

**2009
Fiscal Year
National Ombudsman
Report to Congress**



**Breaking Down Barriers
Building Relationships
Growing & Supporting Small Businesses**



Esther Vassar, National Ombudsman

National Ombudsman's 2009 Report to Congress

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The ONO Mission

The National Ombudsman's primary mission is to assist small business owners when they experience excessive or unfair Federal regulatory enforcement actions.

The Office of the National Ombudsman (ONO), an office within the U.S. Small Business Administration (SBA), was created by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). The law's provisions pertain to all small businesses that receive or are subject to any enforcement-related communication or contact by the Federal government, including audits, on-site inspections, and agency compliance assistance.

SBREFA fosters a small business-friendly enforcement environment by authorizing the National Ombudsman to:

- Work with Federal agencies that have regulatory authority over small businesses to provide a means for entrepreneurs to comment about enforcement activities and encourage agencies to address those concerns promptly.
- Establish a process for the ONO to receive comments from small businesses about unfair Federal compliance or enforcement activities. The National Ombudsman also refers these comments to the Inspector General of the affected agency in appropriate circumstances.
- File an annual report with Congress and affected Federal agencies in which the ONO rates Federal agencies based on substantiated comments received from small business owners and input from the RegFair Boards.
- Provide affected agencies with an opportunity to comment on the draft version of the annual report to Congress.
- In conjunction with the National Ombudsman, the Regional Small Business Regulatory Fairness (RegFair) Boards shall conduct hearings in their respective SBA region to provide small businesses with public forums where they can voice their comments about Federal regulatory and compliance enforcement actions without fear of retaliation.

What is an unfair enforcement action?

It can be repetitive audits or inspections; unreasonable fines or penalties; threats by a Federal agency; and/or acts of retaliation by a Federal agency.

ONO Regional RegFair Board Members, FY 2009

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) authorizes creation of the National Ombudsman and 10 Regional Regulatory Enforcement Fairness (RegFair) Boards to assist small business owners when they experience excessive or unfair Federal regulatory enforcement or compliance actions. The Office of the National Ombudsman (ONO) submits the National Ombudsman's annual report to Congress based on testimony gathered at RegFair Hearings, as well as comments, concerns, and complaints filed with the Ombudsman about Federal compliance and/or regulatory enforcement activity. The ONO forums around the country encourage small business owners to voice their concerns directly to the RegFair Boards and to the National Ombudsman.

The RegFair Boards convene for an annual meeting to discuss matters of Federal regulatory enforcement. The meeting provides the National Ombudsman with the opportunity to assess trends and new regulatory issues for small businesses.

RegFair Board members are appointed by the SBA Administrator. All members are small business owners, officers, or operators and serve on a voluntary basis. Achieving diversity is a major goal in selecting RegFair Board members so that they are truly representative of the small business communities in which they operate.

There is an ONO RegFair Board in each of SBA's 10 regions:

Region I

Andrew E. Markowski, Esq.,
Board Chairman
Gara & Markowski, LLC
Government Relations
Hartford, CT

Kathryn M. Weare
The Cliff House Resort & Spa
Ogunquit, ME

Bernard Featherman
Biddeford-Saco Chamber of Commerce &
Industry
Saco, ME

Leo R. Blais
P.V. Prescription and Surgical Center, Inc.
Coventry, RI

Region II

Howard Horowitz, Board Chairman
Elite Marketing
New Hyde Park, NY

Frank L. Mischia
FLM Graphics Corporation
Fairfield, NJ

Gloria Bryant
The Writing Company
Newark, NJ

Jonathan Weiss
Intermedia Group, Inc.
West Hempstead, NY

W. Timothy Howes
Howes & Howes
Raritan, NJ

Region III

Brooks Hulitt, Board Chairman
Drexel Hamilton
Philadelphia, PA

Tim R. Rupli
TR Rupli & Associates, Inc.
Washington, DC

Christopher D. Lord
Chris Lord & Associates, LLC
Washington, DC

Frank E. Williams, Jr.
Williams Enterprises of Georgia, Inc.
Merrifield, VA

Helen F. Corey
Altenae, LLC
Wilmington, DE

Region IV

Robert S. Latham, III, Board Chairman
LIST Company, Inc.
Piedmont, SC

Edwin A. Rodriguez
Connectiv Solutions, LLC
Tallahassee, FL

R. Bruce McCrory
Kiker Corporation
Mobile, AL

Stanley L. King
S. L. King & Associates, Inc.
Atlanta, GA

Jane R. Dennis
Specialty Contractors & Associates, Inc.
Gulfport, MS

Region V

Stephen L. Becher, Board Chairman
Home Owner's Resource Guide, Inc.
Burnsville, MN

John J. Hiller
Hiller Realty Inc.
Mequon, WI

Khalid Karadsheh
Mediterranean Island
Grand Rapids, MI

Joseph J. Montel
Montel Law Firm, PC
Carmel, IN

Bob Kulp
Kulp's of Stratford, LLC
Stratford, WI

Region VI

James R. Graham, Board Chairman
Hunt Realty Investments
Dallas, TX

Grant C. Humphreys
Humphreys Real Estate Investments
Oklahoma City, OK

Regina N. Hamilton
Jones, Walker, Waechter, Poitevent,
Carrère & Denègre, LLP
Baton Rouge, LA

Beth Sturgeon
AusTex Development Group
Canadian, TX

Jim R. Newell
Jim Newell & Associates, Inc.
Little Rock, AR

Region VII

Joe P. Balsarotti, Board Chairman
Software To Go
St. Peters, MO

Dr. Inez Y. Kaiser
Inez Kaiser & Associates, Inc.
Overland Park, KS

Brian E. Johnson
Capitol Consultants
Panora, IA

Scott R. Perkins
Western Air Maps, Inc.
Overland Park, KS

Region VIII

John H. Herd, Board Chairman
Aesir Group International
Colorado Springs, CO

Michael J. Stransky
Gillies Stransky Brems Smith, PC
Salt Lake City, Utah

Harold Jackson
Buffalo Supply, Inc.
Lafayette, CO

Region IX

James Settelmeyer, Board Chairman
Settelmeyer Ranches, Inc.
Gardnerville, NV

Zainul Abedin, Ph.D.
Environmental Engineering, Inc.
Glendale, CA

Ernest J. Reyes
Network Realty
San Diego, CA

Eddy N. Kemp
E.N. Kemp & Associates, Inc.
Kaneohe, HI

Region X

Daniel Piccora, Board Chairman
Piccora's NY Pizza
Seattle, WA

Larry J. Pettingill
Mr. Mom's Fix It
Idaho Falls, ID

John Bradshaw
Portland Transmission Warehouse
Portland, OR

Anthony Welcher
Capital Park, LLC
Bellevue, WA

Message from the SBA Administrator

I'm pleased to present the SBA's Office of the National Ombudsman's 2009 Report to Congress.

The SBA's National Ombudsman plays a critical role in helping the SBA serve as the strongest voice for America's entrepreneurs and small business owners. This report highlights the Office's dedicated efforts to ensure fair and effective regulations that provide an environment where small businesses can grow, create jobs, and strengthen our economy.

Over the past year, the Office directly reached out to the small business community with more than a dozen large public meetings, roundtables, and other events. These activities allowed SBA to gather candid advice and input from small business leaders. In addition, the Office processed nearly 350 small business comments and carried out more than 500 responses to the public and customer service assistance actions.

Also, the Ombudsman recruited five Regulatory Enforcement Fairness Board applicants for three-year positions. I was pleased to appoint these qualified candidates to help serve as conduits for important suggestions and innovative ideas they are receiving from small business communities in our ten regions.

All of the efforts detailed in this report are helping lead us toward better access to regulatory information, removal of unfair barriers, and, overall, a more effective and powerful partnership between the federal government and America's entrepreneurs and small business owners.

Working closely with the Office of the National Ombudsman, Congress, and others, I look forward to continued promotion of compliance and regulatory fairness to help small businesses grow and create jobs in the months and years to come.



Karen G. Mills
SBA Administrator



Introduction by the National Ombudsman

I came to SBA in August 2009 as the National Ombudsman with an understanding of many of the challenges that face small business owners and the valuable contributions that small businesses make to the national economy. Owning and operating two small businesses instilled in me the understanding, sensitivity, and dedication and taught me the necessary skills to respond to the Federal regulatory enforcement issues raised by the entrepreneurs who seek our assistance. Each day, our work at the Office of the National Ombudsman (ONO) affirms the belief shared by President Barack Obama and Administrator Karen Mills that small businesses represent “the essence of the American spirit—the promise that anyone can succeed in this country if he or she has a good idea and the determination to see it through”.

As National Ombudsman, I have been privileged to travel across the country to lead Regional Small Business Regulatory Fairness Board Hearings and Roundtables. Along the way, I have discussed mutual goals with Federal, state, and local government officials; increased Federal agencies’ understanding of ONO’s mission and partnered with them to take action on small business issues; and strengthened communication among our small business constituents, community groups, and partner organizations. These travels enabled me to directly hear the challenges and struggles facing American entrepreneurs and provided me the substance with which to voice their concerns.

These experiences strengthened my faith in the resilience of the American spirit and deepened my respect for those who pursue the dream of owning a business and make the sacrifices necessary to turn that dream into a reality. Hearing these entrepreneurs’ stories reinforced the importance of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) and the ONO’s mission and commitment to the small business community.

Small business owners want to play by the rules and comply with Federal regulations, but they are often challenged by lack of resources and fearful of contesting regulatory decisions. The ONO is working to improve existing programs, expand and strengthen relationships with Federal agencies, and develop new programs and partnerships that help small businesses maneuver



through the Federal regulatory enforcement environment. These successes and innovations are described in Chapter V: Looking Ahead and in the 2009 Highlights section of this report.

President Barack Obama has made job creation a pillar of his plan to rebuild the nation's economy. He has stated that America's small businesses are a major part of that plan because they are the source of most new jobs. Under the leadership of Administrator Karen Mills, the ONO will exercise full authority granted under SBREFA to address the regulatory dilemmas of small businesses, freeing them to focus on success and expansion.

The ONO recognizes the importance of establishing a more effective and powerful partnership between the Federal government and America's entrepreneurs. With the support of our President and our Administrator, the ONO accepts the challenge of SBREFA as an opportunity and has adopted the slogan: "It is not enough to just listen to small businesses—what we do must make a difference".



