Statement by

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Chairman Williams, Ranking Member Velazquez, and members of the Committee, thank you for the opportunity to testify. I am Todd Phillips, Assistant Professor of Legal Studies at Georgia State University's J. Mack Robinson College of Business, a Fellow with the Roosevelt Institute, and principal with the small business Phillips Policy Consulting, LLC. I previously served as an attorney advisor with the Federal Deposit Insurance Corporation and the Administrative Conference of the United States, and as counsel with what was then known as the House Oversight and Government Reform Committee. My research focuses are on administrative law, the rulemaking process, and financial regulation. I am testifying today on the basis of my expertise and not as a representative of any organization.

My testimony today will discuss the Biden Administration's regulatory efforts to support small businesses and its compliance with the Regulatory Flexibility Act; my concerns about two bills the Committee is considering, H.R. 8033, the Regulatory Transparency for Small Business Act and H.R. 7198, the Prove It Act; my support for a third, H.R. 5999, the Small Business Regulatory Relief Act; and the need to consider both the costs and benefits of regulations.

I. The Biden Administration's Regulatory Support for Small Businesses

The Biden Administration has been intent on ensuring small businesses are at the proverbial table when agencies craft regulations and receive substantial benefits from rules, not only bear their costs.

For too long, agencies have primarily heard from larger and better resourced businesses that hire high-priced lobbyists and dominate industry trade associations to influence agencies during and after rulemaking comment periods, and have lacked important input from entrepreneurs, small businesses, and other members of the public.[1] To address this disparity, President Biden signed Executive Order 14094, *Modernizing Regulatory Review*, which requires agencies to promote meaningful participation by and receive input from "interested or affected parties in the private sector and other regulated entities," among others.[2] In particular, the Executive Order required agencies to go beyond the Administrative Procedure Act's (APA) notice-and-comment requirements[3] and engage in expanded outreach to ensure the meaningful participation of those

[1] *See generally* Michael Sant'Ambrogio & Glen Staszewski, Public Engagement with Agency Rulemaking: Final Report for the Administrative Conference of the United States (2018), https://www.acus.gov/sites/default/files/documents/Public%20Engagement%20in%20Rulemaking%20Final%20Report.pdf; Susan Webb Yackee, *The Politics of Rulemaking in the United States*, 22 Ann. Rev. Pol. Sci. 37 (2019).

[2] Modernizing Regulatory Review, 88 Fed. Reg. 21879 (Apr. 11, 2023).

[3] *See* 5 U.S.C. § 553 (providing notice-and-comment procedures).

affected by regulations, including small businesses.[4]

Building on this executive order, the Biden Administration's Office of Information and Regulatory Affairs (OIRA) and Administrative Conference of the United States (ACUS) issued guidance to help agencies with this new mandate. OIRA issued a memorandum, *Broadening Public Participation and Community Engagement in the Regulatory Process*, that provided guidance for how to better engage with underrepresented communities to ensure that they are truly represented in the rulemaking process.[5] Similarly, ACUS released a collection of 16 principles for ensuring public engagement in rulemakings based on its extensive catalog of recommendations developed through its own public engagement process.[6]

The Biden Administration has made clear that simply ensuring small businesses' participation in rulemakings is insufficient; rules must be crafted to ensure that small businesses can survive and thrive. To that end, OIRA updated Circular A-4—its guidance to agencies for conducting regulatory impact analyses—to require agencies to consider whether the compliance burdens faced by small businesses and their larger competitors will differ and strive to reduce small businesses' compliance burdens accordingly.[7]

Moreover, a centerpiece of the Biden Administration's regulatory agenda is to increase competition in all areas of the economy so that entrepreneurs and small businesses can effectively compete in the marketplace against their larger, monopolistic competitors. The Administration has recognized that "excessive market concentration threatens … the welfare of workers, farmers, small businesses, startups, and consumers" and that unfair methods of competition prevent small businesses from hiring workers and obtaining fairly priced inputs, from selling their goods and services or fairly advertising their products to the public, and from contributing to a growing economy.[8] When the government addresses monopolization, startups and small businesses have an opportunity to shine.

