



Small Business Ombudsman Model for State and Local Governments

*Preserving Transparency and Fairness in
Regulatory Enforcement for America's
Small Businesses*

Helping Small Business Start, Grow and Succeed

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PART I: INTRODUCTION



As the federal troubleshooter for America's small businesses, I often receive questions about the role of an "ombudsman". It is unfortunate that so many people who may be seeking assistance with their concerns will never receive it because they are simply unaware that an ombudsman exists to help them.

In general, an ombudsman is an official who is empowered to represent a group of people by receiving their complaints and investigating on their behalf. The Office of the National Ombudsman (ONO) was authorized by the Small Business

Regulatory Enforcement Fairness Act of 1996 (SBREFA) to be a resource for small businesses to voice their complaints about federal regulatory enforcement and compliance actions.

Small business owners want to play by the rules and comply with federal regulations. However, because of their lack of resources and fear of challenging regulatory decisions, they all-too often fall short of being adequately represented or avoiding unjust enforcement actions against them.

As the National Ombudsman, I have personally received deep satisfaction from the success stories we receive from small business owners who would have otherwise been forced to close their doors, or face gratuitous fines and penalties because of a misunderstanding, faulty assessment, or mistake on behalf of the enforcing agency.

While conducting Regulatory Fairness Hearings and Roundtables across the country, I also face questions about what small businesses can do with concerns regarding local and state regulatory issues. However, as the Office of the National Ombudsman is authorized to provide review of federal regulatory enforcement, we have no authority to assist in state and local matters.

Transparency and fairness in regulatory enforcement is vital for businesses at all levels of government. This document serves the purpose of assisting entities such as state and local governments or small business organizations in creating and implementing their own ombudsman's function so that they may provide these necessary services to the small business constituencies and communities they serve.

It is my hope that the following information will provide you with the best practices and resources in an effort to provide small businesses in your jurisdiction with the transparency that they deserve in the regulatory and compliance process.

There is no question that small businesses drive our economy. As President Bush stated, "To make our economy stronger and more competitive, America must reward, not punish, the efforts and dreams of entrepreneurs." This includes continually evaluating enforcing and governing entities to ensure that regulatory enforcement is effective, and not excessive for America's small business.

Inside you will find an overview of our program, examples of authorizing legislation, and sample documents used by the Office of the National Ombudsman to implement our program. I am energized that you share our goal of attaining fairness for America's small businesses, and thank you for taking the time to consider creating your own ombudsman service for matters of state and local concern.

Sincerely,

A handwritten signature in blue ink, appearing to read "Nick Owens", with a long horizontal flourish extending to the right.

Nicholas N. Owens
National Ombudsman and
Assistant Administrator for Regulatory Enforcement Fairness

Office of the National Ombudsman

Purpose

Every year, regulatory enforcement results in fines and penalties assessed upon small businesses by the federal government. These actions are sometimes perceived to be so excessive or unfair that small businesses do not have the resources or wherewithal to respond to them. To meet this need, the U.S. Small Business Administration's (SBA) Office of the National Ombudsman (ONO) was created to ensure that federal regulatory enforcement is effective, and not excessive. **It is the ongoing mission of the ONO to facilitate transparency and fairness between small businesses and the federal government.**

Function

The U.S. Small Business Administration's Office of the National Ombudsman receives hundreds of cases regarding unfair regulatory enforcement actions every year. The National Ombudsman consolidates these comments and supporting documents from small businesses and seeks a high-level review of the case from the respective agency. Responses are then returned to the small business for either clarification or resolution of the unfair actions.

It is a priority of the Office of the National Ombudsman to inform the nation's small businesses of their right to comment on unfair or excessive federal regulatory enforcement and compliance activities. The Office of the National Ombudsman strives to reach out to small businesses across the nation through their Regulatory Fairness Program. This program includes conducting Regulatory Fairness (RegFair) Hearings, Roundtables and Boards, as well as speeches, presentations and media interviews in all 10 SBA Regions. The Office of the National Ombudsman also partners with major trade associations, members of Congress, and others in the small business community to increase the number of opportunities small businesses have to share their concerns with the National Ombudsman.

Utilizing a Small Business Ombudsman in Your Community

It is the hope of the National Ombudsman that the success of the ONO's Regulatory Fairness Program can be of great benefit to states and other local government entities that currently do not have a small business ombudsman service.

The National Ombudsman receives comments from small businesses regarding local or state regulatory enforcement actions. It is our goal to aid in extending the type of services that we provide on the federal level to those who may be able to provide the same type of transparency for small business at state and local levels.

The following model will serve as an introduction, as well as a tutorial to create a small business regulatory fairness ombudsman office in your community. Small businesses drive our nation's economy, and it is the job of any governing body to ensure a healthy regulatory environment in which they can grow and prosper. Ensuring regulatory enforcement that is effective and not excessive is the first step of this goal.

Authorization

The Office of the National Ombudsman was created pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). The law authorizes the National Ombudsman to:

Work with each federal agency to ensure that small businesses are provided with a means to comment on their unfair or excessive enforcement and compliance activities of the agency.

Establish a means to receive cases from small businesses regarding actions by federal agencies or agency employees conducting compliance or enforcement activities with respect to that small business.

Establish, maintain, and coordinate activities of 10 Regional Regulatory Fairness Boards whose purpose it is to advise and represent the National Ombudsman on regulatory issues for small businesses.

Produce an annual report to Congress rating each federal agency's responsiveness to small businesses and provide affected agencies the opportunity to comment on draft reports.

Scope

Unfair regulatory enforcement actions can be repetitive audits or inspections, burdensome compliance requirements, unreasonable fines or penalties, or threats by a federal agency and/or acts of retaliation by the agency.

Although the comment process provides small businesses with a direct contact with the enforcing agency, there are some limitations to its authority, including:

The comment process is not a substitute for any legal action that the small business may choose to exercise. They should continue to pursue all legal options they believe are in their best interest.

The comment process has no effect on the rights or obligations of the small business under the procedures of the agency to which they are commenting. They must continue to comply with all of the agency's processes and procedures. Any decision to change or alter the enforcement action upon the business will come directly from the agency, and not the ONO.

Neither the National Ombudsman nor the RegFair Board has the authority to overturn, stay, change, stop or delay an agency decision or action. They cannot cancel fines, penalties or other enforcement actions upon small businesses.

PART II: PROGRAM SUMMARY

Comment Process

The ONO receives comments from small entities at public RegFair Hearings, Roundtables and other events; through mail, fax or online; as well as through the Regional RegFair Board Members, members of Congress, and others in the small business community.

Process

If both the commenter and comment meet certain criteria, their case will be submitted for a high-level review.

This includes:

Forwarding the comment and substantiating documentation to the appropriate federal agency, along with a letter from the National Ombudsman, requesting a response within 30 days.

Sending follow-up letters to agencies that fail to respond within 30 days.

Evaluating federal agency responses for sufficiency and timeliness.

Forwarding a copy of the agency response back to the small business or entity.

Case-Management

The ONO receives comments regarding regulatory enforcement actions of over 35 federal departments and agencies. In order to adequately ensure fair internal review of each comment and corresponding substantiating documents before forwarding for agency review, ONO Case Management Specialists manage each incoming comment separately.

The Case Management Specialists are the principal liaison to 12 to 15 federal agencies on behalf of the National Ombudsman. Their responsibilities include:

Ensuring each comment is complete and includes appropriate supplemental documentation.

Preparing the case for agency review, including drafting correspondence from the National Ombudsman regarding the case and why the commenter deems the action(s) unfair or excessive.

Drafting any continuing correspondence to the federal agency should they not submit a timely response.

Controlling the incoming comments and outgoing cases to ensure that each is reviewed by a higher organization level than the one taking the enforcement or compliance action.

Liaising with federal agencies to maintain the status and disposition of each case until resolution.

Ensuring the small business or entity receives the agency response and there are no other matters of inquiry regarding the case.

Commenter Requirements

The National Ombudsman is able to submit a comment for review only when the commenter represents a small business, a small government entity, or a small non-profit organization. These are determined as follows:

The SBA uses the NAICS system to determine size standards of small businesses. Size standards vary depending on the use of number of employees, average annual revenue, or type of industry.

A small government entity is a government of a city, county, town, village or school district with a population of less than 50,000.

A small non-profit organization is defined as an enterprise that is owned and operated independently and is not dominant in its field.

Comment Requirements

Comments must meet several criteria to be submitted for review.

1. Each comment must include a completed Federal Agency Comment Form authorizing the ONO to act on behalf of the small business or entity (See Addendum).
2. A written statement describing the problem.
3. Substantiating documentation (such as copies of notices, citations, audits, etc., and a completed IRS Form 8821, *Tax Information Authorization*, for comments about the IRS).

