Office of Advocacy
www.sba.gov/advocacy

The Small Business Advocate

Advocacy: the voice of small business in government

June-July 2015 *Vol. 34, No. 5*

Small Businesses Concerned about Patent Reform Bills in Congress

By Jamie Belcore Saloom, Assistant Chief Counsel

Congress is currently considering another round of reform of our nation's patent system. Current reform efforts are aimed at curbing the practice of sending fraudulent demand letters to extort unjust licensing fees or settlements by alleging broad claims of patent infringement. Advocacy has engaged with small businesses who have received such demand letters, small businesses who own patents, universities, and the technology transfer organizations that work with small patent holders to license and commercialize their inventions.

Last year, Advocacy submitted a letter in response to a request by the Chair of the Senate Committee on Small Business and Entrepreneurship regarding the concerns of small businesses with respect to the ongoing legislative efforts. In the letter, Advocacy highlighted the importance of a strong patent system to support small innovators, and urged Congress to carefully tailor any legislative reforms aimed at curbing abusive demand letters to avoid harming small business's ability to enforce their legitimate patent rights. This year, both the House Judiciary Committee and the Senate Judiciary have voted bills out of committee for consideration by Congress.

Advocacy has heard significant concerns from small innovators about several provisions of HR 9, especially with regard to both

Continued on page 8

Effects of Patenting Changes on Small Businesses Examined

In June, Advocacy released a new research report entitled *The Leahy-Smith America Invents Act: A Preliminary Examination of Its Impact on Small Businesses.*

The Leahy-Smith America Invents Act of 2011 (AIA) included a provision directing the Office of Advocacy to study how changes made to the U.S. patenting system could affect small businesses. In 2014, the Bella Research Group was awarded a contract to carry out this study which can be found on Advocacy's website at http://go.usa.gov/3vNUR.

Also see Advocacy's issue brief, *Patenting and Innovative Startups: Putting the America Invents Act in a Broader Economic Context,* at http://go.usa.gov/3Gkm9.

In This Issue

Legislative News

Small Businesses Concerned about Patent Reform Bills in Congress. 1

Advocacy News

Advocacy Welcomes New Economists. 2

Interns Join Advocacy for the Summer. 3

Economic News

Office of Economic Research Releases New Publications . .3

Regulatory News

Recent Regulatory Comment Letters and Alerts. 4

Advocacy Urges FCC to Preserve Small Business Choice in Communications . .7

Regional News

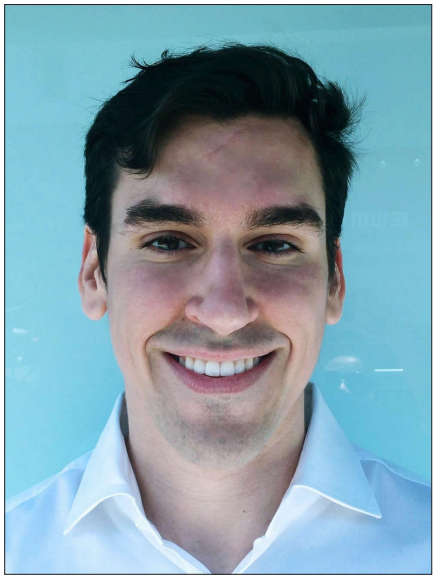
Online Interactive Feature Highlights "3 Reasons to Love Your Region". 5

Advocacy Welcomes New Economists

Lindsay Scherber has joined Advocacy as a regulatory economist. Scherber recently earned her master of public policy degree from George Washington University, with a concentration in regulatory policy. Her master's work included analysis of many important issues, including minimum wage proposals, payday lending reform and proposed amendments to SEC Regulation A (small business exemptions).

Scherber's professional background includes a fellowship last summer at the Office of Information and Regulatory Affairs's Food, Health and Labor Branch; three years working for a Washington, D.C., law firm as finance coordinator and litigation paralegal; and a stint in the Washington State Attorney General's office as a consumer complaint analyst.

Scherber has interned in the U.S. House of Representatives and worked on political campaigns. She received her BA in politics and government from the University of Puget Sound in Tacoma, WA.



Richard Schwinn, Ph.D., has joined Advocacy as a research economist. Most recently, Schwinn was a statistical consultant for a Chicago startup company with over $1 billion in capital, where he provided statistical research, analysis and advice. At the startup, he also performed financial research and developed and presented statistical and economic models. Schwinn also served as a faculty instructor at Northeastern Illinois University and a visiting lecturer at Loyola University and the University of Illinois, where he taught various courses in economic subjects.

