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EPA RULEMAKING UNDER THE REGULATORY FLEXIBILITY ACT: THE NEED FOR REFORM

Jennifer McCoid*

I. INTRODUCTION

As originally enacted, the Regulatory Flexibility Act of 1980 (RFA)¹ modified the federal executive agency rule-making process by requiring agencies to examine, and seek to reduce, the impact of any rules the agencies promulgate on small businesses and other small entities.² In passing the RFA, Congress found that federal regulations were applied uniformly to small and large businesses regardless of the size of the regulated entities.³ The uniform application of regulations, Congress found, retarded the development of small businesses.⁴ Small businesses are disadvantaged because their regulatory costs are proportionately larger than the costs of large businesses, which can spread compliance costs over a larger output.⁵ Another problem caused by the uniform application of regulations is that small businesses do not have the legal, economic, or technical personnel or the resources to achieve regulatory compliance economies of scale.⁶ Con-

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* Managing Editor, 1995–1996, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.
² See Doris S. Freedman et al., The Regulatory Flexibility Act: Orienting Federal Regulation to Small Business, 93 DICK. L. REV. 439, 441 (1989); GENERAL ACCOUNTING OFFICE, REGULATORY FLEXIBILITY ACT: STATUS OF AGENCY COMPLIANCE 1 (Apr. 1994) [hereinafter GAO REPORT].
⁵ See id.
⁶ See id.
gress found that the net result of these negative effects is to decrease competition and innovation.\textsuperscript{7}

This burden on small business was particularly troublesome at the time of the RFA's passage because of the enormous contribution to the national economy that small businesses made. In 1981, small business generated thirty-nine percent of the nation's gross national product.\textsuperscript{8} The efficacy of the RFA continues to be an important issue as small businesses were the major source of new jobs in the United States between 1988 and 1990.\textsuperscript{9} With the rise in regulations since 1990, however, the ability of small business to continue to create new jobs has declined.\textsuperscript{10} Estimates place the current cost to the United States economy of regulations at $600 billion and rising.\textsuperscript{11}

Despite the importance of the RFA in protecting this crucial component of the United States economy,\textsuperscript{12} internal weaknesses and external interpretations have deprived the RFA of its influence on the regulatory process virtually since its adoption. The result is that satisfaction of the RFA's requirements largely depends on the good faith and voluntary compliance of each executive agency.\textsuperscript{13} Compliance has been sporadic at best, and even the most faithful agencies can avoid the RFA's requirements when it is convenient for them to do so. In response to the detrimental effect on small businesses of regulations promulgated outside of the RFA's special flexibility analysis requirements, small-business advocates are petitioning Congress to amend the RFA.\textsuperscript{14}

This Comment examines the weaknesses of the RFA and explores methods of strengthening the RFA to restore the statute as an aid to small businesses and other small entities facing burdensome governmental regulations.\textsuperscript{15} Section II explores aspects of the RFA that have

\textsuperscript{8} Verkuil, supra note 4, at 219.
\textsuperscript{9} The Regulatory Flexibility Act: Hearing before the Committee on Small Business, House of Representatives, 103d Cong., 1st Sess. 16 (July 28, 1993) [hereinafter 1993 Hearing] (testimony of Mark W. Isakowitz, Legislative Representative, National Federation of Independent Business).
\textsuperscript{10} Id. at H2404 (daily ed. Mar. 1, 1995) (statement of Rep. Thomas W. Ewing (R-Ill.)).
\textsuperscript{12} Id. at H2411 (statement of Rep. Zachary P. Wamp (R-Tenn.)). Small businesses employ more than fifty-three percent of the work force in the United States. Id. (statement of Rep. Wamp).
\textsuperscript{13} See Freedman, supra note 2, at 442.
\textsuperscript{14} 141 CONG. REC. H2408 (daily ed. Mar. 1, 1995) (statement of Rep. Henry J. Hyde (R-Ill.)).
\textsuperscript{15} Although this Comment is primarily concerned with the effect of the RFA and the proposed reforms of the RFA on small businesses, these same effects also apply generally to other small entities as defined infra notes 32–35 and accompanying text.
been problematic in implementation and evaluates the efficacy of the current proposals for reform of the RFA in addressing the problems arising in the implementation of the RFA. Section III focuses specifically on the Environmental Protection Agency's (EPA's) rule-making processes and record of compliance with the RFA. The EPA's actions taken pursuant to the RFA demonstrate the need for and possible results of RFA reform.

II. THE RFA IN ACTION: WEAKER THAN INTENDED

The RFA was intended to alter the way federal regulatory agencies treat small business.16 Widespread change in agency treatment of small business, however, has not resulted from the RFA's operation.17 Due to the failure to alter agency rulemaking affecting small businesses in a significant manner, legislators and small-business advocates continue to propose amendments to the RFA that will further encourage changes in the agency rule-making process.18

A. A General Introduction to the RFA

Congress passed the RFA in response to growing concerns among small-business owners that the rise in federal regulations adversely affected the economic health of the small-business sector.19 Although Congress wanted to ensure that the effect of regulations on small businesses was not onerous, Congress opted not to give small businesses a blanket exemption from regulations.20 Rather, the RFA was created to encourage an informed and practical rule-making process in which the regulated entities participate.21 The participation of regulated entities will lead to regulatory alternatives that permit the agencies to continue to regulate small businesses, but that also facilitate compliance by small businesses.22 In addition to requiring regulated entities to participate in the rule-making process, the RFA also requires agencies promulgating rules affecting small businesses to

17 See Freedman, supra note 2, at 442.
19 See Stewart, supra note 16, at 66.
20 See Verkuil, supra note 4, at 223.
21 See Freedman, supra note 2, at 442.
22 See id. at 441–42; Verkuil, supra note 4, at 229.
perform special analyses to discover and address any adverse effect the regulations have on small businesses.\textsuperscript{23}

Congress passed the RFA as an amendment to the Administrative Procedure Act (APA).\textsuperscript{24} The RFA, therefore, incorporates general administrative law principles of internal analysis and public comment and review of federal rulemaking.\textsuperscript{25} Indeed, the final regulations to which the RFA applies can be challenged under the APA as arbitrary or capricious.\textsuperscript{26} Although public participation in the rule making process increases with use of public comment procedures, the RFA makes the agencies ultimately responsible for analyzing their rules and providing that analysis to regulated entities.\textsuperscript{27} This agency self-analysis is particularly necessary because small entities are disadvantaged not only in their legislative sophistication, but also in their access to and experience with statutes and regulations.\textsuperscript{28}

In passing the RFA, Congress intended not only to decrease the burden of governmental regulations on small entities, but also to increase the communication between small businesses and agency rulemakers throughout the rule making process.\textsuperscript{29} Congress assumed that the increased communications would illuminate the difficulties faced by small businesses and the regulatory alternatives available to

\textsuperscript{23} See Freedman, supra note 2, at 443.
\textsuperscript{25} Freedman, supra note 2, at 441.
\textsuperscript{26} See 5 U.S.C. § 706(2)(A) (stating arbitrary and capricious standard for judicial review of agency actions under the APA); see also 126 Cong. Rec. 21,457 (1980) (statement of Sen. John C. Culver (D-Iowa) (explaining that the APA's standards for challenging agency actions also apply under the RFA).
\textsuperscript{27} See Freedman, supra note 2, at 441.
\textsuperscript{28} See id. (explaining that agencies have more knowledge and expertise with regulations than do regulated entities); see also 141 Cong. Rec. H2416 (daily ed. Mar. 1, 1995) (statement of Rep. Tom DeLay (R-Tex.)) (explaining that small businesses need at least one year to learn about and assess the impact of new regulations affecting their businesses).
\textsuperscript{29} See Verkuil, supra note 4, at 229. When passing the RFA, the Senate adopted a substitute bill proposed on the floor. See 126 Cong. Rec. 21,449 (1980) (statement of Sen. Culver). The substitute bill was explained by the proponent, Senator John C. Culver, in a thorough analysis of each section. Id. at 21,452; see Freedman, supra note 2, at 456. As neither the House nor the Senate prepared a formal report explaining the RFA's language, most courts turn to this section-by-section analysis of the RFA when deciding cases involving the RFA. See Freedman, supra note 2, at 456. An important change made in the substitute bill was to include a separate provision barring judicial review. See Verkuil, supra note 4, at 261. Another change accomplished by the substitute bill was to make the RFA an amendment to the APA, rather than an amendment to the Small Business Act. See Freedman, supra note 2, at 456.
avoid those difficulties to the rulemakers at an early stage in the rule making process.\textsuperscript{30}

The RFA applies to all agency rulemakings that have a “significant impact on a substantial number of small entities.”\textsuperscript{31} Despite the recurrence of this standard of qualification for the RFA’s coverage throughout the statute, only the term “small entities” is defined in the statute.\textsuperscript{32} Small entities include small businesses,\textsuperscript{33} small organizations,\textsuperscript{34} and small governmental jurisdictions.\textsuperscript{35}

The RFA uses the Small Business Act definitions of what constitutes a small business.\textsuperscript{36} For manufacturing industries, the definition depends on the number of employees; for service, wholesale, retail, and other non-manufacturing industries, the definition depends on the dollar volume of annual receipts.\textsuperscript{37} Agencies that wish to use a different definition of “small business” may adopt such a definition after consulting with the Chief Counsel of Advocacy of the Small Business Administration (CCA), completing the appropriate notice and comment procedures, and publishing the alternative definition in the \textit{Federal Register}\.\textsuperscript{38} The RFA permits the development of an alternative definition of small business in recognition of the fact that the Small Business Administration (SBA) definitions were created for loan and procurement purposes and may not be consonant with the purposes of other regulating agencies.\textsuperscript{39} Indeed, a 1992 study evaluating the compliance of various EPA regulations with the RFA noted that the standard SBA definition of “small business” is inapplicable to most EPA regulations, and that the EPA therefore often formulates its own defini-

\textsuperscript{30} See Verkuil, \textit{supra} note 4, at 229.

\textsuperscript{31} 5 U.S.C. §§ 601–12. This language can be found in 5 U.S.C. §§ 602, 605(b), 609, and 610. Variations on this language are used in other sections of the RFA. The variations are understood to have the same meaning.

\textsuperscript{32} \textit{Id.} § 601.

\textsuperscript{33} \textit{Id.} § 601(6).

\textsuperscript{34} \textit{Id.} Section 601(4) defines small organization as a “not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”

\textsuperscript{35} \textit{Id.} § 601(6). A government body can qualify if the population does not exceed fifty thousand and it governs “cities, counties, towns, townships, villages, school districts, or special districts.” \textit{Id.} § 601(5).

\textsuperscript{36} See \textit{id.} § 601(3).


\textsuperscript{38} 5 U.S.C. § 601(3).

\textsuperscript{39} See Verkuil, \textit{supra} note 4, at 232.
tion. In addition to the SBA standards, agencies generally consider two other factors in determining whether a business is "small." Specifically, agencies consider whether a business is "independently owned and operated" and whether a business is "not dominant in its field."

The RFA requires agencies to analyze their rules for significant impacts on small entities. If such an impact exists, the agencies must explore alternative proposals that would achieve the regulatory purposes while also lessening the regulatory burden on the affected entities. When an agency gives notice of a proposed rulemaking in the Federal Register pursuant to § 553 of the APA, the RFA also requires the agency to publish an Initial Regulatory Flexibility Analysis (IRFA) in the Federal Register summarizing the impact the proposed rule will have on small entities and describing any significant alternatives to the rule. An agency issuing a final rule must also prepare a Final Regulatory Flexibility Analysis (FRFA) and either publish the FRFA in the Federal Register with the final rule or make the FRFA available to the public upon request.

