

## Twenty-five Years of the Regulatory Flexibility Act

by Kathryn Tobias, Senior Editor

As soon as President Gerald Ford signed Public Law 94-305 creating the Office of Advocacy in June 1976, the important work of paying attention to regulations' effects on small firms came under the wing of the newly created independent office. Part of Advocacy's mandate was explicitly to "measure the direct costs and other effects of government regulation on small businesses; and make legislative and non-legislative proposals for eliminating excessive or unnecessary regulations of small businesses."

In fall of 1979, President Jimmy Carter added the Small Business Administration to his Regulatory Council and issued a memorandum to the heads of executive departments and agencies. He said, "I want you to make sure that federal regulations will not place unnecessary burdens on small businesses and organizations," and he directed agencies to apply regulations "in a flexible manner, taking into account the size and nature of the regulated businesses." Agencies were to report on their efforts to Advocacy.

Meanwhile, the House and Senate Small Business and Judiciary Committees had been holding hearings on the effects of regulation. Small business people cited evidence that uniform application of regulatory requirements made it difficult for smaller businesses to compete.

By 1980, when delegates assembled for the first of three

White House Conferences on Small Business, the conference report noted that "during the past decade, the growth of government regulation has been explosive, particularly in such areas as affirmative-action hiring, energy conservation, and protection for consumers, workers, and the environment. Small business people recognize that some government regulation is essential for maintaining an orderly society. But there are now 90 agencies issuing thousands of new rules each year."

Moreover, the report said the new Office of Advocacy had estimated that small firms spent \$12.7 billion annually on government paperwork. Among the conference recommendations, the fifth highest vote-getter was a recommendation calling for "sunset review" and economic impact analysis of regulations, as well as a regulatory review board with small business representation. The conference delegates recommended putting the onus of measuring regulatory costs on the regulatory agencies—to "require all federal agencies to analyze the cost and relevance of regulations to small businesses."

**1980: The Regulatory Flexibility Act.** The White House Conference recommendations helped form the impetus for the passage, in 1980, of the Regulatory Flexibility Act (RFA). The intent of the act was clearly stated:

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**Special Edition: 25th Anniversary of the Regulatory Flexibility Act**

# The RFA at 25: Some Reflections

by James Morrison, President, Small Business Exporters Association of the United States

As a congressional staffer in the 1970s, I had the privilege to be “present at the creation” of the RFA. From the vantage point of 2005, it is hard to visualize the regulatory atmosphere of the mid-1970s. New agencies had been given sweeping grants of authority to address national concerns like the environment, worker safety, and pension security. Older agencies had been handed new mandates. Coordination and guidance on how to regulate were lacking.

It was a regulatory Wild West. Congress was recoiling from thunderous protests by regulated businesses, communities, and nonprofit organizations.

The RFA began as an informal conversation in April 1977 about a major part of this problem—small business regulatory burdens. It ended with a signing ceremony in the East Room of the White House three and a half years later.

The bill was introduced August 1, 1977. The debate was about what the law should require regulatory agencies to do. Change was needed in the regulatory culture. Agencies needed to stop viewing their rulemaking in terms of top-down, one-size-fits-all regulations. So the bill emphasized gathering input from the affected parties, both directly and through the Office of Advocacy, prior to rulemakings. Agencies should strive to “fit” their rules to the “scale” of the entities they were regulating, the law noted.

The bill’s procedures paralleled the then-new environmental law procedures contained in the National Environmental Policy Act (NEPA). Cosponsors Senator Gaylord Nelson of Wisconsin and Senator John Culver of Iowa advocated the consensus view—that NEPA offered a proven approach to sensitizing agencies to a set of external considerations, that it

was an understood quantity by the courts and the administrative law bar, and that it offered a way to successfully integrate legal innovations into the Administrative Procedure Act.

A major reservation was that if the law included a NEPA-type provision that permitted litigants to shut down a rulemaking process in mid-stride, the RFA would be abused. The RFA was always intended to re-orient rulemaking processes, not to pre-ordain particular substantive outcomes.

The effort to obtain the desired cultural changes at the agencies while restricting any potential misuse of the RFA led to some convoluted language on judicial review. The courts later interpreted the language very narrowly, virtually shutting off all judicial review of agency actions under the RFA. Within a few years of these judicial decisions, agency compliance with the RFA declined. Not until the RFA was amended by SBREFA in 1996 was this problem overcome.

The politics of passing the RFA was interesting. Senators and representatives from both parties and all political ideologies—as well as those from urban and rural areas and all geographic regions of the nation—put their shoulders into the bill’s passage. The very hard political work done by them and their staffs, as well as the small business community, led to this rather amazing fact: in three years of congressional actions on the RFA spanning two Congresses, there was never a single negative vote cast against it. House champions included Representatives Andy Ireland of Florida, Bob Kastenmeier of Wisconsin, and Joe McDade of Pennsylvania.

The executive branch was more skeptical. When Congress first solicited reactions to the bill from

federal agencies, the most common response was that while the law might be appropriate for other agencies, the respondent’s own agency should be exempted from it. Later, when passage seemed likely, agency general counsels jointly sought to have all agencies exempted.

An important ally of the bill within the executive branch was the Office of Advocacy and its chief counsel, Milton D. Stewart. Advocacy had the avid backing of the nation’s small business community, which made passage of the RFA a top recommendation of the 1980 White House Conference on Small Business.

By the middle of 1980, President Carter personally intervened, sending a top aide, Stuart Eizenstat, to Capitol Hill to clear the way for the RFA, which passed Congress soon thereafter and was signed into law.

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## Message from the Chief Counsel

### Listening To Small Business

by Thomas M. Sullivan, Chief Counsel for Advocacy

Too often government agencies appear to be a “black box.” What they do and how they do it is obscure at best. Even when agencies try to be open, they sound as if they are speaking a foreign language. That can even be true here at the Office of Advocacy.

I have just gone back and looked at some of our past newsletters. What do I see? “RFA,” “SBREFA,” “IRFA,” and “FRFA.” All of these acronyms actually mean something, and they are integral to Advocacy’s work. Yet they tend to hide the reality of what Advocacy is all about—listening to the voice of small business and making sure its voice is heard inside regulatory agencies, Congress, and the White House.

