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FULL COMMITTEE HEARING ON SBA'S PROGRESS IN IMPLEMENTING THE WOMEN'S PROCUREMENT PROGRAM

COMMITTEE ON SMALL BUSINESS
UNITED STATES HOUSE OF REPRESENTATIVES

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CONTENTS

OPENING STATEMENTS

	Page
Velázquez, Hon. Nydia M.	1
Chabot, Hon. Steve	2

WITNESSES

PANEL I:

Preston, Honorable Steven C., U.S. Small Business Administration	3
Papez, Elizabeth, U.S. Department of Justice	6

PANEL II:

Dorfman, Margot, U.S. Women's Chamber of Commerce	35
Farris, Denise, Farris Law Firm	38
Gloss, Beth, United Materials, LLC	39
Rubenstein, Pam, Allied Specialty Precision	41
Brown, Jennifer, Legal Momentum	43

APPENDIX

Prepared Statements:

Velázquez, Hon. Nydia M.	58
Chabot, Hon. Steve	60
Braley, Hon. Bruce	61
Altmire, Hon. Jason	64
Preston, Honorable Steven C., U.S. Small Business Administration	65
Papez, Elizabeth, U.S. Department of Justice	69
Dorfman, Margot, U.S. Women's Chamber of Commerce	74
Farris, Denise, Farris Law Firm	77
Gloss, Beth, United Materials, LLC	92
Rubenstein, Pam, Allied Specialty Precision	95
Brown, Jennifer, Legal Momentum	100

Statements for the Record:

National Association of Women Business Owners	111
National Women Business Owners Corporation	114
CMW & Associates Incorporated	115
Bailey Edward Architecture	117
Nash Resources Group	118
Miller's Office Products	119
Peak Electric, LLC	122
Pope Institute for Health and Education, LLC	125
CertifytoSuccess	126

FULL COMMITTEE HEARING ON SBA'S PROGRESS IN IMPLEMENTING THE WOMEN'S PROCUREMENT PROGRAM

Wednesday, January 16, 2008

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The Committee met, pursuant to call, at 10:07 a.m., in Room 2360, Rayburn House Office Building, Hon. Nydia M. Velázquez [chair of the Committee] Presiding.

Present: Representatives Velázquez, González, Cuellar, Altmire, Braley, Clarke, Sestak, Hirono, Chabot, Graves, Akin, Gohmert, Davis, Fallin, and Jordan.

Also Present: Moore of Kansas.

OPENING STATEMENT OF CHAIRWOMAN VELÁZQUEZ

Chairwoman VELÁZQUEZ. I call this hearing to order. Today the Committee will continue its review of SBA programs in implementing the Women's Procurement Program. This initiative was created in part because of the government's inability to meet the five percent contracting goal for women-owned small businesses. Even though this goal was set in 1994, Federal agencies have yet to achieve it.

Seven years - yes seven years - have passed since the Women's Procurement Program was enacted. And now, after all this time, the SBA publishes a rule that is so poorly constructed and so ill-conceived that it is insulting to the tens of thousands of women business owners that have been waiting for action. This makes it apparent that the administration is not serious about carrying out the law, and I don't believe it ever will be.

In creating the program, Congress's objectives were clear: to increase participation by women-owned firms in the Federal market place. The very design of the legislation was meant to reverse at a systemic level the lack of women-owned businesses involved in Federal contracting. But the SBA's proposed rule is just too narrow and burdensome to achieve this intent.

It is evident that few, if any, women-owned businesses will benefit from the new regulation. As a result, of the more than ten million women-owned businesses in this country, only 1,247 businesses will qualify. Women entrepreneurs in industries like con-

struction and manufacturing that are omitted are left scratching their heads. Can this be real?

SBA has chosen one of the most restrictive methodologies to determine which industries will qualify for the program. Out of the 28 approaches identified by RAND, the agency chose a method that designates less than three percent of industries as underrepresented by women businesses. In doing so, it is using a ″dollar amount of contracts″ method for determining underrepresentation, which is inconsistent with the program's intent.

The initiative was designed to be used as a contracting tool, to reverse the under usage of women firms in the Federal marketplace - not as a way to solely advance large dollar awards. A better measure would be the ″number of contracts″ method, which would find 77.1 percent of industries as underrepresented, or a mix of both the number and dollar approaches.

The SBA is also requiring that Federal agencies make a determination of discrimination before any contract can be awarded under the program. This step creates another massive roadblock in the long series of obstructions to the program's implementation. The manner in which this finding is required is vague and could add layers of unnecessary bureaucracy to the program's administration.

Perhaps most problematic, the proposed rule appears to exceed what is constitutionally required. As a gender-based program, ″intermediate″ scrutiny is called for. But, instead, it appears that the administration is stealthily applying a restrictive ″strict″ scrutiny standard. They can call it what they want, but the reality is that this is a standard that has no place in this rule.

The truth is that the SBA's proposal does not embody the program that Congress envisioned. If this rule becomes final, the administration will be successful in blocking by regulation the program's implementation. As a result, women businesses will be one step further from gaining access to the Federal marketplace.

Instead, the SBA should scrap this rule and go back to the drawing board to provide a wider path for the inclusion of women. Women-owned firms are one of the fastest growing segments of our economy. They employ nearly 13 million people, and their annual payroll is almost $175 billion. These firms are driving future growth and job creation in our communities. It is long past the time that they are given greater access to the Federal Government as a customer.

And with that, I now recognize the ranking member, Mr. Chabot, for his opening statement.

OPENING STATEMENT OF MR. CHABOT

Mr. CHABOT. Thank you Madam Chairwoman. This morning the Committee is again examining the implementation of the Women's Procurement Program by the Small Business Administration. This hearing continues the efforts of this Committee to understand the issues and difficulties associated with the regulatory establishment of a program enacted by Congress back in 2000. Without prejudging the ultimate outcome of the SBA's effort, I remain concerned that the will of Congress remains unfulfilled after more

than seven years and more than two years after a federal district court ordered the implementation of the program.

Federal agencies are required to ensure that small businesses receive a fair proportion of contracts for goods and services purchased by the federal government. Recognizing the growing importance of women-owned small businesses to the growth of the economy and the longstanding perceptions that women-owned small businesses were at a disadvantage in obtaining federal government contracts, Congress enacted bipartisan legislation authorizing the SBA to create a Women's Procurement Program.

Slightly more than seven years after enactment, the SBA finally issued a proposed rule to commence the process for implementation. I, like many members of this Committee and many Members of Congress, am somewhat dismayed at the length of time it took to begin the process of implementing the will of Congress.

Administrator Preston's efforts to manage the implementation process should be commended, even if there is disagreement about the results. The notice of proposed rule-making identifies certain industries in which women-owned small businesses are underrepresented in federal government contracting. However, I am troubled by the fact that the notice does not provide the public with sufficient information on the type of probative evidence that would convince the agency to expand the scope of the industry as initially covered by the rule.

The crucial part of the program is the identification of industries in which women-owned businesses are underrepresented in federal procurement. In the notice, the SBA proposes to calculate underrepresentation every five years, but fails to specify how it will make that calculation. Without that information, the potentially-affected public has no way of accurately informing the SBA whether the proposal is adequate. In conclusion, the Administrator is taking an important first step to see that the program is implemented.

On the other hand, the deficiencies in the notice raise real concerns about the adequacy of the notice and comment procedures mandated by the Administrative Procedure Act. I would urge the SBA to provide additional supplemental information to enable the public to respond to the notice in an intelligent manner, I yield back the balance of my time.

Chairwoman VELÁZQUEZ. Thank you, Mr. Chabot.

So now I welcome our first panel.

Chairwoman VELÁZQUEZ. The Honorable Steven Preston, Mr. Preston is the administrator of the United States Small Business Administration. He has served in this capacity since July of 2006 and has testified several times before our Committee.

Mr. Preston, you are most welcome.

STATEMENT OF THE HONORABLE STEVEN C. PRESTON, ADMINISTRATOR, U.S. SMALL BUSINESS ADMINISTRATION

Mr. PRESTON. Thank you for inviting me to testify today. The proposed rule that will implement the women-owned small business Federal contracting procedures has been published in the Federal Register and is currently in the 60-day comment period. The SBA has been and remains committed to implementing the statu-

torily authorized set-aside for the program while at the same time meeting the specific directives provided in the legislation.

Based on a nonpartisan guidance provided by the National Academy of Sciences or NAS, RAND conducted a statistical review to determine underrepresentation for women-owned small businesses in Federal contracting. The NAS recommended considering a variety of data sources and a variety of methodologies in order to gain a broad perspective.

It did, however, emphasize that greater weight be given to results based on contracting dollars. In addition, NAS emphasized the importance of considering more detailed industry information represented by the four-digit North American Industry Classification System, which is called NAICS. And then they highlighted the need to demonstrate that businesses in the review were ready, willing, and able to perform in Federal contracting.

To determine underrepresentation and substantial underrepresentation, RAND identified 28 possible approaches and considered data in the Central Contracting Registration; the Federal Procurement Data System; the Survey of Business Owners, which is a broad industry-wide survey. And relying on the guidance from NAS and the results of parsing the data, RAND then zeroed in on those methods that accurately measured underrepresentation and substantial underrepresentation.

