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# MAKING THE OFFICE OF ADVOCACY INDEPENDENT

## HEARING

BEFORE THE

## COMMITTEE ON SMALL BUSINESS
## HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

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# MAKING THE OFFICE OF ADVOCACY INDEPENDENT

**WEDNESDAY, MARCH 20, 2002**

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
*Washington, DC.*

The committee met, pursuant to call, at 10:40 a.m. in room 2360, Rayburn House Office Building, Hon. Donald Manzullo presiding.

Chairman MANZULLO. The committee will come to order. Welcome to this hearing of the Committee on Small Business.

Since its inception in 1976, the Office of Advocacy has had the difficult and important task of being an effective voice for small business within the Executive Branch of the Federal Government. There have been a number of distinguished individuals who, as Chief Counsel, have directed the Office of Advocacy and have left an admirable record of accomplishments despite the lack of resources and limited authority. One of those Chief Counsels, Jere Glover, is with us here today as one of our witnesses.

Over time, there have been various constructive suggestions to strengthen the office and to make it more effective and independent. We heard a number of those suggestions at the hearing the committee held a year ago on March 22.

Since that time, the Senate has passed and referred to the House, S. 395, the Independent Office of Advocacy Act of 2001. In light of this legislative activity and the subject, the previous legislation that was before the committee last March has been redrafted.

The draft bill for discussion today is less ambitious than the previous version. It makes the office more independent and provides the office with greater resources and more authority to represent the interests of small businesses.

I was encouraged yesterday by the President's small business agenda, particularly heartened with regard to specific points on the Office of Advocacy and how to make that office a stronger voice within the Federal Government.

I believe this draft legislation, along with other provisions I intend to introduce to strengthen the Regulatory Flexibility Act mirror the President's thinking on this issue. We must ensure that regulators take into account the interests of small businesses prior to the issuance of a new rule. The law has been ignored far too often by too many agencies. We must give more tooth to the chief counsel of Advocacy to enforce the President's vision.

I want to work with my colleagues on both sides of the Hill to pass the bill that produces real results for mainstream America.

I now yield for an opening statement from my good friend and colleague, the Ranking Democratic member, Ms. Velázquez.

[Chairman Manzullo's statement may be found in the appendix.]

Ms. VELÁZQUEZ. Thank you, Mr. Chairman, and good morning.

This hearing comes at a very opportune time. Yesterday we heard the President speak about ways to help small businesses in this country. I am very pleased to see he has read the legislative report the Democrats wrote in January. In fact, he mentioned five of our 11 concerns: taxes, regulatory issues, contracting bundling, worker health care, and expanding the Office of Advocacy.

The President has signaled he plans to issue an Executive Order to give the Office of Advocacy more powers and independence. He could not have picked a better moment since the scope of that power and independence is what brings us here today.

We support a truly independent Office of Advocacy. Small businesses agree, which is why we listed it in our report on the small business agenda this January. We want a smart watchdog that compels the agency to respond to regulatory problems that small businesses face.

There are two real questions before us on this issue. First, why do we need an independent Office of Advocacy? Everybody says we do. We all want one. But, before we rush headlong into this, we need to know exactly what the problem is we are trying to solve.

The problem is the Office of Management and Budget. An independent Office of Advocacy must worry about undue influence from the executive branch, which means shielding it from OMB. We have seen too many times how OMB interferes with changes at SBA, such as changing the size standards and subsidy rates.

So the second real question in evaluating the legislation before this committee is, how do we ensure an independent office and shield it from OMB? This clearly cannot be done with simple window dressing like giving Advocacy a budgetary line item or adding so many new responsibilities that it becomes bogged down in its own mission.

Advocacy has been successful because its mission has been laser-focused, and we have given it the flexibility to work with agencies to find creative solutions to the problems facing this country's small businesses. Any future changes must follow this trend for Advocacy to continue serving as the voice of small business.

Clearly, there is much more work to be done. We are here to find solutions to that end. I hope we can hear from Advocacy's chief counsel, Tom Sullivan, about his own ideas about how to make the office more independent. I look forward to hearing from the witnesses and to learn what ideas they have to achieve this goal.

Thank you, Mr. Chairman.

[Ms. Velázquez's statement may be found in the appendix.]

Chairman MANZULLO. I noted in the President's initiative handed down yesterday it talks about—"for a tighter cooperation between the Office of Advocacy and OMB." I—maybe somebody from the White House was sitting in the audience here when we showed the problems with OMB.

Our first witness is the Honorable Tom Sullivan, Chief Counsel for Advocacy.

**STATEMENT OF THE HONORABLE THOMAS M. SULLIVAN, CHIEF COUNSEL, OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION**

Mr. SULLIVAN. Chairman Manzullo——

Chairman MANZULLO. Could you pull the mike up closer?

Mr. SULLIVAN. Certainly.

Chairman MANZULLO. Thank you.

Mr. SULLIVAN. Chairman Manzullo, Congresswoman Velázquez, Congressman Pascrell, good morning and thank you for the opportunity to appear before you today to discuss ways to strengthen and improve the Office of Advocacy, a concept I have been supportive of even before coming on board as chief counsel.

I was also encouraged by President Bush's announcement yesterday and the small business agenda he formalized during the Women's Entrepreneurship conference.

Thank you also for accepting my written statement into the record. I will summarize some of the key points.

First, let me say that I am committed to working with this committee, Congress, and the President both to ensure the Office of Advocacy's independence well past my tenure and to make sure that the government is accountable to small businesses through compliance with the provisions of the Regulatory Flexibility Act (the RFA), and the Small Business Regulatory Enforcement Fairness Act (SBREFA).

I believe these two goals, strengthening the independence of the office and enhancing the effectiveness of the RFA and SBREFA, are best addressed separately because each by itself deserves the full attention of both Congress and the administration.

Later this week, our office will be releasing the annual report on agency compliance with the RFA for Fiscal Year 2001. I can assure you that this committee will be the first to see that report. This report will detail successes and failures and will help frame the debate on how we can all work together to ensure greater attention to the unique needs of small businesses early in the regulatory process, the tenet of the RFA.

With respect to the issue of strengthening the Office of Advocacy, the focus of our discussion this morning, I want to express my appreciation to the committee and staff for their willingness to look carefully at various options in crafting legislation to strengthen Advocacy's role as the voice for small business within the Federal Government. It will be important to keep in mind preserving both the chief counsel's independence and the flexibility to respond to new concerns as they arise.

I believe that if legislation is needed to improve the Office of Advocacy's independence and ability to carry out its mandate, it should be done as cleanly and simply as possible.

I should also note for the record that the administration and, in particular, Administrator Barreto's team have been fully supportive of my office. Discussion of legislative options that seek greater independence for Advocacy should not in any way imply an immediate need to exercise that budgetary independence. Legislation, if needed at all, should be framed in the context of an Office of Advocacy that does not necessarily have the luxury of having such an accommodating landlord as I have in Hector Barreto.

In a few minutes we'll hear from Michael Barrera, the SBA's current National Ombudsman. I know that Michael shares my vision of our complementary roles in support of small business.

Michael and I met to discuss our respective offices even before I came on board, and we continue to meet regularly. I am proud to announce that, just this morning, we signed a memorandum of understanding that will help both our offices work together to benefit small business while at the same time recognizing the independence of the Office of Advocacy.

With the Chair's permission, I would ask that that Memorandum of Understanding be inserted into the record.

Chairman MANZULLO. The statements of the witnesses and of the members, along with the memorandum, will be admitted without objection.

Mr. SULLIVAN. Thank you, Mr. Chairman.

There have been some legislative proposals to require Advocacy to report on specific subjects. While these provisions may be well-intentioned, such a legislative mandate sets a precedent that contradicts the flexibility inherent in Advocacy's role.

Advocacy has a strong history of listening to small business owners and working with this committee to develop the research and action agenda that makes the best use of Advocacy's resources. I fully intend to build on that tradition and capacity. For that reason, I am reluctant to endorse legislative provisions that constrain our research flexibility.

I am encouraged by this committee's dedication to the Office of Advocacy's success and the benefits that obviously are realized by small business owners themselves. I pledge my full cooperation and the resources of Advocacy to work toward solutions that will help our country's economic engine, small business.

[Mr. Sullivan's statement may be found in the appendix.]

Chairman MANZULLO. Thank you. Our next witness will be Michael Barrera, the National Ombudsman. Mr. Barrera accompanied Administrator Barreto to northern Illinois, I think, the first week after your boss was confirmed and had a great time there.

**STATEMENT OF MICHAEL BARRERA, SMALL BUSINESS AND AGRICULTURE REGULATORY, ENFORCEMENT OMBUDSMAN, U.S. SMALL BUSINESS ADMINISTRATION**

Mr. BARRERA. Mm-hmm.

Chairman MANZULLO. I really appreciated the fact that you came along and had a lot of input and met a lot of fine people in northern Illinois, including my brother at the restaurant. So that was a lot of fun, Michael.

Mr. BARRERA. Unfortunately, I didn't get a chance to eat, but I look forward to going back.

Chairman MANZULLO. Yes. That's good. We'll be looking forward to your testimony.

Mr. BARRERA. Thank you, Mr. Chairman.

Chairman MANZULLO. Could you put the mike a little bit closer. Thank you.

Mr. BARRERA. Is that better? Okay.

Thank you, Mr. Chairman Manzullo, Ranking Member Velázquez, Congressman Pascrell, and Congressman Langevin, for

providing me my first opportunity to comment on how the Office of the National Ombudsman can help improve the regulatory environment for small businesses.

First of all, I would like to state that I look forward to working with the committee, Congress, small entrepreneurs, and the new chief counsel for Advocacy, Tom Sullivan, to improve the regulatory enforcement environment for our nation's 25½ million small businesses. In fact, I have already met with staff from both the Senate and House Small Business Committees and with Mr. Sullivan on several occasions to discuss how the Office of Advocacy and the Office of the National Ombudsman can work together to ensure a fair small business regulatory environment.

As Mr. Sullivan mentioned earlier, we both agree that a strong working relationship with frequent communication between the two offices is critical to the SBA's mission of aiding and counseling America's small businesses and protecting small businesses against unnecessary regulatory burdens.

The President also recognizes the importance of regulatory fairness for small businesses and, just yesterday, unveiled his plan to help create an environment where small businesses can flourish.

Some components of his plan include issuing an executive order to provide greater enforcement powers to the Office of Advocacy, instruction to the director of OMB to seek the views and comments of small businesses on existing Federal regulations, paperwork requirements, and guidance documents, instruction to the OMB and Advocacy to work together to strengthen the enforcement of the Regulatory Flexibility Act and for increasing the coordination between OIRA and Advocacy.

Along those lines, Mr. Sullivan and I have taken the initiative to strengthen the complementary roles we each play in working to benefit small businesses. Like Tom, I am also pleased to announce that, as of today, we have signed a memorandum of understanding that, while maintaining our independence, enhances our relationship that will enable us to put forth our best efforts to assist the small business community.

As part of SBA, the SBA National Ombudsman can communicate small business issues directly to the SBA administrator and appropriate program managers. Administrator Barreto has recognized the importance of the SBA National Ombudsman and sources to the SBA's field offices to use my office as another tool to assist and protect small businesses.

The mission of the SBA National Ombudsman is now more relevant and more effective than ever before because it is now a core function of the SBA, and its services are available at the grassroots level through local SBA offices.

I believe that Administrator Barreto underscored his commitment to regulatory fairness by making the appointment of the National Ombudsman one of his first after his confirmation. Since that time, the Office of the National Ombudsman has held six regulatory enforcement fairness hearings and six regulatory enforcement fairness roundtables.

We plan to have at least one hearing and one roundtable in each federal region. This increase in hearings and roundtables is directly

attributed to Administrator Barreto's commitment to make the mission of this office a core function of the SBA.

