

**Congress of the United States**  
**U.S. House of Representatives**  
**Committee on Small Business**  
2361 Rayburn House Office Building  
Washington, DC 20515-6515

To: Members, Subcommittee on Investigations, Oversight and Regulations  
From: Committee Staff  
Date: February 8, 2016  
Re: Hearing: "Oversight of the Office of Advocacy and the Office of the National Ombudsman at the SBA"

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On Wednesday, February 10, 2016 at 1:00 p.m. in Room 2360 of the Rayburn House Office Building, the Subcommittee on Investigations, Oversight and Regulations will meet to examine the Office of the Chief Counsel for Advocacy (Office of Advocacy) and the Office of the Small Business and Agriculture Regulatory Enforcement Ombudsman (Office of the National Ombudsman) within the Small Business Administration (SBA). The Office of Advocacy, which is housed within but independent from the SBA, advocates for the interests of small businesses as federal agencies develop new regulations. The Office of the National Ombudsman provides small businesses with an avenue to confidentially comment on all federal agencies' regulatory enforcement activities. The hearing will examine how these offices are carrying out their statutorily-mandated duties to advocate for and assist American small businesses on regulatory matters.

## **I. Introduction**

Participating in the rulemaking process and complying with regulations has long been recognized as a significant challenge for small businesses. Regulations with fixed compliance costs, such as environmental regulations that require specific pollution control equipment, may have a particularly disproportionate impact on small businesses; large companies with more employees can spread compliance costs over a greater number of employees, thereby gaining a cost advantage in comparison to small companies. Furthermore, small businesses are less likely to have the resources and expertise needed to monitor and provide input on regulations under development that could affect them and to understand complex regulatory compliance requirements. For these reasons, Congress created two offices to help level the regulatory playing field for small businesses.

## **II. The Functions and Duties of the Office of Advocacy and the Office of the National Ombudsman**

### ***A. The Office of Advocacy***

Congress established the Office of Advocacy in 1976 to independently represent the views and interests of small businesses before federal agencies.<sup>1</sup> Management of the office is vested in the Chief Counsel for Advocacy (Chief Counsel), a position which was created in 1974 at the urging of

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<sup>1</sup> Pub. L. No. 94-305, 90 Stat. 663 (codified as amended at 15 U.S.C. §§ 634a-g).

the small business community.<sup>2</sup> The Chief Counsel is appointed by the President with the advice and consent of the Senate.<sup>3</sup> The Office of Advocacy's primary mission is to independently represent the interests of small businesses in federal agency regulatory proceedings as new regulations are developed.<sup>4</sup> It mainly does so by monitoring agency compliance with the Regulatory Flexibility Act of 1980 (RFA).<sup>5</sup>

The RFA requires agencies to analyze the economic impacts of new regulations on small businesses, and if those impacts are significant, agencies must examine alternatives that would minimize those burdens.<sup>6</sup> Those analyses must be published in the Federal Register with the proposed and final rules. In the analyses published with the final rule, agencies must respond to any comments by the Chief Counsel on the proposed rule and provide a detailed statement of any changes made to the rule in response to the Chief Counsel's comments.<sup>7</sup>

The RFA also requires all agencies to conduct outreach to small businesses when a rule will have a significant economic impact on a substantial number of small businesses.<sup>8</sup> The Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and the Consumer Financial Protection Bureau (CFPB) have additional outreach responsibilities. Those agencies must convene a small business advocacy review (SBAR) panel, comprised of a representative of the covered agency (EPA, OSHA or CFPB), a representative of the Office of Advocacy, and a representative from the OMB's Office of Information and Regulatory Affairs before the proposed rule is published in the Federal Register to receive input from small businesses.<sup>9</sup>

The Chief Counsel must annually report to the President and the Committees on Small Business and the Judiciary of the United States House of Representatives and Senate on agency compliance with the RFA<sup>10</sup> and issued its most recent report on January 12, 2016. The report

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<sup>2</sup> H.R. REP. NO. 93-1178, at 8 (1974). The position of Chief Counsel was created in 1974 by Public Law 93-386 signed by President Gerald Ford but the office was given no specific staffing or administrative powers. Pub. L. No. 93-386, § 10, 88 Stat. 742, 749. This memorandum will interchangeably refer to the Chief Counsel and the Office of Advocacy.

<sup>3</sup> 15 U.S.C. § 634a. Public Law 94-305 gave the Chief Counsel staffing powers and specific duties. Pub. L. No. 94-305, §§ 202-06, 90 Stat. 668-70.