After careful analysis of the remaining approaches and in keeping with in the direction of the NAS and RAND, SBA adopted an approach that best captured the most appropriate measures. First, based on the NAS comments and the need to align with Federal policy, we used measures which considered contracting dollars going to businesses rather than the numbers of contracts. The very goal of the statute was intended to support five percent Federal contracting dollars going to women-owned small businesses. Getting revenue from contracts is what creates value for small businesses, not numbers of contracts. And the entire appropriations budgeting, contracting, and accounting process in the Federal Government is based on dollars.

Second, based on NAS comments and the need to tailor the rule to address the need, we used the more detailed classifications in the four-digit NAICS codes. The proposed rule assists certain women owned small businesses in pursuing contracting opportunities with the Federal Government by providing procedures for certifying as an eligible women-owned small business; protesting eligibility determinations and awards; and providing a road map for agencies to make the determination that women-owned small business underrepresentation is related to gender discrimination.

In addition, the rule sets forth when contract officers can restrict competition to women-owned small businesses. SBA's goal is not only to develop regulations implementing those procedures but to help women-owned businesses so they can compete both in the private marketplace and for Federal contracts.

I and my team were surprised at the results of this study. We learned that those women-owned small businesses registered in the CCR generally received a higher percentage of their revenues from Federal contracting dollars than other businesses and that the data only showed underrepresentation in four categories.

According to the study, once women-owned businesses register to do business with the Federal Government, they appear to be doing well as a percentage of their total revenues compared with other firms in their same industries. The study indicates the real issue is increasing the number of women-owned small businesses who compete for Federal contracts.

In fiscal year 2007, we, the SBA, began an initiative to more effectively assist small businesses interested in doing business with the Federal Government. We have aligned our field staff. We have provided additional training so they are better equipped to advise, train, counsel small businesses; so they are prepared to do marketing necessary to find procurement opportunities. As part of this initiative, PCRs will have a greater role in ensuring that Federal agencies reach the small business procurement goals which will increase procurement opportunities for small business.

SBA has made great progress. In 2006, contracting dollars going to women-owned small businesses reached a record level, $11.6 billion. And in 2006, we experienced the largest growth in a single year since that goal was established in 1994, $1.5 billion. The amount of contracting dollars going to women-owned small business is more than two and a half times the level it was in 2000, growing at almost 17 percent per annum. In addition, subcontracting dollars increased to over $10 billion, representing six percent.

SBA is taking a forward-looking approach. First, our programs are tasked with growing the universe of women-owned businesses and encouraging businesses to register with the CCR, making those businesses eligible to contract with the Federal Government. Second, the role of SBA is to help those businesses become ready, willing, and able to undertake and build a successful track record working with the Federal Government.

We provided our entire field organization with a full week of training to make them more effective in outreach and training. We have rolled out new technologies to help other agencies easily identify women-owned businesses that meet their specific contracting needs. We have established outreach goals for every single district office in the country within the SBA, and we are holding Federal agencies accountable for their performance to the score card process.

We have a number of exciting initiatives planned for 2008. Some highlights: SBA intends to participate in almost 600 procurement related events which have some component of women-owned small businesses focused on. Additional training and match-making, we are rolling out online courses on procurement. We are realigning our field staff to focus on these opportunities. We think these initiatives will help women-owned small businesses to achieving the congressionally established goals.

We must remember, I think, that there is no one single approach that will expand the participation of women-owned small businesses in Federal Government; rather, a combination of initiatives that take into account that the individual needs of businesses is the best approach to provide opportunities for women-owned small businesses to do business with the Federal Government.

Thank you for the opportunity to testify today, and I look forward to any questions you might have.

[The prepared statement of Mr. Preston may be found in the Appendix on page 65.]

Chairwoman VELÁZQUEZ. Thank you, Administrator Preston.

And now I welcome Ms. Elizabeth Papez. Ms. Papez serves in the Department of Justice Office of Legal Counsel. She is the Deputy Assistant Attorney General and serves as counsel to the Assistant Attorney General.

Welcome. You'll have five minutes to make your presentation.

STATEMENT OF ELIZABETH PAPEZ, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Ms. PAPEZ. Thank you, Madam Chairwoman, Ranking Member Chabot and members of the Committee, for allowing me to appear here today to discuss the Justice Department's legal views on the Federal Government's efforts to improve contracting opportunities for women.

The Justice Department's view of all gender-based programs rests on a simple premise: These programs, no matter how strong their policy justification, must comply with the Constitution. To do so, these programs must be able to withstand scrutiny under the equal protection component of the Due Process Clause of the Fifth Amendment. The type of programs addressed in the SBA's proposed rule clearly trigger equal protection scrutiny because the programs would require Federal agencies to grant contracts to some businesses and deny contracts to others on the basis of gender.

The practical problem the government faces in administering these programs is determining what exactly this equal protection scrutiny means for the programs. The precise level of equal protection scrutiny that applies to a preference program depends on the type of preference at issue. Preferences, such as veterans preferences, that do not involve race or gender are subject to rational basis scrutiny, which means that courts will uphold them as constitutional as long as the government has a rational basis for adopting them.

On the other hand, preference programs that do involve race or gender are subject to much higher equal protection scrutiny by the courts. Race-based programs are subject to ″strict″ scrutiny, which means the particular program must be narrowly tailored to serve a compelling government interest. In other words, they are highly disfavored. In contrast, gender-based programs are subject to ″intermediate″ scrutiny, which the Supreme Court has said is much more demanding than rational basis scrutiny but different than the ″strict″ scrutiny that applies to race-based programs.

Justice Ginsburg's opinion for the U.S. Supreme Court in the VMI case elaborated on what ″intermediate″ scrutiny requires. It requires that the government be able to show, in the court's words, an ″exceedingly persuasive″ justification for awarding government benefits on the basis of gender. The reason is that these awards, no matter how well intentioned, grant or deny government benefits

on the basis of gender rather than individual abilities or qualifications.

Accordingly, the Supreme Court said that although ″intermediate″ scrutiny is different than ″strict″ scrutiny, ″intermediate″ scrutiny requires the government to show that a gender-based program furthers an important governmental interest and that the gender discrimination the program requires is substantially related to achieving those interests.

The Justice Department in reviewing gender programs adheres to the ″intermediate″ scrutiny standard the Supreme Court set forth in VMI and looks to how courts have applied this standard to particular types of gender programs.

For contracting programs, Federal courts have consistently held that to satisfy ″intermediate″ scrutiny the government must show genuine non-hypothetical evidence of discrimination in the particular field where the program will operate.

I want to point out again that this standard of ″intermediate″ scrutiny and the court's focus in gender cases on the government's ability to prove discrimination does not erase the distinction between ″strict″ and ″intermediate″ scrutiny. The 11th Circuit explained the difference this way: While there is a difference in the evidence required to support a race- versus gender-based program, the difference is one of degree, not of kind. In both contexts, race and gender, the constitutionality of a government program turns on the adequacy of the government's evidence of discrimination. ″Intermediate″ scrutiny just means that, in gender cases, less evidence is required. Exactly how much less evidence is not clear from the cases. What is clear is that to survive ″intermediate″ scrutiny, a government's gender program must allow the government to show genuine, non-hypothetical evidence of discrimination in the particular field where the program will operate. And the cases make clear that mere findings of underrepresentation or disparity are generally not sufficient to satisfy the constitutional standard.

The lesson these cases leave for Federal agencies implementing gender-based programs is clear: If the agencies want their programs to be upheld as constitutional, the programs must be based on government evidence of discrimination in the particular field where the program will operate. That is exactly what the proposed SBA rule requires. It requires that an agency intending to implement a gender-based set-aside program identify, as the government, evidence of discrimination in the field where the program will operate.

It is for that reason that the Justice Department views the proposed rule as consistent with what the Constitution requires under ″intermediate″ scrutiny.

The rule is also consistent with Federal agencies' obligation to implement statutes and programs in a constitutional manner. In order to discharge their obligations, Federal agencies can and should take steps to maximize the chances that courts will uphold their programs. Doing so not only helps the agencies comply with the Constitution, it also helps ensure that the programs will survive legal challenges that would otherwise prevent those programs from serving the very people they were intended to benefit.

Thank you again for the opportunity to testify. I look forward to taking any questions.

[The prepared statement of Ms. Papez may be found in the Appendix on page 69.]

Chairwoman VELÁZQUEZ. Thank you, Ms. Papez.

I will address my first question to Mr. Preston.

Mr. Preston, after seven years, a Federal lawsuit and multiple congressional hearings, the SBA puts out a rule that designates four industries as underrepresented. If this proposed rule is finalized, less than 1,300 out of ten million women-owned businesses will potentially benefit from the Women's Procurement Program. It also requires agencies to make a discriminatory finding regarding its past procurement practices, a heavy and unrealistic burden for any Cabinet Secretary. Once this is implemented, do you believe that it will increase contracts so dramatically that the five percent goal will be achieved?

Mr. PRESTON. First of all, I want to highlight a couple of the numbers you just mentioned. Roughly 1,200 businesses versus many millions; the 1,200 is not all businesses in these categories. It is all businesses that are registered to do business with the Federal Government. So that 1,200 relates to about 55,000, granted still about two percent.