In addition to the increase in the number of hearings, attendance at the hearings and roundtables has also increased dramatically. For example, attendance at our hearings in Orlando and Albuquerque drew crowds of approximately 70 and 80 small business owners and other interested parties, respectively.

Additionally, through contacts and efforts of our district field offices, we have received excellent news coverage for our hearings. This support greatly assists our office in marketing the resources of the SBA National Ombudsman.

As demonstrated by this committee's March 6, 2002, hearing on the Regulatory Flexibility Act, there was continued need to eliminate unnecessary regulatory burdens on America's small businesses.

On behalf of President Bush, Administrator Barreto, and the Office of the SBA National Ombudsman, I look forward to working with the chief counsel, our legislative partners, and America's small businesses to eliminate the unnecessary regulatory burdens and excessive regulatory enforcement burdens on our nation's entrepreneurs.

Thank you for the opportunity to appear today. I will be happy to answer any of your questions. Thank you.

[Mr. Barrera's statement may be found in the appendix.]

Chairman MANZULLO. Thank you.

Our next witness will be Jere Glover with Brand & Frulla.

I thought you retired. I know you got that sailboat.

**STATEMENT OF JERE W. GLOVER, COUNSEL, BRAND & FRULLA**

Mr. GLOVER. I did retire from the Federal Government, Mr. Chairman, but I am still back in the practice of law.

Chairman MANZULLO. You didn't retire from life.

Mr. GLOVER. I did not retire from life.

Chairman MANZULLO. Okay.

Mr. GLOVER. Nor small business advocacy.

Chairman MANZULLO. We look forward to your testimony.

Mr. GLOVER. Thank you, Mr. Chairman, Members of the Committee. It's great to be here with you discussing an issue that's very near and dear to my heart.

You know, yesterday was a great day. Any time a President mentions small business, it's a great day. When the President mentioned strengthening the Office of Advocacy, it's a really great day. And when he talks about stopping contract bundling, it just makes it phenomenal. So I will tell you that we have to be very pleased about hearing that happen.

I've had this fantasy that's gone on for years, this, perhaps, dream, and that is that at one presidential debate, the two candidates will discuss what is best for small business. We haven't reached that yet, but, certainly, yesterday was a good day.

Well, let me try to put the discussion about the Office of Advocacy into context. First of all, you have to recognize that the role within the Small Business Administration has declined over time. When you look at the number of resources that SBA has dedicated

to advocacy, it's less than two percent. When you look at SBA's budget, again, less than two percent.

But let's put it in a little broader context. We had roughly 50 employees when I was there. I understand the number is down a little bit, and I'm not sure where that's going to end up right—overall.

But the Department of Commerce, which is tasked with primarily helping large firms—and I'm not questioning their justification for their existence of their number of employees, but they have 32,981 employees. The U.S. Department of Agriculture has 110,000 employees. The Department of Labor has 15,374 employees. All told, the Federal Government has 1,660,313, according to the last count I saw, full-time Federal employees.

Having less than 50 do the research, fight the regulatory battles and provide important information to policymakers for decisions seems like things are a little askew.

When I was first in the Office of Advocacy in the late 1970s, we had five percent of SBA's budget and about five percent of the employees. The Congress put a floor in the legislation, which I mentioned in my testimony, that said, "Not less than 69 employees and less than $3 million in research would be spent on the Office of Advocacy." That kind of clear congressional direction held the office in good stead for many, many years, but over the last few years we've seen some things begin to—the numbers and things erode.

If we look at this from a cost benefit analysis, there have been roughly $16 billion in regulatory savings by actions by the Office of Advocacy and the Regulatory Flexibility Act, $16 billion. If you do a cost benefit analysis on SBA's Office of Advocacy's budget, you find out that it's $800 returned for every dollar spent. That kind of cost benefit analysis is the kind that you would like to see in everything the government does.

Now we have to remember that this office is, by its very nature, controversial. There will be people who don't like what it does. We can remember back in 1995 when a vote on the floor of the House of Representatives came within 30 votes of eliminating that office forever. I think we have to recognize that, left to their own devices, this office will not receive the focus, the attention, and the priority that it deserves.

Let me go back to the President's statement on advocacy. It's a great statement. I dare say that the administrator did not call the chief counsel up last night and said, "I just had a great meeting with the President. I'm going to increase your slots by 25 percent, and you've got another half-million dollars in research."

I know, when SBREFA was passed and the panel process was put in place, which tremendously increased the responsibilities for the Office of Advocacy, we didn't get a single slot or a single dollar to implement that. In fact, the—the report that we filed before the election on the background paper on the Office of Advocacy 1994–2000 has a chart which shows the Office of Advocacy's staffing overtime. And when SBREFA passed, we actually lost six slots because SBA was in a government-wide freeze—an agency-wide freeze. We never got those slots back. So I think that we have to recognize that something specific really does need to be done.

Now I will tell you that—that I was very proud of all of the accomplishments that the Office of Advocacy had while I was there.

I was certainly appreciative of the congressional support that the office had. Could I have done more if I had had more resources? Absolutely. I have total confidence in Tom Sullivan, the current chief counsel. He will do the very best job that he can do with the resources and personnel he has. Can he do more with more? Absolutely.

I think the historical precedent when this committee, back in the early 1980s, when the first chief counsel who I had the privilege of working under and mentoring under and learning from left, and a new chief counsel came in, they wanted to make sure that the office didn't lose the status. And that's why it said, "Not less than 69 employees, not less than $3 million in research."

That kind of provision did make a difference, and it stayed there for a long time. Let me just ask the question. Between those periods in the late 1970s, early 1980s, is the Office of Advocacy less important today than it was then? Does it have less responsibilities? Is small business less important? Does Congress care less about small business? I think not. I think it's time to restore the office to its prior status and provide it with the resources.

Thank you very much for the opportunity to be here.

[Mr. Glover's statement may be found in the appendix.]

Chairman MANZULLO. Well, thank you very much. The—Ms. Velázquez, did you want to go first?

Ms. VELÁZQUEZ. I don't mind.

Chairman MANZULLO. Okay. Go ahead.

Ms. VELÁZQUEZ. Thank you, Mr. Chairman.

Chairman MANZULLO. Get my thoughts together here. Thank you.

Ms. VELÁZQUEZ. Mr. Sullivan, the President announced a new small business initiative yesterday, and you mentioned that too in your testimony. With this new executive order in the works, should we be considering legislation now too, or should we wait until we can see the effects of this executive order?

Mr. SULLIVAN. Well, let me—let me actually touch on a few things specific to the Office of Advocacy in the announcement yesterday. First, one accomplishment that is done already, as far as a memorandum, is our written agreement to work very early and often with Dr. John Graham in the Office of Information and Regulatory Affairs. And, with the Congresswoman's permission, I would like to insert that Memorandum of Understanding (MOU) also into the hearing record because it is a monumental document.

Chairman MANZULLO. That will be accepted into the record without hesitation or objection.

Mr. SULLIVAN. Thank you, Mr. Chairman.

Chairman MANZULLO. Do you have a copy of that memorandum?

Mr. SULLIVAN. Yes, I do, Mr. Chairman.

Chairman MANZULLO. Could you hand it to us up here so we could look at it?

Mr. SULLIVAN. Yes. And your counsel also has a copy that was provided previous to this. I want to make sure that you know that we get everything to the committee before the hearing, not in the middle.

I do want to also answer the Congresswoman's other part of the question, and that is whether or not we need legislation now when

there is an executive order that, in fact, does a lot in the same direction and with the same purpose of what some of the legislation before us attempts to do.

My answer is, any time you have legislation, presidential announcements, executive orders, or roundtable discussions that focus on strengthening the Office of Advocacy, I'm all for it.

Whether or not we're jumping the gun by formalizing legislation that could be overcome by executive order, I think that those things have to be considered. The timing of those two documents is important.

I think that it is tremendously helpful that the President has committed to formalizing an executive order, and I'm sure that the President wants to make sure that any legislation that seeks to do the same thing is complementary, not contradictory, to the executive order.

Ms. VELÁZQUEZ. But if you mention that, in the Executive Order—it contains a lot of elements that are in the legislation. Shouldn't we wait to see those—if that Executive Order really works or not?

Mr. SULLIVAN. I want to be as responsive as possible without getting into specifics of a document that has not been written yet. But I think it is wise that this discussion happen now because the purpose of both the executive order and the legislation is absolutely similar. So, to the extent that they complement and do not contradict each other, I do think that it's a good idea that those considerations be brought back to the President, and I'll certainly convey that.

Ms. VELÁZQUEZ. Okay. Mr. Sullivan, I understand you signed a memorandum of understanding with OIRA as part of the President's new Small Business Initiative. How does this memorandum actually change any of the current processes in place for interagency review?

Mr. SULLIVAN. Well, like so many things that we do at the Office of Advocacy, we build on the successes of the past. I am honored to share the panel not only with Michael Barrera, but with the past chief counsel, Jere Glover.

The Office of Advocacy has historically had an exchange of letters with Dr. Graham's office, the Office of Information and Regulatory Affairs. That exchange of letters simply formalizes a working relationship of examining agency proposals and how they impact business, quite frankly, how they benefit businesses, more along the lines of what Dr. Graham's shop does.

What the MOU does is to go even further. It specifically calls upon Dr. Graham's executive order authority to send back regulations and uses that authority to examine whether or not agencies have complied with the Reg Flex Act according to the Office of Advocacy.

Ms. VELÁZQUEZ. Mr. Sullivan, giving Advocacy its own line item is being characterized as giving Advocacy independence. However, Advocacy will still need to submit budget requests to the administration, just to OMB instead of SBA.

This question is meant—no. I'm sorry. I just want for you to tell me, if this office is given this line item, does this mean that your budget request will be submitted to OMB instead of SBA?

Mr. SULLIVAN. The Congresswoman is referring to two separate draftings of how an independent budget would work. There is the draft that is the discussion of this hearing that is worded as concurrent submission. And I believe that the way that would work would be that the Office of Advocacy would separately submit its budget to Congress.

The preferable approach, in my opinion, if legislation is needed to separate our budget, is what is contained in S. 395 that the Chairman mentioned in his opening statement. And that isn't a concurrent budget submission, but rather required within the President's budget that the Office of Advocacy be a line item similar to the way our research budget is line-itemed currently.

Ms. VELÁZQUEZ. And let me ask you, given the fact that as—as the Office of Advocacy, you may be, at times, critical of the office of OMB. And, given that time of relationship, we can expect that relationship to be confrontational at times. So, after spending a year holding OMB's feet to the fire, how likely is it that OMB will approve your budget?

Mr. SULLIVAN. Well, I think one of the advantages of having the Office of Advocacy's budget clear, whether it be submitted concurrently or whether it be part of the President's budget, is that it is out in the open. This is an item, a dollar amount that then gets the full attention of this committee, the full attention of OMB and the President and the various entities that do have budget approval authority.

I think the more folks that know the benefits of the Office of Advocacy and the resources that we need to do a good job, the better off we are.

Ms. VELÁZQUEZ. During our hearing on Reg Flex compliance, you testified that legislation to strengthen the Reg Flex Act should be an avenue of last resort. It's two weeks later, and this bill contains new authority for the Office of Advocacy. Are we now already at the point of last resort?

Mr. SULLIVAN. Well, actually, we're starting a whole new chapter and an exciting chapter that was formalized yesterday in the President's announcement and small business agenda.

One of the things that would happen ideally, before reaching the last resort, would be to have the President's emphasis of agencies complying with the Regulatory Flexibility Act. That has happened. That has happened in the proclamation and commitment to formalize that agenda through an executive order.

