budget authority, entitlement authority and tax expenditures.

The Committee does not adopt as its own the estimate of new budget authority contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to § 402 of the Congressional Budget Act of 1974.

The Committee believes that the cost estimate provided by the Congressional Budget Office seriously misconstrues the process of writing regulations. As a result, the estimate provided by the Congressional Budget Office significantly overestimates the cost of complying with the new requirements of H.R. 527.

First, the Congressional Budget Office admits that there are no credible studies on the actual cost of writing federal regulations. That conclusion is buttressed by a review of federal appropriations legislation which does not specifically allocate funds to the writing and drafting of regulations.

Second, the Congressional Budget Office's cost estimate is primarily based on the use of prepublication panels in § 5 of H.R. 527. Under that procedure, all agencies would have to prepare a report on recommendations of small businesses on how to reduce adverse or increase positive consequences of the proposed rule on small businesses and publish such report along with the proposed rule in the Federal Register. The main effort is the preparation of a report by the Office of the Chief Counsel for Advocacy based on input from the agency and small business representatives. In short, this process simply formalizes the already extant procedures that agencies use to obtain input from interested parties as they develop the proposed rules. According to all of the plans developed by federal

agencies in response to E.O. 13,563, each agency has procedures designed to obtain input from the public. As part of this process, the agencies would be required to focus some of this outreach to small businesses or their representatives. The Committee does not believe that this type of outreach, which already is conducted, adds any cost to the process of writing regulations. The other cost is the actual preparation of the report by the Office of the Chief Counsel for Advocacy. Since the report would lay the basis for any subsequent comments on the proposed rule prepared by the Office of the Chief Counsel for Advocacy, the preparation of the reports simply would move the process to a different point in that Office's normal course of business in reviewing regulations published in the Federal Register.

Third, federal agencies would be required to estimate the costs of indirect effects of significant rules under H.R. 527. While the Congressional Budget Office suggests the fact that this will increase costs, the Committee disputes that conclusion. Agencies already are required to estimate indirect effects for regulations that are subject to the strictures of E.O. 12,866. The Committee believes that there will be significant overlap between those two sets of rules—thereby substantially undermining this portion of the Congressional Budget Office estimate for H.R. 527.

Fourth, in response to E.O. 13,563, agencies (other than independent collegial body agencies) published final plans in August to establish procedures for reviewing all existing federal agency regulations. In response to a question from Chairman Graves at a September 21, 2011 hearing on the implementation of E.O. 13,563, Administrator Sunstein stated that the agencies could conduct the review of all existing federal regulations, including outreach to the regulated community, under current budget constraints. If agencies are capable preparing these plans (which total over 800 pages) and do these reviews within existing budgets, there should not be a significant cost to comply with the requirements of H.R. 527, i.e., the agencies could comply with the new analytical requirements within existing budget constraints.

Fifth, every President since President Carter has drafted Executive Orders that impose various analytical requirements, whether with respect to rulemaking or compliance with NEPA, on federal agencies. In some cases, those requirements are significantly greater than that imposed by legislation. For example, E.O. 12,866 imposes cost-benefit analysis requirements on federal agencies even when federal statutes do not. Nevertheless, agencies are able to comply with the requirements of these executive orders within existing budgets. If agencies are able to comply with Executive Orders that modify agency procedural requirements without the expenditure of additional funds, the agencies certainly should be able to comply with requirements of H.R. 527 without additional outlays.

Sixth, every President from President Reagan forward has ordered agencies to review all agency regulations and eliminate unnecessary or costly rules. Clearly this has a significant cost to federal agencies. H.R. 527 provides a statutory procedure that, if properly enforced, would obviate any need for Presidents to issue a mandate to review agency regulations. The estimate from the Congressional Budget Office fails to take account of this.

For the foregoing reasons, the Committee does not adopt the cost estimate provided by the Congressional Budget Office and believes that procedures to draft regulations will be incorporated into agency budgets as is current compliance with Executive Order 12,866 or Executive Order 13,563. The bill does not contain any new entitlement authority, tax expenditures, or tax revenue.

#### XI. OVERSIGHT FINDINGS

In accordance with clause (2)(b)(1) of Rule X of the Rules of the House, the oversight findings and recommendations of the Committee on Small Business with respect to the subject matter contained in H.R. 527 are incorporated into the descriptive portions of this report.

#### XII. STATEMENT OF CONSTITUTIONAL AUTHORITY

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the authority for this legislation in Art. I, § 8, cls. 1, 3, and 18; Art. IV, § 3, cl. 2, and the Sixteenth Amendment of the Constitution of the United States.

#### XIII. CONGRESSIONAL ACCOUNTABILITY ACT

H.R. 527 does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of § 102(b)(3) of Pub. L. No. 104-1.

