

The Regulatory Flexibility Act + The Office of Advocacy = Small Business's Voice in Federal Rulemaking

by Sarah Bresolin Silver, Assistant Chief Counsel

The federal rulemaking process can be long and involved. The Office of Advocacy plays a small but important role in this process which is spelled out in the Regulatory Flexibility Act and several executive orders. The Environmental Protection Agency's formaldehyde rulemaking is a current example of how the office makes sure small business is represented throughout a prolonged, complex process. (Table 1 contains a brief timeline.)

The topic of regulating formaldehyde in home building materials dates to 2005, when the trailers housing the residents

displaced by Hurricane Katrina were found to have high levels of formaldehyde gas. The push for regulations was launched in 2008. In March of that year, 25 organizations and 5,000 individuals petitioned EPA to adopt the California Air Resource Board's (CARB) airborne toxic control measures for formaldehyde in composite wood products nationally. In June, EPA announced a decision to grant some parts of the petition, and the agency issued an advance notice of proposed rulemaking in December.

Advocacy became involved in

fall of 2010 when EPA convened a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel. SBREFA requires that EPA seek input from affected small businesses before proposed rules are published. At this early stage, small businesses can help shape the regulatory approach, which is much more effective than asking for substantive changes after a rule has been proposed. The formaldehyde panel consisted of representatives of the administrator of EPA, the chief counsel for advocacy, and the administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs (OMB/OIRA). The panel met with 17 small entity representatives from across the country. They commented on

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Table 1.

Key Dates in the Formaldehyde Rulemaking Process

2008	March 24. A group of 25 organizations and 5,000 individuals submit a petition to EPA under section 21 of the Toxic Substance Control Act (TSCA).
	December 3. EPA issues an advance notice of proposed rulemaking.
2010	July 7. Legislation is passed adding Title VI, Formaldehyde Standards for Composite Wood Products Act, to TSCA.
	February 3. EPA convenes a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel. The SBREFA panel is a preliminary step to consider how to approach the rulemaking and to gather input from small entities. Advocacy coordinates these small entities' participation.
2011	April 4. SBREFA panel concludes; panel report goes to EPA Administrator.
2011-2013	Advocacy continues discussions with EPA, all the while seeking small business input.
2013	June 10. EPA issues two proposed rules regulating formaldehyde emissions from composite wood products.
	July 19. Advocacy hosts environmental roundtable on proposed rules. EPA officials participate with small businesses.
	July 24-25. Advocacy staff visits small factories in Vermont and New York.
	August 21. Advocacy submits small business comments on the two rules to EPA (online at www.sba.gov/advocacy/816).

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Small Business Input into EPA Formaldehyde Rules,
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EPA’s analysis of the rule’s small business impact and recommended alternative regulatory approaches in many areas. The final panel report was submitted to the EPA administrator in April 2011.

Following the completion of the panel, Advocacy staff attorneys and economists continued to work with EPA on how best to use small business analysis and recommendations.

On June 10, the five-year process resulted in EPA’s publication of two proposed rules. Advocacy renewed its outreach to small entities to prepare official public comments on the proposed rule. Advocacy invited EPA to speak to its July environmental roundtable. Afterward, EPA offered an open door policy to small businesses, inviting them to EPA to meet with agency staff. Advocacy helped EPA follow up with roundtable participants who voiced concerns. On July 24 and 25, Advocacy staff met with small businesses at their factories in Rutland, Vermont, and McConnellsville, New York.



Sarah Bresolin Silver, assistant chief counsel, and Doug Babbitt, executive vice president of Rutland Plywood Corporation, on a site visit to the Vermont small business in July.

Advocacy also observed CARB’s day-long event, “Discussion Session Regarding ARB’s Airborne Toxic Control Measure to Reduce Formaldehyde Emissions from Composite Wood Products and Proposed U.S. EPA Regulations,” on August 1.

This extensive outreach and information exchange informed Advocacy’s public comment letter to EPA submitted on August 21. The letter outlines the most significant small business concerns

highlighted in meetings and conversations. (Table 2 summarizes two key points from the letter.)

Advocacy will continue to promote small business concerns as EPA develops its final rules. Advocacy hopes this extensive stakeholder outreach and engagement with EPA will have a significant and measurable effect on the final rules and will lead to a reduction in the burdens small businesses face once the rules are made final.

Table 2.

Key Small Business Concerns Highlighted in Advocacy’s Comments to EPA

Although the SBREFA panel recommended that EPA adopt regulatory requirements that are consistent with the California Air Resources Board’s (CARB) airborne toxic control measures on composite wood products wherever possible, EPA’s proposed regulations surpass CARB’s. In many instances, EPA used its Congressionally mandated authority to impose greater burdens on small businesses without any indication that the CARB measures were insufficient.

EPA accepted only about two-thirds of the SBREFA panel’s consensus recommendations. In the past, EPA has almost always followed panel recommendations. To reduce the burden on small business, Advocacy urges EPA to follow the panel’s advice and that it adopt regulatory requirements consistent with the panel report wherever possible.

Source: U.S. Small Business Administration, Office of Advocacy. Letter to EPA Administrator Gina McCarthy, August 21, 2013. www.sba.gov/advocacy/816.

