

# Articles

## INTERACTIVE REGULATION

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*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 despite being one of the most important pieces of business legislation, it has yet to fulfill its promise. This article examines not just the calls for statutory reform, but also the motivations and perceptions of the individuals most impacted by business regulation. 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.*

### I. 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 its purpose was

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to do quite the opposite, by helping 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, it would also create a climate of interactivity between small business leaders and regulators that never before existed in the federal system. This interactivity gave the RFA the power to fundamentally redefine the relationship between government and 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 certify that a regulation will not significantly harm a substantial number of small businesses. 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 towards an appreciation of the value of small businesses. 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 the effectiveness of the RFA 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 \$10,585 per employee, thirty-six percent more than the regulatory cost facing large businesses (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.

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1. Keith W. Holman, *The Regulatory Flexibility Act at 25: Is the Law Achieving Its Goal?*, 33 FORDHAM URB. L.J. 1119, 1119 (2006).

2. 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).

3. Holman, *supra* note 1, at 1119-20.

4. Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, (U.S. Small Bus. Admin., Office of Advocacy, Washington, D.C.), 2010, at iv.

At the same time, public criticism of agency effectiveness in general has become severe. In the summer of 2010, in the wake of the British Petroleum (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 internet.<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 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 the ability of small businesses 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 business 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's and regulator's perspectives. 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 businesses is not the prevention of all future regulation that could possibly affect their business, but instead to establish

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5. Press Release, 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>.

6. Memorandum from President Barack Obama to the Heads of Exec. Dep'ts and Agencies on Transparency and Open Government (Jan. 21, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/transparencyandopengovernment/](http://www.whitehouse.gov/the_press_office/transparencyandopengovernment/).

7. Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, to the Heads of Executive Dep'ts & Agencies, Open Government Directive, at 4 (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).

a collaborative effort with government that maximizes the goals of federal mandates while minimizing the costs imposed on operations. This change not only requires a different approach, but a more interactive perspective toward regulation and the RFA. The purpose of this paper is to make this new interactive approach a reality.

Part II 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 improve the efficiency and effectiveness of agencies, and, in particular, their regulation of small businesses. Part III of this article turns its attention to the perceptions and actions of small businesses. This Part reveals that small business leaders carry with them strongly negative attitudes about regulation and government that impair their ability to act effectively on behalf of their organizations. In addition, this Part shows that regulators are not simply passive mirrors of their agency goals, but are dynamic and reactive to the environment around them.

Part IV presents strategies for small enterprise owners to more effectively interact with regulators through a variety of means. As we explain in Part IV, 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 V presents strategies for federal agencies to improve their responsiveness to small businesses by opening new portals for communication. In this section, we suggest lessons that federal agencies can learn from state-level innovations and recommend other strategies as well. This article concludes that interaction with government that is based on a 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 businesses and more flexible opportunities for regulators to satisfy legislative commands.

## II. 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

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8. Barry A. Pineles, *The Small Business Regulatory Enforcement Fairness Act: New Options in Regulatory Relief*, 5 COMM'LAW CONSPECTUS 29, 30 (1997).

grossly underrepresented in regulatory proceedings and that single-solution regulation, applied uniformly to all businesses, disproportionately burdened small companies.<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 businesses 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 affected 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 existing rules that might conflict or overlap with the proposed rule, and must contain alternative options that would achieve the agency’s objectives 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

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9. *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).

10. Pineles, *supra* note 8, at 30.

11. *Id.*

12. Verkuil, *supra* note 9, at 214.

13. *Id.* at 215 (quoting THE WHITE HOUSE, REGULATORY REFORM: PRESIDENT CARTER’S PROGRAM 2 (1980)).

14. *Id.* at 252.

15. 5 U.S.C. § 603(a) (2006).

16. *Id.* at § 603(b).

17. *Id.*

18. *Id.* at § 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).

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 individual members 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 that small businesses 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 businesses, 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 businesses 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 business 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 allow small businesses to file a complaint regarding a potential violation of the RFA up to a year after the agency has published 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> The SBREFA also tightened the factual requirements for agency certifications by

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19. *Id.* at § 605(b).

20. *Id.*

21. Shive, *supra* note 2, at 158.

22. 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).

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

24. Pub. L. No. 104-121, 110 Stat. 847 (1996).

25. 5 U.S.C. § 611(a) (2006).

26. *Id.* at § 611(a)(3)(A).

27. *Id.* at § 611(a)(4).

requiring that agencies articulate a specific factual basis that supports the agency's statement of certification.<sup>28</sup> Finally, the SBREFA required the Environmental Protection Agency and the Occupational Safety and Health Administration convene small business advocacy review panels to consult with small businesses on regulations expected to have a significant impact on them before the regulations are 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 businesses.<sup>31</sup> It also gave further definition to the process by which agencies were to work with the Small Business Administration (SBA) Office of Advocacy to develop alternatives to legislation that would significantly affect a substantial number of small businesses, 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 businesses as well as the direct impacts as the RFA already mandated.<sup>34</sup> The bill 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> However, 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 for entrepreneurs and small business owners and encouraging interaction between agencies and small

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28. *Id.* at § 605(b).

29. *Id.* at § 609(b), (d).

30. Exec. Order No. 13,272, 67 Fed. Reg. 159, (August 13, 2002).

31. *Id.*

32. *Id.*

33. H.R. 4458, 110th Cong. (2007).

34. *Id.* at § 3.

35. *Id.* at § 5; *General Policy: House Small Business Committee Endorses More Federal Review of Regulatory Burdens*, NAT'L ENVTL. DAILY, Dec. 14, 2007.

36. *Connecticut Is Latest New England State To Strengthen Regulatory Flexibility for Small Business*, SMALL BUS. ADVOCATE (U.S. Small Bus. Admin., Office of Advocacy, Washington, D.C.), May 1, 2009, at 8.

businesses. 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. Part V below discusses 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 SBA standards tailored to particular industries.<sup>42</sup> The result has been unusual classifications for small businesses. 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> At one point, this definition resulted in 1423 of the 1758 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

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37. 5 U.S.C. § 609(a) (2006).

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

39. 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.* at § 601(6). Small entity is defined in 5 U.S.C. § 601(6) as including “small business” too. *Id.*

40. 15 U.S.C. 632(a)(1) (2006).

41. *Id.* at § 632(a)(2)(A).

42. Michelle Goldberg-Cahn, Note, *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).

43. *Id.* at 671 n.45 (citing 13 C.F.R. § 121.201 (1998)).

44. *Id.*

“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 entities” 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> For example, See notes 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 Section 610’s requirements further reduces the RFA’s effectiveness overall.

The Government Accountability Office (GAO) 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 interpretations, leading to widely divergent results.<sup>51</sup> In 2002 and 2006, the GAO issued additional critiques of the RFA on several of the same grounds as its 1994 report.<sup>52</sup> In each of these reports, the GAO urged Congress to

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45. *Id.* at 670–71.

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

47. Shive, *supra* note 2, at 163.

48. *Id.*

49. See, *supra* note 22, at 1220.

50. *Id.* at 1221.

51. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-94-105, REGULATORY FLEXIBILITY ACT: STATUS OF AGENCIES’ COMPLIANCE (1994).

52. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-998T, REGULATORY FLEXIBILITY ACT: CONGRESS SHOULD REVISIT AND CLARIFY ELEMENTS OF THE ACT TO IMPROVE ITS EFFECTIVENESS (2006); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-02-491T, REGULATORY

provide the 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 do not directly affect small businesses.<sup>54</sup> There was little debate that the certification affected small businesses; the SBA, 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

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FLEXIBILITY ACT: CLARIFICATION OF KEY TERMS STILL NEEDED (2002).

53. 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).

54. *Am. Trucking Ass'n Inc. v. USEPA*, 175 F.3d 1027, 1045 (D.C. Cir. 1999).

55. *Id.* at 1044.

