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2016 Report of the Regulatory Fairness Board

to

The Joint Standing Committee on

Labor, Commerce, Research and Economic Development

and

The Honorable Paul R. LePage, Governor of Maine

Pursuant to 5 MRSA §90-T

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Executive Summary

The Regulatory Fairness Board (RFB) was first established in 2001 to hear testimony and to report to the Legislature and the Governor at least annually on regulatory and statutory changes necessary to enhance the State's business climate. The Board received technical assistance from the State Planning Office. In 2011, under the regulatory reform act, known as LD 1 (PL 2011 Chapter 304), the Regulatory Fairness Board was transferred to the Secretary of State's office and the office of the Special Advocate was created to, in part, staff the board (Appendix A.)

The Regulatory Fairness Board, comprised of five members who are or have been owners, operators, or officers of businesses operating throughout the State, hears public comment from Maine businesses concerning interactions between businesses and government agencies, specifically state regulations which seriously impact business. The Board also reviews complaints filed with the Special Advocate's Office and any regulatory impact notices filed by the Secretary of State on behalf of those businesses.

The RFB meets in different regions of the state to hear testimony from business community representatives and holds public meetings in Augusta for administrative and operational purposes and discuss public comments received in writing in between public hearings.

This report summarizes the Board's activities during the year 2016 including information presented to the Board, and its resulting recommendations.

During 2016 the Regulatory Fairness Board held two public meetings; one in Waterville, and one in conjunction with the Kennebec Valley Chamber of Commerce's Business Expo. The board heard concerns over the enforcement of day care licensing and inspections, specifically the lack of consistency interpreting the existing day care rules and the lack of an appeals process when the day care license is subject to a probationary hearing. The board also heard from a legislative candidate about the issues that he was hearing around small business regulations as he went door to door.

The Small Business Advocate worked with over 25 businesses to answer questions, provide information and to intercede with regulatory agencies on their behalf. The work encompasses a wide range of issues and interactions with just about every agency in State government. This report includes a brief sampling of the work of the office and the Regulatory Fairness Board.

The work of the advocate identified the following areas of opportunity for regulatory reform.

Day Care Rules – Day Care businesses have raised several concerns about the process of day care licensing and inspections. The rules overseeing family and center based day care would benefit from much greater clarification on what is considered a “critical violation”, leading to a conditional license, vs “non-critical violations”, which are less serious and can generally be corrected immediately. Revamping of these rules to be similar to the Eating and Lodging rules would provide much greater clarity and certainly to day care businesses across the state. Additionally, continual training and coaching, specifically of new license inspectors could lead

to more consistency in rule enforcement and understanding of the inspection process and possible deficiencies identified at licensed day care businesses.

Liquor Licensing: Current liquor laws do not recognize new business models, and as a result businesses have been seeking statutory changes that allow them to operate. These are done one at a time, and the current regulatory system is a patchwork of exemptions created over time. Each business that has a slightly different business model must come before the legislature to request a statutory change. This process makes little sense to the business or to Liquor Enforcement and it makes the liquor laws difficult to navigate and implement. A complete re-codification of the statute is long overdue and would make the current exemptions more consistent and easier to navigate by businesses.

Gathering greater feedback from the public. The Small Business Advocate's webpage includes a simple web-based feedback form. The intent is to make it easier to gather information from businesses that are having regulatory difficulty. The form allows small businesses to identify regulations, rules and statutes that potential create an undo regulatory burden. This form went live in February of 2015.

Broadband expansion. Lack of access to high speed broadband, or in parts of the state any broadband – is a major hindrance to small businesses gaining access to customers, markets, on-line business support services and much more. According to the Maine Technology Users Group, Maine has ranked 49th in the country in terms of access to high speed broadband. This not only hinders the growth of existing businesses, it limits the startup of new businesses.

Maine has been making incremental investments to expand broadband service to unserved areas of the state over the past ten years through ConnectME. That effort has created opportunities for small ISP companies to expand their services, grow and add employees. It has also created an opportunity for businesses who do GIS mapping, or survey existing broadband services to also grow and add new employment. But, the world is changing and Maine can no longer afford to incrementally expand broadband a few miles at a time per year.

