

Affordable Broadband: The Catalyst for Small Business Growth

by Kate Reichert, Assistant Chief Counsel

On April 27, Acting Chief Counsel for Advocacy Susan Walthall testified before the Senate Committee on Small Business and Entrepreneurship in a hearing titled “Connecting Main Street to the World: Federal Efforts to Expand Small Business Internet Access.” The hearing focused on recent efforts to support small business and broadband and ways of continuing and enhancing such efforts in the future.

The panel of witnesses included Federal Communications Commission Chairman Julius Genachowski, Administrator Larry Strickling from the Department of Commerce’s National Telecommunications and Information Administration, Administrator Jonathan Adelstein from the Department of Agriculture’s Rural Utilities Service, and

Associate Administrator for Investment Sean Greene of the Small Business Administration.

Walthall discussed the importance of small businesses to the economy and broadband’s essential role in their continued competitiveness. She also focused on the challenges faced by small broadband providers and noted that Advocacy is conducting a study on broadband and small business.

Small businesses, which make up 99.7 percent of all U.S. employers, are a key driver of our economy, particularly in terms of job creation and innovation. The potential exists for even greater small business contributions to economic growth. “Broadband is a transformative technology,”

Continued on page 2



Testifying before the Senate Small Business Committee on April 27 were, from left, FCC Chairman Julius Genachowski, National Telecommunications and Information Administration Administrator Larry Strickling, Rural Utilities Service Administrator Jonathan Adelstein, Acting Chief Counsel Susan Walthall, and SBA Associate Administrator for Investment Sean Greene.

In This Issue

Affordable Broadband: The Catalyst for Small Business Growth 1

Broadband Plan Offers Blueprint for Access 2

New at Advocacy 8

Small Business Week 2010 . . . 6

Regulatory News

Reform of Procurement Rule Saves \$335 Million 3

OSHA’s MSD Reporting Rule 6

ABA Section Takes Up Regulatory Compliance 7

Research Notes

New Research on Small Firm and Business Owner Retirement Plans 4

Supporting Innovative Business Startups 5

Interest in Growing Firms at Brookings/SBA Forum 5

Tax News

Treasury Mandates Electronic Deposit of Taxes 7

Broadband Testimony

from page 1

Walthall explained, “that allows small businesses throughout the U.S. to access customers throughout the world.” She stressed the importance of affordable access to broadband to all small businesses, even in rural areas, so that these businesses can create greater efficiencies in their business practices and introduce their products to the global market.

Walthall stressed small broadband providers’ critical role in the

attainment of universal broadband. While small providers may serve fewer customers than the larger companies, their value is undeniable. Small providers are able to be the most flexible in offering services to remote and rural areas. It is essential to the survival of this important sector that the FCC take action to ensure that small business telecommunications providers are able to participate and compete in the market. Two issues that affect small providers’ ability to compete are special access and acquisition of spectrum. Walthall stressed

small businesses’ need for access in order to provide services to their customers, as well as the necessary spectrum to continue to grow and provide new services.

Walthall highlighted the upcoming release of Advocacy’s broadband study, pursuant to a directive of the Senate Committee on Small Business and Entrepreneurship under the Broadband Data Improvement Act of 2008. The study will evaluate broadband availability for small businesses. More specifically, it will examine telecommunications service options available to small businesses with respect to price and speed, and it will evaluate the economic impact of such availability.

In closing, Walthall commended the FCC for its efforts on this important initiative. She stressed Advocacy’s willingness to work with the FCC and other agencies in the future to accomplish the goals of the National Broadband Plan, and again noted the great contribution small business broadband providers can make to this effort.

Broadband Plan Offers Blueprint for Access

On March 16, the Federal Communications Commission (FCC) released its long-awaited National Broadband Plan, which offers a blueprint for ensuring broadband access to all Americans. Congress tasked the FCC with developing the comprehensive plan as part of the American Recovery and Reinvestment Act, which was passed in February 2009. In order to fulfill this directive, the FCC immediately began seeking comments from the public. In total, the FCC held 36 public workshops and published 31 public notices, which elicited 23,000 comments. This weighty endeavor culminated with the release of the 360-page plan in mid-March.

Some of the main goals of the plan include increasing U.S. broadband adoption rates from about 65 percent to 90 percent, connecting 100 million U.S. households to “affordable” 100 Mbps broadband service by 2020, and making available 500 MHz of wireless spectrum for mobile broadband by 2020, as well as connecting anchor institutions such as hospitals and schools. In addition, the plan addresses a specific congressional directive to include a strategy to maximize the use of broadband to advance “consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, employee training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes.” The plan also includes a section titled “Supporting Entrepreneurship and America’s Small Businesses.”