56. *Id.*

57. *White Eagle Coop. Ass'n v. Conner*, 553 F.3d 467, 480 (7th 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 Coal. v. EPA*, 255 F.3d 855, 868-69 (D.C. Cir. 2001) (holding that RFA did not require EPA to certify that there would be no substantial effect on small business generators of hazardous waste); *Mid-Tex Elec. Coop. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985) (holding FERC reasonably adopted a rule for valid purposes).

58. Holman, *supra* note 1, at 1132.

59. *Id.*

60. CURTIS W. COPELAND, CONG. RESEARCH SERV., RL 34355, THE REGULATORY FLEXIBILITY ACT: IMPLEMENTATION ISSUES AND PROPOSED REFORM 7, n.18 (2008), <http://www.policyarchive.org/handle/10207/bitstreams/19430.pdf>; *see also* <http://www.govtrack.us/congress/bill.xpd?bill=h110-4458>.

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 economic impact on a substantial number of small entities” 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 businesses.<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 businesses, 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. 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

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61. Holman, *supra* note 1, at 1134.

62. *Id.* at 1135–36.

63. Shive, *supra* note 2, at 161.

64. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 51, at 4, 7-8.

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 businesses.<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 businesses. 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 (IRFA) and consider

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65. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 52, at 4-6.

66. Holman, *supra* note 1, at 1129-32.

67. 5 U.S.C § 605(b) (2006).

68. Phelps, *supra* note 53, at 134-35.

69. John Shanahan, *Regulating the Regulators: Regulatory Process Reform in the 104th Congress*, REGULATION, Winter 1997, available at <http://www.cato.org/pubs/regulation/regv20n1/reg20n1b.html>.

70. Holman, *supra* note 1, at 1133-34.

71. Phelps, *supra* note 53, at 133-39.

whether any less burdensome alternatives are available.<sup>72</sup> In *Allied Local & Reg'l Mfrs. Caucus v. U.S. EPA*,<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 5 U.S.C. § 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 the 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 decision-making.<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 businesses that would be affected by the final agency action.<sup>79</sup>

### III. THE LEGAL AND REGULATORY CHALLENGES OF ENTREPRENEURIAL AND SMALL BUSINESS ACTIVITY

Understanding the unique characteristics of entrepreneurs and small businesses is a critical first step toward developing a more productive relationship with administrative agencies that administer the RFA. Acknowledging these strengths and weaknesses, and paying special attention to how they differ from larger firms with which legislators and regulators may be more familiar, informs the discussion in two ways. First and most importantly, it allows commentators to bridge the gap between theory and practice in developing workable solutions for entrepreneurs and

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72. See *supra* notes 17–24 and accompanying text.

73. 215 F.3d 61 (D.C. Cir. 2000).

74. *Id.* at 80.

75. *Id.* at 79.

76. Phelps, *supra* note 53, at 134.

77. *Id.*

78. Nat'l Tel. Coop. Ass'n v. F.C.C., 563 F.3d 536, 540 (D.C. Cir. 2009).

79. Williams Alaska Petrol. v. United States, 57 Fed. Cl. 789, 801 (2003).

small firms. In addition, understanding the needs of this constituency helps legislators and regulators meet those needs most effectively.

Entrepreneurs are faced with unique and difficult challenges. They need to acquire capital from investors or loans from banks. They must also focus on making their vision for their product or service a reality. Entrepreneurs also have a brand to develop. Growing brand equity can be a costly process, especially when larger competitors have already established brands that are well entrenched in the minds of consumers. Furthermore, so many vehicles for advertising exist that it is difficult for the entrepreneur to break through the chatter and reach potential customers. Entrepreneurs lack the dedicated staff to focus on specific functional areas. The entrepreneur must be financier, personnel manager, accountant, technologist, and marketer for the company's operations. The need for an entrepreneur to manage such divergent disciplines inevitably implies that each functional area will not receive its due attention relative to larger businesses. It also means that each functional area will not benefit from the level of expertise that a dedicated practitioner in the field can bring. The entrepreneur must too often be all things to all people, and as the proverb goes, the jack-of-all-trades is sometimes the master of none.

A. *The Unique Perception of Small Business toward Risk-Taking and Political Activity*

While it is not entirely clear from available research, small businesses appear to represent a large portion of the U.S. economy.<sup>80</sup> Yet, it appears to

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80. Prevailing statistics claim that the economic influence that small businesses assert is almost overwhelming. According to the SBA, small businesses represent 99.7% of all employer firms, employ just over half of all private sector employees, pay forty-four percent of the total U.S. private payroll, generate sixty-four percent of new jobs (over the past fifteen years), produce thirteen times more patents than large patenting firms, and generate more than half of the non-farm private gross domestic product. *How important are small businesses to the U.S. economy?*, SBA, OFFICE OF ADVOCACY, available at <http://www.sba.gov/advocacy/7495/8420> (last visited Jan. 27, 2011). The 99.7% figure alone has been cited repeatedly in the academic literature in a variety of contexts. See, e.g., David A. Domina, *The Debilitating Effects of Concentration Markets Affecting Agriculture*, 15 DRAKE J. AGRIC. L. 61, 77 (2010) (discussing the economic risks of concentration of power in too few food producers); David Lourie, Note, *Rethinking Donor Disclosure After the Proposition 8 Campaign*, 83 S. CAL. L. REV. 133, 165 (2009) (arguing that disclosing the name of a donor's employer presents privacy concerns for donors employed by small businesses); Dexter K. Case & Jennifer R. Alderfer, *BAPCPA and the New Provisions Relating to Small Businesses*, 15 WIDENER L.J. 585, 585 (2006) (discussing reorganization options of small businesses under BAPCPA); Steven H. Hobbs & Fay Wilson Hobbs, *Family Business and the Business of Families: A Consideration of the Role of the Lawyer*, 4 TEX. WESLEYAN L. REV. 153, 156 (1998) (discussing the uniqueness of family owned small businesses, as relates to law services). The statistics are also cited in research specifically discussing the RFA. See, e.g., Holman, *supra* note 1, at 1120–21. Yet these statistics are

be the study of the individual entrepreneur that generates greater scholarly inquiry in business research.<sup>81</sup> Although entrepreneurs and small business owners are not identical in nature,<sup>82</sup> there is considerable overlap between the two.<sup>83</sup> The important distinction for purposes of this paper is between businesses that are able to benefit from the reviews required by the RFA and other supportive measures described here, and those that are not.

As seen through the management literature studying entrepreneurs and small business owners, such individuals have a unique perspective on risk, market-assessment, and their own business abilities.<sup>84</sup> One study of entrepreneurs found that entrepreneurs are more likely to exhibit overconfidence than their large-manager counterparts.<sup>85</sup> The study also found greater representativeness in entrepreneurs, defined by the willingness to generalize about a person or phenomenon based upon a few attributes or observations.<sup>86</sup> Other studies have found differences in the entrepreneur's need for achievement and tolerance of ambiguity when compared to large firm managers.<sup>87</sup>

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sharply criticized by David Hirschberg, a statistician and economist who has worked for the SBA, as not credible and devised to pursue political ends such as stopping health care reform. David Hirschberg, *The Job-Generation Issue and Its Impact on Health Insurance Policy*, 44 CHALLENGE 82 (2001).

81. James W. Carland et al., *Differentiating Entrepreneurs from Small Business Owners: A Conceptualization*, 9 ACAD. MGMT. REV. 354, 355 (1984) (stating that “[a]lthough small business is a significant segment of the American economy, the entrepreneurial portion of that segment may wield a disproportionate influence. If entrepreneurship can be viewed as incorporating innovation and growth, the most fertile ground for management research may be entrepreneurs and entrepreneurial ventures.”).

