Testimony of David E. Frulla
Before the House Small Business Committee
"Reducing Federal Agency Overreach:
Modernizing the Regulatory Flexibility Act"

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I very much appreciate the opportunity to testify today at the Small Business Committee's hearing, "Reducing Federal Agency Overreach: Modernizing the Regulatory Flexibility Act," to discuss the Regulatory Flexibility Act ("RFA")[1] and the benefits that federal agency RFA compliance can have on small entities, including small businesses, non-profit organizations, and local governments.

My name is David Frulla and I am partner with the law firm Kelley Drye & Warren, LLP, in Washington, D.C. I am appearing today personally, and not on behalf of any other client or entity. My practice has been largely centered on regulatory and administrative law, with a long-established focus on helping small businesses and their associations in the rulemaking process and, when things go awry, in litigation.[2] In summary, the RFA, along with its "watchdog,"[3] the Small Business Administration's ("SBA") Office of Advocacy, have proven to be valuable tools in creating a more effective and responsive regulatory process. That said, the

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1 5 U.S.C. Chapt. 6.

2 We at Kelley Drye have handled over a dozen RFA judicial challenges, prevailing in several notable instances, including the landmark case *Southern Offshore Fishing Ass'n v. Daley* ("*SOFA I*"), 995 F. Supp. 1411 (M.D. Fla. 1998), one of the first major victories for small entities under the RFA's judicial review provisions, enacted via the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), a part of the Contract with America Advancement Act of 1996, Pub. L. No. 104-121.

3 *SOFA I*, 995 F. Supp. at 1435.

fifteen years since the last major overhaul of the law[4] have pointed to ways the law can be improved to fulfill its purpose.

When Congress passed the RFA over three decades ago, it chose to require agencies specifically to consider how their proposed regulations would affect small businesses and other small entities. As a general matter, small businesses face relatively higher compliance costs, unique compliance challenges particularly with respect to paperwork and reporting requirements, and disadvantages in monitoring regulatory changes and participating in the rulemaking process. The RFA has helped to level the playing field.

Importantly, however, the RFA has been interpreted since the first reported RFA court decision, to be strictly procedural.[5] Agencies are not required to choose the least burdensome viable regulatory option. The law's impact comes from focusing regulators' attention on the particular needs and challenges facing small entities, backed by the oversight and guidance of the Office of Advocacy. The fact the RFA lacks any substantive obligation has, quite frankly, limited its utility. No requirement exists for an agency's RFA analysis to be based on the best scientific, economic, and social information available. No peer review of agency RFA analyses exists. Any review comes via the Small Business Administration's ("SBA") Office of Advocacy

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[4] Specifically, SBREFA, *supra* note 1. Since SBREFA's enactment, the Small Business and Work Opportunity Act of 2007, part of Title VIII, Subtitle C of Pub. L. No. 110-28, created the RFA requirement that agencies produce "small entity compliance guides" explaining regulatory requirements in plain language along with suggestions to assist small entities. Likewise, as explained below, section 1100G of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-517, required that the newly created Consumer Financial Protection Bureau convene regulatory review panels for regulations impacting small entities and added analytical requirements relating to potential increased credit costs resulting from such rules.

[5] *See, e.g., Associated Fisheries of Maine, Inc. v. Daley* ("*AFM*"), 127 F.3d 104, 114 (1st Cir. 1997); *U.S. Cellular Corp. v. Fed. Commc'n Comm'n*, 254 F.3d 78, 88 (D.C. Cir. 2001).

comments and the very deferential standard of review applicable in Administrative Procedure Act ("APA")-based judicial review. Thus, regulatory flexibility analyses can and often do suffer from some of the same infirmities as other types of agency decisional documents.

Perhaps most significantly, an agency is not required to adopt any more flexible regulatory alternative to the proposed rule in question identified during the rulemaking process. When such a failure occurs, it generally has one of two roots: One, the agency really has not understood or acknowledged the true nature of the regulatory burden it proposes to inflict on small entities, or, two, the agency does understand the unnecessary burden and decides to inflict it anyway. Neither outcome should be acceptable.

