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SBA Office of the National Ombudsman: Overview, History, and Current Issues

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Summary

The Office of the National Ombudsman was created in 1996 as part of P.L. 104-121, the Contract with America Advancement Act of 1996 (Title II, the Small Business Regulatory Enforcement Fairness Act of 1996 [SBREFA]). Housed within the U.S. Small Business Administration (SBA), the office's primary purpose is to provide small businesses, small government entities (those serving populations of less than 50,000), and small nonprofit organizations that believe they have experienced unfair or excessive regulatory compliance or enforcement actions (such as repetitive audits or investigations, excessive fines, and retaliation by federal agencies) a means to comment about such actions.

The Office of the National Ombudsman is an impartial liaison that reports small business regulatory fairness matters to the appropriate federal agency for review and works across government to address those concerns and reduce regulatory burdens on small businesses.

SBREFA also created 10 Small Business Regulatory Fairness Boards, one in each of the SBA's 10 regions, to advise the National Ombudsman on matters related to federal regulatory enforcement activities affecting small businesses.

Specifically, the National Ombudsman

- works with each federal agency with regulatory authority over small businesses to ensure that small businesses are provided a means to comment on the federal agency's regulatory compliance and enforcement activities;
- receives comments from small businesses regarding actions by federal agency employees conducting small business regulatory compliance or enforcement activities;
- refers comments to the affected federal agency's inspector general in appropriate circumstances while maintaining the confidentiality of the person or small business making these comments;
- issues an annual report to Congress and affected federal agencies evaluating the agency's compliance and enforcement activities, including a rating of their responsiveness to small businesses;
- provides the affected federal agency with an opportunity to comment on the annual report prior to publication and includes in the report a section in which the affected federal agency may comment on issues that are not addressed by the National Ombudsman in revisions to the draft; and
- coordinates and reports annually on the Small Business Regulatory Fairness Boards' activities, findings, and recommendations to the SBA Administrator and the heads of affected federal agencies.

This report examines the Office of the National Ombudsman's origin and history; describes its organizational structure, funding, functions, and current activities; and discusses a recent legislative effort to enhance its authority. S. 1146, the Small Business Regulatory Relief Act of 2017, would, among other provisions,

- expand the National Ombudsman's authority to work with federal agencies on the development of best practices for educating, training, and assisting small entities in understanding and complying with federal regulations; and
- authorize the National Ombudsman to evaluate federal agency regulatory compliance guides, ensure that those guides are available to small business

development centers and other SBA management and training resource partners, conduct small business customer service surveys on an ongoing basis to assess the timeliness and quality of federal agency regulatory activities, and develop an outreach program to promote awareness of the National Ombudsman's activities.

This report also discusses some challenges facing the Office of the National Ombudsman:

- although it is generally recognized as an independent, impartial office, it is housed within the much larger SBA and remains subject to its influence;
- the National Ombudsman has often stayed in the position for a relatively short time. Frequent turnover can lead to continuity problems for the office;
- it does not have the authority to compel federal agencies to undertake specific actions to resolve disputes. As a result, although its annual rating of federal agency responsiveness to small business concerns does provide it a means to exert some influence on federal agency actions, its role in resolving disputes is somewhat constrained; and
- its relatively limited budget and staffing level restrict its ability to engage in outreach activities that could increase small business awareness of its existence and services.

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Introduction

There are about 150 ombudsman offices located throughout the federal government.[1] About a third of them are statutorily authorized. The others were created through executive action.[2] Although there are differences among them in terms of their origin, staffing, funding, and organizational structure, they are all tasked with receiving and helping to resolve disputes in an impartial manner. Some ombudsman offices are limited to helping to resolve disputes that arise within the federal agency in which they are housed. Others are limited to helping to resolve disputes received from the agency's clients. Still others may help to resolve disputes that arise both within the federal agency and from the agency's clients.[3]

The Office of the National Ombudsman, housed within the U.S. Small Business Administration (SBA), is fairly unique in that it is authorized to help resolve disputes received from the public across federal agencies.[4] It was created in 1996 as part of P.L. 104-121, the Contract with America Advancement Act of 1996 (Title II, the Small Business Regulatory Enforcement Fairness Act of 1996 [SBREFA]).[5] It is a relatively small office, with authorization for up to seven employees. It currently has six employees (the National Ombudsman [Nathan J. Miller], a Deputy National Ombudsman, an administrative officer, an external outreach manager, and two case management specialists) and intends to hire another employee this fiscal year.[6] The National Ombudsman is appointed by the SBA Administrator.

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[1] Carole S. Houk, Mary P. Rowe, Deborah A. Katz, Neil H. Katz, Lauren Marx, and Timothy Hedeen, "Supplementary Table, Master List of Federal Ombuds Offices," in *The Ombudsman in Federal Agencies–Final Report*, Washington, DC: Administrative Conference of the United States, 2016, at https://acus.gov/report/ombudsman-federal-agencies-final-report-2016.

[2] Ibid. For example, the Small Business Ombudsman for defense audit agencies was authorized by P.L. 112-239, the National Defense Authorization Act for Fiscal Year 2013 (Division A, Title XVI), §1612(a), "Small Business Ombudsman for Defense Audit Agencies." The Small Business Ombudsman at the Consumer Product Safety Commission is not statutorily authorized. Also, several statutes direct state agencies implementing federal programs to establish ombudsman offices for those programs. For example, state education agencies are required to have an ombudsman to monitor and enforce public and private school equity requirements related to federal programs to assist children identified as failing, or most at risk of failing, to meet state academic standards. See 20 U.S.C. §6320.

[3] Ibid., "Part 2. Research Report," pp. 20, 33-38.

[4] The Office of the National Ombudsman's statutory title is the Office of the Small Business and Agriculture Regulatory Enforcement Ombudsman. See P.L. 104-121, the Contract with America Advancement Act of 1996 (Title II, the Small Business Regulatory Enforcement Fairness Act of 1996), §30, "Oversight of Regulatory Enforcement."

