

SMALL BUSINESS REGULATORY FLEXIBILITY
IMPROVEMENTS ACT OF 2015

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FEBRUARY 2, 2015.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed
—————

Mr. GOODLATTE, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 527]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 527) to amend chapter 6 of title 5, United States Code (commonly known as the Regulatory Flexibility Act), to ensure complete analysis of potential impacts on small entities of rules, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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Purpose and Summary

H.R. 527, the “Small Business Regulatory Flexibility Improvements Act of 2015” (SBRFIA), provides needed reforms to the Regulatory Flexibility Act of 1980 (RFA) and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). The RFA and SBREFA attempted to require agencies to account better for the impacts of proposed regulations on small businesses and other small entities and to tailor final regulations to minimize adverse impacts on these entities, but have not commanded full agency compliance.¹ The SBRFIA updates the RFA and SBREFA to close loopholes and more effectively reduce the disproportionate burden that over-regulation places on small entities, thereby enhancing job creation and hastening economic recovery.

Background and Need for the Legislation

I. INTRODUCTION

Committee on Small Business Chairman and Judiciary Member Steve Chabot introduced H.R. 527 on January 26, 2015. The bill reforms the RFA for the first time since SBREFA’s enactment in 1996. The need for additional reform at this time is apparent from the increasing number and scope of regulations issued by Federal regulatory agencies; the disproportionate burden these regulations place on small businesses; and the failure of agencies thus far to comply fully with the RFA and SBREFA.²

H.R. 527’s predecessor bills, H.R. 2542 and H.R. 527, passed the 113th and 112th Congresses respectively on bipartisan votes on September 18, 2014 (253–163, as part of H.R. 4), February 27, 2014 (236–179, as part of H.R. 2804), and December 1, 2011 (263–159, as part of H.R. 527). H.R. 527 reintroduced this legislation in a form essentially identical to the text which most recently passed the House, as part of H.R. 4, renaming the bill the “Small Business Regulatory Flexibility Improvements Act of 2015” and otherwise preserving as written the text contained in H.R. 4. The Committee notes that the views expressed in this report should be read in conjunction with the report filed by the Committee on Small Business (H. Rep. No. 113–288, Part 2) on H.R. 2542 from the 113th Congress, since the language of H.R. 527 is nearly identical to that of H.R. 2542.

II. GENESIS AND EARLY HISTORY OF THE RFA

During the 1970’s, Congress enacted numerous regulatory statutes that dramatically increased the regulatory burden on businesses—and especially on small businesses. Regulatory requirements stifled innovation, limited small business growth, and contributed to the general economic malaise that permeated the latter

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

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

half of the decade. Between 1970 and 1980, the Federal Register more than quadrupled, from a 20,000-page publication for the arcana of the Federal Government to a nearly 90,000-page blueprint for regulating many aspects of modern American life.³

In a series of hearings during the late 1970's, Congress began to focus on the ever-growing burden Federal regulation imposed upon small businesses. Small businesses reiterated two major themes: (1) they were under-represented in Federal regulatory proceedings; and (2) Federal agency efforts to impose a "one-size-fits-all" body of regulation imposed disproportionate burdens on small businesses.⁴ These findings were supported and reinforced during the 1980 White House Conference on Small Business.

To address these concerns, Congress enacted the RFA as an additional component of a significantly broader mechanism to control agency decision-making: the Administrative Procedure Act of 1946 (APA). In general, the RFA requires Federal agencies to prepare a regulatory flexibility analysis that describes the rule's impact on small entities, including on small businesses, when proposed and final rules are published in the Federal Register.⁵ These analytical requirements are not triggered, however, if the head of the agency issuing the rule certifies pursuant to section 605(b) of the Act that the rule would not have a "significant economic impact on a substantial number of small entities,"⁶ an undefined term of art in the RFA. The lack of a uniform definition for this term is a shortcoming that the U.S. Government Accountability Office (GAO) repeatedly has found contributes to inconsistent compliance across Federal agencies.⁷ Further, although the Congressional Research Service has advised that the annual total number of certifications by all agencies is not known (or even knowable), the GAO has found that in the 3-year period after SBREFA was enacted the certification rate at four EPA offices increased from 78% to 96%.⁸ Thus, the EPA avoided complying with the RFA and SBREFA by certifying more of its rules pursuant to Section 605(b). Finally, agencies only need to assess a new regulation's direct impacts on small entities; courts have held that indirect impacts—which often are significant—are irrelevant under the RFA.⁹

The RFA also requires each Federal agency to publish a "regulatory flexibility agenda" in the Federal Register twice a year,¹⁰ similar to the *Unified Agenda of Federal Regulatory and Deregulatory Actions* required by Executive Order 12866. The Small Busi-

³See Figure 2: Federal Register Pages: 1940–2010, in Susan E. Dudley, "Prospects for Regulatory Reform in 2011," ENGAGE 11:1 (June 2011).

⁴The finding on disproportionate impact was substantiated by an Office of Advocacy study in 1984; this has been re-affirmed by subsequent research. See, e.g., National Association of Manufacturers, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business* at 1 (Sept. 10, 2014), available at <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf> (last accessed January 24, 2015).

⁵See 5 U.S.C. §§ 603, 604.

⁶See *id.* § 605(b).

⁷See, e.g., U.S. General Accounting Office, *Regulatory Flexibility Act: Key Terms Still Need to Be Clarified*, GAO-01-669T (Apr. 24, 2001), at 2 ("Over the past decade, we have recommended several times that Congress provide greater clarity with regard to these terms, but to date Congress has not acted on our recommendations.")

⁸U.S. General Accounting Office, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO-GD-00-193 (Sept. 2000), at 16.

⁹See, e.g., *Mid-Tex Elec. Co-op., Inc. v. FERC*, 773 F.2d 327, 343 (D.C. Cir. 1985) ("the legislative history [of the RFA] . . . also gives rise to an inference that Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy.")

¹⁰See 5 U.S.C. § 602.

ness Administration (SBA) Chief Counsel for Advocacy is required to monitor and report on agency compliance, and is authorized to appear as *amicus curiae* “in any action brought in a court of the United States to review a rule” and to present his or her views regarding the agency’s compliance with the RFA and the rule’s impacts on small entities.¹¹ The RFA also requires agencies to conduct decennial rule reviews to identify whether the impacts of rules on small entities can be mitigated further.¹² The effectiveness of this requirement remains unclear, however, as indicated by inconsistent agency practice.¹³

From the time of enactment until 1996, agency compliance with the RFA was at best sporadic. Agencies faced little threat from non-compliance, since judicial review of regulatory flexibility analyses was very limited, and an agency’s certification decision could not be challenged in court.¹⁴ Without the possibility of court orders, agencies only had to comply when it would benefit their rulemakings or when they could be cajoled by the Chief Counsel for Advocacy or the Office of Management and Budget’s Office of Information and Regulatory Affairs. Both the Committee on the Judiciary and the Committee on Small Business held hearings at which witnesses confirmed the systemic failure by many agencies to comply with the RFA.¹⁵

III. ENACTMENT OF SBREFA AND SUBSEQUENT HISTORY

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

¹¹ See *id.* § 612(a), (b).

¹² See *id.* § 610.

¹³ For example, the EPA only reviews rules that it previously concluded had a significant economic impact on a substantial number of small entities when the final rules were promulgated. The Department of Transportation, on the other hand, interprets this section to require a review of all of its rules. See U.S. General Accounting Office, *Regulatory Flexibility Act: Agencies’ Interpretations of Review Requirements Vary*, GAO/GGD-99-55 (Apr. 2, 1999), at 24.

¹⁴ See, e.g., *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984); *Colo. State Banking Bd. v. Resolution Trust Corp.*, 926 F.2d 931, 948 (10th Cir. 1991); *Lehigh Valley Farmers v. Block*, 640 F. Supp. 1497, 1520 (E.D. Pa. 1986), *aff’d on other grounds*, 829 F.2d 409 (3d Cir. 1987).

¹⁵ See, e.g., *Strengthening the Regulatory Flexibility Act: Hearing on H.R. 9 Before H. Comm. on Small Business*, 104th Cong., Serial No. 104-5, at 45-46 (Jan. 23, 1995) (statement of James P. Carty, Vice President, Small Manufacturers, National Association of Manufacturers) (identifying instances where the EPA and Pension Benefit Guaranty Corporation failed to comply with the RFA); *Job Creation and Wage Enhancement Act of 1995: Hearing on H.R. 9 Before the Subcomm. on Comm. and Admin. Law of the H. Comm. on the Judiciary*, 104th Cong., Serial No. 104-3, at 76 (Feb. 3 & 6, 1995) (statement of Benny L. Thayer, President, National Association for the Self-Employed) (noting that confusion under the RFA “has led to an apparent belief on the part of some agencies that compliance with the RFA is entirely voluntary”).

¹⁶ See “Contract with America Advancement Act,” 104 P.L. 141, § 212 (Mar. 29, 1996); see also 5 U.S.C. § 601 note.

¹⁷ 5 U.S.C. § 610(a).

SBREFA also subjected certain Internal Revenue Service interpretative regulations to the RFA.¹⁸

With regard to advocacy review panels, Congress recognized that, by the time a proposed rule is published for notice and comment, the agency has substantial intellectual capital invested in the proposed rule and is unlikely to change the core of its proposal during the notice and comment period.¹⁹ Thus, under SBREFA, Congress required the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA)—two of the agencies that most impact small entities—to obtain input from small entities before publishing a proposed rule that would have a significant economic impact on a substantial number of small entities.²⁰ (In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act further required the new Consumer Financial Protection Bureau to convene advocacy review panels.²¹) Before publishing an initial regulatory flexibility analysis, the agency is required to notify the SBA’s Chief Counsel for Advocacy and provide information on the draft rule’s potential impacts on small entities. The Chief Counsel for Advocacy then assembles a panel consisting of representatives from OIRA, the agency promulgating the rule, and the SBA. The panel gathers input from small entities’ representatives and issues a report within 60 days, which becomes part of the administrative record for the rule.

Congressional intent notwithstanding, SBREFA’s changes have had only a modest effect on agency compliance with regulatory flexibility requirements.²² According to the GAO, the most significant stumbling block to improved compliance is the lack of definitions in the RFA and SBREFA for the terms “significant economic impact” and “substantial number of small entities.” GAO also noted that the threshold determination of whether a rule will have a significant economic impact on a substantial number of small entities

¹⁸The RFA only requires agency compliance if the regulation is required to be issued pursuant to notice and comment pursuant to Section 553 of the APA or some other statute. Interpretative regulations are exempt from the notice and comment requirements. 5 U.S.C. § 553(b)(A).

¹⁹In 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.

²⁰See 5 U.S.C. § 609.

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

²²See, e.g., Sarah E. Shive, *If You’ve Always Done It That Way, It’s Probably Wrong: How the Regulatory Flexibility Act Has Failed To Change Agency Behavior, and How Congress Can Fix It*, 1 ENTREPREN. BUS. L.J. 153, 164 (2006) (“[W]hile one Department of Labor official noted that the judicial review permitted by the SBREFA would likely result in a ‘significant impact,’ judges have rarely ruled in favor of small businesses, granting substantial deference to agencies in all but the most egregious of cases.”); Christopher M. Grengs, *Making the Unseen Seen: Issues and Options in Small Business Regulatory Reform*, 85 MINN. L. REV. 1957, 1973 (June 2001) (“Some observers expressed high optimism about SBREFA’s prospects for holding Federal agencies more accountable for their treatment of small businesses. Although this optimism was perhaps not entirely deserved, SBREFA has spurred moderate progress in improving the regulatory treatment of small businesses. In particular, since SBREFA’s enactment in 1996, judicial review of Federal agency action under SBREFA has proved to be a promising lynchpin for remedying irrational or glaringly mistaken agency action.”); Jeffrey J. Polich, *Judicial Review and the Small Business Regulatory Enforcement Fairness Act: An Early Examination of When and Where Judges Are Using Their Newly Granted Power Over Federal Regulatory Agencies*, 41 WM. & MARY L. REV. 1425, 1426, 1461 (Apr. 2000) (“A review of existing case law demonstrates that small entities have prevailed using SBREFA in cases in which there was a gross violation of Federal rulemaking procedures by an agency, but failed when using SBREFA in cases in which the agency made some effort to comply with those requirements. . . . The SBREFA amendments succeed in refining the requirements of the RFA and, in particular, the judicial review provision grants small businesses a weapon to insure that Federal agencies comply with the RFA. Judicial deference to agency decisions, however, limits the power of judicial review. In the end, true regulatory relief depends upon the agencies’ own commitment to fairness and balance for the small businesses they regulate.”) (emphasis added).

is critical to compliance with other RFA requirements, including periodic review of rules under Section 610 and the receipt of small-entity input under SBREFA prior to the publication of proposed rules by EPA and OSHA.

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

Every agency is required to analyze the impact of new regulations on small businesses before issuing them. That is an important law. The problem is it is often being ignored. The law is on the books; the regulators do not care that the law is on the books. From this day forward they will care that the law is on the books. . . . We want to enforce the law.²³

Subsequently, the President issued Executive Order 13272,²⁴ which required agencies to adopt standards for complying with the RFA, to make those standards known to the public and to give the Office of Advocacy the opportunity to comment on proposed rules prior to publication in the Federal Register. The Executive Order, however, was not judicially enforceable²⁵ and did not address the RFA's loopholes or prevent agencies from adopting strained interpretations to avoid doing the required analysis.

Courts similarly have not been the antidotes that the authors of SBREFA contemplated. For example, courts have not given agency compliance with the RFA the same searching scrutiny that they have given to compliance with the National Environmental Policy Act (NEPA),²⁶ even though it was expected that judicial review would have the same impact on agency decision-making that it had on agency compliance with NEPA.²⁷ Agencies still have broad latitude to interpret and implement the RFA.

Testimony at hearings held by the Committee on Small Business during the 106th, 107th and 108th Congresses supported additional reform,²⁸ revealing that considerable confusion still reigned among agencies and that agencies still found ways to avoid complying with

²³“President Unveils Small Business Plan at Women’s Entrepreneurship Summit,” (Mar. 19, 2002), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/03/20020319-2.html> (last accessed July 25, 2011).

²⁴67 Fed. Reg. 53,462 (Aug. 16, 2002).

²⁵See *id.* at sec. 8.

²⁶*Compare Associated Fisheries v. Daley*, 127 F.3d 104, 112–18 (1st Cir. 1997) (holding SBREFA does not mandate courts to conduct a substantive judicial review of final decisions), and *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001) (“Regulatory Flexibility Act, which requires Federal agencies to assess the impact of their regulations on small businesses, is purely procedural in nature, requiring nothing more than filing of statement demonstrating good-faith effort to carry out its mandate.”) with *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1285 (1st Cir. 1996) (reviewing an agency’s compliance to NEPA requires a “thorough, probing, in-depth [sic] review” and a “searching and careful” inquiry into the record”).

²⁷*Regulatory Flexibility Amendments Act of 1995 on S. 350: Hearing Before S. Comm. on Small Business*, 104th Cong., Serial No. 104–103, at 24 (Mar. 8, 1995) (statement of Jere W. Glover, Chief Counsel for Advocacy, U.S. Small Business Administration) (“A more substantial and ongoing threat, potential judicial review of agency compliance with the RFA, would certainly lead to scrupulous compliance with the RFA, just as similar attentiveness is paid to the impact statement requirements of the [NEPA].”).

²⁸*IRS Compliance with the Regulatory Flexibility Act: Hearing Before the H. Comm. on Small Business*, 108th Cong., Serial No. 108–10 (May 1, 2003) (“IRS Compliance”); *Improving the Regulatory Flexibility Act: H.R. 2345: Hearing Before the H. Comm. on Small Business*, 108th Cong., Serial No. 108–62 (May 5, 2004); *Can Improved Compliance with the Regulatory Flexibility Act Resuscitate Small Healthcare Providers?: Hearing Before the H. Comm. on Small Business*, 107th Cong., Serial No. 107–53 (Apr. 10, 2002); *Regulatory Reform Initiatives and Their Impact on Small Business: Hearing Before the H. Comm. on Small Business*, 106th Cong., Serial No. 106–60 (June 7, 2000).

the RFA, even after the enactment of SBREFA.²⁹ In the 109th Congress, H.R. 682 sought to achieve most of the reforms contained in H.R. 527, H.R. 2542 and, now, H.R. 527. This Committee's Subcommittee on Commercial and Administrative Law and the Committee on Small Business both held hearings on H.R. 682.³⁰

IV. THE OBAMA ADMINISTRATION AND THE CONTINUING NEED FOR REFORM

On January 18, 2011, President Obama issued a Presidential Memorandum to agency heads entitled "Regulatory Flexibility, Small Business, and Job Creation," stating that his "Administration is firmly committed to eliminating excessive and unjustified burdens on small businesses, and to ensuring that regulations are designed with careful consideration of their effects, including their cumulative effects, on small businesses."³¹ The President also directed agency heads to publish explanations of their decisions not to provide regulatory flexibility for small businesses, if those decisions were not based on legal limitations. The President's memorandum, however, added nothing meaningful to existing agency requirements, and it explicitly stated that the memorandum did not create any legal rights. Even if it had, any of its provisions could be revoked at any time, as it is merely an executive memorandum, not a law.

