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Liability Law; Contractor Responsibility, Telecom, and OSHA Updates

IRS Change Provides Tax Relief for Larger Small Businesses

The IRS announced a change allowing simplified tax filing for up to a half million additional small businesses beginning in tax year 2001. IRS Notice 2001-76 allows certain small businesses with gross receipts of \$10 million or less to use the cash method of accounting for income and expenses instead of the costly and complicated inventory and accrual method.

THE SMALL BUSINESS

Acting Chief Counsel for Advocacy Susan M. Walthall praised the tax change. "With this change, a half million small businesses can expect a happier new year. The change lets business owners devote more of their resources to running their businesses instead of trying to comply with difficult accounting rules. We'd like to see the IRS extend this option to even more small businesses."

Until now, the IRS could impose the more stringent method, accrual accounting, on businesses with more than \$1 million in receipts. Under accrual accounting, a business generally reports income when it has a right to receive payment and deducts expenses when it has a fixed and determinable liability for them. This can be complicated, requiring specialized accounting assistance, and can create cash flow problems for small businesses.

Expanding the number of small businesses that can use this simplified accounting method has been a prime goal for supporters of small business. The Office of Advocacy,

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Advocacy Receives Beacon Award. At the Office of Advocacy's 25th anniversary gala, the office was honored to receive National Small Business United's Beacon Award, recognizing 25 years of leadership in the defense of small business. NSBU Chair Richard Herring, presented the award to Acting Chief Counsel Susan M. Walthall, who received it on behalf of the office. (Photo: Cable Risdon)

The U.S. Patent and Trademark Office's Role in Protecting Intellectual Property Rights

by Jonathan Pawlow, Assistant Chief Counsel

Intellectual property is a vital asset to many businesses and individuals. Intellectual property is frequently a central part of a business's market niche—a proprietary technology, a catchy name that sets a product apart from the competition, a unique business name. Documenting one's claim to these can be vital to a business's success.

Protection of intellectual property is central to the success of most small businesses in the United States. In many other countries, intellectual property is difficult, if not impossible, to protect, and is commonly co-opted by big companies.

Most industrial property in the United States is protected through a system of patents and trademarks. The Patent and Trademark Office (PTO), an agency of the U.S. Department of Commerce, administers the U.S. patent and trademark laws related to the granting of patents for inventions and certain designs and the registration of

What Is Intellectual Property?

"Intellectual property" refers to creations of the mind-including inventions, literary and artistic works, and symbols, names, images, and designs used in commerce. Intellectual property is often divided into two basic categories, industrial property and copyrights. Industrial property (covered in this article) includes inventions (patents), trademarks, and industrial designs. Copyrights apply to written, musical, and artistic works, software, architectural designs, artistic performances, films, recordings, and radio and television broadcasts. Copyrights will be discussed in a future article. trademarks and servicemarks. The PTO has no jurisdiction over questions of infringement and the enforcement of patents and trademarks, nor over matters relating to the promotion or utilization of patents or inventions. Rather, enforcement of patent and trademark rights is the responsibility of the intellectual property owner under U.S. patent and trademark laws.

A *patent* for an invention is the grant of a property right to the inventor, issued by the PTO. The term of a new patent is 20 years from the date on which the application for the patent was filed in the United States or, in special cases, from the date an earlier related application was filed. U.S. patent grants are effective only within the United States and its territories and possessions. The right conferred by the patent grant is "the right to exclude others from making, using, offering for sale, or selling" the invention in the United States or "importing" the invention into the United States. What is granted is not the right to make, use, offer for sale, sell, or import, but the right to exclude others from making, using, offering for sale, selling, or importing the invention.

Patent holders need to keep a diligent eye open for potential infringers of their patents and to enforce their right to exclude others through the judicial system. The U.S. patent laws provide legal remedies for infringement.

A *trademark* is a word, name, symbol, or device which is used in trade to indicate the source of the goods and to distinguish them from the products of others. A *servicemark* identifies and distinguishes the source of a service (rather than a product). Trademark rights may be used to prevent others from using a confusingly similar mark,

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but not to prevent others from making the same goods or from selling the same goods or services under a clearly different mark. Trademarks that are used in interstate or foreign commerce may be registered with the Patent and Trademark Office. As with patents, trademark or servicemark registrants need to be on the lookout for potential infringers of their marks and to enforce their right to prevent others from using a confusingly similar mark. The U.S. trademark laws provide legal remedies for infringement.

