Testimony of

Jere W. Glover
Chief Counsel for Advocacy
U. S. Small Business Administration

Before the

Small Business Committee

U. S. House of Representatives

June 21, 2000

Mr. Chairman, Members of the Committee, my name is Jere W. Glover. I am Chief Counsel for Advocacy at the U. S. Small Business Administration. I was appointed by President Clinton and confirmed by the U. S. Senate in May 1994. I am pleased to have the opportunity to appear before this Committee – the first time in two years - to discuss the Office of Advocacy and to lay before you facts about the policy successes of the Office during the six-year period since my confirmation. These successes were made possible in part by actions of the Congress: first, when it established the Office in 1976 as an independent voice for small business, with authority to appear as *amicus curiae,* and second, when it enacted the Regulatory Flexibility Act of 1980 (RFA), later amending it with provisions in the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996. Two of the SBREFA amendments are worth highlighting: one re-affirmed the Chief Counsel's right to appear as *amicus curiae* in appeals from agency final actions,

expanding the subject matter that the *amicus* could address, and another conferred jurisdiction on the courts to review agency compliance with the RFA.

Before proceeding, it is important to note that my comments reflect my own views as Chief Counsel for Advocacy and do not necessarily reflect the views of the Administration. In the context of this hearing on the independence of the Office of Advocacy, this disclaimer takes on a special significance directly relevant to the issue before us, namely the independence of the Office. Since I assumed the role of Chief Counsel, Advocacy has testified before Congress at least 40 times, and submitted testimony for the record on numerous other occasions. My testimony was never submitted for clearance by any office in the Administration. On 25 occasions I took positions that were not consonant with Administration positions (see attached list). This is some evidence not only of my commitment to small business but of the independence of the Office. Independence is a prerogative I have jealously guarded within this Office and is also one that has been honored both by the Congress and the Administration.

Independence – How to Measure It.

Since assuming office, I have had one objective – to be an independent spokesman for small business before regulatory agencies, before Congress and within the Administration. One example: very early in my tenure as Chief Counsel I openly advocated that the Administration and the Congress establish a procurement goal of 5 percent for women-owned businesses. The Administration eventually adopted this recommendation. Congress also supported it and it has become a vital part of SBA's procurement goal-setting process for agencies.

Significantly, Advocacy has always interpreted its mission broadly. It has filed comments with the Federal Trade Commission on mergers – one affecting small cable companies and another affecting small oil refiners. We also raised small business concerns with the U. S. Postal Service regarding its rule on Commercial Mail Receiving Agencies. These actions, we believe, are consistent with the mission given to the Office by Congress – that of being an independent voice for small business on all policy issues.

To be an effective voice for small business I have always viewed my role as striving for consensus at both ends of Pennsylvania Avenue. As Committee Members well understand, consensus is not always easily achieved. It can take years, particularly on contentious issues. Witness the time it took to garner support within Congress and the Administration on an amendment that allows the courts to review compliance with the RFA. The issue was first raised during the debates in 1980 over the adoption of the RFA. The issue surfaced again at the 1986 White House Conference on Small Business (WHCSB) convened under the Reagan Administration, and again at the 1995 WHCSB under the Clinton Administration. Judicial review, an issue consistently supported by the Office of Advocacy to the best of my knowledge, became part of the RFA in 1996 – four Administrations, nine Congresses, and 16 years after the issue first surfaced.

The key to building consensus is never to view any position taken by the Congress or the Administration or a regulatory agency as cast in stone. The challenge is always to find new arguments and new data in support of reforms and initiatives that help small business. The process is a continuum. At any given moment, you may find the Chief Counsel in disagreement with the Administration and other times in disagreement with Congress, and sometimes with both, for example, on patent and bankruptcy reform.

The role of the Chief Counsel is to persist in addressing issues and to bring new data and arguments to the table for consideration by decision makers. Sometimes I have prevailed; sometimes I have not. But I never was pressured, nor did I ever abandon the Chief Counsel's independence to pursue small business issues, even those on which the Office did not prevail at a particular point in time.

