A GUIDE FOR FEDERAL EMPLOYEE OMBUDS
PUBLIC COMMENTS AND RESPONSES

Comments on the Guide for Federal Employee Ombuds ("Guide") were received from five sources. The following presents those comments *precisely* as they were received (*i.e.*, copied directly from the communications sent by each commenter) from Commenters 1-4, and excerpts (which include all substantive comments) from the letter submitted from Commenter #5, together with the responses thereto – that is, how they were reflected within the final version of the Guide. Identifying information about each commenter is redacted.

(1) Commenter #1 (essentially editorial changes)**:**

> pg.3 - last sentence of paragraph - last sentence - take out the word "and" (after the word "by")
> pg. 3 1st footnote - change to "in" February 2004 instead of "of" February 2004
> pg. 3 1st footnote - 2nd line - change "endorsed" to "endorse"
> pg. 4 at bottom under "A." - change to "an Ombuds Program"
> pg. 7 3rd footnote - doesn't make sense to me - should it be "A Legislative Ombuds should be required..."
> pg. 9 under "Federal Guidance Notes" - need to capitalize one "ombuds" (5th line)

Response: All but the last of the editorial revisions suggested cannot be made, since these relate to the text of the ABA Standards, which have been included in the Guide ***verbatim***. The one "ombuds" within the Federal Guidance Notes on page 9 has been capitalized.

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(2) Commenter #2 and Commenter #3:

> **Independence, Impartiality, and Confidentiality – Section C**
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> **Access**
> The draft Federal Guidance notes (at page 7) state that the Ombuds "should, if possible, have direct access to the highest agency official or his designee." While this is true, the optimal arrangement is for direct access to the head of the agency. If the Ombuds reports to or has greatest access to a designee, it is critical that the designee be at the top levels of management and not present a conflict for the integrity of the Ombuds function. Thus, reporting to the head of Human Resources or an associate director for operations and personnel, even as the agency head's designee, would not be appropriate.

Response: The Federal Guidance Note in the final version of the Guide has been revised to read, in pertinent part:

> *The independence of an Ombuds Office is a fundamental prerequisite to its effective operations. To ensure this independence, the federal Ombuds should, if possible, report and have direct access to the highest agency official. If the Ombuds reports to a designee, it is critical that the reporting relationship not present a conflict that would impact adversely the integrity, independence and impartiality of the Ombuds. Thus, it would not be appropriate for an Ombuds who is called upon to resolve employment related matters to report to the agency's Director of Human Resources, even as the designee of an agency head.*

Confidentiality: The ADR Act and Fraud, Waste and Abuse

The draft Federal Guidance Notes (at page 8) state that confidentiality is a critical component of Ombuds programs, and that "Ombuds should be aware that, where they serve as neutrals, the Administrative Dispute Resolution Act of 1996 . . . specifically prohibits them from disclosing the substance of 'dispute resolution communications.'" While both of these things may be true, the latter assertion may inadvertently suggest that Ombuds or other neutrals would choose to disclose "dispute resolution communications" or confidential communications were they not somehow "prohibited" from so doing by the ADR Act. It is more accurate to state that the ADR Act protects the confidentiality of "dispute resolution communications" or confidential communications made to a neutral.

The draft Guidance further notes that federal employees have an affirmative statutory obligation to "report incidents of fraud, waste and abuse" in federal programs and to cooperate with federal investigations. The draft Guidance text is disappointing insofar as the Guide makes no effort to explore the substantive legal issues at the intersection of these two federal statutes, the ADR Act and the Inspector General Act, but rather lists them as serial responsibilities. In particular, the Guidance should indicate that section 574(a) and 574(a)(3) cover situations in which an Ombuds learns of possible fraud, waste and abuse. That is, communications to the Ombuds by a visitor alleging fraud, waste and abuse fall under the definition provided for "dispute resolution communications" made in the context of a "dispute resolution proceeding" and are communications "provided in confidence to the neutral" under the terms of 5 U.S.C. 571(3-7) & 574(a). Ombuds practice is to encourage self-reporting by visitors to our office when appropriate and to aid them in understanding and meeting their responsibilities as federal employees. This includes reporting fraud, waste and abuse where they have a reasonable basis for suspecting it. Section 574(a)(3) and (4) of the ADR Act provide that "a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be