<sup>4</sup> The Office of Advocacy's independence is rooted in several statutory provisions. Unlike all other executive branch offices, is not required to obtain Office of Management and Budget (OMB) clearance when it sends documents, of any nature, to Congress. 15 U.S.C. § 634f. In addition, unlike all other executive branch agencies, the Office of Advocacy is entitled to file briefs in court in certain instances without obtaining the approval of the Department of Justice. 5 U.S.C. § 612(b).

<sup>5</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§ 601-12).

<sup>6</sup> The RFA uses the term "small entity," which includes small business, small organization (i.e., a not-for-profit enterprise), and small governmental jurisdiction. 5 U.S.C. § 601(6). This memorandum simply will use the term "small businesses." For a more detailed explanation of the RFA's requirements, see the Committee on Small Business's March 1, 2013 hearing memo, *available at* <http://smallbusiness.house.gov/calendar/eventsingle.aspx?EventID=321845>.

<sup>7</sup> *Id.* at § 604(a).

<sup>8</sup> *Id.* at § 609(a).

<sup>9</sup> *Id.* at § 609(b). REPORT ON THE REGULATORY FLEXIBILITY ACT, FY 2015: ANNUAL REPORT OF THE CHIEF COUNSEL FOR ADVOCACY ON IMPLEMENTATION OF THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 13272, at 47-50 (2016) [hereinafter RFA FY 2015 Annual Report], *available at* <https://www.sba.gov/sites/default/files/advocacy/FY15-RFA-Annual-Report.pdf>.

<sup>10</sup> 5 U.S.C. § 612(a). Annual reports for Fiscal Years 2001 through 2015 are available on the Office of Advocacy's website <https://www.sba.gov/advocacy/regulatory-flexibility-act-annual-reports>.

describes the Office of Advocacy's work to advance the interests of small businesses and to address agency RFA compliance issues. Its staff, which is comprised of attorneys, economists, regional advocates, and other personnel,<sup>11</sup> does so by reviewing agency regulatory proposals and RFA analyses, reaching out to and receiving input from potentially affected small businesses, engaging in interagency dialogue with federal agency officials, sending public comment letters to agencies on specific regulations, training agencies on RFA compliance as required by Executive Order 13,272, and facilitating roundtable discussions with federal agency officials and small businesses.<sup>12</sup> In fiscal year (FY) 2015, the Office of Advocacy sent 28 public comment letters to federal agencies, trained 126 agency officials, hosted 21 roundtables, and participated in six SBAR panels.<sup>13</sup> In addition, the office's economic research team develops and disseminates both internal and contract research on topics affecting small businesses, such as regulation, taxation, and access to capital, and analyzes agencies' analyses of the potential impacts of proposed rules on small businesses.<sup>14</sup>

### ***B. The Office of the National Ombudsman***

The position of Small Business and Agriculture Regulatory Enforcement Ombudsman (the National Ombudsman) was created with the passage of the Small Business Regulatory Enforcement Fairness Act in 1996 (SBREFA).<sup>15</sup> The National Ombudsman is appointed by the SBA Administrator and utilizes staff of the SBA.<sup>16</sup> The National Ombudsman's primary duty is to give small businesses an opportunity to confidentially comment on agency regulatory enforcement activities.<sup>17</sup> The creation of the position was intended to reduce incidents of excessive and abusive enforcement actions by federal agencies.<sup>18</sup>

The National Ombudsman must: 1) work with agencies to ensure that there is a process by which small businesses can comment on enforcement activities; 2) have a process to receive comments from small businesses and refer comments to the agencies' inspector generals, if necessary; and 3) keep the identity of the small business making the comment confidential.<sup>19</sup> In addition, Small Business Regulatory Fairness Boards in each of SBA's 10 regions (Regional Regulatory Fairness Boards) made up of owners, operators, or officers of small businesses assist the

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<sup>11</sup> The Office of Advocacy currently has a staff, including the Chief Counsel, of 43 employees. <https://www.sba.gov/advocacy/office-advocacy-staff>.

<sup>12</sup> Executive Order 13,272, signed by President George W. Bush in 2002, gave the Office of Advocacy additional duties and imposed additional requirements on federal agencies. 67 Fed. Reg. 53,461 (Aug. 16, 2002).

<sup>13</sup> RFA FY 2015 Annual Report, *supra* note 9, at 3, 16.