Meanwhile, the need for additional RFA reform has grown. In 2010, for example, Federal agencies promulgated 3,312 final rules, while Congress passed and the President signed into law only 385 statutes. Recent reports have found that Federal rulemaking imposes a cumulative burden of at least \$1.86 trillion on our economy—a figure that equals about \$15,000 per household, per year.³² That burden, moreover, falls disproportionately on small businesses:

Considering all Federal regulations, all sectors of the U.S. economy and all firm sizes, Federal regulations cost just less than \$10,000 per employee per year in 2012 (in 2014 dollars). Small firms with fewer than 50 employees incur regulatory costs (\$11,724 per employee per year) that are 17 percent greater than the average firm. The cost per em-

²⁹ See, e.g., *IRS Compliance* at 38 (May 1, 2003) (statement of Juanita Millender-McDonald, Member, House Comm. on Small Business) ("The IRS has generally avoided the requirements of SBREFA, even though the law was, in part, specifically written to address IRS compliance with the RFA."); *Can Improved Compliance with the Regulatory Flexibility Act Resuscitate Small Healthcare Providers?: Hearing Before the H. Comm. on Small Business, 107th Cong., Serial No. 107-53, at 15* (Apr. 10, 2002) (statement of Zachary Evans, President, National Association of Portable X-Ray Providers) ("CMS refuses to consider the impact upon our industry of their rulemaking, consult with us during the rulemaking process, or in any way evaluate industry costs prior to setting our reimbursement rates."); *Regulatory Reform Initiatives and Their Impact on Small Business: Hearing Before the Comm. on Small Business, 106th Cong., Serial No. 106-60, at 40* (June 7, 2000) (statement of Duncan Thomas, President, National Association of Convenience Stores) (explaining that SBREFA "leads often to confusion, inadvertent noncompliance and considerable expense").

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

³¹ "Presidential Memoranda—Regulatory Flexibility, Small Business, and Job Creation," (Jan. 18, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/18/presidential-memoranda-regulatory-flexibility-small-business-and-job-cre> (last accessed July 25, 2011).

³² See Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, at 2 (Competitive Enterprise Institute 2014); cf. *Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business* at 1 (estimating total Federal regulatory costs in 2012 at \$2.028 trillion).

ployee is \$10,664 for medium-sized firms and \$9,083 for large firms. These estimates are consistent with prior studies completed during the past 25 years, which have shown that the cost of regulatory compliance disproportionately affects small firms.³³

Another recent study found that “[e]ach million-dollar increase in the regulatory budget costs the economy 420 private sector jobs.”³⁴

Recent regulatory expansions and the future threat of further excessive Federal regulation—such as under the waves of regulation occurring to implement the Patient Protection and Affordable Care Act³⁵ and the Dodd-Frank Wall Street Reform and Consumer Protection Act³⁶—have created immense regulatory burdens and uncertainty for the economy, chilling job creation, investment and economic growth and suppressing America’s economic freedom and standing among the world’s economies.³⁷ These effects are particularly burdensome on small businesses—and since start-up firms are the source of net job creation in the U.S. economy, it is only logical that the impact of these effects on small businesses contributes substantially to the economy’s inability to create sufficient levels of new jobs.³⁸

Agencies continue to ignore their obligations under the RFA. For example, EPA found carbon dioxide to be a threat to public health and welfare³⁹ and initiated an inexorable series of additional regulatory actions that, under existing environmental laws, will impose large adverse impacts on small businesses. EPA, however, refused to comply with the RFA—even when the Chief Counsel for Advocacy pointed out to the EPA Administrator (and, by copy, to OIRA) that EPA had failed to convene advocacy review panels before imposing its rules, failed to develop and evaluate regulatory alternatives to minimize its actions’ impacts on small businesses, and inappropriately certified that its actions will not impact small busi-

³³ *Id.*

³⁴ T. Randolph Beard et al., *Regulatory Expenditures, Economic Growth and Jobs: An Empirical Study*, Phoenix Center Policy Bulletin No. 28 (Apr. 2011), at 5, available at <http://www.phoenix-center.org/PolicyBulletin/PCPB28Final.pdf> (last accessed July 25, 2011).

³⁵ P.L. 111–148 (Mar. 23, 2010).

³⁶ P.L. 111–203 (July 21, 2010).

³⁷ See, e.g., Editors, *The Uncertainty Principle*, WALL STREET JOURNAL (July 14, 2010), available at <http://online.wsj.com/article/SB10001424052748704288204575363162664835780.html?KEYWORDS=rulemakings> (last accessed July 25, 2011); Chamber of Commerce, *Jobs for America: An Open Letter to the President of the United States, the United States Congress, and the American People* (July 14, 2010) (stating, e.g., that, substantially due to regulatory uncertainty, American corporations are sitting on well over \$1 trillion that they could otherwise invest); Terry Miller & Kim R. Holmes, “Mostly Free”—*The Startling Decline of America’s Economic Freedom and What to Do About It*, Heritage Foundation (July 14, 2010), available at <http://www.heritage.org/Research/Reports/2010/07/Mostly-Free-The-Startling-Divide-of-Americas-Economic-Freedom-and-What-to-Do-About-It> (summary) (last accessed July 25, 2011); http://thf_media.s3.amazonaws.com/2010/pdf/sr0082.pdf (full report) (last accessed July 25, 2011); Terry Miller, *The U.S. loses Ground on Economic Freedom*, WALL STREET JOURNAL (Jan. 13, 2011), available at http://online.wsj.com/article/SB10001424052748703779704576074193214999486.html?utm_source=Newsletter&utm_medium=Email&utm_campaign=Heritage%2BHot sheet (last accessed July 25, 2011); Heritage Foundation and Wall Street Journal, *2011 Index of Economic Freedom: Executive Highlights* (Jan. 2011) at 6 (placing America as ninth in economic freedom among countries surveyed and recording a further decline in U.S. economic freedom).

³⁸ Tim Kane, *The Importance of Start-ups in Job Creation and Job Destruction*, Ewing Marion Kaufmann Foundation (July 2010) at 6, available at http://www.kauffman.org/uploadedFiles/form_formation_importance_of_startups.pdf (last accessed July 25, 2011).

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

nesses.⁴⁰ When former Judiciary Committee Chairman Lamar Smith and Small Business Committee Chairman Sam Graves brought to OIRA’s attention their concerns over these violations, the potential for EPA’s regulations to impose particularly heavy burdens on small businesses, and the need for OIRA to intervene and assure RFA compliance, OIRA’s response was simply to refer the matter to EPA.⁴¹

Other, still more recent instances of EPA’s failures to comply with RFA requirements are similarly egregious. The joint EPA and Corps of Engineers “Waters of the United States” rulemaking (WOTUS), for example, could result in a large expansion of Clean Water Act (CWA) permitting and other requirements to waters asserted in the proposed rule for the first time to be categorically jurisdictional, as opposed to being subject to case-by-case jurisdictional determinations, as well as other waters proposed to be newly subjected to case-by-case jurisdictional determinations. The CWA permitting process alone can be quite expensive and lengthy. As reported in a 2002 assessment, “[t]he average applicant for an individual [CWA section 404] permit spends 788 days and \$271,596 in completing the process, and the average applicant for [coverage under the agencies’ general,] nationwide permit spends 313 days and \$28,915.”⁴² That time and those costs, moreover, did not include the time and expense of design changes or mitigation measures that could be required.⁴³ Permits required under CWA section 402, meanwhile, which include effluent limitations, monitoring and reporting requirements, and conditions, also impose costs. As just one example, EPA itself estimated that per-construction-site compliance costs for its Phase II section 402 storm-water permitting program were between \$2,143 and \$9,646 for sites that disturbed between one and five acres.⁴⁴ In the WOTUS rulemaking, however, EPA and the Corps certified, without any factual basis for the certification, that the proposed rule would not have a “significant economic impact on a substantial number of small entities,”⁴⁵ despite the obvious potential consequences for direct and indirect impacts on small businesses and other small entities. Making matters worse, the agencies’ analysis did not even account for waters that previously had been assumed by landowners and businesses to be non-jurisdictional under the CWA.⁴⁶

Other agencies are similarly at fault for non-compliance with the RFA and SBREFA. On January 25, 2011, for example, OSHA announced that it had temporarily withdrawn from OMB review a proposed rule on injury-related employer recordkeeping. The stated reason for the withdrawal was to “seek greater input from small

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

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

⁴² *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (citation omitted). The Corps may issue general (state, regional or nationwide) permits for similar activities that when performed separately will cause only minimal environmental effects. 33 U.S.C. § 1344(e).

⁴³ *Id.*

⁴⁴ *United States Environmental Protection Agency, Economic Analysis of the Final Phase II Storm Water Rules ES-4* (1999). The compliance cost figures are the sum of the average best management practice costs and administrative costs. *Id.*

⁴⁵ Proposed Rule, 79 Fed. Reg. at 22,220.

⁴⁶ Letter to EPA and Corps from Waters Advocacy Coalition 2 (May 13, 2014), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-0851>.

businesses on the impact of the proposal.”⁴⁷ Yet rather than commit itself to full RFA/SBREFEA compliance, OSHA promised to hold a meeting “to engage and listen to small businesses about the agency’s proposal” and to “conduct a stakeholder meeting with other members of the public if requested.”⁴⁸ This falls well short of convening the advocacy review panel that OSHA is required by law to hold.⁴⁹

V. HEARINGS ON THE LEGISLATION IN PRIOR CONGRESSES

On February 10, 2011, the Subcommittee on Courts, Commercial and Administrative Law held a legislative hearing on H.R. 527.⁵⁰ Testimony was received from Rich Gimmell, President of Atlas Machine & Supply, Inc.; Thomas M. Sullivan, Counsel for Nelson, Mullins, Riley, Scarborough LLP; J. Robert Shull, Program Officer of Worker Right’s for the Public Welfare Foundation; and, Karen R. Harned, Executive Director of the National Federation of Independent Business (NFIB).

Mr. Gimmell, also representing the National Association of Manufacturers, noted that the current recession had to that point resulted in a loss of 2.2 million jobs in the manufacturing sector.⁵¹ Mr. Gimmell called for “more detailed statements in the RFA process and requirements to identify redundant, overlapping, or conflicting regulations.”⁵² Incorporating this sort of “lean thinking” into the regulatory process would change the current wasteful policy practices of most agencies and, in turn, improve the economy by allowing businesses to create jobs and expand.⁵³

Mr. Sullivan testified, “One size fits all Federal mandates do not work when applied to small business; second, small businesses face higher costs per employee to comply with Federal regulation than their larger competitors, and, third, small business is critically important to the American economy.”⁵⁴ According to Mr. Sullivan, H.R. 527 would enable the Office of Advocacy to ensure that agencies properly consider how their regulations impact small businesses, and would provide clarity to courts on judicial review.⁵⁵

According to Ms. Harned, “[o]verzealous regulation is a perennial cause for concern for small business owners and is particularly burdensome in times like these when the Nation’s economy remains sluggish.”⁵⁶ Ms. Harned stated that “small businesses face an annual regulatory cost of \$10,585 per employee which is 36 percent more than the regulatory cost facing businesses with more than 500 employees.”⁵⁷ In opposition to H.R. 527, Mr. Shull alleged the bill would “paralyze the regulatory agencies we need to protect the

⁴⁷ U.S. Dep’t of Labor, Office of Public Affairs, *News Release: US Labor Department’s OSHA temporarily withdraws proposed column for work-related musculoskeletal disorders, reaches out to small businesses* (Jan. 25, 2011).

⁴⁸ *Id.*

⁴⁹ See 5 U.S.C. § 609.

⁵⁰ See “Regulatory Flexibility Improvements Act of 2011”—*Unleashing Small Businesses to Create Jobs: Hearing on H.R. 527 Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary*, 112th Cong., Serial No. 112–16 (Feb. 10, 2011).

⁵¹ *Id.* at 56.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 65.

⁵⁵ *Id.* at 66.

⁵⁶ *Id.* at 85.

⁵⁷ *Id.*

public and keep them from getting things done to protect the public.”⁵⁸

The Committee on Small Business also held a legislative hearing on H.R. 527.⁵⁹ Testimony was received from Bill Squires, Senior Vice President and General Counsel for Blackfoot Telecommunications Group; David Frulla of Kelley Drye & Warren LLP; Craig Fabian, Vice President of Regulatory Affairs and Assistant General Counsel at the Aeronautical Repair Station Association; and, Rich D. Draper, CEO of the Ice Cream Club, Inc.

On June 26, 2013, the Subcommittee on Regulatory Reform, Commercial and Antitrust Law held a legislative hearing on H.R. 2542.⁶⁰ Testimony was received from NFIB Exec. Dir. Harned; Carl Harris, co-founder of Carl Harris Co., Inc., Kansas national area chairman for the National Association of Home Builders, and president of the Kansas Building Industry Association; Rosario Palmieri, Vice President, Infrastructure, Legal and Regulatory Policy, National Association of Manufacturers; and, Amit Narang, Regulatory Policy Advocate, Public Citizen.

Ms. Harned testified that overzealous regulation remains a constant concern, and that, as of June 20, 2013, 23 percent of small businesses cited red tape as their most important concern, second only to taxes.⁶¹ Ms. Harned emphasized that, according to analysis of recent figures released by OIRA, the costs imposed by new regulations under the Obama Administration in 2012 alone exceeded the costs of new regulations promulgated by both the George W. Bush and Clinton administrations.⁶² Meanwhile, Ms. Harned stressed, job creation in the U.S. has remained stagnant, and small businesses had reported a drop in willingness to hire since November 2012.⁶³ In Ms. Harned’s view, regulatory reform like the RFIA would “go a long way” towards resolving the adverse impacts of regulation on small businesses, who are responsible for most job creation in the economy.⁶⁴

Mr. Harris testified that the costs of regulation at all levels account for 25 percent of the cost of new homes, and that it can be very difficult for a small business to comply with the myriad of regulations affecting its business.⁶⁵ Based on his experience with the RFA and SBREFA, including as a SBREFA small business review panelist, Mr. Harris testified that the concepts of the RFA and SBREFA were constructive, but that, under existing law, agencies too frequently reduced RFA and SBREFA compliance to a “check

⁵⁸*Id.* at 77.

⁵⁹See *Reducing Federal Agency Overreach: Modernizing the Regulatory Flexibility Act Before the H. Comm. on Small Business*, 112th Cong., Serial No. 112-007 (Mar. 30, 2011).

⁶⁰See “*Legislative Hearing on H.R. 2542, the Regulatory Flexibility Improvements Act of 2013*” Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 113th Cong., Serial No. 113-29 (June 28, 2013) (hearing record available at <http://judiciary.house.gov/index.cfm/hearings?ID=37999061-C141-C381-BD6B-A8FC233C3258>).

⁶¹*Statement of Karen Harned* at “*Legislative Hearing on H.R. 2542, the Regulatory Flexibility Improvements Act of 2013*” Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 113th Cong., Serial No. 113-29 at 2 (June 28, 2013) (available at <http://judiciary.house.gov/index.cfm/hearings?ID=37999061-C141-C381-BD6B-A8FC233C3258>).

⁶²*Id.* at 2-3.

⁶³*Id.* at 3.

⁶⁴*Id.*

⁶⁵*Statement of Carl Harris* at “*Legislative Hearing on H.R. 2542, the Regulatory Flexibility Improvements Act of 2013*” Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 113th Cong., Serial No. 113-29 at 2 (June 28, 2013) (available at <http://judiciary.house.gov/index.cfm/hearings?ID=37999061-C141-C381-BD6B-A8FC233C3258>).

the box” exercise that produced insufficiently meaningful results.⁶⁶ Mr. Harris submitted that the RFIA’s reforms to the RFA and SBREFA would substantially contribute to the realization of these statutes’ promise.⁶⁷

Mr. Palmieri testified that nearly 95 percent of U.S. manufacturers have fewer than 100 employees, and that “to compete on a global stage, manufacturing in the United States needs policies that enable companies to thrive and create jobs.”⁶⁸ Mr. Palmieri directed the Subcommittee’s attention to a 2011 study by the Manufacturers Institute and the Manufacturers Alliance for Productivity and Innovation, which found that U.S. manufacturers “face a 20 percent structural cost burden compared to nine major trading partners because of government imposed policies, including regulations.”⁶⁹ Mr. Palmieri also cited recent evidence that 67 percent of manufacturers cited an unfavorable business climate due to regulations and taxes as a primary challenge that they faced.⁷⁰ Mr. Palmieri submitted that, when regulatory agencies did comply with the RFA and SBREFA, positive results could occur, but that agencies far too often were able to evade meaningful RFA compliance.⁷¹ Like Ms. Harned and Mr. Harris, he testified that the RFIA would greatly help to solve this problem.⁷²

Mr. Narang, by contrast, submitted that, in his view, the RFIA would slow down the regulatory process unnecessarily.⁷³ In his view, a more productive path forward would be to provide more compliance guidance and assistance to small businesses, rather than additional analysis of regulations before they are imposed.⁷⁴

Hearings

The Committee on the Judiciary held no hearings this term on H.R. 527. As discussed above, the Committee held multiple hearings in the 112th and 113th Congresses on previous bills that embodied the legislation.

