

MAINE STATE LEGISLATURE

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2017 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, which is comprised of five members who are or have been owners, operators, or officers of businesses operating in Maine, 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 2017 including information presented to the Board, and its resulting recommendations.

During 2017 the Regulatory Fairness Board held no public meetings

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.

Business to Business Assistance: The State of Maine has no direct business to business protection or advocacy, similar to the service the Attorney General's Office's 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 who the Maine based businesses feel are taking advantage of the size and resource differences. Neither the Advocate nor the Consumer Protection Division has it in its charge or authority to provide assistance with these 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.

Day care Rules: Daycare businesses have raised several concerns about the process of day care licensing and inspections. This year the Department released new day care rules that follow

some of the suggestions the advocate made 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.

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 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 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 areas 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.

2017 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 lawmakers. The Secretary of State serves as 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.

Because of scheduling conflicts, the board held no meetings this past year.

Activity of the Small Business Advocate January 2017 –December 2017

The Small Business Advocate worked with over 25 businesses to answer questions, provide information and to intercede with regulatory agencies on their behalf. The 2016 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 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 licensing, day care licensing, and aquaculture leasing.

The Advocate attended a meeting in Belfast with over 30 businesses from Waldo County organized by Representative Herbig to talk about business regulation and business assistance provided by the State.

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 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 (www.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 a blog on the Bangor Daily News.

The advocate participated in panels on rural broadband at the Envision Maine Summit on Maine's Next Rural Economy in February, and with the University of Southern Maine's Muskie School. The advocate met with the "paper industry towns" of Madison, Lincoln, Millinocket, East Millinocket, Rumford and Bucksport to talk about how those communities can use broadband as a central part of their economic recovery plan.

The Advocate also organized a meeting with Congresswoman Pingree and several coastal and island communities on how Congress can help rural communities expand broadband, and has worked with Senator King's staff to provide information and feedback on federal programs that can help expand access to broadband.

A Sampling of Case Work

Pole Attachment - Pole Attachment rules being promulgated by the Public Utilities Commission was a significant activity to reduce the regulatory barriers for small ISP's, cable companies and municipalities to bring broadband to more areas of the State. The Advocate played a pivotal role in coordinating the Maine Broadband Coalition's activities around pole attachment. This included legislative testimony, contributing to a working group to amend statutory language to ensure final passage of statutory changes. The Advocate also attended work sessions on the proposed rule, keeping coalition members informed of the rules proceedings, and preparing comments on both the strawman rules and the final proposed rule on pole attachment. Tim McAfee of Pioneer Broadband notes the immediate impact of these rule changes for his company;

"Pole surveys in The County today with FairPoint/Concurrent and Houlton Water Company. We have had several instances of boxing and being lowest position that allowed us to save money and time on fiber construction in Hodgdon, Maine.... Thank you to everyone that pitched in to make these changes possible."

Lead abatement – An apartment owner called concerned that DEP was making a site visit to check for lead. The apartment had a positive lead test in 2009, and the owner had done some work on the building since, but DEP had never contacted them about the positive test. The Advocate contacted DEP about the inspection. The lead abatement position was just recently filled and the department was now following up on old positive tests. The building would be retested, and the work the apartment owner had done on remediation would be included in the retest.

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. Several tourism businesses in Forest City called because they had seen Fairpoint activity in the area but had so far been unable to get better service. The Advocate called Fairpoint who had just expanded service to that area using Federal Connect America Funding, and put them in touch with the businesses to get a timeline for improved services.

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, Piscataquis Economic Development Council, Eastern Maine Economic Development Commission, Sunrise County Economic Development, Washington County Council of Governments, Community Concepts in Oxford County, ConnectME, The Island Institute, Kennebec Valley Council of Governments, and Waldo County area businesses.

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.
148 State House Station
Augusta, Maine 04333-0148
Office: 207.626.8410
Cell: 207.215.5871
Email: peggy.schaffer@maine.gov

Information about the Small Business Advocate may be found at: www.maine.gov/sos/sba

