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THE PROVE IT ACT OF 2016

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Mr. VITTER, from the Committee on Small Business and
Entrepreneurship, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. 2847]

The Committee on Small Business and Entrepreneurship, to which was referred the bill (S. 2847), to require greater transparency for Federal regulatory decisions that impact small businesses having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

i. introduction

The Prove It Act of 2016 (S. 2847) was introduced by Senator Ernst on April 25, 2016.

The Prove It Act of 2016 authorizes the Chief Council of the Small Business Administration (SBA) to request the Office of Information and Regulatory Affairs of the Office of Management and Budget to review any federal certification on a proposed rule. The Chief Council's ability to review any proposed rule gives him/her the power to check the rule for its economic impact on a substantial number of small entities.

ii. history (purpose & need for legislation)

At every point of our history, the need for increased transparency is very apparent in many levels and agencies within our govern-

ment. For small business entities working with the federal government, The Prove It Act of 2016 addresses the need for a check on federal agencies when they develop rules and certifications. S. 2847 mimicked the process of reviewing federal rules from the National Environmental Policy Act (NEPA). This act specifically looks to the Council on Environmental Quality (CEQ) and uses its process of settling a dispute between agencies for the Environmental Impact Statement. The process that is laid out in NEPA incentivizes agencies to collaborate on the Environmental Impact Statement before it would become a problem. The need for this legislation was also apparent when the SBA Office of Advocacy testified to the Senate Small Business Committee on April 25, 2016 that the Environmental Protection Agency (EPA) incorrectly certified the Waters of the U.S. rule. The SBA concluded that the rule should have included a small business panel to better address the concerns for small entities in the rule.

iii. hearings & roundtables

In the 114th Congress, issues related to The Regulatory Flexibility Act (RFA) and the implantation of the Waters of the U.S. rule were discussed in the Senate Committee on Small Business in full committee hearing. On April 27, 2016 the Committee held a hearing titled, "Drowning in Regulations: The Waters of the U.S. Rule and the Case for Reforming the RFA." This hearing examined the implementation of the RFA and how it was designed to ensure that agencies would include small business input. This law was designed for input but some agencies would take actions to circumvent the law through loopholes and misinterpretation. The hearing included a witness from the SBA's Office of Advocacy who presented a variety of agency failures of implantation of the RFA.

iv. description of bill

The bill authorizes the Chief Council of the Small Business Administration to request the Office of Information and Regulatory Affairs of the Office of Management and Budget to review any federal agency certification to a federal rule to ensure that it will not have a significant economic impact on small entities. The bill outlines that if the Chief Council wants to review an agency's rule they must be published in the Federal Register and on the website of the SBA Office of Advocacy. The Chief Council must also include any documentation that he/she furnished during the notice and comment period of the proposed rule and they must also explain why they disagree with the certification and provide factual information to why they do.

v. committee vote

In compliance with rule XXVI (7)(b) of the Standing Rules of the Senate, the following vote was recorded on May 11, 2016

A motion to adopt the Prove It Act, a bill to require greater transparency for Federal regulatory decisions that impact small businesses without amendment was reported favorably to the Senate with the following Senators present: Senators Vitter, Risch, Scott, Ernst, Ayotte, Shaheen, Cantwell, Cardin, Heitkamp, Markey, Booker, Coons, Hirono, and Peters.

vi. cost estimate

In compliance with rule XXVI (11)(a)(1) of the Standing Rules of the Senate, the Committee estimates the cost of the legislation will be equal to the amounts discussed in the following letter from the Congressional Budget Office:

MAY 24, 2016.

S. 2847 would authorize the Small Business Administration (SBA) to request that the Office of Management and Budget (OMB) review federal agency certifications that their proposed regulations would have no significant effect on small entities. CBO estimates that implementing S. 2847 would cost \$10 million over the 2017–2021 period.

Under current law, federal agencies are required to publish in the Federal Register an analysis of the impact of their proposed rules on small entities, such as small businesses, not-for-profits, and local governments, and to propose alternative regulations to minimize any significant economic impacts that may result. Agencies are exempt from this requirement if the head of the agency certifies that the rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. Currently, OMB reviews executive agencies' analyses of economically significant rules (those likely to result in an annual effect on the economy of \$100 million or more).

S. 2847 would authorize SBA to request that OMB review agency certifications if SBA disagrees with an agency's findings. OMB would be required to review analyses of the impact of the rules, including independent agency rules and those determined to be not economically significant. If OMB determined that the proposed rule would have a significant economic impact on small entities, the federal agency would be required to submit a full analysis of the impact of their proposed rule on small entities.