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41 See Verkuil, supra note 4, at 233.
42 See id. For further explanation of the term "not dominant in field of operation," see 13 C.F.R. § 121.406.
43 See Freedman, supra note 2, at 441.
44 See id.; GAO Report, supra note 2, at 1.
46 Id. § 603. Section 603(b) requires the IRFA to contain:
   (1) a description of the reasons why action by the agency is being considered; (2) a succinct statement of the objectives of, and legal basis for, the proposed rule; (3) a description of and where feasible, an estimate of the number of small entities to which the proposed rule will apply; (4) a description of the projected ... compliance requirements ... [and] an estimate of the classes of small entities which will be subject to the requirement ...; (5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate ... the proposed rule.
Section 603(c) explains the requirement for discussion of significant alternatives, including ones that provide:
   (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements ...; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.
47 Id. § 604. The FRFA must contain:
   (1) a succinct statement of the need for, and the objectives of, the rule; (2) a summary of the issues raised by the public comments in response to the [IRFA], a summary of the assessment of the agency of such issues, and a statement of any changes made in
to publication of these documents, § 609 of the RFA requires agencies promulgating rules to provide adequate notice to the affected small entities, thereby facilitating meaningful participation in the rule-making process.48

Although the RFA specifically requires agencies to consider the impact of a rule on small businesses both when the rule is proposed and when the rule is finalized, not all rules are in fact subjected to flexibility analysis.49 Commentators recognize four main problem areas in the implementation of the RFA.50 First, the RFA precludes judicial review of any agency action taken pursuant to its provisions.51 Second, agencies may avoid the IRFA, the FRFA, and the § 609 public comment gathering procedures pursuant to the RFA’s certification provision.52 Courts interpreting the RFA only require agencies to analyze regulations that directly affect small businesses.53 Finally, the RFA makes the CCA responsible for monitoring agency compliance with the RFA, but the CCA’s exercise of this power has been greatly hindered.54 In reaction to these problem areas, Congress is seeking to

the proposed rule as a result of such comments; and (3) a description of each of the significant alternatives to the rule consistent with the stated objectives of applicable statutes and designed to minimize any significant economic impact of the rule on small entities which was considered by the agency, and a statement of the reasons why each one of such alternatives was rejected.

48 See id. § 609. This provision states:
when any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule . . . shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through techniques such as (1) the inclusion in an advanced notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities; (2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities; (3) the direct notification of interested small entities; (4) the conduct of open conferences or public hearings concerning the rule for small entities; and (5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.

49 See 1993 Hearing, supra note 9, at 10 (testimony of Doris S. Freedman, acting Chief Counsel for Advocacy, Small Business Administration).

50 See, e.g., id. at 10–11 (testimony of Doris S. Freedman).

51 5 U.S.C. § 611; see 1993 Hearing, supra note 9, at 111, 112 n.6 (statement of Doris S. Freedman). The judicial review provisions are discussed in greater detail infra Part II.B.1.

52 5 U.S.C. § 605(b); see 1993 Hearing, supra note 9, at 114 (statement of Doris S. Freedman). The certification provision is discussed in greater detail infra Part II.B.2.


54 See 1993 Hearing, supra note 9, at 6–7 (testimony of Rep. Thomas W. Ewing (R-Ill.)). The role of the CCA is discussed in greater detail infra Part II.B.4.
amend the RFA to provide for limited judicial review of agency actions under the RFA and to reinforce the role of the CCA.\textsuperscript{55}

B. The Limitations in the RFA

The RFA's effect on agency rulemaking has not been as great as was anticipated upon the RFA's passage.\textsuperscript{56} The RFA's inadequacies largely result from the inability of small businesses to challenge agency actions and certifications that do not comply with the RFA's requirements.\textsuperscript{57} Agencies may adopt regulations that harm small businesses while bypassing the RFA's requirements because the effect is not direct enough to merit regulatory flexibility analysis.\textsuperscript{58} Finally, the CCA—the only entity having any statutory oversight of agencies' compliance with the RFA—has insufficient power to influence agency rulemaking.\textsuperscript{59}


The APA, which governs administrative actions generally, allows for judicial review of agency actions unless another statute specifically precludes such review.\textsuperscript{60} The RFA specifically precludes judicial review.\textsuperscript{61} The lack of judicial review under the RFA has left small businesses with no avenue to challenge agency actions that fail to give proper consideration to the impact of the actions on small businesses.\textsuperscript{62}

Small-business advocates have cited the lack of judicial review as the main problem with the RFA, because the lack of review deprives the RFA of any influence over agency actions.\textsuperscript{63} Much of the litigation and confusion surrounding the implementation of the RFA arises from the ambiguous language used in the RFA's judicial review provision.\textsuperscript{64} Section 611 of the RFA provides:

(b) Any regulatory flexibility analysis prepared under sections 603 [IRFA] and 604 [FRFA] of this title and the compliance or

\textsuperscript{55} See Reform Act, supra note 18, §§ 301–13.
\textsuperscript{56} See 1993 Hearing, supra note 9, at 10 (testimony of Doris S. Freedman).
\textsuperscript{57} See Freedman, supra note 2, at 463.
\textsuperscript{58} See 1993 Hearing, supra note 9, at 11 (testimony of Doris S. Freedman).
\textsuperscript{59} See Freedman, supra note 2, at 450; infra notes 158–63 and accompanying text.
\textsuperscript{60} 5 U.S.C. § 701(a)(1).
\textsuperscript{61} Id. § 611; see 141 CONG. REC. H2411 (daily ed. Mar. 1, 1995) (statement of Rep. Rob Portman (R-Ohio)) (noting that it is a rare exception to prohibit judicial review of a statute).
\textsuperscript{62} See Freedman, supra note 2, at 463–64.
\textsuperscript{63} See 1993 Hearing, supra note 9, at 5 (testimony of Rep. Ewing).
\textsuperscript{64} See Verkuil, supra note 4, at 263.
noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review. When an action for judicial review of a rule is instituted, any regulatory flexibility analysis for such rule shall constitute part of the whole record of agency action in connection with the review.\footnote{5 U.S.C. § 611(b). The other provisions of § 611 are as follows: (a) Except as otherwise provided in subsection (b), any determination by an agency concerning the applicability of any of the provisions of this chapter to any action of the agency shall not be subject to judicial review. . . . (c) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise provided by law.}

In passing the RFA, Congress was concerned about the amount of litigation the RFA might generate and therefore sought to constrain judicial review under the RFA.\footnote{See 1993 Hearing, supra note 9, at 112 (statement of Doris S. Freedman); Stewart, supra, note 16, at 67.} The legislative history explains that Congress, in writing the judicial review provision, wanted to strike[\footnote{126 CONG. REC. 21,457 (1980) (statement of Sen. Culver).}] a balance between two central aims with regard to the role of the courts. The first is to insure that an agency's compliance with the objectives of this bill be subject to meaningful, yet responsibly defined, judicial oversight. . . . On the other hand, the bill avoids the substantial disruption of agency rulemaking inherent in allowing separate judicial review of the regulatory flexibility analysis itself. . . .\footnote{See Verkuil, supra note 4, at 262. As discussed supra note 29, the section-by-section analysis presented before the Senate is the main piece of legislative history relating to the RFA's passage, and is generally thought to incorporate the views of both the House and the Senate. See Freedman, supra note 2, at 456.}

Thus, although Congress did not want to bar courts from reviewing all agency actions under the RFA, it created § 611(b) to constrain consideration of the FRFA only as one part of the final rule's administrative record.\footnote{The RFA's certification procedures are discussed in more detail infra Part II.B.2.}

Other statements made during the congressional debate, however, suggest that Congress desired a broader availability of judicial review. During the debate on the passage of the House of Representatives version of the RFA, Representative Joseph M. McDade stated that if an agency erroneously certified its rule as having no impact on small entities,\footnote{126 CONG. REC. 24,583 (1980) (statement of Rep. Joseph M. McDade (R-Pa.)).} the House Committee on Small Business intended “that the court should strike down the regulation.”\footnote{See 1993 Hearing, supra note 9, at 112 (statement of Doris S. Freedman); Stewart, supra, note 16, at 67.} Similarly, Senator John C. Culver stated that an inadequate or non-exis-
tent FRFA could be a sufficient basis on which to strike down a rule.\textsuperscript{71} These statements are contrary to the balance intended by Congress, which limited the judicial review of a flexibility analysis to part of the overall rule-making record in order to prevent undue disruption of the rule-making process.\textsuperscript{72}

Despite Congress's clear concern that responsible judicial oversight of an agency's regulatory flexibility analysis should be allowed without retarding efficient rulemaking, Congress's pronouncements in § 611(b) have proved ambiguous in practice. The legislative history states that Congress designed § 611(b) to provide some judicial oversight without subjecting the regulatory flexibility analysis itself to "separate judicial review."\textsuperscript{73} This phrase, however, could be interpreted as forbidding only interlocutory review or as completely forbidding review of the regulatory flexibility analyses when determining the reasonableness of the rule.\textsuperscript{74} Most courts have held that the analysis itself cannot be separately reviewed.\textsuperscript{75} Illustrative of this accepted interpretation is Thompson v. Clark,\textsuperscript{76} where challengers of a Department of the Interior rule increasing fees for certain oil and gas leases claimed that § 611(b) only sought to preclude interlocutory review of regulatory flexibility analyses.\textsuperscript{77} The challengers asserted, however, that courts were permitted to determine the sufficiency of an agency's analyses as part of the review of the final rule.\textsuperscript{78} The United States Court of Appeals for the District of Columbia Circuit disagreed.\textsuperscript{79} The court held that § 611(b) permits a court to review the FRFA in determining the reasonableness of the rule under other

\textsuperscript{71} See 126 Cong. Rec. 21,457 (1980) (statement of Sen. Culver) (explaining that an agency's failure to perform the regulatory flexibility analysis in good faith would leave the agency unable to provide substantive grounds in support of its final rule, and that a court could then invalidate the rule).

\textsuperscript{72} See supra notes 66-68 and accompanying text. One commentator has noted that attributing the weight to the FRFA which the legislators' statements suggest is inconsistent with the idea expressed in the second sentence of § 611(b), that the FRFA is simply part of the entire rule-making record. See Verkuil, supra note 4, at 263.

\textsuperscript{73} 126 Cong. Rec. 21,457 (1980) (statement of Sen. Culver); see also supra notes 66-68 and accompanying text.

\textsuperscript{74} Verkuil, supra note 4, at 262.

\textsuperscript{75} See, e.g., Thompson v. Clark, 741 F.2d 401, 405 (D.C. Cir. 1984); Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 539 (D.C. Cir. 1983).

\textsuperscript{76} See Thompson, 741 F.2d at 405.

\textsuperscript{77} See id.

\textsuperscript{78} Id.

\textsuperscript{79} Id.
applicable laws, but not in determining whether the agency complied with the RFA.80

Even accepting that Congress intended to implement the weaker of the two interpretations—that the FRFA is simply another part of the entire record and should not be reviewed on its own merit—courts have proven reluctant to assess adequately the FRFA’s adequacy or absence when reviewing the reasonableness of a rulemaking.81 Although most courts state that an inadequate FRFA may be the basis for striking down a rule, no court has ever struck down a rule on this rationale.82 The court in Thompson provided the only guidance about when an agency’s mistake in its regulatory flexibility analysis can justify overturning a rule.83 A court can overturn the rule only if the agency’s analysis is so defective that the rule is unreasonable84 or if the agency fails to respond to public comments on the rulemaking.85

Furthermore, in Michigan v. Thomas, the United States Court of Appeals for the Sixth Circuit upheld an EPA action disapproving Michigan’s fugitive dust emissions rules and imposing a construction moratorium until emissions were further reduced or Michigan fashioned satisfactory rules.86 The court upheld the action even though the EPA failed to certify the action as having no economic impact on small entities, to perform an initial regulatory flexibility analysis, or to consider significant alternatives to the construction ban.87 Although the EPA completely failed to abide by the requirements of the RFA, the court determined that the EPA had addressed the regulatory

80 Id. (citing Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 539 (D.C. Cir. 1983)).
81 See, e.g., Michigan v. Thomas, 805 F.2d 176, 188 (6th Cir. 1986) (approving EPA’s actions even absent either a certification or a flexibility analysis).
82 See Thompson, 741 F.2d at 405; Small Refiner, 705 F.2d at 539. But see National Truck Equip. Ass’n v. National Highway Traffic Safety Admin., 919 F.2d 1148, 1157 (6th Cir. 1990), reh’g denied, 928 F.2d 739 (6th Cir.) (en banc), where the court noted that the Administration’s statement that regulatory action would not affect small business was “a conclusory statement with no evidentiary support in the record,” and was not sufficient to prove the Administration had complied with the Regulatory Flexibility Act. Id. Although the National Truck court actually struck down the Administration’s rule under the arbitrary and capricious standard, the court noted the Administration’s noncompliance with the RFA as another piece of evidence to support its conclusion of unreasonableness. See id.
83 See Thompson, 741 F.2d at 405.
84 See id. at 408. The court explained that the agency’s analysis is defective when it “underestimate[s] the harm inflicted upon small business to such a degree that, when adjustment is made for the error, that harm clearly outweighs the claimed benefits of the rule.” See id. at 405.
85 See id. at 408.
87 See id. at 187.
flexibility analysis requirements sufficiently on the basis of the entire rule-making record. The court in Michigan v. Thomas looked to the Thompson court's explanation of when a rule may be overturned and held that because the moratorium was required by law, the EPA was not required to subject its rule to public comment and had not acted unreasonably in imposing the moratorium.

