



Department
for Business
Innovation & Skills

**SMALL BUSINESS APPEALS
CHAMPION**

Draft guidance for Champions

FEBRUARY 2016

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1. Introduction

1. The Small Business, Enterprise and Employment Act 2015 (the Act)¹ places a requirement on Ministers of the Crown to appoint “reviewers” to regulators in scope of the Act.
2. The role of the Reviewer (more commonly referred to as the Small Business Appeals Champion, the “Champion”) is to review the effectiveness of a regulator’s procedures for handling and resolving complaints and appeals made by businesses to the regulator, in connection with specific functions, and to prepare a report about the findings of the review. Their role does not extend to getting involved in decisions or making recommendations in relation to individual cases.
3. The net effect of the measure is expected to be that regulators have appeals processes that are clear, effective and enables all businesses (but particularly small businesses, for whom regulation tends to be a bigger issue) to challenge regulatory decisions.

Policy underpinning the Champion measure and status of this guidance

4. Regulators should have a process in place to enable businesses to challenge an unfair decision or enforcement action. Small businesses in particular need to be confident that they can challenge or ask for an explanation of a regulator’s decision, advice, long delays, outcome, disproportionate cost or behaviour, without fear. However, evidence gathered under the Focus on Enforcement programme² shows businesses were not always confident that there was a clear pathway to challenge decisions by a regulator. This occurred because, for example, businesses did not know how to challenge a decision, or because challenging a decision was too expensive or time consuming.
5. The Government recognises that there is a varied and broad range of statutory remits, enforcement regimes, and types of intervention against which a business may wish to appeal or complain. For that reason, it believes that the most efficient means of improving businesses’ experience of appeals and complaints is to ensure that each regulator’s arrangements for audit and scrutiny of these processes are appropriately tailored, rather than being centrally organised.
6. Although regulators’ circumstances differ, there are many common factors. Where those apply, Champions can learn from one another to help improve their approach to appeals. They can also learn from the evidence³ already gathered by Government which led to the establishment of the Champions legislation.

¹ <http://www.legislation.gov.uk/ukpga/2015/26/part/2/crossheading/review-of-business-appeals-procedures/enacted>

² <http://discuss.bis.gov.uk/focusonenforcement>

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/317409/bis-14-857-appointment-of-small-businesses-appeals-champions-final-impact-assessment.pdf

7. Section 19 of the Act gives the Secretary of State the power to issue guidance to Champions on how to carry out the functions stipulated above. Champions must have regard to this guidance in exercising any of the functions within scope of their duties.
8. On the basis that it would not be sensible to adopt a one size fits all approach, the guidance is principles-based to cater for the wide and diverse range of regulators. The guidance is designed primarily for Champions as a means of supporting them to fulfil their statutory duties. However, it also provides information outlining what is expected of regulators and should assist stakeholders in understanding how the Champion is intended to operate in practice.

Expiry or review

9. This guidance will be reviewed two years after it is issued.

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2. Summary of the champion's process and role of Ministers, Champion and regulator

Summary

- A Minister must appoint a Champion in respect of regulatory functions specified in regulations made under section 18 of the Act.
- The relevant regulator is the person who exercises the specified function.
- The appointed Champion must review (annually) the appeals and complaints procedures in relation to the specified functions of the relevant regulator, drawing on appropriate evidence sources.
- The relevant regulator is required to provide documents and information to the Champion.
- The Champion must produce an annual report outlining the findings of their review, making recommendations to the relevant regulator and Minister as necessary but without reference to individual cases.
- The Champion must send this report to the relevant regulator and (if different) the Minister who appointed the Champion.
- The relevant regulator must respond to the Champion's report and recommendations but the Champion maintains ownership of the report and its content.
- The responsible Minister must publish the Champion's report as well as the regulator's response to the report; and lay both before Parliament.

