

Kansas City Conference Spotlights Flexible Approaches to State Rulemaking

In 2002, the Office of Advocacy launched the small business regulatory flexibility model legislation initiative. The initiative's goal is to encourage states to implement laws directing their regulatory agencies to look at the impact of proposed rules on small businesses and to consider less burdensome alternatives that still accomplish the agency goal. This approach, termed "regulatory flexibility," allows governments to achieve their regulatory goals without imposing unfair economic burdens on small entities, helping to preserve businesses and jobs. Since 2002, 37 state legislatures have considered regulatory flexibility legislation, and 19 states have implemented regulatory flexibility via executive order or legislation.

On March 28, 2007, the Office of Advocacy, the Ewing Marion

Kauffman Foundation, and the Public Forum Institute convened a dynamic conference of state officials and policymakers who are at the forefront of implementing their states' regulatory flexibility laws. The conference, titled "Building a Better Small Business Climate: State Regulatory Flexibility Best Practices," considered all aspects of successful state strategies: teaching agencies, reaching out to small businesses, overseeing compliance, periodically reviewing existing rules, and measuring the success of these efforts.

The event took place at the Ewing Marion Kauffman Foundation Conference Center in Kansas City, Missouri. Participants included small business owners and representatives of advocacy groups, state economic development officials and government leaders, state

policymakers, and representatives of policy research organizations. Each panelist drew from a unique background to give valuable insight into the tools and approaches they have developed. Conference participants shared their experiences and perspectives on their efforts to bring together the small business community and regulatory agencies to create sensible regulations.

The Office of Advocacy would like to thank the Ewing Marion Kauffman Foundation and the Public Forum Institute for their support for the conference and their participation. Their generosity allows forums such as these to take place, giving leaders from across the country the opportunity to discuss important policy issues that foster entrepreneurship.



"Building a Better Small Business Climate: State Regulatory Flexibility Best Practices" took place on March 28 at the Ewing Marion Kauffman Foundation Conference Center in Kansas City, Missouri. Here, participants listen to the keynote address, including SBA Regional Administrator Sam Jones and former Congresswoman Karen McCarthy.

**Special
Conference
Edition**

**Building a Better
Small Business
Climate:
State Regulatory
Flexibility Best
Practices**

March 28, 2007

Keynote Address

Bringing Common Sense into the Legal and Regulatory Process

The day's keynote address focused on a topic related to regulation, but with an even wider impact—the litigious nature of America's legal system and its negative impact on entrepreneurship and all aspects of society. The featured speaker was Philip Howard, a leading proponent of legal reform in the United States.

Howard is vice chair of Covington & Burling LLP and the founder of Common Good, a bipartisan coalition committed to restoring common sense to American law. His two books, *The Death of Common Sense: How Law is Suffocating America* and *The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom*, make powerful arguments for the need for legal reform.

Howard's remarks focused on the impacts of the legalistic world and regulatory bureaucracy on American individuals and small businesses. "If you have no law," he stated, "you end up having a form of anarchy and strong rules and everyone is fearful. If you have too much law, you have a different form of anarchy where the weak

use law to threaten other people."

Howard argued that the litigious nature of the U.S. legal system is damaging entrepreneurship and all aspects of society; and the cumulative cost is even higher than the cost of direct litigation—it is the change in American culture. The fear of getting sued changes how businesses operate and how individuals behave; the distrust of the justice system forces businesses and individuals to function in a defensive manner.

Howard gave ample illustrations of the damaging impact of a legal and regulatory system gone awry. His examples ranged from a nurse who got away with murder because hospitals feared giving a bad reference, to doctors' practicing "defensive" medicine, to limits placed on teachers disciplining children, to a Florida county's ban on running at recess, and wacky warning labels that state the obvious.

The end result is that American culture has become reactive and defensive—no one trusts the system of justice, regulation is one-size-fits-all, and scandals result in laws and regulations that fail to

address the problems they were intended to solve. Howard further declared that "the flaw is that we've tried to create a legal system that's sort of untouched by human hands...an automatic legal system." He argued that there should be room for discretion and judgment in the justice and regulatory systems because humans must have the authority to make sense of the law in order for it to be sensible.

The Small Business Advocate

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The Small Business Advocate (ISSN 1045-7658) is published monthly by the U.S. Small Business Administration's Office of Advocacy. It is available without charge from the Office of Advocacy, U.S. Small Business Administration, MC 3114, Washington, DC 20416; advocacy@sba.gov; (202) 205-6533.

