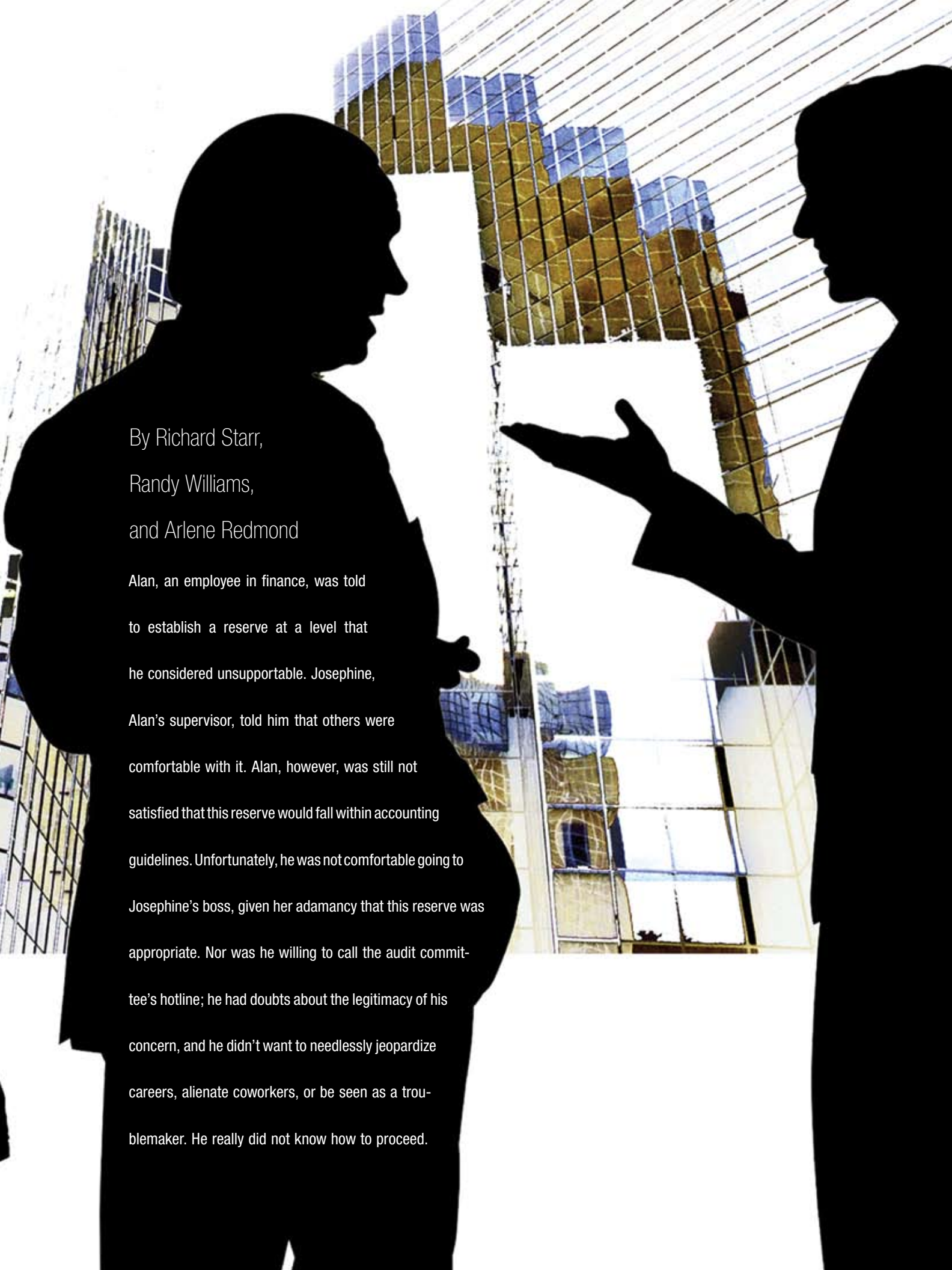


The background of the entire page is a collage of architectural blueprints and technical drawings. Overlaid on this is a black silhouette of a man and a woman in business attire shaking hands. The man is on the left, and the woman is on the right. The text is overlaid on the central part of the image.

When Formal Channels Aren't Enough:

The Advantages  
of an

# Ombouuds Program

The image features two men in black silhouettes, dressed in suits, standing in profile and facing each other as if in conversation. They are positioned in front of a large, modern building with a glass facade. The building's windows reflect the sky and other parts of the structure, creating a complex grid of light and dark lines. The overall scene is set against a bright, slightly overexposed background, emphasizing the dark shapes of the men and the architectural details of the building.

By Richard Starr,  
Randy Williams,  
and Arlene Redmond

Alan, an employee in finance, was told to establish a reserve at a level that he considered unsupportable. Josephine, Alan's supervisor, told him that others were comfortable with it. Alan, however, was still not satisfied that this reserve would fall within accounting guidelines. Unfortunately, he was not comfortable going to Josephine's boss, given her adamancy that this reserve was appropriate. Nor was he willing to call the audit committee's hotline; he had doubts about the legitimacy of his concern, and he didn't want to needlessly jeopardize careers, alienate coworkers, or be seen as a troublemaker. He really did not know how to proceed.

### Outcome 1:

Alan does nothing. However, he was right about the reserve level; an SEC investigation was launched into possible improper accounting. The reserve is eventually reversed, and the financials are restated. The company gets sued by investors; Josephine is fired.