The Regulatory Flexibility Act (RFA), its amendments, and requirements are, in the end, just tools that allow us to bring that voice into the regulatory process.

But how do we know what that voice is saying? This challenge is met daily in our office.

Our 10 regional advocates are Advocacy’s “eyes and ears” across the country. It is their job to meet regularly with state and local trade organizations and small business owners. The insights they gather form the basis of our understanding of the small business agenda.

We also work quite closely with small business membership and trade organizations. I meet regularly with representatives from the largest organizations in “kitchen cabinet” style meetings where current issues are discussed and new opportunities explored.

Our regulatory attorneys also hold specific issue roundtables to gather information. In these open discussions, the practical details of legislative and regulatory proposals

are dissected and their impact on small business is closely examined. Some, like our environmental and safety roundtables, have regular meetings, while others are issue-driven. Whether ongoing or ad hoc, these roundtables with small

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**“By listening to small businesses, we are able to bring their agenda to the attention of policymakers in regulatory agencies, Congress, and the White House. ”**

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business owners and representatives give us clear insights into the effects of regulatory and legislative proposals.

Another way we listen to the voice of small business is through my travels across the country. I am honored to be able to address meetings and conventions in all regions of the country and speak about this Administration’s commitment to tearing down barriers. At each stop

I make sure that I schedule time to speak with small business owners and visit local small businesses. These visits teach me how government policies actually affect real business owners and employees.

Finally, small business owners can comment on the impact of proposed regulations through our Regulatory Alerts webpage, located at [www.sba.gov/advo/laws/law\\_regalerts.html](http://www.sba.gov/advo/laws/law_regalerts.html). It gives anyone the ability to let federal agencies know the real world consequences of their actions.

Through all of these methods we gather the comments and concerns of small business owners. By listening to small businesses, we are able to bring their agenda to the attention of policymakers in regulatory agencies, Congress, and the White House. We do that through the RFA, SBREFA, Executive Order 13272, and other means. Although those tools may be outside of Main Street’s everyday vocabulary, they all aim toward one thing—making sure that America’s entrepreneurs can flourish in an environment that promotes and protects them.



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## 25 Years of RFA, from page 1

“It is the purpose of this act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives... of applicable statutes, to fit regulatory and informational requirements to the scale of businesses... To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.”

The law directed agencies to analyze the impact of their regulatory actions and to review existing rules, planned regulatory actions, and actual proposed rules for their impacts on small entities. Depending on the proposed rule’s expected impact, agencies were required by the RFA to prepare an initial regulatory flexibility analysis, a certification, and/or a final regulatory flexibility analysis. Rules to be included in the agencies’ “regulatory agendas” were those likely to have a “significant economic impact on a substantial number of small entities.”



President Jimmy Carter signed the Regulatory Flexibility Act on September 19, 1980.  
*Courtesy Jimmy Carter Library.*

### Implementing the RFA.

Advocacy was charged to monitor agency compliance with the new law. Over the next decade and a half, the office carried out its mandate, reporting annually on agency compliance to the president and the Congress. But it was soon clear that the law wasn’t strong enough. A briefing paper prepared for the

1986 White House Conference on Small Business noted: “The effectiveness of the RFA largely depends on small business’ awareness of proposed regulations and [their] ability to effectively voice [their] concerns to regulatory agencies. In addition, the courts’ ability to review agency compliance with the law is limited.”

## The RFA Timeline

### June 1976

Congress enacts Public Law 94-305 creating an Office of Advocacy within the Small Business Administration charged, among other things, to “measure the direct costs and other effects of federal regulation on small businesses and make legislative and non-legislative proposals for eliminating excessive or unnecessary regulations of small businesses.”

### April 1980

The first White House Conference on Small Business calls for “sunset review” and economic impact analysis of regulations, and a regulatory review board that includes small business representation.

### September 1980

Congress passes the Regulatory Flexibility Act (RFA), requiring agencies to review the impact of proposed rules and include in published regulatory agendas those likely to have a “significant economic impact on a substantial number of small entities.”

### October 1981

Advocacy reports on the first year of RFA in testimony before the Subcommittee on Export Opportunities and Special Small Business Problems of the House Committee on Small Business.

### February 1993

Advocacy publishes the first annual report on agency RFA compliance.

### November 1986

Delegates to the second White House Conference on Small Business recommend strengthening the RFA by, among other things, subjecting agency compliance to judicial review.

### September 1993

President issues Executive Order 12866, “Regulatory Planning and Review,” requiring each agency to “tailor its regulations to impose the least burden on society, including businesses of different sizes.”

### June 1995

The third White House Conference asks for specific provisions to strengthen the RFA—including the IRS under the law, granting judicial review of agency compliance,

The delegates recommended that the RFA be strengthened by requiring agencies to comply and by providing that agency action or inaction be subject to judicial review. President Ronald Reagan's 1987 report on small business noted: "Regulations and excessive paperwork place small businesses at a disadvantage in an increasingly competitive world marketplace... This Administration supports continued deregulation and other reforms to eliminate regulatory obstacles to open competition." But it would take an act of Congress to make judicial review law—and reaching that consensus needed more time.

Regulations' effects on the economic environment for competition also concerned President George H.W. Bush, whose 1992 message in the annual small business report noted: "My Administration this year instituted a moratorium on new federal regulations to give federal agencies a chance to review and revise their rules. And we are looking at ways to improve our regulatory process over the long term so that regulations will accom-

plish their original purpose without hindering economic growth." The scene was set for the regulatory logjam to move.

In September 1993, President Bill Clinton issued Executive Order 12866, "Regulatory Planning and Review," designed, among other things, to ease the regulatory burden on small firms. The order required federal agencies to analyze their major regulatory undertakings and to ensure that these regulations achieved the desired results with minimal societal burden.

An April 1994 report by the General Accounting Office reviewed Advocacy's annual reports on agency compliance with the RFA and concluded: "The SBA annual reports indicated agencies' compliance with the RFA has varied widely from one agency to another. ...the RFA does not authorize SBA or any other agency to compel rulemaking agencies to comply with the act's provisions."

#### **The 1995 White House Conference and SBREFA.**

In 1995, a third White House Conference on Small Business

examined the RFA's weaknesses. The Administration's National Performance Review had recommended that agency compliance with the RFA be subject to judicial review. Still it had not happened.