We believe it will be an additional tool in their quiver, but we certainly don't think this is going to be the end all at helping agencies meet their Federal goals. And as I mentioned in my testimony, we think that Federal agencies are going to continue to have to focus on outreach efforts, recruiting more women into the CCR, and doing the job and finding the right business for those contracts.

Chairwoman VELÁZQUEZ. Do you believe that the five percent will be achieved?

Mr. PRESTON. I believe that a five percent will be achieved some day. And I think if you look at the growth over the last several years, it has been very, very strong. So I think we are on the path.

Chairwoman VELÁZQUEZ. Okay. Do you believe it will be achieved this year?

Mr. PRESTON. I don't believe it will be achieved this year.

Chairwoman VELÁZQUEZ. Mr. Preston, we have gone back and examined the numbers, and in order to achieve the five percent goal, each—and I know that you mentioned your numbers, but we went back, and based on the data, we found that 1,247 businesses designated as underrepresented will have to receive a contract worth $4.4 million. This is ten times the average a small business contract gets.

How likely, on a scale of one to 100, with one being absolutely no way, to 100 being absolutely guaranteed that each and every of these 1,247 women-owned businesses will receive a contract worth $4.4—

Mr. PRESTON. Ma'am, you are presenting that Federal agencies are going to look at four out of 313 categories to increase their contracts with women. And you are presuming that the only way to do that is to go to those categories. It is a much, much broader opportunity, and I think for agencies to hit those goals they have to look well beyond those four categories to be effective.

Chairwoman VELÁZQUEZ. The number that I mentioned to you will have to correspond to the four categories, those four industries.

Mr. PRESTON. Ma'am—

Chairwoman VELÁZQUEZ. I don't agree with you, and you know that.

Mr. PRESTON. The $1.5 billion increase we saw in 2006 had nothing to do with set-aside programs. It had everything to do with agencies doing more business with women-owned businesses that were competing effectively. And these firms are competing effectively. And so I think this is an additional tool, but I don't think this is what we can look to—

Chairwoman VELÁZQUEZ. Well, Mr. Preston, the focus of today's hearing is the Women's Procurement Program.

One of the four industries that SBA designated as underrepresented was national security and international affairs. Is that correct?

Mr. PRESTON. That is correct.

Chairwoman VELÁZQUEZ. However, the size standards specify that such contracts cannot be performed by private businesses. Do you know that?

Mr. PRESTON. My understanding is that there were private firms in that category, but most of the contracts were classified, so it was difficult for us to get that information.

Chairwoman VELÁZQUEZ. The size standards, Mr. Preston, specify that such contracts cannot be performed by private businesses. What this means is that it will prevent women-owned businesses, and any small business for that matter, from getting a national security contract, so I am appalled. And please explain to me then why the SBA included such an industry in its proposed rule?

Mr. PRESTON. This was one of the four industries that was recommended by the RAND Corporation study, and that is why we included it.

Chairwoman VELÁZQUEZ. ″Section 92, small business size standards are not established for this sector. Establishments in the Public Administration sector are Federal, State and local government agencies which administer and oversee government programs and activities that are not performed by private establishments.″ So what it means is that this industry is out. So we now have three industries where women will be able to participate. So the Small Business Administration had seven years to get this right. And you come back with this product. It just amazes me, Mr. Preston.

Your regulation requires an agency to make a discriminatory finding in order to use the program. Has this ever been done before for a congressionally created affirmative action program?

Mr. PRESTON. I don't have the history on that. My understanding is there is significant precedent in looking at contracting preference or contracting programs that require that.

Chairwoman VELÁZQUEZ. Ms. Papez, can you tell us if an agency finding of discrimination has ever been required before for a similarly situated program?

Ms. PAPEZ. Yes, absolutely.

Chairwoman VELÁZQUEZ. And I need a yes or no answer.

Ms. PAPEZ. Yes, absolutely. Multiple Federal Courts of Appeals and multiple Federal District Courts applying ″intermediate″ scrutiny have required exactly that; they have required—

Chairwoman VELÁZQUEZ. Can you provide the Committee examples of such?

Ms. PAPEZ. Of course, absolutely. One of the examples I mentioned in my opening testimony was an 11th Circuit case—by the way, all the cases that I refer to—

Chairwoman VELÁZQUEZ. Ms. Papez, I am asking about programs, not court cases.

Ms. PAPEZ. Yes, yes, programs. The court cases address programs—programs to give women-owned businesses contracting preferences. Those were the court cases I was relying on. They all deal with the kind of programs that we are talking about here.

Chairwoman VELÁZQUEZ. For each agency, you will require.

Ms. PAPEZ. Well, for the government, yes—

Chairwoman VELÁZQUEZ. I want you to mention for each agency, programs such as the one that we are discussing today, is required for each agency?

Ms. PAPEZ. Well, if by each agency you mean, do courts require the government agency or entity doing the contract program to prove discrimination, yes, they do.

Chairwoman VELÁZQUEZ. So why then in a proposed rule don't you say the Federal Government instead of saying each agency has to prove past discrimination?

Ms. PAPEZ. Well, to be clear, I think what the courts require is that there has to be evidence of discrimination in the particular field where the program operates. So it makes sense to say that the agency who is administering the program, they are the agency in the field where the program operates, has to have the evidence of discrimination. That is what all of the cases hold.

Chairwoman VELÁZQUEZ. Do you think that what you are stating today is clear in the rule?

Ms. PAPEZ. I think it is clear in the rule that the agency doing the program has to identify evidence of discrimination in the field where the program is going to operate. I think that is clear, and it is absolutely consistent with the cases.

Chairwoman VELÁZQUEZ. But let me ask you, the test that you are putting out is not more consistent with ″strict″ scrutiny?

Ms. PAPEZ. No, it is not more consistent—it is the ″intermediate″ scrutiny test that the Supreme Court and Federal courts all over the country have applied to women-owned business contracting programs. It is not a ″strict″ scrutiny test that courts apply to—the tests that I am talking about and the test that is in the rule is what courts, not the Justice Department, courts have applied to women-owned business contracting programs across the country.

Chairwoman VELÁZQUEZ. It seems to us that there is a disagreement regarding the test that you are putting out, and you feel that corresponds to ″intermediate″ scrutiny. I would like for you to state for the record which member of your staff will remain in this Committee hearing so that you get the benefit of the second panel. We are going to have legal experts here which totally disagree with the interpretation that you are stating today. Would you please men-

tion the name of your staff that will remain in the Committee hearing?

Ms. PAPEZ. Yes, of course. I will stay as long as I personally can. I have a staff member, Mr. Phillips, behind me who will stay. And the Justice Department will be happy to do whatever we can to help resolve this disagreement. We are committed to doing that.

Chairwoman VELÁZQUEZ. Thank you.

Mr. Preston, in the preamble to the proposed regulation, the SBA states that RAND provided 28 different approaches to determining which industries are underrepresented by women. The SBA chose one of the narrowest methods to implement the program, even though the National Academy of Sciences recommended that two approaches be used. So I would like to know, why did the SBA ignore the National Academy of Sciences in this instance and just use one method?

Mr. PRESTON. I would be happy to. Before I mention that, I think we need to reconcile some information, because my staff advises me that both small businesses and women-owned small businesses have contracts—

Chairwoman VELÁZQUEZ. I am sorry, Mr. Preston—

Mr. PRESTON. I just want to state for the record here that we need to reconcile some information, because my staff has advised me that small businesses and women-owned small businesses have received contract awards under the category that you mentioned, so I would like to make sure that we offer something for the record subsequently.

I think if you look at the guidance in the National Academy of Science, they recommend considering a broad number of approaches to get a broad understanding of the issue. However, when you look at the detailed guidance that the National Academy of Sciences provides, they provide very specifically a mention that monetary awards are critical to compute; that they are preferable because legislatively mandated goals are based on dollars. Dollar value is critical to business success—

Chairwoman VELÁZQUEZ. I understand that, Mr. Preston, but I am asking you about how the RAND Corporation, the company that you hired to do a study, recommended that out of 28 you could use more than one or multiple factors.

Mr. PRESTON. Okay. The RAND study provided a multiplicity of methodologies, most of which are not defensible, we believe, in this case. There are two concepts I think that are clear to understand, the study looks at dollars of contracts because that is the goal we were trying to achieve, they look at underrepresentation based on dollars. The other piece of information they use is four-digit industry codes, which are much more detailed and which give us better information on underrepresentation. When you use those two concepts, it winnows it down to two methodologies. You know, I can get into a broader explanation, but it is as simple as that.

Chairwoman VELÁZQUEZ. Mr. Preston, it doesn't disturb you that by choosing the number of dollars amount, in terms of contracts given out will only, if you use that criteria, it will cover only three percent of women that are underrepresented, and if you use another method or a combination of more than one, it will show that other women are underrepresented, as high as 80 percent in some

cases; it doesn't disturb you, that disparity between three percent and 80 percent?

