



**Conference Proceedings**  
**September 19-20, 2005**  
**Washington, DC**

Created by Congress in 1976, the Office of Advocacy of the U.S. Small Business Administration (SBA) is an independent voice for small business within the federal government. Appointed by the President and confirmed by the U.S. Senate, the Chief Counsel for Advocacy directs the office. The Chief Counsel advances the views, concerns, and interests of small business before Congress, the White House, federal agencies, federal courts, and state policy makers. Economic research, policy analyses, and small business outreach help identify issues of concern. Regional Advocates and an office in Washington, DC, support the Chief Counsel's efforts.

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## Foreword

The Regulatory Flexibility Act is a landmark piece of legislation that has had the goal for the past 25 years of changing the culture of federal regulatory agencies to make them more aware of the effects of their regulations on small businesses and other small entities. By making regulations more rational and reflective of real-world business situations, the law has the potential to let small businesses be more productive, more powerful engines of economic growth.

The Small Business Administration's Office of Advocacy is pleased to have been a part of the law's development and implementation. As the RFA's 25<sup>th</sup> anniversary approached, we thought it would be an excellent time to take an in-depth look at the law—what has worked well, what has not, and what innovations are emerging—so that we will be prepared to move forward into the next quarter century.

To do this, and to be faithful to the spirit of the law, we wanted to involve as many of our key partners in this process as we could. Our invitation list included federal agency contacts, key members of Congress, regulatory economists, e-regulation developers, attorneys involved in RFA litigation, officials from the Office of Management and Budget, officials involved in regulatory flexibility at the state level, trade association representatives, and, most important, small business people.

It all came together on September 19 and 20, 2005. I want to thank the Office of Advocacy staff who organized it, especially Claudia Rayford Rodgers, who coordinated the effort. Thanks also to all the speakers, moderators, and panelists, whose efforts are documented here. Special appreciation is extended to our generous sponsors listed on the next page. Finally, I want to thank all who came and participated. It was an excellent exchange of ideas that will put us on a solid footing for our ongoing implementation of the RFA.

Remember that the Office of Advocacy is here not only to oversee the RFA's implementation, but to ensure that small businesses have a voice in Washington. Get in touch with us at (202) 205-6533 if you have questions, comments, or suggestions of ways we can do our job better. Check our website—especially our Regulatory Alerts page—at [www.sba.gov/advo](http://www.sba.gov/advo), and sign up for our Advocacy newsletter, press, regulatory news, and research listservs at <http://web.sba.gov/list>. We look forward to our ongoing partnership in improving the regulatory environment for small business.

A handwritten signature in black ink, appearing to read 'Thomas M. Sullivan'.

Thomas M. Sullivan

Chief Counsel for Advocacy



## Cosponsors

The Office of Advocacy gratefully acknowledges the following cosponsors whose generous support funded this symposium:

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- Small Business Legislative Council
- Society of American Florists
- Synthetic Organic Chemical Manufacturers Association
- United Motorcoach Association



# Acknowledgments

The RFA Symposium proceedings contain summaries of each panel from the September 19-20, 2005 events. The compilation of the proceedings was a joint effort of the Office of Advocacy. For more information, contact, Kathryn Tobias or [kathryn.tobias@sba.gov](mailto:kathryn.tobias@sba.gov), (202) 205-6938.

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# Summaries of Presentations

## Introduction

Well before there was a Regulatory Flexibility Act (RFA), small businesses were feeling the pinch of federal regulations and the frustration of not being consulted about regulations' effects on them. Here is one description of the small business situation in 1964:

Often businessmen come down to Washington when they are almost purple with apoplexy. A particular piece of legislation or an administrative ruling has been either passed or under consideration for weeks, months, or perhaps even a year. When it is about to be finalized—or even after it has been passed—the businessman shows up in Washington for a 'last-ditch effort.' He must necessarily be aggressive and antagonistic, in conflict with a policy or a program whose cement has virtually hardened.<sup>1</sup>

In the late 1970s, the U.S. Congress held hearings on how regulations impact small firms and decided that something needed to change, not in small business attitudes, but in the culture of regulatory agencies and in the regulatory development process itself. The result was the passage of the Regulatory Flexibility Act, signed by President Carter on September 19, 1980. As the law was implemented over the years, the need for reform became evident. The Small Business Regulatory

Enforcement Fairness Act (SBREFA), passed in 1996, added provisions for judicial review of the law's implementation and for small business participation in "SBREFA panels" at two federal agencies. President Bush underscored the importance of the RFA in his Executive Order 13272 of August 13, 2002.

As the RFA's 25<sup>th</sup> anniversary approached, the U.S. Small Business Administration's Office of Advocacy, charged with overseeing the law's implementation, began plans for a symposium that would take a look at what has been working and not working, and what still needs to be addressed to ensure that small firms can operate without being hamstrung by ineffective, duplicative, or overly burdensome regulations.

Is the law helpful to small businesses? In stark contrast to the 1964 description, one small business participant in a SBREFA panel offered a ringing endorsement during one of the question and answer sessions at the symposium:

One of the things I came away with from the SBREFA process: it was very, very productive. We had a lot of issues as small businesses relative to emissions and standards and thresholds...but EPA was very, very good at working with us. SBA was outstanding. ...I do want to underscore one final thing, and that was that it's productive. It works. You need to keep doing it."<sup>2</sup>

<sup>1</sup> Ruder, William, and Raymond Nathan, *The Businessman's Guide to Washington* (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1965), 3.

<sup>2</sup> Paul M. (Monty) Felix, Alaglas Pools, South Carolina.





The evening reception allowed speakers and guests an opportunity to get to know each other.

The question in small business circles is not whether the law is important, but how it can be made more effective as the RFA moves into its second quarter century.

## September 19 RFA Training and Evening Reception

On Monday, September 19, Advocacy opened the RFA Symposium with a special training session on the RFA. The session examined what federal regulatory agencies must do to comply with the Regulatory Flexibility Act when promulgating regulations. More than 35 symposium attendees participated in the RFA training. Participants included Capitol Hill staff, trade association representatives, federal agency

staff, small business owners, and representatives of small nonprofits. Following the RFA training, symposium attendees participated in a congressional reception.