3. Appointment of Champions and role of departments and relevant Ministers

10. Section 17(1) of the Act requires the relevant Minister of the Crown to appoint a Champion in respect of each regulatory function specified in regulations made under section 18 of the Act. Ministers will appoint Champions who have sufficient seniority, independence and experience to perform the expected scrutiny of the regulator, and to command the respect of regulated businesses.
11. The requirement to appoint a Champion may be met by the Minister of the Crown appointing an appropriate Non-Executive Director of the regulator. However there is no requirement that the appointee should sit on the Board, particularly where there is a clear need to maintain the independence of the Board from a Ministerial appointment. In addition, appointment to the role of Champion does not automatically confer Board status. Therefore regulators can maintain a non-Government appointed Board where this is important, and Ministers can look for alternative candidates with relevant experience, such as a member of an existing committee or body with close links to the regulator.
12. The Champion should be able to act impartially and therefore the appointment will not be given to any person that is part of the process and procedures for appeals and complaints in the regulator. This may preclude the appointment of a Board member in a case where appeals or complaints may be heard by the Board.
13. It will be for Ministers to determine the length and terms of each Champion's appointment and whether it is appropriate to combine the role of Champion with another role, including the role of Champion at another regulator.

Sharing of Champions between regulators

14. It might be appropriate for a single Champion to be appointed in respect of more than one regulator – for example, where the regulators cover similar groups of businesses or have similar functions. A shared Champion may be able to identify issues arising from interactions between the regulators, or common concerns of business affected by the regulators. The shared Champion may be able to help identify and spread good practice and encourage consistency. In considering whether a shared Champion is appropriate, Ministers may also wish to consider the cost implications.
15. Some regulators may be responsible for several different regulatory regimes, and therefore could be subject to the scrutiny of different Champions. It is therefore possible that a group of regulators could share several Champions in respect of different regulatory functions. In these instances, consideration should be given to placing more specific duties in the description of Champions' duties to ensure cooperation.

Performance of Champion

16. The Minister may monitor the performance of the Champion, including deciding whether they are meeting the terms of their appointment.

4. Reviewing regulators' appeals and complaints processes and procedures

Key features of the review

17. Under section 17(2) of the Act, a Champion must, in relation to each regulatory function carried out by the regulator for which they are appointed:
 - review the effectiveness during each reporting period⁴ of the regulator's procedures (both formal and informal) for handling and resolving complaints and appeals made by businesses to the regulator in connection with their regulatory functions; and
 - prepare an annual report about the findings of the review.
18. The report may include an assessment of the extent to which the regulator's complaints and appeals processes are accessible and fair to business; recommendations to the regulator about how the procedures may be improved; recommendations to the Minister who appointed the Champion about changes in the law which could lead to improvements in those procedures (section 17(4) of the Act).

Champion's interaction with regulator

19. Section 17(10) of the Act stipulates, subject to any express restriction on disclosure imposed, that a Champion may by notice require the relevant regulator to provide documents or other information (in such form or manner as the Champion requires) to enable the Champion to conduct their review of the Regulator's appeals and complaints processes.
20. The Regulator will be expected to co-operate with the Champion, including by providing the requested information where such information is disclosable. In some instances, the regulator may not be able to disclose information due to restrictions in other legislation (section 17[10] of the Act).
21. While there is no obligation on the Champion to do so, to initiate the review, it would be good practice for the Champion to provide the regulator with a written notice of the review. In confirming the first review, the Champion's letter might set out in particular:
 - the purpose and format of the review;
 - what information the Regulator should provide to enable the Champion to carry out their review;
 - that the outcome of the review will be a report with recommendations, which will be published and laid before Parliament by the relevant Minister (section 17[9] of the Act).

⁴ 12 months beginning with the day the Champion is appointed each and subsequent period of 12 months.

22. Once the review has started, it would be good practice for the Champion to keep the Regulator informed of progress, particularly if there are likely to be delays to any agreed timescale for completing the review.