The lack of judicial review also has impeded the CCA in fulfilling its role in the implementation of the RFA. Section 612 of the RFA charges the CCA with monitoring and reporting on the status of agency compliance with the RFA, and grants the CCA special intervention powers to advocate for small businesses. Without any enforcement mechanism in the RFA, the CCA must rely on its powers of persuasion to convince agencies to alter their policies and rules affecting small businesses.

In practice, courts have construed the judicial review provision strictly and have refused to scrutinize any agency action directly pursuant to the RFA. Commentators have reflected that the result of this lack of judicial oversight is that agencies view compliance with the RFA as optional because the RFA is, in effect, an “unenforceable

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88 See id. at 188. The EPA argued that the EPA had already considered small business impacts in its overall action and had, therefore complied with § 605(a) of the RFA which states that the analyses required by the RFA can be performed “in conjunction with or as part of any other . . . analysis . . . if such other analysis satisfies the provisions” of the RFA. 5 U.S.C. § 605(a); see Michigan v. Thomas, 805 F.2d at 187. The court concluded that the EPA had satisfied the requirements of the RFA, but the court did not base that conclusion on § 605(a) of the RFA. See Michigan v. Thomas, 805 F.2d at 188. Rather, the court stated that the Clean Air Act required the imposition of the moratorium and there were, therefore, no available alternatives for small entities. See id. at 179, 188.

89 See Michigan v. Thomas, 805 F.2d at 188. The decision not only adversely affected small businesses that had to halt their construction activities, but also sets a disturbing precedent for the small business community as an example of a court allowing agency action without any real evidence of agency compliance with the RFA.

90 5 U.S.C. § 612; see 1993 Hearing, supra note 9, at 6-7 (testimony of Rep. Ewing). The importance of the CCA in the implementation of the RFA is discussed in greater detail infra Part II.B.4.

91 See Michigan v. Thomas, 805 F.2d at 188; Thompson v. Clark, 741 F.2d 401, 405 (D.C. Cir. 1984); Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 539 (D.C. Cir. 1983). Even though an agency's regulatory flexibility analysis is not subject to direct review, these courts hold that the analysis should become part of the overall rule-making record and should be evidence of the reasonableness or unreasonableness of the rule itself. But see Sargent v. Block, 576 F. Supp. 882, 893 (D.D.C. 1983) (holding that the court will review the compliance of the U.S. Department of Agriculture with the RFA independent of the reasonableness of the rule). However, Sargent has been discounted in subsequent Circuit Court decisions. See, e.g.,
administrative procedure."94 Given this lax attitude, even the most diligent agency can, on occasion, avail itself of the RFA's permissiveness.95 In practice, agencies have taken advantage of the lack of judicial review to fashion rules without consideration of the impact on small business.96 Legislators have responded to this failure to comply with the RFA's requirements by proposing amendments to strengthen and clarify the RFA's judicial review provision.97

2. Certification

Despite the existence of the RFA's flexibility analyses requirements, the RFA also gives agencies a way to circumvent those requirements.98 An agency, by certifying that no significant impacts will result to small entities because of the agency action, removes the agency action from the reach of the RFA.99 Certification, together with the absence of judicial review,100 further impairs the ability of small businesses to challenge agency actions.101 The ability of agencies to remove their rulemakings from the analysis requirements of the RFA and from the useful involvement of the small-business community is a pressing problem, especially when such a decision is not subject to judicial oversight by courts.102 In 1987, the CCA received 112 IRFAs for proposed rulemakings and 1043 certifications by agency heads that the RFA did not apply to proposed rules.103 In addition to agencies certifying rules in the majority of cases, agencies also often use boiler-plate language in their certifications, which indicates the unwillingness of agencies to particularize the certification decision as required by the RFA.104

Section 605(b) of the RFA exempts an agency from the flexibility analyses requirements if the head of the agency certifies that the proposed rule will not have "a significant economic impact on a sub-

94 Freedman, supra note 2, at 463.
95 See id.
96 See 1993 Hearing, supra note 9, at 10 (testimony of Doris S. Freedman).
97 See infra Part II.C.1.
98 See 5 U.S.C. § 605(b).
99 Id.
100 See supra Part II.B.1.
101 See 1993 Hearing, supra note 9, at 114 (statement of Doris S. Freedman).
102 See id. at 114–15 (statement of Doris S. Freedman).
103 Freedman, supra note 2, at 446 n.23.
104 See 1993 Hearing, supra note 9, at 5–6 (testimony of Rep. Ewing). Section 605(b) of the
A substantial number of small entities."[105] The agency must also explain the reasons for the decision in a "succinct statement."[106] Once the agency has certified its rule, the agency is free to promulgate the rule without performing the specialized flexibility analyses and without specifically notifying small entities of the purpose or content of the rule.[107]

In addition to publishing this certification in the *Federal Register*, the agency head is required to provide a copy to the CCA.[108] Although the CCA can provide comments to the agency about the validity of the certification, the CCA has no power to overturn the agency head's categorization of the rule or to force the agency to heed the CCA's recommendations.[109]

The majority of courts do not subject agency certification to judicial review.[110] The refusal of courts to review the adequacy of an agency's certification conflicts with Representative Joseph M. McDade's statement in the House debate on the RFA that the Small Business Committee intended that a rule should be struck down if the agency wrongly determined that the rule had no significant economic impact on a substantial number of small entities.[111] The *Thompson* court,

RFA requires the agency head, when publishing the certification statement also to publish a "succinct statement explaining the reasons for such certification." 5 U.S.C. § 605(b).


[106] Id.

[107] See id. The decision to certify would essentially free the agency of the requirements of § 609 of the RFA, discussed supra note 48 and accompanying text.

[108] Id.

[109] 1993 Hearing, supra note 9, at 201 (statement of Leo McDonough, President, TEC/Pennsylvania Small Business United).

[110] Courts rely on the language in § 611(a) of the RFA stating that "any determination by an agency concerning the applicability of any of the provisions of this chapter to any action of the agency shall not be subject to judicial review," and § 611(b) of the RFA stating that "the compliance or noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review." See American Mining Congress v. EPA, 965 F.2d 759, 771–72 (9th Cir. 1992) (holding that the EPA's decision to certify "constitutes a 'determination by an agency concerning the applicability of any of the provisions of' the RFA, and is therefore unreviewable" even though the EPA failed to truly understand the impact of its rule); Colorado ex rel. Colorado State Banking Bd. v. Resolution Trust Corp., 926 F.2d 931, 948 (10th Cir. 1991) (holding that an agency's certification is not subject to judicial review); Thompson v. Clark, 741 F.2d 401, 405 (D.C. Cir. 1984) (holding that the certification decision "cannot possibly be understood as anything other than" a determination of the RFA's applicability); Lehigh Valley Farmers v. Block, 640 F. Supp. 1497, 1518, 1520 (E.D. Pa. 1986), aff'd, 829 F.2d 409 (3d Cir. 1987) (noting that agency's certification was incorrect, but was nevertheless not subject to judicial review). But see Sargent v. Block, 576 F. Supp. 882, 898 (D.D.C. 1983) (holding that court can review agency's decision to certify).

however, discounted Representative McDade's statement as an unreliable characterization.\textsuperscript{112}

The legislative history regarding judicial review of certification decisions also raises the same ambiguities as the judicial review provision regarding the role of the flexibility analyses themselves. The United States District Court for the Eastern District of Pennsylvania in \textit{Lehigh Valley Farmers v. Block}, noted that the testimony of Senator John C. Culver, upon whose statements most courts have relied in interpreting the RFA, was in some respects contradictory.\textsuperscript{113} In addition to stating that the agency has “sole discretion”\textsuperscript{114} in determining whether to conduct a regulatory flexibility analysis, the Senator also stated that an agency’s disregard of the RFA's analysis requirements would be “grounds to argue that this fact is evidence of the unreasonableness of the rule.”\textsuperscript{115} Nonetheless, the court determined that Senator Culver's first statement of sole agency discretion controlled, without giving any rationale for why the court weighed the statements as it did.\textsuperscript{116}

Despite the harmful consequences of a misinformed or inadequately justified certification, most courts strictly construed the judicial review provisions of the RFA as precluding judicial review of certification decisions.\textsuperscript{117} The court in \textit{Lehigh Valley} noted that the Department of Agriculture's certification of a rule amending milk marketing orders was incorrect because the rule would in fact have a significant economic impact on a substantial number of small entities as defined in the RFA.\textsuperscript{118} Nevertheless, the court declined to address the effect of the inaccurate certification upon the validity of the final rule because § 611(a) precludes judicial review of the agency’s certification.\textsuperscript{119}

Relying on previous District of Columbia Circuit court opinions and

\textsuperscript{112} Thompson, 741 F.2d at 407. The court noted that Representative Joseph M. McDade served on the Small Business Committee which had favored a version of the RFA that did not contain a prohibition of judicial review. \textit{Id.} The court concluded that because he favored allowing judicial review, his “characterization of the effect of the legislation is not reliable.” \textit{Id.}

\textsuperscript{113} \textit{Lehigh Valley}, 640 F. Supp. at 1520 n.20.


\textsuperscript{115} \textit{Id.} at 21,457 (statement of Sen. Culver).

\textsuperscript{116} See \textit{Lehigh Valley}, 640 F. Supp. at 1520 n.20.

\textsuperscript{117} See, e.g., American Mining Congress v. EPA, 965 F.2d 759, 771 (9th Cir. 1992); Colorado \textit{ex rel.} Colorado State Banking Bd. v. Resolution Trust Corp., 926 F.2d 931, 948 (10th Cir. 1991).

\textsuperscript{118} See \textit{Lehigh Valley}, 640 F. Supp. at 1518.

\textsuperscript{119} See \textit{id.} at 1519–20; see also \textit{American Mining Congress}, 965 F.2d at 771 (holding that court
the statements of Senator Culver, the court noted that the decision to certify "remains in the sole discretion of the agency."\footnote{120}

One court, disagreeing with the majority of courts on the issue of judicial review of certifications, reviewed the adequacy of an agency's certification and held that although the certification could have been better documented, the decision was supported by the overall record and should therefore stand.\footnote{121} However, later courts discredited this decision because the court had already determined that the plaintiffs lacked standing to sue and therefore did not need to examine the adequacy of the agency's certification decision.\footnote{122}

The ability of agencies to ignore or to perform inadequate flexibility analyses without fear of judicial review limits the efficacy of the RFA.\footnote{123} This harm is exacerbated by the concurrent ability of agencies to remove the rulemaking from the RFA requirements through certification.\footnote{124} Similarly, many agencies give inadequate explanations of the reasons behind the certification, disregarding § 605(b)'s "succinct statement" requirement.\footnote{125} Therefore, proponents of regulatory reform also suggest a change in the RFA's certification procedures.\footnote{126}

3. Consideration of Indirect Effects

In addition to the lack of judicial oversight of agency actions required by the RFA, some regulations escape flexibility analysis because the effect of the regulations is not direct enough to merit separate small-business impact analysis.\footnote{127} This loophole occurs partly because both the RFA and the legislative history are ambiguous as to the extent of the RFA's substantive coverage.\footnote{128} The RFA applies to agency rulemaking when there is a "significant economic impact on

\footnote{120}See also supra note 110 (discussing flawed certification decisions).
\footnote{121}Lehigh Valley, 640 F. Supp. at 1519 (citing Thompson v. Clark, 741 F.2d 401, 406 (D.C. Cir. 1984), and quoting remarks of Senator Culver, 126 Cong. Rec. 21,460-61 (1980)).
\footnote{122}See Sargent v. Block, 576 F. Supp. 882, 893 (D.D.C. 1983). The United States District Court for the District of Columbia is the only court ever to have separately reviewed an agency's action based on the RFA. No decision after Sargent has cited the case with approval.
\footnote{123}See supra note 9, at 114 (statement of Doris S. Freedman).
\footnote{124}See supra note 9, at 11 (testimony of Doris S. Freedman).
\footnote{125}See id. at 5 (testimony of Rep. Ewing).
\footnote{126}See id. at 5–6 (testimony of Rep. Ewing).
\footnote{127}See id. at 11 (testimony of Doris S. Freedman).
\footnote{128}See supra note 9, at 11 (testimony of Doris S. Freedman).
a substantial number of small entities.”\textsuperscript{129} Unfortunately, the RFA does not define either “significant economic impact” or “substantial number.”\textsuperscript{130} Another insufficiently defined term is “impact.” Here, the question concerns whether indirect effects are within the statute’s purview. In other words, the issue is whether an impact exists when an agency directly regulates a large entity, but the true effect of the regulation is passed on to a small entity.\textsuperscript{131}

Despite Senator Culver’s statement that agencies should analyze both direct and indirect effects,\textsuperscript{132} courts have precluded the consideration of indirect effects from the agencies’ responsibilities in complying with the RFA.\textsuperscript{133} Illustrative is \textit{Mid-Tex Electric Cooperative v. Federal Energy Regulatory Commission} (FERC), where utilities customers challenged FERC’s rule changing the manner of rate calculation.\textsuperscript{134} The challengers argued that the language used in the RFA was broader than the defendant contended,\textsuperscript{135} and that the appearance of the CCA before FERC to encourage the agency to interpret the

\textsuperscript{129} 5 U.S.C. § 602 (requiring every agency to publish a biannual agenda indicating rules the agency expects to propose that will have a “significant economic impact on a substantial number of small entities”); \textit{Id}. § 605(b) (exempting agencies from IRFA and FRFA requirements if rule in question will not have a “significant economic impact on a substantial number of small entities”); \textit{Id}. § 609 (requiring agencies to assure affected entities are given an opportunity to participate when the rule will have a “significant economic impact on a substantial number of small entities”); \textit{Id}. § 610 (requiring periodic review of rules that will have a “significant economic impact on a substantial number of small entities” to determine the continuing necessity or reasonableness of such rules).

