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The Small Business Advocate

Advocacy: the voice of small business in government

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The RFA at 30: Balancing Federal Rules' Impact on Small Businesses

by Kathryn Tobias, Senior Editor

The RFA@30 Symposium, the Office of Advocacy's 30th anniversary observance of the Regulatory Flexibility Act (RFA) delved into the role of the RFA in the federal rulemaking process—past, present, and future. SBA Deputy Administrator Marie Johns greeted the audience of agency, trade association, and small business representatives by saying, "It takes a special breed to get up and get excited about celebrating the 30th anniversary of a law requiring regulatory fairness!"

Former Acting Chief Counsel Susan Walthall kicked off the day's events with her recollection of standing in the White House on September 19, 1980, for President Jimmy Carter's signing of the bill. Since that time the law has been a key tool in Advocacy's efforts to represent the concerns of small businesses in the federal government. The RFA charges Advocacy with monitoring agency compliance with it, and the office has used it to speak up on behalf of small business in the halls of government.

Chief Counsel for Advocacy Winslow Sargeant discussed the importance of the law from the perspective of an entrepreneur and business owner. The RFA directs agencies to consider the impact of a

Continued on page 2

Special Edition: The RFA Turns 30

In honor of the anniversary of the signing of the Regulatory Flexibility Act in September 1980, Advocacy held a daylong symposium on September 21. The event featured speakers and panels on key aspects of the law and its implementation. These pages contain wrap-ups of these panels, plus a history and timeline of the RFA's first 30 years.

Former chief counsel Jere Glover joined Senator Mary Landrieu and Chief Counsel Winslow Sargeant at the RFA@30 Symposium.

In This Issue

The RFA at 30, *from page 1*

proposed rule on small businesses, because of the reality that small businesses lack economies of scale that may make tasks such as regulatory compliance less burdensome and less costly. The law's regulatory "flexibilities" and "alternatives" encourage agencies to give small businesses a fair shake in the rule writing process, while the agency still meets its regulatory objective.

Senator Mary Landrieu, chair of the Senate Small Business and Entrepreneurship Committee, praised her colleagues who worked together on the Small Business Jobs Act. The bill passed the Senate on September 16, the House on September 23, and the President signed it into law on September 27. The bill targets $12 billion in tax cuts to America's 27.5 million small businesses, strengthens core programs of SBA, and engages small, healthy community banks in an effort to make loans to small businesses. Noting that government, with the best intentions, can be clumsy at times in its rulemaking, she promised to work more closely with Advocacy. "The next thing I want to focus on is regulation," Senator Landrieu said.

Cass Sunstein, the head of the White House Office of Information and Regulatory Affairs, noted that regulations can have unforeseen and unintended consequences. Sunstein characterized the RFA as part of the set of analytical requirements imposed on agencies to ensure that they "look before they leap" when writing regulations.

"If regulatory choices are based on careful analysis, and subject to public scrutiny and review, we will be able to identity new and creative approaches designed to maintain and promote entrepreneurship, innovation, competitiveness, and economic growth." He continued, "These points have special importance in a period in which it is crucial to consider the effects of regulation on small business—and to ensure, in accordance with the first declaration of purpose in the Regulatory Flexibility Act, that agencies 'seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public.'"

The Small Business Advocate

Editor Rebecca Krafft

Managing Editor Rob Kleinsteuber

Guest Editor Kathryn Tobias

Production Assistant Angela Hamilton

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The Regulatory Flexibility Act Timeline

June 1976 Congress enacts Public Law 94-305, creating the SBA Office of Advocacy.

January 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 19, 1980 President Jimmy Carter signs the Regulatory Flexibility Act (RFA).

October 1981 Advocacy reports on the first year of RFA experience in testimony before the Subcommittee on Export Opportunities and Special Small Business Problems of the U.S. House Committee on Small Business.

February 1983 Advocacy publishes the first annual report on agency RFA implementation. The report shows spotty agency compliance.

August 1986 Delegates to the second White House Conference on Small Business recommend strengthening enforcement of the RFA by, among other things, subjecting agency compliance to judicial review.

September 1993 President Bill Clinton issues Executive Order 12866, "Regulatory Planning and Review."

June 1995 The third White House Conference on Small Business recommends strengthening the RFA by subjecting additional agencies, including the IRS, to the law; granting judicial review of agency compliance; and including small businesses in the rulemaking process.

March 1996 President Clinton signs the Small Business Regulatory Enforcement Fairness Act (SBREFA).

August 2002 President George W. Bush signs Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking."

July 2010 President Barack Obama signs the Dodd-Frank Wall Street Reform and Consumer Protection Act, which subjects the new Consumer Financial Protection Bureau to SBREFA provisions.

Message from the Chief Counsel

Full Speed Ahead for Small Business

by Dr. Winslow Sargeant, Chief Counsel for Advocacy

When I was sworn in on August 23rd, I felt honored to be appointed by President Obama to lead an organization that speaks out every day for the 27.5 million small businesses that make this country great. I believe in the work of this office and in the power of small businesses to improve lives and put our economy back to work.

