



**Legislative Bulletin.....December 1, 2011**

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**H.R. 527 — Regulatory Flexibility Improvement Act of 2011  
(Smith, R-TX)**

**Order of Business:** The bill is scheduled to be considered on Thursday, December 1, 2011, under a structured rule ([H.Res. 477](#)). The rule provides one hour of general debate with 40 minutes equally divided and controlled by the chair and ranking member of the Committee on the Judiciary and 20 minutes equally divided and controlled by the chair and ranking member of the Committee on Small Business. It makes six amendments in order described within this legislative bulletin and provides for one motion to recommit.

**Summary:** H.R. 527 amends chapter 6 of title 5, United States Code—known as the Regulatory Flexibility Act (RFA)—to ensure complete analysis of potential adverse or beneficial impacts of federal agency rules on small entities.<sup>1</sup> Under current law and executive orders, federal agencies are required to prepare a regulatory flexibility analysis describing the proposed and final rule’s impact on small entities (including small businesses) unless the head of the federal agency using the rule certifies that the rule would not have a “significant economic impact on a substantial number of small entities.” Reports indicate that these “loophole” certifications have increased in recent years. Also, federal agencies need only assess a new rule’s direct impact on small entities, not its indirect impact.

This bill is the first of two featured components of the [House Republican Plan for America’s Job Creators](#) scheduled for floor votes this week. According to the House Committee report [112-289, Part I](#), the purpose of the bill is “...to close loopholes and reduce the disproportionate burden that over-regulation places on small businesses, thereby enhancing job creation and hastening economic recovery.” A section-by-section summary is below:

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<sup>1</sup> The RFA as well as the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121) require federal agencies to take into account the impacts that proposed regulations will pose to small businesses.

- *Section 1. Short title; table of contents*
- *Section 2. Clarification and Expansion of Rules Covered by the Regulatory Flexibility Act*
  - Expands the current law requirements of analyzing a proposed or final rule’s impact on small entities to apply to all rules within the meaning of the Administrative Procedures Act;
  - Clarifies the term “economic impact” when federal agencies prepare a regulatory flexibility analysis to include consideration of a proposed rule’s indirect economic impact on small entities in addition to its direct economic impact;
  - Mandates that a federal agency must perform a regulatory flexibility analysis when a proposed rule’s effects are significant yet **beneficial**;
  - Adds tribal organizations to the list of small entities within the RFA’s purview. The Committee report explains that the same considerations that necessitate requiring agencies to perform regulatory flexibility analyses when small governmental bodies are concerned apply with equal force to tribal organizations;
  - Clarifies that the RFA applies to land management plans developed by the U.S. Forest Service and the Bureau of Land Management;
  - Clarifies that the IRS must comply fully with the RFA; and
  - Adopts the definition of “small organization” under the RFA that the Equal Access to Justice Act uses, which focuses on the resources available to the organization.
- *Section 3. Requirements for Providing More Detailed Analyses*
  - Requires the initial regulatory flexibility analysis to contain a “detailed statement” that requires agencies to consider the cumulative economic impact of the proposed rule in light of existing rules;
  - Requires federal agencies to describe any disproportionate economic impact on a specific class of small entities;
  - Requires federal agencies in their final regulatory flexibility analysis to describe any disproportionate economic impact on a class of small entities;
  - Requires a federal agency to provide a “detailed statement” and to identify the supporting “factual and legal” basis for certifying that a proposed rule will not have a “significant economic impact on a substantial number of small entities”; and
  - Requires quantifiable data as the standard for measuring the economic impact of a proposed rule on small entities. If unavailable, the federal agency must provide a “detailed statement explaining why quantification is not practicable or reliable” as well as “a more general descriptive statement” of the rule’s effects.