The PTO has many duties. It examines applications and grants patents for inventions when applicants are entitled to them. It also *Continued on page 7*

Message from the Acting Chief Counsel

Advocacy's Work Saves Small Business Billions In Foregone Regulatory Compliance Costs

by Susan M. Walthall, Acting Chief Counsel, Office of Advocacy

In October, the Office of Advocacy celebrated 25 years of being the independent voice for small business within the federal government. As our panel of former chief counsels at the 25th anniversary celebration made clear, it wasn't always (if ever) easy. Many agencies did not know what to make of this thing called "Advocacy," and if they knew, they surely did not want anything to do with us! Yet, over time, they came to understand our role in protecting small business, and some even began seeing Advocacy as a partner in the regulatory process.

Of course, the introduction of the Regulatory Flexibility Act (RFA) in 1980 and the Small Business Regulatory Enforcement Fairness Act (SBREFA) in 1996, went a long way toward making federal rulemaking agencies aware of the unique concerns of small business. With the passage of these laws, Advocacy found its voice and we have been putting it to use ever since.

Since the enactment of the RFA, one of Advocacy's roles has been to oversee the act's implementation by federal agencies. The chief counsel for advocacy's Annual Report on the Regulatory Flexibility Act fulfills this role. The report gives Congress and the President real insight into whether proposed federal regulations put a disproportionate burden on small businesses or interfere with small business growth and innovation. The report also provides Congress and the President with information regarding the effectiveness of this law.

Our figures show that in 2001, Advocacy saved U.S. small businesses \$4.4 billion in annual and one-time savings in foregone regulatory compliance costs. As testa-

In 2001, Advocacy saved U.S. small businesses \$4.4 billion in annual and one-time savings in foregone regulatory compliance costs.

ment to Advocacy's wide-ranging efforts on behalf of small business (and to the breadth of federal rulemaking), these savings included:

• \$3 billion in one-time savings (OSHA cost estimate) due to Congress's overturning of the ergonomics standard under the authority of the Congressional Review Act of 1996. We believe that both the SBREFA panel report and the subsequent SBA cost analysis played a significant role in Congress's decision to rescind this rule.

• \$231.3 million in annual savings (Forest Service analysis) due to a court injunction and the Forest Service's decision to revisit its Roadless Conservation rule. The rule prohibited road construction on 58.5 million acres of Forest Service lands (not already under National Park or Wilderness designation). It would have had significant negative impacts on small businesses and communities located in and near these lands.

• An undetermined amount of savings due to the Internet Corporation for Assigned Names and Numbers (ICANN) issuing seven top-level domain names—*.aero, .biz, .coop, .info, .museum, .name*, and *.pro*. Advocacy pushed for this larger number of additional domains, arguing that it would expand opportunities for small businesses to identify and differentiate themselves from other

Internet businesses.

Advocacy continues to carry out its congressional mandate successfully, as evidenced by our many significant accomplishments. These accomplishments are set against a backdrop of an economy that is extremely dynamic, constantly churning, and combined with rapid technological change. This creates new challenges for analyzing regulatory impacts on small business. One thing has not changed however: the need for the Office of Advocacy remains as strong today as it has ever been.

As we enter the 21st century, small businesses continue to rely on an independent advocate to monitor the obstacles to small business growth and give voice to the concerns of small business owners and their employees in an everchanging, and in some cases, overregulated marketplace.

Women Entrepreneurship in the 21st Century

March 18, 2002 Washington, D.C.

A one-day conference of dynamic speakers, workshops, and discussion of the key issues currently affecting women small business owners.