In my first months as chief counsel for advocacy, I have met with the heads of small business associations and listened to their concerns and their issues. I immediately contacted agency heads and chief counsels to discuss these. My contacts have included a conversation with staff at the Internal Revenue Service on the expanded Form 1099 reporting requirements and a meeting at the White House Office of Federal Procurement Policy on women-owned businesses' insourcing and high-road contracting concerns. Additionally, I have sat down twice with Cass Sunstein, administrator of the White House Office of Information and Regulatory Affairs, to ensure that our offices work well together.

All of this is to let you know that the Office of Advocacy—the voice for small business in the federal government—is listening and relaying your concerns to the appropriate agencies. As your man in Washington, I will press forward on this important job.

Last month, I hosted the Office of Advocacy's symposium marking the 30th anniversary of the Regulatory Flexibility Act (RFA) where we released a study updating our research on the cost of regulation. We all know that small firms create new jobs in tough economic times. We also know that for this to happen, entrepreneurs need an environment for success. It's Advocacy's job, through the RFA, to help ensure that they are being adequately considered when new regulations are developed.

My background is in technology and business, so I come to this job with a firsthand understanding of the challenges small businesses face. I started my career as an electrical and computer engineer, working for IBM, AT&T, and Lucent Technologies. The passage of the 1996 Telecommunications Act presented an opportunity to start a business. Along with a couple of friends in Allentown, Pennsylvania—a community going through some tough economic times—we quit our jobs and started a company designing computer chips. In a relatively short time, we grew from a handful of employees to more than 50. While we were ultimately successful, the challenges of starting and growing our business were plentiful. There were regulations, paperwork, legal bills, and sometimes rules that made no sense for a company of our small size.

"Through my experience with high tech startups, I've learned what it's like to deal with federal regulations that apply a 'one size fits all' approach—which fail to take into account the different realities of a small business. "

Small businesses face different challenges and risks than large ones. The impact on small businesses of what we do in Washington must always be front and center, because getting it right is too important for our economy. That is why the RFA was enacted in September 1980, and for 30 years it has been a key tool in improving the regulatory environment for small firms.

With change have come new opportunities, including new businesses developing innovations, products, and services. At the same time, environmental consciousness and demands for better health care and worker safety have intensified. As new business sectors pop up and others expand, new rules and regulations are not far behind.

Through my experience with high tech startups, I've learned what it's like to deal with federal regulations that apply a "one size fits all" approach—which fail to take into account the different realities of a small business. The study we've just released, *The Impact of Regulatory Costs on Small Firms,* demonstrates once again the disproportionately high cost of one-size-fits-all regulation for small business.

This burden is something the Office of Advocacy understands. For the last 30 years Advocacy has worked to ensure that the voice of small business is heard during the government's rulemaking process, and that agencies consider alternatives and solutions that meet their regulatory goals without placing undue burden on small firms.

Small businesses will always have an ally in the fight against burdensome regulations—the Office of Advocacy. I look forward to leading that fight for small business here in Washington.

Panel 1: The Cost of Regulation

Calculating the Additional Regulatory Cost Burden on Small Firms

by Patrick Morris, Public Liaison and Media Manager

Participants in the panel discussion on the cost of regulation on small business probably weren't expecting one of the presenters to quote the rock star Bono.

The panel discussed the disproportionate economic impacts of regulation on small business as highlighted by a new Office of Advocacy study, *The Impact of Regulatory Costs on Small Firms.* Thomas Hopkins, professor of economics at Rochester Institute of Technology moderated the panel. The three panelists were W. Mark Crain, a co-author of the study; John Morrall, the former deputy administrator of the White House Office of Information and Regulatory Affairs; and Rick Otis, a former deputy associate administrator in the EPA's Office of Policy, Economics and Innovation.

Crain summarized his study's findings; it is the fourth report on the topic sponsored by the Office of Advocacy. The study showed that the cost for regulatory compliance in 2008 for all federal regulations was $1.75 trillion; when broken down by firm size, the difference in the cost per employee between the smallest and the largest firms was $2,830 per employee.

Crain quoted the Irish singer Bono's September 19th *New York Times* guest op-ed: "Hidden somewhere in the Dodd-Frank financial reform bill….is a hugely significant 'transparency' amendment…. Measures like this one should be central… And the cost to us is zero, nada." After sharing Bono's thoughts, Crain let it be known that the "costs are never zero." Costs may be hidden, or they may be transferred, but there are no free lunches.

Morrall focused on the costs identified in the report and expressed concerns that high and growing levels of regulation could have a negative impact on growth.

A possible reason for the increasing costs, according to Rick Otis, may be limitations in the perspectives of rulemakers. Otis described a model in which decision-making takes place in "silos," with no interaction beyond those already in the loop. In this scenario, government decision-makers move ahead, but for the Regulatory Flexibility Act, which forces agencies to examine the impacts of their regulations on small businesses and other small entities.

Calculating Costs for Regulatory Review

Implicit in the panel discussion panel on regulatory costs is the importance of the completeness, validity, and precision of the cost-and-benefit estimates that come from the data and models that regulatory agencies, researchers, and policymakers employ. Concentrating on regulatory costs to small firms, there are two important types of data that drive the estimates and that are necessary for expanding knowledge of the subject. First are the costs of new regulations as they are promulgated; and second are the costs of the portfolio of all regulations still on the books. There are important issues with each type, and benefits to improving the quality of both kinds of cost data.