On the basis of information from SBA and OMB about the current review process for agency rules, CBO estimates that implementing S. 2847 would result in approximately 30 to 40 additional reviews by OMB each year, the majority of which would be rules that are not economically significant. Currently, about 35 OMB analysts each review approximately 10 to 15 rules per year. CBO estimates that implementing S. 2847 would cost \$2 million per year for each of fiscal years 2017–2021 for three to four additional OMB staff to review SBA petitions and for additional administrative activities by agencies to prepare additional analysis for some of the rules identified by the SBA.

Because enacting S. 2847 could affect direct spending by agencies not funded through annual appropriations, pay-as-you-go procedures apply. CBO estimates, however, that any net change in spending by those agencies would be negligible. Enacting S. 2847 would not affect revenues. CBO estimates that enacting S. 2847 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

S. 2847 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

vii. evaluation of regulatory impact

In compliance with rule XXVI(11)(b) of the Standing Rules of the Senate, it is the opinion of the Committee that no significant additional regulatory impact will be incurred in carrying out the provisions of this legislation. There will be no additional impact on the personal privacy of companies or individuals who utilize the services provided.

viii. section-by-section analysis

Section 1. Short title

This section provides for the title, “The Prove It Act of 2016.”

Section 2. Review procedures relating to initial regulatory flexibility analysis certifications

This section gives the Chief Council of the SBA the ability to submit a request for review to the Administrator of the Office of Information and Regulatory Affairs (OIRA) for any federal agency’s certification. This power is given so if the Chief Council disagrees with the publishing agency, the Chief Council has the power to review the rule and whether or not it would have a significant economic impact on a number of small entities. For the Chief Council of the SBA to conduct a review they must publish the request for review in the Federal Register and on the SBA Office of Advocacy website, attach proper documentation and comments made during the comment period of the proposed rule by the Chief Council, and provide a factual statement as of why the Chief Council disagrees with the proposed rule. After the request is published in the Register, the federal agency in question has ten days to submit a response.

MINORITY VIEWS

S. 2847, the “Prove It Act of 2016,” authorizes the Chief Counsel of the Small Business Administration to request the Office of Information and Regulatory Affairs (OIRA) to review any federal agency certification to a federal rule to ensure it will not have a significant economic impact on small entities.

The Ranking Member of the Senate Committee on Small Business and Entrepreneurship opposes S. 2847 because it has not been thoroughly vetted; it creates duplicative processes; and creates additional requirements for agencies without providing the necessary resources to achieve them.

I. DESCRIPTION

S. 2847 gives the Small Business Administration’s Office of Advocacy authority to request an additional review of an agency’s evaluation regarding a rule’s impact on small entities from the Office of Information and Regulatory Affairs (OIRA). S. 2847 would also require the Office of Information and Regulatory Affairs to respond publicly when the Office of Advocacy requests a review of an agency’s certification that a rule would not have a significant economic impact on a substantial number of small entities. The Office of Information and Regulatory Affairs review must then be made public within forty days.

II. BACKGROUND

The U.S. Small Business Administration’s Office of Advocacy is an independent office that influences the federal rulemaking process through several activities, including outreach to small businesses about proposed regulations and providing formal comments to Congress and federal agencies on proposed legislation and regulations. At times, the Office of Advocacy may disagree with a federal agency’s decision to certify that a given rule will not have a significant economic impact on a substantial number of small entities.

Generally, the Regulatory Flexibility Act requires all federal rulemaking agencies to: (1) analyze the economic impact of proposed regulations when there is likely to be a significant economic impact on a substantial number of small entities; (2) consider regulatory alternatives that will achieve the agency’s goal while minimizing the burden on small entities; and (3) make their analysis available for public comment. Agencies are exempt from these requirements if the agency “certifies” that the rule would not have a “significant economic impact on a substantial number of small entities.”

III. CONCERNS

The Ranking Member is concerned that the Committee has not fully vetted this legislation, which would significantly alter the federal rulemaking process. As a result, the Ranking Member does not believe the Committee understands the full extent of the legislation's impact on the ability of agencies to craft necessary rules.

The Ranking Member is also concerned that the process set forth in S. 2847 creates a duplicative framework for regulatory review. Currently, the Office of Information and Regulatory Affairs regularly reviews most rules before they are made final. The additional process set forth by S. 2847 would duplicate those efforts, while causing unnecessary delays, and creating additional costs.

S. 2847 also fails to provide any additional resources for agencies to meet the new duplicative requirements. As a result, the measure could delay necessary rulemakings.

IV. CONCLUSION

The Ranking Member believes that poorly crafted regulations can result in an excessive burden on small businesses. Unlike large companies, small firms often do not have the time and resources to devote to understanding new rules or complying with them.

At the same time, well-crafted regulations have the potential to encourage innovation and entrepreneurship, while addressing critical threats to public health, the environment and safety.

The Ranking Member believes that, as the Committee considers reforms to the rulemaking process, the Committee should do so in a way that does not stop important rules that protect the public.

For these reasons, the Ranking Member respectfully dissents and opposes this bill, which was opposed by all Minority members of the Committee.