

April 2000

Judicial Review and the Small Business Regulatory Enforcement Fairness Act: An Early Examination of When and Where Judges Are Using Their Newly Granted Power over Federal Regulatory Agencies

Jeffrey J. Polich

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Administrative Law Commons](#)

Repository Citation

Jeffrey J. Polich, *Judicial Review and the Small Business Regulatory Enforcement Fairness Act: An Early Examination of When and Where Judges Are Using Their Newly Granted Power over Federal Regulatory Agencies*, 41 Wm. & Mary L. Rev. 1425 (2000),
<https://scholarship.law.wm.edu/wmlr/vol41/iss4/6>

JUDICIAL REVIEW AND THE SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT: AN EARLY EXAMINATION OF WHEN AND WHERE JUDGES ARE USING THEIR NEWLY GRANTED POWER OVER FEDERAL REGULATORY AGENCIES

The battle between government regulators and big business is a clash of titans. Well-funded federal agencies are staffed with intricate networks of bureaucrats working to fulfill their legislative mandates and keep American businesses in line with public policy, whether the issue is pollution, workplace safety, taxation or the like.¹ Big business is ready and able to combat their nemeses with big budgets for lobbying, legal work, and compliance with the immense quantity of complex regulations enumerated in the Code of Federal Regulations.² All too often small businesses are found floundering in the middle of this fray. Their business practices inevitably leave them exposed to federal regulations aimed at curbing the excessive practices of big business.³ Their budgets, however, leave them without adequate resources either to comply with or to fight intrusive federal regulators. In 1996, Congress gave small businesses a weapon of their own in their fight against this regulatory morass.⁴ The Small Business Regu-

1. See Barry A. Pineles, *The Small Business Regulatory Enforcement Fairness Act: New Options in Regulatory Relief*, 5 COMMLAW CONCEPTUS 29, 30 (1997).

2. See *The Cost of Federal Regulations on Small Business: Joint Hearing Before the Senate Comm. on Small Bus. and the House Comm. on Small Bus.*, 104th Cong. 46-54 (1995) [hereinafter *The Cost of Federal Regulations*] (report of the Office of Advocacy of the Small Business Administration (SBA), on the changing burden of regulation, paper work, and tax compliance on small business); Paul R. Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 DUKE L.J. 213, 221-23.

3. Small businesses often work in the same fields as large businesses, merely on a smaller scale. See Office of Advocacy, Small Bus. Admin., *Small Business Profile, 1998* (visited Mar. 2, 2000) <<http://www.sba.gov/ADVO/stats/profiles/98us.html>> [hereinafter *Small Business Profile*].

4. See Mark Lewyn, *Fewer Strings Attached: A New Law Lets Little Guys Sue to End Excess Paperwork*, BUS. WK., May 13, 1996, at 26 ("Now, small businesses will have a chance to drive Washington bureaucrats up the wall once in a while."). See generally *infra* notes 65-121 and accompanying text (giving background information on

latory Enforcement Fairness Act of 1996⁵ (SBREFA) contained a judicial review provision giving individuals or entities the power to challenge federal agencies in court if the agencies do not adequately take into account the disparate impact their proposed regulations will have on small businesses.⁶ It remains to be seen whether this new weapon will be effective in assisting small businesses to survive in the current regulatory predicament.

This Note addresses the problems small businesses face in fighting or complying with federal regulations aimed primarily at the activities of big businesses, and Congress's legislative response to these problems. The primary focus is the initial response to the judicial review provision contained in SBREFA. A review of existing case law demonstrates that small entities have prevailed using SBREFA in cases in which there was a gross violation of federal rulemaking procedures by an agency, but failed when using SBREFA in cases in which the agency made some effort to comply with those requirements.

The first section of this Note examines the importance of small businesses and their plight in complying with federal regulations.⁷ This section analyzes data from a variety of sources to show that compliance with federal regulations is often a matter of fixed costs.⁸ The interests of large businesses in federal policymaking are better represented thanks to their ability to hire lobbyists.⁹ Additionally, large businesses have entire departments that deal with regulatory compliance.¹⁰ Small businesses often face the same regulatory requirements of these larger businesses, but lack the resources with which to fight or comply.¹¹ Data indicates that the amount expended on compliance with federal regulations is much higher proportionately for small businesses.¹²

congressional efforts to alleviate the disparate impacts of federal regulations on small entities).

5. Pub. L. No. 104-121, 110 Stat. 857 (codified as amended in scattered sections of 5 U.S.C.).

6. See 5 U.S.C. § 611 (1994 & Supp. III 1998).

7. See *infra* notes 27-64 and accompanying text.

8. See *infra* notes 61-62 and accompanying text.

9. See *infra* notes 56-60 and accompanying text.

10. See *infra* notes 63-64 and accompanying text.

11. See *infra* notes 63-64 and accompanying text.

12. See *infra* notes 61-62 and accompanying text.

The second section describes Congress's attempts at remedying this plight through the Regulatory Flexibility Act of 1980¹³ (RFA) and SBREFA's amendments to the RFA.¹⁴ The RFA attempted to alleviate some of the disproportionate strain placed on small businesses by requiring federal agencies, as part of their regulatory promulgation process, to take into account any disparate impacts that small entities might face.¹⁵ An analysis of the legislation's effects shows that the RFA had little effect on the federal rulemaking process, in part, because it allowed agencies to certify with very little supporting data that their regulation would not have a disparate impact on small entities and, therefore, that a cost-benefit analysis was not required.¹⁶ Further, small businesses had no remedy when the agencies' conclusions were wrong.¹⁷ Congress, in an attempt to address this problem, passed SBREFA, which included, among other things, a judicial review provision allowing individuals or entities to challenge federal agency violations of the RFA in court.¹⁸

The third section looks at some of the early court cases that have arisen as a result of the new power given to small businesses by SBREFA.¹⁹ In two instances, federal district court judges have found federal agency violations of the RFA's requirements sufficiently egregious to warrant a remand of the regulation to the agency for further research into its disparate impact of the regulation on small entities.²⁰ Four other cases involved regulations that were deemed valid by federal circuit and district court judges in spite of the objections to the manner in which the agencies complied with the requirements of the RFA.²¹

Finally, the fourth section analyzes this case law and predicts how courts will decide similar cases in the future.²² In the two cases in which regulations were remanded, the agency had obvi-

13. Pub. L. No. 96-354, 94 Stat. 1164-65 (codified as amended at 5 U.S.C. § 601).

14. See *infra* notes 65-121 and accompanying text.

15. See *infra* notes 65-67 and accompanying text.

16. See *infra* notes 79, 84-86 and accompanying text.

17. See *infra* notes 80-81, 87-90 and accompanying text.

18. See *infra* notes 93-121 and accompanying text.

19. See *infra* notes 122-222 and accompanying text.

20. See *infra* notes 122-66 and accompanying text.

21. See *infra* notes 167-222 and accompanying text.

22. See *infra* notes 223-40 and accompanying text.

ously promulgated its regulation with little regard for the requirements of the RFA, or had conducted its study of the proposed regulation's effects in a disingenuous manner.²³ In the four cases in which the regulation was upheld, it was unclear whether the analysis required by the RFA had been thoroughly conducted, but it was clear to the judge that a good faith effort had been made.²⁴ This analysis leads to the conclusion that small entities can expect to receive some protection from the RFA and SBREFA, but that this legislation is not a shield from every disparate impact resulting from federal regulation.²⁵ Additionally, agencies should be on notice that Congress and the courts are serious about the procedures involved in the rulemaking process and that an utter disregard or contempt for these rulemaking procedures will only stand in the way of their rulemaking agenda.²⁶

SMALL BUSINESSES AND FEDERAL GOVERNMENT REGULATION

Importance of Small Businesses

Small businesses are important in several respects. First, in terms of contribution to the gross national product, a healthy small business sector is vital to the success of the economy.²⁷ Of all private firms in the United States, 99.7% are considered

23. See *infra* notes 223-28 and accompanying text.

24. See *infra* notes 229-32 and accompanying text.

25. See *infra* notes 229-40 and accompanying text.

26. See *infra* notes 239-40 and accompanying text.

27. See Office of Advocacy, Small Bus. Admin., *The New American Evolution: The Role and Impact of Small Firms*, June, 1998 (last modified June 12, 1998) <http://www.sba.gov/ADVO/stats/evol_pap.html> [hereinafter *New American Evolution*] ("The crucial barometer for economic and social well-being is the continued high level of creation of new and small firms in all sectors of the economy by all segments of society. . . . Are small firms important? Yes. The impressive performance of the U.S. economy over the past six years can be contrasted with the rather lackluster performance in both Europe and Japan. This divergent macroeconomic performance can be explained in part by differences in competition, entrepreneurship and new firm start-ups."). But see Richard J. Pierce, Jr., *Small Is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 ADMIN. L. REV. 537, 539-40 (1998) ("Small firms do not produce disproportionate quantities of social 'goods.' They do produce massively disproportionate quantities of social 'bads.' In any event, there is no empirical support for the widespread contrary belief, and there is no plausible meritocratic rationale for conferring favored treatment on small business.").

small businesses.²⁸ These firms contribute roughly half of the country's private nonfarm gross product.²⁹ In 1997, income generated by sole proprietors and partners rose 4.3% to \$503.8 billion.³⁰ The success of the American economy, particularly in the last few years, can be attributed to "fostering and promoting entrepreneurial activity."³¹ In fact, "[t]he emerging conventional wisdom seems to suggest that small firms and entrepreneurship are both necessary for macroeconomic prosperity."³² The Small Business Administration's Office of Advocacy explains small business' contribution to the economy in terms of "efficiency and dynamics."³³ The efficiency contribution stems from the fact that "there are certain things small firms do better than large firms."³⁴ One example is that small firms are often better innovators.³⁵ Another example is that, in certain situations, it is cheaper for a large firm to contract out services to or buy supplies from smaller firms.³⁶ The dynamic contribution of small firms stems from the fact that the small business sector of the economy is better equipped to change and adapt to a given market than are its larger competitors.³⁷

Second, one should care about small businesses because a healthy small business sector is necessary for job creation. Small firms employ over half of the nation's workforce.³⁸ Additionally,

28. See Office of Advocacy, Small Bus. Admin., *Characteristics of Small Business Employees and Owners, 1997*, § 2.1 (visited Mar. 2, 2000) <http://www.sba.gov/ADVO/stats/ch_emp_o.html> [hereinafter *Characteristics*] ("Of the 5,369,068 employer firms (excluding self-employed individuals without employees) in 1995, 78.8 percent had fewer than ten employees, and 99.7 percent had fewer than 500 employees.").

