

Regulatory Flexibility Developments in Louisiana and Texas

by Kate Reichert, Regulatory and Legislative Counsel for Regional Affairs

The spring season has brought many new developments for regulatory flexibility in the states. Eleven states have introduced legislation this year, two states have already enacted regulatory flexibility legislation, and one state has had an executive order signed into law. Many state leaders are looking into ways to help their small businesses succeed and have learned of the benefits a flexible regulatory scheme can provide.

An especially notable development is the introduction of House Bill 368 in Louisiana by Representative Rickey Nowlin. Louisiana is one of only seven states that currently have no regulatory flexibility statute in place. This legislation, creating the Regulatory Flexibility Act, requires agencies to perform a mandatory economic impact

analysis and regulatory flexibility analysis on their proposed rules. It also mandates periodic and judicial review. The bill was introduced on March 31 and was referred to the Committee on House and Governmental Affairs. Advocacy's Region VI Advocate, Eric Munson, is expected to testify on behalf of the bill.

Another recent regulatory flexibility development comes from the Texas Attorney General's office. In June 2007, Texas enacted HB 3430, which, among other things, included an economic impact statement requirement as well as a regulatory flexibility analysis requirement. The bill also required that the Attorney General, in consultation with the Comptroller, prepare guidelines to assist agencies in determining a proposed rule's effect

on small business and help assess alternatives.

The Attorney General's office released its proposed comments in January 2008, and after a public comment period, their final guidelines were published in April 2008. The final guidelines explain in detail an agency's responsibilities after the enactment of HB 3430, including an outline of required steps. The guidance also provides agencies with a sample economic impact statement and regulatory flexibility analysis to assist them in meeting their obligations.

To view the guidelines, visit Advocacy's model legislation webpage, www.sba.gov/advo/laws/law_modeleg.html and click on "State Best Practices."



The Texas Attorney General's office has issued guidance implementing regulatory flexibility. Pictured at a recent meeting are Region VI Advocate Eric Munson, Barbara Deane and Jeb Boyt of the Attorney General's office, and Advocacy's Director of Regional Affairs Christiane Monica.

In This Issue

Regulatory Flexibility in Louisiana and Texas. 1

Message from the Chief Counsel

Kudos for White House Attention to Agency "Midnight Regulations". 3

Regulatory News

Furniture Flammability Rule's Small Business Impact. 4

Research Notes

Small Private Firm Financing Choices. 2

Research Notes

Borrowing Costs Override Tax Calculations in Small Private Firm Financing Choices

by Kathryn Tobias, Senior Editor

The capital structure decision—a fundamental issue faced by financial managers—is, simply put, how a firm finances its assets through some combination of debt and equity. Numerous studies have tested two theories of capital structure by focusing on publicly traded firms. A new Office of Advocacy study examines the question of whether either of these theories addresses the capital structure of small privately held firms.

The research finds that small firm capital structure decisions are more likely to conform to the “pecking order” theory, which says that firms opt first for internally generated funds, then for debt, and only as a last resort, for equity. In contrast, the “trade-off” theory suggests that a firm’s capital structure is more related to weighing the tax benefits of tax-deductible interest against the costs of financial distress.

Rebel A. Cole authored the study, *What Do We Know About*

the Capital Structure of Privately Held Firms? Evidence from the Surveys of Small Business Finance, with funding from the Office of Advocacy. The study used survey data collected by the Federal Reserve Board.

Advocacy Chief Economist Chad Moutray released the report May 22 as part of an economic research forum at the Massachusetts SBA District Office Small Business Week awards presentation, cosponsored with *Cape Business* magazine in Hyannis, Massachusetts. “We welcome this opportunity to showcase research that helps us understand more fully how small businesses choose to obtain capital,” he said in releasing the study. “The findings can be helpful for financial institutions attempting to serve small firms.”

For more information and a copy of the report, visit the Office of Advocacy website at www.sba.gov/advo/research/rs324tot.pdf.

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Editor Rebecca Krafft

Managing Editor Rob Kleinsteuber

Contributing Editors Linwood Rayford, Kate Reichert, Kathryn Tobias

Production Assistant Angela Hamilton

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Trade Associations Lend Support to S. 2902

On April 23, Senator Olympia Snowe (R-Maine) and Senator Mark Pryor (D-Ark.) introduced S. 2902, the Independent Office of Advocacy and Small Business Regulatory Reform Act of 2008. This legislation would ensure the long-term independence of the Office of Advocacy and ensure small businesses have a voice in the regulatory process. The May issue of *The Small Business Advocate* featured an article about this effort. Small business organizations have announced their support of S. 2902. These include:

- National Association for the Self-Employed
- National Black Chamber of Commerce
- National Federation of Independent Business
- National Small Business Association
- Small Business and Entrepreneurship Council
- Small Business Coalition for an Independent Office of Advocacy
- Small Business Legislative Council
- Synthetic Organic Chemical Manufacturers Association
- U.S. Chamber of Commerce
- U.S. Hispanic Chamber of Commerce
- Women Impacting Public Policy

Message from the Chief Counsel

Kudos for White House Attention to Agency “Midnight Regulations”

by Thomas M. Sullivan, Chief Counsel for Advocacy

Some congratulations are in order. Thanks to the work of vigilant small business owners, dedicated small business advocates, and well-informed agency regulatory staff, we have made some hard-won progress in easing the new regulatory burden for small firms. Since 2001, efforts to comply with the federal Regulatory Flexibility Act (RFA) by making regulations smarter and less costly have saved small businesses more than \$65 billion in first-year costs and more than \$20 billion in annually recurring regulatory costs.