For more information please contact: Terry Neese (405) 850-4020 or grassrootsimpact@ earthlink.net

Regulatory Update

Environmental Issues Superfund Bill Enacted. On

Jan. 11, 2002, President Bush signed into law the Small Business Liability and Brownfields Revitalization Act. H.R. 2869. Thousands of small businesses welcome this relief from Superfund liability. Reform of the Superfund law was a key environmental recommendation of the 1995 White House Conference. This law eliminates small business liability from federal environmental cleanups where the small firm (fewer than 100 employees) was disposing of only ordinary household-type wastes. In addition, firms that disposed of fewer than 110 gallons of nonhazardous liquid or fewer than 200 pounds of nonhazardous solid material before April 2001 are also exempt from liability. The Bush administration says the new law "will reduce needless lawsuits by drawing a bright line between large contributors to toxic waste and small businesses that disposed of only small amounts of waste or ordinary trash."

Air Toxics Rule for Lime Manufacturing Plants. After extensive discussions, the **Environmental Protection Agency** (EPA) has decided to proceed with a Small Business Regulatory Enforcement Fairness Act (SBRE-FA) panel regarding an air pollution regulation governing potential toxic emissions from the lime manufacturing industry. EPA had not planned to convene a panel because the number of firms was fewer than 100. Advocacy and the industry convinced EPA that it was more appropriate to have a SBREFA panel. This is particularly important because, until this point, EPA had been planning to dispense with all panels on more than three dozen remaining air toxics regulations.

Water Pollution Rule for Metals Products and Machinery. EPA proposed a regulation in

January 2001 that would regulate about 10,000 facilities that manufacture various products and machinery that contain metals, including iron and steel plants, metal finishing plants, electroplaters, automotive plants, and computer plants. EPA estimated the cost of this regulation at \$2 billion a year. This had been the subject of a SBREFA panel in March 2000. Many small business representatives complained about the rule's great expense and the lack of environmental benefits, since most of these facilities are already regulated by other EPA water pollution rules. In large part, EPA attempted to implement the recommendations in the SBREFA panel report to minimize the small business economic impacts. However, a large number of technical and analytical errors were made in the development of the proposed rule, and it has been widely criticized.

The Office of Advocacy is working with EPA and the Office of Management and Budget to review the stringency of this proposed rule and to look at alternatives that minimize small business costs, including the option of no additional regulatory controls. A new *Federal Register* notice addressing new analyses and new regulatory options is expected in March. A final rule is required to be published in December.

Construction and Development Panel. Advocacy and EPA completed a SBREFA panel in October 2001 for a proposal that would control the direct discharge of pollutants (mostly sediment) to surface waters by businesses that disturb land during construction activity. This would affect approximately 200,000 construction and development firms. The small business representatives expressed concern over the complexity of overlapping and potentially inconsistent federal, state, and local storm water regulations and the difficulties small businesses have in understanding them. Specifically, the commenters reminded the panel that erosion and sediment control and post-construction storm water management for new development activities are already covered by the existing federal storm water regulations.

Advocacy expects that EPA will carefully consider the current federal requirements and consider the option of not going forward with a new rule until the effectiveness of the current rules can be more fully evaluated. Advocacy also expects EPA to better evaluate whether the incremental costs of new rules would carry commensurate environmental benefits. EPA is currently scheduled to issue a proposal or determine that no new rule is warranted in April.

Procurement

Contractor Responsibility Rule Laid to Rest. On Dec. 27, 2001, the Federal Acquisition Regulation (FAR) Council revoked the much debated contractor responsibility rule. The rule would have given a contracting officer the authority to reject an otherwise successful bid if the contractor had violated specified tax, labor, consumer protection, or environmental laws or regulations in the previous three years. In revoking the rule, the FAR Council stated that "the current regulations governing suspension and debarment provide adequate protection to address serious threats of waste, fraud, abuse, poor performance, and noncompliance."

The announcement marked the end of a three-year struggle over a rule that had been formally published but whose implementation had been put on hold. The FAR Council received more than 1,500 comment letters in opposition to the original proposed rule, published a revised proposal on June 30, 2000, and a final rule on Dec. 20, 2000, with an implementation date of Jan. 19, 2001. The final rule and its implementation date were so controversial that some agencies issued "class deviations," delaying implementation. The Civilian Agency Acquisition Council, a component of the FAR Council, postponed implementation until July 19, 2001.