<sup>14</sup> SBA, FY 2016 CONGRESSIONAL BUDGET JUSTIFICATION AND FY 2014 ANNUAL PERFORMANCE REPORT 178 (2015), available at <https://www.sba.gov/content/fiscal-year-2016-congressional-budget-justificationannual-performance-report>. The office also annually issues a report that describes the internal and contract research reports it produces. SBA, OFFICE OF ADVOCACY, ANNUAL REPORT OF THE OFFICE OF ECONOMIC RESEARCH FY 2015/DECEMBER 2015, available at [https://www.sba.gov/sites/default/files/advocacy/2015\\_OER\\_annual.pdf](https://www.sba.gov/sites/default/files/advocacy/2015_OER_annual.pdf).

<sup>15</sup> Pub. L. No. 104-121, §§ 201-224, 241-45, 110 Stat. 847, 857-862 (codified as amended at 5 U.S.C. § 601 (note) and 15 U.S.C. § 657). The memorandum will refer to the National Ombudsman and the Office of the National Ombudsman interchangeably.

<sup>16</sup> 15 U.S.C. § 657(b).

<sup>17</sup> 142 Cong. Rec. S3243 (daily ed. Mar. 29, 1996) (section-by-section analysis of SBREFA submitted by Sen. Bond).

<sup>18</sup> *Id.*

<sup>19</sup> 15 U.S.C. § 657(b)(2)(A)-(B).

National Ombudsman by holding hearings and collecting information.<sup>20</sup> Each board is required to meet at least once a year to advise the National Ombudsman on small business concerns related to agency enforcement activities and report substantiated instances of excessive enforcement actions to the National Ombudsman, along with findings and recommendations regarding agency enforcement policies or practices.<sup>21</sup>

Small businesses can submit comments online or by email, fax, or mail using a form that can be downloaded on the Office of the National Ombudsman's website.<sup>22</sup> Once the office receives a comment, it is reviewed by a case management specialist and forwarded to the federal agency that is involved for a prompt, high-level review.<sup>23</sup> The National Ombudsman also convenes roundtables and hearings around the country to hear directly from small businesses on regulatory concerns.<sup>24</sup>

Based on the comments and input received from small businesses and the Regional Regulatory Fairness Boards, the National Ombudsman is required to annually report to Congress and the affected agencies on enforcement activities and rate the responsiveness of agencies.<sup>25</sup> In FY 2014, the National Ombudsman reported receiving formal comments from 420 small businesses and lists the Centers for Medicare and Medicaid Services, the United States Citizenship and Immigration Services, the Food and Drug Administration, the Internal Revenue Service, and the SBA as the "top agencies for case submissions."<sup>26</sup> Because regulations affect the ability of small businesses to grow, compete, and create jobs, it is critically important that the Office of Advocacy and the Office of National Ombudsman effectively carry out their statutory duties.

### III. Issues For Consideration

#### A. Agency Compliance with the RFA

Although the RFA has been in place for over 35 years, agencies still are not complying with the law's requirements. In FY 2015, the Chief Counsel filed 28 public comment letters with more than 15 federal agencies on proposed rules.<sup>27</sup> The top three issues addressed in those letters were regulatory alternatives to reduce the economic impact of a rule on small businesses, inadequate analysis of small business impacts, and improperly certifying a rule as not having a significant economic impact on a substantial number of small businesses.<sup>28</sup> In one example, the Office of Advocacy submitted comments to EPA and the United States Army Corps of Engineers (Corp) on a rule to elucidate which waters in the United States were subject to the jurisdiction of the agencies.

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<sup>20</sup> 15 U.S.C. § 657(c)-(d). Each board is made up of five members with no more than three members of the same political party. *Id.* at § 657(c)(3). Board members serve on a voluntary basis and receive no compensation except for the payment of travel expenses for official Board duties and are away from their homes or businesses. *Id.* at § 657(d). The statute requires that board members be appointed by the SBA Administrator after receiving recommendations from the chair and ranking member of the Committees on Small Business in the House of Representatives and the Senate for terms of three years or less. *Id.* at § 657(c)(3).

<sup>21</sup> *Id.* at § 657(c)(2).

<sup>22</sup> <https://www.sba.gov/ombudsman/comments>.

<sup>23</sup> SBA, OFFICE OF THE NATIONAL OMBUDSMAN, 2014 ANNUAL REPORT TO CONGRESS 2 (undated) [hereinafter ONO 2014 Annual Report], available at [https://www.sba.gov/sites/default/files/ONO\\_2014.pdf](https://www.sba.gov/sites/default/files/ONO_2014.pdf).

<sup>24</sup> *Id.* at 5.