Maine needs to make a significant investment in expansion of broadband to under and unserved areas of the state. This can be done by using state funds to help fund strategic projects that bring down the cost of expanding broadband so that private companies, regions, counties or municipalities can take on the “last mile” and bring broadband to their region. Expansion of broadband to many rural parts of this state will never make economic sense to private companies, regions or communities unless the state provides funding to lower the cost. Without this effort, all of Maine, but particularly rural Maine, cannot participate in the global economy.

2016 Report of the Regulatory Fairness Board and the Office of the Special Advocate

Activity of the Regulatory Fairness Board

The Board is comprised of five members who are or have been owners, operators, or officers of businesses operating throughout the state. One member is appointed by the President of the Senate, one member is appointed by the Speaker of the House, and two members are appointed by the Governor, one of whom must represent businesses with fewer than 50 employees and one of whom must represent businesses with fewer than 20 employees. Members of the Board volunteer their time and their unique expertise to serve as liaisons between the State's business community, regulatory authorities, and law makers. The Secretary of State is the Chair of the Board. Currently the board has one vacancy, an appointment made by the Governor. A list of members is included in Appendix B.

The board held two public meetings in October and November. The October meeting was in conjunction with the Kennebec Valley Chamber of Commerce's Business Expo at the Augusta Civic Center. The November meeting was at Thomas College in Waterville. During the meetings, members discuss the role and direction of the board, review tasks assigned by the governor and legislature and assesses written comments or complaints that have been received by email from members of the public or the private business community through the office of the Special Advocate. They also listen to any public comments from small businesses that attend the meetings.

Publicity for Regulatory Fairness Board public hearings include press releases to statewide and local papers, emails and phone calls to local chamber of commerce, state wide trade organizations, small business counselors, economic development organizations, and other potentially interested groups. The agenda for the hearings is driven by the members of the public and business community that attend. Information collected in meetings and hearings contributes to RFB's direction as the Board plans for future meetings and hearings. Minutes of those meetings are posted on the Secretary of State's website (<http://www.maine.gov/sos/sba/rfb.html>) and included in Appendix C.

This year the board and the advocate heard concerns over the licensing and inspection of childcare businesses, as well as the process for determining a "conditional license" based on an inspection report. They also heard from a legislative candidate about what he was learning from small businesses as he campaigned in his area.

Activity of the Small Business Advocate January 2016 –December 2016

The Small Business Advocate worked with over 25 businesses to answer questions, provide information and to intercede with regulatory agencies on their behalf. The Regulatory Fairness Board has held public meetings in Augusta and Waterville. The 2015 Annual Report was submitted to the Labor, Commerce and Economic Development Committee on February 1, 2016.

The Small Business Advocate testified or monitored at least four bills this past legislative session. These included increased funding for ConnectME, a general obligation bond to support municipal broadband, and legislation dealing with liquor licensing.

The Small Business Advocate appeared on the Consumer Matter Show, produced by the Maine Attorney General's Office of Consumer Protection. The show is available to watch at <http://www.myspectrumsports.com/videos/2016/05/17/me-consumer-matters--89>.

The Advocate played a pivotal role in the organization of the Maine Broadband Coalition. This coalition has brought together small businesses, communities, nonprofit organizations and individuals to advocate for expanded broadband coverage in Maine. The Advocate hosts a weekly conference call where members from across the state talk about how they are working to expand broadband access in their area. The Coalition (mainebroadbandcoalition.org) worked to develop a specific set of principles and goals for its work. The Advocate attended several meetings and conferences across the state on behalf of the Coalition, and maintains its Facebook and Twitter accounts, as well as blog on the Bangor Daily News.

The advocate met with several economic development groups to talk about the best way to begin community conversations on broadband expansion. This included groups in Washington, Oxford and rural Androscoggin counties.

This fall the Maine Broadband Coalition hosted a conference showcasing different business model to expand broadband. Over 120 attendees from across the state came to learn about how the cooperative model has worked at RS Fiber in Minnesota and EC Fiber in Vermont. The Advocate facilitated a presentation from Leverette, MA and Islesboro, ME about how those rural communities have financed and expanded broadband.

