

118TH CONGRESS
1ST SESSION

S. 1411

To amend title 5, United States Code, to require greater transparency for Federal regulatory decisions that impact small businesses, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 3, 2023

Ms. ERNST introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

To amend title 5, United States Code, to require greater transparency for Federal regulatory decisions that impact small businesses, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Prove It Act of 2023”.

5 **SEC. 2. INITIAL REGULATORY FLEXIBILITY ANALYSIS.**

6 (a) IN GENERAL.—Chapter 6 of title 5, United
7 States Code, is amended—

8 (1) in section 603(b)—

1 (A) in paragraph (5), by striking the pe-
2 riod at the end and inserting “; and”; and

3 (B) by adding at the end the following:

4 “(6) where feasible, any reasonably foreseeable
5 potential indirect costs the proposed rule may im-
6 pose on small entities, which shall include small enti-
7 ties that—

8 “(A) purchase products or services from,
9 sell products or services to, or otherwise con-
10 duct business with entities directly regulated by
11 the rule;

12 “(B) are directly regulated by other gov-
13 ernmental entities as a result of the rule; or

14 “(C) are not directly regulated by the
15 agency as a result of the rule but are otherwise
16 subject to other agency rules as a result of the
17 rule.”; and

18 (2) in section 605(b), by striking “The agency”
19 and inserting “Not later than 10 days after com-
20 pleting the certification described in this paragraph,
21 the agency”; and

22 (3) by inserting after section 605 the following:

1 **“§ 605A. Review procedures relating to initial regu-**
2 **latory flexibility analysis certifications**

3 “(a) FILING A PETITION TO REVIEW AGENCY CER-
4 TIFICATION OF A PROPOSED RULE.—

5 “(1) IN GENERAL.—Any small entity, group of
6 small entities, or organization representing the inter-
7 ests of small entities may petition the Chief Counsel
8 for Advocacy of the Small Business Administration
9 (in this section referred to as the ‘Chief Counsel’) to
10 review a certification published under section 605(b)
11 that a proposed rule will not, if promulgated, have
12 a significant economic impact on a substantial num-
13 ber of small entities.

14 “(2) FORM.—The Chief Counsel shall—

15 “(A) determine the method, timing, and
16 form of disseminating a petition described in
17 paragraph (1); and

18 “(B) display the information described in
19 subparagraph (A) on the website of the Office
20 of Advocacy of the Small Business Administra-
21 tion in a conspicuous manner.

22 “(3) CONTENTS.—Each petition described in
23 paragraph (1) with respect to a certification pub-
24 lished under section 605(a) for a proposed rule shall
25 clearly and concisely—

1 “(A) specify the name of the petitioner and
2 a telephone number, a mailing address, and an
3 email address that the Chief Counsel may use
4 to communicate with the petitioner;

5 “(B) if the petitioner is an organization,
6 provide additional identifying information, as
7 applicable, including the organizational or cor-
8 porate status of the petitioner, the State of in-
9 corporation of the petitioner, the registered
10 agent of the petitioner, the interest of the peti-
11 tioner in representing small entities affected by
12 the proposed rule and the certification at issue,
13 and the name and authority of the individual
14 who signed the petition on behalf of the organi-
15 zational or corporate petitioner;

16 “(C) present the specific problems or
17 issues that the petitioner believes should be ad-
18 dressed or considered through a review of the
19 certification, such as—

20 “(i) any specific circumstances in
21 which the determination of the certification
22 that the proposed rule will not, if promul-
23 gated, have a significant economic impact
24 on a substantial number of small entities is
25 incorrect, incomplete, or inadequate; and

1 “(ii) why the proposed rule would, if
2 promulgated, have a significant economic
3 impact on a substantial number of small
4 entities;

5 “(D) cite, enclose, or reference any rel-
6 evant and non-protected or confidential tech-
7 nical, scientific, or other data or information
8 supporting any assertion of the problems or
9 issues with the certification;

10 “(E) present a proposed solution to the
11 problems or issues raised in the petition, includ-
12 ing potential regulatory or compliance alter-
13 natives to the proposed rule;

14 “(F) provide an analysis, discussion, or ar-
15 gument that explains how the proposed solution
16 described in subparagraph (E) solves the prob-
17 lems or issues raised in the petition; and

18 “(G) cite, enclose, or reference any other
19 publicly available data or information sup-
20 porting the proposed solution described in sub-
21 paragraph (E).

