April 26, 2025

The Honorable Roger Williams Chairman 2361 Rayburn House Office Building Washington, D.C. 20515	The Honorable Nydia M. Velázquez Ranking Member 2069 Rayburn House Office Building Washington, DC 20515

Dear Chairman Williams and Ranking Member Velázquez:

I am Todd Phillips, Assistant Professor of Legal Studies at Georgia State University's J. Mack Robinson College of Business and principal with the small business Phillips Policy Consulting, LLC.[1] I write to comment on two bills under consideration by the House Committee on Small Business.

H.R. 1163, The Prove It Act of 2025

The Prove It Act would unnecessarily elongate the rulemaking process, permit unnecessary litigation, and delay rules' effectiveness without consideration for the benefits small businesses receive from regulations.

The Regulatory Flexibility Act (RFA) currently requires agencies to conduct "regulatory flexibility analyses" alongside each notice-and-comment regulation that "describe the impact of the proposed rule on small entities"[2] unless agencies certify that the rule "will not, if promulgated, have a significant economic impact on a substantial number of small entities."[3] The Prove It Act would amend the RFA to permit small businesses, or any organization claiming to represent small businesses, to challenge agencies' certifications before the Chief Counsel for Advocacy of the Small Business Administration. If agencies fail to comply with the Chief Counsel's orders or participate in adjudicatory process at all, the rules would be invalidated as they pertain to small businesses. The Prove It Act would also require agencies to consider "reasonably foreseeable potential indirect costs" of their rules when conducting regulatory flexibility analyses and require agencies to conduct retrospective reviews of all rules not certified every ten years lest those rules be deemed unenforceable.

I oppose this bill for several reasons.

First, the Prove It Act would unnecessarily delay the rulemaking process by offering new avenues by which rules' opponents may litigate, including litigation over *initial* regulatory flexibility analyses for the first time. The RFA today only allows for judicial review of *final* regulatory flexibility analyses,[4] whereas this bill would permit appeals of both *initial* and *final* analyses to the Chief Counsel, as well as the Chief Counsel's decisions.

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[1] Affiliation provided for identification purposes only. Comments are my own and not of my employer.

[2] 5 U.S.C. § 603–04.

[3] *Id*. § 605(b).

[4] *See id*. § 611(a)(1) (providing for judicial review of section 604, which requires agencies to promulgate final regulatory flexibility analyses, but not section 603, which requires agencies to promulgate initial analyses).

Second, the Prove It Act ignores long-held principles of standing to allow trade associations to launder their complaints under the guise of helping small businesses. In the federal court, organizational standing is granted only to organizations that have at least one member who has itself been (or will be) harmed, and organizations who claim organizational standing must identify that member to the court.[5] This bill would allow "organization[s] representing the interests of small entities" to challenge agencies' regulatory flexibility analyses without requiring them to identify *which* small businesses they purport to represent or *how* those small businesses would be harmed by the rules they are challenging.

Third, the Prove It Act would effectively allow the Chief Counsel to order agencies to adopt its interpretation of rules' impacts on small businesses, lest their rules be invalidated as they apply to small businesses. The three considerations upon which the bill requires the Chief Counsel to base its analysis are ambiguous and give the Chief Counsel broad authority to pause rulemakings it does not like. For example, although the RFA does not define the term "small entity," requiring the Chief Counsel to consider "whether the agency … correctly determined which small entities will be affected by the proposed rule" simply allows the Chief Counsel to make a policy decision instead of the agency. Because appeals under the Prove It Act are of the Chief Counsel's decisions and not the agencies', courts will review the Chief Counsel's decision under the arbitrary and capricious standard and not the agencies' even if both are valid. Furthermore, since it is the *agency* that will be defending its analyses in court, it may be impossible for the agency to defend the Chief Counsel's determination under a legal standard that investigates the agency's thought processes.

Fourth, the Prove It Act would require the Administrator of OIRA to attend the meetings upon which the Chief Counsel makes its decisions and not the Administrator's delegates.[6] This requirement is unnecessarily burdensome on the Administrator, and OIRA would most likely direct agencies to accede to the Chief Counsel's determinations so as to avoid these meetings.