## Opening Remarks

“The state of small business regulation has come a long way since the enactment of the Regulatory Flexibility Act in 1980,” said Chief Counsel for Advocacy Thomas M. Sullivan in his opening remarks to the Office of Advocacy’s RFA Symposium, Tuesday, September 20, 2005, in the Senate Dirksen Office Building. “The past 25 years really have taught us that monitoring federal agency compliance is an ongoing task, and it is something that advocates will be doing 25 years from now as well.”



The benefits of the RFA are becoming more evident, Sullivan said. Because of the RFA, the SBREFA amendments, and Executive Order 13272, “federal agencies really are paying attention to their potential impact on small businesses.

“While implementation has come a long way, it is far from perfect. The RFA symposium offers an opportunity for evaluation,” Sullivan said.

The chief counsel introduced the first panel, on e-rulemaking. “Think about how far we have come today,” he said. “Folks are talking about blogs, about WIFI in their homes, about doing a ‘Google’ news search to find out about small business policy decisions here in Washington, DC.” The first panel, he noted, emphasizes the sharp contrast between today’s state of the art in rule-making compared with that of 1980.

## E-Rulemaking

### Moderator

Neil Eisner, Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation

### Panelists

- Stuart W. Shulman, Assistant Professor, School of Information Sciences and Graduate School of Public and International Affairs, University of Pittsburgh
- Oscar Morales, Managing Director, e-Rulemaking Initiative; Director, Collection Strategies Division, Office of Environmental Information, Environmental Protection Agency
- Jeffrey Lubbers, Fellow in Law and Government, Washington College of Law, American University



In his opening remarks, Chief Counsel for Advocacy Thomas M. Sullivan looked back on 25 years of the RFA.

The 21<sup>st</sup> century is fast becoming an era of electronic rulemaking. This panel looked at the advances made in the e-Rulemaking Initiative to date; how e-rulemaking increases participation in the regulatory process and improves data analysis; and how e-rulemaking helps small businesses identify regulatory impacts on their businesses so that they can comment more effectively on proposed and existing rules.

Neil Eisner opened the discussion, noting that e-rulemaking is among the most promising technologies available to change the way rulemaking is accomplished, from the development of legislative proposals through the regulation development process to

their implementation (see Eisner PowerPoints under Appendix D). The U.S. Department of Transportation (DOT) has made efforts to improve public participation in the rulemaking process by posting electronic dockets on its webpage; developing a listserv where, for example, a small business owner can determine if a regulatory flexibility analysis was performed; creating a chat room for open discussion on a particular rule; and posting public notices, agendas, and status reports so that interested parties can stay abreast of the agency's activities.

DOT is also working on a website that will list rules specifically affecting small businesses and provide guidance, training, and compliance



Jeffrey Lubbers discussed the impact of e-government and electronic technologies on the rulemaking process.

guides after rules are final. Eisner noted that while there have been significant strides in e-rulemaking, obstacles remain, such as the need to improve technology, budgetary constraints, differences in perceived needs, and resistance to change.

Oscar Morales presented the first milestone in the e-Rulemaking Initiative, the launch of the website *Regulations.gov* (see Morales PowerPoints under Appendix D). The purpose of this website is to provide Internet access to all proposed rules published in the *Federal Register*. The vision for *Regulations.gov* is to enable citizens to easily access and participate in a high quality, efficient, and open rulemaking process. The goal of e-rulemaking is to expand the public understanding of the rulemaking process; improve the quality of federal rulemaking decisions; and increase the amount, breadth, and ease of citizen and intergovernmental access and participation. The future of the e-rulemaking initiative, said Morales, lies in increased functionality; expanding the public familiarity and use of *Regulations.gov*; sharing technology and lessons learned with state, local, and foreign governments; and increasing collaboration with stakeholders and academic communities.

Jeffrey Lubbers noted the benefits of e-rulemaking as an opportunity for information dissemination, government transparency, and public participation. He also raised the question whether e-rulemaking will actually revolutionize public commenting. He discussed the informational and participatory views of the transformation to the e-rulemaking system and the implementation challenges associated with each. He identified challenges including integrating existing sources

of information and creating a website that is truly a “one-stop shop.” He also discussed the Federal Docket Management System (FDMS), designed to educate the public on agency rulemaking and engage them in the process, and recommended improvements such as consistency of data across agencies; flexibility in the search mechanism; and ease of downloading and exporting search results. He raised questions pertaining to copyright, authentication, security, and privacy issues.

Stuart Shulman discussed research on advocacy groups and their efforts to develop mass email campaigns to generate comments on rules (see Shulman PowerPoints under Appendix D). The system of submitting comments on paper is quickly becoming archaic. According to Shulman, a problem with digital grassroots campaigns is that many public comments are form letters or edited form letters. As a result, comments are massive in quantity, duplicative, and not unique; therefore, less attention is given to those comments that might contribute meaningfully to a better rule. Advanced technology with duplicate detection algorithms, or near duplicate detection techniques, was discussed as a possible solution. An outgrowth of the digitization of the comment process, Shulman observed, is the ability of advocacy groups to manage their members. Web applications that manage an organization’s relationship with its supporters can include a capability for targeted and personalized e-mail communications, data management and control, and advanced tracking and reporting mechanisms. It is also an avenue for organizations to solicit donations, recruit new members, and inform existing members of advocacy events.





Regulatory Research panelists responded to questions from the audience.