The advocate has worked with Envision Maine to create a panel on broadband for the upcoming Summit on Maine's Next Rural Economy in February. The advocate is facilitating the session with four presenters from across rural Maine about how they are working to expand broadband in their area.

The advocate also appeared on Maine Calling, talking about the importance of rural broadband in Maine. That show can be heard at this link: <http://mainepublic.org/post/rural-broadband>.

A Sampling of Case Work

Division of Childcare Licensing

Several childcare providers brought forward issues around childcare licensing and inspecting. The advocate met with providers as well as the licensing staff to better understand the issues the businesses brought forward. The central concern stems around what the childcare providers feel is an unpredictable interpretation of the childcare rules; the lack of understanding of the nature of the childcare business, and the requirements placed on childcare providers that are not placed on similar businesses. Specifically:

- Childcare Centers rules require that someone with a Bachelor's degree in early childhood – or similar must always be present. This means that even if the director has an hour appointment (like a dentist appointment) the facility must have someone with a BA there at all times. Finding a workforce that meets this guideline is difficult, and the state requires this of no other industry. A reasonable change that would not impact the quality of care at all is to allow for short (say up to 2 hours once week or similar) absences of the person with the BA.
- The providers feel there is no provision for “corrected on site” for a minor violation that can be corrected instantaneously. For example, having toothpaste or shampoo within sight of the children could be corrected immediately by the provider. These types of violations should be allowed to be corrected at the time of the inspection and not end up as part of the conditional licensure decision.
- There is no weighting of the violations, every violation of the rules seem to carry equal weight in the inspection process. The Eating and Lodging (Food Code) rules indicate which violations are “critical” and which are noncritical violations. Those rules also spell out clearly how many critical and minor violations cause a “failed” inspection. The Childcare rules have no such weighting process.
- There is no appeal or dispute process, even for violations that are corrected on-sight. The Childcare licensing agency meets sometime later after an inspection finds violations, without the licensee, to determine if a licensee should be moved to the process to make the license “conditional.” Childcare Licensing does not feel that the licensee needs or should be part of this process because they can be represented at the actual conditional licensee hearing. Since providers will lose any childcare subsidies if their license is found to be conditional and the conditional licensure is posted on the webpage for at least a year, childcare providers feel they should be have some representation at the meeting where the department decides to move to a conditional license hearing.
- Conditional licenses lose any child care subsidy, and those children must find other care. From the Small Business Advocate's research, this is not spelled out in any rule or statute, and is decided by Children and Family Services, and not the Childcare Licensing division.
- There is no flexibility at all around ratio of children to adults, even in emergencies or for very short periods of time. According to some providers this has resulted in being cited for a ratio violation when a worker has gone out to the car to get lunch.
- Providers feel the rules have lots and lots of grey area that inspectors can interpret differently. For example the definition of toxic substance can include toothpaste, air fresheners or shampoo.
- Some inspectors focus not on health and safety violations but what the providers feel are much more programmatic – including behavioral issues of some of the children. Providers do not believe the inspectors have the necessary background, or understanding

- of the day to day workings of their business and children in their care for the inspectors to make these judgments.
- Providers complain that there is zero tolerance for violations. The Childcare Licensing Division points out that it takes only three seconds for a child to be put in danger (a gate left open inadvertently for a few moments, a knife left on a counter for a minute, or other potentially dangerous violation). This is the reason they insist on close to zero tolerance for violations. This strict adherence to rule, in many cases, does not reflect the reality of life, especially taking care of children. Things happen and nothing is perfect 100% of the time. Childcare providers are very conscious of the importance of the role they play keeping children safe and happy. Providers feel that being cited for violations that are not chronic but are incidental sets the bar almost impossibly high for the industry – especially given that there is no indication what violations can put a licensee into the conditional licensure process.

One way to address these issues is to revamp the childcare licensure rules – WITH input from the provider community. The administration has forbidden agencies, by executive order, to work with provider communities as rules are developed or revamped, until the agency enters into the official rulemaking phase. This edict leads to a process that is not open and does not build trust or understanding of the intent of both the provider community and the obligations of the Division of Childcare Licensing.

