

If You've Always Done It That Way, It's Probably Wrong: How the Regulatory Flexibility Act Has Failed To Change Agency Behavior, and How Congress Can Fix It

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Small businesses have often borne the brunt of federal regulation, and have suffered disproportionately as the burden of regulation on all businesses has grown. In 1980, Congress passed the Regulatory Flexibility Act in an effort to alleviate the impact of regulation on the ability of small businesses to grow, compete, and even operate day-to-day. Although the Act has been amended several times since its passage in efforts to increase its effectiveness, small businesses have still struggled due to the high cost of compliance and their inability to monitor the regulatory process. The problem has been compounded by the Act's failure to require meaningful consideration of small business interests, and agencies' deliberate attempts to circumvent the Act's requirements. While a variety of possibilities to mitigate the problem exist, the solution most likely to be successful is to require agencies to delineate practical methods for small businesses to comply with regulation, and to actually assist them when possible.

I. INTRODUCTION

Then-small concrete business owner and Congressman-to-be Frank Cremeans' experience with government agencies was, for the most part, unremarkable. That is, until one day in January of 1994 when inspectors visited him from four different regulatory agencies.¹ "There was an inspector from the Occupational Safety and Health Administration, and

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¹ Brent Bowers and Udayan Gupta, *To Fight Big Government, Some Join It*, WALL ST. J., Nov. 11, 1994, at B1.

another guy from the Environmental Protection Agency, and someone from the Health Department, and then another mine inspector, all in one day,”² Cremeans recounted. “That day I got nothing done. I sold no concrete, I paid no bills, and I made no money.”³

Congressman John Ensign, who owned an animal hospital in Las Vegas, lamented the paperwork requirements. “One of the most common things we use in an animal hospital is bleach,”⁴ he explained. “And we have to keep documents on how to use bleach. C'mon!”⁵

Representative Mark Neumann, a former homebuilder, was also concerned. His subcontractors “were afraid of OSHA,” he said, because “[t]hey couldn’t understand OSHA’s rule books.”⁶ So afraid, in fact, that they once walked off their job sites when they heard inspectors might drop by.⁷

Between vacant work sites, lost hours entertaining inspectors, and unproductive time spent maintaining paperwork on everyday household substances, federal regulation has increasingly interfered with businesses’ ability to operate. In fact, subsequent to the deluge of laws enacted in the 1970s that provided for federal regulation of U.S. industry, the Federal Register has ballooned to over 64,000 pages.⁸ Due to their lack of financial resources and manpower to both monitor proposed regulations and to implement them,⁹ small businesses have felt the pinch from increased regulation the most.¹⁰ Seeing small enterprise inundated with regulation as never before, Congress enacted the Regulatory Flexibility Act of 1980.¹¹ It had hoped to change how agencies develop regulations and to discourage them from acting in a way that would put small businesses at a disadvantage.¹² Unfortunately, the situation for small businesses still seems

² RICHARD LESHER, MELTDOWN ON MAIN STREET 1 (Dutton 1996).

³ *Id.* at 2.

⁴ Bowers, *supra* note 1.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ CLYDE WAYNE CREWS JR., CATO INSTITUTE, TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 1 (2002), available at http://www.cato.org/tech/pubs/10KC_2002.pdf.

⁹ See OFFICE OF ADVOCACY, SMALL BUSINESS ADMINISTRATION, REPORT ON THE REGULATORY FLEXIBILITY ACT, FY 2004: ANNUAL REPORT OF THE CHIEF COUNSEL FOR ADVOCACY ON IMPLEMENTATION OF THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 13272 3 (2005).

¹⁰ See generally *id.* In the 1980s, when the Regulatory Flexibility Act was enacted, the Federal Register was closer to 2/3 of its present size – around 42,000 pages. 126 Cong. Rec. S10, 939 (daily ed. May 12, 1980) (statement of Sen. Culver).

¹¹ Pub. L. No. 96-354, 94 Stat. 1164, §2 (1980).

¹² *Id.*

grim, given that of the 4,509 regulations in the pipeline in 2002, nearly a quarter affected small businesses – up 36 percent since 1997.¹³

As the economy has become increasingly global, the effect of regulatory agencies' activities on small business and industry has steadily increased. Regulating an enterprise "out of business" no longer necessarily means that due to an inability to conform to regulations, the business must close. Rather, even small businesses that are financially able to comply with regulation can now be "regulated out of business" by virtue of the competitive disadvantage associated with passing on regulatory costs to customers. Obviously, regulatory compliance is expensive, but businesses are usually able to pass these costs on to consumers via higher prices. However, when competing with businesses from countries with less regulation, passing on that cost means a huge competitive disadvantage, because competitors do not have any regulatory costs to pass on, and can therefore offer lower prices. As a result, small businesses in the United States are put between a rock and a hard place: either pass on the costs to customers and lose business to overseas competitors; or absorb the costs, and either make sacrifices in areas such as research and development, or simply suffer financially. Either way, these entities can ultimately be driven out of business entirely due to market share losses and an inability to invest in the business's future.

This Note examines the seriousness of the problem that federal regulation poses to small business owners, the history of the Regulatory Flexibility Act and why it has been deemed a valiant, but failed, effort by many, and what new approaches might help relieve the burden of federal regulation that many small businesses shoulder.

II. REGULATION: A HUGE DRAIN ON SMALL BUSINESSES' RESOURCES

For small businesses and their owners, the burden of regulatory compliance is enormous. The Office of Management and Budget estimates that between October 1, 1994 and September 30, 2004, the annual cost of federal regulations was between \$34.8 billion and \$39.4 billion.¹⁴ The Small Business Administration Office of Advocacy believes the cost to be even higher, estimating that the 2004 cost of federal regulations was more

¹³ CREWS JR., *supra* note 8, at 1.