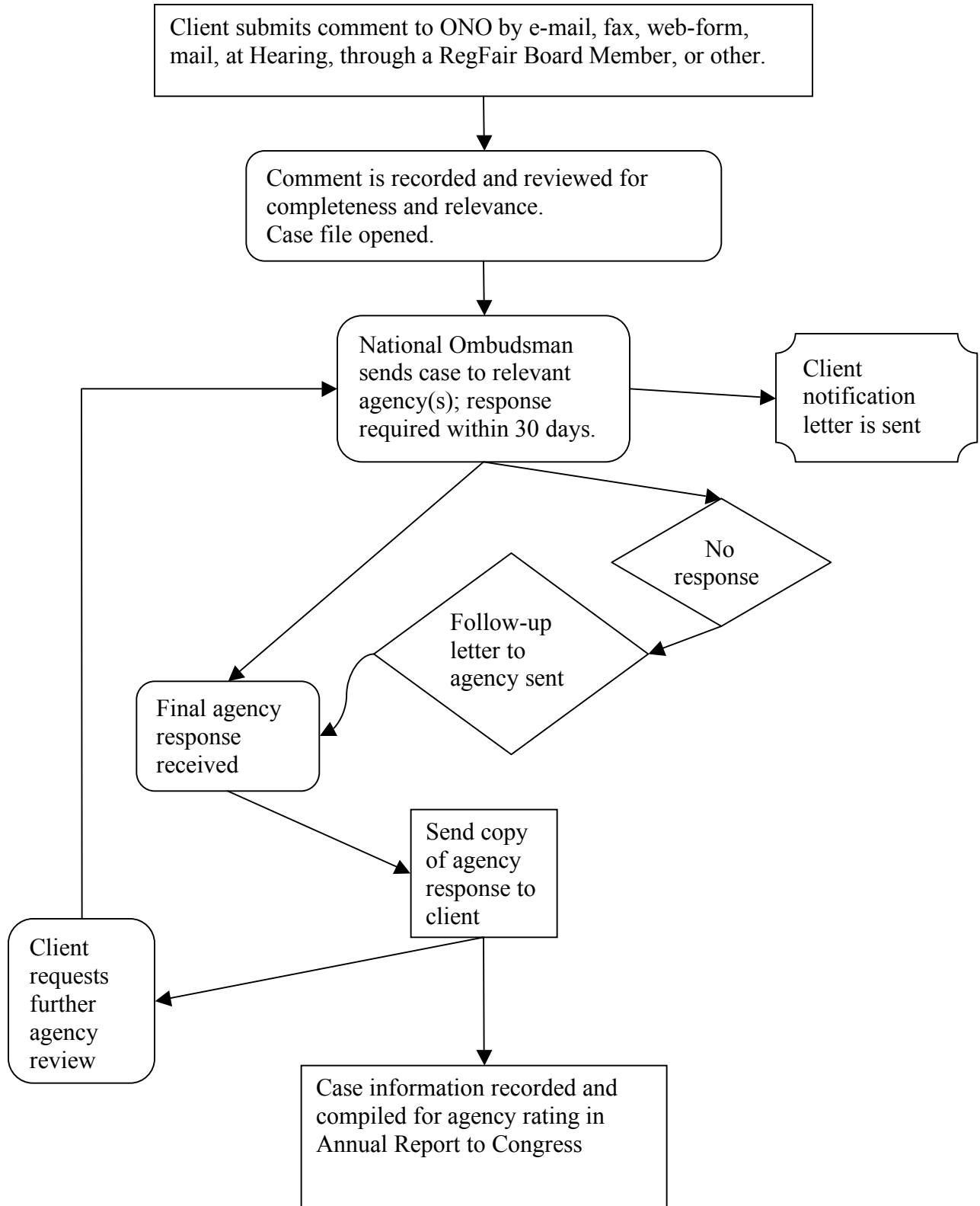
Additionally, the written statement must:

1. Refer to a regulatory enforcement action or compliance assistance effort by a federal agency.
2. Show that the small business or entity has been a subject to this action.

Confidentiality

Small Businesses or entities submitting comments may opt to keep their information confidential. However, restricted confidentiality limits the ability of the Office of the National Ombudsman to obtain a response regarding a specific comment, as the agency may be unable to attain access to the specific case. Full confidentiality is recommended only for general comments.

REGULATORY ENFORCEMENT FAIRNESS COMMENT PROCESS FLOW CHART



Annual Report to Congress

The National Ombudsman annually reports an evaluation of federal enforcement activities to Congress and affected federal agencies. The evaluation is based upon the comments from small businesses and entities received by the ONO during the fiscal year, as well as feedback received from RegFair Boards, RegFair Hearings and Roundtables, and other RegFair events.

The National Ombudsman also provides affected agencies the opportunity to comment on the draft report before being published. The final report includes a section where agencies can make comments on any issues that are not addressed by the National Ombudsman in revisions to the draft. Upon submission, the Annual Reports to Congress can be accessed through the National Ombudsman's web site at www.sba.gov/ombudsman.

Both of these functions serve to encourage agencies to work with the small business community. It is the priority of the National Ombudsman to give agencies the opportunity to work to achieve these goals, but also to evaluate their actions fairly and without prejudice.

Ratings

The report also includes a rating of each agency's responsiveness to small businesses. The Office of the National Ombudsman uses this as a tool to reflect the agency's cooperation, as well as their progress in being responsive to the needs of small business.

The first two criteria, timeliness and quality, are based solely on the agency's responsiveness to the comments received by the Office of the National Ombudsman during the fiscal year. Before publishing the Annual Report, the ONO sends out a survey to allow agencies to respond to how they implement the remaining four criteria. This process ensures accurate and up-to-date assessments of whether the agency participates in what the ONO deems crucial services for agencies to provide to small businesses.

The rating criteria include:

1. Timeliness
2. Quality
3. Non-Retaliation Policy
4. Compliance Assistance
5. Informs about SBREFA
6. Attendance at RegFair Hearings
7. Composite Rating

Rating Criteria for Federal Agencies

Timeliness: The amount of time it takes for the federal agency to respond to the case forwarded by the National Ombudsman. Responses are requested to be returned within 30 days. Corresponding grades are as follows: 30 days or less (A); 31-60 days (B); 61-90 days (C); 91-120 days (D); over 120 days (F).

Quality: How thoroughly or adequately the agency responds to each question, allegation or enforcement or compliance action documented in the case. An incomplete or vague explanation of the actions may result in lower grading.

Non-Retaliation Policy: Whether the agency has adopted a formal, written non-retaliation policy that is available to all agency employees, as well as small businesses and entities outside of the agency. For purposes of the ONO, ‘non-retaliation’ policies are those designed to prevent acts that punish small businesses for complaining or commenting about an agency action.

Compliance Assistance: Whether the agency provides compliance guides and assistance pursuant to Section 212 of SBREFA, as amended in 2007. The law also requires that the agencies provide assistance to small businesses or entities in the form of a compliance assistance telephone line, website and/or other contact. Additionally agencies must provide, and be able to document compliance assistance education for small businesses.

Informs about SBREFA: Whether the agency issues a public statement informing small businesses of their right to comment about the enforcement or compliance processes of an agency under SBREFA. Specifically, an “A” rating will be given if an agency provides this information at the time a citation or notice of regulatory violation is issued; whereas a general public notification will receive a “C” rating.

Attendance at RegFair Hearings: When the National Ombudsman holds RegFair Hearings, small businesses or entities publicly testify on their experience(s) with unfair or excessive regulatory enforcement actions. If testimony will be given regarding a particular federal agency, the ONO notifies them directly, and also posts the Hearing on the ONO event calendar web site so that agencies have the ability to participate either in-person or via conference call. If adequate notice has been given and a Hearing is addressing issues specific to an agency, their participation will be rated.

Composite Rating: After all other ratings are assessed, they are averaged into one final “Grade” for the agency (see the Annual Report Rating Sample from the 2006 National Ombudsman Report to Congress on following page).

Annual Report Rating Sample
2006 National Ombudsman Report to Congress

Table II-1. Rating of Agencies According to FY 2006 Criteria

Cabinet Level Agency (# of comments)	Timeliness	Quality	Non-Retaliation Policy	Compliance Assistance	Informs about SBREFA	Hearing	Overall	Additional Complaints/Comments Referred*
AGRICULTURE (5)	C	A	A	C	C	A	B	
Food Safety & Inspection Service	N/A	N/A	A	A	C	N/A	B	
Forest Service (2)	F	A	A	F	C	N/A	C	
Grain Inspection, Packers & Stockyards Administration (2)	C	A	A	B	C	N/A	B	
Farm & Foreign Agricultural Services (1)	B	A	A	F	C	N/A	B	
COMMERCE (5)	A	A	C	A	F	A	B	3
National Oceanic & Atmospheric Administration (3)	A	A	C	A	F	A	B	
Bureau of Industry & Security (2)	A	A	C	A	F	N/A	B	
DEFENSE	See note in box below about Agency's response to the National Ombudsman.							5
EDUCATION	N/A	N/A	A	N/A	N/A	N/A	A	
ENERGY	N/A	N/A	A	N/A	A	N/A	A	
HEALTH & HUMAN SERVICES (77)	B	A	A	A	B	C	B	1
Food & Drug Administration (61)**	C	A	A	A	A	A	A	
Centers for Medicare & Medicaid Services (16)	A	A	A	A	C	N/A	A	1
HOMELAND SECURITY (10)	C	C	C	C	C	F	C	
Coast Guard	N/A	N/A	A	A	C	N/A	B	2
Citizenship & Immigration Services (1)	F	F	F	F	F	F	F	
Customs & Border Protection (9)	A	A	A	A	A	N/A	A	1
HOUSING & URBAN DEVELOPMENT (1)	B	A	A	A	A	N/A	A	
INTERIOR	N/A	N/A	A	A	C	N/A	B	1
JUSTICE	N/A	N/A	A	A	C	N/A	B	1
LABOR (14)	B	A	A	B	A	A	A	1
Occupational Safety & Health Administration (2)	A	A	A	A	A	A	A	
Wage & Hour Division (6)	B	A	A	A	A	A	A	
Mine Safety & Health Administration (6)	B	B	A	B	A	A	A	1
STATE	N/A	N/A	A	A	A	N/A	A	
TRANSPORTATION (1)	A	A	A	A	A	N/A	A	
TREASURY								
Internal Revenue Service (13)	F	A	A	A	A	A	B	2
VETERANS ADMINISTRATION	See note in box below about Agency's response to the National Ombudsman.							2

* Comments that are not regulatory enforcement related.

** Although 7 individual comments regarding a pedigree issue for small pharmaceutical distributors were sent to FDA, ONO received another 49 comments for the same issue.