In addition, Schwinn has held a variety of other positions, such as a researcher for the Lincoln Institute of Land Policy and the Institute of Public Safety Partnerships in Chicago; a private options trader; and a reporter and photographer for a sporting magazine.

Schwinn holds a Ph.D in economics, an MS in mathematics, and an MA in economics, all from the University of Illinois, as well as a BS in business from Miami University in Oxford, OH.

Daniel Wilmoth, Ph.D., has joined Advocacy as a research economist. Previously, Wilmoth was an economist with the Office of the Assistant Secretary for Planning and Evaluation at the Department of Health and Human Services, where he reviewed regulatory impact analyses for regulations promulgated by various agencies such as the Centers for Medicare and Medicaid Services and the Food and Drug Administration (FDA). In this role, Wilmoth ensured that regulatory impact analyses met all relevant requirements, including those associated with the Regulatory Flexibility Act.

Prior to that, Wilmoth was an economist at the FDA, where he analyzed the impacts of regulations and programs affecting pharmaceuticals, tobacco products and medical devices. In addition, Wilmoth was an assistant analyst at the Congressional Budget Office.

Wilmoth holds a Ph.D. and MA in economics from Cornell University and a BA in economics with a minor in journalism from the University of Iowa.

Interns Join Advocacy for the Summer

Meghan Mandel joins Advocacy as an intern in the Office of Interagency Affairs. Mandel is a rising second year student at The George Washington University School of Law.

Mandel graduated from the University of Massachusetts in 2012 with a BA in political science. She was the valedictorian and the top academic award recipient for the political science department. Mandel also studied pastry making at the Culinary Institute of America.

Emily Theroux joins Advocacy as an intern for the Office of Information. Theroux is a junior at George Mason University studying communications with a minor in business. She is a member of the Public Relations Student Society of America as well as a member of the Gamma Phi Beta Sorority where she is currently serving as the social chairwoman and previously worked on the scholarship committee.

From left: Meghan Mandel, Emily Theroux, Nick Mastron, and Tiffany Tse.

Nick Mastron joins Advocacy as a regulatory economist intern. Mastron is a Ph.D. candidate in public policy and administration at George Washington University with a concentration in gender and social policy. He received his undergraduate degree from the University of Memphis with majors in political science, economics, international studies and history.

Tiffany Tse joins Advocacy as an intern in the Office of Interagency Affairs. Tse is a rising second year student at The Catholic University of America Columbus School of Law, where she is the recipient of the Faculty Merit Scholarship. She is active in the Asian Pacific American Law Students Association, Delta Theta Phi and the Democratic Law Student Association. Tse received her BS in Earth, systems and the environment and political science from University of Illinois at Urbana-Champaign in 2013.

Office of Economic Research Publications

Advocacy's Office of Economic Research has recently released the following publications:

- The Leahy-Smith America Invents Act: A Preliminary Examination of Its Impact on Small Businesses, http://go.usa.gov/3vNUR
- Issue Brief #9: Patenting and Innovative Startups: Putting the America Invents Act in a Broader Economic Context, http://go.usa.gov/3vNUF
- Issue Brief #8: An Overlooked Demographic: Equally-Owned Businesses or EOBs, http://go.usa.gov/3vNUd
- Three Reasons to Love Your Region, http://go.usa.gov/3GkWW
- Small Business Facts: Putting Recent Venture Capital Gains in Perspective, http://go.usa.gov/3vNP3
- Small Business Bulletin: Small Business Market Update, June 2015, http://go.usa.gov/3vNPT
- Quarterly Lending Bulletin: Third and Fourth Quarter 2014, http://go.usa.gov/3vNPm

Regulatory Comments

Comments Respond to EBSA Proposed "Fiducary" Rule

On July 17, 2015, Advocacy submitted a comment letter to the Employee Benefits Security Administration (EBSA) in response to the agency's April 14, 2015 proposed rule, Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice. The proposed rule would expand the definition of "fiduciary" of an employee benefit plan by providing investment advice to a plan, its participants, or beneficiaries. The proposal would extend the fiduciary standard of care to all advisers of workplace retirement plans and IRAs. It would require these advisers to disclose any potential conflicts of interests and the proposal would again prohibit advisers from engaging in certain transactions.