22 “(b) CONSULTATION.—

23 “(1) IN GENERAL.—Any entity desiring to file
24 a petition under subsection (a) may request a con-

1 sultation with the Chief Counsel before or after fil-
2 ing the petition.

3 “(2) FORM.—The Chief Counsel shall—

4 “(A) determine the method, timing, and
5 form of requesting a consultation with the Chief
6 Counsel under paragraph (1); and

7 “(B) display the information described in
8 subparagraph (A) on the website of the Office
9 of Advocacy of the Small Business Administra-
10 tion in a conspicuous manner.

11 “(3) LIMITATIONS ON ASSISTANCE.—In any
12 consultation regarding a petition under paragraph
13 (1), the Chief Counsel—

14 “(A) may only—

15 “(i) describe the process for filing,
16 docketing, tracking, closing, amending,
17 withdrawing, and resolving the petition;
18 and

19 “(ii) assist the petitioner to clarify the
20 petition so that the Chief Counsel is able
21 to understand the issues of concern to the
22 petitioner; and

23 “(B) may not advise a petitioner on wheth-
24 er the petition should be amended or with-
25 drawn.

1 “(c) PRIMA FACIE REVIEW.—

2 “(1) IN GENERAL.—Upon receipt of a petition
3 filed under this section with respect to the certifi-
4 cation of a proposed rule, the Chief Counsel shall
5 make an initial prima facie determination on the
6 merit of the issues raised in petition as to the
7 properness of the certification and whether the pro-
8 posed rule in question would, if promulgated, have
9 a significant economic impact on a substantial num-
10 ber of small entities.

11 “(2) NO FURTHER REVIEW.—If, following the
12 prima facie review of a petition under paragraph (1),
13 the Chief Counsel determines that the issues raised
14 in the petition do not merit further review by the
15 Chief Counsel, the Chief Counsel shall, not later
16 than 10 days after receipt of the petition, inform the
17 petitioner of that determination and the matter shall
18 be closed.

19 “(3) FURTHER REVIEW.—If, following the
20 prima facie review of a petition under paragraph (1),
21 the Chief Counsel determines that the issues raised
22 in the petition do merit further review by the Chief
23 Counsel, the Chief Counsel shall, not later than 10
24 days after receipt of the petition, inform the peti-
25 tioner and the agency that promulgated the pro-

1 posed rule that the Chief Counsel shall conduct a
2 full review of the certification and proposed rule to
3 which the petition relates under subsection (d).

4 “(d) FULL REVIEW.—

5 “(1) CONSIDERATIONS; MEETING.—In con-
6 ducting a full review under this subsection with re-
7 spect to the certification made under section 605(b),
8 the Chief Counsel shall—

9 “(A) consider—

10 “(i) whether the agency that promul-
11 gated the proposed rule correctly deter-
12 mined which small entities will be affected
13 by the proposed rule;

14 “(ii) whether the agency considered
15 adequate economic data to assess whether
16 the proposed rule will have a significant
17 impact on a substantial number of small
18 entities; and

19 “(iii) the economic implications of the
20 proposed rule; and

21 “(B) convene a virtual or in-person meet-
22 ing between the Chief Counsel, the petitioner,
23 representatives of the agency that promulgated
24 the proposed rule who are determined appro-
25 priate by the Chief Counsel, and the Adminis-

1 trator of the Office of Information and Regu-
2 latory affairs to—

3 “(i) provide positions and support for
4 those positions regarding the certification
5 of the proposed rule; and

6 “(ii) allow the Chief Counsel to ask
7 questions as the Chief Counsel determines
8 necessary to make a final determination as
9 to the validity of the certification.

10 “(2) PUBLICATION.—Not later than 30 days
11 after the date on which the Chief Counsel begins a
12 full review of a certification made with respect to a
13 proposed rule under paragraph (1), the Chief Coun-
14 sel shall submit to the petitioner and the agency that
15 promulgated the proposed rule, and publish in the
16 Federal Register and on the website of the Office of
17 Advocacy of the Small Business Administration, the
18 results of the review conducted under paragraph (1).