Committee Consideration

On January 27, 2015, the Committee met in open session and ordered the bill H.R. 527 favorably reported without amendment, by a rollcall vote of 19 to 8, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Statement of Rosario Palmieri at “Legislative Hearing on H.R. 2542, the Regulatory Flexibility Improvements Act of 2013” Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 113th Cong., Serial No. 113–29 at 3 (June 28, 2013) (available at <http://judiciary.house.gov/index.cfm/hearings?ID=37999061-C141-C381-BD6B-A8FC233C3258>).*

⁶⁹ *Id.* at 4.

⁷⁰ *Id.*

⁷¹ *Id.* at 5–7.

⁷² *Id.* at 6.

⁷³ *Statement of Amit Narang at “Legislative Hearing on H.R. 2542, the Regulatory Flexibility Improvements Act of 2013” Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 113th Cong., Serial No. 113–29 at 9 (June 28, 2013) (available at <http://judiciary.house.gov/index.cfm/hearings?ID=37999061-C141-C381-BD6B-A8FC233C3258>).*

⁷⁴ *Id.* at 10.

rollcall votes occurred during the Committee's consideration of H.R. 527.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)			
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)			
Ms. Farenthold (TX)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Ms. Walters (CA)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)			
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Peters (CA)	X		
Total	7	15	

1. Amendment #1, offered by Mr. Johnson. The Amendment exempts regulations that the Director of the Office of Management and Budget determines would result in net job creation. The Amendment was defeated by a rollcall vote of 7 to 15.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)			
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)			
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)			
Ms. Farenthold (TX)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Ms. Walters (CA)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)			
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)			
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Mr. Peters (CA)	X		
Total	8	15	

2. Amendment #2, offered by Mr. Conyers. The Amendment strikes section 5 of H.R. 2542, which provides compliance-related rulemaking authority to the Small Business Administration's Chief Counsel for Advocacy and repeals waiver provisions of the RFA. The amendment was defeated by a rollcall vote of 8 to 15.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)			
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)			
Ms. Farenthold (TX)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Ms. Walters (CA)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)			
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Mr. Peters (CA)	X		
Total	9	17	

3. Amendment #3, offered by Mr. Nadler. The Amendment adds requirements that agencies identify direct and indirect benefits of covered regulations. The Amendment was defeated by a rollcall vote of 9 to 17.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)	X		
Mr. Chabot (OH)	X		
Mr. Issa (CA)	X		
Mr. Forbes (VA)	X		
Mr. King (IA)	X		
Mr. Franks (AZ)	X		
Mr. Gohmert (TX)	X		
Mr. Jordan (OH)	X		
Mr. Poe (TX)			
Mr. Chaffetz (UT)	X		
Mr. Marino (PA)			
Mr. Gowdy (SC)	X		
Mr. Labrador (ID)			
Ms. Farenthold (TX)	X		
Mr. Collins (GA)	X		
Mr. DeSantis (FL)	X		
Ms. Walters (CA)	X		
Mr. Buck (CO)	X		
Mr. Ratchliffe (TX)	X		
Mr. Trott (MI)	X		
Mr. Bishop (MI)	X		
Mr. Conyers, Jr. (MI), Ranking Member		X	
Mr. Nadler (NY)		X	
Ms. Lofgren (CA)		X	
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)			
Mr. Johnson (GA)		X	
Mr. Pierluisi (PR)		X	
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)		X	
Mr. Jeffries (NY)			
Mr. Cicilline (RI)		X	
Mr. Peters (CA)		X	
Total	19	8	

4. Reporting H.R. 527. The bill will promote job creation, economic growth and the protection of small entities from unnecessary Federal regulatory burdens. Reported by a rollcall vote of 19 to 8.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activi-

ties under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

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

Congressional Budget Office Cost Estimate

With respect to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, an estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 was not submitted to the Committee before the filing of the report.

Duplication of Federal Programs

No provision of H.R. 527 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 527 specifically directs the Chief Counsel for Advocacy of the Small Business Administration to conduct one rule making proceeding within the meaning of 5 U.S.C. 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 527 is intended to promote job creation and economic growth by better protecting small entities from unnecessary Federal regulatory burdens.

Advisory on Earmarks

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

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short title; table of contents.

Section 1 provides that the Act may be cited as the “Small Business Regulatory Flexibility Improvements Act of 2015.”

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

Subsection 2(a) expands the RFA and SBREFA to apply to all rules within the meaning of 5 U.S.C. § 551(4), except for certain rules of particular applicability. The RFA currently defines a “rule” as one that is issued pursuant to the notice and comment rule-making provisions of Section 553(b) of the APA. The Committee believes this definition is unjustifiably narrow; the definition of a “rule” under the RFA should be the same as under the APA. Amendment 15 adopted by the Small Business Committee at its September 18, 2013, markup of H.R. 2542 amended Subsection 2(a) to exempt rules that protect the rights of and benefits for veterans from the definition of “rule” in the legislation.

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

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

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

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

Subsection 2(f)(1) clarifies that the IRS must comply fully with the RFA. The IRS has previously concluded that it is not required to follow the RFA when issuing an “interpretative” rule outside of the notice-and-comment process. Adopted in 1996, SBREFA required the IRS to comply with the RFA when an interpretative rule imposes a collection-of-information requirement on a small entity. The IRS misinterprets this statute to apply only when the taxpayer

is required to complete a brand new, never-used form. Section 2(f)(1) makes clear that the IRS is required to comply with the RFA whenever the IRS intends to codify a regulation in the Code of Federal Regulations and the regulation (or statute that the regulation is interpreting) imposes a collection-of-information requirement. Moreover, the ensuing regulatory flexibility analysis should not be limited to the cost associated with the “collection of information”; rather, the “collection of information” is a trigger for a full analysis of the rule’s economic effects. Subsections 2(f)(2)–(3) establishes that the terms “collection of information” and “recordkeeping requirement” have the same meaning under the RFA as under the Paperwork Reduction Act.

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

Section 3. Expansion of Report of Regulatory Agenda.

Section 3 expands the terms of 5 U.S.C. sec. 602, which requires agencies to publish regulatory agendas every April and October, including regulations that may have significant impacts on substantial numbers of small entities. Section 3 requires the agendas to describe the North American Industrial Classification System sectors primarily affected by the rules. It also requires agencies and the SBA to publish plain language summaries of the information in the agendas on their websites.

Section 4. Requirements for Providing More Detailed Analyses.

NEPA, which was the model when Congress adopted the RFA in 1980, requires agencies to develop a “detailed statement” regarding the environmental impact of a proposed rule. Courts have interpreted NEPA to require agencies to take a “hard look” at environmental impacts. The RFA, however, only requires agencies to develop a “statement” regarding the impact of a new regulation on small entities.

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

Section 4 is intended to increase agency scrutiny directly, by amending the statute, rather than indirectly, as was attempted in SBREFA by adding a judicial review component. Thus, Subsection 4(a) amends Section 603 by requiring the initial regulatory flexibility analysis (“IFRA”) to contain a “detailed statement” rather

than merely a “statement”; by striking the term “succinct” from Subsection 603(b)(2); by striking the term “where feasible” from Subsection 603(b)(3); and, by striking the phrase “to the extent practicable” from Subsection 603(b)(5). Agencies exploit these terms to avoid following the law’s clear intent. Subsection 4(a) also adds a new paragraph (6) to Subsection 603(b), requiring agencies to consider the cumulative economic impact of the proposed rule in light of existing rules. Additionally, recognizing that a rule could affect some small entities more than others, Subsection 4(a)(7) requires agencies to describe any disproportionate economic impact on a specific class of small entities. Finally, Subsection 4(a) requires that an initial regulatory flexibility analysis describe any impairment of the ability of small entities to have access to credit.

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

Subsection 4(c) allows agencies to satisfy the RFA by making reference to already-completed analyses (for example, under NEPA) that satisfy the RFA’s criteria. If the necessary analysis already has been completed, then there is no reason to force an agency to go through the rote exercise of performing it again. Nevertheless, agencies must cite to the pre-existing analysis with specificity; vague or casual references will not suffice. Thus, Subsection 4(c) requires the agency to identify the “specific portion of another agenda or analysis.” In the same vein, when an agency certifies that a proposed rule will not have a “significant economic impact on a substantial number of small entities,” Subsection 4(d) requires the agency to give a “detailed statement” and to identify the supporting “factual and legal” basis for the certification.

Finally, Subsection 4(e) makes quantifiable data (of the caliber required under the Information Quality Act) the standard for measuring the economic impact of a proposed rule on small entities. This will make agencies’ IRFAs and FRFAs more transparent, including for courts at the judicial review stage. If quantifiable data is unavailable then the agency must provide a “detailed statement explaining why quantification is not practicable or reliable” as well as “a more general descriptive statement” of the rule’s effects. The Chief Counsel for Advocacy will have the authority to promulgate regulations fleshing out these data quality standards.

Section 5. Repeal of Waiver Authority and Additional Powers of Chief Counsel.

Section 5 empowers the Chief Counsel for Advocacy to make rules governing agency compliance with the RFA. The status quo of agency compliance with the RFA is best described as inconsistent and recalcitrant. To address this problem, the Chief Counsel will promulgate rules regarding agency compliance within 270 days

of enactment. This parallels the authority of the Council on Environmental Quality to issue regulations governing agency compliance with the NEPA. The Chief Counsel's regulations will be promulgated according to notice-and-comment rulemaking and consequently will receive *Chevron* deference. Agencies can issue supplementary compliance protocols, but no agency can overturn the Chief Counsel's compliance rules.

Section 5 clarifies that the Chief Counsel may intervene in agency adjudications, like an *amicus curiae*, to advise the agency of how its decision will affect small entities. The Chief Counsel is not authorized to appeal any decision or otherwise to act as counsel for the small entity concerned. Section 5 also allows the Chief Counsel to file comments on any notice of proposed rulemaking, which will strengthen the Chief Counsel's role as the main advocate for small entities in all Federal agency decision-making (not just when the RFA is concerned).

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

Section 6. Procedures for Gathering Comments.

Section 6 clarifies, improves and expands the advocacy review panel process. Currently, as amended by SBREFA, Section 609 requires OSHA and the EPA to hold advocacy review panels before publishing an IRFA, to receive input directly from small entities. The new Consumer Financial Protection Bureau also is required to conduct advocacy review panels.

Building on these reforms, Section 6 expands the use of advocacy review panels to all Federal agencies, including independent regulatory agencies, for any major rule (as defined by the Congressional Review Act) or for any rule that will have a significant economic impact on a substantial number of small entities. Section 6 clarifies the type of information the agency must provide to the Office of Advocacy (with an appropriate accommodation made for IRS rules) and describes the content and focus of the report itself, which is to be drafted by the Chief Counsel for Advocacy in consultation with other panel members. Rather than simply listing concerns raised by small entities in the panel process, the report should discuss in detail the regulation's economic impact and analyze alternatives that will minimize costs or maximize benefits. Section 6 slightly reforms the panel's composition and clarifies that the Office of Advocacy is solely responsible for selecting small entity representatives to advise the panel. The Section also empowers the Chief Counsel for Advocacy to waive the panel process when it is “impractical, unnecessary, or contrary to the public interest.”

In addition, Section 6 clarifies that agencies are required annually to publish the list of existing rules they plan to review under the Regulatory Flexibility Act's periodic review requirement; requires agencies to provide to small entities, upon their request,

panel reports and materials and information provided to the Chief Counsel for Advocacy within 10 business days of the request; and requires that an assessment of the economic impact of a proposed rule on small entities in a panel report includes an assessment of the proposed rule's impact on startup costs for small entities.

Section 7. Periodic Review of Rules.

Section 7 of H.R. 527 reforms Section 610 to clarify how agencies must perform the periodic regulatory review. The law as currently written contains a number of ambiguities and shortcomings that warrant clarification and revision. Section 7 requires agencies to develop new periodic review plans within 180 days and to publish these plans online. Section 7 clarifies that the agency must review *all* rules that have a significant economic impact on a substantial number of small entities—regardless of whether the agency originally prepared an FRFA for the rule. The trigger is whether the rule *currently* has a significant economic impact on a substantial number of small entities.

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

Section 7 also requires that an agency conduct outreach to and meaningfully include women, veteran and socially and economically disadvantaged small businesses in their plan to gather input on existing agency rules. Finally, Section 7 allows small entities to provide input on the list of rules an agency plans to review by requiring agencies to solicit public comment on the list of rules when it is published in the Federal Register and on the agency's website.

Section 8. Judicial Review of Compliance with the RFA.

Under Section 8, judicial review is available when the agency publishes the final rule; the current law requires small entities to wait until the “final agency action” is complete before bringing suit alleging a violation of the RFA. Taken together, Subsections 8(a) and (b) ensure that small entities will have prompt access to judicial review without procedural delays from agency-imposed exhaustion requirements. Subsection 8(c) makes appropriate conforming and technical corrections to Section 611. Lastly, Subsection 8(d) clarifies the Chief Counsel for Advocacy's authority to file an amicus brief regarding agency compliance with the RFA.

Section 9. Jurisdiction of Court of Appeals for Challenges to Rules Implementing RFA.

Subsection 9(a) grants jurisdiction to the U.S. Court of Appeals to review challenges by small entities to rules promulgated by the Chief Counsel for Advocacy to implement the RFA. Subsection 9(b) makes technical conforming amendments. Subsection 9(c) clarifies the Chief Counsel's authority to file an amicus brief in a lawsuit challenging an agency's compliance with the Chief Counsel's rules implementing the RFA.

Section 10. Establishment and Approval of Small Business Concern Size Standards by Chief Counsel for Advocacy

Section 10 transfers from the SBA Administrator to the Chief Counsel for Advocacy the function of determining size standards of small businesses for purposes other than the Small Business Act and Small Business Investment Act of 1958.

Section 11. Clerical Amendments.

Section 11 contains necessary clerical amendments to make the U.S. Code consistent with the foregoing changes.

Section 12. Agency Preparation of Guides.

Subsection 212(a)(5) of SBREFA requires agencies to prepare compliance guides for any rule for which a final regulatory flexibility analysis was prepared. Under the existing law, agencies may consult with small entities in the development of these guides. Section 12 requires agencies to solicit input from affected small entities or associations of affected small entities in the development of compliance guides.

Section 13. Comptroller General Report.

Section 13 requires a GAO study no later than 90 days after the enactment of the legislation that examines whether the Office of the Chief Counsel for Advocacy has the capacity and resources to carry out its duties under the bill.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and 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.】					
	<i>605. Incorporations by reference and certifications.</i>					
	*	*	*	*	*	*
	【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 pertaining to the protection of the rights of and benefits for veterans or a rule of particular (and not general) applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances.*

[(3) the term]

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

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

(4) *SMALL ORGANIZATION.*—

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

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

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

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

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

[(5) the term]

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

[(6) the term]

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

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

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

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

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

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

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

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

(8) *RECORDKEEPING REQUIREMENT.*—The term “record-keeping 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 (including compliance costs and effects on revenue) 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 the 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) a brief description of the subject area of 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;

(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).

(b) Each regulatory flexibility agenda shall be transmitted to the Chief Counsel for Advocacy of the Small Business Administration for comment, if any.

[(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.*

(d) Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda.

§ 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;

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

(8) describing any impairment of the ability of small entities to have access to credit.

(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) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) the use of performance rather than design standards; and

(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

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

~~[(A) any]~~ (1) *any* projected increase in the cost of credit for small entities;

~~[(B) any]~~ (2) *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]~~ (3) *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) a statement of the need for, and objectives of, the rule;

(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;

(3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;

(4) a *detailed* description of and an estimate of the number of small entities to which the rule will apply or ~~[(an expla-~~

nation] *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)] (7) 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**].**; and

(8) *a detailed description of 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] Incorporations by reference and certifications.—

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

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

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

to the Chief Counsel for Advocacy of the Small Business Administration.

(c) In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of sections 602, 603, 604 and 610 of this title.

* * * * *

¶ 607. Preparation of analyses

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

¶ 608. Procedure for waiver or delay of completion

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

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

§ 607. Quantification requirements

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

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

§ 608. Additional powers of Chief Counsel for Advocacy

(a)(1) Not later than 270 days after the date of the enactment of this section, 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) When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques such as—

(1) the inclusion in an advanced notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;

(2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;

(3) the direct notification of interested small entities;

(4) the conduct of open conferences or public hearings concerning the rule for small entities including soliciting and receiving comments over computer networks; and

(5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.