So when I came here a month ago and talked about things that I would prefer rather than changing the law, those have, in fact, happened, and I'm very excited about it. So, to the extent that we discuss legislative options now, I think we're dealing with a whole new framework and an exciting framework, but certainly something that should be taken into account prior to changing existing laws.

Ms. VELÁZQUEZ. We will have a second round, right?

Chairman MANZULLO. Well, I—yes, of course, of course. It's just the two of us here.

Ms. VELÁZQUEZ. Thank you.

Chairman MANZULLO. Thank you.

I have a couple of questions. And I can understand the President's proposal yesterday, and it's a lot of things that we've been talking about here, but I would suggest—and I appreciate everything that they—that both of you gentlemen are doing.

Our committee never got any heads-up that the President was even considering any small business agenda. And then we found out on the grapevine, placed a call, and then the extent of our briefing was a phone call that came to our staff on Friday afternoon, that somebody came from the SBA on Friday afternoon. I mean, this is not acceptable.

The—we sit up here and pull the hair out of our heads. We had to throw together a rather ugly meeting, a very ugly meeting, with the head of OIRA and the Administrator. As a result of that, we get a Memorandum of Understanding.

I just want to know when is the SBA going to come to this Committee, the Committee of Jurisdiction and say, "We're working on legislation. We'd like you to have some input into it." I mean, do you think that would be a good idea?

Mr. SULLIVAN. Mr. Chairman, let me actually address this on behalf of the Office of Advocacy but not address the questions that you put, more appropriately to the administration.

But with regards to legislative drafting and the vetting, the full vetting of views so that we both can benefit from our experiences, I have met, as you know, regularly with your staff. And, in particular, I am absolutely pleased that my concerns in the drafting of legislation were not only listened to, but then formalized in a redraft that we have before us today. And so the working relationship with the Office of Advocacy, in my view, is not constrained at all.

Chairman MANZULLO. I'm not talking about our relationship. I'm just—I guess I'm just expressing to you the frustration—perhaps it's of the Republican Congress that the Members just can't get the ear of the President. We have no input. Phone calls are not returned. The—I know how hard you work there, but it's as if—you know, the President comes out with a small business agenda, and Members of Congress—I mean, we're supposed to carry the water, at least on a portion of this legislation, and, you know, we're glad to do that.

But I think at the minimum perhaps, you know, both of you are the ultimate middlemen. If you stop to think about it, you really are, and you're placed there for a reason. And you're both doing an excellent job on it, but there has to be a better relationship between the Administration and the Committees of Jurisdiction because, at this point, there is none. And I'm not criticizing Mr. Barreto because he's been—he gets a hundred percent in my book. But there's a huge disconnect going on here.

Mr. SULLIVAN. I appreciate the comments of the chairman. Although I do have the luxury of independence from the administration, I will absolutely view yesterday's announcement and the two-day announcement of the small business agenda, first in Missouri and then yesterday at the Reagan center, as an opportunity to engage both with the White House and with this committee to flush out exactly how the agenda can work cooperatively.

Chairman MANZULLO. Let me give you a suggestion.

Mr. SULLIVAN [continuing]. Whatever legislative options may exist.

Chairman MANZULLO. One suggestion would be for the President to sit down with the Administrator and the Chairman of the Committee on some common goals for the—I mean, this is so simple, but it's not done. And I'm convinced that, unless we raise hell at this Committee level, we don't have any voice going into the White House.

I mean, we're going to have another hearing, very contentious hearing, coming up in two weeks dealing with the Administrator of HCFA because of the continuous pounding by that organization of small businesses.

Ms. VELÁZQUEZ. Mister——

Chairman MANZULLO. Yes, I would yield.

Ms. VELÁZQUEZ. I'm sorry. Yeah. Thank you, Mr. Chairman.

I just would like to share with you the fact that Mitch Daniel now will have more to say in terms of contract bundling. And I think that it's appropriate that we bring him into this Committee so that he could explain and share with this Committee what his views are regarding contract bundling.

Chairman MANZULLO. That's a good idea.

I'm looking at this Memorandum of Understanding with you and OIRA, and I know it's a good start. The words in it, however, are precatory. Every word is a "may". For example, on page two—and I know, Tom, you fought to put "shall" in there.

For example, in IV, Responsibility to Advocacy, "During OIRA's review of an agency rule under Executive Order 12866, OIRA may consult with Advocacy whether—regarding whether an agency should have prepared a regulatory flexibility analysis."

Now, under the bill that Ms. Velázquez introduced and on which I'm a co-sponsor, that's the bill that lodges the power within the SBA Administrator to say that these do apply. Would you be in favor of that particular—what's the number of it, Ms. Velázquez?

[A discussion was held off the record.]

Chairman MANZULLO. 1324.

Mr. SULLIVAN. Mr. Chairman, actually, the language that you're reading in the MOU is deliberate, and it's deliberate for two reasons. One is that it maintains the independence of the Office of Advocacy.

Dr. Graham was extremely sensitive to the misperception, once we sign an MOU, that the Office of Advocacy and the President's regulatory advisor be somehow portrayed as being in cahoots on regulatory issues. And so the "may" wording is deliberate.

Second, it was in the full anticipation—because we just signed this yesterday—that the executive order would put more teeth into some of the flexibility that is otherwise contained in the MOU, while, at the same time, maintaining the independence. So you see that we have a challenging but fantastic opportunity in front of us to formalize that.

And I do need to talk about our communication with the committee and the White House because I view the announcement as tremendously beneficial to small business, obviously, to our office and the powers that our office have to help small business, but not

as a communication breakdown, but as an opportunity to fully engage with the White House.

Chairman MANZULLO. Let me explain communication breakdown. The Executive Order was issued, and we found out about it in the press, and no one ever gave us a copy of that order. Or it hasn't been issued.

Mr. SULLIVAN. It has not been issued.

Chairman MANZULLO. Okay. All right.

Mr. SULLIVAN. And, in fact, therein lies, I think, a great opportunity for this committee——

Chairman MANZULLO. It is. I mean, now what——

Mr. SULLIVAN [continuing]. To work with the White House and also Mitch Daniels on contract bundling.

Chairman MANZULLO. But let me ask you this question. When we request a meeting with the White House to go over these things, it falls on deaf ears. I mean, there is a very serious breach between the majority in this House and the White House with regard to these issues. And that is that members of Congress are not given the opportunity to speak with the President directly on small business issues.

And, somehow, on all the vetting and everything that's going on, I would just urge you to go back to the Administrator and say, "These are the committees that are involved." We are the ones that are elected. We're the ones that have to face the people. We're the ones that have to pass the legislation.

I mean, this frankly has taken a ball, and you pitch it from one hand to the other hand to the other hand. There would be nothing unconstitutional with the President consulting this Committee or this Chairman with regard to wording of the Executive Order. In fact, that's the very same problem we got into when the SBA Administrator and the Chief of Staff issued the rules for—the emergency rules that made the entire nation a disaster area, refusing to allow this Committee to have any input. And, evidently, the message never got through. I mean, why are Members of Congress refused to have any input in any decisions that are being made by the SBA?

Mr. SULLIVAN. I am not in a position, Mr. Chairman, to respond——

Chairman MANZULLO. I can appreciate——

Mr. SULLIVAN [continuing]. Or speculate on this line of comment or question. I apologize.

Chairman MANZULLO. Well, you don't have to apologize. That's not your area.

Ms. VELÁZQUEZ. Would the Chairman yield?

Chairman MANZULLO. Of course, I would yield.

Ms. VELÁZQUEZ. I think, Mr. Chairman, and I don't just want to come here and excuse Mr. Barreto, but I was impressed when I was reading the President's speech. And the first question that I asked my staff is, "Was Hector Barreto there?" And the President didn't even mention Hector Barreto in his speech. I think that the two people that we need to work with and talk to is Mitch Daniel and Larry Lindsay, the——

Chairman MANZULLO. Let me reclaim my time.

The Office of the President is working with our staff on drafting that Executive Order, so I stand corrected on that. But there is a lot of frustration that's going on here. It's obvious that a lot of work is being done to tighten the avenue of communication on it.

The—with regard to the ombudsman and the regulatory fairness hearing and roundtable schedule for Fiscal Year 2002, I don't see Illinois in here.

Mr. BARRERA. We can definitely put it in there if you would like that.

Chairman MANZULLO. But we did have a hearing, I think. Was it two years ago?

Mr. BARRERA. I think we did.

Chairman MANZULLO. We did. That's correct.

Mr. BARRERA. What we tried to do, Mr. Chairman is one of the comments I heard when I started is that we weren't getting out to enough states in the country, and we're trying to spread that out. And, as you know, we went to Indianapolis for the first time, and we're going to Milwaukee for the first time, which are in that Federal region. But, if the Chairman would like a hearing, we would do everything we can to have one there.

Chairman MANZULLO. We would be delighted to work with you on that. I do not forget the fact that the Administrator came out, spent an entire day there. To me, that was an informal hearing when 30 small business people gave them their ear at my brother's restaurant. So we don't forget about that.

Mr. BARRERA. Well, I think it also shows, Mr. Chairman, how committed he is.

Chairman MANZULLO. Absolutely.

Mr. BARRERA. To the regulatory fairness. He knows your commitment, and he wanted to bring me along. And I enjoyed Rockford. I really enjoyed the small towns.

Chairman MANZULLO. That's great. You enjoyed the pizza at my brother's restaurant too, I think.

I don't have any further questions. Do you have anymore, Ms. Velázquez.

Ms. VELÁZQUEZ. Out of New York City, Mr. Sullivan, I just would like to know if SBA provided comments to OMB on the recent CMS prescription drug card regulation.

Mr. SULLIVAN. It's my understanding that we did provide comments.

Ms. VELÁZQUEZ. And were your comments made part of the public record?

Mr. SULLIVAN. It is also my understanding that those comments from Advocacy, as part of the inter-agency review, were not made part of the public comment docket.

Ms. VELÁZQUEZ. Is it your understanding that OMB is able to pick and choose which comments are made part of the public record?

Mr. SULLIVAN. That is not my understanding.

Ms. VELÁZQUEZ. That is not your understanding.

Mr. SULLIVAN. No. I apologize, again, for what appears to be a lack of responsiveness. I do not know how OMB or the issuing agency decides which comments they put in the record and which they do not.

Ms. VELÁZQUEZ. So why do you think they didn't do it? Why they don't follow the law?

Mr. SULLIVAN. Again, I don't know if I'm in a position to be able to speculate on how an issuing agency decides whether or not to include interagency review comments into the record.

I should say that it is an absolute compliment to the Office of Advocacy that not only do we monitor closely compliance with the Regulatory Flexibility Act during preproposal and proposed regs, but when the Administration does circulate proposals outside of that context, then we do comment also through that process. So it's almost a dual commenting procedure. The internal OMB clearance process does not lend itself to the public letter writing that is such a key part of the Office of Advocacy.

Ms. VELÁZQUEZ. Mr. Sullivan, within the last 15 months, do you know how many regulations you have commented on as far as OMB inter-agency review, and how many of those comments were not made part of the public record?

Mr. SULLIVAN. I do not know, Congresswoman Velázquez.

Ms. VELÁZQUEZ. Have you received any feedback from OMB or CMS regarding changes that were made to regulations based on Advocacy's input? Do you know if the outcome of the regulation is the same?

Mr. SULLIVAN. We have received comment back, in particular, from CMS, which used to be HCFA——

Ms. VELÁZQUEZ. You have——

Mr. SULLIVAN [continuing]. On our comments on their lack of attention to the Regulatory Flexibility Act. I do not know whether or not those communications are in written form to date.

Chairman MANZULLO. Could you yield for a second?

Ms. VELÁZQUEZ. Sure.