Non-Cabinet Level Agency (# of comments)	Timeliness	Quality	Non-Retaliation Policy	Compliance Assistance	Informs about SBREFA	Hearing	Overall	Additional Complaints/Comments Referred *
CONSUMER PRODUCT SAFETY ADMINISTRATION	N/A	N/A	A	A	C	N/A	B	1
ENVIRONMENTAL PROTECTION AGENCY (9)	A	A	A	A	A	A	A	1
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (1)	A	A	A	A	A	N/A	A	
FEDERAL COMMUNICATIONS COMMISSION	N/A	N/A	A	A	C	N/A	B	
FEDERAL DEPOSIT INSURANCE CORPORATION (1)	A	A	A	A	***C	A	A	1
FEDERAL ENERGY REGULATORY COMMISSION (1)	A	A	A	A	A	N/A	A	2
FEDERAL RESERVE BOARD	N/A	N/A	A	A	***C	N/A	B	
FEDERAL TRADE COMMISSION	N/A	N/A	A	A	A	N/A	A	2
GENERAL SERVICES ADMINISTRATION	See note in box below about Agency's response to the National Ombudsman.							1
NATIONAL CREDIT UNION ADMINISTRATION	N/A	N/A	A	A	***C	N/A	B	
NATIONAL LABOR RELATIONS BOARD	N/A	N/A	A	A	N/A	N/A	A	
PENSION BENEFIT GUARANTY CORPORATION	N/A	N/A	A	A	N/A	N/A	A	
SECURITIES & EXCHANGE COMMISSION	N/A	N/A	A	A	A	N/A	A	

*** These three agencies are Federal Financial Institution Regulators. The agencies have established Ombudsman functions pursuant to the Riegle Community Development and Regulatory Improvement Act. To receive an 'A' rating in this category from the National Ombudsman, an agency must directly make reference to the National Ombudsman at the Small Business Administration on both its public web site and at the time a citation or notice of regulatory violation occurs.

PLEASE NOTE: As originally stated in the National Ombudsman's 1999 Report to Congress, Section 222 of SBREFA is part of "Subtitle B—Regulatory Enforcement Reforms." Section 221 contains the "definitions" applicable to Subtitle B. Section 221 adopts the Freedom of Information Act (FOIA) definition of "agency." That definition states that agency means "each authority of the Government of the United States, whether or not it is within or subject to review by another agency..." (5 U.S.C. §551). Accordingly, the National Ombudsman, with advice from the regional RegFair Boards, has concluded that Section 222 applies whenever a Federal agency, as defined above, exercises regulatory fairness enforcement or compliance authority with respect to a small business concern (15 U.S.C. Sec 657 (b)(2)(B)).

The Department of Defense and the General Services Administration, despite the broad statutory definition, correspondence, discussions with the National Ombudsman, and a letter from the Subcommittee on Regulatory Reform of the House Small Business Committee, have taken the position that Section 222 of SBREFA does not apply to them (see the National Ombudsman's 1999 Report to Congress).

In addition, the Department of Veterans Affairs, in a 2007 letter to the National Ombudsman, states, "VA is not a regulatory agency..."

Regulatory Fairness Program

Regional Regulatory Fairness Boards

Pursuant to SBREFA, the U.S. Small Business Administration is authorized to establish, maintain, and coordinate activities of 10 Regional Regulatory Fairness Boards. The SBA has RegFair Boards in each of its 10 regions consisting of 5 owners, operators or officers of a small business. No more than three RegFair Board Members per board are of the same political affiliation, and all are appointed by the SBA Administrator for three-year terms.

The purpose of the RegFair Boards is to have leaders of small business advise the National Ombudsman on regulatory issues for small businesses in their respective regions. Each year, the RegFair Boards convene for an annual meeting to discuss the state of affairs in federal regulatory enforcement. The meeting also provides the ONO with the opportunity to assess trends and new regulatory issues for small businesses in each region.

Additionally, the RegFair Boards work with the SBA District Offices and Regional SBA staff to communicate the opportunities small businesses have to share their concerns regarding regulatory enforcement. This includes promoting and providing small businesses with information on RegFair Hearings and Roundtables in their regions.

Finally, the Board reviews a summary of the cases of regulatory enforcement and compliance assistance that we process in our headquarters. This allows them to stay up on the current state of federal regulatory affairs across the nation.

Regional Regulatory Fairness Hearings and Roundtables

Each year, the National Ombudsman travels to each SBA region to hold open regulatory hearings and roundtables for local small businesses to attend and share their concerns about federal regulatory enforcement. The schedule can be accessed on the ONO's Calendar of Events online.

These forums are usually hosted by the local SBA District Office, and sometimes co-hosted with other groups from the small business community they are located in. The meetings take the form of either Hearings or Roundtables:

At RegFair Hearings, the local District Office and RegFair Board invite small businesses, and trade associations representing small businesses that are experiencing federal regulatory enforcement actions to testify with their story at the meeting. The ONO requests their comments in writing before the meeting, then requests the attendance of the corresponding federal agency either in person, or via conference call. The goal of the RegFair Hearings is to educate the community on what sort of federal regulatory hurdles small businesses face, as well as communicate their concerns to the appropriate federal agencies and Congress. They also serve to encourage federal governing agencies to become more proactive in responding to the specific needs of that small business community.

At RegFair Roundtables, the local District Office and RegFair Board send out an open invitation for the small business community to attend and share their concerns and questions about federal regulatory enforcement, or simply attend to learn more about the SBA ONO and concerns of the local small business community.

Small business leaders, associations, organizations and individuals are all welcome and encouraged to attend both Roundtables and Hearings, and usually gain a good sense of issues that their communities are facing. Additionally, the meetings provide the National Ombudsman the opportunity to respond to small business concerns face-to-face; often resolving the disconnect small business communities feel when facing federal government enforcement.

National Regulatory Fairness Hearing

The Office of the National Ombudsman held its first National Regulatory Fairness Hearing in 2007, bringing leaders from national business organizations and trade associations together to comment on unfair or excessive federal regulatory enforcement impacting their membership.

The National Hearing also functioned as an informational session for groups representing large contingencies of the small business community to learn about the functions of the Office of the National Ombudsman, as well as to encourage organizations to promote the use of the ONO by their membership.

It is fundamental to an ombudsman's office that the clients who are in need of help are aware of the services of that office, and know how to access them. The National Regulatory Fairness Hearing not only synthesized major issues and enforcement trends that small business trade groups are facing, but also enabled the National Ombudsman to reach a broad audience of potential small businesses in need of their services.



Associations representing small businesses testify before the National Ombudsman and RegFair Board Members.



Industry leaders detail federal regulatory and compliance challenges affecting America's small business owners.

Example ONO Case Results

Case: Company penalized \$64,000 by DHS for importing counterfeit handbags.

Outcome: Penalty canceled after determination through digital photography that the bags were not counterfeit.

Case: Company fined \$30,000 for purchasing federally regulated seafood without a permit, because the company failed to renew annual \$50 dealer's permit.

Outcome: Through settlement agreement, the NOAA/U.S. Department of Commerce will waive \$18,000 and 145 days of permit sanction if company serves 1-year probationary period, pays \$12,000 and refrains from dealing with federally regulated species for 30 days.

Case: Company claims that although the U.S. Customs and Border Protection constantly puts agricultural holds (to ensure that there was no soil or trapped water that could harbor pests or disease) on imported container shipments of used heavy truck tires used for re-treading industry, no problems are ever found. These repetitive inspections cause delays and additional transportation and storage charges.

Outcome: CBP determined that this particular type of tire poses less risk than previously believed and therefore will reduce the number of inspections.

Case: Company received a citation from MSHA/U.S. Department of Labor for not submitting their MSHA 3rd quarter employment report.

Outcome: DOL vacated the citation.

Case: Company claimed their GSA Schedule proposal for IT services was denied due to unreasonable GSA practices and case was closed without explanation.

Outcome: GSA re-considered and awarded company a 5-year GSA Schedule 70 contract.

Case: Company selling computers under a GSA contract to the U.S. Department of Veteran's Affairs claims it had not been paid for about 10 months for an approx. \$39,000.

Outcome: All outstanding invoices were paid with company stating "I don't think we would have been paid without your (Ombudsman's) help."

Case: Company stated that payment claims (about \$19,000) submitted to Medicare Regional Carriers constantly and inappropriately being denied.

Outcome: The Centers for Medicare and Medicaid Services determined that the carrier incorrectly denied payments and the carrier would monitor system to ensure timely and accurate payments.

PART III: MODEL LEGISLATION

Small Business Regulatory Enforcement Fairness Act of 1996
104th Congress of the United States
P.L. 104-121

Authorizing Legislation

SEC. 222. SMALL BUSINESS AND AGRICULTURE ENFORCEMENT OMBUDSMAN.

The Small Business Act (15 U.S.C. 631 et seq.) is amended--

(1) by redesignating section 30 as section 31; and

(2) by inserting after section 29 the following new section:

SEC. 30. OVERSIGHT OF REGULATORY ENFORCEMENT.

"(a) Definitions.--For purposes of this section, the term--

"(1) 'Board' means a Regional Small Business Regulatory Fairness Board established under subsection (c); and

"(2) 'Ombudsman' means the Small Business and Agriculture Regulatory Enforcement Ombudsman designated under subsection (b).

"(b) SBA Enforcement Ombudsman.--

"(1) Not later than 180 days after the date of enactment of this section, the Administrator shall designate a Small Business and Agriculture Regulatory Enforcement Ombudsman, who shall report directly to the Administrator, utilizing personnel of the Small Business Administration to the extent practicable. Other agencies shall assist the Ombudsman and take actions as necessary to ensure compliance with the requirements of this section. Nothing in this section is intended to replace or diminish the activities of any Ombudsman or similar office in any other agency.