Esther H. Vassar
National Ombudsman and
Assistant Administrator for Regulatory Enforcement Fairness

I

FY 2009 Highlights

Our nation relies on small businesses to generate the jobs and the intellectual capital that keep the U.S. economy strong (see sidebar). When a Federal agency with regulatory authority over small businesses enforces rules through excessive or unfair actions, owners can face frustration and financial hardship that put their companies' economic survival at risk. Recognizing that an entrepreneur's energies are best spent fostering productivity, Congress passed the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) to create a more cooperative regulatory environment among agencies and small businesses.

SBREFA created the position of the National Ombudsman as a resource for small businesses to turn to for help when facing Federal compliance and regulatory enforcement issues. The Office of the National Ombudsman (ONO):

- Provides a variety of channels through which companies can file comments describing their enforcement dilemmas.
- Delivers these comments to the appropriate Federal agencies, which are requested to respond.

SBREFA requires the National Ombudsman to file an annual report to Congress that rates how well each Federal regulatory agency is addressing small business enforcement concerns. This "National Ombudsman's 2009 Report to Congress" chronicles how the ONO is translating its commitment to small business into action and fulfilling the hopes of the legislators who enacted SBREFA by resolving entrepreneurs' regulatory dilemmas and freeing them to focus on success.

The items in the following chart highlight a year of service for the ONO:

Small Businesses Drive Our Economy

Small businesses—those that are independently owned and operated with fewer than 500 employees—are vital to the health of the U.S. economy. The 27.2 million small businesses operating in the United States represent more than 50 percent of the nation's non-farm gross domestic product. They also:

- ✕ *Represent more than 99.7 percent of all employer firms.*
- ✕ *Employ about half of all private sector employees.*
- ✕ *Have generated 60–80 percent of the net new jobs over the past decade. In the most recent year with data (2005), firms with fewer than 500 employees created 979,102 net new jobs, or 78.9 percent.*
- ✕ *Made up 97.3 percent of all identified exporters and produced 28.9 percent of the known export value in FY 2006.*

Source: SBA Office of Advocacy "Small Business Research and Statistics," <http://web.sba.gov/faqs>.

FY 2009 ONO Accomplishments

- ✕ *Conducted 13 RegFair public events, including roundtables, speeches, panel participations, and key public meetings.*
- ✕ *Received and processed 351 small business comments.*
- ✕ *Carried out 520 responses to the public and customer service assistance actions.*
- ✕ *Published and disseminated the FY 2008 Annual Report to Congress.*
- ✕ *Recruited and screened five RegFair Board applicants, then recommended candidates to the Administrator for three-year appointments to the corresponding Regional RegFair Boards.*

Chapter II. Agency Ratings Measure Enforcement Fairness

The ONO's annual rating of Federal agencies is an important way to measure progress toward regulatory fairness. Chapter II explains how the ONO arrives at an overall rating for each agency based on how effectively it has responded to the enforcement concerns of small businesses. The ONO rates agencies' performance in each of five categories:

1. Timeliness of response
2. Quality of response
3. Agency non-retaliation policy
4. Agency regulatory enforcement compliance assistance
5. SBREFA notice

PROGRESS **im 2009**

In FY 2009, the ONO noted an overall improvement in Federal agency ratings, as well as progress in specific areas:

- Agencies continued to respond to small business comments, with an average response time of 41.4 days in FY 2009.

- Several Federal agencies chose compliance education over excessive enforcement in the regulatory arena. Chapter II presents a collection of creative and innovative agency best practices in meeting or exceeding the ONO's rating criteria in each category.

Chapter III. Small Business Success Stories from Main Street

The ONO's comment process offers small business owners a place to turn when they become overwhelmed by Federal regulatory challenges. Entrepreneurs can present their compliance and enforcement concerns to the National Ombudsman, then work with the agencies involved toward a resolution.

When an entrepreneur files a comment with the ONO describing unfair practices, the ONO begins the process of seeking a resolution, with the goal being effective regulation. Such a resolution must take into account small business concerns, as well as the agencies' regulatory obligations under the law. The ONO's small business cases reflect some common themes and perceptions that are at the heart of most compliance and regulatory dilemmas:

- Agency Errors
- Lack of Communication
- Compliance and Regulatory Requirements
- Compliance Costs
- Changing Regulations

Chapter III describes the ONO's comment process, followed by real-life success stories taken from comments submitted to the ONO.

Chapter IV. RegFair Boards and Outreach Strengthen Community Connections

Outreach is an essential part of the ONO's mission. No small business owner should struggle alone with regulatory burdens simply because he or she is unaware that a National Ombudsman exists to help. Connecting with business communities throughout the United States enriches the ONO's understanding of enforcement challenges and spreads the word that entrepreneurs have a resource to turn to when faced with excessive or unfair regulation.

Chapter IV describes successful efforts to reach entrepreneurs with the message that the ONO stands ready to assist them by fostering a fair, effective Federal regulatory enforcement environment.

The ONO relies on its partners in the business community and Federal government to extend and amplify its outreach efforts:

- The 10 Regional Small Business Regulatory Fairness (RegFair) Boards

serve as the National Ombudsman's eyes and ears in local communities and make contact with small business owners where they live and work.

- The ONO collaborates with other SBA resource partners and Federal regulatory agencies to enhance its mission of seeking compliance and regulatory enforcement fairness for small businesses.

- The ONO teams with national trade groups whose members have enforcement issues.

- The ONO continues to successfully encourage Federal agencies to recognize and take steps that lighten the burden of regulatory compliance on small entities.



The SBA Office of Advocacy presents the small business viewpoint while legislation and regulations are being developed. Advocacy saved small businesses \$7 billion in first-year regulatory costs and \$745 million in annually recurring costs in FY 2009 by helping Federal agencies comply with the Regulatory Flexibility Act (RFA)¹. The RFA requires agencies to analyze the economic impact of proposed regulations on small entities and consider less burdensome alternatives that still reach the agencies' regulatory goals.

¹ Source: SBA Office of Advocacy "Report on the Regulatory Flexibility Act, FY 2009," http://www.sba.gov/advo/laws/flex/09regflx_rs.pdf.

Chapter V. Looking Ahead: ONO Collaborates on 21st Century Innovation

The tumultuous opening of the 21st century has challenged a resourceful U.S. government and its citizenry to invent new approaches to public safety and security, sound government, and economic prosperity. One fact of American life has remained constant, however: small businesses are critical to the health of our economy and are

generating many of the innovations that will move the United States toward a safer, stronger future.



The ONO is expanding its creative efforts to encourage entrepreneurs through building positive relationships with other Federal agencies and collaborating with state and local governments, as well as community, business, and trade organizations.

II

Agency Ratings Measure Enforcement Fairness

The annual rating of Federal agencies is an important part of the Office of the National Ombudsman's (ONO) mission to encourage a fair and effective regulatory environment for small business. The ratings measure agencies' progress toward making enforcement fairness a priority throughout the compliance process.

The Agency Questionnaire

The rating process begins with a questionnaire sent to Federal agencies inquiring about their regulatory policies and interactions with their small business constituents. The ONO gives agencies letter ratings based on answers to the following questions:

- Do you have a written non-retaliation policy available to all employees?
 - How is it disseminated throughout your agency? Please provide a hard copy.
- Do you have an online and/or published non-retaliation policy available for viewing by small business owners?
 - Please provide the specific web address or a copy of the published policy.
- Does your agency have a compliance assistance website or any published guidance or information available for small business owners?
 - Please provide hard copy samples and/or pertinent website addresses.
- Do you publish small entity compliance guides in conjunction with publication of a final rule that will impact small businesses per Section 212 of the Small Business Regulatory Enforcement Fairness Act (SBREFA) as amended in 2007?
 - Please explain how your agency implements this section.
- Do you inform small business owners about their rights under SBREFA and the availability of the National Ombudsman to receive their comments?
 - How will a small business owner come by the information?
- Does your agency provide written notice to small business owners at the specific time a citation, notice of regulatory violation, charge of violation, or any equivalent or like notification is issued?
- Please include samples of the form, document, charging instrument, or similar communication mechanisms

that are issued to inform small business owners about SBREFA rights.

Federal Agency Rating Criteria for 2009

The ONO issues agencies a rating of A through F based on five criteria:

1. Timeliness of response to small business concerns
2. Quality of response to small business comments
3. Agency non-retaliation policy (from agency questionnaire)
4. Agency regulatory enforcement compliance assistance (from agency questionnaire)
5. SBREFA notice (from agency questionnaire)

Each agency also receives a composite rating for the year (see Table II-1).

Timeliness of Response— Criterion 1

30 days or less = A

31-60 days = B

61-90 days = C

91-120 days = D

Over 120 days = F

The ONO calculates response time from the day it forwards a small

business comment to an agency until the day it receives the agency's response. For rating purposes, "days" are defined as business days. Figure II-2 depicts the average number of days that agencies took to respond to small business comments. The National Ombudsman will take unusual circumstances into consideration when calculating timeliness.

The ONO must take care to maintain a balanced perspective when rating an agency's timeliness in responding to small business enforcement fairness concerns. The agency needs adequate time to thoroughly evaluate relevant aspects of an enforcement action in a way that meets legal requirements. The small business, meanwhile, may be struggling as a result of regulatory proceedings that strain its limited resources. A prompt resolution of the enforcement issue may make the difference in the continuance of the business.

Agencies' attention to timeliness has continued to pay off as shown by the overall improvement in the average number of days taken by enforcement entities to respond to small business comments (see Figure II-1).