#### XIV. FEDERAL ADVISORY COMMITTEE ACT STATEMENT

H.R. 527 does not establish or authorize the establishment of any new advisory committees as that term is defined in the Federal Advisory Committee Act, 5 U.S.C. App. 2.

#### XV. STATEMENT OF NO EARMARKS

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

#### XVI. PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House, the Committee establishes the following performance related goals and objectives for this legislation:

H.R. 527 includes a number of provisions designed to strengthen agency compliance with the Regulatory Flexibility Act, reduce confusion among agencies concerning compliance with the Regulatory Flexibility Act and streamline determinations associated with size standards for the purposes of statutes other than the Small Business Act and Small Business Investment Act of 1958.

## XVII. DISSENTING VIEWS

H.R. 527—THE REGULATORY FLEXIBILITY IMPROVEMENTS ACT OF 2011

### *Background*

In 1980, Congress enacted the Regulatory Flexibility Act (RFA) to respond to concerns that the uniform application of federal regulations imposed disproportionate burdens on small firms. In order to minimize the burden of regulations on small businesses, the RFA mandates that federal agencies consider the potential economic impact of federal regulations on small entities. Federal agencies accomplish this goal by analyzing regulations for their impact on small businesses. In addition to these requirements, select agencies provide further outreach to small firms by conducting small business advocacy reviews (SBAR) panels.<sup>1</sup> The results of these interventions are used to tailor regulations in a manner that results in lower compliance costs for small firms.

By many measures, the efforts taken under the RFA have been very successful. During FY 2010, the Office of Advocacy claims that efforts undertaken through the RFA yield nearly \$15 billion in foregone regulatory costs for small businesses.<sup>2</sup> Such results included regulatory savings across a wide-range of agencies including the Environmental Protection Agency, the Federal Aviation Administration, the Federal Acquisition Regulation Council, the Securities and Exchange Commission, and the Small Business Administration. It is notable that significant savings were achieved at a considerable number of agencies that are not subject to the SBAR panel process.

While the success of RFA is indisputable, small businesses have requested additional relief from federal regulations. As a result, the committee passed legislation in the 110th Congress which strengthened the RFA.<sup>3</sup> While H.R. 527 incorporates the fundamental provisions of this prior legislation, it adds sweeping new powers to the Office of Advocacy, imposes substantial requirements across all federal agencies, and does so at significant cost to the taxpayer.

### *Impact of Legislation*

This legislation makes unequivocally sweeping changes to the RFA and its implementation. Among the most notable modifications are greatly expanding the powers of the SBA's Office of Advocacy and imposing costly new requirements on agencies. The legislation fails to authorize any new funding for these new require-

---

<sup>1</sup>Agencies subject to the panel process include the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Financial Protection Bureau.

<sup>2</sup>Office of Advocacy, U.S. Small Business Administration, "Report on the Regulatory Flexibility Act for FY 2010" (Washington, D.C., February 2011), 5.

<sup>3</sup>H.R. 4458, the Small Business Regulatory Improvement Act (110th Congress).

ments and it is unlikely that Advocacy's current budget of \$9 million and staffing level of 46 employees will be sufficient to administer the additional responsibilities.

*Ignores substantial costs*

Although during the markup of H.R. 527 proponents stated that the legislation would incur no additional costs, committee Democrats disagree. While the CBO estimated a five-year \$80 million cost for the implementation of H.R. 527,<sup>4</sup> committee Democrats performed a separate cost analysis of the legislation. The rationale for doing so was that CBO's own cost estimate for H.R. 4458 from the 110th Congress was greater than that for H.R. 527, while the scope of H.R. 4458 was actually more limited than H.R. 527. Based on analysis of prior Congressional Budget Office (CBO) cost estimates<sup>5</sup> and of official correspondence with the Office of Advocacy,<sup>6</sup> committee Democrats find that this legislation would actually cost \$291,250,000 over a five-year window or approximately \$58 million per year.

In developing this analysis, staff used the CBO cost estimates for H.R. 4458 (2007, 110th Congress) and H.R. 1882 (1999, 106th Congress). Similar to H.R. 527, H.R. 4458 included provisions requiring more detailed regulatory flexibility analyses, strengthening the section 610 periodic review process, and requiring agencies to consider indirect effects in their analyses. CBO determined that these provisions in H.R. 4458, which H.R. 527 also contains, would cost \$20 million per year or \$100 million over the five-year period. Other major drivers of the cost estimate were the provisions of H.R. 527 that would subject Internal Revenue Service (IRS) interpretative rules and land management plans of the Bureau of Land Management and the U.S. Forest Service to the RFA. In addition, H.R. 527 subjects rules pertaining to tribal organizations to the RFA and requires agencies to consider rules that have beneficial effects. It is estimated that these provisions would cost approximately \$5.5 million per year to implement.