[(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, an assessment of the proposed rule's impact on start-up costs for small entities, and a discussion of any alternatives that will minimize adverse significant economic impacts or maximize beneficial significant economic impacts on small entities.*

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

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

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

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

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

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

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

(g) *A small entity or a representative of a small entity may submit a request that the agency provide a copy of the report prepared under subsection (d) and all materials and information provided to the Chief Counsel for Advocacy of the Small Business Administration under subsection (b). The agency receiving such request shall provide the report, materials and information to the requesting small entity or representative of a small entity not later than 10 business days after receiving such request, except that the agency shall not disclose any information that is prohibited from disclosure to the public pursuant to section 552(b) of this title.*

§ 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 this section, 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 this section 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 this section 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 (including small business concerns owned and controlled by women, small business concerns owned and controlled by veterans, and small business concerns owned and controlled by socially and economically disadvantaged individuals (as such terms are defined in the Small Business Act)) 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, territorial, and local rules.*
- (6) *The contribution of the rule to the cumulative economic impact of all Federal rules on the class of small entities affected by the rule, unless the head of the agency determines that such calculations cannot be made and reports that determination in the annual report required under subsection (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) *Each year, each agency shall publish in the Federal Register and on its website a list of rules to be reviewed pursuant to such plan. The agency shall include in the publication a solicitation of public comments on any further inclusions or exclusions of rules from the list, and shall respond to such comments. Such publication shall include a brief description of the rule, the reason why the agency determined that it has a significant economic impact on a substantial number of small entities (without regard to whether it had prepared a final regulatory flexibility analysis for the rule), and request comments from the public, the Chief Counsel for Advocacy of the Small Business Administration, and the Regulatory Enforcement Ombudsman concerning the enforcement of the rule.*

§ 611. Judicial review

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

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

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

[(3)(A) A small entity]

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

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

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

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

(4) In granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with this chapter and chapter 7, including, but not limited to—

(A) remanding the rule to the agency, and

(B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.

(5) Nothing in this subsection shall be construed to limit the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law or to grant any other relief in addition to the requirements of this section.

(b) In an action for the judicial review of a rule, the regulatory flexibility analysis for such rule, including an analysis prepared or corrected pursuant to paragraph (a)(4), shall constitute part of the entire record of agency action in connection with such review.

(c) Compliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section.

(d) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise permitted by law.

§ 612. Reports and intervention rights

(a) The Chief Counsel for Advocacy of the Small Business Administration shall monitor agency compliance with this chapter and shall report at least annually thereon to the President and to the Committees on the Judiciary and Small Business of the Senate and House of Representatives.

(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.

(c) A court of the United States shall grant the application of the Chief Counsel for Advocacy of the Small Business Administration to appear in any such action for the purposes described in subsection (b).

TITLE 28, UNITED STATES CODE

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PART VI—PARTICULAR PROCEEDINGS

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**CHAPTER 158—ORDERS OF FEDERAL AGENCIES;
REVIEW**

§ 2341. Definitions

As used in this chapter—

(1) “clerk” means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed;

(2) “petitioner” means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed; and

(3) “agency” means—

(A) the Commission, when the order sought to be reviewed was entered by the Federal Communications Commission, the Federal Maritime Commission, or the Atomic Energy Commission, as the case may be;

(B) the Secretary, when the order was entered by the Secretary of Agriculture or the Secretary of Transportation;

(C) the Administration, when the order was entered by the Maritime Administration;

(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) all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47;
- (2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;
- (3) all rules, regulations, or final orders of—
 - (A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101–56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and
 - (B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;
- (4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;
- (5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;
- (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 ACT

* * * * *

SEC. 3. DEFINITIONS.

(a) **SMALL BUSINESS CONCERNS.—**

(1) **IN GENERAL.—**For the purposes of this Act, a small-business concern, including but not limited to enterprises that are engaged in the business of production of food and fiber, ranching and raising of livestock, aquaculture, and all other farming and agricultural related industries, shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation: *Provided*, That notwithstanding any other provision of law, an agricultural enterprise shall be deemed to be a small business concern if it (including its affiliates) has annual receipts not in excess of \$750,000.

(2) **ESTABLISHMENT OF SIZE STANDARDS.—**

【(A) IN GENERAL.—In addition to the criteria specified in paragraph (1), the Administrator may specify detailed definitions or standards by which a business concern may be determined to be a small business concern for the purposes of this Act or any other Act.】

(A) *IN GENERAL.—In addition to the criteria specified in paragraph (1)—*

(i) the Administrator may specify detailed definitions or standards by which a business concern may be determined to be a small business concern for purposes of this Act or the Small Business Investment Act of 1958; and

(ii) the Chief Counsel for Advocacy may specify such definitions or standards for purposes of any other Act.

(B) ADDITIONAL CRITERIA.—The standards described in paragraph (1) may utilize number of employees, dollar volume of business, net worth, net income, a combination thereof, or other appropriate factors.

(C) REQUIREMENTS.—Unless specifically authorized by statute, no Federal department or agency may prescribe a size standard for categorizing a business concern as a small business concern, unless such proposed size standard—

(i) is proposed after an opportunity for public notice and comment;

(ii) provides for determining—

(I) the size of a manufacturing concern as measured by the manufacturing concern's average employment based upon employment during each of the manufacturing concern's pay periods for the preceding 12 months;

(II) the size of a business concern providing services on the basis of the annual average gross receipts of the business concern over a period of not less than 3 years;

(III) the size of other business concerns on the basis of data over a period of not less than 3 years; or

(IV) other appropriate factors; and

【(iii) is approved by the Administrator.】

(iii) except in the case of a size standard prescribed by the Administrator, is approved by the Chief Counsel for Advocacy.

(3) VARIATION BY INDUSTRY AND CONSIDERATION OF OTHER FACTORS.—When establishing or approving any size standard pursuant to paragraph (2), the Administrator *or Chief Counsel for Advocacy, as appropriate* shall ensure that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the various industries and consider other factors deemed to be relevant by the Administrator *or Chief Counsel for Advocacy*.

(4) EXCLUSION OF CERTAIN SECURITY EXPENSES FROM CONSIDERATION FOR PURPOSE OF SMALL BUSINESS SIZE STANDARDS.—

(A) DETERMINATION REQUIRED.—Not later than 30 days after the date of enactment of this paragraph, the Administrator shall review the application of size standards established pursuant to paragraph (2) to small business concerns that are performing contracts in qualified areas and determine whether it would be fair and appropriate to exclude from consideration in the average annual gross receipts of such small business concerns any payments made to such small business concerns by Federal agencies to reimburse such small business concerns for the cost of subcontracts entered for the sole purpose of providing security services in a qualified area.

(B) ACTION REQUIRED.—Not later than 60 days after the date of enactment of this paragraph, the Administrator shall either—

(i) initiate an adjustment to the size standards, as described in subparagraph (A), if the Administrator determines that such an adjustment would be fair and appropriate; or

(ii) provide a report to the Committee on Small Business and Entrepreneurship of the Senate and the Committee on Small Business of the House of Representatives explaining in detail the basis for the determination by the Administrator that such an adjustment would not be fair and appropriate.

(C) QUALIFIED AREAS.—In this paragraph, the term “qualified area” means—

(i) Iraq,

(ii) Afghanistan, and

(iii) any foreign country which included a combat zone, as that term is defined in section 112(c)(2) of the Internal Revenue Code of 1986, at the time of performance of the relevant Federal contract or subcontract.

(5) ALTERNATIVE SIZE STANDARD.—

(A) IN GENERAL.—The Administrator shall establish an alternative size standard for applicants for business loans under section 7(a) and applicants for development company loans under title V of the Small Business Investment Act of 1958 (15 U.S.C. 695 et seq.), that uses maximum tangible net worth and average net income as an alternative to the use of industry standards.

(B) INTERIM RULE.—Until the date on which the alternative size standard established under subparagraph (A) is in effect, an applicant for a business loan under section 7(a) or an applicant for a development company loan under title V of the Small Business Investment Act of 1958 may be eligible for such a loan if—

(i) the maximum tangible net worth of the applicant is not more than \$15,000,000; and

(ii) the average net income after Federal income taxes (excluding any carry-over losses) of the applicant for the 2 full fiscal years before the date of the application is not more than \$5,000,000.

(6) PROPOSED RULEMAKING.—In conducting rulemaking to revise, modify or establish size standards pursuant to this sec-

tion, the Administrator shall consider, and address, and make publicly available as part of the notice of proposed rulemaking and notice of final rule each of the following:

(A) a detailed description of the industry for which the new size standard is proposed;

(B) an analysis of the competitive environment for that industry;

(C) the approach the Administrator used to develop the proposed standard including the source of all data used to develop the proposed rule making; and

(D) the anticipated effect of the proposed rulemaking on the industry, including the number of concerns not currently considered small that would be considered small under the proposed rule making and the number of concerns currently considered small that would be deemed other than small under the proposed rulemaking.

(7) COMMON SIZE STANDARDS.—In carrying out this subsection, the Administrator may establish or approve a single size standard for a grouping of 4-digit North American Industry Classification System codes only if the Administrator makes publicly available, not later than the date on which such size standard is established or approved, a justification demonstrating that such size standard is appropriate for each individual industry classification included in the grouping.

(8) NUMBER OF SIZE STANDARDS.—The Administrator shall not limit the number of size standards established pursuant to paragraph (2), and shall assign the appropriate size standard to each North American Industry Classification System Code.

(9) JUDICIAL REVIEW OF STANDARDS APPROVED BY CHIEF COUNSEL.—*In the case of an action for judicial review of a rule which includes a definition or standard approved by the Chief Counsel for Advocacy under this subsection, the party seeking such review shall be entitled to join the Chief Counsel as a party in such action.*

(b) For purposes of this Act, any reference to an agency or department of the United States, and the term “Federal agency,” shall have the meaning given the term “agency” by section 551(1) of title 5, United States Code, but does not include the United States Postal Service or the General Accounting Office.

(c)(1) For purposes of this Act, a qualified employee trust shall be eligible for any loan guarantee under section 7(a) with respect to a small business concern on the same basis as if such trust were the same legal entity as such concern.

(2) For purposes of this Act, the term “qualified employee trust” means, with respect to a small business concern, a trust—

(A) which forms part of an employee stock ownership plan (as defined in section 4975(e)(7) of the Internal Revenue Code of 1954)—

(i) which is maintained by such concern, and

(ii) which provides that each participant in the plan is entitled to direct the plan as to the manner in which voting rights under qualifying employer securities (as defined in section 4975(e)(8) of such Code) which are allocated to the account of such participant are to be exercised with respect to a corporate matter which (by law or charter) must be

decided by a majority vote of outstanding common shares voted; and

(B) in the case of any loan guarantee under section 7(a), the trustee of which enters into an agreement with the Administrator of which enters into an agreement with the Administrator which is binding on the trust and no such small business concern and which provides that—

(i) the loan guaranteed under section 7(a) shall be used solely for the purchase of qualifying employer securities of such concern.

(ii) all funds acquired by the concern in such purchase shall be used by such concern solely for the purposes for which such loan was guaranteed,

(iii) such concern will provide such funds as may be necessary for the timely repayment of such loan, and the property of such concern shall be available as security for repayment of such loan, and

(iv) all qualifying employer securities acquired by such trust in such purchase shall be allocated to the accounts of participants in such plan who are entitled to share in such allocation, and each participant has a nonforfeitable right, not later than the date such loan is repaid, to all such qualifying employer securities which are so allocated to the participant's account.

(3) Under regulations which may be prescribed by the Administrator, a trust may be treated as a qualified employee trust with respect to a small business concern if—

(A) the trust is maintained by an employee organization which represents at least 51 percent of the employee of such concern, and

(B) such concern maintains a plan—

(i) which is an employee benefit plan which is designed to invest primarily in qualifying employer securities (as defined in section 4975(e)(8) of the Internal Revenue Code of 1954).

(ii) which provides that each participant in the plan is entitled to direct the plan as to the manner in which voting rights under qualifying employer securities which are allocated to the account of such participant are to be exercised with respect to a corporate matter which (by law or charter) must be decided by a majority vote of the outstanding common shares voted,

(iii) which provides that each participant who is entitled to distribution from the plan has a right, in the case of qualifying employer securities which are not readily tradable on an established market, to require that the concern repurchase such securities under a fair valuation formula, and

(iv) which meets such other requirements (similar to requirements applicable to employee ownership plans as defined in section 4975(e)(7) of the Internal Revenue Code of 1954) as the Administrator may prescribe, and

(C) in the case of a loan guarantee under section 7(a), such organization enters into an agreement with the Administration which is described in paragraph (2)(B).

(d) For purposes of section 7 of this Act, the term “qualified Indian tribe” means an Indian tribe as defined in section 4(a) of the Indian Self-Determination and Education Assistance Act, which owns and controls 100 per centum of a small business concern.

(e) For purposes of section 7 of this Act, the term “public or private organization for the handicapped” means one—

(1) which is organized under the laws of the United States or of any State, operated in the interest of handicapped individuals, the net income of which does not insure in whole or in part to the benefit of any shareholder or other individual;

(2) which complies with any applicable occupational health and safety standard prescribed by the Secretary of Labor; and

(3) which, in the production of commodities and in the provision of services during any fiscal year in which it received financial assistance under this subsection, employs handicapped individuals for not less than 75 per centum of the man-hours required for the production or provision of the commodities or services.

(f) For purposes of section 7 of this Act, the term “handicapped individual” means an individual—

(1) who has a physical, mental, or emotional impairment, defect, ailment, disease, or disability of a permanent nature which in any way limits the selection of any type of employment for which the person would otherwise be qualified or qualifiable; or

(2) who is a service-disabled veteran.

(g) For purposes of section 7 of this Act, the term “energy measures” includes—

(1) solar thermal energy equipment which is either of the active type based upon mechanically forced energy transfer or of the passive type based on convective, conductive, or radiant energy transfer or some combination equipment;

(2) photovoltaic cells and related equipment;

(3) a product or service the primary purpose of which is conservation of energy through devices or techniques which increase the energy through devices or techniques which increase the energy efficiency of existing equipment, methods of operation, or systems which use fossil fuels, and which is on the Energy Conservation Measures list of the Secretary of Energy or which the Administrator determines to be consistent with the intent of this subsection;

(4) equipment the primary purpose of which is production of energy from wood, biological waste, grain, or other biomass source of energy;

(5) equipment the primary purpose of which is industrial cogeneration of energy, district heating, or production of energy from industrial waste;

(6) hydroelectric power equipment;

(7) wind energy conversion equipment; and

(8) engineering, architectural, consulting, or other professional services which are necessary or appropriate to aid citizens in using any of the measures described in paragraph (1) through (7).

(h) For purposes of this Act, the term “credit elsewhere” means the availability of credit from non-Federal sources on reasonable

terms and conditions taking into consideration the prevailing rates and terms in the community in or near where the concern transacts business, or the homeowner resides, for similar purposes and periods of time.

(i) For purposes of section 7 of this Act, the term “homeowners” includes owners and lessees of residential property and also includes personal property.

(j) For the purposes of this Act, the term “small agricultural cooperative” means an association (corporate or otherwise) acting pursuant to the provisions of the Agricultural Marketing Act (12 U.S.C. 1141j), whose size does not exceed the size standard established by the Administration for other similar agricultural small business concerns. In determining such size, the Administration shall regard the association as a business concern and shall not include the income or employees of any member shareholder of such cooperative.

(k)(1) For the purposes of this Act, the term “disaster” means a sudden event which causes severe damage including, but not limited to, floods, hurricanes, tornadoes, earthquakes, fires, explosions, volcanoes, windstorms, landslides or mudslides, tidal waves, commercial fishery failures or fishery resource disasters (as determined by the Secretary of Commerce under section 308(b) of the Interjurisdictional Fisheries Act of 1986), ocean conditions resulting in the closure of customary fishing waters, riots, civil disorders or other catastrophes, except it does not include economic dislocations.

(2) For purposes of section 7(b)(2), the term “disaster” includes—

- (A) drought;
- (B) below average water levels in the Great Lakes, or on any body of water in the United States that supports commerce by small business concerns; and
- (C) ice storms and blizzards.

(l) For purposes of this Act—

- (1) the term “computer crime” means—
 - (A) any crime committed against a small business concern by means of the use of a computer; and
 - (B) any crime involving the illegal use of, or tampering with, a computer owned or utilized by a small business concern.

(m) For purposes of this Act, the term “simplified acquisition threshold” has the meaning given such term in section 4(11) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(11)).

(n) For the purposes of this Act, a small business concern is a small business concern owned and controlled by women if—

- (1) at least 51 percent of small business concern is owned by one or more women or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and
- (2) the management and daily business operations of the business are controlled by one or more women.

(o) DEFINITIONS OF BUNDLING OF CONTRACT REQUIREMENTS AND RELATED TERMS.—In this Act:

- (1) BUNDLED CONTRACT.—The term “bundled contract” means a contract that is entered into to meet requirements that are consolidated in a bundling of contract requirements.

(2) BUNDLING OF CONTRACT REQUIREMENTS.—The term “bundling of contract requirements” means consolidating 2 or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern due to—

(A) the diversity, size, or specialized nature of the elements of the performance specified;

(B) the aggregate dollar value of the anticipated award;

(C) the geographical dispersion of the contract performance sites; or

(D) any combination of the factors described in subparagraphs (A), (B), and (C).

(3) SEPARATE SMALLER CONTRACT.—The term “separate smaller contract”, with respect to a bundling of contract requirements, means a contract that has been performed by 1 or more small business concerns or was suitable for award to 1 or more small business concerns.

(p) DEFINITIONS RELATING TO HUBZONES.—In this Act:

(1) HISTORICALLY UNDERUTILIZED BUSINESS ZONE.—The term “historically underutilized business zone” means any area located within 1 or more—

(A) qualified census tracts;

(B) qualified nonmetropolitan counties;

(C) lands within the external boundaries of an Indian reservation;

(D) redesignated areas; or

(E) base closure areas.

(2) HUBZONE.—The term “HUBZone” means a historically underutilized business zone.