Ultimately, the RFA will be judged successful when regulators look for meaningful opportunities to tailor necessary regulations to fit the realities and burdens faced by small business. Small businesses are looking for a regulatory system that protects the public, while not overburdening operations and stifling growth and job creation. They are generally not looking in the first instance for opportunities to sue governmental entities, which can be an inefficient, costly, and uncertain enterprise. Fortunately, there are many good ideas to amend the RFA being considered in both the House and the Senate, which I address in Part III. I have also included other concepts that may be worth considering.

My testimony will focus first on a very brief review of the RFA's major requirements and purposes. I will then explain how the RFA has helped small business through practical examples, and conclude with the above-referenced recommendations for improvements. I commend the Committee for undertaking this important discussion, as Congress seeks to ensure that federal regulatory regimes do not impede economic recovery and job creation.

I. RFA Major Elements

The RFA establishes a process that requires federal agencies to assess the impacts of regulatory proposals on small entities and to develop and consider alternatives that, while being consistent with the agency's statutory mandate, help ameliorate anticipated adverse economic impacts on these small entities.

At the agency rule initiation stage, the RFA requires an agency to develop an initial regulatory flexibility analysis ("IRFA").[6] The IRFA is to identify the rule's purpose, objectives, source of authority, universe of impacted small businesses, reporting requirements, and any duplicative measures. At its heart, an IRFA should also explore significant alternatives that reduce adverse impacts on small entities, including differing or simplified compliance or reporting requirements, performance standards, or even exemption from the rule. An agency must provide for notice and comment on its IRFA.

In general, an agency can avoid the IRFA requirement if it can certify that the rule is not likely to have a "significant economic impact on a substantial number of small entities."[7] A certification of "no significant impact" is subject to judicial review. In the early days of RFA litigation, inappropriate "no significant impact" agency certifications provided fertile ground for litigation and even practical judicial relief.[8]

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6 5 U.S.C § 603.

7 5 U.S.C. § 605(b).

8 *See, e.g., SOFA I*, 995 F. Supp. at 1434-35; *Southern Offshore Fishing Ass'n v. Daley*, 55 F. Supp. 2d 1336, 1345-46 (M.D. Fla. 1999); *North Carolina Fisheries Ass'n v. Daley* ("*NCFA I*"), 16 F. Supp. 2d 647, 651-52 (D.N.C. 1997).

Following notice and comment on an IRFA, the agency must prepare a final regulatory flexibility analysis ("FRFA") to accompany its final rule.[9] The FRFA responds to public comment and updates the impacts assessment from the IRFA, taking into account any changes to the rule made in response to such comments. Finally, the FRFA must explain the "factual, policy, and legal reasons" for the particular approach adopted, and why other – potentially less burdensome – alternatives were not. Any agency's FRFA can be challenged under the Administrative Procedure Act's arbitrary and capricious standard. It is exceedingly rare that a court will set aside a FRFA.[10]

The RFA also established the semi-annual Regulatory Flexibility Agenda, which requires an agency to provide mandatory reports of all its rules expected to have a significant impact.[11] Post-promulgation, all major rules are to be assessed every ten years for continued efficacy and need, considering changes in technology, economic factors, and overlap with other rules. Agencies are also directed to address "complaints and comments received concerning the rule from the public."[12]

To assist with public outreach and comment process during a rulemaking, the RFA provides that each agency must "assure" small entities' participation by providing for adequate

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9 5 U.S.C. § 604.

10 As the First Circuit noted: "[A]n agency can satisfy section 604 as long as it compiles a meaningful, easily understood analysis that covers each requisite component dictated by the statute and makes the end product—whatever form it reasonably may take—readily available to the public." *AFM*, 127 F.3d at 115. *But see Nat'l Ass'n of Psychiatric Health Sys. v. Shalala*, 120 F. Supp. 2d 33, 43 (D.D.C. 2000) (finding cursory analysis regarding economic impacts of a final rule inadequate to meet the standards for a FRFA).