Gathering the evidence to inform the review

23. In conducting the review, the Champion should adopt a proportionate approach, taking into account the potential cost to the Regulator of preparing evidence, especially if the regulator's total budget is small.
24. Champions should draw from a variety of evidence sources as necessary including, for example, the extent of a regulator's performance against relevant provisions of the Regulators' Code⁵ and the Better Regulation Principles⁶ (the regulators that are subject to these requirements are specified in the Legislative and Regulatory Reform (Regulatory Functions) Order 2007). These are rich sources of evidence as to the effectiveness or otherwise of a regulator's complaint and appeals processes.
25. Champions should aim to gather sufficient evidence to allow them to form reliable conclusions. To inform their review, Champions may wish to consider, for example, the number and diversity of the businesses affected by the regulator's activities, and the significance for the business of the regulator's interaction with them.
26. Champions should gather evidence from a selection of relevant businesses. Trade Associations are likely to be an important source of information, and Champions should also consider how to get wider views, depending on the size and make-up of the businesses affected by the regulator. In making contact with individual businesses, it is important that Champions make clear that their role is not to intervene in individual cases, or to place undue burdens on regulators on behalf of businesses. Champions should take a proportionate approach in producing their assessments and, if the sector or industry covered by the regulator is diverse, recognise that it may not be possible to gather comprehensive views.
27. In seeking direct opinions from businesses Champions should consider whether to seek out the experience of businesses which have not lodged an appeal or complaint, as well as those which have: some businesses, especially small ones, may be reluctant to challenge regulators for a variety of reasons.
28. For large regulators the Champion may wish to focus his or her evidence-gathering in different areas of the complaints and appeals process from year to year, taking account of any changes in the regulator's policy or practice or any feedback from business.
29. In reviewing a regulator's procedures for handling and resolving complaints, information provided by the regulator should be the starting point and Champions should seek to use existing data to extract relevant information, for example, segmenting complaints by sector, issue etc.

⁵ <https://www.gov.uk/government/publications/regulators-code>

⁶ Proportionality, accountability, consistency, transparency and targeting.

30. Champions should also seek to use existing data from other sources (eg previous reviews or reports carried out on or by the regulator) where possible so that they avoid unnecessary duplication. Where previous reviews of appeals and complaints processes have been carried out, Champions should ascertain the extent to which relevant recommendations have been addressed as part of their assessment.
31. In reviewing a regulator's procedures for handling and resolving complaints and appeals, the Champion may also give consideration to the following evidence sources.
 - The regulator's internal documentation (e.g. internal guidance on handling appeals); and, subject to not breaching confidentiality agreements and data protection, regulators' database of businesses that regulators have contacted or who have appealed.
 - Comments from the regulator's senior staff on emerging issues.
 - Published material – e.g. the regulator's guidance on making appeals and information about their outcomes (regulators subject to the Regulators' Code are already expected to publish such information).
 - Engagement work carried out by regulators. A regulator, for example, might also have a 'satisfaction survey' (post-complaint/appeal questionnaire) sent to businesses. The Champion could seek to insert appropriate questions as part of that information gathering exercise. Information emerging from such data sources could provide the starting point for the Champion's review.
32. In the case of regulators with large and diverse coverage, consideration should be given using digital media for targeting a sample of the regulated community.

Transparency and recording the evidence

33. Every review, regardless of size, should be subject to a minimum level of recording to show what was done and why, together with the collation and preservation of any documents or other evidence seen or created as part of the review.

Conducting the review and scope

34. Champions should review the internal ('in-house') appeals and complaints processes of the regulator, and not the working of tribunals or law courts even if these constitute part of the appeal process. However, in carrying out a review the Champion may want to consider whether the number of court cases could be reduced through improvement of the regulator's internal systems and make recommendations as necessary.
35. In reviewing a regulator's procedures for handling and resolving complaints and appeals made by businesses, the Champion should focus in particular on:
 - whether there is a clear and impartial route to appeal or complain;
 - whether those who consider appeals or complaints have sufficient operational independence;

- whether options for appeal or complaint are explained clearly to businesses;
- whether the regulator publishes adequate data on appeals and complaints;
- whether there is, or should be, an opportunity for businesses to ask the regulator for a “second opinion” before considering whether to make a formal appeal or complaint and, where there is one, how effective it is;
- where there is more than one route to appeal or complain, whether they are all necessary and whether in combination they are sufficiently simple to understand and use;
- whether terminology distinguishing appeals and complaints, where appropriate, is comprehensible;
- whether there are any examples of unfair or discriminatory behaviour against those who challenge the regulator’s decisions;
- the extent to which complaints and appeals are used to improve a regulator’s operating procedures.

