Minority Views
H.R. 7198, the "Prove It Act of 2024"

Congress passed the Regulatory Flexibility Act (RFA) in 1980 out of concern that uniform regulations disproportionately burdened small firms.[1] Concerns have been raised that the law has become a tool for large businesses to obstruct the regulatory process. To that end, the *"Prove It Act of 2024"* would give the biggest companies a powerful new tool to use against regulations and cause further harm to the very small entities it purports to help.

The bill creates an unworkable quasi-judicial process within the Office of Advocacy (Advocacy) for reviewing agencies' determinations that regulatory flexibility analyses are not required. Unlike the original RFA, which only allows small entities to seek judicial review, the *"Prove It Act of 2024"* would allow an "organization representing the interests of small entities" to file a petition for review with the Chief Counsel. This addition would let powerful trade associations, like the U.S. Chamber of Commerce, petition the SBA to review a certification as long as the organization can claim to represent some small entities affected by the underlying rule. Moreover, the bill would allow these organizations to challenge the agencies' regulatory flexibility analysis without identifying which small businesses they represent or how those small businesses would be harmed by the rules they are challenging. In addition, duplicative petitions could be received on the same rule. This would result in additional meetings with the agencies and Advocacy, which require significant new resources and would likely not result in any meaningful reduction of the burdensome requirements to small businesses.

Once a petition is filed, the Chief Counsel would have 10 days to determine if the petition warrants a full review. If the Chief Counsel determines that a full review is required, the Chief Counsel has a further 30 days to conduct the review and publish the results. The Chief Counsel would also have unreviewable discretion to sanction the agency promulgating the rule by making the final rule inapplicable to small agencies upon a finding that the agency failed to assist the Chief Counsel. Moreover, the bill would require agencies to include indirect economic effects of rules in their regulatory flexibility analyses, which can be burdensome, impracticable, and counterproductive. The RFA requires agencies to take into consideration the direct impact on small entities and try to minimize the direct impact while achieving the same goal. Indirect costs are significantly more difficult to estimate, and agencies do not always have that information available to them, nor do they have control over minimizing them.

Beyond requiring the Chief Counsel to review petitions related to new rules, the bill also charges the Chief Counsel with tracking agencies' completion of mandatory reviews of existing rules every 10 years. It also requires agencies to conduct retrospective reviews based on the indirect costs identified in the initial analysis. This does not make sense because agencies may have changed rules significantly between proposed and final rule stages, meaning the indirect costs identified in the proposed stage may not be applicable to the final rule, let alone 10 years after the final rule has taken effect. This provision is also unworkable.

Even more troubling, if the Chief Counsel finds that an agency failed to conduct a required review of a rule, the Chief Counsel can suspend operation of the rule- meaning it won't apply to anyone or any business. It creates another layer of regulatory review, which would essentially announce that a rule has

[1] Stuart Shapiro & Deanna Moran, *The Checkered History of Regulatory Reform*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 141, 153–54 (2016) (describing hearings leading up to passage of the RFA).

ceased to exist, provide another review, and then allow it to be reinstated – this would cause undue uncertainty to small businesses. This provision would apply to every rule issued in the five years prior to enactment, as well as to all rules after enactment. Essentially, this means it would only affect former President Trump's rules dealing with COVID-19, and all of President Biden's rules.

Small businesses need certainty in the rule-making process and requiring small businesses to come into compliance with a rule or regulation only to remove it from the books would be onerous in and of itself. By opening the door for well-resourced trade associations to challenge virtually any rule, the bill could end up requiring the Chief Counsel to review agencies' RFA compliance for many of the thousands of rules issued each year, to say nothing of agencies' periodic reviews of existing rules. That will do little to help small businesses but help powerful companies with money to hire well-connected lobbyists.

Committee Democrats have pledged to always serve America's Main Streets in a bipartisan manner. To this end, Ranking Member Velázquez proposed a common-sense amendment in the nature of a substitute to this bill. The Velázquez Amendment would: (1) strengthen the section 610 retrospective review process, requiring agencies to include an explanation for any delays in retrospective review, and (2) require the Office of Advocacy to provide training to agency employees who writes, reviews, approves, or analyzes regulations or guidance documents at least once every four years.

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