Mr. PRESTON. Well, I think I can describe for you why that disparity occurs, but what I would tell you is, it would be a lot easier for me to stand here and provide you and the rest of the Federal agencies with a broad set of set-aside capabilities to meet this goal. But what we did is we determined what we thought was the most accurate depiction of what we needed to do to satisfy the statute, the Constitution, and align with the goals. I think there are some things--

Chairwoman VELÁZQUEZ. Let me ask you, of the 28 methods, do you agree with me that any of those will meet constitutional standards?

Mr. PRESTON. I don't believe certain of them would meet constitutional standards, nor—

Chairwoman VELÁZQUEZ. At least maybe one, two, three, four out of 28?

Mr. PRESTON. Ma'am, let me—if you'd like, I can talk about the numbers versus dollars issue because you brought it up in your testimony. When you look at numbers of contracts going to businesses, it doesn't look at a dollar value going to them. And let me just draw a comparison: If you have a $5 million business with five $1 million contracts from the Federal Government, so 100 percent is from the government. And you have GE with ten $1 million contracts from the Federal Government, so they have more contracts, but it is an irrelevant percentage of the revenues. That small business would be considered under-representative, even though all of the revenue is coming from the Federal Government. Numbers you have got to adjust for the capacity to firm and their ability to perform. Numbers put sole proprietorships on the same basis as multinationals in terms of numbers of contracts they are able, capable of performing. That is why that is not a reasonable comparison.

Chairwoman VELÁZQUEZ. It is just frustrating, Mr. Preston, because what I am asking you is based on the National Academy of Sciences, which recommended to use more than one method, for you to explain why you choose to only use one when it is going to produce such a disparity in terms of the three percent that you are going to achieve by using one method or the 80 percent, in some cases, if you would have chosen to use multiple methods.

Mr. PRESTON. The NAS said that all or most of the methodology should point to representation. They also mention very specifically that heavier weight should be given to dollars. And they also specifically said that two-digit NAICS codes were too broad to be used as the basis of disparity, which is what the preponderance of these methodologies used. They even said it is too broad.

Chairwoman VELÁZQUEZ. Okay.

Mr. PRESTON. Let me make one more comment. A two-digit NAICS code, as retailers, when you get to the four-digit, you are looking at automobile dealerships, grocery stores, jewelry dealers, you know. And if you don't look at a more detailed category, you might say there is underrepresentation in jewelry dealers, and that would lead you to give a preference to auto dealerships.

Chairwoman VELÁZQUEZ. So the National Academy of Sciences is wrong.

Mr. Preston, I have to leave with Mr. Chabot, we have a bill on the floor. And Ms. Clarke will be chairing this hearing, and I will be coming back as soon as I can.

Ms. CLARKE. [Presiding.] Ms. Fallin, I understand you have questions at this time, we yield to you.

Ms. FALLIN. Thank you, Mr. Chairman, we appreciate you coming today, and Ms. Papez, we appreciate your expertise, knowledge on constitutional issues and appreciate your explanation of court hearings and Supreme Court rulings. It is very complicated, so thank you for helping to give us a better understanding of what is going on.

I think all of us are very concerned about how we can encourage more women to be able to participate in Federal Government contracting. I certainly know that I have heard from my district back over the many years that I have been in office that women would like to have more opportunities. But I had a couple of questions, and I had a wonderful briefing by your staff yesterday, so thank you for allowing them to come see me.

I have a couple of questions. In looking through all the information, what can we do as a Nation to encourage under-performing business categories to register to be on the list so that more women can take advantage of the Federal contracts? I know back in my district over the years I would hear women say, I don't know how to do this. I have heard you say that you are working closely with the contract procurement people at various agencies within the SBA to help them coordinate, but it seems like we are still not doing as good of a job as we can be. What can the Federal agencies do?

Mr. PRESTON. Well, first of all, I think we can all continue to participate and expand our outreach efforts by holding forums; by doing match-making sessions where we bring businesses together with Federal agencies and procure; and by getting the word out there. We are working very hard do that, both by expanding our own physical outreach and making it simpler for people to understand how to do contracting with the Federal Government through various Web tools, through educational sessions that they can get through the SBA Web site. So it is outreach. It is education. We are also providing the Federal agencies with tools to simplify their ability to find the right business.

A few months ago we rolled out a tool where if agencies put in what they are buying, where they need to buy it, they can basically get a list of all the women-owned businesses that perform that service. So we are helping them find the right small business, which is a brand new opportunity that we have given them. So it is on a number of fronts and increasing awareness as well.

The last piece is holding people accountable. And we rolled out a score card last year to hold Federal agencies accountable for hitting not only their overall procurement numbers but for women in other target groups. And I can tell you that we have gotten more outreach in our direction since we started publishing that information than probably ever before, because the agencies do not want to appear like they are not doing the job to support these businesses. So we are trying to hit it on a number of fronts.

Once again, I would remind the Committee, we had the largest increase in the government's history last year, women, on procurements. So we are on the right track. We just need to continue do more of it. Because we believe it is not only good for women-owned businesses; we think it is good for the Federal Government to have these qualified contractors competing.

Ms. FALLIN. And if I could clarify, what percentage of women-owned businesses receive, the ones that are registered, actually receive the Federal Government contracts?

Mr. PRESTON. Last year it was 3.4 percent of contract revenues compared with a five percent goal in 2006, and I would highlight, in terms of our own commitment, that in 2007, SBA will hit almost 25 percent of our contracts. So we are trying to lead by example here, and we are leading the entire Federal Government.

The other thing is, and I know the Chairwoman mentioned a lot of numbers, but when you look at the revenues of small business in the economy, the most recent census data shows that women-owned businesses get about 4.2 percent of the revenues of the economy, and women-owned small businesses get 3.4 percent of the revenues in the economy, compared with 3.4 percent from the Federal Government. So we are working within that body of businesses to get those revenues. I think it is important to make that distinction because we are comparing the numbers of firms with the dollars they get, and that is not the relevant comparison. We need to look at the capacity to perform versus the dollars we have to give out.

Ms. FALLIN. And the percentage of women-owned businesses in the United States, what percentage of those women actually registered to get the Federal contracts?

Mr. PRESTON. Oh, it would be a very small percentage. It would be a fraction of one percent. Now, when you look at the 18 million women-owned businesses in the United States, probably half of those are one-woman shops. They don't have employees. And then the preponderance of the rest of them are relatively small. So it is a very small number, but I think if you looked at all other businesses of comparable size, you would find a very small percentage. That having been said, it means that there is also a large group of businesses out there for us to go to as we look at recruiting them.

Ms. FALLIN. Madam Chairman, if I can ask one last question.

Ms. CLARKE. Yes.

Ms. FALLIN. Was the SBA removed from the process as far as being independent from the RAND study?

Mr. PRESTON. Oh, yes. What we did with RAND is we conveyed to them the guidelines that were given to them by the National Academy of Sciences. And as many of you know, because it has been a long journey, the original study the SBA did was deemed to be not defensible. So we went to the National Academy of Sciences and said, how does a study have to look to be defensible here? They laid out a methodology. The SBA conveyed that methodology to RAND, and RAND followed the methodology. The agency pulled very much back from the analytical process and left it to the experts because we wanted to ensure that we had a third party unbiased in any way performing that analysis.

Ms. FALLIN. Okay, thank you, Madam Chairman.

Ms. CLARKE. Thank you. I now yield to the gentleman from Pennsylvania, Mr. Sestak.

Mr. SESTAK. Thank you very much. The arguments which I understand for what your position is reminded me of some civil arguments I heard over the last 30 years, but there is an institution of the U.S. Government that understood that there was a national interest, an important interest which I think the Engineering v. Metropolitan Dade case established for gender discrimination. And that organization, the Federal Government said, We really do need women to be more represented. So the U.S. Military actually set goals for promotion boards, not the same as this legislation does, that needed to be achieved.

The arguments I heard prior to this were not dissimilar. Everybody took every position they could of the old timers to prevent them from becoming or getting into combat roles. I can remember being off Afghanistan the first night, and this young, 27-year-old woman pilot diving down as we went into the air and trying to salvage Special Forces that had died and got the other four out. But I never understood when I listened to you today, why was that unconstitutional? We do it today. We have goals that so many women should be promoted into these combat positions and all.

Ms. PAPEZ. I'm sorry, is the question addressed to me?

Mr. SESTAK. Yes, it is.

And second is, when you set the standard that you have, it is a great block, frankly, yet military does it every day. And I have never heard the administration take a differing position.

Ms. PAPEZ. Well—

Mr. SESTAK. If I could, when you go down and look at the Metropolitan case, they actually say societal discrimination in the economic sector is sufficient for the government to prove discrimination. Why are you pushing a higher standard than that court said, the Third Court refers to the Ensley Branch case? Why are you now making a higher standard of having to prove direct discrimination than what the court already said, societal discrimination is sufficient?

Ms. PAPEZ. I guess there are a lot of parts to your question, so let me try to take them piece by piece. First, I just want to say, the Justice Department is not setting any standards here. We reviewed a rule consistent with case law so I want to say that at the outset.

Secondly—

Mr. SESTAK. But shouldn't we as the Justice Department then say the military acted against the Constitution? Because one of your arguments was, we don't want the agencies to set off on a wrong course here and be pulled back. It appears to me you have got an agency, the Department of Defense, that is evidently on the wrong course. Why haven't you pulled them back? But we are preventing—

Ms. PAPEZ. If I could answer that, first, I want to say I don't recall saying or the Justice Department ever saying that anyone has acted unconstitutionally, so I am not really sure where that part of your question comes from. We are not saying that anybody is acting unconstitutionally here.

