

A CRITICAL GUIDE TO THE REGULATORY FLEXIBILITY ACT

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The Regulatory Flexibility Act,¹ enacted with little fanfare in the closing days of the Carter Administration, imposes important new responsibilities upon agencies who declare policy through rules. Every agency must be familiar with the Act before proposing rules and many agencies will have to perform the required regulatory flexibility analyses as part of the rule promulgation process. Since the Act has complicated entry and exit points, its overall impact is difficult to evaluate. What is clear, however, is that it is part of a central theme in regulatory restraint that will be with us through the 1980s. In effect, the regulator has been told to "heal thyself,"² through careful and cautious policymaking. The Regulatory Flexibility Act (RFA) plays a central role in this process of restraint.

The RFA came about because of the political force of the small business lobby, both inside and outside of government. It became part of the regulatory reform legislation when its tenets were accepted by the regulatory reform lobby (a transitory group whose members include big business, The American Bar Association, and members of Congress). When regulatory reform borrowed the small business banner it became a formidable interest group, one strong enough to make the RFA the only regulatory analysis proposal to become law in the Ninety Sixth Congress.³

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1. Pub. L. 96-354, Sept. 19, 1980, 94 Stat. 1165, 5 U.S.C.A. secs. 601-612 (Supp. 1980).
2. Cf. Bible, Luke III:9 ("Physician, heal thyself").
3. See generally, The White House, Regulatory Reform: President Carter's Program 26 (1980).

But the Act does not stand alone. Carter and Reagan Administration Executive Orders introduced the concept of regulatory analysis to executive agencies and the Paperwork Reduction Act reduced the reporting burden of regulation for all agencies. Moreover, the Ninety Seventh Congress will make another try at a generic regulatory reform proposal which mandates regulatory analysis. Thus there is much related activity of which the RFA is or may only be a part.

This article's primary purpose is to serve as a road map to the RFA. The assumptions underlying the Act will be explored and its provisions will be critiqued and analyzed. In addition, however, the RFA's relationship to the other regulatory analysis efforts will be studied and suggestions for integrating the Act into the general scheme of regulatory reform will be offered. The agencies who must implement and administer the Act are the main audience, but the public who is the Act's intended beneficiary, will also find it of interest.

I. Assumptions Underlying the Regulatory Flexibility Act

The RFA is a stunning achievement for the small business community and its representatives in government because it requires virtually all government policymaking to be sensitive to small business concerns. This success was not achieved overnight, but as the culmination of resistance generated by small business to increasing government regulation. Small business had the apparatus in place through earlier legislative successes to take immediate advantage of an emerging general

movement away from government regulation. It also had a seemingly convincing general point -- that small business, because it was small, was bearing a disproportionate share of the regulatory burden upon business and industry which was intended to be neutral in application.

A. Historical Concerns for Small Business

Since 1953, when the Small Business Act became law,⁴ Congress has shown a special solicitude for the problems of small business. That Act provided for government loans to small business, assistance in obtaining government contracts and the provision of technical and managerial assistance. It also established the Small Business Administration, which was to carry out the purposes of the Act under the direction of the President.⁵ The principal concern of the SBA was to study whether defense procurement programs unfairly discriminated against or imposed undue burdens upon small business and to recommend appropriate adjustments.⁶ In 1958 this protective role was expanded by Congress when it required that government assure a fair proportion of all purchases and sales be transacted with small business.⁷ This legislation also permitted variable size standards to be used to define "small" business for procurement purposes (the term had previously been construed almost

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4. Ch. 282 sec. 201 et seq., 67 Stat. 232 (current version at 15 U.S.C. sec. 631 et seq. (1970)).
 5. 15 U.S.C. secs. 633-635 (1970).
 6. Small Business Act of 1953, Ch. 282 sec. 216, 67 Stat. 232.
 7. 1958 Small Business Act Amendments sec. 2[8], 15 U.S.C. sec. 637 (1970).

exclusively to means firms with fewer than 500 employees).⁸

Subsequently, the needs of small business were recognized in related ways as the impact of government grew beyond defense procurement into other areas of the economy.⁹

By 1974 the overall loan, guaranty and investment ceilings for small business had reached \$6 billion.¹⁰ Nevertheless, there was marked dissatisfaction with the performance of the SBA among its constituents. Small business trade associations even suggested that because of mismanagement the SBA no longer represented the small business community.¹¹ They called for the creation of a new position within SBA, the Office of the Chief Counsel for Advocacy, to serve, among other things, as an ombudsman to protect the interest of small business.¹² This remarkable notion -- that an agency with a single constituency needed another agency inside it to protect the interest of that

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8. An interagency task force had determined that size standards should vary by industry. Thus, in the case of oil refineries, it was suggested that "small" refineries would be those with fewer than 1,000 rather than 500 employees. See 1958 U.S. Code Cong. & Ad. News, at 3077-78.
9. The Small Business Investment Act of 1958, 15 U.S.C. secs. 661 et seq. (1970), encouraged the creation of privately-owned small businesses. The 1961 Small Business Act Amendments, Pub. L. 87-305, sec. 9, 15 U.S.C. sec. 636(d) (1970), expanded the availability of grants to state agencies and universities for research into and counselling of small business enterprises. Also the Housing Act of 1961, Pub. L. 87-70, sec. 305, 75 Stat. 149, amended the Small Business Act, 15 U.S.C. sec. 636(b)(3) (1970), to permit loans for small businesses displaced by urban renewal activity.
10. Small Business Act Amendments of 1974, Pub. L. 93-386 sec. 2(a)(3), 88 Stat. 742.
11. The Regulatory Flexibility Act: Hearing Before the Sub-Comm. on Admin. Prac. and Proc., Senate Comm. on the Judiciary on S.1974, 95th Cong., 1st Sess., at 142 (1977) (answers to questions by James McKeivitt).
12. See 1974 U.S. Code Cong. & Ad. News, at 4507.

constituency -- actually garnered the support of Congress within two years.

In 1976 Congress established the Office of Advocacy within the SBA to be headed by a Chief Counsel for Advocacy with broad powers to examine the needs of as well as the burdens upon small business.¹³ Importantly, the Chief Counsel's role was to include the evaluation of complaints against the SBA and other federal agencies and the preparation of recommendations with respect to those complaints. Specifically the Chief Counsel was admonished "to measure the direct costs and other effects of government regulation on small businesses; and make legislative and nonlegislative proposals for eliminating excessive or unnecessary regulations of small business."¹⁴

This responsibility marked a dramatic shift of emphasis for the SBA. The SBA moved away from protecting small business against a harsh economy and towards protecting it against a harsh bureaucracy. This shift undoubtedly reflected a general business discontent with government regulation,¹⁵ especially the health, safety, and environmental regulations of the 1970s.¹⁶ It also

13. 15 U.S.C.A. sec. 634a-g (Supp. 1980).

14. Id. at sec. 634b. The Chief Counsel was by this legislation made something of a knight-errant for small business throughout government. All government agencies and departments were directed to furnish the Chief Counsel "such reports and other information as he deems necessary to carry out his functions" Id. at sec. 634e.

15. For example, President Ford's Executive Order No. 11821, 39 Fed. Reg. 41501 (Nov. 27, 1974), required executive agencies to consider the economic impact of these rules and regulations upon the business community.

16. See, e.g., 122 Cong. Rec., Pt. 11, H13781 (daily ed. May 13, 1976) (remarks of Mr. Conte) citing OSHA, EPA and ERISA as reasons why a small business advocate was needed.

provided the intellectual predicate for the legislation that would create the RFA four years later.¹⁷

The trend towards viewing the bureaucracy with a jaundiced eye culminated in a remarkable march on Washington by the small business community in 1980. In fact 1980 became the year of small business in Congress, when measured in terms of the legislative attention the small business community enjoyed. The stage was set by a Senate report to the White House in late 1979 which emphasized that "Many small business groups have suggested that SBA's only role should be to act as an advocate for small business within the Federal Government."¹⁸

The White House conference on Small Business, chaired by Arthur Levitt of the American Stock Exchange, was a grass roots organization of small business people that formulated agendas and elected delegates in regional caucuses and ultimately arrived in Washington some 2,000 strong to debate and formulate the critical issues facing small business in the 1980s.¹⁹ The Conference made 60 recommendations, many of which had a decidedly anti-regulation

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17. Since the first Chief Counsel, Milton Stewart, was not confirmed by Congress until July 1978, the Office of Advocacy did not begin its work until almost two years after Congress established it. See Nomination of Milton Stewart to be Chief Counsel for Advocacy of the SBA: Hearings Before the Senate Select Committee on Small Business, 95th Cong. 2d Sess. (1978).
18. Discussion and Comments on the Major Issues Facing Small Business: A Report of the Senate Select Committee on Small Business to the Delegates of the White House Conference on Small Business, 96th Cong., 1st Sess., p. 50-51 (1979).
19. Report to the President by White House Conference on Small Business (April 1980) (hereinafter White House Conference).

thrust.²⁰ One of the Conference's six specific policy goals for government was the elimination or reduction of onerous regulations and reporting requirements.²¹ It is difficult to overstate the impact of this Conference upon the White House and Congress in an election year.

At the time of the Conference or shortly thereafter at least four important pieces of small business legislation emerged from Congress with the President's support in 1980. The Small Business Economic Policy Act of 1980²² mandates the coordination of all Federal departments and agencies to foster the economic interests of small business and requires the President annually to submit a report to Congress assessing the impact of federal laws and policies upon small business.

The Equal Access to Justice Act²³ provides for the recovery of attorneys fees, witness fees, and other costs on suits against the United States by certain prevailing parties. These parties include those who meet small business size and asset standards.²⁴ The avowed purpose of this Act is to remove any deterrent effect a small business (or other qualifying litigant) may feel in litigating against administrative agencies. One of the desired

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20. The Report devoted ten of its 60 recommendations to government regulation, paperwork and economic policies that related to small business. Id. at 53-54.
21. Id. at 29.
22. 15 U.S.C.A. sec. 631 (Supp. 1980).
23. Pub. L. 96-481, Title II, sec. 203, 94 Stat. 2325-326, 5 U.S.C.A. sec. 504 (Supp. 1980) and other conforming references in U.S.C.
24. The size standards exclude individuals with a net worth in excess of \$1 million and businesses with a net worth in excess of \$5 million or with more than 500 employees. 5 U.S.C.A. sec. 504 (b) (1) (B) (Supp. 1980).

outcomes of the Act according to the SBA is to make government agencies cautious about bringing actions against small businesses in the first place.²⁵

The Paperwork Reduction Act²⁶ was signed into law by President Carter in December of 1980. This legislation was the result of a four year effort to reduce the paperwork burden the federal government imposes upon business.²⁷ The Act gives the Office of Management and Budget (OMB) control over the amount of paperwork generated by executive and independent agencies. While the Act is not limited in its effect to small business, it was one of the specific recommendations of the White House Conference on Small Business. There are probably few more strongly held objections of the small business community to regulation than the reporting and record keeping requirements imposed by the federal government.²⁸

The Regulatory Flexibility Act is the fourth piece of legislation passed by Congress in 1980.²⁹ It stems from concerns

25. See SBA Annual Report, FY 1980, Vol. I, p. 22.

26. Pub. L. 96-511, 94 Stat. 2812 (1980).

27. A good overview of previous paperwork reduction efforts is provided in Neustadt, Taming the Paperwork Tiger--An Experiment in Regulatory Management, Regulation, Jan./Feb. 1981, p. 28.

28. For example, the Senate Select Committee on Small Business earlier concluded that "improving government regulations, abolishing unnecessary regulations and reducing paperwork are goals that can and must be met...." Discussion and Comments on the Major Issues Facing Small Business: A Report of the Senate Select Comm. on Small Business, 96th Cong., 1st Sess., p. 49 (1979).

29. 5 U.S.C.A. secs. 601-612 (Supp. 1980). Other important pieces of small business legislation enacted in 1980 include the Small Business Investment Incentives Act, P.L. 96-477, 15 U.S.C.A. secs. 77a-77d (Supp. 1981) and the University and Small Business Patents Act, P.L. 9651.

about the differential impact of regulation upon small business that were central to the White House Conference on Small Business recommendations. The RFA is the heart of the pro-small business policy created by Congress over the last five years. There is little doubt that, taken together, the legislative successes of 1980 gave substance to Article 1 of the Small Business Bill of Rights: "The right to start, own, and manage a business without government interference."³⁰

B. The Relationship Between the Health of Small Business and Regulation

1. The Importance of Small Business

There is much that can be said for the small business sector of the economy. Statistically, the small business sector (as defined by the SBA) constitutes about 98 percent of all non-farm businesses and accounts for 39 percent of the Gross National Product. Small businesses employ over 100 million people, a figure which represents 58 percent of all business employment.³¹

But it is not just percentages that tell the story. The small business sector is frequently the entry point for new ventures and therefore it creates new jobs. Undoubtedly there are significant connections between the health of small business,

30. White House Conference, supra note 19, at 49.

31. See generally, Small Business Administration, Facts About Small Business and the U.S.S.B.A., pp. 3-4 (1981). The SBA definitions of small businesses vary by industry codes and are elaborately developed in Standard Industrial Classifications. See SBA, Office of Advocacy, The Study of Small Business, Pt. II (1977). Generally speaking, firm size of fewer than 500 employees or \$5 million in sales are reliable small business indicators.

the rate of innovation in production and technology and the rate of unemployment. Instinctively one feels there is a symbiotic relationship between newness and smallness, and this has been borne out by recent technological successes in industries like the semi-conductor industry. Moreover, there is reason to believe that the rate of innovation is higher in small rather than in large businesses.³² Since the world-wide leadership of the United States economy is dependent upon innovation in business and technology, one would not want to discourage it by suppressing the growth of small business.

Nevertheless over the last 20 years the small business sector of the economy has shrunk relative to the large.³³ This development has understandably caused alarm in and out of the small business community. One cannot with confidence determine what the optimum percentage of small business should be for our economy as a whole. To some extent the growth of a complex economy may portend a shift to larger business entities as small businesses mature and grow. So long as this shift is the result of market forces on firm size there is little that one can or

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32. Determining how the rate of innovation is affected by firm size is not an easy matter. The SBA has conducted studies which convince it that big business is not more innovative than small. The SBA is also recommending further study of the impact of increased merger activity on the rate of innovation. See SBA Annual Report--FY 1980, Vol. I, p. 14. See also, Department of Commerce, The Role of New Enterprises in the United States Economy (1976).
33. In 1960, small and medium size manufacturers accounted for 50% of the industry's assets. By 1972, small businesses owned only 33%. In 1953, 15% of the nation's gross private domestic investment was in small, non-farm, noncorporate businesses. By 1973, the small business percentage was 7.5. 122 Cong. Rec., Pt. 12, p. H15009 (daily ed. May 20, 1976) (remarks of Rep. McCollister).

would want to do to arrest it. But it can be stated unequivocally that it does not make sense to retard small business development through government policies, whether they be intentional or unintentional. This is the increasing concern of those involved with the small business community.³⁴

2. Diseconomies of Regulatory Scale

The optimum size of a business entity in a competitive economy is determined by the point at which it can reasonably be said to achieve economies of scale. At that point growth is no longer necessary to make a product more efficiently. Depending upon the nature of the industry and its product mix, efficient size may or may not leave a firm as a small business by SBA definitions. But aside from these natural forces which increase firm size, there appear to be non-economic forces at work which require a firm to grow or, stated alternatively, which penalize a firm for not growing.³⁵ These forces are produced by government regulation.

To some degree every act of government imposes a cost on an entity that must comply with it, but we usually make a political decision that these costs are for the common good of society. Nevertheless other laws and regulations, while intended to be neutral with respect to firm size, are having an increasing and cumulative negative effect on the growth of small business. This

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34. "If our national policy is to promote small business, that policy is failing." McCollister, *id.*

35. See The Regulatory Flexibility Act: Hearings Before the Subcommittee on Administrative Practice and Procedure, Senate Judiciary Committee on S.1974, 95th Cong., 1st Sess., Pt. 1, p. 126 (testimony of Milton Kafoglis).

negative effect occurs in two ways: small business has fewer units of output over which to spread regulatory costs and they are more expensive on a per unit basis; in addition small businesses are not set up to take advantage of economies of scale in regulatory compliance, personnel and data systems.³⁶

The tax laws and regulations are a particular problem. Representative John McCollister of Nebraska stated the tax problems of small business in the following terms:

Perhaps the most devastating form which Federal antismall business discrimination takes is found in the tax code. The complexity of the code itself overwhelms small businessmen who lack trained legal and accounting departments and can ill afford to hire high priced consultants. In the area of the code's capital recovery provisions, for example, small business typically utilizes straightline depreciation because they cannot afford the time or just plain cannot figure out how to use the more complex capital recovery devices which could give them a better tax situation. Large corporations, of course, are able to utilize the more complicated provisions and, as a result, pay lower effective tax rates than small businesses. As a class, the 100 largest corporations pay an effective rate up to 50 percent. Two years ago, a congressional study of corporate tax rates found that the Nation's largest 143 corporations paid an average tax rate of 23.4 percent. The average rate for all corporations was 33.4 percent.³⁷

When it comes to the tax laws, it seems inescapable that complexity will be the friend of size. Some reforms in the tax

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36. See Regulatory Reform: Hearings Before the Subcommittee on Administrative Practice and Procedure, Senate Judiciary Committee on Regulatory Flexibility Act of 1979, 96th Cong., 1st Sess., Pt. 3, pp. 350-355 (remarks of Alfred Dougherty).
37. 122 Cong. Rec., Pt. 12, H15009 (daily ed. May 20, 1976) (remarks of Rep. McCollister).

laws have benefitted the smaller sized business,³⁸ but virtually every reform carries with it a bias in favor of size.