Chairman MANZULLO. The—I would state that one of the reasons we're having this hearing with HCFA on April 10th is because HCFA blew off the Office of Advocacy, I think, no less than four or five times with such arrogance that the only way we can have accountability is to bring HCFA here. But Office of Advocacy did its job. And we want to work with you, Tom, to make sure that you have a lot more teeth to compel that organization to listen to small businesspeople.

Mr. SULLIVAN. I thank the Chairman, and I also thank the President for also——

Chairman MANZULLO. Yes.

Mr. SULLIVAN [continuing]. Following along those lines to make sure that agencies do pay very serious attention to their obligations under the Regulatory Flexibility Act.

Ms. VELÁZQUEZ. Mr. Sullivan, I just would like to ask you that—please submit to the Committee copies of the regulation that you have commented on in the last 15 months.

Mr. SULLIVAN. We would be happy to do so, Congresswoman Velázquez.

Ms. VELÁZQUEZ. Mr. Chairman, I have other questions, but I just would like to submit it so that they could respond to us in writing.

Chairman MANZULLO. The——

Ms. VELÁZQUEZ. I have—I do have one last question.

Chairman MANZULLO. Oh, go ahead. But, first of all, you want to submit written questions?

Ms. VELÁZQUEZ. Yes.

Chairman MANZULLO. And then how——

Ms. VELÁZQUEZ. Both to the——

Chairman MANZULLO. How long would it take you to submit the written questions and what——

Ms. VELÁZQUEZ. Tomorrow.

Chairman MANZULLO. Tomorrow.

And then how much time would you need to respond?

Mr. SULLIVAN. We will respond as soon as we're able. We're happy, certainly, to receive any of the questions from the Committee and respond appropriately.

Chairman MANZULLO. Okay.

Ms. VELÁZQUEZ. Thank you.

Chairman MANZULLO. Okay.

Ms. VELÁZQUEZ. Mr. Sullivan, you mentioned having Advocacy funding out there in one of the questions that I asked you before. So I want to ask your input on a provision in the draft bill that we are considering. What is the budget now?

Mr. SULLIVAN. I don't have an exact amount, but it is around $8 million.

Chairman MANZULLO. I need to do a couple of housekeeping things. Is it my understanding that you're going to be giving this Committee copies of comments that you made to OMB on the prescription card, your comment on that?

Mr. SULLIVAN. Again, we'll be responding to written questions that, I think, would clarify what the Committee wants to know. And we are happy to provide detailed responses to any of the questions that the committee provides.

Chairman MANZULLO. Okay. Well, I have a functional question. When we are approached by constituents or the broader small business community, sometimes they don't know whether to send them to Michael, who is also an attorney, or to the Ombudsman or to the Office of Advocacy. Sometimes we do both. Could you give us some guidelines on how we should do that? Can you even give us some examples?

Mr. BARRERA. I don't think you can go wrong to send them to either one of us, Mr. Chairman. And I think the Memorandum of Understanding that we just signed addresses that. Both of our offices know what our jurisdictions are, and, under our Memorandum, if this is an issue that our office should handle, and it gets to Advocacy they'll send it to us. An issue that we believe Advocacy can handle, we'll send it to them. And we don't really want to have small business decide which side is good. They have enough to worry about.

Chairman MANZULLO. Yeah.

Mr. BARRERA. So they send them to us, or we would welcome submissions from the Congress and from you, and we'll figure it out for you.

Mr. SULLIVAN. The Chairman did ask for a specific example, and there's a great one. During one of Mike's travels—and he's on the road a good deal; that's part of his job—one of the small business owners approached Mike with a regulatory comment on an EPA

rule having to do with small oil refineries. And Mike, just as is memorialized in the MOU, passed that on directly to our office so that we were able to incorporate that into an Advocacy comment in the regulatory process.

So it is working well, and it's going to work even better now that we've formalized our relationship in an MOU.

Chairman MANZULLO. We have been receiving numerous inquiries from across the country from small businessmen and women who are being cut off by major banks for financing even when they're not in default.

I got involved in a case involving one of my constituents, and the bank got creative and went to the SBA and got a $1.3 million 7(a) loan, which would save the day. But, had I not gotten involved—it was just a very general letter. I mean, they sent the letter of the bank saying, you know, "These people are going to default."

They provided an avenue of payment, and "I realize there are regulations, et cetera, but can you help them out?" And, all of a sudden, the bank stopped what could have been a foreclosure proceeding destroying a small business, and they got creative with a 7(a) loan.

And one of the things that you might just want to think about—and we're not asking for a comment—is that this has become an epidemic in the small business community, as you know. And that would be—I don't know if the word is "advertise," but let these banks know that are really coming down on small businesses the availability of the 504 and the 7(a) programs. It could ultimately or already be considered the loan of last resort. At least the banks should be more than willing to turn to the SBA and say, "Hey, we've got this situation."

Have you received many complaints like this, the Ombudsman or the Office of Advocacy, from small businesspeople?

Mr. BARRERA. I have not heard complaints like that.

Chairman MANZULLO. Okay.

Mr. BARRERA. But I will say this, the Administrator has been very helpful in this when I have my hearings and roundtables, I am also now starting to have small business roundtables just in general. And we have heard small businesses tell banks—we invite banks to these hearings—"We need more help with this." And it's generally launched like that, but nothing about the specifics——

Chairman MANZULLO. Did this Administrator bring on board, about two or four months ago, somebody from the private sector with a background in creative financing?

Mr. BARRERA. It's Ron Bew, I believe.

Chairman MANZULLO. What is his name?

Mr. BARRERA. I think Ron Bew is now the head of Capital Access.

Chairman MANZULLO. That's correct. But I'm just raising this because we're getting more and more of these calls.

Ms. Velázquez, have you been receiving calls like that also on the small businesspeople who have limited access to capital or banks that are——

Ms. VELÁZQUEZ. Every day. But one of the areas where we've been getting a lot of calls is on contract bundling.

Chairman MANZULLO. Okay.

Ms. VELÁZQUEZ. Mr. Sullivan, I just would like to take this opportunity to ask you if the Office of Advocacy currently keeps a contract bundling database.

Mr. SULLIVAN. We do not currently maintain the contract bundling databases, no.

Ms. VELÁZQUEZ. Are you planning to do that? The President, in his speech, made reference to contract bundling as a very important issue. So——

Mr. SULLIVAN. The Congresswoman is correct. In addition to a number of tremendously exciting proposals that all help small business, contract bundling is one of them.

The Office of Advocacy already has a significant role, as this committee knows, in contract bundling. And that role is pretty darn effective. And I would point most recently——

Ms. VELÁZQUEZ. I'm sorry. That role is pretty what?

Mr. SULLIVAN. Pretty darn effective.

Ms. VELÁZQUEZ. Effective?

Mr. SULLIVAN. Effective, yes. Now does that mean that contract bundling is no longer a problem? Absolutely not. Does it mean that the Office of Advocacy, using its current authority, effectively weighs in, for instance, against the Missile Defense Agency effort to lessen its SBIR commitment. Writing letters that we not only get to the heads of departments, but make sure that your staff and this committee knows well, is a way to convince folks about the necessity of looking closely at how small businesses are affected in contract bundling.

Ms. VELÁZQUEZ. Under the draft house proposal, certain parts of contract bundling functions will be transferred to the Office of Advocacy.

Mr. SULLIVAN. It is my understanding that the draft before us doesn't. And, in my written statement, I do share some reluctance on taking over SBA programmatic functions.

One solution legislatively is to put them in the Office of Advocacy. That is a compliment, in that it does show that we're doing a good job. In programs that may be struggling, some folks view that putting them into our offices will make sure that they, in turn, will be done well.

But in each of those areas, whether it be the State of Small Business Report, in which we do have a role, or contract bundling or others—we actually do have a current role, a good role—maybe I overstated it by saying "a pretty darn effective role"—but a good, important role. I'm not sure whether taking on a programmatic function, a core responsibility of each of these programs enhances our office's role or, quite frankly, take it back further.

Ms. VELÁZQUEZ. Mr. Barrera, I do have some questions for you, but I will submit them so that you can answer to me.

Mr. BARRERA. Okay.

Ms. VELÁZQUEZ. And I just want to say that, since you have been in this office, you have been doing a great job, and I look forward to talking and working with you.

Mr. BARRERA. In fact, we are coming to New York, I believe, in May, Congresswoman, and we're coming to Illinois.

Chairman MANZULLO. You've already been there. We welcome you again.

Again, on that note, you're all doing a great job. I don't know how many times Tom has stopped by, and Michael has stopped by. And, Jere, we've known each other for what, nine, 10 years now?

Mr. GLOVER. Yes, sir.

Chairman MANZULLO. I have a tremendous sense of working with this. In fact, back in 1993 I was a freshman. And I had the horrible task of leading the legislation to change the Clean Air Act with respect to something called the Employee Commute Option. This was forced carpooling on small businesses.

And that was a—but you want to get your own party on that—and started fighting big time on the Employee Commute Option. And, at that point, I realized—I said, "Hey, you know, this guy is really independent. I wonder if he's Republican or a Democrat." And it made no difference to you, Jere. You were in there just fighting for the small businessperson. And party label meant nothing to you, nor to you, Michael, or to you, Tom.

And I've come to admire that Office of Advocacy. In fact, I am the one that wants you to be able to start a class action lawsuit on behalf of small businesspeople. But I don't think anybody's going to let me go that far on it. But that's how much strength I want to give to make that Advocacy Office a world class law firm with lots of resources and the ability to start actions and intervene, as opposed to the limited jurisdiction now. But I will take that bill up another day.

And, again, we thank you for coming here. We look forward to working with you.

This committee meeting is adjourned.

[Whereupon, at 11:45 a.m., the Committee was adjourned.]

DONALD A. MANZULLO, ILLINOIS
CHAIRMAN

NYDIA M. VELÁZQUEZ, NEW YORK

Congress of the United States
House of Representatives
107th Congress
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6315

**March 20, 2002**

**OPENING STATEMENT**

**CHAIRMAN DONALD A. MANZULLO**
**COMMITTEE ON SMALL BUSINESS**

**"Making the Office of Advocacy More Independent"**

**Good morning and welcome to this hearing of the Committee on Small Business.**

**Since its inception in 1976, the Office of Advocacy has had the difficult, but important, task of being an effective voice for small business within the Executive Branch of the Federal government. There have been a number of distinguished individuals who, as Chief Counsel, have directed the Office of Advocacy and who have left an admirable record of accomplishments, despite the lack of resources and limited authority.**

**One of those Chief Counsels, Jere Glover, is with us here today and is one of our witnesses.**

**Over time there have been various constructive suggestions to strengthen the Office of Advocacy and**

to make it more effective and independent. We heard a number of those suggestions at the hearing the Committee held, a year ago on March 22, 2001.

Since that time, the Senate has passed and referred to the House S. 395, "The Independent Office of Advocacy Act of 2001."

In light of the legislative activity on this subject, the previous legislation that was before the Committee last March has been redrafted. The draft bill for discussion today is less ambitious than the previous version but makes the Office of Advocacy more independent and provides that Office with greater resources and more authority to represent the interests of small businesses.

I was encouraged yesterday by the President's small business agenda. I was particularly heartened regarding his specific points on the Office of Advocacy and how to make that office a stronger voice within the federal government. I believe this draft legislation, along with other provisions I intend to introduce to strengthen the Regulatory Flexibility Act, mirror the President's thinking on this issue. I wholeheartedly agree with the President: we must insure that regulators take into account the interests of small businesses prior to the issuance of a new rule. The law has been ignored far too often by too many agencies. We must give more tools to the Chief Counsel at Advocacy to enforce the President's vision.

I want to work with my colleagues on both sides of Capitol Hill to pass a bill that produces real results for main street America.

I now yield for an opening statement by my good friend and colleague, the Ranking Democratic member, Ms. Velazquez.