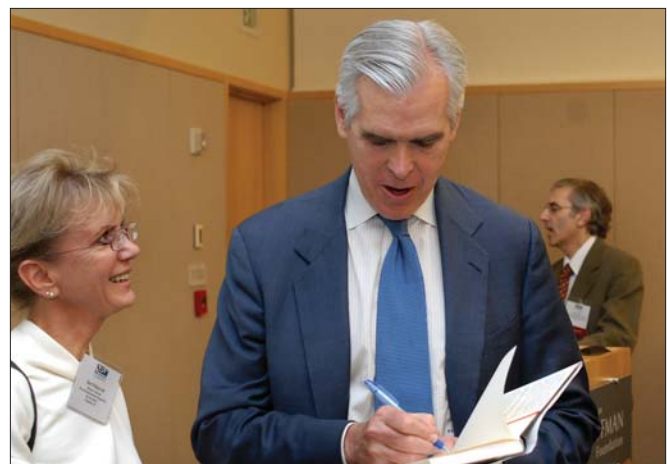
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Thomas M. Sullivan, chief counsel for advocacy, prepares for day's events with Bob Litan, vice president for research and policy at the Ewing Marion Kauffman Foundation.



Keynote speaker Philip Howard autographs one of his books for Dori Palcovich, business advocate for the Hawaii Small Business Regulatory Review Board.

Panel 1: Regulatory Flexibility Education

Regulatory Flexibility Education: Helping Agencies Learn the Ropes

Eileen Nenoff, Deputy Director, Colorado Office of Policy, Research and Regulatory Reform

Patrick Allen, Manager, Oregon Office of Regulatory Streamlining

Allen Malanowski, Economist, Arizona Governor's Regulatory Review Council

Jim Henderson, Region VIII Advocate (Moderator)

The first panel explored methods to assist agencies in crafting rules that comply with regulatory flexibility laws. Colorado's Office of Policy, Research and Regulatory Reform (OPRRR) provides training to state agencies on how to use Colorado's online system for submitting proposed rules. Eileen Nenoff, OPRRR's deputy director, described the process. If a proposed rule may negatively affect small business, job creation, or economic competitiveness, the proposing agency completes a cost-benefit analysis. OPRRR provides agencies with a set of 14 key questions to structure the analysis. The analysis helps the agency understand the full impact of its proposed rule on small business and guides the development of less burdensome alternatives. OPRRR reviews the agency's analysis and submits comments and suggestions through the online system or in formal letters. In addition, OPRRR has developed a list of questions agencies should

consider before drafting proposed rules. The list has helped educate agency staff on the importance of flexible rulemaking and on the significant contribution of small business to the state's economy.

Patrick Allen, of Oregon's Office of Regulatory Streamlining (ORS), emphasized the critical role of communication with state agencies. To help agencies learn how to draft effective rules, ORS provides a one-day training course on administrative rulemaking. Oregon also uses advisory committees (with small business owners) to help agencies understand the impact of proposed rules. The committees help agencies understand the full impact of proposed rules and find alternative approaches that are less burdensome, yet still achieve the regulatory goal. An essential ingredient to ORS's success is the strong buy-in by the Oregon governor's office and state legislature. This high-level support enables ORS to gain the full attention and coopera-

tion of state agencies. The result has been the drafting of less onerous rules for small business.

Allen Malanowski, of the Arizona Governor's Regulatory Review Council, notes that for over 20 years Arizona has used a cost-benefit analysis component called the Economic, Small Business, and Consumer Impact Statement. Due to the constant turnover in state agency rulemaking staff, Malanowski gives training to state agencies three times a year on how to complete it. Completing the statement gives rule writers a greater grasp of how their proposed rules will affect the small business community. These insights enable agency rulemakers to change their thinking—allowing the development of better and more flexible rules. Doing this early in the process reduces the potential for conflict between the agency and the businesses it regulates, and may avert public confrontations late in the process.



Region VII Advocate Wendell Bailey, (center), listens to Scott George of the Missouri Reg Fair Board (left) and Cliff Sones of the Wichita Independent Business Association.



The Education panel: Allen Malanowski, Patrick Allen, Eileen Nenoff, and Jim Henderson.