Thus the question: how is independence measured? Is independence measured by how often the Chief Counsel disagrees *publicly* with the Administration? Is independence measured by how often the Chief Counsel disagrees with legislative proposals? See again the attached list of those instances in which I have disagreed publicly with the Administration. But it is important to add that public disagreements should not be the norm. Why? Because it serves the interest of small business for the Chief Counsel to be perceived by the Administration, by regulatory agencies and by the Congress as an *ally* arguing for sound public policy --- not as an *adversary.* Being an ally keeps access to policy councils open to the Chief Counsel. *Access* to early deliberations is crucial if administrative initiatives are to be tailored to the concerns of small business. Early consultation affords the opportunity to alter proposals, reduces the overall cost of the regulatory process by anticipating and addressing potential objections, and minimizes the cost of the total process up to and including enforcement.

I should further add that anytime the Chief Counsel has to disagree publicly with the Administration (or the Congress), the disagreement must lack acrimony to ensure that the doors remain open to future policy deliberations, often on the same issue. Members of Congress are experts at couching disagreements in diplomatic terms when to do so

helps position the debate to garner support at a later date. It is no different for the Chief Counsel working within the Administration or with the Congress.

Finally, while public disagreement with the Administration (or with Congress) may be *some* visible evidence of independence, it is *not the total measure* of the Chief Counsel's independence. Other activities should also be part of that measure, to wit, those occasions when the Chief Counsel has successfully persuaded the Administration to initiate a policy change or to alter a policy it is considering in order to accommodate the interests of small business. To illustrate this point further, it is appropriate to consider the impact on public policy of the White House Conferences on Small Business, where small business people debated an array of topics on which they wanted reform.

1995 White House Conference on Small Business

While I attended the 1980 and the 1986 White House Conferences on Small Business (WHCSB), my involvement with the 1995 WHCSB was as Chief Counsel. The 1,800 small business delegates from the 50 States and U. S. territories adopted 60 recommendations for consideration by both the Congress and the Administration. The Office of Advocacy immediately took steps to implement those recommendations. To do otherwise would have been an abdication of the Chief Counsel's responsibility to represent small business. Some recommendations would require congressional action and others could be implemented administratively. We set up a structure through which we maintained contact with State and Issue Chairs elected by the delegates to pursue implementation. We held two conferences during which implementation of the recommendations was discussed. We also organized interagency meetings at the White

House to discuss administrative measures that should be taken in response to the recommendations. We constructed a directory of delegates by issue and by state for use by the Congress in identifying potential witnesses for legislative hearings. Progress reports were submitted to the Congress, and the President actively sought information during Cabinet meetings on the progress being made by agencies to act on the recommendations.

The record of actions is unprecedented. To date, the number of 1995 Conference recommendations that have resulted in administrative and legislative policy changes exceeds that from any previous conference. Action, in whole or in part, has been taken on nearly every issue recommendation, resulting in significant progress for the small business community.

Through the Conference agenda, Congress and the Administration have found common ground on the nation's small business priorities. Congress passed, and President Clinton signed the following legislation in response to the recommendations:

1999

- SBIC Technical Corrections Act
- Small Business Year 2000 Readiness Act

1998

- Internal Revenue Service Restructuring and Reform Act
- Department of Defense Reform Act
- Omnibus Budget Reconciliation Act
- Paperwork Reduction Act Amendments

1997

- Balanced Budget Act
- Taxpayer Relief Act

1996

- Small Business Regulatory Enforcement Fairness Act
- Small Business Job Protection Act
- Health Insurance Portability and Accountability Act
- Economic Growth and Regulatory Paperwork Reduction Act
- Telecommunications Act

- Federal Acquisition Reform Act
- National Securities Markets Improvement Act
- Small Business Programs Improvement Act

1995

- Small Business Lending Enhancement Act

Administratively, the number one priority, clarification of the independent contractor definition for tax purposes, was addressed by the Internal Revenue Service. Working with delegates, the IRS published an agents' field manual that fully explained the agency's policies. Additionally, in the area of pension reform, several administrative changes have led to increased opportunities for small business participation in retirement options (see the following pension discussion).