[5] SBREFA's seven statutory purposes are to (1) implement certain recommendations of the 1995 White House Conference on Small Business regarding the development and enforcement of federal regulations; (2) provide for judicial review of chapter 6 of Title 5, U.S. Code (which deals with federal regulatory analysis); (3) encourage the effective participation of small businesses in the federal regulatory process; (4) simplify the language of federal regulations affecting small businesses; (5) develop more accessible sources of information on regulatory and reporting requirements for small businesses; (6) create a more cooperative regulatory environment among agencies and small businesses that is less punitive and more solution-oriented; and (7) make federal regulators more accountable for their enforcement actions by providing small entities with a meaningful opportunity for redress of excessive enforcement activities. See P.L. 104-121, the Contract with America Advancement Act of 1996 (Title II, the Small Business Regulatory Enforcement Fairness Act of 1996), §203, "Purposes."

For additional information and analysis concerning the Small Business Regulatory Enforcement Fairness Act of 1996, see CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey; and CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis.

[6] Nathan J. Miller's title is National Ombudsman and Assistant Administrator for Regulatory Enforcement Fairness. C. Natalie Lui Duncan is the SBA's Deputy Chief Human Capital Officer and is on detail as the Deputy National Ombudsman. See U.S. Small Business Administration (SBA), Office of the National Ombudsman, "Office Directory," (continued...)

The Office of the National Ombudsman's primary purpose is to provide small businesses, small government entities (those serving populations of less than 50,000), and small nonprofit organizations that believe they have experienced unfair or excessive regulatory compliance or enforcement actions (such as repetitive audits or investigations, excessive fines, and retaliation by federal agencies) a means to comment about such actions.[7] As an impartial liaison, the Office of the National Ombudsman "directs reported regulatory fairness matters to the appropriate agency for high-level fairness review, and works across government to address those concerns, reduce regulatory burdens, and help small businesses succeed."[8]

SBREFA also created a five-person Small Business Regulatory Fairness Board in each of the SBA's 10 regions to advise the National Ombudsman on matters related to federal regulatory enforcement activities affecting small businesses.

Specifically, SBREFA directs the SBA Administrator to designate an ombudsman to

- work with each federal agency with regulatory authority over small businesses to ensure that small businesses that receive or are subject to an audit, on-site inspection, compliance assistance effort, or other enforcement-related communication or contact by federal agency personnel are provided a means to comment on those regulatory compliance and enforcement activities;
- receive comments from small businesses regarding actions by federal agency employees conducting small business regulatory compliance or enforcement activities;
- refer comments to the affected federal agency's inspector general in appropriate circumstances and maintain the confidentiality of the person or small business making these comments;[9]
- based on substantiated comments received from small businesses and Small Business Regulatory Fairness Boards, annually report to Congress and affected federal agencies an evaluation of the federal agency's regulatory compliance and enforcement activities, including a rating of the agency's responsiveness to small businesses;
- provide the affected federal agency with an opportunity to comment on the National Ombudsman's annual report to Congress prior to publication and include in the final report a section in which the affected federal agency may comment on issues that are not addressed by the National Ombudsman in revisions to the draft; and
- coordinate and report annually on the Small Business Regulatory Fairness Boards' activities, findings, and recommendations to the SBA Administrator and the heads of affected federal agencies.[10]

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at https://www.sba.gov/ombudsman/office-directory.

[7] SBA, Office of the Ombudsman, "About Us," at https://www.sba.gov/ombudsman/spotlight.

[8] SBA, Office of the Ombudsman, "Complaints or Comments," at https://www.sba.gov/ombudsman/comments.

[9] SBREFA specifies that the National Ombudsman "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.)." See P.L. 104-121, the Contract with America Advancement Act of 1996 (Title II, the Small Business Regulatory Enforcement Fairness Act of 1996), §30, "Oversight of Regulatory Enforcement."

This report examines the Office of the National Ombudsman's origin and history; describes its organizational structure, funding, functions, and current activities; and discusses a recent legislative effort to enhance its authority. S. 1146, the Small Business Regulatory Relief Act of 2017, would, among other provisions,

- expand the National Ombudsman's authority to work with federal agencies on the development of best practices for educating, training, and assisting small entities in understanding and complying with federal regulations;
- authorize the National Ombudsman to evaluate federal agency regulatory compliance guides, ensure that those guides are available to small business development centers and other SBA management and training resource partners, conduct small business customer service surveys on an ongoing basis to assess the timeliness and quality of federal agency regulatory activities, and develop an outreach program to promote awareness of the National Ombudsman's activities; and
- authorize to be appropriated such sums as are necessary to carry out these additional responsibilities.

Origin

On March 19, 1996, the Senate passed, 100-0, S. 942, the Small Business Regulatory Enforcement Fairness Act of 1996. The bill, which included provisions creating the Office of the National Ombudsman and 10 regional Small Business Regulatory Fairness Boards, was later incorporated into P.L. 104-121, the Contract with America Advancement Act of 1996. The bill was based on recommendations of the 1995 White House Conference on Small Business.[11]

The 1995 White House Conference on Small Business, like its 1980 and 1986 predecessors, was preceded by state conferences and regional meetings.[12] The 1,904 delegates to the 1995 White House Conference on Small Business considered more than 150 policy recommendations forwarded from the regional meetings and six petitions. Through a series of votes, the delegates narrowed the list of policy recommendations to 60, which were sent to the President and Congress for consideration.[13] Improving the Regulatory Flexibility Act was the 3rd highest vote-

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[10] P.L. 104-121, the Contract with America Advancement Act of 1996 (Title II, the Small Business Regulatory Enforcement Fairness Act of 1996), §30, "Oversight of Regulatory Enforcement."

[11] U.S. Congress, Senate Committee on Small Business, *S. 917 and S. 942: Implementing the White House Conference on Small Business-Recommendations on Regulations and Paperwork*, hearing, 104th Cong., 2nd sess., February 28, 1996, S.Hrg. 104-443 (Washington: GPO, 1996), pp. 1-33.