Panel 2: Small Business Outreach

Small Businesses: Your Regulatory Flexibility Resource

Carol Dunn, *Small Business Ombudsman, Bureau of Entrepreneurship, Wisconsin Department of Commerce*

Monty Felix, *Chairman, South Carolina Small Business Regulatory Review Committee*

Jennifer Abbott, *Small Business Regulations Coordinator, Alaska Department of Commerce, Community and Economic Development*

Ray Marchiori, *Region V Advocate (Moderator)*

This panel explored the importance of partnerships between state agencies and the small business community. Carol Dunn, small business ombudsman, discussed the resources that Wisconsin's Bureau of Entrepreneurship created to help implement the state's 2004 regulatory reform initiative.

While Wisconsin's legislation was designed to encourage small business participation with the state government rulemakers, this did not happen by itself. The Ombudsman's Office had to conduct compliance training with the agency rulemakers and reach out to the small business community to make them aware of the many new regulatory reforms. The 2004 law established a Small Business Regulatory Review Board, and each agency designated small business regulatory coordinators. To facilitate small business input, Wisconsin established a website where all published administrative rules are posted, and it created an electronic "regulatory alert" system. Wisconsin continues to look for

new ways to make the state agency rulemakers more receptive to small business input.

Small business owner Monty Felix was appointed chairman of the South Carolina Small Business Regulatory Review Committee in 2005, a position created by South Carolina's regulatory flexibility law. Felix stressed that South Carolina's law was meant to address the vibrant, growing small business sectors that are critical for job creation in the state. South Carolina's law applies not only to proposed agency rules, but to existing ones as well. The review committee monitors proposed regulations and serves as a clearinghouse. It works closely with small businesses and trade associations, and it creates an opportunity for small businesses to have direct access to the rulemaking process. The board wants to make sure that a small business person has an opportunity (if he or she has a problem) to reach the key decision makers in the rulemaking process.

Jennifer Abbott is the small business regulations coordinator for Alaska's regulatory oversight program. Abbott acknowledged that the one-year-old program is feeling some growing pains. The concept of regulatory flexibility is brand new to agencies, as well as the small business community. As a one-person department, Abbott conducts outreach to small business stakeholders to create awareness of the office and to illustrate the effect of regulations. The office has created a website to post all the small business regulations, and it has conducted a statewide business survey. One of the challenges Alaska's regulatory flexibility initiative faces is its pilot status. It was created as a three-year program sunsetting in 2009. For Abbott, the critical next step is to get the program reauthorized in 2009. While still in the early stages of implementing regulatory flexibility, Abbott credits the state legislature and the governor for providing the executive leadership necessary for success.



Jennifer Abbott, of the Alaska Department of Commerce, Community, and Economic Development, discusses her state's year-old program.



Monty Felix, chairman of the South Carolina Small Business Regulatory Review Committee, shares his experience implementing his state's regulatory flexibility law.

Panel 3: Oversight

Oversight: Regulatory Flexibility Watchdogs

Scott George, *Chairman, Missouri Small Business Regulatory Fairness Board*

Ken Robinson, *Executive Director, Kentucky Commission on Small Business Advocacy*

Jeffrey Rosenthal, *Deputy Chief Counsel, New York Governor's Office of Regulatory Reform*

Christine Serrano Glassner, *Region II Advocate (Moderator)*

The third panel presented the experience of three states that have seen improvements to small business economies through their regulatory flexibility programs. Missouri, Kentucky, and New York represented three different approaches to providing oversight of the regulatory process.

Small business owner Scott George is chairman of the Missouri Small Business Regulatory Fairness Board. This state board of small business owners holds regular hearings where businesses testify about problems created by specific state regulations. George commenced his remarks in an unconventional manner proclaiming that, “plagiarism is the highest form of flattery,” and urging those in attendance to plagiarize shared ideas heavily. In fact, the conference was an ideal format for exchanging ideas, taking notes, and collecting methodologies of how different states run their various small business regulatory review programs. Through

George’s leadership, state agencies are getting more small business input on proposed rules and are being held accountable for unfair regulatory enforcement actions.

Ken Robinson, executive director of the Kentucky Commission on Small Business Advocacy (CSBA), cited the use of the Office of Advocacy’s model legislation in crafting Kentucky’s 2004 regulatory flexibility law. CSBA acts as a business advocate, advising small business owners and helping resolve concerns and questions about state and federal government regulations. It focuses on three areas: organization, regulatory review, and communication with the small business community. These elements are key to the commission’s success, as is Robinson’s vision for the commission: “Our goal is to reinforce the case that small business matters in Kentucky, and we also want to make sure that every legislator and every mayor throughout the commonwealth

understands the value that the small business sector brings to the economy.”