Other Significant Small Business Initiatives Instituted by the Office of Advocacy

The statute that created the Office of Advocacy (15 U.S.C sec. 634a *et seq)* details the responsibilities of the Office, which include, among others: examination of the role of small business in the economy; measurement of the direct costs and other effects of regulation; assessment of the impact of the tax structure on small business; study of the ability of the financial markets to meet small business credit needs, including the credit and equity needs of minorities; development of recommendations for creating an environment in which small business can compete effectively, etc. This is an extremely broad mandate and we have worked to ensure that our research addresses emerging public policy issues that fall within this broad mandate. For example, each year we have published a report ranking all U.S. banks on their lending to small business.

There is one research effort that is worth special mention. Advocacy's research demonstrated that access to equity capital – not merely credit – was becoming a barrier to

the growth of small business. The need for equity capital was not being met by the existing venture capital market, which our research documented was investing its resources in much larger investments than small businesses needed. Aggravating the shortfall was the fact that the market for investments between $250,000 and $3 million is disorganized, inefficient and costly to both small firms and "angel" investors. The market needed corrective action. The Office of Advocacy devised an Internet-based system, ACE-*Net*, through which small firms could list their equity needs, and accredited investors, using a secured password, could access the system to identify firms with which to negotiate an investment agreement off line. The Securities and Exchange Commission (SEC) issued a "no action" letter for the new Internet-based service, and 42 states have adopted an "accredited investor" exemption, several of which are specific to ACE-*Net*. The SEC recently issued guidance to the effect that for- profit companies using the Internet to list public offerings need to be broker-dealers and comply with all SEC regulations, leaving the field to ACE-*Net* as a unique service that complies with both Federal and State securities laws. Negotiations are now under way to privatize ACE-*Net.* When this is accomplished, there will have been created a new *national* market, facilitated by the Internet with the blessings of Federal and State regulators, that accredited investors can use to find investment opportunities. This will help close the equity chasm that now exists for small business.

The Internet design for ACE-*Net* suggested to us yet another application that could help small businesses find procurement opportunities. This evolved into a program called PRO-*Net* through which small businesses can register their companies, describe their products and services, update their company information at will, and use the service

to find procurement opportunities. But the real value of the system is ease of access and reliance on the data by contracting officers to find small businesses with which to explore procurement possibilities. This service is a major step toward eliminating contracting officers' claims that they cannot find small businesses to bid on their requisitions.

These are but two examples of how the Office of Advocacy has both identified and addressed market imperfections that are erecting barriers to the growth and development of small business – initiatives that grew out of the very broad mission given to the Office of Advocacy by the Congress.

Small Business Involvement in the Work of Advocacy

The small business public policy issues confronting the Office of Advocacy are as diverse as the industries in which small businesses are engaged, and several would not make headlines news in the business sections of our daily newspapers, despite their importance to a particular industry or industries. To stay in touch with changing needs and impacts, and to ensure small business participation in policy deliberations of public officials, Advocacy has done the following:

- Held ad hoc industry roundtables frequently with small business representatives to discuss:

    - court decisions on RFA and pending RFA litigation
    - procurement
    - environment
    - workplace safety
    - fishery and other resource regulations (mining, etc.)
    - telecommunications
    - taxes
    - pensions and related issues
    - transportation
    - technology

Government officials, including congressional staff, also attend. The Administrator of OSHA attended one of our roundtables at which the ergonomics rule was discussed. These are important forums where small business owners can meet policy-makers face-to-face and engage in two-way communications.

- Held regular meetings with leaders of national small business organizations to ensure we remain in touch with the issues of concern to their members.

Direct benefits for small business have resulted. Here is but one example involving the IRS and Treasury. Advocacy has organized dozens of meetings, roundtables and work sessions with IRS and other Treasury officials for small business owners and trade associations. These sessions led to agreements on a simplified defined-benefit plan, safe harbors for small business 401K participation, simplified forms to reduce paperwork burden, and flexibility in participation declarations. We will continue to bring small business people together with IRS and Treasury officials to discuss continuing concerns on taxes and pensions and we are pleased with the IRS's and Treasury's receptivity to having such meetings.

As for other interactions with small businesses, attached are letters that describe the working relationship Advocacy has maintained with small businesses and their representatives on specific issues.