required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless . . . the dispute resolution communication is required by statute to be made public." Even in such a case, however, the ADR Act provides that "a neutral should make such communication public only if no other person is reasonably available to disclose the communication" or a court forces such disclosure by the neutral. A visitor's refusal to meet his statutory obligation to report fraud, waste and abuse, cannot be argued as a matter of legal interpretation or public policy to trump the statutory safeguards contained in the confidentiality provisions of the ADR Act. Indeed, despite his or her refusal, an employee who has information pertaining to fraud, waste and abuse is still "reasonably available" under the Act.

Response: The relevant portion of the Federal Guidance Note in question has been revised to read as follows:

> *All federal employees, including federal employee Ombuds, are obligated to report incidents of fraud, waste and abuse in conjunction with the operation of federal programs and to cooperate with duly authorized federal investigative agencies and organizations. Indeed, federal Ombuds practice should be designed to facilitate reporting by federal employees raising allegations of possible fraud, waste and abuse, in part so that meaningful recommendations may be developed by the Ombuds (and forwarded to those having authority to act upon such recommendations) aimed at eradicating systemic conditions that foster fraud, waste and abuse. Also, on occasion, a federal Ombuds might have to respond to Congressional or agency management inquiries pertaining to possible fraud, waste and abuse within the agency. By the same token, the maintenance of confidentiality is of paramount importance to the effectiveness of federal Ombuds programs. To that end, Ombuds charters should expressly affirm the criticality to the Ombuds process of maintaining confidentiality. Moreover, Ombuds should be aware that, where they serve as neutrals, the Administrative Dispute Resolution Act of 1996 ("ADR Act") specifically protects against disclosure of "dispute resolution communications. A federal Ombuds thus may be presented with a conflict between (1) his/her confidentiality obligations and (2) his/her obligations to report fraud, waste or abuse. Situations may develop, for example, where employees who contact the Ombuds and describe circumstances involving fraud, waste or abuse, advise the Ombuds that they are not themselves willing to report such fraud, waste or abuse to appropriate agency officials. For all such instances where potential conflicts may arise, it is essential that federal Ombuds have access to independent or properly insulated legal counsel, in order to obtain competent advice regarding the resolution of conflicts.*

Confidentiality: The ADR Act and Federal Records

The draft Federal Guidance note (at page 8) states that Federal Ombuds records may be subject to records retention requirements under regulations promulgated and implemented by the National Archives and Records Administration (NARA). The draft Guidance makes no distinction between programmatic records related to the administration of the Ombuds office and notes created or kept in the context of working on Ombuds cases. In fact, the Guidance indicates only that Federal Ombuds offices "should review agency record development and retention procedures and, whenever needed, should consult agency counsel and records officers for guidance."

This extremely limited advice is especially puzzling given the critical need to ensure the integrity of the Ombuds process by properly addressing the records status, and protecting the confidentiality, of Ombuds case notes. NARA regulations on identifying federal records, in fact, provide at 36 CFR 1222.34(c) that "working files, such as preliminary drafts and rough notes, and other similar materials" are to be retained if they "were circulated or made available to employees, other than the creator, for official purposes such as approval, comment, action, recommendation, follow-up, or to communicate with agency staff about agency business; and . . . contain unique information, such as substantive annotations or comments included therein, that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities." According to these standards, the Ombuds' own rough, working notes made in the context of handling a case and not circulated to agency personnel in the manner contemplated in the regulation would clearly not constitute agency records. Programmatic material relating to the development and implementation of the Ombuds program and to agency policy regarding dispute resolution, on the other hand, clearly would constitute agency records and need to be retained according to the appropriate records retention schedules. Moreover, this reading of the NARA regulation is corroborated by the ABA's Guide to Confidentiality Under the Federal Administrative Dispute Resolution Act. In Chapter 7, the ABA Guide states that "a mediator's rough notes which are not circulated to any person may be considered working files which are not agency records," and "[r]ough notes for the mediator's eyes' only or, in other words, memory joggers are more likely to be deemed not to be agency records" (Guide 73).