Mobile Home Licensure

A gentleman from northern Maine called about a licensure issue with his mobile home park. He had, over the last 30 years, both sold and rented lots to people with mobile homes, but had never gotten a mobile home park license. He was now trying to sell those rented lots, and his lawyer informed him that mobile home parks were unable to evict someone off a lot for a year, if they did not wish to buy the lot, or move their mobile home. Since he had never had a mobile home license, he believed the regulations for a mobile home parks should not apply to him. The advocate spoke with the director of the manufactured housing board, and the lawyer for the board who indicated that he should have been a licensed mobile home park, and those regulations did apply to the sale of his lots. In the end, he was able to convince the person renting the lot to move their home, and he was able to sell the lot.

Fire Marshall

A relator called about a client that was trying to open a childcare facility in a new building. The advocate worked as a go-between with the Fire Marshall so that the facility could meet the fire safety regulations.

Lack of access to high speed broadband

The Advocate received a number of calls from small businesses that are unable to get access to broadband. Some of these companies had no access, others were not able to obtain a connection at the speed they felt their business needed. The third category was small businesses that could get access to the internet connection speed they needed, but the cost was prohibitive. These

companies were from across the state, from Portland to Trescott to Bridgewater and into the Western Mountains.

Presentations and meetings:

The Advocate attended, participated or met with the following: Kennebec Leadership Institute, Envision Maine, the Maine Farm Bureau, Slow Money Maine, CEI, Growsmart Maine, Maine Agricultural Trade Show, Maine Calling, Piscataquis Economic Development Council, Eastern Maine Economic Development Commission, Sunrise County Economic Development, Washington County Council of Governments, Community Concepts in Oxford County, Maine Rural Development Council, ConnectME, The Island Institute, Kennebec Valley Council of Governments.

Appendix A: Public Law Chapter 304 (applicable section)

PART D

Sec. D-1. 5 MRSA §57, as amended by PL 2007, c. 676, §1, is repealed.

Sec. D-2. 5 MRSA c. 5, sub-c. 2 is enacted to read:

SUBCHAPTER 2

SPECIAL ADVOCATE

§ 90-N. Bureau established

The Bureau of the Special Advocate, referred to in this subchapter as "the bureau," is established within the Department of the Secretary of State to assist in resolving regulatory enforcement actions affecting small businesses that, if taken, are likely to result in significant economic hardship and to advocate for small business interests in other regulatory matters.

§ 90-O. Definitions

As used in this subchapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Agency. "Agency" has the same meaning as set out in section 8002, subsection 2.

2. Agency enforcement action. "Agency enforcement action" means an enforcement action initiated by an agency against a small business.

3. Complaint. "Complaint" means a request to the special advocate for assistance under section 90-Q.

4. Regulatory impact notice. "Regulatory impact notice" means a written notice from the Secretary of State to the Governor as provided in section 90-S.

5. Significant economic hardship. "Significant economic hardship" means a hardship created for a small business by a monetary penalty or license suspension or revocation imposed by an agency enforcement action that appears likely to result in the:

- A. Temporary or permanent closure of the small business; or
- B. Termination of employees of the small business.

6. Small business. "Small business" means a business having 50 or fewer employees in the State.

7. Special advocate. "Special advocate" means the person appointed pursuant to section 90-P.

§ 90-P. Special advocate; appointment and qualifications

The Secretary of State shall appoint a special advocate to carry out the purposes of this subchapter. The special advocate shall serve at the pleasure of the Secretary of State.

§ 90-Q. Small business requests for assistance

A small business may file a complaint requesting the assistance of the special advocate in any agency enforcement action initiated against that small business. The special advocate may provide assistance to the small business in accordance with section 90-R, subsection 2. The special advocate shall encourage small businesses to request the assistance of the special advocate as early in the regulatory proceeding as possible. Before providing any assistance, the special advocate shall provide a written disclaimer to the small business stating that the special advocate is not acting as an attorney representing the small business, that no attorney-client relationship is established and that no attorney-client privilege can be asserted by the small business as a result of the assistance provided by the special advocate under this subchapter.

§ 90-R. Powers and duties of the special advocate

1. General advocacy. The special advocate may advocate generally on behalf of small business interests by commenting on rules proposed under chapter 375, testifying on legislation affecting the interests of small businesses, consulting with agencies having enforcement authority over business matters and promoting the services provided by the special advocate.