82. Wayne H. Stewart, Jr., et al., *A Proclivity for Entrepreneurship: A Comparison of Entrepreneurs, Small Business Owners, and Corporate Managers*, 14 J. BUS. VENTURING 189, 204 (1998) (finding that “[s]mall business owners are less risk oriented and are not as highly motivated to achieve as are entrepreneurs. Small business owners also lack the same degree of preference for innovation.”).

83. Carland et al., *supra* note 81, at 357. *See also* Stewart et al., *supra* note 82, at 191 (stating that “[a]ccording to the authors, an entrepreneur capitalizes on innovative combinations of resources for the principal purposes of profit and growth, and uses strategic management practices. Alternatively, the small business owner operates a business as an extension of the individual's personality to further personal goals and to produce family income.”).

84. Mark Simon, Susan M. Houghton & Karl Aquino, *Cognitive Biases, Risk Perception and Venture Formation: How Individuals Decide to Start Companies*, 15 J. BUS. VENTURING 113 (2000); Robert A. Baron, *Cognitive Mechanisms in Entrepreneurship: Why and When Entrepreneurs Think Differently than Other People*, 13 J. BUS. VENTURING 275 (1998).

85. Lowell W. Busenitz & Jay B. Barney, *Differences between Entrepreneurs and Managers in Large Organizations: Biases and Heuristics in Strategic Decision-Making*, 12 J. BUS. VENTURING 9, 22–23 (1997).

86. *Id.* at 16, 22–23.

87. *See, e.g.*, Thomas M. Begley & David P. Boyd, *Psychological Characteristics Associated with Performance in Entrepreneurial Firms and Smaller Businesses*, 2 J. BUS.

A particularly important characteristic of entrepreneurs and small business owners that might influence their interaction with the RFA is their attitude towards risk. There are numerous dimensions of risk in business activities beyond the political or regulatory risk that is the focus of most legal scholarship. Financial risk can arise from non-payment by a major customer or the change in the cost of capital. Changes in unemployment and national economic strength underlie economic risk. Operational risk constantly lurks in the breakdown or theft of key manufacturing equipment.

Both academic research and common sense dictate that entrepreneurs perceive risk differently. The most obvious conclusion is that entrepreneurs accept higher levels of risk in both their business decisions and their careers generally because of the inherently precarious nature of entrepreneurial activity. Between fifty and seventy-five percent of small businesses fail within the first five years.<sup>88</sup> More than eighty percent of the businesses that survive the first five years will fail in the subsequent five years.<sup>89</sup> As the risks of new ventures are widely known, the implication for entrepreneurs is that they have a higher propensity for taking risks. Whereas a manager of a large company would perceive significant risk and avoid the activity, the entrepreneur might pursue the venture in spite of the uncertainty.

Such a conclusion may seem intuitive. However, predicted differences in risk propensity for entrepreneurs have not been reproduced in academic data. As one author recently writes, “[r]esearch has fairly consistently shown that entrepreneurs do not differ significantly from other members of the population in terms of their propensity to take risks.”<sup>90</sup> This conclusion does not necessarily mean that small business owners are risk neutral. It also does not mean that academic research on this topic defies common sense. Instead, it may require a closer examination of the concept of risk and an understanding that reconciles both with the academic data and our understanding of entrepreneurial behavior.

Instead of perceiving risk and taking on risky activity, entrepreneurs

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VENTURING 79 (1987) (examining the prevalence of five psychological traits in a sample of entrepreneurs); John B. Miner, Norman R. Smith & Jeffrey S. Bracker, *Role of Entrepreneurial Task Motivation in the Growth of Technologically Innovative Firms*, 74 J. APPLIED PSYCHOL. 554, 557–58 (1989) (discussing a task motivation study).

88. John W. Lee, *A Populist Political Perspective of the Business Tax Entities Universe: “Hey the Stars Might Lie but the Numbers Never Do”* 78 TEX. L. REV. 885, 925 n.225 (2000) (noting five-year failure rate).

89. MICHAEL E. GERBER, *THE E-MYTH REVISITED: WHY MOST SMALL BUSINESSES DON’T WORK AND WHAT TO DO ABOUT IT* 2 (3d ed. 1995).

90. Laura C. Dunham, *From Rational to Wise Action: Recasting Our Theories of Entrepreneurship*, 92 J. BUS. ETHICS 513, 519 (2010) (citing Murray B. Low, & Ian C. MacMillan, *Entrepreneurship: Past Research and Future Challenges*, 14 J. MGMT. 139 (1988)). See also Busenitz & Barney, *supra* note 85, at 24 (stating that “most academicians hold that entrepreneurs do not differ substantially in their risk-taking propensity”).

may instead be subjected to various heuristics and biases that cause them to underestimate the risk of certain activity compared to managers of large firms.<sup>91</sup> As noted earlier, entrepreneurs are more likely to exhibit overconfidence and representativeness when compared to their larger firm counterparts.<sup>92</sup> Entrepreneurs may also view their situations more positively than circumstances warrant.<sup>93</sup> Because entrepreneurs more readily generalize from limited experience, they may more likely reach the conclusion that a decision is less risky than is objectively warranted. Entrepreneurs are more susceptible to what one article called the “illusion of control.”<sup>94</sup> This bias encourages a belief that a given situation can be mastered even when that situation is beyond that person’s control to influence.<sup>95</sup>

A third intriguing possibility is that in some situations, risk is not simply overridden for the achievement of some greater objective. Under this notion, the entrepreneur believes strongly in the normative goodness of the venture.<sup>96</sup> The entrepreneur has a strong desire to solve an important problem, improve the common good, or achieve a personal goal.<sup>97</sup> This practice does not simply devalue the presence of risk, but rather makes considerations of risk less important to the decision.<sup>98</sup> Thus, the difference in risk propensity may not be the important difference in behavior, but rather the way that small businesses perceive and think about risk overall.<sup>99</sup>

These varying perceptions of risk overall likely influence the perception of entrepreneurs toward legal, political, and regulatory risk, the types of risk most relevant to this article. Entrepreneurs and small businesses typically will not have legal counsel on staff or playing a major role in daily operations. Thus, legal advice from an inside or outside lawyer, which can provide important information about the level of legal risk, can be infrequent or non-existent. Furthermore, while the entrepreneur or small business owner is likely trained in the business aspects of the operation and likely can function as a jack-of-all-trades, it is unlikely that these owners have received significant legal training as, with

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91. Leslie E. Palich & D. Ray Bagby, *Using Cognitive Theory to Explain Entrepreneurial Risk Taking: Challenging Conventional Wisdom*, 10 J. BUS. VENTURING 425, 434 (1995).

92. Busenitz & Barney, *supra* note 85, at 22–23.

93. Palich & Bagby, *supra* note 91, at 427.

94. Simon, Houghton & Aquino, *supra* note 84, at 118.

95. *Id.*

96. Dunham, *supra* note 90, at 519 (“Within the context of entrepreneurial start-up, normative considerations—e.g., a strong belief in the goodness of the venture’s purpose . . . might make considerations of risk less important to the decision.”).

97. *See id.*

98. *See id.*

99. Busenitz & Barney, *supra* note 85, at 25.

the exception of a single course in a business program, it remains a separate discipline with high entry and temporal costs. Thus, managers and executives of small businesses are unlikely to have legal experience to weigh risks or to have resources available to assess that risk effectively.

In addition, legal and regulatory risk is largely invisible. A business's rivals are constantly present through their own strategies to capture market value. A business's supply and other operational costs arise on a regular basis through receipt of invoices that must be paid. Financial risk is a constant problem if the business has received a loan from the bank. Regular payments on debt must be made or the bank will take action against the business. Customer demands and preferences continually challenge the business and it must maneuver to produce goods or services that the customer wants at a certain quality or price point. The failure to do so will be immediately reflected in periodic receipts as customers look elsewhere to satisfy demand.