\textsuperscript{130} \textit{See id}. § 601. Although “substantial number” is not defined, it has not become a source of litigation. It may be that once an agency recognizes the existence of an adverse effect on some of the regulated small entities, the agency may be reluctant to expend resources on more accurately determining the number or percentage of entities affected by the rule. Similarly, an agency arguing that its certification is valid because an insubstantial number of entities have been affected may be more likely to suffer a challenge of arbitrariness and capriciousness. Therefore, it may be that agencies themselves have precluded this avenue of challenge through their own defensive techniques.

\textsuperscript{131} \textit{See 1993 Hearing, supra} note 9, at 11 (testimony of Doris S. Freedman). The small entity is indirectly affected because the small entity incurs added costs from doing business with, or being dependent upon, regulated entities. \textit{See id}.

\textsuperscript{132} 126 \textit{CONG. REC}. 21,456 (1980) (statement of Sen. Culver). Senator John C. Culver stated that agencies assessing whether the RFA applies to their rules under the “significant economic impact” standard should consider several factors, including “the direct and indirect effects of the proposed regulation.” \textit{Id}.


\textsuperscript{134} \textit{Id}. at 330.

\textsuperscript{135} \textit{See id}. at 342. The language relied on by the challengers comes from the requirement that the agency publish notification of any planned actions during the coming calendar year on “any rule which the agency expects to propose.” \textit{Id}. (citing 5 U.S.C. § 602(a)(1)). The challengers'
RFA more broadly indicated that the RFA covers indirect effects. The United States Court of Appeals for the District of Columbia Circuit surveyed the legislative findings and purposes of the RFA. The court noted that Congress used language such as "applied uniformly to small businesses," "imposed unnecessary ... demands ... upon small businesses," and "differences in the scale and resources of regulated entities." According to the court, this language indicated that the RFA only applied when the agency was regulating directly a small entity. The court thus concluded that Congress did not intend the potentially broad effect of having agencies consider all indirect effects.

Notwithstanding the court's conclusion in Mid-Tex Electric, some indirect effects impact small businesses so obviously as to merit separate regulatory flexibility analysis under the RFA. For example, when an agency directly regulates an entity whose main customers are all small businesses, significant indirect effects occur. In a 1993 hearing before the House Committee on Small Business, Representative Thomas W. Ewing presented the case of EPA regulations regarding the emissions produced by off-road farm equipment. The EPA did not prepare a regulatory flexibility analysis because no small businesses manufactured the equipment. In reality, however, the true impact would fall on the farmers who purchase the equipment when the manufacturers pass on the added regulatory costs. In the words of Representative Pat Roberts, a member of the House Committee on Agriculture, "[a]s a result of the regulations, farmers could be paying up to $3,000 more per engine or piece of equipment." This example demonstrates that some effects, although technically indirect in application, are very direct in impact, and could therefore trigger a regulatory flexibility analysis.

claim was that this language intended that the RFA applied broadly to all rules affecting small entities, whether the effect was direct or not. See id.

136 See id.
137 See id. at 341-42.
138 Mid-Tex Electric, 773 F.2d at 341 (emphasis in original).
139 See id. at 341-42.
140 Id. at 343.
141 See 1993 Hearing, supra note 9, at 11 (testimony of Doris S. Freedman).
142 See id. at 7 (testimony of Rep. Ewing).
143 Id. (testimony of Rep. Ewing).
144 Id. (testimony of Rep. Ewing).
145 Id. (testimony of Rep. Ewing).
146 1993 Hearing, supra note 9, at 96 (statement of Rep. Pat Roberts (R-Kan.)).
147 See id. at 7 (testimony of Rep. Ewing).
Although the RFA does not provide explicitly for the consideration of indirect effects, some statements in the legislative history indicate that some members of Congress anticipated that agencies would consider both direct and indirect effects when preparing the regulatory flexibility analyses.\textsuperscript{148} Despite judicial interpretation of the RFA as precluding consideration of indirect effects, recent proponents for reform of the RFA have provided examples of easily recognizable indirect effects which agencies could consider.\textsuperscript{149}

4. Decreased Role of the Office of Advocacy

When the RFA was passed in 1980, Congress designated the Chief Counsel for Advocacy of the SBA (CCA) as the entity that should monitor agency compliance with the RFA, because the CCA is the governmental entity best able to assess the needs of small businesses and small entities.\textsuperscript{150} Commentators have noted that, to the extent that the CCA has been permitted, the CCA has provided much of the success achieved in regulatory flexibility.\textsuperscript{151} Indeed, absent judicial review, the CCA is the only enforcement and compliance mechanism of the RFA.\textsuperscript{152}

In addition to the monitoring duties conferred by § 612(a), §§ 612(b) and (c) of the RFA grant remarkable intervention powers to the CCA.\textsuperscript{153} Congress designed these provisions to ensure effective implementation of the RFA by authorizing the CCA to assist small businesses in litigation and to notify courts when a rulemaking involves disputes critical to small business.\textsuperscript{154} Sections 612 (b) and (c) provide:

\begin{itemize}
  \item[(b)] The [CCA] is authorized to appear as amicus curiae in any action brought in a court of the United States to review a rule. In
\end{itemize}

\textsuperscript{149} See 1993 Hearing, supra note 9, at 7 (testimony of Rep. Ewing).
\textsuperscript{150} See Freedman, supra note 2, at 448–49 & n.37. Section 612(a) of the RFA provides that: [t]he [CCA] shall monitor agency compliance with this chapter and shall report at least annually thereon to the President and to the Committees on the Judiciary of the Senate and House of Representatives, the Select Committee on Small Business of the Senate, and the Committee on Small Business of the House of Representatives.
\textsuperscript{151} See Freedman, supra note 2, at 448.
\textsuperscript{152} See Verkuil, supra note 4, at 265.
\textsuperscript{153} See 5 U.S.C. § 612.
\textsuperscript{154} 1993 Hearing, supra note 9, at 14 (testimony of James Morrison, Director of Government Relations, National Association of the Self-Employed, and representing the Regulatory Flexibility Act Coalition).
any such action, the [CCA] is authorized to present his views with respect to the effect of the rule on small entities.  
(c) A court of the United States shall grant the application of the [CCA] to appear in any such action for the purposes described in subsection (b).155

The intended effect of these provisions is to ensure that the CCA is able to independently exercise compliance, review, and amicus powers when monitoring agency compliance with the RFA.156 Although these provisions do not exist in any other statute, Congress, by granting these powers, emphasized the importance of the CCA’s role in implementing the RFA.157

In practice, however, the CCA has been prohibited from exercising the amicus privilege Congress gave it.158 In *Lehigh Valley Farmers v. Block*, the CCA attempted to intervene as amicus curiae, but the Department of Justice (DOJ) argued that intervention by the CCA was unconstitutional.159 The DOJ claimed that Congress lacked the constitutional authority to grant CCA an absolute right of intervention.160 Furthermore, the DOJ contended that only independent agencies may exercise amicus powers, and that even independent agencies are barred if an Executive branch entity or the Attorney General has taken a stance contrary to the position of the CCA.161 The SBA, as the agency under which the CCA operates, argued that its amicus power was limited and posed no threat to the Executive branch’s viability as long as the Executive branch could remove the CCA.162 The dispute was never fully resolved because the CCA withdrew its amicus posi-

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155 5 U.S.C. §§ 612(b)-(c).
157 See 1993 Hearing, *supra* note 9, at 14 (testimony of James Morrison). These provisions are considered rather innovative, especially because the RFA is the only statutory scheme which has the provisions. *Id.* (testimony of James Morrison). The fact that no other federal agency has received amicus or intervention powers when being charged with overseeing a regulatory scheme may contribute to courts’ reluctance to allow the CCA to exercise the rights contained in §§ 612(b)-(c).
158 See Freedman, *supra* note 2, at 450 n.41.
160 Freedman, *supra* note 2, at 450 n.41.
161 *Id.* The DOJ relied on § 1-402 of Executive Order 12,146 which requires that legal disputes between two administrative agencies should be resolved by the Attorney General. 1993 Hearing, *supra* note 9, at 56 (section-by-section analysis of the Regulatory Flexibility Amendments Act of 1993).
162 Freedman, *supra* note 2, at 450–51 n.41.
tion prior to litigating the issue with the DOJ, and the CCA has not asserted its amicus powers in any other case. 163

Although the RFA specifically names the CCA as the entity primarily charged with the RFA's implementation, the CCA has been unable to fulfill this mission. 164 This failure is partly due to the CCA's failure to assert itself, and partly due to the actions of the DOJ in opposing the CCA's assertion of its amicus power. 165

C. The Proposed Amendments to the RFA: Legislative Response to the Limitations of the RFA

The strongest avenue of reform of the RFA currently available is a bill introduced in the 104th Congress on January 4, 1995, officially entitled the "Job Creation and Wage Enhancement Act of 1995." 166 Division C of Title I of that Act, entitled "Regulatory Reform and Relief Act" proposes several amendments to the RFA to improve agency adherence to the original goals of the RFA. 167 Most notably, the bill would permit judicial review of flexibility analyses and certifications on a limited scale, and would strengthen the CCA's role somewhat. 168 The Reform Act, however, fails to address the indirect effects problem of the RFA.

1. Judicial Review

Current court interpretation of the judicial review provision of the RFA precludes small businesses from challenging agency actions sub-

163 1993 Hearing, supra note 9, at 56 (section-by-section analysis of the Regulatory Flexibility Amendments Act of 1993).
164 See id. (section-by-section analysis of the Regulatory Flexibility Amendments Act of 1993).
165 See id. (section-by-section analysis of the Regulatory Flexibility Amendments Act of 1993).
166 Reform Act, supra note 18. The Reform Act passed the House on March 3, 1995, and was referred to the Senate Governmental Affairs Committee on March 9, 1995. 141 CONG. REC. H2639 (daily ed. Mar. 3, 1995); Id. at S3743 (daily ed. Mar. 9, 1995). In addition to the Reform Act, the Senate is currently considering its own bill, entitled "Comprehensive Regulatory Reform Act of 1995." S. 343, 104th Cong., 1st Sess., § 2(b) (1995). The Senate's bill revises only the judicial review section of the RFA. Id. The amendment before the Senate relating to the RFA's judicial review provision is substantively the same as the amendment proposed in the Reform Act. See id. Accordingly, references to the Reform Act's judicial review provisions also apply to the bill currently under consideration on the floor of the Senate. 141 CONG. REC. S7615 (daily ed. May 26, 1995) Both the Senate Governmental Affairs Committee and the Senate Judiciary Committee have favorably reported the Senate bill amending the RFA. Id. at D522 (daily ed. Apr. 27, 1995); Id. at D403 (daily ed. Mar. 23, 1995).
167 Reform Act, supra note 18, §§ 301-13.
168 See id. §§ 311-13.
ject to the RFA. The Reform Act amends § 611 of the RFA to permit judicial review of an agency’s certification or flexibility analysis if a petition for such review is filed within one year of the effective date of the relevant final rule. Judicial review is only available for “affected small entities,” which are “small entities that [are] or will be adversely affected by the final rule.” If the court finds that the certification decision was improper, the court may order the agency to prepare a FRFA. Similarly, if the court finds that the flexibility analysis was prepared improperly, the court may order the agency to correct the analysis. In either case, the agency has ninety days to prepare or correct the FRFA, otherwise the court may stay the rule or grant other appropriate relief.

If enacted, the provisions allowing small businesses to request judicial review likely will encourage increased agency compliance with RFA requirements. The provision, however, appears to strike a different balance than the one initially intended by Congress. Although Congress discussed the need to provide for judicial oversight, the RFA as enacted placed more emphasis on the need for uninterrupted rulemaking. The Reform Act, in contrast, makes judicial oversight a priority.