Figure II-1. Response Timeliness

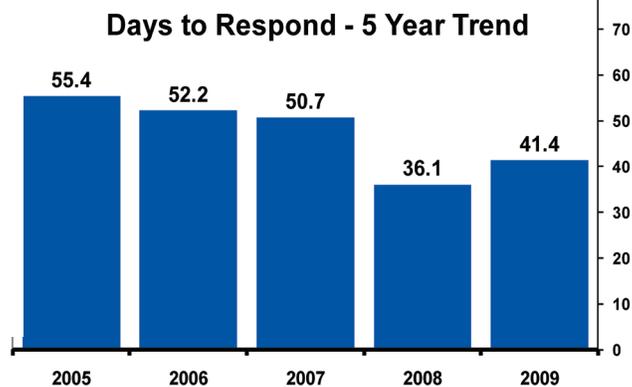
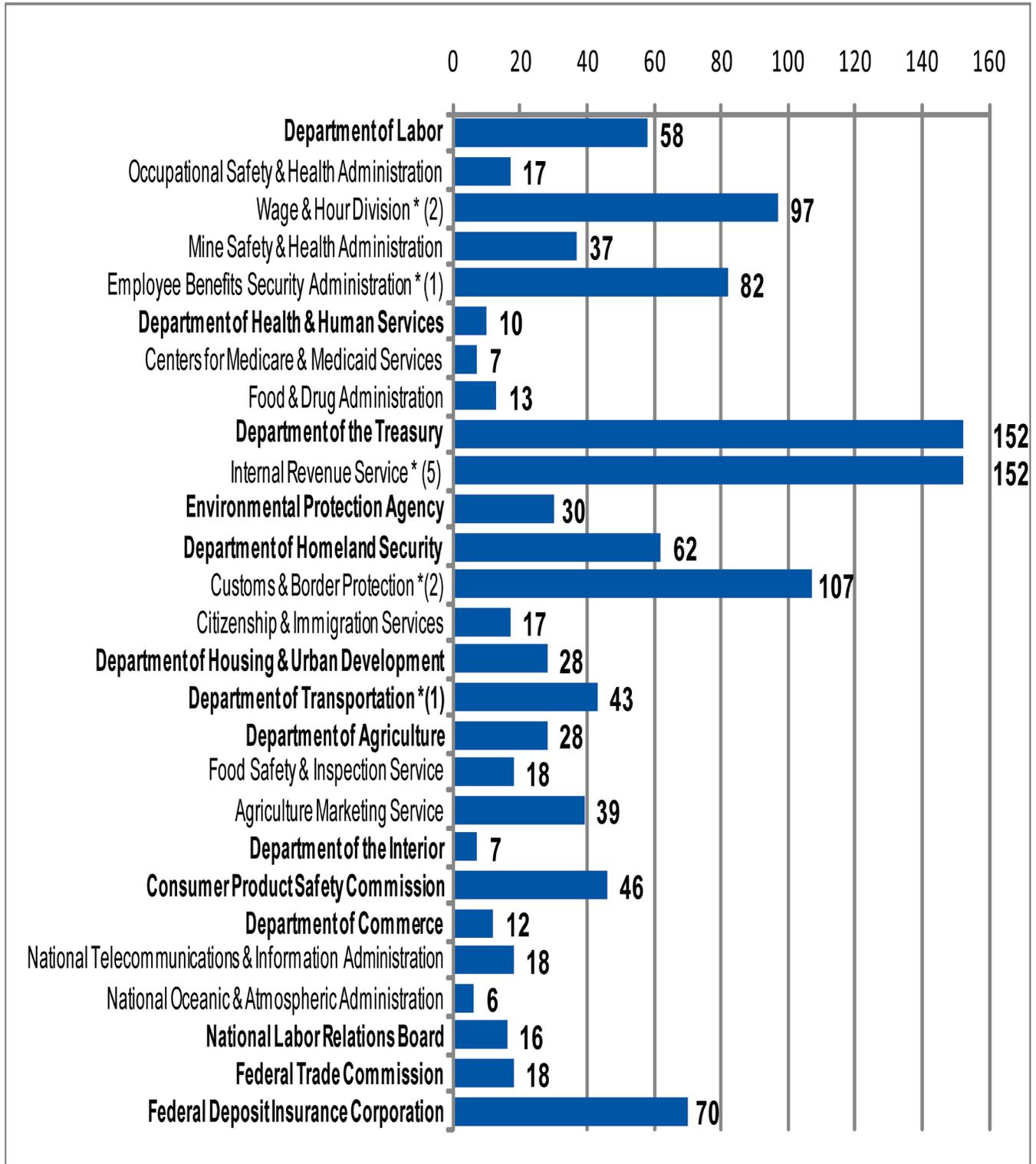


Figure II-2. Response of Federal Agencies

**Response of Federal Agencies to Comments
Average Number of Days
FY 2009**



* As of February 1, 2010 – (# of cases awaiting response)

“Outstanding Services ... Extraordinary Responsiveness”

The ONO singled out the Centers for Medicare and Medicaid Services (CMS) and the Small Business Administration (SBA) in FY 2009 for their exceptional responsiveness to small business concerns.

“CMS has provided outstanding services and extraordinary responsiveness to small business cases that have been filed with the ONO,” commented National Ombudsman Esther Vassar. The ONO presented CMS with 30 cases for which the agency achieved an average response time of 19 days. In one instance, 66 small businesses filed comments protesting CMS handling of oxygen payments and supplier responsibility under the rule CMS-1403-FC. When the ONO referred the comments to CMS for a high-level review, the agency responded within two days.

“CMS has shown a strong willingness to work with and assist the ONO in support of small business interests,” Vassar said. “CMS has addressed the concerns of small businesses without saddling them with unfair burdens. By providing compliance guides that explain the agency’s rules and regulations and reducing the small business compliance burden, CMS has helped entrepreneurs to understand their responsibilities under the agency’s rules and regulations and resolve regulatory and compliance issues to the commenters’ satisfaction” (see Chapter 3 success stories).

SBA also achieved an average response time of 19 days for the 41 cases presented in FY 2009. “The SBA was extraordinarily responsive to cases referred from the ONO, demonstrating a strong willingness to cooperate with the ONO in support of small business interests by responding promptly to cases, often within five working days,” Vassar said. “SBA helped small businesses to understand the agency’s rules and regulations in areas such as financial assistance, government contracting, and disaster assistance.”

Quality of Response—Criterion 2

When the ONO receives a comment from a small business owner concerning a regulatory enforcement or compliance issue, it forwards that comment along with its documentation to the Federal agencies involved. At the same time, the ONO may include correspondence with questions such as, “Why and how did you take the enforcement action?” and “Did your agency consider alternatives, such as waiving penalties or reducing fines?” The answers assist the ONO in assessing the agency’s responsiveness, how thoroughly it considered the

effects of its actions, and whether any follow-up occurred.

The ONO addresses this correspondence to a high-level official within an agency. The ONO may refer any comments to the agency’s Inspector General in appropriate circumstances. The ONO considers the level of specificity and detail provided in each agency’s response and determines ratings according to the following criteria:

- The agency addresses all applicable questions posed in the ONO’s correspondence and responds to the

specific comment made by the small entity.

- The agency provides detailed information showing that it looked into the facts of the specific case and the actions of the agency personnel involved in the enforcement activity.

Agency Non-Retaliation Policy— Criterion 3

The ONO defines “non-retaliation” policies as those designed to prevent acts that punish a small business owner for complaining or commenting about an agency action. An agency will receive a letter rating of A if it demonstrates that all of the following elements exist:

- The agency has adopted a formal written non-retaliation policy.
- The non-retaliation policy is available to all agency employees.
- The agency ensures that small entities have access to the non-retaliation policy through the agency’s website and/or other readily available public places.
- The agency provides a copy of its policy and the publicly available web address where the policy appears.

Well-enforced non-retaliation policies are critical if small business owners are to feel free to critique or question burdensome government rules. Small business owners should be able to tell the Federal government the good and the bad. The ONO encourages agencies to establish non-

retaliation policies that specifically reference small businesses rather than rely on generalized ethics codes or standardized anti-discrimination rules.

Many agencies routinely distribute copies of non-retaliation policies during enforcement actions and outreach events to advise government employees and small businesses that entrepreneurs should not be punished for raising objections to perceived unfair treatment.

The **National Credit Union Administration** (NCUA) references its non-retaliation policy on its website and on the cover page of every examination report, where NCUA explains the procedure if a credit union official disagrees with the report. The agency’s non-retaliation policy is also part of the training program for credit union examiners. Employees who commit retaliatory acts are subject to disciplinary action that can range from an oral or written warning to employee dismissal.

Non-retaliation policy training is mandatory for all **Department of Energy** (DOE) employees, who can access the policy on DOE’s On-Line Learning Center. Standards for non-retaliation are also part of the **Federal Energy Regulatory Commission’s** (FERC’s) mandatory annual ethics training. Employees receive either hard copies of the standards or a website link, depending on whether FERC conducts live or online ethics training in any given year.

The **Department of State** (DOS) posts its non-retaliation policy on both its external small business and internal employee/contractor websites. DOS also takes the innovative step of distributing the policy on a miniature compact disk at small business industry events, conferences, seminars, and one-on-one counseling sessions, as well as in responses to small business letters of inquiry.

Agency Regulatory Enforcement Compliance Assistance— Criterion 4

Congress amended SBREFA in 2007 by adding stronger, more specific requirements for agency compliance assistance to small businesses. An agency must now demonstrate that all of the following elements exist to receive a letter grade of A (or receive a reduced rating for missing and/or non-existent elements):

- The agency provides compliance guides and assistance as described in the amended SBREFA.

- The agency provides small entities with a compliance assistance telephone number.
- The agency provides a compliance assistance website.
- The agency makes a compliance assistance contact available to small entities.
- The agency facilitates compliance assistance education.

With the National Ombudsman's encouragement, agencies are finding that prevention is the best prescription for heading off small business enforcement problems. When entrepreneurs understand compliance expectations, the public is better protected and business thrives.

A strengthened SBREFA has prompted the **Agricultural Marketing Service** (AMS) within the U.S. Department of Agriculture (USDA) to set up four compliance assistance websites, including those specifically geared toward the dairy industry and fruit and vegetable growers. In

Feature II.1. Association Amplifies ONO Message

Rural Telephone Companies Discover "A New Ally"

The National Ombudsman's message reached a fresh audience in FY 2009 when Rural Telecommunications, the magazine of the National Telecommunications Cooperative Association, ran a feature article explaining the ONO's mission to the nation's 580 small and rural telephone companies. Titled "A New Ally in the Fight Against Burdensome Regulations," the article discussed the disproportionate regulatory compliance costs shouldered by small companies; explained the ONO comment process, agency rating system, and SBREFA rights; and informed readers about RegFair hearings and roundtables. The article concluded that "while the ONO may not be a magic wand that makes all disputes with Federal agencies disappear, it could be a useful tool . . . in a battle against oppressive regulation."



addition, the AMS Pesticide Records Branch has distributed more than 60,000 Federal Recordkeeping manuals over the last two years to help small business constituents comply with agency rules. The **Consumer Product Safety Commission** (CPSC) works to fulfill its SBREFA obligations by continuously developing plain language Guidance Documents that small business owners can download from the agency's website. New for 2009 is "Guidance on the Consumer Product Safety Improvement Act for Small Businesses, Resellers, Crafters, and Charities."