The largest portion of costs pertaining to H.R. 527 emanate from the expansion of the SBAR panel process. In 1999, the committee reported H.R. 1882 which subjected the IRS to the SBAR panel process. The CBO estimated this cost at approximately \$1.5 million per year, while the additional costs due to changes in the panel process would cost \$0.5 million per year, for a total cost of \$2 million per year. Based on this estimate, as well as information contained in official correspondence to the committee, these figures were extrapolated to the approximately 55 additional agencies that would be subject to the SBAR panel process under H.R. 527.<sup>7</sup> Within these 55 agencies, 5 were considered to have the highest costs of \$1.5 million per year, which would be on par with the IRS SBAR panel cost estimate in H.R. 1882. Ten agencies were considered to

<sup>4</sup> Congressional Budget Office, Cost Estimate for H.R. 527, August 24, 2011.

<sup>5</sup> Congressional Budget Office, Cost Estimate for H.R. 1882, May 28, 1999 and Cost Estimate for H.R. 4458, February 6, 2008.

<sup>6</sup> Letter to Ranking Member Velazquez from Thomas M. Sullivan Chief Counsel of the Office of Advocacy, detailing the costs of expanding the SBAR panel process, dated May 18, 2004.

<sup>7</sup> The number of additional agencies that would be subject to the SBAR panel process under H.R. 527 is between 50 and 70. This number could fluctuate depending on whether a particular agency located within a Cabinet Department will convene a panel at the agency-level or departmental-level. To be conservative, this analysis uses a number at the lower end of this range.

have the next highest costs of \$1 million per year; twenty to have costs of \$0.5 million per year; and the final twenty to have costs of \$0.25 million per year. Based on this analysis, the expansion of the panel process alone would cost \$32.5 million per year.

While such changes could provide additional cost savings to small businesses, this benefit has not been quantified. Instead, the committee has only heard anecdotal testimony. Given this, it is unclear that the nearly \$60 million annual cost of implementing H.R. 527 will yield any additional saving for small businesses. As a result, it may only add to the deficit, without any real benefit from small firms.

Ranking Member Velázquez offered three amendments that would have addressed the costly nature of H.R. 527. A substitute was offered and defeated by a vote of 9 to 14 that was based on H.R. 4458 from the 110th, which would have provided meaningful relief to small businesses at a lower cost to taxpayers. An amendment was also offered that would have required the Office of Advocacy to report on the costs of the SBAR panel process. This was defeated by a vote of 10 to 13. Finally, an amendment was offered that would have permitted the legislation to be implemented only if it had no cost and if the federal deficit was less than half a trillion dollars in the prior year. Given the insistence by the legislation's proponents that H.R. 527 would have no cost, it was surprising that this amendment was defeated by a vote of 10 to 13.

#### *Delays issuance of important regulations*

Taken together, the changes included in H.R. 527 will create delays for agencies issuing regulations. By subjecting the agencies to the SBAR panel process and requiring more detailed analyses, agencies would face delays in implementing rules. The panel process requires the submission of information to the Office of Advocacy, the convening of the panel, and the submission of a report on panel proceedings. This could take up to 60 days to fulfill these requirements, delaying agencies' action on rulemakings. In addition, H.R. 527 will require agencies to provide more detailed analyses, which would include an assessment of the indirect costs of a rule. This analysis of indirect effects could require substantial time and resources, as such estimates are often not readily evident and require more in depth study and research.

The impact of these bureaucratic delays could be significant on individuals or businesses seeking immediate government action. For example, this could impede rules pertaining to food safety, consumer protection, health and safety, and Veterans' assistance. It could also adversely impact rules that would protect families from fraudulent practices in the mortgage industry or safeguard children from toxic toys. With regard to the SBA, which administers programs to assist small business, H.R. 527 could ironically hurt the very entities that it is seeking to assist by delaying regulations implementing small business financing, contracting, or entrepreneurial development initiatives.

*Impairs the stewardship of the environmental and public lands*

H.R. 527 applies the RFA to Bureau of Land Management (BLM) and U.S. Forest Service (USFS) land management plans. Land management plans address the need for restoration and conservation to enhance the resilience of ecosystems to a variety of threats. Plans proactively address adverse environmental impacts and emphasize the maintenance and restoration of watershed health, which protect and enhance America's water resources. They also provide for the diversity of species and wildlife habitat and foster sustainable forests and lands and their contribution to vibrant rural economies.

Applying the RFA to land management plans, would allow corporate interests, such as those engaged in the timber, energy, and mining industries, to challenge land management plans which restrict commercial activity in national parks and public lands. This could delay and block land management plans that restrict access to federal lands for commercial use or development.