¹⁴ OFFICE OF MANAGEMENT AND BUDGET, DRAFT 2005 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATION 3 (2005), *available at* http://www.whitehouse.gov/omb/inforeg/2005_cb/draft_2005_cb_report.pdf.

than \$1.1 trillion,¹⁵ up from \$777 billion in 1995, and \$876 billion in 2001.¹⁶

While we know the burden of federal regulation to be enormous, the exact costs of complying are unclear. The SBA Office of Advocacy explains the discrepancy between its estimate and the estimate proffered by the Office of Management and Budget by pointing out what the Office of Management and Budget fails to take into account.¹⁷ To begin with, the Office of Management and Budget calculates the “cost” based on figures provided to it by agencies, which may be overly optimistic.¹⁸ Additionally, the Office fails to account for some of the costliest federal regulations, including those promulgated before October 1, 1994, and certain types of regulatory costs, including those of many economic regulations.¹⁹

Even small businesses themselves have been largely unable to say specifically which federal regulations apply to them and how much compliance with those regulations costs.²⁰ Likewise, many agencies were unable to say whether a regulation would apply to a small business or not without in-depth knowledge of the business’s operations.²¹

Of the regulations issued between 2000 and 2003, seventy-five percent of major final rulemakings increased, rather than decreased, regulatory compliance burdens.²² Small businesses have suffered the most as a result of these increased demands. While the average cost of complying with federal regulations is roughly \$5,633 per employee per year, firms with less than twenty employees can expect to pay over forty percent more – roughly \$7,647 per employee annually.²³ This discrepancy is primarily attributable to the fact that while large businesses have large consumer bases to whom they can pass on costs or large profit margins and the ability to distribute costs over a number of years, small businesses frequently do not have these advantages.

¹⁵ W. MARK CRAIN, SMALL BUSINESS ADMINISTRATION, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS v (Sept. 2005), available at <http://www.sba.gov/advo/research/rs264tot.pdf>.

¹⁶ *Id.* at 2.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 2-3.

²⁰ GENERAL ACCOUNTING OFFICE, REGULATORY BURDEN: MEASUREMENT CHALLENGES AND CONCERNS RAISED BY SELECTED COMPANIES 4-5 (1996), available at <http://www.gao.gov/archive/1997/gg97002.pdf>.

²¹ *Id.* at 4.

²² See “Regulatory Reform: Are Regulations Hindering Our Competitiveness?” Before the Subcommittee on Regulatory Affairs, House Comm. on Government Reform, 109th Cong. (2005) (statement of Marlo Lewis, Senior Fellow in Environmental Policy, Competitive Enterprise Institute), available at <http://reform.house.gov/uploadedfiles/7-27-2005%20Lewis%20Testimony.pdf>.

²³ CRAIN, *supra* note 15.

Between 1997 and 2001, the number of regulations that agencies believed would have a significant economic effect on small businesses rose 35.9% from 773 to 996, and the percentage of the total federal regulations promulgated annually that had a significant economic impact on small businesses rose from 16.1% in 1996 to 22.1% in 2001.²⁴ When asked, small businesses ranked “unreasonable government regulations” as a top ten concern.²⁵ In fact, it was considered a critical concern by 19.5% of 4,306 respondents in the survey.²⁶ Even more troubling, many business owners report that it requires forty or more hours of examination to ascertain whether a federal regulation even applies to them.²⁷

III. THE REGULATORY FLEXIBILITY ACT: A GLIMMER OF HOPE

The Regulatory Flexibility Act was passed in 1980 with aspirations of alleviating the increasing burden of federal regulation on small businesses.²⁸ The Act requires that an initial regulatory flexibility analysis be published in the Federal Register at the time a regulation is proposed,²⁹ and that a final regulatory flexibility analysis be published along with the final rule.³⁰ At minimum, the initial regulatory flexibility analysis must include: the reasoning behind the rule; its goals; the types and number of entities that will be affected; and a description of anticipated compliance requirements, including any professional skills that will be required to comply with the rule.³¹ It must also identify any rules already in place that might conflict or overlap with the proposed rule and contain alternative options that would achieve the agency’s objectives while being less burdensome.³² For instance, an agency could discuss the possibility of

²⁴ CREWS JR., *supra* note 8, at 16.

²⁵ NATIONAL FEDERATION OF INDEPENDENT BUSINESS, SMALL BUSINESS PROBLEMS AND PRIORITIES 13 (2004).

²⁶ *Id.* “Government regulation” was also the fourth-ranked “problem cluster,” consisting of unreasonable government regulation; frequent changes in tax laws; federal, state, and local paperwork; health and safety regulations; applications for permits; finding out about government regulations; hiring and firing employment regulations; cost of required equipment/procedures; environmental regulations; requirements for retirement plans; zoning/land use regulations; collecting sales/excise tax; and solid and hazardous waste disposal. *Id.* at 23-24. Before the Regulatory Flexibility Act was enacted, small businesses’ top complaint was government regulation. *Regulatory Flexibility Improvements Act Before the House Comm. On Small Business*, 109th Cong. (2005) (statement of Jere Glover, Of Counsel, Brand Law Group).

²⁷ NATIONAL FEDERATION OF INDEPENDENT BUSINESS, *supra* note 25, at 6.

²⁸ The Regulatory Flexibility Act as originally enacted is available at Pub. L. No. 96-354, 94 Stat. 1164 (1980).

²⁹ 5 U.S.C. § 603(a) (1980).

³⁰ 5 U.S.C. § 604(a) (1980).

³¹ 5 U.S.C. § 603(b) (1980).

³² *Id.*

different compliance requirements, simpler compliance requirements, or a blanket exemption from a rule or a part thereof for small entities.

The final regulatory flexibility analysis is slightly less demanding. To comply with the Act, the agency is only required to include the need for and the objectives of the rule, a summary of the issues raised by public comment, an evaluation of those issues, a list of any changes made as a result of those comments, and a statement of why the agency rejected each of the available alternatives.³³

To avoid this process, the agency must certify that the regulation will not have a “significant economic impact on a substantial number of small entities.”³⁴ Unfortunately, the statute fails to define “significant economic impact,” or “substantial number,” leaving these terms open to the interpretation of each individual agency.³⁵ This has led some agencies to define “significant impact” and “substantial number” themselves. Other agencies have either chosen not to define the term, or to merely provide suggestions as to what the term might mean, leaving the definition in each instance up to the individual rule writer.³⁶

For example, the Environmental Protection Agency has abbreviated “significant impact on a substantial number of small entities” as “SISNOSE”³⁷ and, in its compliance guide, suggests that rulemakers first ascertain whether a substantial number of small businesses will be affected and whether that effect will be adverse.³⁸ If the rule writer finds that there will be an adverse impact on a substantial number of small businesses, the manual recommends that they analyze what the effect on small businesses will be based on what the business will have to do to comply,³⁹ the severity of the economic impact,⁴⁰ and the number and percentage of small businesses that will be affected.⁴¹ The compliance guide stresses, however, that these are only suggested approaches.⁴² As a result, even in cases such as that of the EPA, where there is an intricate formula for determining

³³ 5 U.S.C. § 604(a) (1980).

