

## Interactive Regulation

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**Abstract:** Small businesses shoulder significant costs in order to comply with the maze of government regulation that impacts commerce. The Regulatory Flexibility Act (RFA) was designed to alleviate that burden by making regulators more accountable in their enforcement of agency mandates. The RFA just celebrated its thirtieth birthday, and one of the most important pieces of business legislation developed during the 1970s has yet to fulfill its promise. This article goes beyond the calls for statutory reform to analyze how recent federal and state initiatives, as well as creative use of the internet and social media, could make the relationship between small businesses and regulators far more productive. We propose that while legal reform can be helpful, actions can be taken from both sides of the regulation equation to make the regulatory environment less hostile to small business while still substantially meeting agency goals. The underlying theme is that increased interactivity by both the government and the governed, and not simply statutory reform, will be most effective in bringing the long-delayed potential of the RFA to fruition.

### Introduction

In 1980, during the waning days of the Carter administration and while the Iranian hostage crises captured the attention of America, Congress quietly passed (and the President signed) some of the most influential business legislation of the decade. This legislation was influential not because it was yet another law designed to reign in business practices. Rather, the legislation was so influential because it was created to do quite the opposite and help vulnerable small companies interact with the very regulation and regulators that made doing business so challenging.

That legislation, known today as the Regulatory Flexibility Act (RFA), had the potential to fundamentally reshape how regulators interpreted, applied, and enforced the tens of thousands of rules and dictates that impact American commerce. The RFA would force administrative agencies to weigh the outcome of their actions. More importantly, however, it would also create a climate of interactivity between small business leaders and regulators that has never been before so robustly in the federal system. This interactivity gave RFA the power to fundamentally redefine the relationship between the government and the governed. The RFA also has the distinction of being one of the least examined pieces of business legislation, relative to its potential influence, in the past thirty years.

In short, the RFA represents a concerted effort to reduce administrative burdens by compelling federal agencies to take small firm concerns into account as part of the rulemaking process.<sup>1</sup> The RFA requires, among other things, that an administrative agency promulgating a rule must certify that a regulation will not significantly harm a substantial number of small entities. If the agency cannot certify this, then it must conduct a deeper analysis examining the rule's negative impact on small businesses and possible methods of reducing that burden.<sup>2</sup> The RFA's goal was meant to be nothing less than a culture shift in federal bureaucracy toward an appreciation of the value of small entities. It was designed to instill a desire—or at least create an obligation—to accommodate their unique interests.<sup>3</sup>

Yet thirty years later controversy over RFA effectiveness continues, and the need for reform has never been more pressing. Small businesses continue to suffer disproportionately from the cost of regulations. According to a recent study, small businesses (defined as firms with twenty or fewer employees) faced an annual regulatory cost of

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\$10,585 per employee, thirty-six percent more than the regulatory cost facing large firms (defined as firms with five hundred or more employees).<sup>4</sup> The promised sensitivity to business and interactivity between business and government has never been realized.

At the same time, public criticism of agency effectiveness in general has become severe. In the summer of 2010, in the wake of the BP oil spill, national attention focused on the manifest failures of some of the largest regulatory agencies. The leadership of the Minerals Management Service, after years of criticism, was finally replaced. President Obama told the country that the new agency chief's main task would be to "build an organization that acts as the oil industry's watchdog—not its partner."<sup>5</sup> New agencies like the Consumer Finance Protection Bureau were created to regulate matters affecting the interests of consumers and financial institutions. Furthermore, the President has mandated that agencies increase transparency and participation in their rulemaking processes by using the Web.<sup>6</sup> Federal agencies were required to create "open government plans" with several specific elements to increase public information, engagement and collaboration.<sup>7</sup> These government mandates represent a valuable reinforcement for the goals of the RFA, although they have not been widely recognized as such. By requiring agencies to make their rulemaking more transparent and increasing opportunities for feedback during the process, these initiatives have increased small firms' ability to convey their concerns to regulators and engage in a productive dialogue before unnecessarily burdensome regulations go on the books.

A new approach to the underlying goals of the RFA, one that empowers small businesses, taps the potential creativity of regulators and streamlines the interactivity between government and its citizens could have a much greater impact. Given the small chance of a mutually satisfactory resolution between small enterprise owners and regulators who follow the letter of the RFA, this article eschews a primary focus on the standard account. Instead, the purpose of this article is to encourage interactive regulation from both the businessperson and regulator perspective. We recommend strategies for business people to more effectively interact with government agencies. We also recommend strategies for regulators to make their processes more open and receptive to input.

The goal for small firms is not the prevention of all future regulation that could possibly affect their business, but to establish a collaborative effort with government that maximizes the goals of federal mandates while minimizing the costs imposed on firm operations. This change not only requires a different approach, but a different interactive perspective toward regulation and the RFA. The purpose of this paper is to make this new interactive approach a reality.

Part I of this article examines the history, development, and current treatment of the RFA. This Part will show that although the RFA has been subject to significant criticism, it still has the potential to improving the efficiency and effectiveness of agencies, and in particular their regulation of small firms.

Part II presents strategies for small enterprise owners to more effectively interact with regulators through a variety of means. As we explain in Part II, providing regulators with more detailed, accurate and current information about the specific challenges small enterprises face should help regulators work more efficiently to balance the needs of small enterprises with broader social, commercial and environmental goals.

Part III presents strategies for federal agencies to improve their responsiveness to small entities by opening new portals for communication. In this section, we suggest lessons that federal agencies can learn from state-level innovations in addition to recommending other strategies. This article concludes that interaction with government that is based on a the development of mutual trust and commitment toward resolution, although less viscerally satisfying than traditional approaches, can over the long-term produce a more favorable competitive environment for companies and more flexible opportunities for regulators to satisfy legislative commands.

## **I. The Purpose, Function, and Limitations of the RFA**

### *A. The History and Substance of the RFA*

During the 1970s, Congress became increasingly concerned with the growing burden that federal regulation imposed on small businesses.<sup>8</sup> In a series of hearings, Congress learned that small businesses were being grossly underrepresented in regulatory proceedings and that single-solution regulation, applied uniformly to all companies disproportionately burdened small enterprises.<sup>9</sup> Frustrated small business representatives attended a 1980

conference on small business hosted by the White House.<sup>10</sup> Many business attendees expressed frustration over the growing regulatory burdens and paperwork demands that federal regulations required.<sup>11</sup>

Congress responded by passing the RFA. Enacted with relatively little fanfare in 1980,<sup>12</sup> President Carter stated that the new regulation would “give[] Americans their money’s worth.”<sup>13</sup> The RFA took effect on January 1, 1981.<sup>14</sup>

In short, the RFA requires federal agencies to consider the impact of their regulatory proposals on small entities before imposing new rules. This requires that an initial regulatory flexibility analysis (IRFA) be published in the Federal Register at the time a new rule is proposed.<sup>15</sup> The IRFA must include the rationale behind the proposed rule, its goals, the type and number of effected entities, a description of compliance requirements, and the need for any professional skills required to comply with the rule.<sup>16</sup> The IRFA must also identify any rules that already exist that might conflict or overlap with the proposed rule and contain alternative options that would achieve the agency’s objections in a less burdensome fashion.<sup>17</sup> Later in the rulemaking process, agencies must also prepare a final regulatory flexibility analysis (FRFA), which discloses the rule’s rationale and objectives, a summary of issues raised during the public comment period, an evaluation of those issues, a list of any changes made in response to public comments, and a statement of why the agency rejected available alternatives.<sup>18</sup>

The RFA leaves an escape clause, however, for agencies to avoid this entire process. The head of an agency may simply certify that the rule will not impose a “significant economic impact on a substantial number of small entities” if promulgated.<sup>19</sup> If that occurs, then the agency simply has to publish the certification and need not undergo further regulatory analysis.<sup>20</sup> While some agencies have developed definitions for the terms ‘significant impact’ and ‘substantial number’ on their own, other agencies have left interpretation of the statute up to the discretion of the individual in the agency.<sup>21</sup> As a result, this initial determination of whether a proposed regulation will affect small businesses, made mainly within the discretion of the agency, determines whether the rigorous RFA analyses are implemented fully or circumvented altogether.