Based on input from small business owners and representatives, Advocacy is concerned that the Initial Regulatory Flexibility Analysis (IRFA) contained in the proposed rule lacks essential information required under the Regulatory Flexibility Act (RFA). The IRFA does not adequately estimate the number of small entities that would be affected and does not accurately estimate the costs of the proposal. Advocacy recommends that the EBSA publish for public comment a Supplemental IRFA before proceeding with this rulemaking. It should provide more accurate estimates of the number of small entities impacted by the proposal and of the costs of the proposal. Advocacy also encourages EBSA to consider ways to decrease the potential small business burdens of the proposed rule.

For more information, see **http://go.usa.gov/3Gkce** or contact Dillon Taylor at (202) 401-9787 or **Dillon.Taylor@sba.gov**.

Advocacy Submits Comments Regarding Low-Power TV Stations

On June 12, 2015, Advocacy filed a notice of an ex parte meeting with the FCC detailing a meeting on June 11, 2015, where Assistant Chief Counsel for Advocacy Jamie Saloom and Director of Interagency Affairs Charles Maresca met with staff in the FCC's Wireless Telecommunications Bureau. During the meeting, Advocacy staff forwarded the concerns of small low-power television licensees with regard to the upcoming broadcaster incentive auction. In the meeting, Advocacy stressed that the FCC has an obligation to preserve localism and diversity in broadcasting, and expressed concern that the FCC has not yet given the Low-Power TV Stations (LPTV) community sufficient reassurances that those stations who wish to continue broadcasting will be able to do so.

Advocacy highlighted the investments and added value that LPTV owners have made in their communities, and urged the FCC to protect those investments through its auction policy. Specifically, Advocacy recommended that the FCC:

- make vacant channels available post-auction for displaced LPTV and translator stations before expanding unlicensed white spaces;
- allow voluntary channel sharing arrangements to the extent possible, so LPTV stations can continue to broadcast in their existing service areas; and
- use its optimization software to assist LPTV licensees with identifying suitable channels to relocate post-auction.

For more information, see **http://go.usa.gov/3vNWw** or contact Jamie Belcore Saloom at (202) 205-6890 or **Jamie.Saloom@sba.gov**.

Advocacy Comments on Small Business Participation in Spectrum Auctions

On June 8, 2015, Advocacy filed a notice of an ex parte meeting with the FCC detailing a meeting on June 4, 2015, at which Assistant Chief Counsel for Advocacy Jamie Saloom met with staff in the FCC's Wireless Telecommunications Bureau. During the meeting, Advocacy discussed ways in which the FCC can amend its rules to improve its auction policies to encourage greater competition and small business entry and growth in the wireless marketplace.

Advocacy expressed strong support for the use of small business credits in spectrum auctions, and encouraged the FCC to incentivize further small business participation in its future auctions by updating some of its competitive bidding rules. Advocacy also cautioned against adopting measures that would result in decreased competition and participation by small businesses.

Advocacy specifically recommended that the FCC: eliminate its Attributable Material Relationship (AMR) rule, and evaluate DE eligibility using a case by case approach to determine whether an eligible small business licensee retains control over the spectrum for which it received small business benefits; allow DEs more flexibility, not less, in their ability to lease spectrum; limit the availability of bidding credits to small entities, as defined by SBA-approved size standards; and decline to institute arbitrary caps on DE credits.

For more information, see **http://go.usa.gov/3vNWe** or contact Jamie Belcore Saloom at (202) 205-6890 or **Jamie.Saloom@sba.gov**.

Continued on page 5

Online Interactive Feature Highlights "3 Reasons to Love Your Region"

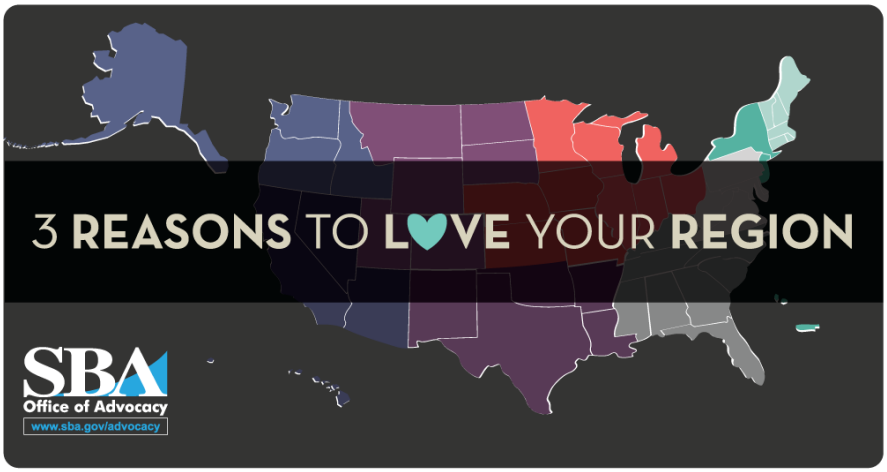
By Emily Theroux, Advocacy Intern

On July 1, the Office of Advocacy launched a new page on their website titled *Three Reasons to Love Your Region*. This new interactive publication was designed to encourage regional pride and unity by providing distinguishing small business facts and statistics that reflect the brightest aspects of each region of the United States.

