

GAO

## Testimony

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# ENVIRONMENTAL PROTECTION

## Issues for Consideration in the Reorganization of EPA's Ombudsman Function

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Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss our work relating to the national hazardous waste ombudsman function at the Environmental Protection Agency (EPA). EPA's hazardous waste ombudsman was first established within the Office of Solid Waste and Emergency Response as a result of the 1984 amendments to the Resource Conservation and Recovery Act.<sup>1</sup> Recognizing that the ombudsman provides a valuable service to the public, EPA retained the ombudsman function as a matter of policy after its legislative authorization expired in 1988. Over time, EPA expanded the national ombudsman's jurisdiction to include Superfund<sup>2</sup> and other hazardous waste programs managed by the Office of Solid Waste and Emergency Response and, by March 1996, EPA had designated ombudsmen in each of its 10 regional offices. While the national ombudsman's activities ranged from providing information to investigating the merits of complaints, in recent years, the ombudsman played an increasingly prominent role through his investigations of citizen complaints referred by Members of Congress. Legislation now pending before the Congress would reauthorize an office of the ombudsman within EPA.<sup>3</sup>

In November 2001, the EPA Administrator announced that the ombudsman function would be reorganized, effective in January 2002.<sup>4</sup> Specifically, the agency announced that the national ombudsman would be relocated from the Office of Solid Waste and Emergency Response to the Office of Inspector General (OIG) and would address concerns across the spectrum of EPA programs, not just hazardous waste programs. The agency also retained the ombudsmen located in its regional offices. In response to a request letter from Representative Diana DeGette raising concerns about placing the national ombudsman within EPA's OIG, we

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<sup>1</sup>The Resource Conservation and Recovery Act governs the management of solid and hazardous waste.

<sup>2</sup>The Superfund program was established under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to clean up highly contaminated hazardous waste sites.

<sup>3</sup>See S. 606 and H.R. 1431, *The Ombudsman Reauthorization Act of 2001*.

<sup>4</sup>The transfer of the ombudsman function to EPA's Office of Inspector General actually took place on April 13, 2002, following the dismissal by a federal district court of a legal challenge to the reorganization.

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have recently initiated work to examine various issues related to the reorganization.

My testimony today, which is based on our 2001 report on EPA's ombudsman<sup>5</sup> and on the work now under way,

- describes the professional standards for independence and other key factors relevant to ombudsmen, including those located within federal agencies; and
- provides our preliminary observations on issues raised by the reorganization of EPA's ombudsman function.

For our 2001 report, we examined relevant standards of practice, including those published by the American Bar Association (ABA), The Ombudsman Association, and the U.S. Ombudsman Association. We also looked at four federal agencies whose ombudsmen deal with inquiries from the public: the Agency for Toxic Substances and Disease Registry (an agency of the Department of Health and Human Services), the Federal Deposit Insurance Corporation, the Food and Drug Administration, and the Internal Revenue Service. In preparing this testimony, we met with, and obtained information from, key EPA officials involved in the reorganization of the agency's ombudsman function. However, because the agency has not yet developed detailed operating policies and procedures or an official description of the national ombudsman position within the OIG, and because we have only recently initiated work related to the reorganization, our observations are preliminary.

In summary:

- Although there are no federal requirements or standards specific to the operation of ombudsman offices, several professional organizations have published standards of practice relevant to ombudsmen who deal with inquiries from the public. These standards incorporate the core principles of independence, impartiality, and confidentiality. For example, an effective ombudsman must have both actual and apparent independence from any person who may be the subject of a complaint or inquiry. According to ABA guidelines, key indicators of independence include a

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<sup>5</sup>U.S. General Accounting Office, *Hazardous Waste: EPA's National and Regional Ombudsmen Do Not Have Sufficient Independence*, [GAO-01-813](#) (Washington, D.C.; July 27, 2001).