"(2) The Ombudsman shall--

"(A) work with each agency with regulatory authority over small businesses to ensure that small business concerns that receive or are subject to an audit, on-site inspection, compliance assistance effort, or other enforcement related communication or contact by agency personnel are provided with a means to comment on the enforcement activity conducted by such personnel;

"(B) establish means to receive comments from small business concerns regarding actions by agency employees conducting compliance or enforcement activities with respect to the small business concern, means to refer comments to the Inspector General of the affected agency in the appropriate circumstances, and otherwise seek to maintain the identity of the person and small business concern making such comments on a confidential basis to the same extent as employee identities are protected under section 7 of the Inspector General Act of 1978 (5 U.S.C. App.);

"(C) based on substantiated comments received from small business concerns and the Boards, annually report to Congress and affected agencies evaluating the enforcement activities of agency personnel including a rating of the responsiveness to small business of the various regional and program offices of each agency;

"(D) coordinate and report annually on the activities, findings and recommendations of the Boards to the Administrator and to the heads of affected agencies; and

"(E) provide the affected agency with an opportunity to comment on draft reports prepared under subparagraph (C), and include a section of the final report in which the affected agency may make such comments as are not addressed by the Ombudsman in revisions to the draft.

"(c) Regional Small Business Regulatory Fairness Boards.--

"(1) Not later than 180 days after the date of enactment of this section, the Administrator shall establish a Small Business Regulatory Fairness Board in each regional office of the Small Business Administration.

"(2) Each Board established under paragraph (1) shall--

"(A) meet at least annually to advise the Ombudsman on matters of concern to small businesses relating to the enforcement activities of agencies;

"(B) report to the Ombudsman on substantiated instances of excessive enforcement actions of agencies against small business concerns including any findings or recommendations of the Board as to agency enforcement policy or practice; and

"(C) prior to publication, provide comment on the annual report of the Ombudsman prepared under subsection (b).

"(3) Each Board shall consist of five members, who are owners, operators, or officers of small business concerns, appointed by the Administrator, after receiving the recommendations of the chair and ranking minority member of the Committees on Small Business of the House of Representatives and the Senate. Not more than three of the Board members shall be of the same political party. No member shall be an officer or employee of the Federal Government, in either the executive branch or the Congress.

"(4) Members of the Board shall serve at the pleasure of the Administrator for terms of three years or less.

"(5) The Administrator shall select a chair from among the members of the Board who shall serve at the pleasure of the Administrator for not more than 1 year as chair.

"(6) A majority of the members of the Board shall constitute a quorum for the conduct of business, but a lesser number may hold hearings.

"(d) Powers of the Boards.

"(1) The Board may hold such hearings and collect such information as appropriate for carrying out this section.

"(2) The Board may use the United States mails in the same manner and under the same conditions as other departments and agencies of the Federal Government.

"(3) The Board may accept donations of services necessary to conduct its business, provided that the donations and their sources are disclosed by the Board.

"(4) Members of the Board shall serve without compensation, provided that, members of the Board shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance of services for the Board."

Model Legislation for State and Local Governments

This model was drafted by the United States Ombudsman Association for the use by state governments. The model and its provisions do not represent the views or practices of the United States Small Business Administration. The Office of the National Ombudsman provides this model for adaptation or reference by state and local government entities. This use has been approved by the USOA.



MODEL OMBUDSMAN ACT FOR STATE GOVERNMENTS

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United States Ombudsman Association
Model Ombudsman Act for State Governments
February 1997

Drafted by
Model Ombudsman Act Committee of the
United States Ombudsman Association

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Approved on February 11, 1997 by the
United States Ombudsman Association's Board of Directors

Editor's Note:

The February 1997 document was reformatted in April 2004.
No substantive changes were made to the language of the original document.

For more information on the United States Ombudsman Association,
please visit www.usombudsman.org

PREFATORY NOTE

In the Fall of 1994, the board of directors of the United States Ombudsman Association authorized the preparation of an updated model ombudsman act appropriate for state government. There had been renewed interest in the ombudsman concept in a number of states and one, Arizona, was on the verge of enacting an ombudsman bill. It was felt that an updated model act would be a useful document for those states interested in establishing an ombudsman office as well as a useful tool to promote the classical ombudsman institution in other states. Ruth Cooperrider, legal counsel in the Iowa ombudsman's office, was asked to chair a committee to draft the model act. She was assisted in this endeavor by Marshall Lux, the Nebraska ombudsman, Mike Hostina, former deputy ombudsman from Alaska, and Yen Lew and Norrie Thompson, the Hawaii ombudsman and first assistant. The accompanying document is the result of our work.

While this model act was designed for use at the state government level, it can also be adapted for local government. Those so interested may contact the USOA for assistance.

In drafting the act, the committee decided to use as our basic reference the American Bar Association model which was completed under the leadership of Bernard Frank in 1974. The ABA model itself was based on earlier models, notably the Gellhorn model and the Harvard model. Thus, we are building on the foundations prepared for us by these worthy predecessors.

The ABA model was (and is) an excellent document, well thought-out, comprehensive in scope and meticulously annotated by Mr. Frank in his law review article presentation. We left it essentially intact, limiting our revisions to the following areas:

1. Updating and clarifying the language and making it gender neutral;
2. Amending those provisions which over the course of more than two decades of practical experience were found to lead to administrative difficulties or were otherwise problematic; and
3. Adding new provisions to accommodate recent changes in technology and public administration.

While the ABA model was our basic reference, we also reviewed the Gellhorn and Harvard models for additional clarification on certain points. The recently enacted Arizona statute was consulted to help us understand current legislative thinking about the ombudsman institution. Being either current or former ombudsman practitioners, we were also able to contribute insights from our experiences with our own respective statutes in Alaska, Hawaii, Iowa and Nebraska. This practical experience gave us an advantage over our predecessors whose frame of reference was more theoretical in nature.

Working drafts of the bill were presented at the October, 1995 USOA annual conference in Plymouth, Minnesota and the First North American Conference of ombudsman organizations held in May, 1996 in St. Louis, Missouri. After each conference, comments on the drafts were solicited from conference delegates and the members of the USOA board. Noted ombudsman scholars were also invited to comment.

We received in return a number of very useful comments and suggestions from all these sources, including scholars such as Gerald C. Caiden, Bernard Frank and Donald C. Rowat. Our thanks to all of them. In particular, we would be remiss if we did not acknowledge Mr. Frank's careful review of our draft and his detailed commentary. Mr. Frank, the chair of the ABA ombudsman committee which had issued the ABA model act in 1974, further stated it was appropriate, timely, and logical for the USOA to review and update the ABA model and issue a new USOA model to supersede the ABA model. We are grateful for his endorsement.

In considering the comments and suggestions we received, we undertook a section-by-section review of the draft model act. While that process took an additional six months, it is our feeling that the model act was significantly strengthened as a result. Obviously not all suggestions were accepted. In many cases, this was because the suggestion was at variance with the approach taken in another part of the act. Or, the suggestion raised an issue that we had already considered and resolved among ourselves. This final draft represents a document that is acceptable to all members of the committee, where individual differences and preferences were subsumed in a spirit of consensus and where suggestions from other individuals were incorporated as deemed appropriate.

While we believe that the model act as here presented is suitable for all states, we recognize that political circumstances in a given state may mean that some variations may be more appropriate. This model act is not cast in stone. Those who may be interested in possible alternatives to any of the provisions of this model act are invited to contact the USOA.

Although this is a model act for state governments, the USOA believes the ombudsman institution is applicable at all levels of government and encourages its wider establishment. The state ombudsman office created by this model act is not intended to preempt the establishment of any new local ombudsman office. Any local ombudsman office - whether at the county, municipal, township or other level - whose enabling document meets the standards of independence, fairness, confidentiality, and integrity of the review process which characterize a classical ombudsman, should have statutory immunity similar to that granted to the state ombudsman under this model act. Such immunity is necessary to enable local ombudsmen to have confidential communications with complainants and witnesses and to make findings without fear of interference or retaliation through legal proceedings. The USOA will assist any state legislature considering the enactment of such local ombudsman immunity.

This model act is intended to provide for the establishment of an ombudsman who is able to operate effectively in the context of contemporary state government in this, the final years of the twentieth century. The USOA recognizes that future revisions may be necessary to keep this document up-to-date in light of ongoing changes in the law, in standards of government and public administration and in technology. The USOA welcomes suggestions for future consideration.

United States Ombudsman Association Model Ombudsman Act for State Governments

An Act to establish the office of Ombudsman in _____.

COMMENT:

Enactment clause would be in an appropriate form for the state.

Section 1. Legislative Purpose

It is the intent of the legislature to establish, in addition to other remedies or rights of appeal of any person under state law, an independent, impartial, state office, readily available to the public, responsible to the legislature, empowered to investigate the acts of state [(Alternate) and local] administrative agencies and to recommend appropriate changes toward the goals of safeguarding the rights of persons and of promoting higher standards of competency, efficiency and justice in the administration of state [(Alternate) and local] laws.

COMMENT:

This section provides a concise description of the characteristics of the office and its goals.

If jurisdiction over political subdivisions of the state is included, the phrase “and local” should be included. It must be determined whether the inclusion of the phrase “and local” will be interpreted as pre-empting state jurisdiction over both state and local agencies and preventing local governmental units from establishing their own Ombudsmen.

Section 2. Short Title

This Act may be cited as “The (name of state) Ombudsman Act.”

COMMENT:

The title “Ombudsman” is distinctive from the more usual official titles such as “director” and “commissioner” and has gained recognition in the United States and other countries. The existing state statutes do not all use the title: Hawaii - “Ombudsman”; Nebraska - “Public Counsel”; Iowa - “Citizens’ Aide”; Alaska - “Ombudsman”; Arizona - “Ombudsman-Citizens’ Aide.” But it should be noted the term “Ombudsman” is used in these states by the public, the media, and even by the incumbents, who found other titles could be confused with other offices and concepts.