Once again, the White House Conference forcefully addressed the problem. One of its recommendations fine-tuned the regulatory policy recommendations of earlier conferences, asking for specific provisions that would include small firms in the rulemaking process.

In October, Advocacy issued a report, based on research by Thomas Hopkins, estimating the total costs of process, environmental, and other social and economic regulations at between \$420 billion and \$670 billion in 1995. The report estimated that the average cost of regulation was \$3,000 per employee for large firms (more than 500 employees) and \$5,500 per employee for small firms (fewer than 20 employees).

In March 1996, President Clinton acted on the 1995 White House Conference recommendation

*Continued on page 6*

and including small businesses in the rulemaking process.

#### **March 1996**

President signs the Small Business Regulatory Enforcement Fairness Act, giving courts jurisdiction to review agency compliance with the RFA, requiring the Environmental Protection Agency and Occupational Safety and Health Administration to convene small business advocacy review panels, and affirming the chief counsel's authority to file *amicus curiae* briefs in appeals brought by small entities from final agency actions.

#### **March 2002**

President announces the Small Business Agenda, which promises to "tear down regulatory barriers to job creation for small businesses

and give small business owners a voice in the complex and confusing federal regulatory process."

#### **August 2002**

President issues Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," which requires federal agencies to establish written procedures to measure the impact of their regulatory proposals on small businesses, that they consider Advocacy comments on proposed rules and notify Advocacy when a draft rule may have a significant small business impact, and that Advocacy train agencies about the law.

#### **December 2002**

Advocacy presents draft state regulatory flexibility model legislation to the American Legislative

Exchange Council for consideration by state legislators, and states begin adopting legislation modeled on the federal law.

#### **September 2003**

Advocacy presents its first report on agency compliance with E.O. 13272, describing agency compliance and noting the start of Advocacy's agency training.

#### **2005**

In the 25th anniversary year of the RFA, Advocacy reports agency cost savings of more than \$17 billion in foregone regulatory costs to small business for FY 2004. Legislation is considered in Congress to strengthen the RFA.

## 25 Years of RFA, from page 5

by signing Public Law 104-121, the Small Business Regulatory Enforcement Fairness Act (SBREFA). The new law gave the courts jurisdiction to review agency compliance with the RFA. Second, it mandated that the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) convene small business advocacy review panels to consult with small entities on regulations expected to have a significant impact on them, before the regulations were published for public comment. Third, it broadened the authority of the chief counsel for advocacy to file *amicus curiae* (friend of the court) briefs in appeals brought by small entities from agency final actions.

**Executive Order 13272.** In March 2002, President George W. Bush announced his Small Business Agenda. The President gave a high priority to regulatory concerns, including the goal, “[to] tear down the regulatory barriers to job creation for small businesses and give small business owners a voice in the complex and confusing federal regulatory process.”

One key goal was to strengthen the Office of Advocacy by creating an executive order directing agencies to work closely with Advocacy in considering the impact of their regulations on small business.

In August 2002, President Bush issued Executive Order 13272. It requires federal agencies to establish written procedures and policies on how they would measure the impact of their regulatory proposals on small entities and to vet those policies with Advocacy; to notify Advocacy before publishing draft rules expected to have a significant small business impact; and to consider Advocacy’s written comments on proposed rules and publish a response with the final rule. The E.O. requires Advocacy to provide

notification as well as training to all agencies on how to comply with the RFA. These steps set the stage for agencies to work closely with Advocacy in considering their rules’ impact on small entities.

**Implementing E.O. 13272.** As part of its compliance with E.O. 13272, Advocacy reported to the Office of Management and Budget in September 2003. The report noted that Advocacy had spread the word about E.O. 13272 and instituted an email address (*notify.advocacy@sba.gov*) to make it easier for agencies to comply with notification requirements. Advocacy developed an RFA compliance guide, posted it on its website, prepared training materials, and began training federal agency staff.

Nearly all of the cabinet agencies submitted written plans for RFA compliance to Advocacy and made their RFA procedures publicly available. Independent regulatory agencies were initially less responsive; some argued that they were exempt from executive orders. Nevertheless, Advocacy continues to work to bring all agencies into compliance with the E.O. Advocacy has also developed a Regulatory Alerts webpage at [www.sba.gov/advo/laws/law\\_regalerts.html](http://www.sba.gov/advo/laws/law_regalerts.html) to call attention to important pending regulations.

The final chapter on how much small businesses are benefiting from the RFA as amended by SBREFA and supplemented by E.O. 13272 has yet to be written. Legislation has been introduced to further enhance the RFA. Advocacy believes that as agencies adjust their regulatory development processes to accommodate the RFA and E.O.’s requirements, the benefits will accrue to small firms. And agencies are making strides in that direction. The annual amount of additional regulatory burdens that are not loaded onto the backs of small businesses are counted cumu-

latively in the billions of dollars—over \$17 billion in first-year cost savings in fiscal year 2004 alone.

## RFA Recollections

“I came to Congress from the private sector and had had no prior political experience, so working on the RFA was a learning experience. As a community banker, I had seen how well-meaning regulations developed in the ivory tower had put small businesses at a disadvantage, so I got on the Small Business Committee to do something about it. The RFA passed on the last night of that Congress, near midnight. It came up for a vote and I made my speech and another congressman who opposed the bill jumped to his feet—but the chair banged the gavel to cut off discussion.

“After it passed on the House side, I carried it over to the Senate where, after about 45 minutes, I looked up and said, ‘What happened to my bill?’ and someone said, ‘Sir, they passed it a half hour ago!’ Well, what passed was a good law, but an imperfect one, without the judicial review provision that was added in SBREFA, for instance. But dedicated people nurtured the RFA and later helped fill in the gaps—one was Steve Lynch, a staff person who had a great impact and, sadly, died at age 51. The RFA is a great case study of what can be done legislatively if you don’t care who gets the credit and don’t try to do it all at once.”

*Congressman Andy Ireland  
U.S. Representative, 1977-93*

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## Rulemaking Success Stories

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### SBREFA Review Panels Improve Rulemaking

by Claudia Rayford Rodgers, Senior Counsel; Keith Holman and Kevin Bromberg, Assistant Chief Counsels

In 1996, Congress fortified the Regulatory Flexibility Act (RFA) with the Small Business Regulatory Fairness Act (SBREFA). Among other things, SBREFA directed the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to convene small business review panels for regulations expected to have a significant small business impact. These panels occur before the rule is published for public comment. Significant rulemaking improvements have resulted from the SBREFA panel process.

