

MAINE STATE LEGISLATURE

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2018 Report of the Regulatory Fairness Board

to

The Honorable Janet T. Mills, Governor

State of Maine

and

the Joint Standing Committee on Innovation, Development, Economic

Advancement and Business

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 report to the Governor and the Legislature 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 Department of the Secretary of State and the Office of the Special Advocate was created to, in part, staff the board (Appendix A.)

The Regulatory Fairness Board, which is comprised of five members who are, or have been owners, operators or officers of businesses operating in Maine, hear public comments from Maine businesses concerning interactions between their businesses, government agencies and specific State regulations which have a serious impact on them. 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. Also discussed, are administrative and operational purposes and public comments that are received in writing.

This report summarizes the board's activities during the year 2018, including information presented to the board and its resulting recommendations.

The Regulatory Fairness Board held no public meetings during 2018.

The Small Business Advocate worked with over 50 Maine businesses to answer questions, provide information and intercede with regulatory agencies on their behalf. The work encompasses a wide range of issues and interactions with nearly every agency in State government. This report includes a brief sampling of the office work and the Regulatory Fairness Board.

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

Business to Business Assistance

The State of Maine has no direct business to business protection or advocacy and is similar to the service provided by the Office of the Attorney General Consumer Protection Division. This is a significant gap in our business assistance programs. The Advocate and the Consumer Protection Division both receive calls from businesses that are having a variety of issues with other businesses. These are usually larger, out of State companies that Maine based businesses feel are taking advantage of their size and resource differences.

The Advocate and the Consumer Protection Division is not charged with and does not have the authority to provide assistance with these kinds of conflicts. Creating a division similar to the Consumer Protection Division in the Attorney General's Office, specifically for business to business conflicts, is an idea the legislature should consider pursuing. Companies that provide credit card processing services for small businesses are the largest source of these complaints. Issues include overcharging, adding excessive fees and at times, unauthorized withdrawals from small business bank accounts. This results in bank fees and often requires the small business to close and reopen accounts so the credit card processing company no longer has access to their information. While the Maine Bureau of Financial Institutions can send notifications to these credit card processing companies, they have no regulatory authority over them.

Daycare Rules

Daycare businesses have raised several concerns about the process of day care licensing and inspections. Last year, the department released new day care rules that follow some of the suggestions which the Small Business Advocate suggested in 2016, including identifying critical violations. Daycare providers continue to push for representation at the department's internal meetings when a licensee is put on probation as a result of an inspection. As more attention is given toward expanding options for quality child care in Maine, it is important to remember the regulatory burden that is often placed on these small businesses as a result. Often increasing the standards and requirements to run a child care business can prove to be too burdensome and may result in a decrease in the number of child care providers. Quality child care is critical for Maine's economy. As the legislature attempts to expand child care options, it will be important to remember to strike an appropriate balance of quality standards and flexible regulations that running a business which serves young children often needs.

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 changes are made one at a time and the current regulatory system is a patchwork of exemptions created over time. Each business has a slightly different business model and must be presented to the legislature to request a statutory change. This process makes little sense to the business or to Maine's Liquor Enforcement Division and as a result makes liquor laws difficult to navigate and implement. A complete recodification of the statute is long overdue and would make the current exemptions more consistent and easier to navigate by businesses.

Gathering Greater Public Feedback

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 which potentially create an undo regulatory burden. This form went live in February 2015.

Broadband Expansion

Lack of access to any broadband or high speed internet creates major difficulties for small businesses in our State when attempts are made to gain access to customers, markets, on-line business support services and much more. This limits growth of existing businesses and the start-up of new businesses.

Maine has made incremental investments to expand broadband service to unserved areas of the State over the past twelve 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 that do GIS mapping or survey existing broadband services to also grow and add new employment. The world is changing and Maine can no longer afford to incrementally expand broadband a few miles at a time each year.

Maine needs to make a significant investment in the expansion of broadband to under and unserved areas of the State. This can be done by using State funds to assist with strategic projects which 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 communities. Expansion of broadband to many rural areas of this State will never make economic sense to private companies unless the State provides revenue to lower the cost. Local communities face the same challenge when they seek to build out broadband to their citizens. Absent some higher level of State funding for broadband deployment, all of Maine, but particularly rural Maine, cannot participate in the global economy.

2018 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 unique expertise to serve as liaisons between the State's business community, regulatory authorities, and lawmakers. The Secretary of State serves as the Chair of the board. Currently the board has one vacancy, an appointment which is made by the Governor. A list of members is included in Appendix B.

Because of scheduling conflicts, the board held no meetings in 2018.