[12] About 20,000 people participated in 59 state conferences held between June 2, 1994, and April 13, 1995. They elected 1,130 delegates to participate in six regional conferences held between April 18, 1995, and May 12, 1995. The five-day 1995 White House Conference on Small Business was held on June 11, 1995, to June 15, 1995. SBA, *The State of Small Business: A Report of the President*, Washington, DC, 1996, p. 45; and U.S. Congress, Senate Committee on Small Business, *S. 111, National Conference on Small Business Act*, 106th Cong., 1st sess., October 19, 1999, S.Hrg. 106-380 (Washington: GPO, 1999), p. 4.

[13] U.S. Congress, Senate Committee on Small Business, *Implementation of the Small Business Agenda*, 104th Cong., 2nd sess., June 5, 1996, S.Hrg. 104-579 (Washington: GPO, 1996), pp. 57-78; White House Conference on Small Business Commission, *Foundation for a New Century: A Report to the President and Congress*, Washington, DC, June 1995. Also see SBA, Office of Advocacy in cooperation with the White House Conference on Small Business, *Foundation for a New Century: Issue Handbook*, Second Edition, Washington, DC, January 1995, at https://babel.hathitrust.org/cgi/pt?id=umn.31951d00289409m;view=1up;seq=6.

getter (1,398 votes) at the conference and paperwork and regulatory reform was the 25th highest vote-getter (1,046 votes).[14] SBREFA addressed both recommendations. The Office of the National Ombudsman and the Small Business Regulatory Fairness Boards were created to address the recommendation concerning federal regulatory reform.

During Senate floor debate, the bill's proponents argued that the Office of the National Ombudsman was part of the bill's overall effort to create a "more cooperative and less punitive regulatory environment between agencies and small business that is less threatening and more solution-oriented than we have achieved in the past."[15] They argued that it would "help small businesses get fair and legal treatment from the government if they have been treated unfairly" and "also assist small businesses in recovering legal fees as a result of unfair Government actions."[16]

During floor debate, Senator John Glenn indicated that he supported the legislation but was concerned that the Office of the National Ombudsman and the Small Business Regulatory Fairness Boards could "end up creating a one-sided record of complaints that will distort the broad public mission of our agencies."[17] He also indicated that federal agencies are not "the enemy when they carry out the laws passed by the people's representatives in Congress" and was "happy, at least, that in the final version of the bill before us, the Ombudsman will focus on general agency enforcement activity and not attempt to evaluate or rate the performance of individual agency personnel."[18]

Senator Carl Levin also supported the legislation but argued that "the committee [on Small Business] should have taken more time to look at the pros and cons of placing an ombudsman in each regulatory agency, rather than relying on a lone ombudsman in the Small Business Administration to cover all agencies."[19]

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[14] Sen. Kit Bond, "Consideration of the Comprehensive Regulatory Reform Act," remarks in the Senate, *Congressional Record*, vol. 141, part 115 (July 17, 1995), p. S10139; and U.S. Congress, Senate Committee on Small Business, *S. 917 and S. 942: Implementing the White House Conference on Small Business-Recommendations on Regulations and Paperwork*, hearing, 104th Cong., 2nd sess., February 28, 1996, S.Hrg. 104-443 (Washington: GPO, 1996), pp. 14, 28.

[15] Sen. Jeff Bingaman, "Consideration of S. 492, the Small Business Regulatory Fairness Act of 1995," remarks in the Senate, *Congressional Record*, vol. 142, part 38 (March 19, 1996), p. S2310.

[16] Sen. John Kerry, "Consideration of S. 492, the Small Business Regulatory Fairness Act of 1995," remarks in the Senate, *Congressional Record*, vol. 142, part 38 (March 19, 1996), p. S2310.

[17] Sen. John Glenn, "Consideration of S. 492, the Small Business Regulatory Fairness Act of 1995," remarks in the Senate, *Congressional Record*, vol. 142, part 38 (March 19, 1996), p. S2311.

[18] Ibid.

[19] Sen. Levin argued that it was unreasonable to expect the ombudsman "to become familiar with the operations of hundreds of programs in dozens of agencies" and stated that

> rather than investigating and mediating individual disputes himself or herself, the ombudsman would have to refer alleged cases of agency misconduct to the inspector general of the relevant agency. In other words, the ombudsman wouldn't receive information for the purpose of mediating disputes, solving problems, and fostering collaboration between agencies and regulated parties. Instead the ombudsman would receive information primarily for assessing agency performance. That doesn't help get immediate and specific problems solved. At the hearing on S. 942 in the Small Business Committee, several representatives of the small business community said that they would prefer to have a single ombudsman in the Small Business Administration rather than an ombudsman in each individual regulatory agency. They argued that agency ombudsmen could be influenced by internal agency politics and that, because of this, small businesses would be susceptible to intimidation by regulators if they came forward with complaints. While I understand the reluctance of small businesses to complain directly to an agency official about inappropriate regulatory practices, I believe that ombudsmen in regulatory agencies can be given sufficient

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History

Initially, the Office of the National Ombudsman was located in Chicago and had a three-person staff.[20] The first National Ombudsman (Peter Barca) was appointed in November 1996, and 50 small business owners were appointed to the 10 Small Business Regulatory Fairness Boards in that same month. The Small Business Regulatory Fairness Boards were all chartered by February 1997, and became operational in June 1997.[21]

During its first year, the Office of the National Ombudsman also created its first small business appraisal form to receive small business comments, developed a structure to evaluate federal agency regulatory compliance and enforcement activities, instructed Small Business Fairness Board members about SBREFA, published a brochure, established its toll-free 1-888-REGFAIR telephone number, created a website, and held 10 public hearings across the nation "to enable small businesses to publicly bring forth their concerns of the regulatory enforcement structure."[22] The Office of the National Ombudsman also received 735 telephone calls, had more than 56,000 hits on its website, and had 110 small businesses initiate an appraisal form. Fifty filed a completed appraisal form, and 33 of these forms were forwarded to federal agencies for responses.[23]

To the dismay of some Members, the Office of the National Ombudsman did not issue a report card on federal agency compliance and enforcement practices in its first annual report to Congress, dated December 31, 1997, primarily because the National Ombudsman felt that the office had not had sufficient small business participation to grade the agencies' performance.[24] Instead, the National Ombudsman provided synopses of 12 small business appraisal forms that illustrated what the National Ombudsman identified as "four common themes in the regulatory environment" that are faced by small businesses: "(1) agencies change their rules in the middle of the game; (2) agencies disregard the economic and other consequences of their actions on small businesses; (3) small businesses often get ensnarled in conflicting regulatory requirements when two federal agencies' jurisdiction overlap; and (4) small businesses fear federal agency retaliation."[25]

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> independence from the regulatory structure to act fairly and to assure regulated parties that their inquiries will not be used against them.