The legal and regulatory environment does not exert a similarly constant pressure to act. A business that complies with relevant legal rules is generally left alone. Furthermore, a business that fails to comply with legal rules is not immediately met with sanction. It is possible, perhaps tempting, for a business that is reducing costs through regulatory non-compliance to continue that non-compliance indefinitely due to the perceived unlikelihood of government sanction. This pressure may be especially significant for small businesses that perceive a competitive disadvantage compared to larger rivals and also lack sustained contact with legal counsel to warn of the dangers. Risk-taking small business managers may find legal compliance a tempting place to cut corners or engage in technically legal though risky 'on the borderline' behavior.

The lack of pressured presence of the legal environment may not only encourage legally risky activity, it may also influence the manner and frequency in which small businesses participate in the political environment in which decisions about regulation are made. Not only are the perspectives of small business managers different from their larger business counterparts, but their choices of participation mode and impact on the political environment are also different. In the realm of corporate political activity, firm size remains a significant influence.<sup>100</sup> For example,

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100. See, e.g., Wendy L. Hansen & Neil J. Mitchell, *Disaggregating and Explaining Corporate Political Activity: Domestic and Foreign Corporations in National Politics*, 94 AM. POL. SCI. REV. 891, 895 (2001) (discussing how corporations' donations to PACs and other charities can be seen as strategic behavior); David M. Hart, *Why Do Some Firms Give? Why Do Some Firms Give a lot?: High-Tech PACs, 1977-1996*, 63 J. POL. 1230, 1236-37 (2001) (discussing the benefits to some firms from donations and lobbying over a twenty year period); Amy J. Hillman, *Determinants of Political Strategies in US Multinationals*, 42 BUS. & SOC'Y 455, 472-73 (2003) (focusing on political strategies of US multinational corporations in Europe).

in one study, authors used questionnaires to determine whether the conduct of small companies differed from their larger brethren in how they engaged in corporate political activity.<sup>101</sup> The study found that medium-sized companies reported a significantly better success rate in corporate political activities when compared to smaller companies.<sup>102</sup>

This finding is not surprising, and supports the notion that firm size can act as a proxy for the resources available to engage in corporate political activity. First, size can represent political power of the business. Larger businesses generate more benefits for various interest groups. More workers are employed, more customers are served, and more suppliers generate business from selling goods and services to the larger businesses. Unintended beneficiaries, such as nearby restaurants and local businesses that receive the patronage of the large business's employees, also gain. Thus, the political power of the larger firms is not only more significant due to their size, but also due to the reliance of various stakeholders that benefit from their activities. More stakeholders mean more voters that can influence the regulator or legislator to act.<sup>103</sup> The result is an amplification effect that augments the larger firm's political power beyond the confines of its direct operations. Small companies often lack the indirect or direct political influence to create this amplification effect.

Second, firm size can also indicate the ability for more effective political engagement.<sup>104</sup> A larger business may have specialists on staff that can monitor pending legislation and react in the most effective fashion possible. A larger business may also have a dedicated lobbying firm on staff to advocate on its behalf. These larger businesses may lead or dominate trade associations that serve to represent the interests of a number of businesses in an industry. Small companies, on the other hand, lack the ability to have such dedicated resources ready. Furthermore, their individual concerns might be devalued when competing with a larger and more politically savvy business that has competing interests in the regulatory environment.

Third, firm size can indicate economic impact. When a larger business suffers from the costs of increased regulation, its ability to provide jobs in the community and purchase goods from suppliers declines. A firm that can claim that disagreeable regulations will impact the economic

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101. Ronald G. Cook & Dale R. Fox, *Resources, Frequency, and Methods: An Analysis of Small and Medium-Sized Firms' Public Policy Activities*, 39 BUS. & SOC'Y 94, 98–100 (2000).

102. *Id.* at 101.

103. Amy Hillman, Gerald D. Keim & Douglas Schuler, *Corporate Political Activity: A Review and Research Agenda*, 30 J. MGMT. 837, 839 (2004).

104. *See, e.g.*, Douglas A. Schuler & Kathleen Rehbein, *The Filtering Role of the Firm in Corporate Political Involvement*, 36 BUS. & SOC'Y 116 (1997).

environment of a locality in a significant way is likely to receive more attention of government representatives than a smaller firm that cannot claim such great harm. This may be so even though the per capita injury may be greater to the smaller firm than the larger one. Larger firms may also be more motivated not only to contest harmful regulation, but to argue proactively for a more favorable regulatory environment. These firms may be able to more effectively capture rents from public policy than their smaller counterparts.<sup>105</sup>

Interestingly, one would expect that, given the impediments to success that small companies face, they would be less active in the political environment. Yet, Cook and Fox found that small companies were more active, not less, in corporate political activity than their medium-sized counterparts.<sup>106</sup> Small companies also tackled a wider range of issues.<sup>107</sup> In addition, small companies were more likely to participate in groups than medium-sized businesses.<sup>108</sup> Intriguingly, even though small companies reported themselves to be more active, they also reported less successful outcomes when compared to the medium-sized businesses studied.<sup>109</sup>

These findings can be combined to imply a pattern of corporate political activity for small businesses. Reports of greater political activity for smaller firms are surprising, especially given the numerous costs and impediments to action in place. However, it may be that the quantity of small business participation, rather than participation quality, is driving the results. A hypothetical pattern may be the following: small businesses, through a trade publication, local newsletter, or word-of-mouth, learn of regulation that is unfavorable. Through their shared contacts or a formal network, these businesses contact their relevant government representatives. The businesses are not highly sophisticated politically, nor are they coordinated, so scattered protests reach the regulator in a relatively disorganized fashion.<sup>110</sup> Perhaps each small business writes about its own situation, giving only a micro-view of the impact of the questionable rule. Businesses might also focus on their own harm, resulting in arguments that vary in form, or even directly contradict their fellow small business owners seeking to change the rule.<sup>111</sup> Legislators faced with pressure from various

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105. Hillman, Keim & Schuler, *supra* note 103, at 839.

106. Cook & Fox, *supra* note 101, at 106-07.

107. *Id.* at 107.

108. *Id.*

109. *Id.*

110. The study found that, with the exception of a negative effect of letter writing campaigns, there was no apparent “‘silver bullet,’ a method or combination of methods that was clearly a winner.” *Id.* at 108.

111. Ronald G. Cook & David Barry, *Shaping the External Environment: A Study of Small Firms’ Attempts to Influence Public Policy*, 34 BUS. & SOC’Y 317, 319 (1995) [hereinafter *Shaping the External Environment*] (stating that “[p]olicy makers accustomed to

groups or regulators tasked with a potentially aggressive mandate might discount the combined campaign because of its relative lack of unity and professionalism. There may also be the presence of influence fatigue due to the repeated challenges of these smaller businesses. The first campaign by small companies to reverse a rule might provoke attention. The tenth campaign in a relatively short period of time, by contrast, might have a diluted effect on the targeted agency or legislator. As a result, the more frequent and coordinated efforts by unsophisticated small businesses to engage in corporate political activity might produce less beneficial results than a more sophisticated larger business that understands how to lobby most efficiently and tactically for the greatest benefit. The above scenario is merely a hypothetical, but may clarify at least in part the motivations for small firm activity and provide an explanation for the less productive results.

*B. The Pressures of the Regulatory Environment*

This cross-disciplinary pressure inevitably influences how entrepreneurs interact with their regulatory environment. At best, a business owner will give legal rules the same scattered treatment provided to business functions. The entrepreneur might learn just enough about trademark law to develop an initial company logo. The entrepreneur might follow the necessary steps to form a corporation, but neglect the corporate form once the business is underway. If the entrepreneur interacts with regulators, the entrepreneur may only consider that interaction to the extent that regulators will leave the entrepreneur alone in the future. The entrepreneur may never again choose to interact with government officials except when required to do so. Given the constant pressures of running a business, dedicating time and effort to voluntary interaction with the regulatory environment is readily seen as an unwise use of limited resources.

