

Advocacy's Interagency Team Leads Dialogue on Regulatory Flexibility Act at ABA Event

by David Rostker, Assistant Chief Counsel

Most federal laws are made within the federal agencies, and the rules of procedure that govern the writing and enforcement of agency-made law are known as “administrative law.” Not only are the attorneys in the Office of Advocacy’s Office of Interagency Affairs active in this field, they have been raising the profile of the office in implementing the Regulatory Flexibility Act (RFA). The RFA ensures that the voice of small business is heard when federal rules are written.

Advocacy’s prominence in administrative law was on display in November at an American Bar Association continuing education event, the Fall Conference of the Section on Administrative Law and Regulatory Practice. Five

Advocacy staff members participated in four panels on the first day, and most played to standing-room-only crowds.

Assistant Chief Counsel Jennifer Smith, who sits on the section’s governing council, moderated the panel titled “White House Review of Rulemaking: Strengthen, Mend, About Right, or Abolish?” Panelists were evenly divided over the role of the White House Office of Information and Regulatory Affairs (OIRA) in regulatory review.

Cost-benefit analysis was the subject of two panels moderated by Assistant Chief Counsel David Rostker. In the morning panel, panelists defined the topic and explained some of the issues that

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The National Small Business Association (NSBA) held its Small Business Congress and 75th anniversary celebration in Washington, D.C., in November. Pictured are three principals with SMC Business Councils, one of NSBA’s affiliate organizations: Dan Galbraith, Mark Shelleby, and Eileen Anderson, with Chief Counsel for Advocacy Winslow Sargeant. SMC Business Councils represents more than 4,000 small businesses in Pennsylvania, Ohio, and West Virginia.

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Senator Snowe, Representative Manzullo To Depart Congress at Year's End

by Kyle W. Kempf, Assistant Chief Counsel for Congressional Affairs

Two longtime small business champions will be leaving Capitol Hill at year's end: Senator Olympia Snowe, ranking Senate Small Business Committee member, and Representative Donald Manzullo, former House Small Business Committee chair.

Chief Counsel for Advocacy Winslow Sargeant noted that, "Both Senator Snowe and Congressman Manzullo have been strong legislators throughout their careers and will be missed by the small business community."

Senator Olympia Snowe (R-Maine), the current ranking member and past chair of the U.S. Senate Committee on Small Business and Entrepreneurship, is retiring at the conclusion of the 112th Congress.

For 16 years in the U.S. House of Representatives and 18 years in the U.S. Senate, Senator Snowe was a stalwart advocate of small business. Willing to work across party lines, she helped produce leg-

islation that, among other things, improved small business owners' access to capital and federal contracts and reduced their regulatory and tax burdens. Senator Snowe also was steadfast in her support for the Office of Advocacy and the Regulatory Flexibility Act.

This also will be the last congress for Rep. Don Manzullo (R-Ill.), chair of the U.S. House Committee on Small Business from 2001 to 2006.

The Rockford, Illinois, congressman focused his two-decade-long congressional career on promoting the interests of America's small businesses and expanding U.S. manufacturing and trade. In 2003, he founded the House Manufacturing Caucus. He was recognized with the Guardian of Small Business Award by the National Federation of Independent Business and received the Award for Manufacturing Legislative Excellence from the National Association of Manufacturers

numerous times. Congressman Manzullo was also a strong supporter of the SBA and the Office of Advocacy.

The Small Business Advocate

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The Small Business Advocate (www.sba.gov/advocacy/810) is published monthly by the U.S. Small Business Administration's Office of Advocacy and is distributed to SBA field staff, members of the U.S. Congress, and the public.

The Small Business Advocate is available without charge from the Office of Advocacy, U.S. Small Business Administration, MC 3114, Washington, DC 20416; advocacy@sba.gov; (202) 205-6533. For delivery changes, send your current address label with your request to the above address. For electronic delivery of this newsletter, visit <http://www.sba.gov/updates>.



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Senator Olympia Snowe, a long-time champion of small business and the Regulatory Flexibility Act, appearing at the 2003 Small Business Week Advocacy luncheon.



Representative Donald Manzullo speaking at the 2003 Small Business Week Advocacy luncheon about the opportunities and challenges facing U.S. entrepreneurs.

Message from the Chief Counsel

2012 Accomplishments, 2013 Horizons

by Dr. Winslow Sargeant, Chief Counsel for Advocacy

As 2012 winds down, the Office of Advocacy continues to build up an impressive number of achievements working with federal agencies and small business owners to bring transparency to the regulatory process. The synergy between our research and regulatory work continues to strengthen both areas; timely and actionable research is the foundation of efficient and sound regulation.