## Regulatory Research

### Moderator

Susan Dudley, Director, Regulatory Studies Program, Mercatus Center, George Mason University

### Panelists

- W. Mark Crain, William E. Simon Professor of Political Economy, Lafayette College
- Susan M. Gates, Director, Kauffman-RAND Center for the Study of Small Business and Regulation

- Mark Dopp, General Counsel and Senior Vice President of Regulatory Affairs, American Meat Institute
- John Morrall III, Branch Chief for Health, Transportation, and General Government, Office of Information and Regulatory Affairs, Office of Management and Budget

Moderator Susan Dudley established at the outset that the volume of federal regulations has been steadily increasing, as have administrative costs.<sup>3</sup> Since 1980, the year in which the Regulatory

<sup>3</sup> Susan Dudley's comments and graphs stemmed from work that the Mercatus Center prepares each year with Melinda Warren of the Weidenbaum Center at Washington University in St. Louis. The most recent study, *Upward Trend in Regulation Continues: An Analysis of the U.S. Budget for Fiscal Years 2005 and 2006*, was released in June 2005 and can be found at: [www.mercatus.org/pdf/materials/1246.pdf](http://www.mercatus.org/pdf/materials/1246.pdf).

Flexibility Act was introduced, graphs of both the number of pages of the *Federal Register* and the administrative costs of federal regulations have been on a steep incline. Dudley pointed out that the Regulatory Flexibility Act was among the first, if not the first, legislative requirement to do an analysis of the impacts of new regulations—hence the importance of and need for regulatory research.

The panel consisted of a number of experts on regulatory research. Mark Crain presented his latest contribution to the research, *The Impact of Regulatory Costs on Small Firms (2005)*, released on September 19, 2005, by the Office of Advocacy (see Crain PowerPoints under Appendix D).<sup>4</sup> The report shows that total costs of regulation have risen to \$1.1 trillion, and that the disproportionality rate in the cost per employee between small

firms (with fewer than 20 employees) and large firms (with more than 500 employees) is now 45 percent—that is, it costs small firms about \$2,400 or 45 percent more per employee to comply with regulations. He further suggested that the manufacturing sector bears a disproportionate share relative to other sectors of the U.S. economy. Manufacturing constitutes 15 percent of the economy and bears 25 percent of the federal regulatory burden. On a per-employee basis, the disproportionality rate is 65 percent for the manufacturing sector.

Susan Gates described the research methodology and scope of the recently created Kauffman-RAND Center for the Study of Small Business and Regulation. Her remarks centered on the need for quality data to better evaluate regulation. The ability to measure the impact of a proposed or recently



Researcher Mark Crain released Advocacy study on regulatory costs.

<sup>4</sup> This study is on the Office of Advocacy’s website at: [www.sba.gov/advo/research/rs264tot.pdf](http://www.sba.gov/advo/research/rs264tot.pdf).

enacted rule is often limited by the lack of data. Assuming that policymakers intend for researchers to measure the impacts of their regulatory efforts, they might want to consider possible data sources when drafting new rules. A number of other issues with respect to research might profitably be addressed, including:

- A focus on the benefits as well as the costs of regulations;
- More clarity about the differences between firms and establishments, i.e., what is happening at the establishment level may differ significantly from what is happening at the firm level;
- More awareness of the range of behavioral effects of regulation—for example, if a regulation exempts firms below a certain size threshold, it may induce firms to limit their growth to remain below the threshold; and
- More use of pilot studies to test the real impact of a proposal before implementing a regulatory regime full scale.

Mark Dopp made a succinct point about data quality, using the example of the E. coli 0157: H7 pathogen epidemic from the early 1990s. He suggested that bad data or lack of data can be detrimental and that the makeup of the meat processing industry and the regulatory response to the epidemic might have been different had the research been done prior to the determination that the pathogen was a problem. Research uncovered that the E. coli pathogen was found most of the time in one particular species, and not all. Had the research been done and consulted prior to the U.S. Department of Agriculture determination, small businesses in the meat processing industry would

have been better equipped to prevent much of the hardship that they experienced. Since the lessons of recent research have been learned, for instance, the pathogen's prevalence has been reduced, and there have been fewer recalls and less food-related illness due to the E. coli pathogen. Before this knowledge was available and due in large part to the regulatory hurdles the industry faced, several small businesses were sold.

John Morrall summarized three kinds of regulatory research: aggregate estimates (such as the recent Advocacy study by Mark Crain) on the total cost of regulation; *ex-ante* regulatory impact and RFA analyses (both initial and final); and *ex-post* evaluation or validation analyses (to improve *ex-ante* analysis or validate/improve existing regulations). He also mentioned the study, *Doing Business in 2005*, an attempt by the World Bank to benchmark business regulatory environments in various countries around the world. This study shows the United States second only to New Zealand in the index of the ease of doing business.<sup>5</sup> John Morrall further suggested that more research is needed to determine whether we are making progress or not in lowering the costs of regulation.

## Small Business Outreach

### Moderator

Todd McCracken, President, National Small Business Association

### Panelists

- Jeffrey S. Longworth, Counsel, Barnes & Thornburg, LLP

<sup>5</sup> More information on this research can be found at [www.doingbusiness.org](http://www.doingbusiness.org), where analysis for 2006 is now available.





Reaching out to small business is key, according to panelists Susan Eckerly, Louise Wise, Laurie Rains, Jeff Longworth, and Todd McCracken.

- Laurie Rains, Partner, Halsey, Rains & Associates
- Louise Wise, Principal Deputy Associate Administrator, Office of Policy, Economics, and Innovation, U.S. Environmental Protection Agency
- Susan Eckerly, Vice President of Federal Public Policy, National Federation of Independent Business

In introducing the panelists, Todd McCracken noted that while trade associations have a very important role in bringing the views of their membership to the regulatory development process, “there’s a key qualitative significance to having real input from real businesses.” Larger companies, he said, are often able to “drill down”

and give very specific comments to federal agencies on how a proposed regulation would affect specific parts of their operations, while the small business community is not always able to replicate that kind of specificity. “So it is very significant to find ways to really reach out and have input from actual small businesses,” McCracken said. Changes in the RFA that established small business advocacy panels for particular kinds of regulations are an important step in that direction.