Yet small business owners face significant and persistent pressures from the regulatory environment.<sup>112</sup> The most obvious pressure that small businesses face is the cost of complying with regulations. Some variable costs might impose a similar percentage burden when compared to larger firms. If a regulation requires a certain safety feature on a product, for

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dealing with the high-powered, smoothly orchestrated, and well-financed influence campaigns of large companies are likely to have difficulty making sense of and responding to the multi-faceted, loosely joined, and often-conflicted voices of small business owners.”).

112. See Ronald G. Cook & David Barry, *When Should the Small Firm be Involved in Public Policy?*, 31 J. SMALL BUS. MGMT. 39, 39 (1993) [hereinafter *When Should Firms be Involved*] (stating that “[i]n many industries, the political success of a business is no less important than marketplace success”).

example, that feature is an added cost that increases or decreases according to the quantity of production.

However, many regulatory costs are fixed costs that disproportionately burden small businesses.<sup>113</sup> Firms handling a certain dangerous substance, for example, might be required to process, monitor, and store that substance in a similar fashion, regardless of the quantity of the substance used. A large firm might benefit from economies of scale in providing facilities to store the substance that a small business cannot.

Paperwork might also accompany regulatory compliance. If paperwork requirements are the same regardless of a firm's size, then the cost of obtaining the information, keeping the necessary records and submitting those records to the appropriate agency may burden the small business more when compared to its larger competitor. The economies of scale from paperwork requirements can be significant; an advantage which small businesses cannot easily exploit.<sup>114</sup> Thus, the problem for small firms is both efficiency and effectiveness. Small firms will not have the internal regulatory systems in place to process paperwork as efficiently as large ones. Small firms will also not know enough about the regulatory environment to be as effective at compliance when compared to their larger brethren. Furthermore, regulatory burdens in a small business can tax the resources of the very person whose attention is necessary elsewhere—the chief executive.<sup>115</sup> Larger firms can delegate regulatory issues to specialists. An entrepreneur may not have that luxury available, or it may come at a very high price. Time spent managing regulatory problems is seen as time lost to developing one's product or service. This zero-sum loss approach to regulation gives a strong incentive to avoid regulatory issues as much as possible.

Small firms may also present more tempting targets because of their lack of resources. If a small business is detected and prosecuted, it might be less likely to mount a successful defense against the prosecuting agency. Large businesses, by contrast, might be able to afford sophisticated and specialized legal counsel and dedicate significant funds to the defense.

Entrepreneurs in particular might face special scrutiny. Although many innovations represent reasonable extensions of current knowledge, some may be so unusual or radical that they might create a new category of product or service altogether. A radically new phenomenon based upon entrepreneurial activity might not easily fall within an agency's regulatory scrutiny. This might give the entrepreneur freedom for a time, but

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113. Paul Sommers & Roland J. Cole, *Costs of Compliance in Small and Medium-Sized Businesses*, 6 AM. J. SMALL BUS. 25, 26 (1981).

114. WILLIAM A. BROCK & DAVID S. EVANS, *THE ECONOMICS OF SMALL BUSINESS* 136 (1986).

115. Sommers & Cole, *supra* note 113, at 26.

regulatory controls will inevitably apply to the business. When the law finally catches up to the business, regulatory scrutiny might be more searching or comprehensive than that practiced in established fields. A good example of this phenomenon might be the introduction of websites such as Facebook or Twitter. In very little time, entrepreneurs created an entirely new web industry based upon social networking. Initially the target of few specialized regulations, increased attention from news media has brought great public scrutiny. The result has been legislators and regulators who struggle to catch up with the advances of the industry.<sup>116</sup>

Not all of the costs involved with regulation, however, necessarily fall hardest upon the smallest firms. Consider the perspective of a regulator with a broad mandate and limited budget. This regulator wants to further the mandate as much as possible within the confines of available funds. The regulator is a kind of entrepreneur in her own right, using her discretion to maximize regulatory returns relative to costs.

Given a regulator's incentives and limitations, small businesses may be the least interesting target for regulatory scrutiny. Small businesses tend to have the smallest non-compliance issues in absolute terms. For example, assume that a small business fails to remediate pollution emissions that are thirty percent over the maximum, due to inadequate controls. This business might be a less attractive target than a business many times its size who fails to remediate by only ten percent. However, it is the much larger business that, in absolute terms, may release more harmful pollutants into the air. If the regulator's goal is to reduce as many illegal pollutants as possible, then the larger business is the optimal target, even though the small business might be a more flagrant violator. Small businesses might be able to get away with more brazen violations because the absolute value of the damage remains diminished.

Small businesses also may be more difficult to detect and isolate.<sup>117</sup> In an industry that might have hundreds, if not thousands, of small businesses, the new venture that skirts regulatory standards might easily be overlooked amongst the sheer number of rival enterprises. A small business that has an otherwise clean slate can readily blend into the regulatory scenery and ignore scrutiny even after repeated violations.

Small firms may also not be ideal public relations targets. Agencies

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116. See, e.g., Daniel B. Garrie et al., *Data Protection: The Challenges Facing Social Networking*, 6 B.Y.U. INT'L L. & MGMT. REV. 127, 128 (2010) (noting in a global context that, "[a]s social networking technology has raced forward, it has left corresponding legislation in the dust. . . . [D]ata protection laws have remained sorely inadequate to protect personal information in the social networking environment."); Lisa Thomas & Robert Newman, *Social Networking and Blogging: The New Legal Frontier*, 9 J. MARSHALL INTELLECTUAL PROP. L. 500 (2009).

117. Sommers & Cole, *supra* note 113, at 26.

have limited budgets and are subject to the will of the legislative entity that funds them. Savvy regulators might respond to such pressures by enforcing rules against the most visible or notoriously-perceived violators rather than those firms that are actually committing the greatest harm. State regulators, for example, might have an incentive to challenge companies with only a token state presence relative to their broader operations.

Small businesses by contrast, are rarely so visible or notorious that they would generate public relations rewards for the agency that scrutinizes them. These small businesses are also more likely to be able to assert that most or all of the jobs they offer are located within a particular state. The implication is that those in-state jobs would be threatened if legal action commences against them. A small business entrepreneur might even make a more sympathetic figure. He can present himself as a 'regular guy' who is just trying to get ahead in a big business world and who is unfairly scrutinized by a massive government bureaucracy.

### C. *Attitudes of Small Business Owners Toward Regulation*

Small business owners have expressed significant concerns about the impact of regulation on their business operations. A survey of nearly two hundred small business owners in the Midwest revealed that 81.1% believed regulatory compliance indirectly added costs to their business and 66.3% believed that regulations added direct costs to their product.<sup>118</sup> A majority of owners (65.3%) believed that government regulation impedes the progress of their business overall.<sup>119</sup> Approximately half of respondents reported that government regulation impacts their motivation to continue as a small business owner.<sup>120</sup> While a majority of respondents reported no contact with public officials, those that did reported both positive and negative experiences.<sup>121</sup> Median annual compliance costs to regulation were estimated at \$2500, representing between five and ten percent of sales for most of the sampled companies.<sup>122</sup> These numbers appear to be self-reported<sup>123</sup> and may represent a tendency toward inflated estimates of the costs of regulation.<sup>124</sup> However, it is no less important to note that at least

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118. Donald F. Kuratko, Jeffrey S. Hornsby & Douglas W. Naffziger, *The Adverse Impact of Public Policy on Microenterprises: An Exploratory Study of Owners' Perceptions*, 4 J. DEVELOPMENTAL ENTREPRENEURSHIP 81, 86 (1999).

119. *Id.*

120. *Id.* at 86–87.

121. *Id.* at 88.

122. *Id.* at 81.

123. *Id.* at 88. The information was obtained as a part of a thirty-six item questionnaire. *Id.* at 85.

124. This overreaction has been observed in various business-related fields. See Robert

the perception of small business owners is that regulation is a significant impediment to efficient operations.