The term “Ombudsman” should be used only when the legislation provides for an independent official who receives complaints against government agencies and who, after investigation, may, if the complaints are justified, make recommendations to remedy the complaints.

If a term other than “Ombudsman” is selected, appropriate changes must be made throughout this Act.

Section 3. Definitions

As used in this Act,

(a) "Agency" means any department, organization, board, commission, council, bureau, administrative tribunal, facility, institution or other governmental entity of (name of state), [(Alternate) any person who is providing services to individuals under contract with (name of state) and as a term of that contract is subject to the Ombudsman's jurisdiction], and any official, officer, administrative hearing examiner, employee or member of (name of state), whether elected or appointed, acting or purporting to act by reason of connection with (name of state), except:

(1) any judge;

(2) the legislature, its members, its committees and its employees;

(3) the governor and the governor's personal staff;

[(4) (Alternate A) any political subdivision of the state;]

[(4) (Alternate B) mayors, council members, judges, and any other elected officials of any political subdivision and their personal staff;]

(5) any multi-state governmental entity.

(b) "Administrative act" means any action, decision, adjudication, failure to act, omission, rule or regulation, interpretation, recommendation, policy, practice or procedure of any agency.

(c) "Person" means any individual, aggregate of individuals, corporation, partnership, or unincorporated association.

(d) "Record" means all records, documents, books, papers, files, photographs, microfilms, sound recordings, video recordings, magnetic storage media, computer data and all other materials, regardless of physical form or characteristics, created, generated, recorded, received, possessed or controlled by or on behalf of any agency.

COMMENT:

(a) Rather than specifying by name those agencies under the Ombudsman's jurisdiction, the Act permits jurisdiction over all state-related governmental operations and personnel (in pursuance of public function) with certain limited exceptions which should be minimized. An alternative clause has been added to provide that the Ombudsman's jurisdiction would include businesses, corporations, persons, etc., under contract to provide services to individuals on behalf of the state. With the increasing popularity of "privatizing" government services, policy-makers may feel the need to bring these "private" bureaucracies under the Ombudsman's jurisdiction, in order to insure that the public receives the same level of protection afforded when the services are provided directly by state agencies. If this alternative is adopted, then it would also be necessary to add to the state's statutes relating to procurement a provision to require all agencies entering into a contract for the "privatization" of governmental services to include in that contract a clause obligating the private service provider to submit to the Ombudsman's jurisdiction. By making cooperation with the Ombudsman a condition of the contract, the private contractors will understand from the outset their responsibilities to the Ombudsman and will accept that arrangement as a part of the agreement with the state.

(a)(1) The exclusion of judges is based upon the existence of the long established system of appellate review of judicial decisions and upon the existence of other mechanisms for the sanctioning and/or the removal of judges who act unethically or who are incapacitated. The exclusion is narrow and contemplates that the Ombudsman

would have jurisdiction to investigate administrative or ministerial acts by employees of the judicial branch, when those acts are peripheral to the adjudication itself. In many instances, administrative errors affecting a particular adjudication would have to be challenged and resolved through the established judicial process, but even in those cases, the Ombudsman could make recommendations for improving administrative procedures that would have a prospective effect. The Ombudsman would not, of course, have the jurisdiction to question, criticize or review the substantive content of any judicial order, decision or opinion. The exclusion of judges would pertain only to judicial officers of the judicial branch of government and would not exclude administrative tribunals or administrative law “judges” from the Ombudsman’s jurisdiction.

(a)(2) The Legislature--an independent policy making body, whose actions are conspicuous and subject to public scrutiny, and whose tenure is subject to periodic popular review--is excluded. Committees and staff members who assist in policy formation are, likewise, excluded. Although there may be legislative employees, agencies, bureaus or divisions that provide direct services to the public, those employees and entities are also excluded from the Ombudsman’s jurisdiction, because of concerns that the Ombudsman’s close relationship with the legislative branch would compromise the independence of the office in dealing with cases involving those employees, agencies, etc. If it is determined that it is desirable to include these legislative service agencies within the Ombudsman’s jurisdiction, then as an alternative the exclusion might read, “(2) the members and committees of the legislature and their immediate staff.”

(a)(3) Elected state officials (e.g., Lt. Governor, Treasurer) who deserve exclusion for the same reasons as (a)(2) above, may be added to (a)(3) but they must be distinguished from other elected state officials who should be included and who are less immediately involved in policy-making and are engaged chiefly in administrative matters indistinguishable from those performed by non-elected officials generally. Thus, appropriate officials to be excluded may vary from state to state. Alternatively, this exclusion might read, “(3) elected constitutional officials and their personal staff;”.

(a)(4) Alternate A: Where local jurisdiction is not included, (a)(4) should read, “[4) any political subdivision of the state;].”

(a)(4) Alternate B: If jurisdiction over a political subdivision is included, Alternate B should be used to give an exclusion parallel to that for state officials: “[4) mayors, council members, judges, and other elected officials of political subdivisions and their personal staff;].” A saving clause for existing municipal Ombudsman offices may be added if necessary and desirable.

(a)(5) The specific exclusion of multi-state entities, such as regional transportation and planning authorities, and implicit exclusion of federal agencies (including the local offices thereof), are based on practical and constitutional limitations on sovereign power of the state over such agencies.

(b) “Administrative Act” is broadly defined and includes decisions by administrative boards or tribunals or administrative law “judges” and rule-making activities.

(c) “Person” is defined broadly.

(d) “Record” is broadly defined to make it clear that the Ombudsman is intended to have access to all recorded information possessed or controlled by agencies, regardless of the form or manner of storage of that information.

Section 4. Creation of Office

The office of Ombudsman is established.

Section 5. Nomination and Appointment

The (insert name of legislative body) shall elect the Ombudsman by a two-thirds vote of the members of each house present and voting.

COMMENT:

The Ombudsman is an appointed officer of the legislative branch of government. This arrangement helps to guarantee the independence of the Ombudsman, who might be reluctant to criticize the actions of agencies that are responsible to the executive, if he or she were an executive appointee. As part of the legislative branch of government, the Ombudsman is not only providing a direct service to citizens, but is also performing a role in legislative oversight of the agencies under the Ombudsman's jurisdiction. Since the Ombudsman may only make recommendations, and may not compel the executive and judicial agencies to take substantive actions, the Ombudsman's role is consistent with the concept of separation of powers.

Section 6. Qualifications

(a) The Ombudsman shall be a person of recognized judgment, objectivity and integrity who is well-equipped to analyze problems of law, administration, and public policy.

(b) No person while serving as Ombudsman:

- (1) shall be actively involved in political party activities or publicly endorse, solicit funds for or make contributions to political parties or candidates for elective office;
- (2) shall be a candidate for or hold any other elective or appointive public office;
- (3) shall engage in any other occupation, business, or profession likely to detract from the full-time performance of his or her duties as Ombudsman or to result in a conflict of interest or an appearance of impropriety or partiality.

COMMENT:

The Ombudsman should be a full-time impartial expert in whom the public can have confidence.

(a) This subsection gives the core characteristics and qualifications for an Ombudsman and hence provides more guidance than a mere listing of restrictions on the official.

(b) Paragraph (b)(1) seeks to preserve the Ombudsman's impartiality and the appearance of impartiality in the political arena. The Ombudsman retains the right to participate in the political process as a voter and to express his or her opinion privately.

Paragraph (b)(2) inhibits an Ombudsman from using the office as a political stepping-stone. To further protect the office from politicization, some states (Arizona, Hawaii, and Nebraska) provide that the Ombudsman shall not have served as a member of the Legislature for one or two years prior to his or her appointment. However, this could prevent the appointment of a highly qualified legislator.

Paragraph (b)(3) seeks to assure that the Ombudsman's work is performed on a full-time basis, and that the Ombudsman remains impartial.

Section 7. Term of Office

The Ombudsman shall serve for a term of _____ years and until his or her successor is appointed and qualified. He or she may be reappointed for additional terms.

COMMENT:

A long term is desirable: to permit the Ombudsman sufficient time to become proficient at his or her duties; to provide a measure of independence from politics; and to provide prestige and security to attract qualified persons to the position. An excessively long term (e.g., 15 years) prevents the desired periodic accountability to the Legislature. The term should not be less than five years. The same points that argue for a long term of office for the Ombudsman also support the concept that the incumbent should be eligible for reappointment at the end of his or her term.

Section 8. Removal and Vacancy

(a) The Legislature by a vote of two-thirds of the members of each house present and voting may remove the Ombudsman from office, but only for mental or physical incapacity to perform the duties of the office, or other grounds sufficient for removal of a judge from state court.

(b) If the position of Ombudsman becomes vacant for any reason, the Deputy Ombudsman shall serve as Acting Ombudsman until an Ombudsman has been appointed for a full term.

COMMENT:

(a) The Ombudsman should be secure in the position, so removal is made difficult and must be for cause. This protects the Ombudsman from groundless attacks or political threats. As an alternative, this subsection might provide that the Ombudsman could be removed from office according to state constitutional provisions for removal of judges or other public officials.

(b) In filling vacancies, full term appointment is preferable to remainder-of-term appointment as it provides the desirable longer term of office.

Section 9. Compensation

The Ombudsman shall receive the same salary and benefits as [(Alternate A) a state judge at the general trial court or higher level.] [(Alternate B) a state department head.] [(Alternate C) a legislative agency head.] The salary of the Ombudsman shall not be diminished during the Ombudsman's term of office, unless by general law applying to all salaried officers of the state.

COMMENT:

The Ombudsman is a high-level official who should receive a salary that reflects the importance, responsibility and prestige of the office. Also, a high salary is warranted if the Ombudsman is prohibited by law from engaging in any other occupation, business, or profession.