"The facts not only represent small business success in each region, but also collectively display the vitality of our nation's small business community," explained Christine Kymn, Advocacy's director of economic research.

"One of the aspects of our nation that makes it so great is the diversity throughout its many regions. Here at Advocacy, we wanted to highlight the small business diversity that gives rise to America's economic success," Kymn added.

The various small business facts are divided into seven different categories: innovation; entrepreneurship; job growth and stability; demographic diversity; international involvement; and access to capital. Intermixed with these small business statistics are interesting regional fun facts and small business success stories.



In an effort to make it easier for the users of Advocacy's website to access the data, this release has been paired with an interactive map.

"Advocacy is taking great strides to advance the use of online graphics to help explain how small businesses are thriving in the U.S. economy. This is just the beginning of Advocacy's efforts to transition into a modern display," said Sarah Coleman, Advocacy's graphic and data visualization designer.

With the arrival of this energizing new web display, Advocacy is optimistic about the office's ability to reach out to a greater audience and further promote regional growth and pride.

To access *Three Reasons to Love Your Region*, visit Advocacy's website at **http://go.usa.gov/3GkWW**.

Regulations, *from page 4*

Comments Urge DOL to Minimize Costs of Wage Increase for H-2A Herders

On May 22, 2015, Advocacy sent a letter to the Department of Labor on its proposed rule which amends regulations under the H-2A program to codify procedures for hiring temporary agricultural foreign workers for job opportunities in sheepherding, goat herding and production of livestock on the open range.

Background: On October 7, 2011, U.S. workers filed a lawsuit in the U.S. District Court for the District of Columbia challenging DOL's special guidance documents that governed sheep and goat herders under the H-2A visa. While the district court dismissed the case, the U.S. Court of Appeals for the D.C. Circuit concluded that DOL's guidance documents were subject to notice and comment under the Administrative Procedure Act (APA). DOL issued this notice and comment rulemaking to remedy this APA violation.

This proposed rule changes the wage methodology for H-2A workers in these special occupations, which will double to triple the wage rate for these workers; this increase will be phased in over five years. Based on small business feedback, Advocacy is concerned that these wage increases may significantly reduce or eliminate the profitability of these small entities and may result in these entities reducing or closing their operations.

Advocacy is concerned that DOL's Initial Regulatory Flexibility Analysis may underestimate the cost of this rule for small herding operations because these small employers may hire more H-2A workers than DOL has estimated; there may also be extra costs such as housing units and workers'

Continued on page 6

Regulations, *from page 5*

compensation insurance. DOL also did not include alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize the rule's economic impact on small entities, as required by the Regulatory Flexibility Act.

Advocacy recommends that DOL publish a Supplemental IRFA for public comment reanalyzing compliance costs. DOL should also consider any recommended small business alternatives that may minimize the economic impact of this rulemaking.

For more information, visit **http://go.usa.gov/3vNZx** or contact Janis Reyes at (202) 205-6533 or **Janis.Reyes@sba.gov.**

Comments to FCC Address Network Technology Transitions

On June 23, 2015, Advocacy filed an ex parte letter with the Federal Communications Commission (FCC) regarding several proposals the FCC is considering that would govern incumbent local exchange carriers' (ILEC) obligations with regard to both consumers and competitive carriers when modernizing their networks.

In its notice of proposed rulemaking, the FCC stressed that technology transitions must preserve the principles of the Communications Act that have defined the relationships between those who build and operate networks and those who use them—competition, consumer protection, universal service, public safety and national security. Advocacy offered support to the FCC's goal of preserving competition as network technology evolves, and specifically suggested that the FCC:

• adopt a rebuttable presumption requiring applications for the discontinuance of wholesale service offerings, under the FCC Section 214 copper retirement rules, and

• require incumbent providers to offer equivalent wholesale rates, terms, and services to competitive providers when it grants such applications.

