United States General Accounting Office

GAO

Report to the Committee on Small Business and Entrepreneurship, U.S. Senate

September 2003

SMALL AND DISADVANTAGED BUSINESSES

Some Agencies' Advocates Do Not Report to the Required Management Level

GAO-03-863

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GAO Accountability • Integrity • Reliability

Highlights

Highlights of GAO-03-863, a report to the Committee on Small Business and Entrepreneurship, U.S. Senate

Why GAO Did This Study

Section 15(k) of the Small Business Act requires that all federal agencies with procurement powers establish an Office of Small and Disadvantaged Business Utilization (OSDBU). This law is one of many designed to enhance the participation of small and disadvantaged businesses in federal procurement. Section 15(k)(3) of the act requires that OSDBU directors, who are intended to be advocates for small and disadvantaged businesses, be responsible only to and report directly to agency heads or deputy agency heads. GAO was asked to determine compliance with section 15(k)(3) across the government, review to whom the OSDBU director at the Office of the Secretary of Defense has reported since the office was exempted from that provision, and determine whether section 15(k) applies to the Office of Administration (OA), which is the central procurement arm of the Executive Office of the President (EOP).

What GAO Recommends

GAO recommends that the heads of agencies that were found not to be in compliance with section 15(k)(3) of the Small Business Act take all of the necessary steps to comply with the requirement. In their comments, the agencies agreed with the report's description of their OSDBU directors' reporting relationships; however, most disagreed with our conclusion that the reporting relationships did not comply with the law.

www.gao.gov/cgi-bin/getrpt?GAO-03-863.

To view the full product, including the scope and methodology, click on the link above. For more information, contact David G. Wood at (202) 512-8678 or woodd@gao.gov.

What GAO Found

Almost half of the federal agencies that GAO reviewed were not in compliance with section 15(k)(3) of the Small Business Act. Thirteen of the 24 agencies were in compliance—that is, the OSDBU director reported directly to and was responsible only to the agency head or deputy head (see table). Eleven agencies were not in compliance with the provision. At these 11 agencies, the OSDBU director (1) reported to officials below the level of agency head or deputy head, (2) was not responsible only to the agency head or deputy head but also to a lower level agency official, or (3) had delegated the responsibilities of the OSDBU director to officials who did not report to the agency head or the deputy head.

Since Congress granted the Office of the Secretary of Defense an exemption from the section 15(k)(3) reporting requirement in 1988, the organizational reporting level of the OSDBU director has changed twice—in both cases to lower levels. From 1989–96, the director reported to officials on the Under Secretary of Defense level, one level below Deputy Secretary. Since 1996 (except in 1999), the director has reported to officials on the Deputy Under Secretary of Defense level, two reporting levels below Deputy Secretary.

OA likely is a "Federal agency with procurement powers" subject to the OSDBU requirements of section 15(k) of the Small Business Act. OA has procurement powers deriving from its authority to contract on behalf of EOP. OA is a "federal agency" by virtue of its being an "agency" under the Administrative Procedure Act (APA), which the Small Business Act adopts by reference, and OA is an APA agency because it possesses the requisite "substantial independent authority."

Agency Compliance with Section 15 (k)(3) of the Small Business Act

Agency in compliance (13)	Agency not in compliance (11)
Defense Logistics Agency	Department of Agriculture
Department of Energy	Department of Commerce
Department of Housing and Urban Development	Department of Education
Department of Labor	Department of Health and Human Services
Department of the Air Force	Department of Justice
Department of the Army	Department of State
Department of the Navy	Department of the Interior
Department of Transportation	Department of the Treasury
Department of Veterans Affairs	Environmental Protection Agency
General Services Administration	Federal Emergency Management Agency
National Aeronautics and Space Administration	Social Security Administration
Office of Personnel Management	
U.S. Agency for International Development	

Source: GAO (analysis).

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Abbreviations

APA	Administrative Procedure Act
CFO	Chief Financial Officers
CICA	Competition in Contracting Act
DOD	Department of Defense
EOP	Executive Office of the President
EPA	Environmental Protection Agency
FAR	Federal Acquisition Regulation
FEMA	Federal Emergency Management Agency
FOIA	Freedom of Information Act
FRA	Federal Records Act
GSA	General Services Administration
HHS	Health and Human Services
NAS	National Academy of Sciences
NARA	National Archives and Records Administration
OA	Office of Administration
ONDCP	Office of National Drug Control Policy
OSDBU	Office of Small and Disadvantaged Business Utilization
OST	Office of Science and Technology
JAG	Judge Advocate General of the Army

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G A O
Accountability * Integrity * Reliability

United States General Accounting Office
Washington, D.C. 20548

September 4, 2003

The Honorable Olympia J. Snowe
Chair
The Honorable John F. Kerry
Ranking Minority Member
Committee on Small Business and Entrepreneurship
United States Senate

During the last 25 years, Congress has enacted several laws designed to enhance small business participation in procurement by federal agencies—a market that reached more than $250 billion in fiscal year 2002. One of these laws—Public Law 95-507, enacted in 1978—amended section 15 of the Small Business Act (15 U.S.C. § 644) to require all federal agencies with procurement powers to establish an Office of Small and Disadvantaged Business Utilization (OSDBU). Under this act, the OSDBU is responsible for overseeing the agency's functions and duties related to the awarding of contracts and subcontracts to small and disadvantaged businesses. Congress intended that OSDBU directors serve in their respective agencies as advocates for small and disadvantaged businesses.

One specific provision of the act—section 15(k)(3)—requires that OSDBU directors be responsible only to agency heads or deputy heads, and that they report directly to these individuals. The purpose of this provision is to ensure that the OSDBU directors have immediate access to their agency's top decision-makers in order to advocate effectively for small and disadvantaged businesses. In 1988, Congress amended section 15(k)(3) and allowed the Department of Defense's (DOD) Secretary of Defense the discretion to designate the official to whom the Defense OSDBU director should report.[1] The OSDBU director of the Office of the Secretary of Defense is the only director exempted from the reporting requirement in section 15(k)(3).[2]

[1]DOD does not have a single OSDBU director for the entire agency. The services (Departments of the Air Force, Army, and Navy) and other DOD command units have established separate OSDBUs, each of which is headed by a director. These organizational units carry out procurement for most of DOD. The DOD agencies refer to their offices as Small and Disadvantaged Business Utilization, or SADBUs. For simplicity, we use the term OSDBU for all agencies in our study.

[2]The Office of the Secretary of Defense is the principal staff element of the Secretary of Defense in the exercise of policy development, planning, resource management, and fiscal and program evaluation responsibilities.

The Executive Office of the President (EOP) is a group of offices that provide policy and administrative support to the President. Offices within EOP include the Council of Economic Advisers, the Council of Environmental Quality, the National Security Council, and the Office of Management and Budget. In addition, EOP includes the Office of Administration (OA), which is responsible for administrative support for all of EOP's offices.

As requested, we determined (1) whether the reporting relationships for the OSDBU directors at major federal agencies comply with section 15(k)(3) of the Small Business Act, (2) to whom the OSDBU director at the Office of the Secretary of Defense has reported since 1988, and (3) whether section 15(k) of the Small Business Act applies to EOP's OA. As agreed with your staffs, we will provide you at a later date with an additional report describing OSDBU duties and functions at the major federal agencies.

To determine agency compliance with section 15(k)(3), we first identified the designated OSDBU director at each of the 24 federal agencies that procured $200 million or more in goods and services in fiscal year 2001 (see app. I).[3] We determined that agencies were in compliance where the designated OSDBU director both exercised the OSDBU responsibilities set forth in section 15(k)(4)-(10) of the Small Business Act, and reported directly to and was responsible only to the agency head or agency head's deputy. To reach our determinations, we considered information provided by the designated directors and documentary evidence. Using a written questionnaire, we asked each designated director to identify the official(s) to whom he or she reported during the past year (March 2002 - March 2003) and to provide information characterizing the reporting relationship, such as the extent to which small business issues were discussed. In addition, we reviewed documentary evidence, including: organizational charts, OSDBU directors' performance appraisals and position descriptions, and memorandums or reports discussing the agencies' small business programs that were submitted to the agency head or the deputy head. We did not review the effectiveness of any agency's OSDBU or small business programs. To determine the reporting levels of officials to whom the

[3]One agency—the Federal Emergency Management Agency (FEMA)—is no longer independent, having become part of the Department of Homeland Security in March 2003. Because FEMA was independent during the period of our review, we included it in our review and are reporting on it as an independent agency.

OSDBU director within the Office of the Secretary of Defense has reported since 1988, we reviewed documentation from the Secretary's office and interviewed the appropriate officials. To determine whether section 15(k) applies to EOP's OA, we analyzed relevant laws, legislative history, and court cases. A more detailed description of our scope and methodology is discussed in appendix II. We conducted our work in Washington, D.C., between October 2002 and July 2003 in accordance with generally accepted government auditing standards.

Results in Brief

The reporting relationships for OSDBU directors at 13 of the 24 agencies that we reviewed complied with section 15(k)(3) of the Small Business Act—that is, the OSDBU director reported directly to and was responsible only to the agency head or deputy head (see table 1). The reporting relationships for OSDBU directors at 11 of the 24 agencies were not in compliance with section 15(k)(3).

Table 1: Summary of Agency Compliance with Section 15(k)(3) of the Small Business Act

Agency in compliance (13)	Agency not in compliance (11)
Defense Logistics Agency	Department of Agriculture
Department of Energy	Department of Commerce
Department of Housing and Urban Development	Department of Education
Department of Labor	Department of Health and Human Services
Department of the Air Force	Department of Justice
Department of the Army	Department of State
Department of the Navy	Department of the Interior
Department of Transportation	Department of the Treasury
Department of Veterans Affairs	Environmental Protection Agency
General Services Administration	Federal Emergency Management Agency
National Aeronautics and Space Administration	Social Security Administration
Office of Personnel Management	
U.S. Agency for International Development	

Source: GAO (analysis).

At the 13 complying agencies, the OSDBU directors stated that they reported directly to and were responsible only to the agency head or the deputy head. Further, agency documentation generally showed that relationship: the organizational chart showed a direct organizational link between the OSDBU and agency head or deputy head, the agency head or

deputy head rated the OSDBU director's performance, the OSDBU director's position description identified one of the top agency officials as the director's supervisor, and the OSDBU director's memorandums or reports on small business contracting were provided to the agency head or deputy head. At the 11 agencies that were not in compliance, we found a variety of reporting arrangements. At 4 of the agencies, the OSDBU directors told us that they reported to a lower level official than the agency head or deputy head. Also, agency documents generally indicated that the OSDBUs were not organizationally linked to the agency head or deputy head and that a lower level official, such as an assistant secretary or a division director, evaluated the OSDBU director's performance. At another 4 of the 11 agencies that were not in compliance, we found that the OSDBU directors were responsible not only to the agency head or the deputy head, but also were responsible to lower level officials. At these agencies, documentary evidence indicated that lower level officials had a supervisory relationship with the OSDBU director. At the remaining 3 noncomplying agencies, we found that the designated OSDBU directors had delegated their responsibilities to others, generally lower level officials who did not report to either the agency head or the deputy head.

Since Congress granted the Office of the Secretary of Defense an exemption from the section 15(k)(3) reporting requirement in 1988, the organizational reporting level of the OSDBU director for the Office of the Secretary of Defense has changed twice—in both cases to lower levels. From 1989 through 1996, the OSDBU director reported to officials at the level of Under Secretary of Defense, the level immediately under the Deputy Secretary of Defense. Since 1996, with the exception of one year—1999—the OSDBU director has reported to officials at the level of Deputy Under Secretary of Defense, two reporting levels below the Deputy Secretary of Defense.

We believe OA is a "Federal agency with procurement powers" subject to the OSDBU requirements of section 15(k), although no court to date has directly addressed this issue. OA has procurement powers because of its authority to contract on behalf of EOP. We believe OA is a "Federal agency" by virtue of its being an "agency" under the Administrative Procedure Act (APA), which the Small Business Act adopts by reference. Several courts have implicitly found that OA is an "agency" under the APA. In addition, OA has a wide range of statutory and other significant responsibilities and, therefore, exercises the requisite "substantial independent authority" that is necessary to constitute an "agency" under the APA.

We are making recommendations to 10 of the 11 agencies that we found to be not in compliance with section 15(k)(3) of the Small Business Act.[4] We recommend that the agency heads at these agencies take steps to ensure that the OSDBU directors are responsible only to and report directly to the head or deputy head of the agency.

We sent a draft of this report to all 24 agencies for their comments. All of the agencies that we concluded were not complying with section 15(k)(3) of the Small Business Act provided us with comments. Generally, they agreed with the report's description of their OSDBU directors' reporting relationships, but most disagreed with our conclusion that the reporting relationships did not comply with section 15(k)(3). However, none of the legal arguments that the agencies raised caused us to revise our conclusions or recommendations. In addition, we provided a draft of our legal opinion on the applicability of section 15(k) of the Small Business Act to OA. OA declined to comment on the draft report. It also stated that its declination to comment did not indicate agreement with our conclusions, citing the court's decision in *Haddon v. Walters*, 43F.3d 1488 (D.C. Cir. 1995).

Background

The U.S. government buys a myriad of goods and services through private contractors. In fiscal year 2002, the federal government awarded $250.2 billion in contracts. It has been the government's long-standing policy to maximize procurement opportunities for small business, small disadvantaged business, and women-owned business. The Small Business Act has been amended several times to increase small business participation in the federal procurement marketplace. For example, the Business Opportunity Development Reform Act of 1988 amended the Small Business Act to require the President to establish an annual governmentwide goal of awarding not less than 20 percent of prime contract dollars to small businesses. The Small Business Reauthorization Act of 1997 further amended the Small Business Act to increase the goal to not less than 23 percent. The Small Business Administration assigns small business prime contract goals to federal agencies, which include all small

[4]We are not making a recommendation for FEMA because it no longer exists as an independent agency.

business categories.[5] Although the Small Business Administration is responsible for coordinating with executive branch agencies to ensure that the federal government meets the mandated goal, agency heads are responsible for achieving the small business goals within their agencies.

In 1978, Congress enacted Public Law 95-507, which amended section 15(k) of the Small Business Act, by requiring each federal agency having procurement powers to establish an OSDBU and the agency head to appoint a director of the OSDBU. The purpose of the law was to create an advocate for small and disadvantaged businesses within each federal agency. A 1978 report by the Senate Select Committee on Small Business noted that officials who were responsible for advocating small business participation in federal government procurements often did not hold high enough positions in the agency to be effective. The law mandates a direct reporting relationship, whereby the OSDBU director is responsible only to and reports directly to the agency head or deputy head. In addition, the law specifies a number of duties and functions that the OSDBU director is responsible for carrying out. These include having supervisory authority over the OSDBU's staff; implementing and executing the functions and duties under sections 8, 15, and 31 of the Small Business Act; and identifying proposed solicitations that involve the bundling of contract requirements.[6]

Before 1987, the OSDBU director at the Office of the Secretary of Defense reported to the Deputy Secretary of Defense. In 1987, Congress created the position of Under Secretary of Defense for Acquisition at DOD, a position considered to be chief of procurement. In conjunction with the new position, Congress mandated that the OSDBU director report to the Under Secretary of Defense for Acquisition. One year later, Congress passed Public Law 100-656, which gave the Secretary of Defense the discretion to designate the individual to whom the OSDBU director would report. Section 15(k)(3) now reads, in relevant part, as follows:

[5]The small business categories include small business; women-owned small business; section 8(a) business; small disadvantaged businesses; HUBZone small business; veteran-owned small business; and service-disabled, veteran-owned small business.

[6]The Small Business Reauthorization Act of 1997 defines the bundling of contract requirements as the consolidation of two or more procurement requirements for goods or services previously provided or performed under separate, smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small business concern.

"The management of each such office shall be vested in an officer or employee of such agency or employee of such agency who shall be responsible only to, and report directly to, the head of such agency or to the deputy of such head except that the director for the Office of the Secretary of Defense shall be responsible only to, and report directly to, such Secretary or the Secretary's designee."

Almost Half of the Agencies We Reviewed Were Not Complying with Section 15(k)(3) of the Small Business Act

While 13 of the 24 agencies we reviewed were in compliance with section 15(k)(3) of the Small Business Act, we found that almost half (or 11) were not in compliance because the OSDBU director did not directly report to and was not responsible only to the agency head or deputy agency head.

The OSDBU Directors Were Reporting to the Agency Head or Deputy Agency Head at 13 Agencies

At each of the 13 complying agencies, the OSDBU director stated that he or she reports only to the agency head or the deputy head for the purposes of carrying out OSDBU duties and functions. All 13 agencies' organizational charts showed that the OSDBU was organizationally linked to the agency's top decision-makers. Other documents also demonstrated this relationship, as follows:

- At 11 of the 13 agencies (the Defense Logistics Agency, Department of the Air Force, Department of the Army, Department of Housing and Urban Development, Department of Labor,[7] Department of the Navy, Department of Veterans Affairs,[8] General Services Administration (GSA), National Aeronautics and Space Administration, Office of Personnel Management, and U.S. Agency for International Development), the OSDBU directors' position descriptions designate the agency head or the deputy head as the supervisor; the OSDBU directors' performance appraisals were signed by the agency head or the deputy; and documents showed that the OSDBU directors periodically

[7]The OSDBU director position at Labor became vacant in April 2002; a new OSDBU director assumed his position on April 21, 2003.

[8]Although the director's position description, dated 1988, identified the supervisor as the Associate Deputy Administrator for Logistics, the OSDBU director's most recent performance appraisal indicated that the agency head evaluated the performance of the OSDBU director.

provided information regarding the agency's small business programs, such as to the agency head or deputy.[9]

- At 2 agencies (the Departments of Transportation and Energy), the documents we obtained indicated a direct reporting relationship; however, we could not obtain the OSDBU directors' performance appraisals that were signed by the agency head or deputy head for the following reasons:

  - At Transportation, the Secretary of Transportation's Chief of Staff signed the director's performance appraisal.[10] However, the OSDBU director's position description indicated that the Secretary was the OSDBU director's supervisor.