³⁴ 5 U.S.C. § 605 (1980).

³⁵ The Act effectively *does* define “small entities” by indicating that the definition of “small business” in the Regulatory Flexibility Act mirrors the definition of “small business concern” set forth in the Small Business Act, codified at 15 U.S.C. § 631 et seq (2006).

³⁶ See ENVIRONMENTAL PROTECTION AGENCY, REVISED INTERIM GUIDE FOR EPA RULEWRITERS: REGULATORY FLEXIBILITY ACT AS AMENDED BY THE SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT 11-27 (1999).

³⁷ *Id.* at 12.

³⁸ *Id.* at 17-18.

³⁹ *Id.* at 19.

⁴⁰ *Id.* at 22.

⁴¹ *Id.* at 27.

⁴² See ENVIRONMENTAL PROTECTION AGENCY, REVISED INTERIM GUIDE FOR EPA RULEWRITERS: REGULATORY FLEXIBILITY ACT AS AMENDED BY THE SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT 11-27 (1999) at 42.

whether there is a “significant impact on a substantial number of small businesses,” agencies and individual rulemakers still have broad discretion to modify the definition as it fits their needs.

The Regulatory Flexibility Act also provides that agencies must publish in the Federal Register its regulatory agendas for the year,⁴³ and must review existing regulations every ten years to ensure that they are still necessary and to determine whether their impact can be minimized.⁴⁴ Yet as explicit as the requirements instituted by the Act were, and as important as Congress believed its goal to be, the Act as originally passed did not include any provisions allowing for judicial review if an agency failed to comply.

The Regulatory Flexibility Act was amended in 1996 by the Small Business Regulatory Enforcement Fairness Act, with hopes of giving the original legislation some teeth.⁴⁵ The amendments retained all of the requirements of the original Act but made significant additions.⁴⁶ Most importantly, the Small Business Regulatory Enforcement Fairness Act provides for judicial review of agency compliance with the Act.⁴⁷ This has allowed courts to apply remedies when agencies have failed to comply, such as staying agency enforcement of a rule, remanding the rule to the agency, or requiring the agency to belatedly complete the regulatory flexibility analysis as it originally should have.⁴⁸ It also requires agencies to assemble “compliance guides” to show small businesses how to comply with regulations,⁴⁹ and allows for Congressional approval or disapproval of certain regulations.⁵⁰ Finally, it requires the EPA and Occupational Safety and Health Administration to conduct small business advocacy review panels in conjunction with the Small Business Administration Office of Advocacy, the Office of Management and Budget, and representatives from small businesses.⁵¹ The goal of the panels was to create an effective forum for small businesses and their advocates to make comments and suggestions for workable alternatives, and to increase the voice of small business in the regulatory process.⁵² Unfortunately, even the Small Business Regulatory

⁴³ 5 U.S.C. § 602(a) (1980).

⁴⁴ 5 U.S.C. § 610(a) (1980).

⁴⁵ See generally OFFICE OF ADVOCACY, SMALL BUSINESS ADMINISTRATION, REPORT ON THE REGULATORY FLEXIBILITY ACT, FY 2004: ANNUAL REPORT OF THE CHIEF COUNSEL FOR ADVOCACY ON IMPLEMENTATION OF THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 13272-4 (2005).

⁴⁶ Pub. L. No. 104-121.

⁴⁷ 5 U.S.C. § 611 (2006).

⁴⁸ *Id.*

⁴⁹ Pub. L. No. 104-121, § 212.

⁵⁰ 5 U.S.C. § 801 (2006).

⁵¹ 5 U.S.C. § 609(b) (2006).

⁵² OFFICE OF ADVOCACY, SMALL BUSINESS ADMINISTRATION, *supra* note 9 at 5.

Enforcement Fairness Act failed to effectuate Congress's goal of preventing small businesses from being overburdened by regulation.

As a result, the Regulatory Flexibility Act was further strengthened in 2002 by Executive Order 13272. This order required agencies to make available procedures outlining how it intended to determine whether a regulation had a significant impact on a substantial number of small businesses, to notify the Small Business Administration Office of Advocacy of draft rules that they expected would have a significant impact on a substantial number of small businesses, and to publish responses to the Office of Advocacy's comments on those regulations in the Federal Register.⁵³ In return, the Office of Advocacy was to periodically conduct training and advise agencies on how to comply with the Act.⁵⁴

IV. THE RFA'S IMPACT: SOME SUCCESSES, BUT MOSTLY DISAPPOINTMENTS

Although the Regulatory Flexibility Act and its subsequent amendments were "introduced with great fanfare and even greater expectations," the RFA failed to meet many of those expectations.⁵⁵ To its credit, the Regulatory Flexibility Act has seen some successes. In the past eight years, the Act has saved small businesses an estimated \$70 billion.⁵⁶ Additionally, agencies seem to be taking the Act, as well as their regulations' effect on small business, under at least some consideration before promulgating rules. For example, the Department of Transportation indicates that it does not even bother proposing some rules because it expects that the Office of Management and Budget⁵⁷ will not approve them.⁵⁸

⁵³ *Id.* at 5-6.

⁵⁴ *Id.* at 6.

⁵⁵ *Regulatory Reform: Are Regulations Hindering Our Competitiveness? Before the Subcommittee on Regulatory Affairs, House Comm. on Government Reform*, 109th Cong. (2005) (statement of Curtis W. Copeland, Senior Fellow in Environmental Policy, Competitive Enterprise Institute), available at <http://reform.house.gov/UploadedFiles/7-27-2005%20Copeland%20Testimony.pdf>.