It is not only substance that frustrates small business. Small business suffers acutely when it comes to a per unit cost of completing reports required by the IRS and other government agencies.³⁹ Studies show that the average cost of forms per employee and per dollar of sales drops dramatically as firm size grows.⁴⁰ While IRS was the traditional nemesis of small business in this regard, the agencies of the 1970s (EPA, CPSC, OSHA and EEOC) have refined the burden of mandatory reporting into a fine art.⁴¹ Mandatory reporting has become a favorite tool of government, perhaps because it is a method of shifting (and dispersing) compliance costs. The government acts based on information it collects and the more information it gets the more it seems to need.

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38. A good example is the reduction in capital gains tax rate which has encouraged the formation of venture capital firms who invest in small business.
39. Small business has been said to pay a "regressive tax" because it bears the same paperwork burden as large, multi-national companies. SBA's Paperwork Measurement and Reduction Program: Hearing Before the Senate Select Committee on Small Business, 96th Cong., 1st Sess., p. 50 (1980) (statement of Milton Stewart).
40. See The Regulatory Flexibility Act: Joint Hearings Before the Subcommittee on Administrative Practice and Procedure, Senate Committee on the Judiciary and Senate Select Committee on Small Business on S.1974 and S.3330, 95th Cong., 2d Sess., Pt. 2, p. 432-33 (1978) (Appendix "F").
41. It has been estimated by the SBA that 130 million man-hours are spent annually by small business in filling out non-IRS forms. IRS paperwork requirements amount of 1,600 million man-hours, more than the total employee production of General Motors. Federal Paperwork Requirements: Hearing Before the Subcommittee on Government Regulation and Paperwork, Senate Select Committee on Small Business, 96th Cong., 1st Sess., p. 2-3 (1979) (remarks of Sen. Hatch).

The small business community (as recorded by the Office of Advocacy) has emphatically objected to federal paperwork requirements for a variety of reasons. Chief among them are the number of reports and forms; their complexity, unclarity, frequency and untimeliness (deadlines that conflict with peak business times); and the need for professional help from accountants and lawyers to complete them.⁴²

Ultimately, the small business concern with regulation relates both to the rules themselves and to the collection of information. Agencies and programs with a high profile on this score are EPA, DOE, OSHA and ERISA. EPA's effluent reductions are said to impact small business to a greater degree than large because they mandate compliance techniques that are less compatible with the production technologies of small firms.⁴³ DOE's record keeping requirements on oil and gas prices and volume are cited as impossibly vague and intelligible.⁴⁴ OSHA comes under fire for its national consensus standards that burden small businesses which lack technical expertise to interpret the requirements.⁴⁵ ERISA is criticised for unreasonable and complicated regulations that, rather than protecting employee

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42. SBA's Paperwork Measurement and Reduction: Hearing Before the Senate Select Committee on Small Business, 96th Cong., 2d Sess. p. 33-34 (1980) (statement of Milton Stewart). The Office of Advocacy refers to these objections as small business' "paperwork lament."
43. H.R.7739 and H.R.10632, Small Business Impact Bill: Hearings Before the Subcomm. on Special Small Business Problems, House Committee on Small Business, 95th Cong., 1st Sess., pp. 89-96 (1978) (remarks of James Miller).
44. *Id.* at 314-318 (statement of Robert Amori).
45. *Id.* at 127-129 (statement of James McKeivitt).

pension rights, have the practical effect of terminating pension plans for employees of small businesses.⁴⁶

There is no easy method to ameliorate these regulatory burdens. Government regulation is intended to achieve substantive results that society has agreed upon, but society has obviously not addressed the unintended effect of regulation upon small business. The plight of small business is that the regulatory goals of society ostensibly equal in impact, burden that sector to its long term disadvantage. To some extent, small business is merely suffering the consequences of equal treatment that Anatole France warned us about long ago.⁴⁷ But then as now, when such treatment results in serious frustration of personal initiatives, it is bound to become a separate subject for reform.⁴⁸

C. The Problem of "Deregulating" Small Business

Much of what we currently recognize as the deregulation movement has been inspired by concerns of the small business community with the existing pattern of regulation. One response to the regulatory problem of equal treatment of unequals is to legislate (or administer) differential reporting and compliance standards based on size. Agencies and Congress have been aware

46. *Id.* at 123-124 (statement of James McKeivitt).

47. Anatole France berated "the majestic equality of the law that forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread." A. France, *Le Lys Rouge* (1894), p. 117. For the view that this criticism of law undermines impartiality of justice, consult F. A. Hayek, *The Constitution of Liberty* (1960), p. 234-249.

48. See generally, Chilton & Weidenbaum, *Small Business Performance on the Regulated Economy*, Working Paper No. 52, Center for Study of American Business (1980).

of the problem and made some attempts to do so even before the advent of the Regulatory Flexibility and Paperwork Reduction Acts. But there are several conceptual difficulties with this approach.

1. The Conceptual Problems

It would be satisfactory to all if each government regulatory program that imposes costs on the private sector could have its compliance costs prorated on a company size adjusted basis. But the complexity of regulation itself makes it virtually impossible to isolate compliance costs in such detail.⁴⁹ Indeed the effort to do so would, like the attempts to design a regulatory budget,⁵⁰ embroil government in additional regulation of a magnitude as yet unknown. Therefore, most reform solutions have emphasized a release of small businesses from the regulatory requirements imposed on larger ones, or a reduction of responsibilities imposed by those requirements. But these solutions are not problem-free.

In the first place, release from some regulation can amount to a kind of special protection for small business which can produce undesirable consequences. The health of small business

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49. One of the few empirical studies on the costs of compliance with regulations took place in the State of Washington, where the study concluded that small businesses with less than 50 employees have inordinately higher compliance costs than those with over 50. Cole & Summers, *Costs of Compliance in Small and Moderate-Sized Businesses*, Report to the SBA (1980). This study suggests that other studies, with larger sample size, need to be performed. *Id.* at 28.
50. Consider Eads, *Harnessing Regulation--The Evolving Role of White House Oversight, Regulation* (May/June 1981), at 19.

is determined not only by the number that succeed, but also by the number that fail. Bankruptcy is a necessary condition of risk and innovation. To stifle these creative forces in the business environment may only serve to keep otherwise inefficient entities alive. Moreover, the natural process of business growth will be affected if smallness is rewarded by deregulation, since firms will be encouraged to maintain a sub-optimal size from an economic perspective.⁵¹ In this event, growth is discouraged and along with it the capital formation necessary for expansion and product development. Alternatively, non-productive organizational devices will be encouraged to take advantage of firm size limitations.⁵²

Another serious problem with deregulation of small business is the potential frustration of the substantive goals of regulation. The purpose of health, safety, environmental and consumer regulation is to protect individuals in the public and in the work force. It is small comfort to the miner who contracts brown lung or the textile worker who inhales cotton dust that they are less protected because their employer is a small

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51. Congress has been concerned about encouraging smallness in this manner. Congress does "not want to create any disincentives to economic growth." 126 Cong. Rec. H8461 (daily ed. Sept. 8, 1980) (remarks of Rep. Seiberling).
 52. For example, DOE's crude oil entitlement program allows "small refineries" to purchase crude oil at reduced prices. As a consequence, 37 of 38 new refineries built between 1974 and 1977 were designed to process less than 40,000 barrels per day, the threshold of the entitlements program, whereas the minimum technologically efficient refinery size is 175,000 barrels per day. See 126 Cong. Rec. H8467 (daily ed. Sept. 8, 1980).

business.⁵³ From a public policy standpoint protection is stated in absolute terms, whether or not it achieves that status in practice. This approach has made OSHA refuse to adopt cost-benefit analysis, a position which the Supreme Court has recently endorsed.⁵⁴

Furthermore there is an equity problem with exempting small businesses from regulations. If one chooses to exempt certain sized businesses from regulations, it is difficult to know where to draw the line. When SBA size standards are adopted, a business with 499 employees to \$4,999,000 in sales may be exempt but an insignificantly larger one may not be. At the margin size standards are meaningless,⁵⁵ but the non-regulatory benefits they carry are quite valuable. In effect the exemption process may be arbitrary in the individual case.

To date this kind of economic discrimination has not risen

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53. Lack of protection can come about not just because protective legislation is held not to apply to the small enterprises involved, but because agency enforcement resources and reporting requirements are modified internally to reflect size considerations. Also, as Representative Seiberling has noted, Congress must be careful not to provide incentives for large business to spin off unsafe operations into smaller ones when they are not subject to as strict regulation. This was said to have occurred in the Kepone case. 126 Cong. Rec. H8461 (daily ed. Sept. 8, 1980) (remarks of Rep. Seiberling).
54. American Textile Manufacturers Institute, Inc. v. Donovan, 101 S.Ct. 2478 (1981).
55. The SBA admits that establishing size standards for small business in the middle (or "gray") area is very difficult. The SBA apparently asks itself whether it should assist competition in given industries by including mid-sized firms within its definitions. See Size Standards for Small Businesses: Hearing Before the Subcommittee on General Oversight and Minority Enterprise, House Committee on Small Business, 96th Cong., 1st Sess., p. 17 (statement of SBA Assoc. Administrator Roger Rosenberger).

to constitutional dimensions. As a matter of equal protection analysis the Court has heard numerous challenges over the years, but has not taken them seriously,⁵⁶ and the SBA size standards themselves have been upheld by the courts when challenged.⁵⁷ If the process of small business deregulation gains in popularity, however, one can expect further attacks upon SBA regulations, either as a political or judicial matter, in the gray area between large and small business.

2. Congressional and Administrative Techniques for Adjusting Regulations to Size of Entity: Herein of "Tiering"

Whatever the conceptual difficulties may be, federal regulations have long acknowledged the relevance of size in determining coverage. Perhaps the classic example is the "Mrs. Murphy" exemption to the Civil Rights Act of 1968⁵⁸ which renders the housing non-discrimination provisions inapplicable to owner-occupied units of four families or less.⁵⁹ Obviously Congress

56. See generally, *New Orleans v. Dukes*, 427 U.S. 297 (1976); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Tigner v. Texas*, 310 U.S. 141 (1940).

57. Courts have held that SBA size standards have the force of law. E.g., *Otis Steel Prods. Corp. v. United States*, 316 F.2d 937 (Ct. Claims 1963). The courts have also upheld SBA's refusal to consider affiliates of large businesses as "small." *American Electric Co. v. United States*, 270 F. Supp. 689 (D. Hawaii 1967); *Springfield White Castle Co. v. Foley*, 230 F. Supp. 77 (W.D. Mo. 1964).

58. 42 U.S.C. sec. 3603(b)(2) (1970). Mrs. Murphy became the imaginary constituent whose rooming house was being debated. See Senate Comm. on the Judiciary, Civil Rights Hearings on the President's Program 1963 (remarks of Sen. Ervin). See also, 42 U.S.C. sec. 2000a(b)(1) (1970) (public accommodations of not more than five rooms not covered by Act).

59. See *Fred v. Kokinokos*, 347 F. Supp. 942 (E.D.N.Y. 1972). Some question has been raised as to whether this exemption (Footnote continued)

saw fit to trade-off the public interest against discrimination in favor of individual interests in privacy when the potential impact of the choice was minimal. This give and take is a classic example of the way in which political debates can be resolved.⁶⁰

There have also been a series of administrative adjustments -- often from the agencies most objected to by small business -- that seek to reduce the regulatory burden on small firms. Some have taken the form of outright exemptions from compliance, such as OSHA's decision to eliminate reporting burdens for businesses with 10 or fewer employees.⁶¹ Both the SEC and EPA have issued a variety of regulations that provide specific exemptions for small business.⁶² In addition agencies have come up with innovative regulatory plans that minimize the impact⁶³ of regulations upon small business. The EPA's bubble concept is such an approach; it permits businesses to reduce total emissions flexibly by placing an imaginary bubble over an entire plant and demanding only that

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59. (continued)

also applies for the 1866 Civil Rights Act, 42 U.S.C. sec. 1982 (1970). See *Morris v. Cizek*, 503 F.2d 1303 (7th Cir. 1974).

60. It has been suggested that the exemption for Mrs. Murphy's rooming house removed a dramatic political argument against the legislation generally. Note, 16 W. Res. L. Rev. 660, 672-73 (1965).
61. See SBA's Paperwork Measurement and Reduction Program: Hearing Before the Senate Select Comm. on Small Business, 96th Cong. 2d Sess., p. 51 (1980) (statement of Milton Stewart).
62. See, e.g., 17 C.F.R. sec. 230-257 (1978) (SEC exception for offerings of securities below \$50,000); 40 C.F.R. Pt. 21 (1978) (EPA small business exemptions).
63. The SEC has created an office of Small Business Policy to review its rules with a view towards minimizing burdens on small business.

overall emissions levels meet established standards rather than expecting each stack within the plant to be of the most efficient design.⁶⁴

This method for adjusting government regulation to the needs of small business has become known as "tiering."⁶⁵ As the examples above show, tiering allows an agency (or in some instances Congress itself) to tailor regulatory requirements to fit the particular needs of the regulated entities. The predominant method of tiering is the use of size standards, employed by the SBA. These standards can be in graduated stages as well as in a single division.⁶⁶ In addition to size standards, some agencies have utilized concepts like degree of risk involved, technological and economic ability to comply, geographical location and level of federal funding to determine appropriate tiers.⁶⁷

By all indications the use of tiering is increasing. In 1981 the Regulatory Council collected 190 examples of tiering in 14 executive and 12 independent agencies.⁶⁸ Undoubtedly this trend will continue as agencies continue to look for ways to meet the objections of their smaller but increasingly influential constituents.

64. See 126 Cong. Rec. S10936 (daily ed. Aug. 6, 1980).

65. See generally, U.S. Regulatory Council, Tiering Regulations: A Practical Guide (1981).

66. In fact the White House Conference on Small Business recommended that SBA size standards themselves be designed in multiple tiers rather than in a single definition. See White House Conference, supra note 19, at 59.

67. See note 65 supra, at 4-6

68. Id. at 41-54.

II. Legislative Background and Overview

As the above discussion suggests, the RFA was a congressional response to the complaints of small business about the burdens of federal regulation, even though the Act by its terms goes beyond the strict definition of small business. The problems of complying with federal regulation and many of the solutions that have already been advanced were before Congress and incorporated in the Act. But the RFA is of more general interest, as its placement in Title 5 of the United States Code (amending the Administrative Procedure Act) suggests. The Act emerged from a broad based concern with regulatory reform. It represents a triumph of regulatory analysis as a statutory concept. To evaluate the Act fairly, it must be viewed legislatively as part of this larger trend, which is still in progress, as well as on its own terms.

A. A Brief Legislative Review

For a piece of legislation that quietly appeared at the tail end of the 96th Congress, the RFA has a lengthy and complex legislative history. A bill (S.1974) entitled "The Regulatory Flexibility Act" was first introduced by Senators Culver and Nelson in the 95th Congress.⁶⁹ Various amendments were also submitted and Senate hearings were held on the bill during 1977

69. S.1974, 95th Cong., 1st Sess. (1977), referred to the Committee on the Judiciary.

and 1978.⁷⁰ The bill passed the Senate on October 14, 1978, but due to a lack of activity on the House side nothing further occurred during the 95th Congress.⁷¹

At the beginning of the 96th Congress activity on regulatory flexibility heated up. Senator Culver reintroduced his original bill (which had passed the Senate in the prior Congress) as S.299 on January 31, 1979.⁷² The House, by Representative Ireland, introduced a bill on the same day entitled "The Small Business Regulatory Relief Act" that had a similar purpose but was cast as an amendment to the Small Business Act.⁷³ Extensive hearings were held by the Senate and House respectively on both bills over the next six months.⁷⁴

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70. Hearings on S.1974 and Amendment No. 849 were held on October 7, 1977, July 21, 1978 and August 23, 1978 before the Subcommittee on Administrative Practice and Procedure, which unanimously reported favorably on S.1974 to the Judiciary Committee on Sept. 9, 1978. S. Rep. No. 95-1322, 95th Cong., 2d Sess., p. 2 (1978).
 71. See News Release, Senate Select Comm. on Small Business, Oct. 13, 1978. A House companion bill to S.1974 (H.R.11376) was introduced by Representatives Kastenmeier and Baldus on March 8, 1978 but no action was taken on it. The House had two other bills before it on small business impact, but no further activity took place in the House after S.1974 Passed the Senate. See H.R.7739 and 10632, Small Business Impact Bill: Hearings Before the Subcomm. on Special Small Business Problems, House Committee on Small Business, 95th Cong. 2d Sess. (1978).
 72. S.229, 96th Cong., 1st Sess. (1979). A House companion bill, H.R.1971, was introduced by Representative Kastenmeier on the same day.
 73. H.R.1745, 96th Cong., 1st Sess. (1979) amending 15 U.S.C. sec. 631.
 74. See S. Rep. No. 96-878, 96th Cong., 1st Sess. (1980) accompanying S.299, H.R. Rep. No. 96-519, 96th Cong., 1st Sess. (1979), accompanying H.R.4660. H.R.4660 became the principal House bill around which the hearings turned. It was an expansion of H.R.1745 and was introduced on June 28, 1979. After amendments, it was favorably reported by the House Small Business Committee on July 17, 1979.

While this activity was taking place, other legislative efforts were forming that, while independent in conception, related to the existing small business efforts. Two omnibus regulatory reform bills were introduced that applied the concepts of regulatory analysis (and other ideas) to all administrative agencies. Senator Ribicoff introduced a regulatory reform act in the Senate and Representative Rodino did the same thing on the House side.⁷⁵ The Carter Administration also introduced a comprehensive regulatory reform bill with regulatory analysis as its centerpiece.⁷⁶

It was obvious from all of this activity that regulatory reform was a major theme of the Ninety-sixth Congress. The number of bills and the number of legislative days devoted to the topic are impressively large relative to the other activities of Congress during that period.⁷⁷ After all the dust had settled, however, it was only the small business reform bills that survived,⁷⁸ and even these went through considerable debate and change before becoming law.