Response: The relevant portion of the Federal Guidance Note in question has been revised to read as follows:

In terms of record keeping, federal Ombuds' records may be subject to regulations administered by the U.S. National Archives & Records Administration (NARA), an independent federal agency that determines which records and reports should be maintained in accordance with the Federal Records Act. In this regard, a distinction should be drawn among

three categories of Ombuds-related documents: (1) programmatic records related to the development and administration of the Ombuds program, including documents containing the Ombuds' recommendations to higher authority for correcting systemic problems and the like; (2) statistical data reflecting conflict and issue trends – maintained by the Ombuds in a manner that respects confidentiality (by containing no information by which individuals can be identified); and (3) the Ombuds' notes that are created in the context of work on specific cases. Whereas, the first and second categories of documents would be considered as "federal records," Ombuds' case notes ordinarily would not be regarded as "federal records," pursuant to NARA regulations, so long as they are not "circulated or made available to employees, other than the creator, for official purposes, such as approval, comment, action, recommendation, follow-up, or to communicate with agency staff about agency business; and . . . contain unique information, such as substantive annotations or comments included therein, that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities. " 36 CFR 1222.34(c). Federal Ombuds offices should review agency record development and retention procedures and, whenever needed, should consult agency counsel and records officers for guidance as to the creation, maintenance and destruction of records. In addition, Federal Ombuds should become familiar with their obligations for complying with the Freedom of Information Act (FOIA) (including the FOIA exemption provided under the ADR Act, applicable when Ombuds are serving as neutrals) as well as the Privacy Act, and should seek counsel to resolve any questions with regard to those statutes.

Limitations on Ombuds Authority – Section D

The draft Federal Guidance notes (at page 9) address section D(6) of the ABA standards, which provides that an "Ombuds should not, nor should an entity expect or authorize an Ombuds to address any issue arising under a collective bargaining agreement or which falls within the purview of any federal, state, or local labor or employment law, rule, or regulation, unless there is no collective bargaining representative and the employer specifically authorizes the ombuds to do so." The draft Federal Guidance note nicely states that section D(6) of the ABA standards does not apply where the charter between an Ombuds and the agency authorizes the Ombuds "to deal with employment related matters" and "employee related issues in controversy."

The draft Federal Guidance, however, neglects to take up the first part of section D(6), namely that Ombuds should not "address any issues arising under a collective bargaining agreement" or even anything that falls within employment law "unless there is no collective bargaining representative." In neglecting to speak further to this particular issue, the federal Guidance notes miss an important opportunity. We believe that it is critical that in the manner an organization is free to authorize the

Ombuds to handle employment related matters, it must be similarly able, in consort with the applicable unions, to authorize the Ombuds to address issues that arise under the collective bargaining agreement. This authorization can be made in the collective bargaining agreement itself or in a memorandum of understanding between the union and the organization. The organization and the union can decide together how wide a role or ambit they want to provide for the Ombuds in the context of issues arising under the collective bargaining agreement. The current ABA language encroaches on organizations and Ombuds by dictating to entities what they should and should not authorize Ombuds programs to do or not do, despite the fact that they are well within their rights to decide for themselves what reach they wish to accord these programs and the fact that they have chosen to create them in the first place. In broader terms, it is reasonable to presume that an organization that has established an Ombuds office has done so precisely in order to address any workplace concerns or issues arising in the organization, and may even, with the union, intend to authorize the Ombuds to address issues falling within a collective bargaining agreement. Limiting the authority of organizations that create Ombuds programs, and their unions, to agree to fashion an Ombuds program responsive to their needs, overlooks what Ombuds do, and the reality and circumstances that typically compel an organization to create an Ombuds office.