  - At Energy, the OSDBU director is a Senate-confirmed presidential appointee. According to the OSDBU director, she does not receive written performance appraisals.

Eleven Agencies Were Not in Compliance with Section 15(k)(3)

Eleven agencies did not comply with section 15(k)(3) (see table 1). At these agencies, the OSDBU directors (1) reported to lower level officials than the agency head or deputy; (2) were not responsible only to the agency head or deputy head, but also were responsible to a lower level agency official; or (3) had delegated their OSDBU director responsibilities to officials who do not report to either the agency head or the deputy head. We believe these arrangements are contrary to the intent of the law, which is that the official carrying out the OSDBU function have direct access to the agency head or deputy head.

At Four Agencies, OSDBU Directors Did Not Directly Report to the Agency Head or Deputy Head

At the Departments of the Interior and Justice, the Federal Emergency Management Agency (FEMA), and the Social Security Administration, the OSDBU directors did not report to the agency head or deputy head. At these agencies, the OSDBU director reported to a lower level official who oversaw the agency's management or finance division.

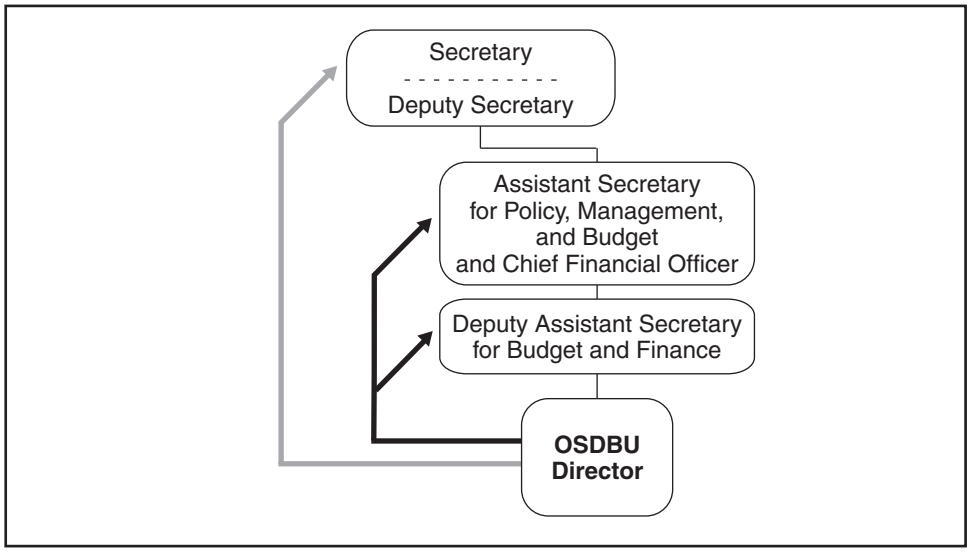
[9]GSA could not provide us with any formal reports because of the high turnover rate of the OSDBU director position since 2000.

[10]In a memorandum dated January 25, 2001, the Chief of Staff is delegated with the authority, by the Secretary, to take personnel actions, including the authority to certify, on behalf of the Secretary, all personnel documents.

The Department of the Interior

The OSDBU director at Interior reported to the Deputy Assistant Secretary for Budget and Finance for administrative matters and to the Assistant Secretary for Policy, Management, and Budget and the Chief Financial Officer (CFO) for policy matters (see fig. 1). On the basis of Interior's organizational chart, the OSDBU is directly linked to the Assistant Secretary for Policy, Management, and Budget and the CFO. The OSDBU director told us that he met with the Assistant Secretary for Policy, Management, and Budget and the CFO or the Deputy Assistant Secretary on small business contracting issues on a regular basis and on a key issue basis. Both the performance appraisal and the position description confirmed that the Assistant Secretary for Policy, Management, and Budget and the CFO was the OSDBU director's reporting official.

Figure 1: The OSDBU Director's Reporting Relationship at the Department of the Interior



Mandated reporting relationship

Actual reporting relationship

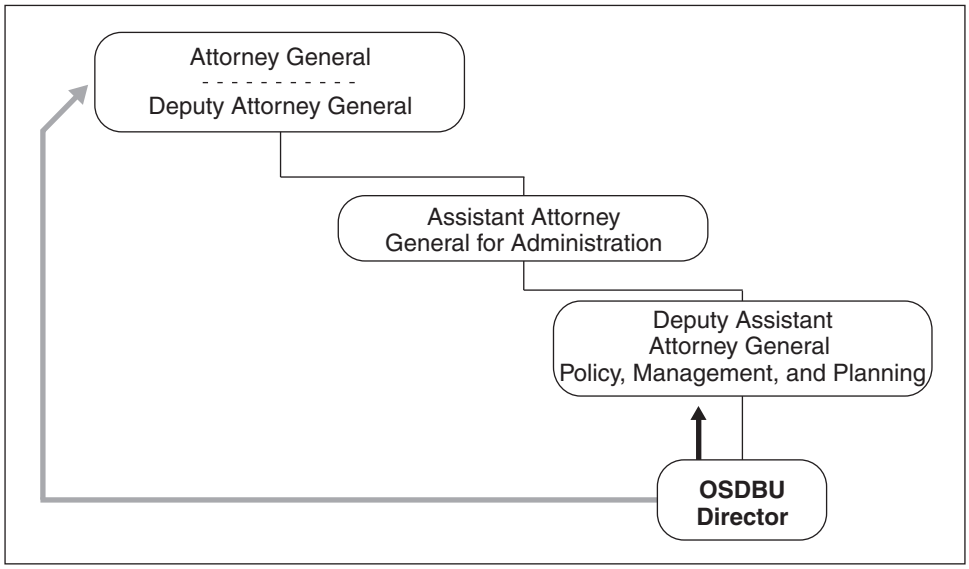
Source: GAO (analysis).

The Department of Justice

As shown in figure 2, the OSDBU director at Justice reported to the Deputy Assistant Attorney General for Policy, Management, and Planning. According to Justice's organizational chart, the OSDBU was located within the Justice Management Division, with the OSDBU director under the supervision of the Deputy Assistant Attorney General Policy, Management, and Planning. The OSDBU director told us that he did not report to the Attorney General or Deputy Attorney General (the agency head and deputy head, respectively) on any matters from March 2002 to 2003, the time frame covered by our study. The Deputy Assistant Attorney General for Law and Policy[11] evaluated the director's performance, and the Assistant Attorney General for Administration, who headed the Justice Management Division, reviewed the director's ratings. The reporting relationship between the OSDBU director and the Deputy Assistant Attorney General has been long-standing. The OSDBU director's position description, dated 1981, identified the director's supervisor at the Deputy Assistant Attorney General level.

[11]According to a Department of Justice staff member, in 2002, the title of Deputy Assistant Attorney General for Law and Policy was changed to the title of Deputy Assistant Attorney General Policy, Management, and Planning.

Figure 2: The OSDBU Director's Reporting Relationship at the Department of Justice



Mandated reporting relationship

Actual reporting relationship

Source: GAO (analysis).

The Federal Emergency Management Agency

Before it was absorbed into the Department of Homeland Security, FEMA was not in compliance with section 15(k)(3). The OSDBU director position had been vacant for 2 years, and a FEMA employee in the Financial and Acquisition Management Division carried out the OSDBU functions on a part-time basis. This employee told us that she did not report directly to FEMA's top decision-makers. FEMA became part of the Department of Homeland Security in March 2003 and ceased to be an independent agency. According to the Department of Homeland Security's organizational chart, the agency has established an OSDBU that is organizationally linked to the Secretary.

The Social Security Administration

Because the OSDBU director reports to neither the Social Security Administration's Commissioner nor the Deputy Commissioner, we concluded that the Social Security Administration is not complying with

section 15(k)(3). The Social Security Administration's OSDBU director reported to the Deputy Commissioner, Office of Finance, Assessment, and Management, who is one of a number of deputy commissioners managing various programs and operations (see fig. 3). The OSDBU director told us that he reports to the Deputy Commissioner, Office of Finance, Assessment, and Management. He does not report to the Commissioner or the Deputy Commissioner of the Social Security Administration. Both the OSDBU director's position description and performance appraisals were signed by the Deputy Commissioner, Office of Finance, Assessment, and Management.

Officials at the Social Security Administration advised us that, on the basis of a 1999 opinion of its Office of General Counsel, the agency is in compliance with section 15(k)(3). The primary argument underpinning the opinion is that the Deputy Commissioner of Finance, Assessment, and Management reports to the agency head, and that therefore the reporting relationship of the OSDBU director to the Deputy Commissioner of Finance, Assessment, and Management is appropriate. The opinion stated that the Small Business Act does not define what is meant by the term "deputy." At the Social Security Administration, each of the eight Deputy Commissioners, including the Deputy Commissioner of Finance, Assessment, and Management, as well as the General Counsel and the Chief Actuary, report directly to the Commissioner. According to the Social Security Administration's General Counsel Office, each of them could be considered to have the status of a "deputy" to the Commissioner, unless more is required by a specific statute or regulation. Thus, each of these individuals could be considered to have the status of deputy for purposes of section 15(k)(3).

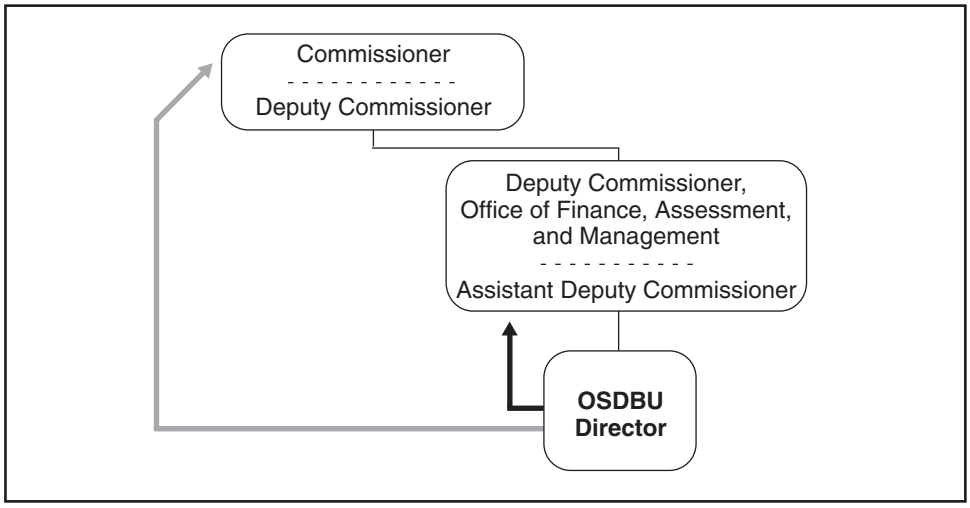
We disagree with the Social Security Administration's legal analysis of section 15(k)(3) and conclude that the Social Security Administration is not complying with the provision. Section 15(k)(3) mandates that the OSDBU director report to the agency head or "the deputy of such head," that is, the second-in-command. The legislative history of section 15(k)(3) supports this analysis. The conference report to the 1978 legislation, establishing the OSDBU, stated that the office would be "directed by an employee of that agency, who would report to the head of the agency or his deputy (i.e., *the second ranking person in that agency*)."[12] [Emphasis supplied.] Moreover, the Senate report to the legislation stated, "these directors would report

[12]H.R. Conf. Rep. No 1714, 95th Cong. 2d Sess. 18 (1978).

directly to the agency head or *an official not less than one level of responsibility lower than the agency head.*"[13] [Emphasis supplied.]

The Social Security Administration has a Deputy Commissioner who has been designated as the second-in-command. The Social Security Administration's organizational manual states that the Deputy Commissioner of Social Security is to serve as the Acting Commissioner in the Commissioner's absence. The manual, in describing the functions of the Commissioner's Office, also states that both the Commissioner and the Deputy Commissioner of Social Security provide executive leadership to the Social Security Administration and exercise general supervision over its major components. Finally, according to the manual, the Deputy Commissioner of Social Security assists the Commissioner in carrying out his or her responsibilities and performs other duties as the Commissioner may prescribe.

Figure 3: The OSDBU Director's Reporting Relationship at the Social Security Administration



Mandated reporting relationship

Actual reporting relationship

Source: GAO (analysis).

[13]S. Rep. No. 1070, 95th Cong., 2d Sess. 18 (1978).

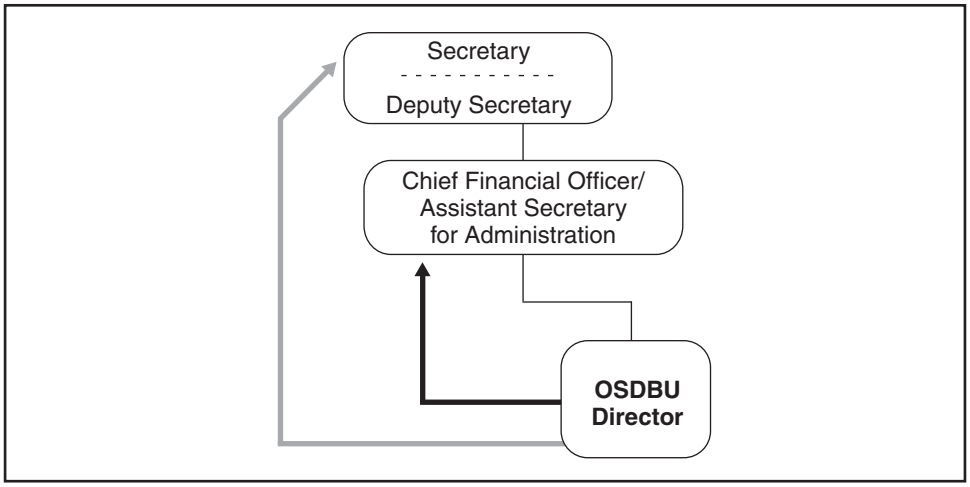
At Another Four Agencies, OSDBU Directors Are Not Responsible Only to the Agency Head or Deputy Head

We found the Departments of Commerce, Education, and Health and Human Services (HHS) and the Environmental Protection Agency (EPA) not to be in compliance with section 15(k)(3) because the OSDBU directors were not responsible only to the agency head and the deputy head. Although evidence indicated that the OSDBU directors at these agencies reported at times to the agency head or deputy, the position descriptions and the performance evaluations identified lower level agency officials as the OSDBU directors' supervisors.

The Department of Commerce

The OSDBU director at Commerce told us that for administrative matters, such as budget, personnel, and space, he reported to a CFO/Assistant Secretary for Administration, but reported to the Deputy Secretary for small business policy matters. However, we found that Commerce's organizational chart directly linked the OSDBU to the CFO/Assistant Secretary for Administration, which is one level below the Deputy Secretary. Further, the performance appraisals showed that the CFO/Assistant Secretary for Administration evaluated the OSDBU director, while the position description did not identify the director's supervisor. Also, according to a Commerce order that describes the functions of the OSDBU, the director is to appeal to the CFO/Assistant Secretary for Administration when internal disputes arise or when the director determines that the procuring or program area is not providing adequate opportunity to small and disadvantaged businesses (see fig. 4).

Figure 4: The OSDBU Director's Reporting Relationship at the Department of Commerce



Mandated reporting relationship

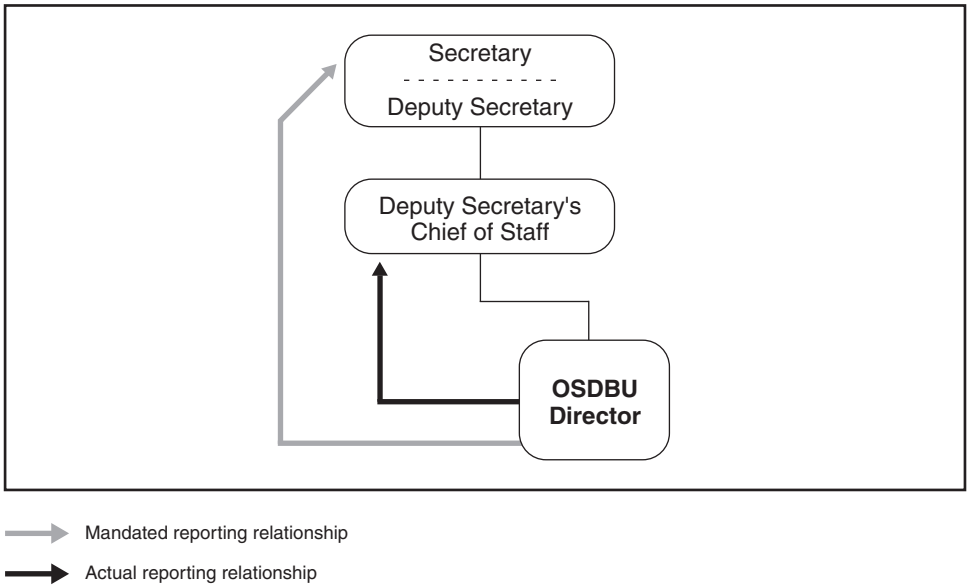
Actual reporting relationship

Source: GAO (analysis).

The Department of Education

The OSDBU director at Education was responsible not only to the Secretary or Deputy Secretary, but she also was responsible to the Deputy Secretary's Chief of Staff. The OSDBU director told us that she reported to the Deputy Secretary, and that her office is located within the Deputy Secretary's office. She told us that she met with the Deputy Secretary 3 to 4 times from March 2002 to March 2003. The Deputy Secretary's Chief of Staff told us that the OSDBU director can meet with the Deputy Secretary whenever she believes it necessary, even though the Deputy Secretary assigned the administrative aspects pertaining to the OSDBU director to the Chief of Staff. However, documentary evidence indicated that the OSDBU director was not always directly reporting to the Deputy Secretary and often went through the Deputy Secretary's Chief of Staff (see fig. 5). OSDBU employees, including the OSDBU director, told us that all of their reports and memorandums were sent through the Chief of Staff before going to the Deputy Secretary. Moreover, the Chief of Staff signed the OSDBU director's performance appraisal for the last 2 years. According to Education officials, evaluating the performance of the OSDBU director is part of the Chief of Staff's responsibilities.