The major Senate and House bills on regulatory flexibility

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75. S.1291, 96th Cong., 1st Sess. (1979); H.R.3263, 96th Cong., 1st Sess. (1979).
 76. S.755, 96th Cong., 1st Sess. (1979).
 77. The session also produced a comprehensive study on federal regulation. See Study on Federal Regulation, Senate Comm. on Government Operations, 95th Cong., 1st Sess. (1977) Volumes I-V.
 78. To give some idea of the popularity of small business in Congress, there was not a single negative vote cast against any regulatory flexibility bill, in subcommittee, full committee or on the Floor, since the first bill was introduced in 1977. 126 Cong. Rec. H8470 (daily ed. Sept. 8, 1980).

(S.299 and H.R.4660) each had its own extensive hearings and differed in significant ways. S.299 amended the APA and H.R.4660 amended the Small Business Act.⁷⁹ H.R.4660 leaned more heavily on a select list of methods (including tiering) for reducing the burden upon small business, whereas S.299 listed its methods as examples and only required that an agency explain why they had been rejected. S.299 covered small governmental jurisdictions and H.R.4660 did not. When introduced, S.299 had a limited provision for judicial review which was a matter H.R.4660 did not address. These bills were the subject of detailed Senate and House reports.⁸⁰

The bill that actually became law was S.299. This occurred when the House passed the bill without amendment on September 9, 1980.⁸¹ The House held no separate hearings on S.299 but simply adopted the Senate description of the bill and its section-by-section analysis.⁸² The House contented itself with a three page "discussion of the issues" which contained the statement that the House Report on H.R.4660 is "incorporated by reference into the legislative history of the present bill."⁸³ That statement must be read with caution, however, since H.R.4660 did not become law. Any conflicts in interpretation must be resolved by resort to the Senate and House "Discussions of the Issues." Nevertheless, both S.299 and H.R.4660 have much in common so their respective

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79. H.R.4660 did however borrow the definitions of "agency" and "rule" from the APA. See 5 U.S.C.A. sec. 557(1)(4) (Supp. 1980).

80. See note 74 *supra*.

81. 126 Cong. Rec. H8468-70 (daily ed. Sept. 8, 1980).

82. *Id.*

83. *Id.* at H8468.

reports (and the discussions of the issues) can usually be read in a complementary fashion.

S.299 reached the Senate Floor on August 6, 1980, and was presented by Senator Byrd in the form a substitute (unprinted amendment number 1502). The principal purpose of the amendment was to recodify the Act from sections 551 and 553 of title 5 to a new Chapter (sections 601-612). In that form (and with some significant substantive changes that will be discussed later) it passed the Senate on the same day.⁸⁴ After passing the House on September 9, 1980, as discussed above, the bill was signed into law by the President on September 19, 1980.

B. Overview of the RFA

The RFA proceeds from an optimistic assumption: that by highlighting the problems of small business and offering suggestions, agencies can be made to cure the problems they have largely created. This process of self-reform assumes a receptive bureaucracy. Rather than speak in terms of deregulation of small business through outright exemptions it assumes that agencies can cure their own problems if they are made more aware of the special conditions of small business and other small entities. Given the historical problems small business has had with the regulatory process, the RFA can only be said to take a positive view of bureaucratic behavior.⁸⁵

84. 126 Cong. Rec. S10944 (daily ed. Aug. 6, 1980).

85. It is not entirely fair to evaluate agency performance historically. With increasing frequency agencies have developed techniques for responding to the special problems
(Footnote continued)

The RFA's structural limitations are crucial. It applies only to the substantive rulemaking process under the informal rulemaking provisions of the APA or related organic legislation.⁸⁶ Thus the Act by its terms does not deal with the vast amount of administrative activity that is not rulemaking, whether it be adjudication or the virtually unlimited realm of informal action.⁸⁷ Moreover it does not even reach rulemaking that is not subject to notice and comment.⁸⁸ Under these circumstances it cannot be said to deal with many of the problems small business faces with agencies like IRS that operate more by reporting requirements, individual actions and interpretative rules than by substantive rules.

The Act does not mandate any particular outcome in rulemaking even where it applies. It requires consideration of alternatives that are less burdensome to small business, but it only requires agency explanation of why those alternatives were

85. (continued)

of small business. See discussion in text at notes 58-68 supra. Moreover, the appointment process puts into leadership people whose outlooks are undoubtedly more receptive to small business problems.

86. RFA, 15 U.S.C.A. sec. 601(2) (Supp. 1980) defines "rule" to include "any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law...." For a discussion of these provisions see text at notes 132-48 infra.

87. While precise figures are impossible to obtain, estimates suggest that informal action is about 90 percent of what the government does. See Verkuil, A Study of Informal Adjudication Procedures, 43 U. Chi. L. Rev. 739, 741 (1976).

88. For example, interpretative rules, and other rules exempted from 5 U.S.C. sec. 553(b). Also rules of "particular applicability" such as ratemaking are excluded. 5 U.S.C.A. sec. 601(2) (Supp. 1980).

rejected.⁸⁹ The Act also extends this process to agency evaluation of existing rules over a ten year period.⁹⁰ It contains little in the way of express enforcement powers, although it does give the courts and the Chief Counsel for Advocacy some limited roles.⁹¹

The Act is to be administered and implemented by the Office of Advocacy of the SBA. This is a natural place to lodge oversight responsibility from the point of view of the small business community, which looks upon the Chief Counsel office as a safe harbor in the unfriendly world of regulation. But there are several difficulties with the Office of Advocacy role under

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89. The note preceding 5 U.S.C. sec. 601 states:

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(b) It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

Section 603 requires consideration of at least four alternatives: (1) tiering; (2) classification and simplification; (3) performance rather than design standards and (4) exemptions.

90. 5 U.S.C.A. sec. 610 (Supp. 1980). The ten year period may be extended, upon notice, in annual increments for up to an additional five years. Id.
91. The Office of Advocacy's best enforcement weapons are publicity, through the requirement of reporting at least annually on agency compliance to the President and Congress, 5 U.S.C.A. sec. 612(a) (Supp. 1980), and amicus appearances in court when the rule is on review, 5 U.S.C.A. sec. 612(b) (Supp. 1980). The role of the courts on judicial review is very limited. See discussion at notes 237-49 infra and accompanying text.

RFA. The Office is clearly small business and not small entity-oriented. Thus to the extent small organizations and governmental jurisdictions seek a supportive advocate they may not find one.⁹² Moreover, even the Office of Advocacy may be hard pressed to provide the kind of professional guidance to agencies who are rethinking their rules under the RFA that more established oversight agencies like OMB could. Therefore it remains to be seen whether this arrangement is even in the best interests of the small business community.

The RFA operates on the typical APA rulemaking process in the following fashion: APA rulemaking can be said to involve four distinct steps: (1) publication of the proposed rule in the federal register; (2) receipt of written and/or oral comments from the public; (3) potential modification of the proposed rule in light of the comments; (4) publication of the final rule in the federal register with a statement of basis and purpose. Under the RFA the following additional steps must be taken: (A) Before a proposed rule is published, an agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) which it publishes along with the proposed rule, unless it certifies in the federal register that the rule will not "have a significant economic impact upon a substantial number of small entities."⁹³ The IRFA or the certification must be sent to the Chief Counsel

92. The Office of Advocacy responds to its small business constituency as it is mandated to do. Other small entities either do not have equivalent advocates in government or if they do (education, to some extent) they are located elsewhere.

93. 5 U.S.C.A. sec. 605(b) (Supp. 1980).

for Advocacy. (B) In addition to publishing the rule and IRFA in the federal register, the agency must send actual notice to affected small entities.⁹⁴ (C) During the comment period, the agency should hold conferences and public hearings on the rule as it affects small entities.⁹⁵ (D) After the comment period is closed, the agency must prepare a Final Regulatory Flexibility Analysis (FRFA) along with its final rule and statement of basis and purpose (unless, of course, it has made a certification as noted above). The agency also has continuing responsibilities with respect to the periodic review of rules and the biannual publication of regulatory agendas.⁹⁶

While this process is fairly easily stated, it opens a host of questions about coverage and compliance. Indeed at this stage in the Act's development the agencies, the public and to some extent the Office of Advocacy itself have many more questions than answers.⁹⁷

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94. 5 U.S.C.A. sec. 609 (Supp. 1980).

95. *Id.* at sec. 609(4).

96. The Act requires that agencies publish in the federal register a plan for a ten year periodic review of rules within six months of the Act's effective date of January 1, 1981. 5 U.S.C.A. sec. 610(a) (Supp. 1980). Additionally, agencies must publish annually a list of rules which significantly affect small entities that will be reviewed during the succeeding year. *Id.* at sec. 610(c). This latter requirement could be viewed as an additional procedural requirement on sec. 553 rulemaking.

97. Milton Stewart, the first Chief Counsel for Advocacy, has published a useful introduction to the RFA that answers some preliminary questions. Stewart, *The New Regulatory Flexibility Act*, 67 A.B.A.J. 66 (1981). The recently confirmed Chief Counsel, Frank Swain, is a former counsel to the National Federation of Independent Business and like Mr. Stewart was active in the legislative efforts that produced the RFA.

III. Analysis and Critique of Pivotal Provisions

The major questions under the Act are as follows: who does it cover (or what is the meaning of "small entities"); what agencies and rules are within its scope; how is the certification process to be administered; what does the regulatory flexibility process demand; what does the agency rule review process contemplate; what is the role of the courts on review; and what is the role of the Office of Advocacy?

A. The Definitional Components of "Small Entities"

The RFA is law because of the support it received from small business and that constituency is its obvious focus. Yet the Act is not limited to small business. Its definitional section subsumes small business within the term "small entity." That phrase also includes "small organizations" and "small governmental jurisdictions."⁹⁸ These latter two definitions greatly expand the potential coverage of the Act, but they also introduce substantial definitional difficulties.

The term "small business" has generally accepted meanings established by the SBA and the Act incorporates those meanings by reference. Moreover, it also requires any agency which seeks to alter established definition of small business to consult with the Office of Advocacy before doing so.⁹⁹ Because the established definitions of small business relate to loan and procurement functions, there may be a tendency for agencies to

98. 5 U.S.C.A. sec. 601(3)-(6) (Supp. 1980).

99. Id. at sec. 601(3).

seek new definitions for RFA purposes. This will certainly complicate the task of the Office of Advocacy,¹⁰⁰ but there are some good examples of this new definitional process that have come after careful consultation between the agency and the Office of Advocacy.¹⁰¹

The other two definitional categories are not familiar ones and the Office of Advocacy is not given the same consultative role with respect to their formulation. Thus it is to be expected that problems of coverage will emerge as individual agencies go about defining what "small organizations" and "small governmental jurisdictions" are within the ambit of the Act.

1. The Meaning of "Small Organizations"

Section 601(4) states:

"the term 'small organization' means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

Since there are no examples given, and since the term is not

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100. The former Chief Counsel indicated a preference to retain established meanings of "small business." See note 97 supra at 67.
101. The SEC provides a good example of a successful process to create a new definition of "small business" and "small organization" applicable to securities issuers and registrants of securities exchanges. See Notice of Proposed Rulemaking, 46 Fed. Reg. 19251 (Mar. 30, 1981). The SEC had a productive exchange of views with the Office of Advocacy on the new definitions. See Letter from Marshall Parker, Acting Chief Counsel for Advocacy, to George Fitzsimmons, Secretary of the SEC, May 27, 1981. The SEC also requested public comments on whether its rules would have a "significant economic impact upon a substantial number of small entities." 46 Fed. Reg. at 19251.

in common usage, one must turn to the legislative history to determine what it means.

(a) Legislative guidance

The section-by-section analysis which was part of the Senate Report supporting the Act (and which the House incorporated by reference)¹⁰² discusses the small organization concept and takes the general approach that an agency applying it is to be "guided by the same considerations which were used in developing the definition of small business."¹⁰³ These considerations are listed (in the small business definition section) as three: a business must be (1) independently owned and operated; (2) not dominant in its field; and (3) fall within the SBA size standards.¹⁰⁴ Obviously the last consideration must be applied to small organizations by analogy only.¹⁰⁵

There are only a few potential small organizations actually named in the Senate Report. It lists the YMCA/YWCA and Boy Scouts/Girl Scouts simply to indicate that their nationwide status does not automatically disqualify them as small organizations¹⁰⁶ on the grounds that they are dominant in their

102. 126 Cong. Rec. S10940 (daily ed. Aug. 6, 1980) (section-by-section analysis). See also discussion at notes 78-79 supra, and accompanying text.

103. Id.

104. Id.

105. SBA size standards that relate to number of employees (under 500) or dollar amount of sales (under \$5 million) may or may not have direct relationship to similar measures in the non-profit field.

106. Id. The section-by-section analysis indicates that these organizations should be tested by other criteria such as structure and operating characteristics at the local level, or organizational resources, and the ability to comply with rules and reporting requirements. This latter character-
(Footnote continued)

field.¹⁰⁷ The House did not discuss any examples in its section-by-section analysis of H.R.4660, the bill which was superceded by the Senate bill S.299. But the H.R.4660 definition of "small organization" varied from that which became law in that it included "unincorporated businesses" and "sheltered workshops" as well as non-dominant, independent, not for profit enterprises.¹⁰⁸ One must question, however, whether the House definitions can be relied upon in the unlikely event of conflict.

Further examples of what the Congress intended "small organizations" to include are hard to find in the legislative hearings. After a careful review about the only category of small organizations that is in any way mentioned are colleges and universities. In the hearings on S.1974, the predecessor bill to S.299, Thomas O. James, a representative of the National

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106. (continued)

istic seems to confuse definitional problems with substantive ones, but it serves to highlight the difficulties agencies will face in applying the small organization standard.

107. "Dominance" is to be given a "liberal" interpretation so as not to disqualify non-profit organizations. *Id.*
108. H.R.4660 sec. 210(2), 96th Cong., 1st Sess. (1979); discussed in H.R. Rep. 96-519, p. 29-30 (1979). An earlier draft of S.299 contained similar definitional terms to those expressed in H.R.4660. See S.299 (Draft, 12/19/79). This language also appeared in earlier bills. See S.1974, 95th Cong., 1st Sess. (1977); S.3330, 95th Cong., 2d Sess. (1978). When it was reported by the Senate Judiciary Committee on May 5, 1980, these terms were eliminated from S.299. This may turn out to be a distinction without a difference in practice however since unincorporated businesses are likely to be picked up in the definition of small business and sheltered workshops may simply be included within the overall definition of small organization. Given the generous nature of the definition section there does not appear to be any intent to exclude these two types of organizations from coverage under the RFA.

Association of College and University Business Officers, testified about the need small colleges (defined as having about 2,000 students and annual budgets of under \$15 million) had for relief from federal regulations.¹⁰⁹ After his prepared statement James had the following inconclusive exchange with Senator Culver, the chief sponsor of the Senate bill:

"SENATOR CULVER. As you read them, Dr. James, do you think that the definitions in the bill of a small business and a small organization include small universities?

DR. JAMES. Yes, I do.

SENATOR CULVER. We have some other questions for you. . . ."110

In the Hearings on S.299, Sheldon Steinbach, General Council of the American Council in Education, submitted a written statement that supported the bill but also urged that the bill "be amended to include colleges and universities."¹¹¹ This did not happen and S.299 became law as it was. Thus it is not obvious that colleges and universities are within the definition of small organizations or, if they are, whether only some of them are "small" by Senator Culver's standards stated above. On the other hand, given the paucity of discussion about the term small

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109. The Regulatory Flexibility Act: Hearing Before the Subcommittee on Administrative Practice & Procedure, Senate Committee on the Judiciary on S.1974, Pt. 1, p. 46, 95th Cong., 1st Sess. (1977) (statement of Thomas O. James).
110. *Id.* at 49. It should be remembered that S.1974 contained a definition of small organization that was different from that which ultimately emerged from S.299. See discussion at note 108 *supra*.
111. Letter from S. Steinbach, American Council on Education, to Sen. Culver, Sept. 24, 1979, reprinted in Regulatory Reform: Hearings Before the Subcommittee on Administrative Practice & Procedure, Senate Committee on the Judiciary on Regulatory Flexibility Act of 1979, 96th Cong., 1st Sess., Pt. 3, p. 212-213 (1979).

organizations, colleges and universities like other possible candidates for coverage (museums, charities, foundations, and the like) are free to make arguments derived from the definition and its apparent purpose of catching small concerns that fall outside the definition of small business.¹¹²

(b) The Problems of Applying the Definition to Colleges and Universities

Despite some question about the meaning of the term small organization, it will undoubtedly be asserted to apply to colleges and universities.¹¹³ Problems with many kinds of regulations in recent years have made the educational sector a strong ally of regulatory restraint.¹¹⁴

The Department of Education has offered its definition of those colleges and universities that fall under RFA which is relevant in all proceedings before that agency (and which will presumably be influential with other agencies). Since that definition is severely circumscribed, it serves to highlight some of the problems the educational establishment will face in utilizing the RFA.

112. See note 103 supra.

113. Sheldon Steinbach, General Counsel of the American Council on Education, mailed a memorandum on November 5, 1980 to college and university presidents that asserted that all independent and public colleges and universities are covered by the RFA.

114. In recent years the record keeping and reporting requirements of many agencies have been particularly burdensome for higher education. Problems include handicap access regulations of OSHA and ERISA pension regulations. See note 111 supra. Perhaps no regulation has caused more consternation than OMB's Regulation A-21, which requires each faculty member's professional time to be recorded on a periodic basis. Fed. Reg., Mar. 6, 1979 (daily ed.), revision of Federal Management Circular 73-8.