But the job of making regulations more effective and less costly for small businesses is far from over.

In that context I am pleased that the White House has sent a strong and proactive message to federal regulatory agencies that they are to avoid the last-minute proliferation of regulations that often happens at the end of an administration.

Studies by the Mercatus Center at George Mason University have looked at this phenomenon over the past 60 years. In 2000, Jay Cochran examined the pages of published regulations in the *Federal Register* for each quarter going back to 1948. In March 2008, Antony Davies and Veronique de Rugy published an update through 2006.

While some regulations issued at the end of an administration have been developed carefully over many years, others may have been hurried into effect without the usual checks and balances. So how is a small business person or citizen to respond to this election cycle phenomenon? A few strategies may be possible to reverse unwarranted regulatory proliferation, but a better approach is being offered by the current administration—prevention.

On May 9, White House Chief of Staff Joshua Bolten issued a memorandum to the heads of federal executive departments and agencies, noting that “Over the last seven years, our Administration has worked to achieve through regulation important public benefits while minimizing regulatory costs on the American people.”

“The interagency review process under Executive Order 12866 will ensure enforcement of this White House memorandum. Advocacy is a key contributor to these interagency reviews.”

“We must recognize,” the memo notes, “that the burden imposed by new regulations is cumulative and has a significant effect on all Americans.”

The memo charges agencies to continue an open and transparent process of maximizing regulatory benefits while minimizing costs. It requires that all regulations that are meant to be finalized during the current administration be proposed no later than June 1, 2008; final regulations are to be issued no later than November 1, 2008.

The memo requires agencies to examine any rules they intend to put out before the end of the administration in light of the memorandum and gives the Office of Information and Regulatory Affairs responsibility for overseeing compliance. Nothing in the memorandum is intended to impede agencies’ ability to carry out existing law.

In its recognition of the cumulative burden of regulation, the

directive is in tune with the RFA’s Section 610 “lookback” provision requiring agencies to review regulations already in effect to see whether they are obsolete or duplicative—with an eye to reducing the cumulative burden on small entities.

At the end of February, as part of our Regulatory Review and Reform (r3) initiative, the Office of Advocacy announced the top 10 of more than 80 regulations nominated by the small business community for review and possible reform. Advocacy’s r3 initiative gives small businesses one tool to address the growing regulatory burden, while encouraging agencies to achieve their regulatory goals.

The interagency review process under Executive Order 12866 will ensure enforcement of this White House memorandum. Advocacy is a key contributor to these interagency reviews.

In several months, this Administration will close another chapter in American history. What will not end is Advocacy’s strong commitment to ensuring that small businesses have an opportunity, through the RFA and the r3 initiative, to be a part of the conversation about new proposed regulations as well as significant regulatory mandates already on the books.

The White House memo is online at www.whitehouse.gov/omb/infereg/cos_memo_5_9_08.pdf.

Regulatory News

CPSC Considers Furniture Flammability Rule's Small Business Impact

by Linwood Rayford, Assistant Chief Counsel

On March 4, the Consumer Product Safety Commission (CPSC) published a proposed rulemaking titled "Flammability Standards for Residential Upholstered Furniture" in the *Federal Register*. The CPSC developed the rule to prevent smoldering ignitions and reduce the need for flame retardant chemicals in upholstered furniture. The rule would require that manufacturers of upholstered furniture certify compliance with one of two methods of testing upholstery fabrics. Manufacturers may use cover materials that are sufficiently smolder resistant to meet a cigarette ignition performance test, or they may place fire barriers between the cover fabric and interior filling materials that meet smoldering and open flame resistance tests.

Pursuant to the Regulatory Flexibility Act and other federal laws, the CPSC analyzed the rulemaking's

anticipated effect on furniture and upholstery fabric manufacturers and fabric finishers. The CPSC noted that more than 97 percent of the manufacturers are small.

After hearing from small furniture and upholstery fabric manufacturers who were concerned that the regulation would have a negative economic impact, the Office of Advocacy filed a comment letter with the CPSC on May 13. Advocacy had filed comments on a previous version of the rule in 1998.

Advocacy commended the CPSC for its comprehensive regulatory impact analysis and for complying with the Regulatory Flexibility Act by including an initial regulatory flexibility analysis in the rule. However, because of industry concerns with some of the rule's analysis and assumptions, Advocacy believed it was necessary to bring many of the industry's trepidations

with the regulation to the attention of the CPSC. Advocacy's comment letter provided the CPSC with information on the number of small businesses likely to be affected by the rule, and how many of the costs associated with the rule would cause increased economic hardship on the furniture manufacturing businesses already operating on small revenue margins and under increasing global competition. Advocacy also asked the CPSC to consider additional alternatives suggested by the affected industries that would reduce the cost of the regulation on small businesses.

Advocacy's comment letter is located at www.sba.gov/advo/laws/comments/cpsc08_0513.html. A fact sheet summarizing the main points may be accessed at www.sba.gov/advo/laws/comments/factspsc08_0513.pdf.

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