2. Advocate on behalf of an aggrieved small business. Upon receipt of a complaint requesting assistance under section 90-Q, the special advocate may:

- A. Consult with the small business that filed the complaint and with the staff in the agency that initiated the agency enforcement action to determine the facts of the case;
- B. After reviewing the complaint and discussing the complaint with the small business and the agency that initiated the agency enforcement action, determine whether, in the opinion of the special advocate, the complaint arises from an agency enforcement action that is likely to result in a significant economic hardship to the small business;
- C. If the special advocate determines that an agency enforcement action is likely to result in a significant economic hardship to the small business, seek to resolve the complaint through consultation with the agency that initiated the agency enforcement action and the small business and participation in related regulatory proceedings in a manner allowed by applicable laws; and
- D. If the special advocate determines that an agency enforcement action applies statutes or rules in a manner that is likely to result in a significant economic hardship to the small business, when an alternative means of effective enforcement is possible, recommend to the Secretary of State that the secretary issue a regulatory impact notice to the Governor.

§ 90-S. Regulatory impact notice

At the recommendation of the special advocate, the Secretary of State may issue a regulatory impact notice to the Governor informing the Governor that an agency has initiated an agency enforcement action that is likely to result in significant economic hardship to a small business, when an alternative means of enforcement was possible, and asking that the Governor take action, as appropriate and in a manner consistent with all applicable laws, to address the small business issues raised by that agency enforcement action. The regulatory impact notice may include, but is not limited to, a description of the role of the special advocate in attempting to resolve the issue with the agency, a description of how the agency enforcement action will affect the interests of the small business and a description of how an alternative enforcement action, when permitted by law, would relieve the small business of the significant economic hardship expected to result from the agency enforcement action. The Secretary of State shall provide a copy of the regulatory impact notice to the agency that initiated the agency enforcement action, the small business that made the complaint and the joint standing committee of the Legislature having jurisdiction over the agency.

§ 90-T. Regulatory Fairness Board

The Regulatory Fairness Board, referred to in this section as "the board," is established within the Department of the Secretary of State to hear testimony and to report to the Legislature and the Governor at least annually on regulatory and statutory changes necessary to enhance the State's business climate.

1. Membership. The board consists of the Secretary of State, who shall serve as the chair of the board and 4 public members who are owners, operators or officers of businesses operating in different regions of the State, appointed as follows:

- A. One public member appointed by the President of the Senate;
- B. One public member appointed by the Speaker of the House;
- C. Two public members appointed by the Governor, one of whom represents a business with fewer than 50 employees and one of whom represents a business with fewer than 20 employees.

The Secretary of State shall inform the joint standing committee of the Legislature having jurisdiction over business matters in writing upon the appointment of each member. Except for the Secretary of State, an officer or employee of State Government may not be a member of the board.

2. Terms of appointment. Each member appointed to the board must be appointed to serve a 3-year term. A member may not be appointed for more than 3 consecutive terms.

3. Quorum. A quorum for the purpose of conducting the board's business consists of 3 appointed members of the board.

4. Duties of board. The board shall:

- A. Meet at least 3 times a year to review complaints submitted to the special advocate;
- B. Review the status of complaints filed with the special advocate and regulatory impact notices issued by the Secretary of State; and
- C. Report annually by February 1st to the Governor and the joint standing committee of the Legislature having jurisdiction over business matters on actions taken by the special advocate and the Secretary of State to resolve complaints concerning agency enforcement actions against small businesses. The report may also include recommendations for statutory changes that will bring more clarity, consistency and transparency in rules affecting the small business community.

5. Compensation. Board members are entitled to compensation only for expenses pursuant to section 12004-I, subsection 2-G.

6. Staff. The special advocate shall staff the board.

Sec. D-3. 5 MRSA §12004-I, sub-§2-G, as enacted by PL 2007, c. 676, §2, is amended to read:

2-G.

Sec. D-4. Maine Revised Statutes headnote amended; revision clause. In the Maine Revised Statutes, Title 5, chapter 5, before section 81, the headnote "subchapter 1, general provisions" is enacted and the Revisor of Statutes shall implement this revision when updating, publishing or republishing the statutes.