### Outcome 2:

Alan is comfortable going to the ombudsman (ombuds) because of the program's confidentiality, neutrality, and independence. He knows he could have an informal, off-the-record conversation with the ombuds, who is a seasoned executive and knows the culture and practices of the company. The ombuds helped him generate and evaluate options for resolving the matter: (1) having the ombuds go to Josephine's boss; (2) having the controller or auditor issue a memo about accounting for reserves to all finance employees (either Alan or the ombuds could have that conversation); (3) merely refusing to make the entry; or (4) leaving the company (which would not solve the root problem). Alan decided to ask the ombuds to have a conversation with the chief auditor, keeping Alan's identity confidential. In that conversation, the ombuds and chief auditor brainstormed about if the memo idea should be pursued or if there were other possibilities. As a result, the issue was raised to the appropriate formal channels and was resolved before the entry was made and potentially serious damage was done to the company.

Our story about Alan and Josephine illustrates the importance of giving your employees (and your other company stakeholders) a safe place to come and informally discuss problems. To provide that kind of safe place, many major corporations have complemented their formal channels with informal ombuds programs. Some of these corporations have established ombuds programs proactively, to preserve an ethical environment; others, in response to mandates and ethics problems. Corporations with programs include, among others, AllianceBernstein, American Express, Bristol-Myers Squibb, Chevron, Coca-Cola Company, Coca-Cola Enterprises, Dell, Eaton Corporation, General Electric, Halliburton, Mars Incorporated, New York Life, Scotia Bank, Shell Oil, The Hartford, Putnam Investments, Tyco, and United Technologies Corporation.



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For more information, please see [www.redmondwilliamsassoc.com](http://www.redmondwilliamsassoc.com).

We will outline the role of an ombuds office and the advantages it can provide while offering some tips on how you might set one up—and how it encourages your employees to give you the advance warning that you need.

## A Partial Solution: Formal Channels

In-house attorneys know that their organizations need an issue management process that helps the company successfully identify and address potential and actual malfeasance, unfair treatment, and other unethical behaviors. Thus, over the past several years, organizations have concentrated on formal programs such as: compliance and ethics, codes of conduct, financial controls, and whistleblower and nonretaliation policies, to name only a sampling. These formal programs take place via a number of formal channels, such as legal, compliance, HR, audit, and line management.

These formal channels have critical issue management roles. How else could you design execute programs and policies, promptly evaluate and formally investigate issues, escalate issues to appropriate senior leaders, document events, decide outcomes, create formal reports, and accept legal notice on behalf of the company? But formal programs, as important as they are, are simply not enough. Remember Alan from our introduction: What happens when an employee is afraid to come forward?

## Employees' Reluctance to Report

Research has shown that even with formal ethics and compliance programs, employees are sometimes slow to report unethical behavior in a timely manner or before it becomes more serious or public, putting at risk the corporation's reputation and/or assets. The Ethics Resource Center's *2005 National Business and Ethics Survey* shows that over the last two years, although the number of formal programs has significantly increased, so has the percentage of employees who observed unethical behavior—from 46 percent to 52 percent. In addition, the percentage of employees observing such behavior and not reporting it increased from 35 percent to 45 percent. And we aren't talking about trivial wrongdoing going unreported. The types of unethical behavior observed were significant, and included discrimination,

abusive behavior, falsification of financial records, and giving or receiving bribes, to name a few.

Why didn't the employees report? According to that same survey, the reasons included the belief that no action would be taken, fear of retaliation from management or coworker, fear of lack of confidentiality, belief someone else would report, or ignorance about whom to contact. Louise Parent, EVP and general counsel at American Express, commented on why they decided to institute an ombuds program.

"In the early '90s, our new CEO wanted to ensure we had the right culture and processes in place to avoid legal or ethical problems and to protect the brand. He put a cross-functional team together, including people from audit, legal, HR, security, line management, and other departments, and challenged them to find the best way to prevent a scandal. They researched, discussed, and in the end, recommended establishing an ombuds office. They and the CEO believed that employees closest to the scene are likeliest to see any wrongdoing, and an ombuds program would provide an effective method to encourage employees to ask questions and escalate concerns early without the fear of reprisal. Our Code of Conduct institutionalizes this approach via an ombuds program."

The bottom line is that wrongdoing can go undetected if an organization has only formal channels, places of notice, investigators, and record-keepers. An ombuds office can reduce this compliance gap by providing a safe place to seek guidance early and without the fear of retaliation. It does not replace formal channels, but complements them by providing the kind of safe, confidential space for discussion that by their nature, formal channels cannot

provide. In proprietary surveys conducted by financial services and industrial manufacturing firms' ombuds offices, they asked employees who used ombuds services what they would have done if there were no office. Between 28 and 35 percent would not have surfaced the issue; 13 to 15 percent would not have surfaced it as early; and 8 to 10 percent would have left the company.

The key to creating an effective ombuds office is therefore to ensure that the process is:

- independent,
- neutral,
- informal and completely voluntary on the part of the employee and, above all,
- confidential.

Mark Manley, SVP, deputy general counsel and chief compliance officer at AllianceBernstein, describes the complementary role of the ombuds program.

"We have good, fair, formal channels that promptly evaluate and investigate issues, escalate them to appropriate senior management, create records, document events, report, and ensure that there is resolution and that the individuals who brought issues forward are protected from retaliation and are aware of the resolution. The ombudsman function does not replace the roles of compliance or other formal channels. The ombudsman is a completely neutral, confidential, informal, and independent resource for employees who are initially uncomfortable going to a formal channel, who do not know where to take an issue or how to take it forward, who do not understand the implications of an issue, or who want to remain anonymous. The ombuds helps these employees generate options to resolve their issues, and helps ensure that issues are brought to the most appropriate resource at Alliance. That saves us all time and effort and helps all of us to be smarter and more efficient. The ombuds acts as a communications channel between an employee and formal channels. She can provide employees with information that may answer their questions about policies and procedures . . . and acts as a listening post."