The Department's definition of "small institution of higher education" includes all accredited colleges, public and private, who have a fulltime equivalent student enrollment of fewer than 500 or an overall student population of fewer than 550.¹¹⁵ This definition by the Department's own admission is very narrow. It includes only 20 to 25 percent of all higher educational institutions and these institutions (which presumably are colleges and not universities) represent less than 2.5 percent of all students in higher education. Thus on a student size basis the definition creates virtually a de minimis category.¹¹⁶

The main problem with the small organization definition is its lack of fit with colleges and universities or non-profit institutions generally. By borrowing language from the small business definition like "not dominant in its field" it becomes difficult to apply. Is any college or university dominant? Certainly some are prestigious and others are relatively large; but none would seem to qualify as dominant in the business or antitrust sense. Because they are not businesses, prestigious

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115. 46 Fed. Reg. 3920 (1981). The proposed definition was circulated for public comment as required by the RFA. Although the comment period expired in February 1981, the definition has not yet been revised or promulgated.
116. Comments received by the Department of Education on its proposed size standards have been critical of its approach. See, e.g., Letter to U.S.D.E. from Christine Milliken, Gen. Counsel, National Ass'n of Ind. Colleges and Universities, Feb. 17, 1981; Letter to U.S.D.E. from Sheldon Steinbach, Gen. Counsel, American Council on Education, Feb. 17, 1981, stressing that the narrowness of the standard defeats the purpose of the statute. Other comments argued for including all higher educational institutions within the definition. Letter to U.S.D.E. from Clauson Jenkins, Executive Ass't, North Carolina State University, Feb. 9, 1981.

colleges and universities do not expand capacity to assert their dominance and drive other institutions out of the market.¹¹⁷ Thus the dominance question seems to be more appropriately resolved along the lines suggested in the Senate report for other national non-profit organizations.¹¹⁸

On the other hand there are significant differences in size between and among colleges and universities. One could draw distinctions based on asset (or endowment) size that would apply to universities and other non-profit institutions like foundations.¹¹⁹ Here the assumption would be that those institutions with large endowments have resources to comply with regulation that others do not have, an argument familiar to small business.¹²⁰ If one added public institutions to this list on the ground that their endowments are guaranteed by state funding there could be several significant definitional lines drawn. But

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117. Prestigious private universities have a national dominance in the sense that students prefer them to other schools. But their prestige is measured more by the number of students they reject than by the number they accept. While such universities experience some growth over time, they clearly do not grow to meet demand. The case with state universities is somewhat different. Obviously in the last 20 years there has been enormous growth in public sector higher education due to unmet demand for education generally. But with a few important exceptions public universities do not have national dominance and even those that could rival the private universities in this way are restricted by residence requirements. Thus unless one were to define states as sub-markets for educational dominance purposes it would be difficult to label public institutions dominant. Before going down that road, any agency would have to wonder why it should be travelled.
118. See notes 107-08 supra, and accompanying text.
119. Information on endowment size is readily available for the educational sector and the foundation sector. By this measure there are some clearly "dominant" institutions.
120. One cannot ignore the fact that some institutions are
(Footnote continued)

before doing so, a further question to be asked is what purpose do such exercises serve? If colleges and universities as a class are suffering from regulatory burdens and if there is no social benefit to be achieved by equalizing competition among them why not seek to have them all included in the definition of small organization.

Two points should not be ignored. First, when an agency decides to make an individualized small organization definition it is not necessarily bound by the ostensible definition of small organization that includes the dominance test.¹²¹ Second, it is only a jurisdictional definition that is being determined whose purpose is to permit entities to be considered for regulatory flexibility treatment. This does not mean that once colleges and universities are said to be small organizations they cannot be treated differently within any resulting rules. Tiering concepts, for example, might usefully discriminate between large well-endowed universities and small tuition dependent colleges when it comes to particular regulations. The relevance of size

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120. (continued)

better situated to comply with federal regulations than others. When it comes to competition for federal grants and contracts, for example, those institutions which have achieved some economies of research grant size have established offices funded by overhead charges that can produce the reports and records necessary to obtain and retain lucrative funding. In this sense "research universities" as a category may be distinct from colleges whose primary role is teaching.

121. Section 601(4) has two stages: (1) a definition of small organization which controls, unless (2) an agency after public comment establishes more appropriate definitions. There is nothing in the act or its legislative history which could be located that requires the second approach to utilize the standards contained in the first.

standards will shift with the substantive goal of the regulation.¹²² The purpose of the RFA is to aid as many small entities as possible in dealing with the burdens of regulation. Definitions which include more entities at the outset and then deal with their particular problems within the regulatory flexibility context are much more likely to meet the Act's corrective purpose.

2. The Meaning of "small governmental jurisdiction."

Section 601(5) states:

"the term 'small governmental jurisdiction' means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register."

This definition is more precise than the previous one and it should not create as many interpretative difficulties.¹²³ It says what it means by naming the entities covered and

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122. Some universities are better able to comply with reporting and record keeping requirements than others. Size of student body, faculty and annual budget should all be factors in deciding whether to tier the requirements of the rule. The rule itself will suggest where this is appropriate. If it involves reporting requirements on government grants and contracts, for example, the amount awarded per college or university is a relevant basis for differentiation.
123. One potential complication could occur if public universities and colleges are excluded from small organizations because they are not incorporated, not-for-profit institutions but are sought to be included in the definition of small governmental jurisdiction. This definition does not discuss higher educational institutions, but an agency might be able to include them as part of a separate definitional scheme.

establishing an objective limit in size (50,000 population). If an agency chooses after public comment to establish its own definition it is constrained by explicit factors (rural areas, limited revenues).¹²⁴

The legislative background to this definition is less extensive, but it reveals one important change. The definition was not included in H.R.4660 and therefore was not discussed at all on the House side. The definition also did not appear in the original Senate bill (S.1974) introduced by Senator Culver in August 1977. The small governmental jurisdiction definition first appeared in S.3330 as follows:

"small governmental jurisdiction" includes --
 (A) governments of cities, counties, towns, villages, school districts, water districts, or special assessment districts, with a population of less than 100,000; and (B) other governmental jurisdictions which the agency should establish by regulation to be of limited means or resources based on factors such as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction."¹²⁵

This definition was added to S.1974 when it passed the Senate on October 15, 1978. Its obvious distinction from that which became law is that it made the threshold population 100,000 rather than 50,000.

When S.299 was introduced on January 31, 1979 it contained the same definition as S.1974.¹²⁶ In fact the 100,000 population

124. The Department of Education has undertaken to define small local educational agencies separately as small governmental jurisdictions. Its definition is based on number of students (fewer than 1,500). See 46 Fed. Reg. 3920, 3921 (1981).

125. S.3330, 95th Cong., 2d Sess. sec. 3(g) (1978).

126. S.299, 96th Cong., 1st Sess. sec. 3(c) (1979).

threshold was still in the bill when it was reported by the Senate Judiciary Committee on May 5, 1980 and placed on the Senate calendar on July 30, 1980.¹²⁷ It was only changed to 50,000 population in Senate Unprinted Amendment No. 1502 which served as a substitute for S.299 and which was agreed to (and passed the Senate) on August 6, 1980.¹²⁸ There was no discussion of this change in the Senate. The inference to be drawn from this change is that Congress sought to limit the number of small governmental jurisdiction that could take advantage of the RFA.

Population size will not always be a critical variable, however, and even when it is the section-by-section analysis accompanying the Senate bill seems to reduce its impact. The analysis states: "Definitions established by an agency need not adhere strictly to the 50,000 population standards nor are they restricted to the types of requirements the agency may impose under a rule affecting governmental jurisdictions."¹²⁹ This explanation appears to give some freedom to include as small entities governmental jurisdictions with populations that range above the 50,000 total. The clear implication of the legislative history, however, is to exclude such jurisdictions if they approach 100,000 in population.

B. Agencies and Rules Covered by the RFA

The RFA borrows the definition of "agency" from the APA which allows the Act to cast a wide net over virtually all

127. S.299, 96th Cong., 2d Sess. sec. 3(c) (1980).

128. 126 Cong. Rec. S10931, 10932 (daily ed. Aug. 6, 1980).

129. 126 Cong. Rec. S10940 (daily ed. Aug. 6, 1980).

government agencies.¹³⁰ Even the SBA is an agency that is within the jurisdiction of the RFA. However, the ultimate question of coverage under the Act is not so much whether the agency itself is within its terms, but whether the rules it promulgates are.¹³¹ On this question much debate can be expected.

Some agencies will consider themselves exempt from the Act's coverage because they do not promulgate rules pursuant to section 553 "or any other law."¹³² The problems arise when agencies and the public (or the Office of Advocacy) disagree about whether some agencies must comply with section 553 or whether such other law (including perhaps procedural regulations) exists.

1. What is a section 553 rule?

Section 553(a)¹³³ exempts military or foreign affairs functions from its rulemaking notice requirements and this would suggest that the Department of Defense and the State Department are two agencies that would be excluded from the Act's coverage, unless those agencies had organic legislation that required rules to be published for comment. Subsection (a) also exempts agency management and personnel matters and matters relating to public

130. 5 U.S.C.A. sec. 601(1) (Supp. 1980) ("the term 'agency' means an agency as defined in Section 551(1) of this title.")

131. Thus during the legislative hearings, some of those agencies that did not promulgate rules pursuant to sec. 553, such as the CIA, took no interest in the Act. See Letter of Stansfield Turner to Sen. Eastland, Jan. 19, 1978, reprinted in The Regulatory Flexibility Act: Joint Hearing Before the Subcomm. on Administrative Practice and Procedure, Senate Committee on the Judiciary and Senate Select Committee on Small Business on S.1974 and S.330, 95th Cong. 2d Sess., Pt. 2, p. 294 (1978).

132. 5 U.S.C.A. sec. 601(2) (Supp. 1980).

133. 5 U.S.C.A. sec. 553(a)(1) (1977).

property, loans, grants, benefits or contracts.¹³⁴ This exemption is modified by the definition of rule in section 601(1) of the Act which specifically includes government grants to state and local governments.¹³⁵ Presumably, however, rules relating to personnel and management, public property, loans, benefits, contracts and grants to entities other than state and local governments would not be included (unless of course organic agency legislation required that they be).¹³⁶

Section 553 contains some other exemptions from its notice and comment requirements that should cause even greater consternation. Interpretative and related kinds of rules are exempted from the notice requirement as are rules the agency

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134. 5 U.S.C.A. sec. 553(a)(2) (1977).

135. Section 601(2) also adds that an agency must provide "an opportunity for notice and comment" on the grants. In many cases there will be situations where the agency has done so voluntarily, even though not required to do so by sec. 553 or any other law. There are several situations like this in grant and benefit agencies and one wonders whether the presence of rules requiring notice and comment might not satisfy the other law requirement and make all such rules subject to the RFA whether or not they relate strictly to grants.

136. This exemption is difficult to justify, since it partially codifies an outmoded approach of the APA that the ABA and the Administrative Conference of the United States are on record as opposing. 3 Recommendations and Reports of ACUS, Jan. 1, 1973 - June 30, 1974, at 53. Since many of the agencies who conduct these activities have voluntarily assumed notice and comment obligations in their rulemaking the problem may be somewhat alleviated. These agencies may balk, however, at voluntarily assuming the additional responsibilities imposed by the RFA and if they do, a question will be raised whether they are bound to do so. See discussion at note 135 supra.

exempts for good cause.¹³⁷ As to the former category there may be some rules that an agency can validly exempt from notice and RFA requirements if they are clearly of the non-substantive variety. The RFA was after all designed to get at substantive rules that impact upon small entities.¹³⁸ But frequently it is not so easy to tell whether an interpretative rule is or is not substantive in effect¹³⁹ and if it is the Act may well be meant to include it. Thus it may not be easy for an agency to tell when it establishes its regulatory agenda, for example, whether or not a particular rule will be subject to the RFA.

With regard to the good cause exception, it would appear that the RFA did not fully contemplate its use. The idea of exempting a substantive rule from notice and comment procedures is a loophole that has been increasingly frowned upon in recent years by Congress and commentators.¹⁴⁰ It is difficult to

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137. 5 U.S.C. sec. 553(b) provides:
 Except when notice of hearing is required by statute, this subsection does not apply -
 (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
 (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
138. This is clear from the simple fact that it relies upon the notice and comment provisions of the APA for the definition of rule under the Act.
139. See Asimow, Public Participation in the Adoption of Interpretive Rules and Policy Statements, 75 Mich. L. Rev. 521 (1977).
140. Professor Davis has recommended that this exemption be scaled down or eliminated. See K. C. Davis, Administrative Law Text sec. 6.01 (1972). Several recent statutes have done so. See, e.g., The Federal Hazardous Substances Act, 15 U.S.C.A. sec. 1261(e) (1) (Supp. 1980); the Poison
 (Footnote continued)

believe that Congress would have provided agencies with a convenient way out of performing regulatory flexibility analyses by use of the good cause escape route. Therefore any agency that utilizes such a technique should and in all likelihood will be closely scrutinized by the Office of Advocacy.

Agencies at the edge of compliance (whether because of the interpretative rule or good cause exceptions) should be wary of opting out of the RFA process. It could well be that a decision to make a rule without notice and comment will be upset at a later stage for several reasons (e.g. substantial impact of rule, lack of good cause), one of which might include failure to comply with the requirements of the RFA.

2. The meaning of "other law"

There are two aspects to this problem. The first, raised earlier,¹⁴¹ is whether other law includes agency regulations as well as legislation. There is no guidance on this question provided in the RFA or its legislative history. So one must turn to related approaches. In many other situations regulations are regarded as law.¹⁴² In this particular context it may be less persuasive to regard regulations as law because Congress clearly could have been more precise. But agencies who have voluntarily imposed notice and comment requirements upon themselves by

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140. (continued)
Prevention Packaging Act, 15 U.S.C.A. sec. 1474(a) (Supp. 1980).
141. See discussion in notes 135-136 supra.
142. See B. Schwartz, Administrative Law sec. 59 (1976).

regulation¹⁴³ may be subject to RFA requirements even though they might not have been if they had not promulgated procedural regulations to begin with.¹⁴⁴ Each agency so situated can of course abrogate its RFA responsibilities by revoking its procedural regulations, although as a policy matter that may be difficult to do. Moreover in many situations the reasons that led an agency to adopt notice and comment procedures by regulation would apply equally to the performance of regulatory flexibility analyses. This may well be an area where the Office of Advocacy will have to take a position endorsing (or not endorsing) the definition of "other law" to include procedural regulations.

The "other law" problem is also raised when Congress imposes notice and comment responsibilities by statute upon an agency that is otherwise free from the requirements of section 553. One such agency is the Office of Federal Procurement Policy (OFPP) which supervises government contracts. Ordinarily government contracts are exempt from the notice and comment provisions of section 553 but the Administrator of the OFPP is required by statute to establish "criteria and procedures for an effective and timely method of soliciting the viewpoints of interested

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143. For example, HEW (the predecessor to HHS) voluntarily submitted its rulemaking to the notice and comment provisions of sec. 553. 36 Fed. Reg. 2532 (1971).
144. In *National Welfare Rights Organization v. Mathews*, 533 F.2d 637, 639 (D.C. Cir. 1976), the court remanded an HEW rule that had been voluntarily subjected to notice and comment rulemaking for failure to provide adequate factual findings. Had HEW done nothing with regard to notice and comment, its rule would presumably not have received the same scrutiny.

parties to comment."¹⁴⁵ The Administrator promulgated procedural regulations under this provision which provide for notice of rulemaking and an opportunity to comment.¹⁴⁶ Thus the statute and regulations would both seem to be "other law" for RFA section 601 purposes. In this way procurement regulations, especially those relating to contractor responsibility, which are of special interest to small businesses, become part of the regulatory flexibility process.

To some extent this automatic application of the RFA to procurement regulations may come as a surprise to Congress and the Executive branch which have long wanted to keep the government contracting process free from extensive procedural entanglements. This is one reason why Congress did not make the provisions of section 553 directly applicable to procurement regulations¹⁴⁷ and it is also why the Carter Administration excluded OFPP from Executive Order 12044.¹⁴⁸ Nevertheless the definition of rule in section 601 of the RFA does not allow for individualized exceptions based on the other law requirement. It

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145. 41 U.S.C.A. sec. 405(d) (3) (Supp. 1980).

146. 41 Fed. Reg. 34324 (1976).

147. The legislative history to the Act which created the OFPP indicated a concern that notice and comment procedures be "effective and timely." Congress therefore left it to the administrator to evaluate the "benefits and burdens of notice and comment rulemaking." See H.R. Rep. No. 93-1176, 93rd Cong., 2d Sess., p. 15 (1979). Once OFPP promulgated procedural regulations it presumably decided that the benefits of notice and comment procedures outweighed the burdens, but it did not do so in light of the RFA.

148. 43 Fed. Reg. 12665 (1978). The extension of the Executive Order to OFPP was thought unnecessary, since the office had issued procedural regulations. The Reagan Administration's Executive Order No. 12291, 46 Fed. Reg. 13193 (1981), contains no such exemption.

is likely that other agencies will find themselves caught by the RFA in this fashion as well.

C. The Certification Process

Even if the RFA applies to the particular agency or rule in question it still may not be operative. The RFA contains an escape clause that is bound to be the source of much controversy. Section 605(b) provides as follows:

"Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register, at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a succinct statement explaining the reasons for such certification, and provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration."

Sections 603 and 604 are the heart of the Act; they describe the initial and final regulatory flexibility analyses. One can anticipate that agencies will try to avoid compliance with the Act by this route.¹⁴⁹

The meaning of "significant economic impact upon a substantial number of small entities" is crucial to the Act's implementation. Indeed, unless it is satisfactorily defined the RFA will be a nullity. But the definition is not very helpful. One wonders at the outset why the words significant and

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149. Over 800 certifications have so far been received by the Office of Advocacy. Conversation with David Metzger, August 10, 1981.

substantial were chosen in this context and whether there is meant to be a difference in meaning implied by the choice of two words that are otherwise synonymous. For the Act to operate effectively considerable attention will have to be given to the meaning of these terms.