SBREFA review panels consist of representatives from the agency, Advocacy, and the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB). The panel reaches out to small entities likely to be affected by the proposal, seeks their input, and prepares a report with recommendations for reducing the potential impact on small businesses. The agency may modify its proposal in response to the panel report.

**OSHA Panels.** OSHA has convened seven panels since 1996. Two of the most significant were on the Safety and Health Program rule and the Ergonomics Program Standard. They demonstrate how small business input early in the regulatory process can help agencies see new ways to solve a problem through regulation—by looking at equally effective alternatives that minimize the harm to small business.

**The Safety and Health Program Rule.** In August 1998, OSHA notified Advocacy of its intent to propose a safety and health program rule. The proposal required employers to establish a workplace safety and health program to ensure compliance with

OSHA standards and the “general duty” clause of the Occupational Safety and Health Act.

Because the proposal covered nearly all employers, a SBREFA panel was convened which included 19 small entity representative advisors. It found that OSHA had underestimated the \$3 billion cost of the proposed rule.

The panel report sent the message loud and clear to OSHA, OMB, and other federal agencies that realistic costs and accurate data must be used when promulgating regulations. As a result, this overly burdensome rule never moved forward, and it was eventually removed from OSHA’s regulatory agenda, saving small businesses billions in regulatory compliance costs.

**The Ergonomics Standard.** In March 1999, OSHA released a draft ergonomics standard and announced its intention to convene a SBREFA panel to discuss the potential impact on small businesses. The draft proposal covered nearly every industry and business in the United States. Twenty small entity representatives (including 13 recommended by Advocacy) advised the panel.

During the panel’s deliberations, the small entities expressed a number of concerns, especially regarding OSHA’s estimates of the time and money required to comply. They provided OSHA with types of costs that they felt were omitted from the calculations and suggested that OSHA provide the public with its assumptions when it proposed the standard in the *Federal Register*. The panel completed the report in April 1999.

Although proposed in November 1999, Congress, under the Congressional Review Act, eventu-

ally repealed the ergonomics rule in March 2001. OSHA’s subsequent decision to issue guidelines instead of creating a new ergonomics rule showed that the SBREFA panel process works. Because of this process and Advocacy’s input throughout the entire progress of the ergonomics issue, the cost to small business has been drastically reduced. Advocacy estimated in 2001 that rescinding the ergonomics standard saved small businesses \$3 billion. Other observers have estimated that the actual cost would have been 15 times higher.

**EPA Panels.** EPA has convened 29 SBREFA panels since 1996. These panels have improved the cost-effectiveness of planned environmental rules and limited the adverse impact on small entities, including small communities. Two recent successes are the panels on Nonroad Diesel Engines and Construction and Development Runoff.

**Nonroad Diesel Engines and Fuel Rule.** In summer 2002, EPA notified Advocacy that it would propose further limits on emissions of nitrogen oxides and particulate matter from diesel-powered nonroad engines. These engines are used extensively in construction, agriculture, and other off-road applications. EPA also planned to dramatically reduce the allowable level of sulfur in diesel fuel used by nonroad engines. The rule was anticipated to have significant economic impacts on small equipment manufacturers who use diesel engines, and on small oil refiners and oil distributors.

EPA convened a SBREFA panel with 20 small entity representative advisors who raised concerns about the technical and cost feasibility of

*Continued on page 8*

### **SBREFA Works**, from page 7

the proposed rule. The panel concluded that equipment manufacturers should be allowed to purchase current engines for several additional years, while redesigning their products to accommodate the newer engines. The panel also advised that expensive aftertreatment devices should not be required on engines with less than 25 horsepower.

The SBREFA panel report recommendations, which were adopted by EPA in the final rule, allowed many small equipment manufacturers to stay in business and gave them valuable time to redesign their products to comply with the new requirements.

**Construction and Development Site Runoff.** In June 2002, EPA proposed a rule to reduce storm water runoff from construction and development sites of one acre or more. The original proposal carried a price tag of almost \$4 billion per year, and its requirements overlapped with existing state and local storm water programs. Fortunately, small business had a voice in the rulemaking process through the SBREFA panel process. Small businesses provided information about the rule's potential impact and offered other options. The panel concluded that the rule's requirements would add substantial complexity and cost to current storm water requirements without a corresponding benefit to water quality. The panel recommended that EPA not impose the requirements, and focus instead on improving public outreach and education about existing storm water rules.

In March 2004, EPA announced that it would not impose new requirements for construction sites. EPA found that a flexible scheme would permit state and local governments to improve water quality without an additional layer of federal requirements and without unduly harming small construction

firms. In addition to the cost savings for small businesses, rescinding the original proposal saved new homebuyers about \$3,500 in additional costs per house.

**SBREFA Panels Work.** These panels illustrate that the SBREFA panel process indeed works to reduce the burdens on small entities. Because agencies are required to convene these panels, small businesses are able to shed light on agencies' underlying assumptions, rationale, and data behind their draft rulemaking. In the absence of SBREFA panels, these rules would have been promulgated in forms costing small businesses millions

in unnecessary regulatory costs. The panel reports allowed EPA and OSHA to examine alternatives and weigh options that accomplished their regulatory objectives while at the same time protecting small businesses, their owners, and employees.

### **SHARKS!!! An RFA Success Story**

On December 20, 1996, the National Marine Fisheries Service (NMFS) of the Department of Commerce published a proposal to reduce the existing shark fishing quota by 50 percent, certifying that the reduction would have no significant impact on a substantial number of small entities. In January 1997, Advocacy questioned NMFS's decision to certify rather than perform an initial regulatory flexibility analysis. In its March 1997 final rule, NMFS upheld its original decision, but prepared a final regulatory flexibility analysis rather than certifying the rule.

In May 1997, the Southern Offshore Fishing Association brought suit against the Secretary of Commerce, challenging the quotas pursuant to judicial review provisions of laws including the RFA. Advocacy filed to intervene as *amicus curiae*, but withdrew after the Department of Justice stipulated that the standard of review for RFA cases should be "arbitrary and capricious," a higher standard than originally requested.