## In-house Counsel on Working with Ombuds

John Parauda is managing counsel, Employment Law Group American Express. He describes a complementary working relationship with the ombuds office. "The ombuds have strict bounds of confidentiality; however, within their bounds, they are an effective listening post for employee issues and trends. They are successful in getting employees to feel comfortable in getting issues raised to legal, compliance, and other formal channels. We share mutually useful information, respecting confidentiality, about employee issues and trends and alert each other to events that may trigger control, compliance, or ethics issues. We can use these observations to help us predict where we need to strengthen processes."

## An Effective Ombuds Office

To be effective, an ombuds must have some independence from the company as a whole. Otherwise, a troubled employee will simply see the ombuds as no different from official channels offered by the company and will have no additional incentive to come forward and report the problem. To ensure this independence:

- The ombuds generally reports directly to the chairman/CEO and Board.
- The ombuds' role and independence is clearly stated in a job description, employee contract, charter, or Board

resolution. (For an example, see “The Alliance Capital (now AllianceBernstein) Charter,” on p. 84.)

- The ombuds operates by recognized professional standards and a code of ethics promulgated by the International Ombudsman Association ([www.ombudsassociation.org](http://www.ombudsassociation.org)).
- The ombuds has external counsel who preferably does not represent the company, or who has taken appropriate precautions to ensure that any representation of the company by his firm will not conflict with his representation of the ombuds.

Of course, independence is only meaningful if it can stand up to a challenge. If a litigant, regulator, or other

third party requests a file or information from an ombuds office or tries to get testimony from the ombuds regarding conversations that took place in the office, the ombuds can and should (with the aid of its external counsel) resist the attempt in court as necessary.

### Neutral and Informal Guidance

An ombuds is a neutral party with whom an employee can have an informal, off-the-record conversation and seek guidance *before* choosing or committing to a resolution option. The employee maintains control. An ombuds should therefore have a holistic understanding of all the company’s programs, policies, and resources, in order to help employees choose the best options for addressing issues.

One consequence of this neutrality, and most especially of this informality, is that ombuds do not keep formal records; they do not represent any constituency within the organization, but advocate only for fair process. Ombuds do not keep records on the identity of the individuals using the office or dates of meetings; they avoid a paper trail that could be created by having an employee sign anything and shred their notes as soon as they are no longer needed for actively working the case. The only records that ombuds do keep are records with generalized and nonconfidential information on demographics, types of issues, and resolutions of issues, to enable root cause analysis and trend reporting. (See “What? No Memo to the File?” on p. 74.)

Another consequence is that ombuds do not do *formal* investigation; they will, however, do *informal* fact finding to help identify appropriate and effective options for getting the issue addressed and potential issue prevention activities.

### Complete Confidentiality

Confidentiality is critical for employees to feel comfortable bringing forward sensitive issues. Like the requirement of independence, the requirement of confidentiality has to be strong enough to withstand even legal challenge—and, in fact, a number of jurisdictions have recognized a common-law confidentiality privilege for ombuds’ communications under Federal Rule of Evidence 501 or a state law analogue. It is important to note that this confidentiality obligation goes both ways. Clearly, the ombuds must keep all communications and case information confidential; what is less obvious, perhaps, is that an ombuds office should instruct each employee to maintain confidentiality about the visit to the ombuds, stressing that confidentiality *belongs to the ombuds office* and is not that of the employee to give away. (See “What? No Memo to the File?” on p. 74.)

The exception to this rule of confidentiality can arise if there is a serious and imminent threat of physical violence (e.g., a bomb threat) or of material harm to the corpora-

## ACC International Resources on . . . Compliance

### Docket Articles:

- James R. Beyer and Johan Lubbe, “Clash of the Titans: Complying with US Whistleblowing Requirements While Respecting EU Privacy Rights,” *ACC Docket* 24, no. 4 (April 2006) 22–36, [www.acca.com/resource/v7105](http://www.acca.com/resource/v7105).
- Gregory R. Watchman, “Sarbanes-Oxley Whistleblowers: Avoiding the Nightmare Scenario,” *ACC Docket* 24 no. 4 (April 2006), [www.acca.com/resource/v7106](http://www.acca.com/resource/v7106).

### Annual Meeting Course Materials:

Program material from the following course at ACC’s 2005 Annual Meeting is available at [www.acca.com/am/05/material.php](http://www.acca.com/am/05/material.php):

- Peter Herbel, “A Comparative Review of Multinational Compliance Programs,” course 509.

### ACC Europe Annual Conference:

- Program materials, “Business Ethics: Implementing a Global Code of Conduct,” (2006), course 101, [www.acca.com/resource/v7270](http://www.acca.com/resource/v7270).

### Webcasts:

The following ACC webcasts are available.

- Whistleblower Anonymous Hotlines and SOX—Dealing with the French and German Decisions (2005), [www.acca.com/resource/v6469](http://www.acca.com/resource/v6469).
- “Protecting sensitive legal advice for international business—the law of privilege and professional secrecy in Europe” (2004), a transcript of an ACC webcast, at [www.acca.com/resource/v102](http://www.acca.com/resource/v102).

tion (e.g., financial malfeasance that could significantly impact the company's reputation or financial well-being). If the employee raises such an issue but decides not to pursue it, an ombuds is obligated to surface the issue (keeping the employee's anonymity, if possible). Ombuds also communicate to formal channels any unethical behavior or actions that they have observed directly.