DONALD A. MANZULLO, ILLINOIS
CHAIRMAN

NYDIA M. VELÁZQUEZ, NEW YORK

# Congress of the United States
## House of Representatives
107th Congress
## Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6315

STATEMENT
of the
Honorable Nydia M. Velázquez
House Small Business Committee
Hearing on SBA's Office of Advocacy
March 20, 2002

This hearing comes at a very opportune time. Yesterday, we heard the President speak about ways to help small businesses in this country. I am very pleased to see he has read the legislative report the Democrats wrote in January. In fact, he mentioned five of our eleven concerns --- taxes, regulatory issues, contract bundling, worker health care, and expanding the Office of Advocacy.

The President has signaled he plans to issue an executive order to give the Office of Advocacy more powers and independence. He could not have picked a better moment, since the scope of that power and independence is what brings us here today.

We support a truly independent Office of Advocacy. Small businesses agree, which is why we listed it in our report on the small business agenda this January. We want a smart watchdog that compels agencies to respond to regulatory problems that small businesses face.

There are two real questions before us on this issue. First is, why do we need an independent Office of Advocacy? Everybody says we do. We all want one. But before we rush headlong into this, we need to know exactly what the problem is we are trying to solve.

The problem is the Office of Management and Budget. An independent Office of Advocacy must worry about undue influence from the executive branch, which means shielding it from OMB. We have seen too many times how OMB interferes with needed changes at the SBA, such as changing the size standards and subsidy rates.
So the second real question in evaluating the legislation before this Committee is HOW do we ensure an independent Office and shield it from OMB.

This clearly can't be done with simple window-dressing like giving Advocacy a budgetary line-item, or adding so many new responsibilities that it becomes bogged down in its own mission.

Advocacy has been successful because its mission has been laser-focused, and we have given it the flexibility to work with agencies to find creative solutions to the problems facing this country's small businesses. Any future changes must follow this trend for Advocacy to continue serving as the voice of small business.

Clearly there is much more work to be done. We are here to find solutions to that end. I hope we can hear from Advocacy's chief counsel, Tom Sullivan, about his own ideas about how to make the office more independent.
I look forward to hearing from the witnesses and to learn what ideas they have to achieve this goal.

News from Congresswoman
NYDIA M. VELÁZQUEZ
Representing New York's 12th Congressional District • Brooklyn, Manhattan and Queens
Ranking Democratic Member, House Small Business Committee

For Immediate Release
March 20, 2002

CONTACT: Wendy Belzer,
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# Velázquez Wants True Independence for Advocacy

## Line-item and similar proposals don't go far enough

WASHINGTON – Congresswoman Nydia M. Velázquez, Ranking Democratic Member of the House Small Business Committee, today called for measures to guarantee a truly independent Office of Advocacy, which is currently under the aegis of the Small Business Administration.

One of the most effective tools to mitigate the impact of regulations over the past two decades has been the Office of Advocacy. Advocacy serves as the watchdog for small businesses, working with agencies to ensure that regulations do not have an adverse impact on small businesses. One way Advocacy has done this is by administrating its successful regulatory panel, where EPA and OSHA sit down with potentially affected small businesses and formalize better regulations with solutions to minimize impact.

With regulatory compliance and paperwork burdens regularly topping small business concerns, Democratic members are looking for options to mitigate their impact. The average cost per employee for regulatory compliance is almost $7,000. This is 60% higher than that of corporate America.

Congresswoman Velázquez, however, insisted that any changes to Advocacy should not just be window dressing that duplicate SBA powers or create a rigid structure that has a chilling effect on Advocacy's ability to find effective compromises on burdensome regulations.

"The President has signaled he plans to issue an executive order to give the Office of Advocacy more powers and independence," Congresswoman Velázquez said. "He could not have picked a better moment, since the scope of that power and independence is what brings us here today."

"We support a truly independent Office of Advocacy," Congresswoman Velázquez continued. "Small businesses agree, which is why we listed it in our report on the small business agenda this January. We want a smart watchdog that compels agencies to respond to regulatory problems that small businesses face."

---more---

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The committee reviewed several options to strengthen Advocacy, including giving Advocacy its own line item in the President's budget and granting more weight to amicus briefs Advocacy files on behalf of small business in court cases. Currently Advocacy is funded under the Small Business Administration, and concerns have been express that courts minimize the Chief Counsel's ability to advocate for small business by reducing the value of amicus briefs filed by Advocacy.

In existence since 1976, the Office of Advocacy is contained within the Small Business Administration and is charged with serving as the independent voice of small business. The office has the ability to take positions contrary to the administration and all Advocacy positions, reports testimony and correspondence are not subject to OMB approval.

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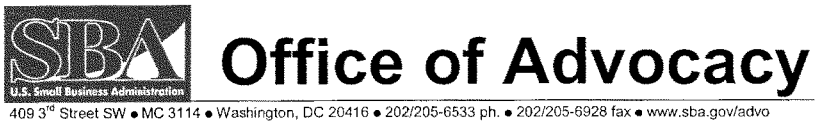


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Testimony of

**Thomas M. Sullivan**

**Chief Counsel for Advocacy**

**U.S. House of Representatives**
**Committee on Small Business**

| | |
|---|---|
| **Date:** | March 20, 2002 |
| **Time:** | 10:00 A.M. |
| **Location:** | 2360 Rayburn House Office Building |
| **Topic:** | Hearing on Strengthening the Office of Advocacy |

*Created by Congress in 1976, The Office of Advocacy of the U.S. Small Business Administration (SBA) is an independent voice for small business within the federal government. The Chief Counsel for Advocacy, who is appointed by the President and confirmed by the U.S. Senate, directs the office. The Chief Counsel advances the views, concerns, and interests of small business before Congress, the White House, federal agencies, federal courts, and state policy makers. Issues are identified through economic research, policy analyses, and small business outreach. The Chief Counsel's efforts are supported by offices in Washington, D.C., and by Regional Advocates located across the United States. For more information on the Office of Advocacy, visit http://www.sba.gov/advo, or call (202) 205-6533.*

Chairman Manzullo and Members of the Committee, good morning and thank you for the opportunity to appear before you today to discuss ways to strengthen and improve the Office of Advocacy, a concept I have been supportive of, even before coming on board as Chief Counsel for Advocacy.

First, let me say that I am committed to working with this Committee, the Congress, and the President both to ensure the Office of Advocacy's independence well past my tenure and to make sure the government is accountable to small businesses through compliance with the provisions of the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act.

I believe these two goals—strengthening the independence of the Office of Advocacy and enhancing the effectiveness of the Regulatory Flexibility Act (RFA)—are best addressed separately because each by itself deserves the full attention of both the Congress and the Executive Branch. I have already had an opportunity to appear before this Committee on the RFA, and as I said in my March 6 testimony, the RFA and the Small Business Regulatory Enforcement Fairness Act (SBREFA) are beginning to make a difference in the culture of some federal regulatory agencies. These agencies are learning what this Committee has known for some time: that the earlier the agencies implement the RFA's principles by involving small businesses and the Office of Advocacy in the regulatory process, the more effective their regulations will be in achieving their purposes without straining small businesses' ability to compete.

Later this week our office will be releasing the annual report on agency compliance with the RFA for fiscal year 2001. This report will detail successes and failures and will help frame the debate on how we can all work together to ensure greater attention to the unique needs of small businesses early in the regulatory process (the tenet of the RFA).

With respect to the issue of strengthening the Office of Advocacy—the focus of our discussion today—I want to express my appreciation to the Committee and staff for their willingness to look carefully at various options. Thanks in large part to the historic vision of the Small Business Committees and the Congress, the Office of Advocacy already has many strengths that can be built upon.

I am aware of at least two bedrock principles that underlie the Office of Advocacy's ability to represent small businesses effectively: one is independence and the other is flexibility. One of the original ideas behind the Office of Advocacy was that small businesses needed a voice both to articulate their contributions to the economy and to represent their unique needs to policy makers in Washington. To be effective, the office had to have the ability to speak within the Administration in a voice that did not always echo Administration policy, hence the need for independence. At the same time, the wisdom of putting the Chief Counsel in the Executive Branch, where the Chief Counsel could insert the "small business voice" into discussions with policymakers on the same team—before proposed policy became law—has been borne out over the years.

A second bedrock principle that is important to keep in mind is flexibility—the flexibility to adapt Advocacy's day-to-day mission and resources to the changing circumstances and needs

of the small business community. This flexibility is reflected in the Public Law hiring authority, which allows the Chief Counsel to hire specialists quickly in the fields where expertise is most needed. It is reflected in our ability to work with various legislative, trade association, and other partners to determine and present the facts about the issues affecting small businesses. And flexibility is a key principle for us as we listen carefully and respond to the insights of small businesses through processes like the White House Conference on Small Business and the small business advocacy review panel process.

So, in crafting legislation to strengthen the Office of Advocacy's role as a voice for small business within the federal government, it will be important to keep in mind preserving both the Chief Counsel's independence and the flexibility to respond to new concerns as they arise.

A number of ideas have been proposed for strengthening the independence of the Office of Advocacy. With the March 12 discussion draft of the Small Business Advocacy Improvement Act, I think we are moving in the right direction. I am fully supportive of the concept behind the Senate bill, S. 395, and have been working with majority and minority staff of the Senate Committee on Small Business and Entrepreneurship to articulate that concept through an appropriate legislative vehicle. What follows is some of the thinking I have already expressed orally in meetings with Senate staff.

**Line item approach to the Office of Advocacy budget.**

I believe that if legislation is needed to improve the Office of Advocacy's independence and ability to carry out its mandate, it should be done as cleanly and simply as possible. S. 395

uses a line-item approach to bolster the office's budgetary independence. I prefer this approach, as part of the President's budget submission, over legislative language that would create a separate budget process specific to the Office of Advocacy. The SBA Administrator and the President should be able to assert their commitment to the Office of Advocacy as part of the annual budget submission. The Congress's subsequent support and this Committee's support will play a constructive role in acknowledging the good work Advocacy is capable of.

I should also note, for the record, that the Administration and, in particular, Administrator Barreto's team have been fully supportive of my office. Discussion of legislative options that seek greater independence for the Office of Advocacy should not, in any way, imply an immediate need to exercise that budgetary independence. Legislation, if needed at all, should be framed in the context of an Office of Advocacy that does not necessarily have the luxury of having such an accommodating landlord as I have in Hector Barreto.

**Whether to transfer certain SBA procurement functions to the Office of Advocacy.**

Under discussion in this process are proposals to give the Office of Advocacy certain procurement-related tasks, such as preparing the annual reports on agencies' efforts to meet the contracting and subcontracting goals for participation in procurement by small business and taking over the contract bundling database, analyses, and annual report. In the past, the Office of Advocacy has a positive record of involvement with procurement policies and reforms, troubling issues for many small businesses. On specific occasions in the past, Advocacy has intervened in major bundled contracts and has had some success in expanding small business participation. The office has also funded some research on bundling. However, with respect to transferring

these program responsibilities to the Office of Advocacy, my questions center on what problem we are trying to solve and whether this approach would solve it. Would such a transfer strengthen or weaken SBA's overall program responsibilities under the laws it administers? While Advocacy has had a role from time to time in evaluating procurement policy through independent research, it has never been asked to take over the management responsibility of an SBA program.

**Working with the National Ombudsman.**

Along similar lines, some earlier legislative drafts proposed merging the functions of the SBA's Office of the National Ombudsman into the Office of Advocacy; the current March 12 draft does not contain this proposal and I think the Committee was wise to lay this idea aside. The question again was what problem are we trying to solve? In a few minutes we'll hear from Mike Barrera, the SBA's current National Ombudsman. I know he shares my vision of our complementary roles in support of small business. Mike and I met to discuss our respective offices even before I came on board, and we continue to meet regularly about our mutual concerns in support of small business. I am proud to announce that today we signed a memorandum of understanding that will help both of our offices work together to benefit small business, while at the same time recognizing the independence of the Office of Advocacy.