In February 1998, the United States District Court for the Middle District of Florida ruled that NMFS's certification of "no significant economic impact" and the FRFA failed to meet the requirements of the Administrative Procedures Act and the RFA. The court noted Advocacy's role as "watchdog of the RFA," remanded the rule, and instructed the agency to analyze the economic effects and potential alternatives.

After reviewing NMFS's subsequent analysis, Advocacy again concluded it did not comply with the RFA. Further steps culminated in the court issuing an injunction to NMFS from enforcing new regulations until the agency could establish bona fide compliance with the court's earlier orders.

Later, a settlement between the plaintiff and NMFS involved a delay in any decisions on new shark fishing quotas pending a review of current and future shark stocks by a group of independent scientists. In November 2001 that study was released, indicating that NMFS had significantly underestimated the number of sharks in the Atlantic Ocean.

—Jennifer Smith, Assistant Chief Counsel



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## The State RFA Model Initiative

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### Regulatory Flexibility Arrives in the State House

by Sarah Wickham, Regulatory and Legislative Counsel for Regional Affairs

While there are federal measures in place to reduce regulatory burdens on small businesses, the burden does not stop at the federal level. More than 92 percent of businesses in every state are small businesses and they bear a disproportionate share of regulatory costs and burdens. However, sometimes because of their size, the aggregate importance of small businesses to the economy can be overlooked. Because of this, it is very easy to fail to notice the negative impact of regulatory activities on them. Recognizing that state and local governments can also be a source of onerous regulations on small business, in 2002 Advocacy drafted model regulatory flexibility legislation for the states based on the federal Regulatory Flexibility Act.

Advocacy's model legislation is designed to foster a climate for entrepreneurial success in the states so that small businesses will continue to create jobs, produce innovative new products and services, and bring more Americans into the economic mainstream. Excessive regulation can be reduced and the economy improved without sacrificing important regulatory goals

such as environmental protection, travel safety, safe workplaces, and financial security.

Many states have some form of regulatory flexibility laws on the books. However, many of these laws do not contain all of the five critical elements addressed in Advocacy's model legislation. Recognizing that some laws are missing key components that give regulatory flexibility its effectiveness, legislators continue to introduce legislation to strengthen their current system.

Since 2002, 15 states have signed regulatory flexibility legislation into law, 33 state legislatures have considered legislation, and four governors have signed executive orders implementing regulatory flexibility.

In 2005, 18 states introduced regulatory flexibility legislation (Alabama, Alaska, Hawaii, Indiana, Iowa, Mississippi, Missouri, Montana, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington). Alaska Governor Frank Murkowski, Indiana Governor Mitch Daniels, Missouri Governor Matt Blunt,

#### Five Points of Law

Effective state regulatory flexibility laws have five elements:

- A small business definition that is consistent with state practices and permitting authorities;
- A requirement that state agencies perform an economic impact analysis on the effect of a proposed rule on small business before they regulate;
- A requirement that state agencies consider less burdensome alternatives for small businesses that still meet the agency's regulatory goals;
- A provision that forces state governments to review all of its regulations periodically; and
- Judicial review to give the law "teeth."

New Mexico Governor Bill Richardson, Oregon Governor Ted Kulongoski, and Virginia Governor Mark Warner signed regulatory flexibility legislation into law. And Arkansas Governor Mike Huckabee implemented regulatory flexibility through an executive order.

A vibrant and growing small business sector is critical to creating jobs in a dynamic economy. Small businesses are 99.7 percent of all businesses, employ half of the work force, produce 52 percent of the private sector output, and provide significant ownership opportunities for women, minorities, and immigrants. Advocacy welcomes the opportunity to work with state leaders on their regulatory issues.

The text of Advocacy's model legislation and the most recent map of state legislative activity can be found at [www.sba.gov/advo/laws/law\\_modeleg.html](http://www.sba.gov/advo/laws/law_modeleg.html).

#### State Progress Since 2002

**Regulatory flexibility laws enacted (15):** Alaska; Colorado; Connecticut; Indiana; Kentucky; Missouri (two laws); North Dakota; New Mexico; Oregon; Rhode Island; South Carolina; South Dakota; Virginia; and Wisconsin.

**Regulatory flexibility legislation introduced (33):** Alabama; Alaska; California; Colorado; Connecticut; Georgia; Hawaii; Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Mississippi; Missouri; Montana; Nebraska; New Jersey; New Mexico; North Carolina; North Dakota; Ohio; Oregon; Pennsylvania; Rhode Island; South Carolina; South Dakota; Tennessee; Texas; Utah; Virginia; Washington and Wisconsin.

**Executive orders signed (4):** Arkansas; Massachusetts; Missouri; and West Virginia.

# The Economics of the RFA

## Office of Advocacy Indicators over the Years

by Chad Moutray, Chief Economist

When the Regulatory Flexibility Act (RFA) was passed in 1980, the cost of regulation was very much on the mind of economists and policymakers. Cost studies from this time period show a general consensus that small firms were being saddled with a disproportionate share of the federal regulatory burden. (Some of these studies were commissioned by the newly created Office of Advocacy.) Then as now, an important tool for redressing the bias against small firms is through implementation of the RFA.

As the Office of Advocacy works with federal agencies during the rulemaking process, it seeks to measure the savings of its actions in terms of the compliance costs that small firms would have had to bear if changes to regulations had not been made. The first year in which cost savings were documented was 1998. Changes to rules in that year were estimated to have saved small businesses \$3.2 billion. In 2004, Advocacy actions saved small businesses over \$17 billion in cost savings. Moving forward, Advocacy will continue to measure its accomplishments through cost savings. Yet, ultimately, if

federal agencies institutionalize consideration of small entities in the rulemaking process, the goals of the regulatory flexibility process and Executive Order 13272 will be realized to a large degree, and the amount of foregone regulatory costs would actually diminish.

Economics has provided a framework for regulatory actions and for other public policy initiatives. What has Advocacy's impact been on influencing public policy and furthering research? One does not have to be an expert in economics to recognize that our research and the research of others over the past couple decades has advanced the recognition that small firms are crucial to the U.S. economy. This has not always been the case.