Jeffrey Rosenthal is deputy counsel for the New York State Governor’s Office of Regulatory Reform (GORR). GORR was created by Governor Pataki in 1995 and serves as a regulatory filter for the governor’s office, reviewing and working with state agencies prior to executive approval of rules or regulations. Rosenthal’s presentation illustrated some pertinent examples of how businesses have benefited from GORR’s oversight of the process in their state. He stressed that New York is always looking for ways to improve the regulatory playing field for small businesses. Rosenthal echoed a shared sentiment in his remarks: “What is interesting to me as I’m listening to all the speakers this morning is that the end result and the goal, to relieve regulatory burdens and red tape that is imposed on small business, is universal across the country.”



Carol Dunn, small business ombudsman for the Wisconsin Department of Commerce, discusses her department’s outreach to small businesses.



The Oversight panelists: Jeffrey Rosenthal, Ken Robinson, and Scott George.

Panel 4: Periodic Review

Periodic Review: Regulatory Flexibility Spring Cleaning

Faith Lumsden, Director, Washington State Governor's Office of Regulatory Assistance

Martin Kent, Counsel to the Virginia Attorney General, Government and Regulatory Reform Task Force

Doug Ommen, Director, Missouri Department of Insurance, Financial Institutions, and Professional Registration

Connie Marshall, Region X Advocate (Moderator)

Existing regulations may unduly burden small businesses because they may no longer serve the stated purpose or may be duplicated by newer rules. Some may have been finalized without consideration of the effects on small businesses, and many become irrelevant or obsolete because of changed technology, economic conditions, or other factors. The three panelists discussed the importance of regularly reviewing existing rules to ensure that they are not outdated, duplicative, or overly burdensome on small businesses.

Faith Lumsden, director of the Washington State Governor's Office of Regulatory Assistance, emphasized, "We do it for all the right reasons, to improve competitiveness and make sure that our economy can be innovative, and that we support the survivability of small business." In order to assess how well Washington state agencies were accomplishing the peri-

odic review requirement, Lumsden conducted a survey of rulemaking agencies. The survey results were provided to the rule coordinators from the surveyed agencies to share best practices.

Martin Kent, counsel to the Virginia Attorney General, spoke about the Government and Regulatory Reform Task Force that the attorney general created to review and reduce unnecessary and obsolete regulations. The task force includes a small business working group that is making recommendations for reform. The Virginia General Assembly recently passed legislation to fast track the process for removal of regulations. Kent emphasized that the leadership of both the attorney general and the governor were critical to the success of the rule review process.

As with writing new regulations, spring cleaning or periodic review can trigger competing interest groups. Doug Ommen, direc-

tor of the Missouri Department of Insurance, Financial Institutions and Professional Registration, agreed. "And frankly," he said, "As part of the process of regulation review and spring cleaning, I can't overemphasize how important it is to get those groups together." The insurance division of this department continues to perform a comprehensive review of its existing regulations to simplify the regulatory framework for small business.

Periodic review of rules to minimize any significant economic impact on small business is a very important part of any successful regulatory flexibility law. The varied approaches to the process in Washington, Virginia, and Missouri show how periodic review can be successfully implemented.



Conference participants include Carmen DeHart, director of the Small Business and Technology Development Center at the University of Missouri-Kansas City.



Martin Kent, counsel to the Virginia Attorney General, and Faith Lumsden, of the Washington State Governor's Office of Regulatory Assistance, tackle periodic review of rules.

Panel 5: Measuring Success

Measuring Success: Is Regulatory Flexibility Working in the States?

Katy Khayyat, *Manager, Regulatory Flexibility Program, Illinois Entrepreneurship Network*

Sherri Carrera, *Rhode Island Small Business Ombudsman, Rhode Island Economic Development Corporation*

Donald Hackler, *Deputy General Counsel, Oklahoma Department of Commerce*

Steve Adams, *Region I Advocate (Moderator)*

Measuring success is critical for keeping state regulatory flexibility efforts fresh. By establishing targets and tracking progress towards these goals, agencies can avoid the complacency that can chip away at such policy initiatives. Moreover, measurable results provide a means of sustaining a program through the policy cycles that inevitably accompany changing administrations. The panelists represented state initiatives at various phases of development.