President Biden's Executive Order 14036, *Promoting Competition in the American Economy*, implemented a whole-of-government effort to promote competition in the American economy.

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[4] *See* Modernizing Regulatory Review, 88 Fed. Reg. 21879 (Apr. 11, 2023) (requiring "community-based outreach; outreach to organizations that work with interested or affected parties; use of agency field offices; use of alternative platforms and media for engaging the public; and expansion of public capacity for engaging in the rulemaking process").

[5] Memorandum Regarding Broadening Public Participation and Community Engagement in the Regulatory Process (July 19, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/07/Broadening-Public-Participation-and-Community-Engagement-in-the-Regulatory-Process.pdf.

[6] *See* Administrative Conference of the United States, Office of the Chair, Statement of Principles for Public Engagement in Agency Rulemaking (rev. Sept. 1, 2023), https://www.acus.gov/sites/default/files/documents/Statement_of_Principles_for_Public_Engagement_in_Rulemaking_2023.09.01.pdf. *See also* Admin. Conf. of the U.S., Recommendation 2023-2, *Virtual Public Engagement in Agency Rulemaking*, 88 Fed. Reg. 42680 (July 3, 2023); Admin. Conf. of the U.S., Recommendation 2021-3, *Early Input on Regulatory Alternatives*, 86 Fed. Reg. 36082 (July 8, 2021).

[7] *See* OFFICE OF MANAGEMENT & BUDGET, CIRCULAR NO. A-4 24(Nov. 9, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf ("Benefits and costs can differ depending on the size of the firms being regulated. Small firms may find it more costly to comply with regulation, especially if there are large fixed costs required for compliance.").

[8] Promoting Competition in the American Economy, 86 Fed. Reg. 36987 (July 14, 2021).

This order created the White House Competition Council to "coordinate, promote, and advance Federal Government efforts to address overconcentration, monopolization, and unfair competition in or directly affecting the American economy" and tasked administrative agencies with knocking down barriers to competition in all sectors.[9] OIRA identified "market power" as a key market failure that requires regulatory action[10] and issued guidance encouraging agencies to take care that rules do not inhibit small businesses' abilities to compete effectively against their larger competitors.[11]

Agencies across the Biden Administration have followed the White House's lead by taking steps to allow small businesses to compete effectively in the marketplace. The examples are too numerous to list, but several demonstrate the importance and breadth of these efforts:

- The Department of Justice's Antitrust Division, Federal Deposit Insurance Corporation, and Office of the Comptroller of the Currency have updated or are in the process of updating their bank merger guidelines to ensure mergers do not limit the provision of financial services.[12] Bank concentration may increase lending costs for small businesses,[13] and large banks are less likely to provide loans to small businesses than community banks.[14] Stopping egregious bank mergers will increase the capacity of small businesses to thrive.

- The Federal Trade Commission (FTC) and Antitrust Division challenged more mergers in Fiscal Year 2022 than in any year since 1976,[15] and that work is ongoing. In September 2023, the FTC initiated a lawsuit against Amazon for, among other things, biasing its platform's search results in favor of its own products and against those of third-party sellers, and requiring those sellers to use Amazon Prime shipping to gain high placement in search

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[9] *Id.*

[10] OFFICE OF MANAGEMENT & BUDGET, *supra* note 7 at 16–17. *See also id*. at 24 (warning against regulations that "can potentially lead small firms to exit the market, resulting in reduced competition in some markets").

[11] *See generally* Office of Info. & Regulatory Affairs, Guidance on Accounting for Competition Effects when Developing and Analyzing Regulatory Actions 12–13 (Oct. 2023), https://www.whitehouse.gov/wp-content/uploads/2023/10/RegulatoryCompetitionGuidance.pdf. *See also id*. at 13 (describing how "a health and safety regulation that requires all firms to pay a fixed fine for each violation, instead of a fine that varies with the cost of the harm caused by the violation, may inappropriately advantage larger producers of a product over smaller producers of that product").