The economy of 1980 and today differ greatly. Real GDP and the number of nonfarm business tax returns have more than doubled since 1980, the unemployment rate and interest rate are much improved, and prices are higher (although inflation is significantly lower). One constant, though, is the lack of timely, relevant data on small businesses. The Office of Advocacy struggled throughout

much of its early existence to accurately measure the number of small firms. The good news is that the Census Bureau now has credible firm size data beginning in 1988, in part because of funding from the Office of Advocacy.

Despite the data obstacles, Advocacy research shows that more women and minorities have become business owners since 1980. Small businesses are now recognized to be job generators and the source of growth and innovation. Not only are more than 99 percent of all employers small businesses, but small firms are responsible for 60 to 80 percent of all new jobs, and they are more innovative than larger firms, producing 13.5 times as many patents per employee.

Research on small entities has gained more prominence, and entrepreneurs are widely acknowledged as engines of change in their regions and industries. The Office of Advocacy will continue to document the contributions and challenges of small business owners. Armed with these data, policymakers will be able to work to ease their tasks, both through better regulation and other endeavors.

### Then and Now: Small Business Economic Indicators Over 25 Years

	1980	1985	1990	1995	2000	Today
Real gross domestic product (\$trillion)	5.2	6.1	7.1	8.0	9.8	11.1
Unemployment rate (percent)	7.2	7.2	5.6	5.6	4.0	5.2
Consumer price index (1982=100)	82.4	107.6	130.7	152.4	172.2	193.4
Prime bank loan rate (percent)	15.3	9.9	10.0	8.8	9.2	5.8
Employer firms (million)	–	–	5.1	5.4	5.7	5.7 (e)
Nonemployer firms (million)	–	–	–	–	16.5	18.3 (e)
Self-employment, unincorporated (million)	8.6	9.3	10.1	10.5	10.2	10.6
Nonfarm business tax returns (million)	13.0	17.0	20.2	22.6	25.1	29.3

Note: All figures seasonally adjusted. Data for "today" are latest available; 2005 data are year-to-date; e = estimate

Source: Federal Reserve Board; U.S. Department of the Treasury, Internal Revenue Service; U.S. Department of Commerce, Bureau of the Census, Bureau of Economic Analysis; U.S. Department of Labor, Bureau of Labor Statistics

# The Importance of Data to Good Policy

by Joe Johnson, Regulatory Economist

Regulatory policy involves difficult choices about costs and benefits. Accurate data on costs and benefits are essential to a complete understanding of the tradeoffs involved. Even though the Regulatory Flexibility Act (RFA) first required agencies to separately consider small business impacts 25 years ago, dependable cost estimates have often been hard to come by.

While measuring the costs of new regulations is a prerequisite for improving regulatory policy, compliance with the sum of all past regulations also places a heavy burden on small businesses. Over the past 25 years, significant gains have been made in measuring the impact of regulatory compliance on small firms. During that time, the Office of Advocacy has produced a series of research reports on this topic, and the findings have been consistent: compliance costs small firms more than large firms. The most significant series of analyses began in the 1990s when Thomas Hopkins first estimated the costs of regulatory compliance for small firms. This research was refined by

Mark Crain and Thomas Hopkins in 2001, and most recently by Crain in the 2005 study, *The Impact of Regulatory Costs on Small Firms*. Crain's latest estimate shows that federal regulations cost small firms nearly 1.5 times more per employee to comply with than large firms.

Despite much progress since passage of the RFA 25 years ago, significant work remains. These hurdles include determining the total burden of rules on firms in specific industries or imposed by specific federal agencies. Estimates of these costs would help show policymakers the marginal cost of adding new rules or modifying existing ones; they would also help show the effects of repealing rules that are no longer relevant yet still cost small business every year. Such analyses will become crucial as the mountain of federal regulations continues to rise. The future of small business depends upon federal rulemaking that uses the best data available to balance the costs and benefits of regulation, while considering how additional rules will affect small business.

## Impact of Regulatory Costs on Small Firms

Mark Crain's 2005 report, *The Impact of Regulatory Costs on Small Firms*, updates the Advocacy sponsored report issued in 2001. These studies estimate the total burden imposed by federal regulations. The 2005 report distinguishes itself from previous research by adopting a more rigorous methodology for its estimate on economic regulation, and it brings the information in the 2001 study up to date.

The research finds that the total costs of federal regulations have increased from the level established in the 2001 study. Specifically, the cost of federal regulations totals \$1.1 trillion, while the updated cost per employee is now \$7,647 for firms with fewer than 20 employees. The 2001 study showed small business with 60 percent greater regulatory burden than their larger business counterparts. The 2005 report shows that disproportionate burden shrinking to 45 percent.

While the true costs of federal regulation have yet to be calculated, Advocacy research has repeatedly and consistently attempted to uncover an estimate of the burden in general, and how it affects small businesses, in particular. —Radwan Saade, Regulatory Economist

## RFA Recollections

“The most memorable event with respect to the history of the RFA was the enactment of SBREFA. Obtaining Vice President Gore's support for judicial review was critical—and of course SBREFA would never have been enacted into law without Senator Bond's leadership.

“The RFA's biggest benefit to the small business environment is the panel process for EPA and OSHA regulations. The panels force the agencies to think through the problems in a rational way rather than using the RFA to find a rationale to support foregone conclusions. If the RFA is an analytical tool for helping the agencies comply with the reasoned decision-making requirements of the Administrative Procedure Act, then agencies must undertake an internal dialogue on the best approaches to resolving a regulatory problem. The panel process, by providing alternative thinking, moves that process along by having an outside party as a sort of referee.

“Probably the best use of the RFA ever by a federal agency was the Food and Drug Administration's final regulatory flexibility analysis for implementing the Nutrition Labeling Education Act (NLEA). The agency noted the impact on small business and would have adopted less burdensome alternatives but could not because of the strictures in the statute. FDA's analysis helped lead to the enactment of 1993 amendments to the NLEA that provided the agency with greater flexibility in providing small business alternatives.”

Barry Pineles

Regulatory Counsel, House Small Business Committee

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## Implementing Executive Order 13272

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### Federal Rule Writers Learn the Ps and Qs of Small Business Impacts

by Claudia Rodgers, Senior Counsel

One key aspect of Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” is to educate federal rulemakers in the specifics of small business impacts—how to comply with the Regulatory Flexibility Act (RFA). Since President Bush signed E.O. 13272 in August 2002, staff at over 40 agencies have been trained.