The **Department of Transportation** (DOT) is experimenting with the following online innovations to enhance its compliance assistance:

- The department is exploring the use of Facebook as a means to provide small entities with easier access to the regulations that affect them and links to question and answer sections.
- The department is experimenting with the use of blogs to facilitate interactive comments during rulemaking.
- DOT is partnering with Cornell University's e-Rulemaking Initiative and its Legal Information Institute to research the legal implications of using social networking, Web 2.0, and other technologies in government rulemaking. The partnership plans to select and begin studying the first rulemaking procedure in 2010.

Online innovation has already helped the **Internal Revenue Service** (IRS) step up its compliance assistance efforts. In addition to the National and Local Phone Forums during which small businesses dial in free of charge to learn about tax compliance issues, the IRS has added live and pre-recorded webinars that allow an unlimited number of audience members to participate on a predetermined date. The IRS also posts audio and video files of past presentations. Topics covered include Recordkeeping for Small Businesses, Correcting Employment Taxes, and Proper Worker Classification.

The IRS also enriched its compliance assistance outreach in 2009 by teaming with firms and trade groups that serve small businesses. The agency conducted weekly conference calls with payroll industry representatives, for example, to determine the impact of then-pending American Recovery and Reinvestment Act legislation. The calls included members of the software and payroll reporting industries; benefits management community; and employer groups, such as the American Payroll Association. When the legislation became law in February 2009, the IRS used information gathered during the calls to create tax forms and develop an online Frequently Asked Questions section.

"Volunteer boards comprised of citizens and business owners will always have a place in a society where our governmental structure is founded on a series of checks and balances, public input, and due process. It is possible to achieve a healthy balance of government enforcement and compliance along with entrepreneurship and free enterprise."

Andrew E. Markowski, RegFair Board Chairman, Region I, interviewed by HartfordBusiness.com

The **Pension Benefit Guaranty Corporation** (PBGC) is combining web-based information and one-on-one contact to provide options for small businesses seeking compliance guidance. The PBGC launched its “Legal Inquiries” web page in 2009 so that business owners can contact an attorney in the Office of the General Counsel for informal advice on compliance and enforcement issues. Entrepreneurs can submit questions via letter, email, or phone call.

Compliance assistance is also an email or phone call away at the **Department of Education’s** Federal Student Aid, Financial Partners Services. In addition to serving as a portal to compliance experts, the website includes a nationwide list of Education Department personnel responsible for the regions, states, and subject areas within the student aid system.

The **Environmental Protection Agency** (EPA) is relying on a combination of multi-lingual print, online, and face-to-face contact to help small businesses comply with new lead-based paint requirements for building renovators. The agency created *Small Entity Compliance Guide to Renovate Right*, a handbook available in English and Spanish that provides a step-by-step compliance summary for contractors, property managers, and maintenance personnel working in buildings constructed before 1978. Also available in English and Spanish is an online worker training course, a model for contractor training, and

a state-by-state listing of lead paint compliance training providers.

SBREFA Notice—Criterion 5

The ONO issues a rating based on whether an agency has established a policy to inform small entities of their SBREFA rights at the same time that the agency issues a citation or notice of compliance and regulatory violation:

- The agency must provide written notification of SBREFA rights to small businesses.
- The agency must inform small business owners about their right to comment on the enforcement/compliance process to the ONO.
- The agency must provide small entities with the National Ombudsman’s web address (www.sba.gov/ombudsman), telephone, and fax numbers and must deliver the information in writing or on appropriate website locations.
- A = A general public statement, usually on the agency website, and a specific written notice of SBREFA rights to small businesses at the same time that the agency issues a citation or compliance and regulatory violation notice.
- C = General information about small businesses’ right to comment about the agency’s enforcement/compliance process to the National Ombudsman’s office but no specific notification of SBREFA rights during a citation or compliance and regulatory violation notice.

■ F = No mention of SBREFA or the National Ombudsman, either generally or during a specific action.

Despite the ONO's expanding creative outreach efforts, too many small business owners remain unaware that the National Ombudsman stands ready to assist with overwhelming regulatory enforcement and compliance complications. This underscores the importance of Federal agencies providing small business owners with written notice of their SBREFA rights when issuing a citation or violation notice.

When USDA's **Food Safety and Inspection Service** (FSIS) conducts an entrance meeting at small and very small businesses, the Enforcement, Investigation, and Analysis Officers (EIAOs) explain SBREFA obligations, the compliance resources available to the plant owner/operator and his/her right to contact the ONO. At the exit conference, EIAOs leave the business owner with a brochure that lists contacts and compliance assistance materials, which are available in multiple languages. FSIS also posts the brochure on its website.

Livestock and Seed Program

inspectors for USDA's Country of Origin Labeling (COOL) program furnish a compliance information sheet during routine annual reviews at retail and supplier businesses. If inspectors find violations, the agency sends the business a non-compliance letter detailing inspection issues and setting a 30-day deadline for making corrections. The agency also posts training materials and frequently asked questions on its website and gives business owners the opportunity to offer feedback on the COOL program.

EPA hands out a Small Business Information Sheet each time that the agency inspects a facility for compliance with environmental laws. The sheet explains SBREFA rights, provides SBA contact information, and lists an array of free compliance assistance resources, including the agency's 16 Compliance Assistance Centers. These centers are sources of in-depth information specifically targeted to industries composed largely of small businesses, such as construction, automotive service, and repair and metal finishing. EPA plans to update the Information Sheet in 2010.

Table II-1. Rating of Agencies According to FY 2009 Criteria

Cabinet Level Agency (# of comments)	Timeliness	Quality	Non-Retaliation Policy	Compliance Assistance	Informs about SBREFA	Hearing	Overall	Additional Complaints/Comments Referred
AGRICULTURE (2)	A	A	A	A	A	N/A	A	(1)
Food & Nutrition Service	N/A	N/A	A	A	A	N/A	A	
Food Safety & Inspection Service (1)	A	A	A	A	A	N/A	A	
Agriculture Marketing Service (1)	B	A	A	A	A	N/A	A	
Forest Service	N/A	N/A	A	A	A	N/A	A	(1)
COMMERCE (2)	A	A	A	A	A	N/A	A	(2)
National Telecommunications & Information Administration (1)	A	A	A	A	A	N/A	A	
National Oceanic & Atmospheric Administration (1)	A	A	A	A	A	N/A	A	(2)
DEFENSE					(See note in box below)			(9)
EDUCATION	N/A	N/A	A	C	C	N/A	B	
ENERGY	N/A	N/A	A	A	C	N/A	B	(1)
HEALTH & HUMAN SERVICES (2)	A	A	A	A	C	N/A	A	(97)
Food & Drug Administration (1)	A	A	A	A	C	N/A	A	
Centers for Medicare & Medicaid Services (1)	A	A	A	A	C	N/A	A	(96)
Office of Small & Disadvantaged Business Utilization	N/A	N/A	N/A	N/A	N/A	N/A	N/A	(1)
HOMELAND SECURITY (8)	C	A	A	A	A	N/A	A	(11)
Coast Guard	N/A	N/A	A	A	A	N/A	A	(3)
Citizenship & Immigration Services (2)	A	A	A	A	A	N/A	A	(1)
Immigration & Customs Enforcement	N/A	N/A	A	A	C	N/A	B	
Customs & Border Protection (6)	F	A	A	A	A	N/A	B	(6)
Federal Emergency Management Administration	N/A	N/A	N/A	N/A	N/A	N/A	N/A	(1)
HOUSING & URBAN DEVELOPMENT (2)	A	A	A	A	A	N/A	A	
INTERIOR (1)	A	A	A	A	A	N/A	A	(2)
JUSTICE (1)	N/A	N/A	A	A	A	N/A	A	(1)
Bureau of Prisons	N/A	N/A	N/A	N/A	N/A	N/A	N/A	(1)
LABOR (30)	B	A	A	A	A	N/A	A	(1)
Occupational Safety & Health Administration (17)	A	A	A	A	A	N/A	A	(1)
Wage & Hour Division (4)	D	A	A	A	A	N/A	B	
Mine Safety & Health Administration (8)	B	A	A	A	A	N/A	A	
Employee Benefits Security Administration (1)	C	A	A	A	A	N/A	A	
STATE	N/A	N/A	A	A	N/A	N/A	A	(1)
TRANSPORTATION (5)	B	A	A	A	A	N/A	A	(5)
TREASURY (7)								(2)
Internal Revenue Service (12)	F	A	A	A	A	A	B	(3)
Office of Small & Disadvantaged Business Utilization	N/A	N/A	N/A	N/A	N/A	N/A	N/A	(1)
VETERANS AFFAIRS					(See note in box below)			(1)

Non-Cabinet Level Agency (# of comments)	Timeliness	Quality	Non-Retaliation Policy	Compliance Assistance	Informs about SBREFA	Hearing	Overall	Additional Complaints/Comments Referred
Commodity Futures Trading Commission	N/A	N/A	A	A	A	N/A	A	(1)
Consumer Product Safety Commission (1)	B	A	A	A	C	N/A	B	(49)
Environmental Protection Agency (2)	A	A	A	A	A	N/A		(2)
Equal Employment Opportunity Commission (1)	N/A	N/A	A	A	A	N/A	A	
Federal Communications Commission	N/A	N/A	A	A	C	N/A	B	(3)
Federal Deposit Insurance Corporation (1)	C	A	A	A	*C	N/A	B	
Federal Energy Regulatory Commission	N/A	N/A	A	A	A	N/A	A	(1)
Federal Reserve Board	N/A	N/A	A	A	*C	N/A	B	
Federal Trade Commission (4)	A	A	A	A	C	N/A	A	(3)
General Services Administration					(See note in box below)			(2)
National Credit Union Administration	N/A	N/A	A	A	*C	N/A	B	
National Labor Relations Board (1)	A	A	A	A	N/A	N/A	A	(1)
Pension Benefit Guaranty Corporation	N/A	N/A	A	A	A	N/A	A	
Small Business Administration	N/A	N/A	A	A	A	N/A	A	(42)
Securities and Exchange Commission	N/A	N/A	A	A	A	N/A	A	

* These three agencies are Federal Financial Institution Regulators. The agencies have established Ombudsman functions pursuant to the Riegle Community Development and Regulatory Improvement Act. To receive an 'A' rating in this category from the National Ombudsman, an agency must directly make reference to the National Ombudsman at the Small Business Administration on both its public website and at the time a citation or notice of regulatory violation occurs.