[12] Antitrust Division Banking Guidelines Review: Public Comments Topics & Issues Guide, Dept. of Justice (last accessed May 16, 2023), https://www.justice.gov/atr/antitrust-division-banking-guidelines-review-public-comments-topics-issues-guide; Request for Comment on Proposed Statement of Policy on Bank Merger Transactions, 89 Fed. Reg. 29222 (Apr. 19, 2024); Business Combinations Under the Bank Merger Act, 89 Fed. Reg. 10010 (Feb. 13, 2024).

[13] *See, e.g.*, Steven G. Craig & Pauline Hardee, *The Impact of Bank Consolidation on Small Business Credit Availability*, 31 J. BANKING & FIN. 1237 (2007) (concluding that bank consolidation has reduced credit availability for small businesses).

[14] *See* Julapa Jagtiani & Raman Quinn Maingi, *How Important Are Local Community Banks to Small Business Lending? Evidence from Mergers and Acquisitions* (Fed. Res. Bank of Phila., Working Paper No. 18-18), https://www.philadelphiafed.org/-/media/frbp/assets/working-papers/2018/wp18-18.pdf (identifying community banks as principal lenders to small businesses).

[15] Leah Nylen, *Biden Antitrust Enforcers Set New Record for Merger Challenges*, BLOOMBERG LAW (Dec. 18, 2023), https://news.bloomberglaw.com/mergers-and-acquisitions/biden-antitrust-enforcers-set-new-record-for-merger-challenges.

results.[16] The Commission alleges that Amazon's pay-to-play advertising has alone cost businesses billions in lost revenue.[17] Similarly, the Antitrust Division initiated a lawsuit against Apple for, among other things, blocking third-party app stores that may charge small developers lower fees and imposing developer agreements on its App Store that allow it to extract high fees and thwart competition from small developers.[18]

- The Federal Communications Commission finalized a regulation to prohibit internet service providers from creating "fast lanes" that prioritize internet users' access to firms that pay for access and slowing down access to their smaller competitors.[19] This "net neutrality" rule will help startups and small businesses compete by permitting them equal access to customers.

- The FTC enacted a regulation prohibiting non-compete agreements, which limit the pool of potential employees from which small businesses may hire and inhibit entrepreneurs from forming small businesses in the first place.[20] One survey found that more than one-third of small business owners have been prevented from hiring an employee due to non-competes, and nearly half said that they have been subject to a non-compete agreements themselves.[21] The Commission estimates the rule will increase the formation of new businesses by 2.7-3.2%.[22]

- The FTC also challenged more than 100 drug patents listed in the Food and Drug Administration's *Orange Book*.[23] Listings may lead to statutory stays that blocks the introduction of competing drug products for 30 months, prohibiting competitors—including small businesses and startups—from introducing lower-cost alternatives.

- The Biden Administration has made tackling "junk fees" one of its key priorities. Junk fees tilt the playing field against honest businesses that are transparent with their customers and towards their larger competitors that profit by hiding the ball from consumers—leading to a race to the bottom. The Consumer Financial Protection Bureau (CFPB), FTC, Department of Transportation, and other agencies have all acted to ensure small businesses compete in fair

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[16] *See generally* Complaint, FTC v. Amazon, 23-cv-01495 (W.D.Wa., Nov. 2, 2023).

[17] *See id.* at 10 ("Amazon took in [redacted] billion in revenue from U.S. Marketplace seller fees in 2021 alone.").

[18] *See generally* Complaint, United States v. Apple, 24-cv-04055 (D.N.J., Mar. 21, 2024).

[19] *See generally* In the Matter of Safeguarding and Securing the Open Internet, Restoring Internet Freedom, FCC 24-52 (May 7, 2024).