1. Legislative Background to the Certification Process

The phrase appeared in S.299 as it was reported by the Senate Judiciary Committee on May 5, 1980¹⁵⁰ and it was placed in its present section by Senate Amendment No. 1502. It was also contained in earlier Senate and House bills¹⁵¹ and, with slightly different phraseology, it appeared in the Senate omnibus Regulatory Reform bill.¹⁵² There is little discussion of the meaning of the phrase in the earlier reports, but it did receive attention from the Senate and the House in the reports accompanying S.299. The Senate stated that any attempt to define the term "significant economic impact" more precisely might be "counterproductive"; it also emphasized that in deciding what the term "substantial number" meant, one should look at each small entity separately, not in the aggregate.¹⁵³

The House devoted a substantial portion of its two page

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150. S.299, 96th Cong., 2d Sess. (1980).
 151. S.1974 (Substitute Amendment), 95th Cong., 1st Sess. sec. 3(5) (1977); H.R.7739, 95th Cong., 1st Sess. sec. 3(a)(2) (1977); H.R.1745, 96th Cong., 1st Sess. sec. 4 (1979); H.R.4660, 96th Cong., 1st Sess. sec. 207(b) (1979).
 152. S.2147, 96th Cong., 1st Sess. sec. 634 (1979) (no IRFA or FRFA if the agency determines that "the rule will not, if implemented, have an adverse effect on a substantial number" of small entities).
 153. 126 Cong. Rec. S10943 (daily ed. Aug. 6, 1980) (section-by-section analysis). In its discussion the Senate appeared to equate "overwhelming percentage" with
(Footnote continued)

discussion of the issues to definitional problems. It clarified that "the term 'significant economic impact' is neutral with respect to whether such impact is beneficial or adverse."¹⁵⁴ Thus doing well for small entities does not discharge an agency from the regulatory flexibility process because presumably it might have done better. The question what is a "substantial number of small entities" is also discussed in detail. The report concludes that "clearly, any anticipated rulemaking which common sense would suggest could have a direct, noticeable impact on several thousand or more small entities (of any type)"¹⁵⁵ should be included within the definition. But the report is also willing to speculate on the numbers and percentages that might satisfy the term substantial number:

"For example, if there were small organizations of a certain description, and 200 of them would face major new reporting requirements if a certain rule were implemented, then the rule should be expected to have a significant economic impact on a substantial number of small entities (in this case small organizations). If there were only 25 small businesses in an industry dominated by 12 large businesses, then a rulemaking initiative which would threaten the economic viability of 15 of those small businesses and thus adversely affect competition and industrial concentration would have a 'significant economic effect on a substantial number of small entities' within the meaning of the legislation, even though the absolute number of small businesses involved would be minuscule."¹⁵⁶

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153. (continued)
substantial number, although it refused to tie itself down to any particular definition.
154. 126 Cong. Rec. H8468 (daily ed. Sept. 8, 1980). This interpretation is suggested by earlier drafts of the certification section which had utilized the term "substantial adverse" impact settling on "substantial impact." See S.2147 cited in note 152 supra.
155. Id. at H8469.
156. Id.

Finally the report also introduces the idea that "economic impacts include effects on competition and economic concentration" thus suggesting that antitrust market analysis might be relevant.¹⁵⁷

2. Administrative Implementation of the Certification Process

There are two basic questions that will arise each time an agency decides whether to certify a rule under section 605(b): What is a significant economic impact and how many entities constitute a substantial number? Both aspects of the definition must be addressed in the certification process and the factors that determine them are interrelated, as will be discussed below.

In making a certification certain steps must be followed. Since it permits an agency to forego the regulatory flexibility analysis, the certification must be made by an agency head (or by his or her delegate) and published with a statement of reasons in the Federal Register along with the notice of proposed rulemaking (if the certification is made at that time). It may be that the certification will not be made initially because the impact on small entities is unclear at the outset. If this occurs the agency will publish an initial regulatory flexibility analysis at the time the proposed rule is published and then submit a certification in lieu of a final regulatory flexibility analysis. It may be that this approach is the best way to determine what impact a particular rule will have upon small entities, since those who consider themselves in that category can be invited to address that question during the comment period.

157. Id.

Once a certification is made it must be forwarded to the Office of Advocacy. While the Chief Counsel of Advocacy is given no particular approval role it is to be expected that objections to the certification process may result and, according to the House report, they should be given "the utmost serious consideration."¹⁵⁸

(a) The Meaning of "significant economic impact"

This phrase is meant to identify the costs or benefits of a regulation to small entities. If it relates to costs (the most likely situation) they should be isolated and measured. Obviously a rule that would drive small entities out of a given market would have such an impact, as would a rule that jeopardizes their competitive position vis a vis large businesses (or entities). Market share analysis before and after the rule should be considered, if available.¹⁵⁹

But other costs should not be ignored so long as they are economic. For example costs of compliance with the regulation can be determined on an absolute and percentage of revenue basis. Reporting requirements may impose paperwork costs that require more time of existing personnel or the need to engage outside professional assistance.¹⁶⁰ Each of these costs should be measured and aggregated.

Inevitably the significance level will be a subjective one.

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158. Id. at H8469.

159. If the rule involves competition between small and large entities almost any increase in costs can become significant to a small entity if that cost is not borne by larger entities.

160. See OMB, Incorporating Regulatory Flexibility Into the Regulation Process: Interim Guidance 6 (Dec. 1980).

It is very difficult in the abstract to say with confidence what it might be, but a small business with several million dollars in sales that incurs compliance costs that equal 5 to 10 percent of its annual sales would satisfy most businesses definitions of significant. If an entity can say with reason that the cost of doing (small) business has been significantly raised by the rule in question this should meet whatever standards the agencies develop. With respect to small organizations and governmental jurisdictions the significance level will also be determined on an economic cost basis but its impact will have to relate to the current level of operational costs involved in its particular field.

(b) The Meaning of "substantial number of small entities"

This aspect of the definition is slightly less subjective, because it can borrow helpful analogies.¹⁶¹ A first step is simply to calculate the total number of entities affected by the rule. If that number is in the thousands legislative history (and common sense) would assume it to be substantial. Frequently, however, the absolute numbers will not be so impressive and efforts must be made to evaluate them in relation to other factors. Some of those factors would be the total number of large entities affected; the size of the industry affected; and the number of geographical areas affected.¹⁶² This latter qualifier suggests an antitrust relevant market

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161. Since there are no indications to the contrary one assumes that use of "substantial" rather than "significant" is not for change of meaning but for variety.

162. See OMB, supra note 160, at 6-7.

definition. If within a given area a substantial number of small entities is affected, the definition can be satisfied even if the number is small nationally. In other words a rule with only regional impact should not be tested by a national definition of substantial. Presumably, the converse is also true so small entities must make a careful study of the geographical reach of any rule.

The relevant product market is also a useful concept to employ. By utilizing SBA Standard Industry Codes¹⁶³ one can obtain an accepted definition of particular lines of commerce that may be affected and thereby segment the market into meaningful parts. Again the question of substantiality will relate to the number affected within that particular industry. After this has been done it will prove useful to establish percentages of affected small entities versus all small entities and small and large entities.

The legislative history gives some guidance on the meaning of substantial. It suggested that a substantial number would certainly be 40 percent of the small entities in given geographical or product markets.¹⁶⁴ Whether smaller percentages would also qualify is less clear, but it should be remembered that any formula is to be liberally interpreted to effectuate the

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163. OMB publishes a Standard Industrial Classification Manual which contains about 950 four digit designations.
 164. The 40 percent figure is derived from the House discussion, noted in text at note 156 supra, which reasoned that if 200 of 500 small organizations faced a particular regulatory burden it would be substantial. The House also listed an impact on 15 of 25 small businesses as substantial. One can overdo this reliance on percentages, but 40 percent or more should clearly qualify as substantial.

coverage purposes of the Act.¹⁶⁵ It will continue to be difficult to answer the substantiality question in the abstract. Better answers should emerge as individual situations arise that test the definition in a variety of contexts. For now the best advice to those seeking coverage is to prepare the strongest statistical case for the highest percentage of small entities affected.¹⁶⁶

D. Formulating the Initial and Final Regulatory Flexibility Analyses

The heart of the RFA is its requirement that agencies proposing rules do so only after considering the impact of those rules upon small entities. The "principle of regulatory issuance" the Act postulates is that agencies should "fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation."¹⁶⁷ To accomplish this regulatory "fit", the Act requires that every proposed rule subject to its jurisdiction be accompanied by an initial regulatory flexibility analysis (IRFA)

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165. In this context the House discussion emphasizes that "the legislation is intended to be as inclusive as possible, and doubts about its applicability should be resolved in favor of complying with the provisions of the Act." 126 Cong. Rec. H8468 (daily ed. Sept. 8, 1980).
166. Engaging in this kind of exercise is a familiar one in the antitrust field where plaintiffs try to define markets narrowly to maximize a particular firm's impact and defendants broadly to minimize it. In the RFA context there is not likely to be a party with the incentives of an antitrust defendant to contradict the proffered small entity definition.
167. 5 U.S.C.A. sec. 601 note 2(b) (Supp. 1980).

and every final rule be accompanied by a final regulatory flexibility analysis (FRFA).¹⁶⁸

Each of these documents has a format with a common sense purpose: to describe, consider and explain the use or nonuse of certain regulatory alternatives. The IRFA suggests regulatory alternatives such as differing compliance and reporting requirements (in effect "tiering"); simplification of those requirements; use of performance rather than design standards; and exemptions from the rule's coverage.¹⁶⁹ The FRFA must contain a succinct statement of the need for the rule; a summary of comments on the regulatory flexibility alternatives; and a description of each "significant" alternative which was considered along with an explanation of why it was rejected.¹⁷⁰ This document must either accompany the final rule or be made available to the public upon request.¹⁷¹

Despite these fairly detailed instructions there are several crucial questions of interpretation and application that remain unanswered or inadequately resolved. Among these queries are: the effect of contradictory substantive law upon the regulatory flexibility analysis process; the actual analytical techniques

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168. The IRFA may be waived or delayed in emergency circumstances if the agency head so states (and provides reasons); the FRFA cannot be waived, but it may be delayed for up to 180 days after the rule is promulgated upon proper findings by the agency head. 5 U.S.C.A. sec. 608 (Supp. 1980).
169. 5 U.S.C.A. sec. 603 (Supp. 1980).
170. 5 U.S.C.A. sec. 604 (Supp. 1980). Of course it may be that one of the alternatives discussed in the IRFA becomes the one chosen in the final rule: that would appear to be the ideal scenario under the RFA.
171. No mention is made of who should bear the cost of copying and distribution, which means that the costs will presumably fall upon the agency promulgating the rule.

required to satisfy the regulatory flexibility analysis process; and the relationship of the RFA to other regulatory analysis requirements.

1. The Effect of Contradictory Substantive Law

The Act states in several places that it is not intended to contradict the underlying requirements placed upon agencies by organic legislation. The introductory note to the Act admonishes agencies to engage in regulatory flexibility analysis if it is "consistent with the objectives of the rule and of applicable statutes" and section 606 states that "the requirements of sections 603 and 604 of this title do not alter in any manner standards otherwise applicable by law to agency action."¹⁷² Both sections 603 and 604 also emphasize that such analysis shall be "consistent with the stated objectives of applicable statutes."

The legislative history deals with the question of statutory inconsistency in several ways. It was obvious that Congress did not want to use the RFA as a means of overruling statutory

172. See 5 U.S.C.A. secs. 601 note 2(b), 606 (Supp. 1980). These provisions raise some interesting questions themselves. So far as not doing anything inconsistent with the "objectives of any rule" goes, it may be that the RFA will seek to change the "objectives" of a rule if they unnecessarily burden small entities; indeed to do that is the Act's purpose. What is probably meant by the term is that the RFA cannot change the objectives of any rule which are mandated by underlying law. On the other hand, the term "objectives" can be reconciled to the RFA by reading it to imply that they can be met without inadvertently placing regulatory burdens upon small entities.

Section 606 only speaks of sections 603 or 604 not altering applicable agency standards. By this formulation, section 602 (the regulatory agenda requirement) is presumably free to suggest alterations in those standards.

requirements.¹⁷³ Indeed the Act would in all likelihood not have become law if it amounted to an implicit rejection of substantive legislative requirements, especially those in the health, safety and consumer and environmental areas.¹⁷⁴ Thus no case was ever made for special treatment of small entities that would frustrate substantive legislative goals.

In some situations, however, it may be difficult to determine whether a particular regulatory alternative will frustrate substantive goals. For example the use of exemptions from coverage, which is one of the listed IRFA alternatives, has the potential easily to contradict underlying legislation. The legislative history recognizes that there may indeed be situations where exemptions are impermissible.¹⁷⁵ But simply

 173. Senator Culver's opening statement at the 1979 Regulatory Reform hearings noted "that it is not the purpose of these hearings or of S.299 to undermine worthwhile Federal regulatory efforts." Regulatory Reform: Hearings Before the Subcommittee on Administrative Practice and Procedure, Senate Committee on the Judiciary, 96th Cong., 1st Sess., Pt. 3, p. 2 (1979).

174. Senator Culver also stated: It is not the aim of this legislation to allow the continuation of practices which are dangerous to workers, consumers or the environment." Id.

175. The discussion of major issues accompanying S.299 makes this point as follows:

In some rare instances, the adoption of a flexible alternative may clearly be legally impermissible. If so, an agency may so indicate with a simple statement such as: "Under Section X of the Y Act, the agency is required to promulgate these rules in a uniform manner upon all members of the public;" or "Under the Supreme Court decision in X v. Y, no exceptions to this rule can be permitted," or "Differing standards of compliance can be required only under circumstances do not occur in this situation."

126 Cong. Rec. S10937 (daily ed. Aug. 6, 1980). See also, Regulatory Reform Hearings, supra note 173, at 3-11 (testimony of Peter Petkas).

because one or more alternatives are impermissible need not mean that the regulatory analysis process is unnecessary. So long as some alternative (whether or not it is listed in Section 603) is feasible or permissible then the IRFA process should be followed. By this reasoning an agency would be hard pressed ever to dispense with the IRFA process since it is difficult to believe that no alternatives would be permissible.¹⁷⁶

The one exception to this generalization might be thought to occur in those agencies where cost-benefit analysis is either forbidden or clearly not required by Congress, such as OSHA. As American Textile Workers Institute v. Donovan¹⁷⁷ makes clear, Congress does not require cost-benefit analysis when it speaks of establishing "feasible" standards for dealing with toxic materials¹⁷⁸ and therefore agencies may not be mandated to perform such analyses. This judicially sanctioned freedom from cost-benefit analysis might be thought to liberate agencies from the preparation of regulatory flexibility and other analyses.¹⁷⁹

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176. The Senate discussion considered this issue:
 In other instances, particularly with regard to laws protecting health, safety or the rights of specific groups, not all of the listed flexible alternatives may be consistent with the stated objectives of the underlying statutes.
177. 126 Cong. Rec. S10937 (daily ed. Aug. 6, 1980).
178. 101 S.Ct. 2478 (1981).
179. In this case, the inhalation of cotton dust. See 29 U.S.C.A. sec. 655(b)(5); 43 Fed. Reg. 27352-27354 (1978) (Cotton Dust Standard).
179. In particular Executive Order 12291 which requires executive agencies to determine that the potential benefits to society of a regulatory action outweigh its potential costs. See discussion in text at notes 200-204 infra. This requirement may or may not be followed by executive agencies like OSHA after American Textile Workers Institute. If they choose not to proceed in this fashion
 (Footnote continued)

But this conclusion could only be reached by resorting to an unfairly narrow reading of the regulatory flexibility requirements. The RFA never mentions the term "cost-benefit" in describing the kinds of alternatives it seeks to have agencies consider. Moreover, it does not mandate any particular form of analysis or resort to any given outcome. Therefore the regulatory flexibility analysis process should be applicable even to those agencies such as OSHA that are congressionally freed from the use of cost-benefit analysis. Indeed the fact that OSHA itself has recently begun to employ concepts like tiering in its promulgation of standards¹⁸⁰ should make the RFA process a congenial one.

A sensible approach to the regulatory flexibility analysis process is for agencies uniformly to prepare an IRFA listing all possible alternatives of significance and then use the comment period as a time in which they can focus on objections to particular alternatives from a legislative as well as feasibility

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179. (continued)

the Court's decision would protect them; indeed one can read the decision as forbidding cost-benefit analysis by OSHA which would prevent it from complying with the Executive Order. In any event the Executive Order requirements would not extend to independent agencies, unless the RFA were read so to require (an interpretation which is not recommended here, but which OMB may encourage). See discussion at notes 197-210 *infra*.

180. Regulatory Reform: Hearings Before Subcommittee on Administrative Practice and Procedure, Senate Committee on the Judiciary, 96th Cong., 1st Sess., Pt. 3, p. 186 (1979). (Testimony of Eula Bingham: "For small businesses OSHA provides special consideration.") OSHA, Occupational Safety and Health Administration's Impact on Small Business (July 1976). Even in the Cotton Dust Standard itself OSHA considered size and profitability of firms in establishing its permissible exposure limits. See 29 CFR sec. 1910.1043; 43 Fed. Reg. 27350 (1978).

point of view. In the FRFA these qualifications can be articulated as reasons why a significant alternative is rejected.

2. The Analytical Techniques Required or Encouraged by the RFA

In preparing the IRFA and FRFA agencies are admonished to engage in regulatory analysis. But the term is not self explanatory and there are a variety of analytical techniques available that would meet its demands, some of which are more burdensome than others. Regulatory analysis can be a code word for regulatory paralysis and the drafters of the RFA were sensitive to the charge that the Act itself would add another delaying mechanism to the administrative process.¹⁸¹ However Congress placed compliance oversight in an agency (the Office of Advocacy) whose single function is to emphasize small business interests in government and who can be expected to demand much of the regulatory analysis process. This arrangement creates inherent tensions that will complicate the determination of acceptable analytical techniques.

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181. The legislative history deals with the problem of administrative efficiency in two respects. The first involved the costs in administrative efficiency in imposing yet another analysis requirement upon agencies. As to this the Act's drafters pointed to the limitations in the RFA to "a significant effect upon a substantial number of small entities" discussed above. The Senate also noted that the goals of the RFA "can be met largely through attentiveness by rulemakers to the unique problems of smaller institutions." See 126 Cong. Rec. S10938 (daily ed. Aug. 6, 1980). The point of this latter observation was that the Senate did not believe there was a real data collection or analysis problem, but only a "lack of interest" by agencies which the Act sought to rectify.