Because small business owners are often already overtaxed and find themselves facing an already complex legal environment, their negative reactions to further regulatory constraints is not surprising. What *is* perhaps unexpected is how strongly these negative attitudes resonate and how vast the gulf between a regulator and small business leader might be.

Cook and Barry conducted thirty-one interviews with small business executives across an array of industries to learn about their attitudes toward regulation and regulators.<sup>125</sup> Transcripts were produced from interviews with these executives, who led companies ranging from eighteen to 380 employees, all located in upstate New York.<sup>126</sup> The transcripts yielded hundreds of pages of data.<sup>127</sup>

The results were unequivocal and striking. The authors explained that, “[f]rom the first interview to the last, it was apparent that small business Chief Executive Officers (“CEOs”) considered the public policy arena extremely confusing and complex.”<sup>128</sup> Executives would often describe regulations as “clear as mud” or ask, “Where did this come from?” and conclude that regulation was not based on reality.<sup>129</sup>

Executives viewed themselves not as participants in an unpleasant but necessary regulatory regime, but as soldiers in a long-standing war against the government.<sup>130</sup> This war was “filled with turf disputes, shootouts, fierce battle campaigns, serious injuries, dashed hopes, and occasional tales

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C. Bird & John D. Knopf, *Do Disability Laws Impair Firm Performance?*, 47 AM. BUS. L.J. 145 (2010) (finding a surprisingly large change in fixed asset purchases by firms when a state adopted a disability accommodation requirement into its state law); Stephen J. Choi, *The Unfounded Fear of Regulation S: Empirical Evidence on Offshore Securities Offerings*, 50 DUKE L.J. 663 (2000) (providing empirical evidence regarding the risks of security regulation compared to inflated market reactions); Lauren B. Edelman, Steven E. Abraham & Howard S. Erlanger, *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC’Y REV. 47, 80 (1992) (finding that “there seems to be significant albeit not conclusive evidence that employers’ responses to wrongful discharge doctrine are in large part a result of constructions of the legal environment by the personnel and legal professions, which significantly overstate the risks of wrongful discharge doctrine to employers.”); Michael D. Weiss, Note, *The Poor Tax Revisited: The Effects of Shifting the Burden of Investigating Drug Crimes to Lenders*, 70 TEX. L. REV. 717, 722 (1992) (noting that banks will likely overreact to regulation involving government seizure of illicit monies because of their inherent aversion to risk).

125. *Shaping the External Environment*, *supra* note 111, at 322.

126. *Id.*

127. *Id.*

128. *Id.* at 324–25.

129. *Id.* at 325.

130. *Id.* at 325–26. The military metaphor, the authors write, was “the most commonly used method of organizing and making sense of public policy information.” *Id.* at 326.

of victory.”<sup>131</sup> This attitude may influence why lobbyists hired by businesses are commonly known as “hired guns.”<sup>132</sup>

An attitude of despair and frustration also permeated the interviews. CEOs are typically confident by nature,<sup>133</sup> but these interviews revealed leaders who were hesitant and uncertain about influencing the regulatory environment.<sup>134</sup> CEO interviews were often punctuated with remarks like “small firms never win.”<sup>135</sup> One executive even lamented about being “very damn discouraged . . . [and] frankly . . . ready to throw in the towel,” over what he perceived as frivolous legal rules.<sup>136</sup> Interviewees generally believed that government policies had such a strong influence that they could be responsible for the long-term failure of the organization.<sup>137</sup> Such responses reveal that regulation was a most uncomfortable and emotional subject for the interviewed subjects.

Little good can come from such strongly negative and emotional responses, and this attitude permeated the decision making process of the organization. Some firms “defended” themselves against regulatory encroachment by avoiding compliance, denying non-compliance had occurred when challenged, and hoping to be overlooked due to sheer numbers.<sup>138</sup> Even fewer viewed the relationship with government as a potentially “win/win” relationship.<sup>139</sup> Instead, government officials were perceived as the “town bad guys” whom executives could never “run out of town.”<sup>140</sup> Businesses tended only to react when regulations had already made extensive inroads into company operations.<sup>141</sup>

Predictably, the interviews showed that meetings with regulators were unproductive. These meetings widened rather than reduced rifts between

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131. *Id.*

132. *See, e.g.,* Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 527 (2007) (using the term); Ron Smith, *Compelled Cost Disclosure of Grass Roots Lobbying Expenses: Necessary Government Voyeurism or Chilled Political Speech?*, 6 KAN. J.L. & PUB. POL’Y 115, 132 (1996) (using the term).

133. James R. Hines, Jr., Jill R. Horwitz & Austin Nichols, *The Attack on Nonprofit Status: A Charitable Assessment*, 108 MICH. L. REV. 1179, 1192 (2010) (noting for the purpose of distinguishing between for-profit and non-for-profit leaders that, “[o]wners and executives of for-profit firms generally receive performance-based compensation, which both motivates high levels of attention and effort and attracts managers who are confident in their capabilities.”).

134. *Shaping the External Environment*, *supra* note 111, at 326.

135. *Id.*

136. *Id.*

137. *Id.* at 328.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

regulators and business owners.<sup>142</sup> Regulators and businesspeople met only when one side wanted something from the other. This encouraged a defensive rather than a collaborative posture,<sup>143</sup> whereby each side second-guessed the other and avoided concessions. These meetings yielded few productive results. Overall, CEOs surveyed in the study exhibited strongly negative attitudes toward regulation.

The attitudes expressed in this study differ significantly from the more moderate responses found by Kuratko and co-authors.<sup>144</sup> Thus, the methodology of the CEO study is worth noting because it may have influenced its finding of graphic results. Unlike the prior work, which used questionnaires,<sup>145</sup> this study used in-depth interviews of thirty-one executives from twenty-seven firms lasting approximately ninety minutes each.<sup>146</sup> The authors also observed nine trade association meetings having a government relations focus.<sup>147</sup> Also unlike the prior work, this paper focused primarily on attempts by executives to influence the public policy process. These lengthy interviews may have provided a sense of comfort to the interviewees, allowing them to express themselves more freely to the interviewer and voice problems with the business. Trade association meetings that were observed may have had a similar effect. The immoderate responses may also be a product of overall frustration as much as specific problems with regulation.

Justified or not, the belligerent attitude of these business leaders likely exacerbates the problem of unwanted regulatory influence even further. Indeed, their behavior may encourage the very regulatory environment they want so strongly to prevent. It is possible that policy makers, presumably already suspicious of business motives, engaged in defensive behaviors of their own. One strategy, the authors of the study surmise, is that policymakers kept legislative language deliberately obtuse in order to avoid clear impact calculations that businesses could use to defeat or repeal the legislation.<sup>148</sup> It is questionable whether obtuseness in legislative language arose solely or even primarily from defensive motives. Among the many reasons might be that the written word is simply an insufficient medium for

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142. *Id.* at 326.

143. See Tia Henderson, *The Foundation to Collaborate: Understanding the Role of Participant Interests* 325 (2010) (unpublished Ph.D. thesis, Portland State University) (stating that “when people are mistrustful, they engage in defensive behavior that encourages positions and distributive tactics.” (citing DEAN G. PRUITT, *NEGOTIATION BEHAVIOR* (1981)))

144. Kuratko, Hornsby & Naffziger, *supra* note 118.

145. *Id.*

146. *Shaping the External Environment*, *supra* note 111, at 322.

147. *Id.*

148. *Id.* at 327.

legislators to ever draft a statute that is perfectly unambiguous.<sup>149</sup> However, the point behind this conclusion is an important one. Policy makers and regulators may react negatively or positively depending on the posture of the regulated parties.