Although many of the details of the plan have yet to be worked out, the Office of Advocacy commends the FCC for its work on this important initiative. Advocacy looks forward to working with the FCC as it moves forward on the plan’s objectives, in order to ensure that small business interests are considered so that this important sector can contribute in a meaningful way to the plan’s success. Advocacy believes that small businesses and broadband both serve as vehicles to spur job creation, stimulate innovation, and promote our country’s competitiveness.

To view the entire plan, visit www.broadband.gov/plan.

The Small Business Advocate

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The Small Business Advocate (ISSN 1045-7658) is published monthly by the Office of Advocacy and is distributed to SBA field staff and members of Congress. *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 visit, www.sba.gov/advo/newsletter.html.



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Reform of Procurement Rule Will Save Small Architectural & Engineering Firms \$335 Million

by Major Clark III, Assistant Chief Counsel

A final rule issued on March 19 will save \$355 million for small architectural and engineering (A&E) firms that contract with the federal government and improve these small firms' ability to compete for federal procurement dollars. The rule by the Federal Acquisition Council (FAR) revises the "retainage" clause applied to federal contracts for A&E services, which mandated that 10 percent of fees be withheld or retained from a firm, regardless of the firm's history of performance.

The retainage rule became a focus of Advocacy's r3 initiative—Regulatory Review and Reform. It was nominated to the r3 Top Ten List of Rules in Need of Review and Reform in 2008 by the Council on Federal Procurement of Architectural and Engineering Services (COFPAES). Designation on the Top Ten list triggered a process under Section 610 of the Regulatory Flexibility Act for agencies to consider whether the current regulations were still needed, and the degree to which technology, economic conditions, or other factors may have changed since the rules were first promulgated.

The practice of retainage can be traced back to the construction industry of 1840s England. Essentially, it is an acquisition cost accounting tool allowing the buyer of services to withhold money from a contractor until the work is completed. The original intent was to have a pool of money available to finish the project if the contractor failed to do so. It was also justified as an incentive to complete the work. The American Subcontractors Association has found retainage to

be unnecessary for the majority of contractors and subcontractors.

In testimony in 2008 before a House Small Business Subcommittee on Regulations, Health Care, and Trade, Paul Renker of the American Institute of Architects explained that "Having 10 percent (or greater) of their fee held back for what could be years," is very troubling for small firms with tight cash flows and profit margins. "The rule is causing significant financial hardships on small A&E firms contracting with the federal government," Renker stated.

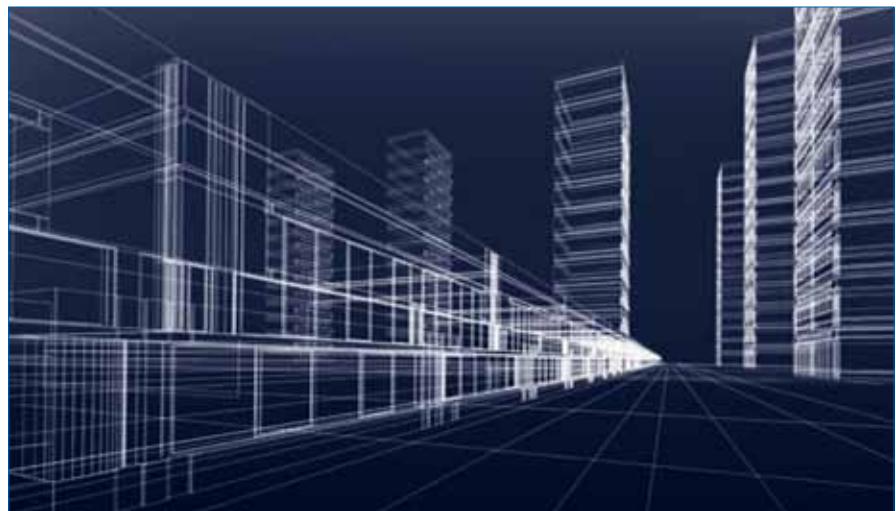
The federal and state governments have required retainage in the construction industry for many years. It is unclear as to when retainage became applicable to federal contracts. However, the Brooks Act of 1972, which has served as the framework of government acquisition of A&E services, provides contracting officers with considerable authority over the selection of contractors, calling into question the need for an across-the-board retainage requirement.