Mr. SESTAK. No, I guess what you are saying is, if you do not do this direct discrimination evidence, the intermediate level, that you won't be held constitutionally valid; it will be against the Constitution, because of court cases. My argument is, well, it seems to me we have got an agency over here that is doing exactly that.

Ms. PAPEZ. First of all, I don't know exactly the details of the program you are talking about. Secondly, I would say—

Mr. SESTAK. It is a goal that actually says—and we go to promotion boards there—5 percent that is our goal of how many women we want promoted.

Ms. PAPEZ. But it is a goal, not a requirement.

Mr. SESTAK. And that is what this is, five percent here for women-owned business is a goal, not a requirement.

Ms. PAPEZ. Right, I think.

Mr. SESTAK. What is the difference?

Ms. PAPEZ. Well, I think the same standard applies, and it is the standard I said.

Mr. SESTAK. So we should be over at DOD telling them that they are—that it is unconstitutional?

Ms. PAPEZ. Not at all, I don't think that is the case.

Mr. SESTAK. It is the same program that you are trying to defend here, ma'am.

Ms. PAPEZ. But I haven't said any program is unconstitutional. The point is a simple one; it is that if the government wants to do all it can to ensure that a court will uphold the program as constitutional and not strike it down, and I would point out—

Mr. SESTAK. Why hasn't the court struck this down as unconstitutional? We have been doing it for decades or so. Why all of a sudden are you holding at a higher stricture than the government already holds on a similar program?

Ms. PAPEZ. Again, I don't know exactly what DOD program you are talking about. One DOD program I do know about is the DOD program that has been at issue, tied up in litigation in the Rothe case for almost ten years. I guess if your question is, why hasn't a court struck down or upheld the particular program you are talking about, again, I don't know the details.

Mr. SESTAK. Can you go to the next question? It amuses me because I heard so many old timers over those decades say, We just don't need women in combat roles. It sort of like sounds to me, we don't need that many women to try to interpret this more easily for women to get a fair share. So my second question is, why are you setting what appears to me a higher standard of proving direct discrimination rather than evidence of societal discrimination in the economic sector?

Ms. PAPEZ. I really would like to address that. First I want to say, no one is disputing—I think we all share the goal that we want to encourage more women in contracting. No one is trying to block them.

Mr. SESTAK. Is the "we" the Justice Department, or that one should that have been addressed to Mr. Preston? I mean, it seems to me Chairwoman Velázquez's comments were spot on. I mean, you could have taken any of the measures, because the law did not specify the amount of money. And so it is unfair to you; that question was really to him of a combined. You went to the amount of

money rather than the number of contracts. Anyway if you would go back to the societal issue.

Ms. PAPEZ. Let me talk about that. When you talk about the Justice Department advising on rules and these constitutional standards, we do that because we are trying really hard to help agencies make sure that these programs are upheld, that the programs that are helping these women are upheld and not struck down. So that is why we are doing it. We are doing it because we want the programs to be right and—

Mr. SESTAK. Why didn't you say the bar was societal discrimination? That is a lower standard than direct discrimination; correct?

Ms. PAPEZ. But I didn't say direct discrimination or societal, I said, like the cases say, that in order to sustain a program, the government must show evidence of discrimination in the relevant sector. That is what I said, and that is what the cases require.

Now your point is some cases, like the ECA case, have said that evidence of societal discrimination may be enough to sustain a program. I would point out in the ECA case that the court actually struck down—

Mr. SESTAK. Actually, it said it can be satisfied by society, not may; there was no may in that hearing.

Ms. PAPEZ. Can be, can, may, it doesn't mean it must necessarily where it is. It can or may if the evidence is sufficient. What I would point out is, in that very case, the court struck down the program, the women's contracting program at issue, because the evidence was not sufficient. And where Justice comes from is we look at cases like that, and we advise agencies that if you don't want your program to be struck down like this one was, you need to have good robust evidence the courts will accept to uphold the program. It is not in the agency's interest or in women's interest to have courts strike these programs down, and that is what that ECA court did, it struck it down.

Mr. SESTAK. Yes, but it struck it down because they had not attempted to show societal discrimination, so if they would come back. Correct me if I am wrong, because—

Ms. PAPEZ. I hate to say that, but you are wrong in that case. They did try to show it, and the court held the evidence, which was a disparity study, was insufficient evidence. So they tried to show it through a disparity study, akin to RAND, and the court said that is not good enough.

Mr. SESTAK. But if I could, doesn't—I am not a lawyer, I am just a seaman, but if an intermediate—is that what it is called—discrimination, doesn't that require direct discrimination finding?

Ms. PAPEZ. No, the courts haven't said that, and the Justice Department hasn't said that. It doesn't require direct versus indirect. It requires evidence—

Mr. SESTAK. So societal is enough?

Ms. PAPEZ. It may be enough depending on the strength of the evidence. That is what courts have held. Courts have held that societal discrimination may be enough depending on the strength of the evidence. And in ECA, the court held that a disparity study was not good enough evidence of discrimination to qualify the program.

Mr. SESTAK. Can we then, either you or staff, I would like to know and then go through the military program which has similar goals as that does, why is that okay, and what is different about it that evidently what you speak about has not been a part of what the U.S. Government's agencies have tried to also lay down as requirements for the agency to be concerned or aware about?

Ms. PAPEZ. I actually think they have. Again, I don't know what specific Defense program you are talking about. The one I know a fair amount about, because it has been in litigation, is the 1207 DOD program, which has race and gender preferences and has been tied up in litigation for years on precisely the issue I was talking about, which is that people were coming in and saying, we don't think that these preferences DOD is giving to contracts are constitutional because—

Mr. SESTAK. No, it is promotion of women from lieutenant to lieutenant commander. That is a different—what I am talking about is a different program. It is just purely promotions.

Ms. PAPEZ. Okay, I am sorry.

Mr. SESTAK. I mean, same thing, trying to get more—I have gone over my limit—representation of women into the upper ranks, and so goals were set. Same thing, but same thing; it was gender-based and it was not—and we have been doing it for years. So I am curious why in this one we are so concerned to make sure the agencies don't get caught up, that they can work their way through constitutional issues, but over there in a very similar program, it seems as though they are going along for what is a national interest good. I have gone on too long I yield back.

Ms. PAPEZ. If I could say briefly for the record, I am not familiar with the military promotions program. I think that there are probably some real differences between that and the contracting program. And all of the evidence and testimony I have presented today is specific to contracting programs, although we would be happy to look at the military program and provide any answers that might help the Committee.

Mr. SESTAK. I would be interested, because there seems to be such commonality of more gender-based representation; the principle seems to be the same. And when I hear the other side of the argument here, I kind of look at the old Navy admirals that did not want them at the top and picked the right measure to make sure they didn't get in there. Thank you very much.

Ms. CLARKE. Ms. Hirono from Hawaii.

Ms. HIRONO. I have several questions for Mr. Preston. You note in your testimony that the proposed rule—about a proposed rule. And I take it that the proposed rule doesn't insulate the agencies from being challenged on constitutional grounds when they are awarding contracts to women-owned small businesses.

Mr. PRESTON. I'm sorry, can you restate the question?

Ms. HIRONO. I'm saying the rule does not completely or even partially insulate the agencies from legal and constitutional challenge.

Mr. PRESTON. No, the agency has to undertake its own review.

Ms. HIRONO. So have they been doing that? Have they set up, established, it says, a framework to make a determination as to justifiable discrimination so that they can award these contracts to women-owned businesses?

Mr. PRESTON. The agency would need to look at the facts and circumstances within their agency, which vary dramatically from one agency to another and from one business category to another. And that is why, because of those uniquenesses, it doesn't set out a specific framework in sort of a one-size-fits-all fashion.

Ms. HIRONO. I realize that, but all of the agencies have particular types of contracts that they are awarding, and so they need to justify, just in case someone decides to challenge, they need to lay out their rationale, so have they done that—

Mr. PRESTON. Prospectively?

Ms. HIRONO. Yeah, in anticipation of legal challenges?

Mr. PRESTON. I don't know what they have done. We haven't asked them for a description of how they would do it. Certainly in the process of the proposed rule, people bring forward ideas on that issue, and we will consider them in the rule-making process.

Ms. HIRONO. I think that that is an area that you probably should—if I can make a suggestion, you probably should proceed with, because it should be anticipated that these challenges will come forward, especially based on the Supreme Court decisions and the circuit court decisions. So you note two areas that you are moving toward. One is to increase a number of women-owned businesses that are registered, and I take it that the registration is a simple thing for women-owned businesses to do, that we don't have a lot of barriers for them to register themselves.

Mr. PRESTON. No, there aren't a lot of barriers for them to register themselves. I would tell you that participating in the entire Federal contracting process has its own challenges just because of the Federal Regulations. And clearly they have to make sure they are aware of those and comply with those, which is somewhat of a higher hurdle.

Ms. HIRONO. I think registration is your easier challenge, I would think.