See Sen. Carl Levin, "Consideration of S. 492, the Small Business Regulatory Fairness Act of 1995," remarks in the Senate, *Congressional Record*, vol. 142, part 38 (March 19, 1996), p. S2314.

[20] U.S. Congress, House Committee on Small Business, Subcommittee on Regulatory Reform and Paperwork Reduction, *The First Report to Congress by the Small Business and Agriculture Regulatory Enforcement Ombudsman*, hearing, 105th Cong., 2nd sess., March 4, 1998, Serial No. 105-37 (Washington: GPO, 1998), p. 6.

[21] U.S. Congress, House Committee on Small Business, Subcommittee on Regulatory Reform and Paperwork Reduction, *The First Report to Congress by the Small Business and Agriculture Regulatory Enforcement Ombudsman*, hearing, 105th Cong., 2nd sess., March 4, 1998, Serial No. 105-37 (Washington: GPO, 1998), pp. 3, 40.

[22] Ibid., pp. 4, 40, 41.

[23] Ibid., p. 42.

[24] U.S. Congress, Senate Committee on Small Business, *Oversight of the Regulatory Flexibility Act and the Red Tape Reduction Act*, 106th Cong., 1st sess., March 10, 1999, S.Hrg. 106-292 (Washington: GPO, 1999), pp. 58-61; and U.S. Congress, Senate Committee on Small Business, *The President's Fiscal Year 1999 Budget Request for the Small Business Administration*, 105th Cong., 2nd sess., March 18, 1998, S.Hrg. 105-637 (Washington: GPO, 1998), pp. 63, 64, 157.

[25] U.S. Congress, Senate Committee on Small Business, *The President's Fiscal Year 1999 Budget Request for the Small Business Administration*, 105th Cong., 2nd sess., March 18, 1998, S.Hrg. 105-637 (Washington: GPO, 1998), (continued...)

In FY1998, the SBA provided the Office of the National Ombudsman its first annual budget (see **Table 1**). The SBA provided $500,000 ($351,000 was actually spent that year), sufficient to hire seven staff members (a writer, clerk or receptionist, agency investigator, attorney, public information officer, special assistant, and policy coordinator), and pay for travel, printing, and overhead expenses (photocopying, telephone line, postage, supplies, etc.).[26]

Table 1. Office of the National Ombudsman, SBA Funding

(includes direct and indirect costs)

Fiscal Year	Amount
1998	$351,000
1999	$524,000
2000	$514,000
2001	$554,000
2002	$362,000
2003	$1,200,000
2004	$1,469,000
2005	$1,348,000
2006	$1,111,000
2007	$1,257,000
2008	$1,518,000
2009	$1,236,000
2010	$1,426,000
2011	$1,787,000
2012	$1,770,000
2013	$1,270,000
2014	$1,804,000
2015	$1,804,000
2016	$1,309,000
2017	$967,000
2018 est.	$1,106,000
2019 (request)	$1,093,000

Sources: U.S. Small Business Administration, "SBA Budget Request and Performance Plan: FY2003 Congressional Submission," p. 12; "SBA Budget Request and Performance Plan: FY2004 Congressional Submission," p. 5; "FY2007 Budget Request and Performance Plan," p. 29; "FY2008 Performance Budget," p. 25; "FY2009 Performance Budget and FY2007 Performance Report," p. 27; "FY2010 Congressional Budget Justification," p. 19; "FY2011 Congressional Budget Justification and FY2009 Annual Performance Report," p. 21;

(...continued)

pp. 42-43.

[26] U.S. Congress, Senate Committee on Small Business, *The President's Fiscal Year 1998 Budget Request for the United States Small Business Administration*, 105th Cong., 1st sess., February 26, 1997, S.Hrg. 105-44 (Washington: GPO, 1997), p. 60; and SBA, "FY2002 Budget Request and Performance Plan," p. 47.

"FY2012 Congressional Budget Justification and FY2010 Annual Performance Report," p. 27; "FY2013 Congressional Budget Justification and FY2011 Annual Performance Report," p. 27; "FY2014 Congressional Budget Justification and FY2012 Annual Performance Report," p. 28; and "FY2019 Congressional Budget Justification and FY2017 Annual Performance Report," p. 99.

Notes: These funding amounts include direct costs from the SBA operating budget, including contracts; compensation and benefits; agency-wide costs, such as rent and telecommunications; and indirect costs. The FY2018 funding amount, as reported in the FY2019 congressional budget justification document ($1.099 million), was adjusted upward to account for the removal of an across-the-board rescission that was in place under a previous continuing resolution when that document was being prepared.

Actual staffing levels have varied somewhat over the years. Including the National Ombudsman, there were 3 staff members in FY1997, 11 in FY1999, 9 in FY2000, 8 in FY2002, 7 from FY2007 to FY2014, and 4 from FY2015 to FY2017.[27] As mentioned previously, the Office of the National Ombudsman currently has six staff members (including the National Ombudsman), has authorization for up to seven employees, and anticipates having all seven positions filled this fiscal year.