Jeff Longworth discussed work with the Environmental Protection Agency (EPA) and the EPA panel process, which he described as “the good, the bad and the ugly.” The panel process, he noted, is an overall benefit in that it brings different small business players to the table early in the



rulemaking process. At the beginning of the panel process, EPA lays its cards on the table before the small business representatives, EPA, the Office of Advocacy, and the Office of Management and Budget (OMB). Usually, an initial conference call and a meeting are followed by the submission of comments to OMB, SBA, and EPA, from which a panel report is prepared. The process gives EPA insight into how the rule will affect small businesses and helps provide needed data, leading to improved regulatory options and finally better rules. Would this happen without the panel process? Longworth said it might, but likely at a much later time, at much greater expense, and perhaps as a result of extensive litigation. Longworth cited examples of rules in which the panel process has worked and rules in which the panel process left something to be desired. He also noted that while at first one might think associations involved in the process represent the “big guys, . . . it’s the other way around. They are really representing the small business aspects of their associations.”

Laurie Rains discussed how Advocacy helped portable x-ray providers obtain relief within the regulatory environment of the Centers for Medicare and Medicaid Services (CMS). She described the portable x-ray industry as extremely small and very reliant on the Medicare system for payment. The industry is regularly affected by rules like the revisions of the payment policies. “We are the little bitty guys that take the portable x-ray equipment from home to home to home, and we are in the same physician fee schedule with the doctors and the big guys, and there’s only one pot of money,” she said. Advocacy’s involvement resulted in CMS analyzing how the prospective payment system affects the portable x-ray

industry, which in turn led directly to changes in the industry reimbursement rates. “The micro businesses that make up this industry, most [of them] mom-and-pops working off their kitchen tables, gain hope from the Office of Advocacy and the RFA.”

Louise Wise said that the EPA has a small business ombudsman responsible for ensuring that rules minimize the impact on small businesses and that the agency inform small businesses on how to comply with new regulations. She also outlined how the EPA panel process works and why the EPA thinks it’s been successful because of stakeholder participation and buy-in before the rule goes final. An example is the nonroad diesel engine and fuel rule, which EPA judged would have a significant impact on a substantial number of small entities. The rule was intended to limit emissions of nitrogen oxide and particulate matter from diesel-powered nonroad engines used in construction, agriculture, and other applications. The EPA SBREFA panel on the rule, convened in October 2002, raised concerns about the technical and cost feasibility of the proposal, particularly for small equipment manufacturers, and recommended that EPA allow more time for those manufacturers to use their current engines to allow them to redesign their products to accommodate new engines. The EPA acted on the panel report to give small equipment operators more time, keeping many of these small firms in business so they could redesign their products. Wise says that EPA now has an “any any” policy, meaning that for *any* rule that imposes *any* impact on small businesses, EPA’s programs must take them into account and solicit information and concerns about them.

Susan Eckerly said that early involvement of small businesses in the rulemaking process allows agencies to better understand how the rules will affect small businesses; allows small businesses to be a part of the rulemaking process; and reduces litigation. She offered examples, from the perspective of a trade association, of helpful trade association participation, as well as concerns about some of the difficulties encountered in involving members in the rulemaking process. A good example of trade association involvement, she said, was in an Occupational Safety and Health Administration (OSHA) rule that would have imposed significant paperwork and recordkeeping requirements on business, including written safety

and health programs, training programs, and a safety committee. Her trade association enlisted the participation in a SBREFA panel of a member whose business had three employees and would have been significantly affected by the rule. “Our member felt it was a very worthwhile, valuable process, and he had his recommendations included in the report...”

## Luncheon Remarks

### U.S. Senator James Talent

Speaking before the symposium, U.S. Senator Jim Talent (R-Mo.), who served as Chairman of the Small Business Committee while he was a



U.S. Senator Jim Talent was keynote speaker at Tuesday’s luncheon.

member of the U.S. House of Representatives, said, “Small businesses create the majority of new jobs in the country and the government should be a partner, not an obstacle to their success. I’m a big believer that small business is the avenue of opportunity for people of all backgrounds and socio-economic status. Regulatory relief efforts like the Regulatory Flexibility Act have helped America’s small businesses flourish, which has contributed to economic growth and prosperity.”

## Judicial Review

### Moderator

Frank Swain, Partner, Baker & Daniels, LLP

### Panelists

- Daniel Cohen, Chief Counsel for Regulation, Office of the General Counsel, U.S. Department of Commerce
- David Frulla, Member, Collier Shannon Scott, PLLC
- Thomas Gleason, Member, Gleason, Dunn, Walsh & O’Shea
- Karen Harned, Executive Director, National Federation of Independent Business Legal Foundation

The purpose of this panel was to discuss how litigation, under the Small Business Regulatory Enforcement Fairness Act, can be an important tool for small entities when involvement in the regulatory development process is not enough. Frank Swain introduced the panelists and led the discussion on the importance of consequences when agencies do not follow the rulemaking process.

Dave Frulla discussed how litigation under the RFA can be different from litigation under the Administrative Procedure Act (APA). Decisions under the RFA are generally of broad application and specifically address the small business impacts or alternatives to a rule. In some cases small businesses have been awarded injunctive relief under the RFA that may not have been available under the APA. For example, an agency may have prepared a skeletal regulatory flexibility analysis satisfying the APA hurdle, but not the RFA requirements. The APA also requires a more “mature” factual record before litigating.

Dan Cohen discussed the impact the RFA has had on the Department of Commerce (DOC) and its regulatory practices. According to Cohen, there have been significant changes in DOC’s regulatory practices since the year 2000 because of litigation. After losing several cases prior to 2000, DOC took a hard look at its RFA compliance guidelines. They found that DOC was often certifying rules without adequately assessing the appropriate course of action. Also, they had developed their own objective criteria for what constitutes a “significant economic impact on a substantial number of small businesses,” but in the process lost sight of the law’s intention.

Cohen discussed particular changes addressed in the new DOC guidelines. The agency developed its own preliminary regulatory economic evaluation (PREE), which is a cost assessment of the impact of a rule and consideration of alternatives before a preferred alternative is selected (so that the agency can make a rational judgment). Under the new guidelines, the rule of thumb is “if there is doubt, don’t certify. Do the full analysis.” The

agency developed an analytical framework to think about impacts on small business that includes the disproportionality of the impact among the regulated entities, the impact on the ability of the business to make a profit, and the ability of the regulated entity to operate in an economically efficient manner. Since the revision of DOC’s internal guidelines, the agency certifies fewer rules, prepares a more substantial economic impact analysis on small business, and is now more successful when sued.

