

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6515

Memorandum

To: Members, Committee on Small Business
From: Committee Staff
Date: March 5, 2018
Re: Hearing: “Regulatory Reform and Rollback: The Effects on Small Businesses”

On Wednesday, March 7, 2018 at 11:00 a.m., the Committee on Small Business will meet in Room 2360 of the Rayburn House Office Building for the purpose of examining the effects of Congress’s and the President’s regulatory reform and rollback efforts on small businesses. The hearing will also explore ways to continue to provide regulatory relief.

I. Background on the Federal Regulatory Process

The federal regulatory process has various procedures in place that are designed to ensure that agencies do not quickly issue new regulations without careful consideration. Some of the most prominent statutes that help protect small businesses are the Administrative Procedure Act, the Regulatory Flexibility Act, and the Congressional Review Act.

A. Administrative Procedure Act

The Administrative Procedure Act (APA) establishes basic steps the agency must take when proposing and finalizing federal regulations. The APA also establishes judicial review of agency rules by federal courts.¹ The APA states that an agency creates a rule whenever it is “designed to implement, interpret, or prescribe law or policy.”² The same rulemaking procedures generally apply when an agency wants to remove a regulation as well.

The APA establishes two general types of rulemaking: formal rulemaking and informal rulemaking.³ Formal rulemaking is only required in limited circumstances and requires a formal,

¹ Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 701–06).

² 5 U.S.C. § 551(4). The full definition of a rule under the APA is “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.” *Id.*

³ Agencies can also promulgate rules through hybrid rulemaking, direct final rules, and negotiated rulemaking.

courtroom-style hearing and presentation of evidence to support the rule.⁴ Informal rulemaking, also known as notice-and-comment rulemaking, is the more common process for creating agency rules. The agency must provide notice to the public of a proposed rule through a notice of proposed rulemaking, and must accept public comment on the proposed rule.⁵ The notice is published in the Federal Register, and anyone from the public may comment on the proposed rule.⁶ Most comment periods last between 30 to 60 days, but there is no minimum period of time that the agency must accept comments. After receiving public comment on the proposed rule, the agency must then review all the comments it receives before issuing a final rule.⁷ The final rule must be published at least 30 days before it becomes effective.⁸

The APA provides certain exemptions where the agency is not required to go through the notice-and-comment rulemaking process. Generally, when a rule involves a military or foreign affairs function of the United States, agency management or personnel, or to public property, loans, grants, benefits, or contracts, the agency is not required to go through notice-and-comment before promulgating the rule.⁹ Additionally, the notice-and-comment requirements do not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.¹⁰ When an agency finds “good cause” that notice and public procedure is “impracticable, unnecessary, or contrary to the public interest,” it can also be exempt from notice-and-comment requirements.¹¹

B. Regulatory Flexibility Act

In addition to the APA, another important procedural statute in the regulatory process for small businesses is the Regulatory Flexibility Act (RFA).¹² The RFA requires agencies to consider how their proposed regulations will impact small entities¹³ and applies to every federal rule, both proposed and final, for which an agency must conduct notice-and-comment rulemaking as required by section 553 of the APA or any other law.¹⁴ Congress had recognized that by treating all regulated businesses, organizations, and governmental jurisdictions as equivalent in the regulatory process, small entities were being disproportionately impacted by federal regulations and a one-size-fits all approach was not always the best solution.¹⁵

⁴ 5 U.S.C. § 556. Formal rulemaking is appropriate where the rules are required by statute to be made “on the record” at an agency hearing. *Id.* § 553(c).

⁵ 5 U.S.C. § 553(b).

⁶ *Id.* § 553(c).

⁷ *Id.*

⁸ *Id.* § 553(d).

⁹ *Id.* § 553(a).

¹⁰ *Id.* § 553(b).

¹¹ *Id.*

¹² Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. §§ 601–12).

¹³ The RFA defines “small entity” into three categories: small businesses (defined by section 3 of the Small Business Act), small organizations (any not-for-profit enterprise that is independently owned and operated and not dominant in its field), and small governmental jurisdictions (governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000). 5 U.S.C. § 601(6).

¹⁴ 5 U.S.C. § 601(2).

¹⁵ Regulatory Flexibility Act § 2, 94 Stat. 1164–65.