The Office of the National Ombudsman's annual report to Congress subsequently included its mandated report card on federal agency regulatory performance, and that section of the report became the focus of congressional hearings, primarily because several federal agencies received relatively low grades, especially in the timeliness of their responses to small business comments.[28] The National Ombudsman added a "best practices" section to the annual report to Congress "so one agency would know what the other agencies are doing and have that dialogue going on, and to encourage them" to do better.[29]

Peter Barca left the National Ombudsman position in July 1999, leaving the position vacant until January 2000 when Gail A. McDonald was appointed the second National Ombudsman. Shortly after her appointment, the SBA's Administrator at that time, Aida Alvarez, decided to relocate the Office of the National Ombudsman from Chicago to SBA's headquarters in Washington, DC, reportedly in an effort to increase the office's "visibility" within the administration.[30] The physical relocation was completed in August 2001.[31]

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[27] U.S. Congress, House Committee on Small Business, Subcommittee on Regulatory Reform and Paperwork Reduction, *The First Report to Congress by the Small Business and Agriculture Regulatory Enforcement Ombudsman*, hearing, 105th Cong., 2nd sess., March 4, 1998, Serial No. 105-37 (Washington: GPO, 1998), p. 6; U.S. Congress, House Committee on Appropriations, Subcommittee on the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies, *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 2000, Part 4: Justification of the Budget Estimates*, hearing, 106th Cong., 1st sess., January 1, 1999 (Washington: GPO, 1999), p. 1019; U.S. Congress, House Committee on Small Business, Subcommittee on Regulatory Reform and Paperwork Reduction, *Hearing on the National Ombudsman's 2000 Report to Congress and the Regulatory Fairness Program*, hearing, 106th Cong., 2nd sess., June 15, 2000, Serial No. 106-65 (Washington: GPO, 2000), p. 95; SBA, Office of the National Ombudsman, "1999 National Ombudsman's Report to Congress: Securing Rights and Benefits for Small Business," 1999; and SBA, Office of the National Ombudsman, "National Ombudsman's Fiscal Year Reports to Congress," at https://www.sba.gov/ombudsman/national-ombudsmans-fiscal-year-reports-congress.

[28] U.S. Congress, House Committee on Small Business, Subcommittee on Regulatory Reform and Paperwork Reduction, *Hearing on the National Ombudsman's 2000 Report to Congress and the Regulatory Fairness Program*, hearing, 106th Cong., 2nd sess., June 5, 2000, Serial No. 106-65 (Washington: GPO, 2000), pp. 6, 7.

[29] Ibid., p. 7. At that time, agencies that provided, on average, a written response to small business comments within 45 days of receipt were rated as excellent on this criteria; those that took, on average, 46 to 60 days were rated good; those that took, on average, 61 to 90 days were rated average; and those that took, on average, more than 90 days were rated unsatisfactory. The 1999 *Annual Report to Congress* rated the timeliness of two federal agency responses to small business comments as unsatisfactory and the 2000 *Annual Report to Congress* rated the timeliness of eight federal agency responses to small business comments as unsatisfactory. See ibid., p. 134.

[30] The relocation took place during the second quarter of FY2001. See U.S. Congress, House Committee on Small (continued...)

In 2002, the Office of the National Ombudsman entered into a memorandum of understanding with the SBA Office of Advocacy in which both parties "pledged the highest degree of cooperation" and the Office of Advocacy (which focuses on issues related to the development of federal regulations and their impact on small businesses) agreed "to offer the services of its Regional Advocates in planning the Ombudsman's regional fairness board hearings."[32]

In 2003, the third National Ombudsman, Michael L. Barrera, testified during a congressional hearing that "as public awareness of ONO [Office of the National Ombudsman] grows, cooperation among the small business community and Federal regulatory agencies is [also] growing."[33] He noted that federal agency attendance at Small Business Regulatory Fairness Board hearings "has improved dramatically" and pointed out that the Internal Revenue Service, through its Taxpayer Advocate system, "now attends every RegFair Hearing and Roundtable conducted by ONO."[34]

In 2006, the Office of the National Ombudsman renewed its previous memorandum of understanding with the SBA Office of Advocacy "to foster increased cooperation between the offices as they both work to provide a more small business friendly regulatory environment."[35] Specifically, the Office of the National Ombudsman agreed to

- receive comments and concerns regarding the impact of regulations on small business and the burden of regulatory compliance and federal regulatory enforcement;
- where appropriate, forward such comments to the Office of Advocacy;
- provide information and materials generated through the Office of the National Ombudsman's activities that are more appropriately within the Office of Advocacy's jurisdiction; and
- promote the SBA's programs and services, including the Office of Advocacy's regulatory and research role, through its various hearings and roundtables and "include the Office of Advocacy Regional Advocates in the planning and implementation of those activities as appropriate."[36]

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Business, Subcommittee on Regulatory Reform and Paperwork Reduction, *Hearing on the National Ombudsman's 2000 Report to Congress and the Regulatory Fairness Program*, hearing, 106th Cong., 2nd sess., June 5, 2000, Serial No. 106-65 (Washington: GPO, 2000), p. 4.

[31] SBA, Office of the National Ombudsman, *Creating a More Small Business Friendly Regulatory Enforcement and Compliance Environment: Fiscal Year 2001 Report*, p. 4, at https://www.sba.gov/sites/default/files/files/ombud_ono2001.pdf.

[32] U.S. Congress, House Committee on Small Business, Subcommittee on Regulatory Reform and Oversight, *Small Business Advocacy Improvement Act of 2003*, 108th Cong., 1st sess., April 1, 2003, Serial No. 108-9 (Washington: GPO, 2003), pp. 33, 34.

[33] U.S. Congress, House Committee on Small Business, Subcommittee on Regulatory Reform and Oversight, *Federal Agency Treatment of Small Business*, 108th Cong., 1st sess., May 15, 2003, Serial No. 108-15 (Washington: GPO, 2003), p. 35.

[34] Ibid., pp. 4, 35.

[35] SBA, Office of Advocacy and SBA, Office of the National Ombudsman, "Memorandum of Understanding Between the Office of Advocacy, U.S. Small Business Administration and the Office of the National Ombudsman, U.S. Small Business Administration," at https://www.sba.gov/sites/default/files/MOU_National_Ombudsman.pdf. For additional information and analysis of the SBA's Office of Advocacy, see CRS Report R43625, *SBA Office of Advocacy: Overview, History, and Current Issues*, by Robert Jay Dilger.