Activity of the Small Business Advocate January 2018 –December 2018

The Small Business Advocate assisted over 50 businesses answering questions, providing information and interceding with regulatory agencies on their behalf. The 2017 Annual Report was submitted to the Joint Standing Committee on Labor, Commerce and Economic Development Committee on February 1, 2018.

The Small Business Advocate testified or monitored at least ten bills this past legislative session. These included increased funding for ConnectME, restructuring of ConnectME, pole attachment regulations, dig once, data collection and digital literacy, two general obligation bonds to support broadband and legislation dealing with liquor and daycare licensing.

The Advocate continues to play 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 the expansion of broadband coverage in Maine. The coalition (www.mainebroadbandcoalition.org) has developed a specific set of principles and goals for its work. The Advocate coordinated State responses to help shape the new USDA broadband program Re-Connect and attended several meetings held by the USDA and ConnectME to talk with communities about USDA grants and loans. The advocate served as part of a grant review committee for the Maine Community Foundation Community Broadband Grants. There were 19 grant submissions reviewed from across the State.

The Advocate also attended the “ground breaking” for a community built network on Cranberry Isles with Anne Hazlett, Deputy Secretary at the USDA, Congressional office staff and others engaged in expanding community based broadband solutions.

A conference on broadband was organized by the Advocate and held at Thomas College. National experts Chris Mitchell from the Institute for Local Self Reliance, Jeff Christiansen from EntryPoint Solutions and Jase Wilson from Neighborly presented to the conference of over 100 attendees. Also included, were local panelists from Maine communities who are engaged in broadband planning and communities that are building out networks. Each group shared lessons learned, ideas on how to move forward and progress which has been made. As part of this event, the Advocate joined Chris Mitchell and Jeff Christensen on the Maine Public Broadcasting Network's Maine Calling Program to discuss community broadband.

As co-chair of the coalition, the Advocate attended a meeting organized by the Telephone Association of Maine on creating a public outreach strategy to increase demand for broadband, and organized a multi-part stakeholder meeting to implement the Maine Development Foundation and Maine State Chamber of Commerce's *Making Maine Work* recommendation of legislative passage of a \$100 million band to expand broadband.

The advocate attended meetings in Franklin County, Belfast, Bethel, Skowhegan, Georgetown, as well as meetings which were held with CEI, EntryPoint, GrowSmart, the National Digital Equity Center and the Telephone Association of Maine regarding financing, smart cities/regions, telehealth and strategies to increase digital literacy in Maine. The Advocate also maintains the listserv of 230 members and provides weekly news updates for coalition members, as well as maintaining the coalition's Facebook, Twitter and webpage. She also maintains close contact with the State's Federal Legislative delegation regarding national opportunities for broadband expansion.

Case Work Sampling

Pole Attachment

Pole Attachment continues to be a significant issue impacting the ability for small ISP's and communities to expand broadband. This year the advocate continued to monitor the Public Utilities Commission's Chapter 880 rules on pole attachment, including rate setting and whether pole replacement is considered part of "make ready" or a separate activity.

Beaver Removal

An Aroostook County hotel owner contacted the Advocate with a complaint about nuisance beavers on his property. The owner removed beavers several times in the past at his own expense, only to have them return. He asked if the Department of Inland Fisheries and Wildlife, the Department of Transportation or the United States Fish and Wildlife Service would be willing to assist with removal of the beaver, as dams were flooding part of his property near his driveway. Those agencies contacted the owner and were assessing whether the beavers presented a danger to the State road, at which point the State would pay for immediate removal.

Retail Sale of Pesticide Free Tick Repellent

An organic pet product store contacted the advocate for marketing assistance regarding a cedar based tick repellent approved for retail sale in Maine. Calls to the Maine Board of Pesticide Control revealed that staff was awaiting reply from the manufacturer for data, to verify the claim that the application “kills ticks and fleas.” This particular manufacturer had previous issues on claims of effectiveness at State and national levels with the Environmental Protection Agency. To that end, the pet store moved to another product that met the EPA and MBPC requirements.

Absence of Access to High Speed Broadband

The Advocate received a number of calls from small businesses which were unable to get access to broadband. Some of these companies had no access and 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 costs were prohibitive. These companies were from across the State, ranging from Portland to Trescott and Bridgewater to the western mountain region.

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 – Chair

Nash School Building, 103 Sewall Street
148 State House Station
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Appointed by Governor Paul R. LePage:

Ms. Patricia Kuhl

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

Appointed by the Governor

Vacant

Appointed by Senate President Justin Alford:

Honorable David Brenerman

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Appointed by House Speaker Sarah Gideon:

Stephen Rich

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