(3) HUBZONE SMALL BUSINESS CONCERN.—The term “HUBZone small business concern” means—

(A) a small business concern that is at least 51 percent owned and controlled by United States citizens;

(B) a small business concern that is—

(i) an Alaska Native Corporation owned and controlled by Natives (as determined pursuant to section 29(e)(1) of the Alaska Native Claims Settlement Act (43 U.S.C. 1626(e)(1))); or

(ii) a direct or indirect subsidiary corporation, joint venture, or partnership of an Alaska Native Corporation qualifying pursuant to section 29(e)(1) of the Alaska Native Claims Settlement Act (43 U.S.C. 1626(e)(1)), if that subsidiary, joint venture, or partnership is owned and controlled by Natives (as determined pursuant to section 29(e)(2)) of the Alaska Native Claims Settlement Act (43 U.S.C. 1626(e)(2));

(C) a small business concern—

(i) that is wholly owned by one or more Indian tribal governments, or by a corporation that is wholly owned by one or more Indian tribal governments; or

(ii) that is owned in part by one or more Indian tribal governments, or by a corporation that is wholly owned by one or more Indian tribal governments, if all

other owners are either United States citizens or small business concerns;

(D) a small business concern that is—

(i) wholly owned by a community development corporation that has received financial assistance under part 1 of subchapter A of the Community Economic Development Act of 1981 (42 U.S.C. 9805 et seq.); or

(ii) owned in part by one or more community development corporations, if all other owners are either United States citizens or small business concerns; or

(E) a small business concern that is—

(i) a small agricultural cooperative organized or incorporated in the United States;

(ii) wholly owned by 1 or more small agricultural cooperatives organized or incorporated in the United States; or

(iii) owned in part by 1 or more small agricultural cooperatives organized or incorporated in the United States, if all owners are small business concerns or United States citizens.

(4) QUALIFIED AREAS.—

(A) QUALIFIED CENSUS TRACT.—The term “qualified census tract” has the meaning given that term in section 42(d)(5)(C)(ii) of the Internal Revenue Code of 1986.

(B) QUALIFIED NONMETROPOLITAN COUNTY.—The term “qualified nonmetropolitan county” means any county—

(i) that was not located in a metropolitan statistical area (as defined in section 143(k)(2)(B) of the Internal Revenue Code of 1986) at the time of the most recent census taken for purposes of selecting qualified census tracts under section 42(d)(5)(C)(ii) of the Internal Revenue Code of 1986; and

(ii) in which—

(I) the median household income is less than 80 percent of the nonmetropolitan State median household income, based on the most recent data available from the Bureau of the Census of the Department of Commerce;

(II) the unemployment rate is not less than 140 percent of the average unemployment rate for the United States or for the State in which such county is located, whichever is less, based on the most recent data available from the Secretary of Labor; or

(III) there is located a difficult development area, as designated by the Secretary of Housing and Urban Development in accordance with section 42(d)(5)(C)(iii) of the Internal Revenue Code of 1986, within Alaska, Hawaii, or any territory or possession of the United States outside the 48 contiguous States.

(C) REDESIGNATED AREA.—The term “redesignated area” means any census tract that ceases to be qualified under subparagraph (A) and any nonmetropolitan county that ceases to be qualified under subparagraph (B), except

that a census tract or a nonmetropolitan county may be a “redesignated area” only until the later of—

(i) the date on which the Census Bureau publicly releases the first results from the 2010 decennial census; or

(ii) 3 years after the date on which the census tract or nonmetropolitan county ceased to be so qualified.

(D) **BASE CLOSURE AREA.**—The term “base closure area” means lands within the external boundaries of a military installation that were closed through a privatization process under the authority of—

(i) the Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of division B of Public Law 101–510; 10 U.S.C. 2687 note);

(ii) title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100–526; 10 U.S.C. 2687 note);

(iii) section 2687 of title 10, United States Code;

or

(iv) any other provision of law authorizing or directing the Secretary of Defense or the Secretary of a military department to dispose of real property at the military installation for purposes relating to base closures of redevelopment, while retaining the authority to enter into a leaseback of all or a portion of the property for military use.

(5) **QUALIFIED HUBZONE SMALL BUSINESS CONCERN.**—

(A) **IN GENERAL.**—A HUBZone small business concern is “qualified”, if—

(i) the small business concern has certified in writing to the Administrator (or the Administrator otherwise determines, based on information submitted to the Administrator by the small business concern, or based on certification procedures, which shall be established by the Administration by regulation) that—

(I) it is a HUBZone small business concern—

(aa) pursuant to subparagraph (A), (B), (C), (D), or (E) of paragraph (3), and that its principal office is located in a HUBZone and not fewer than 35 percent of its employees reside in a HUBZone; or

(bb) pursuant to paragraph (3)(C), and not fewer than 35 percent of its employees engaged in performing a contract awarded to the small business concern on the basis of a preference provided under section 31(b) reside within any Indian reservation governed by one or more of the tribal government owners, or reside within any HUBZone adjoining any such Indian reservation;

(II) the small business concern will attempt to maintain the applicable employment percentage under subclause (I) during the performance of any contract awarded to the small business concern on

the basis of a preference provided under section 31(b); and

(III) with respect to any subcontract entered into by the small business concern pursuant to a contract awarded to the small business concern under section 31, the small business concern will ensure that the requirements of section 46 are satisfied; and

(ii) no certification made or information provided by the small business concern under clause (i) has been, in accordance with the procedures established under section 31(c)(1)—

(I) successfully challenged by an interested party; or

(II) otherwise determined by the Administrator to be materially false.

(B) LIST OF QUALIFIED SMALL BUSINESS CONCERNS.—

The Administrator shall establish and maintain a list of qualified HUBZone small business concerns, which list shall, to the extent practicable—

(i) once the Administrator has made the certification required by subparagraph (A)(i) regarding a qualified HUBZone small business concern and has determined that subparagraph (A)(ii) does not apply to that concern, include the name, address, and type of business with respect to each such small business concern;

(ii) be updated by the Administrator not less than annually; and

(iii) be provided upon request to any Federal agency or other entity.

(6) NATIVE AMERICAN SMALL BUSINESS CONCERNS.—

(A) ALASKA NATIVE CORPORATION.—The term “Alaska Native Corporation” has the same meaning as the term “Native Corporation” in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602).

(B) ALASKA NATIVE VILLAGE.—The term “Alaska Native Village” has the same meaning as the term “Native village” in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602).

(C) INDIAN RESERVATION.—The term “Indian reservation”—

(i) has the same meaning as the term “Indian country” in section 1151 of title 18, United States Code, except that such term does not include—

(I) any lands that are located within a State in which a tribe did not exercise governmental jurisdiction on the date of the enactment of this paragraph, unless that tribe is recognized after that date of the enactment by either an Act of Congress or pursuant to regulations of the Secretary of the Interior for the administrative recognition that an Indian group exists as an Indian tribe (part 83 of title 25, Code of Federal Regulations); and

(II) lands taken into trust or acquired by an Indian tribe after the date of the enactment of this paragraph if such lands are not located within the external boundaries of an Indian reservation or former reservation or are not contiguous to the lands held in trust or restricted status on that date of the enactment; and

(ii) in the State of Oklahoma, means lands that—

(I) are within the jurisdictional areas of an Oklahoma Indian tribe (as determined by the Secretary of the Interior); and

(II) are recognized by the Secretary of the Interior as eligible for trust land status under part 151 of title 25, Code of Federal Regulations (as in effect on the date of the enactment of this paragraph).

(7) AGRICULTURAL COMMODITY.—The term “agricultural commodity” has the same meaning as in section 102 of the Agricultural Trade Act of 1978 (7 U.S.C. 5602).

(q) DEFINITIONS RELATING TO VETERANS.—In this Act, the following definitions apply:

(1) SERVICE-DISABLED VETERAN.—The term “service-disabled veteran” means a veteran with a disability that is service-connected (as defined in section 101(16) of title 38, United States Code).

(2) SMALL BUSINESS CONCERN OWNED AND CONTROLLED BY SERVICE-DISABLED VETERANS.—The term “small business concern owned and controlled by service-disabled veterans” means a small business concern—

(A) not less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; and

(B) the management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran.

(3) SMALL BUSINESS CONCERN OWNED AND CONTROLLED BY VETERANS.—The term “small business concern owned and controlled by veterans” means a small business concern—

(A) not less than 51 percent of which is owned by one or more veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans; and

(B) the management and daily business operations of which are controlled by one or more veterans.

(4) VETERAN.—The term “veteran” has the meaning given the term in section 101(2) of title 38, United States Code.

(5) RELIEF FROM TIME LIMITATIONS.—

(A) IN GENERAL.—Any time limitation on any qualification, certification, or period of participation imposed under this Act on any program that is available to small

business concerns shall be extended for a small business concern that—

(i) is owned and controlled by—

(I) a veteran who was called or ordered to active duty under a provision of law specified in section 101(a)(13)(B) of title 10, United States Code, on or after September 11, 2001; or

(II) a service-disabled veteran who became such a veteran due to an injury or illness incurred or aggravated in the active military, naval, or air service during a period of active duty pursuant to a call or order to active duty under a provision of law referred to in subclause (I) on or after September 11, 2001; and

(ii) was subject to the time limitation during such period of active duty.

(B) DURATION.—Upon submission of proper documentation to the Administrator, the extension of a time limitation under subparagraph (A) shall be equal to the period of time that such veteran who owned or controlled such a concern was on active duty as described in that subparagraph.

(C) EXCEPTION FOR PROGRAMS SUBJECT TO FEDERAL CREDIT REFORM ACT OF 1990.—The provisions of subparagraphs (A) and (B) shall not apply to any programs subject to the Federal Credit Reform Act of 1990 (2 U.S.C. 661 et seq.).

(r) DEFINITIONS RELATING TO SMALL BUSINESS LENDING COMPANIES.—As used in section 23 of this Act:

(1) SMALL BUSINESS LENDING COMPANY.—The term “small business lending company” means a business concern that is authorized by the Administrator to make loans pursuant to section 7(a) and whose lending activities are not subject to regulation by any Federal or State regulatory agency.

(2) NON-FEDERALLY REGULATED SBA LENDER.—The term “non-Federally regulated SBA lender” means a business concern if—

(A) such concern is authorized by the Administrator to make loans under section 7;

(B) such concern is subject to regulation by a State; and

(C) the lending activities of such concern are not regulated by any Federal banking authority.

(s) MAJOR DISASTER.—In this Act, the term “major disaster” has the meaning given that term in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122).

(t) SMALL BUSINESS DEVELOPMENT CENTER.—In this Act, the term “small business development center” means a small business development center described in section 21.

(u) REGION OF THE ADMINISTRATION.—In this Act, the term “region of the Administration” means the geographic area served by a regional office of the Administration established under section 4(a).

(v) MULTIPLE AWARD CONTRACT.—In this Act, the term “multiple award contract” means—

(1) a multiple award task order contract or delivery order contract that is entered into under the authority of sections 303H through 303K of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253h through 253k); and

(2) any other indefinite delivery, indefinite quantity contract that is entered into by the head of a Federal agency with 2 or more sources pursuant to the same solicitation.

(w) PRESUMPTION.—

(1) IN GENERAL.—In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to small business concerns, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a small business concern willfully sought and received the award by misrepresentation.

(2) DEEMED CERTIFICATIONS.—The following actions shall be deemed affirmative, willful, and intentional certifications of small business size and status:

(A) Submission of a bid or proposal for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement reserved, set aside, or otherwise classified as intended for award to small business concerns.

(B) Submission of a bid or proposal for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a small business concern.

(C) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research agreement, as a small business concern.

(3) CERTIFICATION BY SIGNATURE OF RESPONSIBLE OFFICIAL.—

(A) IN GENERAL.—Each solicitation, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the small business size and status of a business concern seeking the Federal contract, subcontract, or grant.

(B) CONTENT OF CERTIFICATIONS.—A certification that a business concern qualifies as a small business concern of the exact size and status claimed by the business concern for purposes of bidding on a Federal contract or subcontract, or applying for a Federal grant, shall contain the signature of an authorized official on the same page on which the certification is contained.

(4) REGULATIONS.—The Administrator shall promulgate regulations to provide adequate protections to individuals and business concerns from liability under this subsection in cases

of unintentional errors, technical malfunctions, and other similar situations.

(x) ANNUAL CERTIFICATION.—

(1) IN GENERAL.—Each business certified as a small business concern under this Act shall annually certify its small business size and, if appropriate, its small business status, by means of a confirming entry on the Online Representations and Certifications Application database of the Administration, or any successor thereto.

(2) REGULATIONS.—Not later than 1 year after the date of enactment of this subsection, the Administrator, in consultation with the Inspector General and the Chief Counsel for Advocacy of the Administration, shall promulgate regulations to ensure that—

(A) no business concern continues to be certified as a small business concern on the Online Representations and Certifications Application database of the Administration, or any successor thereto, without fulfilling the requirements for annual certification under this subsection; and

(B) the requirements of this subsection are implemented in a manner presenting the least possible regulatory burden on small business concerns.

(y) POLICY ON PROSECUTIONS OF SMALL BUSINESS SIZE AND STATUS FRAUD.—Not later than 1 year after the date of enactment of this subsection, the Administrator, in consultation with the Attorney General, shall issue a Government-wide policy on prosecution of small business size and status fraud, which shall direct Federal agencies to appropriately publicize the policy.

(z) AQUACULTURE BUSINESS DISASTER ASSISTANCE.—Subject to section 18(a) and notwithstanding section 18(b)(1), the Administrator may provide disaster assistance under section 7(b)(2) to aquaculture enterprises that are small businesses.

(aa) VENTURE CAPITAL OPERATING COMPANY.—In this Act, the term “venture capital operating company” means an entity described in clause (i), (v), or (vi) of section 121.103(b)(5) of title 13, Code of Federal Regulations (or any successor thereto).

(bb) HEDGE FUND.—In this Act, the term “hedge fund” has the meaning given that term in section 13(h)(2) of the Bank Holding Company Act of 1956 (12 U.S.C. 1851(h)(2)).

(cc) PRIVATE EQUITY FIRM.—In this Act, the term “private equity firm” has the meaning given the term “private equity fund” in section 13(h)(2) of the Bank Holding Company Act of 1956 (12 U.S.C. 1851(h)(2)).

(dd) DEFINITIONS PERTAINING TO SUBCONTRACTING.—In this Act:

(1) SUBCONTRACT.—The term “subcontract” means a legally binding agreement between a contractor that is already under contract to another party to perform work, and a third party, hereinafter referred to as the subcontractor, for the subcontractor to perform a part, or all, of the work that the contractor has undertaken.

(2) FIRST TIER SUBCONTRACTOR.—The term “first tier subcontractor” means a subcontractor who has a subcontract directly with the prime contractor.

(3) AT ANY TIER.—The term “at any tier” means any subcontractor other than a subcontractor who is a first tier subcontractor.

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SECTION 212 OF THE SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT OF 1996

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SEC. 212. COMPLIANCE GUIDES.

(a) COMPLIANCE GUIDE.—

(1) IN GENERAL.—For each rule or group of related rules for which an agency is required to prepare a final regulatory flexibility analysis under section 605(b) of title 5, United States Code, the agency shall publish 1 or more guides to assist small entities in complying with the rule and shall entitle such publications “small entity compliance guides”.

(2) PUBLICATION OF GUIDES.—The publication of each guide under this subsection shall include

(A) the posting of the guide in an easily identified location on the website of the agency; and

(B) distribution of the guide to known industry contacts, such as small entities, associations, or industry leaders affected by the rule.

(3) PUBLICATION DATE.—An agency shall publish each guide (including the posting and distribution of the guide as described under paragraph (2))

(A) on the same date as the date of publication of the final rule (or as soon as possible after that date); and

(B) not later than the date on which the requirements of that rule become effective.

(4) COMPLIANCE ACTIONS.—

(A) IN GENERAL.—Each guide shall explain the actions a small entity is required to take to comply with a rule.

(B) EXPLANATION.—The explanation under subparagraph (A)

(I) shall include a description of actions needed to meet the requirements of a rule, to enable a small entity to know when such requirements are met; and

(ii) if determined appropriate by the agency, may include a description of possible procedures, such as conducting tests, that may assist a small entity in meeting such requirements, except that, compliance with any procedures described pursuant to this section does not establish compliance with the rule, or establish a presumption or inference of such compliance.

(C) PROCEDURES.—Procedures described under subparagraph (B)(ii)—

(i) shall be suggestions to assist small entities; and

(ii) shall not be additional requirements, or diminish requirements, relating to the rule.

[(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 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 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.*

(6) REPORTING.—Not later than 1 year after the date of enactment of the Fair Minimum Wage Act of 2007, and annually thereafter, the head of each agency shall submit a report to the Committee on Small Business and Entrepreneurship of the Senate, the Committee on Small Business of the House of Representatives, and any other committee of relevant jurisdiction describing the status of the agency’s compliance with paragraphs (1) through (5).

(b) COMPREHENSIVE SOURCE OF INFORMATION.—Agencies shall cooperate to make available to small entities through comprehensive sources of information, the small entity compliance guides and all other available information on statutory and regulatory requirements affecting small entities.