11 5 U.S.C. § 610.

12 5 U.S.C. § 610(b)(2).

notice.[13] Among other tools, an agency is encouraged to: indicate in advance notices of proposed rulemaking that a subsequent proposed rule may have significant economic impacts; provide general notice in industry publications; directly notify small entities; and conduct public hearings or conferences for regulated small business, organization, and governmental concerns.

SBREFA added a requirement that major rules being considered by certain agencies be subject to statutorily-enhanced, pre-promulgation regulatory review and consultation. Specifically, SBREFA created a review panel process for major rules being considered by the Environmental Protection Agency ("EPA") and Occupational Safety and Health Administration ("OSHA").[14] Further, as part of the Dodd-Frank financial reform legislation enacted last year, the newly created Consumer Financial Protection Bureau ("CFPB") also is required to comply with the SBREFA panel process. Under that process, EPA, OSHA, or CFPB, prior to publishing an IRFA, must notify the Chief Counsel for Advocacy, providing analysis of potential impacts of the proposed rule. Within fifteen days, the Chief Counsel must identify representatives of small entities to review and provide advice relating to the proposed impacts.

These selected small business representatives provide input to a panel comprised of personnel from the particular "covered agency," staff from the Office of Management and Budget's Office of Information and Regulatory Affairs ("OIRA"), and the Chief Counsel for Advocacy. This panel reviews material related to the rule, including comments from the panel of affected small business entities, materials prepared in compliance with the RFA, and the analyses required to be included in the IFRA. Within sixty days, the panel must provide a report

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13 5 U.S.C. § 609(a).

14 5 U.S.C. § 609(b).

regarding its review that the agency then can use to modify its proposed rule. SBREFA panels can and have helped EPA and OSHA avoid "ready, fire, aim" outcomes, albeit these agencies' participation in panel processes has often been begrudging.

The SBA's Office of Advocacy also oversees and enforces agencies' implementation of the RFA more generally. The Chief Counsel of Advocacy has authority to comment on proposed rules, provide agencies with RFA compliance guidance, and serve as a liaison to and advocate for small businesses. The Chief Counsel has the authority to file an *amicus curiae* brief on the side of a small business plaintiff challenging agency compliance with the RFA.[15] The Office has intervened, with significant positive effect, in two of the RFA cases I litigated. In one instance, the Office settled its intervention literally on the courthouse steps, when the Federal Communications Commission opted to provide small businesses additional implementation flexibility. This right to be involved in litigation is a powerful tool, albeit one not utilized much, involving, as it does, one federal agency effectively litigating against another.

Finally, the Office of Advocacy is a point of contact for regulated small businesses. The Office often plays a constructive mediatory role, conveying industry concerns to an agency and working behind the scenes in ensuring RFA compliance.[16]

II. RFA Benefits and Limitations and Agency Non-Compliance

The RFA serves the public interest by focusing agencies' attention on the disparate impacts "one-size-fits-all" regulations can have on the significant engine of job creation provided

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15 5 U.S.C. § 612(b).

16 *See* Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 Fed. Reg. 53461 (Aug. 16, 2002); Presidential Memoranda – Regulatory Flexibility, Small Business, and Job Creation (Jan. 18, 2011).

by small businesses nationwide. The Office of Advocacy puts it best in the introduction to its *Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*:

> Economic freedom is the foundation for individual success and prosperity. This freedom is evident in the entrepreneurial small business sector, which creates most of the new jobs and a large share of the innovations in the American economy. When government takes small businesses into consideration in developing regulations, it saves time and money for the nation's most productive sector.[17]

The law performs this function best when an agency works constructively and collaboratively to identify and implement regulatory alternatives that reduce regulatory compliance and paperwork burdens on small entities.