Response: The relevant portion of the Federal Guidance Note in question has been revised to read as follows:

> *Standard D(6) provides that Ombuds may not "address" issues arising under a collective bargaining agreement, or an issue involving federal, state or local labor or employment law, rule or regulation, but implies that Ombuds may do so where "there is no collective bargaining representative" and where "the employer specifically authorizes the Ombuds to do so." Charters for federal Ombuds frequently provide specific authority for the Ombuds to deal with employment related matters and, indeed, the sole focus of the federal Ombuds in many instances is in the area of employee related issues in controversy. Ombuds may also be specifically authorized to address issues "under a collective bargaining agreement or issues involving federal, state or local labor or employment law or regulation," either by language included within the collective bargaining agreements themselves, within memoranda of agreement between labor unions and federal agencies, or through some other authorizing documenst. Where such authority has been conveyed to an Ombuds, the above Standard D(6) does not apply, and does not limit the Ombuds' involvement in federal employment matters. See the Federal Guidance Notes following 'Establishment and Operations' and 'Independence, Impartiality, Confidentiality' Standards."*

Notice – Section F

On the subject of notice, the draft Federal Guidance states that "Federal employee communications to a federal Ombuds should not be construed as providing notice to the federal agency or other federal entity, because Ombuds should maintain the confidentiality of those communications and their own independence from others within the entity." While this is largely true, it can be stated much more affirmatively and less tentatively. In particular, the draft Guidance should state that federal employee communications "never" constitute notice to the entity and that Ombuds must "strictly maintain the confidentiality" of communications by visitors to the office.

The federal Guidance note adds that "Where the employee raising an issue with an Ombuds wishes to remain anonymous, the Ombuds, acting as a conduit for the employee and at the employee's request, *should provide notice* to the entity, to the extent notice is possible with an anonymous report, and provide notice in such a way that anonymity is maintained." This language is somewhat confusing as it seems to suggest that Ombuds "should" provide notice. It would be more accurate to say that "Where the employee raising an issue with an Ombuds wishes to remain anonymous, the Ombuds *may act as a conduit* for the employee." We would then add that "This communication by the Ombuds on behalf of the visitor may constitute notice, and should reflect the employee's request for anonymity." Finally, it is not clear how the federal Guidance note for section F of the ABA standards on notice speaks to uniquely to the application of the ABA standards in the federal situation or context.

Response: The relevant portion of the Federal Guidance Note in question has been revised to read as follows:

> *Federal employee communications to a federal Ombuds should never be construed as providing notice to the federal agency or other federal entity, because Ombuds must strictly maintain the confidentiality of those communications and their own independence from others within the entity. See Federal Guidance Notes following the "Independence, Impartiality and Confidentiality" Standard. Where the employee raising an issue with an Ombuds wishes to remain anonymous, the Ombuds, acting as a conduit for the employee and at the employee's request, may provide notice to the entity, to the extent notice is possible with an anonymous report, and should provide notice in such a way that anonymity is maintained. It is recognized that, in more instances than not, if the complainant remains anonymous, the communication by the Ombuds to the agency may not have the effect of placing the agency on notice.*

(3) Commenter #4:

ESTABLISHMENT AND OPERATIONS

Federal Guidance Notes (p. 6)

The second sentence of the second paragraph states, "Consistent with collective bargaining agreements, federal Ombuds charters also may authorize Ombuds to work with unions on union related issues." We believe the reference to union-related issues is inappropriate as it implies working with unions on internal union business rather than working with unions on employment dispute resolution. We also note that, although uncommon, there is no prohibition to a union setting up and chartering an Ombuds who could be authorized to participate in the resolution of employee disputes, but only after the union has satisfied any collective bargaining obligations with the agency. Therefore, we recommend revision of the sentence to read, "Consistent with collective bargaining obligations and agreements, Ombuds' charters also may authorize Ombuds to participate in the resolution of bargaining-unit employee disputes."

Response: This suggestion has been adopted within the final version of the Guide.

INDEPENDENCE, IMPARTIALITY, AND CONFIDENTIALITY

Federal Guidance Notes (p. 8)

In the first paragraph, we recommend the addition of a new opening sentence: "The independence of an Ombuds Office is a fundamental prerequisite to its effective operations. To ensure this independence the federal Ombuds should if possible have direct access to the highest agency official or his designee."

In the first paragraph we recommend the addition of the following sentence immediately before "Also, on occasion, a federal Ombuds . . . ": "The federal Ombuds functions by making recommendations for resolution of systemic problems to those persons who have the authority to act upon them." This properly reflects the role of the Ombuds to assist in both individual-related and systemic matters.

