Calendar No. 628

116TH CONGRESS
2d Session

SENATE

REPORT
116–326

HARMLESS ERROR LESSER PENALTY FOR SMALL BUSINESSES ACT

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 2757

TO WAIVE THE IMPOSITION OF A CIVIL FINE FOR CERTAIN FIRST-TIME PAPERWORK VIOLATIONS BY SMALL BUSINESS CONCERNS

DECEMBER 15, 2020.—Ordered to be printed

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DECEMBER 15, 2020.—Ordered to be printed

Mr. JOHNSON, from the Committee on Homeland Security and Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 2757]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 2757) to waive the imposition of a civil fine for certain first-time paperwork violations by small business concerns, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill, as amended, do pass.

CONTENTS

I. PURPOSE AND SUMMARY

S. 2757, the Harmless Error Lesser Penalty for Small Businesses Act, or the HELP for Small Businesses Act, would prohibit an agency from imposing a civil fine for certain first-time paperwork violations committed by a small business.

II. BACKGROUND AND THE NEED FOR LEGISLATION

By one estimate, Federal regulations cost American consumers and businesses more than $1.9 trillion every year.[1] These regulatory costs fall disproportionately on small businesses, which "bear the largest burden of federal regulations."[2] The primary reason that the regulatory cost burden falls disproportionately on small businesses is that firms with 20 employees incur "the same expense as a firm with 500 employees."[3] Accordingly, for larger businesses, the costs are spread over a larger number of employees, which lowers the costs and provides a comparative cost advantage over smaller firms.[4]

Small firms without in-house legal departments or expensive outside legal counsel can potentially make minor paperwork violations that result not only in fines and penalties, but also divert resources to responding to these legal consequences.[5] Often, these violations have little consequence and simply need to be corrected for the Federal agency to proceed with their collection of information.[6] For example, a business establishing a 401k for its employees that misses one signature on a 20-page form, rather than having an opportunity to correct the mistake, was issued a small penalty and spent hours communicating with the Federal agency that could have been put to better use.[7]

S. 2757 bars Federal agencies from penalizing first-time paperwork violation for businesses with fewer than 50 employees. It provides various exceptions to this rule for paperwork violations that negatively impact health, safety, the environment, and criminal investigations. It also requires agencies to track first-time violations and to report on their waivers.

III. LEGISLATIVE HISTORY

Senator James Lankford (R–OK) introduced S. 2757, the Harmless Error Lesser Penalty for Small Businesses Act, on October 31, 2019, with Senator Maggie Hassan (D–NH), Senator Marco Rubio (R–FL) and Senator James M. Inhofe (R–OK). The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 2757 at a business meeting on March 11, 2020. During the business meeting, a substitute amendment was offered by Senator Lankford and Senator Hassan that modified the definition of small business and expanded on the reasons for which an agency could still impose a civil penalty for a

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[1] Clyde W. Crews Jr., *Ten Thousand Commandments An Annual Snapshot of the Federal Regulatory State*, Competitive Enter. Inst. (2020), https://cei.org/sites/default/files/Ten_Thousand_Commandments_2020.pdf.

[2] *See, e.g.*, Nicole V. Crain & W. Mark Crain, Small Bus. Admin., The Impact of Regulatory Costs on Small Firms iv (2010) ("As of 2008, small business face an annual regulatory cost of $10,585 per employee, which is 36 percent higher than the regulatory cost facing large firms (defined as firms with 500 or more employees)."); Ben Gitis & Sam Batkins, Regulatory Impact on Small Business Establishments, American Action Forum, (2015) ("The results . . . indicate that regulations cumulatively have a highly regressive effect on businesses.")

[3] *Id.*

[4] W. Mark Crain & Nicole V. Crain, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, Nat'l Ass'n of Mfrs. 3 (2014), https://www.nam.org/wp-content/uploads/2019/05/Federal-Regulation-Full-Study.pdf.

[5] *Examining Federal Rulemaking Challenges and Areas of Improvement within the Existing Regulatory process: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs, Subcomm. On Regulatory Affairs and Fed. Mgmt.*, 114th Cong. (2015) (statement of Drew Greenblatt).