29. See *New American Evolution*, *supra* note 27, at tbl.2.

30. See *Small Business Profile*, *supra* note 3.

31. *New American Evolution*, *supra* note 27. The Office of Advocacy of the U.S. SBA has pointed to three factors in the resurgence of the American economy: (1) the "entrepreneurialization" of large businesses, (2) the blossoming of new and small start-up companies, and (3) the entry of women, minorities, and immigrants into the business world. See *id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. See *infra* notes 46-48 and accompanying text.

36. See *New American Evolution*, *supra* note 27.

37. See *id.*

38. In 1996, 56.5% of all employees in the United States worked for firms employing less than 500 employees, which generally is the standard defining small busi-

there are 10,507,000 self-employed workers in the United States.³⁹ From 1992 to 1996, firms with fewer than 500 employees created all of the new jobs in the United States.⁴⁰ As larger firms continue to streamline and downsize, small businesses will be relied upon to keep Americans working.⁴¹ Not only do small businesses employ over half of all Americans, they employ those Americans who often cannot find work anywhere else. Very small firms hire part-time employees "at a rate almost twice that of very large firms. . . . Overall, 20.5% (11.5 million) of small firm workers were part-time employees in 1996, compared to the 17.4% (7.5 million) of large firm workers."⁴² Thus, parents and others who wish to work, but cannot do so full-time, have a better opportunity of finding an employment situation that fits their needs at a small firm. Small firms also employ a "higher ratio of employees with lower educational levels."⁴³ The small firm workforce employs about thirty million workers with a high school degree or less, compared with the nineteen million employed by larger firms.⁴⁴ In addition, small firms hire more employees receiving public and financial assistance than do larger firms.⁴⁵ Thus, not only do small businesses contribute greatly to the overall employment of America, but they hire more individuals who otherwise would remain unemployed.

Third, small businesses, particularly the newer, start-up firms, "play a crucial role in experimentation and innovation, which leads to technological change and productivity growth."⁴⁶ Small firms are prolific innovators because "[i]nnovations arise

ness. See *Characteristics*, *supra* note 28, at tbl. 2.1.

39. See *Small Business Profile*, *supra* note 3.

40. See *id.* Firms with less than 500 employees generally are considered to be small businesses, although, as will be discussed later, the SBA has more specific definitions of small businesses that vary by the type of industry in which the firm does business. See *Characteristics*, *supra* note 28, § 1; *infra* notes 157-61 and accompanying text.

41. See *New American Evolution*, *supra* note 27.

42. *Characteristics*, *supra* note 28, § 3.3. Firms with less than 10 employees hire 31.7% of their employees on a part-time basis compared to firms with more than 1000 employees who hire only 17.7% of their employees on a part-time basis. See *id.*

43. *Id.* § 3.4.

44. See *id.*

45. See *id.* § 3.5.

46. *New American Evolution*, *supra* note 27.

only when property rights are properly aligned."⁴⁷ This occurs more in small firms because "small firms can hold clear property rights."⁴⁸ In other words, there is no reason for an entrepreneur to take her innovation to a larger firm where the proceeds of that innovation will have to be shared when she can start her own small business and keep all the profits for herself.

Finally, small firms are an avenue through which women, minorities, immigrants, and others who find themselves unable to find conventional economic success can gain access to the mainstream economy.⁴⁹ Over the last twenty to thirty years, female small business ownership has increased from 5% to 38%.⁵⁰ This is important not only for its economic empowerment of women, but also because "raising children and self-employment seem to go together, and home-based firms have the capacity for both."⁵¹ In a similar fashion, small business ownership by minorities increased between 1987 and 1992 from 8.8% of total firms to 12.5%.⁵² The importance of these developments, according to the Office of Advocacy, is that "these businesses are building a community and developing networks, and therefore will grow and prosper in the future."⁵³

Disproportionate Impact of Federal Regulations on Small Businesses

Despite the equal footing of small businesses in the economy, federal regulations seem to favor large corporations.⁵⁴ By some

47. *Id.*

48. *Id.*

49. *See id.*

50. *See id.* Women make up 37.4%, or 4.2 million, of the self-employed with earnings. *See Characteristics*, *supra* note 28, § 5.1.

51. *New American Evolution*, *supra* note 27. Studies have substantiated that "workers [in smaller companies] report having fewer work-family conflicts." Shelly M. MacDermid et al., *Organizational Size and Work-Family Issues*, 562 ANNALS AM. ACAD. POL. & SOC. SCI. 111, 122 (1999).

52. *See New American Evolution*, *supra* note 27.

53. *Id.*

54. *See generally* Pineles, *supra* note 1, at 29-32 (discussing the need for regulatory flexibility for small businesses); Thomas O. Sargentich, *The Small Business Regulatory Enforcement Fairness Act*, 49 ADMIN. L. REV. 123, 124-26 (1997) (same); Verkuil, *supra* note 2, at 215-23 (same).

estimates, small firms shoulder 63% of the total cost of complying with federal regulations.⁵⁵ Several reasons exist for this disparity.

First, federal regulations typically are written with bigger businesses in mind.⁵⁶ When Congress first addressed the problem of cost disparity in complying with federal regulations between large and small businesses, it found that "(1) small businesses were underrepresented in federal regulatory proceedings; and (2) federal agency efforts to impose a 'one-size-fits-all' body of regulation imposed disproportionate burdens on those small businesses."⁵⁷ It should surprise no one that federal agencies, in trying to alleviate the social ills of industry, target their regulations on the most visible offenders—large businesses.⁵⁸ Problems occur, however, when smaller businesses, which as a whole create only a fraction of the problems of big businesses, are forced to comply with an onerous regulation tailored for a much larger business.⁵⁹ Compounding this problem are the relatively insignificant resources that small businesses are able to direct toward lobbying efforts to change the rulemaking process to better reflect their interests.⁶⁰

55. See *The Cost of Federal Regulations*, *supra* note 2, at 39.

56. See Pineles, *supra* note 1, at 30.

57. *Id.*; see also S. REP. NO. 96-878, at 1 (1980), reprinted in 1980 U.S.C.C.A.N. 2788, 2788.

58. Although written in 1982, Professor Verkuil's assessment of the federal regulatory scene and its impact on small businesses still rings true today, to the dismay of many small business owners:

EPA's effluent-reduction regulations have a greater impact on small business than on large business because the regulations mandate compliance techniques that are less compatible with the production technologies of small firms. DOE's record-keeping requirements concerning oil and gas prices and volume are vague and unintelligible. OSHA is faulted for its national-consensus standards, which burden small businesses that lack technical expertise to interpret the requirements. The Internal Revenue Service (IRS) is criticized for promulgating unreasonable and complicated ERISA regulations that, rather than protecting employee pension rights, have the practical effect of terminating pension plans for employees of small businesses.

Verkuil, *supra* note 2, at 221-22.

59. See Sargentich, *supra* note 54, at 125 ("[G]eneralized rulemaking does not naturally look to the special needs of and burdens on small entities . . ."). But see Pierce, *supra* note 27, at 557-61 (describing the responsibility of small firms for a disproportionate quantity of social bads).

60. See DAVID O. STEWART, REPRESENTING SMALL BUSINESSES § 4.3, at 154 (1986).

A second cause of the disparity in the costs of compliance between large and small businesses is an economic consequence of economies of scale. As Barry Pineles explains, "if the cost of compliance with a federal regulation is fixed, then the smaller firm will suffer a more severe impact since it has a smaller output over which to recover the costs."⁶¹ A congressional study proved this, finding that "the average annual cost of regulation, paperwork, and tax compliance for firms with fewer than 500 employees is about \$5,000 per employee, compared with about \$3,400 per employee for firms with more than 500 employees."⁶²

Finally, small businesses have more trouble meeting federal regulatory burdens because they lack the compliance resources that make it easier for big businesses to deal with federal regulations.⁶³ Big businesses have administrative departments, legal counsel, and other resources that they can devote exclusively to researching regulations, filling out forms, and conducting other tasks involved in complying with federal requirements. This allows the rest of the company to undertake the regular business of the firm. On the other hand, in the case of small businesses, it is often the owner who is left alone to comprehend and comply with federal regulatory requirements; a daunting task undertaken in addition to his management duties.⁶⁴

LEGISLATIVE EFFORTS TO ASSIST SMALL BUSINESSES IN COMPLYING WITH FEDERAL REGULATIONS

Regulatory Flexibility Act of 1980

In the waning months of the Carter Administration, Congress attempted to alleviate some of the problems of federal regulation for small businesses by passing the RFA.⁶⁵ The framers of the

61. Pineles, *supra* note 1, at 31; see also Sargentich, *supra* note 54, at 125 (noting that small businesses face higher costs per unit of output than larger businesses because they lack economies of scale); Verkuil, *supra* note 2, at 220-23 (same).