The proposed amendment of § 611 could lead to increased litigation, thereby contradicting the other original concern of Congress—that of disruption of the rule-making process due to increased litigation. Representative Thomas W. Ewing attempted to allay this concern in a 1993 hearing before the Committee of Small Business of the House of Representatives. In his statement, Representative Ewing noted

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169 See 1993 Hearing, supra note 9, at 5 (testimony of Rep. Ewing). The judicial review provisions of the RFA are discussed in more detail supra Part II.B.1.
170 Reform Act, supra note 18, § 311(a).
171 Id.
172 Id.
173 Id.
174 Id.
175 See 1993 Hearing, supra note 9, at 6 (testimony of Rep. Ewing).
177 See id. (statement of Sen. Culver).
179 See 1993 Hearing, supra note 9, at 6 (testimony of Rep. Ewing); see also 126 CONG. REC. 21,457 (1980) (statement of Sen. Culver) (discussing Congress’s concern about substantial disruption of agency rulemaking).
180 See 1993 Hearing, supra note 9, at 6 (testimony of Rep. Ewing). Representative Thomas W. Ewing was the sponsor of H.R. 830, a bill introduced in the 103d Congress to amend the RFA, advocating the repeal of § 611. Although Representative Ewing’s comments speak only
that the limited availability of remedies makes legal abuse unlikely, and that small businesses will rarely bring frivolous suits because small businesses do not have the time or financial resources to sue unnecessarily. Therefore, the resulting disruption to the rule-making process would be minimal. In addition, although numerous suits might be filed upon the amendment of § 611, the incidence of such suits quickly would decrease once precedent is established.

Although the proposed judicial review section of the Reform Act strikes a different balance than the one struck by Congress when passing the RFA, the new balance encourages oversight without unduly disrupting the rule-making process. Despite the likelihood of some suits immediately upon the passage of the Reform Act, the Reform Act's remedies are confined to injunctive relief so the number of law suits would not be extreme. Furthermore, it is likely that small businesses with limited resources will sue only when there is a clear violation of the statute because it is not cost effective to sue when the violation is borderline and success is questionable.

2. Certification

The amendment of the judicial review provisions of the RFA also would work to permit judicial review of an agency's decision to exer-

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1995]
cise the certification option. With full judicial review, affected entities could challenge the final agency rules based on incorrect certifications, even if the final rule is not arbitrary or capricious on its face or as applied to all regulated entities, large or small. Under current RFA law, plaintiffs must challenge regulations under the APA's arbitrary and capricious standards. If, however, small businesses could challenge the certification decision under the RFA, the application of the regulation to small businesses could be improved by the adoption of regulatory alternatives, even though the regulation might be otherwise acceptable.

Advocates of amending the RFA's judicial review provision point out that the amendment also would encourage more responsible decisionmaking by the agencies. When a small business challenges an agency rule due to a flawed certification decision, a court's remedy would be to require the performance of a regulatory flexibility analysis. The performance of the regulatory flexibility analysis would improve agency rulemaking by requiring the agency to identify and consider regulatory alternatives. As noted previously, the amount of litigation over incorrect certifications would likely decrease rapidly as agencies, courts, and the administrative law bar learn the boundaries of permissible actions.

3. Consideration of Indirect Effects

Although no challenge to the lack of consideration of indirect effects of regulations has been raised in any court since *Mid-Tex Electric Cooperative, Inc. v. Federal Energy Regulatory Commission*, small-business advocates have voiced concerns that the exclusion of indirect effects gives many agencies a solid loophole to evade the requirements of the RFA, and that entirely excluding indirect effects

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191 See Reform Act, supra note 18, § 311. The Reform Act provides that courts may overturn an agency's certification decision and require the agency to perform a FRFA if the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id.
192 See id.
193 See supra notes 24-26 and accompanying text.
194 See Freedman, supra note 2, at 441-43; Verkuil, supra note 4, at 229.
196 Reform Act, supra note 18, § 311.
198 See supra notes 179-85 and accompanying text.
199 773 F.2d 327 (D.C. Cir. 1985).
deprives the RFA of its utility as a protector of small entities. The Reform Act does not address the issue of indirect effects.

A previous version of the current Reform Act explicitly required the consideration of indirect effects. A separate House of Representatives bill that had no provision for the consideration of indirect effects replaced the prior version in its entirety. The replacement bill constitutes the Reform Act as passed by the House of Representatives and as sent to the Senate. The House of Representatives gave no explanation for the failure to include indirect effects in the version of the Reform Act it adopted.

4. Increased Role of the Office of Advocacy

Although specifically named in the RFA as the entity charged with monitoring agency compliance with the RFA, the CCA largely has failed to be an effective enforcement mechanism. To ensure the effective use of the amicus power granted to the CCA by Congress in the RFA, the Reform Act adds a "sense of Congress" provision to the RFA. The sense of Congress provision reiterates Congress's intention that the CCA can appear as amicus in any action for purposes of reviewing a rule.

The Reform Act also seeks to strengthen the role of the CCA by clarifying the procedure to be followed when the CCA disagrees with an agency certification or analysis. The bill adds a new subsection (d) to § 612 of the RFA entitled "Action by the SBA Chief Counsel for Advocacy" and would require agencies to provide the CCA with a copy of all proposed rules, § 605(b) certifications, and IRFAs no later than thirty days before the planned publication of the document in the Federal Register. The CCA must then review the proposed rule,

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200 See 1993 Hearing, supra note 9, at 11 (testimony of Doris S. Freedman).
201 See Reform Act, supra note 18, §§ 301-13.
204 See id. at H2636 (daily ed. Mar. 3, 1995).
205 See supra notes 158-65 and accompanying text.
206 Reform Act, supra note 18, § 313. The provision states: "[i]t is the sense of Congress that the [CCA] should be permitted to appear as amicus curiae in any action or case brought in a court of the United States for the purpose of reviewing a rule." Id. As noted supra note 166, the Senate's bill to amend the RFA only addresses the judicial review provisions, and therefore it does not have a similar sense of Congress provision.
207 See Reform Act, supra note 18, § 313.
208 Id. § 312(a).
209 Id.
IRFA, or certification, and return a written statement to the agency concerning the proposed rule's effect on small entities no later than fifteen days before the scheduled publication.\textsuperscript{210} The agency must publish the CCA's statement of effect, together with the agency's response and the proposed rule at the time of the notice of proposed rulemaking.\textsuperscript{211}

The provisions in the Reform Act enable the CCA to assume the role that Congress intended. These provisions, together with the judicial review provisions, should encourage increased agency compliance with the RFA.\textsuperscript{212} One commentator, however, noted that the additional reporting requirements imposed on the CCA by the Reform Act may be difficult to fulfill completely, given the limited resources of the CCA.\textsuperscript{213}

5. Shortcomings of the Proposed Legislation and Possible Alternatives

Some small-business advocates suggest that agencies should consider the comments of small entities when certifying their proposed rules.\textsuperscript{214} To ensure comments from small entities, Congress could broaden the scope of § 609 to require an agency to solicit comments before the agency determines the impact of a rule or indicates that a rule will not affect small entities.\textsuperscript{215} This change could alleviate some concerns about increased litigation arising from expanded judicial review by encouraging communication and sharing of ideas, which is one of the goals of the RFA.\textsuperscript{216} The ability of the public to respond to the certification decision could force agencies not to rely on boilerplate language to try to escape the RFA, and to explore the true

\textsuperscript{210} Id.
\textsuperscript{211} Id. There are exceptions from the statement of effect procedures for rules issued by "an appropriate federal banking agency (as that term is defined in . . . 12 U.S.C. § 1813(Q)), the National Credit Union Administration, or the Office of Federal Housing Enterprise Oversight" when any of those entities issue rules relating to implementing monetary policy, ensuring the safety of federal monetary institutions, or protecting federal deposit insurance funds. Id.
\textsuperscript{212} See 1993 Hearing, supra note 9, at 58 (statement entitled "Why Should the Regulatory Flexibility Act be Amended?").
\textsuperscript{214} See 1993 Hearing, supra note 9, at 23 (testimony of William S. Busker, Senior Vice President for Law and Finance, and General Counsel and Chief Financial Officer, The American Trucking Associations, Inc.).
\textsuperscript{215} See id. (testimony of William S. Busker).
\textsuperscript{216} See 1992 STUDY, supra note 40, at 11.
impact of the rules they promulgate. Commentators recognize that agency rulemakings tend to be more effective and easier to apply when agencies explore all possible alternatives at an early stage in the rule-making process, thereby developing and considering the alternatives together with a rule as a whole.

D. Analysis of the Proposed Legislative Amendments

The Reform Act is an important step in reinstating the RFA as the catalyst to change agency consideration of small-business compliance problems. The judicial review provision should encourage more responsible rulemaking without unnecessarily disrupting the rule-making process. Similarly, small businesses could challenge incorrect certifications even though they could not comment on those decisions at the time they are made. Furthermore, the Reform Act may help solidify the CCA as the appropriate enforcement mechanism for the RFA. However, the Reform Act fails to mandate the consideration of indirect effects. Although the Reform Act is a good start, there are further steps available.

1. Judicial Review

Achieving the original purposes of the RFA requires more extensive judicial review. Current interpretations of the judicial review provision do not give adequate evidentiary weight to the IRFA and the FRFA, which are the main analytical components of the RFA. Furthermore, the Thompson v. Clark test regarding when an inadequate flexibility analysis can justify overturning a rule is too vague to be applied meaningfully. First, the undefined “adjustment... for

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218 See id. at 31 (statement of Rep. Peter G. Torkildsen (R-Mass.)); 1992 STUDY, supra note 40, at 78.
221 See Reform Act, supra note 18, § 311.
222 See 1993 Hearing, supra note 9, at 56 (section-by-section analysis of the Regulatory Flexibility Amendments Act of 1993).
223 See Reform Act, supra note 18, §§ 301–13.
224 See Thompson v. Clark, 741 F.2d 401, 405 (D.C. Cir. 1984). The test says if the agency “underestimate[s] the harm inflicted upon small business to such a degree that, when adjustment is made for the error, that harm clearly outweighs the claimed benefits of the rule,” the rule can be overturned. Id.
the error” language could cut off the only opportunity now available to a small-business plaintiff to challenge an agency’s flexibility analysis. Second, the test weighs the harm to one individual or entity against the overall good that the rule could achieve. This test suffers from an analytic deficiency because it compares what could be a very real burden on small entities—which might only compose a small percentage of the entire regulated population—against the benefit that could be achieved by regulating all one hundred percent of the affected entities—which often includes both large and small entities. Small business would almost always lose in this type of comparison. The comparison causes a failure to consider realistically small-business concerns, thus frustrating a central goal of the RFA.

The lack of judicial review has been the most significant obstacle to successful application of the RFA. Commentators argue that the amendment of § 611 will ensure that agencies complete the flexibility analyses by threatening the agencies with judicial review of the very analyses the agencies prepare. Although the Reform Act proposal to amend the judicial review provisions does not protect the agencies against disruptions of their rule-making processes to the same extent that the RFA currently does, the Reform Act does limit the availability of judicial review to one year after the effective date of the final rule. The Reform Act proposal also limits the period during which the agency must correct any default to ninety days, thus encouraging timely compliance and facilitating the prompt completion of the rule-making process. Furthermore, the “balance” originally struck by Congress between the need for oversight and the need not to disrupt agency rulemaking strongly favored the latter need. Based on the obvious inadequacies of the RFA in implementation, a new balance that provides for some true judicial oversight, as well as protection against paralysis of the rule-making process makes sense.

225 Id.
226 See id.
229 See id. at 112 n.6 (statement of Doris S. Freedman).
230 See Reform Act, supra note 18, § 311.
231 See id.
2. Certification

Section 605(b) creates a large loophole for agency compliance by nullifying the IRFA and FRFA requirements if agencies decide to certify. Courts have interpreted the section nonsensically, holding that even when an agency fails to perform any regulatory flexibility analysis, only a failure to respond to public comments justifies overturning a rule. The agency’s certification, however, is not reviewable by courts and is valid pursuant to § 609 even if the agency fails to solicit public comments. Furthermore, the certification is sufficient under the “succinct statement” standard if the certification merely alleges no impact on small entities. In effect, courts appear to ignore the requirements of notice and comment, which are an integral part of responsible administrative rulemaking. This is completely at odds with the purposes of the RFA—heightened awareness by agencies of the needs of small business and greater interaction between small entities and the agencies that regulate them. It would be in the best interest of the agency and the small entities if agencies performed regulatory flexibility analyses even when the RFA does not require the analyses, so as to achieve more efficient and rational rulemaking.