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budget funded at a level sufficient to carry out the ombudsman's responsibilities; the ability to spend funds independent of any approving authority; and the power to appoint, supervise, and remove staff. The Ombudsman Association's standards of practice define independence as functioning independent of line management, and advocate that the ombudsman report to the highest authority in the organization. Impartiality requires ombudsmen to conduct inquiries and investigations in a manner free from initial bias and conflicts of interest. Confidentiality requires, with some exceptions, that ombudsmen not disclose, and not be required to disclose, any information provided in confidence. While federal agencies face some legal and practical constraints in implementing some aspects of these standards, ombudsmen at the federal agencies we reviewed for our 2001 report reflected aspects of the standards. For example, at the Federal Deposit Insurance Corporation, the Food and Drug Administration, and the Internal Revenue Service, the ombudsman's office had its own budget and reported directly to the head of the agency.

- If EPA intends to have an ombudsman function that is consistent with the way the position is typically defined in the ombudsman community, placing the national ombudsman within the OIG does not achieve that objective. Specifically, the role of an ombudsman typically includes program operating responsibilities, such as helping to informally resolve program-related issues and mediating disagreements between the agency and the public. Including these responsibilities in the national ombudsman's role within the OIG would likely conflict with the Inspector General Act, as amended, which prohibits the transfer of program operating responsibilities to the Inspector General; yet, omitting these responsibilities would result in establishing an "ombudsman" that is not fully consistent with the function as defined within the ombudsman community. Further, while EPA's reorganization removes the national ombudsman from the Office of Solid Waste and Emergency Response—whose programs the ombudsman is charged with investigating—it may not result in a degree of structural or functional independence that is consistent with professional standards for ombudsmen for several reasons.
- The national ombudsman, as the position is currently envisioned, still will not be able to exercise independent control over the budget and staff resources needed to implement the function. According to EPA, authority for budget and staffing for the national ombudsman function will rest with the Assistant Inspector General for Congressional and Public Liaison.
- Prior to the reorganization, the national ombudsman could independently determine which cases to pursue; however, according to

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EPA, the Inspector General has the overall responsibility for the work performed by the Office, and no single staff member—including the national ombudsman—has the authority to select and prioritize his or her own caseload independent of all other needs.

- In addition, the reorganization does not appear to address concerns we raised in our 2001 report about the independence of the regional ombudsmen, whose position is generally seen as a collateral duty within EPA. They will continue to have a dual role in fulfilling some ombudsman responsibilities while also serving in line management positions, primarily within the Superfund program.

Finally, placing the ombudsman in the OIG could affect the activities of the Inspector General; for example, the OIG could no longer independently audit or investigate the ombudsman, as the OIG can at other federal agencies where the ombudsman function and the OIG are separate entities.

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## Relevant Professional Standards for Ombudsmen

Through the impartial and independent investigation of citizens' complaints, federal ombudsmen help agencies be more responsive to the public, including people who believe that their concerns have not been dealt with fully or fairly through normal channels. Ombudsmen may recommend ways to resolve individual complaints or more systemic problems, and may help to informally resolve disagreements between the agency and the public.

While there are no federal requirements or standards specific to the operation of federal ombudsman offices,<sup>6</sup> the Administrative Conference of the United States recommended in 1990 that the President and the Congress support federal agency initiatives to create and fund an external ombudsman in agencies with significant interaction with the public.<sup>7</sup> In addition, several professional organizations have published relevant standards of practice for ombudsmen. Both the recommendations of the

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<sup>6</sup>The federal Interagency Alternative Dispute Resolution Working Group will be developing guidance on standards of practice for federal ombudsmen, as recommended in a GAO report entitled, *Human Capital: The Role of Ombudsmen in Dispute Resolution*, [GAO-01-466](#) (Washington, D.C.; Apr. 13, 2001).

<sup>7</sup>The Administrative Conference of the United States was an independent advisory agency in the executive branch that issued recommendations and statements on the improvement of the federal administrative process. The agency was terminated by the Treasury, Postal Service, and General Government Appropriations Act for fiscal year 1996.