PLEASE NOTE: As originally stated in the National Ombudsman's 1999 Report to Congress, Section 222 of SBREFA is part of "Subtitle B—Regulatory Enforcement Reforms." Section 221 contains the "definitions" applicable to Subtitle B. Section 221 adopts the Freedom of Information Act definition of "agency." That definition states that agency means "each authority of the Government of the United States, whether or not it is within or subject to review by another agency ..." (5 U.S.C. §551). Accordingly, the National Ombudsman, with advice from the regional RegFair Boards, has concluded that Section 222 applies whenever a Federal agency as defined above exercises regulatory fairness enforcement or compliance authority with respect to a small business concern (15 U.S.C. §657 (b)(2)(B)).

The Department of Defense, the General Services Administration, and the Department of Veterans Affairs are not rated because they do not report the necessary information. These agencies contend that SBREFA does not apply to them because they are not regulatory agencies.

Agency Comments Regarding Ratings

The ONO presented a draft of this report to the agencies and RegFair Board members for their comments. The IRS provided the following comment:

The National Ombudsman's 2009 Report to Congress (RTC) notes that in referring small business comments to Federal agencies, the ONO expects an agency to substantively engage the small business and to take specific action to resolve a problem. The RTC also notes that in rating an agency's responsiveness to a small business, the first criterion it considers is timeliness. The ONO expects a complete response in 30 business days or less. Because the average response time from the IRS is greater than 120 days, the IRS is graded "F" on timeliness.

As we have discussed with your office previously, it is impossible in most cases for the IRS to provide a complete response within 30 days.

The majority of comments referred from the ONO to the IRS involve a small business's dispute about its tax liabilities. The ONO refers all case-specific comments to the Taxpayer Advocate Service (TAS) through Jim Leith, the Local Taxpayer Advocate for Washington, DC (D.C. LTA). TAS makes every effort to comply with the ONO's expectations in responding to these referrals.

The ONO's evaluation of TAS timeliness disregards the work TAS performs. The ONO focuses on the timeliness of the TAS response to the ONO instead of the timeliness of the TAS response to the small business.

In all cases, TAS notifies the ONO within 30 days that the referral was received and assigned to a TAS office where the small business is located. Within that same timeframe, a TAS Case Advocate contacts the small business to advise that TAS is responding to the comments submitted to the ONO and that TAS will provide assistance in resolving the problem. The Case Advocate then communicates regularly with the small business owner until all issues are resolved.

Solving problems with the IRS is a complex and time-consuming process. Many cases require extensive documentation and formal requests for assistance from other IRS functions. TAS employees must comply with relevant sections of the Internal Revenue Code, operate within the limits of their delegated authorities, and utilize normal IRS functions and procedures.

TAS currently receives over 250,000 cases a year, and our quality standards emphasize resolving the taxpayer's case correctly, addressing all related issues so that the case is fully resolved, and taking initial and all follow-up actions in a timely manner. While the aggregate number of days it takes to resolve a case is an indicator

of timeliness, reducing aggregate response time is not, per se, a TAS objective. In fact, the use of aggregate response time as a quality measure in other IRS functions is sometimes the reason why cases end up in TAS. When response time itself is made the priority objective, an incentive arises for caseworkers to close out cases prematurely.

TAS implemented several changes to the SBREFA program to increase the efficiency of IRS efforts. First, program responsibility was moved to the D.C. LTA office to give the SBREFA cases priority attention and to facilitate a degree of specialization in working the cases. Second, the process was streamlined by reducing the number of program managers reviewing cases before they are forwarded to the National Taxpayer Advocate. Third, through the streamlined procedure, TAS is more effective and more efficient in engaging the local TAS offices, TAS Attorney-Advisors, and the TAS offices of Case Advocacy and Systemic Advocacy to address issues raised through the SBREFA referral process.

The Department of Labor's Wage and Hour Division (WHD) provided the following comment:

WHD works diligently to meet its obligation to provide full, complete, and timely responses to the ONO and received an overall grade of "B" on the combined criteria. With regard to WHD's grade concerning its timeliness of response to small

business complaints, the draft report assigned WHD a below average grade of "D." WHD strives to meet this important timeliness obligation without jeopardizing its ability to protect and enhance the welfare of the nation's workforce through investigations of employer compliance, and thus submitted interim responses in those cases without a final resolution, noting WHD's long-standing policy not to disclose information during the fact-finding process of an open investigation. Had the interim response time of 41.25 days been acknowledged, WHD would have received a grade of "B" on timeliness and an overall grade of "A" on all criteria.

WHD understands that interim responses are not final reports, but notes that final responses to the ONO may nevertheless continue to be delayed on open investigations due to subsequent actions taken by the WHD concerning a particular case, such as possible litigation or civil money penalties against a particular employer who is the subject of a SBREFA inquiry. However, in order to be more responsive to SBREFA complaints, WHD has changed its process to answer as many questions posed by the ONO as possible without disturbing the integrity of an open investigation. This is especially true if answering said questions [has] no bearing on the ultimate conclusion of a WHD investigation and can better address the concerns of small businesses.

Enforcement Fairness Conveys Benefits To All

Federal regulations are most effective when small business owners clearly understand their obligations under the law. The ONO's agency ratings are meant to convey this message by guiding Federal agencies with regulatory authority toward

enforcement fairness. The American people benefit each time that an agency provides compliance assistance rather than resorting to enforcement actions, the agency accomplishes its legally-mandated mission, and small businesses have a chance to thrive in an effective enforcement environment.

III

Small Business Success Stories from Main Street



Federal agencies are often unaware of the cumulative effect that multiple regulatory regimes can have on a small business. Entrepreneurs focus their time and energy on growing their businesses, thereby growing their local economies, and their limited resources are frequently unequal to the task of keeping up with all relevant regulations.

When small business owners become overwhelmed by Federal regulatory challenges, the comment process of the Office of the National Ombudsman (ONO) offers a forum where entrepreneurs can present their compliance and enforcement concerns, then work with the agencies involved toward a resolution.

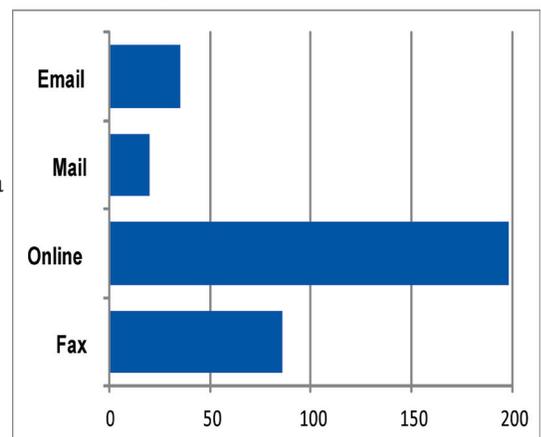
The process begins when an entrepreneur files a comment with the ONO describing unfair compliance or enforcement practices. The ONO seeks a resolution that leads to effective regulation, taking into account both small business concerns and agencies' regulatory obligations under the law.

Focusing on Fairness

The National Ombudsman stands ready to act as a liaison between entrepreneurs and Federal agencies through its Regulatory Enforcement Fairness Comment Process (see Figure III-2). The ONO receives comments regarding the enforcement actions of more than 35 Federal departments and agencies and provides small entities with multiple avenues for submitting comments, with online filing generating the largest number of comments in FY 2009 (see Figure III-1).

The National Ombudsman's website (www.sba.gov/ombudsman) is the most popular online filing venue, allowing small business owners to begin the process simply by clicking on "How to File a Complaint or Comment." After receiving pertinent small business comments and complaints, the ONO directs them to the

Figure III-1. How Comments Were Received



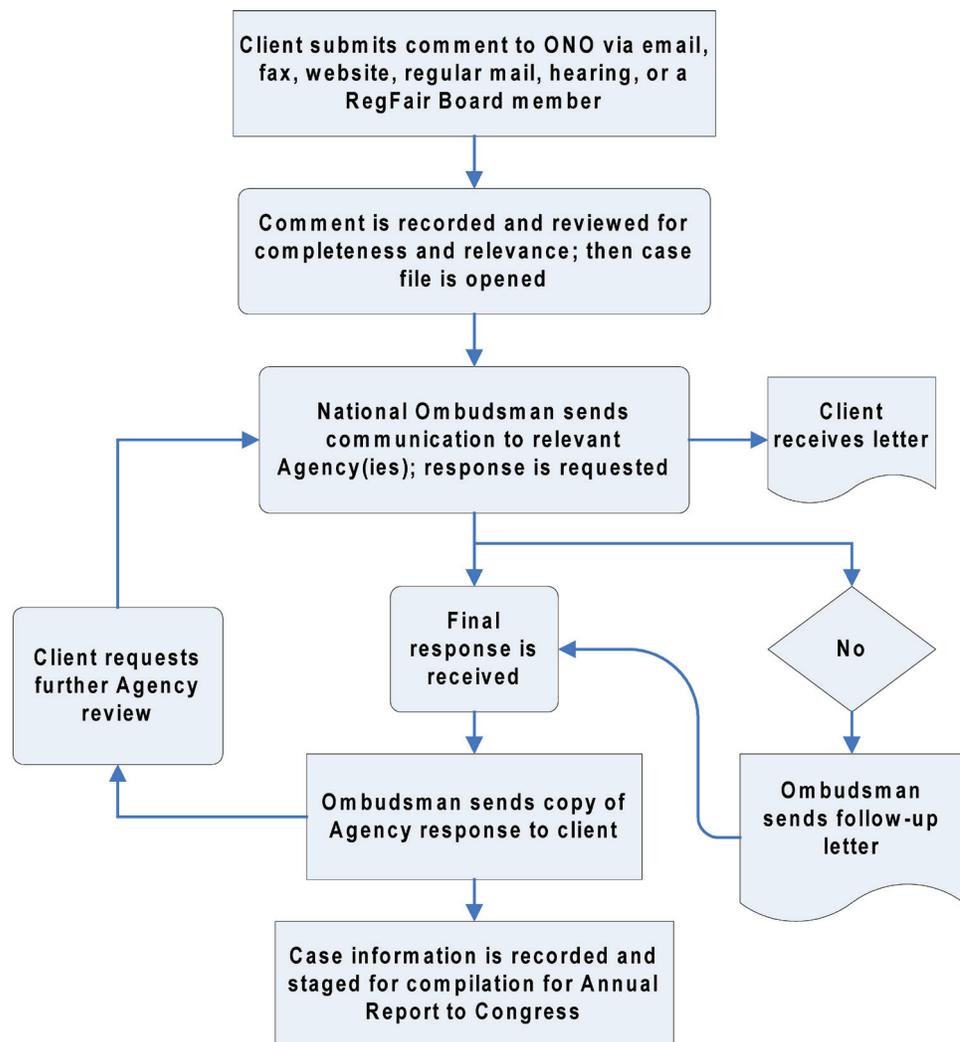
relevant Federal agency, appropriate SBA office, or other governmental entity for a high-level review (see box below) and requests that Federal

agencies consider the fairness of their enforcement actions. The ONO sends a copy of the agency's response to the small business owner.