Further aggravating the problem is lack of notice or interest for government programs designed to aid small businesses or alleviate the regulatory burden. When government agencies offer programs to assist or support small enterprises, they often become invisible to these entities. In one study, the author examined the effectiveness of government export assistance programs for businesses and discovered a general lack of awareness that such programs even existed.<sup>150</sup> Another study reported a similar lack of awareness of technology transfer assistance programs available to local manufacturers.<sup>151</sup> When small firms learn of such programs, they often view these programs with suspicion rather than appreciation. An investigation of business-owner attitudes towards government involvement on a range of issues revealed that small business owners were largely unconvinced that government could deliver on promised assistance.<sup>152</sup> Almost half of small business owners surveyed believed that government should not be involved in job creation.

Ultimately, most CEOs of small businesses did not even consider involving themselves in a public policy issue until that issue directly impacted their businesses.<sup>153</sup> Overall, few small business owners surveyed took an active role in the public policy arena.<sup>154</sup> When these few owners attempted to influence public policy makers to promote more business-friendly policies, these efforts usually failed.<sup>155</sup> It is little wonder why small business owners are so frustrated with what they perceive as an oppressive, inexplicable, and hostile regulatory climate in the United States.

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149. Jonathan D. Andrews, *Reconciling the Split: Affording Reasonable Accommodation to Employees: "Regarded As" Disabled Under the ADA—An Exercise in Statutory Interpretation*, 110 PENN. ST. L. REV. 977, 994 (2006) (stating that "[l]atent statutory ambiguities can arise any time after drafting. The English language is far too complex for legislators to draft a perfectly unambiguous statute; not to mention the fact that the meanings of words change over time.").

150. A.H. Moini, *Small Firms Exporting: How Effective are Government Export Assistance Programs?*, 36 J. SM. BUS. MGMT. 1, 1 (1998).

151. John Masten, G. Bruce Hartman, & Arief Safari, *Small Business Strategic Planning and Technology Transfer: The Use of Publicly Supported Technology Assistance Agencies*, 33 J. SM. BUS. MGMT. 26, 26 (1995).

152. Kelly C. Strong & Michael Winchell, *A Comparison of Small and Large Business Managers' Attitudes Toward Innovation and the Role of Government in Promoting Technology*, 6 J. SM. BUS. STRATEGY 109, 119 (1995).

153. *Shaping the External Environment*, *supra* note 111, at 329.

154. *Id.* at 328.

155. *Id.* at 326.

#### IV. STRATEGIES FOR SMALL BUSINESSES IN NAVIGATING THE RFA

Learning to think strategically over the long term in a way that is both realistic and effective is a crucial skill for small businesses. The most competitive small businesses will acknowledge the need to take regulations into account as a business concern, in the same way that they acknowledge other issues that may be beyond their expertise, but which significantly affect their chances of success.

While the RFA mandates some amount of agency attentiveness to small business' 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 businesses better communicate their interests to relevant agencies, when so many of them are already under enormous financial pressure simply to turn a profit? Often these small businesses will 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 contributions 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 strategies can help improve the substantive dialogue between agencies and firms, creating or strengthening the working relationship between them and, presumably, leading to a more nuanced appreciation of small firm concerns in the rulemaking process. We will next describe some of the most promising routes for small firms to take.

##### *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 businesses. For example, because agencies are now required to put their information online in a searchable format, small businesses 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 businesses can use the resulting flow of information competitively to reap greater and more concrete benefits than other stakeholders.

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 in agency action.<sup>156</sup> An Open Government Directive ("Directive") issued in December 2009 provided more detailed instructions to agencies about implementing these standards.<sup>157</sup> A comprehensive overview of the results of the Open Government Initiative, as it is called, was established through the White House website.<sup>158</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, indexed and searched by commonly used web search applications."<sup>159</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 "[d]etails as to how your agency is complying with transparency initiative guidance such as . . . eRulemaking . . ."<sup>160</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>161</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" on their agency's website, to be maintained and updated "in a timely fashion."<sup>162</sup> Each Open Government Webpage was to

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156. Memorandum from President Barack Obama, *supra* note 6.

157. Memorandum from Peter R. Orszag, *supra* note 7.

158. *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.

159. Memorandum from Peter R. Orszag, *supra* note 7, at 2.

160. *Id.* at 8.

161. *Id.* at 9.

162. *Id.* at 2.

“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>163</sup>

The Open Government Initiative bodes well for small businesses. 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 both the small businesses they regulate as well as the general public to voice concerns about proposed or existing regulations, even if the agencies do not ultimately act on 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 for possible regulatory action by 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>164</sup> Agencies also use blogs, wikis, podcasts and mashups to convey information about agency activity.<sup>165</sup>

Similarly, most small firms have some presence on the internet. According to the Small Business Success Index published by Network

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163. *Id.* at 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.

164. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-872T, CHALLENGES IN FEDERAL AGENCIES’ USE OF WEB 2.0 TECHNOLOGIES (2010).

165. *Id.* at 4.

Solutions, LLC and the University of Maryland's Smith School of Business, sixty-seven percent of small firms surveyed either have a website or plan to have one within two years, and twenty-four percent of small firms surveyed already use social media.<sup>166</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. The SBA received an enthusiastic response when it started using social media. 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 2500 followers on the agency's Twitter account, and close to 5000 "Likes" on their Facebook page.<sup>167</sup>

Another underused innovation supporting the goals of the RFA is the Regulations.gov website. This website, part of the eRulemaking initiative, allows users to "[s]earch for" and access "a proposed rule, final rule or Federal Register (FR) notice," "[s]ubmit a comment on a regulation or on another comment," "[s]ign up for e-mail alerts about a specific regulation" and "[s]ubscribe to RSS feeds by agency of newly posted FR notices."<sup>168</sup> The site provides access to information from nearly 300 federal agencies.

While the Directive does encourage agency responsiveness to small firms and other stakeholders who benefit from increased transparency and communication, its potential benefits are greatest when a small firm can target the specific agency or agencies that most directly affect its operations. The 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

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166. Rockbridge Assoc., *The State of Small Business Report: June 2010 Survey of Small Business Success*, NETWORK SOLUTIONS 2 (July 2010), [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).

167. Jen Williams, *The Small Business Administration Engages Social Media*, PRONET ADVERTISING (Jan. 5, 2011), <http://www.pronetadvertising.com/articles/the-small-business-administration-engages-social-media.html>.

168. *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 Regulations.gov website in 2003 "to enable citizens to search, view and comment on regulations issued by the U.S. government." *eRulemaking Program*, REGULATIONS.GOV, <http://www.regulations.gov/#!aboutProgram> (last visited Feb. 2, 2011). The EPA has served as the managing partner of the eRulemaking program since its inception. *Id.*

reading room, then struggle through a comment process specific to each agency. Today using Regulations.gov, the public can shape rules and regulations that impact their lives conveniently, from anywhere.<sup>169</sup>

Using this website, small firms can search broadly for proposals that could affect their 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 an advantage to such an organizational scheme would be that “rulemakings of federal agencies [would] become more compatible with commonly used media categories, providing real-world perspectives about rules.”<sup>170</sup> 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>171</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—social media offers 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 businesses 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

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169. *eRulemaking Program*, REGULATIONS.GOV, <http://www.regulations.gov/#!aboutProgram> (last visited Feb. 2, 2011).

170. *Regulated Sector Categories*, REGULATIONS.GOV, <http://www.regulations.gov/exchange/topic/exchange/discussion/regulated-sector-categories> (last visited April 8, 2011).

171. *See, e.g., Exchange Discussions*, REGULATIONS.GOV, <http://www.regulations.gov/exchange/topic/exchange> (last visited Feb. 2, 2011) (allowing users to evaluate the usefulness of the site’s features through a star-rating feature).