### Advantages of an Ombuds Program

Ombuds can help get issues to the most direct and appropriate resources. Because their independence and confidentiality inspire employee trust, they can probe to uncover the precise issue to be addressed and potential root causes of problems. Their neutrality enables them in

turn to guide employees through the available options.

An effective ombuds is a seasoned professional, one who thoroughly knows the organization's business strategies, risks, code of conduct, resolution channels, policies, and processes—and knows how best to use those channels and processes. Their experience will also mean that they understand the implications of both the employee's concerns and of the different options for addressing them. Those options (generated and evaluated by the employee and ombuds together) might include: the employee's going to a boss or skip-level boss; a formal channel such as audit or HR; changing jobs; changing their own behavior; having the ombuds take the issue forward, do shuttle diplomacy, or perform an informal mediation; asking the

## What? No Memo to the File?

Most attorneys reading about the ombuds program probably have the same immediate reaction: What? The ombuds keeps no records of the advice given to the employee? How can that be? Although the ombuds isn't necessarily an attorney, the office is still a counselor—without a memo to the file, wouldn't the ombuds feel—well, kind of naked?

But the ombuds' lack of permanent records is in fact crucial to the office's success. It is the essence of the ombuds function that it be an *alternative* to the official channels for whistleblowing, grievance procedures, and the like. No employee is ever obligated to go to an ombuds for help; it is an off-the-record, informal, strictly voluntary process. The ombuds serves no official business purpose for which the keeping of records is necessary; it does not conduct investigations or make management decisions, but only advises the employee and helps the employee explore solutions. If the employee later decides to file a complaint, make use of a hotline, send a letter, or take some other action, an official record will be made at that point. Consequently, the ombuds should have no official business records that would be discoverable in any later litigation—which in turn is crucial to preserving the confidentiality of the advice.

But, you might ask, what if an aggrieved employee later claims that the ombuds gave bad advice, advice that might expose the company to some form of liability—for example, that the ombuds told the employee that she had to tolerate obvious misconduct?

Charles Howard, a partner at Shipman & Goodman LLP in Hartford, CT, who represents many ombuds programs across the country, offers the following observations. "If you want to encourage a culture of breaking down the corporate barriers that often discourage employees from raising tough issues, I

think you need an ombuds program. The best way to minimize disputes about its operation is to make sure that it works well—which means that you must rigorously protect both the informality and the confidentiality of the process. In some ways, the issue is analogous to one that sometimes arises in mediation, another process that is valuable precisely because it is a confidential process that is generally less formal than the other alternatives (e.g., litigation and arbitration). Most US jurisdictions recognize a mediator's privilege not to reveal communications made in the course of the mediation, in order to uphold the public policy of effective dispute resolution. Similarly, in my experience, courts have been willing to recognize a privilege under Federal Rule of Evidence 501 for communications between an ombuds and an employee that is not waivable by the employee alone.\* Of course, not all disputes are litigated in federal court and not all states recognize a 501-type privilege. For that reason, I have argued that the employee's use of the ombuds office creates an implied contract to respect its principles underlying the ombuds office, including the stated policy of confidentiality. Of course, that argument reinforces how important it is to create, describe, and publicize your ombuds office in the right way."

\* American Express Company and United Technologies Corporations are two companies whose ombuds programs have successfully defended the confidentiality of ombuds communications. *Roy v. UTC*, No. H-89-686 (JAC) (D. Conn. May 29, 1990); *Van Martin v. UTC*, No. 95-8389-CIV-Ungaro-Benages (S. D. Fla., July 16, 1996), *affirmed without opinion* 141 F.3d 1188 (11th Cir. 1998); *Smith v. American Express Company*, No. 98-7206-CIV-Jordan (S.D. Fla. January 3, 2000).

## Global Complexities

In global ombuds programs, ombuds must face a host of cultural complexities. It is important to continue to align the program with the institution's core values and code of conduct. The situation described here is illustrative only, but typical of the situations that arise.

**Can Sue tell her boss she thinks he is making a tremendous mistake which could cost the company?**

Not in certain Asian cultures. Coming forward and challenging someone higher up the corporate ladder on strategic issues, or even fraud, waste, and abuse, is a terrifying prospect. It is just not done. In societies that emphasize hierarchy, there is a very high stress on individuals following orders from superiors. Here is where an ombuds can be particularly valuable. First, the ombuds builds a very high level of trust by making personal market visits and building rapport

with all employees through teas, lunches, meetings, info booths, and similar activities. The ombuds explains the role, emphasizing confidentiality and the off-the-record nature of all conversations with the ombuds. The ombuds builds trust through personal communication; this has been shown to be an important element of shifting the culture in Asia so that people will speak with the ombudsman. Often, employees are more comfortable meeting in a place that is not on company grounds. The ombuds also spends significant time gaining the respect and trust of the leaders so that they will sponsor the office, address issues brought to them, and bring forth issues they have observed. As elsewhere in the world, the ombuds can only successfully execute the mission of the ombuds office if all employees are aware of the role and comfortable coming forward.

ombuds to provide coaching and role-playing or provide information; or not doing anything at all.

### **Supporting Legal and Regulatory Compliance**

One of the key advantages of an ombuds program is its ability, as we discussed in the introduction, to “fill the gap” in your issue management program that is all too often caused by employee reluctance to report problems. This function has become particularly critical in recent years with regulatory and legislative changes stressing compliance, such as Sarbox and the US Sentencing Guidelines.