The most important reason for improving the quality of data used to estimate the costs of regulations in the proposal stage is to inform the rulemaking process and improve the quality of regulation. However, this endeavor also improves our regulatory cost estimates by making the ongoing inventory of regulatory cost data more complete and accurate. Currently, the Office of Information and Regulatory Affairs in the White House only reviews a small minority of all regulations under the process of E.O. 12866. Many rules that do not undergo review have serious cost implications for small business, and often these costs are under-reported.

The second category of cost data involves the backlog of existing regulations, many of which were passed at a time when regulatory cost impacts were not estimated in any systematic way. In many cases, data have been developed over the years to estimate the costs of these rules *ex post,* and certainly the research done by the Crains incorporates many of these estimates. Nevertheless, there are still large and important gaps in our knowledge about the costs of even some of the longest-lived regulations that affect small business. Developing new data and new methodologies to estimate both categories of costs is an ongoing process that will never cease to be relevant, as long as new regulations continue being promulgated and the conditions in which businesses operate continue to evolve.

— Joseph Johnson, Regulatory Economist

Cost of Federal Regulation Study Updated

Regulations provide the rules and structure that allow societies to function. While aware of this need, the Office of Advocacy has periodically examined the costs of complying with federal regulations and documented the disproportionate effects on small businesses compared with large ones.

In the 2010 edition of *The Impact of Regulatory Costs on Small Firms,* Nicole Crain and W. Mark Crain find that the cost for firms with fewer than 20 employees to comply with regulations is now $10,585 per employee, up from $7,647 in the 2005 report. Compared with firms with 500 or more employees, firms with fewer than 20 workers pay about $2,830 more per employee—a 36 percent difference. The authors employ new and improved methodologies, so direct comparisons with the previous reports' data should be made with caution.

The authors estimate the cumulative cost of federal regulations at $1.75 trillion. That figure is the sum of the compliance costs for four components: economic regulations; environmental regulations; tax compliance; and occupational safety, health, and homeland security regulations. The study uses the World Bank's Regulatory Quality Index for the economic regulations component. This index has more observations than the index used previously, as well as continuous data from 1998 to 2008.

Small firms continue to be disproportionately affected by the cost of regulations. Compliance with environmental regulations costs the smallest firms 364 percent more than large ones. Another significant disparity is in the cost of tax compliance—206 percent higher in the smallest firms. Analyzed by industry sector, regulations on manufacturing are particularly burdensome for small businesses. In the service sector, regulatory costs differ little between small and larger firms.

The full report is online at **www.sba.gov/advo/research/rs371tot.pdf**.

—Kathryn Tobias, Senior Editor

Annual Cost of Federal Regulations by Firm Size

Type of Regulation	Cost per Employee for All Firms	Cost per Employee for Firms with:		
		Fewer than 20 Employees	20–499 Employees	500 or More Employees
All Regulation	$8,086	$10,585	$7,454	$7,755
Economic	5,153	4,120	4,750	5,835
Environmental	1,523	4,101	1,294	883
Tax Compliance	800	1,584	760	517
Occupational Safety and Homeland Security	610	781	650	520

Source: *The Impact of Regulatory Costs on Small Firms,* Nicole Crain and Mark Crain, 2010 **(www.sba.gov/advo/research/rs371tot.pdf).**

Authors Thomas Hopkins and Mark Crain discuss recent research with Advocacy economist Radwan Saade.

John Morrall presented alternate scenarios for calculating cumulative regulatory costs.

Panel 2: Regulatory Flexibility Act Training in a Nutshell

Four Basic Steps to Complying with the RFA

by Rebecca Krafft, Editor

Office of Advocacy staff members Claudia Rodgers (acting deputy chief counsel) and Joseph Johnson (regulatory economist) gave a condensed version of the three-hour RFA training course they have been treating regulatory agencies to over the past seven years. The training familiarizes rule writers with their obligations under the RFA.

Rodgers and Johnson described the four basic steps of a regulatory flexibility analysis, which they summed up in four questions:

1. Applicability: Does the RFA apply?

2. Threshold Analysis: Will there be a significant economic impact on a substantial number of small entities? If not, can you so certify?

3. The IRFA: What is the potential economic impact of the rule on small entities?

4. The FRFA: What has been done to minimize the adverse economic impact of the rule on small entities?

Two messages came through loud and clear: Start early and use Advocacy as a resource.

The place to begin to apply the RFA is the draft rule. The RFA requires an agency to include either a certification of no impact or an initial regulatory flexibility analysis (IRFA) with the publication of the draft rule. If a rule needs an IRFA, it should accompany the publication of the rule proposal in the *Federal Register*.

As an agency attempts to determine what a proposed rule's impact on small businesses is, Advocacy is available to help. Advocacy can hold roundtables to gather small businesses' impressions of a rule proposal, both its impacts and possible alternatives. Agency reps may participate in a roundtable, observe, or receive feedback after the fact. In this way, agencies can gather specific estimates of the number of businesses affected, the proportion of an industry they make up, as well as alternative approaches and solutions to the regulatory issue at hand.