[20] *See generally* Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024).

[21] *See Opinion Poll: Small business owners support banning non-compete agreements*, SMALL BUSINESS MAJORITY (Apr. 13, 2023), https://smallbusinessmajority.org/our-research/fair-competition/opinion-poll-small-business-owners-support-banning-non-compete-agreements ("The poll reveals that nearly half of small businesses (46%) report that they were subject to a non-compete agreement that prevented them from starting or expanding their business. More than a third (35%) have been prevented from hiring an employee due to a non-compete agreement.").

[22] Non-Compete Clause Rule, 89 Fed. Reg. at 38470.

[23] *See generally FTC Challenges More Than 100 Patents as Improperly Listed in the FDA's Orange Book*, FED. TRADE COMM'N (Nov. 7, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-challenges-more-100-patents-improperly-listed-fdas-orange-book.

markets.[24]

- The Department of Agriculture enacted its Inclusive Competition and Market Integrity rule to establish clear, effective standards for fair competition.[25] This rule, which prohibits discrimination against agricultural producers on a variety of bases, retaliation against farmers for engaging in protected activities, and fraud in the formation of contracts, will support family farmers as they compete on a national and international stage.

Of course, competition has not been the only focus of the Biden Administration. President Biden signed Executive Order 14058, *Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government*, to require agencies to improve the manner in which they interact with customers, including small businesses.[26] Similarly, the CFPB finalized a regulation requiring lenders to collect demographic information of small business applicants to stop discrimination against minority small business owners and ensure fairer lending.[27]

II. The Biden Administration's Compliance with the Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) was enacted by Congress to ensure that agencies take into consideration the views of small businesses when enacting regulations.[28] Applicable to this hearing, the RFA requires agencies to conduct an initial regulatory flexibility analysis for each rule proposed that estimates the rules' significant expected impacts on small businesses, solicit comments on such analyses, and issue a final analysis responding to such comments and describing the steps taken to minimize expected impacts.[29] If an agency finds that a rule will not have a significant economic impact on a substantial number of small entities, it may certify that finding and need not conduct the aforementioned analyses.[30] These certifications must be published in the *Federal Register* "with a statement providing the factual basis for such certification," alongside rules' proposals and finalizations.[31] The RFA also requires agencies to conduct retrospective reviews of rules that have a significant economic impact upon a substantial number of small entities every ten years.[32]

The Biden Administration has a history of compliance with the RFA, and the Office of

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[24] *See generally* Brian Deese et al., *The President's Initiative on Junk Fees and Related Pricing Practices*, The White House (Oct. 26, 2022), https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/

[25] *See generally* Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 89 Fed. Reg. 16092 (Mar. 6, 2024).

[26] *See generally* Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government, 86 Fed. Reg. 71357 (Dec. 16, 2021).

[27] *See generally* Small Business Lending Under the Equal Credit Opportunity Act (Regulation B), 88 Fed. Reg. 35150 (May 31, 2023).

[28] Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. § 601 *et seq.*). *See also id*. § 2(a) ("the process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions to examine the impact of proposed and existing rules on such entities, and to review the continued need for existing rules").

[29] *See* 5 U.S.C. § 603–04.

[30] *See id*. § 605(b).

[31] *Id*.

[32] *See id*. § 610.

Advocacy notes that in Fiscal Years 2021 and '22 (the only years for which data is available), compliance with the RFA resulted in over $150 million in quantifiable regulatory cost savings; had the Supreme Court not overturned the Biden Administration's COVID-19 Emergency Workplace Safety Standard, that number would be billions higher.[33]

III. Proposed Legislation Will Inhibit Agencies' Ability to Regulate for the Benefit of Small Businesses

In my personal experience, agencies recognize the importance of small business participation in the regulatory process and strive to comply with the RFA. Unfortunately, this Committee is considering two bills that would make compliance that much more difficult, unnecessarily slowing down the regulatory process without providing corresponding benefits to small businesses. I discuss each in turn.