The potential for abuse of this discretionary opt-out provision was only one of the RFA’s weaknesses. Another was the difficulties small firms faced in redressing agency noncompliance with the RFA. Certainly, concern for small businesses was always at the heart of the RFA.<sup>22</sup> Even in its original form, the RFA recognized the need for more nuanced treatment of these enterprises, acknowledging that “unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes.”<sup>23</sup> In its early years, however, small firms had no way to protect their interests when agencies failed to follow the RFA’s requirements.

In 1996, the RFA was amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA).<sup>24</sup> Until that amendment, small enterprise owners who felt that new or proposed regulations had been promulgated in violation of the RFA had no legal recourse. In response to pressure from the small business community, which felt that many agencies were not complying with the terms of the RFA, the SBREFA strengthened the RFA by providing for a judicial review process.<sup>25</sup> The SBREFA’s judicial review provisions allowed small businesses to file a complaint regarding a potential violation of the RFA up to a year after the agency publishes the rule.<sup>26</sup> If a court finds that the agency has not complied with the RFA, it may remand the rule to the agency and delay enforcement of the rule until the agency has analyzed the rule as required.<sup>27</sup> SBREFA also tightened the factual requirements for agency certifications by requiring that agencies articulate a specific factual basis that supports an agency’s statement of certification.<sup>28</sup> Finally, SBREFA also required the Environmental Protection Agency and the Occupational Safety and Health Administration to convene small business advocacy review panels to consult with small entities on regulations expected to have a significant impact on them, before the regulations were published for comment.<sup>29</sup>

In August 2002, the RFA was further strengthened when President Bush signed Executive Order 13,272.<sup>30</sup> That order mandated all federal agencies to develop written policies describing how they measured the impact of proposed legislation on small entities.<sup>31</sup> It also gave further definition to the process by which agencies were to work with the SBA’s Office of Advocacy to develop alternatives to legislation that would significantly affect a substantial number of small entities, and required the SBA to develop training for the agencies on how to comply with the RFA.<sup>32</sup>

Subsequent efforts to improve the RFA have failed. In 2007, the House Small Business Committee unanimously approved a bill to add new requirements to the RFA.<sup>33</sup> If passed, the bill would have required agencies to consider

the indirect impacts of their proposed legislation on small entities as well as the direct impacts as the RFA already mandated.<sup>34</sup> It would also have required federal agencies to conduct a periodic review of all of their regulations to determine whether any of them should be modified or eliminated.<sup>35</sup> The bill never reached the House or Senate for review.

Although the RFA has not evolved significantly for several years, many states have enacted their own versions of the RFA. Some states have adopted versions of a model “mini-RFA” that the SBA has developed. In May 2009, for example, Connecticut amended the state’s regulatory processes to help ensure that new rules and regulations do not unnecessarily burden small businesses.<sup>36</sup> These state laws share the RFA’s goal of increasing agency appreciation of entrepreneurs and small business owners and encouraging interaction between agencies and small firms. Other state laws, however, try to achieve this general goal through a number of different means. In some instances, innovations on the state level have succeeded where the RFA arguably has not. In Part IV below, we discuss some effective state versions in more detail and explores ways in which these variations might serve as a model for further reform of the RFA.

### *B. Perceived Weaknesses in the Statutory Language*

Both government and academic commentators have acknowledged the numerous weaknesses in the statutory language of the RFA. Most prominently, critics have noted that a number of vague terms in the RFA impede clear and consistent application across agencies. As noted earlier, the RFA requires agencies to consider alternatives when they determine that a proposed regulation will have a “significant economic impact on a substantial number of small entities.”<sup>37</sup> Scholars analyzing the RFA’s effectiveness have pointed out the relative vagueness of the terms ‘significant’ and ‘substantial number.’ As one author notes, without further clarification these terms are “completely discretionary.”<sup>38</sup>

Another author expressed concern over the meaning of the words ‘small entities’. The RFA defines the term as having the same meaning as “‘small business concern’ under section 3 of the Small Business Act.”<sup>39</sup> The Small Business Act, in turn, defines a small business concern as one that is “independently owned and operated and which is not dominant in its field of operation.”<sup>40</sup> Further size standards can be established<sup>41</sup> and agencies typically use elaborate Small Business Administration (SBA) standards tailored to particular industries.<sup>42</sup> The result has been unusual classifications for small business enterprises. For example, the SBA defines small entities for cable and pay television as firms generating \$11 million or less in revenue annually.<sup>43</sup> This definition then resulted in 1,423 of the 1,758 cable and pay television firms in existence to fall under the ambit of small entity protection.<sup>44</sup> This led one author to call the ‘small entity’ definition “tenuous” and to conclude that, “[s]urprisingly, a small entity may include a national organization generating millions of dollars and employing thousands of workers. . . . Thus, the group that the RFA attempts to protect, small entities, has many definitions, the meanings of which vastly differ among industries and people.”<sup>45</sup>

Another troublingly vague provision is the RFA’s requirement, under Section 610, that agencies review their own regulations every ten years. Scholars have noted that different agencies interpret this requirement differently.<sup>46</sup> Some agencies, including the Department of Transportation, interpret Section 610’s terms to mean that they must review *all* of their regulations every ten years.<sup>47</sup> Other agencies, including the Environmental Protection Agency, understand Section 610 to require them only to review those regulations that the agency believed would have a “significant impact on a substantial number of small businesses” when the regulations were adopted.<sup>48</sup>

Then there is the question of when that ten-year clock starts to run. Michael See has noted that some agencies take the view that amending a rule “‘restarts the clock,’ allowing the agency another ten years for RFA review from the date of amendment” rather than the date that the initial rule was adopted.<sup>49</sup> See notes, for example, that with regard to a 1993 Department of Commerce regulation limiting the pollock fishing season that was amended in 1996, the Department of Commerce would likely argue that it had ten years from the date of the amendment to review the rule rather than ten years from the date of the original regulation’s enactment in 1993.<sup>50</sup> The variability among agency interpretations of what Section 610 requires further reduces the RFA’s effectiveness overall.

The Government Accountability Office (formerly the General Accounting Office) has echoed the concerns of scholars like Shive and See, repeatedly calling for reforms of the RFA because its terms are so vague. In 1994, the GAO noted that the terms of the RFA lend themselves to an impossibly wide range of interpretation, leading to

widely divergent results.<sup>51</sup> In 2002 and 2006, the GAO issued another critique of the RFA on much the same grounds as its 1994 report.<sup>52</sup> In each of these reports, the GAO urged Congress to provide SBA with the authority to interpret the RFA's requirements, reasoning that a uniform interpretation would lend more consistency to agency understanding and implementation of the RFA's terms.