[6] *Id.*

[7] *Id.*

first-time violation by a small business. The amendment was accepted by unanimous consent with Senators Johnson, Lankford, Romney, Scott, Enzi, Hawley, Peters, Carper, Hassan, and Rosen present.

The bill, as amended, was ordered reported favorably by a roll call vote of 8 yeas to 5 nays. Senators Johnson, Portman, Lankford, Romney, Scott, Enzi, Hawley, and Hassan voted in the affirmative. Senators voting in the negative were Peters, Carper, Harris, Sinema and Rosen.

IV. Section-by-Section Analysis of the Bill, as Reported

Section 1. Short title

This section established that the bill may be cited as the "Harmless Error Lesser Penalty for Small Businesses Act" or the "HELP for Small Businesses Act."

Section 2. Paperwork violations by small businesses

Section 2 of the bill amends Section 3512 of title 44, United States Code, to add a new subsection at the end pertaining to small businesses.

This new subsection defines the terms "first-time violation" and "small business concern." A small business concern is defined as a business concern that operated with not more than 50 full-time employees in the preceding calendar year.

The new subsection bars an agency from imposing a civil penalty on a small business concern that commits a first-time violation. In determining whether to impose a penalty, an agency is required to consider violations of information collections by another agency. There are five exceptions to this rule: violations that could interfere with detection of criminal activity; violations of internal revenue or other tax, debt, revenue, or receipt laws; violations not corrected within 30 days of the agency providing actual written notice; violations that present or have the potential to present a danger to public health, safety, or the environment; and violations that have the potential to cause serious harm, injury or death.

The new subsection also requires the Director of the Office of Management and Budget to establish a process for agencies to track first-time violations and requires an annual report from any agency that waived a penalty during the previous year that describes each waiver.

Finally, the new subsection clarifies that nothing in this subsection relieves a small business from its legal obligations to comply with regulations, and that this subsection shall be construed to control if there are any conflicts with section 223 of the Small Business Regulatory Enforcement Fairness Act of 1996.

Section 2 subsection (b) makes technical edits.

V. Evaluation of Regulatory Impact

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, December 9, 2020.

Hon. RON JOHNSON,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2757, the HELP for Small Business Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

PHILLIP L. SWAGEL,
Director.

Enclosure.

S. 2757, HELP for Small Business Act

As ordered reported by the Senate Committee on Homeland Security and Governmental Affairs on March 11, 2020

By Fiscal Year, Millions of Dollars	2021	2021-2025	2021-2030
Direct Spending (Outlays)	0	0	0
Revenues	*	*	-1
Increase or Decrease (-) in the Deficit	*	*	1
Spending Subject to Appropriation (Outlays)	*	1	not estimated

Statutory pay-as-you-go procedures apply?	**Yes**	**Mandate Effects**	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2031?	**No**	Contains intergovernmental mandate?	**No**
		Contains private-sector mandate?	**No**

* = between -$500,000 and $500,000.

S. 2757 would direct federal agencies to waive fines on small businesses for first-time violations of reporting requirements. Those waivers would not apply if the agency determines the violation was intended to cover criminal activity, related to tax collections, not corrected in a timely manner, or dangerous to public health and safety. Agencies would be required to track and report on the waived fines.

CBO is unaware of any comprehensive list of specific fees, fines, or penalties at a level of detail that would isolate penalties for violations of reporting requirements. The Government Accountability Office reports, however, that aggregated collections for fines, penalties, and forfeitures total tens of billions annually.

Given the wide latitude agencies have in enforcing penalties and that violators are often given a grace period to correct the violation, CBO expects that few first-time violators of paperwork rules would pay significant fines. Thus, CBO estimates that the loss of fines, which are recorded in the budget as revenues, would be insignificant in every year but would total about $1 million over the 2021–2030 period.

CBO also estimates that satisfying the bill's reporting requirements across approximately 50 agencies would cost less than $300,000 annually and about $1 million over the 2021–2025 period; such spending would be subject to the availability of appropriated funds.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was reviewed by H. Samuel Papenfuss, Deputy Director of Budget Analysis.

VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows: (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * * * *

TITLE 44—PUBLIC PRINTING AND DOCUMENTS

* * * * * * *

CHAPTER 35—COORDINATION OF FEDERAL INFORMATION POLICY

* * * * * * *

Subchapter I—Federal Information Policy

* * * * * * *

SEC. 3512. PUBLIC PROTECTION.

(a) * * *

(b) The protection provided by [this section] *subsection (a)* may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.

(c) SMALL BUSINESSES.—

(1) DEFINITIONS.—In this subsection:

(A) FIRST-TIME VIOLATION.—The term "first-time violation" means a violation by a small business concern of a requirement regarding collection of information by an agency, where the small business concern has not previously violated any similar requirement regarding collection of information by that agency.

(B) SMALL BUSINESS CONCERN.—The term "small business concern", with respect to a calendar year, means a

business concern that employed an average of not more than 50 full-time employees on business days during the preceding calendar year.

(2) FIRST TIME VIOLATION.—

(A) IN GENERAL.—Except as provided in subparagraph (C), in the case of a first-time violation by a small business concern of a requirement regarding the collection of information by an agency, the head of the agency shall not impose a civil fine on the small business concern.

(B) DETERMINATION.—For purposes of determining whether to impose a civil fine on a small business concern under subparagraph (A), the head of an agency shall not take into account any violation by the small business concern of a requirement regarding collection of information by another agency.

(C) EXCEPTION.—The head of an agency may impose a civil fine on a small business concern for a first-time violation if the head of the agency determines that—

(i) the violation has the potential to impede or interfere with the detection of criminal activity;

(ii) the violation is a violation of an internal revenue law or a law concerning the assessment or collection of any tax, debt, revenue, or receipt;

(iii) the violation was not corrected on or before the date that is 180 days after the date on which the head of the agency provided the small business concern with actual notice of the violation in writing; or

(iv) the violation presents, or has potential to present—

(I) a danger to the public health;

(II) a danger to safety;

(III) a danger, or risk of harm, to the environment; or

(IV) the violation has the potential to cause serious harm, injury, or death.

(3) Agency tracking of first time violations.—

(A) IN GENERAL.—The Director shall promulgate regulations requiring an agency to track each first-time violation of a requirement regarding the collection of information by the agency.

(B) REQUIREMENTS.—In promulgating regulations under subparagraph (A), the Director shall ensure that an agency—

(i) does not make data compiled under the regulations available to the public; and

(ii) maintains the data described in clause (i) in a format that is consistent across agencies.

(4) ANNUAL REPORT.—Each year, any agency that waived a civil fine under paragraph (2)(A) of this subsection during the preceding year and any agency (as defined in section 221 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 601 note; Public Law 104–121)) that waived or reduced a civil penalty under section 223 of that Act during the preceding year shall submit a report to Congress that describes, for each such waiver or reduction—

(A) the specific requirement that was violated, including the provision of law that authorizes the agency to impose the civil fine or civil penalty for the violation;

(B) the amount of the civil fine or civil penalty that the agency could have imposed; and

(C) the industry in which the small business concern or small entity that committed the violation operates.

(5) RELATION TO OTHER LAWS.—In the event of a conflict between section 223 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 601 note; Public Law 104–121) and this subsection, this subsection shall control.

(6) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to relieve a small business concern from the obligation to comply with all legal requirements.

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THE SMALL BUSINESS REGULATORY FAIRNESS ACT OF 1996

* * * * * * *

SEC. 223. RIGHTS OF SMALL ENTITIES IN ENFORCEMENT ACTIONS.

(a) * * *

(b) * * *

(c) REPORTING.—[Agencies shall]

(1) Initial Report.—Agencies shall report to the Committee on Small Business [now Committee on Small Business and Entrepreneurship] and Committee on Governmental Affairs [now Committee on Homeland Security and Governmental Affairs] of the Senate and the Committee on Small Business and Committee on Judiciary of the House of Representatives no later than 2 years after the date of enactment of this section [Mar. 29, 1996] on the scope of their program or policy, the number of enforcement actions against small entities that qualified or failed to qualify for the program or policy, and the total amount of penalty reductions and waivers.

(2) ANNUAL REPORT.—Agencies shall submit annual reports to Congress in accordance with section 3512(c)(4) of title 44, United States Code.

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