Section-by-Section Analysis
S. 584
The Small Business Regulatory Flexibility Improvement Act of 2017

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Summary

S. 584 would drastically overhaul the Regulatory Flexibility Act (RFA), making an already problematic law even worse. The RFA has long served as an impediment to the effective and timely implementation of critical public interest laws, such as the Clean Water Act, the Federal Food, Drug, and Cosmetic Act, and the Dodd-Frank Wall Street Reform and Consumer Protection Act. By strengthening the RFA as a tool for defeating efforts to protect public health, consumer and worker safety, and the environment, S. 584 would place American families and communities at greater risk of harm. S. 584 would also harm small businesses since its provisions would empower large corporations to block or weaken regulations, some of which help level the playing field for small businesses and protect responsible small business owners. In this way, S. 584 would enhance the competitive advantage that large corporations enjoy at the expense of smaller firms within their industry. In short, the only winners under S. 584 would be large corporate interests while the biggest losers would be ordinary Americans and the small businesses that many of them rely on for their livelihoods.

S. 584 would also make several troubling revisions to the Small Business Act and the Paperwork Reduction Act (PRA), all of which would serve to undermine the ability of federal agencies' to carry out their statutory missions of protecting people and the environment.

The most troubling aspects of this bill include the following:

- Under the guise of "reform," the bill would add over a dozen new redundant and unnecessary analytical and procedural requirements to the rulemaking process. These requirements would unnecessarily delay the completion of critical public safeguards and waste scarce agency resources, all without improving the quality of agency decision-making. Under the current convoluted rulemaking process, it can already take four to eight years for agencies to complete their most complex rulemakings, and in some cases, the process can last more than a decade, potentially spanning four different presidential administrations. Complying with the bill would make this dire situation worse and could be expected to add several months, if not years, to the rulemaking process, particularly as agencies must satisfy these requirements at a time when their resources continue to shrink in real terms.

- The bill would expand the scope of the RFA's applicability to cover rules that only have "indirect" effects on small businesses. In reality, these rules have a much greater impact on large corporations than on real small businesses. Consequently, this expanded scope would defeat the purpose of the RFA – namely, to ensure that the unique concerns of real small businesses are accounted for in the rulemaking process. It would in effect transform the RFA into a powerful new tool for large corporations to protect their bottom line by weakening or delaying rules they oppose. As such, this bill would actively harm small businesses by exacerbating the competitive disadvantages they already face with the largest corporations in their industry.
- The bill would also expand the RFA's applicability to cover agency's guidance documents, interim final rules, and direct final rules. These different forms of agency actions are essential for agencies to work more efficiently and to nimbly respond to emergency situations. Their effective use redounds to the benefit of the general public as well as regulated industry. By subjecting these actions to the RFA's burdensome requirements, however, agencies would be hindered in their ability to deploy them effectively or may not use them at all.
- The bill would further concentrate power under the Chief Counsel for Advocacy, the official who heads the Small Business Administration's (SBA) Office of Advocacy. The Chief Counsel for Advocacy is already a powerful actor in the rulemaking process who operates as a "one-way ratchet" against regulatory safeguards by pushing for delays in rulemaking and weaker protections. This bill would provide the Chief Counsel for Advocacy with still more tools for achieving these anti-safeguard ends.
- The bill would significantly undermine agencies' ability to effectively enforce so-called information collection requirements violations committed by small businesses. The bill misleadingly implies that information collection requirements are mere "paper-pushing" exercises, but in fact, their effective implementation goes to the heart of many regulatory programs. By severely constraining agencies' enforcement discretion for these requirements, the bill risks encouraging widespread violations, which would directly imperil public health, safety, and environmental protection.

Section-by-Section Analysis

Section 1. Short Title

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

- The bill broadens the RFA's definition of "rule" by adopting the Administrative Procedure Act's (APA) general definition of "rule," which includes guidance documents, interim rules, and direct final rules (subsection (a))
    - *Comment*. This provision is concerning because it would greatly expand the kinds of agency actions that would be subject to the RFA's burdensome requirements.

Subjecting interim and direct final rules to the RFA's burdensome requirements would effectively defeat the purpose of the alternative rulemaking procedures that the APA creates for these rules, which are intended to prevent harm from emergencies or to avoid unnecessary waste of agency resources. Subjecting agency guidance documents would likely cause significant delays in their issuance. These delays would harm regulated business the most, since the purpose of guidance documents is to alleviate regulatory uncertainty by clarifying applicable compliance responsibilities for relevant regulations. Indeed, these guidance documents are often produced in response to industry requests.