For more information, see **http://go.usa.gov/3GTkY** or contact Jamie Belcore Saloom at (202) 205-6890 or **Jamie.Saloom@sba.gov**.

Regulatory Alerts

Department of Labor Issues Proposed Overtime Regulations

On July 7, 2015, the Department of Labor's (DOL) Wage and Hour Division published a proposed rule that amends the regulations under the Fair Labor Standards Act (FLSA) governing the "white collar" exemption from overtime pay for executive, administrative and professional employees.

The proposed rule from DOL:

• would double the salary threshold for employees who are eligible to receive overtime pay, from $23,660 to $50,440. This salary threshold will also be updated every year in the Federal Register, and

• does not propose regulatory changes to the duties tests, which require employees to perform certain primary duties to qualify for an overtime exemption.

However, DOL is seeking feedback on whether these duties tests should be revised.

DOL estimates that this rule would:

• directly affect 4.6 million workers in the U.S, and total direct employer costs for Year 1 are estimated to equal $592.7 million dollars;

• cost each small business, on average depending on the number of workers covered by the regulation, $100 to $600 in direct costs and $320 to $2,700 in additional payroll costs to employees in the first year after the promulgation of the proposed rule; and

• cause each small business to spend one hour of time for regulatory familiarization; one hour per each affected worker in adjustment costs; and five minutes per week scheduling and monitoring each worker expected to be classified as overtime eligible as a result of the proposed rule.

Advocacy is seeking feedback on the numbers and types of small businesses affected by this rulemaking, the compliance costs of this rule to these small businesses, and any significant regulatory alternatives that may minimize the impacts of this rule.

Comments are due to DOL on September 4, 2015. For more information, see **http://go.usa.gov/3GTke** or contact Janis Reyes at (202) 205-6533 or **Janis.Reyes@sba.gov**.

SEC Issues Proposal to Amend Investment Adviser Registration

On June 17, 2015, the Securities and Exchange Commission (SEC) issued a proposed rule that would revise the paperwork requirements for investment advisers who are registering with the SEC and with their state. Specifically, the SEC is proposing amendments to Form ADV that are designed to provide additional information regarding advisers, including information about their separately managed account business; incorporate a method for private fund adviser entities operating a single advisory business to register using a single Form ADV; and make clarifying, technical and other amendments to certain Form ADV items and instructions. Comments are due by

Continued on page 7

FCC Urged to Preserve Small Business Choice in Communications

By Jamie Belcore Saloom, Assistant Chief Counsel

Small business demand for services is driving the evolution of our communications networks, and Advocacy recently filed a letter with the Federal Communications Commission (FCC), urging the body to ensure that small businesses have choices that fit their needs, at prices they can afford. In 2010, Advocacy released a study which concluded that broadband is as vital to running a small business as basic utilities like electricity. Moreover, the study concluded that small business owners are largely dissatisfied with the affordability and choices offered to them in the broadband market.

The majority of small businesses buy broadband and voice services from both incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs). ILECs own and maintain our country's legacy phone network, but are required to lease network facilities to CLECs so that they can provide competing choices in broadband and voice services. ILECs obligations to the public and competitive carriers are governed by a number of regulations to ensure consumer welfare. Network technology is evolving, allowing both ILECs and CLECs to offer a greater variety of services over the same network by upgrading electronics; in some cases ILECs are also retiring copper landlines and replacing them with fiber-optics. The FCC has established a task force that is overseeing policy issues related to these technology transitions and seeking public comment and engagement on various issues.

The FCC has the important responsibility of not only preventing consumer harm as network technology evolves, but also preserving the kind of competition for services that has spurred innovation in the way communications are delivered. FCC Chairman Tom Wheeler has vowed that small businesses will not lose the benefits of competition as technology changes. Advocacy has long supported efforts by the FCC to maintain and promote competition for the benefit of small business consumers.

According to information provided by one CLEC, one third of small businesses purchase broadband and/or voice services from competitive carriers. In its most recent letter to the FCC, Advocacy expressed concerns that large incumbent carriers like AT&T and Verizon are planning to retire copper landlines and update network technology without adequate regulatory safeguards in place. Advocacy believes such safeguards are necessary to ensure that prices for small businesses do not increase, and that the number of providers a small business is able to choose from do not decrease. Advocacy strongly supported the FCC's proposals to ensure that incumbents seek FCC permission to retire last mile facilities, and offer replacement products to CLECs at equivalent rates, terms, and conditions.