19 “(3) REQUIREMENT TO PERFORM ANALYSES.—
20 If, after a full review of a certification made with re-
21 spect to a proposed rule under paragraph (1), the
22 Chief Counsel determines that the proposed rule
23 will, if promulgated, have a significant economic im-
24 pact on a substantial number of small entities, the
25 agency that promulgated the proposed rule shall per-

1 form an initial regulatory flexibility analysis and a
2 final regulatory flexibility analysis for the proposed
3 rule under sections 603 and 604, respectively.

4 “(4) PENALTY.—If an agency fails to attend
5 the required meeting under paragraph (1)(B) or in
6 any other way fails to assist the Chief Counsel in a
7 full review under paragraph (1) with respect to a
8 proposed rule of the agency, as determined by the
9 Chief Counsel, the final rule shall not apply to small
10 entities.

11 “(5) JUDICIAL REVIEW.—For purposes of judi-
12 cial review under chapter 7 of this title, a certifi-
13 cation made by an agency under section 605(b) for
14 which a petition is filed under subsection (a) shall
15 be considered final agency action as of the date on
16 which the Chief Counsel—

17 “(A) makes a determination under sub-
18 section (c)(2) that the issues raised in the peti-
19 tion do not merit further review; or

20 “(B) publishes the results of a full review
21 of the certification under paragraph (1).”.

22 (b) TECHNICAL AND CONFORMING AMENDMENT.—
23 The table of sections for chapter 6 of title 5, United States
24 Code, is amended by inserting after the item relating to
25 section 605 the following:

“605A. Review procedures relating to initial regulatory flexibility analysis certifications.”.

1 **SEC. 3. PUBLICATION OF GUIDANCE.**

2 Section 609 of title 5, United States Code, is amend-
3 ed by adding at the end the following:

4 “(f) With respect to any rule that an agency deter-
5 mines is likely to have a significant economic impact on
6 a substantial number of small entities, the head of the
7 agency shall, on regulations.gov or any similar internet
8 website—

9 “(1) publish all guidance documents and other
10 relevant documents, as determined by the agency,
11 including any updated guidance documents that set
12 forth interpretations of the rule; and

13 “(2) allow for comments on the documents de-
14 scribed in paragraph (1) to ensure that small enti-
15 ties may access and provide feedback on those docu-
16 ments.”.

17 **SEC. 4. REVIEW PROCEDURES FOR SECTION 610 PERIODIC**
18 **REVIEW OF RULES.**

19 (a) IN GENERAL.—Section 610 of title 5, United
20 States Code, is amended—

21 (1) in subsection (b)—

22 (A) in the matter preceding paragraph (1),
23 by striking “the following factors”;

1 (B) in paragraph (4), by striking “and” at
2 the end;

3 (C) in paragraph (5), by striking the pe-
4 riod at the end and inserting “; and”; and

5 (D) by adding at the end the following:

6 “(6) any indirect costs described in the initial
7 regulatory flexibility analysis under section
8 603(b)(6), and any other indirect costs that may
9 have arisen during the 10-year period described in
10 subsection (a).”; and

11 (2) by adding at the end the following:

12 “(d) If an agency fails to conduct a review of a rule
13 as required under this section within the 10-year period
14 described in subsection (a)—

15 “(1) the Chief Counsel for Advocacy of the
16 Small Business Administration shall notify the agen-
17 cy that the rule has ceased to be effective;

18 “(2) the agency shall publish in the Federal
19 Register a notification that the rule has ceased to be
20 effective, and solicit comments for why the rule
21 should be reinstated; and

22 “(3) if, based on the comments received under
23 paragraph (2), the agency determines that the rule
24 should be reinstated—

1 “(A) the agency shall have 180 days begin-
2 ning on the date of that determination to com-
3 plete the review of the rule under this section;
4 and

5 “(B) upon completion of the review under
6 subparagraph (A), the rule shall be reinstated,
7 notwithstanding the notice and comment rule-
8 making procedures under section 553 of this
9 title.”.

10 (b) APPLICATION.—The amendment made by sub-
11 section (a)(2) shall apply with respect to any final rule
12 issued by an agency—

13 (1) during the 5-year period preceding the date
14 of enactment of this Act; or

15 (2) on or after the date of enactment of this
16 Act.

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