Beyond our interaction with small firms, the Office of Advocacy has also reached out to academic and government researchers to engage them in dialogues on small business public policy issues. We held a conference on Industrial Organization Economics examining both the legal and economic trends in this field of research to see what new research was emerging and how court decisions were influencing industrial

organization trends. We also sponsored two conferences addressing the impact of bank mergers. The most recent, completed just last week and attended by more than 100 people, produced a wealth of information on what is happening in the banking industry—for example, how small banks are emerging to fill the credit needs of small business, how credit scoring is affecting the market, and how call report and Community Reinvestment Act data can be used to shed light on the credit marketplace. Chairman Leach and Ranking Member LaFalce both addressed the conferees.

Finally, the Office of Advocacy has held three conferences to showcase state and local initiatives that help small business. Discussions on such initiatives help state and local officials institute similar and even improved services for small business. A publication – *Models of Excellence* – emerged from these conferences for use by Governors interested in small business initiatives.

Each of these endeavors is premised on a basic economic principle, namely, information rationalizes markets. Markets are imperfect where information is lacking; public policy decisions are also imperfect when they are based on imperfect information. Thus, one of Advocacy's missions is to ensure a place at the table for small business.

Regulatory Achievements – Impact of SBREFA

The foregoing provides a backdrop for Advocacy's important regulatory work. Advocacy reviews and critiques the regulatory proposals of approximately 20 Executive Branch and independent agencies. The Small Business Regulatory Enforcement Fairness Act, which requires that EPA and OSHA convene Small Business Advocacy Review panels, also mandates that the Chief Counsel be a member of the panel. This change has

altered the way these two agencies approach the regulatory process. I have witnessed this change firsthand, having participated in 20 EPA panels and 3 OSHA panels. The work of the panels is labor-intensive, consuming on average over 500 professional hours for Advocacy alone. This average understates the amount of time spent on the OSHA ergonomics rule, especially when one considers the number of meetings Advocacy staff addressed to explain and discuss the rule with small business people. But the effort has been worthwhile, since the panels generated significant savings for small business.

And the impact of SBREFA goes well beyond these two agencies.

When SBREFA was first enacted, the Office of Advocacy provided briefings to approximately 200 small business trade association representatives and more than 500 Federal officials. We participated in several meetings convened by the Office of Information and Regulatory Affairs (OIRA) for high-ranking agency officials specifically to discuss the SBREFA amendments, how the amendments would affect their regulatory process, what the law required regarding small business impact analyses and that compliance with the RFA would now be subject to judicial review in any regulatory appeals.

Since then, it is becoming increasingly clear that the SBREFA amendments are changing the culture of regulatory agencies. We documented this trend in last year's report to Congress on agency compliance with the RFA and again in this year's report. That is not to say that all agencies are complying with the RFA 100 percent of the time. That certainly is not the case and we so reported. But there is renewed interest, as reflected in agency concerns about complying with the RFA. We have received a growing number of requests for Advocacy involvement in regulatory deliberations *prior*

to publication of regulations for public comment. And it is also evident from Advocacy's increased involvement with OIRA's review of final rules, pursuant to its authority under EO 12866 and the Paperwork Reduction Act. We believe this change in agency focus is a direct result of the SBREFA amendment, which empowers the courts to review agency compliance with the RFA.

It is also a result of the close working relationship SBREFA has in effect established between Advocacy and OIRA in the Small Business Advocacy Review panels, which OSHA and EPA must convene when these agencies anticipate that a rule will have a significant impact on a substantial number of small entities.

Finally, Advocacy's first filing of an *amicus curiae* brief, did not go unnoticed. We prevailed on the issues raised in the brief, and the challenged rule was remanded to the agency.

While we have filed only one *amicus curiae* brief, we have nevertheless relied on that authority to resolve several regulatory disputes with agencies. One of the Committee's Counsels has firsthand knowledge of this, since he played a major role in a dispute with the Federal Communications Commission when he was on the staff of the Office of Advocacy. Just four months after I assumed office in 1994, two years before the adoption of SBREFA, we filed a notice to appear as *amicus curiae* in an appeal from an FCC rule. Our notice of intent to file triggered several calls from the Commission and the Department of Justice on the issues that concerned us. With only four hours remaining to file the brief, an agreement was reached and a commitment received from the Commission to revise the rule along the lines we recommended. The details do not matter – but the process does. This was informal behind-the-scenes negotiation with a

regulatory agency on behalf of small business -- concrete evidence that the *threat* of filing an *amicus curiae* brief can be as important as the *actual* filing. We have found this to be the case in other regulatory disputes that were resolved without Advocacy having to file a brief. By the way, I have with me today a copy of the brief that was never filed.