Under the RFA, if the agency determines that the proposed regulation will have a “significant economic impact on a substantial number of small entities,” then the agency must prepare and make available for public comment an initial regulatory flexibility analysis (IRFA).¹⁶ The IRFA must contain an analysis of how the proposed rule will impact small entities and examine alternatives that will reduce the impact while still achieving statutory and regulatory objectives.¹⁷ Similarly, when the agency issues a final rule that will have a significant impact on a substantial number of small entities, it must publish a final regulatory flexibility analysis (FRFA), which includes a similar analysis to the IRFA while revising it to reflect any comments received during the comment period.¹⁸

Alternatively, if the agency determines that the rule will not have a significant impact on a substantial number of small entities, the head of the agency may “certify” the rule and bypass the IRFA and FRFA requirements (commonly referred to as the “certification”).¹⁹ The certification must be published and available for public comment, along with “a statement providing the factual basis for such certification.”²⁰

When a rule will have a significant economic impact on a substantial number of small entities, certain agencies are required to complete a Small Business Advocacy Review Panel (SBAR panels) before the rule is proposed.²¹ This process includes agency employees, along with the Chief Counsel for Advocacy of the Small Business Administration and the Office of Information and Regulatory Affairs within the Office of Management and Budget, and establishes a formal process to hear directly from small entities on how the proposed rule will impact them before the rule is published for notice-and-comment.²² Currently, the only agencies required to hold SBAR panels are the Environmental Protection Agency, the Occupational Health and Safety Administration, and the Consumer Financial Protection Bureau.²³

Agencies are also required to prepare small entity compliance guides for rules that will have a significant economic impact on a substantial number of small entities to assist small entities in complying with the rule.²⁴ The agencies must publish the guide on its website and submit an annual report to Congress on the status of its small entity compliance guides.²⁵

Finally, the RFA, along with Executive Order 12866, also requires agencies to publish their regulatory flexibility agendas twice a year in the fall and spring in the Federal Register in order to provide greater agency transparency and facilitate greater participation from the public and, in particular, small businesses.²⁶ Agencies must also conduct a periodic review of its

¹⁶ 5 U.S.C. § 603(a).

¹⁷ *Id.* § 603(b).

¹⁸ *Id.* § 604(a).

¹⁹ *Id.* § 605(b).

²⁰ *Id.*

²¹ *Id.* § 609.

²² *Id.* § 609(b)(3).

²³ *Id.* § 609(d).

²⁴ *Id.* § 601 note.

²⁵ *Id.*

²⁶ *Id.* § 602.

existing rules to determine whether the rules should “be continued without change, or should be amended or rescinded” to minimize any significant economic impact on small entities.²⁷

C. Congressional Review Act

The Congressional Review Act (CRA) was enacted in 1996 to allow Congress to rescind a regulation on an expedited track.²⁸ Before a final regulation can take effect, the CRA requires agencies to submit a copy of the final regulation to Congress and a report detailing the reasons for the rule.²⁹ Once Congress receives the final rule, Congress has 60 legislative days to consider the rule before it becomes effective.³⁰ Congress may disapprove the rule by enacting a joint resolution of disapproval within 60 days of receiving the rule.³¹ The President must then sign the joint resolution of disapproval in order to rescind the rule. Once the joint resolution disapproving the rule becomes law, the agency is prohibited from reissuing the rule again, or any rule that is substantially similar to it, without legislative approval.³²

II. Small Businesses Are Burdened by Federal Regulations

Across every industry, small business owners continue to be burdened by federal regulations. The cost in time and money to research, understand, and comply with regulations continues to be a problem for small businesses, and federal agencies have not always taken the proper steps to ensure they are adequately assessing how they are impacting small businesses when issuing new regulations.

A. Cost of Regulation

According to a survey conducted by the National Small Business Association, the average small business owner spends at least \$12,000 every year to deal with the costs of regulation.³³ A start-up company will spend an average of \$83,019.23 in regulatory costs alone in the first year.³⁴ Seventy percent of small firms say that new regulations have a very or somewhat significant impact on their plans to grow their business, with more than half reporting that they have held off on hiring a new employee because of regulatory burdens.³⁵ A similar report by the United States Chamber of Commerce found that 79 percent of chamber officials

²⁷ *Id.* § 610(a). For any particular rule, the agency must review the rule within 10 years of publication of the final rule. *Id.*

²⁸ Small Business Regulatory Enforcement Fairness Act of 1996, § 251, Pub. L. No. 104-121, 110 Stat. 857, 868–74 (codified at 5 U.S.C. §§ 801–08).