Another recognized weakness of the RFA is its failure to reach regulations that indirectly affect small businesses, even though their eventual impact may be greater than direct regulation.<sup>53</sup> For example, the EPA's certification of ozone emission standards, which states regulate, has been held to be exempt from the RFA's provisions because the standards did not directly affect small businesses.<sup>54</sup> There was little debate that the certification affected small businesses; the Small Business Administration, in fact, had advised the EPA that the standards would substantially burden those businesses.<sup>55</sup> Because the SBA served only as an advisory agency to the EPA on this issue, however, the court refused to consider the SBA's determination in evaluating the effect of the EPA regulations on small businesses.<sup>56</sup> Indeed, recent case law confirms that courts generally will not consider RFA-based challenges to a regulation brought by small businesses that are only indirectly affected by that regulation.<sup>57</sup>

Both scholars and government officials have called attention to this failure.<sup>58</sup> In 2006, Keith Holman, then the Assistant Chief Counsel in the SBA's Office of Advocacy, noted that the RFA could be strengthened in part by broadening the scope of the RFA to address both the direct and indirect impacts of proposed regulation on small businesses.<sup>59</sup> As noted above, this issue was addressed in the "Small Business Regulatory Improvement Act" (HR 4458), introduced in December 2007, but the bill did not reach either the House or the Senate for a vote.<sup>60</sup>

Critics have also noted that the RFA does little to address the cumulative impact of regulations that affect small businesses—the problem, as Keith Holman called it, of "death by a thousand cuts."<sup>61</sup> Just as the RFA fails to address regulations that indirectly affect small businesses, it does little to address the cumulative effect of regulations that may not have a "significant impact on a substantial number of small businesses" individually, but which significantly affect those businesses over time and in conjunction with other regulations. To help address this problem, Holman has recommended that Congress codify Executive Order 13272, which requires agencies to analyze the cumulative and foreseeable indirect effects of their regulations on small entities.<sup>62</sup>

While many scholarly analyses and government reports have focused on the RFA's flaws, few have discussed the RFA's limitations in light of the unique challenges small businesses face. By focusing on the goals of assisting small enterprises, which was certainly a primary goal of the RFA, scholars have tended to overlook the ways in which the regulators themselves might benefit from a closer and more nuanced interaction with their smaller targets.

### *C. Perceived Weaknesses in the Application of the Statutory Language*

Because agencies have great latitude to interpret the language of the RFA as they see fit, different agencies can come to entirely different conclusions about their meaning. That, in turn, can lead to disparity and inconsistency in their application from agency to agency, and perhaps even from year to year. Some interpretations may appear to be more self-serving than sensible. For example, Shive observed that in 1999, for example, the EPA determined that one of its regulations would impose costs of \$7,500 the first year and \$5,000 the next year on over 5,000 small businesses, and require each of them to prepare a report that would take them approximately 100 hours to complete. According to the EPA, this regulation did not have a "significant impact on a substantial number of small businesses"—a determination that the EPA has made for ninety-six of the regulations it has passed since 1996.<sup>63</sup>

Just as agencies' interpretations of key RFA terms vary, agencies vary greatly in their compliance with the RFA overall. A 1994 GAO report found that the EPA and SEC were among the agencies exhibiting the most comprehensive compliance with the RFA, while the IRS was among the least compliant.<sup>64</sup> The GAO offered variations on the same criticism in their 2002 and 2006 RFA critiques as well.<sup>65</sup> To what extent this variable compliance is due to the agencies' differing interpretation of the RFA's requirements, as opposed to other possible explanations such as the agencies' failure to meet their statutory obligations as they understand them, is not clear.

Agency compliance does appear to be improving, however. One review of the RFA on its twenty-fifth anniversary, written by a member of the SBA's Office of Advocacy, noted increasing agency compliance with the RFA, and praised the RFA process for its effectiveness in enabling agencies to write regulations that were more responsive to the concerns of small entities.<sup>66</sup>

Scholars have also suggested that agencies exercise this latitude under the RFA to simply avoid the kind of burden analysis that the RFA was meant to compel. As noted above, agencies considering a new regulation are only required to conduct a regulatory flexibility analysis if they have determined that the proposed regulation may have a significant economic impact on a substantial number of small entities. If the agency determines that the proposed rule will not have such an impact, it can issue a certification to that effect and forgo the analysis that would otherwise be required.<sup>67</sup> Because agencies can make that burden-reducing determination unilaterally, scholars have noted, the RFA leaves too much room for abuse of agency discretion.<sup>68</sup> One Department of Labor employee seemed to confirm this suspicion when he explained that “[w]e routinely certified [that] proposed rules would have no significant impact on a substantial number of small entities without a second thought. We didn’t even bother to decide internally what constituted a ‘small entity,’ or what ‘significant’ meant either.”<sup>69</sup> Similarly, Keith Holman has noted that agencies can circumvent the terms of the RFA by issuing guidance documents and enforcement initiative consent agreements, neither of which employ the notice and comment procedures that the RFA addresses.<sup>70</sup>

Other critics, including Eric Phelps, have expressed concern that agencies have little incentive to comply with several RFA requirements because there is little judicial review to hold them accountable for not doing so.<sup>71</sup> For example, as noted above, the RFA requires agencies to conduct an initial regulatory flexibility analysis (or IRFA) and consider whether any less burdensome alternatives are available.<sup>72</sup> In *Allied Local & Reg’l Mfrs. Caucus v. USEPA*,<sup>73</sup> where the EPA was accused of failing to comply with this requirement, the U.S. Court of Appeals for the District of Columbia ruled that it had no jurisdiction to decide the issue.<sup>74</sup> The only RFA provisions subject to judicial review, according to the court, are the subset of the RFA’s provisions listed in the “Judicial Review” provision at section 611.<sup>75</sup> As a result of this lack of jurisdiction to evaluate IRFA compliance and the lack of judicial power to convene review panels, small businesses cannot participate in this important early stage of the agency’s rulemaking process.<sup>76</sup> They also cannot ensure that SBREFA objectives are carried out by the agency.<sup>77</sup>

What little judicial interpretation of the RFA there has been has set a low bar for agency compliance, and courts have generally adopted a “hands off” policy toward the RFA. The RFA has been interpreted as a purely procedural requirement, imposing no substantive constraint on agency decisionmaking.<sup>78</sup> Courts will not interfere with an agency’s own judgment of how to comply with the RFA’s requirements, or whether it is exempt from doing so, unless there is a flagrant abuse of the agency’s discretion. Courts have also taken a fairly narrow view of who has standing to challenge an agency’s compliance with the RFA in the first place. At least one court has limited the right to sue an agency for failing to comply with the RFA’s initial regulatory flexibility analysis requirement to small firms who would be affected by the final agency action.<sup>79</sup>

## II. Strategies for Small Enterprises in Navigating the RFA

A key decision for small firms is whether to act strategically in their long-term interest and, if so, how to do so in a way that is both realistic and effective. The most competitive small enterprises will acknowledge the need to take regulatory concerns into account as a business concern, in the same way they acknowledge other issues that may be beyond their expertise but which can significantly affect their chances of success.

While the RFA mandates some amount of agency attentiveness to small firms' concerns, its limitations have been well documented, as described above. In order to increase transparency and improve real-time communication between small firms and agencies throughout the rulemaking process, small firms must have a stronger voice in the rulemaking process. The SBA plays some role in training and policing the agencies in small firm sensitivity, but small firms can and should also take the issue of maximizing RFA benefits into their own hands. They can do so both directly (in terms of specific exemptions and adjustments to regulations) and indirectly (in terms of improved long-term relationships with relevant agencies).

But how can these small enterprises better communicate their interests to relevant agencies, when so many of these enterprises, already under enormous financial pressure simply to turn a profit, put regulatory matters at the bottom of their priority list? There are several ways for small businesses to contribute meaningfully to that process, rather than coming to the table too late to effect change. These include taking advantage of technological advances and federal imperatives to improve the accessibility of the rulemaking process as well as finding strength in numbers through trade associations and other means. These options can help improve the substantive dialogue between agencies and firms, creating and/or strengthening the working relationship between them and, presumably, leading to a more nuanced appreciation of small firm concerns in the rulemaking process. We describe some of the most promising routes for small firms to take below.

### A. *Make Strategic Use of the Online Open Government Initiatives.*

Small businesses can benefit from recent mandates compelling federal agencies to increase opportunities for public participation in the rulemaking process. These mandates require agencies to take several steps that have ancillary benefits for small firms. For example, because agencies are now required to put their information online in a searchable format, small firms are better able to find information about, and give feedback on, potential rules that may affect their operations during the rulemaking process. While these increased transparency mandates are designed to benefit the public in general, small firms can reap greater and more concrete benefits from them than other stakeholders if they use the resulting flow of information competitively.