To better explain the impact of the Federal Labor Management Relations Statute on the Ombuds process, we recommend inserting the text from "Guidance for Federal Employee Mediators," Standard VI, Quality of Process, Federal Guidance Notes 1 (page 10), which reads:

> *With respect to Standard VI.A.3, certain individuals may not be excluded from a federal mediation, if their attendance and/or participation is mandated by federal law. For example, the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7114(A)(2)(a), entitles a labor*

organization representing bargaining unit employees to be represented at any "formal discussion" between one or more representatives of an agency and one or more employees in the unit the union represents. This right has been interpreted by the Federal Labor Relations Authority and the U.S. Court of Appeals for the District of Columbia as applying to mediation of formal EEO complaints when the complainant is a bargaining unit employee. See, e.g., Dep't of the Air Force, 436th Airlift Wing, Dover AFB v. FLRA, 316 F.3d 280 (D.C. Cir. 2003); Luke Air Force Base, Ariz., 54 F.L.R.A. 716 (1998), rev'd, 208 F.3d 221 (9th Cir. 1999). Federal employee mediators should consult with the agency's ADR Program official, a Labor Relations Officer, labor counsel or other appropriate official when confronted with an issue of union attendance in a federal mediation pursuant to its "formal discussion" rights.

Response: We have inserted into the Federal Guidance Note in question language that adequately addresses these concerns and suggestions. See the previous response to Commenters ## 2 and 3. The suggested insertion of text from "Guidance for Federal Employee Mediators" has been implemented within the Federal Guidance Notes accompanying the "Establishment and Operations" Standard.

LIMITATIONS ON THE OMBUDS' AUTHORITY

Federal Guidance Notes (p. 9)

We recommend revising the final sentence to read as follows: "See the Federal Guidance Notes following 'Establishment and Operations' and 'Independence, Impartiality, Confidentiality' Standards."

Response: This suggestion has been implemented in the final version of the Guide.

REMOVAL FROM OFFICE (p. 10)

We recommend that a "Federal Guidelines Notes" be added to address the discipline and/or removal of Ombuds who are federal employees. It should be made clear that the "procedure" and grounds for discipline and/or removal of an Ombuds is controlled by 5 U.S.C. Chapter 75.

Response: This has been implemented in the final version of the Guide.

NOTICE

Federal Guidance Notes (p. 11)

Insert the word *"generally"* in the first sentence to read as follows: "Federal employee communications to a federal Ombuds generally should not be construed as providing notice to the federal agency or other federal entity . . . ." Subsequent text in this Federal

Guidance Note describes specific circumstances in which the Ombuds provides notice. The change makes the Note internally consistent.

We recommend revising the third sentence as follows and adding a new sentence (changes italicized here): "Where the employee raising an issue with an Ombuds wishes to remain anonymous, the Ombuds, acting as a conduit for the employee and at the employee's request, should provide notice to the entity, *to the extent notice is possible with an anonymous report*, *and provide notice* in such a way that anonymity is maintained. *In more instances than not, if the complainant is anonymous, the Ombuds may not be able to put the agency on notice.*

We recommend adding the following as the concluding sentence: "In other instances the Ombuds may make recommendations for the resolution of a systemic problem to those persons who have the authority to act upon them." This properly reflects the role of the Ombuds to assist in both individual-specific and systemic matters.

Response: These suggestions have been implemented in the final version of the Guide.

(4) **Commenter #5**

December 5, 2005

Dear_____:

I am writing on behalf of _____ to offer comments on the document entitled "A Guide for Federal Employee Ombuds", which was developed by the Coalition of Federal Ombudsmen working in conjunction with the federal interagency ADR Working Group Steering Committee……..

To a large extent, the Guide recapitulates the "Standards for the Establishment and Operations of Ombuds Offices," which were issued on February 9, 2004, by the American Bar Association. While _____ has acknowledged that those ABA Standards have some good features, in fact, _____ has never endorsed the 2004 ABA Standards, because we have concluded that the 2004 Standards include significant weaknesses or inaccuracies that, at best, promote a misunderstanding of the nature of the ombudsman institution. At the worst, the 2004 ABA Standards actually threaten to undermine the usefulness and effectieness of ombudsman offices, both those existing and those yet to be created.