²⁹ 5 U.S.C. § 801(a)(1)(A).

³⁰ *Id.* § 801(a)(3)(A).

³¹ *Id.* § 802.

³² *Id.* § 801(b). For more information about the process and procedures of the Congressional Review Act, see RICHARD S. BETH, CONG. RESEARCH SERV., RL31160, DISAPPROVAL OF REGULATIONS BY CONGRESS: PROCEDURE UNDER THE CONGRESSIONAL REVIEW ACT (2001).

³³ NAT’L SMALL BUS. ASS’N, 2017 NSBA SMALL BUSINESS REGULATIONS SURVEY 6 (2017), available at <http://www.nsba.biz/wp-content/uploads/2017/01/Regulatory-Survey-2017.pdf>.

³⁴ *Id.* at 9.

³⁵ *Id.* at 14.

across the country believe federal regulations have become “more” or “much more impactful” over the past several years.³⁶

Small business owners also spend a substantial amount of time with regulations. For example, 44 percent of small firms reported spending 40 hours or more every year to handle new and existing federal regulations, with nearly one-third spending more than 80 hours per year.³⁷ Regulatory uncertainty has been reported as “one of the biggest perceptual challenges surrounding regulation and productivity” for small business owners.³⁸ Small business owners have reported that the complexity of rules and the difficulty in understanding them are some of the biggest causes of difficulty when doing business with federal agencies.³⁹ Some examples of the most difficult and burdensome categories of regulations for small businesses include environmental protection, labor and hiring, land use and construction, and licensing and permits.⁴⁰ Additionally, 68 percent of small business owners have reported that guidance documents and new interpretations for existing regulations are even more burdensome, or just as burdensome, as regulations.⁴¹

B. Small Businesses Are Not Being Adequately Considered in the Regulatory Process

While the RFA was enacted to help ensure agencies considered small businesses when implementing their regulations, small businesses still experience problems with the rulemaking process and feel their voices are not being heard. Before the RFA was amended in 1996, agency compliance with the RFA had been “at best sporadic” because the agencies “faced little threat from non-compliance” because judicial review of the RFA was so limited.⁴² However, even with the changes in 1996, agencies “continue to ignore their obligations under the RFA.”⁴³ For example, a series of Environmental Protection Agency (EPA) regulatory actions regarding carbon dioxide were issued without convening a SBAR panel and did not consider alternatives to minimize the rules’ impacts on small businesses, despite evidence that they would impose “large adverse impacts on small businesses.”⁴⁴ Even when the Chief Counsel for Advocacy at the Small Business Administration and Members of Congress pointed out such impacts, EPA still certified that the rule would not have a significant economic impact on a substantial number of small entities.⁴⁵

³⁶ THE REGULATORY IMPACT ON SMALL BUSINESS: COMPLEX. CUMBERSOME. COSTLY, U.S. CHAMBER OF COM. FOUND. 16, 53 (Mar. 2017) *available at* https://www.uschamberfoundation.org/smallbizregs/assets/files/Small_Business_Regulation_Study.pdf [hereinafter Chamber Report].

³⁷ NAT’L SMALL BUS. ASS’N., *supra* note 33, at 5.

³⁸ Chamber Report, *supra* note 36, at 11.

³⁹ NAT’L SMALL BUS. ASS’N., *supra* note 33, at 8.

⁴⁰ Chamber Report, *supra* note 36, at 49. The following classes of regulations were reported as difficult or very difficult for the following percentages of respondents: environmental protection (82.2%), labor and hiring (79.5%), land use and construction (77.7%), licensing and permits (70.4%). *Id.* Taxation, incorporation and registration, finance and investment, contract enforcement and dispute resolution, worker safety, and international trade were also reported as difficult classes of regulations for small businesses. *Id.*

⁴¹ *Id.* at 12.

⁴² H.R. REP. NO. 114-12, PT. 1, at 4 (2015).

⁴³ *Id.* at 8.

⁴⁴ *Id.*

⁴⁵ *Id.* at 8–9.