The National Ombudsman assists thousands of businesses with their compliance and regulatory challenges, but the ONO and RegFair Board members cannot:

- ❏ *Serve as a small entity's attorney. The ONO does not legally represent the organization filing the comment.*
- ❏ *Guarantee a positive outcome.*
- ❏ *Overrule, stop, or delay a Federal action (such as halting an IRS audit). The agency involved is the only one that can change a regulation.*

Figure III-2. The ONO Regulatory Enforcement Fairness Comment Process



Comments Make the Case

The small business cases presented in this chapter reflect some common themes and perceptions that run through comments and are at the heart of most compliance and regulatory challenges:

- Agency Errors
- Lack of Communication
- Compliance and Regulatory Requirements
- Compliance Costs
- Changing Regulations

Agency Errors

Relatively minor mistakes made during an agency's compliance and regulatory enforcement process can produce a heavy financial or logistical burden for a small business. Despite the best intentions and strong quality control, agencies can make enforcement errors with consequences that are potentially damaging enough to threaten a small operation's ability to stay in business.

Small business comments concerning the Centers for Medicare and Medicaid Services (CMS) within the Department of Health and Human Services frequently involve medical providers navigating the complexities of Federal healthcare policy.

Comment: One small provider, for example, sought ONO assistance with the ongoing problem of a Medicare health maintenance organization

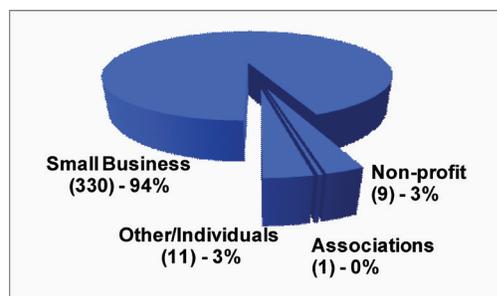
(HMO) “denying coverage for vital medication for dialysis patients.” The commenter told the ONO that “this is a violation of the HMO’s contract with CMS not to cover services that are covered by Medicare” and “contrary to our medical protocol ... as well as currently acceptable medical practice.”

► **Outcome:** When presented with the case by the ONO, CMS determined that denial of coverage “did not follow CMS guidelines.” CMS assured that the HMO “will authorize payment for the services provided” by the dialysis center, and the HMO director would contact the center to discuss the guidelines.

Comment: The owner of a small pharmacy brought two issues to the ONO’s attention—his request for provider enrollment reconsideration and his claims that were left unpaid by a CMS agent. The owner wrote that he had submitted all requested information and was told by the agent that a determination could take as long as 90 days. The pharmacy had already filed 247 flu shot claims and, with the 2009 flu season looming, was anxious to find out the claims’ eligibility status.

► **Outcome:** Prompted by the National Ombudsman, CMS contacted its agent and reported that flu shot claims were covered and the pharmacy’s application was approved with a five-month retroactive effective date.

Figure III-3. Breakdown of Who Filed Comments



Comment: In a case involving the Mine Safety and Health Administration (MSHA) within the Department of Labor, a mine owner complained to the National Ombudsman about the “unprofessional and troubling demeanor” of an MSHA inspector. The small business owner reported that during a site inspection: the inspector “did not identify himself properly, used threatening comments to miners not in charge, was verbally abusive and threatening, used profane and vulgar language, and went through proprietary files without permission.”

► **Outcome:** MSHA looked into the incident at the urging of the ONO and responded that “we are disappointed that our representative did not conduct himself in a manner as required by this agency. MSHA strives to train its personnel to conduct themselves in a professional manner.” A supervisor conducted extra training for the inspector and all of his colleagues in the field office to reinforce that the agency expects professional conduct and will not tolerate the use of profanity.

Comment: A disaster recovery firm sought help from the National Ombudsman, reporting that the Department of Homeland Security’s (DHS’s) U.S. Coast Guard (USCG) allegedly entered incorrect information on the company’s 1099 Federal tax form. The small firm expressed concern that the errors would affect timely submission of its taxes.

► **Outcome:** The ONO’s involvement led the USCG to analyze payments made to the small company, reconcile the payment amounts reported by the Treasury Department, and determine that two 1099s contained incorrect information. The USCG promised “to take immediate action” to rectify the situation.

Lack of Communication

Busy entrepreneurs and Federal regulators have different compliance perspectives, and some miscommunication might be expected. The trouble arises when these misperceptions or misplaced messages impact the vitality of a small company. When accurate, complete information fails to flow between small entities and their regulators, serious consequences can be magnified for a business with slim profit margins and limited resources. The ONO strives to help reopen clear communication channels between agencies and their constituents.

Comment: A distribution company received a noncompliance ticket with a 45-day deadline from the Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (PHMSA). The commenter contacted the ONO after failing to resolve the ticket despite the fact that the small business communicated twice with PHMSA before the deadline and received no response.

► **Outcome:** Prompted by the ONO, PHMSA reviewed the matter, withdrew the ticket, and instead issued a warning letter—all to the satisfaction of the commenter.

Comment: A small supply company sought help from the National Ombudsman because the firm was unable to obtain proof of final delivery on merchandise that had been tracked by the Department of the Army's Defense Distributions Center to the shipment's final destination in Bagram, Afghanistan.

► **Outcome:** The Army Office of Small Business Programs (OSBP) told the ONO that the agency would review events leading to the delayed proof of delivery and monitor progress until all payment matters are resolved.

Comment: A medical equipment company commented to the ONO that mail delivery problems with the U.S. Post Office led to suspension of the small firm's medical provider number without notification. The CMS National Supplier Clearinghouse told the company that in order to activate its provider number, the firm would have to submit a new provider enrollment application with full documentation.

► **Outcome:** The National Ombudsman stepped in to help resolve the situation, leading CMS to reactivate the equipment company's Provider Transaction Access Number.

Comment: The ONO assisted with another CMS-related case when a dialysis center asserted that it had

failed in its efforts to obtain some necessary remittance notices and explanations of benefits. "We have no information on where to post the money that was deposited in our account and cannot bill the secondary insurance without these explanations," the commenter told the National Ombudsman.

► **Outcome:** The ONO intervened, and a remittance notice was promptly forwarded to the commenter.

Compliance and Regulatory Requirements

Fines and inspections meant to foster good business behavior and protect the public can result in serious financial setbacks to a small business. When agencies enforce a regulation, they may fail to realize that the same provisions and penalties needed to keep large companies in check can prove unnecessarily harsh for a small business.

Comment: An orthopedics center elicited the ONO's help when the National Supplier Clearinghouse (NSC) deactivated the owner's Medicare billing number because he had failed to check a box on one page of a form.

► **Outcome:** When contacted by the National Ombudsman, CMS responded that NSC reactivated the commenter's billing number with no loss of billing dates.

Comment: In a second case involving CMS billing, the owner of a medical

equipment company contacted ONO concerning the firm's re-enrollment application. The owner wrote that "we were unaware that anything was wrong with the re-enrollment until we started receiving denial claims." According to the commenter, CMS told him that he must re-enroll, receive accreditation, and await a new provider survey—a process that could take at least six months.

► **Outcome:** CMS investigated and resolved the case at the ONO's urging, noting that NSC will process a reactivation application from the supplier without accreditation and give the application priority processing. If the form is submitted correctly, the process should take one month, after which the NSC will reactivate the firm's Provider Transaction number, and the supplier will be able to resume billing.

Comment: DOL's Employee Benefits Security Administration (EBSA) rejected a company's annual report of its 401(k) profit sharing plan because the document did not include the required Independent Qualified Public Accountant (IQPA) report. The firm contended that as a small company, it was exempt from incurring the costs for an audit of its 401(k) plan and should not have to pay the EBSA's \$50,000 noncompliance penalty.

► **Outcome:** The company submitted a "statement of reasonable cause" explaining its failure to submit required documents when they were originally due along with a satisfactorily amended

annual 401(k) report that included an IQPA report. DOL, in turn, abated 95 percent of the original \$50,000 penalty and assessed the company a \$2,500 fine.

Comment: Even the SBA can benefit from the National Ombudsman's efforts to encourage an atmosphere of fair and effective regulatory compliance. In the case of two borrowers, the SBA put a lien on all of their currently financed property, impeding their efforts to restructure their debt. The borrowers asked SBA to release the lien on one of their properties to make it easier to obtain a lower interest rate.

► **Outcome:** After the ONO stepped in, SBA contacted the bank involved and agreed to release the agency's lien upon receipt of a formal application, paving the way for the bank to structure the refinancing at a lower interest rate. SBA reinstated the lien once the refinancing was complete.

Compliance Costs

A rule that appears reasonable to regulators can result in costly and frustrating hurdles for businesses with small staffs and limited financial resources. Compliance costs that large companies take in stride as the price of doing business may place small firms in financial jeopardy.

Comment: Although a credit union was admittedly delinquent in submitting its annual recertification reports to the Federal Housing

Administration (FHA) within the Department of Housing and Urban Development (HUD), the small entity approached the ONO for help with what the union asserted was an “excessive and unreasonable” civil penalty. The union explained that its annual fees were paid, it had immediately submitted the required reports upon notification, and it had not originated or closed an FHA loan during the reporting period.

► **Outcome:** HUD’s Mortgage Review Board revisited its assessment of the credit union’s civil money penalty at the ONO’s urging and reduced the penalty from \$3,500 for each infraction to \$3,500 for both infractions.

Comment: A construction company called upon the National Ombudsman when DOL’s Occupational Safety and Health Administration (OSHA) inspected the small business, issued a citation, and proposed a \$1,225 penalty.

► **Outcome:** After discussing the matter with the ONO, the OSHA area director negotiated an Informal Settlement Agreement with the company’s secretary/treasurer that reduced the penalty to \$613.

Comment: A small businessman alleged that the Internal Revenue Service (IRS) charged him a penalty with interest as a result of a mistake by his bank in recording his quarterly payment.

► **Outcome:** After speaking with the National Ombudsman, the IRS abated

the penalty and interest charges and refunded the commenter \$839.18.