⁵⁶ *Regulatory Flexibility Improvements Act Before the House Comm. On Small Business*, 109th Cong. (2005) (statement of Jere Glover, Of Counsel, Brand Law Group), available at <http://wwwc.house.gov/smbiz/hearings/databasedrivenhearingssystem/displayTestimony.asp?hearingIdDateFormat=050316&testimonyId=271>.

⁵⁷ The Office of Management and Budget reviews certain agency rules under Executive Order 12866.

⁵⁸ *Regulatory Reform: Are Regulations Hindering Our Competitiveness? Before the Subcommittee on Regulatory Affairs, House Comm. on Government Reform*, 109th Cong. (2005) (statement of Christopher Mihm, Managing Director, Strategic Issues, Government Accountability Office), available at <http://reform.house.gov/uploadedfiles/7-27-2005%20GAO%20testimony%20final.pdf>.

Agencies still have very broad discretion, however, which allows a determined agency to avoid the Regulatory Flexibility Act if it so chooses. The Act itself provides no definition of what constitutes a “significant impact on a substantial number of small businesses.” In fact, as of March 1998, neither the Small Business Administration Office of Advocacy, nor any agency, had developed a government-wide definition for the term.⁵⁹ Given that Congress offered practically no guidance as to what it might have intended,⁶⁰ some agencies have used this ambiguity to avoid regulatory flexibility analysis. For example, in 1999, the EPA demanded that any business that had more than ten employees and used more than ten pounds of lead per year in manufacturing would have to meet new reporting requirements. The EPA estimated that the report would take approximately 100 hours to complete and would cost each of the more than 5,000 small businesses affected roughly \$7,500 each the first year and \$5,000 every year after.⁶¹ Nonetheless, it certified that the rule would not have a significant economic impact on a substantial number of small entities.⁶²

The EPA’s standard is that a rule can impose \$10,000 each in costs on up to 10,000 small businesses, as long as the cost would not represent more than one percent of their annual revenue.⁶³ As a result, the EPA has certified that ninety-six percent of their rules since 1996 would not have a significant impact on a substantial number of small businesses.⁶⁴ Prior to the enactment of the SBREFA in 1996, the EPA’s four major offices only certified seventy-eight percent of their rules as not having a “significant impact on a substantial number of small businesses.”⁶⁵

After the SBREFA took effect, the agency changed its internal rules regarding when a regulatory flexibility analysis would be conducted. Subsequently, it certified ninety-six percent of its rules as not having a “significant economic impact on a substantial number of small businesses.”⁶⁶ This seems in keeping with the statements of one

⁵⁹ GENERAL ACCOUNTING OFFICE, REGULATORY REFORM: IMPLEMENTATION OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL REQUIREMENTS 9-10 (1998), *available at* <http://www.gao.gov/archive/1998/gg98036.pdf>.

⁶⁰ As the General Accounting Office indicated, Congress does not even give a general idea as to what the idea of a “significant impact” should be based on - the number of work hours consumed by paperwork or compliance, or the cost of compliance? Cumulative impact or individual impact? Based on the impact of the underlying statute, or based on the regulation implementing it? GENERAL ACCOUNTING OFFICE, REGULATORY FLEXIBILITY ACT: CLARIFICATION OF KEY TERMS STILL NEEDED 2 (2002), *available at* <http://www.gao.gov/new.items/d02491t.pdf>.

⁶¹ Copeland, *supra* note 55.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 8.

⁶⁵ *Id.*

⁶⁶ GENERAL ACCOUNTING OFFICE, *supra* note 60.

Department of Labor official, who noted that while regulatory flexibility certification merely requires agencies to fill out another form, “[w]e routinely certified [that] proposed rules would have no significant impact on a substantial number of small entities without a second thought.”⁶⁷ The EPA justified the change by indicating that since any rule that would have a significant impact on a substantial number of small businesses would now require the convening of a small business advocacy review panel, an expensive process, it changed its internal procedures from conducting a regulatory flexibility analysis on any rule that would have *any* impact on small businesses to only conducting analyses on rules that would have a *significant* impact on a substantial number of businesses. However, it is extremely difficult to imagine that the pronounced decrease in the number of regulations the EPA claims to believe will have a significant impact on small businesses was correlated with a dramatic change in the EPA’s rulemaking culture or anything other than the desire to avoid the panel process. Nevertheless, the policy change still led to the EPA conducting fewer regulatory flexibility analyses under the SBREFA—the opposite of the intended result.

Other broad grants of authority, such as giving agencies the “sole discretion” to determine whether the mandated small business compliance guides will be composed in plain language, when they will be published, and how they will be distributed can also allow an agency to take advantage of the Act. Additionally, the agencies are often told that they “may” take a certain action “when feasible” or “at their discretion.”⁶⁸ “When agencies are told that they ‘may,’ at their discretion, take some action that requires substantial cost or effort on their part, at least some agencies will seek to avoid it,” Curtis W. Copeland speculated to the United States Congress in 2005.⁶⁹

Agencies have also found ways to avoid the small business advisory panels that the EPA and the Occupational Safety and Health Administration (“OSHA”) are required to assemble under the amended Act. For example, the EPA convened over three times as many panels in the first four years after the SBREFA was enacted than it did between 2001 and 2005.⁷⁰ Even in the first year after the Act was amended, however, the Small Business Administration Office of Advocacy felt that the EPA should have held small business advisory panels for two of the seventeen rules it certified would not have a “significant impact on a substantial number of

⁶⁷ JOHN SHANAHAN, REGULATING THE REGULATORS: REGULATORY PROCESS REFORM IN THE 104TH CONGRESS, *available at* <http://www.cato.org/pubs/regulation/reg20n1b.html>.

⁶⁸ Copeland, *supra* note 55.

⁶⁹ *Id.*

⁷⁰ *Regulatory Flexibility Improvements Act Before the House Comm. On Small Business*, 109th Cong. (2005) (statement of Jere Glover, Of Counsel, Brand Law Group).

small businesses,” in addition to the four that it held.⁷¹ Because of the time and cost involved in convening these panels, it is not difficult to imagine that the EPA would deliberately try to avoid convening them.