<sup>25</sup> *Id.* at § 657(b)(2)(C). Annual reports for fiscal years 2000 through 2014 are available on the office's website at <https://www.sba.gov/ombudsman/national-ombudsmans-fiscal-year-reports-congress>.

<sup>26</sup> ONO 2014 Annual Report, *supra* note 23, at ix, 3.

<sup>27</sup> RFA FY 2015 Annual Report, *supra* note 9, at 22-34.

<sup>28</sup> *Id.* at 21.

The agencies ignored the comment letter the Chief Counsel submitted which stated that the agencies had failed to comply with the RFA's requirements.<sup>29</sup> The agencies did not make any changes to the final rule to address the RFA deficiencies raised by the Office of Advocacy.

RFA non-compliance failures often stem from individual agencies interpretations of the RFA's requirements that differ from the Chief Counsel's long-standing positions. Court decisions have exacerbated this problem. For example, the United States Court of Appeals for the District of Columbia has concluded that an agency only needs to analyze the effects of a regulation on small entities that are directly subject to a regulation.<sup>30</sup> The EPA and the Corps relied on these decisions for rejecting Advocacy's comments and noted that the regulation at issue did not regulate any small entity but was only a definitional rule.<sup>31</sup>

The Committees on Small Business and the Judiciary have acted to address weaknesses in the RFA and court decisions that have allowed agencies to creatively interpret its requirements to avoid compliance. Last year, Chairman Chabot introduced H.R. 527, the Small Business Regulatory Flexibility Improvements Act of 2015. The legislation would clarify and strengthen a number of the RFA's provisions. It also would provide the Chief Counsel for Advocacy with authority to promulgate RFA compliance regulations. This will ensure that the Chief Counsel's longstanding interpretations of the RFA are permanently memorialized in government-wide rules that all agencies must follow in complying with the RFA. H.R. 527 passed the House by a vote of 260-163 on February 5, 2015 and awaits action in the Senate.

### ***B. Management of the Offices***

In order to successfully serve small businesses, both the Office of Advocacy and the Office of the National Ombudsman must be properly managed by a qualified executive that is committed to carrying out their statutory duties. As previously noted, the Chief Counsel is appointed by the President and confirmed by the Senate. The National Ombudsman is designated by the SBA Administrator, a Senate-confirmed Presidential appointee.

Having a Senate-confirmed Presidential appointee leading the Office of Advocacy and ensuring that there is sufficient staff development and succession planning is critical to ensuring that the office functions effectively. There have been seven Senate-confirmed, Presidentially-appointed Chief Counsels in the Office of Advocacy's history. The position has been filled by an acting Chief Counsel when a Chief Counsel resigns. For example, the Office of Advocacy's Deputy Chief Counsel, Claudia Rodgers, served as the acting Chief Counsel for approximately a year between the resignation of the previous Chief Counsel, Winslow Sargeant, and the confirmation of the current Chief Counsel, Darryl DePriest, at the end of 2015. After a new President is sworn into office, it is

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<sup>29</sup> Letter from the Hon. Winslow Sargeant, Chief Counsel for Advocacy to the Hon. Gina McCarthy, Administrator, EPA and Maj. Gen. John Peabody, Deputy Commanding General, Civil and Emergency Operations, Corps (Oct. 1, 2014), available at <https://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act>.

<sup>30</sup> See *Michigan v. EPA*, 213 F.3d 663, 688-89 (D.C. Cir. 2000); *American Trucking Ass'n v. EPA*, 175 F.3d 1027, 1043-45 (D.C. Cir. 1999), *aff'd in part and rev'd in part on other grounds sub nom., Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001); *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 340-43 (D.C. Cir. 1985).

<sup>31</sup> *Id.* at 37,102; see also *Regulatory Overreach: Is EPA Meeting Its Small Business Obligations: Hearing Before the H. Comm. on Small Business*, 113<sup>th</sup> Cong. 6-8 (2014) (testimony of the Hon. Bob Perciasepe, Deputy Administrator, EPA), available at <https://www.gpo.gov/fdsys/pkg/CHRG-113hhrg88925/pdf/CHRG-113hhrg88925.pdf>. The agencies interpretation is suspect. Compare *National Ass'n of Home Builders v. Army Corps of Eng'rs*, 417 F.3d 1272, 1284 (D.C. Cir. 2005) (changing scope of permit affects private parties).

not uncommon for the Chief Counsel for Advocacy position to remain vacant for a year or more. When the Office of Advocacy is without a Senate-confirmed, Presidentially-appointed Chief Counsel, it is not able to operate as effectively because certain statutory powers, such as the ability to file friend of the court briefs with respect to RFA compliance, cannot be exercised.