It is important to understand a little about the history of ombudsman standards in the United States. In 1969, the American Bar Association, through its Administrative Law Section, created and endorsed a broad statement of principles for the operation of the ombudsman institution in government. That 1969 document has had wide-ranging influence, and has served as the basis for the creation of independent governmental ombudsman offices in the United States, Canada, and around the world. In fact, the original statement of principles found in the 1969 ABA document is recognized throughout the world as being a fundamental description of what a governmental ombudsman should be, and is still used by ombudsman offices to defend and strengthen their authorizing legislation, and by policy makers who are considering the creation of new omnbudsman offices. In contrast, the 2004 Standards represent a significant departure from the ABA's 1969 statement of principles and, because of that, _____ believes that a document that presents ombudsman guidelines that substantially recapitulate the 2004 ABA Standards will necessarily be flawed in important ways.

In our analysis of the 2004 ABA Standards and, by extension, the Guide, _____ has identified several specific areas of concern. In no particular order, _____'s concerns with the 2004 ABA Standards and the Guide are:

- **Advocate Ombudsman**: The 2004 ABA Standards and the Guide include a section that deals with a separate category that is termed the "Advocate Ombuds." ____ believes that "Advocate Ombuds" is not only awkward terminology, like speaking of an "Advocate Mediator," but is also a concept that is fundamentally inconsistent with the idea of the ombudsman as an impartial fact-finder. While an ombudsman may, in a sense, "advocate" for a position or recommendation, once a finding or determination has been reached, an ombudsman is not supposed to be an advocate in the sense in which the

term is used in the 2004 ABA Standards and in the Guide. _____ believes that the provision in the 2004 ABA Standards and the Guide that indicates that an "advocate ombudsman" is authorized "to initiate action in an administrative, judicial, or legislative forum when the facts warrant" is particularly objectionable. An ombudsman is supposed to be an impartial fact-finder, a complaint-handler, and a critic of public administration, but an ombudsman is not supposed to be an advocate for any party in the sense that a lawyer is an advocate. It is wrong that any ombudsman in the United States should be authorized to sue on behalf of a complainant, and any supposition to the contrary is a radical departure from the norms of North American ombudsman practice.

- **Confidentiality**: Paragraph C(3) of the Guide regarding "Confidentiality" uses the word "confidentiality" in two different contexts, one of which conflicts significantly with the way that a governmental ombudsman normally operates. The Guide, in keeping with the 2004 ABA Standards, make the ombudsman's records "confidential" in the sense of allowing an ombudsman to protect the ombudsman's office records from discovery or disclosure, but also uses the term "confidential" in the sense of limiting the ombudsman's own discretion to disclose those records. Certainly, _____ agrees that an ombudsman should not be subject to compelled disclosure of the ombudsman's records. However, a governmental ombudsman should continue to have full discretion to disclose anything in the ombudsman's records that is not required by law to be kept confidential, or that the ombudsman has not expressly agreed to keep confidential. If a governmental ombudsman were to be prohibited from having that discretion, then that ombudsman would not be able to make the reports to the public on the ombudsman's investigative findings and recommendations that are crucial to making the public aware of the weaknesses and wrongdoing that the ombudsman identifies in government. _____ believes that Paragraph C(3) should be amended to make it clear that, while an ombudsman does need a shield to protect the ombudsman's records from discovery, the ombudsman also retains the discretion to disclose critical information that might otherwise be forever hidden from the public.

- **Issues pending in legal forums:** Paragraph D(5) of the Guide under "Limitations on the Ombuds' Authority" states that an ombudsman should not have jurisdiction to address any issue that is "currently pending in a legal forum." This runs counter to what a governmental ombudsman who deals with citizen complaints normally has authority to do. In fact, _____'s own Model Act, and several ombudsman statutes, explicitly state that the ombudsman has the power to investigate "without regard to the finality of the administrative act," which could include any stage of a proceeding regarding an action or decision. There could be many situations where it would be desirable for an ombudsman who is in the business of promoting accountability in government to review an issue that is involved in a legal proceeding. The issue may, for instance, involve a significant policy or practice about which the ombudsman has an interest in commenting on or making the subject of a recommendation to improve government. An ombudsman may, for example, want to review a finding of child abuse by a state agency to determine whether relevant policies and procedures are being consistently followed by agency's investigators, or if there are problems related to those policies and procedures, even though the case may also be involved in an administrative hearing. Many of the Ombudsman offices who are active in _____ are asked to do far more than simply resolve disputes between parties. An ombudsman working in government is often also expected to hold agencies accountable to the public for their actions, and a legislative ombudsman