Mr. PRESTON. I would agree with you, absolutely.

Ms. HIRONO. Because then you have all these thousands of businesses that are registered, and unless they know what to do once they have registered, it is just funds on seats. And so that is the second part of your task, the second part being the educating and helping them actually get these contracts.

Mr. PRESTON. And I mentioned some new technology we have. Once they are registered, we have the ability to find them very simply based on the industries they compete in and their locations. So it is important for us to get them in there to help the other agencies find them.

Ms. HIRONO. That is right. But I see the larger problem as making sure that these agencies—you want to—you want to encourage them to give these contracts to women-owned small businesses, but they are not going to do that if they are going to have to face a legal challenge every time they do that. So I think the larger challenge is for you to really help them establish the—be able to sustain a legal challenge, and I don't see that as part of your push right now.

Mr. PRESTON. I just want to emphasize one concept.

Ms. HIRONO. I am suggesting that it be.

Mr. PRESTON. I want to make one comment. The only issue with respect to legality here has to do with an agency that chooses to do a set-aside for only women-owned small businesses in one of those four industry categories, which is—as we have all acknowledged, it is a relatively small percentage of the overall contracting pie, and only, once again, if it is set aside to the exclusion of other businesses.

With respect to the overall contracting picture, where 99 percent plus of the revenue base is, those types of justifications are irrelevant because women-owned businesses would be going to the table competing against other small businesses. The only thing I would mention is in our 8(a) program, about 30 percent of those companies are women-owned, and women represent a significant portion of the HUBZone program and overall small businesses. So there are set-aside possibilities in those categories, but they would be competing against non-women-owned small businesses in those categories.

Ms. HIRONO. And those would not be subjected to legal challenges, I take it. It is only the instance where it is just going to be women-owned small businesses that can qualify for the particular contract that raises a potential constitutional challenge.

Mr. PRESTON. Yes. Specifically in those four categories for set-asides. I would tell you that there are ongoing cases that are challenging the constitutionality of our other programs, but I think that is a different issue.

Ms. HIRONO. That is probably a different constitutional standard.

Now that you have explained that, then what percentage of all of your agencies' contracts are in the category where constitutional challenges could arise based on gender?

Mr. PRESTON. It is less than one percent within these categories, and, once again, only if it is a set-aside, which I think is the concern that you raised is because of the small number of categories.

Ms. HIRONO. Is there a possibility of increasing this one percent to more than that to give—basically to really focus on women-owned small businesses?

Mr. PRESTON. Yes, there is. One of the challenges in the RAND study is there are a number of codes where they found that there was not enough statistical evidence to really dig into it. For example, there might not have been any women signed up for those categories. There may have only been a few Federal contracts going to those categories. And I think it will be important for the SBA to continue to review those categories to see if they are significant enough to matter, and if there is additional activity coming into those categories that would enable us to do a review to determine underrepresentation.

The other thing which we mention in this study is I think periodically it will be incumbent upon the SBA to update its findings to determine whether or not there is a change and whether or not the categories could be expanded. So that is, I believe, a task that we will have going into the future.

Ms. HIRONO. Thank you very much.

Thank you, Madam Chair.

Ms. CLARKE. The gentleman from Texas Mr. González.

Mr. GONZÁLEZ. Thank you very much, Madam Chair.

My first question will go to the Administrator, and I am going to read from a story from the Post, January 7th, and see if you can respond to this concern expressed by a certain individual.

The quote: The government's recent preference for hiring one large company to manage several smaller projects also makes the idea of capping individual projects at $3 million unfeasible, said Faye Coleman, president of Westover Consultants in Bethesda. And I am sure that you have addressed it, and I apologize for getting here late. We are starting the second session of the 110th, and we are spread out all over the place. But I am sure what Ms. Coleman is talking about is you already have a problem with bundling out there, and is this just basically an accommodation or an incentive for further practice in expanding what procurement officers are already doing, which will basically shut out women-owned businesses by capping it? Does it work that way, or am I just totally wrong?

Mr. PRESTON. Well, the $3 million that is in the rule is based on the statute that was passed. So the $3 million in the rule, we have only implemented it to mirror the statute, and that is why it is in there.

The other thing I would mention is on the $3 million, once again, that only relates—3 million for service, I think $5 million for manufacturers, only relates to the ability to do set-asides, not for the ability for those people to compete for business. So it doesn't mean that these businesses can't compete for $5 million or $10 million contracts. It would only mean that those would not be available—

Mr. GONZÁLEZ. We are talking about set-asides, aren't we?

Mr. PRESTON. Right.

Mr. GONZÁLEZ. We will leave it at set-asides then. That was her concern. And I understand you are pointing something out that is very important: That is part of a reg, it is part a rule, you are bound by the $3 million.

Mr. PRESTON. It is part of the statute.

Mr. GONZÁLEZ. Exactly. I am just saying if that restricts you, you need to let us know so that we can understand how it may mitigate and actually work against the very thing that we are attempting to accomplish, because, believe me, we have serious problems with bundling already. Whether it is 8(a) or it is going to be 8(m), it doesn't matter. The whole problem is that they cannot compete because we have contracting and procurement officers out there that intentionally bundle these things because they really just want to deal with one big ball of wax rather than maybe ten moving parts, which we all understand is human nature. But it frustrates what we attempt to do, and that is why Chairwoman Velázquez's scorecard for governmental agencies and departments usually amounts to nothing more than maybe a lot of Ds, a lot of Fs, and maybe a C here and there.

My next question would go to Ms.—is it Papez?

Ms. PAPEZ. Papez.

Mr. GONZÁLEZ. Papez. And let me—the good thing, and you are a lawyer, and the wonderful thing for members of the Committee is that we have staff that will prepare memos that really do explain where we are, at least with the situation, and give us some guidance. I am going read from the memo.

The SBA has proposed that in order for an agency to set aside a new contract, the procuring agency would have to conduct an appropriate analysis of its own procurement history to show that there has been discrimination against women-owned small businesses in the past.

Is that correct?

Ms. PAPEZ. I think the rule generally requires that the agency that would be administering a set-aside program has to find discrimination in the relevant field, which is the area where that agency is going to administer contracts.

Mr. GONZÁLEZ. So where does societal discrimination, as my colleague Mr. Sestak pointed out—where does that come into play? Because if we are really going to restrict it to what is going on in that particular arena, to that particular agency, to that particular product or service, then what happens with the bigger picture of what we are really trying to address as a societal issue, as a societal problem, reducing it to a specific instance here? Because that simply is not a consideration, it is really not a factor. I mean, they should just basically stay within their own purview, their own little universe and say, well, what our agency does and how we conduct our business is not discriminatory, one, within, again, another what I would say—I don't know if it is a subsection of a subsection of a subsection as far as the type of business product or service in which they are dealing. Is that where we find ourselves today?

Ms. PAPEZ. That is a very good question. I am glad you asked it because this goes to something that is a tough issue in these kind of programs, and it goes to the cases that your colleague mentioned also.

I am not going to say that societal discrimination isn't a factor, because I don't think I need to say that or it is appropriate to say. I think what I would say is the rule talks about agency findings of discrimination in the area where they do government contracts, because that is what the cases are going to hold the agency to in order to get the program to pass muster. And specifically what these cases have said, including the Supreme Court, is the government, in this case the agency that is doing the contract program, has to show evidence of discrimination in—this is the Court's words—the particular field where the contract program is going to operate. And so the particular field is going to be the field where that agency is giving out government contracts.

And the reason that the rule tells agencies line up your evidence of discrimination in your area where you do contract is because that is what courts are going to require. And I would point out in that ECA case that I was talking about a few minutes ago, it is an 11th circuit case in Florida, it involved a contracting program administered by the State to benefit women-owned businesses, and they contended that societal discrimination was indeed relevant, and they tried to sustain the program based on it. They had a disparity study and they were saying, look, women are underrepresented. The government, the State of Florida had, the county has an important interest in trying to help women out. They have been underrepresented, they have suffered societal discrimination, we want to help them, here is our program to do it. And they put forth

that evidence, and the Court struck the program down. It said that is not good enough evidence under intermediate scrutiny.

So what I am saying is we at Justice, we look at cases like that, and when we look at a rule, we say, okay, what should the rule say that agencies need to do in structuring these programs in a way that is going to get them upheld? Because that is what the real end game is here. I don't think it is in Congress' interest or the administration's interest to see these programs struck down.

So a long story short, it is not that anyone is saying societal discrimination is irrelevant at all. The rule just simply reflects what the courts have been requiring the government and in these cases the agency that is doing the contracting program to show.

Mr. GONZÁLEZ. It seems to me then there is no application for a societal discrimination factor.

Ms. PAPEZ. I don't know that that is true.

Mr. GONZÁLEZ. Give me an example of where you might have an agency or department rely on societal discrimination as a factor to maybe carry the day before the Court. I am in a certain sector. I am an agency or department that deals in a certain product or service. Give me an instance where I might be able to bring into the legal argument societal discrimination.