In 2012, Advocacy was pleased to see the introduction of Executive Order 13610, Identifying and Reducing Regulatory Burdens. This built on Executive Orders 13563 and 13609, supporting a structural reporting requirement for regulatory reform and review.

During 2012 we saw the exit of OIRA Administrator Cass Sunstein. Before departing Sunstein made clear the need to assess the cumulative impact of regulation, which was part of a wider recognition of the need to assess the regulatory cost-benefit calculus. This affirmation is particularly relevant as several key statutes will require agencies to issue new implementing regulations. Among these are:

- The Affordable Care Act, with new regulatory proposals issued or forthcoming from the Departments of Health and Human Services (Centers for Medicare and Medicaid Services), Labor, and Treasury (Internal Revenue Service);
- The America Invents Act, which set in motion the Patent and Trademark Office's overhaul of the patent process, including implementation of the "first-inventor-to-file" patent provision; and
- The Dodd-Frank Act, which created the Consumer Financial Protection Bureau and added small

business review panels to the agency for rulemakings expected to have a significant impact on a substantial number of small entities. So far, four panels have been convened as part of the agency's overhaul of consumer lending practices. Advocacy has been a partner on all of these panels.

"The synergy between our research and regulatory work continues to strengthen both areas; timely and actionable research is the foundation of efficient and sound regulation."

The widening recognition of Advocacy's key role was apparent in November, during the American Bar Association's administrative law conference in Washington. Advocacy staff were facilitators and panelists at four well-attended sessions.

Advocacy understands the role that statistics play in supporting the small business community. This year we updated our most widely used publication, "Frequently Asked Questions about Small Business." We added informative graphics and doubled the amount of data from previous editions to make it even more helpful. Our Office of Economic Research has replaced its annual small business data set with quarterly data bulletins, again to improve accessibility and timeliness of information.

As part of the recognition that no "one size fits all" small businesses, Advocacy launched our Innovation Initiative. The Innovation Initiative is designed to

shed light on concerns and challenges faced by emerging sectors of our economy, among them, key sectors in life sciences, clean energy, advanced manufacturing, nanomaterials, and data mining (big data).

In September, we held a one-day event in Seattle, Washington, highlighting the ways that the public and private sectors can work together in support of innovative small businesses. To better understand the needs of this high-growth sector, Advocacy staff also participated in events held by other organizations which focused on innovation and entrepreneurship. Many issues that disproportionately affect innovative businesses were discussed. Some examples include visas and immigration issues; intellectual property and patents; early stage financing options (crowd funding, micro-finance, venture capital, angel investment); the SBIR/STTR programs; specific licensing procedures, e.g., FDA 510(k); and specific tax policies that affect entrepreneurs, startups, and innovative sectors.

Advocacy's central role of listening to small business remains a constant. Our regional advocates are essential in providing unfettered access to emerging entrepreneurs and small business owners. As a voice for small business within the federal government, our effectiveness will continue to be measured and driven by how closely we remain in touch with small businesses.

Fall Regulatory Roundup

Key Comment Letters and Developments from the Legal Staff

The Office of Advocacy provided input to numerous federal agencies on key regulations that have a disproportionate impact on small businesses. Summaries of several of these follow, including three to the Consumer Finance Protection Bureau (CFPB) regarding the long-awaited overhaul of mortgage regulations. All comment letters and fact sheets summarizing them are available on Advocacy's website, www.sba.gov/advocacy/816.

Advocacy Comments on Three Key Proposed Mortgage Rules

Advocacy commented on three key revisions of the Real Estate Settlement Procedures Act (RESPA or Regulation X) and the Truth in Lending Act (TILA or Reg Z):

- The integrated mortgage disclosure statement (comments filed November 6)
- Mortgage servicing rules for ARMs (October 5), and
- Loan originator compensation (October 16).

Mortgage Disclosure Statements. This major rule governs the practices and documents in use when consumers close on real estate loans. Although the proposal makes several changes to RESPA/TILA, the top five issues for small entities concern the costs from the expanded recordkeeping requirements, the difficulties of integrating the two mortgage disclosure statements used under the previous system, problems arising from the revised definition of the term "loan application," the burden of requiring three days for the presumed receipt of documents, and confusion arising from defining Saturday as a business day.

To alleviate their impact on

small business while maintaining the rule's purpose, Advocacy recommended that CFPB allow for flexibility in small business compliance with the regulation, delaying the effective date of one measure, providing an exemption from another, and specific modifications of others.