- *Section 4. Repeal of Waiver Authority and Additional Powers of Chief Counsel*
  - Repeals federal agencies’ ability to waive initial regulatory flexibility analyses and delay final regulatory flexibility analyses in emergency situations;
  - Permits the Chief Counsel for Advocacy of Small Business to make rules governing federal agency compliance with the RFA because the current status quo of federal agency compliance is best described by the Committee report as “inconsistent and recalcitrant”; and
  - Permits the Chief Counsel to intervene in federal agency adjudications to advise the federal agency of how its decision will affect small entities;
  
- *Section 5. Procedures for Gathering Comments*
  - Expands the use of advocacy review panels to all federal agencies—including independent agencies—for any “major rule”<sup>2</sup> or for any rule that will have a significant economic impact on a substantial number of small entities;
  - Requires the Occupational Safety and Health Administration, the Environmental Protection Agency, and the new Consumer Financial Protection Bureau to hold advocacy review panels before publishing an initial regulatory flexibility analysis; and
  - Permits the Chief Counsel for Advocacy for Small Business to waive the panel process when it is “impractical, unnecessary, or contrary to the public interest.”
  
- *Section 6. Periodic Review of Rules*
  - Reforms current law to clarify how federal agencies must perform their periodic regulatory review by mandating federal agencies to develop new periodic plans within 180 days and to publish these plans on their website;
  - Mandates that federal agencies must reiew all rules that have a significant economic impact on a substantial number of small entities regardless of whether an final regulatory flexibility analysis was prepared;
  - Requires that the federal agency report the results of this review and publish in the *Federal Register* a list of rules to be reviewed requesting public comments.
  
- *Section 7. Judicial Review of Compliance with the RFA*
  - Provides small entities prompt access to judicial review of an alleged violation of the RFA without having to wait through federal agency procedural delays. Current law requires small entities to wait until the

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<sup>2</sup> As defined by the Congressional Review Act to be any rule that has an annual economic impact of over \$100 million.

“final agency action” is complete before bringing a lawsuit alleging a RFA violation; and

- Clarifies the Chief Counsel for Advocacy for Small Business’ authority to file an amicus brief regarding the federal agency’s compliance with the RFA.

➤ *Section 8. Jurisdiction of Court of Appeals for Challenges to Rules Implementing the RFA*

- Grants the U.S. Court of Appeals jurisdiction to review legal challenges brought by small entities to rules promulgated by the Chief Counsel for Advocacy for Small Business to implement the RFA; and
- Clarifies the Chief Counsel’s authority to file amicus briefs in lawsuits challenging a federal agency’s compliance with the Chief Counsel’s rules implementing the RFA.

➤ *Section 9. Clerical Amendments*

- Makes necessary conforming and technical amendments.

**Amendments Ruled in Order:** The following six amendments ruled in order by the Committee on Rules will each be debatable for 10 minutes equally divided by a proponent and opponent of the amendment:

1. ***Critz (D-PA)*** – This amendment requires each initial regulatory flexibility analysis by a federal agency to include the estimated cumulative impact on small businesses of any other rule stemming from the implementation of the Free Trade Agreements.
2. ***Jackson Lee (D-TX)*** – This amendment exempts from the bill all rules promulgated by the Department of Homeland Security (DHS). **Note:** Page two of the bill’s CBO [report](#) explains that DHS is one of four federal agencies that promulgate most of the 3,000 to 4,000 final rules each year (according to the Congressional Research Service).
3. ***Cohen (D-TN)*** – This amendment exempts from the bill any federal agency rule that relates to food safety, workplace safety, consumer products safety, air quality, or water quality.
4. ***Peters (D-MI)*** – This amendment exempts from the bill any proposed rule, final rule, or guidance that the Director of the Office of Management and Budget determines will result in net job creation.
5. ***Jackson Lee (D-TX)*** – This amendment requires within two years of enactment a Government Accountability Office report to determine the cost of carrying out the Act, the effect it will have on federal agency rule making, and the impact of

repealing the ability of an agency to waive provisions in the bill when responding to an emergency. This same amendment failed in the Committee markup of the bill by a roll call vote of [11-15](#).

6. **Johnson (D-GA)** – This amendment exempts from the bill any rule making to carry out the FDA Food Safety Modernization Act (21 U.S.C. 2201 note). This same amendment failed in the Committee markup of the bill by a roll call vote of [10-16](#).

**Additional Background:** The Small Business Administration recently [reported](#) that federal rulemaking now imposes a cumulative burden of \$1.75 trillion on the national economy while small businesses bear the largest burden of these regulations.