62. *The Cost of Federal Regulations*, *supra* note 2, at 38-39.

63. See Verkuil, *supra* note 2, at 221 (acknowledging the disproportionate burden faced by small businesses in complying with the tax code).

64. See Pineles, *supra* note 1, at 30; see also 126 CONG. REC. S21,451-52 (daily ed. Aug. 6, 1980) (statement of Sen. Culver) (discussing the unfair impact uniform regulations have on small businesses).

65. Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164 (codified

RFA intended it to address the fact that "uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands . . . upon small businesses, small organizations, and small governmental jurisdictions with limited resources."⁶⁶ According to Professor Thomas Sargentich, "the underlying premise of the RFA was to require that agencies conducting notice-and-comment rulemaking consider fully the effects of such rulemaking on 'small entities'"⁶⁷

Procedurally, the RFA does not prevent federal agencies from promulgating regulations that have difficult compliance requirements for small businesses.⁶⁸ Federal agencies in the process of promulgating rules that will have a significant impact⁶⁹ on small entities⁷⁰ must first complete an initial regulatory flexibility analysis and publish the results of the analysis in the *Federal Register*.⁷¹ Generally, this analysis must contain a description of the regulation, the rationale for its promulgation, an estimate of its cost, both in time and money, and a description of any alter-

as amended at 5 U.S.C. § 601).

66. Regulatory Flexibility Act § 2(a)(3), 94 Stat. at 1164. The underlying purposes of the RFA recognize that "the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation." § 2(a)(6), 94 Stat. at 1164.

67. Sargentich, *supra* note 54, at 124.

68. See 5 U.S.C. §§ 603-604 (1994); Sargentich, *supra* note 54, at 125 ("The key procedural requirement of the RFA is the preparation of initial and final regulatory flexibility analyses . . . to accompany, respectively, notices of proposed rules and final rules that affect small entities."); *infra* text accompanying notes 239-40 (explaining the potential political ramifications of full disclosure).

69. For a discussion on the problems of defining "significant impact" in the context of environmental rulemaking, see Keith N. Cole, *The Small Business Regulatory Enforcement Fairness Act and the Regulatory Flexibility Act: Could a Single Word Doom the New NAAQS?*, 11 TUL. ENVTL. L.J. 281, 287-92 (1998).

70. The RFA defines the term "small entity" as meaning "small municipalities of less than 50,000 people, small nonprofit organizations and 'small business concern[s]' as that term is defined by the Small Business Administration." *Id.* at 282 n.2 (citing 5 U.S.C. § 601(3)-(6) (1994)); see also *infra* notes 158-61 and accompanying text (explaining how the SBA defines small businesses).

71. The initial regulatory flexibility analysis must be published at the time of the publication of the general notice of proposed rulemaking and must contain a description of "the impact of the proposed rule on small entities." 5 U.S.C. § 603(a).

native means by which the agency's objectives could be met.⁷² Once the proposed rule has been published, time is provided for any interested parties to submit comments to the agency.⁷³ A final regulatory flexibility analysis is required when the final rule is published in the *Federal Register*.⁷⁴ Generally, this final analysis must contain the same information as the initial regulatory flexibility analysis as well as responses to any relevant comments the agency received after releasing the proposed rule.⁷⁵

Additionally, the RFA requires federal agencies "in April and October of each year, . . . [to] publish in the *Federal Register* an agenda of all rules under consideration, or likely to be considered, which would have a significant economic impact on a substantial number of small entities."⁷⁶ The final requirement is

72. The analysis must contain the following:

- (1) a description of the reasons why action by the agency is being considered; (2) a succinct statement of the objectives of, and legal basis for, the proposed rule; (3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply; (4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; [and] (5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

Id. § 603(b). Finally, the initial regulatory flexibility analysis must also contain a list of "significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." *Id.* § 603(c).

73. *See id.* § 609.

74. *See id.* § 604(b).

75. The final regulatory flexibility must contain:

- (1) a succinct statement of the need for, and the objectives of, the rule; (2) a summary of the issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; and (3) a description of each of the significant alternatives to the rule consistent with the stated objectives of applicable statutes and designed to minimize any significant economic impact of the rule on small entities which was considered by the agency, and a statement of the reasons why each one of such alternatives was rejected.

Id. § 604(a).

76. STEWART, *supra* note 60, § 4.1 (citing 5 U.S.C. § 602(a)(1) (1982)).

that federal agencies conduct periodic reviews of their regulations to "determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities."⁷⁷

There are two important points to keep in mind regarding the RFA as it was originally enacted. First, an agency may promulgate the most egregiously onerous regulation for small businesses so long as the requisite regulatory flexibility analyses are completed.⁷⁸ Furthermore, if an agency promulgates a rule that does not have a significant disparate impact on small businesses as certified by the agency head, the agency may be exempted from completing the analyses.⁷⁹ Second, at the time of its enactment, the RFA provided: "[A]ny 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."⁸⁰ Thus, any violation of RFA's provisions could be reviewed only in conjunction with a broader case against the agency for violating the Administrative Procedures Act and not simply for a failure to comply with the RFA.⁸¹

77. 5 U.S.C. § 610(a).

78. Although this may be politically challenging, it is, at least in theory, allowable under the RFA. See Sargentich, *supra* note 54, at 135-36.

79. The RFA does not require agencies to complete initial or final regulatory flexibility analyses "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." 5 U.S.C. § 605(b). If a certification is made, "the agency shall publish such certification in the Federal Register, . . . along with a succinct statement explaining the reasons for such certification." *Id.*; see also STEWART, *supra* note 60, § 4.10 (discussing the impact of allowing agencies to avoid the RFA's requirements).

80. 5 U.S.C. § 611(a), amended by Pub. L. No. 104-121, § 242, 110 Stat. 847, 865-66 (1996).

81. As Barry Pineles explains:

Regulatory flexibility analyses were only part of the record upon review. The court examined the analysis and, if it is so flawed that it undercut the rationality of the rule, then the rule is invalid, not due to the agency's failure to comply with the RFA, but because the rule violated the rulemaking standards set out in the APA.

Pineles, *supra* note 1, at 37 (footnotes omitted).

Need for Amendments

The RFA made strides in exposing the plight of small businesses in complying with federal regulations and in forcing federal agencies at least to consider the disparate effects of their regulations on small entities.⁸² For several reasons, however, it did not have the effect of significantly reducing the regulatory burden on small businesses that its supporters had hoped it would.⁸³ The first problem with the RFA was federal agency abuse of the certification provision.⁸⁴ The provision was intended to operate as an escape clause to avoid waste in the promulgation of rules and regulations that had nothing to do with the small entities.⁸⁵ In practice, however, agencies abused the certification provision by simply attaching boilerplate language to their notice of proposed rulemaking stating that the requisite secretary or administrator had certified that the proposed rule would not have a significant impact on a substantial number of small entities, even when the contention was clearly incorrect.⁸⁶

The RFA's second flaw was its disallowance of judicial review if a federal agency's rulemaking process did not meet the Act's requirements.⁸⁷ Abuse of the certification requirement would not

82. See STEWART, *supra* note 60, § 4.1; Pineles, *supra* note 1, at 37 (lauding the efforts of the FCC in reducing the impact of its regulations on small entities).

83. See Cole, *supra* note 69, at 284; Pineles, *supra* note 1, at 37-38; Sargentich, *supra* note 54, at 126; see also *supra* notes 54-64 and accompanying text (describing the current burdens of federal regulations on small businesses).

84. See 5 U.S.C. § 605(b); STEWART, *supra* note 60, § 4.10; Cole, *supra* note 69, at 283; Sargentich, *supra* note 54, at 125; Verkuil, *supra* note 2, at 241-46; *supra* note 79 and accompanying text.

85. According to the Senate report accompanying the RFA at the time of its passage, the certification provision was intended to be given "great deference by the courts" so long as it was "made in good faith and based on sound evidence." S. REP. NO. 96-878, at 14 (1980), reprinted in 1980 U.S.C.C.A.N. 2788, 2801. This certification provision has been upheld in federal court. See *Southwestern Growth Alliance v. Browner*, 121 F.3d 106, 106 (3d Cir. 1997).

86. See Cole, *supra* note 69, at 284-87 (describing the EPA's use of the certification provision to avoid conducting a regulatory flexibility analysis despite "clear indications from Congress and the Chief Counsel for Advocacy that the law required [it]"); Pineles, *supra* note 1, at 38 & n.109; *infra* text accompanying notes 145-66 (describing the failure of the Department of the Interior to conduct a regulatory flexibility analysis when evidence clearly showed that one was required).

87. See 5 U.S.C. § 611(a), amended by Pub. L. No. 104-121, § 242, 110 Stat. 847, 865-66 (1996); *supra* notes 80-81 and accompanying text.

have been a crippling impediment to the RFA if small entities had a remedy against those agencies who promulgated regulations antithetical to the purpose of the RFA.⁸⁸ Unfortunately, under the RFA, small businesses generally did not have such a remedy.⁸⁹ The only exception, as explained by Professor Sargentich, is "[w]hen judicial review of a rule [as a whole] is instituted, any reg-flex analysis 'shall constitute part of the whole record of agency action' in connection with such review."⁹⁰ Thus, an incorrect or abusive certification by a federal administrator could be considered in court only as a factor when the entire rulemaking process was being examined, but could not by itself overturn a proposed rulemaking decision.