One of President Obama's first actions upon taking office was to direct federal agencies to make better and more extensive use of the internet in order to improve transparency, participation and collaboration.<sup>80</sup> An Open Government Directive ("Directive") issued in December 2009 provided more detailed instructions to agencies about implementing these values.<sup>81</sup> A comprehensive overview of the Open Government Initiative, as it is called, was established through the White House website.<sup>82</sup> This website features an "Innovations Gallery" that showcases some of what the Administration considers the most outstanding ways in which agencies have improved transparency, participation and collaboration.

The Open Government Initiative increases the potential for small firm interaction with government agencies in several ways. For example, the Directive required agencies to "publish information online in an open format that can be retrieved, downloaded, searched and indexed by commonly used web search applications."<sup>83</sup> The Directive also ordered each federal agency to develop a comprehensive Open Government Plan to meet the terms of the President's mandate by April 2010. The Open Government Plans were also to include "details as to how your agency is complying with transparency initiative guidance such as [...] eRulemaking[.]"<sup>84</sup> They were also required to include "descriptions of and links to appropriate websites where the public can engage in existing participatory processes of your agency" and "proposals for new feedback mechanisms, including innovative tools and practices that create new and easier methods for public engagement."<sup>85</sup> Through these requirements, agencies were compelled both to make it easier for stakeholders to find existing ways of engaging in agency processes, such as rulemaking, and to expand the opportunities for such engagement.

The Directive further required each agency to create an “Open Government Webpage” at their agency’s website, to be maintained and updated “in a timely fashion.”<sup>86</sup> Each Open Government Webpage was to “incorporate a mechanism for the public to (i) give feedback on and assessment of the quality of published information; (ii) provide input about which information to prioritize for publication; and (iii) provide input on the agency’s Open Government Plan.”<sup>87</sup>

The Open Government Initiative bodes well for small firms. The new opportunities for public input, once developed and implemented by the agencies, offer small firms another means of communicating with agencies about their interests and increase accessibility to those agencies. They require agencies to create new ways for the small entities they regulate, along with the general public, to voice their concerns about proposed or existing regulations, even if they do not compel the agencies to listen to those concerns.

Small firms can use these initiatives to their advantage in several specific ways. For example, a small firm might periodically perform a search of an agency’s website to determine whether there are any proposed regulations relevant to its business. Prior to the Directive, a small firm had no assurance that any of an agency’s proposed rules and any related agency discussions would be searchable online, let alone all of them. Before the release of Open Government Plans, small firms might not have known what participatory processes an agency offered in the first place. Small firms now have much greater opportunities to (1) find out how to interact with agencies, (2) take part in developing new means of interacting with agencies, and (3) learn what substantive matters potentially affecting their businesses are on the table at the agencies that affect them the most.

#### *B. Engage Agencies Through Social Media and Dedicated Websites.*

Small firms can also use social media to interact with agencies to an extent that was unimaginable even ten years ago, let alone in 1980 when the RFA was passed. According to a recent GAO report, twenty-two of the twenty-four major federal agencies had a presence on Facebook, YouTube and/or Twitter.<sup>88</sup> Agencies also use blogs, wikis, podcasting and mashups to convey information about agency activity.<sup>89</sup>

Similarly, most small firms have some presence on the internet. According to the Small Business Success Index published by the University of Maryland’s Smith School of Business and Network Solutions, 67% of small firms surveyed either have a website or plan to have one within two years, and 24% of small firms surveyed already use social media.<sup>90</sup> At the very least, most small business owners have an email account and the ability to interact online. Using the internet and social media in particular, to communicate with federal agencies offers the potential of streamlining and facilitating interaction in a way that benefits both the regulators and the regulated. Some of this interaction is happening already. When the SBA itself started using social media, it received an enthusiastic response. The SBA’s Facebook pages and Twitter feeds for its regional offices were activated in the third week of December 2010. Two weeks later, there were over 2,500 followers on the agency’s Twitter account, and close to 5,000 “Likes” on their Facebook page.<sup>91</sup>

Another underused innovation supporting the goals of the RFA is [www.regulations.gov](http://www.regulations.gov). This website, part of the eRulemaking initiative, allows users to “search for” and access “a proposed rule, final rule or Federal Register (FR) notice,” “submit a comment on a regulation or on another comment,” “sign up for e-mail alerts about a specific regulation” and “subscribe to RSS feeds by agency of newly posted FR notices.”<sup>92</sup> The site provides access to information from nearly 300 federal agencies.

While the Directive does a great deal to encourage agency responsiveness to small firms, and other stakeholders who benefit from increased transparency and communication, its potential benefits are greatest where a small firm can target the specific agency or agencies that most directly affect its operations. The [www.regulations.gov](http://www.regulations.gov) website, in contrast, allows public searches of proposed and current regulations from all major government agencies. As the website explains, “In the past, if members of the public were interested in commenting on a regulation, they would have to know the sponsoring agency, when it would be published, review it in a reading room, then struggle through a comment process specific to each agency. Today using [Regulations.gov](http://Regulations.gov), the public can shape rules and regulations that impact their lives conveniently, from anywhere.”<sup>93</sup> Using this website, small firms can search broadly for proposals that could affect its operations without limiting themselves to specific agencies, which could be especially advantageous for small firms that know relatively little about the rulemaking process and/or the federal agencies most likely to regulate their specific operation.



As part of the Open Government Initiative, the Regulations.gov website was retooled to create the Regulations.gov Exchange, which explicitly invites public comment and participation in the rulemaking process and on improvements to the Regulations.gov website itself. For example, one well-received proposal was the organization of regulatory information by regulatory category, such as Defense, Energy, Environment or Health Care. The site notes that the advantages to such an organizational scheme would include that “rulemakings of federal agencies [would] become more compatible with commonly used media categories, providing a real- world perspectives about rules.” An unusual feature of the Regulations.gov Exchange (unusual, at least, for a government website) is the star-rating feature that allows users to evaluate the usefulness of the site’s features.<sup>94</sup>

While most agency usage of social media is designed to stream information one way—from the agency to the general public, thus ostensibly meeting the goal of transparency—these media offer small firms a valuable new way to convey their concerns and interests back to the agencies whose regulations can affect every aspect of their operations.

### *C. Leverage the Lobbying Power of Trade Associations.*

Trade associations have enormous potential to help small enterprises make their best strategic use of the RFA. Trade associations are professional groups that bring firm representatives together to share information and concerns about their industry. They often act on behalf of an industry group to promote the association members’ interests to the government at the federal and/or state level. With a centralized communication channel to small firms in a particular industry already in place, trade associations could serve as a critical point of contact for agencies seeking input from the smaller firms in a given industry.

Two kinds of trade associations exist to help small entities. There are industry-specific associations, which offer benefits to both large and small firms within a given industry. Other trade associations operate to help meet the needs of small businesses in general. These include the National Small Business Association (NSBA), the National Association of Women Business Owners (NAWBO), which assists women entrepreneurs, and the National Federation of Independent Businesses (NFIB), the largest lobbying organization for small businesses in the country. Small firms can make strategic use of both kinds of associations.