[36] SBA, Office of Advocacy and SBA, Office of the National Ombudsman, "Memorandum of Understanding Between (continued...)

The SBA Office of Advocacy, which has a larger budget and more staff than the Office of the National Ombudsman, agreed to

- provide material that may be distributed to participants in the Office of the National Ombudsman's Regulatory Fairness Program; and
- provide the National Ombudsman with regulatory complaints and other information generated by small business interests that are more appropriately within the Office of the National Ombudsman's jurisdiction.[37]

The Office of Advocacy's FY2018 appropriation is $9.120 million and it has authorization for 52 full-time equivalent employees.[38]

In recent years, Congress has focused increased attention on the Office of the National Ombudsman's efficacy in helping small businesses resolve their regulatory disputes with federal agencies, as opposed to focusing on how many small businesses contacted the office, submitted a formal comment, or participated in one of the office's hearings and roundtable discussions. For example, in 2016, the House Committee on Small Business noted that the National Ombudsman "has no investigative capacity nor authority to overrule, stop or delay a federal action" and asked the National Ombudsman to report back to the committee the percentage of cases that were referred to federal agencies for resolution in FY2014 (420) that resulted in a favorable outcome for the small businesses, "such as reduction of a penalty."[39] The National Ombudsman reported that 41 of the 420 small businesses (about 10%) that had a regulatory compliance or enforcement dispute forwarded to a federal agency in FY2014 for resolution received a favorable outcome.

Current Organizational Structure and Funding

As noted previously, the Office of the National Ombudsman currently has six employees (the National Ombudsman [Nathan J. Miller], a Deputy National Ombudsman, an administrative officer, an external outreach manager, and two case management specialists) and intends to hire another employee this fiscal year.

The 10 Small Business Regulatory Fairness Boards are required to meet at least annually to advise the National Ombudsman on matters related to federal agency small business regulatory activities, report substantiated instances of excessive federal enforcement actions against small businesses, and prior to publication, comment on the National Ombudsman's annual report to Congress.[40]

(...continued)

the Office of Advocacy, U.S. Small Business Administration and the Office of the National Ombudsman, U.S. Small Business Administration," at https://www.sba.gov/sites/default/files/MOU_National_Ombudsman.pdf.

[37] SBA, Office of Advocacy and SBA, Office of the National Ombudsman, "Memorandum of Understanding Between the Office of Advocacy, U.S. Small Business Administration and the Office of the National Ombudsman, U.S. Small Business Administration," at https://www.sba.gov/sites/default/files/MOU_National_Ombudsman.pdf.

[38] SBA, Office of Advocacy, *FY2019 Congressional Budget Justification and FY2017 Annual Performance Report*, p. 2, at https://www.sba.gov/sites/default/files/aboutsbaarticle/FY_2019_CBJ_Office_of_Advocacy.pdf.

[39] U.S. Congress, House Committee on Small Business, Subcommittee on Investigations, Oversight and Regulations, *Oversight of the Office of Advocacy and the Office of the National Ombudsman at the SBA*, hearing, 114th Cong., 2nd sess., February 10, 2016, H.Hrg. 114-042 (Washington: GPO, 2016), p. 37.

[40] P.L. 104-121, the Contract with America Advancement Act of 1996 (Title II, the Small Business Regulatory Enforcement Fairness Act of 1996), §30, "Oversight of Regulatory Enforcement."

The boards are composed of five volunteers who are an owner, operator, or officer of a small business.[41] Board members are appointed by the SBA Administrator, after receiving the recommendations of the chair and ranking minority member of the House Committee on Small Business and the Senate Committee on Small Business and Entrepreneurship.[42] No more than three board members may be of the same political party, they cannot be a federal officer or employee, in either the executive branch or Congress, and they serve at the pleasure of the SBA Administrator for terms of three years or less.[43]

The boards are based in the SBA's 10 regions:

- Region 1 (serving Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont);
- Region 2 (serving New Jersey, New York, Puerto Rico, and the U.S. Virgin Islands);
- Region 3 (serving Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and the District of Columbia);
- Region 4 (serving Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee);
- Region 5 (serving Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin);
- Region 6 (serving Arkansas, Louisiana, New Mexico, Oklahoma, and Texas);
- Region 7 (serving Iowa, Kansas, Missouri, and Nebraska);
- Region 8 (serving Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming);
- Region 9 (serving Arizona, California, Hawaii, Nevada, and the territories of Guam and American Samoa); and
- Region 10 (serving Alaska, Idaho, Oregon, and Washington).[44]

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[41] Small Business Regulatory Fairness Board members serve without compensation but are allowed reimbursement for travel expenses, including per diem in lieu of subsistence at rates authorized for federal employees while away from their homes or regular places of business in the performance of services for the Board. See P.L. 104-121, the Contract with America Advancement Act of 1996 (Title II, the Small Business Regulatory Enforcement Fairness Act of 1996), §30, "Oversight of Regulatory Enforcement."

In recent years, the SBA has focused on finding ways to reduce vacancies on Small Business Regulatory Fairness Boards. In FY2016, nearly one-quarter (24%) of Small Business Regulatory Fairness Board seats across the SBA's 10 regions were vacant. In FY2017, the board vacancy rate increased to 54%, primarily because board vacancies were not filled due to the change in Administrations "to preserve the prerogative of the incoming SBA Administrator to make appointments based upon recommendations by the incoming National Ombudsman." See SBA, *Fiscal Year 2019 Congressional Budget Justification and Fiscal Year 2017 Annual Performance Report*, p. 100, at https://www.sba.gov/sites/default/files/aboutsbaarticle/SBA_FY_2019_CBJ_APR_2_12_post.pdf.

[42] Although the SBA Administrator is required by statute to make these appointments after receiving the recommendations of the chair and ranking minority member of the House Committee on Small Business and the Senate Committee on Small Business and Entrepreneurship, some Members have complained that the SBA has often ignored this statutory requirement. See U.S. Congress, House Committee on Small Business, Subcommittee on Investigations, Oversight and Regulations, *Oversight of the Office of Advocacy and the Office of the National Ombudsman at the SBA*, hearing, 114th Cong., 2nd sess., February 10, 2016, H.Hrg. 114-042 (Washington: GPO, 2016), pp. 10, 11.