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Administrative Conference of the United States and the standards of practice adopted by various ombudsman associations incorporate the core principles of independence, impartiality (neutrality), and confidentiality. For example, the ABA's standards<sup>8</sup> define these characteristics as follows:

- Independence—An ombudsman must be and appear to be free from interference in the legitimate performance of duties and independent from control, limitation, or penalty by an officer of the appointing entity or a person who may be the subject of a complaint or inquiry.
- Impartiality—An ombudsman must conduct inquiries and investigations in an impartial manner, free from initial bias and conflicts of interest.
- Confidentiality—An ombudsman must not disclose and must not be required to disclose any information provided in confidence, except to address an imminent risk of serious harm. Records pertaining to a complaint, inquiry, or investigation must be confidential and not subject to disclosure outside the ombudsman's office.

Relevant professional standards contain a variety of criteria for assessing an ombudsman's independence, but in most instances, the underlying theme is that an ombudsman should have both actual and apparent independence from persons who may be the subject of a complaint or inquiry. According to ABA guidelines, for example, a key indicator of independence is whether anyone subject to the ombudsman's jurisdiction can (1) control or limit the ombudsman's performance of assigned duties, (2) eliminate the office, (3) remove the ombudsman for other than cause, or (4) reduce the office's budget or resources for retaliatory purposes. Other factors identified in the ABA guidelines on independence include a budget funded at a level sufficient to carry out the ombudsman's responsibilities; the ability to spend funds independent of any approving authority; and the power to appoint, supervise, and remove staff. The Ombudsman Association's standards of practice define independence as functioning independent of line management; they advocate that the ombudsman report to the highest authority in the organization.

According to the ABA's recommended standards, "the ombudsman's structural independence is the foundation upon which the ombudsman's

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<sup>8</sup>To help develop the standards, ABA's Sections of Administrative Law and Regulatory Practice and Dispute Resolution appointed a steering committee, which included representatives from several ombudsman associations: the Coalition of Federal Ombudsmen, The Ombudsman Association, the U.S. Ombudsman Association, and the University and College Ombuds Association.

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impartiality is built.” One aspect of the core principle of impartiality is fairness. According to an article published by the U.S. Ombudsman Association on the essential characteristics of an ombudsman, an ombudsman should provide any agency or person being criticized an opportunity to (1) know the nature of the criticism before it is made public and (2) provide a written response that will be published in whole or in summary in the ombudsman’s final report.<sup>9</sup>

In addition to the core principles, some associations also stress the need for accountability and a credible review process. Accountability is generally defined in terms of the publication of periodic reports that summarize the ombudsman’s findings and activities. Having a credible review process generally entails having the authority and the means, such as access to agency officials and records, to conduct an effective investigation. The ABA recommends that an ombudsman issue and publish periodic reports summarizing the findings and activities of the office to ensure its accountability to the public. Similarly, recommendations by the Administrative Conference of the United States regarding federal ombudsmen state that they should be required to submit periodic reports summarizing their activities, recommendations, and the relevant agency’s responses.

Federal agencies face legal and practical constraints in implementing some aspects of these standards because the standards were not designed primarily with federal agency ombudsmen in mind. However, ombudsmen at the federal agencies we reviewed for our 2001 report reflected aspects of the standards. We examined the ombudsman function at four federal agencies in addition to EPA and found that three of them—the Federal Deposit Insurance Corporation, the Food and Drug Administration, and the Internal Revenue Service—had an independent office of the ombudsman that reported to the highest level in the agency, thus giving the ombudsmen structural independence.<sup>10</sup> In addition, the ombudsmen at these three agencies had functional independence, including the authority to hire, supervise, discipline, and terminate their staff, consistent with the

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<sup>9</sup>Gottelher, Dean M. and Hostina, Michael, “Essential Characteristics of a Classical Ombudsman” (U.S. Ombudsman Association, 1998), <http://www.usombudsman.org/References/Essential.pdf>, (downloaded June 19, 2001).

<sup>10</sup>For example, the ombudsmen from the Food and Drug Administration and the Internal Revenue Service each reported to the Office of the Commissioner in their respective agencies.

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authority granted to other offices within their agencies. They also had control over their budget resources. The exception was the ombudsman at the Agency for Toxic Substances and Disease Registry, who did not have a separate office with staff or a separate budget. This ombudsman reported to the Assistant Administrator of the agency instead of the agency head.