*Sarbanes-Oxley Act.* Sarbox requires audit committees to establish procedures for “the confidential, anonymous submission by employees of the (company) of concerns regarding questionable accounting or auditing matters.” The Act and related SEC rules require companies to disclose whether they have a code of ethics for senior financial officers which is reasonably designed to promote, among other things, the prompt internal reporting of code violations to an appropriate person or persons identified in the code. The Act also makes it a criminal offense to retaliate against or interfere with the employment of someone who provides

truthful information relating to possible federal crimes.

*US Sentencing Guidelines.* The US Sentencing Guidelines reduce penalties for organizations that have “an effective compliance and ethics program.” Revisions to the guidelines in 2004 more closely link ombuds’ capabilities to compliance. Section 8B2.1(b)(5)(C) now provides: “to have and publicize a system, which may include mechanisms that allow for anonymity or *confidentiality*, whereby the organization’s employees and agents may report or *seek guidance* regarding potential or actual criminal conduct without fear of retaliation.” (Emphasis added.) The ombuds program, of course, is the quintessential confidential mechanism for providing guidance to employees on such matters.

### **Organization-wide Change and Issue Prevention**

John B. Phillips, vice president and deputy general counsel at Coca-Cola Enterprises talks about the ombudsman’s role. “Since its inception in 2001, the ombuds office at Coca-Cola Enterprises has played a significant role in helping our company be proactive in identifying employment risks and taking appropriate action to mitigate those risks.

## Best Practices

We recommend the following best practices for an ombuds program:

- Keep the ombuds independent and neutral. Provisions in any employment contract between the company and the ombuds, for example, can state that the ombuds cannot be dismissed for such reasons as maintaining the confidentiality of the office.
- Make it clear that the ombuds office is a strictly voluntary alternative to official channels such as hotlines and grievance procedures.
- Be sure that the program is well-documented with a charter or board resolution, and with other documentation including job descriptions, brochures, websites, and periodical articles. All of these documents should convey a consistent theme:
  - Discussing an issue with the ombuds does not constitute notice to the company.
  - Discussions with the ombuds office are confidential, and the employee as well as the ombuds is obligated to maintain that confidentiality; the ombuds is not an appropriate witness to call in any subsequent legal proceeding.
  - The office operates in accordance with the Code of Ethics and Standards of Practice of the International Ombudsman Association and only the office can waive confidentiality (under the limited exception for imminent risk of serious harm).

Charles Howard, a partner at Shipman & Goodman LLP, adds the following: "I believe that the materials describing the program should consistently state that the office is an independent, neutral, alternate, and confidential resource for employees and that communication with the ombuds does not constitute notice of any claims against the company. Further, it is a good idea to be explicit in stating that the ombuds will resist testifying about confidential communications in any legal or administrative proceedings and that, while no one is required to use the office, those who do will be deemed to have agreed to abide by these principles. If the documentation demonstrates that both management and employees are aware of what the office is and how it operates, it will be much easier for a court, if necessary, to protect the confidentiality of the communications with the ombuds office." (See also "What? No Memo to the File?" on p. 74.)

Although our ombuds acts in an appropriately confidential manner, the informal relationship existing between the ombuds office and our legal department provides a mechanism for routinely talking about recurring problems, possible hotspots, and developing trends within the company. The ombuds office complements our ethics and compliance hotline and our solutions (ADR) program as a "heads-up" tool in our risk mitigation strategy for dealing quickly and effectively with employment concerns."

An ombuds is ideally placed to observe, analyze, and report (while protecting individual confidentiality) to the board on trends in problems being observed by employees (and on trends in employees who come to the ombuds). This can give a company the early warning it needs to improve its control and compliance systems and other processes—before regulators or hostile lawyers come knocking.

For example, in one organization, the ombuds noticed an increase in questions about potential conflicts of interest with vendor contracts in a certain country. The ombuds took this emerging trend to compliance. Compliance did an audit and found no clear policy and a practice of questionable contracts. This gave the company the opportunity to issue a policy outlining procedures (and consequences), train the procurement staff, and set out an action plan for the questionable contracts and those who had secured them. In another example, an ombuds began receiving increasing inquiries regarding personal use of the internet. As it became clear how widely rules and disciplinary actions varied from manager to manager and country to country, the ombuds took the emerging trend to HR and compliance and suggested potential solutions. The result: a global policy on the acceptable use of company PCs and the internet, and an improvement in both morale and productivity.

Another, often-overlooked advantage of an ombuds program is its unique organization-wide view. Whereas the line leaders concentrate primarily on their areas of responsibility in looking for change opportunities, an ombuds can share best practices among units or across the organization. For example, an ombuds began hearing concerns about a pending departmental restructuring. Morale and productivity were declining and attrition increasing.

With its organization-wide knowledge, the ombuds was able to connect that department's leader with the leader of a successful restructuring in another business unit. The latter was able to share change management and communication processes that turned the problem around and helped to make the rest of the restructuring process a success—with the support of the employees involved.