Mortgage Servicing. The proposed rule would require periodic statements for residential mortgages, a six-month notification prior to the reset of the initial rate of hybrid Adjustable Rate Mortgages (ARMs), and the possible extension of this requirement to other ARMs. Small entities have said that these changes would be costly for them. Small mortgage servicers use a different business model that is relationship-based and customer service-friendly. As such, they argue that they were not the cause of some of the problems that the statute was meant to address. Advocacy encouraged the CFPB to exempt small entities from many of the requirements of the proposal. For the aspects of the proposal that do not exempt small entities, Advocacy encouraged the CFPB to provide small entities with a sufficient amount of time for them to comply with the requirements of this proposal.

Mortgage Loan Originator Compensation. The proposal would implement statutory changes to Regulation Z's current loan originator compensation provisions, including a new restriction on the imposition of any upfront discount points, origination points, or fees on consumers under certain circumstances. Advocacy encouraged the CFPB to clarify aspects of the proposal, to fully consider small entities' concerns, and to carefully consider the alternatives that have been

set forth by the industry. Advocacy also encouraged the CFPB to develop revenue limits that reflect the unique business structure of smaller industry members and provide relief to small entities.

—Assistant Chief Counsel
Jennifer Smith

Patents: PTO Reviewing Comments Regarding First-to-File Rulemaking

The U.S. Patent and Trademark Office (PTO) is continuing to move forward in implementing the Leahy-Smith America Invents Act (AIA), and is reviewing the public comments it has received regarding its proposed rules and examination guidelines concerning the "first-inventor-to-file" (FITF) provisions of the AIA. The majority of comments PTO received focus on the controversial issue of the PTO's interpretation of the AIA's grace-period provisions, which allow inventors and third parties to make certain public disclosures regarding an invention before filing a patent application, without jeopardizing the filer's ability to receive a patent at a later date.

On October 4, Advocacy filed public comments on the proposals after conducting outreach with small entities, including nonprofit research and educational institutions. These stakeholders expressed strong concerns that PTO's interpretation is inconsistent with congressional intent and would have chilling effects on innovation in the academic setting, as well as within the startup community. Advocacy urged the PTO to consider alternative interpretations of the law.

—Assistant Chief Counsel
Jamie Belcore

Continued on page 5

Key Comment Letters, *from page 4.*

Fish and Wildlife Service Makes Progress on Economic Analyses

For several years, Advocacy and the Fish and Wildlife Service have been engaged in discussion regarding the agency's practice of publishing economic analyses for proposed designations of critical habitat after critical habitat has been proposed. Advocacy has maintained that this practice is in violation of the Endangered Species Act. On August 24, in response to the Presidential Memorandum issued on February 28, the agency published a proposed rule that would require it to publish economic analyses simultaneous with designating critical habitat. The agency also proposed several substantive changes to the manner in which it conducts its economic analyses.

Advocacy has been in contact with small businesses across several affected industries that have concerns about the manner in which the agency conducts its economic analyses. Businesses were further concerned that the agency had not provided the public enough time to adequately review and comment on the proposed changes. Advocacy relayed these concerns to the agency and on November 8, the agency re-opened the comment period to allow the public more time to provide input.

—*Assistant Chief Counsel*
Kia Dennis

Basel III Global Regulatory Standards

On October 22, Advocacy submitted a comment letter to the Federal Reserve, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation on their joint proposed rules on Basel III. Basel III is a global regulatory standard on bank

capital adequacy. It was developed in response to the 2008 financial crisis. Basel III strengthens bank capital requirements and introduces new regulatory requirements on bank liquidity and bank leverage.

Community banks operate on a different business model than larger banks, one that is designed for long-term service to their respective communities, many of which are in areas not served by large banks. Basel III may require significant changes at a time when the small banks are facing increased regulatory requirements due to the Dodd-Frank Act.

Advocacy recommended that community banks be allowed to continue to use the current Basel I framework for computing their capital requirements. Advocacy also encouraged the agencies to give careful consideration to the information provided by the small banks in determining the economic impact of the actions as well as analyzing alternatives that may reduce the impact on small banks.

—*Assistant Chief Counsel*
Jennifer Smith

Small Business Research and Development Set-Aside Contracts

On August 10, the Federal Acquisition Council published a proposed regulation, Small Business Set-Asides for Research and Development Contracts, to address the restrictive nature of the current FAR Part 19 provision. The proposal clarified that contracting officers shall set aside acquisitions for R&D for small businesses when there is also a reasonable expectation that there are two or more small businesses capable of providing the best scientific and technological approaches.