Sec. D-5. Transition provisions; Regulatory Fairness Board. The terms of members appointed to the Maine Regulatory Fairness Board under the former Maine Revised Statutes, Title 5, section 57 are terminated on the effective date of this Act. Notwithstanding Title 5, section 90-T, subsection 2, the initial terms of members appointed to the Regulatory fairness Board must be staggered as follows:

- 1. The member appointed by the President of the Senate shall serve an initial term of 2 years;
- 2. The member appointed by the Speaker of the House shall serve an initial term of 2 years;
- 3. The first member appointed by the Governor shall serve an initial term of one year; and
- 4. The 2nd member appointed by the Governor shall serve an initial term of 3 years.

Appendix B: 2016 Regulatory Fairness Board Members

Secretary of State Matthew Dunlap – *Chairman*

Nash School Building, 103 Sewall St.
148 State House Station
Augusta, Maine 04333-0148
Office: 207.626.8400
Email: matthew.dunlap@maine.gov

Appointed by Governor Paul R. LePage:

Ms. Patricia Kuhl

Owner, PK Associates
22 Tarratine Drive
Brunswick, Maine 04011
Office: 207.729.2260 Home: 207.729.5229
E-mail: patk@pkmaine.com

Information about the Board, including
biographies, may be found at:
www.maine.gov/sos/sba/rfb.html

Vacant

Appointed by Senate President Justin Alford:

Hon. David Brenerman

32 Overset Road
Portland ME 04103
Office: 207.807.4053 Home 207.797.9298
Email: david@brenermanconsulting.com

Appointed by House Speaker Mark Eves:

Stephen Rich

374 Hudson Road
Glenburn Maine 04401
Phone 207.745.8572
stephen.rich.aia@gmail.com

Staff:

Peggy Schaffer, Small Business Advocate

Nash School Building, 103 Sewall St.
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Information about the Small Business Advocate
may be found at: www.maine.gov/sos/sba

Appendix C: Minutes of the Regulatory Fairness Board Meetings

Regulatory Fairness Board Meeting October 12, 2016, at the Augusta Civic Center, Augusta Maine 3:30 – 5:15

Members of the Board: Stephen Rich, Chair, Matthew Dunlap

Small Business Advocate: Peggy Schaffer

Members of the public:

June Holman, Childcare provider and Maine Childcare Association

Shantelle Pentgil, Childcare Provider

Eloise Vitelli, New Ventures

Betty Adam, Central Maine Newspapers

The Chair convened the meeting with an overview of the history of the Regulatory Fairness Board and its purpose.

Ms. Holman and Ms. Pentgil brought forward their concerns with the childcare licensing and inspection process in Maine. Ms. Holman runs a small childcare business taking care of 20 children. She previously took care of 80 children. Because of the regulatory structure in place to run a large center, she has decreased the size of her business.

Ms. Pentgil runs a childcare center in Androscoggin County with 93 children.

Both talked about the inflexible structure of the inspection process, and the requirements placed on their businesses that were not placed on similar businesses not in the childcare field. They noted that the number of licensed childcare facilities in Maine has decreased from around 2000 to a little less than 1800 in the past year. The inability to get childcare is one of the major impediments for parents who are working.

They also noted that it was increasingly difficult to get parents child care subsidies to place children into childcare. This often creates a barrier to low income parents who are trying to work, but are unable to afford childcare for their children.

The Board offered suggestions on statutory and other changes that might be helpful to create more predictability in the inspection process and to clarify the licensure rules.

The meeting adjourned at 5:15

Meeting of the Regulatory Fairness Board, November 2, 2016 12:00-1:15
Thomas College, Spann Student Center, Waterville Maine.
Regulatory Fairness Board: Stephen Rich, Chair, Matthew Dunlap
Small Business Advocate: Peggy Schaffer
Members of the Public: Alan Tibbetts, Sidney

The Chair convened the meeting with an overview of the history of the Regulatory Fairness Board and its purpose.

The group had wide ranging discussion about many issues that Mr. Tibbetts – who was a candidate for the Legislator – was hearing as he talked to people in Sidney and Oakland. Topics included health care availability and cost, access to quality broadband, concerns over transportation and roads issues. The group also discussed some of the ballot initiatives.

The meeting was adjourned at 1:15.