Tom Gleason provided a state perspective on judicial review and discussed a particular case that demonstrated its importance. Under New York’s State Administrative Procedure Act (SAPA), agencies are required to prepare an economic impact analysis and regulatory flexibility analysis for rules having an adverse impact on small business. In a case litigated by Gleason, a state agency

promulgated a rule that imposed drastic changes in notification, recordkeeping, and billing procedures of small medical providers for claimants, without preparing a regulatory flexibility analysis as required under SAPA.

As a result of this litigation, the state agency was required to take a “hard look” at the regulation, the cost to small businesses, alternatives to the rule, and the overall benefit to the public. During the rulemaking process the agency received public comments from a variety of interests, prepared a revised regulatory flexibility analysis, and made substantive revisions to the proposed regulations. The bottom line is that to comply, agencies must at least take a hard look and consider alternatives to their proposed regulations. Noting that New York has a Governor’s Office of Regulatory Reform, Gleason also suggested to states considering an RFA model that “having



Panelists Thomas Gleason, Frank Swain, and David Frulla discussed judicial review.



an institutional body that is inclined to look at the impacts and challenge them on behalf of regulated parties is supremely important.”

Karen Harned discussed the central mission of the National Federation of Independent Business (NFIB) Legal Foundation as litigating and defending on behalf of small business, including compliance with the RFA. She discussed the importance of judicial review, which protects small businesses from the beginning of the rulemaking process. She also noted the importance of reaching out to stakeholders early in the agency rulemaking process and compiling a substantive record in the event that litigation becomes necessary. Harned believes that because of the threat of litigation, there has been progress with agency compliance with the RFA. This is important because of the limited time and resources that small businesses have to litigate cases.

## Reducing Existing Burdens

### Moderator

Thomas M. Sullivan, Chief Counsel for Advocacy

### Panelists

- John Graham, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget
- Howard Radzely, Solicitor, U.S. Department of Labor
- Karen Kerrigan, President and Chief Executive Officer, Small Business and Entrepreneurship Council

Tom Sullivan noted that currently U.S. businesses pay more than \$1 trillion in regulatory compliance costs. Throughout the day, symposium participants



Panel on Reducing Existing Burdens addressed audience questions (left to right, Karen Kerrigan, Howard Radzely, John Graham, and Tom Sullivan.)

had remarked several times about how a heavy regulatory burden becomes a drag on the economy. All of the printed rules and regulations would occupy 20 feet of shelf space, and within that 20 feet of regulations, Sullivan noted, some regulations can be reduced or eliminated. Efforts must continue to be made to eliminate duplicate regulations and root out regulations in conflict with each other. While the government may not always be situated well to see which regulations are out of date or in conflict with one another, small businesses are. They comply with regulations regularly, and they know which regulations cause problems. Government needs to hear what small businesses are saying.

John Graham gave a candid assessment of reducing regulatory burden. Already, the Administration has reduced the cost and slowed the creation of new rules, and increased the beneficial impact of other rules. The challenge is that since 1980, 109,000 regulations have been created. OMB has looked at only 20,000. One thousand rules have cost \$100 million or more; most have not been reviewed. Reviews of rules and regulations are not always done in great depth or detail; OMB staff are unable to look closely at each of the 2,000 new rules created each year. Also, rulemaking bodies are reluctant to revisit their own previous work, sometimes even opposing such reviews. And groups in Washington profit from certain rules and do not want them reviewed. Graham noted the importance of the small business community's interaction with regulators. Small businesses have knowledge and experience that is important to pass on.

Howard Radzely, solicitor for the Department of Labor, noted that his office enforces more than

200 laws. Most small business employers want to obey the laws and rules governing their businesses, but they find that many of the laws are hard to know and understand. His office is making an effort to reach out to small businesses by updating websites and pamphlets, and by the efforts of DOL officials to explain, educate, and advertise offered services. This is occurring in many of DOL's offices, including OSHA.

Radzely also mentioned that DOL needs to know what is not working. Small businesses are in the best position to note the problems and communicate about them. DOL has listened to small businesses in redeveloping overtime rules and now has several programs within OSHA that are reviewing current rules and regulations. Small business input has been extremely important to making these reviews better. Radzely urged small business owners, employees, and trade associations to get involved in the rulemaking process and voice their concerns.

Karen Kerrigan brought a nongovernmental perspective. She agreed with Graham that research and good data to back up policy decisions are of utmost importance. She also thanked Graham for creating an open culture in the rule review process at OMB's Office of Information and Regulatory Affairs. Kerrigan noted that a lack of accountability in rulemaking bodies hurts small businesses. Rulemaking bodies are not consistent in implementing rules, and issues become clouded because it is unclear what agencies are trying to accomplish and how they will go about accomplishing their goals. One possible improvement for some rulemaking bodies would be to establish a small business advisory committee to look at the impact of rules, such as that in the Federal Communications Commission.



Deputy Chief Counsel for Advocacy Shawne Carter McGibbon, moderator of the Symposium, thanked sponsors and panelists.

Other potential models, such as more oversight by Congress, might help strengthen small business priorities.

## Closing Remarks

In closing the symposium commemorating the 25<sup>th</sup> anniversary of the RFA's signing, Chief Counsel for Advocacy Thomas Sullivan said, "I'm looking forward to the 50<sup>th</sup> anniversary. I am looking forward to taking what we have discussed today, absorbing it, wrapping our arms around it, and figuring out how we can better advocate on behalf of small business and how we can truly change the attitudes within regulatory agencies. As we embark on the next 25 years of the Regulatory Flexibility Act, it is not the time to sit back and

admire our successes. It's the time to redouble our efforts, rediscover our passion, and press on towards our goal of having small business take its rightful seat at the table in Washington. But look how far we have come. Slowly but surely, we have members of Congress, the White House, and, most importantly, dedicated career public servants in regulatory agencies, asking the question, 'What about small business?' And the more those dedicated public servants ask that question, the more success we will have with the Regulatory Flexibility Act here in Washington, D.C. and in many of the states leading the effort to discover how regulatory flexibility can lead to economic development."