The final regulatory flexibility analysis (FRFA) summarizes the comments received, any adjustments made in response to comments, and it explains what has been done to minimize adverse economic impacts of the rule on small businesses.

Several helpful publications were made available. The shortest of them, *The RFA in a Nutshell,* is actually a smaller number of words than the law itself. Nice going! The longest, *A Guide to Compliance with the Regulatory Flexibility Act,* is an authoritative reference work created for federal agencies.

The trainers stressed many other important points, and especially the benefits of RFA compliance. To federal rulemakers, RFA compliance:

- Minimizes legal problems and challenges,
- Avoids delays due to these challenges,
- Improves public and congressional support, and
- Improves compliance with the regulation.

And to small businesses, RFA compliance:

- Levels the competitive playing field between large and smalls, and
- Supports the most vital segment of the American economy.

Advocacy staffers Claudia Rodgers and Joe Johnson led the RFA training panel.

Chief Counsel Sargeant and Assistant Chief Counsel Jamie Belcore Saloom led the successful RFA symposium.

Making a Difference with RFA Training

RFA training at federal regulatory agencies continues to be an important part of getting agencies to recognize that they can issue regulations that accomplish their objective while reducing the potential economic burden of those regulations on small businesses.

Since Executive Order 13272 was signed in 2002, the Office of Advocacy has been actively developing and maintaining a training program designed to teach agencies this important point. With over 80 agencies and 1,600 employees trained to date, Advocacy's RFA training sessions are making a difference. We see this difference in the consideration some agencies are giving to their economic analysis when drafting regulations and more importantly, in the advanced notice some agencies are giving to Advocacy staff regarding those draft regulations. If there is one thing Advocacy's RFA training sessions stress, it is that coming to Advocacy as early on in the regulatory development process as possible makes a significant difference for small business and makes it easier in the long run for the agency to comply with the RFA.

It still surprises my training team when we arrive at a federal agency for an RFA training session and I ask regulatory economists, attorneys, and policy staff at the agency, "How many of you are familiar with the RFA?" Consistently, no matter the agency, the number of agency staff that raise their hand are not even half of those in attendance. Even though Advocacy recently celebrated 30 years of the passage of the RFA, the need for training on compliance with the important mandates of the act remains. In these challenging economic times small businesses, now more than ever, need agencies to consider the potential economic impact of their regulatory decisions prior to issuing a final rule. The challenge continues!

—Claudia Rodgers, Acting Deputy Chief Counsel

Top left, SBA Deputy Administrator Marie Johns welcomed the audience. Below, OIRA Administrator Cass Sunstein talked about the RFA and transparency in governance.

Top right, Senate Small Business Committee Chair Mary Landrieu thanked Advocacy for supporting small business. Below, Chief Counsel Sargeant discussed regulations and the research, innovation, and development process.

Panel 3: The RFA in the Courts and Congress

Recent History of RFA Activity

by Assistant Chief Counsel Kate Reichert

"The RFA in the Courts and Congress" panel featured a discussion about developments in RFA case law since the passage of SBREFA and recent legislation regarding the RFA. The panel was moderated by Jeffrey Lubbers of American University's Washington College of Law, and included panelists David Frulla of Kelley, Drye & Warren LLP; Keith Holman of the National Lime Association and former assistant chief counsel for advocacy; and Elizabeth Kohl, attorney advisor with the U.S. Department of Energy.

Lubbers raised several issues for discussion including the meaning of "significant," "substantial," and "small," for purposes of RFA analyses, the ongoing discussion regarding whether indirect impacts, in addition to direct impacts, should be considered during regulatory analyses; as well as the use of small business regulatory review panels.

Holman described his experience at the Office of Advocacy with small business review panels at the Occupational Safety and Health Administration and the Environmental Protection Agency, noting positive effects of the panel process and areas where panels could be utilized more effectively. Holman recognized that these panels can be labor-intensive for the agencies, but stressed their utility, explaining that the "purpose of the panel process is to get a better rule at the end of the process so that Advocacy can work with the agency at its best and highest level."

Frulla discussed the impact that litigation can have on the RFA, noting that "rarely is regulatory flexibility legislation alone a silver bullet [in terms of ensuring an appropriate regulatory outcome for small businesses]." Rather, small businesses need to have the "staying power" to ensure that an agency adequately corrects RFA violations that a court finds. For instance, Frulla noted that, in *Southern Offshore Fishing Association v. Daley*, in which he served as counsel for a group of Atlantic shark fisherman, the RFA violations were addressed via an independent scientific review and reconsideration of the agency's proposed rules. In addition, Frulla singled out the standard of review used by the courts in RFA cases, and suggested that it is becoming more deferential to the agencies than Congress intended when it provided for judicial review of agency RFA compliance.

Elizabeth Kohl discussed RFA analysis from the agencies' perspective noting some of the challenges her team faces when analyzing the impact on small entities; these include statutory limitations on creating flexibility for small entities and the difficulty in tiering small businesses based on revenue. Despite these challenges, Kohl acknowledged that "certification is the exception to the norm … and conclusory or unsupported certifications are made at the agencies' own peril."

Panel 3 featured trade association and government experts. From left are Keith Holman, David Frulla, and Elizabeth Kohl.