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Managing Editor Rob Kleinsteuber

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Message from the Chief Counsel

North Carolina: Home to Solution-Driven Entrepreneurs

by Dr. Winslow Sargeant, Chief Counsel for Advocacy

When people mention North Carolina, a person's mind could wander from its scenic Outer Banks beaches to Charlotte's banking center to the numerous small business storefronts. After my recent trip to the Queen City of Charlotte, North Carolina, my mind will not meander. I will forever remember North Carolina as the home of solution-driven entrepreneurs—the “game changers,” as author Jim Clifton put it in his book, *The Coming Jobs War*.

On a beautiful August day in Charlotte, when many of these entrepreneurs could have been enjoying the fine weather, they gathered instead for the first annual face-to-face meeting of Senator Kay Hagan's Small Business Advisory Committee. From Miss Jenny's Pickles to the Mast General Store, the room was filled with North Carolina small business owners and entrepreneurial incubators. Our dialog crossed many different topics—the struggle for access to capital, the drive for export expansion, the need for a skilled workforce, and finally, the maze of federal regulations.

After my introduction, the group immediately steered the discussion to regulations, moving it from the last discussion of the day to the first. The chance to vent about the regulatory labyrinth was foremost in their minds. I will never forget the comment of one committee member: “As soon as I open the door to my business, I'm probably breaking the law... I tell my employees it's better to beg for forgiveness.” I was floored.

North Carolina small business owners—the job creators, the businesses that employ close to half of their state's private sector work-

force, who keep their economy alive—live in fear of the regulations imposed by the government. Something is wrong here. Rules should not breed anxiety in the minds of America's game changers. American businesses should not feel that “begging for forgiveness” should be a company motto.

Instead, our small business owners should value government regulations that keep Americans safe, protect the public health and our environment, while cultivating a strong small business economy that promotes economic growth, innovation, and job creation. President Obama reaffirmed his commitment to this charge in Executive Order 13563, “Improving Regulation

and Regulatory Review.” Through events like the one in Charlotte, the Office of Advocacy works to uphold these principles.

Advocacy will use this input to improve the small business regulatory environment and move the small business economy forward. For this reason, I would say our discussion was a success. I was pleased to inform the committee that the Office of Advocacy, small businesses' voice in the executive branch, has been navigating the maze for them for more than 30 years. I explained how we monitor federal regulations and help agencies find alternatives to burdensome rules before they are made final. Hearing from small business owners like themselves provides us with solutions to bring back to the White House, Congress, and federal agencies.

Much to my surprise, the sentiments they initially expressed were followed by the same entrepreneurial spirit that keeps their businesses alive: “We may not understand every step of the process, but we want to be part of the solution. We may not have time to follow the *Federal Register*, but we want to know when you need us to weigh in with our experience.” Their drive to be part of the solution is what will keep America on the path to prosperity.

Our office will continue to navigate the federal rulemaking web, and our Region IV Advocate Mark Berson will continue to reach out to North Carolina businesses. By combining their drive to be part of the solution and our efforts to find alternatives, I believe we will continue to improve the regulatory environment for America's small businesses.



North Carolina Senator Kay Hagen and Chief Counsel for Advocacy Winslow Sargeant.

Comment Deadline To Be Extended in Response to Advocacy Request

On July 29, the Office of Advocacy filed public comments with the Fish and Wildlife Service in response to the notice entitled “National Environmental Policy Act: Implementing Procedures; Addition to Categorical Exclusions for U.S. Fish and Wildlife Service.” The exclusion would allow the agency to add species to the list of injurious wildlife under the Lacey Act without preparing an environmental assessment or impact statement.

Listed species are prohibited from being imported into the United States or transported across state lines, effectively halting commercial trade.

Small businesses contacted Advocacy to express concerns. Those engaged in commercial trade of the species proposed for listing are concerned that the categorical exclusion removes transparency and checks and balances from the listing process. They felt strongly that a

30-day comment period was insufficient to consider all potential effects of this far-reaching exclusion.

In response to Advocacy’s letter, the Fish and Wildlife Service announced that it will reopen the comment period. The new deadline is October 15, 2013. For more information contact Assistant Chief Counsel Kia Dennis at (202) 205-6936, kia.dennis@sba.gov.

Do Trade Restrictions Affect Your Business?

The U.S. International Trade Commission is compiling a report on barriers to trade with the European Union. It is seeking information on trade barriers that disproportionately affect U.S. small and medium-size firms’ exports (as compared to those of large firms). The commission will be releasing its report on July 31, 2014. The notice appeared in the *Federal Register* on July 30, and a public hearing will be held in Washington, D.C., on October 8.

- Requests to appear at the public hearing must be received by September 13.
- The deadline for filing pre-hearing briefs and statements is September 20.
- The deadline for statements is October 15.

Further information on the scope of the study is available in the ITC’s notice of investigation, dated July 25, 2013, posted on www.usitc.gov, or by contacting the ITC Office of the Secretary at (202) 205-2000.

U.S. Small Business Administration
Office of Advocacy
Mail Code 3114
409 Third Street, S.W.
Washington, DC 20416

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