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## Issues Raised by EPA's Reorganization of the Ombudsman Function

In our July 2001 report, we recommended, among other things, that EPA modify its organizational structure so that the function would be located outside of the Office of Solid Waste and Emergency Response, whose activities the national ombudsman was charged with reviewing. EPA addresses this recommendation through its placement of the national ombudsman within the OIG, where the national ombudsman will report to a newly-created position of Assistant Inspector General for Congressional and Public Liaison. OIG officials also told us that locating the national ombudsman function within the OIG offers the prospect of additional resources and enhanced investigative capability. According to the officials, the national ombudsman will likely have a small permanent staff but will also be able to access OIG staff members with expertise in specific subject matters, such as hazardous waste or water pollution, on an as-needed basis. Further, OIG officials anticipate that the ombudsman will adopt many of the office's existing recordkeeping and reporting practices, which could help address the concerns we noted in our report about accountability and fairness to the parties subject to an ombudsman investigation.

Despite these aspects of EPA's reorganization, several issues merit further consideration. First and foremost is the question of intent in establishing an ombudsman function. The term "ombudsman," as defined within the ombudsman community, carries with it certain expectations. The role of an ombudsman typically includes program operating responsibilities, such as helping to informally resolve program-related issues and mediating disagreements between the agency and the public. Assigning these responsibilities to an office within the OIG would conflict with statutory restrictions on the Inspector General's activities. Specifically, the Inspector General Act, as amended, prohibits an agency from transferring any function, power, or duty involving program responsibilities to its OIG.<sup>11</sup> However, if EPA omits these responsibilities from the position within the OIG, then it will not have established an "ombudsman" as the

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<sup>11</sup>See 5 U.S.C. Appx. 3 § 9(a)(2).



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function is defined within the ombudsman community. In our April 2001 report, we noted that some federal experts in dispute resolution were concerned that among the growing number of federal ombudsman offices there are some individuals or activities described as “ombuds” or “ombuds offices” that do not generally conform to the standards of practice for ombudsmen.

A related issue is that ombudsmen generally serve as a key focal point for interaction between the government, or a particular government agency, and the general public. By placing the national ombudsman function within its OIG, EPA appears to be altering the relationship between the function and the individuals that make inquiries or complaints. Ombudsmen typically see their role as being responsive to the public, without being an advocate. However, EPA’s reorganization signals a subtle change in emphasis: OIG officials see the ombudsman function as a source of information regarding the types of issues that the OIG should be investigating. Similarly, rather than issue reports to complainants, OIG officials expect that the national ombudsman’s reports will be addressed to the EPA Administrator, consistent with the reporting procedures for other OIG offices. The officials told us that their procedures for the national ombudsman function, which are still being developed, could provide for sending a copy of the final report or a summary of the investigation to the original complainant along with a separate cover letter when the report is issued to the Administrator.

Based on the preliminary information available from EPA, the reorganization raises other issues regarding the consistency of the agency’s ombudsman function with relevant professional standards. For example, under EPA’s reorganization, the national ombudsman will not be able to exercise independent control over budget and staff resources, even within the general constraints that are faced by federal agencies. According to OIG officials, the national ombudsman will have input into the hiring, assignment, and supervision of staff, but overall authority for staff resources and the budget allocation rests with the Assistant Inspector General for Congressional and Public Liaison. OIG officials pointed out that the issue our July 2001 report raised about control over budget and staff resources was closely linked to the ombudsman’s placement within the Office of Solid Waste and Emergency Response. The officials believe that once the national ombudsman function was relocated to the OIG, the inability to control resources became much less significant as an obstacle to operational independence. They maintain that although the ombudsman is not an independent entity within the OIG, the position is independent by virtue of the OIG’s independence.