One of the most common ways for small firms to leverage the power of trade associations has been through litigation. Trade associations have taken the lead in several lawsuits challenging new regulations because the promulgating agency failed to comply with RFA requirements. In one case, the International Franchise Association and a number of other national trade associations succeeded in getting a Northern District of California court to enjoin the Department of Homeland Security’s “no-match” rule, which prohibited employers from hiring or retaining workers whose names did not match their Social Security number records. Their complaint alleged that the federal government did not assess the impact of this rule on small businesses as required by the Regulatory Flexibility Act, nor did it prove that there was no less burdensome alternative available.<sup>95</sup> After nearly two years of litigation, the Department of Homeland Security eventually rescinded the rule.<sup>96</sup>

While trade associations have great potential to help small firms communicate with regulators, they may have disadvantages for small firms as well. One potential obstacle to the use of trade associations is the perception that they are deaf to the concerns of small enterprises. In some industries, small firms have been reluctant to engage in trade association activity because they believe that larger firms, with the capacity to devote greater resources to funding and leading such associations, dominate or distort the agenda. While some commentators have pointed out that trade associations are often dominated by large companies, leaving the concerns of small enterprises underrepresented<sup>97</sup>, this is not always the case. In any event, there is far less risk that a large firm will dominate a trade association’s lobbying agenda for trade associations specializing in the interests of small firms, such as the NSBA. The NSBA, for example, only gives voting rights to small firm members.<sup>98</sup>

### *D. Voice Concerns Through the R3 Process.*

One of the easiest ways for small firms to register concerns about particular laws is to take advantage of the Regulatory Review & Reform Initiative, also known as the R3 process. Through this annual process, the SBA’s Office of Advocacy invites small firms to single out regulations for review and possible revision. As part of the

process, the Office of Advocacy solicits suggestions from small entities at the end of every calendar year. A few months later, the Office publishes the “Top Ten Rules for Review and Reform.” In order to track agency progress in reviewing these rules, the Office posts an update on their status every six months.<sup>99</sup> The Office of Advocacy has described the R3 process as “a tool for small business stakeholders” to help “identify and address existing federal regulations that should be revised because they are ineffective, duplicative, or out of date.”<sup>100</sup> The R3 process is not just a vehicle for complaints. It also allows small firms to engage more creatively with the government by suggesting positive regulatory reforms.

Despite the visibility and responsiveness of the R3 process, however, relatively few small firms have taken advantage of it. The 2009 “Top Ten Rules for Review and Reform” were chosen from a field of only 38 nominations, fewer than half of the 80 nominations the SBA received in 2008.<sup>101</sup> While it is not clear why more small firms do not take advantage of this process, it is likely that many firms simply do not know about it. Given the attitudes of small firms discussed in Part II above, it is also possible that many small firms lack the information they would need to take part in the process, such as the specific name of a regulation affecting them and/or the information necessary to suggest an affirmative change. A third possibility is that some small firms simply do not want to engage with the SBA at all.

### **III. Strategies to Improve Agency Responsiveness to Small Businesses**

While small businesses can do much to achieve their own goals in working with regulators, regulators also have new means to help them achieve the RFA’s mandate of sensitivity to small firms’ concerns. The original terms of the RFA asked the agencies to take the considerations of small businesses into account during the rulemaking process, but provided little direction as to how agencies might learn what the true constraints and concerns of these businesses were. Federal agencies can vastly improve their understanding of and responsiveness to small businesses, as the RFA originally compelled them to do, by adopting some of the reforms suggested below. None of them requires a significant investment of additional resources, and the potential benefits for both regulators and the smaller firms they affect could be tremendous.

#### *A. Consider Potential Advantages of Adapting State Models.*

In an effort to spread the gospel of regulatory flexibility from federal to state government, the SBA’s Office of Advocacy first drafted model legislation for state versions of the RFA in 2002. Since that time, according to the SBA, “37 state legislatures have considered regulatory flexibility legislation, and 22 states have implemented regulatory flexibility via Executive Order or legislation.”<sup>102</sup> The number of states adopting some version of a regulatory flexibility law has grown over time.

A closer examination of these state statutes, however, shows a wide variation in their potential benefit for small businesses. For example, while Arizona law establishes fairly comprehensive provisions that mirror most aspects of the RFA, the Alabama laws cited by the SBA as responsive to the needs of small businesses actually make no mention of, and compel no regulatory concern for, small businesses or entrepreneurs at all.<sup>103</sup> Alaska’s small business flexibility law was repealed effective January 1, 2009.

While many states have adopted a regulatory structure similar to the RFA, some states have added their own innovations designed to improve communication between agencies and small firms. In May 2009, for example, Connecticut augmented its own regulatory flexibility laws. Like the RFA, Connecticut state law had already required agencies to estimate the cost of proposed regulations on small businesses and assess their likely impact before enacting them. The new law, however, requires state agencies to go a step further by notifying the public about how to obtain copies of the new small business impact analysis and the regulatory flexibility analysis in advance of public comment period for the proposed regulation.<sup>104</sup> The fact that ninety-four percent of Connecticut’s 73,000 employers have fewer than one hundred employees underscores the importance of providing this notice to small businesses in the state.<sup>105</sup>

Several states have created remarkably effective and low-cost options for improving their agencies’ responsiveness to small business concerns. The SBA itself highlighted certain state innovations in its 2007 publication, “State Guide to Regulatory Flexibility for Small Businesses,” a guide to the “best practices” state governments have adopted to improve regulatory flexibility for small firms. The SBA also monitors state law developments on its

website. Why, one might ask, doesn't the federal government consider amending the RFA to incorporate some of the "best practices" the SBA has identified among these state innovations?

Many of the innovations created at the state level could be adapted by federal agencies. One such innovation is email notification. Rhode Island, for example, has created a Rules Tracker System that allows individuals to customize their updates by specifying the agencies and keywords they want to monitor. The Rules Tracker system is accessible from the home page for Rhode Island's rules and regulations database, where small firms can follow a simple registration procedure.<sup>106</sup> After registering for the service, users can choose to receive notifications from any or all of the state's regulatory agencies, the state police, the Secretary of State, the Attorney General and other government divisions. Users can also specify the keywords for which they want to receive alerts and choose whether they want to receive alerts on a daily, weekly or monthly basis.

Similarly, Colorado's state government website enables companies to sign up for free email alerts to notify them whenever a state agency proposes a rule change involving certain keywords the companies have identified.<sup>107</sup> Under the Colorado Administrative Procedure Act, state agencies must file copies of proposed rules and amendments to existing rules with a central agency, which then generates an automatic email to interested parties who have registered for this free service.<sup>108</sup> The sign-up form is a single page on which small business owners and other stakeholders identify the general subjects of rulemaking that they are interested in.<sup>109</sup> Other states with comparable internet tools that promote the transparency of the rulemaking process include Alaska, Illinois, Kentucky, Nebraska, Virginia and Wisconsin.

Another state innovation that federal agencies might adopt is the creation of small business regulatory review boards. In Hawaii, for example, the Small Business Regulatory Review Board consists of current and former small business owners appointed by the Governor, and meets monthly.<sup>110</sup> Its duties include commenting to regulatory agencies on the impact of existing and proposed regulation on small businesses and reviewing requests from small business owners for review of state and county administrative rules.<sup>111</sup> The Board has also set up sub-committees to work with individual agencies between monthly meetings, increasing the potential for more focused and productive relationships with those agencies.<sup>112</sup> Missouri has a Small Business Regulatory Fairness Board serving much the same purpose, as do Oklahoma and South Carolina.<sup>113</sup>

While a single review board obviously would be impractical for the federal government, major federal agencies could consider developing a similar review board, consisting of current and/or past small business owners whose firms are (or were) directly affected by that agency's rules. If the board consisted of volunteers, as they do in the Hawaii model, the cost could be minimal as well.

Other states maintain periodically updated lists of proposed regulations that may have an impact on small businesses. Ohio, for example, posts a list that is updated weekly.<sup>114</sup> In a variation of this type of service, California maintains a list of the agencies that "frequently propose regulations that can have a major impact on small businesses," with hyperlinks to each agency's current list of proposed rules, on its "Small Business Advocate" website.<sup>115</sup>

If federal agencies were required to develop similar outreach efforts, small businesses would be better able to stay informed about potential rule changes affecting them. This could be a relatively inexpensive and potentially effective measure for federal agencies to take when they are considering new rules.