H.R. 7198, the Prove It Act

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 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"[34] unless agencies certify that the rule "will not, if promulgated, have a significant economic impact on a substantial number of small entities."[35] 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*

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[33] *See* CHIEF COUNSEL FOR ADVOCACY, REPORT ON THE REGULATORY FLEXIBILITY ACT, FY2021 32 (Apr. 2022), https://advocacy.sba.gov/wp-content/uploads/2022/03/Report-on-the-Regulatory-Flexibility-Act-FY-2021.pdf (identifying $3.277 billion in savings, $3.200 billion of which was from the COVID-19 workplace standard); CHIEF COUNSEL FOR ADVOCACY, REPORT ON THE REGULATORY FLEXIBILITY ACT, FY2022 41 (Apr. 2023), https://advocacy.sba.gov/wp-content/uploads/2023/05/FY2022RFA_Final-508c.pdf (identifying $73.5 million in savings).

[34] 5 U.S.C. § 603–04.

[35] *Id*. § 605(b).

regulatory flexibility analyses,[36] whereas this bill would permit appeals of both *initial* and *final* analyses to the Chief Counsel, and then appeal the Chief Counsel's decisions to federal court.

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.[37] 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.[38] 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

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[36] *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).

[37] *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).

[38] *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.

another, statutes generally provide specific the appeals processes.[39] This bill seems to erroneously presume that only the private sector will appeal the Chief Counsel's decisions.

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 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."[40] 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.[41]

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. 8033, the Regulatory Transparency for Small Business Act

The Regulatory Transparency for Small Business Act (RTSBA) would amend the RFA to require agencies to include additional information in certifications that rules will not have significant economic impacts on substantial numbers of small entities. This bill would require those certifications include, at minimum, an estimate of the "number of small entities" affected; an estimate of the rule's implementation costs on small businesses; a "determination of whether the costs of compliance … represent a significant economic impact;" and a "determination of the

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

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

[41] *See* 5 U.S.C. § 553(b)(B).

number of small entities that will experience a significant economic impact as a result of the rule."

The RTSBA would impose costs on agencies without resulting in any tangible benefit for small businesses. I oppose it for several reasons.

First, the RTSBA is a solution in search of a problem. Although claims that agencies are misusing the certification process to avoid conducting regulatory flexibility analyses abound, the RFA currently requires agencies to provide a "factual basis for such certification"[42] and subjects those bases to judicial review.[43] Today, agencies must demonstrate that their factual bases were not arbitrary or capricious. Imposing new requirements on those analyses would simply provide no benefit.

Second, the information the RTSBA would require is frequently unavailable to agencies. The notice-and-comment process was appropriately designed to allow the public to provide agencies with information necessary to make informed decisions, and to that end, the RFA currently allows commenters who disagree with agencies' certifications to provide information to the contrary and permits agencies to issue final regulatory flexibility analyses if persuaded. Requiring regulators to obtain information they do not already have before they can issue rule proposals simply serves to impose a burden on agencies and delay the rulemaking process.

Third, the RTSBA would impose what is essentially a cost-benefit analysis requirement when every regulation is proposed. The APA does not require economic analyses when rules are proposed; Executive Order 12866 requires regulatory impact analyses at the proposal stage only of "significant regulatory action;" and the RFA requires initial regulatory flexibility analyses only on rules that will "have a significant economic impact on a substantial number of small entities."[44] The RTSBA would impose an economic analysis requirement when rules are proposed for *all* regulations, upending the rulemaking process that has existed since 1946.

Fourth and finally, the RTSBA provides no additional resources that would allow agencies to comply with its new requirements.

IV. H.R. 5999, the Small Business Regulatory Relief Act, Would Benefit Small Businesses

Despite these two problematic bills, the Committee is considering legislation that would benefit

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[42] *Id*. § 605(b).