Agency staff—attorneys, economists, policymakers, and other

employees involved in the regulation writing process—come to RFA training with varying levels of familiarity with the RFA, even though it has been in existence for 25 years. Some are well versed in the law’s requirements, while others are completely unaware of what it requires an agency to do when promulgating a regulation.

The three-and-a-half hour session consists of discussion, group

assignments (where participants review fictitious regulations for small business impact), and a question and answer session. Agency employees receive a hands-on approach on how to comply with the RFA and are able to see how the law’s many requirements work in a real-life regulatory setting. By the end of the course there are always many revelations and

*Continued on page 13*

### Federal Agencies Participating in RFA Training Since December 2002

*Regulatory staff from the following agencies have participated in Advocacy’s RFA training, as directed by E.O. 13272.*

Department of Agriculture

Animal and Plant Health Inspection Service

Department of Commerce

National Oceanic and Atmospheric Administration

Manufacturing and Services

Patent and Trademark Office

Department of Education

Department of Energy

Department of Health and Human Services

Centers for Medicare and Medicaid Services

Food and Drug Administration

Department of Homeland Security

Bureau of Citizenship and Immigration Services

Bureau of Customs and Border Protection

Transportation Security Administration

United States Coast Guard

Department of Housing and Urban Development

Community Planning and Development

Fair Housing and Equal Opportunity

Manufactured Housing

Public and Indian Housing

Department of the Interior

Bureau of Indian Affairs

Bureau of Land Management

Fish and Wildlife Service

Minerals Management Service

National Park Service

Office of Surface Mining, Reclamation and Enforcement

Department of Justice

Bureau of Alcohol, Tobacco, and Firearms

Department of Labor

Employee Benefits Security Administration

Employment and Training Administration

Employment Standards Administration

Mine Safety and Health Administration

Occupational Safety and Health Administration

Department of Transportation

Federal Aviation Administration

Federal Highway Administration

Federal Motor Carrier Safety Administration

Federal Railroad Administration

National Highway Traffic Safety

Administration

Research and Special Programs Administration

Department of the Treasury

Financial Crime Enforcement Network

Financial Management Service

Internal Revenue Service

Office of the Comptroller of the Currency

Tax and Trade Bureau

Department of Veterans Affairs

Independent Federal Agencies

Access Board

Environmental Protection Agency

Federal Communications Commission

Federal Deposit Insurance Corporation

Federal Election Commission

General Services Administration / FAR Council

Securities and Exchange Commission

Small Business Administration

## RFA Training, from page 12

excited faces as agency staff realize what they have to do to comply with the RFA and that Advocacy is here to help them along the way.

One of the most important themes throughout the course is that the agency should bring Advocacy into the rule development process early in the creation of a regulation. Advocacy encourages agencies to work closely with us to help them determine whether a potential rule will have a significant economic impact on a substantial number of small entities. Making this determination is frequently where agencies make their initial mistakes under the RFA. The training session helps to explain the steps rule writers need to take to make this decision accurately. By considering the impact of their regulations on small business from the beginning, agencies are more likely to promulgate a rule that is less burdensome on small businesses with more effective compliance. By “doing it right on the front end,” agencies avoid legal hassles

and delays for noncompliance with the RFA.

While changing the culture of agency rule writers is a tall order, Advocacy’s RFA training is already having quite an impact on the way agencies approach rule development. Those agencies that have been through training are now calling Advocacy earlier in the process, sending us draft documents, and recognizing that if they don’t have the information they need, Advocacy can help point them in the right direction for small business data.

Advocacy has trained over 40 federal agencies, independent commissions and departments. Training is expected to be enhanced in the near future with a web-based training module for employees who missed the initial sessions. With continued RFA training sessions for all 66 of the agencies and departments on Advocacy’s priority list, the number of regulations written with an eye toward their small entity impact will continue to grow.



Chief Counsel for Advocacy Thomas M. Sullivan kicks off an RFA training session at the Environmental Protection Agency in 2003.

## RFA Recollections

“I remember when the concept of ‘regulatory flexibility’ was just that—a concept. In 1978-1981, the Office of Advocacy tried with limited success to educate agencies to make regulations more flexible for small business in ways that would not compromise public policy objectives.

“Congress intervened in 1980 with the enactment of the Regulatory Flexibility Act and again in 1996 with two major amendments to the act—judicial review of agency RFA compliance and the creation of regulatory review panels for EPA and OSHA regulations. Much was expected of judicial review, but over the past 10 years, court after court refused to enforce the law. This may now change with the decision in *National Telecommunications Cooperative v. FCC*, in which I participated as counsel. The court ordered the FCC to comply with the law—a legal breakthrough for RFA. As for the EPA and OSHA regulatory review panels, they have been a total success in my view. I participated in 20 panels as chief counsel. In almost every instance, the panel process produced regulatory proposals that achieved their regulatory objective while significantly reducing the burden on small business—a win-win for all.

“RFA compliance diligently pursued by a strong Office of Advocacy, I am confident, will continue to enhance our country’s regulatory framework.”

*Jere W. Glover*  
Chief Counsel for Advocacy  
1994-2001

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## Future Directions for the RFA

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### Legislative Solutions to RFA Weaknesses

by Shawne Carter McGibbon, Deputy Chief Counsel

Federal agency compliance with the Regulatory Flexibility Act (RFA) has meant billions of dollars saved for small businesses. It has been a gradual process as some agencies have moved from completely ignoring the requirements of the RFA to realizing that the law is a tool for crafting smarter and less costly rules. It has not been an easy journey and it is worthwhile to take a brief look back and then look forward to where future improvements are needed.

Prior to the Small Business Regulatory Enforcement Act (SBREFA) of 1996 there was no judicial review provision that enabled small businesses to hold agencies' feet to the fire when it came to compliance with the RFA. After SBREFA was enacted, agencies took their obligations a bit more seriously, although compliance was still far from perfect. Executive Order 13272, signed in 2002, encouraged agencies to share more information on draft rules with the Office of Advocacy and acknowledge Advocacy's comments when any final rule is published. This was an important step forward because it meant that small business concerns would be addressed in the early stages of rulemaking, rather than late in the process when most decisions have already been made. Even though SBREFA and the executive order have been successful in boosting agency attention to unique small business issues and reducing unnecessary burden, there is still room for improvement.