On October 8, Advocacy submitted a comment letter to the Federal Acquisition Council on the proposed rule. The comment letter focused on FAR Part 19.502(b)

(2), which sets a more restrictive standard for agencies in making a small business R&D contract set-aside; it requires them to meet a scientific and technological test that is not imposed on other FAR 19 small business set-aside contracts. Removing the current restrictions will go a long way in helping small R&D companies be successful in marketing their products to the federal government.

—*Assistant Chief Counsel*
Major Clark

ABA Conference, *from page 1.*

arise in developing analyses during the rulemaking process. In the afternoon session, panelists discussed current issues. Office of Advocacy Economist Christine Kymn (a former policy analyst at OIRA) was also a speaker, and discussed the requirements of OMB's guidance on regulatory analysis.

The final panel of the day was "Building Successful SBREFA Panels." Assistant Chief Counsel Kevin Bromberg organized this panel, and Assistant Chief Counsel Bruce Lundegren moderated. Panelists included officials from the Environmental Protection Agency and the Occupational Safety and Health Administration, and a private attorney who has represented small entities in a number of SBREFA panels. (The panels are named for the Small Business Regulatory Enforcement Fairness Act or SBREFA, which amended the RFA.) The participants concluded that a successful SBREFA panel helps an agency achieve its statutory objectives while minimizing the impact on small entities.

Advocacy's presence at all of these sessions helped expand knowledge of the RFA within the Washington, D.C., legal community.

Regional News

Region III Innovation Events Span Startup, Mentoring, Market-Entry

by Ngozi Bell, Region III Advocate

All across Region III, diverse institutions are promoting innovation and entrepreneurship in novel and energetic ways. These are exciting developments because they are expanding discourse and making room for disparate groups to deliberately and systematically work together. This was my takeaway from three events in which I recently participated.

In Pittsburgh, the AlphaLab Demo Day featured pitches from innovators and entrepreneurs from the joint partnership of Carnegie Mellon University, University of Pittsburgh, and Innovation Works. I had the honor of addressing the group at its evening session. Innovation Works is a southwestern Pennsylvania Ben Franklin Institute focused on innovation growth using mentorship and investment. It includes a 20-week AlphaLab Accelerator program that enables entrepreneurs to fast-track their market entry by reducing marketing and technology risk.

The second event was Lehigh Valley's first StartUp Weekend,

which took place at the Ben Franklin Technology Institute on Lehigh University's Bethlehem, Pennsylvania, campus. I witnessed an event that was alive with an electric creativity, as the final stretch of a 54-hour weekend event yielded eleven competing teams. I was privileged to speak at the finals and the awards night.

A third event took place at the University of Virginia in Charlottesville. Titled the "Entrepreneurship Cup," or "E-Cup," it featured pitches from finalists from the university's Schools of Law, Business, Health Sciences, Engineering, Education, Arts and Sciences, Commerce, and their newest addition, the School of Social Entrepreneurship.

More than 240 entrepreneurs and innovators and 600 other individuals participated in the three events. Innovations ranged from a cardiovascular diagnostic imaging tool, to an iPad/Android app that allows teachers and students to communicate seamlessly, to a unique food truck catering to vegetarian tastes.

At the Lehigh University event, one team filed a provisional patent for a home-brew beer-making machine within the 54-hour StartUp Weekend period!

Prizes were just as diverse, including monetary awards, free office space, business development, and legal consulting. Some of these relatively new innovators even made inroads into their markets at these events—one company closed a significant deal for its scientifically formulated beauty products.

What these and many events show is that there is a great buildup of entrepreneurship and innovation across the region. As I write, there are more invitations to attend other events for the rest of the year and into 2013. Each event is another great opportunity to expand on the work begun this fall at the Seattle conference on innovation and entrepreneurship.



Nicki Zevola, of the cosmetics company FutureDerm, was one of the startups pitching innovative products at the AlphaLab Demo Day in Pittsburgh.



The winners of the University of Virginia's 2012 E-Cup, the PhageFlag team, accept their prize.

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NOAA Withdraws Proposal Requiring Southeastern Shrimpers To Equip Vessels with Turtle Excluder Devices

by Rebecca Krafft, Editor

In November, the National Oceanic and Atmospheric Administration (NOAA) announced its intent to withdraw a proposed rule that would have required the use of turtle excluder devices (TEDs) by commercial shrimping vessels in the southeast fisheries. The rule



would have affected an estimated 6,500 shrimp fishermen. NOAA's regulatory flexibility analysis of the proposed rule estimated that the proposal would have meant a loss of nearly 5 percent of the current shrimp harvest for each affected vessel, in addition to annual and recurring costs associated with acquiring and maintaining multiple devices on each boat. Dr. Roy Crabtree, southeast regional administrator for NOAA Fisheries, stated that the information the agency now has regarding the effectiveness of TEDs in the targeted fishery "suggests the conservation benefit does not justify the burden this rule would place on the industry."