(c) LIMITATION ON JUDICIAL REVIEW.—An agency’s small entity compliance guide shall not be subject to judicial review, except that in any civil or administrative action against a small entity for a violation occurring after the effective date of this section, the content of the small entity compliance guide may be considered as evidence of the reasonableness or appropriateness of any proposed fines, penalties or damages.

Dissenting Views

H.R. 527, the “Small Business Regulatory Flexibility Improvements Act of 2015,” (SBRFIA) amends the Regulatory Flexibility Act¹ (RFA) in ways that will significantly hinder the promulgation of critical public health and safety rules by Federal administrative agencies. While H.R. 527’s proponents claim that these changes to the RFA will ease the alleged burden of regulatory compliance on

¹ Pub. L. No. 96–354, 94 Stat. 1164 (codified at 5 U.S.C. §§ 601–612 (2015)).

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

small businesses and other small entities, an examination of the bill's provisions makes clear that this measure is really intended to slow down, if not halt, most agency rulemaking.

H.R. 527 does nothing to help small businesses and other small entities reduce compliance costs or to ensure agency compliance with the RFA. Instead, the bill imposes numerous and unnecessary burdens on agencies while ignoring the fact that small businesses, like their larger counterparts, can substantially impact the health and safety of their workers as well as that of the general public.² Small businesses, like all businesses, provide services and goods that also affect our lives and can carry the same risk of harm as the services and goods that large businesses provide. It makes no difference to someone who is breathing dirty air or drinking poisoned water whether the hazards come from a small or large business.

Accordingly, we must oppose attempts like H.R. 527 that create an unacceptable barrier to agency rulemaking. Specifically, we oppose this legislation because it: (1) is based on the false premise that regulatory costs stifle economic growth and job creation; (2) threatens public health and safety by severely undermining Federal agency rulemaking; (3) imposes additional duties on agencies while failing to provide for any additional resources to meet such burdens; and (4) allows more opportunities for industry to delay or defeat proposed rulemakings.

Consumer groups and organizations concerned with protecting public health and safety have raised many of these same concerns. The Coalition for Sensible Safeguards, a broad coalition of more than 70 environmental, labor, and consumer organizations—including the AFL–CIO, the American Federation of State, County and Municipal Employees, the American Lung Association, Consumer Federation of America, Consumers Union, the League of Conservation Voters, Public Citizen, and the Union of Concerned Scientists—strongly oppose H.R. 527.³ Additionally, the American

²For example, workplace safety rules may impact tens of millions of Americans who work for small businesses. As of 2008, there were 5.93 million small firms employing 120,903,551 workers, including 5,294,970 firms of 20 or fewer employees, employing 21,461,733 workers and 5,684,120 firms of 50 or fewer employees, employing 33,453,284 workers, according to the SBA. See U.S. Census Bureau, Statistics of U.S. Businesses, U.S. NAICS Sectors, small employment sizes, 2008, <http://www.census.gov/econ/susb>. There were 4,383 fatal occupational injuries in 2012, according to the Bureau of Labor Statistics. Press Release, U.S. Dep't of Labor Bureau of Labor Statistics, National Census of Fatal Occupational Injuries in 2012 (Preliminary Results), Aug. 13, 2013, <http://www.bls.gov/news.release/pdf/cfoi.pdf>. Additionally, an analysis by the National Institute for Occupational Safety and Health, the American Cancer Society, and Emory University's School of Public Health estimates that after factoring in disease and injury data "there are a total of 55,200 US deaths annually resulting from occupational disease or injury (range 32,200–78,200)." Kyle Steenland *et al.*, Dying for Work: The Magnitude of US Mortality from Selected Cases of Death Associated with Occupation, 43 *Am. J. Industrial Medicine* 461 (2003).

³The other organizations include: Alliance for Justice, American Association of University Professors, American Federation of Teachers, Americans for Financial Reform, American Rivers, American Values Campaign, American Sustainable Business Council, BlueGreen Alliance, Campaign for Contract Agriculture Reform, Center for Effective Government, Center for Food Safety, Center for Foodborne Illness Research and Prevention, Center for Independent Living, Center for Science in the Public Interest, Citizens for Sludge-Free Land, Clean Air Watch, Clean Water Network, Consortium for Citizens with Disabilities, Countercorp, Cumberland Countians for Peace and Justice, Demos, Economic Policy Institute, Edmonds Institute, Environment America, Farmworker Justice, Free Press, Friends of the Earth, Green for All, Health Care for America Now, In the Public Interest, International Brotherhood of Teamsters, International Center for Technology Assessment, International Union of United Automobile, Aerospace, & Agricultural Implement Workers of America (UAW), Los Angeles Alliance for a New Economy, Main Street Alliance, National Association of Consumer Advocates, National Center for Healthy Housing, National Consumers League, National Council for Occupational Safety and Health, National

Continued

Sustainable Business Council, which represents more than 200,000 businesses, opposes this measure because it would “hurt small and medium size businesses by halting the regulatory process that levels the playing field for these businesses to compete.”⁴

Moreover, the Obama administration issued a veto threat against substantively similar legislation considered in the 112th Congress, explaining that the bill “would impede the ability of agencies to provide the public with basic protections, and create needless confusion and delay that would prove disruptive for businesses, as well as for state, tribal and local governments.”⁵

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

BACKGROUND AND DESCRIPTION

I. BACKGROUND

Enacted in 1980, the RFA requires Federal agencies to assess the impact of proposed regulations on “small entities,” which the Act defines as either a small business, small organization, or small governmental jurisdiction.⁶ The RFA requires agencies to prepare a regulatory flexibility analysis at the time certain proposed and final rules are promulgated. The analysis must: (1) describe the reasons why action by the agency is necessary; (2) include a succinct statement of the regulation’s objectives and legal basis; (3) describe which small entities are affected by the rule as well as provide an estimate of the number of such entities so affected; (4) describe anticipated reporting, recordkeeping, and other compliance requirements; (5) identify any relevant Federal regulations that may duplicate, overlap, or conflict with the rule; and (6) identify any significant alternatives to the rule.⁷ This analysis is not required, however, if the agency certifies that the rule will not have a “significant economic impact on a substantial number of small entities.”⁸ Whether a proposed rule will have such an impact is, therefore, the threshold inquiry under the RFA.

In addition, the RFA requires each agency to publish twice a year in the Federal Register a regulatory flexibility agenda identi-

Employment Law Project, National Lawyers Guild Louisville Chapter, National Women’s Health Network, National Women’s Law Center, Natural Resources Defense Council, Network for Environmental & Economic Responsibility of the United Church of Christ, New Jersey Work Environment Council, New York Committee for Occupational Safety and Health, Oregon Peaceworks, People for the American Way, Protect All Children’s Environment, Reproductive Health Technologies Project, Safe Tables Our Priority (S.T.O.P.), Service Employees International Union, Southern Illinois Committee for Occupational Safety and Health, The Arc of the United States, The Partnership for Working Families, Trust for America’s Health, U.S. Camber Watch, U.S. PIRG, Union Plus, United Food and Commercial Workers Union, United Steelworkers, Waterkeeper Alliance, Worksafe. See Letter from Coalition for Sensible Safeguards to Representative John Conyers, Jr., Ranking Member, Committee on the Judiciary (Jan. 26, 2015) (on file with the H. Comm. on the Judiciary, Democrats).

⁴Letter from American Sustainable Business Council to Representative John Conyers, Jr., Ranking Member, Committee on the Judiciary (Jan. 26, 2015) (on file with the H. Comm. on the Judiciary, Democrats) (listing its membership as “200,000 businesses and more than 325,000 business professionals, including industry associations, local and state chambers of commerce, micro-enterprise, social enterprise, green and sustainable business, local living economy groups, woman and minority business leaders, and investor networks.”).

⁵Executive Office of the President, Office of Management and Budget, Statement of Administration Policy for H.R. 527—Regulatory Flexibility Improvements Act of 2011 (Nov. 29, 2011), http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr527r_20111129.pdf.

⁶5 U.S.C. § 601(6) (2015).

⁷See 5 U.S.C. §§ 603, 604 (2015).

⁸5 U.S.C. § 605(b) (2015).

fyng regulations that have a significant economic impact on a substantial number of small entities which the agency expects to propose.⁹ Further, the RFA requires agencies to conduct periodic reviews of rules having a significant impact on a substantial number of small entities¹⁰ and to ensure that small entities have an opportunity to participate in the rulemaking process.¹¹

Congress amended the RFA in 1996 with the enactment of the Small Business Regulatory Enforcement Fairness Act (SBREFA)¹² to permit judicial review of an agency's regulatory flexibility analysis for a final rule and of an agency's certification that a rule would not have a significant economic impact on a substantial number of small entities. SBREFA also requires that proposed rules of the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) be subject to an advocacy review panel consisting of representatives of the agency promulgating the rule, the Chief Counsel for Advocacy of the Small Business Administration, and the Office of Information and Regulatory Affairs (OIRA).¹³

II. DESCRIPTION

H.R. 527 amends the RFA to greatly expand the scope of its provisions and impose numerous new procedural and analytical requirements on agencies whenever a rule is subject to the RFA.

First, H.R. 527 expands the type of rules covered by the RFA to include those that have a reasonably foreseeable indirect effect on small entities, which is a highly speculative requirement. It also includes documents like land management plans and certain guidance documents under the definition of "rule," further expanding the RFA's scope. Second, the bill would require agencies to provide more detail and analysis in their initial and final regulatory analyses of proposed and final rules. Third, H.R. 527 repeals the emergency authority that the RFA gives to agencies to waive or delay an initial regulatory flexibility analysis or to delay a final regulatory flexibility analysis. This provision will prevent agencies from quickly responding to a public health or safety emergency. Fourth, H.R. 527 grants additional power to the Small Business Administration's (SBA's) Chief Counsel for Advocacy to promulgate rules governing agencies' RFA compliance, to intervene in agency adjudications, and to file comments on proposed rules. Fifth, the bill expands the use of advocacy review panels to cover rules with a significant economic impact on a substantial number of small entities that are proposed by *all* agencies—not just rules issued by the EPA, OSHA, and the Consumer Financial Protection Bureau (CFPB), as is currently the case—and would also apply to rules that would be considered "major rules" regardless of whether such rules would otherwise be subject to the RFA.

Sixth, H.R. 527 amends the RFA's requirement that agencies periodically review rules to also require that agencies review *all* rules that exist on H.R. 527's enactment date. The bill would also man-

⁹ 5 U.S.C. § 602 (2015).

¹⁰ 5 U.S.C. § 610 (2015).

¹¹ 5 U.S.C. § 609 (2015).

¹² Pub. L. No. 104-121, § 242, 110 Stat. 847, 857 (1996).

¹³ 5 U.S.C. § 609(b) (2015). The review panel requirement was extended to the Consumer Financial Protection Bureau in 2010 through the enactment of the Dodd-Frank Act. *See* 5 U.S.C. § 609(d) (2015).

date that agencies amend or rescind those rules, regardless of the review's findings. In addition H.R. 527 expands the availability of judicial review to include any agency action taken to comply with the RFA, and not just "final agency action," as is the case under current law. Finally, H.R. 527 grants exclusive jurisdiction to the Federal courts of appeals to enjoin, set aside, suspend, or determine the validity of all final rules concerning RFA implementation that have been promulgated by the SBA's Chief Counsel for Advocacy under the authority granted to it under this legislation.

A detailed section-by-section analysis of H.R. 527 appears later in our dissenting views.

CONCERNS WITH H.R. 527

I. H.R. 527 IS BASED ON THE FALSE PREMISE THAT REGULATIONS STIFLE JOB CREATION

H.R. 527 is based on the false premise that regulations impose overwhelmingly burdensome costs on small businesses that ultimately hamper economic growth and job creation. In particular, H.R. 527's supporters rely almost exclusively on an SBA-sponsored study conducted by economists Nicole and Mark Crain (Crain study),¹⁴ which concluded that Federal regulations impose a \$1.75 trillion cost on all businesses and that a disproportionate share of these costs are borne by small businesses.¹⁵

The Crain study, however, has been roundly criticized for exaggerating the costs of Federal rulemaking on small businesses. For example, the Center for Progressive Reform (CPR) notes that the \$1.75 trillion cumulative burden cited by the study fails to account for any benefits of regulation.¹⁶ CPR observes that the Office of Management and Budget (OMB) estimated in 2008 that major rules imposed \$46 billion in costs, but also produced \$122 billion to \$656 billion in benefits.¹⁷ Moreover, the study's methodology is flawed with respect to how it calculated economic costs. The study, which relied on international public opinion polling by the World Bank on how friendly a particular country was to business interests, ignored actual data on costs imposed by Federal regulation in the United States.¹⁸

The Congressional Research Service (CRS) also conducted an extensive examination of the Crain study and criticized much of its methodology.¹⁹ CRS noted that the authors of the Crain study themselves told CRS that their study was "not meant to be a decision-making tool for lawmakers or Federal regulatory agencies to use in choosing the 'right' level of regulation. In no place in any

¹⁴Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, Rep. No. SBAHQ-08-M-0466 (Sept. 2010), <http://archive.sba.gov/advo/research/rs371tot.pdf>.

¹⁵*H.R. 527, the "Regulatory Flexibility Improvements Act of 2011"—Unleashing Small Businesses to Create Jobs: Hearing Before the Subcomm. on Courts, Commercial and Administrative L. of the H. Comm. on the Judiciary*, 112th Cong. 58, 67 & 87 (2011) (prepared statements of Richard Gimmel, President, Atlas Machine & Supply, Inc., on behalf of the National Association of Manufacturers; Thomas Sullivan, former Chief Counsel for Advocacy, Small Business Administration; and Karen R. Harned, Executive Director, Small Business Legal Center, National Federation of Independent Businesses).

¹⁶Sid Shapiro, Ruth Ruttenberg, & James Goodwin, *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs*, Center for Progressive Reform White Paper #1103 (Feb. 2011), http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf.

¹⁷*Id.*

¹⁸*Id.*

¹⁹Curtis W. Copeland, *Analysis of an Estimate of the Total Costs of Federal Regulations*, Congressional Research Service Report for Congress, R41763 (Apr. 6, 2011).

of the reports do we imply that our reports should be used for this purpose. (How could we recommend this use when we make no attempt to estimate the benefits?)”²⁰ Accordingly, CRS concluded that “a valid, reasoned policy decision can only be made after considering information on both costs and benefits” of regulation.²¹

The Crain study’s failure to account for the net benefits of regulation in general was particularly shortsighted given evidence that regulation can result in net economic benefits for business. For example, promulgation of OSHA’s Cotton Dust Standard resulted in the affected industry growing and prospering in the aftermath of the rule’s promulgation.²² Much of that growth and prosperity was the result of business innovations relating to compliance with the rule.²³ Indeed, the costs of the rule ended up being much smaller than predicted because of these innovations.²⁴

Sally Katzen, a former OIRA Administrator during the Clinton administration, noted in testimony before a Judiciary Subcommittee that the OMB regularly finds that the aggregate benefits of Federal regulation outweigh its costs.²⁵ Katzen noted that:

OMB’s Report to Congress does include data on benefits, and the numbers are striking: according to OMB, the benefits from the regulations issued during the 10-year period ranged from \$128 billion to \$616 billion. Therefore, even if one uses OMB’s highest estimate of costs and its lowest estimate of benefits, the regulations issued over the past 10 years have produced net benefits of \$73 billion to our society. This cannot be dismissed as a partisan report by the current Administration, because OMB issued reports with similar results (benefits greatly exceeding costs) throughout the George W. Bush administration (e.g., for FY 1998–2008, major regulations cost between \$51 and \$60 billion, with benefits estimated to be \$126 to \$663 billion dollars). Given that the benefits of regulations consistently exceed the costs, the need for any legislation that would make the issuance of regulations more difficult or time consuming is certainly in question.²⁶

OMB’s 2013 Report to Congress further bolsters the conclusion that the benefits of regulation far outweigh its costs. It found that the “estimated annual benefits of major Federal regulations reviewed by OMB from October 1, 2002, to September 30, 2012, for which agencies estimated and monetized both benefits and costs, are in the aggregate between \$193 billion and \$800 billion, while the estimated annual costs are in the aggregate between \$57 bil-

²⁰*Id.* at 26 (quoting an e-mail from Nicole and W. Mark Crain to the author of the CRS report).

²¹*Id.*

²²Occupational Safety and Health Administration, Regulatory Review of OSHA’s Cotton Dust Standard, at 35–38 (Sept. 2000), http://www.osha.gov/dea/lookback/cottondust_final2000.pdf.

²³*Id.*

²⁴*Id.* at 38–39.

²⁵*The REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations Hearing Before the Subcomm. on Courts, Commercial and Administrative L. of the H. Comm. on the Judiciary*, 112th Cong. 3 (2011) (prepared statement of Sally Katzen, former Administrator of the Office of Information and Regulatory Affairs).