Ms. PAPEZ. I think, I guess, the best and hardest, most concrete example I can give you is that ECA case where the government doing the contracting program relied on evidence of societal discrimination. The evidence they had was a disparity study. The Court said that wasn't enough because the disparity study didn't do regression analyses and other things that backed out the disparity and linked it up to discrimination. And the Court seemed to suggest that if the study had done that—in other words, instead of just saying there is disparity or underrepresentation, it can link it up to specific discrimination. And the Court, I guess, left open that discrimination could have been from society or the government if the study had gotten into that level of proof of discrimination. And again, the Court left it open; maybe it is societal, maybe it is government discrimination, but at the end of the day, you are linking up the disparity to discrimination. It might have upheld it.

So that is, I guess, a court case and a fact pattern that says the government could convince a court that it has sufficient evidence of discrimination in the relevant sector by pointing to societal discrimination. They have got to show discrimination related to the disparity in the government contracting sector, and they have got to do that with statistics and hard evidence, not just with arguments or hypotheses.

Mr. GONZÁLEZ. Do you believe as a society there is still discrimination being practiced against women, again, gender bias and prejudice and discrimination in business enterprises, you as an individual?

Ms. PAPEZ. I think that is entirely possible.

Mr. GONZÁLEZ. It is way more than possible. You don't really—because I am going to get eventually to my last question. This is only my second question. Again, I am going to read from the memo.

Furthermore, the Metropolitan Dade case cites the third circuit case for Ensley Branch, which states that the discrimination offered into evidence need not be governmental discrimination. In

that case the Court found that, quote, one of the distinguishing features of intermediate scrutiny is that unlike strict scrutiny, the government interest prong of the inquiry can be satisfied by a showing of societal discrimination in the relevant economic sector. This suggests that the level of scrutiny required by the SBA in its proposed rule is beyond what is required under current case law.

Is that an accurate statement by staff that prepared the memo?

Ms. PAPEZ. I do not think it is accurate to say that the SBA rule goes beyond what is required by intermediate scrutiny. I would say, and I think I just said it a couple minutes ago, including under that ECA case, that we are not saying that evidence of societal discrimination doesn't have a place here. That is not at all what we are saying.

I explained in talking about the ECA case how a court might find evidence of societal discrimination to be good enough where the government can link up that kind of evidence of discrimination to the underrepresentation in the government contracting field, and I think that is clearly what the cases stand for.

I think what your question goes to—and maybe the Committee generally looked at this rule and said, wait a second, isn't this rule making it harder than necessary? And if your question is are there cases out there that suggest that a program might be able to survive on something less than what the rule is requiring, I think there are some cases out there that may suggest that. But the body of the case law under intermediate scrutiny, and even those cases, are all clear about one thing: The government has to prove discrimination.

So if the issue is is it okay to just go ahead with the set-aside program based on a disparity study that doesn't link up to evidence of discrimination, that is not going to pass muster. And I don't think it is advisable for an agency to proceed on that basis.

Mr. GONZÁLEZ. Have you ever advanced any argument relying on the societal discrimination factor, not alone, but in conjunction with specific practices within that agency or department's own practices when it comes to the specific service or product?

Ms. PAPEZ. Well, when you say ″you,″ you mean the Justice Department?

Mr. GONZÁLEZ. I am just saying in your memorandums or brief, anything that you would even provide in the way of guidance to the Administration, to the Small Business Administration, as they attempt to promulgate certain rules governing this particular program. I mean, do you ever have a discussion about societal discriminatory practices that might come into play that would be relevant to substantiate and support whatever SBA would do in trying to meet their obligation under 8(m)?

Ms. PAPEZ. That is exactly what we do in discussing these cases when we look to the cases and try to explain what an agency would have to show to have their program upheld.

Mr. GONZÁLEZ. And so you do touch on the big picture. Societal discrimination is something that they would be able to try to show or establish to support whatever SBA efforts might be.

Ms. PAPEZ. Certainly we highlight that courts do look to, like the ECA case, societal discrimination as a relevant factor. The thing that we go on to point out, though, is that the ultimate test is

whether your set-aside program is furthering a government interest, and do you have evidence of discrimination in the area where the program is going to operate?

If the area where the program is going to operate is an area of government contracting where the government is the actor, we also caution, because courts have done it, that the government ultimately bears the burden of showing discrimination in that sphere. So if the government is going to rely on societal discrimination, they better be able to link that up to discrimination in the contracting sphere.

Mr. GONZÁLEZ. Do you know what, though? I think you have touched on it. There is no relevance when it comes to societal discriminatory practices unless you have a specific discriminatory practice occurring by that particular agency in whatever it is doing in its procurement practices on its products and services, which means—and as a lawyer you know this—you can throw out societal discrimination, it has no application.

That is what I really want—I don't want to deal in fictions. I do not want to deal in fictions. I don't think the courts are dealing in fictions. What I think is the courts are sending out a message to all you lawyers out there saying, bring back these arguments, let us develop them.

And I am going to leave you with one final thought. And I understand, look, you have a job to do, and as a lawyer you want to give advice to SBA that whatever they do will survive judicial scrutiny, because someone is going to contest it. Believe me, I know that is important. But you are still an advocate and a representative indirectly of women, of women in all the programs that we attempt to effectuate through legislation such as 8(m) or 8(a), whatever we may have.

But I will never forget, there was a wonderful old lawyer named Judge Curry in San Antonio, and we would be up there arguing a case, and we would have the controlling case authority, and then he would rule against it. And we would say, but, Judge Curry, Smith v. Jones stands for the very opposite proposition. Do you know what Judge Curry would say? I am going to give the appellate courts another chance to get it right.

And you really need—we used to think that was outrageous as lawyers. Do you know what? Judge Curry was right, because sooner or later they overturned old precedent because society moved on, and it was reflected more often than not by the judicial branch of our government. And that is the beauty of it. I think you represent actually both. But when it is all said and done, it will be some judge up there that will decide that we need to move forward as a society.

So I am just going to say still look at the societal discriminatory practices as a relevant factor, and I hope that we are totally wrong that it really is not that relevant.

And I yield back. And thank you for your indulgence, Madam Chair.

Ms. PAPEZ. If I may just respond very briefly to say that, again, we do not serve women or programs that benefit them by advising agencies to implement them in a way that courts are going to strike down.

I would also say that I did not take the position, nor does the Justice Department, that in judicial challenges evidence of societal discrimination is irrelevant. That is not the position we have taken. What we have said is if agencies are going to rely on that, under the case law they have got to link it up to discrimination in their agency contracting field in order for the program to be upheld, which is really what everybody wants at the end of the day.

And the final thing I would say is the U.S. Supreme Court very recently, it is not an old precedent, confirmed the intermediate scrutiny standards that I am talking about and that the rule reflects. I don't think the Supreme Court thinks, and I certainly hope they don't decide, that this country should move on from the equal protection standards that must be satisfied in these cases. These standards should be satisfied and should not, for policy preferences or even the most well-intentioned policy reasons, depart from basic constitutional protections that have protected both sides of this question for a very long time in a way that has really benefited women.

Mr. GONZÁLEZ. The Constitution—I mean, we are going to go on and on on this thing, but the whole point is the way that the Constitution and its protections have been interpreted in the past have not been truly the most admirable way of doing it. Society has moved forward because brave lawyers and judges have been able to give true life to the words and spirit of the written word. That is what I am trying to discuss with you here.

And I know that you keep telling me that societal discriminatory practices are relevant, but in your answers you are still telling me you are going to tell your client that that is lofty and wonderful, but if it doesn't have a specific application when it comes to your interpretation of intermediate scrutiny on what they are doing specifically within their own department, within their own product, with their own service, it doesn't matter. So if I am on the receiving end of that legal advice, where do you think I am going to go with this?

Ms. PAPEZ. Well, I didn't say it doesn't matter. I never said that. What I said—and it is not my standard or the Justice Department's standard. I said if an agency wants their program to be upheld by the courts, and that is what everyone should want, because it doesn't benefit women to have these things struck down, what I said was if you are going to rely on societal evidence of discrimination, and courts will look to it and they will let you rely on it, you have to link it up, because if you don't, your program is going to go the way of the 11th circuit case program, it is going to get struck, and that doesn't benefit anybody.

Mr. GONZÁLEZ. Thank you very much.

Chairwoman VELÁZQUEZ. Will the gentleman yield?

Mr. GONZÁLEZ. I yield back.

Chairwoman VELÁZQUEZ. Will you yield for me for one second?

Mr. GONZÁLEZ. Oh, absolutely.

Chairwoman VELÁZQUEZ. I want to ask a question of Mr. Preston.

Mr. Preston, the 8(a) program is the most challenged program in the Federal Government. It has been challenged in court. It is the last affirmative action program that exists in the Federal Govern-

ment. Are you required to admit past discrimination in order to award contracts under the 8(a) program, yes or no?

Mr. PRESTON. I don't know, frankly, what the judicial history is for supporting discrimination.

Chairwoman VELÁZQUEZ. I am asking you today as the Administrator of SBA. This is a program that exists under SBA statute.

Mr. PRESTON. Yes.

Chairwoman VELÁZQUEZ. Is it required to admit past discrimination in order to award grants, contracts?

Mr. PRESTON. It is required for us to show social disadvantage and economic disadvantage. And social disadvantage, I think, is closely related.