Agency beliefs about which regulations must be reviewed pursuant to Section 610 of the Act to ascertain whether they are still necessary also vary greatly. Some agencies believe the Act requires them to review *all* regulations within ten years of its enactment; others believe that only the regulations that they believed at the time of enactment would have a “significant impact on a substantial number of small businesses” must be re-examined.⁷²

For example, the Department of Transportation interprets the Act as requiring it to review *every* rule within ten years, whereas the EPA believes that it must only review rules for which it published a final regulatory flexibility analysis.⁷³ As a result of this ambiguity, review of existing regulations has been inconsistent among agencies.⁷⁴ Furthermore, many agencies appear to be publishing no notices of review in the Federal Register Unified Agenda at all, despite the fact that they indicate that many of their regulations have a “significant effect on a substantial number of small entities.”⁷⁵ Some of these interpretations undoubtedly frustrate the purpose of the provision, because a finding that only regulations originally thought to have a “significant impact on a substantial number of small entities” must be reviewed clearly excludes regulations that were not anticipated to have a significant impact, but ultimately resulted in one anyway.

⁷¹ GENERAL ACCOUNTING OFFICE, *supra* note 59, at 3-4. The General Accounting Office did find, however, that the Occupational Safety and Health Administration had convened panels for all of the regulations necessary in that year – two. *Id.* at 3.

⁷² GENERAL ACCOUNTING OFFICE, REGULATORY FLEXIBILITY ACT: AGENCIES’ INTERPRETATIONS OF REVIEW REQUIREMENTS VARY 11 (1999), *available at* <http://www.gao.gov/archive/1999/gg99055.pdf>.

⁷³ *Id.*

⁷⁴ While using the Unified Agenda to notify the public of an opportunity to comment is not specifically required by the Act, agencies *are* required to publish some form of notice that they intend to review a particular rule in the next year (the Unified Agenda simply happens to be the most convenient method). GENERAL ACCOUNTING OFFICE, REGULATORY REFORM: AGENCIES’ SECTION 610 REVIEW NOTICE S OFTEN DID NOT MEET STATUTORY REQUIREMENTS 1 (1999).

⁷⁵ In the April 1998 edition of the Unified Agenda, 22 entries from seven agencies were § 610 reviews, while in the November 1998 edition, 31 entries from eight agencies were identified as § 610 reviews. *Id.* at 2. Of the more than 50 agencies that did not indicate any § 610 reviews, six indicated in the 1998 Unified Agenda, as well as the 19 previous Unified Agendas, that a significant number of their regulations have a “significant effect on a substantial number of small entities,” from which one can infer that they should have regulations under review, and may not be complying with the Act. *Id.*

Additionally, as of 2004, not all agencies had complied with the new notice requirements of Executive Order 13272.⁷⁶ Executive Order 13272 requires agencies to emphasize the consideration of small businesses in the rulemaking process by formulating a procedure for determining when there is a significant impact on a substantial number of small businesses, notifying the Small Business Administration Office of Advocacy of rules likely to have such an impact and responding to their comments in the final regulatory flexibility analysis.⁷⁷ Although the Small Business Administration believes otherwise, however, eight agencies, including the Federal Communications Commission, have asserted that the order does not apply to them and have failed or refused to comply.⁷⁸

Finally, while one Department of Labor official noted that the judicial review permitted by the SBREFA would likely result in a “significant impact,”⁷⁹ judges have rarely ruled in favor of small businesses, granting substantial deference to agencies in all but the most egregious of cases.⁸⁰

Because the Act merely creates procedural requirements that agencies must follow, courts have ascertained that only a “reasonable, good faith effort” by the agency is required to comply with the Act.⁸¹ As a result, courts have tended to defer to agencies’ judgment and expertise in ascertaining whether a regulatory flexibility analysis should have been undertaken.⁸² Consequently, courts have usually only intervened in the

⁷⁶ The Small Business Office of Advocacy has indicated that the Export-Import Bank of the United States, the Farm Credit Administration, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Housing Finance Board, the Federal Maritime Commission, the Federal Reserve System, and the Securities and Exchange Commission have all failed to comply with the new Executive Order. The FDIC has asserted to the Office of Advocacy via letter that the Executive Order does not apply to them, because they are an independent agency. OFFICE OF ADVOCACY, SMALL BUSINESS ADMINISTRATION, *supra* note 9, at 8.

⁷⁷ *Id.* at 5.

⁷⁸ *Id.* at 8.

⁷⁹ SHANAHAN, *supra* note 67.

⁸⁰ See, e.g., *Southern Offshore Fishing Ass’n v. Daley*, 55 F. Supp. 2d 1336 (M.D. Fla. 1999) (where the court intervened when the Department of Commerce reduced the Atlantic shark harvest quota by 50%, then when compelled to do a regulatory flexibility analysis by the court, failed to perform a meaningful or understandable economic analysis, and based their analysis on unrealistic assumptions).

⁸¹ *United States Cellular Corp. v. F.C.C.*, 254 F.3d 78 (D.C. Cir. 2001) (where the court found that the F.C.C. had not acted arbitrarily and capriciously in failing to consider the impact of a regulation on rural telephone carriers).

⁸² See *Grand Canyon Air Tour Coalition v. F.A.A.*, 154 F.3d 455 (D.C. Cir. 1998) (where the court deferred to the judgment and expertise of the F.A.A. in ascertaining whether establishing flight-free zones to reduce air traffic noise would have a significant impact on a substantial number of small businesses).

most serious cases.⁸³ Even then, they have only remanded rules to agencies or temporarily stayed the rules until analyses were conducted.⁸⁴

Additionally, courts have only required agencies to ascertain the effects of their regulations on the businesses that they regulate directly. Therefore, if a business will only be incidentally affected, an agency need not assess the effects of its regulation on that business, even if that effect is likely to be severe.⁸⁵ For example, the EPA allowed auto manufacturers to be “deemed-to-comply” with federal emissions regulations if they were in compliance with California’s emissions regulations without ascertaining what effects, if any, such a rule would have on aftermarket auto-parts manufacturers. Even though the regulation was likely to hurt aftermarket auto-parts manufacturers, the court found that an agency only needed to analyze the effects on small businesses it directly regulates (in this case, manufacturers), and did not have to investigate the impact on businesses indirectly impacted (here, the aftermarket part manufacturers), however serious that impact might be.⁸⁶

V. PROGRESS, THANKS TO THE INTERNET: INCREASED ACCESS TO REGULATORY PROCESS ONLINE MAKES IT EASIER FOR SMALL BUSINESSES TO CONTRIBUTE

As the Internet has evolved, the ability of small businesses and the general public to take advantage of agency notice-and-comment periods and to keep up with rulemaking has improved. The potential improvements, however, have not been fully realized.⁸⁷

Currently, twenty-five agencies post all of their rulemaking materials online and allow for public comment on those materials as long as the periods are open.⁸⁸ Other agencies, such as the Department of Transportation, publish all of their materials on their agency’s website in a Docket Management System, which allows for the viewing of proposed regulations, final regulations, public comments on regulations, and other

⁸³ *Supra* note 80.