- The bill broadens the RFA's definition of "economic impact" to include "any indirect effect which is reasonably foreseeable" (subsection (b))
    - *Comment*. The effect of this provision is to make almost every agency rule subject to the RFA's burdensome requirements, including those that have no real impact on small businesses at all. This broad coverage defeats the purpose of the RFA, which is meant to focus agency attention on those of their rules that uniquely impact small businesses. With this broad definition of economic impacts, though, the large corporate interests that small businesses must compete against would thus be empowered to use the RFA's burdensome requirements to delay and weaken those rules they oppose with little or no regard to whether these delays or changes to the rules would actually help real small businesses. The bottom line is this change to the RFA could actually make real small businesses worse off, by transforming the RFA into a tool that helps the largest firms in their industries, putting them at an even greater competitive disadvantage.

- The bill broadens the scope of agencies' responsibilities for conducting initial regulatory flexibility analyses (IRFAs) to include a "description of alternatives to the proposed rule which . . . maximize any beneficial significant economic impact on small entities" (subsection (c)(1))
    - Currently, the RFA only requires descriptions of alternatives that "minimize any significant economic impact on small entities," which has been construed to mean economic impacts that are adverse to small businesses.
    - *Comment*. Requiring agencies to account for ways to revise their rules to maximize their beneficial impacts on small entities risks adding unnecessary new burdens to the rulemaking process, which could delay the completion of critical public safeguards and waste scarce agency resources.
    - Other elements of this provision:
        - For IRFAs, the bill further provides such descriptions must be "detailed," a mandate that is not currently required by the RFA (subsection (c)(1))
        - *Comment*. The mandate that agencies provide detailed descriptions would add unnecessary new burdens to the rulemaking process, which would delay the completion of critical public safeguards and waste scarce agency resources.
        - For IRFAs, the revision of this requirement eliminates mention that alternatives to be considered must be those that "accomplish the stated objectives of applicable statutes"

        - *Comment*. This revision suggests that agencies must consider as part of their IRFAs alternatives that would be contrary to or consistent with the statutes that authorized the regulations. It makes no sense to require agencies to consider alternatives that would in effect be illegal. This is bad policy and would risk wasting scarce agency resources.

- The bill broadens the scope of agencies' responsibilities for conducting final regulatory flexibility analyses (FRFAs) to include "steps the agency has taken to . . . maximize the beneficial significant economic impact" (subsection (c)(2))
    - Currently, the RFA only requires a description of steps that "minimize any significant economic impact on small entities," which has been construed to mean economic impacts that are adverse to small businesses.
    - *Comment*. Requiring agencies to account for ways to revise their rules to maximize their beneficial impacts on small entities risks adding new burdens to the rulemaking process, which would delay the completion of critical public safeguards and waste scarce agency resources.

- The bill broadens the RFA's definition of "small governmental jurisdiction" to include "tribal organizations" (subsection (d))

- The bill broadens the scope of agencies' responsibilities for conducting IRFAs and FRFAs to include "a revision or amendment to a land management plan." In support of this provision, the bill adds to the RFA definitions for the terms "land management plan," "revision," and "amendment" (subsection (e)).
    - *Comment*. The statutes authorizing the development of land management plans already requires the Department of the Interior to engage in public outreach aimed reducing unnecessary burdens associated with those plans, consistent with statutory objectives. Subjecting the development of land management plans to the RFAs requirements would be duplicative and wasteful.

- The bill broadens the scope of agencies' responsibilities for conducting IRFAs to include certain "interpretive rule[s] involving the internal revenue laws of the United States" insofar as they "impose on small entities" "a recordkeeping requirement." Currently, the RFA only requires IRFAs for such interpretive rues when impose a "collection of information requirement." In support of this provision, the bill adds to the RFA definitions for the terms "collection of information" and "recordkeeping requirement" (subsection (f))

- The bill revises the RFA's definition of "small organization" in various ways (subsection (g))
    - For "nonprofit entit[ies]" in general, the definition is revised so it is either (1) tied to the SBA's small business size standards set pursuant to the Small Business Act or (2) set below a maximum threshold on the entity's net worth ($7,000,000 or less) and number of employees (500 or less).
    - The revision clarifies that when applied to "local labor organizations," the revised definition should disregard any larger entities of which they might be a part.

- The revision authorizes agencies to establish their definitions of "small organizations" that will govern instead of the RFA's revised definitions, provided that these alternative definitions are developed in consultation with the Office of Advocacy and following an opportunity for public comment.