233 See Verkuil, supra note 4, at 241.
234 See Colorado ex rel. Colorado State Banking Bd. v. Resolution Trust Corp., 926 F.2d 931, 948 (10th Cir. 1991) (quoting Michigan v. Thomas, 805 F.2d 176, 188 (6th Cir. 1986)).
236 See, e.g., Colorado v. RTC, 926 F.2d at 948. In this case, the court upheld the RTC’s certification decision when it simply alleged no impact. The RTC’s statement, in its entirety, read:

[t]he basis for the RTC’s certification is its determination that the rule will not impose compliance requirements on depository institutions of any size. It imposes no performance standards, no fees, no reporting or recordkeeping criteria, nor any other type of restriction or requirement with which depository institutions must comply. Thus, it does not have the type of economic impact addressed by the RFA.

Id.
237 The case of Colorado v. RTC demonstrates the court’s willingness to sustain an agency’s certification decision even when little explanation is given by the agency. See id.
238 See Freedman, supra note 2, at 442; 1992 Study, supra note 40, at 11.
239 See 1992 Study, supra note 40, at 12. The EPA has adopted new internal guidelines for the implementation of the RFA that require flexibility analyses whenever there is any effect on small entities. OFFICE OF REGULATORY MGMT. & EVALUATION AND OFFICE OF POLICY, PLANNING, AND EVALUATION, ENVIRONMENTAL PROTECTION AGENCY, EPA GUIDELINES FOR IMPLEMENTING THE REGULATORY FLEXIBILITY ACT 4 (Rev. ed. Apr. 1992) [hereinafter EPA GUIDELINES]. The Guidelines are discussed in detail infra notes 317–21, and accompanying text. The legislative history indicates that the rationale behind performing flexibility analyses and considering regulatory alternatives even when not statutorily required to do so is in the agency’s interest because the amount of resources expended in determining the extent of the impact and
The proposal in the Reform Act to amend the judicial review provision will solve much of the problem presented by allowing agencies to remove their rules from the RFA's special analysis requirements through certification. Analytically, courts classify the certification decision as a determination of the RFA's applicability to the rule, which § 611(a) removes from review by courts. The amendment of the judicial review section of the RFA could increase the amount of litigation over agencies' certification decisions. Representative Thomas W. Ewing's statements respond to this possibility by suggesting that the number of suits will not be large and will decline quickly. Even if litigation increases, the ability of small entities to challenge certifications is wholly consistent with one of the key purposes of the RFA—to facilitate communication between the regulated and the regulator. Furthermore, the Reform Act amendment to judicial review of RFA actions would permit only the review of interim actions such as certifications after the rule becomes final. Thus, the Reform Act would minimize further the possible disruption to the rule-making process.

A suggestion of this author is to amend § 605(b) to require a certification decision at or before the time an agency publishes the notice of proposed rulemaking in the Federal Register. Section 605(b) currently permits the publication of a certification decision either at the time of publication of the notice of proposed rulemaking or at the time of publication of a final rule. However, if the certification were provided concurrently with the notice of proposed rulemaking, small entities would have an opportunity to present their concerns to the agency while the rulemaking is proceeding rather than after the fact. In order to allow agency flexibility, the RFA should authorize the agency to later rescind its certification decision, or to certify at a subsequent time, but only if the agency can show that it has acquired new information or that the purpose or scope of the rulemaking has changed such that small entities are no longer implicated. By requir-
ing an early certification decision, the agency would be required to focus on the flexibility issues early on, when key policy issues are being decided.  

In addition to the amendment to the judicial review provision to deter agency over-reliance on certification, small-business advocates have also suggested that § 609 of the RFA should be amended to require the solicitation of public comment on the certification decision. Allowing the public to comment could force agencies to perform true analyses and not to rely on boiler-plate language. The use of boiler-plate language is inconsistent with the policy of the RFA to increase agency response to small entity demands because boiler-plate language effectively robs both the CCA and the public of the opportunity to point out any inaccuracies in the agency's position or to petition the agency to amend its decision. Furthermore, boiler-plate language that fails to give a basis for the certification arguably violates § 605(b)'s "succinct statement" requirement.

Amending the certification process to require that agencies provide notice of all proposed rulemaking concurrently with certification would allow potentially affected entities to provide comments to the agency about the potential effect of the proposed rule on them. Despite concerns that the ability to comment on certification decisions could slow the regulatory process, it is generally recognized that earlier and broader inputs provide the greatest benefits to the regulatory process. If the certification decision were subjected to notice and comment concurrently with the development of the rule, the agencies could improve the regulation by tailoring the alternatives and the regulation to more appropriately fit one another, rather than simply adding an alternative at the end of the process that is not fully consonant with the regulatory scheme. Similarly, agencies could cut costs and achieve more efficient rulemaking by consulting with interested parties. Finally, opening the certification decisions to public notice and comment would result in greater compliance by small businesses who could feasibly comply with the regulatory alternative

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246 See 1992 Study, supra note 40, at 93.
248 See id. at 5–6 (testimony of Rep. Ewing).
249 See 5 U.S.C. § 605(b).
251 See 1992 Study, supra note 40, at 78.
252 See 1993 Hearing, supra note 9, at 31 (testimony of Rep. Torkildsen).
and who would feel better about complying since they had a voice in
the development of the alternative.

3. Consideration of Indirect Effects

Many regulations that place a burden on small entities by burden­
ing an entity upon which small businesses are dependent have evaded
flexibility analysis in the past.\textsuperscript{253} Despite the fact that such regulations
do not directly regulate small businesses, agencies must recognize
that the regulations still place a burden on small businesses because
of the cumulative regulatory effect.\textsuperscript{254} In the case of an indirect effect,
the small business still bears the true cost of the regulation because
the regulated entity indirectly passes the cost to the small entity.\textsuperscript{255}

As indirect regulatory effects can impact small entities greatly, the
RFA should be amended to require consideration of indirect effects
in the flexibility analyses. Such an amendment would clarify further
which rulemakings must abide by the RFA's requirements. Requiring
consideration of indirect effects is also consistent with the RFA's
overarching purpose of reducing the burdens on small entities of
complying with federal regulations.\textsuperscript{256}

Although requiring consideration of indirect effects does place an
additional burden on the agency, the agency can look to the purpose
of the RFA\textsuperscript{257} to determine which indirect effects actually fall within
its coverage. The RFA's standard language "significant impact on a
substantial number of small entities"\textsuperscript{258} can help guide the agencies to
recognize that some impacts although imposed on one entity realistically
will fall on a substantial number of small entities due to the
realities of the marketplace. For example, a regulation such as the
off-road farm equipment emissions regulation promulgated by the
EPA\textsuperscript{259} is an indirect effect that has as significant an effect as if the
EPA had directly regulated those small entities that purchase the
equipment.\textsuperscript{260} Admittedly, not all indirect effects should be analyzed
by agencies. An attenuated effect would not fall within the scope of
the RFA, but there are some "indirect" effects that are so easily

\textsuperscript{253} See id. at 11 (testimony of Doris S. Freedman).
\textsuperscript{254} See id. at 14 (testimony of James Morrison).
\textsuperscript{255} See id. at 11 (testimony of Doris S. Freedman).
\textsuperscript{256} See Freedom, supra note 2, at 442-43.
\textsuperscript{258} E.g., 5 U.S.C. § 602.
\textsuperscript{259} See supra notes 143-47 and accompanying text.
\textsuperscript{260} See 1993 Hearing, supra note 9, at 7 (testimony of Rep. Ewing).
recognized and linked to the regulation that consideration of those effects by the agency is appropriate.

4. Increased Role of the Office of Advocacy

The RFA, as originally crafted, gave the CCA a special role in enforcing its provisions.\(^{261}\) In practice, however, courts' refusal to recognize fully the CCA's powers has hampered the CCA.\(^{262}\) Although the sense of Congress provision in the Reform Act\(^{263}\) certainly does not free the CCA from potential constitutional challenge similar to the DOJ's position in *Lehigh Valley Farmers v. Block*, it does clarify congressional intent on this issue.\(^{264}\) The supportive stance of Congress may encourage the CCA to reassert itself and to take an active stance on behalf of small entities.

The CCA's activities could become an important aspect of RFA law if judicial review is permitted.\(^{265}\) The involvement of the CCA could facilitate litigation by providing experience and expertise on small-business issues to the court proceedings. Also, the mere existence of the CCA's power to intervene could cause more agencies to abide by the CCA's recommendations at an early stage in the rule-making process, which could, in turn, reduce the incidence of litigation and more fully achieve the RFA's purposes.\(^{266}\)

Similarly, the statement of effect provision of the Reform Act\(^{267}\) should encourage the CCA to assume a more active stance as one of the primary enforcement mechanisms. The Reform Act proposal of a statement of effect procedure could, however, go much further toward improving the RFA. The current proposal simply would alert the public that reads the *Federal Register* to the fact that the CCA is opposed to an agency action.\(^{268}\) Therefore, the proposal's usefulness

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\(^{262}\) See *supra* Part II.B.4.

\(^{263}\) Reform Act, *supra* note 18, § 313; see *supra* notes 206-07 and accompanying text.

\(^{264}\) See Reform Act, *supra* note 18, § 313. The DOJ claims that Congress does not have the constitutional authority to vest the CCA with the amicus power without the approval of the Attorney General because it would interfere with the Executive branch's ability to fulfill its own constitutional functions. See 1993 Hearing, *supra* note 9, at 56 (section-by-section analysis of the Regulatory Flexibility Amendments Act of 1993); Freedman, *supra* note 2, at 450 n.41. As the CCA has never pursued this position, the constitutionality of the RFA's amicus provision remains unclear.


\(^{266}\) See *id.* at 6-7 (testimony of Rep. Ewing).

\(^{267}\) See *supra* notes 208-11 and accompanying text.

\(^{268}\) See Reform Act, *supra* note 18, § 312.
may be limited to small businesses that regularly check the Federal Register. Thus, it may be useful to expand the RFA's procedures for gathering comments to ensure that the CCA's opposition to proposed rulemakings is also publicized in trade magazines that small businesses are more likely to read.269

Although the Reform Act requires the agency to respond to the statement of effect, the Reform Act puts no affirmative duty on the agency to change its rulemaking or to incorporate the CCA's comments.270 Requiring agencies to respond to and collaborate with the CCA during the rule-making process would improve the quality of rulemaking by assuring compliance with the RFA from the outset.271 Although the statement of effect is a first step, placing a more affirmative duty on agencies to comply with the CCA's suggestions would strengthen the provision.

The RFA has suffered in implementation due to statutory ambiguity and judicial interpretation. The passage of the Reform Act, however, could be an important step in restoring the RFA as a protection against disproportionately burdensome regulation of small businesses. Despite the need for the provisions contained in the Reform Act, there may be a need for further amendment of the RFA, even if Congress adopts the Reform Act.

III. THE EPA AS AN EXAMPLE OF REGULATORY ACTION UNDER THE RFA

Since its creation in 1970, Congress has charged the EPA with direct administrative responsibility for a variety of legislative environmental protection schemes.272 Due to the substantive breadth and complexity of these schemes, the EPA has developed numerous areas

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269 Section 609 of the RFA requires agencies to publicize proposed rulemakings in trade magazines and through public hearings when the proposed rulemaking will have a significant impact on a substantial number of small entities. 5 U.S.C. § 609. Extending the § 609 requirements to include the publication of the CCA’s opposition to a proposed rulemaking would increase the number of small businesses that could respond to and participate in the rulemaking. See also supra notes 214–18 and accompanying text.

270 1993 Hearing, supra note 9, at 200–01 (statement of Leo McDonough).

271 See id. (statement of Leo McDonough).

of expertise.\textsuperscript{273} The EPA, like other agencies, facilitates its administration of statutory schemes by promulgating rules.\textsuperscript{274} The promulgation of these rules, to the extent it affects small businesses, must comply with the requirements of the RFA.\textsuperscript{275} In order to evaluate effectively whether the EPA's rule-making process complies with the RFA, this section first explores the EPA's internal rule-making process and the roles of the important participants in that process. This information, together with an understanding of the EPA's record of compliance or noncompliance with the RFA, form the basis for suggestions to improve that record.