The second objection based on administrative efficiency had to do with the disruptive and dilatory potential of judicial review, a topic which will be separately discussed at pp. 84-87 *infra*. See Senate Regulatory Reform Hearings, supra note 173, at 5 (testimony of Peter Petkas).

Sections 603 and 604 do not identify the analytical techniques an agency should use in discussing the suggested regulatory alternatives. But section 607 provides an important guide:

"In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable."

This provision and the related legislative history discussion indicates that the agency is not to perform regulatory analyses that require extensive creation of new data or even elaborate reworking of existing data. Rather it appears that an agency is to rely on existing data, which may or may not be quantified, and whatever additional data it receives during the comment process.¹⁸² If the main problem the RFA is seeking to overcome is an agency "lack of interest" in small entities,¹⁸³ then data collection is simply not its thrust.

This narrow view of the agency's data collection role has important budgetary consequences. The agency will not usually need to commission studies on small entity impact by its staff or outside consultants. It should be able to incorporate the small

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182. The Senate section-by-section analysis stated with respect to section 607 that agencies are encouraged to make reasoned estimates or [sic] quantifiable and non-quantifiable effects of various proposals, basing such estimates upon experience and expertise of agency personnel and any other information made available to the agency by external sources.

126 Cong. Rec. S10942 (daily ed. Aug. 6, 1980).

183. See note 181 supra.

entity impact issue into related studies.¹⁸⁴ This interpretation will surely please agencies, but it may conflict with the Office of Advocacy which might envision more thorough regulatory flexibility responsibilities.¹⁸⁵ Moreover OMB has also circulated tentative regulatory analysis guides that must be considered as well.¹⁸⁶

If the Office of Advocacy behaves as if compliance with the requirements of the RPA is the sole responsibility of agencies, it could well establish guidelines that are more onerous than necessary to accomplish the task at hand. The temptation is undoubtedly present to postulate standards for creating an "ideal" IRFA and suggesting that those standards should be the norm.¹⁸⁷ For example, proposing economic modeling of industries affected by a rule subject to the RFA could result in costly studies by agencies that would consume most of the decision resources available for rulemaking generally.¹⁸⁸ Standards of

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184. See note 182 *supra*. The question of interrelating the RFA process to other regulatory analysis requirements is discussed in the next section.
185. The Office of Advocacy is currently in the process of formulating guidelines for the preparation of RFAs.
186. OMB, Interim Regulatory Impact Analysis Guidance (June 13, 1981) (hereinafter "OMB Guidelines").
187. Bureaucratic behavior that seeks to maximize its particular role is understandable, but especially mischievous where it puts one bureaucracy in an oversight role over another. In this case the RFA gives the Office of Advocacy a unique role in supervising compliance by rulemaking agencies that can easily be overemphasized.
188. It is possible that the SBA will have some data on industry behavior already collected that would be of use to agencies making industry specific evaluations through its SIC Codes. However agencies are also called upon to make impact studies of small organizations and small governmental jurisdictions where no data base comparable to that available through the SBA exists.

performance such as these would ultimately prove unrealistic and counterproductive¹⁸⁹ and would confirm fears that the RFA deals a sharp blow to administrative efficiency. What would best serve the interests of those supporting the RFA in the long run is an outline that accepts realistic limits upon agency data collection and organization.

The OMB version of a regulatory flexibility outline does not impose the burdensome detail of the Office of Advocacy outline; indeed at this stage it appears that OMB has not yet decided whether it intends to propose an official outline at all.¹⁹⁰ To date the OMB approach has simply been to provide an interim outline to the regulatory impact analysis required under Executive Order 12291 and ask agencies to suggest improvements and ways in which the RFA requirements might be incorporated into the Executive Order.¹⁹¹ From this approach it appears that OMB will in all likelihood push the RFA process in the direction of the Executive Order regulatory impact analysis over which it has jurisdiction. It is not yet clear what difficulties, if any, will emerge from this approach; but one thing that should be

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189. As to "unrealistic" see note 188 supra; as to "counterproductive" consider the "substantial effect on a significant number of small entities" loophole and estimate the number of agencies that will choose certification rather than attempt compliance with the IRFA requirements. See discussion in text at note 149 supra and 252 infra.
190. OMB is still circulating a helpful but succinct outline of the RFA prepared by its predecessors during the closing days of the Carter administration. See OMB, Incorporating Regulatory Flexibility into the Regulatory Process: Interim Guidance (Dec. 1980).
191. Letter from James C. Miller III, Administrator for Information and Regulatory Affairs, OMB, to agency heads, June 12, 1981.

monitored is whether agency compliance will require a thorough going cost-benefit analysis which does not seem to be called for under the RFA. This can become a problem in situations where agencies are not required (or perhaps even permitted) to conduct such analyses.¹⁹² In effect cost-benefit analysis can but need not be utilized to satisfy the regulatory flexibility analysis called for by the RFA.

Some agencies have prepared their own RFA regulatory flexibility guidelines. The FDA, for example, published a useful guide for its regulation writers and developers when the RFA came into force on January 1, 1981.¹⁹³ The guide discusses the RFA and related Executive Orders and outlines the various regulatory alternatives (like tiering, exemptions, performance standards) that might be of use in preparing regulatory flexibility

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192. See notes 177-178 *supra*. The ultimate reach of cases like American Textile Manufacturers Institute is not yet clear. The Court was not faced with the question whether OSHA may voluntarily engage in cost-benefit analysis. It may be, therefore, that OSHA as an executive agency will perform the cost-benefit analyses called for by Executive Order 12291 and OMB will be satisfied (as would the Office of Advocacy if an RFA analysis is incorporated therein). But a subsequent suit would in all likelihood call attention to the Court's language in American Textile that Congress had already balanced the costs and benefits in passing the Act and did not expect the agency to do so again. See 101 S.Ct. at 2496-97. In this case the Executive Order's requirements could not be imposed and the only regulatory analysis that could operate would be that provided for under the RFA. The Administrator of OSHA, Thorne G. Anchter, has already indicated that his agency will drop plans to apply cost-benefit analysis. See N.Y. Times, "Safety Agency to Forego 'Cost-Benefit Analysis'", July 13, 1981, at A 11. He did not mention regulatory flexibility analysis.
193. FDA, Flexible Regulatory Alternatives: A Guide for FDA Managers, Regulation Writers and Developers (Jan. 1981).

analyses.¹⁹⁴ The FDA guide does not discuss a format for the preparation of an IRFA or FRFA, but it does recommend a procedure for an advance notice of proposed rulemaking that will allow the early collection of information about a proposed rule including how it will affect small business.¹⁹⁵

At this stage an agency can experiment with the preparation of IRFA's and still be within the broad outlines of the Act. It may be that guidelines proposed by the Office of Advocacy or OMB will ultimately limit agency experimentation, but there is little evidence that Congress intended the IRFA to become an analytical straightjacket. Section 603 is a clearly expressed provision and it should not pose compliance difficulties for agencies who have personnel with the appropriate analytical skills. Discussion of the significant alternatives will require some care and creative analysis but there are no unfamiliar concepts to wrestle with. Experience with the process, coupled with a good faith effort to comply, should allow agencies to create satisfactory, if not ideal, regulatory flexibility analyses.

3. Relating the RFA to Executive Order 12291 and the Paperwork Reduction Act

Section 605(a) emphasizes the avoidance of duplicative or unnecessary analyses:

"Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections."

194. Id. at 3-7.

195. Id. at 8.

Section 605(c) complements this approach by allowing related rules to be aggregated for purposes of analysis: "In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of sections 602, 603, 604 and 610 of this title." The obvious intent of these provisions is to minimize the extent to which the RFA frustrates administrative efficiency.

Since regulatory analysis has become a watchword for the 1980s there are several opportunities for integrating regulatory flexibility requirements into existing efforts. In the first place many agencies focus on regulatory alternatives in rulemaking as a common sense proposition. Achieving the proper fit between regulation and regulatee (the RFA principle) is not a new idea. In other situations, agencies are specifically encouraged by Congress to undertake analyses that would presumably satisfy the IRFA requirements so long as the focus was placed upon the effect of the rule on small entities.¹⁹⁶ Often the collection and organization of existing data may be adequate and all that need be done is to reorganize that data to reflect concern for small entities and identify alternatives in the FRFA.

In addition to relating the RFA to organic analysis requirements, agencies can anticipate regular interaction with

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196. In FTC rulemaking, for example, the Commission is required to publish an advance notice of rulemaking that discusses "possible regulatory alternatives." 15 U.S.C.A. sec. 57(a)(2) (Supp. 1980). When a rule is promulgated, the Commission's statement of basis and purpose must contain "a statement as to the economic effect of the rule, taking into account the effect on small business and consumers." 15 U.S.C.A. sec. 57(a)(d)(1) (Supp. 1980).

the requirements imposed by Executive Order 12291 and the Paperwork Reduction Act.

(a) The RFA and Executive Order 12291

Executive Order 12291, issued by President Reagan on February 18, 1981, is designed to minimize duplication and conflict and ensure well-reasoned regulations.¹⁹⁷ It operates much like the RFA by requiring a regulatory impact analysis which lists regulatory alternatives, but it departs from the RFA in that it applies only to "major rules"¹⁹⁸ issued by executive agencies¹⁹⁹ and it emphasizes cost benefit analysis.²⁰⁰ The Executive Order is ultimately more emphatic than the RFA since it tells agencies not to promulgate rules unless the potential benefits to society outweigh the potential costs, whereas the RFA permits any regulatory outcome so long as the alternatives rejected are well reasoned.

Frequently regulatory impact analysis and regulatory flexibility analysis will both be applicable to a proposed rule.²⁰¹

197. 46 Fed. Reg. 13193 (1981).

198. Major rules are defined as those which are likely to result in "[a]n annual effect on the economy of \$100 million or more...." *Id.* sec. 1(b). In addition the Director of OMB is granted the authority to prescribe further criteria for defining a major rule, *id.* sec. 3(b), and may actually designate a rule as major. *Id.* sec. 6(a)(1).

199. See *id.* sec. 1(d) defining "agency" pursuant to 44 U.S.C. sec. 3502[1].

200. *Id.* sec. 2.

201. It should be noted that the definition of "rule" under Executive Order 12291 is broader than under the RFA. Under the Order the definition of rule is not tied directly to the APA and it includes interpretative rules which are excluded by the RFA definition. *Id.* sec. 1(a). See discussion in text at notes 137-38 *supra*. Also the Order directs that a final regulatory impact analysis be prepared for those rules which are not emergency rules and for which

(Footnote continued)

The Order and the RFA contemplate such occasions and urge that the analyses be combined.²⁰² In both cases a two stage analysis process is contemplated.²⁰³ In terms of appropriate analytical techniques, it would seem that the cost benefit analysis approach of the Order would suffice for the regulatory flexibility process under the Act unless that approach was forbidden by organic legislation.²⁰⁴

Complications arise when an agency must submit its preliminary or initial analyses for review. Under the RFA, all

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201. (continued)
no notice of rulemaking has been published. Id. sec. 3(c)(1). In such circumstances no FRFA would be required since that process only attaches to published notice rules.
202. See id. sec. 3(a); 5 U.S.C.A. sec. 605 (Supp. 1980).
203. Called a preliminary and final regulatory impact analysis under the Order and an IRFA and FRFA under the Act.
204. See discussion at notes 172-176 supra. The Order specifies that each preliminary and final analysis contain the following information:
- (1) A description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits;
 - (2) A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs;
 - (3) A determination of the potential net benefits of the rule, including an evaluation of effects that cannot be quantified in monetary terms;
 - (4) A description of alternative approaches that could substantially achieve the same regulatory goal at lower cost, together with an analysis of this potential benefit and costs and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted; and
 - (5) Unless covered by the description required under paragraph (4) of this subsection, an explanation of any legal reasons why the rule cannot be based on the requirements set forth in Section 2 of this Order.

Exec. Order No. 12291 sec. 3(d)(1-5), 46 Fed. Reg. 13194 (1981).

IRFAs must be transmitted to the Office of Advocacy, but that Office is given no direct role in the rulemaking process.²⁰⁵

Under the Order, the preliminary and final regulatory impact analyses must be submitted to the Director of OMB for review.²⁰⁶

The agency is then required to consult with the Director and to refrain from publishing its notice or promulgating its final rule, as the case may be, during the consultation process.²⁰⁷

The Order stops short of forbidding publication or promulgation if the consultation process is unsuccessful, but it obviously contemplates a much more direct coordination role for OMB than does the RFA for the Office of Advocacy. Assuming a rule is subject to both analyses, there is no apparent way to avoid the OMB consultation process for RFA rules unless organic legislation declares to the contrary (either directly or by establishing rule promulgation time limits).²⁰⁸

The Executive Order process is clearly the dominant one for rules that are subject to both regulatory analysis and regulatory flexibility requirements. The RFA process will operate freely only in those rulemaking circumstances where the Executive Order

205. 5 U.S.C.A. sec. 603 (Supp. 1980). The FRFA need not even be submitted to the Office of Advocacy. See id. sec. 604.

206. To allow the Director to conduct this review an agency must submit the preliminary analysis 60 days before the notice of proposed rulemaking is published and the final analysis 30 days before the final rule is promulgated. Exec. Order No. 12291 sec. 3(c), 46 Fed. Reg. 13194-13195 (1981). Even if the rule is not a "major" one, each rule must be submitted to the Director at least 10 days before publication and promulgation, respectively. Id. sec. 3(c)(3).

207. Id. sec. 3(f)(1), (2).

208. The Order states that it does not apply where its deadlines would conflict with deadlines imposed by statute or judicial order. Id. sec. 8(2).

does not apply. This includes all independent agency rulemaking and any executive order rulemaking that involves rules with less than a \$100 million impact upon the economy. Needless to say, a large number of rules will fall into these categories.²⁰⁹ From the Office of Advocacy's point of view, it may be well advised to consolidate its oversight resources over those rules and leave the others to OMB to review under the Executive Order, unless there are strong pro-small business reasons for joining in the OMB review process.²¹⁰

(b) The RFA and the Paperwork Reduction Act

The Paperwork Reduction Act of 1980²¹¹ establishes standards for the review and reduction of reporting and paperwork requirements. The Act was specifically designed with small business in mind.²¹² The Act gives OMB, through a newly created Office of Information and Regulatory Affairs (OIRA), oversight responsibility over independent and Executive agency information

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209. Independent agencies such as the SEC, FTC, CPSC and ICC issue many regulations that concern small business. The \$100 million threshold for Executive Order regulations overlooks regulations by Executive agencies that probably number in the thousands.
210. One could foresee a willingness on the part of OMB for the Office of Advocacy to take the lead on regulations that exceed \$100 million if they have a significant impact on small business and if OMB and the Office of Advocacy have a good working relationship.
211. 44 U.S.C.A. secs. 3501-3520 (Supp. 1980).
212. The first purpose of the Act is "to minimize the Federal Paperwork burden for individuals, small businesses, State and local governments, and other persons...." 44 U.S.C.A. sec. 3501(1) (Supp. 1980) (emphasis added). See also White House Conference, note 19 supra, at 29, which called for the elimination of onerous reporting requirements.

policies and mandates a 25 percent reduction in federal paperwork by October 1983.²¹³

With regard to rulemaking, the Act imposes several duties upon agencies and OMB. At the time the notice is published agencies must forward to the OIRA copies of all proposed rules that contain a collection of information requirement.²¹⁴ Within 60 days after the receipt of these rules the OIRA may file public comments on the collection requirement and the agency must respond to those comments in its final rule. OMB (through OIRA) may disapprove any collection of information it deems to be unreasonable if it so determines within 60 days of the publication of the final rule.²¹⁵

This control of agency rulemaking under the Paperwork Reduction Act gives OMB another role to play in rulemaking proceedings that could also be subject to RFA requirements. Thus the Office of Advocacy may have to relate its regulatory flexibility function to OMB on two fronts, the Executive Order and Paperwork Reduction.²¹⁶ There is no reason why the Office of Advocacy cannot work with OMB on paperwork as it must on regulatory analysis. Undoubtedly there will be circumstances where the Office of Advocacy will be recommending alternatives to information collection regulations that exempt small entities or reduce the collection burden they would otherwise bear. In these

213. See 44 U.S.C.A. secs. 3504, 3505 (Supp. 1981).

214. *Id.* at sec. 3504(h)(1)-(5).

215. Independent agencies may overrule OMB disapproval of their information collection requests by a majority vote of their members. *Id.* at sec. 3507(c).

216. Since the Paperwork Reduction Act reaches independent agencies it could conceivably have a greater overlap with the RFA than the Executive Order.

circumstances, the Office could find an ally in OMB and the Paperwork Reduction Act. However there will be an inevitable shift of agency attention away from the RFA under these circumstances, since OMB has a stronger influence on agency behavior generally.²¹⁷

One important purpose of the Paperwork Reduction Act is to serve as a collector of information about reporting requirements through the Federal Information Locator System.²¹⁸ This system is to be maintained by OIRA. Its purpose is to collect and index agency data collection requests in order to facilitate the cooperative exchange of data among agencies and the reduction of requests for new data.²¹⁹ This capability should be of use to the Office of Advocacy in its monitoring of agency rulemaking since one of the purposes of IRFA is to identify duplicative federal rules and reporting requirements.²²⁰ One can easily foresee useful information being collected by OIRA that will assist both the Office of Advocacy and the agencies themselves in complying with the RFA requirements.