Section 3. Expansion of Report of Regulatory Agenda

- The bill expands the reporting requirements that agencies must satisfy for completion of the semiannual "Regulatory Agenda." For each rule listed in the "Regulatory Agenda" that is likely to have a significant economic impact on a substantial number of small entities, the agency is required to describe each industrial sector, as defined according to the North American Industrial Classification System, that will be affected by that rule (subsection (1))
    - *Comment*. This new requirement would add unnecessary new burdens to the rulemaking process, which would delay the completion of critical public safeguards and waste scarce agency resources.

- The bill revises the steps that agencies must take to publicize the semiannual "Regulatory Agenda" to require that they include "plain language summary" of the agenda on their respective websites. The bill further requires the Office of Advocacy to include a "plain language summary" of the agenda on the SBA's website (subsection (2)).

Section 4. Requirements Providing for More Detailed Analyses

- The bill directs agencies to ensure that their IRFAs satisfy 8 requirements, of which 3 would be required for the first time under the bill (subsection (a))
    - The most troubling of the new requirements include the following:
        - An estimate of the "cumulative economic impact" that the proposed rule would have on affected small businesses beyond what the agency is already imposing on those businesses (new subsection (b)(6))
            - *Comment*. This requirement would add unnecessary new burdens to the rulemaking process, which would delay the completion of critical public safeguards and waste scarce agency resources. In particular, the concept of cumulative impacts is vague, and any attempt to measure it would be at best speculative. It is unclear anything useful at all could be gleaned from this exercise, and it certainly would not improve the quality of agency decision-making.
        - Descriptions of any "disproportionate economic impacts" on small entities (new subsection (b)(7))
            - *Comment*. This requirement would add unnecessary new burdens to the rulemaking process, which would delay the completion of critical public safeguards and waste scarce agency resources. In particular, the concept of disproportionate impacts is vague, and any attempt to measure it would be at best speculative. It is unclear anything useful at all could be gleaned from this exercise, and it

certainly would not improve the quality of agency decision-making.

- The bill also revises every one of the existing requirements for IRFAs to make them all more onerous. For example, under the current RFA some of the requirements required a "succinct statement" or a "summary." For each of these requirements, the bill now requires agencies to prepare "detailed statements." In addition, the current RFA permits agencies to explain why an estimate of the number small entities to which a proposed rule was not available. The bill no longer gives agencies the option of providing this explanation.
  - *Comment*. These revisions would add unnecessary new burdens to the rulemaking process, which would delay the completion of critical public safeguards and waste scarce agency resources.

- The bill directs agencies to ensure that their FRFAs satisfy 8 requirements, of which 1 would be required for the first time under the bill (subsections (b)(1)).
  - The new requirement is troubling and would mandate that agencies describe "any disproportionate economic impact" the final rule might have on small entities (new subsection (a)(8))
    - *Comment*. This requirement would add unnecessary new burdens to the rulemaking process, which would delay the completion of critical public safeguards and waste scarce agency resources. In particular, the concept of disproportionate impacts is vague, and any attempt to measure it would be at best speculative. It is unclear anything useful at all could be gleaned from this exercise, and it certainly would not improve the quality of agency decision-making.
  - The bill also revises two of the existing requirements to make them more onerous. Specifically, these revisions would require agencies to provide a "detailed explanation" and a "detailed description" instead of an "explanation" and "description" as is currently required
    - *Comment*. The mandate that agencies provide detailed descriptions or explanations would add unnecessary new burdens to the rulemaking process, which would delay the completion of critical public safeguards and waste scarce agency resources.

- When applicable, the bill would require agencies to include in their FRFAs summaries of their responses to any comments they receives on their certification that a particular rule would not have a significant economic impact on a substantial number of small entities (subsection (b)(2))
  - *Comment*. This requirement would add unnecessary new burdens to the rulemaking process, which would delay the completion of critical public safeguards and waste scarce agency resources.

- The bill would expand existing requirements for agencies to publicize their FRFAs to include publication of the FRFA on their website (subsection (b)(3))

- The bill clarifies how agencies should explain that they are relying on compliance with other existing agenda or analysis requirements to demonstrate compliance with the RFA's agenda or analysis requirements (subsection (c))

- The bill would expand the existing requirements agencies must satisfy in order to "certify" that their rules will not have a significant economic impact on a substantial number of small entities (and thus do not require the completion of an IRFA or an FRFA). The new requirements include: (1) a "detailed statement" regarding the "factual . . . basis" of the certification (the RFA currently on requires a "statement"); (2) a "detailed statement" regarding the "legal basis" of the certification (no analogous requirement in the current RFA); and (3) an "economic assessment" in support of the certification (no analogous requirement in the current RFA) (subsection (d))
    - *Comment*. These requirements would make it so onerous for agencies to try to certify their rules as not having a significant economic impact on a substantial number of small entities that agencies might not attempt this certification at all. Completing the economic assessment would be establishing time-consuming and resource-intensive. As such agencies may opt to undertake the burdensome IRFA and RFRA processes, which would unnecessarily delay the completion of critical public safeguards and waste scarce agency resources.