⁸⁴ *Id.*

⁸⁵ *Motor & Equipment Manufacturers Association v. Nichols*, 142 F.3d 449, 467 (D.C. Cir.1998).

⁸⁶ *Id.*

⁸⁷ Stuart W. Shulman, *The Internet Still Might (But Probably Won't) Change Everything*, 1 I/S 111 114-15 (2004/2005).

⁸⁸ The regulatory materials can be accessed through Regulations.gov. The entire list of agencies is available on the web site; the agencies include major agencies such as the Environmental Protection Agency, the Department of Energy, the Department of Homeland Security, the Department of Housing and Urban Development, and the Federal Emergency Management Agency, as well as others.

materials, as well as for the electronic submission of comments by both registered viewers and guests.⁸⁹

George W. Bush and the Office of Management and Budget hope to expand the Department of Transportation's Docket Management System to other agencies to increase citizen access to the regulatory process.⁹⁰ Such an expansion in online access to the regulatory process would likely benefit small businesses that have limited resources, but a serious interest in regulatory outcomes and a desire to have input in the process.⁹¹ While large businesses have the ability to devote the necessary man-hours to monitoring forthcoming regulations and ensuring effective input in the regulatory process, small businesses frequently cannot afford to sacrifice time and money in this way. Thus, providing small businesses with an easier method for monitoring and commenting on regulations would likely be beneficial to them.

It is doubtful, however, that such a development would completely equalize access to the regulatory process. Small businesses generally do not have the funds to engage in paid lobbying efforts, which are overall more effective than grassroots lobbying. This is particularly true when those grassroots efforts are conducted online using form letters, because many agencies filter these out when considering comments.⁹² More importantly, even with improved access to the regulatory process through an easy-to-use online interface, a large time investment is still required to research regulations and their implications, and compose comments. With small business owners already reporting that it can take forty hours or more for them to determine whether a regulation even applies to them,⁹³ the Internet alone is unlikely to significantly alleviate the burden these businesses face in participating in the regulatory process.

VI. A MODEST PROPOSAL: HOW TAKING CUES FROM THE UNFUNDED MANDATES REFORM ACT CAN STRENGTHEN THE RFA

The Unfunded Mandates Reform Act is similar to the Regulatory Flexibility Act in the sense that both the Regulatory Flexibility Act and the

⁸⁹ A full explanation of the Department of Transportation's Docket Management System is available at their website: http://dms.dot.gov/help/about_dms.cfm. The Department of Transportation's web site also allows individuals to sign up to be emailed regulatory updates daily through their listserv.

⁹⁰ EXECUTIVE OFFICE OF THE PRESIDENT AND OFFICE OF MANAGEMENT AND BUDGET, THE PRESIDENT'S MANAGEMENT AGENDA 25 (F.Y. 2002).

⁹¹ OFFICE OF ADVOCACY, SMALL BUSINESS ADMINISTRATION, REGULATORY FLEXIBILITY ACT, FY 2004: ANNUAL REPORT OF THE CHIEF COUNSEL FOR ADVOCACY ON IMPLEMENTATION OF THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 13272 3 (2005).

⁹² Shulman, *supra* note 87, at 116.

⁹³ NATIONAL FEDERATION OF INDEPENDENT BUSINESSES, *supra* note 25, at 40.

Unfunded Mandates Reform Act were intended to curb mandates from the federal government that would impose costs on smaller entities when the government would have no monetary investment in the cost of compliance with the mandate. Both also employ shaming as their primary enforcement technique. Where the Unfunded Mandates Reform Act subjects members of Congress to a point of order if their legislation exceeds a certain cost threshold without accompanying funding, the RFA forces agencies to “admit” in the Federal Register if their regulation will have a serious negative effect on small businesses.

One serious problem with the Regulatory Flexibility Act is that while agencies are required to develop definitions of a “significant . . . impact on a substantial number of small businesses,”⁹⁴ these definitions are inconsistent and completely discretionary. For example, the Occupational Safety and Health Administration’s definition hinges on percentages of revenue or profit. If for a group of small entities, the cost of the rule is estimated to cost more than one percent of revenue or five percent of profits, and the cost is not likely to be absorbed by passing it on to consumers, nor is the group “de minimis,” then the Regulatory Flexibility Act applies.⁹⁵ Conversely, the EPA uses a very complex definition that essentially revolves around the magnitude of the impact, the actual number of small businesses that will be affected, and the percentage of small entities to be impacted.⁹⁶

The simplest fix to this part of the problem is to take a cue from the very similar Unfunded Mandates Reform Act of 1995,⁹⁷ and define a “significant impact on a substantial number of small entities.” The phrase can most easily be defined in terms of total economic cost to the covered entities – in this case, “small entities.” Because the RFA employs the definition of “small entities” provided by the Small Business Act,⁹⁸ this would easily eliminate any confusion as to what constitutes a “significant impact on a substantial number of small entities.” It would also reduce or eliminate situations such as the earlier-discussed example where the EPA certified that slapping 5,600 small entities with a total estimated \$116 million in costs was not a “significant impact on a substantial number of small entities.”

⁹⁴ Exec. Order No. 13272, 67 Fed. Reg. 53461 (Aug. 16, 2002).

⁹⁵ Department of Labor. OSHA Procedures for Compliance with the Regulatory Development and Review Requirements of the Regulatory Flexibility Act. <http://www.osha.gov/> (last accessed Jan. 30, 2006).

⁹⁶ ENVIRONMENTAL PROTECTION AGENCY, *supra* note 36, at 11-27.

⁹⁷ 2 U.S.C. § 1501 (2006).