All of this sounds acceptable "on paper" but there is great potential for delay and confusion on practice. The agencies now

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217. In addition, under the Paperwork Reduction Act, OMB reports to Congress about agencies who violate any provisions of the Act. Id. 3514(7). This reporting function is similar to the Office of Advocacy annual report to the President and Congress under the RFA.
218. See id. sec. 3511.
219. Before seeking information agencies must check with OMB to determine if the data, or substantially similar data, already exist in the system. See id. secs. 3508-3510.
220. See 5 U.S.C.A. sec. 603(b)(4)-(5) (Supp. 1980).

find themselves with three new directives to consider before noticing rules for comment.²²¹ This will slow up the rulemaking process considerably, which is perhaps one of the unarticulated purposes of regulatory analysis,²²² and require agencies to develop special expertise in juggling the various demands now placed upon the rulemaking process.

E. Reviewing Existing Rules and Establishing Agendas

The RFA imposes two further responsibilities upon agencies who promulgate rules. Under section 602 an agency must establish regulatory agendas and under section 610 it must publish and implement a plan for reviewing existing rules for their impact upon small entities. The regulatory flexibility agenda is to be published in the Federal Register on a semiannual basis (during the months of October and April).²²³ The rules covered are those likely to have a significant economic impact upon a substantial number of small entities; each rule must be summarized and given a timetable for completing action upon it.²²⁴ The agenda is to

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221. The Appendix contains a chart showing how the requirements of the RFA, the Executive Order and the Paperwork Reduction Act interact.
 222. On the advisability of "slowing the regulatory process to a crawl" as a means of achieving deregulation, consult Eads, note 50 *supra*, at 26.
 223. The Act does not specify any particular dates within these months because of the need to coordinate publication submission dates with the Office of the Federal Register. See OMB, Incorporating Regulatory Flexibility Into the Regulatory Process: Interim Guidance p. 7-8 (Dec. 1980).
 224. This timetable only applies to those rules that have been subject to a notice of proposed rulemaking. The legislative history makes clear that the agenda would not force agencies to announce rulemaking proceedings that are still in the planning stage. See 126 Cong. Rec. S10941 (daily ed. Aug. 6, 1980).

be transmitted to the Office of Advocacy for comment and brought to the attention of small entities or their representatives. The purpose of the agenda is to provide small entities with another kind of early warning system;²²⁵ it does not bind an agency to make future determinations in accordance with its terms.²²⁶

Executive Order 12291 also requires the publication of a regulatory agenda and explicitly states that it may be incorporated into the RFA section 602 agenda.²²⁷ The substantive requirements of this agenda are phrased in substantially similar language, except that they are directed at major rules rather than significant economic impact rules.²²⁸ The obvious interest of the Order is to mesh its requirements as much as possible with those of the RFA so as to avoid duplication. The Order does, however, add the requirement that existing regulations be reviewed in this agenda, a subject that the RFA treats separately.²²⁹

The RFA plan for reviewing existing rules is a basic part of its goal of reducing the burden of regulation upon small entities. It works on the sensible assumption that much burdensome regulation is already in effect and it seeks to have agencies systematically review such regulations by an established schedule. The plan is to be published within 180 days after the

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225. Id.

226. See 5 U.S.C.A. sec. 602(d) (Supp. 1980).

227. Exec. Order No. 12291 sec. 5(a), 43 Fed. Reg. 13195 (1981).

228. The phraseology is so similar as to suggest the drafters of the Order borrowed it from the RFA.

229. Id. sec. 5(a)(3).

effective date of the Act or by July 1, 1981 and it is to provide for a ten year period of review.²³⁰

It is fair to say that it imposes an enormous administrative burden upon the responsible agency. It asks an agency to review all of its rules at the outset to determine if they have a significant economic impact upon a substantial number of small entities (which is itself a complex determination) and then as to each such rule it asks the following:

- "(1) the continued need for the rule;
- "(2) the nature of complaints or comments received concerning the rule from the public;
- "(3) the complexity of the rule;
- "(4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and
- "(5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule."²³¹

Those factors are similar to those listed in an earlier Executive Order issued by President Carter²³² and are thus described in the legislative history as being non-burdensome because of their familiarity.²³³ But even the uninformed observer can recognize that this process of review will take a great deal of agency effort to complete. Indeed, however, one feels about the value of such a review in the abstract, one has to wonder whether its real purpose is to keep an agency from doing anything but reviewing rules.²³⁴

230. This period can be expanded annually, upon notice, for an additional five years.

231. 5 U.S.C.A. sec. 610(b)(1)-(5) (Supp. 1980).

232. Exec. Order No. 12044, 43 Fed. Reg. 12661 (Mar. 23, 1978).

233. 126 Cong. Rec. S10942 (daily ed. Aug. 6, 1980).

234. Consider only the requirement that a rule be reviewed to determine conflict or overlap with Federal, state and local (Footnote continued)

Despite this careful list of factors the Act is silent in one important respect: it in no way aids an agency in setting priorities for reviewing rules within the plan's ten (or fifteen) year life. Given the burden imposed upon an agency to conduct the review in the first place, which will carry with it an inevitable tendency to push back deadlines, it is important to establish some method whereby the most burdensome rules (from a small entity perspective) will be considered first. A single rule with a heavy burden on small entities should be more in need of review than many rules with relatively light (though still technically "significant") burdens.

One approach to establishing priorities may be to utilize the factors themselves as a prioritizing device.²³⁵ For example, the complaints received about a rule may be as good a single measure as any other. Agencies should be aware of the number of complaints, at least in a general way, but they can refine that data by analyzing the type of complaint and the characteristics of the complainer so as to develop an index of regulatory burden for each of its existing rules. An agency which proceeds in this fashion may be operating more efficiently from an RFA standpoint even if it reviews far fewer existing regulations than its counterparts.

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234. (continued)

rules. There is little existing guidance on present conflicts at the federal level (indeed the CFR still lacks a comprehensive index) and none with regard to state and local rules which are not, in many cases, even published.

235. Executive Order 12044 also adds some useful criteria for review such as burdens imposed by the rule and the need for clarifying language. See 43 Fed. Reg. at 12663.

F. The Role of Judicial Review

The RFA contains an extremely qualified and ambiguous provision for judicial review; yet, as a realistic matter, much of the Act's enforcement potential hangs on the interpretation of this provision. Section 611 provides:

"(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.

"(b) Any regulatory flexibility analysis prepared under sections 603 and 604 of this title and the compliance or 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.

"(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."

Taken at face value, this provision reads more like a statement of non-reviewability than reviewability, but it does anticipate some judicial awareness of the RFA process by including the IRFA and FRFA as part of the whole record on review. To comprehend the legislative purpose of this provision it should be broken down into those parts that are self-evident and those (principally the whole record requirement) that can be best understood after an examination of the relevant legislative history.

Section 611(a) is a clear non-reviewability provision for any activity under the RFA other than that required by the regulatory flexibility process of Sections 603 and 604. Thus an

agency decision to certify a rule as not having a significant economic impact upon a substantial number of small entities under section 605(b), any activities under sections 602 and 610 relating to the regulatory agenda or periodic review of existing rules, or any procedural decisions under sections 608 and 609²³⁶ are beyond judicial scrutiny. This is the clear import of section 611(a) and the relevant legislative reports.²³⁷ In effect Congress traded off the compliance value of judicial oversight for the administrative efficiency value of uninterrupted decisionmaking.²³⁸ Congress was willing to risk

236. In emergency circumstances, section 608 provides for waiver of an IRFA and for delay of an FRFA for up to 180 days. A rule lapses if the FRFA is not completed by then, but judicial enforcement of this "lapse" is apparently barred by section 611(a). Section 609 establishes procedures for gathering comments from small entities.

237. The Senate section-by-section analysis of S.299 states with respect to section 611(a):

Section 611(a) provides that there is no judicial review of any determination by an agency regarding the applicability of any provision of this subchapter except as provided in Section 611(b). This means, for example, that the decision by an agency with respect to what proposed rules would have a significant economic impact on a substantial number of small entities pursuant to Section 605(b) shall not be subject to judicial review. Thus, the decision regarding when the agency shall conduct a regulatory flexibility analysis remains in the sole discretion of the agency. Also not subject to judicial review are agency determinations regarding the agenda (section 602), the procedures for gathering comments (section 609), the periodic review of rules (section 610) and any other administrative determinations under this act.

126 Cong. Rec. S10942-3 (daily ed. Aug. 6, 1980).

238. In the Senate discussions the judicial review (or non-review) provision is addressed as a solution to the perceived problem of "increased litigation" and "undue delay." See *id.* at S10937.

frustration of the Act's purposes through unexamined use of the certification process rather than embroil rulemaking in the potential sideshow of collateral judicial review.²³⁹

Section 611(c) is also a clear provision. It simply states the obvious by declaring that nothing said about judicial review in the RFA is intended to affect review of any impact statement mandated by other law. This provision is not discussed in any detail in the legislative reports, but Congress apparently had in mind the possibility that combining regulatory flexibility analyses with other analyses (like for example, the regulatory impact analysis required by Executive Order 12291) might unintentionally lead to a change in the judicial review standards.²⁴⁰ Since the subsection is only a cautionary one, however, it has no real bearing on the question of the role of

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239. In one respect the certification process does hint at some judicial oversight. If a certification is improperly made (according to the Office of Advocacy) and a rule later promulgated, there is an argument that the rule will lapse under section 608(b) in 180 days for failure to supply an FRFA. The question will be, however, who can raise this later "lapse" and in what forum. Judicial review seems inappropriate because of section 611(a). Perhaps the most that can be said is that Congress did not envision judicial review as the method whereby improper certifications (or improper emergency determinations for that matter, see note 236 *supra*) are to be policed. The policing mechanism is in effect the Office of Advocacy's annual reports to the President and Congress.
240. The Carter Administration Executive Order 12044, 43 Fed. Reg. 12661 (1978), contained an explicit non-reviewability provision of its regulatory analyses. The Reagan Administration Executive Order 12291, 46 Fed. Reg. 13193 (1981), contains a judicial review provision of its regulatory impact analyses that is equally ambiguous as that in section 611(b).

This Order is intended only to improve the
(Footnote continued)

judicial review under the RFA. The subsection that raises that question is section 611(b).

1. Legislative Background

Section 611 emerged late in the legislative process. Senate bill 299 contained no specific judicial review provision when it was introduced into the Senate in the 96th Congress and reported out of the Judiciary Committee on May 5, 1980.²⁴¹ That version had grafted the substantive provisions of the RFA on to Title 5 of the APA, primarily section 553. As a result of failing to mention judicial review at this point, the Senate recognized that the judicial review provisions of the APA would apply to review under the RFA amendments: "The bill does nothing to alter the right of review of agency action as outlined in 5 U.S.C. sec. 702."²⁴² When the bill went to the Senate floor for passage, however, it was recodified as a separate section of the APA, and it acquired section 611.

The Senate believed it was achieving a balance between the

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240. (continued)

internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person. The determinations made by agencies under Section 4 of this Order, and any Regulatory Impact Analyses for any rule, shall be made part of the whole record of agency action in connection with the rule.

Id. sec. 9.

Since this provision has a similarity to section 611, it could well be judicially interpreted in the same manner.

241. S.299, 96th Cong., 2d Sess. (1980) (as amended July 30, 1980).
242. S. Rep. No. 96-878, 96th Cong., 2d Sess. 9 (1980) (to accompany S.299).

non-reviewability provisions of related legislation²⁴³ and the full reviewability of APA judicial review by adding section 611:

"[T]he bill strikes a balance between two central aims with regard to the role of the courts. The first is to ensure that an agency's compliance with the objectives of this bill be subject to meaningful, yet responsibly defined, judicial oversight. A flat prohibition of any such oversight might give the erroneous impression that regulatory flexibility provisions may be ignored with impunity. . . .

"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. . . ." ²⁴⁴

This balance was partially the result of the Senate's belief that to try and prevent a reviewing court from examining the regulatory flexibility analysis would be "unrealistic."²⁴⁵ Therefore to permit a court to consider the FRFA as part of the whole record, yet not to allow it to be the separate subject of judicial review seemed to be a satisfactory compromise. There remains an ambiguity in this approach however. The idea of forbidding "separate" judicial review expressed above could be read to mean either forbidding interlocutory review (which the

243. See S.262 and S.755, 96th Cong., 1st Sess. secs. 607 and 603 respectively (1980) (the Senate and Carter Administration omnibus regulatory reform bills).

244. 126 Cong. Rec. S10939 (daily ed. Aug. 6, 1980).

245. *Id.* The Senate may have been mindful of the earlier testimony of the late Judge Harold Leventhal (in connection with S.262 and S.755) on the court's role in considering "non-reviewable" analyses, as well as the economic impact assessment provision of section 317 of the Clean Air Act Amendments to which he referred. Judge Leventhal took the position that the reviewing court will consider any documents or analyses in the record which help it determine whether the rule itself is a valid exercise of administrative power. See Regulatory Reform: Hearings Before the Senate Committee on the Judiciary, 96th Cong. 1st Sess., Pt. 1, p. 6-23 (1979).

RFA clearly does) or also forbidding "separate" review of the FRFA as part of the evaluation of the final rule. This distinction requires further elaboration.

2. Problems of Interpretation

There is a continuing difficulty with the FRFA as it appears to the court on review. In one sense the FRFA is there for the court to read but not to evaluate. This is a difficult distinction for any reviewing tribunal to maintain. Suppose the FRFA is so poorly done as to be worthless, or manifestly in bad faith, would this make the FRFA and/or the resulting rule arbitrary and capricious?²⁴⁶ If the court is not reviewing the FRFA, its weakness should not be an independent basis for overturning it or the rule to which it relates. This means that the FRFA will be of assistance to the court in determining the substantive meaning of the rule, but it should not of itself lead to an overturning of the rule.²⁴⁷

246. In an exchange with Judge Leventhal during the hearings, Senator Culver asked the following question: "If an agency, for example, stated that it relied on an impact analysis and the analysis was, in the judgment of the court, viewed to be arbitrary or capricious, could the rule itself then not be considered to be arbitrary and capricious?" The Judge replied negatively, as follows: "I think that the function of the regulatory analysis in that case would only be to indicate what the agency meant in its rule and what the agency was doing in its rule." *Id.* at 14.

247. This seems to be the view expressed by Judge Leventhal above. *Id.* On the other hand, a sloppy or manifestly inadequate FRFA could indicate to the court that the rule itself has not been adequately prepared. Judge McGowan has suggested that the presence of a regulatory analysis in the record may affect the court's judgment as to the rule's validity, either positively or negatively depending upon the quality of the analysis. See C. McGowan, Address to the AALS, San Antonio, Texas, Jan. 4, 1981, at 14.

On the other hand, the legislative history indicates that failure to complete an FRFA, preparing it in bad faith, or doing so inadequately "would be grounds for finding the rule unreasonable under established case law."²⁴⁸ This interpretation

248. The Senate section-by-section analysis reads as follows:

...For example, in the unlikely event that following an agency head's decision not to certify that a particular rule will have no significant economic impact on a substantial number of small entities (pursuant to Section 605(b)), the agency then completely ignores the resulting requirement to perform regulatory flexibility analyses, an injured party would have grounds to argue that this fact is evidence of the unreasonableness of the rule. Similarly if it can be demonstrated that a regulatory flexibility analysis has not been prepared in good faith and the agency therefore is unable to provide substantive grounds supporting the final rule in the statement of basis and purpose, the court would have grounds to invalidate the rule. In addition, if an agency completely fails to respond to a clearly available significant alternative to the rule less burdensome on small entities and raised in public comments, then this failure would be grounds for finding the rule unreasonable under established case law. See Portland Cement v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1978); and Automotive Parts and Accessories v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968); see also Kennecott Copper Corp. v. EPA, 462 F.2d 846, 849-50 (D.C. Cir. 1972). 126 Cong. Rec. S10939 (daily ed. Aug. 6, 1980).

In the House the following exchange on judicial review under S.299 took place:

MR. BROOMFIELD. But what if the agency fails to do this analysis, or if the analysis is inadequate, sloppy or incomplete?

...
MR. MCDADE....

Let me say unequivocally as a member of the committee that wrote this bill, that in that instance, upon review of the final regulation, it is the intent of our committee that the court should strike down the regulation.

126 Cong. Rec. H8463 (daily ed. Sept. 8, 1980). It should be remembered that Mr. McDade was a member of the committee that drafted H.R.4660, not S.299.

clashes with the idea that the regulatory analysis is only to be used as a supplement to the record, not as the subject of review itself. It also puts the court in a conceptual bind; how is it to know when an FRFA is performed inadequately or even in bad faith. The standards for judging regulatory flexibility analyses or any other kind of regulatory analysis are hardly well known and the process itself is so experimental as not to have any established performance norms.

It is not difficult to conceive of a situation where the FRFA is poorly done (or even non-existent), but the rule itself was carefully prepared. Perhaps an agency simply did not regard its small entity problems as a serious concern of the rule but rather than certifying out of the RFA decided to submit a pro forma FRFA. In such a case, the court would not look to the FRFA for guidance, but it would have enough in the record otherwise to evaluate the basis for the rule. Unless the organic legislation under which the rule was promulgated declares a particular concern for small entities that only the FRFA can satisfy, there would be no necessary reason why poor FRFA performance would compel poor rulemaking performance generally. But one must recognize that the legislative history raises the possibility that section 611(b) can serve as an independent ground for reviewing the adequacy of the FRFA.²⁴⁹

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249. The Senate analysis cited lists three judicial review cases that appear to have little to do with the question of reviewability. They involve the general question whether the court may examine the record of informal rulemaking as part of its judicial review function. They do not involve the RFA issue whether that record should make the FRFA judicially cognizable.

There is no decisive way to resolve this ambiguity in the role of judicial review. The courts will face arguments from those who seek to overturn a rule because of a failure to provide an adequate FRFA and poor performance on the FRFA will undoubtedly color the court's view of the agency's performance on the underlying rule. From the perspective of those who support the RFA, the more judicial review that is available the better the chance of agency compliance with the Act's goals and purposes.