Three alternative salary proposals are offered for consideration. The first sets the salary at least equal to that of a general trial court judge. The comparison between the two offices is apt in terms of recognizing the Ombudsman's stature as well as reinforcing the

concept of the Ombudsman's independence and neutrality. The second ties the Ombudsman's salary to that of the state department heads. This also provides appropriate stature to the office and emphasizes the point that the Ombudsman deals with department heads as an equal rather than as a lower level official. The third equates the Ombudsman with other legislative agency heads. This approach may be a more familiar frame of reference to legislators and it would help assure consistency within any existing legislative branch salary system. Practically speaking, any of the three alternatives should result in fairly similar salary amounts.

Section 10. Organization of Office

(a) The Ombudsman shall select, appoint and fix the compensation of a person as Deputy Ombudsman and may select, appoint and fix the compensation of such other officers and employees as the Ombudsman may deem necessary to discharge the Ombudsman's responsibilities under this Act. Compensation shall be fixed within the amount available by appropriation. All officers and employees shall serve at the Ombudsman's pleasure.

(b) The Ombudsman may delegate to staff members any authority, power or duty except this power of delegation and the Ombudsman's duty to make any report under this Act. However, the Ombudsman may authorize the Deputy Ombudsman to act in the Ombudsman's stead in the event of illness, absence, leave or disability, or when, in the Ombudsman's sole discretion, an appearance of impropriety or partiality or a conflict of interest prevents the Ombudsman from discharging his or her duty in a particular matter.

(c) The Ombudsman and his or her staff shall be entitled to participate in any employee benefit or retirement plan available to state employees.

COMMENT:

(a) The sensitive nature of the work and the high degree of delegation to and confidence in staff that will be required dictate that the Ombudsman be free of civil service and political constraints in staff selection and retention. The Ombudsman, however, should refer to civil service salary schedules in setting comparable salaries for staff, and would naturally use state accounting facilities for payment of such [cf., section 11(j)]. The appointment of a Deputy Ombudsman is compulsory while selection of other officials, including an Assistant Ombudsman or Ombudsmen, is optional.

(b) This same desire for flexibility should permit a broad delegation of powers. The Ombudsman, however, remains responsible for the organization of the office and for whatever reports leave the office [section 16] -- unless the Deputy Ombudsman has assumed the Ombudsman's duties under this sub-section or when the office is vacant [section 8(b)]. The Ombudsman has complete discretion with respect to recusal for "cause" in order to avoid procedural smoke screens and because the Ombudsman can be expected to diligently maintain his or her limited authority through appropriate recusal. The Ombudsman has discretion to require, by regulation [section 11(b)] or otherwise, that a delegation be in writing or that staff members take an oath of office.

Section 11. Powers

The Ombudsman's powers and duties include but are not limited to the following:

(a) to investigate, on complaint or on the Ombudsman's own initiative, any administrative act of an agency, without regard to the finality of the administrative act;

- (b) to undertake, participate in or cooperate with persons and agencies in such conferences, inquiries, meetings, or studies which might improve the functioning of agencies or lessen the risks that objectionable administrative acts will occur;
- (c) to make such inquiries and obtain such assistance and information from any agency or person as the Ombudsman shall require for the discharge of the Ombudsman's duties. Agencies shall not restrict the Ombudsman's access to agency personnel;
- (d) notwithstanding any other provision of state law, to have access to and to examine and copy, without payment of a fee, any agency records, including records which are confidential by state law. The Ombudsman shall not disclose confidential records and shall be subject to the same penalties as the legal custodian of the records for any unlawful or unauthorized disclosure;
- (e) to enter and inspect without prior notice the premises of any agency;
- (f) to subpoena any person to appear, to give sworn testimony or to produce documentary or other evidence that is reasonably relevant to the matters under investigation;
- (g) to maintain confidential any matter related to complaints and investigations, including the identities of the complainants and witnesses, except as the Ombudsman deems necessary to discharge the Ombudsman's duties;
- (h) to bring suit in (name of court) to enforce the provisions of this Act;
- (i) to adopt, promulgate, amend and rescind rules and regulations required for the discharge of the Ombudsman's duties, including procedures for receiving and processing complaints, conducting investigations, and reporting findings, conclusions and recommendations. However, the Ombudsman may not levy any fees for the submission or investigation of complaints;
- (j) to prepare and administer a budget for the office of the Ombudsman;

COMMENT:

The general powers and duties of the Ombudsman are enumerated for clarity; however, this section is not an exhaustive listing of all the powers and duties delegated to the Ombudsman. Additional provisions related to staffing, delegation of powers and duties, recommendations, and reports are contained in sections 10, 15, and 16.

- (a) The Ombudsman's investigatory power is limited to administrative acts of agencies [section 3(b)]. The Ombudsman may receive and consider complaints from any source. The Ombudsman can initiate an investigation when others are unwilling to come forward with a complaint or when the Ombudsman discovers a matter warranting investigation.
- (b) Although most of the Ombudsman's time will be occupied with individual complaints, the Ombudsman can conduct studies of a general nature to improve agency efficiency or service to the public, either independently or jointly with other governmental bodies or non-governmental research enterprises.
- (c) The Ombudsman has broad access to any type of information from an agency or person, and an agency may not restrict agency personnel from assisting or providing information to the Ombudsman. There is no requirement to conduct formal evidentiary hearings of an adversary nature, although the Ombudsman can take statements from persons under oath. If testimony is taken, it should be perceived purely as an investigatory proceeding, and the procedure need not comport with what is normally required in a formal adjudication hearing.

(d) The Ombudsman can examine and copy or obtain a copy of any agency record, including records which are confidential under state law, without the payment of any fee. However, the Ombudsman and the Ombudsman's staff are obligated to maintain the confidentiality of any confidential records provided by an agency to the same extent as the legal custodian of the records.

(e) The Ombudsman has the power to inspect any agency without notice, as advance notice might negate the value of such a visit. Information gathered on site visits may provide subjects for investigation on the Ombudsman's own motion.

(f) The Ombudsman can compel any person to provide testimonial, documentary, or other evidence through issuance of a subpoena. Implicitly, the Ombudsman and his or her staff are empowered to administer oaths to such witnesses. Protections and privileges for witnesses, regardless of whether or not they have been subpoenaed, are provided in section 18. If a person refuses to comply with the subpoena, the Ombudsman can seek enforcement under section 11(h).

(g) To facilitate the gathering of information, the Ombudsman has discretion to keep confidential any complaint or investigative information. The Ombudsman may disclose such information as the Ombudsman deems necessary or appropriate in carrying out the Ombudsman's duties.

(h) The Ombudsman may bring suit regarding the exercise of his or her powers, including actions: for a declaratory judgment to obtain jurisdiction [under sections 3(a) and 11(a)]; to enter and inspect agencies [section 11(e)]; to show cause for not appearing after being subpoenaed [section 11(f)]; and to enforce confidentiality provisions [sections 13(d) and 13(e)].

(i) The Ombudsman is given broad regulatory discretion to determine the procedures for carrying out the office's functions. The Ombudsman may through rules or regulations specify the means by which complaints may be submitted (which may include fax or electronic mail) and require for good reason that certain types of complaints be in writing. To insure accessibility (and avoid discrimination against the poor), a fee may not be imposed for the Ombudsman's services.

(j) A provision for budgetary powers may be necessary in some states and useful in others, to insure that the Ombudsman's budget is independent of outside (agency) administration.

Section 12. Investigation of Complaints

(a) The Ombudsman shall conduct a suitable investigation of a complaint that is an appropriate subject for investigation. An appropriate subject for investigation by the Ombudsman includes any administrative act which the Ombudsman believes might be:

- (1) Contrary to law or regulation;
 - (2) Based on mistaken facts or irrelevant considerations;
 - (3) Unsupported by an adequate statement of reasons;
 - (4) Performed in an inefficient manner;
 - (5) Unreasonable, unfair, or otherwise objectionable, even though in accordance with law;
- or

(6) Otherwise erroneous.

(b) The Ombudsman in the Ombudsman's discretion may decide not to investigate because:

- (1) The complainant could reasonably be expected to use another remedy or channel;
- (2) The complaint is trivial, frivolous, vexatious, or not made in good faith;
- (3) The complaint has been too long delayed to justify present examination;
- (4) The complainant is not personally aggrieved by the subject matter of the complaint;
- (5) Resources are insufficient for adequate investigation; or
- (6) Other complaints are more worthy of attention.

(c) The Ombudsman's declining to investigate a complaint shall not bar the Ombudsman from proceeding on his or her own initiative to investigate an administrative act whether or not included in the complaint.

COMMENT:

(a) The Ombudsman has a duty to investigate the complaints described in subsection (a), although he or she may decline to investigate for the reasons given in subsection (b). The enumerated complaints indicate the kinds of administrative acts that generate complaints to the Ombudsman's office. As shown by paragraph (a)(6), which is a catchall, and subsection (c), the statute is intended as a guide to and not a limitation on the complaints which the Ombudsman can investigate.

(b) The Ombudsman may choose to investigate a complaint even though the statute permits him or her to refuse. For instance, under paragraph (b)(1), if the Ombudsman believes that recourse to an administrative or legal remedy would be futile or overly burdensome to the complainant, the Ombudsman may investigate the complaint. Similarly, the Ombudsman may decide to investigate a complaint of public concern even though the complainant was not personally aggrieved.

(c) Complaints which are inappropriate for investigation may nevertheless reveal administrative acts which the Ombudsman may decide to investigate on his or her own initiative [section 11(a)].

Section 13. Rights of Complainant--Communication With Complainant

(a) After the Ombudsman has decided whether or not to investigate a complaint, the Ombudsman shall suitably inform the complainant.

(b) The Ombudsman shall, if requested by the complainant, suitably report the status of his or her investigation to the complainant.