The third problem associated with the RFA was the constant disregard for the law by some agencies.⁹¹ In hearings before the 104th Congress prior to the passage of SBREFA's amendments to the RFA, Jere Glover, Chief Counsel for Advocacy of the SBA, explained:

Unfortunately . . . compliance with the RFA is inadequate. Agencies, such as the Internal Revenue Service, the Department of Agriculture (with the Forest Service and Agricultural Marketing Service being especially egregious violators), and the Department of Interior, can ignore the RFA. The only way to ensure that all agencies comply with the RFA, and therefore consider the impact of their regulatory proposals on small business is to modify the RFA so that agency compliance can be tested in court.⁹²

Accordingly, although the procedural requirements of the RFA showed promise in informing both government and industry of the disparate impact of federal regulations on small businesses, it failed to remedy the disparity because private forces were unable to enforce its provisions by taking the agencies to court.

88. See Sargentich, *supra* note 54, at 126.

89. See *id.*

90. *Id.* (quoting 5 U.S.C. § 611(b)); see also *supra* notes 80-81 and accompanying text (noting that judicial review of regulatory flexibility analyses was only available under RFA if incorporated into review of a larger rulemaking process).

91. See STEWART, *supra* note 60, § 4.10.

92. *The Cost of Federal Regulations*, *supra* note 2, at 30 (testimony of Jere W. Glover, Chief Counsel for Advocacy, U.S. SBA).

Small Business Regulatory Enforcement Fairness Act of 1996

In response to the aforementioned problems with the RFA and the desire to give small businesses more protection against the disparate effects of federal rules and regulations, Congress passed SBREFA⁹³ as part of the Contract with America Advancement Act of 1996.⁹⁴ In justifying the legislation, SBREFA's framers included a list of findings that, among other things, recognized the importance of small businesses and the problems they faced in complying with federal regulations.⁹⁵ Although most of the provisions in SBREFA are beyond the scope of this Note, it is useful to discuss these provisions briefly before turning to the provision that is most relevant: SBREFA's amendments to the RFA that provide for judicial review.

Subtitle A of SBREFA attempts to address the problem of rules and regulations that are written in such a manner as to make them incomprehensible to the typical small business owner.⁹⁶ First, it requires federal agencies, as part of their rulemaking process, to develop "small entity compliance guides [that] explain the actions a small entity is required to take to comply

93. Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (codified as amended in scattered sections of 5 U.S.C.).

94. Pub. L. No. 104-121, §§ 201-253, 110 Stat. 847, 857-74 (codified at 5 U.S.C. § 611).

95. See *id.* § 202, 110 Stat. at 857. The findings section reads:

Congress finds that –

(1) a vibrant and growing small business sector is critical to creating jobs in a dynamic economy;

(2) small businesses bear a disproportionate share of regulatory costs and burdens;

(3) fundamental changes that are needed in the regulatory and enforcement culture of Federal agencies to make agencies more responsive to small business can be made without compromising the statutory missions of the agencies;

(4) three of the top recommendations of the 1995 White House Conference on Small Business involve reforms to the way government regulations are developed and enforced, and reductions in government paperwork requirements;

(5) the requirements of chapter 6 of [RFA] have too often been ignored by government agencies, resulting in greater regulatory burdens on small entities than necessitated by statute; and

(6) small entities should be given the opportunity to seek judicial review of agency actions required by chapter 6 of title 5, United States Code.

Id.

96. See *id.* §§ 211-216, 110 Stat. at 858-59; Sargentich, *supra* note 54, at 130-31.

with a rule"⁹⁷ The statute further stipulates that the guides must be "written using sufficiently plain language likely to be understood by affected small entities."⁹⁸ Second, subtitle A requires agencies to work with small entities in a way that enhances the agency's ability to informally "answer inquiries by small entities concerning information on, and advice about, compliance with such statutes and regulations."⁹⁹ Although the outward goal of subtitle A is to make federal regulations more understandable to small business owners, questions have arisen in conjunction with this provision as to "whether the guides or guidances will provide a basis for a court to hold an agency estopped from acting in a manner contrary to that spelled out in the guides or guidances."¹⁰⁰

Subtitle B provides for changes in the way federal regulations are enforced against small businesses.¹⁰¹ It attempts to accomplish this in two ways. One such way is by establishing an Enforcement Ombudsman at the SBA and Regulatory Fairness Boards at each regional office of the SBA.¹⁰² The Ombudsman "work[s] with each federal agency to ensure that small entity concerns are considered."¹⁰³ The Regional Fairness Boards hear the comments and complaints of small businesses in their region and report those statements to the Ombudsman.¹⁰⁴ Second, subtitle B requires agencies to "establish a policy or program . . . to provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement."¹⁰⁵ "Overall, the hope is to 'change the culture' of agencies to promote avoidance of enforcement activity that is 'excessive and abusive.'"¹⁰⁶

97. *Id.* § 212(a), 110 Stat. at 858.

98. *Id.*

99. *Id.* § 213(a), 110 Stat. at 859.

100. Sargentich, *supra* note 54, at 130; *see also* § 222, 110 Stat. at 860-62 (reforming the regulatory enforcements).

101. *See* §§ 221-224, 110 Stat. at 860-62; Sargentich, *supra* note 54, at 131-33.

102. *See* § 222, 110 Stat. at 860-62; Sargentich, *supra* note 54, at 131-32.

103. Sargentich, *supra* note 54, at 131; *see also* § 222, 110 Stat. at 860.

104. *See* § 222, 110 Stat. at 861; Sargentich, *supra* note 54, at 131-32.

105. § 223, 110 Stat. at 862; *see* Sargentich, *supra* note 54, at 132.

106. Sargentich, *supra* note 54, at 131 (quoting 142 CONG. REC. S3243 (daily ed. Mar. 29, 1996) (Joint Managers's Statement of Legislative History and Congressional

Subtitle C "amend[s] the Equal Access to Justice Act (EAJA) to allow small entities to recover attorneys' fees and costs attributable to substantially excessive and unreasonable demands by an agency in a regulatory enforcement context."¹⁰⁷ The test for the recovery of fees and costs is whether the original government demand that led to the action is "substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision."¹⁰⁸ Though the clear intent of subtitle C is to "change the culture" of federal agencies in their enforcement of regulations, critics worry that it merely will increase the amount and stakes of litigation in the field.¹⁰⁹

Subtitle E authorizes a "legislative veto of regulations promulgated after March 29, 1996."¹¹⁰ After receiving a mandatory report from a federal agency for any regulation issued, "Congress can then, by enacting a joint resolution, prevent the regulation from taking effect unless the President vetoes the resolution within thirty days of its passage."¹¹¹

Although the provisions mentioned above serve the essential tasks of making important regulations more understandable and providing a defense against particularly aggressive agencies, none have had the potential impact of subtitle D and its judicial review provision. Subtitle A only ensures that rules and regulations are comprehensible to those who read them, something that common sense dictates should be accomplished without a legislative mandate.¹¹² Subtitle B fights unfair enforcement of regulations, but requires small entities either to file their complaints through another federal agency or to attempt to obtain a waiver from the agency that cited them for a violation;¹¹³ neither seems to be a process that small businesses will undertake readily. Subtitle C may be a powerful weapon, but is one that must overcome a court's deference to governmental decisions and can be used only when the process of enforcement has been

Intent)).

107. Sargentich, *supra* note 54, at 133 (footnotes omitted); see §§ 231-232, 110 Stat. at 862-63.

108. § 231(a), 110 Stat. at 862-63.

109. See Sargentich, *supra* note 54, at 134-35.

110. Pineles, *supra* note 1, at 40 (footnote omitted); see § 251-53, 110 Stat. at 868-74.

111. Pineles, *supra* note 1, at 40; see § 251, 110 Stat. at 868-74.

112. See *supra* notes 96-100 and accompanying text.

113. See *supra* notes 101-06 and accompanying text.

undertaken and costs have been expended to defend oneself.¹¹⁴ Finally, although it offers an encouraging indication of the political rise of the small business lobby, subtitle E requires disgruntled small business owners to file their grievances through another dubious governmental body—Congress.¹¹⁵

Conversely, subtitle D provides a more substantial weapon in the fight against regulations that are oppressive to small businesses, allowing them to take federal agencies to court.¹¹⁶ Significantly, SBREFA takes steps apart from judicial review to promote more in-depth analyses of regulatory flexibility and to avoid perfunctory certifications.¹¹⁷ For instance, the new law requires that:

[A]nalyzes now must contain an estimate of the number of small businesses that will be subject to regulation or the reasons why the agency could not make that estimate; the factual, legal, and policy reasons why the agency could not take steps to minimize burdens on small businesses; and the type of professional skills needed to comply with any recordkeeping or reporting requirements.¹¹⁸

In addition, with regard to the certification process, SBREFA mandates that the agency head "provide the factual basis for the certification."¹¹⁹ Lastly, it establishes small business advocacy review panels, coordinated by the SBA's Office of Advocacy and made up of interested federal employees, who review feedback from affected small business entities and report on their findings to the agency promulgating the regulation.¹²⁰

Although these provisions are well-intended improvements in the regulatory process, they ultimately will be ineffective without the corresponding threat of judicial review because they impose no meaningful sanction for an agency's noncompliance. Thus, judicial review is the lynchpin of SBREFA's reforms because it provides the much needed reprisal for an agency's in-

114. See *supra* notes 107-09 and accompanying text.

115. See *supra* notes 110-11 and accompanying text.

116. See §§ 241-245, 110 Stat. at 864-68; Pineles, *supra* note 1, at 38-39; Sargentich, *supra* note 54, at 127-29.

117. See *supra* notes 84-86, 91-92 and accompanying text.

118. Pineles, *supra* note 1, at 38 (footnotes omitted); see § 241, 110 Stat. at 864-65.

119. Pineles, *supra* note 1, at 38; see § 243, 110 Stat. at 866.

120. See § 244, 110 Stat. at 867-68.

transigence with respect to the RFA's requirements. "If a small business disagrees with either the final analysis or certification, it can challenge the agency's compliance in court" and the court may "delay the enforcement of the rule against small businesses until the agency has complied with the RFA."¹²¹ By holding over the agencies the threat of going to court and having to start the promulgation process anew, SBREFA imposes significant costs on an agency's disregard of the RFA.