## Being Clear on Confidentiality

Before starting any conversation with an individual coming to its office or with a representative of the company's formal channels, the ombuds should provide a recap of its role. For example, an ombuds might use an opening like this with an individual:

- “Before we get started, I would like to take a minute to review the role of the ombuds office, so that there is a clear understanding.
  - (Informality.) Our conversations are informal and off-the-record. I am an independent resource within the company. My role is to understand your issue or concern and help you generate and evaluate options for addressing it. If you decide that you want to formally communicate your concern, I can help you identify an appropriate source within the company for reporting.
  - (Confidentiality.) This office is totally confidential. I do not move forward with any information, and do not reveal your identity to anyone, without your permission. I ask that people using the office agree to this confidentiality so that the discussion we have regarding your concern will not be known by anyone whom you do not want to know about it. The only exception to this confidentiality is where there is imminent threat of serious harm. In that case, the issue must be surfaced. I can take the issue forward, but keep your anonymity, if requested.
  - (Neutrality.) Please note that I am officially neutral. I do not advocate for any particular party. I do not judge or take sides, I only advocate for a fair process.
- Do you have any questions?”

And with a formal channel, an ombuds might say, for example:
- “Before we get started, I wanted to mention again that the ombuds office was set up with the charter that any and all communications with it are confidential. The individual coming to the office would like the discussion to remain confidential.
  - Additionally, I am a designated neutral in the company and I do not advocate for any party.
  - I am a communications conduit and provide early warnings. My role complements yours and does not duplicate it. I can also help brainstorm solutions to address this issue.
  - Do you have any questions?”

## Establishing an Ombuds Program

*Size.* The number of ombuds for an organization is based on several considerations, e.g., an organization's size and complexity, number of US and international locations, number and effectiveness of other issue resolution resources, risks, amount of change taking place, and focus of the program. Depending on those considerations, an ombuds could serve 5,000 to 20,000 constituents. A survey of members of the International Ombudsman Association shows that in the corporate sector, on average, 5 percent of employees use an ombuds program throughout the course of a year. Keep in mind that an ombuds program is not only for the largest corporations that might need a whole department of ombuds. Smaller organizations can use contract ombuds or have a part-time ombuds who has no conflicting formal responsibilities.

*Staffing.* Selecting the right person to be your ombuds is critical. It's important that the ombuds be an experienced professional who has a thorough knowledge of the corporation's culture, strategies, risk, and resolution processes. Effective ombuds can come from a variety of backgrounds: legal, compliance, HR, line management, and others. Important hiring criteria would include business and professional experience, reputation, and demonstration of such competencies as integrity, independent decision-making, problem-solving, collaboration, communicating with diverse constituents, and ability to be neutral and maintain confidentiality. We recommend that candidates be interviewed by a team representing the demographics of the organization.

*Training.* Ombuds can and should receive training from the International Ombuds Association (IOA). The IOA offers an initial two and a half day course covering general ombuds practices, such as confidentiality and independence. It also offers specialized courses on such topics as dealing with difficult people, negotiation, or cultural issues. In addition, ombuds often take courses in mediation, as dispute resolution is often a critical part of their role.

## Keeping Your Program Successful

*Strong sponsorship.* Be sure that key executives throughout the organization support the program. These executives must communicate how the program is related to your organization's mission, values, and code of conduct.

*Respectful relationships with formal channels.* If an organization has effective compliance and other formal channels, along with an effective open-door policy, some leaders may see an ombuds as redundant or in competition with these formal channels. The ombuds must therefore be particularly careful to maintain respectful, neutral, and confidential relationships with these formal channels, and

to foster understanding of how the roles are complementary and not duplicative.

*Trust in the program.* All stakeholders in the organization must understand and trust the program. An ombuds must therefore have an effective awareness program that extends throughout the organization. And (of course) an ombuds must always operate by the standards of practice and code of ethics.

*Evaluating employee use and satisfaction.* An ombuds must continually assess and communicate the effectiveness of the program to key stakeholders. One useful way to assess a program is to understand who uses the office, in terms of issues, location, demographics, and so forth. For example, results from proprietary surveys conducted by financial services and industrial manufacturing firms' ombuds offices indicate that:

## ACC and Other Extras on . . . Compliance

### ACC Committees:

More information about these committees is available on ACC Online<sup>SM</sup> at [www.acca.com/networks/committee.php](http://www.acca.com/networks/committee.php), or you can contact Staff Attorney and Committees Manager Jacqueline Windley at 202.293.4103, ext. 314, or [windley@acca.com](mailto:windley@acca.com).

- Corporate & Securities Law
- Employment & Labor Law

### Docket Articles:

- Joseph C. Hutchison, "The Acid Test for Your Compliance Program," *ACC Docket* 24, no. 4 (April 2006): 72–84, [www.acca.com/resource/v7110](http://www.acca.com/resource/v7110).
- Teresa Kennedy, Seth M. Cohen, and Charles A. Riepenhoff, Jr. "About that Compliance Thing . . . Creating and Evaluating Effective Compliance Programs," *ACC Docket* 22, no. 10 (November/December 2004): 24–43, [www.acca.com/protected/pubs/docket/nd04/compliancething.pdf](http://www.acca.com/protected/pubs/docket/nd04/compliancething.pdf).
- Dinah Seiver, "Setting Up a Compliance Department from Scratch," *ACC Docket* 23, no. 9 (October 2005): 22–31, [www.acca.com/protected/pubs/docket/oct05/scratch.pdf](http://www.acca.com/protected/pubs/docket/oct05/scratch.pdf).
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### InfoPAKs:

- Compliance Training and e-Learning Programs (2005), [www.acca.com/infopaks/ecompliance.htm](http://www.acca.com/infopaks/ecompliance.htm).
- Corporate Compliance (2004), [www.acca.com/resource/v4955](http://www.acca.com/resource/v4955).
- Internal Investigations (2004), [www.acca.com/resource/v4737](http://www.acca.com/resource/v4737).
- Responding to Government Investigations (2004), [www.acca.com/resource/v4738](http://www.acca.com/resource/v4738).