- The bill would expand the existing requirements agencies must satisfy if they are unable to support their IRFAs and FRFAs with "a quantifiable or numerical description of effects" of the agencies' rules. The agency would now have to provide a "detailed statement explaining why quantification is not practicable or reliable."

<u>Section 5. Repeal of Waiver and Delay Authority; Additional Powers of the Chief Counsel for Advocacy</u>

- The bill would authorize the Chief Counsel for Advocacy of the SBA Office of Advocacy to issue enforceable rules that would govern agency compliance with the RFA's procedural analytical requirements (subsection (a))
    - *Comment*. This provision would grant the Chief Counsel for Advocacy expansive new powers to interfere in agency rulemakings. Historically, the Chief Counsel for Advocacy has pursued a single-minded focus on weakening or delaying pending rule. It is not clear that the Chief Counsel for Advocacy would have adequate resources or expertise to perform this task.

- The bill would authorize the Chief Counsel for Advocacy of the SBA Office of Advocacy to intervene in certain kinds of agency adjudications for the purpose of informing the agency of the impacts that the outcome of the adjudication might have on small entities (subsection (a))
    - *Comment*. This provision would provide the Chief Counsel for Advocacy with new opportunities for interfering in agency rulemakings. Historically, the Chief Counsel for Advocacy has pursued a single-minded focus on weakening or delaying pending rule. It is not clear that the Chief Counsel for Advocacy would have adequate resources or expertise to perform this task.

- This bill would authorize the Chief Counsel for Advocacy of the SBA Office of Advocacy to submit comments in response to any agency requests for comments (subsection (a))
    - *Comment*. This provision would provide the Chief Counsel for Advocacy with new opportunities for interfering in agency rulemakings. Historically, the Chief Counsel for Advocacy has pursued a single-minded focus on weakening or delaying pending rule. It is not clear that the Chief Counsel for Advocacy would have adequate resources or expertise to perform this task.

- The bill would repeal the current Section 608(a) of the RFA, which generally authorizes agencies to waive or delay compliance with applicable IRFA requirements if they provide a written finding that compliance with these requirements would prevent the agency from responding to an emergency or would otherwise be impracticable.
    - *Comment*. This revocation of this provision in the current RFA is troubling because it will significantly inhibit agencies' ability to respond to emergencies. It would also undermine agencies' ability to avoid wasteful rulemaking procedures. Further reinforcing these negative consequences is the fact, as noted above, that the bill would expand the applicability of the RFA's requirements to interim and direct final rules.

- The bill would repeal the current Section 608(b) of the RFA, which generally authorizes agencies to delay completion of applicable FRFA requirements by up to 180 days after publishing a final rule if they provide a written finding that compliance with these requirements would prevent the agency from responding to an emergency or would otherwise be impracticable. The current Section 608(b) further provided that the effectiveness of the final rule would lapse if the agency failed to complete the applicable FRAFA requirements within the 180-day period.
    - *Comment*. This revocation of this provision in the current RFA is troubling because it will significantly inhibit agencies' ability to respond to emergencies. It would also undermine agencies' ability to avoid wasteful rulemaking procedures. Further reinforcing these negative consequences is the fact, as noted above, that the bill would expand the applicability of the RFA's requirements to interim and direct final rules.

<u>Section 6. Procedures for Gathering Comments</u>

- The bill would greatly expand the applicability of the RFA's early notification process requirements. Whereas under the current RFA these requirements only apply to the EPA, OSHA, and the CFPB, the bill would extend their application to all agencies. Whereas under the current RFA these requirements generally only apply to rules that would have significant economic impact on a substantial number of small entities, the bill would extend their application to cover rules that qualify as "major" rules, as that term is defined in the Unfunded Mandates Reform Act, as well. Notably, for agencies other independent regulatory agencies, the White House Office of Information and Regulatory

Affairs (OIRA) would have the sole discretion to determine whether a given rule qualifies as a "major" rule (new subsections (b)(1) and (e)).