Essentially, a contracting officer evaluates the qualifications of firms competing for a contract; if qualifications of one are not suitable, the contracting officer may choose another contractor.

The retainage requirement has been a burden on small firms. For a number of years, the provision has been applied as an absolute 10 percent withholding requirement. Companies have reported that the release of funds has taken as long as 15 months beyond the closeout of the contract. In addition to the cost of money the contractor might be required to add to the cost of the project, this retainage restricted the cash flow of small businesses.

The FAR's March 19 rule relaxes the retainage requirement. The revision gives contracting officers the option of withholding up to 10 percent of the payment due if the contracting officer deems it necessary to protect the government's interest and ensure satisfactory completion of the contract. The amount of

Continued on page 4



Research Notes

New Studies on Small Firm and Business Owner Retirement Plans

by Kathryn Tobias, Senior Editor

The Office of Advocacy has released two new studies focusing on small firms and retirement. One examines workers and retirement plans; the other focuses on business owners. Both find significant reasons for concern.

Workers in small firms with fewer than 100 employees are much less likely than those in larger businesses to have a retirement plan available to them, according to *Small Business Retirement Plan Availability and Worker Participation* by Kathryn Kobe. The author finds that the number of companies offering traditional defined benefit pension plans has been declining steadily, and almost half of the workforce—about 58 million workers—do not have access to any type of retirement plan through their place of work. Moreover, another 20 million workers do not participate in the plans their employers

offer. Nearly 72 percent of workers in small companies have no retirement plan available. One reason smaller firms may not offer the benefit is the cost of setting up and running a retirement plan.

In a related working paper, *Saving for Retirement: A Look at Small Business Owners*, Advocacy Economist Jules Lichtenstein analyzes the retirement savings behavior of business owners, and finds that retirement account ownership, contribution, and participation rates for all business owners are low; this is especially true of micro-business owners. Lichtenstein shows that 38.5 percent of owners of businesses with 10 or more employees participated in a 401(k)/Thrift plan, compared with only 16.1 percent of business owners with fewer than 10 employees. These microbusiness owners represent 91 percent of the owners in the sample. The most

significant factors affecting participation in individual retirement accounts (IRAs) and 401(k)/Thrift plans are homeownership and other retirement plan savings.

Both studies use nationally representative data from the Census Bureau's Survey of Income and Program Participation. The two studies are available on Advocacy's website: www.sba.gov/advo/research/rs361tot.pdf (Kobe) and www.sba.gov/advo/research/rs362tot.pdf (Lichtenstein).

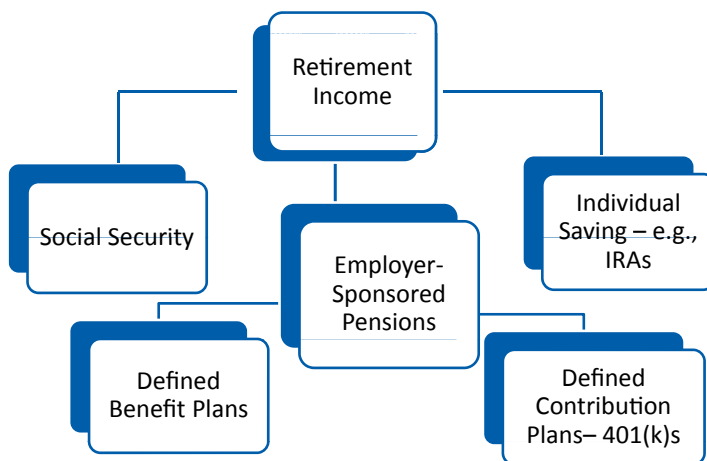
Procurement Rule Savings, from page 3

withholding is to be based upon the contractor's performance record. The final rule also makes several related editorial changes, including one that clarifies that the contractor will be paid any unpaid balance, including withheld amounts, at the successful completion of the work. Advocacy anticipates that first-year cost savings of this rule change will be \$335 million, with additional cost savings of \$335 million annually.

The revision to the FAR on A&E retainage is the first regulation to have gone through the entire r3 process: from nomination, through Advocacy endorsement, to final regulatory revision. As a result, small architectural and engineering firms are now better able to compete in the federal procurement marketplace.

For more information see Advocacy's history of action on this rule on the r3 webpage, www.sba.gov/advo/r3/r3_services08.html#se.

Retirement Income Components



The U.S. retirement system has three principal components: Social Security, employer-sponsored pensions, and individual saving.