**Committee Action:** Judiciary Chairman Lamar Smith (R-TX) introduced H.R. 527 on February 8, 2011. The bill was then referred to the Committee on the Judiciary and Small Business. On February 10, 2011, the Judiciary Subcommittee on Courts, Commercial and Administrative Law held a legislative hearing on the bill. On March 30<sup>th</sup> and June 15<sup>th</sup>, the Committee on Small Business held legislative hearings on the bill. On July 7, 2011, the full Judiciary Committee reported the bill favorably by a roll call vote of [18-8](#), and on July 13, 2011, the full Small Business Committee reported the bill favorably by a voice vote.

**Administration Position:** The Administration released a Statement of Administration Policy (SAP) on November 29, 2011 “strongly” opposing the bill.

**Cost to Taxpayers:** The Congressional Budget Office (CBO) released a cost [estimate](#) on August 24, 2011 stating that implementing the bill would cost \$80 million subject to authorization of appropriations over the 2012-2016 period due to increased federal agencies’ administrative responsibilities to expand the RFA. Reports indicate that the deficit reduction savings estimate for H.R. 3463—see explanation in bill analysis below—that the House plans to vote on tomorrow will be used as an offset for H.R. 527.

**Does the Bill Expand the Size and Scope of the Federal Government?:** The legislation is intended to provide regulatory relief to small businesses which is a reduction of the influence of the federal government.

**Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?:** No.

**Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?:** According to the Committee report, H.R. 527 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of rule XXI.

**Constitutional Authority:** The Constitutional Authority Statement accompanying the bill upon introduction states:

“Congress has the power to enact this legislation pursuant to the following: Article I, Section 1 of the United States Constitution; Article I, Section 8 of the United States Constitution, including, but not limited to, Clauses 1, 3 and 18 of Section 8; Article IV, Section 3, Clause 2 of the United States Constitution; and the Sixteenth Amendment to the United States Constitution.”

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## **H.R. 3463 — To reduce Federal spending and the deficit by terminating taxpayer financing of presidential election campaigns and party conventions and by terminating the Election Assistance Commission (Harper, R-MS)**

**Order of Business:** The bill is scheduled to be considered on Thursday, December 1, 2011, under a closed rule ([H.Res. 477](#)). The Rule provides one hour of general debate equally divided and controlled by the chair and ranking member of the Committee on House Administration and provides for one motion to recommit.

**Summary:** H.R. 3463 combines the texts of two bills that have previously received a House vote this Congress along with some technical changes: [H.R. 359](#) and [H.R. 672](#).<sup>3</sup> Title I—incorporating provisions of H.R. 359 authored by **Rep. Tom Cole (R-OK)**—eliminates taxpayer financing of presidential election campaigns and party conventions. Title II—incorporating provisions of H.R. 672 authored by **Rep. Gregg Harper (R-MS)**—eliminates the Election Assistance Commission. A summary of each Title is below:

- *Title I—Termination of Taxpayer Financing of Presidential Election Campaigns*
  - This title eliminates taxpayer funding of the Presidential Election Campaign Fund (fund), a fund created by Congress in 1971 that allows individual taxpayers to currently designate \$3 (or \$6 for a married couple filing their federal income taxes jointly) to the fund in order to publicly finance presidential candidates primary and general election campaigns and party convention expenses. Any remaining balance in the fund would be transferred to the general fund of the Treasury Department specifically *for deficit reduction purposes*;

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<sup>3</sup> H.R. 359, a bill to reduce Federal spending and the deficit by terminating taxpayer financing of presidential election campaigns and party conventions, passed the House on January 26, 2011 by a vote of [239-160](#). H.R. 672, the Election Support Consolidation and Efficiency Act, failed in the House under suspension of the rules requiring a two-thirds majority vote for passage on June 22, 2011 by a vote of [235-187](#).