(c) After investigation of a complaint, the Ombudsman shall suitably inform the complainant of his or her conclusion or recommendation and, if appropriate, any action taken or to be taken by the agency involved.

(d) A letter to the Ombudsman from a person held in custody--including by detention, incarceration and hospitalization--by an agency shall be forwarded immediately, unopened, to the Ombudsman. A letter from the Ombudsman to such person shall be immediately delivered, unopened, to the person. Telephone and personal contacts between the Ombudsman and a person in custody shall not be prohibited or monitored.

COMMENT:

Subsections (a), (b) and (c) give the Ombudsman a general duty to inform the complainant of the status of his complaint. The experience and judgment of the Ombudsman will determine the suitable response to be made.

Section 14. Rights of Agency

Before formally issuing a conclusion or recommendation that is significantly critical or adverse to an agency, the Ombudsman shall have consulted with that agency and permitted the agency reasonable opportunity to reply. If the Ombudsman makes a conclusion or recommendation available to the agency to facilitate a reply, the conclusion or recommendation is confidential and may not be disclosed to the public by the agency unless the Ombudsman releases it.

COMMENT:

This section protects agencies, their officers and employees by requiring consultation and giving them reasonable time to reply to significant criticism before the Ombudsman issues critical findings. The Ombudsman has the discretion to make all or part of his or her findings available to facilitate a reply. Because the Ombudsman may modify findings, which may include removal of confidential information and incorporation of the agency's response [section 15(b)], after reviewing the agency's reply, disclosure of findings not released by the Ombudsman is a violation of law, which may be dealt with under existing records confidentiality provisions.

Notice of the Ombudsman's decision to investigate is not required because such formalities: are inconsistent with the role of the Ombudsman as an alternative to procedure-bound remedies and the limited resources of the office; are largely ceremonial in that the Ombudsman will inevitably contact the agency during an investigation; and are not required by due process given the absence of Ombudsman power to enforce recommendations and the fact that an opportunity to be heard is required before publication.

If an advance notice provision is nonetheless desired, it should provide for: informal or preliminary inquiries without notice, since experience shows that the vast majority of complaints are handled expeditiously and informally; withholding notice when notice would hinder investigation; and flexibility of form to avoid legalistic procedural wrangling, e.g. "If after making preliminary inquiries the Ombudsman decides to investigate, the Ombudsman shall suitably inform the agency involved unless the Ombudsman reasonably believes that advance notice will unduly hinder the investigation or make it ineffectual. The Ombudsman may inform the agency verbally or in writing."

Section 15. Procedure after Investigation

(a) If, after investigation, the Ombudsman is of the opinion that an agency should:

- (1) consider the matter further,
- (2) modify or cancel an act,
- (3) alter a regulation, practice or ruling,
- (4) explain more fully the act in question,
- (5) rectify an omission, or
- (6) take any other action,

the Ombudsman shall state any conclusions, recommendations and reasons therefore to the agency. If the Ombudsman so requests, the agency shall, within the time specified, inform the Ombudsman about the action taken on recommendations or the reasons for not complying with them.

(b) After a reasonable period of time has elapsed, the Ombudsman may issue his or her conclusions or recommendations to the legislature, the governor, a grand jury, the public, or any other appropriate authority. The Ombudsman shall include any brief statement the agency may provide if an opportunity to reply is required by this Act.

(c) If the Ombudsman believes that an action has been dictated by laws whose results are unfair or otherwise objectionable, and could be revised by legislative action, the Ombudsman shall notify the (insert name of legislative body) and the agency of desirable statutory change.

(d) If the Ombudsman believes that any agency official or employee has acted in a manner warranting criminal or disciplinary proceedings, the Ombudsman shall refer the matter to the appropriate authorities without notice to that person.

COMMENT:

(a) Though the Ombudsman will rarely have reason to make a recommendation if there is no error in what the agency has done or neglected to do, the Ombudsman should remain free to suggest improvements in method or policy even when the existing practice may be legally permissible. Thus the Ombudsman may facilitate one agency's learning about and taking advantage of the experience of another. This subsection contemplates no entry of judgment, as it were, but simply the expression of opinion by the Ombudsman. The Ombudsman is not a superior official, in a position of command, and cannot compel a change in an administrative act. The Ombudsman's recommendation may, however, induce an agency to exercise whatever power it may possess to right what the Ombudsman points out as a past mistake.

(b) If the Ombudsman is required to provide an opportunity to reply under section 14 and a reply is forthcoming, the Ombudsman must include it when issuing findings. Rather than permitting the Ombudsman to summarize replies, replies are limited to a "brief" statement which shall be printed unedited; regulations as to what is "brief" might be promulgated under section 11(i).

(c) There may be instances where an agency acted in accordance with existing law, but the law itself produces unjust results. The Ombudsman has the duty to bring these situations to the attention of the legislature and appropriate agency officials; if appropriate, the Ombudsman may comment on or recommend changes in legislation.

(d) The Ombudsman's duty to report wrongdoing pertains to miscreant officials. This subsection makes it clear that the Ombudsman may report allegations of wrongdoing without having to first notify the person involved (who may otherwise flee the state or destroy pertinent evidence if tipped off prematurely). This avoids any ambiguity which may arise if this subsection is read in conjunction with section 14.

If the person has testified before the Ombudsman, such testimony would bear the same privileges as testimony in court [section 18].

Section 16. Reports

The Ombudsman may from time to time and shall annually report on his or her activities to the Governor, to the Legislature, or any of its committees, to the public and, in the Ombudsman's discretion, to agencies.

COMMENT:

The Ombudsman's sole means of correcting flawed practices when agencies refuse to do so is to publish criticism and recommendations.

The annual report, whose release date would be set by the Ombudsman [section 11(i)], is mandatory. Special [section 15(b)] or general interim reports are discretionary with the Ombudsman.

Section 17. Ombudsman's Immunities

(a) The substantive content of any finding, conclusion, recommendation, or report of the Ombudsman or member of the Ombudsman's staff shall not be reviewable in any court.

(b) The Ombudsman and the Ombudsman's staff have the same immunities from civil and criminal liabilities as a judge of this state.

(c) The Ombudsman and the Ombudsman's staff shall not be compelled to testify or produce evidence in any judicial or administrative proceeding with respect to any matter involving the exercise of their official duties except as may be necessary to enforce this Act.

COMMENT:

(a) & (b) As a public watchdog, the Ombudsman should be able to state his or her position freely and candidly without fear of pressure or reprisal. The judicial immunities afforded the Ombudsman are intended to protect against harassment when the Ombudsman deals with controversial issues or makes an unpopular decision. While the Ombudsman's findings are presented only after due consideration, no claim of infallibility is made and the Ombudsman's findings, conclusions and recommendations are always subject to criticism by government officials as well as members of the public. Since the Ombudsman has no enforcement power and any findings and recommendations are only advisory in nature, the courts should have no authority to order that an expression of opinion be changed.

(c) Certain dealings that the Ombudsman has with complainants and witnesses may be confidential in nature. This subsection is meant to protect these confidential relationships so as to encourage complainants to avail themselves of the Ombudsman's services and witnesses to cooperate with the Ombudsman, where they may be otherwise reluctant to do so.

Section 18. Witnesses' Privileges

Any person who provides information under this Act may be accompanied and advised by counsel of his or her choice and shall be paid the same fees and travel allowances and accorded the same privileges and immunities as witnesses whose attendance has been required in the (name of court). However, a representative of an agency providing information under this Act during business hours shall not be entitled to receive such fees and allowances.

COMMENT:

Although investigations conducted by the Ombudsman are not contested cases or adjudications of rights or interests, and although nearly all testimony will be private and confidential, witnesses who testify (whether or not by subpoena) are given judicial privileges and immunities. Witness fees and travel allowances are also required for persons who provide information to the Ombudsman under the Act. A provision that a representative of an agency during business hours shall not be entitled to such fees and allowances is included to avoid possible double payment of public servants during working hours.

Section 19. Obstruction

Any person who willfully obstructs or hinders the proper and lawful exercise of the Ombudsman's powers, or willfully misleads or attempts to mislead the Ombudsman in the Ombudsman's inquiries, shall be guilty of a (specify the level of offense).

COMMENT:

It must be determined in each state whether necessity exists for indicating the court in which proceedings are to be brought and upon whose initiative. Since fines for offenses vary from state to state and may be subject to periodic changes, it is preferable to specify the offense rather than a set amount of fine for a violation.

Section 20. Reprisals Prohibited

(a) No person who files a complaint or participates in any investigation or proceeding pursuant to this chapter shall be subject to any penalties, sanctions or restrictions in connection with his or her employment or be denied any right, privilege, or benefit because of such action.

(b) A person who alleges a violation of this part may bring a civil action for appropriate injunctive relief, actual damages, and punitive damages. Punitive damages shall not exceed \$10,000.

COMMENT:

This section provides protection to complainants and witnesses from reprisals at their place of employment or the deprivation of other rights or privileges because of their participation in Ombudsman investigations.

Section 21. Relation to Other Laws

The provisions of this Act are in addition to and do not in any manner limit or affect any other provisions of law under which any remedy or right of appeal is provided for any person, or any procedure is provided for the inquiry into or investigation of any matter. The powers conferred on the Ombudsman may be exercised notwithstanding any provision of law to the effect that any administrative action shall be final or unappealable.

COMMENT:

This section clearly sets forth that the Ombudsman office is a supplemental remedy and is in addition to other remedies or rights of appeal--a principle also covered in section 1 with respect to legislative purpose. This section also establishes the principle that the Ombudsman powers are not inhibited by statutory enactments providing that any administrative action shall be final or unappealable.

Section 22. Appropriation

There is appropriated out of the general revenues of the state the sum of \$_____, or so much thereof as may be necessary for fiscal year _____, to the office of the Ombudsman to carry out the purposes of this Act.