Agencies have also inappropriately used the certification process to avoid conducting a detailed analysis of how their regulations will impact small businesses and considering reasonable alternatives that could help reduce the impact on small businesses. The most egregious example of inappropriate certification was the joint EPA and Army Corps of Engineers' "Waters of the United States" rulemaking (also known as the WOTUS rule).⁴⁶ The agencies certified, without any factual basis, that the proposed rule would not have a significant economic impact on a substantial number of small entities, despite overwhelming evidence to the contrary.⁴⁷

III. Congress and the President Have Taken Steps to Reduce the Regulatory Burden

Complying with federal regulations continues to be one of the biggest challenges for America's small businesses. In an effort to reduce the continuing burden, both Congress and President Trump have taken steps to reduce the regulatory burden on small businesses by rolling back and revising existing regulations. The President has also taken steps to reform the regulatory process and require federal agencies to review their existing regulations and identify candidates for removal or revision.

A. Actions Taken Under the Congressional Review Act

Congress's use of the CRA to more quickly invalidate regulations has been "one of the most important ways it has pursued deregulation" during the Trump Administration.⁴⁸ Prior to the Trump Administration, the Congressional Review Act had only been used to invalidate an agency rule once, and is typically used during a change in presidencies. In 2001, President Bush signed a joint resolution of disapproval from Congress to invalidate a rule finalized near the end of the Clinton Administration regarding ergonomics standards.⁴⁹

Since President Trump has taken office, Congress has used the CRA to invalidate 15 rules issued by 13 agencies that were finalized near the end of the Obama Administration.⁵⁰ The most recent rule that was invalidated on November 1, 2017 under the CRA was an arbitration rule finalized by the Consumer Financial Protection Bureau, which marked the first time a president disapproved a regulation under the CRA during his own presidency.⁵¹ The

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ David Zaring, *Guidance and the Congressional Review Act*, REG. REV. (Feb. 15, 2018), <https://www.theregreview.org/2018/02/15/zaring-guidance-congressional-review-act/>.

⁴⁹ Act of Mar. 20, 2001, Pub. L. No. 107-5, 115 Stat. 7 (congressional disapproval of Department of Labor rule regarding ergonomics).

⁵⁰ See CONGRESSIONAL REVIEW ACT TRACKER 2017, THE GEORGE WASH. UNIV. REG. STUDIES CTR., available at <https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/CRA%20Tracker%201-01-2017.pdf> (last updated Nov. 1, 2017).

⁵¹ Act of Nov. 1, 2017, Pub. L. No. 115-74, 131 Stat. 1243 (congressional disapproval of CFPB rule relating to Arbitration Agreements). See also SOFIE E. MILLER & ZHOUDAN XIE, 2017 REGULATORY YEAR IN REVIEW, THE GEORGE WASH. UNIV. REG. STUDIES CTR. 3 (Dec. 18, 2017), available at https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/RegInsight_2017-Regulatory-Year-In-Review.pdf.

Government Accountability Office also recently confirmed in a letter that the CRA can be used to invalidate guidance documents that did not go through notice-and-comment rulemaking.⁵²

B. Regulatory Reform Legislation

Many bills have been introduced in Congress that would reform the regulatory process.⁵³ Of particular importance to small businesses is H.R. 33, the Small Business Regulatory Flexibility Improvements Act of 2017, which would amend the RFA in significant ways.⁵⁴ H.R. 33 would clarify which rules are covered under the RFA, require agencies to assess the indirect and cumulative economic effects that a rule will have on small entities, require agencies to include more detailed statements in their RFA analyses, modify the SBAR panel process to provide more participation for small businesses in the rulemaking process, and require an agency to justify its decision to certify a rule will not have a significant economic impact on a substantial number of small entities in a more detailed manner.⁵⁵

H.R. 33 was included in a larger regulatory reform legislative package, H.R. 5, the Regulatory Accountability Act of 2017. This larger package includes six previously passed bills to address numerous issues in the regulatory process, including H.R. 33 as Title III of H.R. 5. H.R. 5 passed the House on January 11, 2017 on a bipartisan vote. The Senate Committee on Small Business and Entrepreneurship held a hearing on H.R. 5 on March 29, 2017.⁵⁶

The Senate's version of H.R. 33 is S. 584, also named the Small Business Regulatory Flexibility Improvements Act.⁵⁷ The Senate also has provided two other regulatory reform bills related to H.R. 5: Providing Accountability through Transparency Act of 2017 (S. 577)⁵⁸ and REVIEW Act of 2017 (S. 919).⁵⁹ All three of the Senate bills were voted out of the Senate Homeland Security and Government Affairs Committee and are waiting to be taken up by the full Senate.

