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The Small Business Advocate

Advocacy: the voice of small business in government

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Forum Seeks Solutions To Thaw Frozen Small Business Credit

by Brian Headd, Advocacy Economist

As the U.S. economy emerges from the crevasse that most nations have slipped into during the past few years, two things are very clear: small businesses and financing have both fallen on hard times and both will be instrumental in the economy's march forward.

The Small Business Administration and the Office of Advocacy are both tuned into these related issues: the SBA as an important source of loan guarantees, and the Office of Advocacy as a key source of research and analysis on small business lending.

Jump-starting small business borrowing and commercial lending was the focus of a forum sponsored by the SBA and the U.S. Department of the Treasury in November. President Obama called for this summit during meetings with small business owners in October, as part of the effort to get credit flowing to them again. Small business owners from many regions of the country were in attendance and were able to discuss the current environment and the credit challenges they face. Small and large lenders, industry associations, and community development financial institutions also took part. Representing the Office of Advocacy were Acting Chief Counsel Susan Walthall and Economist Brian Headd.

Treasury Secretary Timothy Geithner discussed the government's policies that have stabilized the financial system, and he urged banks to lend to qualified businesses. SBA Administrator Karen Mills stressed that SBA financing has filled some of the gap during this

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In October, President Obama called for a finance summit to bring bankers and small businesses to the table and help get credit flowing to small businesses again. The forum took place on November 18.

In This Issue

Labor Department Receives Small Business Input on H-2A Visa Rule

by Janis Reyes, Assistant Chief Counsel

On November 10, the Office of Advocacy hosted a Small Business Roundtable on the Department of Labor's proposed H-2A visa rule, Temporary Agricultural Employment of H-2A Aliens in the United States. The program allows agricultural employers to hire temporary foreign workers during seasonal or peak times. Two agency representatives gave an overview of the proposed rule: William Carlson, administrator of the Employment and Training Administration's Office of Foreign Labor Certification and James Kessler, chief of the Farm Labor Branch of the Wage and Hour Division.

The Labor Department's proposal reverses many provisions of the final H-2A rule that had been released in December 2008. The proposed rule rejects a streamlined attestation-based system for submitting applications and changes the method for calculating the Adverse Effect Wage Rate (AWER) to be paid to H-2A workers. The agency estimates that the change in wage rate will result in higher average hourly wages of approximately $1.44 for workers in the top 10 agricultural states that use the H-2A program.

The 2009 proposal also reinstates the 50 percent rule, in which employers would have to continue to employ U.S. workers through completion of 50 percent of the contract work period (even though the employer has brought in an H-2A worker). The rule also increases transportation costs and reclassifies reforestation activities as part of the H-2A program.

The Labor Department tried to suspend the 2008 final rule in another rulemaking in March 2009, but that rule was enjoined by the U.S. District Court for the Middle District of North Carolina.

Participants came from across the country, representing such small entities as fruit and vegetable farms, nurseries, labor contractors, H-2A associations, florists, the horse industry and reforestation groups. Congressional staffers and Labor Department personnel were also in attendance.

These small business representatives were concerned that the changes will make the H-2A program too expensive to use for small farms, blocking their access to a legal workforce and making them less viable. In particular, the proposal's increased wages would discourage use of the H-2A program because labor costs of farmers using H-2A labor would be higher than those of neighboring farms and foreign competitors.

Comments on the proposed rule were due on October 20, and the roundtable gave small businesses the chance to discuss their formal comments with the agency representatives in person. The Labor Department will post a summary of the roundtable comments on **www.regulations.gov** (docket ID: ETA-2009-0004).

Advocacy hosted an H-2A visa roundtable in November. Pictured here (from left) are Acting Chief Counsel Susan Walthall and the two Labor Department officials who spoke, James Kessler and William Carlson.

The Small Business Advocate

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Small Business Finance,
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credit crunch for small businesses. SBA has become a bigger and more important supplier of credit in the small business market, particularly with its new targeted programs reducing loan fees and increasing loan guarantees. And Treasury's Coalition of Community Development Financial Institutions has helped businesses in overlooked rural and urban markets, even before the economic downturn.