is expected to help to provide legislative oversight. Obviously, the need for the ombudsman to be involved in public accountability and legislative oversight continue, regardless of whether an issue is being litigated. Because legislators and the public may be legitimately interested in the ombudsman's findings and recommendations, a governmental ombudsman should not be prohibited from addressing issues simply because they are pending in an administrative or judicial forum.

● **"The term "Ombuds":** ____ believes the term "ombudsman," rather than "ombuds," favored by the 2004 ABA Standards and the Guide, should be the primary term used to identify the institution. In spite of the attempts in the 2004 ABA Standards to replace the word "ombudsman," as used in the 1969 ABA Resolution, with the term "ombuds," in fact, the term "ombudsman" is still internationally recognized, and is the word most often used universally to identify the institution. Legislative proposals at all levels of government, including proposals at the federal level, continue to use the word "ombudsman." The word "ombuds," unlike other gender neutral terms now accepted in our society, does not exist in English dictionaries. _____ is concerned that trying to replace a word ("ombudsman") that too few English speakers understand the meaning of, with the word ("ombuds") that none have ever heard will frustrate our long term goal of advancing the public's awareness and grasp of the institution. In addition, some of the members of ____ are concerned that use of the word "ombuds" will be viewed as presumptuous by the global community, a burden that we in the U.S. already bear in too many ways. The caveat now appearing in the text of the Guide can be amended to state that the term "ombudsman" is used throughout the document in recognition of the history of the word and concept, and in recognition of its nearly universal use in the global arena, although this is not intended to discourage the use of other variations to identify the institution in specific jurisdictions, like Citizens' Aide in Iowa, or Public Counsel in Nebraska.

_____ believes that the 2004 ABA Standards that have been used to formulate the Guide include a number of provisions and concepts that are inimical to the institution of the public sector ombudsman. In light of this, ____ would recommend that the Guide be revised to address the several points raised in this letter.

Sincerely yours,

Response: Regarding the ____ comment on the "Advocate Ombudsman" Standard, while we understand the ____'s concern about terminology and possible inconsistency with the principle of impartiality, that comment is aimed not at a Federal Guidance Note, but rather at the language of the American Bar Association Standards, which have been incorporated ***verbatim*** and which we have no authority to revise. As to the _____ comments on "Confidentiality," we believe the final version of the Guide adequately addresses those comments and does not detract from the discretion that may be available to a federal Ombuds. As to Standard D(5) concerning "Limitations On The Ombuds' Authority" and, more specifically, the Ombuds' authority to "accept jurisdiction over an issue that is currently pending in a legal forum unless all parties and the presiding officer in that action explicitly consent," the following language has been inserted into the Federal Guidance Note in question:

Notwithstanding Standard D(5), it is recognized that an Ombuds working in government may be expected to remain involved in matters pertaining to public accountability and legislative oversight, whether or not a related issue is the subject of pending litigation. Ombuds charters may explicitly state that the Ombuds has the power to investigate "without regard to the finality of the administrative act" and thus to continue involvement in an issue, regardless of its status in terms of litigation.

Finally, as to the ____ comment pertaining to the Guide's use of the term "Ombuds," we have inserted into the Guide's Foreword the following bracketed note:

[Currently, the CFO, the International Ombudsman Organization (IOA), the United States Ombudsman Association (USOA), the Forum of Canadian Ombudsman, the European Union's Ombudsman and most other Ombudsman organizations continue to use the term "Ombudsman." However, the term "Ombuds" is found in the Administrative Dispute Resolution Act of 1996, 5 U.S.C. 571, et seq. ("ADRA"), as well as in the ABA Standards that serve as the basis for this Guide. Accordingly, and to maintain gender neutrality, the Steering Committee and CFO have opted to use "Ombuds" for purposes of this Guide.]