Figure 5: The OSDBU Director's Reporting Relationship at the Department of Education

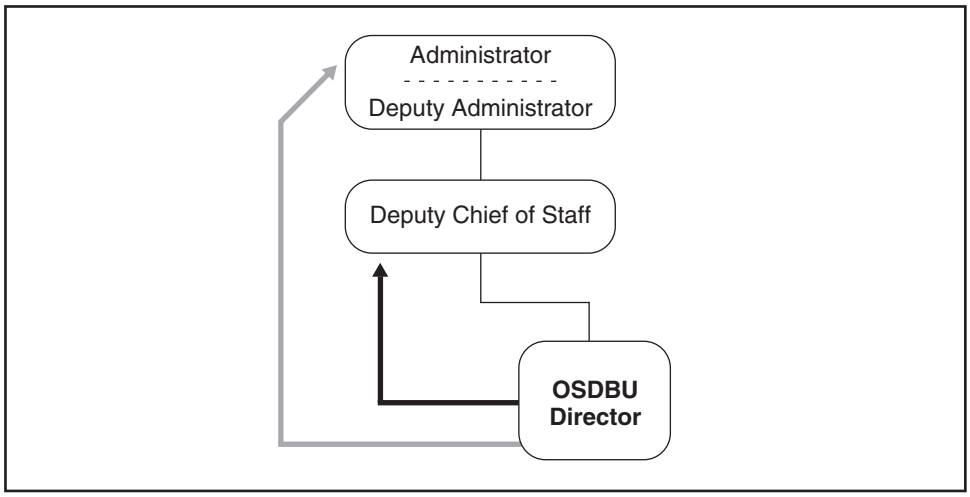


Source: GAO (analysis).

The Environmental Protection Agency

The OSDBU director at EPA is not responsible only to the Administrator or the Deputy Administrator (see fig. 6). The OSDBU director told us that she met with the Administrator approximately 4 times from March 2002 to March 2003 to discuss small business contracting issues. Also, her position description, last updated in 1984, identified her supervisor as the Deputy Administrator, and EPA's organizational chart indicated that the OSDBU director was organizationally linked to the Administrator. However, the OSDBU director told us that she reported to the Deputy Chief of Staff for the day-to-day operations and all matters related to small business programs. Also, the performance appraisal indicated that the Administrator's Deputy Chief of Staff evaluated the OSDBU director's performance.

Figure 6: The OSDBU Director's Reporting Relationship at the Environmental Protection Agency



Mandated reporting relationship

Actual reporting relationship

Source: GAO (analysis).

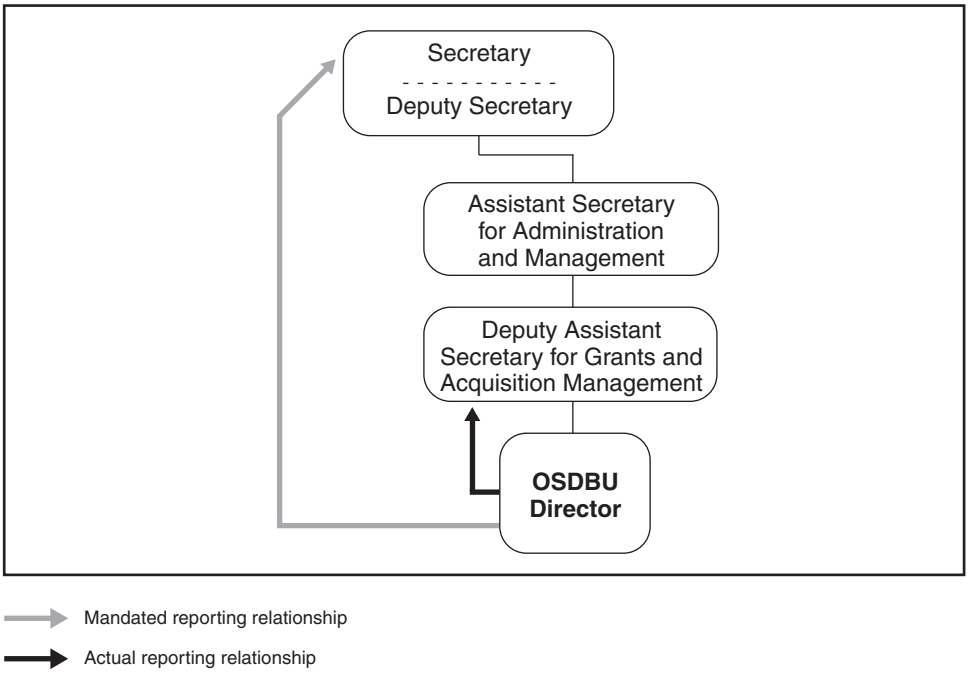
The Department of Health and Human Services

The OSDBU director at HHS informed us that she reported to the Deputy Secretary on high-level policy issues, such as small business procurement, goal setting and achievement, contract bundling, and overall support for the small business program. However, she advised us that she coordinated with the Acting Deputy Assistant Secretary for Grants and Acquisition Management for at least some small business issues—what she categorized as the day-to-day issues affecting the small business community, as well as budget and personnel issues (see fig. 7). The HHS organization chart linked the OSDBU with the Assistant Secretary for Administration and Management. Further, the OSDBU director's position description and performance appraisal showed that a supervisory relationship existed between the Deputy Assistant Secretary for Grants and Acquisition Management and the OSDBU director. The only evidence we found that the OSDBU director had reported to the Deputy Secretary on small business issues was one statement from the OSDBU director—that is, between March 2002 and March 2003, she met with the Deputy Secretary once to discuss small business contracting issues. The agency did not provide us

with any documentary information that indicated the OSDBU director reports to the Deputy Secretary on any matters.

Since March 2003, HHS has reorganized some of its components. As of June 19, 2003, the OSDBU director is located in the Office of the Director for Acquisition Management and Policy, which is located within the Office of the Assistant Secretary for Administration and Management.[14] The notice in the *Federal Register* announcing HHS's reorganization stated that the OSDBU director reports directly to the Deputy Secretary, with the day-to-day operational support provided by the Office of Acquisition Management and Policy. However, as discussed in the agency comments section of this report, it is unclear whether the Deputy Secretary is the only official to whom the OSDBU director is responsible.

Figure 7: The OSDBU Director's Reporting Relationship at the Department of Health and Human Services before March 2003



Source: GAO (analysis).

[14]68 Fed. Reg. 36811 (2003).

Note: This figure represents the reporting relationship during the period covered by our review (March 2002 to March 2003).

Agriculture, the Treasury, and State Were Not in Compliance Because the OSDBU Directors Delegated Their OSDBU Responsibilities to Lower Level Officials

We found that the Departments of Agriculture, the Treasury, and State were not complying with section 15(k)(3) because their designated OSDBU directors delegated all of their OSDBU director responsibilities to officials who do not directly report to either the Secretaries or Deputy Secretaries. At each agency, an Assistant Secretary who manages the agency's administrative functions was designated as the statutory OSDBU director. The Assistant Secretaries then delegated nearly all of their OSDBU responsibilities to lower ranking officials, who reported directly to the Assistant Secretaries. The lower ranking officials thus became the *de facto* OSDBU directors. These arrangements, whereby an Assistant Secretary for management or administration has delegated nearly all of the responsibilities of the OSDBU director to a lower level official, maintaining only the title of OSDBU director, defeats the purpose of section 15(k)(3). Congress assigned to the OSDBU director specific responsibilities to ensure that small and disadvantaged businesses received a fair portion of federal procurements. To ensure that these responsibilities were effectively implemented, Congress also mandated that the OSDBU director—that is, the person actually carrying out the responsibilities—have immediate access and be responsible only to the agency head or deputy head. Consistent with the explicitly specified reporting relationship, the legislative history of the reporting requirements reveals congressional frustration with a system that kept those whose principal job was the promotion of procurement opportunities for small and disadvantaged businesses in the lower echelons of federal agencies. As the Senate Select Committee on Small Business reported:

> "[Many] small business officials…are located in the lower echelons of the bureaucracy and, therefore, are unable to advocate or effectively assist in the procurement of contracts for small businesses. The committee believes that the small business procurement officers must have direct access to top level agency policymakers to improve their effectiveness as small business advocates."[15]

The reporting relationships at Agriculture, State, and Treasury, in which the official responsible for the OSDBU function has no direct access to the

[15]S. Rept. No. 1070, 95th Cong.2d Sess. 18 (1978). See also S. Rept. No. 1140, 95th Cong., 9 (1978); H.R. Conf. Rep. No. 1714, 95th Cong. 2d Sess. 27 (1978); and H.R. Rep. No. 460, 100th Cong., 1st Sess. 40 (1987).

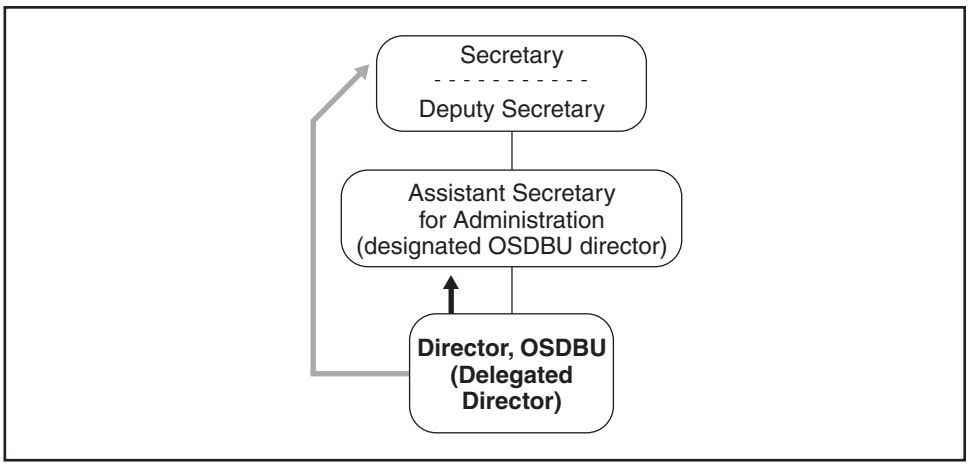
agency head or deputy head, is precisely the structure Congress intended to avoid.

The Department of Agriculture

Agriculture designated the Assistant Secretary for Administration by the additional title of Director of Small and Disadvantaged Business Utilization, the statutory title mandated by section 15(k) for agency OSDBU directors. The Assistant Secretary reported to the Secretary and the Deputy Secretary of Agriculture[16] (see fig. 8). On the basis of Agriculture's organizational chart, the Assistant Secretary was linked to the Secretary and the Deputy Secretary. However, the Assistant Secretary delegated nearly 100 percent of his OSDBU responsibilities to a lower level official whose title is very similar—that is, Director, Office of Small and Disadvantaged Business Utilization (hereafter Delegated Director)—and who reported to the Assistant Secretary.

[16]The Assistant Secretary for Administration, who served as the OSDBU director during the period covered by our study, retired as of June 30, 2003. Subsequently, the Acting Assistant Secretary for Administration was appointed the OSDBU director.

Figure 8: The OSDBU Director's Reporting Relationship at the Department of Agriculture



Mandated reporting relationship

Actual reporting relationship

Source: GAO (analysis).

The Assistant Secretary for Administration told us that he, along with an Associate Assistant Secretary and the Delegated Director, were responsible for the day-to-day implementation and execution of the functions and duties of the OSDBU. However, we found little evidence that the Assistant Secretary handled the day-to-day functions of the OSDBU. He told us that he spent 5 percent of his time on small business contracting issues, while spending the rest of his time on his other duties and responsibilities.[17] On the basis of documents that the agency provided, the only task that the Assistant Secretary appeared to implement in terms of small business contracting was providing information to the Secretary. He advised us that he met at least weekly with the Secretary, and that small business contracting was one of the many issues discussed at these meetings. For these weekly meetings, he prepared reports on various administrative matters. We reviewed 15 of these weekly reports dated from January 28,

[17]The Assistant Secretary for Administration's additional responsibilities included human resources management, procurement and property management, facilities operations, conflict resolution, crisis planning and management, energy efficiency, ethics, and outreach programs.

2003, through April 29, 2003, and found that 11 of them included some information on Agriculture's small business issues.

Other evidence showed that the Delegated Director carried out the day-to-day implementation of Agriculture's OSDBU. The Delegated Director told us that he handled the day-to-day duties and functions of Agriculture's OSDBU, and that he spent 100 percent of his time on OSDBU duties and functions. Moreover, his position description indicated he was the official responsible for carrying out the duties and functions prescribed under section 15(k). The position description stated, among other things, that the Delegated Director is responsible for

- establishing short- and long-range program objectives, time schedules, and courses of action for the accomplishment of small business goals;
- formulating, recommending, and implementing broad policies and procedures, which provide the structural framework for all OSDBU functions;
- keeping abreast of all OSDBU activities and initiating any corrective actions deemed necessary;
- developing, presenting, and justifying to higher level authorities recommendations for modifications of OSDBU operations, policies, and procedures to enhance the Office's effectiveness toward maximum satisfaction of functional requirements;
- representing Agriculture at conferences and meetings with Members of Congress and their key staff members and representatives of the Small Business Administration, the Office of Management and Budget, and other Executive departments; and
- planning, initiating, directing, and coordinating a comprehensive evaluation system for review and analysis of budgets, program developments, progress, and performance.

The Delegated Director told us that he did not report to the Secretary or Deputy Secretary for any matters and his performance appraisals showed that the Assistant Secretary evaluated his performance.

The Department of the Treasury

In December 2002, Treasury appointed the Acting Assistant Secretary for Management as Treasury's "Designated OSDBU Director." According to Treasury's *Small Business Program Handbook*, the Assistant Secretary for Management delegated the responsibility for the overall management of Treasury's small business programs to the Director of the Office of Small Business Development—an official who did not directly report to either the Secretary or the Deputy Secretary. We found little evidence that the Acting Assistant Secretary was involved with OSDBU functions or duties during the period covered by our review. She told us that she spent about 5 percent of her time on small business contracting issues and acknowledged that she was not responsible for the day-to-day implementation of OSDBU functions and duties. On the basis of interviews with Treasury officials, it appeared that her only responsibility in terms of small business contracting was to provide information to the Secretary or Deputy Secretary on Treasury's small business programs. Further, Treasury could not provide us with any documentary evidence that information related to the OSDBU was provided to the Secretary or the Deputy Secretary during the time frame covered by our study. The Acting Assistant Secretary acknowledged that from December 2002 to March 2003, she never met formally with the Secretary or Deputy Secretary to discuss small business contracting issues primarily because she had other Treasury matters that needed her attention.[18]

Evidence from Treasury showed that the Director of the Office of Small Business Development carried out the day-to-day responsibilities under section 15(k). The Director of the Office of Small Business Development told us that he spent 100 percent of his time on OSDBU duties and functions from March 2002 to March 2003. On the basis of the position description, the Office of Small Business Development director's duties and responsibilities, among other things, are

- planning, developing, issuing, and providing overall direction for policies and programs governing Treasury procurement and financial assistance action in accordance with the Small Business Act;

- directing Treasury's annual goal setting process;

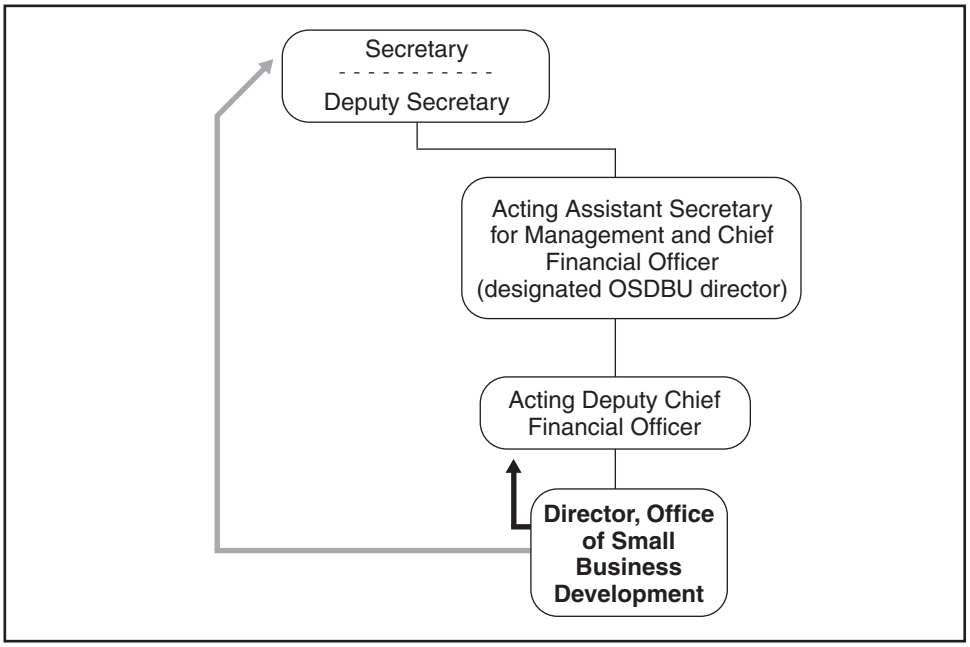
[18]The Acting Assistant Secretary said that she was dealing with, among other things, the transfer of part of Treasury to the Department of Homeland Security.

- working with Treasury bureau heads to establish individual bureau goals, and developing and recommending for approval of the Assistant Secretary (Management) the appropriate Department goals for each of the small business categories; and

- monitoring Treasury's small business goal accomplishments during the fiscal year.

The Director of the Office of the Small Business Development told us that he reported to the Acting Deputy Chief Financial Officer, who, in turn, reported to the Acting Assistant Secretary (see fig. 9). Treasury documents confirmed this statement. The Office of Small Business Development director's most recent performance appraisal showed that the Acting Deputy Chief Financial Officer rated the director on small business goals and the position description identified the Deputy Assistant Secretary (Management Operations) as the supervisor.