[43] P.L. 104-121, the Contract with America Advancement Act of 1996 (Title II, the Small Business Regulatory Enforcement Fairness Act of 1996), §30, "Oversight of Regulatory Enforcement."

[44] SBA, Office of the National Ombudsman, "Fairness Boards," at https://www.sba.gov/ombudsman/regional-regulatory-fairness-board-members.

As shown in **Table 1**, the SBA provided the Office of the National Ombudsman $1.309 million in FY2016, $967,000 in FY2017, and is expected to provide it $1.106 million in FY2018. The SBA has requested $1.093 million for FY2019.[45]

Unlike the SBA's Office of Advocacy, which is also tasked with serving as an independent advocate for small businesses in the regulatory process (but primarily at the developmental stage), the Office of the National Ombudsman does not have its own funding account. The SBA funds the Office of the National Ombudsman through its salaries and expenses' executive direction subaccount. That account includes funding for the SBA's Office of the Administrator, Office of General Counsel, Office of Government Relations, Office of Hearings and Appeals, Office of Marketing and Communications, Office of Performance Management and Chief Financial Officer, and the National Ombudsman.[46] The Office of Advocacy was also funded through that account, but Congress directed the SBA to provide the Office of Advocacy its own budgetary account in P.L. 111-240, the Small Business Jobs Act of 2010, as a means to enhance the Office of Advocacy's independence from the SBA Administrator. To date, similar legislation has not been introduced to provide the Office of the National Ombudsman its own funding account within the SBA. Instead, ombudsman advocates have argued that ombudsman offices "should not have duties within the agency that might create a conflict with their responsibilities as a neutral, and their budgets should be publicly disclosed."[47]

The Ombudsman's Regulatory Activities and Outreach Efforts

Small businesses that believe they have experienced excessive or unfair federal regulatory compliance or enforcement actions may file a formal comment with the Office of the National Ombudsman. The formal comment typically includes the following basic information and a signed consent form (SBA Form 1993) authorizing the Office of the National Ombudsman to pursue the matter with the federal agency:

- a description of the specific action taken by the federal agency and the results of this action;
- the specific resolution sought; and
- any relevant documentation.[48]

These comments may be filed online or in paper form, and commenters can receive information regarding the comment form or information about the Office of the National Ombudsman by calling the National Ombudsman's Regulatory Fairness Helpline at 888-REG-FAIR.[49] In

[45] This funding amount includes direct costs from the SBA operating budget, including contracts; compensation and benefits; agency-wide costs, such as rent and telecommunications; and indirect costs. See SBA, *FY2019 Congressional Budget Justification and FY2017 Annual Performance Report*, p. 99, at https://www.sba.gov/sites/default/files/aboutsbaarticle/SBA_FY_2019_CBJ_APR_2_12_post.pdf.

[46] Ibid., p. 10.

[47] Carole S. Houk, Mary P. Rowe, Deborah A. Katz, Neil H. Katz, Lauren Marx, and Timothy Hedeen, "Recommendation," in *The Ombudsman in Federal Agencies – Final Report*, Washington, DC: Administrative Conference of the United States, 2016, at https://acus.gov/report/ombudsman-federal-agencies-final-report-2016.

[48] SBA, Office of the National Ombudsman, "2015 Annual Report to Congress," p. 3, at https://www.sba.gov/sites/default/files/ONO_2015.pdf.

[49] Ibid.

addition, small businesses may file comments "on-the-spot" at any of the Office of the National Ombudsman's regional hearings and roundtables.

Once a comment is submitted, a case management specialist reviews the case and any supporting documentation to ensure that the necessary authorization and other information are present. The case management specialist then determines how the Office of the National Ombudsman can best assist the small business, advises the small business of expected next steps, and, if the comment is to be forwarded to a federal agency, explains the parameters of the SBREFA review.

Comments forwarded to a federal agency include a request for "a prompt, high-level, responsive review of the matter reported."[50] The federal agency is asked to consider the fairness of the case from a small business perspective and "to provide a practical, timely response that balances the spirit of the regulation with the specific circumstances of the small business."[51] All comments are handled on a confidential, protected basis, and can be raised anonymously, if preferred by the small business.

The case management specialist then follows up with the federal agency and the small business as appropriate and communicates with the small business owners the actions taken to assist them.[52]

In FY2017, the Office of the National Ombudsman assisted 460 small businesses, "responded to thousands of general inquiries," conducted 15 targeted regional regulatory fairness roundtables, completed 134 outreach events, initiated contact with 11 trade associations representing more than 616,000 small business owners and SBA resource partners, and identified 23 federal rules that it argued are a burden to small businesses and worked with the affected federal agencies to reduce those burdens.[53] The National Ombudsman also met with senior officials representing 28 federal agencies.[54]

In addition, the National Ombudsman's annual report includes a report card providing letter grades (which can range from A to F) for each federal agency (and in several instances, for individual offices within the federal agency):

- two grades rating the agency's responsiveness to small business concerns (the timeliness of the agency's response and the quality of the response);
- three grades rating the agency's compliance with SBREFA (the agency's nonretaliation policies against small business commenters, the provision of regulatory compliance assistance to small businesses, and the provision of notice to small businesses of their rights under SBREFA); and
- an overall grade.[55]

[50] Ibid., p. 4.

[51] Ibid.

[52] Ibid., p. 5.

[53] SBA, *Fiscal Year 2018 Congressional Budget Justification and Fiscal Year 2016 Annual Performance Report*, p. 107, at https://www.sba.gov/sites/default/files/aboutsbaarticle/Office_of_Advocacy_-_FY_2018_CBJ_FY_2016_APR.pdf; and SBA, *FY2019 Congressional Budget Justification and FY2017 Annual Performance Report*, p. 101, at https://www.sba.gov/sites/default/files/aboutsbaarticle/SBA_FY_2019_CBJ_APR_2_12_post.pdf. The Office of the National Ombudsman assisted 420 small businesses in FY2014, 412 in FY2015, and 316 in FY2016.