  - *Comment*. The RFA's early notification process has proved to be an extremely time-consuming and resource-intensive process that has served to delay progress on crucial safeguards by several months, if not years. It is extremely troubling that this bill would seek to expand the applicability of this requirement to all agencies and to a broader universe of rules. These requirements would add unnecessary new burdens to the rulemaking process, which would delay the completion of critical public safeguards and waste scarce agency resources. It is also extremely troubling that this bill would allow OIRA to determine whether a rule is potentially subject to the early notification process. This authority would give OIRA a powerful tool to interfere in pending rulemakings.

- The bill would expand the information that agencies would be required to share as part of the early notification process. In addition to what the RFA already requires, the bill would direct agencies to share with the Chief Counsel of Advocacy (1) the draft proposed rule itself (with limited exceptions) and (2) any materials the agency "prepared or utilized" in developing the proposal (new subsections (b)(1), (2)).
  - *Comment*. This requirement would add unnecessary new burdens to the rulemaking process, which would delay the completion of critical public safeguards and waste scarce agency resources.

- As under the current RFA, the bill would require the Chief Counsel of Advocacy to identify individuals to serve on the Small Business Advocacy Review (SBAR) panels for the rule within 15 days of receiving the early notification information. The bill would expand the kind of information these individuals would be invited to provide. Whereas under the current RFA these individuals would be invited to provide information about the potential impacts of the draft proposed rule on them and other small entities, the bill would also invite these individuals to offer their views on the agency's compliance with the IRFA requirements (new subsection (c)(1))
  - *Comment*. This expanded role for individuals who serve on the SBAR panels risks adding unnecessary new burdens to the rulemaking process, which could delay the completion of critical public safeguards and waste scarce agency resources. It is not clear that these individual would possess the expertise to effectively evaluate agency's compliance with the IRFA requirements.

- The bill would shift the responsibility for assembling the government officials involved in the SBAR panel process. Whereas under the RFA the agency developing the rule would select the members, under the bill the Chief Counsel of Advocacy would perform this task. As under the current RFA, the government officials would include representatives from the agency developing the rule, the Office of Advocacy, and, except in the case of rules being developed by independent regulatory agencies, OIRA (new subsection (c)(2)).
  - *Comment*. This provision would provide the Chief Counsel for Advocacy with new opportunities for interfering in agency rulemakings. Historically, the Chief Counsel for Advocacy has pursued a single-minded focus on weakening or

delaying pending rule. It is not clear that the Chief Counsel for Advocacy would have adequate resources to perform this task.

- The bill would shift the responsibility for assembling the SBAR panel's report on the draft proposed rule from the agency developing the rule, as currently required under the RFA, to the Chief Counsel of Advocacy. As under the current RFA, the bill would require that the SBAR panel's report be assembled within 60 day after the SBAR panel was convened. The bill would require that this report be submitted to the agency developing the rule as well as OIRA, except in the case of rules being developed by independent by regulatory agencies (new subsection (d)(1))
    - *Comment*. This provision would provide the Chief Counsel for Advocacy with new opportunities for interfering in agency rulemakings. Historically, the Chief Counsel for Advocacy has pursued a single-minded focus on weakening or delaying pending rule. It is not clear that the Chief Counsel for Advocacy would have adequate resources or expertise to perform this task.

- The bill would expand the scope of issues that the SBAR panel's report would be required to cover. Under the current RFA, this report is only required to cover the comments of the small entity representatives and their findings with regard to some of the analyses that the agency performed for the IRFA. The bill would require that the SBAR panel's report assess the economic impact of the draft proposed rule on small entities, including its effects on energy costs for small entities, its effects on startup costs for small entities, and any alternatives to the draft proposed rule that would minimize adverse impacts on small entities or maximized beneficial impacts on small entities (new subsection (d)(2)).
    - *Comment*. These requirements would add unnecessary new burdens to the rulemaking process, which would delay the completion of critical public safeguards and waste scarce agency resources. In particular, any attempt to measure such indirect impacts from rules as their effect on energy costs or startup costs would be at best speculative. It is unclear anything useful at all could be gleaned from this exercise, and it certainly would not improve the quality of agency decision-making.