[43] *Id*. *See also id.* § 611(a) (allowing small businesses to obtain "judicial review of agency compliance with the requirements of," *inter alia*, section 605(b)).

[44] *See id.* § 704 (providing that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review"); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (explaining that the APA requires agencies to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'") (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)); Executive Order 12866 § 6(a)(3)(b)(ii) ("For each matter identified as … a significant regulatory action, the issuing agency shall provide to OIRA … [a]n assessment of the potential costs and benefits of the regulatory action"); 605(b) (providing that initial reg flex analyses are not required when rules "will not, if promulgated, have a significant economic impact on a substantial number of small entities").

small businesses. The Committee should quickly approve H.R. 5999, the Small Business Regulatory Relief Act.

The Small Business Regulatory Relief Act would provide to the Small Business Administration's Office of the National Ombudsman new authority to assist federal agencies with better helping small businesses. Specifically, the bill would authorize the Ombudsman to work with federal agencies to establish programs to assist small businesses in meeting regulatory requirements and completing mandated forms, train small businesses with regulatory compliance, and otherwise address small businesses' questions or concerns. The Small Business Regulatory Relief Act would also permit the Ombudsman to increase outreach to small businesses and establish a single point of contact for the Ombudsman at each agency.

As opposed to the Prove It Act and RTSBA, which serve to styme agencies' efforts that benefit small businesses, the Small Business Regulatory Relief Act makes government work more effectively and efficiently. It would expand the authority of the Ombudsman to work with small businesses when its help may be most needed. Existing law provides that the Ombudsman's role is to assist small businesses when they are being investigated or are the subject of compliance or enforcement activities. At that point in the regulatory process, however, many small businesses have already attempted to understand and comply with agency regulations, and enforcement actions are a result of their misunderstanding legal requirements. Many small businesses simply need help understanding what the law expects of them. Allowing the Ombudsman to aid small businesses *before* they get into trouble will help small businesses avoid being the subject of investigations or enforcement actions in the first place.

In addition, the Small Business Regulatory Relief Act would authorize funding to allow the Ombudsman to undertake these new activities, ensuring that they do not detract from the Ombudsman's existing role.

V. Considering Costs and Benefits of Regulation

I wish to make one final point: Considerations of regulations' costs must include corresponding considerations of their benefits. The American Action Forum's assertions that the Biden Administration has finalized 851 rules imposing combined costs of $1.37 trillion tells you nothing about the sensibility of those regulations, as their analysis lacks a similar quantification of regulations' benefits.[45] Yet in a single rule, the Environmental Protection Agency has finalized a policy that provides quantified benefits of between $1.7 and $2.1 *trillion*—far in excess of the total costs AAF has claimed for *all* Biden Administration rules.[46] Any consideration of rules' effects on small businesses should include considerations of both their costs and benefits, lest rules with positive expected outcomes be unnecessarily thwarted.

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[45] *See* Dan Goldbeck, *The Biggest Week on Record*, AMERICAN ACTION FORUM (Apr. 22, 2024), https://www.americanactionforum.org/week-in-regulation/the-biggest-week-on-record/.

[46] *See* Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 89 Fed. Reg. 27842, 28107 (Apr. 18, 2024).

For nearly four years, the Biden Administration has worked to promote the interests of small businesses in its regulatory efforts. It has broken from a tradition of hearing primarily from well-resourced businesses to ensure that agencies affirmatively solicit input from the small businesses affected by their rules. But more than simply facilitating participation, the Administration has put effectuated an agenda that ensures entrepreneurs and small businesses can effectively compete in the marketplace against their larger, monopolistic competitors. And in undertaking these efforts, the Biden Administration has complied with the Regulatory Flexibility Act.

Unfortunately, this Committee is considering several bills that would make compliance with the Act much more difficult, unnecessarily slowing down the regulatory process without providing corresponding benefits to small businesses. The Committee should, however, quickly approve H.R. 5999, the Small Business Regulatory Relief Act.

Thank you, and I am happy to answer any questions.