The RFA's requirement for agencies to identify the impacts their proposed rules will have on small entities to develop and consider alternative regulatory strategies to mitigate measures with disproportionate adverse impacts on small entities is itself a useful discipline. Indeed, as President Obama explained in his January 18, 2011 Presidential Memorandum regarding regulatory flexibility and small business[18]:

> Adherence to these requirements is designed to ensure that regulatory actions do not place unjustified economic burdens on small business owners and other small entities. If regulations are preceded by careful analysis, and subjected to public comment, they are less likely to be based on intuition and guesswork and more likely to be justified in light of a clear understanding of the likely consequences of alternative courses of action. With that understanding, agencies will be in a better position to protect the public while avoiding excessive costs and paperwork.

President Obama's affirmation of the benefits provided by the RFA is consistent with a long line of similar pronouncements by presidents of both parties.[19]

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17 *Available at* http://www.sba.gov/sites/default/files/rfaguide.pdf.

18 *Supra* n.16.

19 *See, e.g.,* President George W. Bush's Executive Order 13272, *supra* n.16.

Enhanced public notice, particularly through direct communication and trade journals, helps to keep regulated businesses informed and engaged in the process. In my experience, other particularly beneficial aspects of the law include:

- Small Entity Compliance Guides: These guides assist regulated entities by providing a plain-language explanation of new regulatory requirements. They are often made directly available to regulated businesses and provide contact information for relevant agency personnel. While the reach and utility of such guides likely vary by regulatory bodies, Compliance Guides can be a vast improvement over *Federal Register* notices and the dense, legalistic language that inhabits the *Code of Federal Regulations*.

- The SBA Office of Advocacy: Without a doubt, the attorneys, economists, and other professionals in the Office of Advocacy are the single best resource available to small businesses, their associations, and representatives. They have facilitated communication between agencies and stakeholders as part of the rule development process. The Office can help to develop a record and hold regulators' feet to the fire in terms of RFA compliance and also plays an important coordinating role in OIRA regulatory review. Often, by necessity, the Office's efforts occur behind the scenes. Our experience with this Office has been uniformly positive, a compliment I can pay no other governmental agency.

- Judicial Review: Prior to SBREFA, the RFA was honored as much in the breach, rather than serving its intended function. Indeed, Congress added judicial review provisions[20] to ensure federal agencies do more than pay "lip service" to the RFA.[21] My experience in RFA litigation has shown both the benefits and limits of this right of review. On the positive side, the ability to litigate has prevented agencies from ignoring disparate impacts on small businesses and employing gambits to avoid RFA compliance altogether. RFA court victories in the years immediately following SBREFA's enactment did work to raise consciousness across agencies of the need to pay special heed to those protected by the RFA and address the law's mandates.

The RFA is not, however, a silver bullet. First, some agencies have become adept at negotiating the procedure to avoid full consideration of small business impacts and alternatives. In these instances, agency development and consideration of alternatives becomes little more than a *pro forma* exercise. Further, so long as the agency faces up to the most obvious economic

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20 5 U. S. C. § 611.

21 *See* 142 CONG. REC. S3242, S3245 (*daily ed.*, Mar. 29, 1996).

impacts and justifies the action in terms of its particular statutory mandate, courts have been increasingly unwilling to fault agencies for failing to explore and develop meaningful mitigating alternatives under deferential, applicable APA judicial review standards. This has been particularly apparent in the realm of fisheries management, even where regulated small businesses proffer feasible alternatives that meet the agency's conservation objectives.[22]

Another shortcoming is revealed in the ever-growing line of cases holding that agencies need not comply with the RFA if the rule does not "directly" impact a universe of small entities. For instance, we represented the National Federation of Independent Businesses as *amicus curiae* in an RFA case involving Food and Nutrition Service ("FNS") requirements relating to prices that could be charged by small business grocers primarily serving persons under the Women Infant and Children's Nutrition ("WIC") program. While the grocers were the obvious "targets" of the regulations, the challenge was dismissed because FNS' standards directly applied to the states administering the program.[23] The origins of this narrowing construction of the RFA's scope are sketchy and non-statutory, having been derived from the RFA's preamble, rather than its operative terms.[24] The direct impact standard has often allowed the EPA to avoid