Katy Khayyat manages the Illinois Regulatory Flexibility Program, which has been active since 1998. She described the tools they use to engage the small business community in the regulatory review process. These include the Regulatory and Informational Alert, Small Business Impact Analysis, and the Illinois Small Business Advisor website. Khayyat also described approaches they have adopted for measuring success with their constituents. For example, a

recent survey of small businesses showed that the Regulatory Alert is the number one way they get their information about rulemakings.

Rhode Island has New England's most aggressive regulatory flexibility initiative. It is based on legislation adopted in late 2004. Sherri Carrera, Rhode Island's small business ombudsman, discussed the state's system for measuring agency compliance with the new regulatory flexibility requirements. The system rates agencies in five areas. Scores range from one to five: five indicates that they did everything in a timely manner, and one means that the agency did not comply at all. Carrera noted that the scorecard is for internal use only, but it could become a public document in the future.

Don Hackler, of Oklahoma's Department of Commerce and its Small Business Regulatory Review Committee, took a different approach to measurement. He talked of measuring a change in the

rulemaking climate in Oklahoma. Hackler described the process of educating state agencies to understand the hows and whys of regulatory flexibility. The limits on Oklahoma's regulatory flexibility requirements also helped allay their concerns. There are three exceptions: emergency rules, rules mandated by the legislature, and those related to professional groups. The department was able to help agencies gradually accept the new law. In fact, agencies who believe their rules may affect small business now regularly contact the department seeking advice.

While finding ways to measure the success of regulatory flexibility programs is challenging, it provides useful information to improve the state regulatory flexibility process. Documenting successes can also be a way to recognize the positive efforts of state agencies. Success stories can be found on Advocacy's website at www.sba.gov/advo/laws/law_modeleg.html#examples.



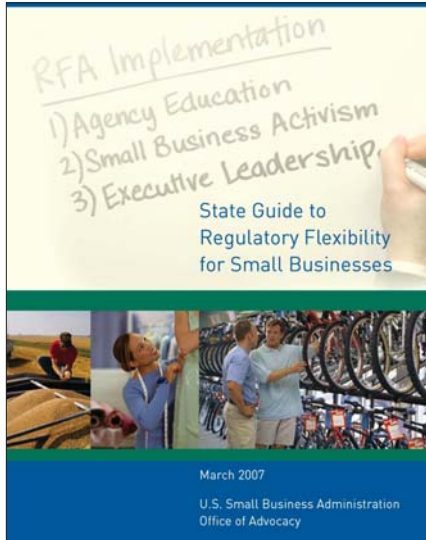
Region I Advocate Steve Adams considers diverse approaches to measuring the success of state regulatory flexibility efforts.



Measuring Success panelists: Donald Hackler, Sherri Carrera, and Katy Khayyat.

A New Tool to Craft State Regulatory Flexibility Programs

During the Kansas City conference, a new tool for state regulators made its debut. In this new publication, *A State Guide to Regulatory Flexibility for Small Businesses*, the Office of Advocacy has compiled



a wealth of useful information. Regulatory flexibility programs in 19 states are highlighted. Helpful resources include the key elements of effective implementation and guidelines for preparing an economic impact analysis and a regulatory flexibility analysis. It also contains examples of outstanding state efforts to educate rulemaking officials and small businesses on regulatory flexibility, to create transparency in the rulemaking process, and to measure the success of regulatory flexibility programs.

The complete guide is available at www.sba.gov/advo/laws/rfa_stateguide07.pdf. Print copies are also available. Contact Dawn Crockett, dawn.crockett@sba.gov or (202) 619-2310, to receive your copy.

Advocacy's State Reg Flex Webpage

Be sure to bookmark www.sba.gov/advo/laws/law_modeleg.html, the Office of Advocacy's state and regional webpage. From this portal, you can

- Get the latest news on model legislation and legislative activity;
- Download the *Guide to Regulatory Flexibility for Small Businesses*; and
- Get in touch with your Regional Advocate.

Advocacy wants to help you stay abreast of activity across the country, and we want you to share the latest developments in your state with us! For more information contact Sarah Wickham, regulatory and legislative counsel for regional affairs, at (202) 205-6972 or sarah.wickham@sba.gov.

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