

Minority Views

H.R. 8033, the “Regulatory Transparency for Small Businesses Act”

The bill would amend Section 605 of the Regulatory Flexibility Act (RFA) to require agencies to include new requirements for the certification that rules will not have a “significant economic impact on a substantial number of small entities” (SEISNSE). The new required information would be:

- The approximate number of small entities impacted and identification of any such small entity (including their NAICS code);
- An estimate of total cost of implementing the rule, including the cost of compliance with the rule, measured as percentage of revenue of the small entities (or other reasonable measure);
- A determination of whether those costs are significant, and the criteria used to make the determination; and
- A determination of whether the number of small entities that will experience a significant impact is substantial and the criteria used to make the determination.

The bill is a solution in search of a problem. Under current law, agencies are required to certify whether a rule would have a SEISNSE and submit the certification and factual basis in the Federal Register at the time of the publication of the proposed and final rule.¹ If a certification is not adequate, courts will overturn the rule. In amending the RFA to require a statement of factual basis, Congress intended that agencies provide more than a boilerplate and unsubstantiated statement. The factual basis has to be meaningful.

The bill imposes a cost analysis requirement for every rule, not just those that have a SEISNSE. While agencies include some of these requirements in their factual basis, the requirement for an estimate of the total cost of implementing the rule, including the cost of compliance with the rule is not required for every rule. Only economically significant rules are required to have a cost-benefit analysis.² The APA does not require economic analyses when rules are proposed; and the RFA requires initial regulatory flexibility analyses only on rules that will have a SEISNSE. Moreover, this bill would extend the *cost* requirement to a vast majority of rules, but not require agencies to calculate the *benefits* of the rules, which is only half of the ledger. Even more troubling, the cost estimate would be extended to all rules, even those that do not impact small businesses. For example, the U.S. Coast Guard has published thousands of rules in the Federal Register to declare safety zones for public events, like firework displays or triathlons. It doesn’t make sense to require the cost estimate for rules that will not impact small businesses, and it is a waste of taxpayers’ dollars. Moreover, the bill removes any flexibility given to agencies to determine the most appropriate level of analysis.

The new procedural requirements to be included in the certification are very detailed, frequently unavailable to agencies, and provide no flexibility in instances where the information is difficult to obtain. As drafted, the provisions require agencies to identify every specific small entity and provide an estimate of revenue for each specific small entity impacted, which would be practicably impossible if the small entity is unknown. Congress created the rulemaking process to allow the public to provide agencies with information necessary to make informed decisions. Moreover, the language is inconsistent with the RFA

¹ OFF. OF ADVOCACY, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, U.S. SMALL BUS. ADMIN. (Aug. 2017), <https://advocacy.sba.gov/wp-content/uploads/2019/06/How-to-Comply-with-the-RFA.pdf>.

² CONG. RESEARCH SERV., *COST-BENEFIT ANALYSIS IN FEDERAL AGENCY RULEMAKING*, 1-2 (Mar. 8, 2022).

in that it does not include language like “to the extent practicable” or “where feasible” to take into consideration situation where the data is unknown, unquantifiable, or unavailable.

In sum, this bill would require agencies with limited resources to perform extremely detailed data and analytical requirements for every rule, even if a rule would not have a significant impact on a significant number of small businesses.

The bill provides no additional resources to agencies to conduct a cost estimate for every rule or obtain the detailed information for the certification. This requirement for detailed analysis for all rules would detract from the quality of analysis for rules in which the RFA is triggered.

The bill’s detailed requirements would also be subject to judicial review. Specifically, the new subsection (d) would detail the requirements for the certification in 605(b), and those certifications are subject to judicial review under 611(a). In essence, if an agency failed to comply with one of the new procedural requirements the rule could be overturned.

The Majority is concerned that agencies are improperly certifying that rules do not have a SEISNSE. It is important to note that the Office of Advocacy (Advocacy), an independent agency, is responsible for monitoring agencies’ compliance with the RFA. In testimony before the Committee, Mr. Clark, the Acting Chief Counsel of Advocacy stated, “our concern when an agency does, in fact, attempt to certify a regulation that the certification has a factual basis. And the factual basis should set forth reasons why they feel that the impact is minimum or to no extent on small business. And when agencies fail to give us the factual basis, we do bring it to their attention.”³

Moreover, with regard to DOL’s Walkaround Rule, Advocacy didn’t state the certification was wrong, it just said that the agency should conduct more outreach and better explain the impact of the proposed rule on small businesses. In another instance, Advocacy sent a comment letter to EPA raising concerns over the improper certification of the rule requiring one-time reporting and recordkeeping requirements for Asbestos. In the final rule, the EPA provided an exemption to businesses with annual sales threshold of \$500,000 or less, in any calendar year from 2019 to 2022, saving small businesses 144 million.⁴

For these reasons, I oppose the legislation.



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Ranking Member

³ Reviewing the SBA’s Office of Advocacy Report on the Regulatory Flexibility Act, Hearing Before the H. COMM. ON SMALL BUS., 118th Cong. (Jun. 22, 2023).

⁴ OFF. OF ADVOCACY, ANNUAL REPORT ON THE REGULATORY FLEXIBILITY ACT, (Jun. 2024)., http://advocacy.sba.gov/wp-content/uploads/2024/06/RFA-FY23_final.pdf.