JUDICIAL REVIEW IN ACTION

In theory, the threat of litigation and a potential injunction barring enforcement of an ill-considered regulation should be enough to force federal agencies to give some consideration to the requirements of the RFA. In practice, however, small businesses with valid complaints may find the court system to be expensive, time-consuming, and unpredictable. Whether small businesses are actually willing to use the judicial review provision is vitally important to the success of the revamped RFA. Accordingly, this section provides a preliminary survey of cases that have been brought using the new judicial review provision.

Cases in Which Judicial Review Was Used to Remand Federal Regulations

Southern Offshore Fishing Ass'n v. Daley

In *Southern Offshore Fishing Ass'n v. Daley*¹²² the National Marine Fishery Service (NMFS), an agency within the Depart-

121. Pineles, *supra* note 1, at 38-39; see § 242, 110 Stat. at 865-66.

122. 995 F. Supp. 1411 (M.D. Fla. 1998); see also *North Carolina Fisheries Ass'n v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1998) (finding the economic analysis to be insufficient and setting aside some of the quota); *North Carolina Fisheries Ass'n v. Daley*, 16 F. Supp. 2d 647 (E.D. Va. 1997) (finding that NMFS was not justified in certifying that small entities would not be affected by its quotas and fish size limits and ordering the agency to complete economic analysis on the effects of the regulation on small entities). But see *Washington v. Daley*, 173 F.3d 1158, 1171 (9th Cir. 1999) (finding that a certification in a similar regulation was appropriate because the language of the RFA "calls for the agency to consider the [significant economic] effect on the entity, not the effect on revenue earned from a particular harvest"); *Associated Fisheries v. Daley*, 127 F.3d 104 (1st Cir. 1997) (finding that a certification in a similar regulation promulgated before the SBREFA amendments was justified using the pre-amendment requirements of the RFA).

ment of Commerce, had promulgated rules establishing commercial harvest quotas and minimum fish size limits for some species of fish.¹²³ Initially, NMFS certified that the proposed rule would not have "a significant economic impact on a substantial economic number of small entities."¹²⁴ NMFS justified its certification "primarily because of the large degree of diversification in fishing operations that exist in the fleet and the already short shark fishing season."¹²⁵ Many disagreed with NMFS's initial assessment of the effects of its rules on small entities.¹²⁶ The case record showed that "[c]omments from the public and from the Small Business Administration included assertions that the proposed rule may significantly injure a substantial number of small businesses."¹²⁷

NMFS responded to these comments by reasserting in its final rule that although many fishermen are considered to be small businesses, the rule would not affect their economic interests significantly because so few of them harvest *only* the types of species restricted from harvesting by the rule.¹²⁸ In its final regulatory flexibility analysis, NMFS concluded that, "a reduction in quota should have relatively little impact on commercial shark fishing firms since the season, even if cut by more than half, would not adversely impact other harvesting operations that take up the majority of the fishing season."¹²⁹

In *Southern Offshore Fishing*, the plaintiffs had two claims relating to the RFA. The first was that "NMFS failed to prepare

123. NMFS, an agency of the National Oceanic and Atmospheric Administration of the Department of Commerce, made the rules pursuant to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1813 (1980), which delegated to the Secretary of the Treasury "broad authority to manage and conserve coastal fisheries." *Southern Offshore Fishing*, 995 F. Supp. at 1416 (quoting *Kramer v. Mosbacher*, 878 F.2d 134, 135 (4th Cir. 1989)).

124. Atlantic Shark Fisheries; Quotas, Bag Limits, Prohibitions, and Requirements, 61 Fed. Reg. 67,295, 67,298 (1996) (amending 50 C.F.R. pt. 678) (proposed Dec. 20, 1996).

125. *Id.*

126. *See Southern Offshore Fishing*, 995 F. Supp. at 1424.

127. *Id.*

128. *See* Atlantic Shark Fisheries; Quotas, Bag Limits, Prohibitions, and Requirements, 62 Fed. Reg. 16,648, 16,653 (1997) (amending 50 C.F.R. pt. 678).

129. *Southern Offshore Fishing*, 995 F. Supp. at 1424 (quoting A.R. Vol. 5, tab IV-K-34, at 32 (FRFA)).

an initial regulatory flexibility analysis (IRFA) pursuant to § 603, solicit comments on the IRFA, and prepare a final regulatory flexibility analysis (FRFA) incorporating public comment proceedings, pursuant to § 604.¹³⁰ Implicit in this claim was the allegation that the certification offered by NMFS, made pursuant to § 605(b), was incorrect.¹³¹ The second claim under the RFA was that "the [final regulatory flexibility analysis] prepared by NMFS failed to comply with § 604."¹³² Citing the judicial review amendments of SBREFA, Judge Merryday found that, "[b]oth NMFS's certification pursuant to §605(b) and the adequacy of a [final regulatory flexibility analysis] are reviewable."¹³³

NMFS rationalized their certification in terms Judge Steven D. Merryday described as "suspiciously cryptic,"¹³⁴ concluding that

shark fishermen are nimble and adaptive in their fishing operations (that is, they pursue sharks in the season as well as other fish and at other times) and that the shark fishing season was historically too brief to permit a prudent fisherman to rely exclusively on annual revenue from shark fishing.¹³⁵

NMFS estimated that the average gross revenue from shark fishing was \$26,426,¹³⁶ but Judge Merryday soundly criticized this statistic.¹³⁷

The commercial fishermen responded by "explaining their dependence on sharks (especially [large coastal sharks]) and the

130. *Id.* at 1434 (footnote omitted).

131. *See id.*

132. *Id.*

133. *Id.* (citing 5 U.S.C. § 611(a)(1) (1994)).

134. *Id.*

135. *Id.* (citing A.R. Vol. 5, tab IV-K-16, at 28).

136. *See id.* at 1435.

137. *See id.* Judge Merryday explained:

The record fails to contain an adequate explanation of the agency's calculation, if any, leaving no possibility to gauge its rationality, which is manifestly suspect. Further, NMFS cannot demonstrate how the loss of a major portion of \$26,426 . . . would not . . . constitute a significant economic impact on a substantial number of directed shark fishermen.

Id.

quotas' punitive effect on their livelihood."¹³⁸ The SBA also was critical of NMFS's certification, "stating that it was 'perplexed' and 'bewildered' by the 'illogical' certification."¹³⁹ Based on expert testimony, Judge Merryday rejected NMFS's claim that fishermen could easily subsidize their earnings by harvesting other types of fish.¹⁴⁰ He explained, "One can no more readily change a bass boat to a flats boat than change directed shark fishing paraphernalia to equipment for profitable tuna fishing."¹⁴¹ Judge Merryday further cited the secretary of commerce's past refusal to employ stricter quotas out of concern for the industry as "incongruous" with his current stand that the quotas would not have a significant impact on fishermen.¹⁴² In finding for the fishermen, Judge Merryday concluded from the record that NMFS's rules would "significantly injure the prospects of shark fishermen,"¹⁴³ and that the certification and the final regulatory flexibility analysis failed to meet the requirements of the RFA.¹⁴⁴

Northwest Mining Ass'n v. Babbitt

In *Northwest Mining Ass'n v. Babbitt*¹⁴⁵ the Bureau of Land Management (BLM), an agency of the Department of Interior, had promulgated a change in its regulations concerning the use of public lands by private mining operations.¹⁴⁶ The relevant por-

138. *Id.*

139. *Id.* (quoting A.R. Vol. 5, tab IV-K, at 13).

140. *See id.*

141. *Id.* at 1436.

142. *Id.*

143. *Id.*

144. *See id.* In so concluding, Judge Merryday admitted to being "mindful that the RFA does not require mechanical exactitude." *Id.* at 1437. He went on to stress that "the statute compels the Secretary to make a 'reasonable, good-faith effort,' prior to issuance of a final rule, to inform the public about potential adverse effects of his proposals and about less harmful alternatives." *Id.*; see also *Associated Fisheries v. Daley*, 127 F.3d 104, 114-15 (1st Cir. 1997) (drawing a parallel between section 604 of the RFA and the National Environmental Policy Act's environmental impact statement and concluding that both require the Secretary to notify the public, in good faith, about a proposal's adverse effects and less harmful alternatives before reaching a final decision).

145. 5 F. Supp. 2d 9 (D.D.C. 1998).

146. *See id.* at 11-12.

tion of the amended regulation, made pursuant to the Federal Land Policy and Management Act,¹⁴⁷ changed the size requirement for mining operations that are required to post a bond to offset the cost of clean-up operations for abandoned mines on public land.¹⁴⁸ The effect of the regulation was that smaller to midsize mining operations that previously had been able to operate without a bond, now were put in the position of having to front a large amount of cash before they could begin operations.¹⁴⁹ In contrast, the regulations had little impact on larger mining operations who had been posting bonds all along.¹⁵⁰

BLM paid little attention to these concerns in its rulemaking.¹⁵¹ In its proposed rule, issued on July 11, 1991, the Department of the Interior exercised its section 605 option under the RFA to certify that an initial regulatory flexibility analysis was unnecessary.¹⁵² The certification contained no justification other than, "[the rule] will not have a significant economic impact on a substantial number of small entities."¹⁵³ In its final rule, published over five and a half years after the proposed rule, BLM published a slightly more detailed regulatory flexibility analysis that continued to maintain that "the final rule will not have a

147. 43 U.S.C. §§ 1701-1784 (1994 & Supp. II 1996). The Act gives the Secretary of the Interior the power to "manage public lands 'in a manner which recognizes the Nation's need for domestic sources of minerals . . . from public lands.'" *Northwest Mining*, 5 F. Supp. 2d at 11 (quoting 43 U.S.C. § 1701(a)(12)). It acknowledges "the need to manage the public lands 'in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values,'" *id.* at 11 (quoting 43 U.S.C. § 1701(a)(8)), and therefore, gives the Secretary of Interior and the BLM the power to regulate so as to "prevent unnecessary or undue degradation of the lands," 43 U.S.C. § 1732(b).