- Congress created the program in the aftermath of the Watergate political scandal with the goal of restoring public confidence in the financing and fundraising of presidential political campaigns. Critics claim it has failed to achieve this goal since only 7.3% of income tax filers contribute to the fund down from a 1980 high of 28.7 percent;
- According to a recent [CRS report](#), the fund has paid out nearly \$1.5 billion to publicly finance presidential candidates and party conventions. The bulk of this support has gone to major party candidates with 4% of the funding received from third-party and independent candidates (approximately \$52 million). For the 2012 election cycle, the Democratic and Republican convention committees each received \$17.7 million;
- Approximately \$199 million remains in the fund as of this week. According to the Committee on House Administration (CHA), eliminating this program will save \$447 million over five years;
- Speculation exists as to whether viable presidential candidates will elect to use the public funds since President Obama in 2008 became the first elected President to forgo accepting any public funds; and
- The RSC has previously highlighted **Rep. Tom Cole's (R-OK)** bill to eliminate this public financing program including a [Waste Action Alert](#) and as a separate provision of the [Spending Reduction Act](#).

➤ *Title II—Termination of Election Assistance Commission*

- This title eliminates the U.S. Election Assistance Commission ([EAC](#)) within 60 days of enactment and transfers some of its functions to the Federal Election Commission (FEC). The Help America Vote Act of 2002 (HAVA) established the EAC to principally administer the distribution of federal money to the states to assist in upgrading their voting systems. According to the committee [report](#) of H.R. 672, the EAC has helped administer \$3.1 billion in federal grant money to the states for this purpose. Additionally, EAC's other functions include operating a federal voting system testing and certification program, maintaining a clearinghouse of election administration information, and performing a series of research studies mandated by HAVA;
- Congress originally intended to sunset the EAC in 2005 and only authorized appropriations for the EAC of up to \$10 million for fiscal years 2003, 2004, and 2005. However, according to the most recent full-year enacted appropriation, the EAC received almost \$18 million in fiscal year 2010. Since 2005, the agency has more than doubled in size while its principal functions have decreased.

- Since its inception, the agency has been subject to [well documented controversies](#) involving management and partisanship controversies, employee hostile work environment allegations, politicized hiring decisions, and discrimination charges based on partisan affiliation and military service. Also, the National Association of Secretaries of State, in recognizing the EAC's tasks as limited in duration and scope, has called upon Congress to not reauthorize or fund the EAC since 2005; and
- Eliminating the EAC has been an *RSC Sunset Caucus* priority this Congress. You can read the announcement calling for its elimination through legislation sponsored by **Rep. Gregg Harper (R-MS)** [here](#); and
- The CHA estimates that eliminating this federal agency would save \$33 million over five years.

**Additional Background:** Reports indicate that the savings from eliminating this federal program and agency will be used as an offset to any increase in spending expected from the two regulatory reform bills the House will consider this week: H.R. 527 and H.R. 3010.

**Committee Action:** Representative Gregg Harper (R-MS) introduced H.R. 3463 on November 17, 2011. It was referred to the Committee on House Administration (CHA) with an additional referral to the Committee on Ways and Means. No further Committee action has taken place.

**Administration Position:** The Administration has not released a Statement of Administration Policy (SAP) on this bill as of press time. However, the Administration issued a SAP on H.R. 359 strongly opposing that bill.

**Cost to Taxpayers:** The Congressional Budget Office (CBO) has not released a cost estimate for this bill. However, previous CBO reports for eliminating the Presidential Election Campaign Fund estimate a savings of [\\$447 million](#) and [\\$33 million](#) for eliminating the EAC over five years.

**Does the Bill Expand the Size and Scope of the Federal Government?:** No. It reduces the size of the federal government by eliminating a public financing program and an entire federal agency.

**Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?:** No.

**Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?:** According to the committee report, H.R. 672 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of rule XXI.



**Constitutional Authority:** The Constitutional Authority Statement accompanying the bill upon introduction states:

“Congress has the power to enact this legislation pursuant to the following: Article I, Section 4 of the U.S. Constitution granting Congress the authority make laws governing the time, place, and manner of holding Federal elections. Additionally, Amendment XVI to the United States Constitution. Additionally, since the Constitution does not provide Congress with the power to provide financial support to candidates seeking election to offices of the United States or to U.S. political parties, the general repeal of the presidential election fund is consistent with the powers that are reserved to the States and to the people as expressed in Amendment X to the United States Constitution. Further, Article I, Section 8 defines the scope and powers of Congress and does not include this concept of taxation in furtherance of funding campaigns within the delegated powers.”

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