Changing Regulations

Entrepreneurs who pour their time and resources into strengthening and growing their businesses often find it a struggle to keep up with the latest regulatory requirements. Owners who fear for their firms’ health can turn to the ONO for assistance in coping with new rules.

Comment: Numerous small business owners wrote the National Ombudsman asserting that they were unjustly subject to the Federal Trade Commission’s (FTC’s) Red Flags Rule because the regulation is too broad. The rule requires certain businesses to create prevention programs that identify “red flag” patterns and activities that could indicate identity theft.

► **Outcome:** ONO intervention has led to the FTC delaying enforcement of the regulation to give businesses additional compliance time and to allow Congress to consider narrowing the scope of the anti-theft legislation on which the rules are based. Meanwhile, the FTC has:

- Launched a suite of compliance assistance materials to help businesses determine if they are covered by the rule and if so, how to comply.
- Distributed 140,000 brochures since March 2009 entitled, “Fighting Fraud with the Red Flags Rule: A How-to Guide for Business.”

■ Launched a new website that includes articles for businesses to use in their communications, a do-it-yourself template for low-risk businesses, an eight-minute compliance assistance video, and an online assessment tool to help entities determine if the rule applies to them.

IV

RegFair Boards and Outreach Strengthen Community Connections

The Office of the National Ombudsman (ONO) relies on outreach to spread the word: no small business owner should struggle alone with regulatory burdens simply because he or she is unaware that a National Ombudsman exists to help. Connecting with business communities throughout the United States enriches the ONO's understanding of enforcement challenges and lets entrepreneurs know that they have an ally to turn to when faced with excessive or unfair Federal regulatory enforcement actions.

The ONO relies on its partners in the business community and Federal government to extend and amplify its outreach efforts:

- The 10 Regional Regulatory Enforcement Fairness (RegFair) Boards serve in local communities and make contact with small business owners where they live and work.
- The ONO collaborates with other SBA resource partners and Federal agencies to enhance its mission of seeking compliance and regulatory enforcement fairness for small businesses.
- The ONO teams with national trade groups whose members have enforcement issues.

- The ONO continues to successfully encourage Federal agencies to recognize and take steps that lighten the burden of regulatory compliance on small entities.

RegFair—Peer-to-Peer Support

Because RegFair Board members are business owners, operators, and officials themselves, they empathize with their peers and encourage entrepreneurs to speak out about unfair compliance and regulatory actions without fear of retaliation. As part of their duties, the National Ombudsman and RegFair Boards host and participate in several types of public activities, including hearings and roundtables:

Hearings are open forums focused on collecting comments and hearing testimony from individual entrepreneurs and/or small business service associations (see Table IV-1 and Figure IV-1), as well as educating the community on the Federal regulatory hurdles that small businesses face. Federal agency representatives are invited to attend hearings to keep abreast of small business regulatory issues, particularly

Table IV-1. 2009 Outreach

<i>Destin, FL (R)</i>
<i>Philadelphia, PA (R)</i>
<i>Louisville, KY (S)</i>
<i>Des Moines, IA (S)</i>
<i>Baltimore, MD (S)</i>
<i>Montgomery, AL (S)</i>
<i>Toledo, OH (S)</i>
<i>Dallas, TX (S)</i>
<i>Baltimore, MD (S)</i>
<i>Richmond, VA (S)</i>
<i>Richmond, VA (S)</i>
<i>Denver, CO (R)</i>
<i>Newport, RI (R)</i>
✕ (R)=Roundtable
✕ (S)=Speaking Engagement

when they directly concern an agency's enforcement responsibilities. Roundtables bring together the small business community and business and trade associations for an information exchange. Sometimes agencies

participate and explain their regulatory and compliance assistance programs. Business representatives discuss enforcement concerns and the impact of government rules from a small company's point of view.

Figure IV-1. 2009 Outreach

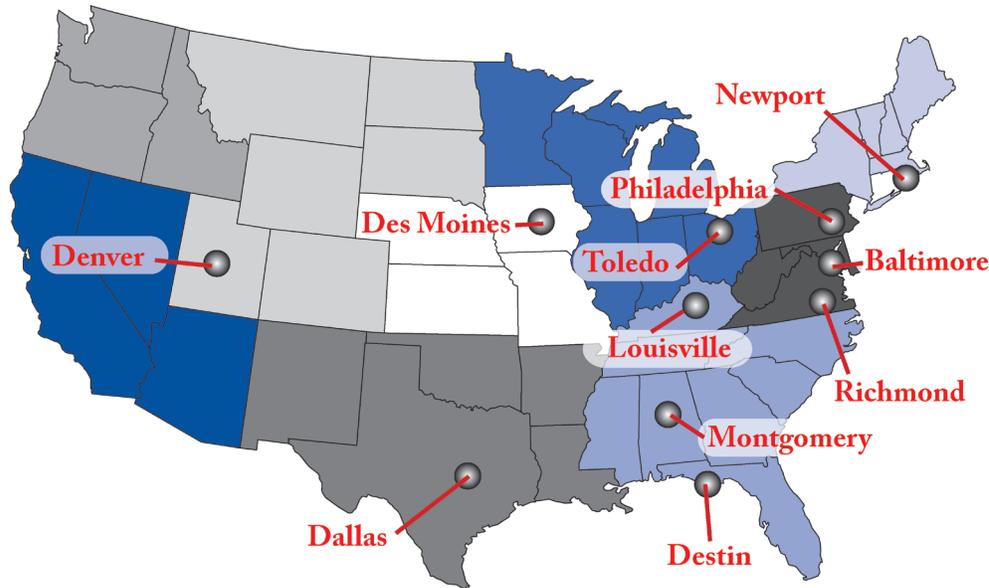


Table IV-2. 2009 Outreach

Location	Date	Type
Destin, FL	October 3, 2008	Roundtable
Philadelphia, PA	December 4, 2008	Roundtable
Louisville, KY	June 3, 2009	Speaking Engagement
Des Moines, IA	June 10, 2009	Speaking Engagement
Baltimore, MD	June 24, 2009	Speaking Engagement
Montgomery, AL	June 29, 2009	Speaking Engagement
Toledo, OH	July 16, 2009	Speaking Engagement
Dallas, TX	July 21, 2009	Speaking Engagement
Baltimore, MD	July 29, 2009	Speaking Engagement
Richmond, VA	August 14, 2009	Speaking Engagement
Richmond, VA	August 17, 2009	Speaking Engagement
Denver, CO	August 20, 2009	Roundtable
Newport, RI	September 1, 2009	Roundtable

The National Ombudsman and RegFair Board members often capitalize on publicity surrounding these forums to give speeches, presentations, and media interviews that extend the ONO message to a larger audience.

RegFair Boards also monitor the Federal agency enforcement issues that arise in their region and use their network of business contacts and affiliations with trade associations to spread the word that entrepreneurs need not struggle alone with compliance and regulatory challenges.

As members of the local community, RegFair Board members can attract media attention both before and after hearings and roundtables to publicize the ONO's mission and the various ways that the National Ombudsman can assist small companies.

RegFair Board members also brief Congressional small business liaisons and local elected officials to keep government representatives abreast of small business enforcement challenges.

Feature IV.1. Board Member Outreach



“ONO is Always Favorably Received”

“ONO is unknown to everyone, but the message on the mission of ONO is always favorably received.” That is how Scott R. Perkins, Region VII RegFair Board member, sums up the results of his outreach efforts in 2009. Perkins, a member of the Society of American Military Engineers (SAME), attends as many SAME-sponsored small business industry day conferences as possible throughout his region, explaining how the ONO and RegFair Boards can assist with resolving compliance and regulatory enforcement problems. Perkins did double duty at a May 2009 forum sponsored by Service Disabled Veteran Owned Business, spreading his message about the ONO as well as networking with Kathleen Piper, Deputy District Director of Team SBA Nebraska. Piper and Perkins committed to maintain ongoing communication about their efforts to boost small business.

SBA Partners— Extending Outreach

The ONO is an important component in SBA's mission to serve small business and so are the Federal agency partners that support the National Ombudsman in working toward regulatory enforcement fairness:

- SBA District and Regional field offices support RegFair Board members in publicizing hearings and serving as liaisons to small business owners. Field office staff are often those listed as points of contact for hearings, roundtables, and other ONO-sponsored events.
- SBA Office of Advocacy presents the small business viewpoint while legislation and regulations are being developed. For example:
 - Advocacy saved small businesses \$7 billion in first-year cost savings and \$745 million in annually recurring savings as a result of FY 2009 efforts to help Federal agencies comply with the Regulatory Flexibility

“The public roundtables and hearings are one of the best ways to stir up interest with small businesses. We use the announcements for these kinds of exchanges to get our message out.”

*Michael J. Stransky,
RegFair Board, Region
VIII*

Act (RFA). The RFA requires agencies to analyze the economic impact of proposed regulations on small entities and consider less burdensome alternatives that still reach the agencies' regulatory goals.

— Advocacy continued its State Regulatory Flexibility Initiative, supporting a piece of model legislation similar to the Small Business Regulatory Enforcement Act to which state lawmakers can refer when writing their own laws. To date, 44 states have enacted the model bill, at least in part, through legislation or an executive order. Advocacy has begun working with small business communities, state legislators, and state government agencies to assist them with implementing their regulatory flexibility laws.

■ Small Business Development Centers and SCORE serve as rich resources when small companies make requests for start-up advice that is not within the ONO's jurisdiction. These SBA resource partners can help entrepreneurs set the stage for success.

FY 2009 saw several Federal agencies teaming with SBA to offer assistance that amplified the message of fair regulatory enforcement and compliance:

■ The Department of Commerce's **Bureau of Industry and Security** (BIS) teamed with SBA regional

offices, District Export Councils, and other local organizations for eight seminars for exporters.

■ The Department of Justice's (DOJ's) **Civil Rights Division** and SBA jointly published an Americans With Disabilities Act (ADA) Guide for Small Businesses. The guide is part of the division's extensive ADA technical assistance program, which offers compliance and enforcement help to more than one million business owners and disabled individuals each year.

Agency Outreach— Education Before Enforcement

Federal regulations are most effective when small business owners understand their obligations under the law and feel comfortable seeking agency assistance to head off compliance difficulties before they develop. The ONO's ultimate partners in regulatory fairness are those Federal agencies that protect the public good by emphasizing compliance education before resorting to enforcement sanctions. The National Ombudsman encourages agency outreach programs such as those below to promote an effective regulatory environment:

The **Pesticide Research Branch** (PRB) within the U.S. Department of Agriculture (USDA) has established a compliance assistance program that begins with the publication of a regulation. Small businesses that do not pass PRB's initial inspection receive

face-to-face compliance instruction from an inspector. The agency issues a warning letter requiring compliance within the year. Under the program, 98 percent of businesses that fail the first inspection are in compliance during the second.