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5. Reporting the review's findings

36. At the end of the review, the Champion must produce a report covering the findings of the review which may include recommendations for improvement (17(2)(b))
37. The Champion's report may include (Section 17(4) of the Act):
 - an assessment of the extent to which the relevant regulator's procedures for handling and resolving complaints and appeals are accessible and fair to businesses;
 - recommendations to the relevant regulator about how the procedures, or the way in which they are operated, could be improved;
 - where appropriate, recommendations to the relevant Minister for any change in the law which the Champion considers would lead to improvements in the procedures or their operation.
38. In their assessment, the Champion should also note the positive aspects of a regulator's appeals and complaints procedures. The positive aspects can help shape future reviews as well as constituting a source for good practice sharing.
39. If the regulator is not complying with any requirement for the provision of information, or not attempting to address recommendations from a previous review, the Champion should record this and the outcome of any discussion with the regulator. The Champion should make clear the issues not addressed and why; and the regulator's reaction to addressing the issues. It is important anyone reading the report clearly understands how the Champion arrived at a given conclusion.

Champion's report and confidentiality

40. The Champion's report must not address, and the Champion must not make any recommendation in relation to, the outcome of any particular case (Section 17(5) of the Act).
41. Champions should protect businesses providing information about a regulator's appeals and complaints process so that business can speak openly. In their assessment and discussions with business, Champions should cover issues relating to fear of reprisal for making a complaint.
42. The Champion's report and response will be published. Individual cases should not be identifiable in the Champion's report, and the Champion should not include any references that would identify businesses that wished to remain anonymous. However, this should not preclude Champions from reviewing individual cases in order to gather evidence about the effectiveness of the regulator's processes more generally. Indeed, looking at individual cases of appeal and complaint to see what went well or badly and how to make it better will be one source of evidence for a Champion's assessment.
43. Champions should be aware that if a regulator only has a few complaints, even if anonymised the Champion's assessment might make it easy to identify the business

concerned. For example, a complainant may not be explicitly named, but it may be possible to identify that person or organisation from the context when several documents are considered together. Therefore, the Champion should have regard to the size of the regulated sector before making reference to cases. However, the Champion should also avoid withholding evidence for their assessment unless there is a real risk of the disclosure of the information causing a significant adverse effect. The Champion should consider whether it is possible to avoid, or minimise, any impact by redacting certain material.

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6. Submission of report to regulators and Ministers

44. The Champion must send their report to the relevant regulator and (if different) the Minister who appointed them as soon as reasonably practicable after the end of the reporting period (Section 17(7) of the Act).
45. In some cases the regulator will be the Minister that appointed the regulator. In such cases all of the Champion's recommendations will be addressed to the Minister.
46. The Champion should give the regulator opportunity to comment on the draft report, but retains the decision as to its final content.
47. Within 3 months of receiving the report, the regulator must (Section 17(8) of the Act):
 - prepare a response and send it to the Champion, and
 - if the relevant regulator is not the Minister who appointed the Champion, send it to the Minister.
48. Regulators are expected to respond to the Champion's recommendations. In doing so, they may wish to set out any action they intend to take in response to those recommendations, or why they do not intend to take action.

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7. Publication and laying of the report and the regulator's response before Parliament and the role of the relevant Minister

49. On receipt of the Champion's report, the Minister who appointed the reviewer is responsible for:

- publishing the Champion's report and the regulator's response; and
- laying them before Parliament (Section 17 (9) of the Act)⁷.

50. A regulator may also choose to publish the report and the response in its' own annual report.

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⁷ Laying before Parliament in this instance relates to the presentation of the Champion's report before the Houses of Commons and Lords. As such it is subject to Parliamentary scrutiny (and also public scrutiny by reason of the requirement to publish).

8. Champion participation in network of Champions

51. Champions will face a number of common issues and challenges in deciding how to go about their roles. The recommendations which they devise may well provide useful inspiration to other Champions and regulators through the sharing of best practices.
52. The Department for Business, Innovation and Skills will establish and facilitate a network of Champions to encourage the sharing of best practices; Champions should participate in network meetings.

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