**Mandating what the Office of Advocacy reports, researches, and advocates.**

There have been some legislative proposals to require Advocacy to report on specific subjects. While these provisions may be well intentioned, such a legislative mandate sets a

precedent that contradicts the flexibility inherent in the Office of Advocacy's role. Laws that specify exactly how and what the Office of Advocacy should research leave open the question of how the Office of Advocacy is to deal with new issues that come along two years, or even two months down the road.

The Office of Advocacy has a strong history of listening to small business owners and working with our legislative partners, trade associations, membership organizations, and others in the small business community to develop the research and action agenda that makes the best use of Advocacy's resources. I fully intend to build on that tradition and capacity. For that reason, I am reluctant to endorse legislative provisions that constrain our research flexibility.

I am encouraged by the Committee's dedication to the Office of Advocacy's success—and the benefits that obviously are realized by the small business owners themselves. I pledge my full cooperation and the resources of Advocacy to work towards solutions that will help our country's economic engine, small business.

This concludes my prepared testimony. Thank you again for inviting me here today, and I am pleased to answer any questions you may have.

# MEMORANDUM OF UNDERSTANDING

BETWEEN

THE OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION

AND

THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS,
OFFICE OF MANAGEMENT AND BUDGET

## I. BACKGROUND

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) and the Office of Information and Regulatory Affairs of the Office of Management and Budget (OIRA) recognize that small entities (including small businesses, non-profit organizations and small governmental jurisdictions), as defined in 5 U.S.C. § 601, often face a disproportionate share of the Federal regulatory burden compared with their larger counterparts. Advocacy and OIRA further recognize that the best way to prevent unnecessary regulatory burden is to participate in the rulemaking process at the earliest stage possible and to coordinate both offices to identify draft regulations that likely will impact small entities.

Inasmuch as Advocacy and OIRA share similar goals, the two agencies intend to enhance their working relationship by establishing certain protocols for sharing information and providing training for regulatory agencies on compliance with the Regulatory Flexibility Act (RFA) and various other statutes and Executive orders that require an economic analysis of proposed regulations.

## II. PURPOSE

The purpose of this Memorandum of Understanding (MOU) between Advocacy and OIRA is to achieve a reduction in unnecessary regulatory burden for small entities. This initiative also is intended to generate better agency compliance with the RFA and other statutes and Executive orders requiring an economic analysis of proposed regulations.

## III. AUTHORITY

This agreement is under the authority of 15 U.S.C. § 634(a) et seq., 5 U.S.C. § 601 et seq., Executive Order 12866, as amended, and other relevant provisions of law.

## IV. OBJECTIVES

To the extent consistent with Advocacy and OIRA authority, Advocacy and OIRA agree to accomplish the following objectives:

a. Establish an information sharing process between Advocacy and OIRA when a draft rulemaking is likely to impact small entities.
b. Establish Advocacy guidance for Federal agencies on the requirements of the RFA.
c. Establish training for Federal agencies on compliance with the RFA.

## V. SCOPE

Nothing in this MOU shall be construed to limit or otherwise affect the authority of the Office of Advocacy as established in 15 U.S.C. § 634a et seq. or the authority, management or policies of OIRA.

## VI. RESPONSIBILITIES

a. Advocacy

1. During OIRA's review of an agency's rule under Executive Order 12866, OIRA may consult with Advocacy regarding whether an agency should have prepared a regulatory flexibility analysis. Advocacy will designate staff by issue and/or agency to facilitate such discussions. If OIRA is uncertain as to small business impact or RFA compliance, OIRA may send a copy of the draft rule to Advocacy for evaluation.

2. If Advocacy's discussions with an issuing agency do not result in an acceptable accommodation, Advocacy may seek the assistance of OIRA during the regulatory review process under Executive Order 12866 and may recommend that OIRA return the rule to the agency for further consideration.

3. Advocacy will monitor agency compliance with the RFA by reviewing the semi-annual regulatory agenda and the analyses that agencies publish in the *Federal Register*. Similarly, Advocacy will review the regulatory flexibility analyses that agencies provide directly to Advocacy. If Advocacy finds that a rule does not comply with the RFA, Advocacy will raise these concerns with OIRA.

4. Advocacy shall provide OIRA with a copy of any correspondence or formal comments that Advocacy files with an agency concerning RFA compliance.

5. Advocacy will develop guidance for agencies to follow on how to comply with the RFA.

6. Advocacy will organize training sessions for Federal agencies on how to comply with the analytical requirements of the RFA.

b. OIRA

Consistent with OIRA's responsibility to ensure adequate interagency coordination, OIRA shall endeavor to do the following:

1. During OIRA's prepublication review of an agency's rule pursuant to Executive Order 12866, OIRA will consider whether the agency should have prepared a regulatory flexibility analysis. If Advocacy has a concern in this regard, OIRA will provide a copy of the draft rule to Advocacy. In addition, upon request, OIRA may, as appropriate, provide Advocacy with draft proposals and accompanying regulatory analyses.

2. If, in the judgment of Advocacy or OIRA, an agency provides an inadequate regulatory flexibility analysis, or if an agency provides a rule with an inadequate certification pursuant to section 605 of the RFA, OIRA may discuss and resolve the matter with the agency in the context of the regulatory review process under Executive Order 12866. Where OIRA deems it appropriate, OIRA may return a rule to the agency for further consideration.

3. If Advocacy or OIRA are concerned about an information collection requirement contained in a rule which OIRA is reviewing under the Paperwork Reduction Act, OIRA may discuss and resolve the matter with the agency.

4. OIRA will endeavor to provide assistance, as appropriate, at the request of Advocacy in support of its development of guidance for agencies to follow in complying with the RFA and its training sessions on the analytical requirements of the RFA.

c. Joint Advocacy-OIRA Responsibilities

For rulemakings and information collection requests related to urgent health, safety, environmental, and homeland security matters, Advocacy and OIRA shall endeavor to cooperate and discuss their concerns in an expeditious manner.

## VII. TERM

This MOU shall take effect on the date of signature of both parties, and will remain in effect for three years, at which time it may be renewed by mutual agreement of Advocacy and OIRA.

## VIII. AMENDMENT

This MOU may be amended in writing and at any time by mutual agreement of Advocacy's Chief Counsel or his/her designee and the Administrator of OIRA or his/her designee.

## XI. TERMINATION

Either Advocacy or OIRA may terminate this MOU upon 90 days advance written notice.

## X. POINTS OF CONTACT

Points of contact for this MOU are as follows:

**For Advocacy:**

Thomas M. Sullivan
Chief Counsel
Office of Advocacy
U.S. Small Business Administration
409 Third Street, SW
Suite 7800
Washington, DC 20416
(202) 205-6533
(202) 205-6928 (fax)

**For OIRA:**

Dr. John D. Graham
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
262 Old Executive Office Building
Washington, DC 20503
(202) 395-4852
(202) 395-3047 (fax)

XI. ACCEPTANCE

The undersigned parties hereby accept the terms of this MOU:

FOR THE OFFICE OF ADVOCACY:

3/19/02

Thomas M. Sullivan, Chief Counsel

FOR THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS:

3/19/02

John D. Graham, Administrator



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# MEMORANDUM OF UNDERSTANDING

BETWEEN

THE OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION

AND

THE OFFICE OF THE NATIONAL OMBUDSMAN, U.S. SMALL BUSINESS ADMINISTRATION

## I PURPOSE

The purpose of this Memorandum of Understanding (MOU) between the Office of Advocacy of the U.S. Small Business Administration (Advocacy) and the Office of the Small Business and Agriculture Regulatory Enforcement Ombudsman of the U.S. Small Business Administration (Ombudsman) is to foster a more small business friendly regulatory environment.

This MOU is consistent with Advocacy's statutory independence under 15 U.S.C. § 634(f) and the Ombudsman's duties pursuant to 15 U.S.C. § 657.

## II BACKGROUND

Advocacy and the Ombudsman recognize that small business concerns face a disproportionately higher share of Federal regulatory burden than their larger counterparts. Advocacy and the Ombudsman further recognize that regulatory burden can result both during the rulemaking process and in the enforcement of existing regulations.

Inasmuch as Advocacy and the Ombudsman share similar goals, the two offices intend to enhance their working relationship by establishing certain protocols for sharing information in support of the mission of each office and to avoid conflicts of interest and duplicative efforts.

## III AUTHORITY

This agreement is under the authority of 15 U.S.C. § 634(a) et seq.; 5 U.S.C. § 601 et seq.; and 15 U.S.C. § 657.

## IV OBJECTIVES

To the extent consistent with the statutory authority granting powers to the two offices, Advocacy and the Ombudsman agree to pursue the following objectives together.

a. Establish an information sharing process to ensure that small business complaints, comments or concerns are handled by the appropriate office.

b. Establish guidance for dissemination of information to small businesses and Federal agencies explaining the statutory responsibilities of both offices.

V. RESPONSIBILITIES

a. Ombudsman

1. The Ombudsman, through its National presence, the SBA field offices and Regional Fairness Board members, will receive comments and concerns regarding the impact of regulations on small business and the burden of regulatory compliance and federal regulatory enforcement.

2. Where appropriate the Ombudsman shall forward such comments to the Office of Advocacy and shall provide to Advocacy information and materials generated through the Regulatory Fairness Program that are more appropriately within Advocacy's jurisdiction.

3. The Ombudsman will promote the SBA's programs and services, including the regulatory and research role of Advocacy, through its RegFair Hearings and Roundtables and will include the Office of Advocacy Regional Advocates in the planning and implementation of its RegFair Hearings and Roundtables.

b. Advocacy

Advocacy will use its regional presence to assist the Ombudsman in the implementation of the Regulatory Fairness Program. Regional Advocates serve as the primary communications link between the Chief Counsel and local small business owners, trade and business associations, and state and local governments. Part of their responsibility is to enroll small business owners for participation in roundtables and rulemaking panels. To assist the Ombudsman, Advocacy will:

1. Provide material from Advocacy that may be distributed to participants in the Regulatory Fairness Program.

2. Provide the Ombudsman with information, regulatory complaints and other material generated by small business interests that are more appropriately within the Ombudsman's jurisdiction.

VI. TERM

This MOU shall take effect on the date of signature of both parties, and will remain in effect for three years, at which time it may be renewed by mutual agreement of Advocacy and the Ombudsman.

VII. AMENDMENT

This MOU may be amended in writing at any time by mutual agreement of Advocacy's Chief Counsel or his/her designee and the Ombudsman or his/her designee.

VIII TERMINATION

Either Advocacy or the Ombudsman may terminate this MOU upon 90 days advance written notice.

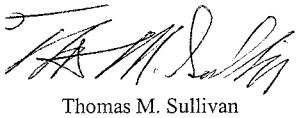
IX. SCOPE

Nothing in this MOU shall be construed to limit or otherwise affect the independent powers of the Office of Advocacy as established in 15 U.S.C. § 634(a) et seq. Similarly, nothing in this understanding shall be construed to interfere with the management or policies established by the Office of National Ombudsman.