Impact Measurements

The changes agencies have made to regulatory proposals are further evidence of the cultural change that we believe is occurring. We measure impact not by how many rules we review or how many rules we critique, but by how agencies change their proposals in response to Advocacy's recommendations. The amount of regulatory savings resulting from changes measures Advocacy's impact. We estimate that in FY 1998, changes made to regulatory proposals resulted in $1.5 billion in reduced regulatory savings. In FY 1999, the savings were $5.3 billion. Attached to this testimony is the *Executive Overview* of our FY 1999 Report to Congress on agency compliance with the RFA, wherein these savings are detailed and documented. Also attached is a graph illustrating these savings. The importance of this report is that it is the first time we have been able to quantify these regulatory savings.

The savings in FY 1999 represent a return of $1,060 for every dollar of Advocacy's budget, which we estimate to be in the vicinity of $5 million, including salaries and benefits. Having said this, Advocacy recognizes that these savings did not result solely from Advocacy's work. Advocacy partners with small entities, their trade representatives, with OIRA, and, yes, even with regulatory agencies to effect changes in regulations. These savings are the result of these partnerships. And in another sense, these savings also measure increased agency compliance with the RFA.

Committee Questions

This then brings me to the questions raised in your letter of invitation. It also brings me back to the question I raised in the beginning of this testimony: how to measure independence? I have tried to address this issue thus far by describing our work and impact under existing authority. Let me now be more explicit.

In my view, independence cannot and should not be measured by how often the Chief Counsel disagrees publicly either with the Administration or with the Congress. Independence needs to be measured by the totality of the work of the Office of Advocacy on behalf of small business. There will, of course, always be skeptics about the effectiveness of in-house early negotiations on public policy issues, but it is difficult to refute the truism that early access to policy deliberations is the most effective way to influence an outcome. Some negotiations and deliberations are public and produce important changes, as evidenced by meetings we organized for small businesses with IRS and Treasury officials. Others are not but can be equally successful.

Sufficient Independence?

Where is the evidence that the Office does not have sufficient independence? Where has the Office failed to represent small business? I will be the first to admit that we may have missed some regulations and that we have not used our *amicus curiae* authority in every instance where some thought we should. We limit our involvement to those issues where we can make a difference or where small business interests are underrepresented. But this is not a constraint on independence. It is a *resource* constraint – not a policy or partisan political constraint on the Office's independence.

Independent Commission?

Should the functions of the Office of Advocacy be transferred to an independent commission? I and my Deputy have both worked for two or three collegial bodies in our professional careers and both are of the view that independent commissions are not panaceas for efficient decision making or for enhancing accountability to the Congress or to the constituencies they serve.

Let's examine the question in the context of the Small Business Advocacy Review Panel process. Once a panel is convened, it has 60 days to develop a report. This time period is short but helps focus the work of the agency and the panel to bring issues to closure. Often negotiations continue up until the last minute. If a Commission has to vote on the report, can the work of the panels be completed within 60 days? If there is a minority opinion by the Commission, how will this be addressed? Will the involvement of a Commission delay the process and add cost to the work of the panel and the regulatory agency? If the answer to any of these questions is "yes," will this undermine agency commitment to the RFA? And before a panel is convened, will the Commission have to vote on the names of the small entities submitted to the convening agency to be consulted by the panel?

Additional questions. Creating an independent entity would clearly alter the working relationship of the commission with regulatory agencies by escalating informal negotiations to formal decision making on regulatory comments, etc. by the commission. Would early access to policy deliberations be lost since every decision would be subject to a commission vote rather than informal negotiations? How would this alter what is now a *cooperative* working relationship with non-regulatory agencies such as the Bureau

of the Census which provides data essential to the Office's research and regulatory responsibilities? Could debates and votes on commission regulatory comments be sufficiently timely to meet deadlines for public comment? Usually I submit comments and positions to Congress within 24 hours of receipt of the request. Would a commission be able to respond as quickly? As effectively? We think not.