On April 3, 2001, the FAR Council stayed the implementation of the final rule indefinitely. Advocacy provided comments in support of revoking the rule on July 6, 2001. The Dec. 27 announcement brings this prolonged chapter in procurement regulation to an end.

Telecommunications Multiple Ownership of Radio

Stations. The FCC is undertaking a comprehensive examination of its rules and policies concerning multiple ownership of radio stations in local markets. The agency intends to be more responsive to current marketplace realities while continuing to address the core public inter-

For More Information

Advocacy's assistant chief counsels can answer questions about these regulatory issues:

Environment. Kevin Bromberg, (202) 205-6964 or kevin.bromberg@sba.gov; Jonathan Pawlow, (202) 205-6951 or jonathan.pawlow@sba.gov; Austin Perez, (202) 205-6936 or austin.perez@sba.gov.

OSHA. Claudia Rayford-Rogers, (202) 205-6804 or *claudia.rayford@sba.gov.*

Procurement. Major Clark, (202) 205-7150 or *major.clark@sba.gov.*

Telecommunications. Eric Menge, (202) 205-6949 or *eric.menge@sba.gov.*

est concerns of promoting diversity and competition. According to the proposed rule, the radio industry has undergone substantial changes since the revision of radio ownership limits in the Telecommunications Act of 1996, and FCC policies on local radio ownership do not adequately reflect current industry conditions. The proposed rule, released on Nov. 8, 2001, asks for comments on government's interest in competitive radio markets, on the definition of the relevant market (advertising or audience), on barriers to entry, potential efficiencies, possible harms, and on the economic costs and benefits of consolidation. The FCC noted that promoting diversity and competition remains the touchstone of its local radio ownership rules. Comments are due Feb. 11, 2002.

Digital Television Transition Revamped. The FCC modified a number of its digital television (DTV) transition rules to enable more broadcasters to get on the air with a digital signal and to help speed the DTV transition. For details, visit *www.fcc.gov/dtv*.

Telecom Compensation Regimes. In May, the FCC released a proposed rule that would make sweeping changes to the current compensation regime between telecommunications carriers, switching from a system where the "calling party network pays" (CPNP) to a "bill and keep" (B&K) system.

Advocacy provided comments on Nov. 6, 2001. Advocacy questioned the need to completely restructure the system since CPNP is a fairly accurate representation of the benefits of the call. While both parties benefit from a call, they do not benefit equally; the caller often receives a far greater benefit from the call than the called party. CPNP is not an inaccurate assessment of the costs, and Advocacy believes that a new regulatory paradigm is not necessary at this time.

Under B&K, small businesses that are net callers will pay less, while net receivers will end up paying more. Small businesses in rural areas are usually net receivers so they will end up paying more. To provide any benefit to small businesses, the FCC must require the carriers to pass through all cost savings to end users on a proportional basis.

Under B&K, costs that had been covered by access charges to long distance carriers would be moved to end users. To counter these increases, the FCC must offset any reductions in access charges to rural carriers with increases in the universal service fund. Advocacy also recommended that the FCC refer the universal service issues of this proposed rule to the Federal -State Joint Board for Universal Service for further review.

Occupational Safety Still No Word on Ergon

Still No Word on Ergonomics. The U.S. Department of Labor has not yet released its plans for any movement on an ergonomics regulation. The Occupational Safety and Health Administration (OSHA) initially published regulations effective Jan. 16, 2001, but these were overturned by a congressional resolution on March 20, 2001.

OSHA had planned to release the next step in their ergonomics policymaking in September 2001. This was postponed after the events of Sept. 11. OSHA Administrator John Henshaw has stated that OSHA will soon be making public its next moves regarding ergonomics, but he has not indicated whether this will be in the form of a revised ergonomics regulation or mere policy guidance to employers. Advocacy continues to follow this issue and will work to see that small business concerns and needs are seriously considered.

Economic News

Small Business in the Aftermath of the Terrorist Attacks

by Dr. Radwan Saade and Dr. Richard Boden

The disasters that occurred on Sept. 11, 2001, weakened an already slumping U.S. economy. The Conference Board's index of lead-ing economic indicators—a portent of future macroeconomic activity in the United States—had been declining since August. The Conference Board's consumer confidence index dropped 11.5 points to its lowest level since 1994. Finally, according to the Bureau of Labor Statistics, the unemployment rate in October rose to 5.4 percent, its highest level since the end of 1996.