Some detractors of the SBREFA amendments believed that judicial review would open a floodgate of lawsuits. In fact, this has not happened—an average of 12.5 lawsuits

per year have been filed, despite 4,000 final rules being published annually. Some detractors of the executive order believed that sharing early drafts of rules with Advocacy would result in leaks of pre-decisional information to the public. Those detractors failed to realize that Advocacy is subject to the same interagency confidentiality rules as any other federal agency. Of course, one basic criticism over the years has been that the RFA is intended to roll back necessary health and safety regulations. To the contrary, the RFA has only caused agencies to assess the impact of their regulations on small entities and analyze less burdensome alternatives where feasible.

Recently, legislation has been introduced to plug some of the remaining loopholes in the RFA. The legislation represents an unprecedented opportunity to realize fully the intentions of the original drafters of the RFA. The Office of Advocacy crafted a legislative agenda for the 109th Congress. The concepts outlined in the agenda include clarifying and strengthening the regulatory look-back provisions in the RFA to ensure that agencies periodically review existing regulations for their impact on small entities. It also includes codifying Executive Order 13272, so that its requirements will be made permanent and so that it is certain to apply to independent agencies. And it includes expanding economic impact analyses to include an assessment of foreseeable indirect effects. Currently, agencies can avoid the analytical requirements of the RFA if a rule has only a direct impact on large businesses or if general standards are promulgated

for states to implement through state-level rulemakings. However, Advocacy's experience has shown that the trickle down (indirect) effects of these types of rules can greatly affect small entities.

Legislation has been introduced in both the House of Representatives and the Senate which would accomplish the goals set out in Advocacy's legislative agenda. As with earlier reform successes, nothing in the proposed legislation would undermine vital health and safety regulations. The reforms are targeted in a way that will only promote a better rulemaking process and smarter, less burdensome rules. Let's hope that RFA reform can become a reality during this Congress.

#### RFA Recollections

“When the RFA was under consideration, some believed the effort required to analyze small business impacts would unduly delay regulatory efforts—a myth that was soon dispelled. In hindsight, I wish we had closed the loophole that allowed many tax-related regulations to escape the scrutiny of the RFA process. As good as the RFA was, not having that arrow in the quiver made the development of reasonable tax regulations all the more difficult.

“I believe the mere existence of the RFA has produced better regulations, even when a specific small business solution was not obvious. Any time options are explored, whether implemented or not, small business wins.”

*John Satagaj  
President, Small Business  
Legislative Council*

# Technology Transforms Small Business Role in Rulemaking

by Bruce Lundegren, Assistant Chief Counsel

Think back 25 years to the time when the Regulatory Flexibility Act (RFA) was passed. The rulemaking process was much less friendly and less accessible to small business. Things are very different, and in many respects, much better today.

Congress passed the RFA in 1980 because “one-size-fits-all” regulations were imposing disproportionate burdens on small business. The RFA ensures that federal agencies consider the impact of regulations on small business. Congress supplemented the RFA in 1996 with the Small Business Regulatory Enforcement Fairness Act (SBREFA), which gave small business a stronger voice in the rulemaking process.

But another important factor has been at work in improving small business access to the rulemaking process: technology. Twenty-five years ago desktop computers were a futurist’s dream. To learn about new regulations, you had to go to the library to search the *Federal Register* for regulations that might affect your business. Regulatory dockets full of paper files were housed in remote government offices—often in distant cities. And does anyone recall having to make 5¢ copies of regulatory documents on those old photocopy machines? It was a costly, difficult, and time-consuming process.

Now, in 2005, the *Federal Register* is available online, and it’s searchable. You can have it delivered to your desktop every morning, and federal agencies have established email lists to deliver timely regulatory announcements. Agencies have also established electronic dockets for their new regulations, where every study, report, or public comment used in the decisionmaking process can be accessed with a click of the mouse.

Technological advancement to enhance the regulatory process can be traced to the Electronic Government (or eGovernment) Initiative. Congress launched this initiative in 2002, and it has been a priority for this Administration. The initiative seeks to use advanced technology and the Internet to deliver better government services to the public at lower costs and to create citizen-focused services that improve government’s value to the public. The trick now is for federal agencies to use these new technologies to create new and dynamic models of government. Small business should benefit from these efforts.

While the eGovernment Initiative consists of 24 separate projects, some of the most important to small business include:

- **E-Rulemaking.** This includes creating electronic dockets at each agency and creating a single site ([www.regulations.gov](http://www.regulations.gov)) for proposed federal regulations. These will help small businesses and the public participate in the regulatory process;
- **The Business Gateway.** This is a single portal ([www.business.gov](http://www.business.gov)) for government regulations, services, and information to help business with their operations; and
- **E-Grants.** This is a single site ([www.grants.gov](http://www.grants.gov)) to find and apply for federal grants online.

These eGovernment projects should improve public access to information and services, reduce paperwork and reporting requirements, and allow small business to more effectively participate in the regulatory process. These advances, combined with new requirements to improve the quality and transparency of scientific information that underlies federal regulations, are a giant step in making government more accountable to small business.

## RFA Recollections

“Small businesses are well understood to be a driving force behind U.S. economic growth and prosperity. It is therefore critical that any unnecessary regulatory burdens on small businesses be identified and removed. Since its passage 25 years ago, the Regulatory Flexibility Act (RFA) has helped federal regulatory agencies conduct the analysis that is essential to understanding the impact proposed regulations have on small firms. The analysis required by the RFA can alert policymakers that a regulation will have a disproportionately costly impact on small entities and help them craft regulatory alternatives that reduce this impact.

“The RFA also requires agencies to conduct periodic reviews of existing regulations, an activity that is as important as assessing the consequences of new proposed regulations. OMB has recently engaged the public and federal agencies in a number of regulatory reform initiatives that seek to reduce unnecessary costs and increase flexibility through the reform of existing regulations, guidance documents, and paperwork requirements. The regulatory reviews required by the RFA are a natural complement to regulatory reform initiatives that take into consideration the regulatory burdens and complexities confronting America’s small businesses.”

John D. Graham  
Administrator  
Office of Information and  
Regulatory Affairs



Advocacy staff at the 25th anniversary of the office in 2001. Many of the staffers who worked on the original Regulatory Flexibility Act still enthusiastically administer it now.

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