148. See *Mining Claims Under the General Mining Laws; Surface Management*, 62 Fed. Reg. 9093, 9100-03 (1997) (amending 43 C.F.R. pt. 3800) (final rule); *Mining Claims Under the General Mining Laws; Surface Management*, 56 Fed. Reg. 31,602, 31,604-05 (1991) (amending 43 C.F.R. pt. 3800) (proposed July 11, 1991).

149. See *Northwest Mining*, 5 F. Supp. 2d at 16. The court noted that "the new rule's requirements concerning the amount of regulation on the smaller notice level mining operations, the dollar amounts the BLM can require for all bonds, and the additional procedural expenses incurred by miners when obtaining the bonds, appear to have a large impact on the small miner." *Id.*

150. See *id.* at 15.

151. See *Mining Claims Under the General Mining Laws; Surface Management*, 56 Fed. Reg. at 31,604.

152. See *id.*

153. *Id.*

significant economic impact on a substantial number of small entities."¹⁵⁴

The most significant portion of the section addressing concerns with the RFA, at least in the eyes of the court, was the definition of "small entity" used by BLM as "an individual, small firm, or partnership at arm's length from the control of any parent companies."¹⁵⁵ The analysis went on to admit that because some small entities would not be able to afford the bond requirement, "the short-term impact of this rule on small entities will be to curtail some of their prospective [midlevel mining] activities."¹⁵⁶

In their claim, plaintiffs alleged that "BLM did not use the correct definition of 'small entity' (specifically, a small miner) when it made the 'no significant impact' certification."¹⁵⁷ They cited the RFA, which defines "small entity" as having "the same meaning as the term[] 'small business.'"¹⁵⁸ "Small business" is, in turn, defined by the RFA as having "the same meaning as the term 'small business concern' under section 3 of the Small Business Act."¹⁵⁹ The Small Business Act directs the SBA to set the standards by which a business is considered small according to the industry in which it operates.¹⁶⁰ According to the SBA's standards, "mining concerns must have 500 or fewer employees to be considered 'small.'"¹⁶¹

Using the power given to her by SBREFA, District Judge June L. Green of the District Court of the District of Columbia found that "[b]y using a definition other than the SBA's, the BLM violated the procedure of law mandated by the statute."¹⁶² In so finding, she concluded, "Insofar as the BLM's certification . . . was without observance of procedure required by law, the [plain-

154. Mining Claims Under the General Mining Laws; Surface Management, 62 Fed. Reg. at 9099.

155. *Id.*

156. *Id.*

157. *Northwest Mining Ass'n v. Babbitt*, 5 F. Supp. 2d 9, 15 (D.D.C. 1998).

158. 5 U.S.C. § 601(6) (1994).

159. *Id.* § 601(3).

160. *See* The Small Business Act, 15 U.S.C. § 632(a)(2)(A) (1994).

161. *Northwest Mining*, 5 F. Supp. 2d at 15 (citing 13 C.F.R. § 121.201 (division B)).

162. *Id.*

tiff] is entitled to relief. . . ."¹⁶³ Quoting the judicial review section of the RFA, as amended by SBREFA, Judge Green noted that in providing a remedy for such a violation

the court shall order the agency to take corrective action consistent with this chapter . . . including, but not limited to remanding the rule to the agency, and deferring the enforcement of the rule against small entities *unless the court finds that continued enforcement of the rule is in the public interest*.¹⁶⁴

Finding that "not . . . much would change should enforcement be discontinued,"¹⁶⁵ Judge Green remanded the rule.¹⁶⁶

Judicial Review Cases in Which the Regulation Was Upheld

Valuevision International, Inc. v. FCC

At issue in *Valuevision International, Inc. v. FCC*,¹⁶⁷ were portions of a FCC rule setting rates, terms and conditions for carriage of "leased access" programming on cable television stations.¹⁶⁸ The applicable sections of the rule were promulgated pursuant to powers granted to the FCC by the Communications Policy Act of 1984;¹⁶⁹ legislation enacted by Congress with the intent of "bringing about 'the widest possible diversity of information sources' for cable subscribers."¹⁷⁰

In its Reconsideration Order setting the terms and rates of "leased access" programming, the FCC issued an initial regulatory

163. *Id.*

164. *Id.* (quoting 5 U.S.C. § 611(4)(A)-(B) (Supp. III 1997)) (emphasis added).

165. *Id.*

166. *See id.* at 16. Judge Green noted, "While recognizing the public interest in preserving the environment, the Court also recognizes the public interest in preserving the rights of parties which are affected by government regulation to be adequately informed when their interests are at stake and to participate in the regulatory process as directed by Congress." *Id.*

167. 149 F.3d 1204 (D.C. Cir. 1998).

168. Under leased access programming, "cable operators of systems with more than thirty-six channels" were compelled "to set aside between 10 and 15 percent of their channels for commercial use by persons unaffiliated with the operator." *Id.* at 1206; see 47 U.S.C. § 532(b)(1) (1994).

169. Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C.).

170. *Valuevision*, 149 F.3d at 1206 (quoting 47 U.S.C. § 532(a) (1994)).

flexibility analysis and sought written comments;¹⁷¹ however, community broadcasters did not complain during this comment period.¹⁷² The FCC also issued a final regulatory flexibility analysis in which it "addressed the effect of its rules on small leased access programmers."¹⁷³

Despite the FCC's effort to comply with the RFA, Community Broadcasters persisted in raising the issue:

Although the Commission performed the analysis required by [the RFA and the Communications Act of 1934] . . . the Commission's analysis was insufficient because it focused on the effect the rules would have on those cable operators qualifying as small businesses and because it did not give adequate consideration to the negative impact of the rules on leased access programmers, most of whom are also small businesses.¹⁷⁴

The Court of Appeals for the District of Columbia was not as amenable to the plaintiffs' complaint as the courts in the previously mentioned cases.¹⁷⁵ Circuit Judge A. Raymond Randolph stressed that "the Commission's primary focus was on the small cable operators, who were *directly* subject to the new rule."¹⁷⁶ In denying plaintiff's petition for judicial review of the district court decision, Judge Randolph noted that, as far as cable programmers were concerned, the Commission found that the revised rules "would have only a 'positive' effect on programmers because they lowered the maximum rates for leased access service, permitted resale, granted access to highly penetrated tiers, and required part-time rates to be pro-rated. This analysis is sufficient to satisfy the obligations of the Regulatory Flexibility Act."¹⁷⁷

171. *See id.* at 1212.

172. *See id.*

173. *Id.* In addition to having to comply with the requirements of the RFA, as amended by SBREFA, the FCC also must abide by the Communications Act of 1934, 47 U.S.C. §§ 151-613, which requires the commission to "complete a proceeding for the purpose of identifying and eliminating . . . market entry barriers for . . . small businesses in . . . telecommunications." 47 U.S.C. § 257(a) (Supp. III 1997).

174. *Valuevision*, 149 F.3d at 1212.

175. *See supra* notes 122-66 and accompanying text.

176. *Valuevision*, 149 F.3d at 1213 (emphasis added).

177. *Id.* (citation omitted).

American Trucking Ass'ns v. EPA

*American Trucking Ass'ns v. EPA*¹⁷⁸ dealt with National Ambient Air Quality Standards (NAAQS)¹⁷⁹ proposed in compliance with the Clean Air Act (CAA),¹⁸⁰ which "requires the EPA to issue regulations establishing national air quality standards . . . [that] set ambient levels of air pollution that all areas of the country must attempt to meet."¹⁸¹ According to the CAA, every five years the EPA's Administrator is required to update the national standards "for each air pollutant for which air quality criteria have been issued."¹⁸² States then have three years to adopt and submit to the Administrator "a plan which provides for implementation, maintenance, and enforcement" of the standard for every air quality criteria on which the EPA sees fit to regulate.¹⁸³ If the EPA Administrator finds that a state has failed to comply with the CAA, the EPA Administrator has the option of promulgating a federal implementation plan for the state.¹⁸⁴ If a state continues to ignore its responsibilities under the CAA, the EPA Administrator may prohibit the awarding of any federal highway funds or restrict the manner in which the EPA grants permits.¹⁸⁵

To avoid having to conduct regulatory flexibility analyses for all of the NAAQS, EPA Administrator Carol Browner consistently has certified that the proposed standards would not have "a significant economic impact on a substantial number of small entities,"¹⁸⁶ and thus do not require a regulatory flexibility anal-

178. 175 F.3d 1027 (1999).

179. See, e.g., National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (1997) (to be codified at 40 C.F.R. pt. 50). There is not one final rule or proposed rule that sets out the national ambient air quality standard for all areas. Rather, the EPA has been progressively issuing the standards for different categories of pollutants.

180. 42 U.S.C. §§ 7401-7671(g) (1994 & Supp. III 1998).

181. Cole, *supra* note 69, at 286 (citing the Clean Air Act §§ 109(a) & 110(a), 42 U.S.C. §§ 7409(a) & 7410(a)).

182. 42 U.S.C. § 7409(a) & (d).

183. *Id.* § 7410(a).