- Similar to the current RFA, the bill would require the agency developing the rule to include the SBAR panel's report in the rulemaking record and explain how the agency revised the rule, if at all, in response to SBAR panel's report (new subsection (d)(3))

- Similar to the current RFA, the bill would authorize the Chief Counsel of Advocacy to waive the early notification process requirements. Specifically, the bill would authorize the Chief Counsel of Advocacy to grant such a waiver in response to an application from the agency developing the rule. The Chief Counsel of Advocacy could grant this waiver if he or she determines that compliance with the early notification process requirements would be impractical, unnecessary, or contrary to the public interest (new subsection (f))

- The bill would authorize a small entity to request from the agency developing the rule a copy of the SBAR panel's report and all of the information that the agency provided to

the Chief Counsel of Advocacy as part of the early notification process. The bill would require the agency developing the rule to provide this information within 10 days of receiving the request (new subsection (g))

  - *Comment*. This requirement risks adding unnecessary new burdens to the rulemaking process, which could delay the completion of critical public safeguards and waste scarce agency resources.

- In support of its early notification process requirements, the bill adopts a standard definition of the term "independent regulatory agency" (new subsection (h))

Section 7. Periodic Review of Rules

- Similar to the current RFA, the bill would require agencies to develop a plan for periodically reviewing their existing rules that a significant economic impact on a substantial number of small entities. The bill would expand upon on what the RFA currently requires for this plan by directing agencies to also review rules the agency head determines have a significant economic impact on a substantial number of small entities, even if that rule did not undergo a FRFA at the time it was issued. Similar to the current RFA, the bill would provide that the purpose of this review is to determine whether the existing rules should be continued without change or revised or rescinded. The bill would expand on this purpose by directing agencies to consider whether an existing rule should be revised to maximize the beneficial impacts it has on small entities. The bill would authorize agencies to revise their plan for reviewing existing rules (new subsection (a)).
  - *Comment*. The expanded review plan would impose new burdens on agencies, which would divert agency resources away from pursuing an affirmative agenda of advancing their statutory mission. Requiring agencies to account for ways to revise their rules to maximize their beneficial impacts on small entities risks adding unnecessary new burdens to the rulemaking process, which could delay the completion of critical public safeguards and waste scarce agency resources.

- Similar to the current RFA, the bill would direct agencies to design their plan so that every rule for which the review requirement applies is reviewed at least once every 10 years. As such, any rules that exist at the time the bill is enacted would be required to be reviewed within 10 years after the bill is enacted; any rules issued after the bill is enacted would be required to be reviewed within 10 years after their issuance. The bill would permit agencies to slightly extend the deadline for completing the review if the head of the agency determines that meeting the deadline would not be feasible (new subsection (b)).

- The bill would direct agencies to include in their review plan an explanation of how the agency intends to invite participation by small entities in carrying out its reviews of existing rules (new subsection (c))

- The bill would direct agencies to create an annual report summarizing the results of its reviews of existing reviews. The bill would direct agencies to submit this report to Congress, to the Chief Counsel of Advocacy, and, for agencies other than independent regulatory agencies, OIRA (new subsection (d))

- If on the basis of its review the agency determines that an existing rule should be revised or rescinded, the bill would charge the agency with doing so "to the fullest extent possible" to (1) minimize adverse economic impacts on small entities, (2) minimize disproportionate economic impacts on a class of small entities, or (3) maximize beneficial economic impacts on small entities. The bill would expand on the factors that agencies are supposed to consider in determining whether and how to revise or rescind their existing rules. In addition to those already required by the RFA, the bill would also require agencies to consider (1) comments from the Regulatory Enforcement Ombudsman and the Chief Counsel for Advocacy and (2) how the rule contributes to the cumulative economic impact imposed by all federal rules on affected small entities, unless the agency head determines that this kind of assessment would be impractical to carry out (new subsection (e)).
    - *Comment*. The additional factors that agencies are required to consider would make the review process more burdensome, which would divert agency resources away from pursuing an affirmative agenda of advancing their statutory mission. In particular, the concept of cumulative impacts is vague, and any attempt to measure it would be at best speculative. It is unclear anything useful at all could be gleaned from this exercise, and it certainly would not improve the quality of agency decision-making.

- The bill would expand the current RFA's requirements for agencies to publish their annual list of existing rules that they intend to review within the next 12 months. Unlike the current RFA, the bill would require agencies to solicit public comment on whether any rules should be added to or removed from that list. The bill would also require the agency to explain why it believes each rule on the list has a significant economic impact on a substantial number of small entities. The bill would also require the agency to solicit comment from the public, the Chief Counsel of Advocacy, and the Regulatory Enforcement Ombudsman (new subsection (f)).
    - *Comment*. The requirement that agencies solicit public comment on the contents of their annual list of rule reviews risk inviting well-resourced industries to overwhelm agencies with recommendations for additional rules that should be reviewed. Responding to these comments would be burdensome, and thus risks diverting agency resources away from pursuing an affirmative agenda of advancing their statutory mission. The requirement that agencies solicit comments from the Chief Counsel of Advocacy on their annual review plans would provide the Chief Counsel for Advocacy with new opportunities for interfering in the agencies' regulatory review processes. Historically, the Chief Counsel for Advocacy has pursued a single-minded focus on weakening or delaying pending rule. It is not clear that the Chief Counsel for Advocacy would have adequate resources or expertise to perform this task.