²⁶*Id.*

lion and \$84 billion.”²⁷ The 2013 report further noted that some benefits and costs cannot be quantified or monetized.²⁸ Similarly, the San Francisco Federal Reserve has also disputed that regulations impede job growth, concluding in 2013 that “there was almost no correlation between job growth in a state from 2008 to 2011 and the increase in the percentage of businesses citing regulation and taxes as their primary concern. In fact, if anything, the correlation is positive.”²⁹

To highlight the lack of support for claims that regulations burden families and impede job and economic growth, Representative Henry C. “Hank” Johnson, Jr. (D-GA) offered at markup an amendment that would have exempted rules resulting in net job growth from H.R. 527. Speaking in support of his amendment, Representative Johnson cited an article in the *Washington Post* noting that the studies cited by the Majority in support of deregulatory legislation have “‘serious methodological problems—even the report admits it is ‘not scientific’ and ‘back of the envelope’—and we fear these caveats are being forgotten as it is repeated in Capitol Hill news conferences and then in news reports.’”³⁰ Representative Johnson also noted that “even the president of the U.S. Chamber of Commerce acknowledged that the figures used to generate this number include many necessary regulations that are “important for the economy” and supported by the Chamber.”³¹ The amendment was defeated on a party-line vote of 7 to 15.³² Similarly, Representative Jerrold Nadler (D-NY) offered an amendment that would have required agencies to assess the direct and indirect benefits of a rule as part of the required regulatory flexibility analysis under H.R. 527.³³ This amendment was also defeated on a party-line vote of 9 to 17.³⁴

II. H.R. 527 THREATENS PUBLIC HEALTH AND SAFETY BY UNDERMINING FEDERAL AGENCY RULEMAKING

H.R. 527 will undermine agencies’ ability to protect public health and safety by imposing new and unnecessary requirements on the rulemaking process and will force agencies to shift limited resources to this more complex, costly, and time-consuming rule-making process. This legislation will accordingly prevent agencies from effectively promulgating regulations designed to protect Americans’ health and safety.

²⁷ Office of Management and Budget, 2013 Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act, http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/2013_cost_benefit_report-updated.pdf.

²⁸ *Id.*

²⁹ Atif Mian & Amir Sufi, *Aggregate Demand and State-Level Employment*, FRBSF ECONOMIC LETTER (Feb. 11, 2013), <http://www.frbsf.org/economic-research/publications/economic-letter/2013/february/aggregate-demand-state-level-employment>.

³⁰ Unofficial Tr. of Markup of H.R. 527, “Small Business Regulatory Flexibility Improvements Act of 2015” by the H. Comm. on the Judiciary, 114th Cong. at 22 (Jan. 27, 2015) (statement of Rep. Henry C. “Hank” Johnson, Jr.), <http://judiciary.house.gov/cache/files/7ff3d5cc-a39b-42f0-930f-75ed4d98dcb5/01.27.15-markup-transcript.pdf> [hereinafter *Markup Tr.*]; Glenn Kesler, *The Claim that American Households Have a \$15,000 Regulatory Burden*, WASH. POST (Jan. 14, 2015), <http://www.washingtonpost.com/blogs/fact-checker/wp/2015/01/14/the-claim-that-american-households-have-a-15000-regulatory-burden>.

³¹ Markup Tr., *supra* note 30, at 22.

³² *Id.* at 40.

³³ *Id.* at 51.

³⁴ *Id.* at 61.

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

Section 5 of H.R. 527 eliminates agencies' ability to waive or delay any required initial regulatory flexibility analysis or to delay any required final regulatory flexibility analysis in the event of an emergency. By eliminating this safeguard, H.R. 527 undermines an agency's ability to respond to emergency situations.

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

At the Committee markup, Ranking Member John Conyers, Jr. (D-MI) offered an amendment that would have preserved the exception under current law that allows agencies to quickly respond to emergencies without being hampered or second-guessed by others.³⁵ The amendment was defeated by an 8 to 15 party-line vote.³⁶

Representative Scott Peters (D-CA) also offered an amendment that would have exempted from H.R. 527 any agency rulemaking to protect servicemembers from predatory lending.³⁷ Speaking in support of his amendment, Representative Peters noted the amendment is necessary to ensure the timely promulgation of rules by the Department of Defense to expand protections to servicemembers and reduce predatory lending to military families.³⁸ Representative Peters observed that "[m]embers of the armed services make sacrifices to protect us from harm and defend our freedoms. It is our responsibility to ensure that these men and women are protected when they return home."³⁹ Recognizing the importance of protecting servicemembers, Chairman Bob Goodlatte (R-VA) acknowledged that "there is a process ongoing to make sure that they are treated fairly in securing loans."⁴⁰ Following Chairman Goodlatte's commitment to address Representative Peters' concerns with H.R. 527 following the markup, the amendment was withdrawn from consideration.⁴¹ However, even if the Majority ultimately adopts an exception for this purpose, it only underscores why H.R. 527 is problematic. Essentially, this proves that exceptions for vulnerable populations are necessary to mitigate the harmful effects of the bill on such populations.

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

As discussed earlier, SBREFA⁴² amended the RFA to require that rules proposed by the EPA and OSHA be subject to an advocacy review panel consisting of the agency promulgating the rule,

³⁵ *Id.* at 41.

³⁶ *Id.* at 51.

³⁷ *Id.* at 62.

³⁸ 79 FED. REG. 58602 (Sept. 29, 2014) (to be codified at 32 C.F.R. Part 232)-2013-OS-0133.

³⁹ Markup Tr., *supra* note 30, at 63.

⁴⁰ *Id.* at 65.

⁴¹ *Id.* at 67.

⁴² Pub. L. No. 104-121, § 242, 110 Stat. 847, 857 (1996).

the Chief Counsel for Advocacy of SBA, and OIRA.⁴³ The Dodd-Frank Act later added the CFPB to this list of agencies subject to advocacy review panels. Section 6 of H.R. 527 significantly expands the reach of this requirement to make it apply to rules proposed by *all* agencies to which the RFA would apply. In addition, section 6 would make the review panel requirement apply to *all* major rules regardless of whether they have a significant economic impact on a substantial number of small entities, regardless of whether the RFA would apply. Under section 6, the review panel would review a proposed rule, solicit and obtain input from business interests, and then issue a report assessing the economic impact of the proposed rule on small entities, including the energy cost impact, as well as a discussion of regulatory alternatives. This report is then to be made part of the rulemaking record, and the agency must explain what, if anything, it did in response to the report.

By expanding the cumbersome review panel process to include *all* agency rules having a significant economic impact on a substantial number of small entities, as well as including *all* major rules regardless of whether they have such an impact, this provision will greatly slow down the rulemaking process and substantially empower business interests to throw sand into the gears of rulemaking. The use of advocacy review panels is already cumbersome. SBA's Office of Advocacy, which was established with the express purpose of acting as an independent advocate for business interests within the Federal Government,⁴⁴ is already able to delay the issuance of final EPA, OSHA, and CFPB rules and to shape them in industry-friendly ways.⁴⁵ Expanding the use of these panels to include all agencies and rules that do not necessarily have a significant economic effect on a substantial number of small entities would guarantee that most rulemakings would be delayed and reflect a less consumer-oriented perspective. Moreover, this expansion of the review panel process takes it well beyond the scope of the RFA.

There is also substantial public criticism of the SBA's Office of Advocacy independence and credibility as a voice for small businesses. In a 2014 report, the Government Accountability Office found, among other things, that the SBA's Office of Advocacy "did not ensure the quality of information that the office disseminated."⁴⁶ The report also reprimanded the SBA for not "retaining

⁴³ 5 U.S.C. § 609(b) (2015). The review panel requirement was extended to the CFPB in 2010. See 5 U.S.C. § 609(d) (2015).

⁴⁴ SMALL BUSINESS ADMINISTRATION, OFFICE OF ADVOCACY, *About Us*, <http://www.sba.gov/category/advocacy-navigation-structure/about-us>.

⁴⁵ The Center for Progressive Reform prepared a report in 2013 detailing the Office of Advocacy's role in politicizing debates about regulation and "funneling special interest pressure into agency rulemakings, even though such interests have already had ample opportunity to comment on proposed regulations." Sidney Shapiro & James Goodwin, *Distorting the Interests of Small Business: How the Small Business Administration Office of Advocacy's Politicization of Small Business Concerns Undermines Public Health and Safety*, Center for Progressive Reform White Paper #1302 (Jan. 2013), http://www.progressivereform.org/articles/SBA_Office_of_Advocacy_1302.pdf. Additionally, the Center for Effective Government issued a report explaining how the Office of Advocacy interfered with regulators' scientific assessments in order to promote the interests of large chemical companies having nothing to do with small business. Randy Rabinowitz, Katie Greenhaw, & Katie Weatherford, *Small Business, Public Health, and Scientific Integrity: Whose Interests Does the Office of Advocacy at the Small Business Administration Serve?*, Center for Effective Government (Jan. 2013), <http://www.foreffectivegov.org/files/regs/office-of-advocacy-report.pdf>.

⁴⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-525, SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY NEEDS TO IMPROVE CONTROLS OVER RESEARCH, REGULATORY, AND WORKFORCE PLANNING ACTIVITIES (2014).

data for influential studies or taking other steps to substantiate the quality of information in such studies when they have not retained the data,” citing specifically to the Crain Study.⁴⁷ The Center for Progressive Reform noted that the report “offered uncharacteristically strong criticisms of the SBA Office of Advocacy,” including “15 disturbing revelations” that “depicts an agency that is at best sloppy and at worst willfully indifferent to whether or not its actions actually help small businesses.”⁴⁸

Amit Narang, Regulatory Policy Advocate for Public Citizen, testified before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law (Subcommittee) that the “dramatic expansion” of review panels under the previous version of H.R. 527 “will result in these panels giving feedback on rules that have no application and place no requirements on small businesses. Once again, the bill stretches the boundaries of what is considered a regulation that impacts small businesses to such a degree that the distinction between what does and what does not impact small businesses is rendered meaningless.”⁴⁹ Mr. Narang further noted that a Government Accountability Office report detailing the “glacially slow pace of rulemaking at OSHA identified the SBREFA panel process as one of the factors delaying OSHA, finding that it takes about 8 months of work for OSHA to prepare for the panel”⁵⁰ Greatly expanding use of these panels can only cause similar rulemaking delays at other agencies.

III. H.R. 527 FORCES AGENCIES TO ENGAGE IN WASTEFUL, SPECULATIVE ANALYSES

H.R. 527 could effectively kill a rulemaking as a result of “paralysis by analysis.” Specifically, the term “economic impact” is defined under section 2 to include any reasonably foreseeable “indirect economic effect” that a proposed rule may have on a small entity. This provision would force agencies to conduct highly speculative and labor-intensive assessments, all of which could be subject to litigation by well-financed business interests.

In sum, the bill’s onerous requirements will prevent agencies from engaging in effective rulemaking. As Mr. Narang testified before the Subcommittee, the bill:

[D]oes little to clarify what constitutes, and more importantly, what does *not* constitute an indirect economic effect, giving agencies only the vague and perfunctory guidance that it be “reasonably foreseeable.” This ill-defined and indeterminate new mandate will exert strong pressure on agencies to engage in a guessing game of sorts as they attempt to identify all possible indirect effects of a rule, an enterprise akin to ordering a meteorologist to discern the

⁴⁷*Id.* at 13.

⁴⁸James Goodwin, *The GAO’s Scathing Report on the SBA Office of Advocacy: 15 Big Revelations*, CPRBLOG (July 28, 2014), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=7E0B435A-AF31-3773-74F4C5EB1559B1E5>.

⁴⁹H.R. 2542, the “Regulatory Flexibility Improvements Act of 2013”: *Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust L. of the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Amit Narang, Regulatory Policy Advocate, Public Citizen).

⁵⁰*Id.*

effects on Washington, D.C. weather of a butterfly flapping its wings in Japan.⁵¹

A. *H.R. 527 Imposes Additional Duties on Agencies, But Fails To Provide Any Additional Funding for Agencies to Comply with Burdensome New Requirements*

In addition to requiring agency assessments of a rule’s indirect effects and expanding the use of advocacy review panels, H.R. 527 substantially increases other agency responsibilities with respect to rulemaking. For example, section 4 of the bill requires agencies, with respect to regulatory analyses, to:

- specify that the required descriptions be detailed;⁵²
- provide a detailed explanation of significant issues raised by any public comments submitted in response to the initial regulatory flexibility analysis, provide the agency’s assessment of the issues, and explain any changes made in the proposed rule as a result of such comments;⁵³
- describe any disproportionate economic impact on small entities or a specific class of small entities;⁵⁴
- supply a detailed statement—including the factual and legal bases—of the reasons why an agency has determined that a proposed or final rule will not have a significant economic impact;⁵⁵ and
- provide in every instance (rather than simply making discretionary, as under current law) a quantifiable or numerical description of the effects of a proposed rule and alternatives to a proposed rule or a general description of such effects with a detailed statement explaining why quantification is not practicable or reliable.⁵⁶

These heightened responsibilities and other duties imposed by H.R. 527 will force agencies to expend already-strained resources and incur considerable costs to implement the bill. Not surprisingly, the Congressional Budget Office (CBO) estimated in the 113th Congress that a previous version of H.R. 527 would cost American taxpayers \$45 million between 2014 and 2018 and would provide no cost savings.⁵⁷ These costs may be even higher, as the Small Business Committee’s minority staff noted in the 113th Congress, concluding that the “true cost, based on prior CBO scores, is likely closer to \$100 million.”⁵⁸

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

Section 7 of H.R. 527 threatens to undermine agency rulemaking by requiring that every agency conducts a review of *all* rules—not

⁵¹ *Id.*

⁵² H.R. 527, 114th Cong., § 4(b)(1)(B) (2015).

⁵³ H.R. 527, 114th Cong., § 4(b)(1)(A) (2015).

⁵⁴ H.R. 527, 114th Cong., § 4(a) (2015).

⁵⁵ H.R. 527, 114th Cong., § 4(d) (2015).

⁵⁶ H.R. 527, 114th Cong., § 4(e) (2015).

⁵⁷ Congressional Budget Office, *Cost Estimate for H.R. 2542, the Regulatory Flexibility Improvements Act of 2013* (Sept. 5, 2013), <http://cbo.gov/sites/default/files/cbofiles/attachments/hr527.pdf>.

⁵⁸ *Id.* at 96.

just those subject to the RFA—that exist on the bill’s enactment date. The review must consist of a determination of whether these rules have a significant economic impact on a substantial number of small entities, regardless of whether they already went through a final regulatory flexibility analysis previously. As a result of this provision, agencies would be forced to re-justify safeguards such as regulations designed to ensure clean air, clean water, food safety, automobile safety, and workplace safety. To do so, agencies will be required to redirect their scarce resources to meet this burdensome requirement.

To put this requirement in context, it should be noted that there are currently more than 165,000 pages of regulations in the Code of Federal Regulations, as well as several hundred thousand guidance documents that could be subjected to H.R. 527’s look-back requirement. At a time when agencies are already under strain with limited resources, they can ill afford this substantial increase in their workload.

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

Furthermore, section 7 imposes the absurd and wasteful requirement that agencies amend or rescind all existing rules. Specifically, H.R. 527 states that 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.” In other words, regardless of the findings of any review of existing regulations, agencies must amend or rescind all existing rules, even when the review finds there is no need to amend or rescind a particular rule.⁵⁹ Why require agencies to engage in a review to determine whether a rule should be amended or rescinded if amending or rescinding the rule is required regardless of what the review would find? Taken literally, this provision would require agencies to: (1) review the hundreds of thousands of pages of rules and guidance documents existing on H.R. 527’s enactment date; and (2) amend or rescind every rule in existence on that date regardless of the review’s findings. As J. Robert Shull noted in testimony before the Subcommittee in the 112th Congress, the mandatory “amend or rescind” provision requires that “the agency . . . embark upon new rulemakings for all of those [existing] regulations.”⁶⁰ While we find much of H.R. 527’s provisions to be wasteful, surely, the sponsors of H.R. 527 could not have intended to include this absurd and monumental waste of taxpayer resources.

⁵⁹H.R. 527, 114th Cong, §7 (2015).

⁶⁰*The Regulatory Flexibility Improvements Act of 2011—Unleashing Small Businesses to Create Jobs: Hearing Before the Subcomm. on Commercial and Administrative L. of the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of J. Robert Shull).

IV. THE EXPANSION OF JUDICIAL REVIEW TO INCLUDE ALL AGENCY ACTIONS, AND NOT JUST “FINAL AGENCY ACTION,” ALLOWS SPECIAL INTERESTS TO OBSTRUCT RULEMAKING BY CHALLENGING AGENCY ACTION BEFORE A RULE IS FINALIZED

Section 8 of H.R. 527 creates the opportunity for well-funded anti-regulatory business interests to engage in frivolous litigation. It does this by expanding the scope of judicial review to include court challenges to agency actions to issuance of a final rule, including agency compliance with H.R. 527’s numerous, vague, speculative, and cumbersome analytical and other requirements. Current law limits such judicial review to final agency actions.