A. The EPA Rule-making Process

1. The EPA's Organizational Structure

To effectively fulfill its rule-making responsibilities under each environmental protection scheme, the EPA has developed lead offices such as Solid Waste, Toxic Substances, and Drinking Water, each of which supervises different environmental concerns.\textsuperscript{276} No individual within the EPA has adequate knowledge to promulgate a rule independently, rather, a team of individuals from the various lead offices affected by a rule works together to promulgate a rule by expressing the concerns of their respective offices and reaching a compromise.\textsuperscript{277}

These teams are called "working groups" and are created by the EPA Steering Committee.\textsuperscript{278} Although one lead office is technically in charge of the rule-making process and the working group is meant to assist that office, the working group is charged independently with

\textsuperscript{274} See id.
\textsuperscript{275} See 5 U.S.C. §§ 601–12.
\textsuperscript{276} See McGarity, supra note 273, at 70.
\textsuperscript{277} See id. at 61, 90.
\textsuperscript{278} See id. at 72. The Steering Committee includes representatives from each Assistant Administrator and from the general counsel. Id. at 69. Assistant Administrators are divided into those with programmatic responsibilities—administrators charged with approving the substance of regulations—and those with functional responsibilities—administrators charged with agency enforcement or management. See id. at 65, 66 & nn.23–24. These individuals are appointed, and the subject matter areas of responsibility change over time. See id. at 65–66. The Steering Committee, which is composed of high level representatives from the numerous departments within the EPA, coordinates the EPA's regulation promulgation activities. See id. at 69.
resolving conflicts among the competing interests and ensuring the adequacy of the rulemaking.\textsuperscript{279} The working group, acting pursuant to the lead office's direction, also is charged with conducting and assessing any regulatory impact analyses, including the regulatory flexibility analyses prepared pursuant to the RFA.\textsuperscript{280}

The team approach creates recognizable benefits to the rule-making process. The compromise reached by representatives of various EPA divisions can result in the most well-rounded rule and a wider array of regulatory options.\textsuperscript{281} The team approach also somewhat reduces delay in the rule-making process by bringing representatives from all affected areas together at once,\textsuperscript{282} rather than having each area separately attempt to promulgate a rule that could be acceptable to all.

This framework, however, is somewhat inefficient because numerous people all focus on the same rule. Inefficiency can result when a large number of people collaborate on a rule, making it more difficult to achieve an acceptable result.\textsuperscript{283} The rule-making process suffers because it takes longer to educate the participants and to build consensus among the competing interests.\textsuperscript{284} Moreover, one commentator has noted that the team approach results in problems of accountability.\textsuperscript{285} Similarly, participation by representatives from each office affected by a rule requires a larger institution so that adequate participation can be achieved for all the rules.

2. The Role of the Asbestos and Small Business Ombudsman

In 1983, the EPA created a Small Business Ombudsman (ASBO).\textsuperscript{286} An ASBO representative serves on all working groups formed for

\textsuperscript{279} See id. at 73–74.
\textsuperscript{280} See id. at 75; ENVIRONMENTAL PROTECTION AGENCY, EPA'S ASBESTOS AND SMALL BUSINESS OMBUDSMAN REGULATORY ASSISTANCE 3 (1992) [hereinafter REGULATORY ASSISTANCE].
\textsuperscript{281} See McGarity, supra note 273, at 91.
\textsuperscript{282} See id.
\textsuperscript{283} See id.
\textsuperscript{284} See id.
\textsuperscript{285} Id. at 91–92. The accountability problem arises because members of the working group are given deadlines by the chairperson, but in most instances the chairperson is not the member's boss. See id. The chairperson is, of course, free to complain to the member's boss, but more often the rule-making process continues without that member's input. See id. at 92. The result is that the lagging member is not reprimanded for the resulting delay when the member's office later raises the objections the member should have raised. See id.
\textsuperscript{286} REGULATORY ASSISTANCE, supra note 280, at 8. The current Small Business Ombudsman is Karen V. Brown. Id. at 3. She is also the EPA's Asbestos Ombudsman. Id. at 2. Hence, the
rules that will affect small entities, and therefore must satisfy the requirements of the RFA. The ASBO also informs affected small business trade associations and organizations of the EPA's proposed rulemakings in order to fulfill the RFA's § 609 solicitation of comments requirement. After providing comments about the rulemaking to the working group, the ASBO continues to serve as an advocate for small entities in the rule-making process "to the extent possible considering the potential environmental consequences." The ASBO reviews all proposed regulations but, due to limited resources, directly monitors only those regulations that it determines are likely to have the greatest adverse impact on small entities. While this process appears to be an effective way of alerting the working group to small-business concerns and of bringing EPA rules in line with the RFA requirements, the success of the ASBO representatives in influencing rulemaking has been less than stellar. For example, in 1993, the ASBO directly monitored twenty-two rulemakings, and only had a significant effect on eight to ten of those rules.

Even though success requires taking one step at a time, the ASBO's role in the rule-making process seems less influential than one would imagine, given that many view the EPA as a leader in compliance with the RFA. In addition to the fact that only a small percentage of monitored rules were actually affected, the ASBO only chose those rules the ASBO deemed most likely to have an adverse impact on

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office she holds is referred to as the Asbestos and Small Business Ombudsman (hereinafter ASBO). Although she holds the title of ASBO, she is also the head of a department that accomplishes the work discussed in this Part III.A.2. In addition to Ms. Brown, there are five ASBO representatives (one Deputy Ombudsman and four Ombudsman Staff Assistants) who work to fulfill the mission of the ASBO. There are also small business liaisons in each region who are available for questions regarding compliance with the Clean Air Act.  

287 See Regulatory Assistance, supra note 280, at 3.
288 Id. at 4. In application, this has meant that the ASBO can only assert itself when the small business concern does not override the overall EPA regulatory agenda and the anticipated environmental benefits of the rule. See infra notes 296–97 and accompanying text.
289 See Regulatory Assistance, supra note 280, at 5.
290 See id.
291 Id. The ASBO, however, did not define, or give an example of, what effects qualify as "significant effects" on the rules the ASBO monitored. Id.
292 See 1993 Hearing, supra note 9, at 105 (statement of Doris S. Freedman); GAO Report, supra note 2, at 2 (noting the EPA has repeatedly been characterized as satisfying RFA's requirements).
small entities. Therefore, there could be a substantial number of rules that have an impact on small business—and are therefore subject to the RFA’s analysis requirements—but which escape the influence of small-entity advocates at the critical early stages of promulgation. Regulatory commentators note that influence early in the rule-making process is crucial because once impetus builds behind an option, it becomes harder to divert attention to more effective options.

The ASBO is further hampered in its advocacy by the overall EPA agenda. The ASBO only can pursue small-business concerns “to the extent possible considering the potential environmental consequences.” This limitation suggests that small-business concerns easily can be overruled by other working group participants who believe the benefits to the environment from the proposed rule outweigh any small-business concerns. Although the EPA cannot disregard its legislative agenda of improving the environment in favor of small business, this broad standard gives the rest of the working group a large loophole by which it can disregard the ASBO’s warnings and effectively disregard the requirements of the RFA.

B. **Actions Taken by the EPA to Deal with Small Businesses**

Many commentators have cited with approval the EPA’s actions under the RFA. The EPA has also adopted some innovative schemes that are not required by the RFA to deal with small businesses. Despite the implementation of these measures, and the existence of a better compliance record than most agencies, being the best example among widespread noncompliance does not equal compliance. There are measures that the EPA could and should adopt to increase its compliance with the RFA.

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294 See *Regulatory Assistance*, supra note 280 at 5.
295 See *1992 Study*, supra note 40, at 93, 95.
297 See McGarity, *supra* note 273, at 92 (arguing that the team approach can be a disadvantage to efficient rulemaking because of the coercive effect on individuals not to stand up for an unpopular proposal, which removes that proposal from upper-management consideration later in the rule-making process).
298 See *1993 Hearing*, supra note 9, at 105 (statement of Doris S. Freedman); *GAO Report*, supra note 2, at 2.
299 See *infra* Part III.B.1.
300 See *1993 Hearing*, supra note 9, at 10 (testimony of Doris S. Freedman).
1. EPA Policies Consistent with the Spirit of the RFA

Although not specifically required by the RFA, the EPA has adopted some measures to lessen the compliance burden on small business. These measures evidence the EPA's attempts to satisfy the policies of the RFA.

The most obvious example of an EPA policy that is consistent with the policies of, but not required by, the RFA is the "bubble concept." The bubble concept provides an alternative method of computing emissions, thereby minimizing the burden on all small entities that must comply with regulations designed to reduce emissions. The bubble concept permits the small entity to place a hypothetical "bubble" over an entire plant and measure the emissions from the whole plant rather than measuring emissions from each separate source within the plant. Thus, emissions are more easily measured and the small entity that must reduce emissions can do so on an overall basis rather than undertaking expensive renovations of each separate source. Other examples of EPA responsiveness to small-business concerns include small-business exemptions from certain EPA requirements, a reduced-penalty policy for small governments and not-for-profit entities, and the development of State Small Business Ombudsman's and Technical Assistance Programs as required by the Clean Air Act Amendments to encourage small business compliance with the Clean Air Act.

Finally, the EPA recently announced the development of a new policy to assist small entities in increased compliance with all regulatory schemes. Although no final policy has been announced, the EPA stated that it intended to implement a "Compliance Assistance" program before taking enforcement actions against small entities under

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301 Although the effect of the EPA's measures on small businesses is the concern of this Comment, some of the measures discussed infra also apply to other small entities.
302 See Verkuil, supra note 4, at 226.
303 See id.
304 See id.
306 E.g., EPA Small Business Rules, 40 C.F.R. § 21 (1994) (establishing procedures by which small businesses can be relieved of total compliance with water pollution rules).
307 ENVIRONMENTAL PROTECTION AGENCY, GUIDANCE FOR CALCULATING MUNICIPAL AND NOT-FOR-PROFIT ORGANIZATIONS' ABILITY TO PAY CIVIL PENALTIES USING CURRENT FUND BALANCES (Mar. 1993).
308 SBO MEMORANDUM, supra note 286, at 1, 4.
environmental statutes. The proposed policy indicated that the EPA would conduct a compliance assistance visit to assess the entity’s obligations and then give the entity a period of time to comply with the action, following up with an inspection at a later date.

The rationale behind the compliance assistance program is that enforcement has not always had the deterrent effect the EPA intended. Scott C. Fulton, Deputy Assistant Administrator for Enforcement at the EPA, noted that enforcement measures will still be applied, but primarily to larger entities that are capable of complying but lack the will to do so. On the other hand, smaller entities that do not comply due to lack of information or resources to achieve compliance will be assisted by the EPA to achieve such compliance. Although the program is still in the planning stages, the program is representative of the shift in focus of the EPA, since its 1993 restructuring, toward compliance instead of enforcement.

As such a policy can benefit all entities, large and small, involved in the regulatory process, this policy should be made a high priority by the EPA. Postponing costly EPA penalties for noncompliance is a crucial first step toward fostering improved relations between the EPA and regulated entities. But the policy may be applied in an ad-hoc manner based on the individual agendas of EPA representatives charged with the policy’s implementation. The effectiveness of the policy might be improved if there are clearly defined standards which the EPA representatives visiting the sites must apply. The development of standards would result in consistent application of the policy and give small businesses predictability. Although this step would improve the flow of information to the small regulated entity, the policy does not necessarily ease the overall regulatory burden on such entities as required by the RFA.

2. EPA Performance Under the RFA

Numerous commentators have commended the EPA for its compliance with the RFA. The EPA is among the few agencies to have

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310 See id. at 2194.
311 See id. at 2195.
312 See id.
313 See id. at 2194–95.
314 Compliance Assistance, supra note 309, at 2195.
315 See id.
316 See 1993 Hearing, supra note 9, at 105 (statement of Doris S. Freedman); GAO REPORT, supra note 2, at 2.
adopted internal guidelines for implementing the RFA. The agency has recently revised those guidelines in a manner that suggests the EPA supports the analysis of regulatory impacts on small entities in almost every case.

The EPA's Revised Guidelines for Implementing the Regulatory Flexibility Act recognize that regulatory burdens on small entities not only exist, but that such burdens are likely to increase in the future. Accordingly, the official position of the EPA is that "EPA will perform an IRFA and a FRFA for every rule subject to the Act that will have any economic impact, however small, on any small entities that are subject to the rule, however few, even though the Agency may not be legally required to do so." The EPA adopted the new guidelines due to difficulties in determining the meaning of "significant" impacts and "substantial" numbers—the RFA standards governing when flexibility analyses must be prepared.