*Turns the Office of Advocacy into a super-regulator*

Section 4 of H.R. 527 requires the Office of Advocacy to issue regulations subject to the notice and comment rulemaking provisions of the Administrative Procedures Act<sup>8</sup> for the RFA, which will confer such regulations with Chevron deference, effectively giving the regulations the force of law. As a result, the Chief Counsel will now be involved in federal agency decision-making and not just on matters pertaining to agency compliance with the RFA.

By broadening the Office of Advocacy's role in the rulemaking process, the balance between the office and federal agencies will change dramatically. Currently, the office may simply file a comment letter on a particular proposed rule and the agency may or may not heed its advice. However, if H.R. 527 is enacted, the Office of Advocacy will be accorded with judicial deference in interpreting the RFA, which will provide it with substantial power to coerce regulatory modifications. This could adversely affect federal agencies ability to protect consumers, workers, and the environment.

*Conclusion*

H.R. 527 would dramatically expand the powers of the Office of Advocacy, including requiring the office to issue RFA regulations, greatly increasing its role in judicial proceedings, and subjecting all RFA agencies to the SBAR panel processes. In doing so, it makes no effort to ensure that sufficient resources and personnel are provided, instead leaving taxpayers with the bill. If H.R. 527 is enacted, agencies could be hamstrung in their efforts to accomplish their rulemaking and administrative responsibilities, leaving many regulations—including those that are consumer-, environmentally-, and worker-oriented—delayed or, in the worst case, unimplemented.

NYDIA M. VELÁZQUEZ.

---

<sup>8</sup> 5 U.S.C. § 553.

## XVIII. 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 italic, 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 opportunity 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 sec-*



tion 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 organiza-*

tion” 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)).

## § 602. Regulatory agenda

(a) During the months of October and April of each year, each agency shall publish in the Federal Register a regulatory flexibility agenda which shall contain—

(1) \* \* \*

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

(3) a brief description of the sector of the North American Industrial Classification System that is primarily affected by any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities; and

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

\* \* \* \* \*

[(c) Each agency shall endeavor to provide notice of each regulatory flexibility agenda to small entities or their representatives through direct notification or publication of the agenda in publications likely to be obtained by such small entities and shall invite comments upon each subject area on the agenda.]

(c) Each agency shall prominently display a plain language summary of the information contained in the regulatory flexibility agenda published under subsection (a) on its website within 3 days of its publication in the Federal Register. The Office of Advocacy of the Small Business Administration shall compile and prominently display a plain language summary of the regulatory agendas referenced in subsection (a) for each agency on its website within 3 days of their publication in the Federal Register.

\* \* \* \* \*

### § 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.*

#### **【§ 605. Avoidance of duplicative or unnecessary analyses**

**[(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.]**

#### **§ 605. Incorporations by reference and certifications**

*(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 re-promulgated 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) 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, including an assessment of the proposed rule's impact on the cost that small entities pay for energy, 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) The plan shall include a section that details how an agency will conduct outreach to and meaningfully include small businesses for the purposes of carrying out this section. The agency shall include in this section a plan for how the agency will contact small businesses and gather their input on existing agency rules.*

*(d) 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 (e) and a detailed explanation of the reasons for such determination.*

*(e) In reviewing a rule pursuant to subsections (a) through (d), 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 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 (d).*

(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.*

(f) *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 requirements 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.

\* \* \* \* \*

## TITLE 28, UNITED STATES CODE

\* \* \* \* \*

## 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.

\* \* \* \* \*

---

## SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT OF 1996

### TITLE II—SMALL BUSINESS REGULATORY FAIRNESS

#### SEC. 201. SHORT TITLE.

This title may be cited as the “Small Business Regulatory En-  
forcement Fairness Act of 1996”.

\* \* \* \* \*

#### SEC. 212. COMPLIANCE GUIDES.

(a) COMPLIANCE GUIDE.—

(1) \* \* \*

\* \* \* \* \*

[(5) AGENCY PREPARATION OF GUIDES.—The agency shall, in  
its sole discretion, taking into account the subject matter of the  
rule and the language of relevant statutes, ensure that the  
guide is written using sufficiently plain language likely to be  
understood by affected small entities. Agencies may prepare  
separate guides covering groups or classes of similarly affected  
small entities and may cooperate with associations of small en-  
tities to develop and distribute such guides. An agency may  
prepare guides and apply this section with respect to a rule or  
a group of related rules.]

*(5) AGENCY PREPARATION OF GUIDES.—The agency shall, in  
its sole discretion, taking into account the subject matter of the  
rule and the language of relevant statutes, ensure that the guide  
is written using sufficiently plain language likely to be under-  
stood by affected small entities. Agencies may prepare separate  
guides covering groups or classes of similarly affected small en-  
tities and may cooperate with associations of small entities to  
distribute such guides. In developing guides, agencies shall so-  
licit input from affected small entities or associations of affected*

*small entities. An agency may prepare guides and apply this section with respect to a rule or a group of related rules.*

\* \* \* \* \*