Small business owners discussed financing issues in recent times. Their myriad of financing adventures illustrated a couple of things: financial self-reliance is back in vogue as banks have all but shuttered their lending windows; and relationship lending, while valuable, is not a panacea, as even banks worry about their bottom lines. Additionally, policymakers and analysts were reminded that behind the dismal aggregate statistics circulating in Washington are actual business owners, employees, and communities. Bankers defended their restrictive lending practices: while they try not to let their customers fail, especially with years of a relationship at stake, they are businesses too, and are required to make financially prudent decisions.

Small business owners and representatives from the lending community urged Congress to continue funding to extend SBA's 90 percent guarantee and the reduction of fees on SBA 7(a) and 504 loans. They all agreed that this will be a crucial step in the continued recovery of small businesses.

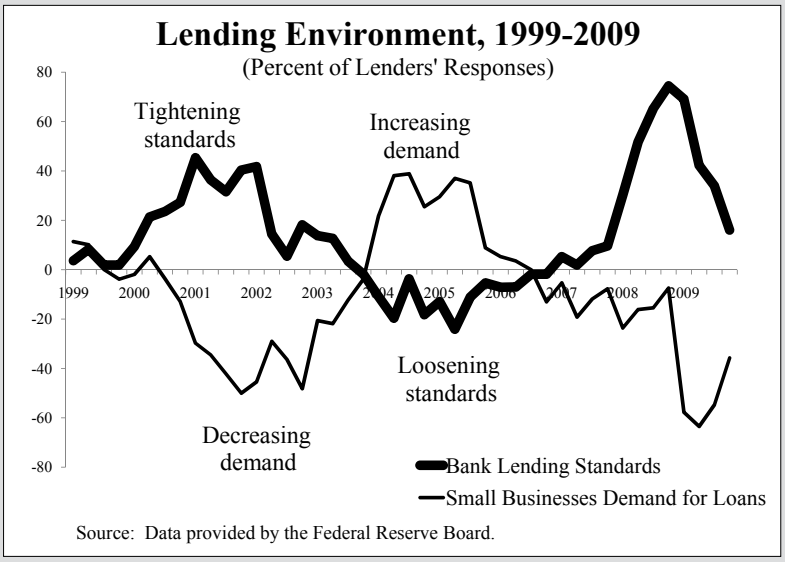
Congress was well represented, with Senate Small Business Committee Chair Mary Landrieu and House Small Business Committee Chair Nydia Velazquez in attendance, along with Senators Sherrod Brown (Ohio) and Mark Warner (Virginia). They added to the discussion, and stressed related problems such as lending in manufacturing sectors and distressed areas. In fact, Senator Warner mentioned that while healthcare dominates the news, increasing financing and jobs should be our current focus. While mentioning that small business financing problems are not behind us, he detailed a government proposal to increase small business lending. Agriculture Secretary Thomas Vilsack also attended, and he discussed his agency's prominent role as a lender to small agriculture businesses.

Measures to help alleviate the credit crunch were offered: additional expansion and streamlining of SBA programs; letting small businesses tap into the Troubled Asset Relief Program (TARP); reducing the stigma that has accompanied banks' use of TARP funds; and spreading government financing assistance more broadly. (That is, instead of just increasing financing assistance, increase support for businesses in distressed areas and increase counseling for small businesses.) But the overwhelming sentiment of the conference was that the bruising that small business balance sheets have taken is now healing, and banks need to recognize this. Secretary Geithner had a pointed comment to banks with regard to solutions. He stressed that banks should not wait for government help, but should do what they can to regain the trust of the public.

An analogy that several speakers returned to was the time-worn picture of getting the elementary girls in one corner and boys in the other corner together to dance, or getting good bank and small business matches for lending. One could not help but feel that the two groups were at least meeting on the dance floor for a handshake, as small businesses and banks got a better understanding of each others' positions. For the sake of the unemployed and our economy overall, let's hope the dancing begins soon.

Poised for a Healthier Lending Environment

Recent surveys show that the credit crunch may have eased somewhat. Data from the Federal Reserve Board show that the number of banks tightening lending standards over the past year has declined, making it a little easier to be approved for a loan. At the same time, the drop in small business demand for loans appears to be easing, and businesses may be a little more encouraged to seek credit again.



Source: Data provided by the Federal Reserve Board.