Supporting Innovative Business Startups

by Ying Lowrey, Senior Economist, and Thad Inge, Assistant Chief Counsel

On April 16, the National Academy of Sciences hosted a conference titled “Early-Stage Capital in the United States: Moving Research across the Valley of Death and the Role of SBIR.” The conference focused on important issues surrounding the Small Business Innovation Research (SBIR) program and early-stage capital.

SBIR is a highly competitive small business program that encourages innovative startups and small businesses to explore their technological potential to help achieve our nation’s research and development goals. The SBIR program, currently in place at 11 administrative agencies and coordinated by the SBA, puts a strong emphasis on commercialization and has aided thousands of small businesses in developing new technologies. The Office of Advocacy has

had a strong connection to SBIR since the program began in 1982.

Several government agencies and practitioners reviewed the role of SBIR and early-stage capital; they included the Department of Defense, Department of Energy, NASA, National Science Foundation, SBA, Angel Capital Association, Illuminate Ventures, and Minority Angel Investment Network. Ginger Lew, senior advisor of the White House National Economic Council, gave a presentation on the obstacles currently facing innovative startups, including access to capital and the drop-off in venture capital investment over the past 10 years.

The conference highlighted initiatives at federal and state levels that are strengthening the program. For example, the Defense Advanced Research Projects Agen-

cy has shortened the review period for SBIR applications from six months to 60 days, and it has simplified SBIR contract procedures. The National Science Foundation is assisting innovative startups and SBIR companies in establishing partnerships with research centers, universities, and industries. One state-level program that coordinates with SBIR and its recipients is the Pennsylvania Ben Franklin Technology Development Authority. The agency has been working closely with small businesses and universities in developing robotic products. Such programs make it easier for innovative small businesses to gain access to financial resources.

Interest in Growing Firms on Display at Brookings/SBA Forum

by Brian Headd, Economist

Staff from the Office of Advocacy recently participated in a panel cosponsored by the Brookings Institution and the Small Business Administration. The March 15 event, titled “High-Level Working Group on the Future of Small Business,” examined firm growth.

The foundation for growth companies was presented by Zoltan Acs (George Mason University), John Haltiwanger (University of Maryland), and Dane Stangler (Kauffman Foundation). The panelists clearly demonstrated the value of high-growth companies to the economy with regard to increasing jobs and productivity, but two unanswered worries rose to the surface. Are the economy’s current woes blocking the emergence of potential high-growth compa-

nies that would help the economy change course and boost productivity? Is there a policy solution to support high-growth firms that could address the unemployment problem?

The discussion moved toward barriers that high-growth firms face with presentations from Liz Reynolds (Massachusetts Institute of Technology), Ted Zoller (University of North Carolina), and Ginger Lew (National Economic Council). It was clear that localities need to support business clusters and encourage “dealmakers” to create a momentum in which “good things beget good things.” However, the low venture capital levels of the past few years are still putting a brake on such efforts.

SBA Administrator Karen Mills pointed out that the Small Business Administration is working on improvements to the Small Business Investment Company program to mitigate part of the decline in venture capital. Also during the discussion, Mark Lange (of the Edward Lowe Foundation) pointed out that another barrier for growing firms is not necessarily receiving advice, but receiving timely information to make business decisions, “to fly with instruments instead of flying blind.”

The Office of Advocacy welcomed the opportunity for top economists and policymakers to attend to small business development issues, offering suggestions and, equally important, paying attention to their unique needs.

Regulatory News

Advocacy Asks OSHA To Reassess Cost of MSD Reporting Rule

by Bruce Lundegren, Assistant Chief Counsel

The Office of Advocacy recently filed comments on an Occupational Safety and Health Administration (OSHA) proposal, the Occupational Injury and Illness Recording and Reporting Requirements Rule or “MSD reporting rule.” Advocacy is concerned that OSHA may have understated the cost and complexity of complying with the rule, especially for small businesses.

OSHA’s proposed rule, published on November 18, 2009, would require employers with 10 or more employees (unless exempt) to record certain work-related musculoskeletal disorders (MSDs, also known as ergonomic injuries) in their OSHA 300 Log. The log is a record of work-related injuries and illnesses that certain employers are required to maintain.

MSDs are defined by OSHA as disorders of the muscles, nerves, tendons, ligaments, joints, cartilage and spinal discs (e.g., carpal tunnel and rotator cuff syndrome, herniated spinal disc, low back pain); they do not include disorders caused by slips, trips, falls, motor vehicle accidents, or other similar accidents. The proposed rule would add a new column to the 300 Log specifically for recording MSDs; however, OSHA does not indicate where on the OSHA 300 Log this new column would be located, or whether an MSD is an injury, illness, or a hybrid of the two.