Section 8. Judicial Review of Compliance with the Requirements of the Regulatory Flexibility Act After Publication of the Final Rule

- The bill would revise the RFA's judicial review provisions to clarify that publication of a final rule that is subject to the RFA's analytical and procedural requirement triggers the availability of judicial review (subsection (a))

- The bill would expand the Chief Counsel of Advocacy's litigation intervention authorities to include the submission of amicus curiae in cases challenging agency compliance with various analytical requirements of the RFA, as amended by this bill (subsection (b))
    - *Comment*. This provision would provide the Chief Counsel for Advocacy with new opportunities for interfering in agency rulemakings. Historically, the Chief Counsel for Advocacy has pursued a single-minded focus on weakening or delaying pending rule. It is not clear that the Chief Counsel for Advocacy would have adequate resources or expertise to perform this task.

Section 9. Jurisdiction of Court of Appeals Over Rules Implementing the Regulatory Flexibility Act

- The bill would give exclusive jurisdiction to the U.S. Court of Appeals for the Federal Circuit to review challenges to any rules issued by the Chief Counsel of Advocacy pursuant to the RFA, as amended by this bill, that govern agency compliance with the RFA's requirements (subsection (a))

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

- The bill would authorize the Chief Counsel of Advocacy to specify definitions or standards by which a business concern may be determined a small business concern for the purposes of the RFA or certain other laws. Currently, this authority is granted to the SBA Administrator (subsection (a)).
    - *Comment*. This provision would provide the Chief Counsel for Advocacy with new opportunities for interfering in agency rulemakings. Historically, the Chief Counsel for Advocacy has pursued a single-minded focus on weakening or delaying pending rule. It is not clear that the Chief Counsel for Advocacy would have adequate resources or expertise to perform this task.

- The bill would authorize the Chief Counsel of Advocacy to approve size standards prescribed by other agencies for categorizing a business concern as a small business concern. Currently, this authority is granted to the SBA Administrator (subsection (b)).
    - *Comment*. This provision would provide the Chief Counsel for Advocacy with new opportunities for interfering in agency rulemakings. Historically, the Chief Counsel for Advocacy has pursued a single-minded focus on weakening or

delaying pending rule. It is not clear that the Chief Counsel for Advocacy would have adequate resources or expertise to perform this task.

- The bill would give any party challenging a rule that includes a size standard or definition approved by the Chief Counsel of Advocacy the legal right to include the Chief Counsel of Advocacy as a party in that litigation (subsection (d))
    - *Comment*. This provision would provide the Chief Counsel for Advocacy with new opportunities for interfering in agency rulemakings. Historically, the Chief Counsel for Advocacy has pursued a single-minded focus on weakening or delaying pending rule. It is not clear that the Chief Counsel for Advocacy would have adequate resources or expertise to perform this task.

Section 11. Clerical Amendments

Section 12. Agency Preparation of Guides

- This bill would direct federal agencies to solicit input from small entities or associations of small entities when developing the small business regulatory compliance guides that are required under the Small Business Regulatory Enforcement Fairness Act

Section 13. Comptroller General Report

- This bill would direct the Comptroller General of the United States to complete a study within 90 days after the bill is enacted that assesses whether the Chief Counsel of Advocacy has the resources to carry out the RFA, as amended by this bill
    - *Comment*. This provision appears to recognize the numerous grants of new authorities that this bill would provide the Chief Counsel of Advocacy. As it is, the Chief Counsel of Advocacy does not appear to have the resources to carry out his or her responsibilities under the RFA. The bill would make that situation worse. However, given the negative impact that typically result from the Chief Counsel of Advocacy in terms of defeating agency efforts to carry out their statutory responsibilities, maintaining or even reducing the resources available to the Chief Counsel of Advocacy would appear to be desirable.