X. POINTS OF CONTACT AND BINDING SIGNATURES

Points of contact for this MOU are as follows:

For Advocacy:



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409 Third Street, SW
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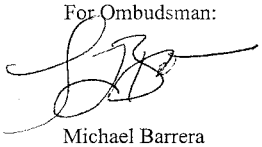
For Ombudsman:



Michael Barrera
National Ombudsman
U.S. Small Business Administration
409 Third Street, SW
Suite 7000
Washington, D.C. 20416
(202) 205-6657
(202) 481-5719 (fax)

Signed on the 20th day of March (month) 2002 (year)

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

# STATEMENT OF MICHAEL BARRERA
# NATIONAL OMBUDSMAN
# U.S. SMALL BUSINESS ADMINISTRATION

## BEFORE THE

## SMALL BUSINESS COMMITTEE
## HOUSE OF REPRESENTATIVES

## MARCH 20, 2002

Federal Recycling Program Printed on Recycled Paper

THANK YOU CHAIRMAN MANZULLO AND RANKING MEMBER VELAZQUEZ FOR PROVIDING ME THIS OPPORTUNITY TO COMMENT ON HOW THE OFFICE OF THE NATIONAL OMBUDSMAN CAN HELP TO IMPROVE THE REGULATORY ENVIRONMENT FOR SMALL BUSINESSES.

FIRST OF ALL, I WOULD LIKE TO STATE THAT I LOOK FORWARD TO WORKING WITH YOU, AND THE COMMITTEE, TO IMPROVE THE REGULATORY ENFORCEMENT ENVIRONMENT FOR OUR NATION'S 25.5 MILLION SMALL BUSINESSES. I AM ALSO EXCITED THAT TOM SULLIVAN IS NOW ON BOARD AS THE CHIEF COUNSEL FOR ADVOCACY. I HAVE MET WITH MR. SULLIVAN ON SEVERAL OCCASIONS TO DISCUSS HOW THE OFFICE OF ADVOCACY AND THE NATIONAL SMALL BUSINESS AND AGRICULTURE OMBUDSMAN ("U.S. SMALL BUSINESS ADMINISTRATION'S (SBA) NATIONAL OMBUDSMAN") CAN WORK TOGETHER TO ENSURE A FAIR SMALL BUSINESS REGULATORY ENVIRONMENT. WE BOTH AGREE THAT A STRONG WORKING RELATIONSHIP WITH FREQUENT COMMUNICATION BETWEEN THE TWO OFFICES IS CRITICAL TO THE SBA'S MISSIONS OF AIDING AND COUNSELING AMERICA'S SMALL BUSINESSES AND PROTECTING SMALL BUSINESSES AGAINST UNNECESSARY REGULATORY BURDENS.

THE OFFICE OF ADVOCACY IS THE PREMIER FEDERAL GOVERNMENT ADVOCATE FOR SMALL BUSINESSES. AMONG ITS MANY DUTIES, THE

OFFICE OF ADVOCACY WORKS WITH FEDERAL AGENCIES IN THE IMPLEMENTATION AND PROMULGATION STAGES OF FEDERAL REGULATIONS TO DETERMINE THEIR IMPACT ON SMALL BUSINESSES.

THE SBA NATIONAL OMBUDSMAN, HOWEVER, IS SPECIFICALLY INSTRUCTED TO EXAMINE AND RATE FEDERAL AGENCIES ON HOW THEY ENFORCE FEDERAL REGULATIONS. PURSUANT TO THE SMALL BUSINESS REGULATORY ENFORCEMENT AND FAIRNESS ACT ("SBREFA"), THE SBA NATIONAL OMBUDSMAN WAS CREATED TO SEEK OUT SUBSTANTIATED COMMENTS FROM SMALL BUSINESS CONCERNS, NON PROFIT ORGANIZATIONS AND SMALL GOVERNMENT ENTITIES REGARDING THEIR TREATMENT BY FEDERAL AGENCIES DURING COMPLIANCE OR ENFORCEMENT ACTIONS. AS SUCH, THE STATUTE ITSELF CREATED A SYSTEM OF CHECKS AND BALANCES. THE OFFICE OF ADVOCACY REVIEWS AND ANALYZES REGULATIONS BEFORE THEY ARE ENACTED. THE SBA NATIONAL OMBUDSMAN DETERMINES IF THE REGULATIONS ARE BEING FAIRLY ENFORCED ONCE THEY ARE IN PLACE.

FOR INSTANCE, THE OFFICE OF THE NATIONAL OMBUDSMAN ASSISTED A SMALL BUSINESS THAT FILED A COMMENT INVOLVING U.S. CUSTOMS WHO FINED A SMALL BUSINESS FOR IMPROPERLY IMPORTING PRODUCTS INTO THE UNITED STATES. THE SMALL BUSINESS DISAGREED WITH THE FINE AND FILED A COMMENT WITH OUR OFFICE. DUE TO OUR

INTERVENTION, CUSTOMS REVERSED THEIR DECISION AND REFUNDED THE FINE BACK TO THE SMALL BUSINESS OWNER.

IT IS CRITICAL THAT THE SBA HAVE AN OFFICE OF THE NATIONAL OMBUDSMAN. IN ADDITION TO RECEIVING COMMENTS REGARDING REGULATORY FAIRNESS, THE SBA NATIONAL OMBUDSMAN ALSO RECEIVES COMMENTS REGARDING OTHER ISSUES SUCH AS CONTRACTING, CAPITAL ACCESS AND BUSINESS TRAINING. AS A PART OF SBA, THE SBA NATIONAL OMBUDSMAN CAN DIRECTLY COMMUNICATE THESE ISSUES TO THE SBA ADMINISTRATOR AND APPROPRIATE PROGRAM MANAGERS.

THE OMBUDSMAN ALSO BENEFITS FROM ACCESS TO THE RESOURCES OF THE SBA'S OFFICE OF GENERAL COUNSEL AND OTHER DIVISIONS. IF REMOVED FROM SBA, THE OFFICE OF THE NATIONAL OMBUDSMAN WOULD FIND ITSELF SEVERELY HAMPERED BY A SHORTAGE OF THESE SKILLED, EXPERIENCED PERSONS.

ADMINISTRATOR BARRETO HAS RECOGNIZED THE IMPORTANCE OF THE NATIONAL OMBUDSMAN AND STRESSES TO THE SBA'S FIELD OFFICES TO USE THE OFFICE OF THE NATIONAL OMBUDSMAN AS ANOTHER TOOL TO ASSIST AND PROTECT SMALL BUSINESSES. THE MISSION OF THE SBA NATIONAL OMBUDSMAN IS NOW MORE RELEVANT AND MORE EFFECTIVE

THAN EVER BEFORE BECAUSE IT IS NOW A CORE FUNCTION OF THE SBA AND ITS SERVICES ARE AVAILABLE AT THE GRASSROOTS LEVEL THROUGH LOCAL SBA OFFICES.

SINCE THE SENATE CONFIRMATION OF THE ADMINISTRATOR IN THE LAST QUARTER OF FISCAL YEAR 2001, THE OFFICE OF THE NATIONAL OMBUDSMAN HAS HELD SIX REGULATORY ENFORCEMENT FAIRNESS HEARINGS AND SIX REGULATORY ENFORCEMENT FAIRNESS ROUNDTABLES.

HEARINGS, WHICH ARE REQUIRED BY STATUTE, ARE AN AVENUE BY WHICH WE SEEK SPECIFIC COMMENTS FROM SMALL BUSINESS CONCERNS. ROUNDTABLES ARE USED TO PROMOTE THE MISSION OF THE SBA NATIONAL OMBUDSMAN TO TRADE ASSOCIATIONS AND OTHER SMALL BUSINESS GROUPS. ATTACHED IS A SCHEDULE OF THE REGFAIR MEETINGS FOR FISCAL YEAR 2002. PLEASE NOTE THAT WE WILL HAVE AT LEAST ONE HEARING AND ONE ROUNDTABLE IN EACH REGION. THIS INCREASE IN HEARINGS AND ROUNDTABLES IS DIRECTLY ATTRIBUTED TO ADMINISTRATOR'S BARRETO'S COMMITMENT TO MAKE THE MISSION OF THIS OFFICE A CORE FUNCTION OF THE SBA.

IN ADDITION TO THE INCREASE IN THE NUMBER OF HEARINGS, ATTENDANCE AT THE HEARINGS AND ROUNDTABLES HAS ALSO

INCREASED DRAMATICALLY. FOR EXAMPLE, ATTENDANCE AT OUR REGFAIR HEARINGS IN ORLANDO AND ALBEQUERQUE DREW CROWDS OF APPROXIMATELY 80 AND 90 SMALL BUSINESS OWNERS AND OTHER INTERESTED PARTIES RESPECTIVELY.

ADDITIONALLY, THROUGH THE EFFORTS AND CONTACTS OF OUR DISTRICT FIELD OFFICES, WE HAVE RECEIVED EXCELLENT NEWS COVERAGE FOR OUR HEARINGS. THIS IS ASSISTING US IN OUR EFFORT TO MARKET THE RESOURCES OF THE OFFICE OF THE NATIONAL OMBUDSMAN. (SEE ATTACHED)

AS DEMONSTRATED BY THIS COMMITTEE'S MARCH 6, 2002 HEARING ON THE REGULATORY FLEXIBILITY ACT, THERE IS A CONTINUED NEED TO ELIMINATE UNNECESSARY REGULATORY BURDENS ON AMERICA'S SMALL BUSINESSES.

SMALL BUSINESSES NEED THE OFFICE OF ADVOCACY TO ENSURE REGULATIONS ARE FAIR BEFORE THEY ARE IMPLEMENTED AND THE SBA NATIONAL OMBUDSMAN TO ENABLE SMALL ENTITIES TO COMMENT ON HOW FEDERAL REGULATIONS ARE ENFORCED. HOWEVER, OUR RESOURCES AND ABILITIES SHOULD BE JUDGED BY OUR RESULTS RATHER THAN OUR LOCATIONS. I STRONGLY BELIEVE THAT MY OFFICE IS AND WILL CONTINUE TO BE EFFECTIVE AS A PART OF SBA.

ON BEHALF OF THE ADMINISTRATION, ADMINISTRATOR BARRETO, AND THE OFFICE OF THE SBA NATIONAL OMBUDSMAN, I LOOK FORWARD TO WORKING WITH THE CHIEF COUNSEL, OUR LEGISLATIVE PARTNERS AND THE NATION'S SMALL BUSINESSES TO ELIMINATE UNNECESSARY REGULATORY BURDENS ON SMALL BUSINESSES.

THANK YOU FOR THE OPPORTUNITY TO APPEAR HERE TODAY. I WILL BE HAPPY TO ANSWER ANY QUESTIONS.

BRAND & FRULLA
A PROFESSIONAL CORPORATION
923 FIFTEENTH STREET, N.W.
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TELEPHONE: (202) 662-9700
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**Testimony of**

**Jere W. Glover**
**Brand & Frulla**

**Before the**

**Small Business Committee**

**U. S. House of Representatives**

**On the**

**Small Business Advocacy Improvement Act**

**March 20, 2002**

**Mr. Chairman and Members of the Committee:**

I am Jere W. Glover with Brand and Frulla, a law firm specializing in litigation and regulatory and administrative law. My practice is focused on administrative law and representing small business and business development. I am pleased to be here today to testify about improving the Office of Advocacy.

I had the privilege of serving as the Chief Counsel for Advocacy from 1994-2001. During this time we issued over 100 reports and economic studies, testified before Congress over 30 times, intervened in over 200 agency rulemaking proceedings, reviewed over 5,000 regulations, oversaw the White House Conference on Small Business and coordinated the implementation of over 87% of the conference recommendations, reduced the regulatory burden on small business by $16 billion through our comments on regulatory proposals and the successful implementation of the Small Business Regulatory Enforcement Fairness Act, and filed the first *amicus curiae* brief in the history of the Office. Because of the work of an outstanding staff, the strong support from the White House Conference delegates and small business community, and the support of many members of the Congress and the Administration, we were able to accomplish a great deal. I am proud to have been Chief Counsel during this period.