Conference attendees trade ideas with OIRA Administrator Cass Sunstein (right).

Judicial Review: RFA Case Law since 1996

One of the most important amendments to the Regulatory Flexibility Act (RFA) is judicial review. When the RFA was passed 30 years ago, it did not specifically state that the law could be reviewed in the courts. As such, the courts initially found that the RFA was only reviewable in terms of the Administrative Procedures Act (APA). Agencies, therefore, did not give full consideration to their obligations under the RFA.

In 1996, Congress amended the RFA to include judicial review as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA). Since the passage of SBREFA, scores of RFA cases have been filed. In those cases, the courts have ruled on several important issues such as standing to sue, the procedural requirements of the RFA, appropriate size standards, consideration of adequate alternatives, etc. An article on the RFA cases through 2006 can be found on Advocacy's website: **www.sba.gov/advo/laws/law_lib.html**.

The most recent reported case that raised an RFA claim is *Council Tree Communications, Inc. v. Federal Communications Commission*. The case involved some of the rules that governed the participation of small wireless telephone service providers in auctions of electromagnetic spectrum conducted by the FCC. The small service providers claimed that the rules were enacted without notice and comment as required by the APA and the RFA and that the rules were arbitrary and capricious. The court did not address the RFA, because it viewed it as duplicative of the APA notice-and-comment claim and stated, "To the extent that the FCC failed to give notice of the new rules for RFA purposes, it also gave inadequate notice for APA purposes, necessitating a remand on the latter basis alone." The court further stated that on remand, the FCC must comply with all RFA requirements.

—Jennifer Smith, Assistant Chief Counsel

SBREFA Panels Benefit Agencies, Small Business

Since the Small Business Regulatory Enforcement Fairness Act (SBREFA) was passed in 1996, two federal agencies, the U.S. Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA), have been required to convene small business advocacy review panels (also known as SBREFA panels) prior to proposing any rule that is expected to have a significant economic impact on a substantial number of small entities. In the future, the newly created Consumer Financial Protection Bureau (CFPB) at the Federal Reserve Board will join that short list of covered agencies.

Do SBREFA panels help agencies and small business? Well, judging by the final panel discussion at the recent RFA@30 Symposium, the answer is definitely, "Yes"!

SBREFA panels consist of officials from the rulemaking agency, the Office of Advocacy, and the Office of Information and Regulatory Affairs. Small entity representatives inform the panels about how the contemplated regulation would affect them. The small entity representatives review preliminary materials, assess the proposal, consider costs, and recommend alternatives. The panel in turn issues a report to the agency detailing these concerns and recommending a course of action.

SBREFA panels are definitely helpful. First and foremost, the panels force the agencies to consider the real world costs and implications of their rules on small business. As each of the panelists at the symposium agreed, requiring the agency to explain the rule to actual small business representatives forces the agency to think through its proposal, clearly explain the issue, and justify what it is trying to do. Each of the panelists agreed the process was beneficial, although not without costs. For small business, the panels give them direct access to the agency decision-makers and the opportunity to explain how regulations will affect them. Most small entity representatives report having a favorable experience working with the panel, and nearly all think the process is beneficial.

SBREFA panels do require time and effort by both the panel and the small entity representatives. However, because the SBREFA statute establishes a strict 60-day timeframe to conclude the panel, the panels have not been time-consuming and have operated efficiently. Further, because regulations may impose disproportionate impacts on small entities, the process helps to reduce costs and consider approaches that are more flexible and small business-friendly.

—Bruce Lundegren, Assistant Chief Counsel

Panel 4: RFA Success Stories and Challenges

Implementing the RFA

by Assistant Chief Counsel Janis Reyes

The panel, "RFA Success Stories and Challenges," featured agency officials and small business stakeholders who shared their experiences with implementing the Regulatory Flexibility Act (RFA) and offered suggestions for improving the process.

Moderator Neil Eisner, assistant general counsel for regulation and enforcement at the U.S. Department of Transportation, opened the discussion with the question, "Is the RFA a success?" Eisner noted that the RFA was a success at the agency because for all important rules that go before the secretary, the question that is always posed at briefings is, "Has the agency considered the impact on small entities?"

"The greatest impact of the RFA that is out of the sight of the public is that it has changed the agency culture to think about small businesses when they are thinking about doing rulemaking," stated Jim Laity, an audience participant and desk officer at the Office of Information and Regulatory Affairs.

"The Small Business Administration's Office of Advocacy is the best use of tax dollars out there," stated panelist Jeff Hannapel, vice president of regulatory affairs at the Policy Group and former official at the U.S. Environmental Protection Agency (EPA), "the RFA is so important because it allows small businesses to be part of the regulatory process."

Panelist Nicole Owens, director of regulatory management at EPA, stated that the small business input in the SBREFA panel process before the rule is published has resulted in significant rulemaking improvements at EPA, such as small business exemptions or phased-in compliance dates.

Hannapel added, "SBREFA panels are important because they are composed of small businesses with real world experience. They discuss how they will be impacted by the rule—they are not just some talking heads."