184. See *id.* § 7410(c).

185. See *id.* § 7509.

186. Cole, *supra* note 69, at 283; see, e.g., National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. 65,716, 65,747; National Ambient Air

ysis.¹⁸⁷ The EPA rationalized that "the NAAQS themselves impose no regulations upon small entities. Instead, the several States regulate small entities through the state implementation plans (SIPs) that they are required by the Clean Air Act to develop."¹⁸⁸

According to Keith Cole, former Regulatory Affairs Counsel to the Senate Small Business Committee, the EPA avoided its responsibilities under the RFA by hiding behind the "bifurcated nature" of the NAAQS rulemaking.¹⁸⁹ He explains his argument as follows:

The imposition of regulatory controls is divided into a two-step process of first, setting a general standard, followed at a later point by the application of that general standard to particular entities and the approval of each state's SIP. No one can be directly and immediately subject to a NAAQS rule in the sense that no one will ever face fines or penalties for violating a national ambient standard.¹⁹⁰

In making its certification, the EPA relied greatly on two cases decided prior to SBREFA's amendments to the RFA: *Mid-Tex Electric Cooperative, Inc. v. FERC*¹⁹¹ and *United Distribution Cos. v. FERC*.¹⁹² While the regulations involved in each case were slightly different, both involved complaints by customers of entities directly regulated by the Federal Energy Regulatory Commission which had been indirectly affected by the regulation in the form of higher prices.¹⁹³ "In both cases, the impacts that

Quality Standards for Particulate Matter: Proposed Decision, 61 Fed. Reg. 65,638, 65,669; see also Cole, *supra* note 69, at 289 n.53 (quoting EPA Administrator Carol Browner: "A SIP approval does not create any new requirements, but simply approve [sic] requirements that the State is already imposing. Therefore, because the federal SIP-approval process does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected.").

187. See Cole, *supra* note 69, at 289.

188. American Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1044 (D.C. Cir. 1999) (citing 42 U.S.C. § 7410); see also Cole, *supra* note 69, at 287-89.

189. Cole, *supra* note 69, at 289.

190. *Id.* at 286-87.

191. 773 F.2d 327 (D.C. Cir. 1985).

192. 88 F.3d 1105 (D.C. Cir. 1996).

193. In *Mid-Tex*, the plaintiffs were "wholesale customers of electric utilities whose wholesale rates [were] regulated by the Federal Energy Regulatory Commission."

these petitioners sought to bring within the RFA did not flow from any new regulatory costs that might be imposed on small entities.¹⁹⁴ The court in *Mid-Tex* agreed with FERC's argument that it was not required to complete regulatory flexibility analyses concerning small entities that it did not directly regulate. The court stated:

The problem Congress stated it discerned was the high cost to small entities of compliance with uniform regulations, and the remedy Congress fashioned—careful consideration of those costs in regulatory flexibility analyses—is accordingly *limited to small entities subject to the proposed regulation*. We find a clear indication of this limitation in section 603 of the statute, which specifies the contents of initial regulatory flexibility analysis.¹⁹⁵

The court in *United Distribution* relied on *Mid-Tex* in holding that “no analysis is necessary when an agency determines ‘that the rule will not have a significant economic impact on a substantial number of small entities that *are subject to the requirements of the rule*.’ FERC has no jurisdiction to regulate the local distribution of natural gas.”¹⁹⁶ Thus, the courts in each case held that certification by the agency head was proper.¹⁹⁷

Mid-Tex, 773 F.2d at 330. The dispute arose after FERC issued regulations allowing electric utilities to “include in their rate bases amounts equal to 50% of their investments in construction work in progress (CWIP).” *Id.* The plaintiffs argued:

[A] FERC rule allowing CWIP in rate base will necessarily cause a price squeeze in states that do not allow CWIP in rate base, because wholesale rates, which FERC regulates, will rise as a result of CWIP, while retail rates, which the states regulate, will not rise wherever CWIP is not allowed.

Id. at 336.

In *United Distribution*, FERC issued several rules in an effort to deregulate the natural gas industry. See *United Distribution*, 88 F.3d at 1121-22. One of these rules, like the rule in *Mid-Tex*, affected the rates that natural gas companies could charge their customers by changing “from the preexisting modified fixed variable (MFV) to a straight fixed variable (SFV) rate design.” *Id.* at 1161.

194. Cole, *supra* note 69, at 293.

195. *Mid-Tex*, 773 F.2d at 342 (emphasis added).

196. *United Distribution*, 88 F.3d at 1170 (quoting *Mid-Tex*, 773 F.2d at 342).

197. See *United Distribution*, 88 F.3d at 1170; *Mid-Tex*, 773 F.2d at 342; see also *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 467 & n.18 (D.C. Cir. 1998)

The EPA relied on this case for the proposition that regulations that result in indirect impacts do not need regulatory flexibility analyses. Keith Cole argues that *Mid-Tex* and *United Distribution* can be distinguished from the NAAQS rules because "the NAAQS rules also trigger the imposition of regulatory costs directly on small entities."¹⁹⁸ He elaborates:

Mid-Tex and *United Distribution* may stand for the proposition that the impact on small entities of possibly having to pay increased prices for various goods and services may be so indirect as to properly be excluded from consideration under the RFA. However, the EPA's certifications in the NAAQS rules would require a significant expansion of the holdings in those cases to exclude the impacts on small entities of complying with new regulations that are likely to be imposed upon them as a direct and foreseeable consequence of rulemaking.¹⁹⁹

In *American Trucking Ass'ns*, a group of small business trucking interests had filed suit against the EPA over its NAAQS rulemaking, in part because the EPA had not completed a regulatory flexibility analysis for the rule.²⁰⁰ The court rejected this claim, stating, "We have consistently interpreted the RFA, based upon these sections, to impose no obligation upon an agency 'to conduct a small entity impact analysis of effects on entities which it does not regulate.'"²⁰¹ The court relied upon the decision in *Mid-Tex*, noting that Congress had not altered section 605 in its SBREFA amendments to the RFA.²⁰² Further, the court did not view the situation at hand as distinguishable from *Mid-Tex*.²⁰³

(finding that the RFA does not contemplate a regulatory flexibility analysis when the regulation is deemed to have an insignificant impact on small businesses).

198. Cole, *supra* note 69, at 293.

199. *Id.* at 294.

200. See *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1043 (D.C. Cir. 1999).

201. *Id.* at 1044 (citing *Motor & Equip. Mfrs.*, 142 F.3d at 467 & n.18).

202. See *id.* at 1045.

203. See *id.*

Grand Canyon Air Tour Coalition v. FAA

In *Grand Canyon Air Tour Coalition v. FAA*,²⁰⁴ the Federal Aviation Administration (FAA) underwent a prolonged promulgation of rules that placed restrictions on flights in the vicinity of the Grand Canyon.²⁰⁵ In so doing, the FAA had been acting to enforce the National Parks Overflights Act,²⁰⁶ which Congress enacted to combat the effects of flights over units of the National Park System, including the Grand Canyon National Park.²⁰⁷

The FAA issued a proposed rule with a rather extensive initial regulatory flexibility analysis that included examinations on the cost of compliance as well as a consideration of alternatives to the rule and concluded that the proposed rule would indeed have "a significant economic impact on a substantial number of small entities."²⁰⁸ Interestingly, the FAA defined "small entity" for purposes of the analysis as "a commercial sightseeing operator who owns, but does not necessarily operate, nine or fewer airplanes."²⁰⁹

When the FAA issued its final regulatory flexibility analysis, it remained largely unchanged. It mentioned that only the SBA had submitted comments on the proposed rule and concluded again that the rule would have a "significant economic impact on all commercial sightseeing operators conducting flights within Grand Canyon National Park."²¹⁰ It changed its definition of

204. 154 F.3d 455 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 2046 (1999).

205. *See id.* at 460-61.

206. Pub. L. No. 100-91, 101 Stat. 674 (1987).

207. *See id.* § 1(b), 101 Stat. at 674. Congress had found that commercial sightseeing flights over the Grand Canyon were causing "a significant adverse effect on the natural quiet and experience of the park," as well as raising "serious concerns regarding public safety, including concerns regarding the safety of park users." *Id.* § (3)(a), 101 Stat. at 674.

208. Special Flight Rules in the Vicinity of Grand Canyon National Park, 61 Fed. Reg. 40,120, 40,133 (1996) (to be codified at 14 C.F.R. pt. 93) (proposed July 31, 1996).

209. *Id.* at 40,132. Compare this definition with the definition used by BLM, *see supra* text accompanying note 155, that Judge Green used to remand the regulation back to BLM for further analysis. *See supra* notes 162-66 and accompanying text.

210. Special Flight Rules in the Vicinity of Grand Canyon National Park, 61 Fed. Reg. 69,302, 69,326 (to be codified at 93 C.F.R. pt. 93) (final rule).

"small entity" to "essentially . . . a commercial sightseeing air tour operator [who] owns or operates nine or fewer aircraft."²¹¹

At trial, plaintiffs complained that, among other alleged violations of the Administrative Procedures Act, the FAA "failed to respond to comments on the inadequacy of its analysis under the Regulatory Flexibility Act, and failed to consider alternatives to the rule it adopted."²¹² Judge Merrick B. Garland disagreed, finding that "[t]he FAA did a lengthy analysis of the economic impact of the proposed rule on small businesses, as required by the Regulatory Flexibility Act, and responded to comments submitted by the SBA and other commenters. It also considered alternatives to the rule."²¹³ As far as the plaintiffs were concerned, Judge Garland noted, "The Coalition does not describe any particular response as inadequate, nor does it point to any alternative that the agency irrationally rejected—other than the alternative of routing tours away from concentrations of visitors which, as we noted above, the FAA reasonably could reject."²¹⁴

Greater Dallas Home Care Alliance v. United States

In *Greater Dallas Home Care Alliance v. United States*²¹⁵ a collection of home health agencies in Texas brought suit against the Department of Health and Human Services (HHS) seeking a permanent injunction for allegedly violating the RFA in connection with a rule made pursuant to statute.²¹⁶ As part of the Balanced Budget Act of 1997,²¹⁷ Congress changed the method by which Medicare paid home health agencies.²¹⁸ Pursuant to those changes, the Health Care Financing Administration, an agency of HHS, promulgated regulations implementing Congress's changes.²¹⁹

211. *Id.* at 69,326 (emphasis added).