The Department of Interior's **Bureau of Land Management** (BLM) is reissuing compliance assistance guidance to all employees via an internal instruction memorandum. BLM will emphasize that when dealing with small entities, agency employees should consider:

- Seeking alternatives to initiating an enforcement action to seek civil penalties.
- Reducing or waiving civil penalties for first violations.
- Reducing or waiving civil penalties whenever a small entity makes a good faith effort to comply with all requirements of its land use authorization.
- Allowing for an abatement period if a violation does not pose an immediate impact on health, safety, or the environment.

The **Federal Trade Commission** (FTC) applies its Textile Corporate Leniency Policy to small businesses that commit certain minor and inadvertent violations of the textile and wool labeling rules. The FTC has determined that this "second chance" policy educates business owners,

increases overall compliance with the rules, and minimizes the burden on firms of correcting labeling errors that are not likely to injure consumers.

Education about regulatory compliance is also the focus of the USDA's **Grain Inspection, Packers, and Stockyards Administration's** (GIPSA) outreach program. The agency aims to educate small and disadvantaged farmers about their rights under the Packers and Stockyards Act and inform small inspection agency owners and grain elevator operators of compliance issues under the U.S. Grain Standards Act. GIPSA addresses compliance and enforcement fairness at scores of formal events but also through continuous informal meetings with individual growers, livestock producers, stockyard owners, livestock dealers, order buyers, grain elevator operators, and inspection service providers.

One of the main goals of the **Employee Benefits Security Administration** (EBSA) within the Department of Labor (DOL) is assisting small entities in complying voluntarily with the Employee Retirement Income Security Act (ERISA). Small business owners can receive individualized assistance with resolving benefits disputes informally or call a toll free hotline run by Benefits Advisors who are trained in compliance and can locate the proper assistance guides or direct calls to the nearest regional EBSA office.

DOL's Mine Safety and Health Administration (MSHA) has created the Small Mine Office to help small entities develop safety and health programs tailored to their specific needs. About 99 percent of the mines regulated by MSHA have less than 500 employees and qualify as small businesses. The agency has found that individualized assistance helps small operators better protect miners. MSHA lists contact information on its web page for compliance assistance specialists throughout the United States and conducts workshops and seminars nationwide that cover current issues and new safety and health regulations.

The **Securities and Exchange Commission's** (SEC's) examination staff also has a policy of attempting to resolve compliance problems informally without enforcement action. SEC examiners provide the small entity with a "deficiency letter" identifying problems and outlining appropriate remedial steps. Before initiating action, the SEC generally offers a small business owner the opportunity to submit a statement explaining why the agency should not authorize such action.

V

Looking Ahead: ONO Collaborates on 21st Century Innovation

America's world view shifted dramatically during the opening decade of the new millennium. Political, financial, and even climatic upheavals have challenged the U.S. government and its citizenry to rethink approaches to public safety and security, sound government, and economic prosperity.

The tumult of the past 10 years has highlighted an ongoing fact of our national life: small businesses are critical to the health of our economy and maintaining the spirit of our democracy. Entrepreneurs fuel more than job growth and business expansion. They are generating many of the innovations that will move the United States toward a safer, stronger future.

The Office of the National Ombudsman (ONO) was created to support these small business owners by promoting regulatory fairness in conjunction with the Small Business Administration (SBA) mission "... to aid, counsel, assist, and protect the interests of small business concerns; to preserve free competitive enterprise; and to maintain and strengthen the overall economy of our nation."



Inspired by the SBA's mission and guiding principles (see box below), the ONO is expanding its efforts to develop creative new ways that encourage entrepreneurs through:

- Building positive relationships with other Federal agencies. Collaboration between the National Ombudsman and other government entities will amplify the efficient, imaginative use of valuable resources, such as networks of district and regional offices, field staff, websites, and small business events.
- Collaborating and partnering with state and local governments, as well as community, business, and trade organizations to exchange information and leverage resources to benefit the small business community. Examples include mutual participation in organizational events and sharing information on organizational websites.

The events of the past decade have transformed “collaboration” from a buzzword into a practical necessity for economic recovery. The ONO is already in the midst of building on its strong history of dialogue and

outreach to create a sound regulatory environment in which small businesses can thrive. If the United States is to flourish in the 21st century, our nation needs the ingenuity and spirit of each and every one of our entrepreneurs.

SBA's Guiding Principles

Creativity

Our people inspire creativity in the American economy by developing and supporting entrepreneurs through a vast network of resource partners.

Advocate

We advocate for all small businesses by taking leadership in building a productive partnership between the American people and their government.

Results

Our team focuses on delivering results for small businesses and being accountable, accessible, and responsive.

Empower

We empower the spirit of entrepreneurship within every community to promote and realize the American dream.

Success

We facilitate the environment necessary for America's small businesses to succeed, measuring our performances by small business success.

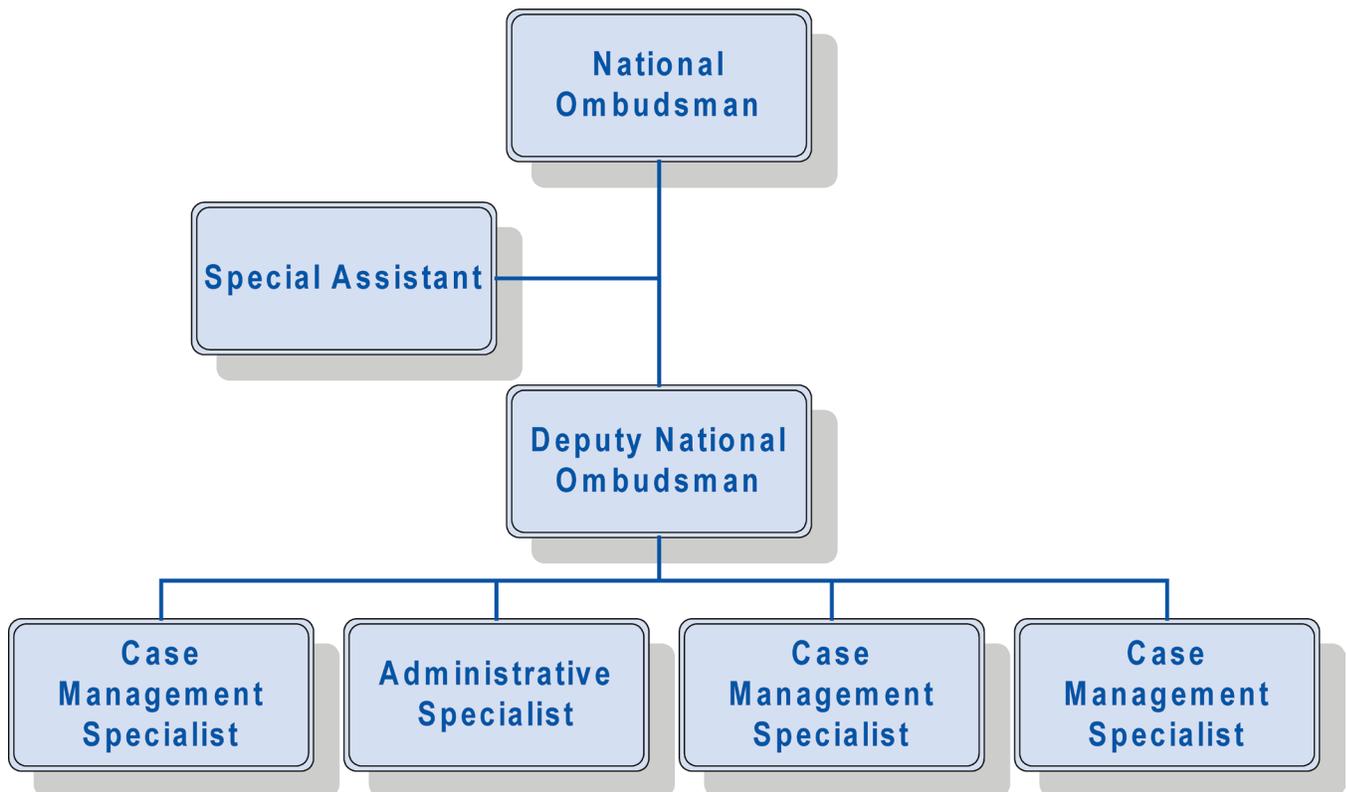
Appendix: Media Outreach

Event	Location	Date	Radio/Television Interviews	Print Media Articles	Internet
Roundtable	Destin, FL	10-03-08			
Roundtable	Philadelphia, PA	12-04-08			
Speaking Engagement	Louisville, KY	06-03-09			
Speaking Engagement	Des Moines, IA	06-10-09			
Speaking Engagement	Baltimore, MD	06-24-09			
Speaking Engagement	Montgomery, AL	06-29-09			
Speaking Engagement	Toledo, OH	07-16-09			
Speaking Engagement	Dallas, TX	07-21-09			
Speaking Engagement	Baltimore, MD	07-29-09			
Speaking Engagement	Richmond, VA	08-14-09			
Speaking Engagement	Richmond, VA	08-17-09			
Roundtable	Denver, CO	08-20-09			
Roundtable	Newport, RI	09-01-09			08-31-09 <i>Providence Business News</i> published an article to promote the roundtable. www.pbn.com [Circulation 4,219 weekly]

National Outreach

Date	Radio/Television Interviews	Print Media Articles	Internet Articles	Purpose of Media
12-10-08			<i>Star Tribune</i> , www.startribute.com [Circulation 304,543 daily]	Article published about Stephen L. Becher's appointment to the Region V Regulatory Fairness Board
12-15-08			<i>Hartford Business Journal</i> , www.hartfordbusiness.com [Circulation 10,500 weekly]	An interview with Andrew E. Markowski, Chair, Region I Regulatory Fairness Board
09-14-09	Federal News Radio – 1500 AM, Washington, D.C. [Circulation 78,000 weekly]			Jane Norris & Tom Temin interviewed Ombudsman Esther Vassar on her appointment and the direction of the Office of the National Ombudsman

Appendix: ONO Organizational Chart





U.S. Small Business Administration

**U.S. Small Business Administration
Office of the National Ombudsman
409 Third Street, S.W.
Washington, D.C. 20416**