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Despite the OIG's argument, we note that the national ombudsman will also lack authority to independently select and prioritize cases that warrant investigation. According to EPA, the Inspector General has the overall responsibility for the work performed by the OIG, and no single staff member—including the ombudsman—has the authority to select and prioritize his or her own caseload independent of all other needs. Decisions on whether complaints warrant a more detailed review will be made by the Assistant Inspector General for Congressional and Public Liaison in consultation with the national ombudsman and staff. EPA officials are currently reviewing the case files obtained from the former ombudsman, in part to determine the anticipated workload and an appropriate allocation of resources. According to OIG officials, the national ombudsman will have access to other OIG resources as needed, but EPA has not yet defined how decisions will be made regarding the assignment of these resources. Under the ABA guidelines, one measure of independence is a budget funded at a level sufficient to carry out the ombudsman's responsibilities. However, if both the ombudsman's budget and workload are outside his or her control, then the ombudsman would be unable to assure that the resources for implementing the function are adequate. Ombudsmen at other federal agencies must live within a budget and are subject to the same spending constraints as other offices within their agencies, but they can set their own priorities and decide how their funds will be spent.

EPA has also not yet fully defined the role of its regional ombudsmen or the nature of their relationship with the national ombudsman in the OIG. EPA officials told us that the relationship between the national and regional ombudsmen is a "work in progress" and that the OIG will be developing procedures for when and how interactions will occur. Depending on how EPA ultimately defines the role of its regional ombudsmen, their continued lack of independence could remain an issue. In our July 2001 report, we concluded that the other duties assigned to the regional ombudsmen—primarily line management positions within the Superfund program—hamper their independence. Among other things, we cited guidance from The Ombudsman Association, which states that an ombudsman should serve "no additional role within an organization" because holding another position would compromise the ombudsman's neutrality. According to our discussions with officials from the Office of Solid Waste and Emergency Response and the OIG, the investigative aspects of the ombudsman function will be assigned to the OIG, but it appears that the regional ombudsmen will respond to inquiries and have a role in informally resolving issues between the agency and the public before they escalate into complaints about how EPA operates. For the

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time being, EPA officials expect the regional ombudsmen to retain their line management positions.<sup>12</sup>

Finally, including the national ombudsman function within the Office of the Inspector General raises concerns about the effect on the OIG, even if EPA defines the ombudsman's role in a way that avoids conflict with the Inspector General Act. By having the ombudsman function as a part of the OIG, the Inspector General could no longer independently audit and investigate that function, as is the case at other federal agencies where the ombudsman function and the OIG are separate entities. As we noted in a June 2001 report on certain activities of the OIG at the Department of Housing and Urban Development, under applicable government auditing standards the OIG cannot independently and impartially audit and investigate activities it is directly involved in.<sup>13</sup>

A related issue concerns situations in which the national ombudsman receives an inquiry or complaint about a matter that has already been investigated by the OIG. For example, OIG reports are typically transmitted to the Administrator after a review by the Inspector General. A process that requires the Inspector General to review an ombudsman-prepared report that is critical of, or could be construed as reflecting negatively on, previous OIG work could pose a conflict for the Inspector General. OIG officials are currently working on detailed procedures for the national ombudsman function, including criteria for opening, prioritizing, and closing cases, and will have to address this issue as part of their effort.

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In conclusion, Mr. Chairman, we believe that several issues need to be considered in EPA's reorganization of its ombudsman function. The first is perhaps the most fundamental—that is, the need to clarify the intent. We look forward to working with members of the Committee as you consider the best way of resolving these issues.

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<sup>12</sup>EPA officials told us that they are piloting a new approach in three regional offices in which the ombudsmen will be increasing their level of involvement in the ombudsman role, although the individuals will continue to have other responsibilities.

<sup>13</sup>U.S. General Accounting Office, *HUD Inspector General: Actions Needed to Strengthen Management and Oversight of Operation Safe Home*, GAO-01-794 (Washington, D.C.: June 29, 2001)

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This concludes my prepared statement. I would be happy to respond to any questions that you or other Members of the Committee may have at this time.

**Contact and Acknowledgments**

For further information, please contact John B. Stephenson at (202) 512-3841. Individuals making key contributions to this testimony included Ellen Crocker, Rich Johnson, Les Mahagan, and Cynthia Norris.