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[22] *See, e.g., North Carolina Fisheries Ass'n v. Gutierrez*, 518 F. Supp. 2d 62, 93, 96 (D.D.C. 2007) (upholding agency rejection of alternative found to offset economic harm "to only a minor extent" and finding RFA satisfied because "the Secretary fully understood and publicly explained the [rule's] potentially dire consequences"); *Legacy Fishing Co. v. Gutierrez*, 2007 WL 861143, *8, *11 (D.D.C. March 20, 2007), *rev'd on other grounds, sub nom. The Fishing Co. of Alaska v. Gutierrez,* 510 F.3d 328 (D.C. Cir. 2007) (rejecting claim of agency failure to consider mitigating alternatives, holding "[m]ere allegations that the analysis was not sufficiently 'rigorous' are not enough for [a court] to find defendant's actions arbitrary and capricious").

[23] *See Nat'l Women, Infants, and Children Grocers Ass'n v. Food and Nutrition and note Svc.*, 416 F. Supp. 2d 92, 109-10 (D.D.C. 2006).

[24] *See Mid-Tex Elec. Coop. v. FERC*, 773 F.2d 327, 341 (D.C. Cir. 1985).

in-depth consideration of Clean Air Act cases, when states ultimately implement permitting regimes.[25]

The RFA section 610 regulatory review process has also failed to fulfill the role it was designed to play. As former Assistant Chief Counsel for Advocacy, Michael See, noted, following an exhaustive review of agency reports:

> [O]ver the past twenty-five years, federal regulators have often ignored section 610 and have not conducted periodic reviews of their rules. Even those agencies which review some of their existing rules under section 610 rarely act in response to their reviews. Most of these agencies comply with the letter of the law for only a small percentage of their rules, and they rarely take action beyond publishing a brief notice in the Federal Register. Ironically, when regulators conduct periodic reviews under section 610, they are far more likely to increase the burden of regulation on small entities than to reduce it.[26]

This history is particularly discouraging in that regulatory review is the focal point of many reform proposals currently before Congress. Clearly, as discussed below, an effort to foster meaningful review of existing rules that may be duplicative, out-dated, or which contribute to large cumulative regulatory impacts, will likely be frustrated unless the provision has teeth in the form of meaningful enforcement.

Finally, courts have deferred to an agency's finding of no significant economic impact, even in instances when the Office of Advocacy and the public weigh in with contrary data showing quite devastating impacts. Often this arises when agencies fail to appropriately identify the universe of small businesses impacted by a rule or fail to measure the proposed regulation's

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[25] *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1044 (D.C. Cir. 1999), *aff'd in part and rev'd in part on other grounds, Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001).

[26] Michael See, *Willful Blindness: Federal Agencies' Failure to Comply with the Regulatory Flexibility Act' Periodic Review Requirement—and Current Proposals to Invigorate the Act*, 33 FORDHAM URB L.J. 1199, 1200 (2006).

impacts properly. For instance, the Environmental Protection Agency's RFA implementing guidelines authorize the agency to conduct RFA economic impact analyses based on small businesses' revenues, rather than their profitability. While any fair assessment of a regulation's economic impact ought to be measured against profits (and thus the entity's ability to pay for the regulation), a district court in Washington, D.C. deferred to the EPA guidelines.[27] Uniform, statutorily-authorized Office of Advocacy regulations consistent with its *Guide for Government Agencies* would have changed the deference calculus.

More generally, the caselaw is mixed regarding the level of deference accorded to the Office of Advocacy in its efforts to ensure RFA compliance. Certain cases are very respectful of positions and submissions from the Chief Counsel.[28] However, other cases are not deferential.[29] This is a matter that ought to be settled in favor of granting deference to the Office of Advocacy. The Office of Chief Counsel and its experienced staff have a detailed familiarity with the RFA and its requirements, small entities' ability to accommodate regulations, and the benefit of an overall perspective on the many and varied ways that rulemaking agencies attempt to avoid or defeat their RFA obligations.