To be quite sure, the circumstances of the U.S. economy are changing. Most observers interpret the direction of change as a telling sign that we are heading into a recession, and that we have been doing so since early 2000. While "no growth" and "declining growth" are generally taken to mean the same thing, i.e., "we are heading into a recession," it may help to ponder the concept a bit further. Quantifying the decline helps to clarify this point. Suppose

we introduced a range within which economic fluctuations would be deemed acceptable. Say, for example, that a deviation of plus or minus 2 percent around the existing growth rate is considered to be "normal" economic fluctuation. If we are currently at 4 percent and three months later we are at 2 percent, we would not necessarily be headed into a recession. Put another way, a period of no positive growth is not necessarily one of declining growth. It is possible to be prosperous while not necessarily growing during a given interval. While this may seem to be an argument over semantics, semantics have an explicit effect on perceptions, and investors' perceptions determine the movements of financial markets.

The terrorist attacks have left myriad businesses in the lurch. Those in the immediate vicinity have suffered physical and financial losses, while every other business in the United States is witnessing a slowdown in economic activity.

Industries Hardest Hit by Sept. 11 Attacks and Their Small Business Shares (Percent)

Industry	Small Business Share of Total Firms	Small Business Share of Total Firm Employment
Air Transportation	94.7	6.8
Amusement, Gambling,		
and Recreation Industries	99.3	67.9
Direct Mail Advertising	98.4	68.0
Eating and Drinking Places	99.7	65.4
Hotels and Motels	70.5	48.8
Insurance Carriers	90.6	7.8
Passenger Car Rental	98.9	23.2
Sightseeing Transportation	99.0	75.9
Taxi and Limousine Service	99.8	86.5
Travel Agencies	99.7	69.1

Source: U.S. Small Business Administration, Office of Advocacy, based on 1998 data provided by the U.S. Department of Commerce, Bureau of the Census.

For More Information

• Victor Zarnowictz, "The U.S. Economy Before and After the Terrorist Attacks," October 2001, and "Consumer Confidence Jumps More Than Eight Points," Dec. 28, 2001, The Conference Board, www.conferenceboard.org.

• NFIB's survey, *Small Business* and the Aftermath of Sept. 11— An NFIB Update (Oct. 23, 2001) and the NFIB Special Report of Oct. 3, 2001, can be found on the website, *www.nfib.com*.

The industries hardest hit by the attacks are largely made up of small businesses (see table). Plenty of other industries are also feeling the slowdown as well.

A survey by the National Federation of Independent Business showed that the attacks clearly damaged small business economic activity. Thirty-four percent of those responding reported that their sales were lower since Sept. 11. Thirteen percent reported that business investment plans had been postponed or cancelled.

Clearly, small businesses need help. The nature of the help, however, should coincide with the circumstances of the problem at hand. The problems that small businesses are facing are not caused by a credit crunch, but by depressed demand. Indeed, the index of small business optimism fell by over seven points between August and the second half of September, according to NFIB. Consumer confidence cures that problem, which brings us back to the point made above regarding perceptions. Care

Continued on page 7

IRS Changes, from page 1

the White House Conference participants, and a host of small business representatives have urged the IRS to make this change. In testimony before the Senate last spring, the Office of Advocacy recommended that Congress take action on this issue if the IRS failed to act. Advocacy is extremely pleased that IRS decided to act on its own and speed up this needed change.

For More Information

For questions related to the change, Advocacy's assistant chief counsel for tax policy, Russell Orban, can be reached at (202) 205-6946 or via e-mail at *russell.orban@sba.gov.*

Aftermath, from page 6

should be taken when we label economic activity. There is a lot at stake.

Consumer confidence appears to be inching back up. The consumer confidence index rebounded in December, climbing 8.8 percent from its November level. Indeed, the Conference Board's director of consumer research, Lynn Franco, suggested that "The deterioration in current economic conditions appears to be reaching a plateau, led by a stabilizing employment scenario." This is just the kind of news that consumers and small business need to hear more of.