In spite of the promulgation of new agency-wide guidelines, examples of EPA noncompliance with RFA requirements still exist. For example, the Comprehensive Environmental Response, Compensation, and Liability Act requires all companies to comply with extensive reporting procedures whenever anti-freeze is spilled. Even though anti-freeze is generally considered a mildly harmful chemical, small garages and auto shops are still required to report any spill to local, state, and federal entities. This reporting requirement reduces the efficiency of small business, who must incur substantial compliance costs in meeting the reporting requirements, with only a minimal environmental benefit from the compliance with the regulation. The result of EPA overregulation in direct contradiction to its position that the RFA requires the examination of realistic alternatives to regulation. Representatives of the American Trucking Associations, Inc. are also concerned that the EPA ignores viable regulatory alter-

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317 See Freedman, supra note 2 at 448 n.34.
318 EPA GUIDELINES, supra note 239, at 4 (revising original guidelines published in 1982).
319 Memorandum from F. Henry Habicht II, Deputy Administrator, EPA to EPA Administrators 1 (Apr. 1992) [hereinafter Habicht Memorandum].
320 EPA GUIDELINES, supra note 239, at 4 (emphasis in original).
321 See id.; 1992 STUDY, supra note 40, at 102; see also supra notes 129–30 and accompanying text (discussing the RFA's "significant impact" and "substantial number" language).
323 1993 Hearing, supra note 9, at 22 (testimony of William S. Busker).
324 See id. (testimony of William S. Busker).
325 See id. (testimony of William S. Busker).
326 EPA GUIDELINES, supra note 239, at 15.
natives that would protect small businesses from onerous regulations and still achieve the regulatory objective, which the EPA claims is an integral part of useful regulatory flexibility analysis.

Another example of the EPA's inadequate compliance with the RFA's goals is the agency's treatment of storm water run-off regulations promulgated pursuant to the Clean Water Act. Pursuant to § 605(b) of the RFA, the EPA certified that its rule requiring permits for industrial storm water discharge would not have a substantial impact on small entities. The EPA therefore did not prepare a regulatory flexibility analysis. The cost to companies trying to comply with the rule, however, has far exceeded EPA estimates. Small-business advocates assert that had a regulatory flexibility analysis been prepared, and had small businesses been consulted during promulgation of the rule, the severe understatement of actual costs might have been discovered, alternatives might have been developed, and much money could have been saved for both large and small entities.

The CCA has uncovered other problems with EPA compliance. The CCA regularly reviews all proposed rulemakings and issues comments when the CCA believes the agency has failed to comply with RFA requirements. In 1992, the CCA reviewed numerous agency notifications of proposed rulemaking. Of the 260 rules proposed by the EPA in 1992, thirty were considered insufficient by the CCA, and the CCA wrote a comment letter for all thirty. Although full agency compliance is rarely expected, this represents greater than ten percent noncompliance by the EPA.

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327 See 1993 Hearing, supra note 9, at 22 (testimony of William S. Busker).
328 See EPA GUIDELINES, supra note 239, at 15.
329 See 1993 Hearing, supra note 9, at 22 (testimony of William S. Busker).
330 See id. (testimony of William S. Busker).
331 Id. (testimony of William S. Busker).
332 See id. (testimony of William S. Busker). The EPA estimated a cost of $17 to $1,000 per facility, but some companies have reported compliance costs in excess of $100,000. See id. (testimony of William S. Busker).
333 See id. (testimony of William S. Busker).
334 See 1993 Hearing, supra note 9, at 264 (letter from Doris S. Freedman, Acting Chief Counsel for Advocacy to Honorable John LaFalce, Chairman, Committee on Small Business, House of Representatives 1 (Aug. 1993)).
335 See id. (letter from Doris S. Freedman, Acting Chief Counsel for Advocacy to Honorable John LaFalce, Chairman, Committee on Small Business, House of Representatives).
336 Id. (letter from Doris S. Freedman, Acting Chief Counsel for Advocacy to Honorable John LaFalce, Chairman, Committee on Small Business, House of Representatives). The letter from the CCA indicated that comment letters were written when the CCA "found a compliance error and/or deemed it within the best interests of small business to offer substantive comments regarding a particular rule." Id. (letter from Doris S. Freedman, Acting Chief Counsel for
The EPA has also been guilty of incorrectly certifying its regulations as not having a disparate economic effect upon small entities. The EPA certified storm water run-off regulations even though regulating the discharge of storm water will certainly affect every industry and cannot possibly be considered to have no effect on small entities. The EPA certified its off-road farm equipment emissions rule because no small entities manufacture the equipment and therefore the EPA found no resulting impact on small entities. Even though the RFA currently covers only direct effects and this certification was therefore not illegal, this is a clear example of an indirect effect that any agency trying to comply in good faith with the RFA should consider. Even if no small business manufactures the equipment, such equipment is mainly used by farmers, most of whom qualify as small entities under the RFA.

3. Analysis: What the EPA Can Do to Improve Its RFA Record

These examples of noncompliance with the RFA's requirements and goals, even against an overall record of compliance, are especially troublesome because the EPA regulates small entities more than many other federal agencies. Therefore, it is especially important that the EPA take the lead in complying with the RFA. It is also essential that the EPA continue to refine and adapt its policies to remain consistent with the true objectives of the RFA.

Advocacy to Honorable John LaFalce, Chairman, Committee on Small Business, House of Representatives). The thirty comment letters written to the EPA were not classified by rationale, but examples of what the CCA considers a deficiency are "inadequate certifications, inadequate [IRFAs], incorrect certifications, incorrect IRFAs, incorrect exemptions, cases in which [FRFAs] were not prepared, or references to the RFA were omitted altogether." Id. at n.1 (letter from Doris S. Freedman, Acting Chief Counsel for Advocacy to Honorable John LaFalce, Chairman, Committee on Small Business, House of Representatives).

337 See, e.g., American Mining Congress v. EPA, 965 F.2d 759, 772 (9th Cir. 1992) (upholding the EPA's rule relating to storm water discharge rules for inactive mines even though the EPA certified the rule when "[i]t does appear that the EPA failed to understand the number of inactive mines covered by its rule"); see also supra notes 323-28 and accompanying text (discussing the EPA's rules relating to anti-freeze spills); supra notes 329-33 and accompanying text (discussing the EPA's industrial activity storm water discharge rules); supra notes 143-47 and accompanying text (discussing the EPA's regulation of off-road farm equipment).

338 See 1993 Hearing, supra note 9, at 22 (testimony of William S. Busker).

339 See id. at 7 (testimony of Rep. Ewing).


341 See 5 U.S.C. § 601(3) (defining small business); 13 C.F.R. § 121.601 (requiring annual receipts less than $0.5 million to qualify as "small" in the agricultural sector).

342 1993 Hearing, supra note 9, at 26 (testimony of Doris S. Freedman); Verkuil, supra note 4, at 221.
Some of the difficulties in the EPA's ability to address consistently small-business concerns undoubtedly arise from the method of EPA rulemaking. The team approach necessarily focuses on consensus.\textsuperscript{343} Therefore, regardless of how large a role the ASBO representative plays in the rule-making process, a majority of representatives from other departments that do not want to lighten the compliance procedures for small entities can still override the ASBO representative's point of view.\textsuperscript{344} Furthermore, commentators have criticized EPA rulemakings and analyses for reliance on inadequate figures.\textsuperscript{345}

Although the EPA Guidelines will likely increase the number of IRFAs and FRFAs actually prepared by the agency,\textsuperscript{346} the new policy still contains substantial loopholes. First, the policy only applies when entities are "subject to the rule."\textsuperscript{347} Thus, the EPA has specifically absolved itself and its lead offices of a duty to require any consideration of indirect effects regardless of how obvious and significant those effects are. Although this approach is consistent with current case law,\textsuperscript{348} the approach appears inconsistent with the stated objective of the new policy—to improve the EPA's compliance with the RFA "even though the Agency may not be legally required to do so."\textsuperscript{349} Therefore, just as Congress should amend the RFA to compel consideration of indirect effects, the EPA should also further amend its guidelines to direct lead offices to consider indirect effects on small entities when promulgating rules.

Although the danger in considering indirect effects is that the rule-making processes could become paralyzed by the need to consider every possible secondary effect in every industry, the RFA still only requires IRFAs and FRFAs when there are significant impacts on a substantial number of entities.\textsuperscript{350} Therefore, the EPA would not be required to consider every possible effect, as regulatory reform opponents may claim.\textsuperscript{351} Rather, by consulting in good faith with the regulated industries, the EPA could determine the largest secondary

\textsuperscript{343} See supra notes 278--85 and accompanying text.
\textsuperscript{344} See McGarity, supra note 273, at 92; see also supra note 297 and accompanying text.
\textsuperscript{345} See 1993 Hearing, supra note 9, at 98 (statement of Rep. Roberts); 1992 Study, supra note 40, at 70--72, 85.
\textsuperscript{346} See Habicht Memorandum, supra note 319, at 2.
\textsuperscript{347} EPA Guidelines, supra note 239, at 4. (emphasis added).
\textsuperscript{348} See supra Part II.B.3.
\textsuperscript{349} EPA Guidelines, supra note 239, at 4.
\textsuperscript{350} See 5 U.S.C. §§ 603--04.
\textsuperscript{351} See Mid-Tex Elec. Coop., Inc. v. Federal Energy Regulatory Comm'n, 773 F.2d 327, 343 (D.C. Cir. 1985).
effects of proposed rules without a significant increase in resource expenditure.

A potential problem with the consideration of indirect effects is that such consideration, combined with the proposed amendment to the judicial review provision, could subject the EPA to lawsuits that may further impede the regulatory process.\textsuperscript{352} Although some suits would be filed immediately after the passage of an amendment to require consideration of indirect effects, such suits will quickly decrease in number as the EPA refines its rule-making policies and as a general understanding of which kinds of secondary effect must be analyzed under the RFA is achieved.\textsuperscript{353}

Another problem with the EPA Guidelines is that the lead offices have too much discretion as to how much of their resources should be expended in performing IRFAs and FRFAs.\textsuperscript{354} Although the EPA Guidelines explain the RFA's requirements for the content of the IRFA and FRFA in detail,\textsuperscript{355} there is little explanation of how extensive the lead office's analysis must be.\textsuperscript{356} This approach could result in lead offices allocating minimal resources to the flexibility analyses. This approach is dangerous because if the existing facts are not thoroughly analyzed for their validity and specific applicability to the rule under consideration, the adequacy and utility of the flexibility analysis will be seriously undermined.\textsuperscript{357} The EPA does make the level of regulatory flexibility analysis dependent upon the severity of the effect on small businesses, thus the approach recognizes that there must be at least a minimal consideration of small entity impacts for every rule.\textsuperscript{358} However, the EPA should rewrite the Guidelines to give lead offices less discretion and more direction on how to evaluate and weigh each of the factors.

\textsuperscript{352} See 1993 Hearing, supra note 9, at 6 (testimony of Rep. Ewing).

\textsuperscript{353} See id. (testimony of Rep. Ewing).

\textsuperscript{354} See EPA GUIDELINES, supra note 239, at 4 (describing the discretion given to each lead office).

\textsuperscript{355} See id. at 11–18, 21 (listing IRFA and FRFA content requirements).

\textsuperscript{356} The EPA Guidelines state:

[s]ubject to these minimum requirements of the [RFA], lead offices have wide latitude in determining the level of analysis appropriate, based on the following considerations: (1) the severity of a rule's anticipated impact on small entities that are subject to the rule; (2) the quality and quantity of available data; and (3) the level of resources available for the analysis.

\textit{Id.} at 11.

\textsuperscript{357} See 1992 STUDY, supra note 40, at 85 (noting that the EPA's use of averaged and aggregated data often seriously misstates the potential impact of the rule).

\textsuperscript{358} See id. at 102.
IV. Conclusion

In order to restore the RFA as the protector of small businesses against governmental overregulation and the facilitator of communication between the regulator and the regulated, the RFA must be amended. The proposals of the Reform Act are a necessary first step, but they too could prove inadequate in implementation. If the availability of judicial review causes undue litigation without improving rulemakings, or if the CCA is unable to become the enforcement mechanism anticipated in the RFA, further revisions to the RFA may be necessary. Should the Reform Act fail to achieve the RFA's original goals, there are other steps which could be taken, including providing for public comments on agency certifications and requiring certifications concurrent to the notice of proposed rulemaking.

It is likely, however, that the amendments proposed in the Reform Act will achieve a more desirable balance between the interests of small businesses and the interests of regulatory agencies without impeding the rule-making process. The current provisions have been advanced by small business advocates for years, and are therefore the result of extensive collaboration and perfection by experts. The passage of the Reform Act will not only give the small-business sector the opportunity to continue to thrive and contribute significantly to the United States economy, but also will ensure that agencies will observe greater compliance with regulations and possibly save on enforcement costs.

In the spirit of the Reform Act, the EPA should further examine its rule-making process and expand its efforts to improve any rule-making which affects small businesses. Not only could the EPA revise its guidelines, but it could also improve its data collection and rule promulgation practices.

Society as a whole will benefit from clearer and simpler environmental regulations. Even more, the EPA and the environment itself will benefit from the revision of the EPA Guidelines because regulatory compliance options will be more fully explored, thereby allowing small entities to more readily comply. This will achieve a better understanding and improved working relationship between the EPA and the affected industries. Such a relationship will create even greater communication, further easing the EPA's difficulties in determining indirect effects by opening the flow of information between the regulator and the regulated.