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[27] *Ad Hoc Metals Coalition v. Johnson*, 1:01cv0766 (PLF) (D.D.C., Jan. 20, 2006), *slip op.*, at 12-13. The court explained, "The RFA does not define 'significant impact on a substantial number of small entities,' grants neither authority nor responsibility to any entity to develop a uniform definition of SEISNSE, and provides no guidance as to how certification decisions are made. Instead, the RFA grants federal agencies broad discretion regarding how key terms in the act should be defined and how certification decisions should be made." *Id.*, *slip op.*, at 12.

[28] *See, e.g., SOFA I,* 995 F. Supp. at 1435 (terming the Office of Advocacy as the Federal Government's RFA "watch dog").

[29] *American Trucking Ass'ns v. EPA*, *supra* n.25 (no deference owed to either EPA's or SBA's RFA interpretations).

III. Potential Improvements to the RFA

Give the Chief Counsel the authority to draft implementing regulations for agencies to follow. As I explained, intelligible standards and procedures that agencies have to follow with respect to, for example, calculating impacts and defining the universes of impacted entities, could make the process less susceptible to evasion or marginalization. H.R. 527, the Regulatory Flexibility Improvement Act ("RFIA"), does this. The Small Business Size Standard Flexibility Act, H.R. 585, likewise empowers the Chief Counsel to set size standards, along with the SBA Administrator. This should provide a second set of eyes on agency determinations, which, as my experience in *Legacy Fishing Company*[30] demonstrates, can only be helpful.

Expand small entity outreach during the pre-proposed rule stage, along with increased use of SBREFA-type panels. Seeking input from stakeholders on impacts analysis and alternatives and bringing together agency personnel, the Chief Counsel, and OIRA early in the development of major rules to vet issues and discuss approaches can only improve the regulatory process. Provisions to effectuate this approach are included in H.R. 527, as well as S. 474, the Small Business Regulatory Freedom Act.

Enhance other opportunities for pre-proposed rule notice and comment. To be effective, stakeholders and Advocacy must be given sufficient advance notice of proposed rules. SBA has called for amendments to section 609 that would require at least two-months advance notice and specification of the information that agencies should provide participants. Congress should also look to improve section 609(a), "Procedures for gathering comments," by requiring agencies to

[30] *Supra* n.22. In that case, the agency had one classification for "fishing vessels" and one for "fish processing facilities." Regulated catcher/processor vessels qualified as small entities under the latter standard, but generally not under the former standard, yet NMFS chose to apply the less inclusive "fishing vessel" classification for RFA purposes. 2007 WL 861143 at *10.

utilize one of the several options for seeking early small business comment. The required use of such tools as scoping hearings, ANPRMs, and direct notification to the regulated community prior to solidification of a proposed rule, represents a highly effective way to facilitate the development and serious consideration of alternatives.

Include indirect effects. While this needs to be cabined in some way to be administratively feasible, the "target" concept is a good place to start. When states merely act as intermediaries, such as in the Clean Air Act, Clean Water Act, and the WIC examples discussed above, there is no reason an agency cannot assess the rule's impact on the small business universe that ultimately will be responsible for complying with a rule. Also, where the substantive law protects a class of businesses or specific interests that are predictably impacted by a regulatory program, foreseeable impacts on small entities to those classes should also be assessed and minimized.[31] H.R. 527 and S. 474 both include workable definitions of such indirect effects, including that such effects be "reasonably foreseeable" and result directly from compliance with the rule.

Regulatory review. Agencies should be held accountable for failure to review rules or follow specified procedures in conducting reviews. The public should be allowed to petition for review of specific rules under set conditions. Also, rules scheduled for section 610 review should be incorporated in the section 602 Regulatory Agenda. These requirements should be included specifically in the RFA, to ensure 610 reviews are not illusory at best and counter-productive, at worst. Review and petition measures are included in many of the regulatory

[31] One such example of a protected group are "fishing communities" under the Magnuson-Stevens Fishery Conservation and Management Act, which NOAA Fisheries is charged with maintaining. *See, e.g.*, 16 U.S.C. § 1851(a)(8).

reform review bills, including H.R. 214, the Congressional Office of Regulatory Analysis Creation and Sunset and Review Act, H.R 527 and S. 474.