Staff development and succession planning is also a critical issue because there is staff turnover with each new Administration. In a 2014 report, the GAO raised concerns that the Office of Advocacy's workforce planning did not include long-term strategic plans and that the Office's strategic plans did not include goals or objectives related to staff development and succession planning.<sup>32</sup> In addition, the Office of Advocacy has several long-serving staff, particularly attorneys and economists, which have significant expertise and knowledge of the Office of Advocacy's longstanding positions on RFA compliance. As those staff retire, the Office of Advocacy could face significant gaps in needed skills and knowledge.<sup>33</sup> Consequently, the GAO recommended the Office of Advocacy improve its workforce planning efforts, particularly succession planning.<sup>34</sup> The Office of Advocacy has implemented all the recommendations made by GAO in the 2014 report.<sup>35</sup>

Focusing on its sole duty of oversight of regulatory enforcement is critically important for the Office of the National Ombudsman to function effectively. A review of the Office of the National Ombudsman 2014 Annual Report to Congress indicates that the office expends a significant amount of time on helping small businesses resolve federal procurement disputes, including past due payments to small government contractors.<sup>36</sup> This is duplicative of other parts of the SBA and the federal government that are dedicated to doing the same thing.<sup>37</sup> It is unclear whether the Office of the National Ombudsman is properly referring all small businesses with contracting disputes to the advocates and offices charged with resolving these matters.<sup>38</sup> Moreover, it is unclear whether such actions violate the Small Business Act's prohibition against duplication by SBA of other agency programs. 15 U.S.C. § 647.

An additional issue is the administration of the Regional Regulatory Fairness Boards. As the memorandum previously described, the board members are appointed by the SBA to terms of three years or less and the boards are required to meet at least annually and advise the National Ombudsman on excessive enforcement activities. It is unclear whether the SBA is adhering to the

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<sup>32</sup> UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, SMALL BUSINESS ADMINISTRATION: OFFICE OF ADVOCACY NEEDS TO IMPROVE CONTROLS OVER RESEARCH, REGULATORY, AND WORKFORCE PLANNING ACTIVITIES 21 (GAO-14-1525) (2014), available at <http://gao.gov/products/GAO-14-525>.

<sup>33</sup> *Id.* at 22. In fact, the Office of Advocacy has no real established processes for memorializing its long-standing positions. H.R. 527, by mandating the Chief Counsel issue rules, would address this significant weakness in succession planning.

<sup>34</sup> *Id.* at 25.

<sup>35</sup> <http://gao.gov/products/GAO-14-525>.

<sup>36</sup> ONO 2014 Annual Report, *supra* note 23, at 15-17 (describing the office's work regarding agencies' inconsistent treatment of small businesses seeking federal contracts and ensuring small contractors and subcontractors were paid on time).

<sup>37</sup> On December 7, 2015, the Committee held a hearing that examined the individual advocates and offices within SBA and other agencies that assist small federal contractors including: Procurement Center Representatives; the Commercial Market Representatives; Business Opportunity Specialists; and the offices of Small and Disadvantaged Business Utilization. The hearing memo, which describes these advocates and offices, is available on the Committee's website at [http://smbiz.house.gov/uploadedfiles/12-09-2015\\_hearing\\_memo.pdf](http://smbiz.house.gov/uploadedfiles/12-09-2015_hearing_memo.pdf).

<sup>38</sup> The report does note that in one instance it worked with the SBA Procurement Center Representative to ensure a small contractor was paid for services performed and rated fairly. ONO 2014 Annual Report, *supra* note 23, at 12-13.

statutory requirements in appointing board members. In addition, there are board member vacancies in six of the 10 SBA regions according to the Office of the National Ombudsman's website. It is not known what efforts are being made to the properly administer the Regional Regulatory Fairness Boards.

#### **IV. Conclusion**

The Office of Advocacy and the Office of the National Ombudsman have important statutory duties related to advocating for and assisting small businesses on regulatory matters. Given that the burden of new regulations and complying with existing rules remains a key top concern for small businesses, ensuring that agencies comply with the RFA and that the Office of Advocacy and the Office of the National Ombudsman are focused on their primary missions and are well-managed is critical. The Subcommittee will receive testimony from the Chief Counsel for Advocacy and the National Ombudsman, which should help the Subcommittee determine whether additional oversight or legislative changes are needed to ensure the offices function as Congress intended.