Could we have done more if some of the proposals you are considering today were enacted? I think so. I am extremely pleased that this committee is considering improvements to the Office of Advocacy. You will see from my testimony below, what we accomplished while the Office went from 70 employees to 50 and the economic research budget was reduced to between $800,000 and 1.1 million. We did more with less and are proud of what we accomplished with what we had. Would I want my successors to have to work with so few

resources? Absolutely not! I want future Chief Counsels to be able to focus on small business issues instead of budget and personnel concerns.

Before proceeding to my comments, I would like to note that a year ago, almost to the day, this Committee held hearings on a specific proposal concerning the Office on which my former Deputy, Mary K. Ryan, submitted testimony.[1]

**Looking Back – Advocacy's Successes**

My tenure as Chief Counsel was not my first experience with the Office of Advocacy. Earlier, when the Office was first established, I was Deputy under the first Chief Counsel, Milton D. Stewart. Milt was a wonderful leader to me and a whole generation of small business leaders. That was a rewarding time since the establishment of the Office was a first. We had a clean slate on which to work and had a world of activity options from which to choose. Among other things, we were very successful in promoting new legislation to help small business, to wit, the Equal Access to Justice Act, the Small Business Innovation Research Act, and the Regulatory Flexibility Act, which has become a cornerstone of the Office's work.

During those first years, we established a style of operating that institutionalized the independence of the Office. We submitted comments on agency regulatory proposals without clearing the comments with anyone. We did not clear our testimony before delivery to the Congress. We developed significant reports on small business trends, innovations, industry characteristics, etc. This research we believed was equally important to our regulatory work and was designed to fulfill the research responsibilities assigned to us by Congress. Until the Office

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[1] As you proceed to consider what should be included in the current bill, that testimony should be reviewed for its relevance to your deliberations. When I was Chief Counsel we often discussed how to strengthen the Office and a lot of our collective thinking is reflected in that testimony of a year ago.

started publishing and analyzing small business data, there was little if any factual data on which to rely in formulating public policy. A vacuum existed which our research started to fill.

Those early years were a proving ground and had a profound influence on the approach I brought to the job in 1994 when I was appointed and confirmed as Chief Counsel. I had learned to value the importance of the Office's independence and had a sense of how to use this status internally within the Administration to establish the Office as an effective voice for small business. To influence Administration policy, Advocacy, in my view, had to be perceived not only as an advocate but as an ally bringing facts - credible and independently garnered – that were relevant to policy deliberations affecting small business. Further, it would not serve small business interests if we were perceived as seeking special treatment for small business without regard for other important policy issues such as clean air, water quality, worker and industrial safety, etc. Our job was to present facts that argued for alternatives that were equally effective but less harmful to small business. I always felt that, if I had the facts, I stood a good chance of influencing Administration policy but we had to be at the table early in the process. It is a truism that it is easier to affect changes as a policy is being deliberated than when it is cast in concrete and made public. We were successful working internally in numerous instances during my tenure. If we did not succeed in changing the Administration's position, everyone involved knew that we had the option of disagreeing publicly, which we did when there was still a chance to alter the outcome. When public disagreements occurred, although unwelcome, the disagreements did not come as a surprise to those involved. Because of our early involvement in deliberations, we had already established our credibility and commitment to promoting alternatives that had less harmful impacts on small business.

This approach served us well, not only with the Administration but also with the Congress. Congress had to know that what we were saying in testimony was the same message we were giving the Administration. Small business issues, after all, are not partisan issues, and the facts are the facts. At times, we even disagreed with congressional proposals, buttressing our arguments, however, with facts generated by our research.

It is with some pride that I note the small business data we generated has become part of the rhetoric of policy makers on both sides of the aisle and at both ends of Pennsylvania Avenue. Advocacy's job generation numbers, based on sound methodology, are undisputed, as is the data on the number of small businesses and their contribution to the nation's economic growth. The studies we financed on the regulatory burdens on small business justify Advocacy's intervention on regulatory proposals and strengthen its arguments when urging agencies to consider less onerous but equally effective alternatives.

One challenge we faced was measuring the impact of Advocacy's work on affecting changes in regulations. We finally found a way to track the savings achieved when changes were made to regulations prior to publication for comment or when finalized. The most recent estimate I have seen is $16 billion over a four year period. If my recollection is correct, Advocacy's budget is about $5 million (exclusive of research). This means that the savings of $16 billion is a return of $ 800 for each dollar of Advocacy's total 4 year budget. That is a pretty good return to the taxpayer. That's the kind of cost benefit analysis we like to see.

There is no question that four factors have strengthened Advocacy's hand in negotiating for regulatory changes. The factors are embodied in the 1996 amendments to the Regulatory Flexibility Act – better known as the Small Business Regulatory Enforcement Fairness Act ("SBREFA"). First, the Act requires the Occupational Safety and Health Administration

("OSHA") and the Environmental Protection Agency ("EPA") to have advocacy review panels for the purpose of consulting small entities that would be effected by rules the agencies are considering. This mandate is "early consultation," not only with small entities but with the Office of Advocacy and the Office of Information and Regulatory Affairs ("OIRA") of the Office of Management and Budget ("OMB"). These panels have clearly demonstrated the value of involving small businesses and other small entities in an agency's early deliberations where the practical impact of regulatory proposals can be weighed, debated, and scrutinized.

The second factor was Congress' re-affirmation of the Chief Counsel's authority to file *amicus curiae* (friend of the court) briefs in regulatory appeals. This is important when negotiating with agencies on the form and content of final rules. Agencies do not want to argue with Advocacy in court. Without having to actually file an *amicus brief*, we were successful on several occasions in winning on an issue after filing a notice of our intent to file an *amicus* brief. As stated before, we did file the first *amicus curiae* brief in the history of the Office. In that case, the Court agreed with the issues we raised and returned the rule to the agency for review.

The third factor was the amendment that allowed the courts to review an agency's compliance with the Regulatory Flexibility Act ("RFA") in an appeal from a final rule. This change provided a great incentive for agencies to consider small business impacts, although agency compliance with the RFA remains uneven.

The fourth factor was our collective success in keeping the Office of Advocacy from being abolished in 1995. As you may remember, there was a serious attempt by a former member of Congress to zero fund the Office of Advocacy. Thanks to the hard work of this committee and our friends in the Senate that effort failed. This was a re-affirmation by the Congress of the need for an independent small business voice in the Executive Branch.

The combined results of these changes in the law and the work of the Office of Advocacy resulted in savings of $16 billion in regulatory costs for small businesses.

Much of the foregoing has been covered in greater detail in a report entitled "Background Paper on the Office of Advocacy 1994-2000" which was delivered to the Congress on November 1, 2000, and which I commend to the staff working on the current proposal.

**Changes to Strengthen the Office of Advocacy**

Can more be done to strengthen the Office? Yes, absolutely. The Committee's current working draft contains important proposals which I support.

**I. Line Item Budget**

At one time the Office had a line item in SBA's budget for both staff and research. For a number of years there was a line item for 69 positions, $2.4 million for salaries and at least $3.2 million for economic research for a number of years in the reauthorization bill for the Small Business Administration.[2] The working draft under consideration by this committee provides for a separate budget and staffing for Advocacy – a budget that is not dependent on the SBA Administrator. That change would be most welcome and would be effective in establishing, through the appropriation and authorization processes, the independence of the Office.

The current authorized staffing level for the Office is significantly less than the 69 positions the Office had in 1992, and some review of the Office's workload and responsibilities may be in order. Certainly, if the regulatory review panel process of the RFA is expanded to other agencies beyond the EPA and OSHA, staff should be expanded accordingly.

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[2] The program levels reported are those provided by SBA authorization legislation enacted in P.L. 96-302 (approved 7/2/80) and P.L. 97-35 (approved 8/13/80). The "floors" were provided with language whose form was "...of which amount not less than...shall be used to..."

We estimated that Advocacy's participation in a SBREFA panel consumed 700 professional hours. That figure is a good guideline to follow in estimating what additional staff would be needed if Advocacy's panel responsibilities are expanded.

**II. "Substantial Weight" To be Given to Advocacy Comments on Regulations**

The working draft directs agencies to give substantial weight to Advocacy's regulatory comments and to publish those comments with their regulatory proposals. This, too, is a welcome change, but I would also ask that you consider a provision that would direct the courts to give deference to Advocacy comments. One Court, erroneously I believe, has held that Advocacy comments are merely advisory, the import being Advocacy comments on regulations carry no weight in litigation and need not be considered by the courts.

**III. Chief Counsel to Serve Until Replaced**

I strongly support this provision. A hiatus in the Office harms small business. In the case of my appointment, the Office had been vacant for four and a half of the five years before I was confirmed. The Office was vacant for over a year after my departure. That break in continuity is harmful and your approach corrects a major weakness in the current system. There is ample support for such a provision elsewhere in the Government. The notion of a Presidential appointee continuing in service until his or her successor is in place is certainly not novel. In the case of a United States Attorney, the law provides that "On the expiration of his term, a United States Attorney shall continue to perform the duties of his office until his successor is appointed and qualifies." 28 U.S.C. 541(b). U.S. Ambassadors routinely stay for several months after a new President is elected. Also, although it is clear that a President can

remove an Inspector General, the law requires that "The President shall communicate the reasons for any such removal to both Houses of Congress." 5 U.S.C. App. 3.[3]

**CONCLUSION**

In closing, I would like to raise three additional issues that I hope you will consider. First, there needs to be another White House Conference on Small Business, as seven years have passed since the last one. These conferences help all of us, but especially the Chief Counsel, find a new group of elected small business leaders, who will develop an agenda for small business in the new millennium.

The Small Business Innovation Research Program ("SBIR") has demonstrated over and over again its benefits to the Federal Government. The program has been administered by the SBA. However, it has been relegated to a very low level of priority within the SBA and is not getting the attention or support that it deserves, particularly given its importance both to small business and to the research programs of the government. Only six staff are assigned to this important program which oversees $1.4 billion in federal R and D contracts. In essence SBIR is an interagency program and would be better served if it were housed in Advocacy. Advocacy was one of its early and important sponsors and has been a vocal supporter over the years. The

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[3] A recent Congressional Research Service report on Presidential appointments to regulatory boards and commissions provides many examples of authorities for incumbents to remain in office after their terms have expired. I might add that these authorities are used routinely. This study conveniently cited appointment authorities for 33 such collegial bodies, most of which provide that appointees can remain in their positions after the expiration of their terms.

For example, presidential appointees to the Federal Reserve Board of Governors, the Federal Trade Commission, the Farm Credit Administration, the Federal Deposit Insurance Corporation Board of Directors, and the Federal Election Commission all may continue to serve after their terms expire until their successors take office. This is also true in at least a dozen other such collegial bodies. Similar provisions at the Securities and Exchange Commission, the Federal Communications Commission, and the Commodity Futures Trading Commission allow appointees to remain in office at the end of their terms until the end of the next session of Congress.

mission of the program is both consonant and compatible with the mission of the Office of Advocacy. I know the current Chief Counsel has committed to stay involved in the SBIR program. I hope you would give serious consideration to transferring program responsibility (and staff) to Advocacy.

One of the statutory obligations of the Office of Advocacy is to represent small businesses in their dealings with federal agencies. This obligation was not changed with the establishment of the Ombudsman function within SBA. Having the Ombudsman function separate from the Office of Advocacy causes confusion in the small business community. Moreover, it is housed in an entity that is not knowledgeable in the diverse regulations affecting small business or how to bring about change through the regulatory process. This results in unnecessary and costly redundancy. The possibility of having the Ombudsman appointed by and directly accountable to the Chief Counsel is worth exploring. If this idea has merit, then the Chief Counsel should also be given the authority to appoint the members of the 10 regional regulatory fairness boards.

I will be happy to work with your staff as needed on any of the changes you are considering. Thank you for giving me the opportunity to appear before this committee.