COMMENT:

Before an Ombudsman statute can be implemented, funding needs to be made available to pay for the expense of the office. This section provides the mechanism to do this. This section should be included where required by the fiscal regulations or practice of the state. If inclusion of such section is not necessary, it can be omitted.

Section 23. Effective Date

This Act shall take effect upon its approval.

COMMENT:

This is standard enactment language. The Act actually becomes effective only after appropriation has been made and an Ombudsman has taken office.

Section 24. Severability

The provisions of this Act are declared severable, and if any provision thereof is held to be invalid for any reason, the validity of the remainder of the Act shall not be affected.

COMMENT:

The inclusion of this section is optional. It is not in any of the existing state Ombudsman statutes. The need for a severability clause is unclear, but it may be helpful to assuage any legal concerns that may be raised when the bill is being voted on in the legislature.



REFERENCES

Our proposed model ombudsman act is based primarily on the American Bar Association Model Ombudsman Statute for State Governments. The annotated ABA model, together with Bernard Frank's extensive commentary, may be found in Bernard Frank, "State Ombudsman Legislation in the United States," *University of Miami Law Review* 29, no. 3 (Spring 1975), 379-445. This is an extremely comprehensive source of information about the history of the ombudsman institution in the United States as well as on the principles behind ombudsman legislation.

In turn, the ABA model was based on the model prepared by the late Professor Walter Gellhorn. See Walter Gellhorn, "Annotated Model Ombudsman Statute." In *Ombudsman for American Government?* Edited by Stanley V. Anderson. Englewood Cliffs, NJ: Prentice-Hall, Inc., 1968.

One of the sources that Professor Gellhorn used for his model was the Harvard model prepared by the Harvard Student Legislative Reference Bureau. See "A State Statute to Create the Office of Ombudsman," *Harvard Journal on Legislation* 2, no. 2 (June 1965), 213-238.

We also consulted the current state ombudsman statutes to compare the differences and similarities among them. Interested readers are directed to those sources for further information about possible statutory variations and alternatives. The Alaska ombudsman is authorized under Title 24, Chapter 55 of the Alaska Statutes. In Arizona, Title 41, Chapter 8, Article 5 of the Arizona Revised Statutes Annotated establishes the office of the ombudsman-citizens aide. Chapter 96, Hawaii Revised Statutes, is the ombudsman statute for Hawaii. In Iowa, the ombudsman is known as the citizens' aide pursuant to Chapter 2C, Iowa Code Annotated. Public Counsel is the title used in Nebraska in accordance with Sections 81-8,240 to 81-8,254, Revised Statutes of Nebraska.

PART IV: ADDENDUM

Office of the National Ombudsman Informational Sheet



The U.S. Small Business Administration

Regulatory Fairness for Small Business

To report excessive or unfair regulatory enforcement:

Complete the *Federal Agency Comment Form* found online at www.sba.gov/ombudsman.

Submit the form online, by mail or fax:

U.S. Small Business Administration
Office of the National Ombudsman
409 3rd Street SW, MC 2120
Washington, DC 20416-0001

Toll-Free: 888-REG-FAIR,
(734-3247)

Fax: 202-481-5719

What to include in your comment form:

- Describe the enforcement or compliance action, inspection or review activity and its results;
- Provide documentation of any enforcement action taken by the federal agency (i.e. correspondence, citations, or notice, etc.); and
- Briefly explain how the federal agency could have served your business better.

We will review your comment and may request additional documentation to substantiate your comment as needed.

SBA programs and services are provided on a nondiscriminatory basis.

If excessive fines, penalties or unfair regulatory enforcement by federal agencies are problems for your small business, you have a voice in Washington, D.C., through the U.S. Small Business Administration's Office of the National Ombudsman.

The National Ombudsman assists small businesses with unfair and excessive regulatory enforcement by federal agencies including repetitive audits or investigations, excessive fines, penalties, retaliation or other unfair regulatory enforcement actions.

Acting as a "troubleshooter" between small businesses and federal agencies, the National Ombudsman receives comments and complaints from small businesses. The comments and complaints are then directed to the appropriate federal agency for a high-level review.

The National Ombudsman can help if:

- You are or represent a small business, small government entity (population 50,000 or less) or a small nonprofit organization;
- Your comments or complaints are directly related to a federal agency that has regulatory authority over small businesses; and
- A compliance or enforcement action has been taken by a federal agency or such an action is imminent.

Looking Out for Small Business

Each year the National Ombudsman files a report with the U.S. Congress on how federal agencies have treated small business. Agencies are given a grade on their timeliness and quality of responsiveness to small business concerns. The National Ombudsman also coordinates 10 regional regulatory fairness boards which report cases concerning federal regulatory enforcement affecting small business.

Regulatory burdens are much greater for small firms than they are for those with 500 employees or more:

- The cost of federal regulations totals \$1.1 trillion.
- Small firms with fewer than 20 employees spend \$7,647 per year per employee, 45 percent more than larger firms, to comply with federal regulations.
- Small firms spend four and a half times as much per employee to comply with environmental regulations.
- Small firms spend 67 percent more per employee on tax compliance.

For more information go to www.sba.gov.

Government forms are available at www.forms.gov. Compliance assistance is located at www.business.gov. To contact SBA's toll-free answer desk, call 1-880-U ASK SBA.

Federal Agency Comment Form
Small Business Administration – Office of the National Ombudsman
409 Third Street SW, Washington, DC 20416
P: (202) 205-2417 – F: (202) 481-5719

OMB Control #3245-0313

Exp. date 6/30/2010

Case #: _____

Instructions

1. Complete, sign and date this form. (Signature not required if completed at www.sba.gov/ombudsman).
2. Provide a brief written statement on the reverse side regarding the specific enforcement or compliance action taken against your organization by the federal agency.
3. Submit copies of substantiating documentation, such as correspondence, citation, or notice (Note: Can be submitted separately from this form by fax or mail. Make sure to reference your name or company's name with this information).
4. If your comments concern the IRS, you must also submit a completed IRS Tax Information Authorization Form 8821, available at <http://www.irs.gov/forms> (Can be sent by fax or mail).
5. Fax, e-mail or send this form and requested information to: (1) Fax: (202) 481-5719; (2) E-mail: Ombudsman@sba.gov; (3) Address: SBA, Office of the National Ombudsman, 409 Third Street, SW, Washington, DC 20416.

Please Print

Organization/Company Name: _____

Address: _____

City: _____ **State:** _____ **Zip:** _____

Phone: _____ **Fax :** _____ **E-mail:** _____

Contact Name: _____ **Title:** _____

Please indicate your organization type:

Small Business Not-for-Profit, Representing _____ Members
 Small Government (population of less than 50,000)

List the federal agency with which you are having a problem:

Federal Agency Name: _____

Agency Contact person: _____

Agency Office/Division: _____

Did the federal agency listed above inform you of your right to contact the SBA Office of the National Ombudsman?

Yes No If not, how did you learn about this office?

Confidentiality / Disclosure

The Small Business Regulatory Enforcement Fairness Act (SBREFA), allows you to keep your identity and other information private, and limit its access only to the Office of the Ombudsman (See 15 U.S.C. 657 (b) (2) (B)). However, by requesting confidentiality the federal agency may not have sufficient information to investigate your specific problem, possibly delaying or preventing any potential resolution of your situation.

I request that my information be kept confidential. Yes No (If yes, results may be limited.)

Signature : _____ Date : _____

Your signature authorizes the SBA Ombudsman to proceed on your behalf.

Pursue all legal options you believe are in your company's best interest.

This process is not a substitute for legal action.

SBA FORM 1993 (3-07) Previous Editions Obsolete

Please Note: The estimated burden for completing this form is 45 minutes. You will not be required to respond to this information collection if a valid OMB approval number is not displayed. If you have any questions or comments concerning this estimate or other aspects of this information collection, please contact the U. S. Small Business Administration, Chief, Administrative Information Branch, Washington, D.C. 20416 and/or Office of Management and Budget, Clearance Officer, Paperwork Reduction Project (3245-0313), Washington, D.C. 20503. PLEASE DO NOT SEND FORMS TO OMB.

Type or (print) your comments below:



Sample Regulatory Fairness Forum Flyer



Office of the National Ombudsman

Regulatory Fairness Forum for Small Business

Small business owners will have an opportunity to discuss issues regarding Federal regulatory compliance and enforcement during this Forum.

Have you or a small business owner you know been unfairly fined or penalized by a Federal government agency, or is a Federal agency enforcement action imminent?

WHO: **SBA National Ombudsman Nicholas Owens**, members of the Region X Regulatory Fairness Board and representatives of Federal regulatory agencies will hear issues and comments about Federal regulatory enforcement and compliance. Small business owners, representatives of trade associations and community and business leaders are invited to comment about compliance and enforcement of regulations by Federal agencies and to learn more about the impact of federal regulations on small businesses.

WHAT: To create a more cooperative regulatory environment among Federal agencies and small businesses, Congress has directed the SBA and the National Ombudsman to hold Regulatory Fairness forums. Issues addressed at this forum will be directed to the appropriate Federal regulatory agency for a higher-level review of the fairness in the enforcement action. In many instances, the National Ombudsman’s action has resulted in Federal agencies reducing or waiving penalties and/or compliance actions in cases of unfair or excessive regulatory enforcement.

WHERE: XXX

WHEN: XXX

Small business owners may testify during the forum by registering in advance. Testimony may be submitted in writing in advance or at the forum. Anyone desiring confidentiality may request that his or her name not be released and may submit written testimony in lieu of a public appearance at the forum.

For additional information, visit the Office of the National Ombudsman’s website at www.sba.gov/ombudsman.



Make Your Voice Heard!



All of the SBA’s programs and services are provided to the public on a nondiscriminatory basis. Reasonable arrangements for persons with disabilities will be made, if requested at least 2 weeks in advance.