Authority for Agency-Wide RFA Compliance Regulations?

Under existing authority, the Office of Advocacy does not have a mandate to promulgate regulations that force compliance with the RFA. GAO has recommended that the Office be given such authority. We have issued guidance to agencies on how to comply with the law but have stressed that each agency must rely on the advice of its own General Counsels how to mesh compliance with RFA with the diverse array of congressional mandates each agency has to fulfill. I am confident that with existing resources we could not undertake such a comprehensive rule-making, and I have serious reservations about the wisdom of doing so. Current authority gives the Office of Advocacy and regulatory agencies the flexibility to respond to dynamic changes that are occurring in the small business sector of the economy. The RFA admonishes us to avoid one-size-fits-all regulations and I have reservations that a one-size-fits-all compliance regulation might also result in harm to small business in the long run.

Conclusion

Before concluding this testimony, I have a few additional questions about the staff's draft of legislation to create an independent commission that deserve some mention. Was there a reason for eliminating the functions

- to study and analyze financial markets?
- to analyze credit and equity availability for minorities as well as to evaluate federal programs to help minority businesses?

Was it merely an oversight that the *amicus curiae* language of SBREFA was not adopted? The SBREFA language strengthened the authority of the Chief Counsel and had been relied on in deliberations with regulatory agencies.

Beyond this, it is important to point out that small business historically has opposed the formation of new bureaucracies, even when the bureaucracy would have helped them. There clearly would be a cost to establishing an independent commission which needs to be considered. The issue of cost is particularly relevant since most of the authority the draft bill proposes to be given to the Commission already exists in the Office of Advocacy. (An example is subpoena power. On this point, Advocacy has used its subpoena power on several occasions and has also used the petition provisions of the Administrative Procedures Act to seek regulatory reforms.) Any new authority could be given to the Office of Advocacy with little, if any, budgetary implications.

As I mentioned earlier, constraints on the Office of Advocacy are uniquely resource constraints. When the Office was first established in 1976, it was given a line item budget, including a budget for research. This line item was eliminated in recent years, except for economic research. Another constraint on the work of the office has occurred when the position of Chief Counsel remained vacant for a number of years. These problems are easily fixed by the Congress and I believe Senator Bond's bill addresses both of these concerns.

Thank you for the opportunity to address such important issues that affect small business. I appreciate your concern and interest in the work of the Office of Advocacy, as well as your efforts on behalf of small business. I will be happy to provide any additional information you need.

Attachments:

1. List of Independent Positions
2. Executive Overview – FY 99 Report on Agency Compliance with the RFA
3. Chart on Regulatory Savings
4. Letters from Small Business Stakeholders

QUESTIONS SUBMITTED IN CONNECTION WITH PROPOSAL ON INDEPENDENT ADVOCACY COMMISSION

By

Office of Advocacy
U. S. Small Business Administration

- Small Business Committee staff has instructed us that the principle issue before the Committee is what is the ideal structure to ensure the independence of a small business advocacy office.
- Efficiency, timeliness and impact also need to be addressed
- First, there is NO IDEAL system. The current objective of the Office is to demonstrate and stretch its work to reach its full potential – establishing a standard from which future Chief Counsels cannot deviate but only expand and build upon:
    - to use all the tools available to help small business
    - to achieve consensus at both ends of Pennsylvania Avenue
    - to design solutions to market imperfections
    - to help agencies develop “SMART” rules
    - to save small business regulatory costs

- to create processes that help small business have direct access to decision makers

- Let us attempt to do a side by side analysis of how the work is accomplished now as compared to how it would be done with a commission.
  - Current staff works with small business on a proposed regulation published in the Fed Register with deadlines for public comment – staff drafts a critique of the regulation – submits it for review – it is reviewed usually within hours – signed and sent to the agency.

    In a commission structure – each commissioner and staff would review the letter – debate ensue - a vote taken – How much time would be needed for this? Would deadlines be met? Would each commissioner wish to speak with small businesses affected? Probably.