# Appendix A Conference Program



## Symposium Program

September 19-20, 2005  
Senate Dirksen Building  
1st & C Streets, NE  
Washington, DC

### Monday, September 19th

1:00 p.m.	Registration Opens	Room SD-G50
1:30 - 4:45 p.m.	RFA Training Session	Room SD-G50
5:00 p.m.	Evening Reception	Room SD-106

### Tuesday, September 20th

8:00 a.m.	Registration and Continental Breakfast	Room SD-G50
8:45 a.m.	Welcome and Opening Remarks	Room SD-G50

- Shawne McGibbon, Deputy Chief Counsel for Advocacy, U.S. Small Business Administration
- Thomas M. Sullivan, Chief Counsel for Advocacy, U.S. Small Business Administration

9:00 - 9:55 a.m.	E-Rulemaking Panel	Room SD-G50
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- **Moderator:** Neil R. Eisner, Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation
- Stuart W. Shulman, Assistant Professor, School of Information Sciences and Graduate School of Public and International Affairs, University of Pittsburgh
- Oscar Morales, Managing Director, e-Rulemaking Initiative; Director, Collection Strategies Division, Office of Environmental Information, Environmental Protection Agency
- Jeffrey Lubbers, Fellow in Law and Government, Washington College of Law, American University

*Advances made in e-rulemaking to date; how e-rulemaking increases participation in the regulatory process, improves data analysis, and helps small entities search for small business impact in order to comment more effectively on various rules.*



# Appendix B Speaker Biographies



## Keynote Speaker Biography

**Honorable Jim Talent  
U.S. Senate**

Senator Jim Talent campaigned for the U.S. Senate on a platform of health care, job creation, economic growth, and national defense. Missourians elected him to serve the state in the U.S. Senate in November 2002. Previously, Senator Talent served eight years in the U.S. House of Representatives (1993-2001) and eight years in the Missouri House (1985-1992).

Senator Talent introduced the Small Business Health Fairness Act to provide health care to small business owners and workers through Association Health Plans (AHPs). The bill would provide health insurance to millions of uninsured Americans by allowing small business men and women to purchase health care plans for themselves and their employees through their trade associations.

As a member of the Energy Committee, Senator Talent is supporting a pro-jobs, pro-growth energy bill to help stimulate the economy, reduce energy prices and increase our energy independence. In addition, he has introduced renewable fuels legislation, the Reliable Fuels Act, which would secure a market for ethanol for our producers, create jobs in Missouri and reduce our dependence on foreign sources of fuel.

For eight years, Jim Talent served on the House Small Business Committee. In 1997, he was named chairman of the committee, where he was the youngest chairman in Congress. In that capacity he fought successfully for tax and regulatory relief for small business people across America. In particular, he succeeded in permitting small business men and women to deduct the cost of their health insurance, restoring the tax deduction for those operating businesses at home, helping women start their own businesses and bolstering loan programs to help individuals who want to start their own small businesses.

He twice facilitated the passage out of the U.S. House of Representatives of Association Health Plans legislation that would permit small business people to join together and buy health insurance through their trade associations—legislation that would reduce by millions the number of uninsured people in the country without any cost to the taxpayer.

Senator Jim Talent was born and raised in Des Peres, Missouri. He graduated from the University of Chicago Law School in 1981 and clerked for Judge Richard Posner of the United States Court of Appeals from 1982 through 1983.

Senator Jim Talent and his wife, Brenda, were married in 1984 and they have three children.



## Panel Speaker Biographies

**Daniel Cohen, Chief Counsel for Regulation, Office of General Counsel, U.S. Department of Commerce.** Daniel Cohen oversees the General Counsel's Regulatory Division, which is responsible for legal review of the Department of Commerce's regulatory actions and for developing and implementing Commerce's regulatory policy. Cohen is a national expert on federal rulemaking, and he has chaired the rulemaking committee of the ABA's Section of Administrative Law and Regulatory Practice. Before joining Commerce in 1994, Cohen was counsel to the National Council on Compensation Insurance and an attorney in the Office of the General Counsel at the U.S. Small Business Administration.

**W. Mark Crain, William E. Simon Professor of Political Economy, Lafayette College.** Mark Crain is the author of the Office of Advocacy's 2005 study, *The Impact of Regulatory Costs on Small Firms*, one of the authoritative works on the uneven impact of regulation on small businesses. Crain came to Lafayette College (Easton, Pennsylvania) in 2004 from George Mason University (Fairfax, Virginia) where he was a faculty member and administrator since 1982. He served as director of George Mason's Center for Study of Public Choice and of its economics graduate program. He served as assistant to the director of the Office of Management and Budget while on leave from George Mason, and he has worked at the federal and state level on budgeting, energy, regulation, transportation, and finance.

**Mark Dopp, General Counsel and Senior Vice President of Regulatory Affairs, American Meat Institute.** Mark Dopp has directed the American Meat Institute's regulatory affairs activities since 1999. He oversees policy development and research and represents industry views to government officials on all major regulatory initiatives, as well as providing legal counsel. Prior to joining the institute, Dopp was a partner at Hogan and Hartson, where he practiced food and agricultural law. He served in USDA's Office of General Counsel before entering private practice in 1985. Dopp received his B.S. in agricultural economics from the University of Wisconsin, M.S. from Michigan State University in agricultural economics, and J.D. from the University of Missouri.

**Susan Dudley, Director, Regulatory Studies Program, Mercatus Center.** Susan Dudley directs the Regulatory Studies Program of the Mercatus Center at George Mason University, which brings academic research to bear on current regulatory issues. She also teaches courses on regulation at the George Mason University School of Law. Before joining Mercatus, Dudley was vice president and director of environmental analysis at Economist Incorporated, a consulting firm in Washington, D.C. She has worked at the Environmental Protection Agency and the Office of Management and Budget, and she was an economic advisor to Commissioner Albrecht at the Commodity Futures Trading Commission.