[54] SBA, *FY2019 Congressional Budget Justification and FY2017 Annual Performance Report*, p. 101, at https://www.sba.gov/sites/default/files/aboutsbaarticle/SBA_FY_2019_CBJ_APR_2_12_post.pdf.

[55] SBA, Office of the National Ombudsman, *2016 Annual Report to Congress*, pp. 23-29, at https://www.sba.gov/sites/default/files/ONO_2016AnnualReport_Pages_120617-508_1.pdf.

In FY2016, 30 federal agencies and offices received an overall grade of A, 8 received an overall grade of B, and the Department of Veterans Affairs received an overall grade of D.[56] No agencies received an overall grade of C or F.

Current Congressional Issues

Some Members and small business advocates have argued that the Office of the National Ombudsman should be provided additional resources. For example, on March 29, 2017, a small business advocate argued the following at a Senate Committee on Small Business and Entrepreneurship hearing:

> Where the Office of Advocacy works on the front end of a development of a significant regulation, the Office of the National Ombudsman is charged with helping small businesses on the back end, with all regulation compliance. It serves as the conduit for small businesses to have their grievances about compliance problems, or other issues, with Federal agencies, heard directly by the agencies, in an effort for successful resolution. In this way, the Office of the National Ombudsman, and the agencies, can detect patterns of compliance problems so that the agencies can revisit rules for modification.
>
> This important component of the rulemaking process is woefully underfunded. The Office of the National Ombudsman actually relies on volunteers to help get the message out about its vital small business services. It is, for the most part, unknown and underutilized. If Congress really wants to help small businesses with Federal regulations, invest more in the small business outreach, support, and feedback loop.[57]

As mentioned previously, many small businesses that submit formal comments to the Office of the National Ombudsman do not receive a favorable outcome from the federal agency. Some Members and small business advocates have argued that the Office of the National Ombudsman should be provided additional authority to assist small businesses in their efforts to resolve their regulatory disputes with federal agencies. For example, S. 1146, the Small Business Regulatory Relief Act of 2017, would, among other provisions,

- expand the National Ombudsman's authority to work with federal agencies on the development of best practices for educating, training, and assisting small entities in understanding and complying with federal regulations;
- authorize the National Ombudsman to evaluate federal agency regulatory compliance guides, ensure that those guides are available to small business development centers and other SBA management and training resource partners, conduct small business customer service surveys on an ongoing basis to assess the timeliness and quality of federal agency regulatory activities, and develop an outreach program to promote awareness of the National Ombudsman's activities; and
- authorize to be appropriated such sums as are necessary to carry out these additional responsibilities.

[56] Ibid., pp. 28, 29.

[57] U.S. Congress, Senate Committee on Small Business and Entrepreneurship, *Examining How Small Businesses Confront and Shape Regulations*, hearing statement by Frank Knapp Jr., co-Chairman, American Sustainable Business Council (ASBC); President and CEO, South Carolina Small Business Chamber of Commerce, 115th Cong., 1st sess., March 29, 2017, S.Hrg. 115-21 (Washington: GPO, 2017), p. 13.

Others Members appear unconvinced that providing the Office of the National Ombudsman additional resources and/or authority is necessary. They have argued, for example, that the best way to reduce small business regulatory burden is not more government but less regulation.[58]

Concluding Observations

The Office of the National Ombudsman is a small office with a relatively large mandate—to serve as an impartial liaison across federal agencies for small businesses that believe they have not been treated fairly in the enforcement of federal regulations. It faces several challenges.

First, the Office of the National Ombudsman is generally recognized as being an independent, impartial office, but it is housed within the SBA and remains subject to its influence through (1) its proximity to the agency and its organizational culture; (2) the budgetary process, which provides the SBA Administrator the authority to determine the Office of the National Ombudsman's budget; and (3) the appointment and removal process, which provides the SBA Administrator the authority to hire and fire the ombudsman. In addition, the sheer size of the SBA (more than 3,200 full-time employees and an annual budget exceeding $800 million) relative to the Office of the National Ombudsman, and the existence of the SBA's Office of Advocacy, which has a similar mission (but focused primarily on regulatory development as opposed to regulatory compliance and enforcement), makes it more difficult than would otherwise be the case for the Office of the National Ombudsman to be recognized by stakeholders as the definitive voice for small businesses in the regulatory process.

Second, the National Ombudsman has often had a relatively short tenure. The current National Ombudsman was appointed in September 2017 and the previous National Ombudsman (Earl L. Gay) served for a little over a year.[59] The National Ombudsman has left office for various reasons, such as a change in Administration or for opportunities in the private sector. Frequent turnover can lead to continuity problems for the office.

Third, the Office of the National Ombudsman does not have the authority to compel federal agencies to undertake specific actions to resolve disputes. As a result, although its annual rating of federal agency responsiveness to small business concerns does provide it a means to exert some influence on federal agency actions, its role in resolving disputes is somewhat constrained.

Finally, the Office of the National Ombudsman's relatively limited budget and staffing level restricts its ability to engage in outreach activities that could increase small business awareness of its existence and services.

[58] For example, see U.S. Congress, Senate Committee on Small Business and Entrepreneurship, *Examining How Small Businesses Confront and Shape Regulations*, hearing statement by Sen. John Kennedy, 115th Cong., 1st sess., March 29, 2017, S.Hrg. 115-21 (Washington: GPO, 2017), p. 22.

[59] Eight people have served as the National Ombudsman: Peter Barca (1996-1999), Gail A. McDonald (2000-2001), Michael L. Barrera (2001-2005), Nicholas N. Owens (2006-2009), Esther H. Vassar (2009-2012), Brian M. Castro (2013-2015), Earl L. Gay (2015-2016), and Nathan J. Miller (2017-present). SBA, Office of Congressional and Legislative Affairs, correspondence with the author, December 18, 2017.

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