Add teeth to alternatives. Courts and agencies both have lost sight of the admonition in the RFA's legislative history that the terms of the law are to be liberally construed to fulfill its ameliorative purpose.[32] The RFA should more affirmatively seek to ensure, consistent with the RFA's legislative record, that an agency not only develop and consider feasible ameliorative or beneficial alternatives, but actually implement the "least cost" alternative consistent with that agency's statutory mandate. An agency's failure to conscientiously develop meaningful alternatives has also been problematic.[33]

Mandate the use of the "best scientific and economic information available" and provide for peer review in appropriate instances. I would recommend consideration of a requirement that agencies employ the "best scientific and economic information available" in their RFA analyses. The Office of Advocacy should be authorized to draft regulations defining the meaning of these terms under the RFA. Congress should also consider developing a process by which small entities could petition the Office of Advocacy to convene a peer review of the quality of the information and analysis employed in an agency's "no significant economic impact" determination, IFRA, and/or FRFA. A peer review should also be available to address whether an agency appropriately developed and considered ameliorative alternatives. The results of any

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[32] *See* 126 CONG. REC. H24589 (Sep. 8, 1980) ("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.").

[33] For instance, in *National Association for Home Care v. Shalala*, 135 F. Supp. 2d 161, 165 (D.D.C. 2001), the court recognized Congress' admonition to read liberally the RFA's terms, but then used the deferential APA "arbitrary and capricious standard" to favor the agency's interpretation that it had no authority to consider any alternative approaches at all.

such peer review should be accorded equal deference to an agency's own RFA analyses in any subsequent judicial challenge.

Explicit provision for expedited judicial review. When the issue involves whether the RFA applies in the first instance or when an agency certifies that a rule has no significant economic impact on substantial number of small entities, protected entities should have speedy recourse to judicial review. From time to time, an agency will persist in claiming that binding, widely-applicable actions are not legislative rules subject to the RFA. We have prevailed on this issue twice at the D.C. Circuit level. However, in *National Association of Home Builders v. U.S. Army Corps of Engineers*,[34] we waited for well over three years for the district court to (erroneously) dismiss the case for lack of jurisdiction, and then spent another year-plus in the appellate phase.

Reform Equal Access to Justice Act ("EAJA") for prevailing small entities. The RFA's judicial review provisions also should be amended to provide for attorneys' fees under the EAJA whenever a small entity obtains a judgment in its favor on an RFA/SBREFA claim. Small entities and associations representing them often lack the funds to sustain RFA litigation, particularly once it reaches the often-protracted remedy phase. RFA litigation and compliance efforts should not become—as they often are—a war of attrition for these often economically marginal entities and associations representing them.[35]

Finally, Congress should ensure the Office of Advocacy has the resources to fulfill its statutory mission. These resources will be especially important if legislation greatly expands the

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[34] 417 F.3d 1272 (D.C. Cir. 2005).

[35] *See, e.g.*, *United States Telecom Ass'n v. FCC*, 2005 U.S. App. LEXIS 18599 (D.C. Cir., Aug. 25, 2005) (denying EAJA award to prevailing small business associations).

Office's regulatory and oversight role. While I recognize the budgetary realities of the times, such a public investment in RFA compliance pays dividends in terms of "more just application of the laws and more equitable distribution of economic costs, which will ultimately serve both the society's and the government's best interests."[36] In this instance, an ounce of prevention can truly be worth a pound of cure.

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While the RFA can be improved, as the many suggestions above attest, this should not detract from the value and positive influence the law has had on the regulatory process for the past thirty-plus years. The RFA has been a valuable tool, one which can be better refined to meet its broadly accepted and important goals. Thank you for your time and attention. I would be pleased to answer any questions you may have.

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[36] *See* 126 Cong. Rec. H24589 (Sep. 8, 1980).