**Susan M. Eckerly, Vice President of Federal Public Policy, National Federation of Independent Business.**

In November 1996, Susan Eckerly joined the federal government relations team of the National Federation of Independent Business (NFIB), the nation's largest small business advocacy organization. As the vice president of federal public policy, she lobbies on behalf of NFIB's 600,000 small and independent business members across the United States. Before coming to NFIB, Eckerly was director of regulatory policy for Citizens for a Sound Economy, where she worked on regulatory and Superfund reform. She has served as deputy director of economic policy studies for the Heritage Foundation and has been a staff member of the Senate Committee on Small Business and other legislative committees.

**Neil R. Eisner, Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation.**

Neil Eisner is assistant general counsel for regulation and enforcement at the U.S. Department of Transportation. Prior to this, Eisner held positions as assistant chief counsel for regulation and enforcement and deputy assistant chief counsel for litigation at the Federal Aviation Administration. He received his J.D. from Columbia University School of Law and an A.B. (with honors in political science) from Syracuse University. He is a member of the District of Columbia bar, and is a past chair of the ABA's Section of Administrative Law and Regulatory Practice. He is an adjunct professor at American University's Washington College of Law.

**David E. Frulla, Member, Collier Shannon Scott, PLLC.**

David Frulla is a member of Collier Shannon Scott. His advocacy-focused practice develops and implements regulatory approaches to lessen governmental burdens on businesses and other entities. He has particular expertise in maritime and natural resources-related law. Frulla seeks creative, often science-based, solutions that involve the judicial, legislative, and executive branches at the federal and state levels. He counsels a wide range of entities—corporations, trade associations, and labor organizations. Frulla serves as chair of the Criminal Process Committee of the ABA's Administrative Law and Regulatory Practice Section.

**Susan M. Gates, Director, Kauffman-Rand Center for the Study of Small Business and Regulation.**

Susan Gates is a senior economist specializing in the economics of organizations, political economy, and applications of economic management principles to public sector organizations, with a special interest in public sector leadership and entrepreneurship. She is currently studying the relationship between health insurance mandates and business size; civilian workforce requirements in the Department of Defense (DoD); and improving K-12 educational options for military families. She has also studied the career paths of school principals and superintendents; the impact of DoD outsourcing efforts on the civilian workforce; and industry's view of higher education.

**Thomas Gleason, Member, Gleason, Dunn, Walsh & O'Shea.**

Thomas Gleason is an attorney in private practice and a member of the law firm Gleason, Dunn, Walsh & O'Shea, in Albany, New York. He is an adjunct professor at Albany Law School, teaching insurance law. He is a member of the New York Office of Court Administration Advisory Committee on Civil Practice and chair of its Subcommittee on Technology. He is the author of the 1999 Special Supplementary Practice Commentary on Electronic Filing for McKinney's CPLR 2101 and 2103 and has written articles and commentary on electronic filing of court papers, computer-generated evidence, and electronic discovery.

**John D. Graham, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget.**

John Graham is serving for President Bush as administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget. Graham coordinates regulatory review, paperwork reduction, statistical policy, and information policy in the federal government. Prior to joining the Bush Administration, Graham founded and led the Harvard Center for Risk Analysis from 1990 to 2001. Graham earned his B.A. from Wake Forest University, his M.A. from Duke University, and his Ph.D. from Carnegie-Mellon University. He is widely published and is best known for his scholarship on automotive safety and environmental policy.



**Karen R. Harned, Executive Director, National Federation of Independent Business Legal Foundation.**

Karen Harned has served as executive director of the National Federation of Independent Business Legal Foundation since April 2002. Previously, she was an attorney at Olsson, Frank and Weeda, PC, a Washington, D.C., law firm specializing in food and drug law, where she represented several small and large businesses and their respective trade associations before Congress and federal agencies. She served as assistant press secretary to U.S. Senator Don Nickles of Oklahoma from 1989 to 1993. She received her B.A. from the University of Oklahoma and her J.D. from the George Washington University National Law Center.

**Karen Kerrigan, President and CEO, Small Business and Entrepreneurship Council.** Kerrigan is the founder of the Small Business and Entrepreneurship Council, a prominent advocacy and research organization with more than 70,000 members. She is also president and CEO of Women Entrepreneurs, Inc., a nonprofit business association that helps women business owners succeed. Kerrigan regularly testifies before the U.S. Congress on small business issues. She counsels delegations from around the world on public policy measures to enhance and sustain entrepreneurial activity. She is a regular contributor to the *American City Business Journals*—a national network of weekly business newspapers.

**Jeffrey S. Longworth, Counsel, Barnes & Thornburg, LLP.** Jeffrey Longworth is counsel in the Washington, D.C., office of Barnes & Thornburg, and is the administrator of the Washington office's Environmental Practice Group. He counsels and litigates on behalf of corporations, trade associations, and municipal governments, with a special emphasis on Clean Water Act permitting, compliance, and enforcement matters. His clients include entities in aviation, construction, manufacturing, municipalities, and recycling. Longworth was appointed to the EPA Federal Advisory Committee on Urban Wet Weather Flows, which was established in 1996. He is admitted to practice in the state of Maryland, the District of Columbia, and the U.S. Courts of Appeals for the Fourth, Seventh, and Ninth Circuits.

**Jeffrey Lubbers, Fellow in Law and Government, American University's Washington College of Law.**

Jeffrey Lubbers teaches courses in administrative law, environmental law, and federal legal institutions. Prior to joining American University, he served in various positions with the Administrative Conference of the United States (ACUS), the U.S. government's advisory agency on procedural improvements in federal programs. As ACUS's research director, he developed ideas for new studies, supervised the implementation of studies, and assisted ACUS committees in developing administrative law recommendations. He worked with congressional committees and agencies to seek implementation of ACUS recommendations, and served as team leader for Vice President Gore's National Performance Review team on Improving Regulatory Systems in 1993.