### Leading Practice Profiles:

- Corporate Governance Programs for Reporting Concerns:

What Companies Are Doing (2005), [www.acca.com/resource/v6527](http://www.acca.com/resource/v6527).

- Law Department's Role in Developing and Implementing Compliance and Ethics Programs (2005), [www.acca.com/resource/v5909](http://www.acca.com/resource/v5909).

### Surveys:

2005 Compliance Program and Risk Assessment Benchmarking Survey, [www.acca.com/protected/Surveys/compliance/survey.pdf](http://www.acca.com/protected/Surveys/compliance/survey.pdf)

### Annual Meeting Course Materials:

Program material from the following courses at ACC's 2005 Annual Meeting is available at [www.acca.com/am/05/material.php](http://www.acca.com/am/05/material.php):

- Jeffrey L. Antoon, Philip P. Crowley, Lucinda P. Long, "Collaboration on Compliance," course 309.
- Valli Baldassano, Kathleen Chagnon, Angeline G. Chen, "Assessing Your Risk for Compliance," course 909.
- Andrea Bonime-Blanc, Keith T. Darcy, Martha Ries, "Firespotting Key Compliance Issues for Your Company," course 709.
- Donna Costa, James A. Hatcher, Martin Montes, David J. Slobodien, "Creating a Compliance Function," course 109.
- Moanica Caston, Teresa T. Kennedy, Lori J. Shapiro, Philip I. Weis, "Best Practices for Building an Effective Corporate Compliance Program," course 209.
- E. Scott Gilbert, Douglas A. Graham, Patricia R. Hatler, Daniel E. Karson, Gretchen A. Winter, "Compliance in Internal Investigations," course 609.

### Webcasts:

The following ACC webcasts are available.

- Assessing the Presence of a Culture of Compliance at Your Organization (2005), [www.acca.com/resource/v6411](http://www.acca.com/resource/v6411).
- Directors and Officers Coverage: Potentials and Pitfalls (2005), [www.acca.com/resource/v5937](http://www.acca.com/resource/v5937).

- 3 to 6 percent of a company's employee base uses the ombuds program.
- Utilization patterns reflect the population.
- Issues typically cluster in several areas, such as leadership, company assets, compensation, meritocracy, and the job itself.
- 90 percent (or more) of constituents know about the ombuds program, would use the program if they needed it, or would recommend it to others.
- If there were no ombuds office, 28 to 35 percent would not have brought up their issues at all, 13 to 15 percent would not have brought them up as quickly, and 8 to 10 percent would have left the company.
- A high percentage of employees using the program:
  - o feel high satisfaction with ombuds' timeliness of response, respectfulness, confidentiality, neutrality, knowledge of the organization;
  - o would return to the office, if needed;
  - o feel better equipped to handle future problems.

*Evaluating issue resolution.* Another way to assess your program is to evaluate how well it resolves issues. In successful programs, results indicate:

- Users of the office succeed in formulating a resolution plan through the process.
- Most issues are addressed by HR, legal, compliance, line management, or another resolution channel.
- Channels have a high degree of satisfaction with the office's neutrality, confidentiality, respectfulness, and help in identifying resolution and change opportunities.

*Evaluating your program's impact.* You should also measure the impact of your program by tracking any changes that occurred because the issues were surfaced. Changes that are seen resulting from ombuds cases include:

- halting violations of laws, policies, and code of conduct;
- avoiding discrimination and harassment lawsuits;
- correcting incorrect financial reporting;
- resolving health and safety issues;
- terminating leaders due to inappropriate behavior;
- fixing compliance and control problems; and
- improving turnover, productivity, and employee satisfaction.

*Preventing future problems.* Identify ways your program is helping to prevent issues from recurring or to address emerging trends. Ways ombuds can help prevent


problems include:

- sharing best practices,
- conflict resolution training,
- educational articles on websites and in employee newsletters,
- issue trend reporting,
- identification of improvement opportunities, and
- risk priority alignment meetings with formal channels.

### The Formal Importance of Informality

As in-house counsel, we have all labored long and hard over strengthening our formal compliance, governance, and ethics procedures. But the bottom line is that these procedures are of only limited use if employees avoid

them. You can help your company mitigate risk and strengthen its formal strategies by establishing a *complete* issue management system: one that adds an informal ombuds program to the mix.

“Our bottom line is that our ombuds program helps makes us a better company. When the office brings wrongdoing incidents to the attention of senior management at an early stage and we are able to intervene and stop the occurrence, effectiveness is attained,” says Mark Manley, SVP, deputy general counsel, and chief compliance officer at AllianceBernstein. 

*Have a comment on this article? Email [editorinchief@acca.com](mailto:editorinchief@acca.com).*

## Alliance Capital Management L.P., Charter of the Ombudsman Office

### Purpose

The Ombudsman of Alliance Capital Management L.P. (“Alliance Capital”) provides a neutral, confidential, informal, independent, and safe communications channel where any Alliance Capital employee can obtain assistance in surfacing and resolving Alliance Capital work-related issues. In addition, the Ombudsman will receive complaints from Alliance Capital employees and others regarding accounting, internal accounting controls or auditing matters. The primary purpose of the Ombudsman is to help Alliance Capital:

- Safeguard its reputation and financial, human and other company assets;
- Maintain an ethical and fiduciary culture;
- Demonstrate and achieve its commitment to doing the right thing; and
- Comply with relevant provisions of the Sarbanes-Oxley Act of 2002, U.S. Sentencing Guidelines, the Order of the Securities and Exchange Commission, dated December 18, 2003, as amended on January 15, 2004 (the “Order”), New York Stock Exchange Rule 303A.10 and other laws, regulations and policies.