While SBREFA panels can be helpful, Owens stated that the EPA can take four to ten months for agency staff to prepare its analyses to give to the SBREFA panel and it ultimately lengthens the time to do a rulemaking. Owens noted that it is hard for the agency to conclude that they couldn't get the same data in another way, such as through the comment period or through agency outreach.

Panelist Jonathan Snare, partner at Morgan, Lewis & Bockius LLP and a former official of the Occupational Safety and Health Administration (OSHA), stated that getting relevant data is always a challenge for the agency. Sarah Shortall, an attorney for OSHA, recommended that Advocacy train small entity representatives on the SBREFA process and the type of quantitative data that the agency needs to make this process more helpful. Panelists noted that while OSHA and EPA have different ways of implementing the SBREFA process, the most important thing is for the agency to be flexible and hold panels before the policy decisions are made.

Panel 4 featured RFA success stories. From left are Neil Eisner, Jeff Hannapel, Nicole Owens, and Jonathan Snare.

Chief Counsel Sargeant recognized Susan Walthall for her service as acting chief counsel.

An RFA Success Story: EPA Gives a Final Rule a Second Look

In one of the major success stories under the Regulatory Flexibility Act, the Environmental Protection Agency (EPA) is reexamining its final rule for stormwater discharge from construction sites, known as the construction and development (or C&D) rule. The Office of Advocacy estimated that the regulation had the potential of costing business $10 billion annually, with minimal environmental improvement; in addition, it would adversely affect housing affordability for millions of Americans. The cost impact would fall primarily on small firms, which make up 97.7 percent of the construction and development industry.

On February 26, 2009, Advocacy submitted comments on the proposed rule. Advocacy endorsed an "action level" approach as one of two desirable regulatory approaches. An action level does not stipulate a specific numeric limit, instead it requires the facility to take steps to minimize sediment runoff once the action level is exceeded. Under the RFA, Advocacy was recommending a less costly approach with substantially equivalent environmental protection.

In its final rule, issued on December 1, 2009, EPA adopted a numeric turbidity standard of 280 nephelometric turbidity units (NTU). On April 20, 2010, Advocacy issued a letter petitioning EPA to reconsider the final rule for stormwater discharges for construction sites. The petition identified errors in EPA's data review and analysis. Advocacy also suggested that EPA could take notice and comment on a new proposal, after consideration of this new information, instead of re-promulgating a new standard without additional notice and comment.

In response to this petition for reconsideration, the Department of Justice, acting upon behalf of EPA, filed a motion in the 7th Circuit to vacate the 280 NTU standard and reconsider the standard. The court ruled in October to remand the standard back to the agency, and EPA is expected to issue another proposed rule for notice and comment.

—Kevin Bromberg, Assistant Chief Counsel

The History of the Regulatory Flexibility Act

by Kathryn Tobias, Senior Editor

After 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 nonlegislative proposals for eliminating excessive or unnecessary regulations of small businesses."

On October 11, 1979, President Jimmy Carter added the Small Business Administration to his Regulatory Council and on November 16, he issued a memorandum to the heads of executive departments and agencies saying, "I want you to make sure that federal regulations will not place unnecessary burdens on small businesses and organizations," and laying out steps for agencies so that regulations are applied "in a flexible manner, taking into account the size and nature of the regulated businesses." He required agencies to report the results of their efforts to the Office of 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 effectively in the regulated market.

By 1980, when delegates assembled for the first of three White House Conferences on Small Business, the conference report to the president 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

Continued on page 12

RFA History, *from page 11*

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, supporting earlier calls for action and the findings on Capitol Hill, helped form the impetus for the passage, in 1980, of the Regulatory Flexibility Act (RFA). The intent of the act was clearly stated:

"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 one or more of three documents: an initial regulatory flexibility analysis, a certification, and 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."

Implementing the RFA

The Office of 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 became clear early to the Office of Advocacy and many small business people 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 Regulatory Flexibility Act 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."

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

The delegates recommended strengthening the RFA by requiring recalcitrant agencies to comply and by providing that the action or inaction of all federal agencies with respect to the RFA 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…" 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 accomplish their original purpose without hindering economic growth." The scene was set for the regulatory logjam to move.

On September 30, 1993, President 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 carefully their major regulatory undertakings and to take action to ensure that these regulations achieved the desired results with minimal societal burden.

An April 1994 report by the General Accounting Office reviewed the Office of Advocacy's annual reports on agency compliance with the RFA and concluded: "The SBA annual reports indicated

Continued on page 13

RFA History, *from page 12*

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 looked at why the RFA had not made enough progress in mitigating regulations' increasing and disproportionate effect on small firms. 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 delegates forcefully addressed the problem. Recommendation #183 of the National Conference Recommendation Agenda fine-tuned the regulatory policy guidance of earlier conferences, asking for specific provisions that would include small firms in the rulemaking process.

In October, the Office of Advocacy issued a report, based on research by Thomas Hopkins, that estimated the total costs of "process," environmental, and other social and economic regulations at $668 billion in 1995. Conservative estimates put the average cost of regulation at $3,400 per employee for large firms with more than 500 employees and $5,000 per employee for small firms with fewer than 500 employees.

