

June 1999

MEMORANDUM

SUBJECT: Ombudsman Function Created by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)

As part of the FY 2001 budget formulation process in which possible program/organizational efficiencies are being examined, and in light of the upcoming vacancy in the Ombudsman position, a policy paper was requested outlining the "pros" and "cons" of merging the function into the Office of Advocacy.

Background

The Small Business Regulatory Enforcement Fairness Act in 1996 (SBREFA) created the position of "Small Business and Agriculture Regulatory Enforcement Ombudsman" to be appointed by and reporting directly to the Administrator of the Small Business Administration. The focus of the position is to assess enforcement actions, policies, etc. as they are applied to small business by regulatory agencies. The Ombudsman reports annually to Congress, evaluating the enforcement activities of federal departments and agencies and their enforcement personnel, and rating the responsiveness of agencies to small business, basing the evaluations and ratings on "substantiated comments received from small business." Small Business Regulatory Fairness Boards were created in each of SBA's 10 regions, consisting of 5 owners, operators or officers of small business concerns, appointed by the SBA Administrator for three year terms in consultation with the chair and ranking member of both the House and Senate Small Business Committees.

The Ombudsman function has been operational for three years now and some problems/challenges have surfaced, some of which are inherent to function and structure.

Policy Issues

At the outset, consideration was given to the following as potential Ombudsmen:

- SBA's General Counsel
- Chief Counsel for Advocacy
- Another SBA employee

General Counsel.

Pro Arguments:

- knowledge of administrative law
- knowledge of interaction of the Executive with the Legislative branches of government
- knowledge of the various regulatory agencies and their statutory missions, their legal processes and legal limitations on their authority

Con Arguments:

- would change role of the General Counsel in SBA from a legal advisor to the Administrator to that of managing a line function within SBA
- conflict of interest between advisory role and that of a quasi investigator of “comments” aka “complaints” against SBA
- no investigative authority other than within SBA
- staff not structured to deal with other agencies on enforcement issues related to specific regulations designed for diverse public policy issues

Chief Counsel for Advocacy

Pro Arguments:

- knowledge of administrative law
- knowledge of the various regulatory agencies and their statutory missions, their legal processes
- possible investigative authority to compel evidence in relation to specific “comments”
- staff already set up with knowledge of public policy responsibilities and regulations of diverse agencies
- has regional advocates in each of the 10 regions to manage the Fairness Boards
- reduces confusion in the minds of the public—minimizes need to distinguish between enforcement role of the Ombudsman and the policy role of the Chief Counsel (Advocacy has right of petition to seek regulatory changes; members of Fairness Boards understandably want to get into policy issues, which is Advocacy’s expertise and mission.)
- Many of the Board members are known to Advocacy because of its work with the 1995 White House Conference on Small Business and other working relationships.

Con Arguments:

- as Ombudsman, Chief Counsel would report directly to the Administrator; this could raise questions about a possible conflict with *statutory independence* of the Office

- “comment” case work could potentially be very demanding, diverting valuable staff time away from regulatory policy work—this outcome is driven by the obligation to report annually to Congress with “evaluations” and “ratings”
- additional labor intensive workload was imposed by SBREFA on Advocacy related to Advocacy Review Panels for the Occupational Safety and Health Administration and the Environmental Protection Agency
- Judicial review has stimulated increased pre-proposal work of the staff, i.e. agencies are consulting with Advocacy with increased frequency to avoid challenges to their regulations for failing to comply with the Regulatory Flexibility Act (RFA). There are indications that Congress may expand the panel process to other agencies, which will place further resource demands on Advocacy

Another SBA Employee

Pro Arguments:

- an SBA employee is already accountable to the Administrator
- an SBA employee could already be experienced in managing a line operation
- creates an incentive to reach out to constituencies other than those interested in/involved with lending programs

Con Arguments:

- other SBA employees do not have knowledge of administrative law or precedents or inter-relationship with other statutes
- difficult to avoid regulatory policy concerns both of small business and Fairness Board members
- cannot limit “comments” at hearings to enforcement issues (the expectation is then created that the Ombudsman will handle)
- creates bureaucratic layering within SBA on issues not within SBA’s expertise or the need for staffing that duplicates Advocacy
- if the Office addresses policy concerns, it may conflict with Advocacy and put SBA prominently in the middle of a conflict with the Administration
- work and duties are not constrained by other obligations and are unrelated to other SBA programs—thus, work expands to justify its mission

Resource Issues

If Advocacy were to undertake the Ombudsman and Fairness Board functions, the Regional Advocates could handle, in addition to their Advocacy duties, the logistics and the administrative duties involved with the Fairness Boards. The Fairness Board duties could also expand the impact of the work of the Regional Advocates. Since the Regional Advocates do not have any support assistance in the Regional Office, the issue of

resources would clearly have to be examined in more detail. We do, however, think that the existing Congressionally approved budget of \$500,000 would be sufficient.

It needs to be clearly understood that the Regional Advocates could not take on this additional responsibility if someone else, other than the Chief Counsel, is the Ombudsman. The Regional Advocates are a major resource for Advocacy. Their value to the fairness board system would be the efficient tie-in with their Advocacy policy work, which we supervise. Supervision of this resource could not be divided and we would not willingly relinquish the slots.

CONCLUSION

The choice is not clear cut.

The biggest problem in making the Chief Counsel the Ombudsman is the perception of a conflict between the statutory independence of the Office and the statutory reporting relationship of the Ombudsman to the Administrator. (The Chief Counsel goes to great lengths to keep the Administrator informed, especially when Advocacy is about to take a position or publish information critical of Administration policies and programs. This is different, however, than reporting directly and being accountable to the Administrator for a specific function.) Legislative language could be drafted to clarify the reporting relationship if the Administrator and the Committees thought it necessary.

The strongest argument in favor of the merger of the offices and making the Chief Counsel the Ombudsman is the elimination of confusion in the minds of the public and elimination of any need to explain the limitation on the mission of the Ombudsman or the differences in the roles of the Ombudsman and the Chief Counsel.

The second most important argument in favor of the merger is the more effective use of combined resources and expertise, especially at a time of decreasing agency resources. Enforcement and regulatory policy would be joined efficiently and effectively and the fairness board members could be an effective outreach mechanism into the community for Advocacy's work and the work of the Regional Advocates. It would involve economies of scale.

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