    The Commission structure generates a process of delay – it does not have the dynamics to move quickly to decision.
- how are issues selected? Under the current system staff does the selection. Would this change under a commission structure?

Unlikely, not unless the commission wants to peruse the Federal Register each day and select the regulatory proposals staff should work on. Does something get lost under the current system? Probably – we probably miss some regulations but are not timid in asking agencies to re-open the process when small businesses bring a regulation to our attention. In any event, staff works under general guidance to comment on rules where Advocacy is likely to make a difference or where small business interests are under-represented or where certain issues need to be emphasized

- What about designing solutions to market imperfections? ACE-Net? Pro-Net? Banking studies? These are all staff functions under the current system and would probably remain a staff function under a commission system. What value is added by having three commissioners?
- Organizing conferences such as the White House Conference on Small Business, or the bank merger conferences? This too is a staff function and would remain so under a 3-headed commission. What value is added by a 3-headed commission?

- The Ombudsman function is also a staff function and would remain so under a 3-headed commission? What is the value added by a 3-headed commission?
- Finally, the Small Business Advocacy Review panels. The work is performed by staff – the panel report is drafted by staff – there is negotiations on the report up to and including the very last hour in order to meet the 60-day time limitation – under a commission structure the deadline could not be met – the time limit would have to be extended – giving rise to agency criticism that the RFA delays and increases the cost of regulation – and they would be right.
- *Amicus Curiae* authority has been used to get resolution of regulatory disputes right up to the court house steps – up to the nth hour. Could this be done with a Commission requiring a majority vote? Unlikely.
- Early consultation with agencies on regulations. This is a staff function now and requests for pre-proposal consultation are on the increase. A commission structure provides no incentive – in fact the opposite dynamic would be created – for agencies to work with Advocacy early to avoid adverse small business impacts.
- Accountability? The Chief Counsel is accountable to the President, to the Congress and to the Small Business community. All three know

who is in charge. In a 3-headed commission, the majority is in charge and who is that? The decision maker shifts and individual accountability of each commissioner is lost. Under the existing system, you know who to blame and who to praise.

- How would the effectiveness of each commissioner be evaluated? At least in the current system, you have an easy target.
- Thus, in terms of processing the work – of critiquing regulations – of negotiating solutions – a 3-headed commission introduces delay. Delay means opportunities lost to effect change in regulations. Accountability is lost. And based on Advocacy staff's experience with commissions, so also is innovation lost.
- How would the successes – impacts of the Commission be measured? By the number of votes? By the number of Comments submitted? These are *activity* measures – not *impact* measures. Advocacy now is measuring its impact by the amount of dollars saved for small business. Is not impact what we want to measure? Is not dollars saved what interests small business?
- Is the current system neat and tidy? No. But anyone who has worked at a commission knows how untidy a commission decision process can be. Each commissioner has to justify his/her existence and this

often takes the form of second-guessing everything. The current system, imperfect though it may be, works and that is the ultimate test. Is it perfect? No. Some would differ with some decisions we have made but what makes anyone think there will be no disagreements with the decisions of a 3-headed commission? The commission structure offers no guarantees that small business, the congress or the administration will always agree with its actions – or its in-actions as well. So nothing will be different under a commission structure – the commission structure does nothing to ensure unanimity of agreement - there will always be those who disagree. Disagreements do not measure effectiveness or lack of effectiveness. Effectiveness can only be measured by the totality of performance.

- Is the current system independent? Emphatically YES. It is as independent as it can be when it must work toward achieving consensus – to getting small business favorable decisions made by a mixture of policy makers – namely the Congress, the regulatory agencies, the Administration. It has to work within a political structure representative of and pursuing special interest agendas and to strike a balance that harmonizes those interests. Do we always get

our way? No. Do we win some? Yes. The commission structure adds nothing to this. It will have its failures and its successes. And it has no incentive nor the structure through which to work at achieving consensus – the dynamic that it introduces is *confrontation*. Confrontation is not conducive to give-and-take discussions on contentious issues. Nor is it conducive to compromise. But it is conducive to gridlock on those issues where there is not a majority -- and -- also because its role is just to vote on positions and not to negotiate resolutions or be part of the process to achieve consensus.

June 2000