The resolution of the reviewability issue will turn on the interpretation of section 611(b) in light of its legislative history. Since some ambiguity persists on that score the courts will be thrown back to several basic questions about the structure of the act. If Congress intended the FRFA itself to be subjected to adequacy analysis on review, why did it not simply leave the APA judicial review provisions as part of the RFA. Certainly the problem of interlocutory review could have been cured short of abandoning the APA judicial review scheme. Finally it must be remembered that even if an FRFA is non-existent, the court must still find the underlying agency rationale inadequate to decide that the rule is unreasonable. That determination remains the same with or without the RFA, unless it can be said that concern for small entities is part of the specific agency mandate that governs the substance of the rule itself.

G. The Role of the Office of Advocacy

The Act is designed so as to make its ultimate success or failure rest on the shoulders of the Chief Counsel for Advocacy. Section 612 requires the Chief Counsel to monitor agency compliance with the Act and to submit compliance reports at least annually to the President and the Congress. This section also grants the Chief Counsel the right to intervene in any rulemaking review proceeding to present his views on the effect of the rule on small entities. The RFA also requires agencies to report many of their activities to the Chief Counsel. Since the Act does not rely upon judicial enforcement by private parties, the Chief Counsel becomes in effect the sole policeman. It is a complex role with many pitfalls, most of which can be avoided if the person who serves in that role has the requisite political instincts.

1. The Chief Counsel's Monitoring Role

Under the RFA the Chief Counsel receives regulatory flexibility agendas (section 602), initial regulatory flexibility analyses (section 603), and certifications declaring the inapplicability of the Act (section 605(b)). As the designated depository, the Office of Advocacy will be inundated with these reports, which it must monitor in some effective way to make the Act work. Neither the agendas, the IRFA's, nor the certifications are subject to judicial review so the only compliance incentives are those provided by the Chief Counsel.

The Office of Advocacy is not a familiar word in the agency lexicon. Thus the first step is to gain the attention of the

affected agencies and then to turn that awareness into a credible force for compliance. This is truly a political matter than can only be realized by an effective Chief Counsel and a dedicated staff. The Chief Counsel is not without persuasive tools in this process. Annual (or more frequent) reports to the President and Congress on those agencies who cooperate and do not can be influential "winners and sinners" lists when it comes to reappointments and budget hearings. A willingness to intervene in rulemaking appeals from recalcitrant agencies should also give the courts an awareness of particular problem areas. In other words, the Chief Counsel has several techniques for gaining the attention of agencies for the purposes of urging (or negotiating) a favorable compliance posture.

2. The Personnel Needs of the Office of Advocacy

The most difficult problem for the Chief Counsel will be obtaining the staffing necessary to undertake the monitoring process. When Congress passed the RFA, estimates were made that about 500 rules a year would require regulatory flexibility analysis.²⁵⁰ That estimate appears to seriously understate the actual workload. Even with the restraints on rulemaking imposed by the incoming administration,²⁵¹ in the first six months of the RFA's existence (January 1, 1981 to July 31, 1981) about 1000 rules have been noted by the Office of Advocacy. Of this group about 20 IRFAs have been received by the Office along with about

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250. 126 Cong. Rec. H8469 (daily ed. Sept. 8, 1980).

251. President Reagan froze the issuance of new regulations by executive agencies for the first three months of his term. Presidential Memorandum of January 29, 1981, 46 Fed. Reg. 11227 (1981).

800 certifications. The imbalance between certifications and IRFAs is a matter of special concern and it emphasizes the fact that the certification process is a critical juncture in the RFA scheme. As a practical matter, Office of Advocacy monitoring must concentrate upon certifications as much as it does upon IRFAs. This realization translates into a significantly greater workload for the office.

At present the Office has about 25 attorneys assigned to it by virtue of the act establishing the Office in 1976.²⁵² The Office also has about 6 to 8 trained economists on its staff. This level of professional staffing has not been increased by the RFA and given the general cutback in federal manpower it is unlikely that additional support will be forthcoming. Under these circumstances the professional staff resources of the Office are a precious commodity and they must be expended carefully to yield the highest monitoring return. The professionals must also be supported by non-professional staff wherever possible. As presently organized the Office has non-professional intake personnel assigned to each agency or group of agencies that promulgate rules. These personnel collect certifications and IRFAs and scan the Federal Register for notices of proposed rules that may have escaped the attention of the RFA. They are aided in their task by internal monitoring guides.²⁵³ But the collection process requires supervision by

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252. These attorneys are "public law employees" designated so by the act which created the Office of Advocacy. See 15 U.S.C.A. sec. 634g (Supp. 1980).

253. The Office of Advocacy has drafted internal guides to RFA (Footnote continued)

professionals, especially with respect to the review of certifications.²⁵⁴

Given this limited staff it is imperative that priorities be set and that the Office of Advocacy look for outside assistance wherever it can. The Office should narrow its focus considerably with regard to the number of agencies whose activities are monitored. The Office estimates that about 70 agencies promulgate rules that are potentially subject to the RFA. Rather than reviewing all agencies equally, a priority list of those agencies who are most of concern to small entities should be developed and staff resources committed to their monitoring. This may mean that rules by other agencies will escape the Office's attention, but that seems to be necessary if the Office is to do its job at all.

To assist the Office in its monitoring function volunteers in the private sector can be utilized to alert the staff to important rules.²⁵⁵ Beyond the private sector, the Office can turn for assistance in regulatory analyses to other government agencies, in particular OMB. But that alliance, while critical

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253. (continued)

monitoring. See Office of Advocacy, "Guides to Regulatory Flexibility Analysis Monitoring" (May 14, 1981).

254. Presumably, IRFAs will be turned over to professional staff as soon as they are received by the Office of Advocacy.

255. The Office of Advocacy has already appointed a task force of volunteers that will assist in the monitoring process. So far over 200 unpaid monitors, many of whom are attorneys who practice before the particular agencies involved, have been selected. Their role is primarily to serve as an early warning system and as a source of substantive guidance for the Office of Advocacy professionals who are assigned to specific agencies. In addition many agencies have established RFA officials as contact and resource persons. See id.

to resolving the staffing problems facing the Office of Advocacy, will also bring with it some difficulties of its own.

3. The Office of Advocacy and OMB

The overlap in jurisdiction between OMB which monitors the Paperwork Reduction Act and Executive Order 12291 and the Chief Counsel who monitors the RFA may create disputes and confusion, but it can also serve as a source of mutual support. OMB, through its Office of Information and Regulatory Affairs, is an established organization familiar with regulatory analysis and well-trained to conduct it. It is also an office that has historically asserted strong control over the agencies within its ambit. Certainly it can be expected to assert itself in any working relationship involving the Executive Order 12291 and the RFA.²⁵⁶ The question is really to what extent may the Chief Counsel rely upon OMB assistance in performing the monitoring role under the RFA without yielding decision authority under the Act. Obviously some coordination is necessary; not to do so would be to ignore the basic message of regulatory reform being sent to the agencies by the last two administrations and by the RFA itself.

On the other hand, coordination is the stuff of bureaucratic rivalries. The Chief Counsel is the chosen representative of a special constituency that will be sensitive to intrusion from those it considers not fully informed or committed to its

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256. To some extent this assertion has already taken place in that the Executive Order ties directly into the RFA requirements. See notes 197-210 supra, and accompanying text.

cause.²⁵⁷ Moreover, Congress has clearly placed responsibility for the well-being of small entities in the hands of the Office of Advocacy and it is unlikely to sit still for excessive OMB control, especially since that office, speaking as it does for the Executive, often confronts Congress on other matters.

Since Congress and the President clearly want to minimize the burden of regulatory analysis, both the Office of Advocacy and OMB must minimize any disagreements and work together. Recognizing that OMB has the quantitative expertise to monitor agencies effectively, which the Office of Advocacy cannot duplicate, the Chief Counsel can and should rely upon OMB for its special skills.²⁵⁸

During all of this the small business community will have to recognize that the Chief Counsel is an advocate with limited resources, they must be spent in those few situations where they can do the most good. This means intervening only in those few judicial review proceedings where important RFA policy issues are at stake and pressing the President and Congress through the

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257. The small business community may well have special interests that OMB will not consider as important (or as justified) as would the Chief Counsel for Advocacy. After all the Chief Counsel is intended to be biased in favor of small business. Unfortunately other small entities do not have a special friend, either at the Office of Advocacy or at OMB.
258. Of course, OMB has personnel limitations as well. The Office of Information and Regulatory Affairs has a staff of some 90 professionals, after being supplemented by former employees of the Council on Wage and Price Stability. See Eads, *supra* note 50, at 22-23. Since the OIRA has responsibility for the Paperwork Reduction Act and Executive Order 12291 it is doubtful that it will have the capacity to do much RFA work unless it is tied to its regulatory analysis function under the Executive Order.

annual report mechanism on a carefully selected list of agencies who are major compliance problems. In large measure this kind of balanced approach will not only determine the effectiveness of the RFA, but will go far towards providing an awareness of how successful a concept regulatory analysis can be on a government-wide basis.

IV. Relationship of the RFA to the Regulatory Reform Movement

The RFA is part of a broad movement toward a regulatory analysis as a method for improving the performance of federal agencies. The RFA is the first such experiment to become law; regulatory analysis was included in two omnibus bills during the last Congress but they failed of passage.²⁵⁹ There is a strong push for regulatory analysis in the 97th Congress in both the Senate and House. It is likely that new legislation will be forthcoming and, if it is, the RFA and its regulatory flexibility requirements will have to be integrated into the larger pattern of regulatory reform. This process can be usefully anticipated based upon information now available.

A. The Regulatory Reform Proposals

Senator Laxalt has introduced a bill (S.1080) to amend the APA by, among other things, imposing regulatory analysis and review upon all agencies who make rules.²⁶⁰ A related bill

259. S.1291 and S.755, 96th Cong., 2d Sess. (1980).

260. S.1080, 97th Cong., 1st Sess. (1981). The bill had 74 Senate co-sponsors. S.1080 was reported by the Judiciary Committee, with amendments, on July 17, 1981.

(H.R.746) has been introduced in the House by Representative Danielson.²⁶¹ Both bills provide for regulatory analysis of new rules, periodic review of existing rules and the publication of a regulatory agenda. In these respects they track similar requirements under the RFA. In other respects they differ from the RFA however.²⁶² The bills impose standards of regulatory analysis upon agencies that are more reminiscent of Executive Order 12291 than the RFA. Both bills deal with "major rules" of \$100 million annual effect on the economy or related economic impact tests.²⁶³

The type of analysis required is more of the technical cost-benefit type than the general regulatory flexibility type. The Senate bill requires that the statement of basis and purpose for a major rule include a "reasonable determination" that the benefits of the rule justify the cost and adverse effects of the rule.²⁶⁴ This amounts to a requirement that cost-benefit analysis determine the outcome of agency rulemaking, except where

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261. H.R. 746, 97th Cong., 1st Sess. (1981), as amended (July 30, 1981).
262. The bills also differ significantly between themselves, but no attempt will be made to discuss these differences unless they relate directly to the RFA.
263. S.1080 sec. 2(16); H.R.746 sec. 621(3). The bills also consider as "major" rules which have a significant adverse effect on health, safety or the environment and rules which the President designates as such. The House bill adds to regulatory analysis a category of "significant rules" which are to be defined by the agencies themselves according to the number of entities covered, the compliance and reporting requirements involved, the direct and indirect effects and the relationship of the rule to other rules. H.R.746 sec. 621(4).
264. S.1080 sec. 3(e)(2).

enabling legislation explicitly dictates to the contrary.²⁶⁵ The House bill also requires preliminary and final regulatory analyses to be filed with each new rule, although it does not mandate strict compliance with cost-benefit outcomes.²⁶⁶ Both bills allow agencies to incorporate regulatory analyses from other statutes.²⁶⁷

The bills provide for agency review of existing major rules over a ten year period (which can be extended to 15 if necessary).²⁶⁸ Each bill also requires the establishment of a regulatory agenda. S.1080 requires an agency to publish in the Federal Register an agenda for all proposed rules and requires the "President or his designee" to publish a bi-annual list of major rules.²⁶⁹ H.R.746 requires agencies themselves to publish a regulatory agenda of major rules in the Federal Register on a bi-annual basis.²⁷⁰

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265. S.1080 anticipates legislation, like that involving OSHA, which forbids cost-benefit analysis. See discussion at notes 179-180 supra.
266. H.R.746 sec. 622. The analysis originally required "an explanation of why an approach entailing greater adverse economic effects was selected", id. sec. 602(c)(5)(B), which did not, unlike the Senate bill, forbid non-cost justified outcomes. In the later revision of the House bill cost justification of a proposed rule is more clearly demanded. H.R.746, July 30, 1981 amendment at sec. 622(c)(5)(B).
267. S.1080 sec. 3(f)(4); H.R.746 sec. 622(d)(1). The RFA is not referred to directly but its regulatory flexibility analysis requirement is undoubtedly within each bill's contemplation.
268. S.1080 sec. 560; H.R.746 sec. 641.
269. S.1080 sec. 561. The publication of major rules by the President is a function similar to that which was performed by President Carter's Regulatory Council.
270. H.R.746 sec. 631. In addition, the President is instructed to publish a Calendar of Federal Regulations that collects information on major rules from all agencies. Id. sec. 632.

Oversight responsibility for regulatory analysis is located in a variety of places. The Senate bill assumes that the justification for a major rule will be reviewed in its statement of basis and purpose as part of the rule. It places in the President "or an officer designated by him" the responsibility for reviewing existing rules and establishing the regulatory agenda.²⁷¹ The House bill gives oversight responsibility over the final regulatory analysis to OMB and the courts.²⁷² In addition, it places overall responsibility in the Comptroller General of the United States to audit and examine agency compliance with the regulatory analysis process and to make periodic reports to Congress.²⁷³

B. The RFA and Regulatory Reform

On the solid assumption that some variation of the Senate and House bills will become law, there will obviously be a need to relate that legislation to the RFA and vice versa. From what now appears, there will be no effort made to eliminate or drastically reduce the role of the RFA in regulatory review. New legislation will largely implement the regulatory analysis

271. S.1080 sec. 560(a)(2).

272. H.R. 746 secs. 622(d)(3) and 623. Section 624 provides:

The Director of the Office of Management and Budget shall monitor and review compliance by agencies with the requirements of this subchapter and shall establish such procedures as may be necessary to ensure such compliance. The Director shall from time to time report to the President and the Congress on such agency compliance.

273. H.R.746 sec. 625.

requirements currently imposed by Executive Order 12291. In effect, therefore, much of the reconciliation process that now must take place between the Order and the RFA discussed earlier²⁷⁴ would be relevant to new legislation. To the extent that the Office of Advocacy will already be familiar with the regulatory flexibility process there will presumably be an initial RFA advantage in any reconciliation process.

There are several ways, however, in which the RFA and the Office of Advocacy can be reduced in importance by new legislation. If the House version becomes law and includes "significant" as well as major rules in the regulatory analysis process, a potentially greater number of rules will be subject both to RFA and regulatory analysis. Moreover, since the House bill replaces existing RFA section 602 with its own regulatory analysis format, there will be further conflict.²⁷⁵

The primary difficulty from the Office of Advocacy's viewpoint is a clear shift of monitoring responsibility (via the regulatory agenda) to OMB or other government authorities.²⁷⁶ This would suggest that the current overlap in responsibilities

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274. See discussion at notes 197-210 supra.

275. Section 602 of the RFA deals with the regulatory agenda. By eliminating it, the House bill would require the RFA to utilize the general regulatory agenda provisions of the new legislation. This approach certainly will reduce duplication and redundancy, but it will also eliminate special notice to small entities unless the Chief Counsel takes pains to monitor and report such agendas to small entities.

276. H.R.746 gives control to OMB and the Comptroller General, but S.1080 speaks in terms of the President or his designee. It is not inconceivable that the "designee" could in some situations become the Chief Counsel for Advocacy and thereby ensure a continued role for that office and the RFA.

between the two organizations will be intensified; given OMB's stature, one can anticipate further attempts to narrow the Chief Counsel's role in regulatory analysis. But all signs are not negative. The Office remains politically important and any bureaucratic attempt to reduce its authority would create substantial countervailing pressures. Certainly the staff support for regulatory analysis currently lacking at the Office of Advocacy can be supplied by this government-wide attempt to engage in regulatory analysis.

Thus it is difficult to calculate the ultimate effect that enactment of generic regulatory analysis legislation will have upon the RFA. In some ways the recognition of regulatory analysis throughout government should have a positive effect upon the regulatory flexibility process. Agencies should become better trained to conduct regulatory analyses and more receptive to the special concerns of small entities. If they do not, generic regulatory analysis will have had an ironic effect upon the RFA for it would amount to another instance where government regulation, allegedly neutral in application, has worked to the disadvantage of the small business community.

V. Conclusion

The RFA may become the most significant legislation small business has ever achieved or it may fade into the background. At this juncture, it is not easy to say with confidence what course it will take. The factors that will determine its importance are known. One is the Office of Advocacy which must

implement the Act. How will the Office react to questionable certifications and weak analyses? The Office has it within its power, through careful management, to react decisively and by so doing gain the attention of the agencies who must respond initially to the Act's demands.

Careful management requires a consolidation of efforts upon the certifications and IRFAs. It also assumes an ability to work effectively with OMB. Despite its preoccupation with other regulatory reform legislation, OMB can provide the expertise necessary to assist the Office of Advocacy in becoming an effective oversight agency.

The judicial review provisions of the Act deserve attention from the Chief Counsel. While the Act clearly does not contemplate an assertive role for the courts in enforcing agency compliance with regulatory flexibility analysis, there are ways in which the Chief Counsel can effectively intervene to alert the courts to the RFA and thereby increase agency incentives to comply in the future. The Chief Counsel's reports to Congress and the President can be utilized in a similar fashion.

Small business expects much from the RFA; perhaps too much. The Act points a direction, and that direction is to require agencies to consider the plight of small business. This awareness can make a difference in rulemaking proceedings as it does in the halls of Congress. The RFA is special interest legislation in the best sense. It urges agencies to recognize differences in size when promulgating rules, but it does not undermine regulatory authority over organic legislation. This may not be all the small business community desires, but it is more than it has gotten for many years.