

INDEPENDENT OFFICE OF ADVOCACY

STATUS

Situation Improved. The Small Business Jobs Act, Public Law 111-240, strengthens the Regulatory Flexibility Act by requiring agencies to respond to the SBA Chief Counsel of Advocacy's comments in the final rule. It also seeks more independence for the Office of Advocacy by mandating a separate line item in the SBA's annual budget.

ANALYSIS

Congress has recognized the important role of the Office of Advocacy and has repeatedly designated the Office to perform specific tasks, such as monitor and report on the implementation of the Regulatory Flexibility Act, conduct research on small business trends, maintain economic statistics on small business growth, and prepare issue materials for the three previous White House Conferences on Small Business. In 1996, Congress added a major new authority to these duties by directing the Office of Advocacy to monitor and participate in the implementation of the Small Business Regulatory Enforcement and Fairness Act (SBREFA).

In addition, the Office of Advocacy is the federal government's primary provider of small business statistics. These statistics — on job creation, business start-ups, etc. — have proven very valuable to informed lawmaking and small business supporters over the years. In light of congressional efforts to expand the Office of Advocacy's responsibilities, by proposing that IRS regulations be included under the SBREFA panel process, the need for a larger research budget is even greater.

According to a former Chief Counsel of the Office of Advocacy, Jere Glover, there have been four factors that have strengthened the Office's hand in the regulatory process (Glover, House Small Business Committee, 3/20/02). The factors are embodied in SBREFA. First, the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA) are required by SBREFA to conduct advocacy review panels for the purpose of consulting with small entities that would be affected by rules the agencies are considering. According to Glover, the 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' reaffirmation 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 because they do not want to argue with Advocacy in court. On several occasions, the Office of Advocacy has been successful in winning on an issue without even having to file an *amicus* brief, because they have used the *amicus* threat effectively. When the Office of Advocacy filed their very first *amicus curiae* brief, the Court agreed with the issues the Office 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. Finally, the fourth factor, according to Glover, was keeping the Office of Advocacy from being abolished in 1995. The campaign to save the Office of Advocacy was a reaffirmation by the Congress of the need for an independent small business voice in the Executive Branch.

It has become apparent that the Office of Advocacy requires a level of independence from the Small Business Administration (SBA). One way to achieve some structural independence is to establish a separate line-item for the salary and benefits of the Office of Advocacy. Currently, these expenses are covered under the full SBA budget. A budget line-item for the entire office, however, would allow Advocacy's Chief Counsel to hire additional staff to help with an ever increasing workload.

Supporting View

Many believe that none of what has been discussed above would be possible without the flexibility to react and shift resources based on the changing needs of small entities and the economy. Moreover, none of it would be possible without an independent voice to say what is right or wrong about government policies or regulations. The long-term viability of the Office of Advocacy depends on preserving its unique statutory mandate. There is a fear that should an SBA Administrator and the Chief Counsel have different priorities the Office of Advocacy's budget could be pillaged.

When you examine the statutory mandate of the Office of Advocacy, and the authority it has to defend small business, it becomes obvious why the Office of Advocacy should be independent. Some argue that the Office of Advocacy is supposed to be critical of government that treats small business unfairly. The SBA is a regulatory agency and the Office treats the SBA the same as the Environmental Protection Agency, the Occupational Safety and Health Administration, the Department of Transportation, the Internal Revenue Service, and other agencies. The Office of Advocacy makes sure that the SBA adequately considers its impact on small business before they finalize rules (the basic requirement of the RFA and SBREFA). Proponents of a separate line item believe the system is flawed when the Office of Advocacy's budget is determined by a part of the government it holds accountable for compliance with the RFA.

Opposing View

Some in Congress and within the Executive Branch are opposed to creating an independent Office of Advocacy because creating a line item for the Office could violate the separation of powers between the legislative and executive branches. Essentially, those opposed believe that a line item would take too much influence away from the Executive, specifically the Office of Management and Budget (OMB), and put it in the hands of Congress and the Chief Counsel.