As it turned out, recommendation #183 was among the first of the 1995 White House Conference results to be implemented. President Clinton signed Public Law 104-121, the Small Business Regulatory Enforcement Fairness Act (SBREFA), on March 29, 1996. The new law gave the courts jurisdiction to review agency compliance with the RFA, thus providing for the first time an enforcement mechanism. 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 early on regulations expected to have a significant impact on them, before the regulations were published for public comment. This formalized for these two agencies a process for involving small entities in the agencies' deliberations on the effectiveness of regulations that would affect them. Third, it reaffirmed 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.

The 2000s: A Small Business Agenda and Executive Order 13272

On March 19, 2002, President George W. Bush announced his Small Business Agenda, which succinctly noted that "The role of government is not to create wealth but to create an environment where entrepreneurs can flourish." The president gave a high priority to regulatory concerns, including as a key feature of his agenda 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."

The first point under this section was the goal of strengthening the Office of Advocacy by enhancing its relationship with the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) and creating an executive order that would direct agencies to work closely with Advocacy in properly considering the impact of their regulations on small business.

On August 13, 2002, he issued Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking." The E.O. required 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;
- Notify Advocacy before publishing draft rules expected to have a significant economic impact on a substantial number of small entities; and
- Consider Advocacy's written comments on proposed rules and publish a response with the final rule.

The E.O. requires Advocacy, in turn, to provide periodic 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' impacts on small entities. Since then, Advocacy has trained nearly all agencies in implementing the RFA, and Cabinet departments as well as many independent agencies have submitted written RFA compliance plans and made their RFA procedures publicly available. Another significant development in the first decade of the 21st century was the creation of a model "state RFA" that has since been adopted by many states in whole or in part.

A New Administration Implements the RFA

When the Obama Administration took office in 2009, one immediate pressing challenge was to respond to the financial crisis faced by the American public and the business community in particular. Some of the participants in the debate on a new financial protection law were familiar with the success of the SBREFA panels that apply to EPA and OSHA rulemakings. The

Continued on page 16

Test Your Knowledge of the RFA

Ten Frequently Asked Questions About the Regulatory Flexibility Act

The following questions repeatedly arise during RFA training. They address some of the more challenging parts of rule analysis, as well as areas that are commonly misunderstood. Many continue to pose problems for agency regulators. In the following article, Acting Deputy Chief Counsel Claudia Rodgers answers them. The list first appeared in the May 2004 issue of The Small Business Advocate.

1. What is the difference between direct and indirect impact?

A regulation imposes a direct impact on a business it regulates. Those compliance costs associated with the rule are an example of direct economic impacts of the rule on those businesses. However, a regulation may also have an economic impact on businesses that are not subject to the rule and its requirements. As a result of the regulation, those other businesses may also incur costs. For example, a rule that regulates car manufacturers may indirectly affect car rental agencies which must purchase those cars for use in their business.

Courts have held that the RFA requires an agency to perform a regulatory flexibility analysis of small enitity impacts only when a rule directly regulates them. This issue was first decided in *Mid-Tex Electric Cooperative, Inc., v. Federal Energy Regulatory Commission (FERC)*.[1] In that case, FERC stated that "the RFA does not require the Commission to consider the effect of this rule, a federal rate standard, on nonjurisdictional entities whose rates are not subject to the rule." The court agreed, reasoning that "Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy." The court concluded that "an agency may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule." Although *Mid-Tex* occurred before passage of the Small Business Regulatory Enforcement Fairness Act of 1996, courts have upheld this reasoning since then. The court in *Cement Kiln Recycling Coalition v. EPA*[2] reasoned that "requiring an agency to assess the impact on all of the nation's small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected."

Although it is not required by the RFA, the Office of Advocacy believes that it is good public policy for agencies to include reasonably foreseeable indirect impacts in the regulatory flexibility analysis.

2. Define "substantial number" and "significant economic impact."

An agency's second RFA step in a threshold analysis is to determine whether there is a significant economic impact on a substantial number of small entities. The RFA does not define "significant" or "substantial." In the absence of statutory specificity, what is significant or substantial will vary depending on the problem being addressed, the rule's requirements, and the preliminary assessment of the rule's impact.

The agency is in the best position to gauge the small entity impacts of its regulations. Significance should not be viewed in absolute terms, but should be seen as relative to the size of the business, business profitability, regional economics, and other factors. One measure for determining economic impact is the percentage of revenues or percentage of profits affected. Other measures may be used. For instance, the impact could be significant if the cost of the proposed regulation (a) eliminates more than 10 percent of the businesses' profits; (b) exceeds 1 percent of the gross revenues of the entities in a particular sector, or (c) exceeds 5 percent of the labor costs of the entities in the sector.

The absence of a particularized definition of either "significant" or "substantial" does not mean that Congress left the terms completely ambiguous or open to unreasonable interpretations. Thus, Advocacy relies on legislative history of the RFA for general guidance in defining these terms.

3. Does an agency have to consider a rule's impact on international firms doing business in the U.S.?

The definition of small business in the RFA comes from the Small Business Act[3] and regulations issued by the Small Business Administration. With regard to international firms, the act defines a small business as "a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor." So where a business meets the above criteria, agencies must consider a rule's impact.