⁹⁸ The Small Business Act is located at 15 U.S.C. § 631et seq. For an explanation of how the Regulatory Flexibility Act appropriates the definition set forth in the Small Business Act, *see supra* note 35.

As for Section 610 of the Regulatory Flexibility Act, which requires review of existing regulations within ten years to ascertain whether they are still relevant or could be improved, it is questionable if this section would actually improve small businesses' situations if it could be enforced. At worst, Section 610 may reduce agency credibility and reward non-compliance.

The Unfunded Mandates Reform Act has a similar provision, which required the Advisory Council on Intergovernmental Relations to study existing mandates to determine if each should be continued, modified, or repealed.⁹⁹ Unfortunately, the Council was terminated before it could release its final report on federal mandates imposed on state governments.¹⁰⁰ However, it was speculated that, regardless, since there was no actual procedure in place to demand the changes the Council suggested, the review would be "yet another interesting but essentially meaningless academic exercise."¹⁰¹

Section 610 of the RFA suffers the same fatal flaw: although it requires agencies to review regulations, it does not require it to act on any conclusions it might draw as to the necessity or efficacy of the regulation. Furthermore, while agencies should be expected to revise regulations in light of scientific discovery and other revelations, arbitrarily forcing review of rules within ten years of their enactment for no particular reason reduces the credibility of agencies in the same way that continually breaking with precedent would reduce the credibility of a court. In fact, requiring such a practice may even reward non-compliance by encouraging businesses to play the "waiting game" to see if an agency will either make the compliance standard less rigorous, or modify the procedures required to be less time-consuming.

Modifying the Regulatory Flexibility Act to actually level the playing field for small businesses when it comes to federal regulation is a much more difficult problem. Much of this problem centers on the fact that the original purpose of the Regulatory Flexibility Act was not to exempt

⁹⁹ The Council did not study mandates that applied to private industry – only mandates that applied to state and local governments. See ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS, THE ROLE OF FEDERAL MANDATES IN INTERGOVERNMENTAL RELATIONS: A PRELIMINARY ACIR REPORT FOR PUBLIC REVIEW AND COMMENT (1996).

¹⁰⁰ The Council published its report on judicial mandates, *Federal Court Rulings Involving State, Local, and Tribal Governments, Calendar Year 1994: A Report Prepared Under Section 304, Unfunded Mandates Reform Act of 1995*, in July 1995. It also released a preliminary report, *The Role of Federal Mandates in Intergovernmental Relations: A Preliminary ACIR Report for Public Review and Comment*, examining the effect of federal mandates on state and local governments, in January 1996. It was terminated at the end of fiscal year 1996.

¹⁰¹ John Novison of the International City-County Management Association made this comment in ANGELA ANTONELLI, CATO INSTITUTE, PROMISES UNFULFILLED: UNFUNDED MANDATES REFORM ACT OF 1995 n.p. (n.d.).

small businesses from compliance with regulation. Rather, it was to revise agencies' rulemaking processes to avoid placing undue compliance burdens on small businesses while still achieving the desired public policy objectives.¹⁰² Indeed, the Act was only intended to create procedural requirements to encourage agencies to seek suggestions from small businesses and to investigate alternatives that would minimize the requirements that small businesses have to comply with, such as "multi-tiered regulation,"¹⁰³ or blanket exemptions for small businesses when regulation of them would not produce a particularly meaningful result.¹⁰⁴

There is no evidence that Congress's intent has changed since the time that the Regulatory Flexibility Act was originally passed. While Congress clearly intended to prevent an undue regulatory burden from being placed on small businesses, it just as clearly did not intend to prevent small businesses from being regulated. Thus, while Congress's intent is not currently being executed effectively, it never intended to demand that small businesses be held to lesser standards of compliance.

Another obstacle is the fact that courts cannot solve the problem. The relationship that Congress intended between agencies and courts, as well as the case law developed over many years, requires courts to defer to agencies' judgment and expertise. In Regulatory Flexibility Act litigation, courts have merely extended that approach to this piece of legislation, permitting agency actions and decisions to stand unless they are arbitrary and capricious, and generally placing their faith in the expertise of agencies.¹⁰⁵

Instead of expecting a meaningful solution to bloom from modifications to prior failed approaches, we should hold agencies responsible for the consequences that small businesses experience by requiring them to assume some of the burden of identifying how businesses with limited resources can comply with their requirements. For example, if a new regulation requires reporting of information through a costly software system, the agency should first be required to examine the primary negative consequences to small businesses. In this situation, the most serious problems a small business is likely to experience are a lack of man-hours to devote to gathering and inputting the information, lack of funds to purchase the software program, and lack of computer literacy. The agency should then be required to craft solutions to mitigate the most serious problems;

¹⁰² See OFFICE OF ADVOCACY, *supra* note 78, at 3.

¹⁰³ Multi-tiered regulation involves less stringent requirements for smaller organizations, to lessen the demands on their resources. For a more in-depth explanation, see C. Steven Bradford, *Does Size Matter? An Economic Analysis of Small Business Exemptions from Regulation*, 8 J. SMALL & EMERGING BUS. L. 1, 20 (2004).

¹⁰⁴ 5 Rep. No. 96-878 (1980) 1.

¹⁰⁵ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

here, by streamlining the reporting requirements, and providing a reporting program free of charge, with accompanying simple instructions for use.

The goal is not to force agencies to become consulting services to solve all of the problems experienced by small businesses. Rather, the goal is to distribute the major costs of compliance equally, reducing the increased burden small businesses face as a result of regulation, and reducing the benefit larger businesses experience from decreased competition. Some large businesses have gone so far as to lobby for new regulations, with hopes that it could put smaller competitors out of business, or at least stifle their ability to take advantage of opportunities and to develop. The objective of federal regulation is to serve the public interest, not to create a process of which certain businesses can take advantage. Therefore, when such an effect occurs, the government should take steps to distribute the cost of compliance more equally.