Fifth, the Prove It Act would unnecessarily increase White House oversight of independent regulatory agencies. The Act would require the OIRA Administrator to attend all meetings regarding appeals of regulatory flexibility analyses, including those of agencies for which OIRA plays no role. Failing to omit the Administrator from meetings regarding independent agencies' rules serves only to reduce those agencies' independence.

Sixth, the Prove It Act does not provide an appeals process allowing agencies to appeal the Chief Counsel's decisions. In other statutory schemes under which one agency may rule against another, statutes generally provide specific the appeals processes.[7] This bill seems to erroneously presume that only the private sector will appeal the Chief Counsel's decisions.

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[5] *See* Summers v. Earth Island Institute, 555 U.S. 488, 494 (2009) (providing that "organizations can assert the standing of their members" but rejecting standing where the organization could not identify a member with standing).

[6] *Compare* the bill's requirement that "representatives of the agency that promulgated the proposed rule" attend a meeting *with* the bill's requirement that "the Administrator of the Office of Information and Regulatory Affairs" attend.

[7] *See, e.g.*, 29 U.S.C. § 660 (providing judicial review for appeals of decisions by the Occupational Safety and Health Review Commission).

Seventh, in expanding the universe of effects agencies must consider in their regulatory impact analyses to include "reasonably foreseeable potential indirect costs," the Prove It Act gives courts broad latitude to retroactively impose analysis requirements on agencies that they cannot anticipate. Indirect costs are speculative and devoid of context if not also accompanied by consideration of direct and indirect benefits, and courts likely have different impressions of which indirect costs are reasonably foreseeable and may identify indirect costs agencies never considered. In the APA's notice-and-comment process, judicial review of agencies' considerations is limited to those facts arguments that commenters presented to agencies. Here, the Act would permit courts to strike down regulations for agencies' failure to consider costs never expected they would be required to consider.

Eighth, the Prove It Act's penalty for failing to conduct retrospective reviews is unnecessarily severe. Retrospective reviews can certainly be worthwhile, but deeming a rule invalid and unenforceable for failing to conduct an analysis by a set date may lead to catastrophic consequences. Agencies frequently face competing priorities, and—as the Supreme Court has noted—agency officials are "far better equipped" than others "to deal with the many variables involved in the proper ordering of [agency] priorities."[8] For example, the Federal Reserve may be facing a financial crisis at the time when its 10-year period has expired, and the American public would be better served by officials focusing on the larger crisis than conducting a retrospective review of its regulations, lest regulations promoting the stability of the financial system suddenly cease operation. Whereas the notice-and-comment process at least provides for good cause exceptions, the Prove It Act does not.[9]

Moreso, rules' invalidation would not just apply to the small businesses the retrospective reviews are meant to help, but *all* businesses. The Prove It Act is, perhaps, best thought of as a backdoor way of imposing retrospective review requirements that legislators have not been able to enact in Congresses past.

Ninth and finally, the Prove It Act provides no additional resources that would allow agencies or the Chief Counsel to comply with its new requirements.

H.R. 2965, The Small Business Regulatory Reduction Act

The Small Business Regulatory Reduction Act is a poorly drafted bill that would at best unnecessarily hamstring the Small Business Administration (SBA) and America's small businesses by restricting the ability for the Administration to operate its vital loan programs, and at worst would overwhelm the SBA in paperwork without additional funding. It would impose on the Small Business Administration a so-called "small business regulatory budget," defined as "the cost to a small business" of the Administration's rulemakings, of "not greater than zero." In addition, the Act would require the Chief Counsel for Advocacy to annually report to Congress the impacts the rules of other agencies have on small businesses.

I oppose this bill for several reasons.

[8] Heckler v. Chaney, 470 U.S. 821, 831–832 (1985).

[9] *See* 5 U.S.C. § 553(b)(B).

First, the concept of a small business regulatory budget does not provide for the consideration of any benefits that may accrue to small businesses. It is already a practical violation of the Administrative Procedure Act for the SBA to enact regulations that are, on the whole, more burdensome than beneficial.[10] This Act would throw out this framework in favor of one that prohibits the SBA from enacting rules that impose any net costs on small businesses at all, no matter the benefits that they receive and even if the benefits significantly outweigh the costs. The concept of a regulatory budget that only takes into consideration costs is antithetical to the core principles of contemporary administrative law.