Figure 9: The OSDBU Director's Reporting Relationship at the Department of the Treasury



Mandated reporting relationship

Actual reporting relationship

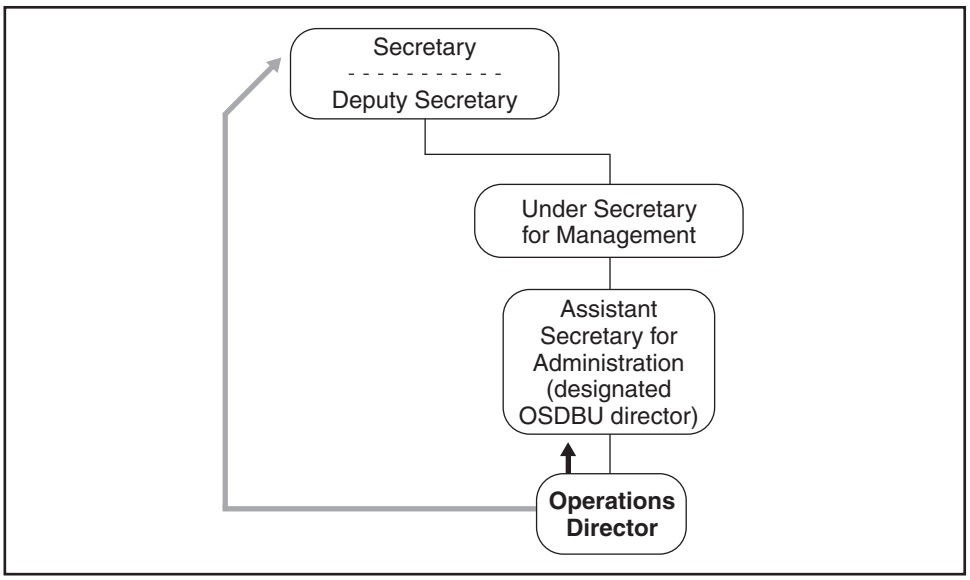
Source: GAO (analysis).

The Department of State

Similar to Agriculture and Treasury, State was not in compliance with the reporting requirement of section 15(k) because its *de facto* OSDBU director—the Operations Director for the Office of the Small and Disadvantaged Business Utilization—does not report to the Secretary or Deputy Secretary. The State Department designated the Assistant Secretary for Administration as its OSDBU director. The Assistant Secretary, who reports to the Under Secretary for Management, delegated his OSDBU responsibilities to the "Operations Director," who in turn reports to the Assistant Secretary (see fig. 10). The Assistant Secretary told us that he spends 5 percent of his time on OSDBU functions. However, we found little evidence that the Assistant Secretary handles any of the day-to-day functions of the OSDBU. On the basis of agency documents, the only task that the Assistant Secretary appeared to implement in terms of small

business contracting was providing information to the Under Secretary for Management.

Figure 10: The OSDBU Director's Reporting Relationship at the Department of State



Source: GAO (analysis).

The performance appraisal of the Assistant Secretary for Administration, the "designated OSDBU director," indicated that he was not evaluated on State's small business programs. However, the Operations Director's performance appraisal indicated that she was responsible for developing and implementing the goals and objectives of the OSDBU. In addition, she was responsible for, among other things,

- delegating and overseeing the duties to screen all new domestic contract actions over $100,000,
- reviewing subcontracting plans from those large prime contractors required to submit plans,
- helping small businesses that request assistance with late payments, and

- helping small businesses in their efforts to do business with State.

It should also be noted that we found no evidence that the Assistant Secretary reported to the Secretary or the Deputy Secretary. The Assistant Secretary informed us that he reported to the Under Secretary for Management for all matters related to small business contracting, and agency documents confirmed his statement. The Under Secretary signed his performance appraisal. In addition, the Assistant Secretary prepared weekly reports on the agency's administrative matters, which include small business contracting. We reviewed several of the weekly reports and found that they were addressed to the Under Secretary for Management.

Reporting Level of the OSDBU Director at the Office of the Secretary of Defense Has Changed Twice

Since Congress granted the Office of the Secretary of Defense an exemption from the 15 U.S.C. § 644(k)(3) reporting requirement in 1988, the organizational reporting level of the OSDBU director has changed twice, in both cases to lower levels. From 1989 until 1996, the director reported to officials on the Under Secretary of Defense level, immediately below the Deputy Secretary of Defense. Since then, except in 1999, the OSDBU director has reported to officials on the Deputy Under Secretary of Defense level, two reporting levels below the Deputy Secretary of Defense.

According to DOD Directive[19] 5134.4, dated March 17, 1989, the Office of the Secretary of Defense's OSDBU director reported to the Under Secretary of Defense for Acquisition, a subordinate of the Deputy Secretary of Defense. The Under Secretary of Defense for Acquisition was the senior acquisition executive for DOD and advised the Secretary and Deputy Secretary of Defense on all matters relating to DOD's acquisition system. In 1994, the title of Under Secretary of Defense for Acquisition was changed to the Under Secretary of Defense for Acquisition and Technology.

[19]DOD directives are broad policy documents containing what is required by legislation, the President, or the Secretary of Defense to regulate the actions of DOD components. DOD directives establish or describe policies, programs, and organizations; define missions; provide authority; and assign responsibilities.

However, the title change did not affect the reporting level of the OSDBU director who continued reporting to the Under Secretary of Defense for Acquisition and Technology.[20]

In 1996, another DOD directive[21] changed the reporting relationship of the OSDBU director from the Under Secretary of Defense for Acquisition and Technology to the Deputy Under Secretary of Defense for International and Commercial Programs, two reporting levels below the Deputy Secretary. This arrangement lasted until 1999, when for 1 year, the OSDBU director again reported[22] to the Under Secretary of Defense for Acquisition and Technology. In 2000, the reporting relationship switched back to the Deputy Under Secretary level when the OSDBU director began reporting[23] to the Deputy Under Secretary of Defense for Acquisition and Technology, two levels below the Deputy Secretary. This reporting relationship remains in effect today (see fig. 11).

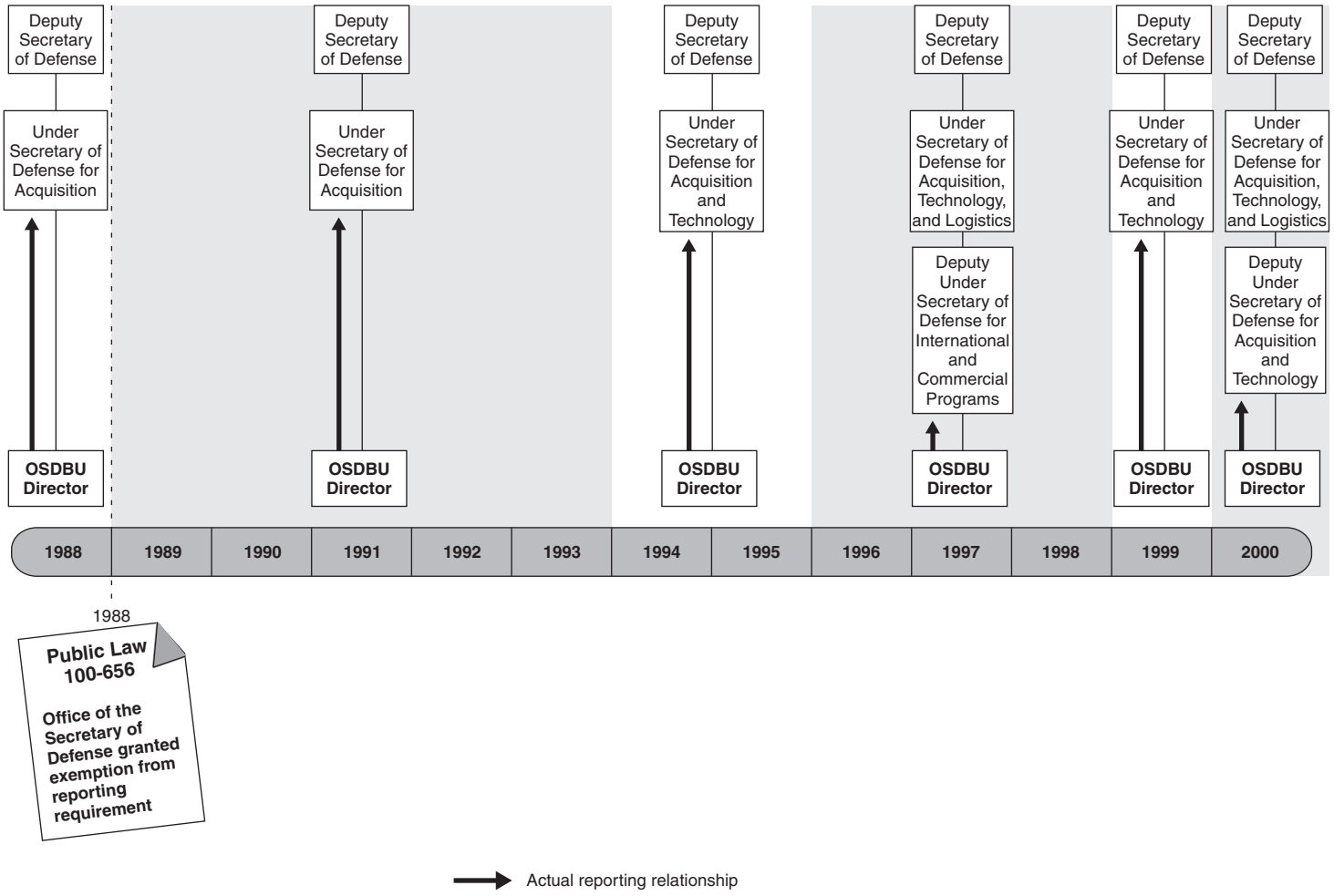
[20]DOD Directive 5134.1, dated June 8, 1994, implemented the position change of Under Secretary of Defense for Acquisition and Technology. The directive added the responsibilities of advanced technology, economic security, environmental security, and atomic energy to the responsibilities of the Under Secretary of Defense for Acquisition.

[21]DOD Directive 4205.1, September 11, 1996.

[22]DOD Directive 5134.1, September 17, 1999.

[23]DOD Directive 5134.13, May 25, 2000.

Figure 11: Timeline of the OSDBU Director's Reporting Relationship at the Office of the Secretary of Defense



Source: GAO (analysis).

Note: Shading indicates time period of each reporting relationship.

OA Likely Is Subject to the OSDBU Requirements of Section 15(k) of the Small Business Act

Although no court to date has directly addressed this issue, we believe OA is subject to the OSDBU requirements of section 15(k) of the Small Business Act, which applies to any "Federal agency with procurement powers." There is no dispute that OA has procurement powers because it serves as the central procurement office for the significant majority of EOP's procurements of goods and services. We believe that it is a "Federal agency" by virtue of its being an "agency" under the APA, which the Small

Business Act adopts by reference, and it is an APA "agency" because it exercises the requisite "substantial independent authority." Several courts have implicitly found that OA is an "agency" subject to the APA. In addition, OA has a wide range of statutory and other significant responsibilities and, therefore, exercises the requisite "substantial independent authority" necessary to constitute an "agency" under the APA. See appendix III for our detailed legal analysis of the applicability of section 15(k) to EOP's OA.

OA Serves as the Central Procurement Office for the Significant Majority of EOP's Procurements

OA has authority to contract on behalf of EOP and thus it clearly has procurement powers. OA officials told us that, historically, OA has served as a central procurement office for a significant portion of EOP, and that except for procurements for the EOP Office of National Drug Control Policy's antidrug campaign, OA manages the significant majority of EOP's procurements. OA officials also told us that OA currently has an OSDBU, headed by a director who also serves as Deputy Director of OA; in both capacities, this official reports to the Director of OA. According to these officials, the OA OSDBU works with the Small Business Administration to ensure that an appropriate procurement program is in place for small business, and much of EOP's small business procurement activity is concentrated within OA.

OA Has Substantial Independent Authority and Likely Constitutes a Federal Agency Under the Small Business Act

The Small Business Act defines the term "Federal agency," with exclusions not relevant here, as "having the meaning given the term 'agency' by Section 551(1) of title 5" of the APA. Section 551(1) of the APA defines "agency" in relevant part as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." Several courts have implicitly found that OA is an "agency" subject to the APA, and therefore is a "Federal agency" subject to the Small Business Act. In addition, OA exercises the type of "substantial independent authority" that courts have declared constitutes an "agency" under the APA. Finally, OA satisfies the broader Freedom of Information Act "agency" standards that courts have developed to address entities specifically within EOP.

OA exercises "substantial independent authority" on the basis of its wide range of significant responsibilities and functions performed across EOP. These responsibilities include (1) administration of significant statutory requirements under the Federal Records Act and the Presidential Records Act, similar to the functions performed by the National Archives and Records Administration; (2) serving as EOP's central procurement office

with the authority to contract on behalf of EOP (of particular relevance to the OSDBU program); (3) oversight of EOP's annual budget submission and testimony on EOP's behalf at appropriations hearings; (4) provision of financial services, including budget formulation, execution and analysis, centralized accounting support, coordinated internal control reporting, and financial records maintenance; (5) provision of wide-ranging legal support services; (6) facilities management services similar to those performed by agencies such as GSA; and (7) human resources management services similar to those performed by agencies such as the Office of Personnel Management. We believe that these responsibilities constitute "substantial independent authority" as the courts have interpreted that term.

Conclusions

Our review of 24 federal agencies showed that nearly half were not in compliance with section 15(k)(3) of the Small Business Act, a provision enacted by Congress to ensure that small business advocates within federal agencies have access to the highest agency levels. One of these noncomplying agencies—the Federal Emergency Management Agency—has been subsumed into the Department of Homeland Security, which has established an Office of Small and Disadvantaged Business Utilization with a director reporting to the highest agency levels. The remaining 10 agencies—the Departments of Agriculture, Commerce, Education, Health and Human Services, Justice, State, the Interior, and the Treasury; the Environmental Protection Agency; and the Social Security Administration—are not in compliance with section 15(k)(3). Because the OSDBU directors at these agencies do not have a direct reporting relationship with their agencies' head or deputy, the reporting relationships potentially limit their role as an advocate for small and disadvantaged businesses.

Recommendations

We recommend that the following agency heads take steps as necessary to comply with the requirement in section 15(k)(3) of the Small Business Act that the Office of Small and Disadvantaged Business Utilization director be responsible only to and report directly to the head or deputy head of the agency:

- The Attorney General
- The Commissioner of the Social Security Administration

- The EPA Administrator
- The Secretary of Agriculture
- The Secretary of Commerce
- The Secretary of Education
- The Secretary of Health and Human Services
- The Secretary of State
- The Secretary of the Interior
- The Secretary of the Treasury

Agency Comments and Our Evaluation

We sent drafts of this report to all 24 agencies for their comments. In addition, we sent to OA a draft of our legal opinion, appendix III of this report, on the applicability of section 15(k) of the Small Business Act. Of the agencies that we concluded were complying with section 15(k)(3), we received written comments only from the U.S. Agency for International Development, which concurred. Among the agencies that we concluded were not complying with section 15(k)(3), we received written comments from the Departments of Agriculture, Commerce, Education, Health and Human Services, the Interior, Justice, State, and the Treasury and the Social Security Administration. The written comments are reproduced in appendixes IV through XIII. EPA also provided us with E-mail comments on the draft, which we did not reproduce. We also received a written response from OA, which is reprinted in appendix XIV.

Generally, the commenting agencies agreed with the report's description of their OSDBU directors' reporting relationships. However, most of the agencies disagreed with our conclusion that the reporting relationships did not comply with section 15(k)(3) of the Small Business Act. None of the legal arguments that the agencies raised caused us to revise our conclusions or recommendations. The agencies' specific comments and our responses are summarized below.

- Agriculture agreed that the Assistant Secretary for Administration, as the designated OSDBU director (Designated Director), had delegated to the Director, Office of Small and Disadvantaged Business Utilization, the

responsibilities of the OSDBU. However, Agriculture pointed out that section 15(k) does not contain an explicit prohibition on delegating this authority. It cites the case of *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121 (1947), for the proposition that in the event that there is no statutory prohibition on the delegation, one cannot be presumed. We acknowledge Agriculture's statement. However, the lack of an express prohibition on delegation does not necessarily mean that delegation of authority is thereby permitted. The *Fleming* case recognizes that the delegation of authority may be withheld by implication, and we believe section 15(k)(3) does exactly that. Section 15(k) assigns specific duties to the OSDBU director. As pointed out in the report, to ensure that the OSDBU responsibilities are effectively implemented, the statute mandates that the OSDBU director (i.e., the person actually carrying out the responsibilities) have immediate access, and only be responsible, to the agency head or deputy. The legislative history reveals that the reason for this requirement is that Congress believed that too often, agency officials responsible for promoting procurements for small and disadvantaged businesses were relegated to positions too far down the chain of command to be effective. The reporting requirement of section 15(k)(3) was intended to remedy that situation. Agriculture's reporting arrangement frustrates the purpose of the law. Agriculture also argues that section 15(k) does not require that the designated director personally perform all of the specific duties it outlines. We acknowledge that at some agencies, the OSDBU director may have a staff that carries out many of the duties listed under section 15(k). However, there is a difference between, on the one hand, having staff carry out the duties while retaining responsibility for the duties and, on the other, delegating responsibility for carrying out those duties to a lower official.

- Commerce stated that they believe its current OSDBU director reporting structure—whereby the OSDBU director reports directly to the Deputy Secretary on all legislative and policy issues and to the CFO/Assistant Secretary for Administration on administrative matters such as personnel and budget—complied with the law. However, Commerce did not include any analysis or information demonstrating how the above mentioned reporting relationship fulfills the requirements of section 15(k)(3). Moreover, the comments did not respond to any of the evidence we presented in the report showing that the OSDBU director reported to the CFO/Assistant Secretary. We continue to believe Commerce is not in compliance.