OSHA states that the proposed rule would only require employers to check a new MSD box on their OSHA 300 Log and that employers are already required to report this information on the current form. As such, OSHA concludes that compliance with the proposed rule would involve five minutes per employer to read and understand the new

rule, and one minute per MSD injury or illness to check the new box.

Following publication of the proposed rule, Advocacy consulted with small business representatives about the proposal. These representatives believe that OSHA has significantly understated the cost and complexity of compliance. For example, many small businesses will have to hire attorneys and consultants to advise and train them on the new requirements, engage in additional consultation with the employee, consult with medical professionals, and make complex medical evaluations they are not qualified to make. Further, many small businesses do not have qualified human resource specialists on staff as OSHA assumes in its analysis.

OSHA certified under the Regulatory Flexibility Act (RFA) that the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Accordingly, the agency did not convene a small business review panel to consider the impact of the proposed rule. However, based on small business concerns, Advocacy recommended that OSHA reassess its cost assumptions and RFA certification before proceeding.

Advocacy’s March 30 letter can be found at www.sba.gov/advo/laws/comments. Please contact Bruce Lundegren at (202) 205-6144 or bruce.lundegren@sba.gov for more information.



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ABA Section Takes Up Regulatory Compliance

The Regulatory Policy Committee of the American Bar Association's Administrative Law and Regulatory Practice Section is sponsoring a brown bag lunch series on regulatory compliance under the direction of the Office of Advocacy's Assis-

tant Chief Counsel Jennifer Smith, who co-chairs the committee and moderates the panels.

The informal and informative series highlights four laws that are intrinsic to the rulemaking process—the Regulatory Flexibility

Act (RFA), the National Environmental Policy Act, the Data Quality Act, and the Paperwork Reduction Act. Each session features agency representatives, academics, and recognized authorities discussing these laws and issues that pertain to them.

The session on the RFA took place on April 29. It featured Claudia Rodgers, Advocacy's acting deputy chief counsel; Daniel Cohen, assistant general counsel for legislation, regulatory law, and energy efficiency of the U.S. Department of Energy; Shaun Gehan, a senior associate at Kelly Drye who has litigated several RFA cases; and Jim Laity, senior policy analyst of the Office of Management and Budget's Office of Information and Regulatory Affairs.



The Regulatory Flexibility Act was the focus of the first session of the ABA Administrative Law and Regulatory Practice Section's brown bag lunch series on regulatory compliance.

Tax News

Treasury Mandates Electronic Deposit of Taxes

by Dillon Taylor, Assistant Chief Counsel

On April 19, the Financial Management Service (FMS), a bureau of the Department of the Treasury, issued a press release that announced a new initiative that will require most businesses to make federal tax deposits electronically through Treasury's free Electronic Federal Tax Payment System (EFTPS).

Businesses are currently permitted to use paper federal tax deposit coupons. The new rules will no lon-

ger permit businesses to use these paper deposit coupons. Businesses with \$2,500 or less in quarterly tax liabilities that pay when filing their returns will be exempted from the new requirements.

Treasury and FMS state that this new initiative will be accomplished by changes to Treasury's existing regulations. Therefore, be on the lookout for proposed changes to Treasury's rules to implement this initiative in the near future.

The announcement was made in conjunction with Earth Day and was one of several new initiatives to move taxpayers to paperless, electronic transactions.

The full text of the Treasury announcement is available at www.ustreas.gov/press/releases/tg644.htm.

New at Advocacy

The Office of Advocacy welcomes Patrick J. Morris as the office's public liaison and media manager. Morris is a communications and media expert who has worked in government, the private sector, and as a sole proprietor. Morris served as the lead advance in the battleground states during the 2008 presidential campaign. He has also worked as a press secretary and communications director on Capitol Hill. Morris's experience in the private sector includes running his own public relations business, spanning communications, event management, grassroots campaign management, and government affairs. Morris also spent four years at the Department of Commerce working for the secretary of commerce and the International Trade Administration (ITA). While serving as the director of export promotion coordination at ITA, he oversaw

the development and management of the first virtual trade mission to China for small business.

Morris is a native of Rochester, New York; he received his bachelor of arts from Canisius College and a

master's degree in urban planning from the State University of New York at Buffalo. He is an ardent Buffalo Bills fan. Morris can be reached at (202) 205-6941 or patrick.morris@sba.gov.



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