Requiring an entity making demands on smaller organizations to have an increased stake in the actualization of those demands was the same approach taken by the Unfunded Mandates Reform Act of 1995. The Unfunded Mandates Reform Act indicates that, with certain exceptions,¹⁰⁶ intergovernmental and private sector mandates that will impose more than \$50 million or \$100 million in costs, respectively, in any one year are subject to points of order in Congress if not funded adequately.¹⁰⁷

This policy strongly encourages Congress to take responsibility for the ramifications of their actions by providing funding for compliance, or simply concluding that the cost of the mandate outweighs its benefit. Of course, the same approach cannot be taken in the case of federal agencies, because federal agencies are never responsible for financing compliance with their actions. Forcing agencies to help small businesses develop actual solutions for compliance would, however, require agencies to take the same kind of responsibility for the consequences of their actions that Congress is now expected to take under the Unfunded Mandates Reform Act.

The Unfunded Mandates Reform Act of 1995 has resulted in disappointment for many, primarily because it does not provide that legislation may not be passed unless it includes adequate funding. Rather, it only provides that a point of order may be raised on a piece of legislation that falls under the Act and is funded either inadequately or not at all. Because a point of order can be overcome by a majority vote, the Unfunded Mandates Reform Act has, at most, a shaming effect if Congress truly

¹⁰⁶ These include existing mandates, mandates that enforce constitutional rights or disallow discrimination, compliance with funding or programs provided by the federal government, emergency relief, national security, Social Security, or any legislation deemed "emergency" by Congress. 2 U.S.C. § 1503 (2006). Mandates under the cost thresholds set forth in 2 U.S.C. § 658(d) (2006) are also excepted.

¹⁰⁷ 2 U.S.C. § 658d (2006).

wants to enact a piece of legislation anyway.¹⁰⁸ In the first three years after the enactment of the Unfunded Mandates Reform Act, however, only 19 of 100 proposed mandates covered by the Act were passed.¹⁰⁹ While it is difficult to speculate what those numbers would have been in the absence of the Act, the Congressional Budget Office believes that the Act decreased the number of mandates passed and has seen changes in final versions of legislation that would reduce or eliminate costs.¹¹⁰

Although agencies are already required to consider the theoretical implications of their actions under the Regulatory Flexibility Act, requiring agencies to devise plans for compliance would require them to also consider the practical implications and would hopefully result in increased sensitivity to the difficulties of compliance. More radical solutions ignoring the original intentions of the Regulatory Flexibility Act might be more effective, but would require substantial changes in the way federal regulations are currently promulgated and enforced.

One option is to require federal agencies to stay within a “regulatory budget”—that is, an agency could only promulgate regulations each year imposing costs up to a certain dollar amount. This idea is similar to a bill proposed by Rep. Lamar Smith (R-TX), which would have required Congress to annually approve the costs that would be imposed by federal agencies through regulation in the same way that Congress approves the budget.¹¹¹ Unfortunately, such an approach might not result in an actual decrease in regulatory costs for small businesses, and might, in fact, cause problems in the overall regulatory process. While this solution might serve to reduce overall costs of regulation for businesses, it would do nothing to relieve the disproportionate burden these regulations place on small businesses, the very issue Congress has sought to address. Furthermore, if Congress refused to allow for additional regulation once the budget was reached, an agency could be forced to delay important rules until the next year, resulting in detriment to the public interest.

Similarly, agency budgets could be increased drastically and agencies could be required to pay for the costs of implementing their regulations. Unfortunately, this creates many problems similar to those that would be created by forcing agencies to stay within a “regulatory budget,” such as requiring them to ask Congress for budget increases, potentially sidelining important regulations when the budget has been depleted.

¹⁰⁸ SENATE COMM. ON RULES & ADMINISTRATION, *STANDING RULES OF THE SENATE*, XX.

¹⁰⁹ Hearing on The Unfunded Mandates Reform Act before the Subcommittee on Rules and Organization of the House and the Subcommittee on Legislative and Budget Process Committee on Rules, 106th Cong. (1999) (statement of James L. Blum, Acting Director, Congressional Budget Office).

¹¹⁰ *Id.*

¹¹¹ Regulatory Accountability Act, H.R. 3277, 104th Cong. (1995).

Although this option removes the cost burden entirely from large and small businesses alike, it implicates an added concern—that a regulation with an unexpectedly high implementation cost could “blow” the budget for the year. Although increases could be granted, important regulatory goals for the year could still be delayed.

VII. CONCLUSION

Despite the fact that members of Congress themselves have experienced the woes that other small business owners frequently suffer as a result of federal regulation, Congress’s response to the problem has proven inadequate. Indeed, the burden of federal regulatory compliance that small businesses have faced since the 1970s has continued to grow, even as Congress has made efforts to rein it in. As a result, many small business owners and employees find themselves spending hours trying to parse confusing language in regulations to ascertain whether they even apply, and worrying about the costs of compliance in the face of the potential for large fines.

Although the Regulatory Flexibility Act imposed analytical requirements on agencies to encourage them to be more sensitive to small businesses’ concerns, failures by Congress to create a definition for “significant impact on a substantial number of small businesses,” or to demand an approach that would actually result in a substantive, rather than a procedural, change in agencies’ rulemaking processes has resulted in disappointment with the changes that the Regulatory Flexibility Act has actually effected.

While there are a variety of potential solutions, few are in line with Congress’s original purpose of ensuring that agencies have the freedom to pursue public policy goals as they see fit, while encouraging it to take into consideration small businesses’ unique concerns. There is no evidence that Congress has changed its stance since the Regulatory Flexibility Act was enacted over twenty-five years ago. Therefore, a solution that can be implemented in the near future probably must pursue that same intent. In light of that fact, a practical way to increase sensitivity to small business concerns is to require agencies to develop solutions to the most costly problems that small businesses are most likely to experience in attempting to meet the agency’s standards. Certain portions of the existing Regulatory Flexibility Act may also need to be abandoned, such as the requirement that agencies review regulations within a decade of their promulgation, even if no specific reason to do so exists.

Even though efforts to rein in the cost of federal regulation to avoid putting small businesses at a serious competitive disadvantage have failed, small business owners need not become hopeless. Even if Congress fails to promptly enact a solution that truly levels the playing field, small business owners can perhaps be comforted by the knowledge that some members of

Congress have experienced the problem of overly burdensome compliance costs and procedures themselves. They not only understand the headaches, but also the fact that regulation can truly get in the way of a business's operations, hurting both competitiveness and long-term survivability.