The Office of Advocacy has been engaged on this issue since NOAA proposed its draft rule on May 10. The office's involvement is an effective case study of the Regulatory Flexibility Act in action, and the role Advocacy plays in implementing it.

To alert small businesses and stakeholders to the proposal, a regulatory alert was posted on Advocacy's webpage, and an article appeared on Advocacy's blog. Both items alerted the small business community to the comment deadlines and the need to submit input showing that the proposal stood to have a substantial impact on a significant number of small entities.

As the shrimp fishing industry became aware of the new proposed requirements, they voiced their concerns through Advocacy's regional network. Region VI Advocate Caitlin Cain was the office's "boots on the ground" in southeast Louisiana, working closely with the fishing community to ensure small business concerns with the TED rule resonated back in Washington. Chief Counsel for Advocacy Winslow Sargeant visited Louisiana to independently dialogue with fisheries stakeholders

on TED and other issues.

On June 28, Assistant Chief Counsel Jamie Belcore filed comments with NOAA, making the small business case to the agency about the rule's impact—that it would cause significant economic harm to the already fragile shrimping industry in the Gulf of Mexico. The letter articulated small business concerns that the use of TEDs would be cost-prohibitive and, in some cases, technologically unfeasible for many small businesses. Advocacy recommended that NOAA evaluate alternatives that would exclude smaller vessels from the regulations to avoid forcing a significant number of them out of business. Advocacy also urged NOAA to reconsider implementing its proposed rule unless it could show a stronger link between increased sea turtle strandings and commercial shrimping, as well as rule out other causes raised by small business stakeholders. The comment letter and a fact sheet summarizing it are posted on Advocacy's website, www.sba.gov/advocacy/816.

Going forward, NOAA plans to research further options for reducing sea turtle mortality in the southeastern fishery.

Stay Up to Date with Regulatory Happenings

The Office of Advocacy makes critical regulatory information and deadlines available through multiple electronic means, including Facebook and Twitter ([@AdvocacySBA](https://twitter.com/AdvocacySBA)), Advocacy's blog (<http://weblog.sba.gov/blog-advo>), and two dedicated webpages:

- Regulatory Alerts: www.sba.gov/advocacy/815.
- Regulatory Comments: www.sba.gov/advocacy/816.

Advocacy regularly distributes target information via email. To sign up for Advocacy's electronic mail lists, visit: www.sba.gov/updates.

Research Notes

Advocacy Research Asks, “Do Entrepreneurs Invest in Retirement?”

by Kathryn Tobias, Senior Editor

As they start and grow their business plans, do small business owners invest in their own retirement? Two new Advocacy reports compare the retirement holdings of small business owners and workers. They focus on different databases and subgroups, but both find that small business owners continue to be significantly less likely to have traditional retirement plans than workers. The studies also show that small business owners' individual retirement accounts remain stable, despite the recession.

Research by Advocacy Economist Jules Lichtenstein finds that having an underwater mortgage does not have a significant effect on the likelihood that a small business owner invested in retirement assets or on the amount accumulated.

Lichtenstein uses 2009 Census data from the Survey of Income and Program Participation to compare retirement assets of small business owners and private sector workers. A key focus is the influence of wealth holdings on retirement assets. He finds that smaller and more financially vulnerable business owners have less invested in retirement assets than their larger or financially stronger counterparts. His study, *Financial Viability and Retirement Assets: A Look at Small Business Owners and Private Sector Workers*, is online at www.sba.gov/advocacy/7540/372811.

A second report compares how well small business owners and workers who are nearing retirement age are prepared for retirement. *Retirement, Recessions, and Older*

Small Business Owners by Tami Gurley-Calvez, Kandice Kapinos, and Donald Bruce, uses the 1992-2010 Health and Retirement Study conducted by the University of Michigan. It finds that small business owners are less likely to have retirement plans, but those with IRAs and Keogh accounts are likely to have larger amounts of assets in them than workers do. It also finds that older small business owners report thinking about retirement less frequently than workers in the same age group.

This study also finds both the probability of having a retirement plan and the value of IRA or Keogh accounts to be unchanged through recessions. The report is online at www.sba.gov/advocacy/7540/372751.

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