NMFS Issues Final Rule on Georges Bank Herring Fisheries

by Jennifer Smith, Assistant Chief Counsel

On September 24, the Office of Advocacy filed comments on the National Marine Fisheries Service's (NMFS) proposed rule on the *Fisheries of the Northeastern United States; Modification of the Gulf of Maine/Georges Bank Herring Midwater Trawl Gear Authorization Letter.*

Advocacy's comments echoed concerns raised by the fishing industry. Advocacy recommended that NMFS provide information about the catch rates and revenue garnered from the particular areas so that the public can assess the economic impact of this proposal. Advocacy also recommended that NMFS consider alternatives such as lifting the prohibition on fishing without an observer if no observer is available; clarifying the phrase "unless the fish has been brought aboard the vessel" to prevent fishers from being penalized unnecessarily; giving full consideration to the industry's rewritten version of the dogfish exemption; and allowing a vessel to discontinue fishing in Closed Area I (the area of greatest fish concentration) but keep the fish if it has to discontinue a trip due to mechanical failure or a safety concern.

On October 28, the NMFS released a final rule in this matter. The final rule had several revisions. One of the most important revisions was to allow vessels that release a net for safety or mechanical concerns or due to spiny dogfish in the catch to leave Closed Area I and to continue fishing outside of the area for the remainder of the trip rather than having to forfeit the entire catch.

Advocacy Comments on Scientific Basis of Future Herring Catch Limits

NMFS' s management of the herring fishery is a major issue at this time. In October and November, Advocacy held conference calls with the herring fishing industry and representatives from various offices at the Department of Commerce to discuss the herring specifications. In June 2009, the Transboundary Resources Assessment Committee (TRAC) performed a stock assessment. As a result of the TRAC report, the Science and Statistical Committee (SSC) set the acceptable biological catch (ABC) at 90,000 MT, which reduced the current ABC by more than 50 percent. However, the SSC recognized that there is substantial uncertainty in the June 2009 assessment; the New England Fishery Management Council (NEFMC) has stated that the herring fishery is not overfished and that the data from the TRAC assessment were questionable.

Reducing the ABC by greater than 50 percent could have a devastating effect on small businesses in the herring fishery, the lobster fishers who rely on herring for bait, and the small communities from New Jersey to Maine that are dependent on the fish stock for economic vitality. Advocacy submitted a letter to NOAA on November 10 stating that employing a wider range of scientific information is necessary to keep small entities from suffering unnecessary economic harm. Advocacy urged NMFS to perform a new benchmark assessment for the Atlantic herring fishery and asked it to extend the 2009 specifications to 2010 and to utilize maximum flexibility in considering alternatives.

The NEFMC voted in mid-November to recommend that the allowable catch for herring be 106,000 MT rather than 90,000 MT. The 106,000 MT was based on the three-year average catch from 2006 to 2008.

This is an example of how Advocacy gets involved early in the process. This was not a rule. The specifications at issue will be used to determine future herring fishery rulemakings for the next couple of years. Advocacy will continue to work with the industry as this issue goes through the rulemaking process. Watch future newsletters for updates on this issue. —*Jennifer Smith*

Tax News

Roundtable Examines Pension and Retirement Plan Issues

by Dillon Taylor, Assistant Chief Counsel

On November 6, Advocacy hosted a roundtable where representatives from the federal government and small businesses discussed a number of important pension and retirement plan issues.

The first presenter, Sandy Turner of Retirement Plan Specialists, expressed concern about declining rates of employee retirement savings. Turner presented information on free resources that employers could use to help educate their employees about the importance of retirement saving.

Gary Kushner, of Kushner & Company, made a presentation on Internal Revenue Code Section 125 "cafeteria plans." Kushner described several Internal Revenue Service rules related to cafeteria plans that would benefit from revision. One of these rules prevents many employers from participating in the cafeteria plans that they sponsor for their employees. Second were the IRS 1984 "use it or lose it" rules, which should be updated to permit an employee who separates from service to roll over benefits to a different employer's plan. Third, the IRS should update its rules to provide a simplified method for nondiscrimination testing.

Judy Miller of the American Society of Pension Professionals and Actuaries discussed the IRS penalties to which many small business employers would be subject if Congress did not provide relief from the pension plan funding requirements.