The Ombudsman shall seek to provide early warnings and to identify changes that will prevent malfeasance and workplace issues from becoming significant or recurring. The Ombudsman has a reporting relationship to the Chief Executive Officer, the Audit Committee of the Board of Directors (“Board”) of Alliance Capital Management Corporation and, under certain circumstances, the independent directors of Alliance Capital’s U.S.

mutual fund boards.

Any type of work-related issue or complaint may be brought to the Ombudsman, including (i) potential or actual matters involving accounting, internal accounting controls or auditing, (ii) potential or actual violations of laws, rules, regulations or codes of conduct or ethics of Alliance Capital or its parent companies, or (iii) various other matters, including financial malfeasance, security, inappropriate business practices, compliance, unethical behavior, health and safety and employee relations. The Ombudsman supplements, but does not replace, existing formal channels such as human resources, legal and compliance, internal audit, security and line management.

The effective functioning of the Ombudsman demands that inquiries be kept confidential. Accordingly, the Ombudsman will not maintain records for the benefit of Alliance Capital and will refuse access to any confidential data maintained by the Ombudsman Office (“Office”), including seeking a protective order in legal proceedings, unless the protective order is denied and the Ombudsman is ordered by a court of law to produce the records. All conversations with the Ombudsman are strictly off-the-record.

### Responsibilities and Duties

The responsibilities and duties of the Ombudsman include: (a) issue identification and resolution; (b) issue prevention and change advocacy; and (c) awareness and accessibility, each of which is described more fully below:

#### A. Issue Identification and Resolution

Issue identification and resolution includes: (i) assisting man-

## For More Information

International Ombudsman Association: [www.ombudsassociation.org](http://www.ombudsassociation.org).

- Ombuds Confidentiality Privilege: Theory and Mechanism
- Neutrality
- United States Sentencing Guidelines; What an organizational ombudsman might want to know and share with management
- Gnazzo, Patrick J. and George Wratney, "Are You Serious about Ethics?" *Across The Board*, July/August 2003.

Redmond, Williams & Associates, LLC: [www.redmondwilliamsassoc.com](http://www.redmondwilliamsassoc.com)

- Howard, Charles, L. "Sarbanes-Oxley Act of 2002—Another Opportunity for Ombuds," White Paper, 2002.
- Redmond, Williams & Associates, LLC. "The Ombuds and the Corporate Secretary." *The Corporate Secretary & Governance Professional*, Society of Corporate Secretaries and Governance Professionals, 2005.
- Williams, Randy, co-author, *The Ethical Enterprise: A Global Study of Business Ethics 2005–2015*, American Management Association/Human Resource Institute, 2006.
- Singer, Andrew "Do You Know Me? I Am the American Express Ombudsperson," *Ethikos*, Sept/Oct 2005.

agement of Alliance Capital in early identification, surfacing and resolution of work-related issues and providing Alliance Capital's employees with a confidential and anonymous procedure to report, and seek guidance regarding, illegal, unethical or criminal behavior, including, but not limited to, questionable accounting or auditing practices, without fear of retaliation or interference with employment; (ii) ensuring the prompt internal reporting to an appropriate formal channel of any issue brought to the Office that creates an imminent threat of serious harm to individuals or to Alliance Capital; and (iii) ensuring that the Office's practices adhere to Ombudsman standards of confidentiality, neutrality, informality, independence, and all other modes of operating.

### B. Issue Prevention and Change Advocacy

Issue prevention and change advocacy includes: (i) promptly reporting issue trends and impacts to senior management, the Audit Committee of the Board and, where relevant, the independent directors of Alliance Capital's U.S. mutual fund boards; (ii) communicating with formal channels such as Legal and Compliance, Internal Audit and Human Resources to share issue trends and risk priorities, and to provide informal guidance in relation to specific investigations undertaken by formal channels; (iii) recommending changes to prevent systemic issues and issue recurrence; and (iv) identifying ways to improve the overall management and corporate governance of Alliance Capital and its mutual funds.

### C. Awareness and Accessibility

Awareness and accessibility includes taking steps to: (i) inform all employees of the Ombudsman's role; (ii) make the Ombudsman easily accessible to all employees and others; (iii) encourage employees to report illegal, unethical

or criminal behavior; (iv) make all employees aware that they will not be retaliated against for making a report to, or seeking guidance from, the Ombudsman; and (v) create means for making confidential inquiries, through the use of "800" numbers, websites, visits or other methods.

## Reporting

The Ombudsman shall make reports, while maintaining confidentiality, to the Chief Executive Officer and the Audit Committee of the Board at least twice a year, and to the independent directors of Alliance Capital's U.S. mutual fund boards with such frequency as the independent directors may instruct, such reports to include:

- Types, number, trends and impact of issues brought to the Office;
- Demographics of employees using the Office;
- Identification of formal channels that addressed the issues;
- Types of changes resulting from issues surfaced and prevention opportunities; and
- Office effectiveness measures.

Throughout the year, the Ombudsman will provide to staff and business leaders periodic reports, while maintaining confidentiality, in order to inform them of what the Ombudsman is hearing from employees and other inquirers, explain the relevance of such information and provide guidance to staff and business leaders.

In addition, the Ombudsman will promptly inform the head of the relevant formal channel when the Ombudsman reasonably believes that some imminent harm may come to Alliance Capital or one or more of its employees.