A number of small businesses, public interest groups and competitive carriers have submitted similar comments to the FCC. Advocacy is interested in hearing from small businesses regarding their experiences purchasing broadband and will continue to forward their concerns to the FCC. For more information, contact Jamie Belcore Saloom at (202) 205-6890 or **Jamie.Saloom@sba.gov**.

Regulations, *from page 6*

August 11, 2015. For more information, see **http://go.usa.gov/3vNZV** or contact Dillon Taylor at (202) 401-9787 or **Dillon.Taylor@sba.gov**.

Proposed Rule Implements Executive Order on Fair Pay and Safe Workplaces

On May 28, 2015 the FAR Council published a proposed rule to amend the Federal Acquisition Regulation (FAR) to implement the Executive Order (E.O.) "Fair Pay and Safe Workplaces." The E.O. requires that for contracts over $500,000, prospective and existing contractors disclose whether under certain labor laws there has been any administrative merits determination, civil judgment, or arbitral award or decision rendered against them during the preceding three-year period. The E.O. directs agencies to include clauses in their contracts that require similar disclosures by certain subcontractors so their prime contractors can also consider labor violations when determining whether there have been any similar violations by prospective or existing subcontractors.

The E.O. further requires that processes be established to assist contractors and subcontractors to come into compliance with labor laws. To achieve paycheck transparency for workers, the E.O. requires contractors and subcontractors to provide individuals with information each pay period regarding how they are paid and to provide notice to those workers whom they treat as independent contractors.

Comments on this rule are due on July 27, 2015. For more information, see **http://go.usa.gov/3vNZH** or contact Major Clark at (205) 205-6533 or **Major.Clark@sba.gov**.

Patent Reform, *from page 1*

the fee shifting and joinder provisions of the bill. HR 9 includes a presumption in favor of requiring the losing party of a patent dispute to pay the prevailing party's fees. Some stakeholders are concerned that this provision would offer a strong disincentive for a small business to attempt to enforce their legitimate patent rights.

The Senate bill (S. 1137) has fee-shifting language that is slightly different than the language in HR 9. The Senate's language gives a judge discretion to award attorney fees upon a showing by the prevailing party in a patent dispute that the actions of a non-prevailing party were objectively unreasonable. Some stakeholders believe the Senate's fee shifting provision is slightly less onerous for patent holders than HR 9, because it does not require them to overcome any presumption that their attempt to enforce their patent rights was unreasonable.

However, small businesses are also concerned about the joinder provisions in both bills, that would make investors liable for attorney's fees in the event a patent holder loses their lawsuit. While S. 1137 includes a carve-out for universities and other educational institutions, some stakeholders have expressed concern that the joinder provisions will deter investment in start-ups by venture capital and angel investors.

Advocacy is interested in hearing from small businesses regarding the ongoing patent litigation reform efforts. For more information, contact Assistant Chief Counsel Jamie Belcore Saloom at (202) 205-6890 or **Jamie.Saloom@sba.gov**.

For more information on Advocacy's research efforts on small business patenting, please review *Issue Brief 9: Patenting and Innovative Startups: Putting the America Invents Act in a Broader Economic Context,* at **http://go.usa.gov/3Gkm9**, as well as the study, *The Leahy-Smith America Invents Act: A Preliminary Examination of Its Impact on Small Business,* at **http://go.usa.gov/3vNUR**.

Explore Advocacy!

Website **www.sba.gov/advocacy**

Email **advocacy@sba.gov**

Blog **http://weblog.sba.gov/blog-advo**

Facebook **www.facebook.com/AdvocacySBA**

Twitter **www.twitter.com/AdvocacySBA**

Listservs *(News, regulatory news, research and statistics)* **www.sba.gov/content/connect-us-0**

The Small Business Advocate

Managing Editor Brooke Nelson, **Brooke.Nelson@sba.gov**

The Small Business Advocate newsletter is published by the U.S. Small Business Administration's Office of Advocacy. It is distributed electronically to 35,000 subscribers.

The Office of Advocacy is the independent voice for small business in the federal government. The office is the watchdog of the Regulatory Flexibility Act (RFA) and the source of small business statistics. Advocacy advances the views and concerns of small business before Congress, the White House, the federal agencies, the federal courts, and state policymakers.

To begin receiving the newsletter or to update your subscription, visit **www.sba.gov/content/connect-us-0**

Address *Office of Advocacy, U.S. Small Business Administration, MC 3114, Washington, DC 20416*
Phone *(202) 205-6533*

Federal Recycling Program
Printed on recycled paper