212. *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 470 (N.D. Tex.), *cert. denied*, 119 S. Ct. 2046 (1999).

213. *Id.* at 470-71 (citing Special Flight Rules in the Vicinity of Grand Canyon National Park, 61 Fed. Reg. at 69,318-28).

214. *Id.* at 471.

215. 36 F. Supp. 2d 765 (N.D. Tex. 1999).

216. *See id.* at 766.

217. Pub. L. No. 105-33, 11 Stat. 251 (1997).

218. *See Greater Dallas Home Care Alliance*, 36 F. Supp. 2d at 766.

219. *See id.*; Medicare Program; Schedule of Limits on Home Health Agency Costs

In their complaint, plaintiffs alleged that HHS had violated section 604(a)(5) of the RFA by failing to include in either of the regulations "any examination of alternatives to the adopted rule."²²⁰ The HHS admitted as much, but stipulated that "they were not required to examine alternatives to the proposed rules because the [statute] did not grant the Secretary of HHS any discretion in implementing the [relevant provisions]."²²¹ Judge Barefoot Sanders agreed with HHS, finding that "Congress did not intend for agencies to consider other alternatives when Congress does not grant the agency discretion in creating the particular rule."²²²

ANALYSIS OF CASES

When Small Businesses Can Win Using the Judicial Review Provision Under SBREFA

The cases discussed above appear to show two safe bets for small businesses who want to challenge a regulation using SBREFA's judicial review provision. As a result, federal agencies should be wary of the following pitfalls. First, judges will be willing to remand a regulation if there is a concrete mistake made in the analysis. The clearest example of this comes from *North-west Mining Ass'n* in which the agency used an incorrect definition of "small entity" in completing its regulatory flexibility analyses.²²³ The requirements of the RFA and SBREFA are fairly straightforward.²²⁴ If an agency ignores or subverts them, the judicial review provision of SBREFA makes it easy for a judge to remand a regulation for proper analysis by the agency in accordance with the rules set out by the RFA.²²⁵

Per Visit for Cost Reporting for Periods Beginning on or After October 1, 1997, 63 Fed. Reg. 89, 92-93 (notice with comment period); Medicare Programs; Schedule of Per-Beneficiary Limitations on Home Health Agency Costs for Cost Reporting Periods; Final Rule, 63 Fed. Reg. 15,718.

220. *Greater Dallas Home Care Alliance*, 36 F. Supp. 2d at 768.

221. *Id.* at 769.

222. *Id.*

223. See *supra* text accompanying notes 155-66.

224. See *supra* text accompanying notes 67-77, 96-111.

225. See 5 U.S.C. § 611(4) (Supp. III 1997).

The second pitfall for federal agencies occurs when agencies egregiously mishandle regulatory flexibility analyses as demonstrated in *Southern Offshore Fisheries Ass'n*.²²⁶ If an agency's regulation will have an obvious disparate economic impact on a significant number of small businesses, it serves no purpose to ignore such fact by certifying to the opposite effect. SBREFA's judicial review provision now allows judges to recognize certifications that are disingenuous and remand them back to the agency.²²⁷ Additionally, *Grand Canyon Air Tour Coalition* demonstrates that it is far easier for the agency in the long run to complete the required analyses and, if necessary admit to the effects of their regulation.²²⁸

Does the RFA Work?

These initial cases may have raised more questions than they answered. Has the balance of power between small businesses and federal agencies evened in the wake of these initial tests of judicial review under SBREFA or has the balance shifted? Does SBREFA really make a difference, or is it merely a statutory obligation requiring more paper be pushed around our nation's capital? Although these queries may be impossible to answer until a case reaches a higher court, some initial findings may be established.

First, judges give great deference to agencies in framing their regulations and completing their regulatory flexibility analyses.²²⁹ This should not be of great surprise as a court's job traditionally has been not to make the law, but rather to interpret it.²³⁰ Within the scope of agency rulemaking, the judicial branch has always given great deference to federal agencies in enforcing the laws of Congress through rules and regulations. It is there-

226. See *supra* text accompanying notes 122-44.

227. See 5 U.S.C. § 611(4).

228. See *supra* text accompanying notes 204-14.

229. See, e.g., *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 460 (N.D. Tex. 1999) (upholding the FAA regulation not because the rule was right, but out of deference to the agency's "reasonable exercise of its judgment and technical expertise").

230. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143 (1990).

fore logical that the courts involved in the aforementioned cases would give great deference to the agencies in meeting the requirements of the RFA²³¹ and only remand a regulation when an egregious violation of the RFA had occurred.²³²

In a second, related point, the cases showed also that the RFA, even as amended by SBREFA, is still a very broad piece of legislation that allows for a literal interpretation that may run counter to the spirit of its intent. Nothing in the RFA or SBREFA prohibits agencies from promulgating regulations that are disproportionately more oppressive to small businesses, just so long as they complete the requisite regulatory flexibility analyses.²³³ *Grand Canyon Air Tour Coalition* exemplifies this very point. After conducting its analysis, the FAA admitted that its regulation would have an economic impact on small entities.²³⁴ The FAA considered alternatives and rejected them in favor of a rule that makes it more difficult for air tour operators, predominantly small businesses, to conduct business in the Grand Canyon National Park. All of this was perfectly in line with the requirements of the RFA and SBREFA, which brings into question how much relief this legislation brings to small businesses as long as federal agencies are willing to admit to the harshness of their regulations.

Exacerbating this fact is the third finding from the cases that agencies need only focus on small entities that the regulation influences directly.²³⁵ Thus, in *Valuevision International*, the agency was permitted to examine the effects of its regulation on the small cable operators only,²³⁶ instead of making a broader

231. See *supra* text accompanying notes 167-222.

232. See *supra* text accompanying notes 122-66.

233. See Sargentich, *supra* note 54, at 135-37; see also National Propane Gas Ass'n v. United States Dep't of Transp., 43 F. Supp. 2d 665, 681-83 (N.D. Tex. 1999) (finding that the agency had considered the effect of its regulation on small businesses and was justified in imposing those effects for the sake of safety).

234. See *supra* text accompanying notes 208, 210.

235. For a more in-depth analysis of this issue, examining whether "the 'impact' to be analyzed under the RFA [is] a rule's impact on the small entities that will be subject to the rule's requirements, or the rule's impacts on small entities in general, whether or not they will be subject to the rule," see Cole, *supra* note 69, at 281, 287-97.

236. Obviously, the small cable operators would benefit from a cap on rates charged by programmers.

study of all those small entities who might be affected.²³⁷ Further, in *American Trucking Ass'ns*, the EPA was not required to conduct regulatory flexibility analyses because the EPA's standards directly affected only the states, who would then impose regulations on small businesses.²³⁸ In so ruling, countless small businesses that may not be required by law to answer directly to a federal agency, but who nonetheless face direct consequences to their financial state when their suppliers or customers do, will not receive relief under the RFA and SBREFA.

A fourth finding from the cases may shed some light upon the question of what sort of teeth the RFA, as amended by SBREFA, has in providing real regulatory relief to small businesses. In each of the two situations when the court remanded the rule, the SBA was involved, not only in stressing the need to comply with the RFA and SBREFA, but also in exposing the potentially adverse effects of the regulation on small businesses.²³⁹ This may indicate that although the requirements of federal agencies under the RFA cannot keep an anti-small business regulation from being promulgated, it can expose the true effects of a regulation, forcing agencies to examine such effects and to consider more small business-friendly alternatives that achieve the same policy goals. An agency may be able legally to promulgate a regulation by conducting and publishing the required regulatory flexibility analyses in accordance with the RFA, but if those analyses show a disparate impact on a significant number of small entities, the agency may run into political obstacles.²⁴⁰

237. See *Valuevision Int'l, Inc. v. FCC*, 149 F.3d 1204, 1213 (D.C. Cir. 1998).

238. See *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1044 (D.C. Cir. 1999).

239. See, e.g., *supra* text accompanying note 139. In *Greater Dallas*, the court upheld the right of plaintiffs to use affidavits from the SBA's Counsel for Advocacy in establishing their case that a rule should not be exempted from the requirements of the RFA. See *Greater Dallas Home Care Alliance v. United States*, 36 F. Supp. 2d 765, 767-68 (N.D. Tex. 1999).

240. Of course, no guarantee exists that if the Small Business Administration gets involved, the regulation will be remanded to the agency. The Small Business Administration was also involved in *Grand Canyon Air Tour Coalition*, see *supra* text accompanying note 210, but that involved another political issue—the public policy desire to free the Grand Canyon National Park of excess noise due to the proliferation of flights overhead. See *supra* note 207.

CONCLUSION

For all they contribute to the economy, small businesses deserve to have a voice in the federal regulatory process. The RFA gives them that voice by forcing federal rulemaking agencies to examine the potential effects of their rules and regulations on small entities and to make such information known through the *Federal Register*. The SBREFA amendments succeed in refining the requirements of the RFA and, in particular, the judicial review provision grants small businesses a weapon to insure that federal agencies comply with the RFA. Judicial deference to agency decisions, however, limits the power of judicial review. In the end, true regulatory relief depends upon the agencies' own commitment to fairness and balance for the small businesses they regulate.

Jeffrey J. Polich