- Education disagreed with our conclusion that the OSDBU director is at least partly responsible to the Deputy Secretary's Chief of Staff. Their comments state that the OSDBU director reports to the Deputy Secretary, who is the deputy agency head, and cite (1) the director's position description and the agency's organizational chart, as evidence that the position of the OSDBU director is in the Office of the Deputy Secretary and (2) the functional statement of the Office of the Deputy Secretary, which states that the OSDBU director reports to the Deputy Secretary. Education disagreed with other factors that we used to assess compliance, such as the level of the official to whom the OSDBU director submits reports or who signs the director's performance appraisal—in this case, the Deputy Secretary's Chief of Staff. According to the comments, these factors are operating procedures reflecting the Deputy Secretary's managerial preferences and should not lead to a conclusion that the OSDBU director is not reporting to the Deputy Secretary. However, we continue to believe that Education is not in compliance with section 15(k)(3) because the OSDBU director is responsible not only to the Deputy Secretary, but also to the Deputy Secretary's Chief of Staff. Education's comments did not refute the factual information presented in the draft report. Further, Education's OSDBU staff told us that information on small business programs was submitted to the Chief of Staff before going to the Deputy Secretary. Education did not provide any evidence that the OSDBU director directly provided information on small business programs to the Deputy Secretary. The OSDBU director told us she was not sure what the Chief of Staff did with the information after she submitted it.

- According to the OSDBU director, EPA generally agreed with the report's findings, conclusions, and recommendations and told us that EPA would take action to comply with section 15(k)(3). According to the staff member, the OSDBU director will report to the Deputy Administrator and will meet regularly with the Deputy Administrator to discuss the overall program and the agency's performance.

- HHS stated that it believes it is in compliance with section 15(k)(3). However, our draft report prompted HHS to clarify the reporting relationship of the OSDBU director and the Deputy Secretary. Specifically, HHS stated that the OSDBU director will report to the HHS Deputy Secretary on all policy matters and significant day-to-day issues affecting the OSDBU and will arrange for monthly meetings with the Deputy Secretary and/or prepare a monthly report for the Deputy Secretary on major issues facing the OSDBU. In addition, the Deputy

Secretary will serve as the reviewing official for the OSDBU director's performance evaluations. We agree that by taking these actions, HHS is moving toward compliance with section 15(k)(3). However, the comment letter is not clear regarding the extent to which the OSDBU director will be reporting to the Assistant Secretary for Administration and Management's Office of Acquisition Management and Policy or others. The comments mentioned that the OSDBU director will report to the Deputy Secretary on certain—but not all—matters. In addition, the comments stated that the OSDBU director will continue to receive operational support from the Office of Acquisition Management and Policy but did not describe what areas were covered under operational support. Because we could not conclude on the basis of the comments that the OSDBU director would be responsible only to the Deputy Secretary, we did not revise the recommendation for HHS.

- Interior agreed that the OSDBU director reports to the Assistant Secretary for Policy, Management, and Budget; rather, its comment letter stated that this reporting relationship has worked for the department as evidenced by its successful small business program. However, Interior stated that we mischaracterized the OSDBU director's reporting relationship. According to Interior's letter, the OSDBU director does not report to a lower level official within the department, but reports to the "the agency head" as defined in Subpart 2.101 of the Federal Acquisition Regulations (FAR). The letter added that the Assistant Secretary for Policy, Management, and Budget is the agency head for acquisition matters, in accordance with the FAR. In our draft report, we used the term "lower level official" to distinguish the Assistant Secretary from the two officials—the agency head or deputy agency head—that section 15(k)(3) designates as the permissible officials to whom an agency's OSDBU director may report. Interior's designation of the Assistant Secretary as its "agency head" for procurement powers does not mean that the person thereby becomes its agency head for purposes of section 15(k)(3).

- Justice acknowledged that its OSDBU resides within the Justice Management Division. But Justice also said that the OSDBU's placement in the division is for administrative purposes, and that the OSDBU director reports to the Deputy Attorney General on matters of substance requiring such attention. Justice's letter stated that the Office of the Deputy Attorney General fully supports the objectives of the OSDBU and has met with the director to discuss the office's work. According to a Justice official, the OSDBU director met with a representative of the

Office of the Deputy Attorney General in May 2003. As our draft report stated, the OSDBU director told us that he did not report to the agency head or deputy head on any matters from March 2002 to March 2003, the time frame covered by our study. Also, agency documentation did not show that the OSDBU director reported to the Deputy Attorney General in any manner. Furthermore, the May 2003 meeting does not provide any additional evidence on compliance, since the OSDBU director met with a representative of the office, not the Deputy Attorney General. Therefore, we did not revise our conclusion or recommendation.

- State wrote that it would not comment on our conclusions, since neither Justice nor the President's counsel has provided guidance on the matter. Most of State's comments focused on the effectiveness of its small business programs, including contracting awarded to 8(a) firms and to firms located in HUBZones. State's letter stated that as a practical matter, the Department of State believed that the organizational placement of its OSDBU was highly effective, and that if the organization was reorganized to ensure that the OSDBU director reported directly to the Secretary or the Deputy Secretary of State, the OSDBU director would be less effective in securing contracts for small and disadvantaged businesses. State's letter stated that given the broad range of urgent issues upon which the Secretary and the Deputy Secretary of State must focus, the OSDBU director would receive much less attention than the director enjoys in their present organizational location.

- The Social Security Administration disagreed with our conclusion that because its OSDBU director reported to the Deputy Commissioner of Finance, Assessment, and Management, the agency was not in compliance with section 15(k)(3). As it had previously indicated to us, the Social Security Administration again noted that its Deputy Commissioner of Finance, Assessment, and Management reported directly to the Commissioner, and that the Deputy Commissioner of Finance, Assessment, and Management was considered to have the status of "deputy" to the Commissioner. The Social Security Administration did not offer us any new information that would affect our overall conclusions and recommendation. We acknowledge that the Deputy Commissioner of Finance, Assessment, and Management reports directly to the Commissioner and is responsible for its programs and mission. However, as our draft report stated, this official is not second in command. The legislative history of section 15(k)(3) shows that Congress intended the deputy referred to in section 15(k)(3) to be

the second ranking person in that agency. In the Social Security Administration, the second ranking person is the Deputy Commissioner. As our draft report noted, the Social Security Administration's organization manual states that the Deputy Commissioner of the Social Security Administration assists the Commissioner in carrying out his or her responsibilities and performs other duties as the Commissioner may prescribe. Furthermore, a Social Security Administration press release dated March 13, 2002, announcing the swearing-in of the Deputy Commissioner, referred to the Deputy Commissioner as the principal Deputy Commissioner.

- Like Agriculture, Treasury disagreed that section 15(k)(3) does not allow the delegation of OSDBU responsibilities to lower level officials. Treasury's letter stated that the statutory language or the legislative history does not suggest that an OSDBU director cannot delegate some of the OSDBU authority. The letter reiterated that the department's OSDBU director remained responsible for the OSDBU performance, whether the director personally performed the functions or delegated them. However, as previously discussed, we believe that section 15(k)(3) has an implied prohibition against delegating the OSDBU director's authority. Therefore, we continue to believe Treasury is not in compliance.

Agriculture, Commerce, Interior, State, and Treasury also commented on the effectiveness of their small business programs. As stated in the draft report, our review did not include an examination of the effectiveness of agencies' small business programs; rather, it focused only on agencies' compliance with section 15(k)(3) of the Small Business Act.

OA declined to comment on the draft report, including the report's discussion of the applicability of section 15(k) to OA. However, OA also stated that its declination to comment did not indicate agreement with our conclusions, citing the court's decision in *Haddon v. Walters*, 43 F.3d 1488 (D.C. Cir. 1995). The *Haddon* decision does not affect our conclusions in any way. This case involved whether a unit other than OA—the Executive Residence of the President—was an "executive agency" covered by the employment discrimination prohibitions of Title VII of the Civil Rights Act of 1964. That act, in turn, adopts a second statute's definition of "independent establishment," and the court noted in passing that under a third statute, OA is expressly excluded as an "independent establishment." None of this *dicta* is relevant to the issue in our report—that is, whether

OA is an "agency" under the Small Business Act or the APA—and thus does not change our conclusion that OA is covered under those statutes.

As agreed with your offices, unless you publicly release its contents earlier, we plan no further distribution of this report until 30 days from its issuance date. At that time, we will send copies of this report to the Chairman and the Ranking Minority Member of the House Committee on Small Business. We will make copies available to others on request. In addition, this report will be available at no charge on the GAO Web site at http://www.gao.gov.

If you have any questions regarding this report, please contact me or Charles E. Wilson, Jr., Assistant Director, at (202) 512-8678. Key contributors to this report are listed in appendix XV.

David G. Wood

David G. Wood
Director, Financial Markets and
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Twenty-four Agencies Covered by the Compliance Review

Defense Logistics Agency
Department of Agriculture
Department of Commerce
Department of Education
Department of Energy
Department of Health and Human Services
Department of Housing and Urban Development
Department of Justice
Department of Labor
Department of State
Department of the Air Force
Department of the Army
Department of the Interior
Department of the Navy
Department of the Treasury
Department of Transportation
Department of Veterans Affairs
Environmental Protection Agency
Federal Emergency Management Agency
General Services Administration
National Aeronautics and Space Administration
Office of Personnel Management
Social Security Administration
U.S. Agency for International Development

Scope and Methodology

In assessing compliance with section 15(k)(3) of the Small Business Act, we reviewed 24 federal agencies (see app. I). We focused on agencies that procured $200 million or more in goods and services in fiscal year 2001 on the basis of data from the Federal Procurement Data System.[1] Because the Department of Defense (DOD) has established separate Offices of Small and Disadvantaged Business Utilization (OSDBU) for its services and other command units, the 24 agencies we reviewed include the Departments of the Air Force, Army, and Navy and the Defense Logistics Agency. These entities are responsible for a large portion of DOD's procurements. The Office of the Secretary at DOD was not included in our compliance review because the law allows the Secretary of Defense the discretion to designate the official to whom the OSDBU director should report. Agencies were determined to be in compliance where the OSDBU director reported directly to the agency head or agency head's deputy.

In making our determinations of compliance, we considered several factors, including the OSDBU directors' statements about their reporting relationships and documentary evidence that reflected the reporting relationships. To obtain this information, we administered to each of the 24 OSDBU directors a brief questionnaire regarding their reporting relationships and requested supporting documentation. The questionnaire consisted of 11 open-ended questions, including 1 that asked the OSDBU directors to confirm whether they reported to the agency head or deputy head. We reviewed organizational charts to identify where the OSDBU was located in relation to the agency head or deputy head; OSDBU directors' performance appraisals for the previous 2 years to identify the agency official who evaluated the OSDBU director's performance; the most recent position description of the OSDBU director position to identify the OSDBU director's supervisor; and various other agency documents, such as reports and memorandums discussing the agency's small business programs that the OSDBU director prepared for the agency head or deputy head. In addition, we reviewed and analyzed section 15(k)(3). We did not review or analyze the effectiveness of any agency's OSDBU or small business programs.

To describe the reporting levels of the OSDBU director at the Office of the Secretary of Defense since 1988 when the Secretary of Defense was given discretion to designate the official to whom the OSDBU director should

[1]The Federal Procurement Data Center is a unit of the General Services Administration that collects data on all federal contract actions.

report, we reviewed a written timeline from the Office of the Secretary of Defense OSDBU. This timeline identified to whom OSDBU directors serving from 1979 to 2003 reported. We reviewed DOD directives from 1984 to 2000 pertaining to the reporting relationships of the OSDBU directors of the Office of the Secretary of Defense. We interviewed an official from the Office of the Secretary of Defense for clarification on the information included in the directives and the timeline. We reviewed section 15(k)(3), including the exemption for the Office of the Secretary of Defense, and the legislative history and congressional reports relating to the Office of the Secretary of Defense, OSDBU.

To determine the applicability of the section 15(k) of the Small Business Act to the Office of Administration (OA) within the Executive Office of President (EOP), we reviewed and analyzed relevant legislation, legislative history, and case law.

We conducted our work in Washington, D.C., between October 2002 and July 2003 in accordance with generally accepted government auditing standards.

Legal Analysis of the Applicability of Section 15(k) of the Small Business Act to the EOP's Office of Administration

Introduction and Summary of Conclusions

According to officials in the Office of Administration (OA) within the Executive Office of the President (EOP), OA serves, with one major exception, as the central procurement arm for the significant majority of EOP's procurements of goods and services.[1] These officials also indicated that OA has an Office of Small and Disadvantaged Business Utilization (OSDBU), but they declined to provide OA's legal position on whether it is subject to the OSDBU requirements of section 15(k) of the Small Business Act, 15 U.S.C. § 644(k). As discussed below, we conclude that section 15(k) likely applies to OA. The Small Business Act adopts the Administrative Procedure Act's (APA) definition of a covered "agency," and several courts have implicitly found that OA is an "agency" subject to the APA. In addition, under the relevant statutes, legislative history and case law, OA meets both the core APA "agency" standards and the broader Freedom of Information Act (FOIA) "agency" standards that courts have developed to address entities specifically within EOP.

Background

Section 15(k) of the Small Business Act

Section 15(k) requires each "Federal agency having procurement powers" to establish an OSDBU. The establishment of OSDBUs "is central to the goal of the Small Business Act which directs that small businesses receive a fair portion of the Federal procurement through vigorous action on the part of Federal departments and agencies." S. Rep. No. 1070, 95th Cong., 2d Sess. 18 (1978); *see* 15 U.S.C. §§ 631(a), 644(a) (small businesses should receive "fair proportion" of federal government contracts for goods and services).

The Executive Office of the President and the Office of Administration

By Reorganization Plans I and II of 1939 and Executive Order 8248 of September 8, 1939, President Roosevelt transferred the functions of several existing federal agencies into the Executive Office of the President, so that EOP would be organized "with functions and duties so prescribed and responsibilities so fixed that the President will have adequate machinery

[1]OA does not manage the roughly $200 million in annual procurements associated with the EOP Office of National Drug Control Policy's (ONDCP) National Youth Anti-Drug Media Campaign, but does manage the "significant majority" of the remainder of EOP's procurements, which total roughly $50 million annually.

for the administrative management of the Executive branch of the Government." *See* E.O. 8248. As initially established, EOP had five principal divisions, with no division specifically designated as responsible for procurement.[2] Since 1939, EOP has grown and undergone a number of organizational changes according to the aims of different administrations. EOP's total annual budget is now approximately $276 million and it employs approximately 1,760 people.[3] There are currently more than 15 separate units in EOP, including the Office of the President (known as the White House Office), the Office of Management and Budget, the Council on Environmental Quality, the Council of Economic Advisers, and the National Security Council.

In 1977, in order to improve the efficiency and effectiveness of EOP's operations, President Carter took the administrative support functions then being performed by individual EOP units and consolidated them into one central Office of Administration. *See* Reorganization Plan No. 1 of 1977, 91 Stat. 1633; E.O. 12028 (Dec. 12, 1977). The mission of the newly created OA (originally to be called the Central Administrative Unit) was "to provide support in administrative services common to all EOP entities. It should be a separate EOP entity because of the need to assure equal access by all other units." *See* Message of the President to the Congress of the United States, transmitting Reorganization Plan No. 1 of 1977. After congressional hearings and debate on the President's Reorganization Plan, OA was officially established.[4]

[2]These were the White House Office, the Bureau of the Budget, the National Resources Planning Board, the Liaison Office for Personnel Management, and the Office of Government Reports, with a sixth division authorized in the event of an actual or threatened emergency.

[3]*See* Pub. L. No. 107-67, 115 Stat. 514 (2001); *U.S. Office of Management and Budget*, *Budget of the United States Government*, *Fiscal Year 2003* (Feb. 4, 2002).

[4]A reorganization plan proposed by the President can take effect only if neither house of Congress passes a resolution disapproving the plan within a certain time period. Resolutions disapproving of Reorganization Plan No. 1 of 1977 were introduced in both the House and Senate, *see* S. Res. 222 (July 18, 1977)(introduced by Sen. Ribicoff); H. Res. 688 (July 18, 1977)(introduced by Rep. Brooks), but after hearings on the Plan, including acknowledgement of the proposed creation of OA, neither resolution passed. *See generally* S. Rep. No. 465, 95th Cong., 1st Sess. (1977); H.R. Rep. No. 661, 95th Cong., 1st Sess. 4, 44-46, 56 (1977).

OA's functions today can be broadly defined as "all types of administrative support and services that may be used by, or useful to, [EOP] units" (although generally not the White House Office). *See* Message of the President Accompanying Reorganization Plan No. 1 of 1977, Sec. III. These services include: (1) financial management; (2) information technology and records management; (3) procurement; (4) data processing; (5) research and other library services; (6) personnel management; (7) facilities management and security; and (8) office services and operations, including printing and duplication, mail, messenger, graphics, word processing, and supply services.[5] With respect to financial management, for example, OA officials oversee submission of the annual EOP budget request to Congress and testify before congressional funding panels. With respect to records management, OA is responsible for administering the Federal Records Act and the Presidential Records Act throughout EOP.[6] OA also administers, with respect to information it possesses, the requirements of FOIA, 5 U.S.C. § 552, the Privacy Act, 5 U.S.C. § 552a, and other information-disclosure statutes applicable to federal agencies and entities. *See* 5 C.F.R. Parts 2500, 2502, 2504. At least one federal judge has recognized OA as a significant administrative resource in the federal government. *See Meyer v. Bush*, 981 F.2d 1288, 1304 n. 11 (Wald, J., dissenting).

OA is nominally headed by the President, but its day-to-day operations are managed by a Presidentially appointed Director. The Director serves as chief administrative officer, whose duties include "contract[ing] for supplies and services, and do[ing] all other things that the President, as head of [OA], might do." *See* E.O. 12028 § 4(a). In addition to its Director and associated staff, OA currently has an Office of the Deputy Director, Office of the General Counsel, and Office of the Executive Secretary, as well as six principal divisions, each headed by a director, and offices dedicated to equal employment opportunity, operations and legislative

[5]*See* E.O. 12028 § 3(b), as amended by E.O. 12122 (Feb. 26, 1979); E.O. 12134 (May 9, 1979); *Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, on Executive Office of the President and Funds Appropriated to the President and Independent Agencies, FY 2002* (hereafter *2002 EOP Budget Hearings)*.