The effectiveness of state models may be limited, however, by unpredictable and inconsistent interpretations of what constitutes a "small business." State attempts to define "small business" more clearly than the RFA does have met with mixed results. In Vermont, for example, state law requires state agencies to consider the impact of proposed regulations on small businesses.<sup>116</sup> A separate state law defines "small business" as "a business employing no more than twenty full-time employees."<sup>117</sup> Vermont courts, however, have ruled that state agencies need not use that statutory definition when considering the impact of proposed regulations on small businesses; instead, the agencies themselves may choose any definition of "small business" that is "rational and effective" in light of the regulation at issue. In *Gasoline Marketers of Vermont, Inc. v. Agency of Natural Resources*,<sup>118</sup> the Supreme Court of Vermont rejected a challenge to a regulation that would have required gasoline stations to install vapor recovery systems on their pumps, but would have exempted gasoline stations with a throughput of 400,000 gallons or less from that requirement. Plaintiff challenged the regulation because it alleged that the agency failed to consider the impact on

small businesses, as required by state law; throughput volume, they alleged, did not correlate with the size of the business. According to the plaintiff, the agency had “failed to identify which gas stations were small businesses, determine how many gas stations were small businesses, calculate what volume of gas they sold, and analyze the cost of compliance for them,” even though the information necessary to complete this analysis was readily available to the agency.<sup>119</sup>

In siding with the agency, the Court noted that:

[Small businesses] cannot demand that ANR use any particular methodology as opposed to another [to comply with state requirements]. Here, ANR's methodology was reasonable, both in minimizing the cost burden of compliance and maximizing attainment of environmental standards. Given the purposes of the regulation, the throughput measure of small businesses was more relevant both in terms of economic impact . . . and efficacy of the regulations. . . . It would be illogical to forbid the agency from operating in a manner that was rational and effective.<sup>120</sup>

In effect, the *Gasoline Marketers of Vermont* case made it impossible for small firms to demand that state agencies use the statutory definition of “small business,” suggesting instead that the agencies themselves were better equipped to decide how to define those interests than either the state legislature or the firms who actually held those interests. This case suggests the potential complexity and likely challenge to any federal definition of “small” business for RFA purposes.

#### *B. Expand Small Business Offices Within Agencies.*

Another way for agencies to strengthen agency-firm partnerships is to dedicate resources specifically to helping small businesses and, crucially, to publicizing those efforts so that small businesses can take advantage of them. Depending on the agency, it may make sense to create a commission or designate an “in-house” representative dedicated to improving communication with small enterprises.

The FTC provides an example, albeit an imperfect one, of how an agency might dedicate resources to small business concerns. Its Small Business Compliance Assistance Policy Statement describes various forms of assistance that the FTC makes available to help small businesses comply with truth-in-advertising laws. The FTC also includes an expanding library of materials written especially for small businesses within the Business Guidance section of the FTC's website. Finally, the agency invites small businesses to contact either the FTC headquarters or one of the agency's regional offices with specific inquiries about compliance.<sup>121</sup> In practice, however, there is no particular group within the FTC that appears designated to receive inquiries from small businesses. Given the typical entrepreneur's limited time and resources, she would likely find it hard to locate someone within the agency bureaucracy who was knowledgeable about, and sympathetic to, her unique needs and concerns.

Similarly, the FDA's Center for Drug Evaluation and Research (CDER) offers focused support for small businesses.<sup>122</sup> Unlike the FTC, however, the FDA has designated small business contacts in both its national headquarters and two of its five regional offices, which represent more than a third of the states as well as the US/Mexico border generally.<sup>123</sup>

#### *C. Balance Small Enterprise Concerns with Broader Impact*

An important, but overlooked, area of concern is that some of the small business exemptions that the RFA has facilitated may be counterproductive in some respects by potentially undermining the broad purposes of the legislation they affect. The SBA's 2007 report on the cost savings achieved by the RFA describes a number of examples of small businesses being excused from regulations whose overall social and environmental benefits might well exceed the short-term costs borne by affected small firms. Environmental impact is just one of many areas where this sort of undesirable trade-off might occur. For example, the report noted that the Fish and Wildlife Service (FWS) had initially designated 18,031 square miles of critical habitat for the Canada lynx. In response to “comments” by SBA and various small enterprises, however, the FWS ultimately designated only 1,841 square miles of protected lynx habitat based on “economic” and other factors, reducing its proposed conservation area by some ninety percent. While the SBA report noted that the “exclusion of these high cost areas resulted in \$919 million in cost savings,” the report did not analyze the resulting cost to the lynxes.<sup>124</sup> Similarly, the FWS excluded

private lands from a critical habitat designation for certain endangered minnows, in response to concerns voiced by small enterprises, because of “economic factors.”<sup>125</sup>

In assessing the RFA’s cost savings to small businesses, the SBA does not appear to have quantified or even considered the potential longer-term costs that such tradeoffs may generate, let alone compare them to the estimated savings experienced by the small enterprise owners. In smoothing the path for small enterprise owners, government must not bulldoze over equally important, but perhaps less immediately quantifiable, broader concerns.

## Conclusions

While the economic significance of small firms has only become more important since the RFA’s introduction 30 years ago, the RFA has not met its promise of increasing regulatory flexibility to accommodate those firms’ concerns. The RFA increased awareness among federal regulators that small firms have unique concerns and that regulation must take those concerns into account in order to maximize effectiveness, but its shortcomings have undercut its effectiveness. Instead, a new approach is needed. An interactive and multifaceted approach that capitalizes on the reforms introduced by the Open Government Initiative to engage small firms in a dialogue with regulatory would generate many of the benefits that the RFA originally intended to convey.

Recent government directives increasing the transparency and participatory nature of regulation have the potential to serve small firms well. Small firms have an unprecedented opportunity to make strategic use of these initiatives and to help bring about the kind of regulatory flexibility that the RFA fell short of achieving. The most competitive small firms will benefit significantly as a result. There are also new strategies available to federal agencies, often modeled on innovations at the state level, for improving responsiveness to small firms’ concerns and overall efficiency.

While the RFA sought to raise agency awareness of small firms’ concerns, it has not been sufficient to address those concerns effectively. Only recently have initiatives emerged at both the federal and state level that genuinely empower small firms to help reduce and reform the regulatory burdens on them. By taking advantage of new directives and technology to help fill the gap left by the RFA and its subsequent amendments, small firms can now interact with regulators to alleviate the pressure of the most burdensome rules. These reforms are necessary. Without them, the possibility exists that thirty years later a new generation of scholars will hold a symposium titled, “The RFA at 60,” and continue to wrestle with the same unaddressed questions.

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<sup>1</sup> Keith W. Holman, *The Regulatory Flexibility Act at 25: Is the Law Achieving Its Goal?*, 33 *Fordham Urb. L.J.* 1119, 1119 (2006).

<sup>2</sup> Sarah E. Shive, *If You've Always Done it That Way, It's Probably Wrong: How the Regulatory Flexibility Act Has Failed to Change Agency Behavior, and How Congress Can Fix It*, 1 *Entrepreneurial Bus. L.J.* 153, 157-58 (2006).

<sup>3</sup> Holman, *supra* note 1, at 1119-20.

<sup>4</sup> Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, *U.S. Small Bus. Admin.* (Sep. 2010).

<sup>5</sup> President Barack Obama, Remarks by the President to the Nation on the BP Oil Spill (June 15, 2010), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill>.

<sup>6</sup> Memorandum on Transparency and Open Gov’t from Barack Obama, President of the United States, to the Heads of Executive Dep’ts & Agencies (Jan. 21, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/transparencypandopengovernment/](http://www.whitehouse.gov/the_press_office/transparencypandopengovernment/).

<sup>7</sup> Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, to the Heads of Executive Dep’ts & Agencies, Open Gov’t Directive (Dec. 8, 2009), *available at* [http://www.whitehouse.gov/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf).

<sup>8</sup> Barry A. Pineles, *The Small Business Regulatory Enforcement Fairness Act: New Options for Regulatory Relief*, 5 *CommLaw Conspectus* 29, 30 (1997).

<sup>9</sup> *Id.* For a detailed review of Congressional hearings preceding the passage of the RFA, see Paul R. Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 *Duke L.J.* 213 (1982).

