

Research on State Regulatory Flexibility Acts

by Microeconomic Applications Inc. Washington, D.C. 20016. 212 pages.
Under contract number SBAHQ-11-M-0205.

Purpose

The impact of government regulation falls harder on small businesses than large ones because small businesses lack economies of scale. In small firms, the costs of complying with a regulation are spread over fewer employees or sales, whether measured in dollar expenditures, employee hours, or some other metric. Regulatory requirements may take the form of extra paperwork, new work processes, or product modifications, and these cost small firms more on a unit basis to initiate than they cost large firms. To alleviate such disproportionate effects of regulatory compliance on small business, a federal law, the Regulatory Flexibility Act (RFA),¹ was enacted in 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).²

The RFA requires agencies to consider the impact of proposed regulations on small entities. The law has spared small businesses from many burdensome costs, while preserving the health, safety and other broad goals of regulations. This burden reduction is made possible through “flexibility” in regulatory requirements, for example, staggering the effective date of a regulation, exempting businesses below a certain size from some requirements, simplifying compliance requirements, or creating limited safe harbors.

The RFA charges the Office of Advocacy, housed in the Small Business Administration, with monitoring the implementation of the law, and in the 2000s, the office launched a concerted effort urging states to adopt similar consideration in state-level rulemaking processes.³ This report examines these state efforts.

1. 5 USC § 602.

2. Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.)

3. The 50 state regulatory systems vary considerably. Some are

Background

The Office of Advocacy published a study in 2002 which analyzed and evaluated state efforts to mitigate the regulatory burden on small businesses.⁴ The findings of this study revealed that very few states were actively implementing protections for small businesses against burdensome regulations. It also suggested that genuine protection for small businesses was the product of well written legislation and executive orders, as well as support from the governor’s office.

In 2002, the Office of Advocacy launched a model legislation initiative utilizing a model state regulatory flexibility bill. The model bill incorporated many elements of the RFA in a simplified form. It was published for general use in 2005, along with supporting documentation; a guidance document to assist the states with adoption and implementation was published in 2007.

By 2008, a majority of states had some form of small business regulatory flexibility on their books. The purpose of the present study is to see what changes and improvements have stemmed from the various regulatory flexibility initiatives.

Overall Findings

- State regulatory flexibility programs differ greatly in many dimensions, although many are based on the same foundation, the Office of Advocacy’s model bill. Some programs were implemented by executive

at the forefront of regulatory policymaking; for instance the California Air Resource Board (CARB) leads federal efforts. Others are not fully immersed in the regulatory rigors.

4. Management Research and Planning Corporation, *Analysis of State Efforts to Mitigate Regulatory Burden on Small Businesses*. U.S. Small Business Administration, Office of Advocacy, 2002. <http://archive.sba.gov/advo/research/rs219tot.pdf>.

order, others by legislation; all, however, are missing at least some of the elements found in the model bill.

- Executive branch support for regulatory flexibility is essential to success. At a minimum, state leadership must regard regulatory flexibility as a legitimate activity in its own right and give priority to making regulatory flexibility infrastructure effective.

- In addition, to be effective, regulatory flexibility must be recognized as an activity distinct from other small business assistance, and, as such, be given support and resources at the departmental level.

- Guidance on regulatory flexibility is lacking in most state programs. The most common forms of guidance are checklists or templates for reporting analyses; these do little more than repeat the statutory requirements without elaboration or explanation.

- A small business regulatory advocate is an essential element in the regulatory flexibility infrastructure. Fewer than one-fifth of states have such an advocacy position or office. An advocate works with agency staff—from early in the rulemaking through the public hearing process—to understand regulatory flexibility principles and practices.

A comparison of New Mexico's Small Business Regulatory Advisory Commission and Missouri's Small Business Regulatory Fairness Board shows the necessity of executive support. New Mexico and Missouri have very similar regulatory flexibility statutes. However, while Missouri's Regulatory Fairness Board flourished, New Mexico's Regulatory Advisory Commission floundered. The origins and compositions of each group followed very different courses. Missouri's statute was adopted after two years of operation with strong gubernatorial support under an executive order. In addition, the Missouri board's membership includes the chair of the minority business advocacy commission. New Mexico's advisory commission, on the other hand, was established with no context and no experience.

Policy Implications

In order for state regulatory flexibility to be more effective, states need to invest more time and effort into making state regulatory flexibility a priority. The report contains several best practices in this regard. The effectiveness of such measures lies in how thoroughly these are carried out, not in their mere presence. This study implies that policymakers should:

- Keep the focus on regulatory flexibility, e.g., mitigation of disproportionate burdens on small business;
- Give elements of the regulatory infrastructure a durable, preferably statutory, foundation with clear authority to act;
- Build a complete and well-coordinated regulatory flexibility infrastructure;
- Find creative, dedicated people who understand the mission;
- Make regulatory flexibility a policy priority and provide adequate resources; and
- Recognize and prepare for the fact that this is a long-term endeavor.

Scope and Methodology

The authors gathered information from September 2011 through July 2012. Information was collected predominantly from online sources. This was appropriate in that openness and accessibility of information is itself an important aspect of implementing the process. Use of online information was a limitation because in most states some types of useful documents were not online. Documents generally were available from enough states to show patterns and the range of practices.

Conceptually, information collection was organized and driven by assuming two roles:

- A small business owner trying to weigh in with an opinion on a rule needs to identify four pieces of information: regulations that may affect him or her, the specifics of a particular regulation, how to comment and otherwise make his or her concerns heard, and any recourse if small businesses concerns are not being considered.
- A new regulatory agency staffer trying to learn about the process needs to know four things: the requirements of the regulatory flexibility law, how to comply with the law, where to go for assistance, and what rulemaking resources are available.

This dual approach was fruitful in identifying and providing information on practices themselves and experience with the responsiveness of the system.

This report was peer-reviewed consistent with Advocacy's data quality guidelines. More information on this process can be obtained by contacting the director of economic research at advocacy@sba.gov or (202) 205-6533.

Additional Information

This report is available on the Office of Advocacy's website at www.sba.gov/advocacy/7540. To receive email notices of new Advocacy research, news releases, regulatory communications, publications, and the latest issue of *The Small Business Advocate* newsletter, visit www.sba.gov/updates and subscribe to the Small Business Regulation & Research Listservs.