[6]The Federal Records Act, a collection of statutes at 44 U.S.C. §§ 2101–2118, 2901-2910, 3101-3107, 3301-3324, governs the creation, management, and disposal of federal records. The Presidential Records Act, 44 U.S.C. §§ 2201-2207, governs the creation, management, and disposal of Presidential records, which are documentary materials "created or received by the President, his immediate staff, or a unit or individual in [EOP] whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President." *Id.* § 2201(2).

liaison, and security. *See* 5 C.F.R. § 2502.3; *United States Government Manual* 2002-2003 at 95. The Director of OA does not have program or management responsibilities for the other EOP units; that authority is retained by the respective office heads. *See* E.O. 12028 § 4(d).

Finally, with respect to procurement responsibilities, OA officials told us that historically, OA has served as a central procurement office for a significant portion of EOP, and as noted above, except for procurements for the EOP Office of National Drug Control Policy's anti-drug campaign, OA manages the significant majority of EOP's procurements.[7] OA officials also told us that OA currently has an OSDBU, headed by a director who also serves as Deputy Director of OA; in both capacities, this official reports to the Director of OA. The OA OSDBU works with the Small Business Administration to ensure that an appropriate procurement program is in place for small business, and much of EOP's small business procurement activity is concentrated within OA.

[7]Since 1994, OA generally has contracted for EOP procurements over $25,000, with other EOP units making smaller procurements through purchase orders. *See* U.S. General Accounting Office, *Executive Office of the President: Major Procurements for Calendar Years 1990 to* 1993, GAO/GGD-94-138FS (Washington, D.C.: Sept. 16, 1994) at 1.

Analysis

In order to be subject to the OSDBU requirements of the Small Business Act, OA[8] must both be a "Federal agency" and have "procurements powers." OA clearly has "procurement powers," a term presumed to have its common meaning of authority to make purchases.[9] As to the requirement to be a "Federal agency," the Small Business Act defines this term, with exclusions not relevant here, as "hav[ing] the meaning given the term 'agency' by section 551(1) of title 5" of the APA. *See* 15 U.S.C. § 632(b). Section 551(1) of the APA, in turn, with exclusions not relevant here, defines "agency" as: "each authority of the Government of the United

[8]Our congressional requesters asked us to analyze whether the statutory OSDBU requirements apply to EOP and its constituent offices. As agreed, we are responding to this question by focusing on OA as the centralized procurement arm of EOP. (We do not express an opinion on whether any EOP units other than OA, which manage the remainder of EOP's procurements, also may be "Federal agencies" under the Small Business Act.) We have not focused on EOP as a whole in light of the general practice of the courts, in litigation filed against the "Executive Office of the President," to look to the specific EOP office involved in determining whether there is an "agency" under the relevant statute. A number of recent suits against EOP under the Privacy Act, for example, which adopts the FOIA definition of "agency," have been resolved by examining the activities of the White House Office rather than EOP. *See*, *e.g.*, *Tripp v. EOP*, *200 F.R.D. 140* (D.D.C. 2001), *appeal dismissed*, No. 01-5189, 2001 WL 1488614 (D.C. Cir. Oct. 17, 2001); *Dale v. EOP*, 164 F. Supp. 2d 22 (D.D.C. 2001); *Falwell v. EOP*, 113 F. Supp. 2d 967 (W.D. Va. 2000); *Barr v. EOP*, No. 99-CV-1695, 2000 WL 33539396 (D.D.C. 2000).

Several courts, however, have either allowed suit to proceed directly against EOP or suggested that EOP would be a proper party. *See Public Citizen v. Carlin*, 2 F. Supp. 2d 1, 8-9 (D.D.C. 1997), *rev'd on other grounds*, 184 F.3d 900 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1003 (2000) (rejecting argument in APA/Federal Records Act suit against EOP, OA, and others that EOP should be dismissed on ground that it "functions simply as an 'umbrella' designation for various separately designated components which operate in close proximity to the President"); *Armstrong v. EOP*, 1 F.3d 1274, 1282 n. 4 (D.C. Cir. 1993)(rejecting untimely argument in APA/Federal Records Act/Presidential Records Act suit that EOP was improper party); *United States v. Espy*, 145 F.3d 1369, 1372-74 (D.C. Cir. 1998)(Independent Counsel argues EOP is "agency of the United States" under Criminal Code provision 18 U.S.C. § 6, defining "agency" to include any "authority . . .of the United States.").

[9]When statutes use unambiguous terms without providing a specialized technical meaning, the terms generally are deemed to have their ordinary, "plain" meaning. *See*, *e.g.*, *Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992).

States, whether or not it is within or subject to review by another agency. . ..” 5 U.S.C. § 551(1). Thus, whether OA is covered by section 15(k) and required to have an OSDBU turns on whether it is an “agency” under the APA.[10]

Although no court to date has addressed whether OA is a “Federal agency” under the Small Business Act, at least three courts have implicitly found that OA is an “agency” under the APA and, thus, a “Federal agency” under the Small Business Act. The courts determined that because the actions of OA and other federal entities did not comply with certain statutory requirements, their actions were “arbitrary and capricious” under the APA, and the decisions were necessarily premised on OA being an “agency” under the APA.[11]

We conclude that OA also is an APA agency under the standards set forth in the case law and legislative history. As the courts have recognized, “the law on the simple question of what is an [APA] agency is quite complex.” *Lee Constr. Co. v. Federal Reserve Bank*, 558 F. Supp. 165, 172 (D. Md. 1982). Likewise, the courts have acknowledged that “[a]ny general definition [of “agency” under the APA] can be of only limited utility . . . [when] confronted with one of the myriad organizational arrangements for getting the business of the government done. . . .The unavoidable fact is that each new arrangement must be examined anew and in its own context.” *Washington Research Project, Inc. v. HEW*, 504 F.2d 238, 245-46 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975)(citations omitted).

[10]When Congress enacts a statute incorporating a section of another statute, Congress generally is presumed to have adopted the interpretations given to that other statute. *Lorillard v. Pons*, 434 U.S. 575, 581 (1978).

[11]In *Carlin*, footnote 8 above, the court ruled that the actions of OA, EOP and the Archivist of the United States violated the Federal Records Act and therefore also violated the APA as “arbitrary and capricious” actions. In *Armstrong*, footnote 8 above, the court found that OA's electronic records management guidelines violated the APA and thus the Federal Records Act. Finally, in *Hartness v. Bush*, 712 F.Supp. 986 (D.D.C 1989), *rev'd on other grounds*, 919 F.2d 170 (D.C. Cir. 1990), the court preliminarily enjoined OA and others, under the APA, from enforcing an EOP-wide plan under the Drug-Free Workplace statute.

The issue of whether an EOP unit in particular constitutes an APA "agency" is further complicated by the fact that virtually all cases analyzing EOP units' "agency" status are based not on the APA but on FOIA (or statutes adopting FOIA's "agency" definition), and FOIA's definition of "agency" has expanded over time. Until 1974, FOIA incorporated the APA "agency" definition without change, meaning that decisions interpreting FOIA were effectively decisions interpreting the APA. In 1974, Congress broadened the APA definition, for FOIA purposes only, to include entities "which perform governmental functions and control information of interest to the public" but which "might have eluded the APA's definition [of agency] in § 551(1). . .."[12] Further, even though one of the EOP offices already had been held covered by the pre-1974 FOIA (APA) definition (*see Soucie v. David*, 448 F. 2d 1067 (D.C. Cir. 1971), discussed below), EOP was specifically included in the entities added by the 1974 amendments, and the amendments' history shows Congress intended to codify the pre-1974 *Soucie* analysis into FOIA.[13] The net effect of these events is that although there are a number of post-1974 FOIA decisions addressing the "agency" status of various EOP offices, the decisions must be applied with care in determining whether a particular EOP entity is an "agency" under the APA, because the decisions typically do not specify which aspect of FOIA they are applying—the more stringent core APA "agency" definition or the potentially less stringent list of entities added by the 1974 amendments, including EOP. With that background, we examine how the courts have defined "agency" under the APA, including any relevant cases pertaining to offices within EOP.

Courts have taken somewhat different approaches to what constitutes an "agency" under the APA. The seminal case is *Soucie v. David*, above, which

[12]*Energy Research Foundation v. Defense Nuclear Facilities Safety Board*, 917 F.2d 581, 583 (D.C. Cir. 1990). *See also Meyer v. Bush*, above, 981 F. 2d at 1304 (Wald, J. dissenting)(APA definition of agency is "less expansive than FOIA's"). As amended, FOIA's definition of "agency" now reads: "For purposes of this section, the term...'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency...." 5 U.S.C. § 552(f)(1) (emphasis added).

[13]*See* H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 15 (1974) ("With respect to the meaning of the term 'Executive Office of the President,' the conferees intend the result reached in *Soucie v. David*. The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President."); S. Rep. No. 854, 93d Cong., 2d Sess. 33 (1974).

involved what was then called EOP's Office of Science and Technology (OST). Because the APA and FOIA definitions of "agency" were identical at the time of the lawsuit, the court looked to interpretations of the APA in determining whether OST was an "agency" under FOIA. The court found that while the meaning of "agency" under the APA was "not entirely clear," it "apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions." 448 F.2d at 1073 (emphasis added). Because OST's "sole function" was not limited to advising and assisting the President—OST also evaluated federal science programs previously evaluated by the National Science Foundation—the court found OST had "substantial independent authority" and "must be regarded as an agency subject to the APA and [FOIA]." *Id.* at 1075.

Applying the *Soucie* test, the court reached a different conclusion regarding the Judge Advocate General of the Army (JAG) in *McKinney v. Caldera*, 141 F. Supp. 2d 25 (D.D.C. 2001). JAG was found not to have "substantial independent authority," and thus not to be an APA agency, even though JAG supervised the Army's military justice system, performed appellate review of court martial trials, and furnished legal services. Notwithstanding that the APA contemplates an "agency" within an "agency," the court focused on the fact that JAG's duties flowed from the authority of the Secretary of the Army, suggesting that JAG's responsibilities were not sufficiently independent.[14]

Other courts have framed the APA "agency" definition slightly differently, looking to whether an entity can take "final and binding action." This standard is based in part on the *Soucie* "substantial independent authority" test and the APA's legislative history indicating Congress intended covered agencies to have "final and binding" legal authority.[15] In *Dong v. Smithsonian Institution*, 125 F.3d 877 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 922 (1998), for example, the court looked to whether the Smithsonian Institution was:

[14]The court also was influenced by the fact that finding JAG to be an APA "agency" would "fundamentally alter the relationship between the civilian and military courts and would, in essence, defy the presumptions against civilian-court review of military-court decisions." *McKinney*, 141 F. Supp. 2d at 34.

[15]*See Report on the Administrative Procedure Act*, 79th Cong., 1st Sess. 13 (Comm. Print 1945).

"a part of government which is generally independent in the exercise of [its] functions and. . .by law has authority to take final and binding action affecting the rights and obligations of individuals, particularly by the characteristic procedures of rule-making and adjudication."

Id. at 881 (emphasis added). The court found that the Smithsonian was not an APA "agency" under this standard, because while it exercised authority, the authority was not sufficiently "substantial." Although the Smithsonian is closely linked with the federal government, receives federal funding, has certain police powers to protect its physical plant, and publishes regulations in the Code of Federal Regulations, the court noted that it does not make binding rules of general application, determine rights and duties through adjudications, issue orders, or perform regulatory functions.

Finally, courts have focused on whether an entity is one of the "centers of gravity" in the exercise of administrative power "where substantial 'powers to act' . . .are vested," *see Lee Constr. Co.*, above, 558 F. Supp. at 173 (Federal Reserve Bank was APA agency based on its substantial delegated decision-making authority from Federal Reserve System's Board of Governors), or whether the entity has "authority in law to make decisions," *see Washington Research Project, Inc. v. HEW*, above, 504 F.2d at 248 (HEW peer review groups for grant applications were not APA agencies, because they only recommended grants to an NIH entity which in turn recommended to the HEW Secretary), or whether the "governmental unit has substantial authority to act with the sanction of the government behind it," *see Conservation Law Foundation v. Harper*, 587 F. Supp. 357, 364 (D. Mass. 1984)(Property Review Board, created by Executive Order to review federal real property acquisition and disposal policies, advise GSA on same, and establish annual agency targets may be APA agency if it controls disposition of public property). Thus, the National Academy of Sciences (NAS) was held not to be an APA "agency," even though it was authorized to veto EPA's suspension of auto-emission standards. *See Lombardo v. Handler*, 397 F. Supp. 792 (D.D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C. Cir. 1976). As the *Lombardo* court explained, NAS is not the kind of "center of gravity in the exercise of administrative power" to which the APA refers. 397 F. Supp. at 796.

Applying these authorities, we conclude that OA possesses the requisite "substantial independent authority" to constitute an "agency" under the APA. In OA's administration of the significant requirements of the Federal Records Act and Presidential Records Act, for example, it issues statutorily required records disposition schedules and other directives for all EOP units. In this regard, OA serves a function similar to the National Archives and Records Administration (NARA), and indeed, OA was embroiled in substantial APA-based litigation, along with the head of NARA (the Archivist of the United States), EOP, and the National Security Council, challenging the manner in which these parties carried out their statutory obligations.[16] Another of OA's significant functions, of particular relevance to the OSDBU program, is serving as EOP's central procurement office with authority to contract on behalf of EOP. This procurement responsibility includes the authority to bind the United States government in contracts backed by the full faith and credit of the United States. *See* 41 Op. Atty. Gen. 403 (1959); *White v. DOI*, 639 F. Supp. 82 (M.D. Pa. 1986), *affd*, 815 F.2d 697 (3rd Cir. 1987).

Other significant EOP-wide OA functions include the OA Director's oversight of submission of EOP's annual budget request and testimony on EOP's behalf at appropriations hearings,[17] and the OA Financial Management Division's provision of financial services including budget formulation, execution and analysis; centralized accounting support; coordinated internal controls reporting; and financial records maintenance. *See 2002 EOP Budget Hearings* at 167-69. OA's Office of General Counsel also has significant responsibilities across EOP. The office "advises other EOP components in areas related to OA's administrative support mission, particularly in cases where EOP components do not have counsel with expertise in government agency law," for example, on matters involving "a wide range of substantive areas including general administrative law, ethics, federal procurement, employment law, legal aspects of budgetary and congressional matters, federal record keeping, and information technology management." *Id.* at 167. In the area of security, OA manages "personnel, computer and information security for the EOP complex," as

[16]*See Armstrong v. EOP*, 810 F. Supp. 335 (D.D.C 1993); *Armstrong v. EOP*, 821 F. Supp. 761 (D.D.C. 1993), *rev'd on other grounds*, 1 F.3d 1274 (D.C. Cir. 1993). *See also Carlin*, footnote 8 above (involving OA's Federal Records Act responsibilities).

[17]*See, e.g.*, *2002 EOP Budget Hearings* at 1; OA Web site at http://www.whitehouse.gov/oa/ ("The Director of the agency [OA] oversees the submission of the annual EOP Budget Request and represents the agency before congressional funding panels.").

well as overseeing access to the EOP complex. *Id.* OA directs background investigations for personnel, pre-screens candidates for employment based on security guidelines, and briefs employees on requirements and guidelines for handling classified materials.

Finally, with respect to facilities management and human resources management, OA carries out functions for EOP similar to the functions of agencies such as the General Services Administration and the Office of Personnel Management, respectively. Among other things, OA's Facilities Management Division manages "space use, rent allocation, repairs, and renovations in the White House complex." *Id.* at 168. OA's Human Resources Management Division manages "recruitment and placement, internal staffing, general employee and management advisory services, employee development and training, and position management" for all of EOP, as well as the automated management systems and the EOP Drug Free Workplace Program. *Id.*

In carrying out many of these functions and responsibilities, OA acts independently, and the nature of the delegation from the President to OA is extensive. According to the Executive Order establishing OA, "the primary responsibility for performing all administrative support and service functions of units within the Executive Office of the President shall be transferred to the Office of Administration." E.O. 12028 § 5. Although OA is nominally headed by the President, OA acts independently in contracting for and providing administrative supplies and services to the other EOP units. E.O. 12028 §§ 3(a), 4(a). In the words of *Soucie*, OA's "sole function" is not to advise and assist the President but rather it exercises "substantial independent authority."

In addition to finding that OA is an "agency" under these core APA standards, we also find OA to be an "agency" under the so-called *Meyer* test, developed in *Meyer v. Bush*, 981 F. 2d 1288 (D.C. Cir. 1993). *Meyer* sets forth an interrelated three-factor test to determine when a component of EOP is an "agency" under the post-1974 FOIA definition:[18] (1) how operationally close the entity is to the President; (2) what the nature is of the delegation from the President to the entity; and (3) whether the entity has a self-contained structure. The first *Meyer* factor—the degree of operational closeness of the President—weighs in favor of OA being an "agency."[19] Although the President is the nominal head of OA, its mission of providing common administrative support and services to all EOP units, developing and implementing guidance for them relating to records management and disposition, and carrying out facilities and human resources management are all accomplished without close continuing interaction with the President. The second *Meyer* factor—the nature of the delegation from the President—also weighs in favor of OA being an "agency." The nature of the delegation from the President to OA is extensive: the Executive Order creating OA assigned it primary responsibility for performing all administrative support and service functions for EOP. *See* E. O. 12028 § 5. Finally, the third *Meyer* factor—whether OA has a self-contained, firm structure—confirms that OA is an "agency." OA has such a structure: it is organized, under the direction of a Director, Deputy Director, General Counsel, and Executive Secretary, into a series of functional divisions, each headed by a director. *See* 5 C.F.R. § 2502.3; *United States Government Manual 2002-2003* at 94-96.