4. How soon must an agency notify Advocacy after certifying a rule?

If the head of an agency makes a certification that a rule will not have a significant economic impact upon a substantial number of small entities, section 605(b) of the RFA requires the agency to "provide such certification to the chief counsel for advocacy." The RFA does not provide a time requirement. However, Advocacy encourages agencies to provide this information at a reasonable time in advance of publication or submission to the Office of Management and Budget for review.

5. Does an agency have to choose the alternative that gives the most relief to small business?

The RFA does not require an agency to choose the alternative that gives the most relief to small business. In an agency's final regulatory flexibility analysis, an agency must give a statement of factual, policy, and legal reasons for adopting one or more alternatives and rejecting others. However, it would be contrary to the spirit of the RFA to reject an alternative that does the best job of reducing small business burden while accomplishing the agency's regulatory goal.

6. Under what circumstances do interim final rules and direct final rules require an initial regulatory flexibility analysis (IRFA) or final regulatory flexibility analysis?

The RFA applies to any rule subject to notice and comment rulemaking under section 553(b) of the Administrative Procedure Act (APA)[4] or any other law. Rules are exempt from APA notice and comment requirements (and therefore from the RFA requirements) when the agency for good cause finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest.

In the case of an interim final rule where an agency has relied on this good cause exception, the rule is exempt from RFA analysis. However, Advocacy advises agencies that the exemption is narrowly construed by courts and may be challenged. Advocacy has been particularly concerned about agencies who might utilize this exemption to avoid performing the regulatory analysis required by the RFA. Advocacy encourages agencies to perform the analysis so the public can comment on the accuracy of the agency's assumptions regarding the economic impact of the rule. Once an agency moves to a *final* final rule, following an interim final rule, the emergency nature of the rule is usually no longer in effect and the agency must then perform the regulatory analysis necessary under the RFA. In practice, some agencies have been slow (or have failed) to issue a *final*, final rule and therefore have avoided performing the required analysis.

7. Is an IRFA required when the small business impact is positive?

Admittedly, Advocacy is primarily concerned with agencies' failure to identify *adverse* impacts of their regulations on small entities and lack of efforts to mitigate those adverse impacts. This, after all, is the primary concern of the law. Legislative history, however, makes it clear that Congress intended that regulatory flexibility analyses also address *beneficial* impacts. Therefore, an agency cannot certify a proposed rule if the economic impact will be significant but positive. If an agency finds the impact will be positive, it should conduct a regulatory flexibility analysis to determine if alternatives can enhance the economic benefits to small entities.

8. Does Advocacy ever file an *amicus curiae* brief on behalf of an agency?

The chief counsel for advocacy is authorized to file an *amicus curiae*, or friend of the court, brief in any action brought in a U.S. court to review a rule. Advocacy may present its views with respect to RFA compliance, the adequacy of the rulemaking record with respect to small entities, and the effect of the rule on small entities. To date, Advocacy has only sought to file *amicus* briefs to support the views of small business.

9. Where can an agency get small business data?

An agency should first look into its internal resources to identify what data it has on the industry it is intending to regulate. If such data need to be supplemented with additional information, the agency should conduct research or hire a contractor to acquire the information and should conduct outreach to trade associations and small businesses. Alternatively, an agency can contact the Office of Advocacy which will assist them in finding adequate sources of data, e.g., the Census Bureau or the Bureau of Labor Statistics. Advocacy also has the ability to convene small business roundtables to solicit additional data and information from potentially affected small entities.

10. If a rule does not require notice and comment under the Administrative Procedure Act, does the RFA require it?

The RFA requires analysis of a proposed regulation only where notice and comment rulemaking is required by the APA or any other statute. If a rule is not required to follow notice and comment rulemaking under the APA or any other statute, then the rule is exempt from the requirements of the RFA.

NOTES

1. Mid-Tex Elec. Coop v. FERC, 773 F.2d 327, (D.C. Cir. 1985).
2. Cement Kiln, 255 F.3d at 868.
3. 13 C.F.R. 121.105.
4. 5 U.S.C. §553(b).

RFA History, *from page 13*

Dodd-Frank Wall Street Reform and Consumer Protection Act, signed by President Obama in July 2010, names the new Consumer Financial Protection Bureau as the third agency required to use the SBREFA panel process in developing regulations.

Meanwhile, Advocacy continues its active work with federal agencies and the small business community to implement the intent of the RFA. New regulatory cost studies continue to find a disproportionate burden on small firms; but the amount of additional regulatory burden that was not loaded onto the backs of small businesses because of Advocacy's work and the RFA totaled more than $7 billion in fiscal year 2009 alone. As agencies adjust their regulatory development processes to accommodate the requirements of the RFA and the E.O., the benefits will continue to accrue to small firms.

At the 30th anniversary symposium on the RFA in September 2010, OIRA Administrator Cass Sunstein summed up the RFA mission: "In the current economic environment, it is especially important to see that [regulatory] analysis and openness are mutually reinforcing. If the two are taken together, they can help to promote important social goals, to reduce unjustified burdens, and to identify approaches that will promote entrepreneurship, innovation, job growth, and competitiveness, not least for the millions of small businesses that are indispensable to economic recovery and growth."

U.S. Small Business Administration
Office of Advocacy
Mail Code 3114
409 Third Street, S.W.
Washington, DC 20416