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FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

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Neil R. Eisner
Chair, Committee on Rulemaking
Administrative Conference of the United States
1120 20th Street, NW
Suite 706 South
Washington, DC 20036

Dear Chair Eisner:

I commend the Administrative Conference's staff, the project consultant chiResolutions, and the Committee on Rulemaking for their efforts to provide guidance on the important role that ombuds can play in improving agency processes. A well-positioned and effective ombuds can provide an invaluable service to an agency by acting as an impartial intermediary in addressing and resolving issues at an early stage and before they develop into full-fledged disputes. Thus, I fully support the draft recommendation's goal of highlighting best practices for the establishment and operation of ombuds offices, and identifying situations in which the expanded use of ombuds may benefit agencies and the people with whom they deal.

I am concerned, however, that in some cases the draft recommendation would impose one-size-fits-all solutions that do not recognize federal agencies' need for flexibility in staffing and program management.

Recommendation 5

I support the goal of ensuring that ombuds offices enjoy the independence necessary to operate successfully and resolve issues on behalf of an agency and its constituents. As currently drafted, however, Recommendation 5 does not afford agencies—particularly small agencies—the flexibility to structure ombuds programs in a manner that will promote their effectiveness while recognizing the limits on agency resources.

Recommendation 5(a)

As currently drafted, the proposed recommendation would require all agencies to provide ombuds offices with a separate budget and ensure that an ombuds reports only to "the highest levels of agency leadership." Although this is a laudable proposal, in many instances it would be

unworkable because it ignores the staffing and budgetary realities facing agencies.

Accordingly, I urge the Committee to revise the recommendation to provide agencies additional flexibility, while guaranteeing ombuds necessary independence and access to agency leadership:

~~Both the perception of and actual independence from agency management structure are essential for the ombuds to be regarded as a source of impartial, fair assistance. To promote the effectiveness and independence of ombuds offices, agencies should consider structuring ombuds offices should be so that they are structurally separate from all other units of the agency and should have a separate budget. To ensure adequate support from agency leadership, ombuds staff should typically report to an official in the senior leadership of the agency and should not have duties within the agency that might create a conflict with their responsibilities as a neutral. They should report only to the highest level of agency leadership and have no management decision-making authority apart from what is necessary to operate the ombuds office. Those few ombuds offices that have, by virtue of statutory mandate, some authority to make management decisions with respect to issues that are brought to them by constituents must have other indicia of independence that are unequivocal and sustainable.~~

Recommendation 5(d)

I support the Committee's efforts to promote the independence of ombuds offices, however, I believe that mandating blanket "for cause" removal protections for ombuds offices is unnecessary and ill-advised. Federal agencies operate under ever-increasing budget and resource constraints. Imposing "for cause" removal protections for ombuds office staff could unduly hamper agencies' ability to address poor performance, and I am unaware of any justification for such a departure from accepted norms. To the contrary, agency staff in a broad range of senior positions that routinely handle sensitive, highly confidential matters are not afforded "for cause" removal protections—including, but not limited to, equal employment opportunity officers, civil rights officers, privacy officers, and mediators. Moreover, such requirements could deter agencies from expanding ombuds offices due to fears that that they may be constrained from effectively addressing performance issues.

Accordingly, I recommend that you eliminate Recommendation 5(d) in its entirety:

Federal ombuds should not be subject to removal or the threat of removal from the ombuds office except for good cause shown. The act of looking into and assisting with the resolution of any issue within the ombud's area of jurisdiction should not constitute such good cause.

Recommendation 11

Several commenters have raised serious concerns with Recommendation 11, and I share those concerns and suggest that the recommendation be deleted in its entirety:

To protect the independence and confidentiality of federal ombuds, it is essential that agencies ensure, consistent with available resources, that ombuds have access to non-agency independent counsel, whether provided under contract with the agency or under an arrangement enabling the sharing of such a resource across agencies.

As discussed at the Committee on Rulemaking's October 19, 2016 meeting, agencies routinely provide their ombuds staff with access to counsel through a variety of means. For example, depending on the ombuds' needs and the agency's resources, agencies may hire full-time counsel for an ombuds office, provide ombuds with access to dedicated staff within a general counsel's office, or designate attorneys on an *ad hoc* basis to assist the ombuds who are then "walled off" from other matters to avoid potential conflicts.

Accordingly, I believe that requiring agencies to provide access to non-agency independent counsel is unnecessary and inadvisable. In this regard, I think it important to bear in mind that in the vast majority of matters, ombuds serve to act as intermediaries between their employing agency and those who seek the ombuds' assistance. Thus, their work involves the informal resolution of "incipient disputes" and should not entail any direct conflict with the agency. Moreover, when all is said and done, the agency itself is ultimately responsible for settling its policies and construing its legal mandates and any requirement that the agency provide ombuds with non-agency independent counsel would likely result in substantial costs for agencies and create unnecessary conflicts.

Conclusion

If you have questions about these comments, you may contact my colleague Kenny Wright, Attorney, Office of the General Counsel. Kenny can be reached at kwright@ftc.gov or by phone at (202) 326-2907.

Sincerely,



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Cc: Lisa M. Harrison
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