C. Presidential Actions

President Trump has also taken actions to reform the regulatory process. On January 30, 2017, President Trump signed Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs."⁶⁰ This Executive Order requires agencies to identify two existing regulations

⁵² See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-B-329272, OFFICE OF THE COMPTROLLER OF THE CURRENCY, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, FEDERAL DEPOSIT INSURANCE CORPORATION--APPLICABILITY OF THE CONGRESSIONAL REVIEW ACT TO INTERAGENCY GUIDANCE ON LEVERAGED LENDING (2017).

⁵³ For a list of regulatory reform bills introduced in the 115th Congress, see ADMINISTRATIVE LAW REFORM BILLS: 115TH CONGRESS, ADMIN. CONF. OF THE U.S. (Feb. 14, 2018), available at <https://www.acus.gov/memorandum/administrative-law-reform-bills-115th-congress>.

⁵⁴ Small Business Regulatory Flexibility Improvements Act of 2017, H.R. 33, 115th Cong. (2017).

⁵⁵ *Id.*

⁵⁶ See *Examining How Small Businesses Confront and Shape Regulations Before the Comm. on Small Bus. & Entrepreneurship U.S. Senate*, 115th Cong. (2017).

⁵⁷ Small Business Regulatory Flexibility Improvements Act, S. 584, 115th Cong. (2017).

⁵⁸ Providing Accountability Through Transparency Act of 2017, S. 577, 115th Cong. (2017).

⁵⁹ Require Evaluation Before Implementing Executive Wishlists Act of 2017, S. 919, 115th Cong. (2017).

⁶⁰ Exec. Order No. 13771, 82 Fed. Reg. 9,339 (Feb. 3, 2017).

for removal for every one new regulation (also known as “two-for-one” or “one-in-two-out”).⁶¹ The Executive Order also limits the incremental cost of all new regulations to \$0 for fiscal year 2017.⁶² The Office of Information and Regulatory Affairs (OIRA) issued guidance to help agencies comply with the Executive Order.⁶³

In addition, President Trump also signed Executive Order 13777 on February 24, 2017, “Enforcing the Regulatory Reform Agenda.”⁶⁴ This Executive Order requires the heads of federal agencies to designate an agency official as the Regulatory Reform Officer, who will oversee the agency’s efforts to revise and roll back regulations.⁶⁵ The Executive Order also requires the agencies to form a Regulatory Reform Task Force, which will identify and make recommendations for regulations that can be revised or eliminated.⁶⁶

OIRA also published its Fall 2017 Unified Agenda of Regulatory and Deregulatory Actions in December 2017. In addition to identifying the regulations that federal agencies plan to issue within the next 12 months, the agenda also reports that federal agencies plan to eliminate three new regulations for every one new regulation.⁶⁷ In fiscal year 2017, OIRA reported that agencies finalized 67 deregulatory actions and imposed only 3 new significant ones, resulting in a ratio of 22 deregulatory actions for every one new regulation.⁶⁸ OIRA also reported that agencies imposed no new regulatory costs and created \$8.1 billion in present value cost savings, or \$570 million per year.⁶⁹

IV. Conclusion

Congress and the President have taken important steps to reduce the regulatory burden on America’s small businesses. However, more can be done to ensure that America’s small businesses continue to see a reduction in the regulatory burden through individual rulemakings and changing the current regulatory process through legislation.

⁶¹ *Id.*

⁶² *Id.*

⁶³ See Memorandum from Dominic J. Mancini, Acting Administrator, Off. of Info. & Reg. Aff., to Regulatory Policy Officers at Executive Department and Agencies and Managing and Executive Directors of Certain Agencies and Commissions (Apr. 5, 2017), available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>.

⁶⁴ Exec. Order No. 13777, 82 Fed. Reg. 12285 (Mar. 1, 2017).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See OFF. OF INFO. & REG. AFF, *Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions*, REGINFO.GOV, <https://www.reginfo.gov/public/do/eAgendaMain> (last visited Mar. 5, 2018).

⁶⁸ OFF. OF INFO. & REG. AFF, *Regulatory Reform: Two-for-One and Regulatory Cost Caps*, REGINFO.GOV, <https://www.reginfo.gov/public/do/eAgendaEO13771> (last visited Mar. 5, 2018).

⁶⁹ *Id.*