George Buffington, from Buffington & Aaron, made a presentation on Internal Revenue Code Section 409A relating to deferred compensation. He noted that many pension plan sponsors were unsure how this section applies to their plans, and of the definition of "deferred compensation." Buffington hoped that Congress would provide relief from this section to small employers who sponsor pension plans.

Alex Brucker of Brucker & Morra presented information on Internal Revenue Code Section 6707A, the penalty for failure to disclose a listed or reportable transaction. Brucker observed that this expensive penalty is burdensome for small businesses that sponsor pension plans because the IRS imposes the penalty regardless of whether the transaction at issue is de minimis in nature or a mistake.

Paula Calimafde, from the Small Business Council of America, discussed "interim plan amendments." Interim amendments are the annual amendments that the IRS requires to keep a pension plan compliant with changing laws and rules between dates when the plan is fully restated. Calimafde presented data to show that the number of changes in laws and rules has required plan administrators to produce an increasing number of amendments over the last decade. Such changes are expensive and burdensome for employers that sponsor pension plans. Calimafde discussed ways in which the IRS could revise its rules to help reduce the number of such amendments for which employers are responsible. This topic generated so much conversation that Advocacy will host a conference call to continue discussing this issue on December 2.

For information on future roundtables contact Assistant Chief Counsel Dillon Taylor at (202) 401-9787 or **dillon.taylor@sba.gov.**

r3 Update

Last Chance to Nominate!

Do you know of a federal regulation that is in need of review and reform? This is the time to speak up. Nominations for the Office of Advocacy's 2010 edition of the Top 10 List of Rules in Need of Review and Reform are due by December 31, 2009.

r3 includes a process by which interested stakeholders can nominate existing regulations for reform, and monitor the progress that agencies make toward achieving those reforms. The nomination criteria may be found on Advocacy's webpage at **www.sba.gov/advo/r3/r3_nomination.html.**

To suggest reviews and reforms, please contact Advocacy at **advocacy@sba.gov**.

Regulatory News

EPA Reform of SPCC Rule Relieves Small Business Burdens

by Kevin Bromberg, Assistant Chief Counsel

The Environmental Protection Agency (EPA) has now implemented its 2008 reforms of the Oil Spill Prevention, Control, and Countermeasure (SPCC) rule, concluding an effort that the Office of Advocacy has been involved in since December 2002, when it held the first roundtable on the rule.

EPA's revisions streamline reporting requirements in order to increase overall compliance. Advocacy had encouraged EPA to listen to small businesses and include provisions that will benefit small business in the reformed rule. After re-examining the December 2008 rule last month, EPA reaffirmed the original relief, preserving generally all the provisions supported by Advocacy in previous comments.

Advocacy has worked with EPA and the affected trade associations to improve the SPCC rule, while still protecting the environment. The SPCC program is designed to prevent spills of oil into waterways, and to contain spills after they occur. Facilities subject to the program must develop spill prevention plans designed to prevent and minimize such discharges.

EPA's amendments are designed to increase overall compliance by small firms while reducing the regulatory burden on facilities that handle small volumes of oil and have a history of no reportable discharges. For small facilities, EPA has introduced a reporting template and other streamlined requirements. It also includes a visual inspection option for small volume tanks.

The SPCC rule affects hundreds of thousands of small businesses, including farmers, manufacturers, and oil and gas production facilities that store more than 1,320 gallons of oil at a given facility.

EPA realized that its original rule put an unnecessary burden on firms that did not contribute significantly to the oil spill problem EPA was attempting to address. The November 2009 revised rule contains many of the changes suggested by the Office of Advocacy in February 2006 comments to EPA. The compliance date has been set for November 2010, but EPA has committed to re-opening this date. Visit **www.epa.gov/emergencies/content/spcc/index.htm** for the rule and additional information.

Panel Examines Federal Broadband Programs

On November 20, the Office of Advocacy's Assistant Chief Counsel Cheryl Johns moderated a luncheon panel for the Rainbow Push Coalition's Annual Telecommunications Symposium.