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 businesses. The first are industry-specific associations, which offer benefits to both large and small firms within a given industry. The second are trade associations that operate to help meet the needs of small firms 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 businesses 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 the 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>172</sup> After nearly two years of litigation, the Department of Homeland Security eventually rescinded the rule.<sup>173</sup>

While trade associations have great potential to help small businesses communicate with regulators, they may bring disadvantages as well. One potential obstacle to the use of trade associations is the perception that they are deaf to the concerns of small businesses. In some industries, small businesses have been reluctant to engage in trade association activity because they believe that larger businesses, 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 businesses underrepresented,<sup>174</sup> this is not always the case. In any event, there is far less risk that a large business will dominate a trade

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172. David French, *IFA and Industry Groups Sue to Stop "No-Match" Rule: Firing Workers Required Under Immigration "No-Match" Rule*, FRANCHISING WORLD, Oct. 2007, at 39.

173. 74 FED. REG. 51, 447 (OCT. 7, 2009).

174. Holman, *supra* note 1, at 1124.

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>175</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 businesses 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>176</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>177</sup> The r3 process is not just a vehicle for complaints. It also allows small businesses to engage more creatively with the government by suggesting positive regulatory reforms.

Despite the visibility and responsiveness of the r3 process, 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 thirty-eight nominations, fewer than half of the eighty nominations that the SBA received in 2008.<sup>178</sup> While it is not clear why more small firms do not take advantage of this process, it is likely that many simply do not know about it. Given the attitudes of small firms discussed in Part III above, it is also possible that many small firms lack the information they would need to

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175. 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).

176. Press Release, U.S. 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>.

177. *Small Business Regulatory Review and Reform Initiative*, U.S. SMALL BUS. ADMIN. OFFICE OF ADVOCACY (Oct. 1, 2010), <http://archive.sba.gov/advo/r3/>.

178. Press Release, U.S. 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 176. 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).

take part in the process, such as the specific name of a regulation affecting them 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.

#### V. 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 businesses' 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 require a significant investment of additional resources, and the potential benefits for both regulators and the smaller firms that 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>179</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>180</sup> Alaska's small business flexibility law was repealed effective January 1, 2009.

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179. *Small Business Regulatory Flexibility Model Legislation Initiative*, U.S. 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).

180. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1035 (2010) (demonstrating Arizona's comprehensive statute applicable to small businesses); ALA. CODE §§ 41-22-23 (2010) (demonstrating Alabama's lack of regulation applicable to small businesses).

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 businesses. 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 the public comment period for the proposed regulation.<sup>181</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>182</sup>

Several states have created remarkably effective, 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 email 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 businesses can complete a simple registration procedure.<sup>183</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 businesses to sign up for free email alerts to notify them whenever a state agency proposes a rule change involving certain keywords that the businesses have

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181. *Connecticut Is Latest New England State To Strengthen Regulatory Flexibility for Small Business*, *supra* note 36.

182. *Id.*

183. *Rules Tracker*, STATE OF RHODE ISLAND, available at <http://www.rules.state.ri.us/rules/freshregs/> (last visited Feb. 2, 2011) (simple registration required).

identified.<sup>184</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>185</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>186</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>187</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>188</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>189</sup> Missouri has a Small Business Regulatory Fairness Board serving much the same purpose, as do Oklahoma and South Carolina.<sup>190</sup>

While a single review board obviously would be impractical for the federal government, major federal agencies could consider developing similar review boards, consisting of current and/or past small business owners whose businesses 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

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184. U.S. SMALL BUS. ADMIN. OFFICE OF ADVOCACY, STATE GUIDE TO REGULATORY FLEXIBILITY 17 (2007), [http://archive.sba.gov/advo/laws/rfa\\_stateguide07.pdf](http://archive.sba.gov/advo/laws/rfa_stateguide07.pdf).

185. *Id.*

186. *Sign-up Form*, COLO. OFFICIAL STATE WEB PORTAL, OFFICE OF POLICY, RESEARCH AND REGULATORY REFORM, [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).

187. *Small Business Regulatory Review Board*, HAW. DEP'T OF BUS., ECON. DEV. & TOURISM, [http://hawaii.gov/dbedt/business/start\\_grow/small-business-info/sbrfb](http://hawaii.gov/dbedt/business/start_grow/small-business-info/sbrfb) (last visited Feb. 2, 2011).

188. *Id.*

189. *Id.*

190. MO. SMALL BUS. REGULATORY FAIRNESS 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).

regulations that may have an impact on small businesses. Ohio, for example, posts a list that is updated weekly.<sup>191</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>192</sup>

If federal agencies were required to develop similar outreach efforts, small businesses would be better able to stay informed about potential rule changes that could affect 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>193</sup> A separate state law defines “small business” as “a business employing no more than twenty full-time employees.”<sup>194</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>195</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. The 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

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191. *Small Business Rules and Regulations*, OHIO DEP’T OF DEV., <http://www.development.ohio.gov/Entrepreneurship/SBRegister1.htm> (last visited Feb. 2, 2011).

192. *Small Business Advocate*, CA.GOV, <http://sba.ca.gov/index.php> (last visited Feb. 2, 2011).

193. VT. STAT. ANN. tit. 3, § 832a (2011). This law was enacted in 1985, five years after passage of the RFA.

194. *Id.* at § 801(b)(12). This definition was also adopted in 1985, in the same session as Vermont’s version of the RFA.

195. 739 A.2d 1230 (1999).

complete this analysis was readily available to the agency.<sup>196</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>197</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 business 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 businesses.

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>198</sup> In practice, however, there is no particular group within the FTC that appears designated to receive inquiries from small businesses. Given the typical

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196. *Id.* at 1233 (emphasis added).

197. *Id.* at 1234-35.

198. *Advertising FAQ's: A Guide for Small Business*, FED. TRADE COMM'N BUREAU OF CONSUMER PROT. BUS. CTR., <http://business.ftc.gov/documents/bus35-advertising-faqs-guide-small-business> (last visited Feb. 2, 2011).

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>199</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>200</sup>

*C. Balance Small Business 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 businesses. 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 the SBA and various small businesses, however, the FWS ultimately designated only 1841 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>201</sup> Similarly, the FWS excluded private lands from a critical habitat designation for certain endangered minnows, in response to concerns voiced by small businesses, because of "economic factors."<sup>202</sup>

In assessing the RFA's cost savings to small businesses, the SBA does

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199. 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) (providing information for small businesses relating to the development and approval process).

200. *Small Business Contacts*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/ForIndustry/SmallBusinessAssistance/SmallBusinessRepresentatives/default.htm> (last visited Feb. 2, 2011).

201. U.S. SMALL BUS. ADMIN. OFFICE OF ADVOCACY, REPORT ON THE REGULATORY FLEXIBILITY ACT FY 2007, 23 (2008), available at <http://archive.sba.gov/advo/laws/flex/07regflx.pdf>.

202. *Id.*

not appear to have quantified or even considered the potential longer-term costs that such tradeoffs may generate, let alone compared them to the estimated savings experienced by the small business owners. In smoothing the path for small business owners, the government must not bulldoze over equally important, but perhaps less immediately quantifiable, broader concerns.

## VI. CONCLUSIONS

While the economic significance of small businesses has only become more important since the RFA's introduction thirty years ago, the RFA has not met its promise of increasing regulatory flexibility to accommodate those businesses' concerns. The RFA increased awareness among federal regulators that small businesses 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 businesses in a dialogue with regulators would generate many of the benefits that the RFA originally intended to convey.

Understanding the unique legal, regulatory and practical challenges that small firms face is a critical first step toward realizing these potential gains. Recent research demonstrates that small businesses have the capacity for greater political activity than might be expected, although they tend to lack the resources necessary for success using the traditional models of engaging with regulatory agencies. Because small businesses are disproportionately burdened by regulation, they may be uniquely motivated to seek regulatory flexibility.

Recent government directives increasing the transparency and participatory nature of regulation have the potential to serve small businesses well. Small businesses 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 businesses 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 businesses' concerns and overall efficiency.

While the RFA sought to raise agency awareness of small businesses' 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

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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 unresolved questions.