

*The*  
**Ombudsman**  
A S S O C I A T I O N

October 21, 2002

VIA FACSIMILE (312) 988-5578

Mr. James H. Cheek, III  
Chair, Task Force on Corporate Responsibility  
C/O Sue Daly  
American Bar Association  
Section of Business Law  
750 North Lake Shore Drive  
Chicago, Illinois 60611

Re: Response to Request for Comment on Preliminary Report of the American Bar Association Task Force on Corporate Responsibility

Dear Mr. Cheek:

On behalf of The Ombudsman Association (TOA), I would like to commend the American Bar Association for its work in addressing issues of corporate responsibility. TOA would like to offer the following comment on the July 16, 2002 Preliminary Report by the American Bar Association Task Force on Corporate Responsibility (Task Force). Specifically, TOA would like to provide comment on Sec. II(B)5, on page 20, which references the creation of an Ombudsman.

The existing paragraph states as follows:

The Corporate Governance Committee (or other committee consisting entirely of independent directors) should recommend for adoption by the full Board of Directors a corporate code of ethics and conduct that includes the establishment of a mechanism (such as a hot line, an ombudsman or compliance certification) through which information concerning violations of law by the corporation or its management personnel, or breaches of duty to the corporation which could have a material effect on the corporation, not appropriately addressed by corporate officers, can be freely transmitted to more senior officers and, if necessary, to the Audit or Corporate Governance Committee. In any investigation by the Board of Directors (or any committee) of such violation or breach of duty, the Board (or committee) should have the authority to retain independent legal counsel.

Based on the collective, extensive experience of our Corporate, Governmental and Academic Ombudsmen, TOA is pleased to see that two of the values of establishing an Ombudsman Office—as a means to uncover illegal conduct and breaches of duty—has been recognized by the Task Force. While we strongly support the ideal contribution an Organizational Ombudsman can make to an organization, we would respectfully request the following three clarifications in Sec. II(B)(5) to strengthen this inclusion and significantly enhance the overall report.

First, as you may be aware, in August 2001, the ABA adopted “Standards for the Establishment and Operation of Ombuds Offices” (ABA Standards), setting forth the guidelines for establishing Ombudsman Offices. TOA recommends that the Task Force include language in Sec. II(B)(5) to incorporate and refer to ABA Standards for how one should define an Organizational Ombudsman.

Second, the ABA Standards differentiate between various types of Ombudsmen. In the context of corporate responsibility, the establishment of an Organizational Ombudsman is the model that is appropriate for the Task Force’s report. Therefore, the word “ombudsman” should be replaced with the term “organizational ombudsman.”

Finally, TOA strongly feels that reference to the creation of an Organizational Ombudsman should be stated separately from those of compliance certification and hot lines. An Organizational Ombudsman is a part of an organization’s *informal system* in that it supplements existing formal mechanisms and guarantees the confidentiality of the person who brought forth the concern (inquirer). In this capacity, an Organizational Ombudsman provides useful guidance on options for the inquirer and a variety of resolution steps available in the organization. An Organizational Ombudsman can also carry information forward while protecting the confidentiality of the inquirer, thus helping protect the employee from retaliation.

In contrast, compliance functions are a part of the *formal system*, and they cannot always guarantee full confidentiality. In addition, formal systems inhibit the early surfacing of wrongdoing unless reprisal protections are strong and reliable. As part of a formal system, a compliance officer’s knowledge of possible wrongdoing constitutes notice to the organization and an inquirer would lose control over how their concern is resolved. The compliance officer would also have a duty to act to protect the organization. Such formality, coupled with the lack of confidentiality, has a chilling effect on an employee’s willingness to report possible misconduct.

While a hotline may provide a useful alternative to surface concerns, an Organizational Ombudsman has the authority to conduct a fact-finding, provide the inquirer with options, and facilitate resolutions. Moreover, an Organizational Ombudsman has intimate knowledge of the formal and informal systems within the organization for employees who wish to report wrongdoing but need more information or reassurance in order to do so. Therefore, as part of an organization's corporate governance plan, an Organizational Ombudsman offers an early warning capability, a resolution capability, an option for employees who want to raise concerns without fear of retaliation, and a mitigating factor in risk.

Based on the collective experience of professional Organizational Ombudsmen, we submit that employees are often initially reluctant to report potentially illegal and wrongful conduct either by co-workers, supervisors or managers. Barriers to coming forward include: fear of retaliation, fear of loss of relationships, fear of job loss, uncertainty about the facts, and lack of faith in the system. An Organizational Ombudsman provides a unique enclave to overcome these barriers.

An Organizational Ombudsman practicing to TOA and ABA Standards is a neutral, confidential conduit for information, and is the only resource that can assure the anonymity of the inquirer while being able to surface the issue. The absolute confidentiality of an Organizational Ombudsman fosters an increase in reporting of any illegal conduct.

An Organizational Ombudsman:

- ~ Provides a confidential outlet and an avenue for early detection of wrongful acts while eliminating fear of retribution.

- ~ As a senior independent member of the organization, uses business judgment, institutional knowledge and management maturity to probe and identify serious issues, such as illegal acts, so that these issues may be surfaced to and handled by the appropriate party in the corporation.

- ~ Supplements but does not take the place of ethics, compliance officers or 1-800 hot lines.

- ~ Drives the systemic change to correct patterns and practices of wrongdoing.

In summary, we support the inclusion of a reference to an Organizational Ombudsman in the preliminary report and believe that Organizational Ombudsmen are a critical part of any strategy to detect and prevent criminal activity and breaches of duty without the fear of retribution. We recommend that the Task Force amend Sec. II(B)(5) to: 1) reference the ABA Standards, 2) replace “ombudsman” with “organizational ombudsman,” and 3) distinguish the Organizational Ombudsman from compliance certification and hot lines.\*

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\* PROPOSED WORDING

The Corporate Governance Committee (or other committee consisting entirely of independent directors) should recommend for adoption by the full Board of Directors a corporate code of ethics and conduct that includes the establishment of both formal and informal mechanisms for surfacing alleged violations. Formal mechanisms could include compliance certifications or functions. Informal mechanisms should include an Organizational Ombudsman System which establishes an Organizational Ombudsman in accordance with the standards, guidelines and code of ethics as outlined by both the American Bar Association and The Ombudsman Association. Additionally, programs such as a hot line could be helpful as well. By an appropriate balance of formal and informal mechanisms, information concerning violations of law by the corporation or its management personnel, or breaches of duty to the corporation which could have a material effect on the corporation, not appropriately addressed by corporate officers, can be freely transmitted to more senior officers and, if necessary, to the Audit or Corporate Governance Committee. In any investigation by the Board of Directors (or any committee) of such violation or breach of duty, the Board (or committee) should have the authority to retain independent legal counsel.

I want to thank you for this opportunity to provide comments on the Preliminary Report. Please feel free to contact me if there are any questions concerning these comments or if TOA can be of any further assistance. In addition, please note that representatives of TOA will be appearing before the Task Force on October 25, 2002, from 1:30 p.m.-2:00 p.m.

Sincerely,

A handwritten signature in cursive script that reads "John S. Barkat". The signature is written in black ink and is positioned above a horizontal line.

John S. Barkat, Ph.D.  
President, The Ombudsman Association

Cc: TOA Board of Directors