The symposium featured several prominent speakers, including Federal Communications Commissioners Michael Copps, Robert McDowell, and Mignon Clyburn; the administrator for the Department of Agriculture's Rural Utilities Service (RUS), Jonathan Adelstein; and the deputy assistant secretary for communications and information at the National Telecommunications and Information Administration (NTIA), Anna Gomez.

The panelists discussed the latest round of funding for broadband programs undertaken by both the NTIA and RUS, as well as what these agencies have done to further include socially and economically disadvantaged small businesses in these broadband projects.

Assistant Chief Counsel Cheryl Johns (right) and Kimberly Marcus, executive director of public policy and director of media and telecommunications for the Rainbow Push Coalition.

Department of Homeland Security Moves Forward on Two Important Aviation Issues

by Bruce Lundegren, Assistant Chief Counsel

The Department of Homeland Security (DHS) has moved forward on two important regulatory issues for small business. The first involves air cargo screening; the other, aviation flight school training.

Cargo Screening on Passenger Aircraft

As part of the 9/11 Act (P.L. 100-53), Congress mandated that DHS establish a system to screen cargo placed on passenger aircraft at a level of security similar to that of passenger checked baggage. The mandate stipulated that 50 percent of such cargo must be screened by February 2008, and 100 percent by August 2010.

The Transportation Security Administration (TSA) wrestled with how to meet this requirement, and realized that requiring commercial airlines to screen all of the cargo was impractical for a number of cost and logistical reasons. So TSA decided to utilize a "supply chain approach" similar to that used in England and elsewhere. Under the program, announced on September 16, TSA will allow entities such as manufacturers, distributors, shippers, warehousing entities, and indirect air carriers (IACs) to screen and secure cargo before it arrives at the airport. These entities will implement chain-of-custody provisions to ensure that cargo is not tampered with while in storage or transit. Essentially, everyone who touches the cargo along the way will have to be vetted through TSA, and the certified cargo screening facilities themselves will be overseen by TSA-approved validation firms.

Some 12 million pounds of cargo are shipped on passenger aircraft every day, so the magnitude of the challenge is immense. Many small businesses in the distribution chain approve of the approach TSA has taken—essentially deputizing the private sector to police itself—while others thought the government should screen cargo the way it does airplane passengers. Regardless, TSA's program is now underway and the agency is hoping to achieve the security goals that Congress established. DHS's September 16 announcement is online at **http://edocket.access.gpo.gov/2009/pdf/E9-21794.pdf.**

Aviation Flight School Training

Historically, the United States has been the worldwide leader in aviation flight training, serving as the destination of choice for student pilots the world over. Until recently, foreign students wishing to train to be commercial airline pilots came to the United States on a J visa issued through the U.S. Department of State. The J visa was preferred because it allowed students sufficient time to complete the program of study, including the required hours as a certified flight instructor.

Recently, the State Department announced their intention to delete flight training from their approved programs and sought to transfer this area to the Department of Homeland Security. There are currently eight flight schools authorized to participate in the program, which brings significant economic benefits to the nation. Immigration and Customs Enforcement (ICE), through its Student and Exchange Visitor Program, has recently approved the transfer of these programs into their F visa category for professional training. This will allow for the continued operation of the flight training programs, which would have been effectively terminated on December 31, 2009, had ICE not acted. Because there is a growing worldwide shortage of commercial pilots, the aviation industry strongly supported the move.

For further information, please contact Bruce Lundegren at (202) 205-6144 or **bruce.lundegren@sba.gov.**

Advocacy's Blog Celebrates a Birthday

The Office of Advocacy's blog, The Small Business Watchdog, just celebrated its first birthday. During its first year, we've added helpful features, like the regular Capitol Hill Connection. These posts give the schedule of important congressional hearings on issues that concern small business.

The blog also lets you come up to the minute with many of the office's efforts on behalf of small business—meeting policymakers, uncovering new small business research, listening to you.

Drop by Advocacy's blog and find out more about the office's day-to-day activities and add your own views. The Small Business Watchdog is a place where you can ask questions about small businesses' contributions to the economy, discuss the impact of regulations on your business or industry, and connect with the small business community in your state or region, or around the country. In other words, the blog is another way of becoming a more effective Small Business Advocate.

Visit The Small Business Watchdog at **http://weblog.sba.gov/blog-advo.**

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