Our conclusion that OA is an agency under FOIA finds support in the fact that OA itself believes it is covered. As noted above, OA has promulgated regulations "implementing 5 U.S.C. 552" (FOIA), *see* 5 C.F.R. § 2502.2, with

[18]While these factors are not strictly applicable in determining what is an "agency" under the APA, some courts have considered them in that context because they relate back to the pre-1974 APA/FOIA analysis in the *Soucie* decision. In *Dong*, above, for example, the court cited EOP FOIA "agency" cases in determining whether the Smithsonian was an "agency" under the APA. *See Dong*, 125 F.3d at 881, citing, in addition to *Soucie*, *Armstrong v. EOP*, 90 F.3d 553 (D.C. Cir. 1996)(National Security Agency not an "agency"); *Meyer v. Bush*, above, (Task Force on Regulatory Reform not an "agency"); *Rushforth v. Council of Economic Advisers*, 762 F. 2d 1038 (D.C. Cir. 1985) (CEA not an "agency"); *Pacific Legal Foundation v. Council on Environmental Quality*, 636 F.2d 1259 (D.C. Cir. 1980) (CEQ is an "agency").

[19]As the court explained this factor in *Armstrong v. EOP*, 90 F. 3d 553, 558 (D.C. Cir. 1996), "[t]he closer an entity is to the President, the more it is like the White House staff, which solely advises and assists the President, and the less it is like an agency to which substantial independent authority has been delegated."

respect to records possessed by OA. This conclusion also is consistent with the fact that OA has been subject to GAO's government procurement bid protest proceedings under the Competition in Contracting Act (CICA) applicable to "executive agencies," *see* 31 U.S.C. § 3551(3), in which this term is broadly defined in a manner similar to FOIA.[20] OA has raised no objection to the jurisdiction of those proceedings.[21] OA also raised no objection to GAO's evaluation of OA's acquisition of a software system under the Federal Acquisition Regulation (FAR), with the FAR being applicable to "executive agencies" defined in a similarly broad, FOIA-like manner.[22]

Finally, in determining whether OA should be considered an agency under the Small Business Act, we are guided by the overall remedial purpose of the statute. It is well settled that remedial statutes should be construed liberally to effectuate their purposes. *See*, *e.g.*, *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990) (interpreting environmental cleanup statute broadly to ensure protection of human health and environment). One of the central purposes of the Small Business Act is to ensure small businesses receive a "fair proportion" of federal government contracts, *see* 15 U.S.C. §§ 631(a), 644(a), and Congress has amended the Act several times over the last 25 years to increase small business participation in federal procurement. The OSDBU amendments were enacted in 1978 to remedy the particular problem of small and disadvantaged businesses lacking effective advocates at high levels within agencies. Congress deemed these amendments to be necessary to ensure that the voice of these communities are heard. *See* S. Rep. No. 1070, 95th Cong., 2d Sess. 18 (1978) (OSDBU amendments); *see also* H.R. Rep. No. 460, 100th Cong., 1st Sess. 40 (1987). Thus, any doubt about whether OA is an

[20]As relevant here, "executive agencies" is defined for purposes of CICA bid protest proceedings as "an executive department or independent establishment in the executive branch of the Government." 40 U.S.C. § 102(4).

[21]*See*, *e.g.*, *In re Stay Inc. Protective Services*, 92-1 CPD ¶ 393, 1992 WL 93059 (Apr. 24, 1992).

[22]*See* U.S. General Accounting Office, *White House: Acquisition of Automated Resume Processing System*, GAO/GGD-93-117 (Washington, D.C.: June 17, 1993); U.S. General Accounting Office, *White House: Follow-up on Acquisition of Automated Resume Processing*, GAO/GGD-94-127 (Washington, D.C.: Aug. 3, 1994). The FAR applies to "executive agencies," defined to mean "executive department[s] . . .or any independent establishment[s] within the meaning of 5 U.S.C. 101, 102, and 104(1). . .." *See* 48 C.F.R. §§ 1.101, 2.101(b). Those sections, in turn, contain a broad, FOIA-like definition of "agency."

"agency" within the scope of the Small Business Act should be resolved in favor of coverage.

Conclusion

In summary, we conclude that OA likely is a "Federal agency with procurement powers" subject to the OSDBU requirements of section 15(k) of the Small Business Act. OA clearly has procurement powers, and several courts have implicitly found that OA is an "agency" within the meaning of the APA and therefore a "Federal agency" within the meaning of the Small Business Act. In addition, OA meets both the core APA "agency" standards and the broader FOIA "agency" standards that courts have developed to address entities specifically within EOP.

Comments from the Department of Agriculture

United States Department of Agriculture

Office of the Assistant Secretary for Administration

1400 Independence Avenue SW

Washington, DC 20250-0103

AUG 19 2003

Mr. Charles E. Wilson, Jr.
Assistant Director, Financial Markets
and Community Investment
General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Wilson:

Thank you for the opportunity to comment on the proposed draft report entitled "Small and Disadvantaged Business: Some Agencies' Advocates Do Not Report to Required Management Level." We found this report, which examines the reporting relationships for the Office of Small and Disadvantaged Business Utilization (OSDBU) directors at major federal agencies, useful.

We agree with the General Accounting Office (GAO) assessment that the Assistant Secretary for Administration, as the designated Director of Small and Disadvantaged Business Utilization (Designated Director), has delegated to the Director, Office of Small and Disadvantaged Business Utilization the responsibilities of the OSDBU. We disagree, however, with the GAO conclusion that the Department of Agriculture (USDA) does not comply with Section 15(k)(3) of the Small Business Act.

The GAO determined that compliance with Section 15(k)(3) requires the Designated Director to both exercise OSDBU responsibilities and report directly to and be responsible only to the Secretary or Deputy Secretary. At USDA, the Designated Director both supervises the Director, OSDBU, in implementing the responsibilities pursuant to the delegation of authority and, as the report notes, provides information to the Secretary and Deputy Secretary on small business issues. Significantly, Section 15(k) of the Small Business Act does not contain an express prohibition on delegation of authority or a requirement that the Designated Director personally perform all of the specific responsibilities it outlines. Absent an express limitation on redelegation, one cannot be presumed. Cf. Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 121 (1947). Contrary to the assertion of the GAO, the Director, OSDBU, has not become the de facto Designated Director. The Secretary holds the Assistant Secretary for Administration responsible and accountable for the duties delegated to him as the Designated Director. We believe, therefore, that USDA's reporting structure is in compliance with Section 15(k)(3) of the Small Business Act.

Consistent with USDA's commitment that the small business program receive the priority Congress intended, the Director, OSDBU, is a full-time employee dedicated to guiding

AN EQUAL OPPORTUNITY EMPLOYER

Mr. Charles E. Wilson, Jr.
Page -2

and implementing the small business program. Furthermore, the Director, OSDBU, position remains classified as a non-career, senior executive service position, appointed by and serving at the pleasure of the Secretary.

USDA has found its present OSDBU reporting structure to be effective. The most recent Congressional Report Card prepared by the House Small Business Committee Democratic Staff rates the DA small business program as the best among the 21 top Federal agencies. Also, Federal Procurement Data System reports show that since Fiscal Year 1997, the USDA small business prime contracting volume has grown from 33 percent of total procurements to over 48 percent in FY 2002. The Federal statutory goal for small business prime contracting is 23 percent annually. This evinces the USDA firm commitment to fostering opportunities for small and disadvantaged business, and we will continue to carry out that commitment effectively. Thank you for the opportunity to comment on this draft report.

Sincerely,

John Surina
Acting Assistant Secretary
for Administration

Comments from the Department of Commerce

UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer
Assistant Secretary for Administration
Washington, D.C. 20230

AUG 22 2003

Mr. Charles E. Wilson, Jr.
Assistant Director
Financial Markets and Community Investment
U.S. General Accounting Office
441 G. Street, N.W., Room 2A32
Washington, D.C. 20548

Dear Mr. Wilson:

Thank you for the opportunity to comment on the draft General Accounting Office (GAO) report entitled, "Small and Disadvantaged Business: Some Agencies' Advocates Do Not Report to Required Management Level (GAO-03-863)."

The Director of the Office of Small and Disadvantaged Business Utilization (OSDBU) reports directly to the Deputy Secretary on all legislative and policy issues and to the Chief Financial Officer and Assistant Secretary for Administration on administrative matters such as personnel and budget. I believe this organizational structure complies with the statute. Further, this organizational structure strengthens the role of OSDBU within the Department and focuses the Department's resources to create contracting opportunities for small businesses. In FY 2002, the Department had the highest percent among cabinet level agencies of total procurement dollars awarded to small businesses. The Department also exceeded its small business goals in the small disadvantaged, 8(a), and women-owned small business programs.

The Department of Commerce is deeply committed to the goals of the Small Business Act, and our record reflects our determination to increase business opportunities for small, small disadvantaged and women-owned small firms. As a result of our strong commitment, the Department is a leader in awarding Federal contracts to small business concerns.

If you have any further questions, please call me at (202) 482-4951.

Sincerely,

Otto J. Wolff
Chief Financial Officer and
Assistant Secretary for Administration

Comments from the Department of Education

UNITED STATES DEPARTMENT OF EDUCATION

THE DEPUTY SECRETARY

August 15, 2003

Mr. David G. Wood
Director, Financial Markets and Community Investment
General Accounting Office
Washington, DC 20548

Dear Mr. Wood:

This is in response to the draft GAO report, "Small and Disadvantaged Business: Some Agencies' Advocates Do Not Report to Required Management Level."

The draft report lists the Department of Education as not in compliance with Section 15(k)(3) of the Small Business Act. I strongly disagree with that characterization. Section 15(k)(3) requires that the Director of the Office of Small and Disadvantaged Business Utilization be responsible directly to agency heads or deputy agency heads. In the Department of Education, the OSDBU Director reports to the Deputy Secretary, who is the deputy agency head. The Director's position description and the official organizational chart both clearly show that the position of the director is in the Office of the Deputy Secretary. In addition, the Functional Statement of the Office of the Deputy Secretary states that the OSDBU reports to the Deputy Secretary.

GAO bases its conclusion on the following facts: that the OSDBU Director met with the Deputy Secretary's Chief of Staff, in addition to meeting with the Deputy Secretary; that the Director submitted reports through the Chief of Staff to the Deputy Secretary; and that the Chief of Staff signed the Director's performance appraisal. These operating procedures reflected the management preference of then-Deputy Secretary William Hansen, who opted to manage the significant workflow of his office in this way. These procedures in no way indicate a revision in the reporting relationship of the Director to the Deputy Secretary. As the Secretary is fully supportive of the goals of the Small Business Act and the activities of the OSDBU Director, it has not been necessary for the Deputy Secretary to closely oversee or monitor the Director's activities.

It is my hope that this information demonstrates that the Department is in fact fully in compliance with Section 15(k)(3) of the Small Business Act, and I request that the final report be revised accordingly.

Sincerely,

Eugene W. Hickok
Acting Deputy Secretary

400 MARYLAND AVE., S.W., WASHINGTON, D.C. 20202-0500
www.ed.gov

Our mission is to ensure equal access to education and to promote educational excellence throughout the Nation.

Comments from the Department of Health and Human Services

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Inspector General

Washington, D.C. 20201

AUG 20 2003

Mr. David G. Wood
Director, Financial Markets and
Community Investment
United States General
Accounting Office
Washington, D.C. 20548

Dear Mr. Wood:

Enclosed are the Department's comments on your draft report entitled, "Small and Disadvantaged Business: Some Agencies' Advocates Do Not Report to Required Management Level." The comments represent the tentative position of the Department and are subject to reevaluation when the final version of this report is received.

The Department appreciates the opportunity to comment on this draft report before its publication.

Sincerely,

Dara Corrigan
Acting Principal Deputy Inspector General

Enclosure

The Office of Inspector General (OIG) is transmitting the Department's response to this draft report in our capacity as the Department's designated focal point and coordinator for General Accounting Office reports. OIG has not conducted an independent assessment of these comments and therefore expresses no opinion on them.

Comments of the Department of Health and Human Services on the General Accounting Office's Draft Report, "Small and Disadvantaged Business: Some Agencies' Advocates Do Not Report to Required Management Level" (GAO-03-863)

The Department of Health and Human Services (HHS) has received and reviewed the draft report that examined the reporting relationships for the Office of Small and Disadvantaged Business Utilization (OSBDU) Directors at Federal agencies that procured $200 million or more in goods and services in FY 2001.

While the Department believes it has been in compliance with the law, your report has stimulated us to clarify and explicitly state certain arrangements as follows:

(1) The OSDBU Director will continue to report directly to the HHS Deputy Secretary on all policy issues and will also report on all significant day-to-day issues affecting the OSDBU.

(2) The OSDBU Director will arrange for monthly meetings with the HHS Deputy Secretary and/or prepare monthly reports for the HHS Deputy Secretary on major issues facing the OSDBU.

(3) The HHS Deputy Secretary will serve as the reviewing official on performance-evaluation documents for the OSDBU Director, with the Assistant Secretary for Administration and Management (ASAM) serving as the appraisal official.

(4) The OSDBU Director will continue to receive operational support from ASAM's Office of Acquisition Management and Policy.

We have enclosed the memorandum, dated August 11, 2003, from the HHS Deputy Secretary to the OSDBU Director, which delineates the changes discussed above.

THE DEPUTY SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

AUG 11 2003

MEMORANDUM

TO: Debbie Ridgley, Director Office of Small and Disadvantaged Utilization (OSBDU)

SUBJECT: OSBDU Reporting Relationship

The purpose of this memo is to clarify OSBDU's reporting relationship to my office, and to affirm several important aspects of that relationship.

In accordance with Section 644 (k)(3) of the Small Business Act, you, as HHS's OSBDU Director, will continue to report directly to me as the Department's Deputy Secretary. Thus, all policy issues and all significant day-to-day issues affecting OSBDU should be brought to my attention. Additionally, you should arrange for monthly meetings and/or monthly reports to me on major issues facing OSBDU. As set out in the statement of organization and functions for the Office of the Assistant Secretary for Administration and Management (ASAM) published in the Federal Register on June 19, 2003, OSBDU will continue to receive operational support from ASAM's Office of Acquisition Management and Policy. I will serve as reviewing official on performance-evaluation documents for the OSBDU Director, with the Assistant Secretary for Administration and Management serving as appraising official.

Thank you for your continuing efforts on behalf of small, disadvantaged and women-owned businesses and HubZones in their dealings with the Department.

Claude Allen

Comments from the Department of Justice

U.S. Department of Justice

Washington, D.C. 20530

AUG 19 2003

David G. Wood
Director
Financial Markets and Community Investment
General Accounting Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Wood:

On August 1, 2003, you provided the Department with a copy of the General Accounting Office's draft report entitled SMALL AND DISADVANTAGED BUSINESS: Some Agencies' Advocates Do Not Report to Required Management Level (GAO-03-863/250109) with a request for comments by August 19, 2003. We appreciate the opportunity to review and comment on the draft report.

While the Department agrees that organizationally the Office of Small and Disadvantaged Business Utilization (OSDBU) resides within the Justice Management Division, this placement, initially made in 1981, has been consistently described as being for administrative purposes. The Department has previously advised both the GAO and the Congress that the Director, OSDBU reports to the Deputy Attorney General on matters of substance requiring his attention. We believe it is important for the GAO to recognize the commitment of the Deputy Attorney General to facilitate the participation of small and disadvantaged businesses as contractors, subcontractors, and suppliers for the Department. The Office of the Deputy Attorney General fully supports the objectives of the OSDBU and has met with the Director to discuss the office's work.

If you have any questions concerning the Department's comment in this matter, please feel free to contact Vickie L. Sloan, Audit Liaison Office, Justice Management Division on (202) 514-0469.

Sincerely,

Paul R. Corts
Assistant Attorney General
for Administration

Comments from the Department of State

United States Department of State

Washington, D.C. 20520

AUG 25 2003

Dear Mr. Wood:

We appreciate the opportunity to review your draft report, "SMALL AND DISADVANTAGED BUSINESS: Some Agencies' Do Not Report to the Required Management Level," GAO-03-863, GAO Job Code 250109.

The enclosed Department of State comments are provided for incorporation with this letter as an appendix to the final report.

If you have any questions concerning this response, please contact Durie White, Director, Office of Small and Disadvantaged Business, at (703) 875-6824.

Sincerely,

Sid L. Kaplan, Acting
Assistant Secretary for
Resource Management and
Chief Financial Officer

Enclosure:

As stated.

cc: GAO - Charles Wilson, Jr.
State/OIG - Luther Atkins
State/A - William Eaton
State/H - Paul Kelly

Mr. David G. Wood
Director,
Financial Markets and Community Investment,
U.S. General Accounting Office.

GAO Draft Report: Small and Disadvantaged Business: Some Agencies' Advocates Do Not Report to the Required Management Level (GAO-03-863)

The Department of State is pleased to have the opportunity to comment on the GAO's report regarding the organizational placement of federal agency Offices of Small and Disadvantaged Business Utilization. The report finds State Department as not in compliance with Section 15(k)(3) of the Small Business Act. The report recommends that State Department and other agencies found not in compliance take steps to comply with the requirement of Section 15(k)(3) of the Small Business Act that OSDBU directors be responsible only to, and report directly to, the head or deputy head of the agency.

The facts concerning the organizational placement of the Office of Small and Disadvantaged Business Utilization as stated in the draft report are accurate. The Department of State reserves comment on the legal conclusions in the draft report in the absence of authoritative guidance from the Department of Justice or the President's counsel. As a practical matter, the Department of State believes that the organizational placement of its Office of Small and Disadvantaged Business Utilization (OSDBU) is highly effective. The Department created the OSDBU in 1980. At the time, the OSDBU reported directly to the Secretary. The placement was not effective. The OSDBU Director did not meet with the Secretary of State, but dealt exclusively with the staff of the Executive Office of the Secretariat. The OSDBU had a skeletal staff of three and a small operational budget. Since its reorganization into the Bureau of Administration in 1991, the OSDBU receives much more attention from senior management. Its staff has grown to six direct hires and one contract employee. Its budget has also grown. The office was relocated to larger space, the design of which presents a much more professional face to the small business public that it serves.