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<sup>10</sup> Pineles, *supra* note 8, at 30.

<sup>11</sup> *Id.*

<sup>12</sup> Verkuil, *supra* note 9, at 214.

<sup>13</sup> *Id.* at 215 (quoting The White House, Regulatory Reform: President Carter’s Program 2 (1980)).

<sup>14</sup> *Id.* at 252.

<sup>15</sup> 5 U.S.C. § 603(a) (2006).

<sup>16</sup> *Id.* § 603(b).

<sup>17</sup> *Id.* § 603(b).

<sup>18</sup> *Id.* § 604(a). The RFA also imposes a periodic review requirement of all rules, requiring federal agencies to review all of their existing regulations over a period of ten years, eliminating those which are duplicative, unduly burdensome, or unnecessary. 5 U.S.C. § 610 (2006).

<sup>19</sup> *Id.* § 605(b).

<sup>20</sup> *Id.* § 605(b).

<sup>21</sup> Shive, *supra* note 2, at 158.

<sup>22</sup> See, e.g., Holman, *supra* note 1, at 1119; Michael R. See, *Willful Blindness: Federal Agencies’ Failure to Comply With the Regulatory Flexibility Act’s Periodic Review Requirement – And Current Proposals to Invigorate the Act*, 33 Fordham Urb. L.J. 1199, 1201 (2006).

<sup>23</sup> 5 U.S.C. § 601 (2006) (Congressional Findings and Declaration of Purpose).

<sup>24</sup> Pub. L. No. 104-121, 110 Stat. 847 (1996)

<sup>25</sup> 5 U.S.C. § 611(a) (2006).

<sup>26</sup> *Id.* § 611(a)(3)(A).

<sup>27</sup> *Id.* § 611(a)(4).

<sup>28</sup> *Id.* § 605(b).

<sup>29</sup> *Id.* § 609(b), (d).

<sup>30</sup> 67 Fed. Reg. 53, 461 (August 13, 2002).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> H.R. 4458, 110<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2007).

<sup>34</sup> *Id.* § 3.

<sup>35</sup> *Id.* § 5; *General Policy: House Small Business Committee Endorses More Federal Review of Regulatory Burdens*, National Env’tl. Daily, Dec. 14, 2007.

<sup>36</sup> U.S. Small Bus. Admin, *Connecticut Is Latest New England State To Strengthen Regulatory Flexibility for Small Business*, The Small Business Advocate (May 1, 2009).

<sup>37</sup> 5 U.S.C. § 609(a) (2006).

<sup>38</sup> Shive, *supra* note 2, at 167; See, *supra* note 22, at 1223-24.

<sup>39</sup> 5 U.S.C. § 601(3) (2006). The section uses the term “small business,” but also states that the term “small entity” should be given the same meaning. *Id.* § 601(6).

<sup>40</sup> 15 U.S.C. 632(a)(1) (2006).

<sup>41</sup> *Id.* § 632(2)(A).

<sup>42</sup> Michelle Goldberg-Cahn, *Associated Fisheries of Maine, Inc. v. Daley: A Balanced Approach to Judicial Review Under the Regulatory Flexibility Act*, 51 Admin. L. Rev. 663, 670 (1999)

<sup>43</sup> *Id.* at 670 n.45 (citing 13 C.F.R. § 121.201 (1998)).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 670–71.

<sup>46</sup> 5 U.S.C. § 610 (2006); Shive, *supra* note 2, at 163.

<sup>47</sup> Shive, *supra* note 2, at 163.

<sup>48</sup> *Id.*

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- <sup>49</sup> See, *supra* note 22, at 1220.
- <sup>50</sup> *Id.* at 1221.
- <sup>51</sup> U.S. Gen. Accounting Office, Regulatory Flexibility Act: Status of Agencies' Compliance (1994).
- <sup>52</sup> U.S. Gen. Accountability Office, Regulatory Flexibility Act: Congress Should Revisit and Clarify Elements of the Act to Improve Its Effectiveness (2006); U.S. Gen. Accounting Office, Regulatory Flexibility Act: Clarification of Key Terms Still Needed (2002).
- <sup>53</sup> Eric Phelps, *The Cunning of Clever Bureaucrats: Why the Small Business Regulatory Enforcement Fairness Act Isn't Working*, 31 Pub. Cont. L.J. 123, 136–37 (2001).
- <sup>54</sup> *Am. Trucking Ass'n Inc. v. USEPA*, 175 F.3d 1027, 1045 (D.C. Cir. 1999)
- <sup>55</sup> *Id.* at 1044.
- <sup>56</sup> *Id.*
- <sup>57</sup> *White Eagle Co-op. Ass'n v. Conner*, 553 F.3d 467, 480 (7<sup>th</sup> Cir 2009). The rationale of this decision borrows explicitly from a long line of similar holdings in the District of Columbia. See, e.g., *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 868–69 (D.C. Cir. 2001); *Mid-Tex Electric Coop. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985).
- <sup>58</sup> Holman, *supra* note 1, at 1132.
- <sup>59</sup> *Id.*
- <sup>60</sup> Curtis W. Copeland, *The Regulatory Flexibility Act: Implementation Issues and Proposed Reform*, Congressional Research Serv. 7, n. 18 (2008), available at <http://www.policyarchive.org/handle/10207/bitstreams/19430.pdf>; see also <http://www.govtrack.us/congress/bill.xpd?bill=h110-4458>
- <sup>61</sup> Holman, *supra* note 1, at 1134.
- <sup>62</sup> *Id.* at 1135–36.
- <sup>63</sup> Shive, *supra* note 2, at 161.
- <sup>64</sup> U.S. Gen. Accounting Office, *supra* note 51, at 4, 7 and 8.
- <sup>65</sup> U.S. Gen. Accountability Office, *supra* note 52, at 4-5; U.S. Gen. Accounting Office, *supra* note 52, at 6.
- <sup>66</sup> Holman, *supra* note 1, at 1129–32.
- <sup>67</sup> 5 U.S.C § 605(b) (2006).
- <sup>68</sup> Phelps, *supra* note 53, at 134–35.
- <sup>69</sup> John Shanahan, *Regulating the Regulators: Regulatory Process Reform in the 104<sup>th</sup> Congress*, CATO Institute, available at <http://www.cato.org/pubs/regulation/regv20n1/reg20n1b.html>.
- <sup>70</sup> Holman, *supra* note 1, at 1133–34.
- <sup>71</sup> Phelps, *supra* note 53, at 133–39.
- <sup>72</sup> See *supra* notes 17–24 and accompanying text.
- <sup>73</sup> 215 F.3d 61 (D.C. Cir. 2000).
- <sup>74</sup> *Id.* at 80.
- <sup>75</sup> *Id.* at 79.
- <sup>76</sup> Phelps, *supra* note 53, at 134.
- <sup>77</sup> *Id.*
- <sup>78</sup> *Nat'l Telephone Co-op. Ass'n v. F.C.C.*, 563 F.3d 536, 540 (D.C. 2009).
- <sup>79</sup> *Williams Alaska Petroleum v. United States*, 57 Fed. Cl. 789, 801 (2003).
- <sup>80</sup> Memorandum from Barack Obama, *supra* note 6.
- <sup>81</sup> Memorandum from Peter R. Orszag, *supra* note 7.
- <sup>82</sup> *Open Government Initiative*, The White House, <http://www.whitehouse.gov/open> (last visited Feb. 1, 2011). The site's Open Gov Blog serves as a news feed to highlight agency improvements and awards that further the Open Government Initiative's goals.
- <sup>83</sup> Office of Mgmt. & Budget, *Open Government Directive 1* (Dec. 8, 2008), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf).
- <sup>84</sup> *Id.* 8.

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<sup>85</sup> *Id.* at 9.

<sup>86</sup> *Id.* at 2.

<sup>87</sup> *Id.* 3. Each agency is also directed to “respond to public input received on its Open Government Webpage on a regular basis.” *Id.* The vagueness inherent in the terms “respond” and “regular” do not provide small firms with as much assurance of a timely and substantive response as supporters of small firm interests might want.