Please note that the application deadline for SBA economic disaster loans to small businesses directly affected by the events of September 11 has been extended to April 22, 2002. Call (800) 827-5722 or visit www.sba.gov/disaster for details.

Who Benefits from the Change?

The IRS has issued a proposed revenue procedure regarding cash accounting. Many small businesses with receipts of \$10 million or less will be allowed to use the cash method without question. Even though it is in the proposal stage, businesses may rely on it for tax years ending on or after Dec. 31, 2001.

Most small service providers with average receipts of \$10 million or less will be allowed to use the cash method of accounting. The change should benefit service providers who also sell related products, such as a plumber who also sells plumbing supplies. The

Was your small business directly affected by the events of September 11th?

An SBA Economic Injury Disaster Loan with a 4% fixed interest rate might help.

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extremely responsive.

They were really there.

It was a surprising pleasure.

«Warren Kasztl, President Millennium Aero Parts Miami-Dade County, Fla.

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Deadlines extended!

new rules generally exclude manufacturers, wholesalers, retailers, miners, certain publishers, and sound recorders unless they are principally a service business or perform certain kinds of custom manufacturing. A listing of the kinds of businesses that will be able to take advantage of the change can be found on the Ohio Small Business Development Center's website:

www.ohiosbdc.org/fincash.shtml

The complete text of the proposal is contained in IRS Notice 2001-76 which can be found at http://ftp.fedworld.gov/pub/irsdrop/n-01-76.pdf. Comments to the proposal are due March 1, 2002, via e-mail or the addresses listed in the notice.

Intellectual Property, *from page 2*

publishes and disseminates patent information, records assignments of patents, maintains electronic and paper files of U.S. and foreign patents, and maintains both an Internet-accessible electronic database and a search room for public use in examining issued patents and other records. It also supplies copies of patents and official records to the public. The PTO performs similar functions relating to trademarks and their registration.

The PTO maintains a comprehensive website on patents and trademarks at www.uspto.gov. The website includes general information on patents and trademarks, comprehensive patent and trademark databases which the public may search, and guidance for applying for patents and trademark registrations, including procedures for applying online. Today, all issued U.S. patents and trademarks may be searched through the PTO's website, and electronic searches have become far more prevalent than traditional paper searches.

OIRA Makes Regulatory Process More Open

OIRA, the regulatory arm of OMB, announced in late October that it will make greater use of the Internet in order to make the regulatory process more transparent. The first steps in this initiative are already apparent. Rather than rely on the public docket room in Washington, D.C., OIRA will now use the www.firstgov.gov portal and the OMB website to provide information on the rules under its review. Information now posted on its website includes daily updates of regulations under review and copies of OIRA's correspondence with agencies received from outside parties on rules under review.

OIRA's long-term goal is to integrate regulation and paperwork reviews with OMB's e-government policies. OMB is developing a computerized tracking system to replace its outmoded 20-year-old system. The new system will manage the reviews of both regulations and information collection requests (paperwork burdens).

Reg Compliance Site Launched

A new website, *www.businesslaw.gov*, offers small business owners a gateway for finding, understanding, and complying with federal, state and local regulations.

The Small Business Administration launched the site as part of the Bush administration's e-government initiative. It includes links to regulatory announcements, plain-English guides to basic laws applying to each stage of a small business, and compliance assistance information by topic. Users can also get information about state and local business regulations. The site also includes news from congressional small business committees and the Office of Advocacy. and it has links to the U.S. Code and the *Federal Register*.

New IRS Webpage Consolidates Tax Filing Changes

A new IRS webpage, "News for You 2002," highlights the many changes taking place at the IRS since the agency undertook its largest reor-ganization effort in nearly 50 years. The site represents a renewed effort to keep taxpayers and tax practitioners informed of the latest events that directly affect them.

"News for You 2002" contains 13 fact sheets outlining tax law and IRS changes to help individuals, businesses, and tax practitioners. For example, many individuals and businesses will have new addresses to file their tax returns. Tax practitioners will have a new nationwide toll-free hotline number. And, some taxpayers may be eligible for additional tax relief. The site also outlines the changes that make filing tax returns electronically easier. The site is located at *www.irs.gov/prod/news/foryou*.

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