Second, this Act's definition of a small business regulatory budget is not the costs to *all* small businesses as a whole, but to "*a* small business."[11] If the SBA's rules in a given year would collectively decrease costs for small businesses but increase them on a single business, this bill could be read as prohibiting those rules from being enacted. To that end, this Act could overwhelm the SBA with paperwork in an effort to ensure that no single small business in America is subject to increased net costs as a result of its rules.

Third, and perhaps most importantly, the Small Business Regulatory Reduction Act could have the effect of stymying the programs the SBA is most known for—its 7(a) and other loan programs that help small businesses recover from natural disasters or compete effectively against larger rivals. In many instances, the SBA does not make these loans itself, but instead relies on banks and other financial institutions, with SBA only guaranteeing to purchase a portion of these loans if the borrowers default.[12] It is these lenders who evaluate, process, close, disburse, and service the SBA's loans. Although lenders of all sizes may qualify, community banks and credit unions—which are themselves small businesses[13]—account for a disproportionate share of lenders. According to a researcher at the Federal Reserve Bank of St. Louis, banks with less than $10 billion in assets constitute roughly 5% of banking assets but make over 30% of all small business loans.[14] During the COVID-19 crisis, the Federal Deposit Insurance Corporation reports

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[10] *See* Michigan v. EPA, 576 U.S. 743, 752 (2015) ("One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."); Allentown Mack Sales & Serv., Inc. v. N.L.R.B., 522 U.S. 359, 374 (1998) (explaining that "the process by which [an agency] [its] result must be logical and rational.").

[11] Emphasis added.

[12] *See Become an SBA Lender*, Small Business Administration (last accessed Apr. 20, 2025), https://www.sba.gov/partners/lenders/become-sba-lender ("SBA will purchase the guaranteed portion of a loan if a borrower defaults."); *7(a) loans*, Small Business Administration, (last accessed Apr. 20, 2025), https://www.sba.gov/funding-programs/loans/7a-loans (explaining that borrowers "will always work directly with your lender and not with SBA").

[13] The term "small business concern" is defined in part as a business that "is independently owned and operated and which is not dominant in its field of operation." 15 U.S.C. § 632(a)(1). According to the Federal Deposit Insurance Corporation, community banks are "more likely to be privately owned and locally controlled than larger banks." FDIC, COMMUNITY BANKING STUDY 1-1 (2012).

[14] Eldar Beiseitov, *Small Banks, Big Impact: Community Banks and Their Role in Small Business Lending*, REGIONAL ECONOMIST (October 20, 2023), https://www.stlouisfed.org/publications/regional-economist/2023/oct/small-banks-big-impact-community-banks-small-business-lending.

that community banks provided 31% of Paycheck Protection Program loans operated by the SBA.[15]

To that end, all regulations written by the SBA to govern its loan programs impose costs on this subset of small businesses, even though the rules' benefits far outweigh their costs and participation is voluntarily undertaken by participating lenders.[16] As the Small Business Regulatory Reduction Act would not allow for the consideration of benefits and could prohibit rules from being enacted that overall increase costs on particular small businesses, it could have the effect of prohibiting rules governing its loan programs from being enacted, or could require SBA to prohibit community banks from serving as participating lenders. Either consequence would have the result of fundamentally weakening the loan programs on which small businesses nationwide rely.

Finally, this Act would provide the Chief Counsel of Advocacy with no additional resources with which to comply with its new, extensive reporting requirements. Requiring the Chief Counsel to annually report on the impacts of all regulations promulgated government-wide would be a significant undertaking that would come at the expense of its other responsibilities.

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In sum, these bills are solutions in search of problems that would result in governmental inefficiencies if enacted. Moreover, the Small Business Regulatory Reduction Act could harm small businesses that serve as lenders for the SBA's loan programs in the process. I encourage members of the Small Business Committee to oppose these bills.

Sincerely,

Todd Phillips

[15] *The Importance of Community Banks in Paycheck Protection Program Lending*, 14 FDIC Quarterly 31 (2020), https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2020-vol14-4/article1.pdf.

[16] *See* 13 C.F.R. Part 120 (regulating SBA's business loan programs); *id*. Part 123 (regulating SBA's disaster loan programs).