The Secretaries of State in both this Administration and the previous Administration have willingly given their support to OSDBU initiatives when asked to do so. Very early in his Administration (March 2001), Secretary Powell signed a *Memorandum to All Department of State Employees* reaffirming his support for the Department's Small Business Program. In November 2002, he gave opening remarks at the Department's first Veteran-Owned Business Small Business Exposition. He is serving on the Honorary Committee to commemorate the Small Business Administration's 50th anniversary. He spoke at an event during last year's Department of Commerce Minority Enterprise Development Week and may do so again this year. In addition, former Secretary of State Albright signed a Memorandum of Understanding with the Small Business Administration, committing the Department to redouble its efforts to assist women business owners.

The Department of State believes that the effectiveness of its OSDBU's organizational placement is borne out by the results of our program. We traditionally meet or exceed our small business goals. Normally, at least 40% of our domestically awarded contracts go to small businesses each fiscal year. We have done an extensive analysis of the FY 2002 performance of the twenty-three large federal agencies (those that awarded over

$100 million in contracts) and note that there is no direct correlation between the OSDBUs' reporting level and the agencies' achievements. (See the attached booklet). State Department outperformed all the compliant agencies in the percentage of contract dollars awarded to small businesses. We ranked first among the twenty-three large agencies in the percentage of dollars awarded to 8(a) firms and second among the twenty-three in the percentage of dollars awarded to HUBZone firms. In fact, State Department was one of only two federal departments that achieved the statutory 3% minimum goal for awarding contracts to firms located in HUBZones during FY 2002. The Small Business Administration recently notified us that State Department's OSDBU staff has been selected to receive SBA's 2003 Gold Star Award. The award recognizes the exemplary performance of Federal personnel within the OSDBU who have primary responsibility for the goals and strategic initiatives that ensure small businesses have a role in the Federal marketplace.

State Department maintains that to reorganize its Office of Small and Disadvantaged Business Utilization to report to the Secretary or his Deputy would result in its being less effective. Given the broad range of urgent issues upon which the Secretary and Deputy Secretary of State must focus, the OSDBU Director would receive much less attention than she enjoys in her present organizational location. The OSDBU Director regularly meets with the Assistant Secretary for Administration, attends staff meetings, and has direct access whenever necessary. Whether the Director would enjoy the level of visibility and operational influence were she moved to the Secretary's level is questionable. If the objective of Section 15(k)(3) is to insure that the OSDBU program receives support from top management, the Department of State believes we have achieved that objective.

Comments from the Department of the Interior

United States Department of the Interior

OFFICE OF THE ASSISTANT SECRETARY
POLICY, MANAGEMENT AND BUDGET
Washington, D.C. 20240

AUG 27 2003

Mr. Charles Wilson, Jr.
Assistant Director
General Accounting Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Wilson:

We are writing regarding the draft GAO report dated September 2003 entitled, "Small and Disadvantaged Business, Some Agencies' Advocates Do Not Report to Required Management Level."

The Assistant Secretary – Policy, Management and Budget is the agency head for acquisition matters, in accordance with the Federal Acquisition Regulation (FAR). Consequently, Interior's Office of Small and Disadvantaged Business Utilization's (OSDBU) Director reports to the "agency head" as defined in Subpart 2.101 of the FAR. The Report seems to mischaracterize the situation when it states that the OSDBU reports to a "lower-level official within the Department" as indicated on page 9 of the draft report. This reporting relationship has worked well. Interior has led Federal cabinet agencies in small business achievements for a variety of categories in the present structure. (Over 50 percent of all procurement dollars for the past four fiscal years have been awarded to small business.) Secretarial support and autonomy that are critical for program success have been emphasized in the Department through the reporting relationship with the Assistant Secretary - Policy, Management and Budget.

If you have any additional questions regarding our comments, please contact Mr. Robert W. Faithful, IV, Director, Office of Small and Disadvantaged Business Utilization at (202) 208-3493.

Sincerely,

P. Lynn Scarlett
Assistant Secretary -
Policy, Management and Budget

Comments from the Department of the Treasury

DEPARTMENT OF THE TREASURY
WASHINGTON

ASSISTANT SECRETARY

AUG 20 2003

David G. Wood
Director, Financial Markets and Community Investment
U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Wood:

The Department of the Treasury is pleased to have the opportunity to comment on the U.S. General Accounting Office's (GAO) draft report entitled *Small and Disadvantaged Business: Some Agencies' Advocates Do Not Report to Required Management Level* (GAO-03-863). This report reviews the organizational placement and reporting relationships of the position of Director of Small and Disadvantaged Business Utilization (OSDBU) at a number of agencies. The report concludes that Treasury, among other agencies, is not complying with §15(k)(3) of the Small Business Act (15 U.S.C. §644(k)(3)) because, as GAO states, "[Agriculture, Treasury and State] designated OSDBU directors delegated all of their OSDBU director responsibilities to officials who do not directly report to either the secretary or deputy secretary." [Draft report, p. 19] The report states: "The lower ranking officials thus became the *de* facto OSDBU directors." [*id.*] The apparent view of the report is that Director of Small and Disadvantaged Business Utilization must, as a matter of law, be engaged essentially full-time in OSDBU functions.

Section 15(k)(3) of the Small Business Act makes the OSDBU directors responsible for the implementation and execution of the specific functions and duties assigned under sections 8 & 15 of the Small Business Act. The responsibilities are assigned, but there is no requirement that the director personally perform any specific functions. Counsel has advised me that there is no bar in the statutory language, and no explanation of that language in its legislative history that suggests a bar, to the Director's delegation of some of this authority. As Director, I remain responsible for OSDBU performance, whether I personally perform the functions or delegate portions of the OSDBU authority. I do report directly to the Secretary and Deputy Secretary.

We believe that Treasury's Office of Small Business Development (OSBD) has been particularly successful: Winning awards from the Small Business Administration (SBA); receiving approbation from small businesses themselves for our outreach efforts; leading Government agencies in our small business contracting; and serving in leadership roles in the Government's small business efforts.

The OSBD assists, counsels, and advises small businesses of all types on procedures for contracting with Treasury. Additionally, the OSBD works closely with each Treasury bureau to implement the Department's small business procurement assistance program.

Each bureau has appointed a Small Business Specialist, located within the procurement office, to coordinate the program.

We attribute our small business success to a number of critical factors. These include: senior management support, commitment, a team approach, outreach, information dissemination, training, mentor-protégé/subcontracting efforts, and recognizing that we are part of a larger network that makes up the small business community (senior management, small businesses, large business prime contractors, Small Business Administration, Treasury procurement/program/small business staff, other federal agency small business offices, and small business trade associations).

Sincerely,

for Teresa Mullet Ressel
Assistant Secretary for Management
And Chief Financial Officer

Comments from the Social Security Administration

SOCIAL SECURITY

The Commissioner

August 13, 2003

Mr. David G. Wood
Director, Financial Markets
and Community Investment
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Wood:

Thank you for the opportunity to review and comment on the draft report "Small and Disadvantaged Business: Some Agencies' Advocates Do Not Report to Required Management Level" (GAO-03-863). Our comments on the report are enclosed.

If you have any questions, please have your staff contact Laura Bell at (410) 965-2636.

Sincerely,

Jo Anne B. Barnhart

Jo Anne B. Barnhart

Enclosure

SOCIAL SECURITY ADMINISTRATION BALTIMORE MD 21235-0001

COMMENTS ON THE GENERAL ACCOUNTING OFFICE (GAO) DRAFT REPORT "SMALL AND DISADVANTAGED BUSINESS: SOME AGENCIES' ADVOCATES DO NOT REPORT TO REQUIRED MANAGEMENT LEVEL" (GAO-03-863)

Thank you for the opportunity to review and comment on the draft report. The report accurately describes the reporting relationship of the Director of the Office of Small and Disadvantaged Business Utilization (OSDBU) within the Social Security Administration (SSA). However, we do not agree with the conclusion that the reporting relationship of our OSDBU director does not comply with the requirement of Section 14(k)(3) of the Small Business Act (SBA). The rationale for our disagreement is provided below. Attached is a copy of the March 2, 1999 General Counsel (GC) opinion (which was provided to the GAO auditors during the review) that supports our position.

Recommendation 1

The Commissioner of SSA should take steps as necessary to comply with the requirement in Section 15(k)(3) of the SBA that the OSDBU director be responsible only to, and report directly to, the head or deputy head of the agency.

Comment

On March 2, 1999, our GC issued an opinion specifically related to the OSDBU director position. In that opinion, the Associate General Counsel for General Law states that each of SSA's Deputy Commissioners, including the Deputy Commissioner for Finance, Assessment and Management (DCFAM), as well as the GC and the Chief Actuary report directly to the Commissioner. The GC concluded that each of them (i.e., the Deputy Commissioners) could be considered to have the status of a "deputy" to the Commissioner, unless more is required by a specific statute or regulation. Based on that opinion and the current direct reporting relationship of our Deputy Commissioners, including the DCFAM, to the Commissioner, we continue to believe we are in compliance with Section 15(k)(3) of the SBA.

Additionally, with respect to GAO's interpretation of the role of the Agency's "Deputy Commissioner" provided on page 13 in the second paragraph we offer the following: "While the Deputy Commissioner shares responsibility for providing executive leadership to the Social Security Administration, including acting for the Commissioner in her absence, each of the other Deputy Commissioners report directly to her. The DCFAM's functional statement in the SSA Organization Manual reads, "The Deputy Commissioner, Finance, Assessment and Management (S1) is directly responsible to the Commissioner for carrying out the ODCFAM mission and providing general supervision to the major components of ODCFAM. The Deputy Commissioner also is the SSA Chief Financial Officer (SSACFO) and is directly responsible to the Commissioner for carrying out the SSACFO mission."

SOCIAL SECURITY

Office of the General Counsel

MEMORANDUM

DATE: March 2, 1999

TO: Dale Sopper
Assistant Deputy Commissioner for
Finance, Assessment and Management

FROM: Michael Hoover
Associate General Counsel
for General Law Division

SUBJECT: Your Inquiry as to Who May Serve as SSA's Director of Office of Small and Disadvantaged Business Utilization

You requested our views as to the interpretation of language contained at 48 C.F.R. Chapter 1, Subpart 19.201(d), stating that each agency with contracting authority is required by the Small Business Act to

> . . . establish an Office of Small and Disadvantaged Business Utilization. Management of the office shall be the responsibility of an officer or employee of the agency who shall, in carrying out the purposed of the Act . . . 3. Be responsible to and report directly to the agency head or the deputy to the agency head; . . .

Specifically, you requested our opinion as to whether the language "deputy to the agency head," contained in this regulation, could be interpreted to mean the Deputy Commissioner for Finance, Assessment and Management.

The regulation which you cited implements section 15 of the Small Business Act, 15 U.S.C. § 644k, which states:

> (k) Office of Small and Disadvantaged Business Utilization; Director. There is hereby established in each Federal agency having procurement powers an office to be known as the "Office of Small and Disadvantaged Business Utilization." The management of each such office shall be vested in an officer or employee of such agency who shall

SOCIAL SECURITY ADMINISTRATION BALTIMORE MD 21235-0001

(1) be known as the "Director of Small and Disadvantaged Business Utilization" for such agency,

(2) be appointed by the head of such agency,

(3) be responsible only to, and report directly to, the head of such agency or to the deputy of such head, except that the director for the Office of the Secretary of Defense shall be responsible only to, and report directly to, such Secretary or the Secretary's designee,

(4) be responsible for the implementation and execution of the functions and duties under sections 8 and 15 of this Act [*15 USCS § 637* and this section] which relate to such agency, . . .

(5) identify proposed solicitations that involve significant bundling of contract requirements, and work with the agency acquisition officials and the Administration to revise the procurement strategies for such proposed solicitations where appropriate to increase the probability of participation by small businesses as prime contractors, or to facilitate small business participation as subcontractors and suppliers, if a solicitation for a bundled contract is to be issued;

(6) assist small business concerns to obtain payments, required late payment interest penalties, or information regarding payments due to such concerns from an executive agency or a contractor, in conformity with chapter 39 of title 31, United States Code [*31 USCS §§ 3901* et seq.], or any other protection for contractors or subcontractors (including suppliers) that is included in the Federal Acquisition Regulation or any individual agency supplement to such Government-wide regulation,

(7) have supervisory authority over personnel of such agency to the extent that the functions and duties of such personnel relate to functions and duties under sections 8 and 15 of this Act [*15 USCS § 637* and this section],

(8) assign a small business technical adviser to each office to which the Administration has assigned a procurement center representative--

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(A) who shall be a full-time employee of the procuring activity and shall be well qualified, technically trained and familiar with the supplies or services purchased at the activity,

(B) whose principal duty shall be to assist the Administration procurement center representative in his duties and functions relating to section 8 and 15 of this Act [*15 USCS § 637* and this section], and

(9) cooperate, and consult on a regular basis, with the Administration with respect to carrying out the functions and duties described in paragraph (4) of this subsection; and

(10) make recommendations to contracting officers as to whether a particular contract requirement should be awarded pursuant to subsection (a), or section 8(a) of this Act or section 2323 of title 10, United States Code. Such recommendations shall be made with due regard to the requirements of subsection (m), and the failure of the contracting officer to accept any such recommendations shall be documented and included within the appropriate contract file.

The Small Business Act does not define what is meant by the term "deputy." Specifically, it does not require that a "deputy" be one whose appointment is subject to the advice and consent of the Senate. Generally, a deputy is one who reports directly to the official as whose deputy he serves. In SSA, each of the eight Deputy Commissioners, as well as the General Counsel and the Chief Actuary, report directly to the Commissioner. For this reason, each of them could be considered to have the status of a "deputy" to the Commissioner, unless more is required by a specific statute or regulation. Accordingly, we believe that where an agency has created an organizational structure which has more than one individual reporting directly to the agency head and has given each of these individuals the title "deputy," the Small Business Act does not create any statutory impediment to finding that an individual who reports directly to one of these individuals may serve as the Director of Small and Disadvantaged Business Utilization.

We note that several federal agencies have established organizational structures which have the Director of Small and Disadvantaged Business Utilization (SDBU) reporting to an individual who reports to the agency head, but who does not have the title of "deputy." For example, in the Department of State, the Director, SDBU reports to the Assistant Secretary of State for Administration. 48 C.F.R. § 619.201(c). In the Department of Labor, the Director, SDBU reports to the Assistant Secretary for Administration and Management for all substantive responsibilities under sections 8 and 15 of the Small Business Act, and on his own has an advisory role only. 48 C.F.R. §§ 2901.603-1(a), 2901.603(f)(3), 2901.603(g)(4).

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Another approach, followed by the Department of Treasury, was to name its Assistant Secretary (Management)/CFO as the statutory Director, SDBU, and have an Office of Procurement which reported to him/her carry out the functions of the Small and Disadvantaged Business Utilization program. 57 FR 32614, July 22, 1992, § 4.c.(1).

In our view, it would be legally defensible for the agency head either to name an official who reports directly to the Deputy Commissioner for Finance, Assessment and Management to serve as SSA's Director of Small and Disadvantaged Business Utilization, or to name the DCFAM as the Director, SDBU, and for the DCFAM to have the Office of Acquisition and Grants carry out the functions of the SDBU program.

Should you have any additional questions, I would be pleased to discuss this matter with you further. Staff inquiries may be directed to Ms. Eileen Houghton who can be reached at extension 54816.

Comments from the U.S. Agency for International Development

U.S. AGENCY FOR
INTERNATIONAL
DEVELOPMENT

AUG 14 2003

Mr. David G. Wood
Director
Financial Markets and Community Investment
U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Wood:

I am pleased to provide the U.S. Agency for International Development's (USAID's) formal response on the draft GAO report entitled "SMALL AND DISADVANTAGED BUSINESS: Some Agencies' Advocates Do Not Report to Required Management Level (GAO-03-863).

Upon review of the draft, we concur with the conclusions as they apply to USAID, and therefore have no comment.

Thank you for the opportunity to respond to the GAO draft report and for the courtesies extended by your staff in the conduct of this review.

Sincerely,

John Marshall
Assistant Administrator
Bureau for Management

1300 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20523

CLEARANCE PAGE FOR response on the draft GAO report entitled "SMALL AND DISADVANTAGED BUSINESS: Some Agencies' Advocates Do Not Report to Required Management Level (GAO-03-863)

M543

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Comments from the Executive Office of the President, Office of Administration

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF ADMINISTRATION
WASHINGTON, D.C. 20503

August 15, 2003

Ms. Susan Sawtelle
Associate General Counsel
U.S. General Accounting Office
Washington, DC 20548

VIA FAX: (202) 512-3445

Dear Ms. Sawtelle:

This responds to the letter of July 31, 2003 from David G. Wood, Director, Financial Markets and Community Investment, transmitting GAO's draft report entitled "Small and Disadvantaged Business: Some Agencies' Advocates Do Not Report to Required Management Level."

We do not plan to provide views or comments to GAO with respect to the views expressed by GAO in the draft report, including Appendix III's discussion of GAO's legal views on the applicability of Section 15(k) of the Small Business Act to the Office of Administration. However, this does not indicate our agreement with the views expressed in the report, see, e.g., Haddon v. Walters, 43 F.3d 1488 (D.C. Cir. 1995).

Sincerely,

for Adam F. Greenstone
General Counsel

GAO Contact and Staff Acknowledgments

GAO Contacts

David G. Wood, (202) 512-8678
Charles E. Wilson, Jr., (202) 512-6891

Staff Acknowledgments

In addition to the individual names above, the following individuals made significant contributions to this report: Emily R. Chalmers, Nancy Eibeck, Edda Emmanuelli-Perez, Brodi Fontenot, Gregg J. Justice III, John T. McGrail, Marc Molino, and Susan D. Sawtelle.

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