**Todd McCracken, President, National Small Business Association (NSBA).** Todd McCracken has been with NSBA since 1988, and has been its president since 1997. He represents NSBA in myriad settings. As director of its government affairs arm, he plays a key role in developing NSBA's policies on issues and the strategies in implementing them. He has testified before Congress on issues ranging from fundamental health care reform to tax code restructuring. As a nonpartisan organization, NSBA works with elected and appointed officials to promote policies that support small business growth and development. NSBA is the nation's oldest small business organization, founded in 1937.

**Shawne Carter McGibbon, Deputy Chief Counsel.** Shawne McGibbon is the deputy chief counsel for the Office of Advocacy of the U.S. Small Business Administration. She has worked in Advocacy since 1994, and has served previously as assistant advocate for food, drug, and health policy, and as director of interagency affairs. As deputy, she manages the daily operations and statutory responsibilities of the Office of Advocacy. In addition, she represents the chief counsel in his absence. Her prior experience includes working in the Capitol Hill office of a member of the U.S. House of Representatives and on the staff of a Maryland state representative in Annapolis. She is a member of the Maryland bar.

**Oscar Morales, Director, Collection Strategies Division, Environmental Protection Agency.** Oscar Morales is director of the Collection Strategies Division of the EPA's Office of Environmental Information, and managing director of the eRulemaking Initiative. As director of the eRulemaking Initiative, he oversees the construction and maintenance of an electronic rulemaking and docket system to be used by over 200 federal agencies. The initiative is a groundbreaking achievement in the creation of a citizen-centered eDemocracy, envisioned as revolutionizing the way the entire federal government writes rules and solicits comments from the public. Morales is also responsible for EPA's FOIA, Privacy Act, Paperwork Reduction Act, and National Records Management Program.

**John F. Morrall III, Branch Chief for Health, Transportation, and General Government, Office of Information and Regulatory Affairs.** John Morrall is branch chief for Health, Transportation, and General Government in the Office of Information and Regulatory Affairs of the Office of Management and Budget. He and his staff are responsible for reviewing the regulations and regulatory impact analyses issued by the departments and agencies of the federal government under E.O. 12866. He is a lead author of OMB's annual *Report to Congress on the Costs and Benefits of Federal Regulations* and is an expert in the areas of regulatory reform and oversight, benefit-cost analysis, health economics, and risk assessment. He has worked on regulatory policy in the Executive Office of the President since 1975 and been at OMB since 1981. He is a prolific author, and three of his articles are included in *Classics in Risk Management*, a collection of top articles in the field.

**Howard M. Radzely, Solicitor, U.S. Department of Labor.** Howard Radzely has been solicitor of the Department of Labor since 2003. The solicitor is the department's principal legal officer, overseeing the department's litigation and providing counsel on the laws it administers, including the Fair Labor Standards Act, the Davis-Bacon Act, the Labor-Management Reporting and Disclosure Act, the Occupational Safety and Health Act, the Federal Mine Safety and Health Act, and ERISA. Previously, Radzely was in private practice in Washington, D.C., concentrating on labor and employment law. He graduated *summa cum laude* from the Wharton School of Business and *magna cum laude* from Harvard Law School. He clerked for the Honorable J. Michael Luttig, U.S. Court of Appeals for the Fourth Circuit, and for the Honorable Antonin Scalia, Supreme Court of the United States.

**Laurie D. Rains, Partner, Halsey, Rains & Associates.** Laurie Rains has served over 10 years as a senior congressional staff member. Prior to founding Halsey, Rains & Associates in 1997, she worked for the House of Representatives Committee on Small Business as a professional staff member and as the majority staff director for the Government Programs Subcommittee. Rains was senior policy advisor and legislative director for Senator James M. Inhofe of Oklahoma. Her tenure with Senator Inhofe began when he served in the House of Representatives. She has also worked as an international trade analyst, specializing in trade relations with Latin America, for the firm of Bishop, Cook, Purcell & Reynolds.

**Stuart W. Shulman, Assistant Professor, University of Pittsburgh.** Stuart Shulman is an assistant professor in the School of Information Sciences and the Graduate School of Public and International Affairs at the University of Pittsburgh. He is also project director on a National Science Foundation-funded research project focusing on electronic rulemaking, language technologies, digital citizenship, and service-learning efforts in the United States. Shulman has organized and chaired several federal agency-level electronic rulemaking workshops, and for the past three years he has served on the Program Committee for the NSF's National Conference on Digital Government Research.

**Thomas M. Sullivan, Chief Counsel for Advocacy.** Thomas Sullivan is chief counsel for advocacy with the U.S. Small Business Administration's Office of Advocacy. The chief counsel is charged with independently advancing the views, concerns, and interests of small business before Congress, the White House, federal regulatory bodies, and state policymakers. In the past three years, the Office of Advocacy has helped save America's small businesses more than \$31 billion in money they would have spent attempting to comply with federal regulations.



**Frank Swain, Partner, Baker & Daniels, LLP.** Frank Swain is a partner in the law firm, Baker & Daniels, in Washington, D.C. Swain advises clients on finance and insurance regulatory issues, and he has particular experience with policies on dissemination and collection of government information. Swain served as the chief counsel for advocacy at the U.S. Small Business Administration from 1981 to 1989. He also served as legislative counsel to the National Federation of Independent Business, where he led NFIB's efforts in support of enactment of the Regulatory Flexibility Act and the Equal Access to Justice Act. He is the author of numerous articles on small business and regulation.

**Louise Wise, Principal Deputy Associate Administrator, Environmental Protection Agency.** Louise Wise is the principal deputy associate administrator for the Office of Policy, Economics, and Innovation at the U.S. Environmental Protection Agency. An attorney and graduate of Georgetown Law School, she worked for a federal judge and in private practice before joining the EPA General Counsel's Office in 1984. She has since held various positions at EPA, including special assistant to EPA Administrator Lee Thomas; division director in the Office of Underground Storage Tanks; and various positions in the Office of Water, including deputy director.