<sup>88</sup> Gregory Wilshusen, Dir. of Info. Sec. Issues, Statements to the Subcommittee on Information Policy, Census, and National Archives and Committee on Oversight and Government Reform, House of Representatives (July 22, 2010), available at <http://www.gao.gov/new.items/d10872t.pdf>.

<sup>89</sup> *Id.*

<sup>90</sup> “The State of Small Business Report: June 2010 Survey of Small Business Success,” July 2010, available at [http://www.networksolutions.com/smallbusiness/wp-content/files/Network\\_Solutions\\_Small\\_Business\\_Success\\_Index.pdf](http://www.networksolutions.com/smallbusiness/wp-content/files/Network_Solutions_Small_Business_Success_Index.pdf).

<sup>91</sup> Jen Williams, “The Small Business Administration Engages Social Media,” January 5, 2011, available at (<http://www.pronetadvertising.com/articles/the-small-business-administration-engages-social-media.html>)

<sup>92</sup> *About Us*, Regulations.gov, <http://www.regulations.gov/#!aboutUs> (last visited Feb. 2, 2011). The eRulemaking initiative was established in October 2002, and launched the [www.regulations.gov](http://www.regulations.gov) website in 2003 “to enable citizens to search, view and comment on regulations issued by the U.S. government.” *Id.* The Environmental Protection Agency has served as the managing partner of the eRulemaking program since its inception. *Id.*

<sup>93</sup> *eRulemaking Program*, Regulations.gov, <http://www.regulations.gov/#!aboutProgram> (last visited Feb. 2, 2011).

<sup>94</sup> See, e.g., *Exchange Discussions*, Regulations.gov, <http://www.regulations.gov/exchange/topic/exchange> (last visited Feb. 2, 2011).

<sup>95</sup> D. French, *IFA and Industry Groups Sue to Stop “No-Match” Rule: Firing Workers Required Under Immigration “No-Match” Rule*, 39 Franchising World 39, 39 (2007).

<sup>96</sup> 74 Fed. Reg. 51,447 (October 7, 2009).

<sup>97</sup> Holman, *supra* note 1, at 1124.

<sup>98</sup> While the NSBA technically accepts businesses of any size as members, only those members with 500 or fewer employees are allowed to vote on issues, according to Patrick Post, its Vice President of Membership. Mr. Post notes that 98% of the NSBA’s members have 15 or fewer employees, and 37% have 5 or fewer employees. Interview with Patrick Post, Vice President of NSBA Membership (Dec. 15, 2010).

<sup>99</sup> Press Release, Small Bus. Admin. Office of Advocacy, *Advocacy Commits To Long-Term R3 Initiative* (July 30, 2008), available at <http://archive.sba.gov/advo/press/08-20.html>.

<sup>100</sup> <http://www.sba.gov/advo/r3/>, last accessed October 1, 2010.

<sup>101</sup> Press Release, Small Bus. Admin. Office of Advocacy, *Two New Regulations Added To 2009 r3 Top 10 Rules For Review And Reform*, (Feb. 27, 2009), available at <http://www.sba.gov/advocacy/809/12400>; *Advocacy Commits To Long-Term r3 Initiative*, *supra* note 175. Low participation rates may have influenced the Office of Advocacy’s decision in early 2011 to put the R3 program on temporary hiatus. Telephone conversation with Charles Maresca, Director of Interagency Operations (Feb. 8, 2011).

<sup>102</sup> *Small Business Regulatory Flexibility Model Legislation Initiative*, Small Bus. Admin. Office of Advocacy, [http://archive.sba.gov/advo/laws/law\\_modeleg.html](http://archive.sba.gov/advo/laws/law_modeleg.html) (last visited Feb. 2, 2011)

<sup>103</sup> See, e.g., Ariz. Rev. Stat. Ann. § 41–1035 (2010); Ala. Code §§ 41–22–22, 23 (2010).

<sup>104</sup> *Connecticut Is Latest New England State To Strengthen Regulatory Flexibility for Small Business*, Small Bus. Advocate, May 1, 2009.

<sup>105</sup> *Id.*

<sup>106</sup> *Rules and Regulation Tracker*, State of Rhode Island, <http://www.rules.state.ri.us/rules/freshregs/> (last visited Feb. 2, 2011).

<sup>107</sup> U.S. Small Bus. Admin. Office of Advocacy, *State Guide to Regulatory Flexibility 17–19* (2007), available at [http://archive.sba.gov/advo/laws/rfa\\_stateguide07.pdf](http://archive.sba.gov/advo/laws/rfa_stateguide07.pdf).

<sup>108</sup> *Id.*



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- <sup>109</sup> *Sign-up Form*, Office of Policy, Research and Regulatory Reform, Dep't of Regulatory Agencies, [http://www.dora.state.co.us/pls/real/sb121\\_web.signup\\_form](http://www.dora.state.co.us/pls/real/sb121_web.signup_form) (last visited Feb. 2, 2011).
- <sup>110</sup> *Small Business Regulatory Review Board*, Haw. Dep't of Bus., Econ. Dev. & Tourism, [http://hawaii.gov/dbedt/business/start\\_grow/small-business-info/sbrrb](http://hawaii.gov/dbedt/business/start_grow/small-business-info/sbrrb) (last visited Feb. 2, 2011).
- <sup>111</sup> *Id.*
- <sup>112</sup> *Id.*
- <sup>113</sup> Mo. Small Bus. Regulatory Reform Bd. <http://www.sbrfb.ded.mo.gov/> (last visited Feb. 2, 2011); *Small Business Advocacy*, Okla. Dep't of Commerce, <http://www.okcommerce.gov/Businesses-And-Employers/Small-Business-Advocacy> (last visited Feb. 2, 2011); *Small Business Resources*, S.C. Dep't of Commerce, <http://sccommerce.com/business-services/business-services/small-business-resources> (last visited Feb. 2, 2011)
- <sup>114</sup> *Small Business Rules and Regulations*, Ohio Dep't of Dev., <http://www.development.ohio.gov/Entrepreneurship/SBRegister1.htm> (last visited Feb. 2, 2011)
- <sup>115</sup> *Small Business Advocate*, ca.gov, <http://sba.ca.gov/index.php> (last visited Feb. 2, 2011).
- <sup>116</sup> Vt. Stat. Ann. tit. 3, § 832a (2010). This law was enacted in 1985, five years after passage of the RFA.
- <sup>117</sup> Vt. Stat. Ann. tit 3, § 801(b)(12) (2010). This definition was also adopted in 1985, in the same session as Vermont's version of the RFA.
- <sup>118</sup> 169 Vt. 504 (Vt. 1999).
- <sup>119</sup> *Id.* at 507.
- <sup>120</sup> *Id.* at 510.
- <sup>121</sup> *Advertising FAQ's: A Guide for Small Business*, FTC Bureau of Consumer Protection Bus. Ctr., <http://business.ftc.gov/documents/bus35-advertising-faqs-guide-small-business> (last visited Feb. 2, 2010).
- <sup>122</sup> See, e.g., *Small Business Assistance: Contact, Organization & Meeting Information*, U.S. Food & Drug Admin. <http://www.fda.gov/Drugs/DevelopmentApprovalProcess/SmallBusinessAssistance/ucm069901.htm> (last visited Feb. 2, 2011).
- <sup>123</sup> *Small Business Contacts*, U.S. Food & Drug Admin, <http://www.fda.gov/ForIndustry/SmallBusinessAssistance/SmallBusinessRepresentatives/default.htm> (last visited Feb. 2, 2011).
- <sup>124</sup> SBA Office of Advocacy, FY 2007 Report on the Regulatory Flexibility Act, 23 (2007), available at <http://archive.sba.gov/advo/laws/flex/07regflx.pdf>.
- <sup>125</sup> *Id.*