As Mr. Narang noted at the Subcommittee’s hearing on an earlier version of H.R. 527, the bill’s expansion of judicial review to include challenges to the adequacy of regulatory flexibility analyses, for instance, would simply open the door to endless litigation, stating:

the [bill] ensures that if agencies guess wrong on indirect effects, regulated entities will have the ability to draft the agency into court and overturn a rule because the agency wasn’t able to satisfy this new and highly speculative mandate of determining all indirect effects. Thus, the [bill] opens the floodgates of litigation and transforms a statute that is supposed to target rules that apply to small businesses into one that forces agencies, by default, to assume that their rules will in some indirect and attenuated fashion apply to small businesses.⁶¹

Similarly, Mr. Shull testified that the bill would “dramatically” expand the RFA’s judicial review provisions “to allow corporate special interests to challenge the adequacy of analysis over a wide range of agency activities, not limited to the ‘final agency actions’ that normally are the decision point that must be reached before an agency can be dragged into court.”⁶²

SECTION-BY-SECTION EXPLANATION

Section 1. Short Title. Section 1 sets forth the bill’s short title as the Small Business Regulatory Flexibility Improvements Act of 2015.

Section 2. Clarification and Expansion of Rules Covered by the Regulatory Flexibility Act. Section 2(a) amends 5 U.S.C. § 601(2) to provide that the term “rule” does not include a rule pertaining to the protection of the rights and benefits of veterans or a rule of particular applicability related to rates, wages, corporate or financial structures (or reorganizations thereof), prices, facilities, appliances, services, or allowances. Section 2(a) would change the definition of “rule” requiring notice-and-comment rulemaking from its current usage under Section 553(b) of title 5 to a much broader definition of a rule under Section 551(4) of title 5, which includes in-

⁶¹H.R. 2542, the “Regulatory Flexibility Improvements Act of 2013”: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust L. of the H. Comm. on the Judiciary, 113th Cong. (2013) (statement of Amit Narang, Regulatory Policy Advocate, Public Citizen).

⁶²The Regulatory Flexibility Improvements Act of 2011—Unleashing Small Businesses to Create Jobs: Hearing Before the Subcomm. on Commercial and Administrative L. of the H. Comm. on the Judiciary, 112th Cong. (2011) (statement of J. Robert Shull).

terpretive rules, policy statements, informal guidance, and other ministerial agency action.

Section 2(b) amends 5 U.S.C. § 601 to define “economic impact” as any direct economic effect on small entities by a proposed or final rule and any indirect economic effect on small entities, including compliance costs and effects on revenue, that is reasonably foreseeable and results from such rule, without regard to whether small entities will be directly regulated by the rule.

Section 2(c) amends 5 U.S.C. §§ 603(c) and 604(a)(7) (as amended by this Act) to require each initial and final regulatory flexibility analysis to contain a detailed description of alternatives to the rule that minimize any significant adverse economic impact or maximize any significant beneficial economic impact on small entities.

Section 2(d) amends 5 U.S.C. § 601(5) (which defines small governmental jurisdiction) to expand its applicability to tribal organizations.

Section 2(e) amends 5 U.S.C. §§ 603(a) and 604(a) to make the requirement to prepare an initial and final regulatory impact analysis applicable to instances where an agency publishes a revision or amendment to a land management plan or issues a proposed rule made on the record after opportunity for an agency hearing. In addition, section 2(e) amends 5 U.S.C. § 601 to define land management plan, revision of a land management plan, and amendment of a land management plan.

Section 2(f)(1) amends 5 U.S.C. § 603(a) with respect to its requirement for an initial regulatory flexibility analysis for Internal Revenue Service interpretative rules published in the Federal Register for codification in the Code of Federal Regulations to the extent that such interpretative rules require small entities to collect information. As amended, section 603(a) applies to recordkeeping requirements imposed by such rules on small entities, without regard to whether such requirements are imposed by statute or regulation.

Section 2(f)(2) amends 5 U.S.C. § 601(7), which defines the term “collection of information” to provide that the term has the same meaning as set forth in 44 U.S.C. § 3502(3), which has a nearly identical definition for the term.

Section 2(f)(3) amends 5 U.S.C. § 601(8), which defines the term “recordkeeping requirement” “as a requirement imposed by an agency on persons to maintain specified records.” Section 2(f)(3) amends the definition to provide that the term has the same meaning as set forth in 44 U.S.C. § 3502(13), which is slightly more expansive and requires persons to retain records, notify, disclose, or report to third parties, including the Federal Government or the public, about such records.

Section 2(g) amends 5 U.S.C. § 601(4), which defines the term “small organization” as “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[.]” Section 2(g) provides that this term includes any not-for-profit enterprise that “as of the issuance of the notice of proposed rulemaking” does not exceed the specified size standard for small business concerns established by the SBA Administrator

applicable to a classification code of the North American Industrial Classification System, providing such enterprise has a net worth of less than \$7 million and has less than 500 employees. For a local labor organization, the definition applies regardless of whether the organization is a part of a national or international organization. These definitions do not apply to the extent that an agency, after consulting the Office of Advocacy of the Small Business Administration and public comments, establishes its own definition of “small organization” and publishes such definition in the Federal register.

Section 3. Expansion of Report of Regulatory Agenda. Section 3 amends 5 U.S.C. § 602 by adding a requirement for a brief description of the sector that is primarily affected by a rule in its regulatory flexibility agenda and a requirement that the agenda contain a plain-language summary to be published on the agency’s website within 3 days of its publication in the Federal Register.

Section 4. Requirements Providing for More Detailed Analyses. Section 4(a) amends 5 U.S.C. § 603(b) to require an initial regulatory flexibility analysis to contain a detailed statement: (1) describing the reasons why the 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 businesses to which the rule will apply; (4) describing the rule’s projected reporting, recordkeeping, and other compliance requirements; (5) describing all relevant Federal rules that may duplicate, overlap, or conflict with the rule or the reasons why such description was not provided; (6) estimating the rule’s additional cumulative economic impact on small entities beyond that already imposed on the class of small entities (or an explanation of why such an estimate is not available); and (7) describing any disproportionate economic impact on small entities or a specific class of small entities.

Section 4(b)(1)(A) amends 5 U.S.C. § 604(a), which outlines the requirements of a final regulatory flexibility analysis, by requiring detailed descriptions and explanations wherever such description or explanation is required and adds a further requirement that an agency describe any disproportionate economic impact on small entities or a specific class of small entities.

Section 4(b)(2) amends 5 U.S.C. § 604(a)(2) to provide that it applies to instances where the agency certifies a proposed rule.

Section 4(b)(3) amends 5 U.S.C. § 604(b), which requires an agency to make copies of the final regulatory flexibility analysis available to the public and to publish it (or a summary thereof) in the Federal Register. Section 3(b)(3) expands this requirement to include posting the entire analysis on the agency’s website. In addition, the final analysis must also include the telephone number, mailing address, and link to the website where the complete analysis may be found.

Section 4(c) amends 5 U.S.C. § 605(a), which provides that an agency must be treated as having satisfied any requirement regarding an agenda or regulatory flexibility analysis, to require a cross-reference to the specific portion of the other agenda or analysis that satisfies this requirement.

Section 4(d) amends 5 U.S.C. § 605(b), which permits an agency, in lieu of complying with sections 603 and 604, to certify that the rule will not have a significant economic impact on a substantial

number of small entities. As amended, section 605(b) requires such certification to be accompanied by a detailed statement providing the factual and legal basis for it.

Section 4(e) amends 5 U.S.C. § 607, which allows an agency to provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to a proposed rule, or more general descriptive statements if quantification is not practicable or reliable. This amendment makes section 607 mandatory and specifies that in instances where an agency provides a general descriptive statement, the agency must also provide a detailed statement explaining why quantification is not practicable or reliable.

Section 5. Repeal of Waiver and Delay Authority; Additional Powers of the Chief Counsel for Advocacy. Section 5(a) repeals current 5 U.S.C. § 608, which allows an agency to waive or delay the completion of some or all of the requirements of section 603 (pertaining to initial regulatory flexibility analyses) and to waive the requirements of section 604 (pertaining to final regulatory flexibility analyses), and replaces it with a new provision allowing for additional powers of the Chief Counsel for Advocacy of the Small Business Administration.

New Section 608(a)(1) requires the Chief Counsel for Advocacy to issue rules governing compliance with chapter 6, after opportunity for notice and comment, within 270 days after enactment of this section. New section 608(a)(2) provides that an agency may not issue rules that supplement those promulgated by the Chief Counsel unless such agency has first consulted with the Chief Counsel to ensure that the supplemental rules comply with chapter 6 and the Counsel's rules.

New section 608(b) provides that the Chief Counsel, notwithstanding any other law, may intervene in any adjudication before any Federal agency (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 provision prohibits the Chief Counsel from initiating an appeal with respect to any adjudication in which the Chief Counsel intervenes pursuant to new section 613(b).

New section 608(c) authorizes the Chief Counsel to 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 5 U.S.C. § 553.

Section 5(b) makes conforming amendments.

Section 6. Procedures for Gathering Comments. Section 6 replaces 5 U.S.C. § 609(b), which sets out procedures that an agency must follow prior to the publication of an initial regulatory flexibility analysis. As amended, section 609(b) requires the agency to provide to the Chief Counsel of Advocacy with the following: (1) all materials prepared by the agency in promulgating the proposed rule, including any drafts of such rule (with certain exceptions); and (2) information on the rule's potential adverse and beneficial impacts on small entities that might be affected.

Within 15 days of receipt of such information, the Chief Counsel must identify small entities or representatives thereof (or a combination of both) for the purpose of obtaining advice, input and recommendations about the rule's potential economic impact and compliance with sections 603 or 605(b) of title 5. The Chief Counsel

must also convene a review panel staffed by an Office of Advocacy employee and an employee for the agency promulgating the rule. If the agency is not an independent regulatory agency, the panel must also include an employee from Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

Within 60 days after the panel is convened, the Chief Counsel must, after consultation with the panel, submit a report to the agency or to OIRA. The report must include an assessment of the proposed rule's impact on small entities as well as a discussion of any alternatives that will minimize adverse economic impacts on small entities.

In addition, section 6 mandates that the report become part of the rulemaking record. In the publication of the proposed rule, the agency must explain what actions, if any, the agency took in response to such report.

Section 6 further provides that section 609(b), as amended, applies to a proposed rule if the OIRA Administrator or an agency head (or delegate) determines that the rule is likely to result in any of the following: (1) an annual effect on the economy of \$100 million 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.

Section 6 permits the Chief Counsel for Advocacy to waive the requirements of subsections (b) through (e) of section 609 if the Counsel determines that compliance with these requirements are impracticable, unnecessary, or contrary to the public interest.

Finally, section 6 provides that a small entity or its representative may request that the agency supply a copy of the report, including all materials and information provided to the Chief Counsel. Upon receiving this request, the agency must provide these materials to the small entity within ten business days of the request, unless otherwise protected under 5 U.S.C § 552(b), which exempts certain sensitive matters relating to national defense, foreign policy, internal personnel rules, and other matters.

Section 7. Periodic Review of Rules. Section 7 amends 5 U.S.C. § 610, pertaining to the periodic review of rules, requires each agency to publish in the Federal Register and on the agency's website a plan for the periodic review its rules. Section 7 requires the agency's head, rather than the agency, to determine whether the rule has a significant economic impact on a substantial number of small entities. Such determination must be made without regard to whether the agency performed an analysis under section 604. Section 7 revises the objectives of the determination to require consideration of whether the rule maximizes any significant beneficial impacts on a substantial number of small entities. If an agency head determines that the periodic review cannot be performed within the stated time frames, then section 7 permits the agency head to so certify and extend the review period for 2 years after publication of the notice of extension in the Federal Register. In ad-

dition, such notice and certification must be provided to the Chief Counsel and Congress. Section 7 also directs the agency to amend or rescind a rule to minimize adverse significant economic impact on a substantial number of small entities or a disproportionate economic impact on a specific class of small entities, or to maximize beneficial significant economic impact on a substantial number of small entities. Section 7 further requires the agency's plan to include an explanation of the agency's plans to conduct outreach to small businesses, including small businesses controlled by women, veterans, or socially and economically disadvantaged individuals, for the purposes of gathering input on their concerns relating to existing agency rules.

As amended, section 610 requires agencies to annually submit a report regarding the results of their review to Congress and to OIRA. Section 7 expands the criteria that an agency must consider to include comments by the Regulatory Enforcement Ombudsman and the Chief Counsel for Advocacy. In addition, the agency must consider the rule's contribution to the cumulative economic impact of all Federal rules on the class of small entities affected by the rule, unless the agency head determines that such calculations cannot be made and reports that determination in the annual report required under section 610(c).

In addition to publication in the Federal Register, section 6 requires each agency to publish a list of rules to be reviewed on its website and to include an explanation of why the agency determines such rules have a significant economic impact on a substantial number of small entities. The agency's publication must include a request for public comment on any inclusion or exclusion of rules from the list, and respond to these comments. In addition, this publication must request comments from the public, Chief Counsel for Advocacy, and the Regulatory Enforcement Ombudsman concerning enforcement of such rules.

Section 8. Judicial Review of Compliance with the Requirements of the Regulatory Flexibility Act Available After Publication of the Final Rule. Section 8(a) amends 5 U.S.C. § 611(a)(1) to provide that a small entity that is adversely affected or aggrieved by any rule under chapter 6 is entitled to judicial review of agency compliance. Section 611(a)(1) currently applies only to "final agency action."

Section 8(b) amends 5 U.S.C. § 611(a)(2) to provide that a court may review a rule if publication of the final rule constituted final agency action.

Section 8(c) amends 5 U.S.C. § 611(a)(3) to provide that the time within which judicial review may be sought begins from publication of a final rule. It also specifies that the exception applies in the case of a rule for which the date of final agency action is the same date as the publication date of the final rule.

Section 8(d) amends 5 U.S.C. § 612(b), which authorizes the Chief Counsel for Advocacy to appear as *amicus curiae* in any action brought in a court of the United States to review a rule. As amended, the provision permits the Chief Counsel to also appear as *amicus curiae* in any action to review agency compliance with section 601, 604, 605(b), 609, or 610.

Section 9. Jurisdiction of Court of Appeals Over Rules Implementing the Regulatory Flexibility Act. Section 9(a) amends 28 U.S.C. § 2342 to give the United States Court of Appeals (other

than the United States Court of Appeals for the Federal Circuit) exclusive jurisdiction to enjoin, set aside, suspend, or to determine the validity of all final rules under 5 U.S.C. § 608(a) (as amended by this Act).

Section 9(b) amends 28 U.S.C. § 2341(3), which defines the term, “agency”. As amended, the definition includes the Office of Advocacy of the Small Business Administration, when a final rule is promulgated under section 608(a) of title 5 of the United States Code (as amended by this Act).

Section 9(c) amends 5 U.S.C. § 612(b), which sets out certain intervention rights of the Chief Counsel for Advocacy pertaining to matters under chapter 6. As amended, section 612(b) extends this provision to apply to compliance under chapters 5 and 7, in addition to chapter 6.

Section 10. Establishment and Approval of Small Business Concern Size Standards by Chief Counsel for Advocacy. Section 10 of the bill amends the Small Business Act to give the SBA’s Chief Counsel for Advocacy the authority to establish small business size standards. This text is identical to the text of H.R. 585, the “Small Business Size Standard Flexibility Act of 2011,” from the 112th Congress, which was referred to the Committee on Small Business and over which this Committee did not have jurisdiction.

Section 11. Clerical Amendments. Section 11(a) amends 5 U.S.C. § 601, which defines various terms for purposes of chapter 6 of title 5 of the United States Code, to make conforming and stylistic revisions.

Section 11(b) amends the heading of section 605 of title 5.

Section 11(c) amends the table of citations for chapter 6 of title 5, United States Code, to conform to the new section headings.

Section 11(d) amends 5 U.S.C. § 603 by striking subsection (d)(2) and amending the second paragraph to make conforming and stylistic revisions.

Section 12. Agency Preparation Guides. Section 12 amends SBREFA requiring that agency guides be written in plain language.

Section 13. Comptroller General Report. Section 13 requires the Comptroller General of the United States to publish a study examining whether the Chief Counsel of Advocacy of the Small Business Administration has the capacity or resources to carry out the duties required under this Act.

CONCLUSION

H.R. 527 is the latest iteration of the Majority’s ongoing attack on Federal regulation. Since the beginning of the 112th Congress, the Judiciary Committee’s Subcommittee on Regulatory Reform, Commercial and Antitrust Law has held 26 hearings and considered at least seven bills designed to hobble Federal agency rulemaking and to increase the influence of business interests over the rulemaking process. The Majority’s use of pro-small business rhetoric cannot obscure the fact that H.R. 527, like previous anti-regulatory proposals, will erect major barriers to rulemaking that will hinder the promulgation of critical public health and safety protections.

We share the Majority’s belief that small business plays an important role in our nation’s economy, but H.R. 527 does nothing to

alleviate the purported burden on small entities of complying with Federal regulations. In fact, it includes no provision that offers assistance to small entities, whether through subsidies, government-guaranteed loans, preferential tax treatment for small firms, or fully funded compliance assistance offices. Instead, the bill merely aggrandizes the power of the SBA's Office of Advocacy and of the professional lobbying class in Washington. If the proponents of H.R. 527 were serious about helping small entities deal with the regulatory system, they would support instituting mechanisms for small entities that actually help them participate directly in rule-making, without having to rely on Washington-based intermediaries.

There are other meaningful ways to assist small businesses and small entities to navigate the regulatory landscape that would not threaten agencies' ability to protect public health and safety. We urge our colleagues to shift their attention to these alternatives and to oppose this ill-conceived legislation.

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MR. COHEN.
MR. JOHNSON, JR.
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