Section 14. Waiver of Fines for First-Time Paperwork Violations by Small Businesses

- The bill would amend the Paperwork Reduction Act (PRA) to include a new requirement that agencies waive any civil fines they might otherwise impose on small businesses for a "first-time violation" of an information collection requirement (new subsection (j))
    - *Comment*. This amendment to the PRA is very troubling, because it would undermine the enforcement of core regulatory programs aimed at promoting public health, safety, and environmental protection. The PRA's definition of information collection requirements is extremely broad, and includes not just recordkeeping and reporting requirements, but also mandated disclosures to third parties as well. Effective implementation of many regulatory programs depends

upon agencies obtaining crucial information through recordkeeping and reporting requirements. For example, these kinds of requirements help identify which problems are being successfully addressed as well as to reveal new and emergent harms that threaten the public interest. For other regulatory programs, such as disclosures to third parties, it is the so-called information collection requirements that directly contribute to the achievement of the program's public interest. For example, in the worker health and safety context, requirements that employers inform their workers about asbestos-related hazards constitute information collection requirements under the PRA. In short, information collection requirements under the PRA are not simple "paper-pushing" exercises as the bill implies. Instead, violations of these standards carry significant and substantial implications for the public's safety and wellbeing. The limited exceptions that the bill would provide to its mandate that agencies waive fines for these violations do little alleviate these concerns. In addition, the bill would severely constrain the exercise of agencies' enforcement discretion. Agencies can and already do waive civil fines for violations of certain information collection requirements committed by small businesses when they are warranted and appropriate. In many cases, such waivers are not appropriate. The bill would largely prevent agencies from exercising their discretion to issue civil fines in such cases. These constraints would serve to undermine agencies' ability to effectively enforce their regulatory programs. This lack of effective enforcement risks encouraging widespread noncompliance with crucial information collection requirements, which in turn puts the public at significantly greater risk of harm.

- The bill would define the term "first-time violation" to include not just the first violation that a small business has committed, but also any violations that are not similar to any previous violations that the small business may have committed of an information collection requirement imposed by the same agency during the previous five-year period (new subsection (j)(1)(A))
    - *Comment*. Depending on how this definition is interpreted, it could end up covering a lot of violations that small businesses commit. In particular, if the term "similar" is construed narrowly enough then nearly every violation that a small business commits may end up qualifying for a waiver. Also, it is unclear what function the five-year limit serves. Violations committed more than five years ago should still serve to put even small businesses on notice of their information collection responsibilities. In any event, this potentially expansive conception of what constitutes a "first-time violation" is overly broad and would constrain agency enforcement discretion too much. In certain cases, consideration of these kinds of earlier violations would reveal that the small business deliberately fails to comply with applicable requirements and that the imposition of a civil fine would be especially appropriate.

- The bill specifies that, for the purposes of determining whether a violation constitutes a "first-time violation" that qualifies for a waiver from a civil fine, the agency is prohibited from considering violations of information collection requirements imposed by other agencies (new subsection (j)(2)(B))

- *Comment*. This blanket prohibition is overly broad and would constrain agency enforcement discretion too much. In certain cases, consideration of these kinds of earlier violations would reveal that the small business deliberately fails to comply with applicable requirements and that the imposition of a civil fine would be especially appropriate.

- The bill would outline five limited exceptions to the requirement that agencies waive civil fines for first-time violations of information collection requirements by small businesses (new subsection (j)(2)(C))

- The bill would provide an exception to one of those limited exception – namely, those violations that "present[] a danger to the public health or safety." In these cases, the bill would authorize the agency head not to issue a civil fine if the small business corrects the violation within 24 hours after receiving notification of the violation. This exception to the exception further specifies certain considerations the agency head should account for in determining whether to grant the small business 24 hours (new subsections (j)(3)(A), (B))
    - *Comment*. This provision would impose a significant burden on agencies to justify imposing a civil fine on small businesses for their violation of an information collection requirement that "presents a danger to the public health or safety." This burden would likely discourage agencies from exercising their authority to use this exception from the bill's general mandate that they waive fines for such violations.

- The bill would require agencies to notify Congress within 60 days any time it imposes a civil fine on a small business for a violation of an information collection requirement based on its determination that the violation "presents a danger to the public health or safety." In other words, agencies must report to Congress whenever they do not take advantage of this exception to the exception for waiving a civil fine for the violation of the information collection requirement (new subsection (j)(3)(C)).
    - *Comment*. This provision would impose a significant burden on agencies to justify imposing a civil fine on small businesses for their violation of an information collection requirement that "presents a danger to the public health or safety." This burden would likely discourage agencies from exercising their authority to use this exception from the bill's general mandate that they waive fines for such violations.