Chairwoman VELÁZQUEZ. Ms. Papez, before I asked you to give me an example of programs in the Federal Government that will have to prove past discrimination.

Ms. PAPEZ. Yes.

Chairwoman VELÁZQUEZ. You didn't answer my question. I want to ask which programs and agencies.

Ms. PAPEZ. Well, 8(a) is certainly one.

Chairwoman VELÁZQUEZ. It is not.

Ms. PAPEZ. It is.

Chairwoman VELÁZQUEZ. It is not.

Ms. PAPEZ. Actually it is. In the Rothe case, the Texas case that just came down on Rothe said that, and the Supreme Court has said that, any program that awards benefits based on race or gender requires the government to show evidence of discrimination.

Chairwoman VELÁZQUEZ. Are you telling me each agency has to go through this in order to award 8(a) contracts in their agencies?

Ms. PAPEZ. I guess maybe I was confused on the question. You are saying, are there programs that have to show past discrimination? And I am saying, yes, all race and gender programs have to do that. If your question is agency-specific admissions of past discrimination, is that what you are asking about?

Chairwoman VELÁZQUEZ. Yes.

Ms. PAPEZ. If the question is do agencies have to admit past discrimination, I think if they do, they would certainly pass constitutional scrutiny. I don't know that they have to do that in order to pass constitutional scrutiny. But I would say also—

Chairwoman VELÁZQUEZ. It is a matter of semantics.

Ms. PAPEZ. No. If I may, though, I think this is partly—I get the sense that part of the frustration that the Committee is feeling, and I think what I understood you to be saying before, before you left for the break, was the Committee looked at this rule and said, wait a second, what is going on here? This rule is requiring individual agencies to find discrimination when we have already got a disparity study.

Chairwoman VELÁZQUEZ. What I am saying is that for gender-based programs, it would be necessary to demonstrate that there is past discrimination when you do not require minority programs to do so. That is the whole issue here.

And now I recognize Mr. Chabot.

Mr. CHABOT. Thank you, Madam Chairwoman.

Mr. Preston, let me start with you if I can. I know there is considerable frustration in the seven years how long this has taken to

implement, et cetera. How much, if any, of the delay in implementing the program is attributable to trying to make sure that it will ultimately withstand constitutional muster?

Mr. PRESTON. I think the long and storied past of this rule is exactly based on that. The SBA, I think, after the 2000 statute was passed, very quickly conducted a study of underrepresentation, and as part of the interagency review, it was determined that somebody on the outside basically needs to look at this to determine whether or not it was adequate. That is when it went over to the National Academy of Sciences, and the National Academy of Science basically said this will not for a number of reasons, which we can go into. The National Academy of Science then laid out a detailed methodology for what would be sufficient for a program of this nature, and then that methodology went over to RAND, and RAND took obviously a period of time to actually do the analytical work, to write it up and present it to us.

So the entire pathway is one of trying to get this right. And as you have heard from Ms. Papez and other people, these are very complex issues and require a great deal of solid foundation to be able to ensure that this is sustained.

Mr. CHABOT. Thank you.

Ms. Papez, I assume you agree with that, and is there anything that you would like to add to that?

Ms. PAPEZ. I would thank you. I very much appreciate the opportunity, and this partly goes back to the Chairwoman's question. I want to make a distinction here. The law and the Constitution require government proof of discrimination in both race and gender programs. So from the standpoint of the law and the Constitution, discrimination would have to be shown for 8(a) programs and 8(m).

I think what the Chairwoman may have been getting at is that the language of the Federal rules implementing these programs may not say the same thing about exactly what an agency has to do. That may be. I don't have the rules on 8(a) in front of me. But just because an administration rule in an 8(a) versus 8(m) program doesn't use the exact same language on agency findings doesn't mean there are different legal standards or that discrimination is not required in both.

Mr. CHABOT. Thank you.

Mr. Preston, irrespective of the outcome of the rulemaking, what efforts is the SBA taking to get more women small business owners to register with the Central Contract Registry or otherwise get involved in the federal procurement process?

Mr. PRESTON. Very significant outreach efforts through our network. We have about 100 locations throughout the country. We hold events to bring in people to teach them about Federal contracting, to introduce them to purchasers within the Federal contracting region so they can actually connect with contracts. We are providing educational tools on the Web site. We have retrained our entire field organization, over 1,000 people, to enable them to provide better training in support to small businesses when they come in. We have redirected the PCRs, which are procurement center representatives, that work for the SBA that actually sit at other agency procurement activities. They are focusing not only entirely now on those contracts, but we have also rolled out a new program

where even when they look at small business set-asides, they will be working with the individual agencies to ensure that they are meeting their goals for preference groups within small business. And women-owned small businesses is one of the targeted categories for them to work with, and we continue to expand it.

So these are very real, very tangible initiatives that we think will continue to drive that number forward.

Mr. CHABOT. Thank you.

And also given the fact that the ultimate authority for utilizing the program rests with contracting officers, what actions will the SBA take to educate contracting officers about the program?

Mr. PRESTON. We have a very consistent process of meeting with all the other Federal agencies on any new rules, any new processes. We get their input. We have dramatically expanded our coordination efforts with the other agencies in a number of ways. So I think—and they are very much apprised of the progress on this rule and what they are going to be required to do.

Mr. CHABOT. Thank you.

Have you determined who in the SBA will be involved in interacting with other Federal agencies in the development of the final rule?

Mr. PRESTON. There are a number of people. And frankly, this is an issue that my deputy is very engaged with directly and in chairing those meetings with the other agencies. So we have a very senior person at the agency focused on it all the way at the deputy level.

Then we also have a new head associate administrator for government contracting business development named Fay Ott, who will be the primary contract person and primary driver of the implementation of the rule.

Mr. CHABOT. Thank you.

And my final question with you is typically the SBA will only consider comments filed after the deadline if it is able to do so without delaying the rulemaking. Will the SBA consider late-filed comments in this proceeding given the potential controversy associated with the rulemaking?

Mr. PRESTON. I think if we find that there is the possibility of a lot of additional comments coming in, what we would like to do is extend the comment period, and we have done this in a number of other situations. This is a rule that obviously has some very complex legal issues and analytical issues associated with it, so we would certainly be open to expanding that period if we believe it will be helpful in getting more comments in.

Mr. CHABOT. Thank you.

And, Ms. Papez, finally, because of the Chairwoman and myself being called over to the floor and having to handle a different bill, we weren't here to hear all the questions that may have been asked. I know there has been a lot of controversy. Were there any of the questions asked of you that you think that you need to expound upon or to clarify that there still could be any confusion about?

Ms. PAPEZ. I think all I would say is, and this partly goes to one of the Chairwoman's questions, also something you touched upon, is does this rule—how can we say this rule is consistent with inter-

mediate scrutiny in the Constitution? I think, again, all the cases applying that test, it is not the Justice Department, it is the courts, the government has to show discrimination in the relevant area, which would be the area where the agency administers its contracts, and what the rule represents is a prudent approach to that standard. Basically it is saying, agencies, get ready for the legal challenges, and if you want to do the best you can to make sure your programs are upheld, which is what everyone, I think, would want to see with these programs, you should have your evidence.

I would point out, though, the rule doesn't say exactly how much evidence an agency has to have. I feel like some of the Committee may be frustrated with the rule - which is not a disagreement about the law, because the law is clear the government has to show discrimination - because the rule sort of looks like it makes it too hard on an agency. And I would just point out, the rule doesn't require an agency to have a specific level of discrimination. Again, this is a prudent approach to comply with the Constitution, but if people feel as a policy matter a riskier approach to the litigation challenges is appropriate, then that is certainly something that can come in through the notice and comment.

Mr. CHABOT. Thank you.

Chairwoman VELÁZQUEZ. Will the Gentleman yield?

Mr. CHABOT. I would be happy to yield to the Gentlelady.

Chairwoman VELÁZQUEZ. Ms. Papez, my frustration is that I asked you where does the Court rule, tell me where, that each agency has to show past discrimination; not the Federal Government, but each agency? I just want for you to tell me which case.

Ms. PAPEZ. Well, the cases say the government, not the Federal Government. And in the cases where it has been a county, for example, or a county board doing the contracts, they say that county board. So it is the issue of whatever government entity is administering the contract.

Chairwoman VELÁZQUEZ. That is not definitive. That is your interpretation.

Ms. PAPEZ. Well, no. What I am saying is the cases require that the government entity doing the program show discrimination. And all the rule is saying is the best way to be able to meet that standard is to have the showing. The rule doesn't say how much or exactly what—you know, it is consistent with the cases. There is not some hard, fast rule that says this has to be so.

Chairwoman VELÁZQUEZ. I yield back. Thank you.

Mr. CHABOT. I reclaim my time, and I yield back the balance of my time.

Chairwoman VELÁZQUEZ. Now I recognize Ms. Clarke.

Ms. CLARKE. Thank you. Thank you very much, Madam Chair.

Last week I attended the Wall Street project hosted by the Rainbow/PUSH Coalition and Reverend Jesse Jackson. It was a women's luncheon that took place during our district work period. And I came away from that luncheon energized and knowing one thing: Women-owned businesses are the fastest-growing sector of our small businesses.

But I sit here today and I feel like I am in a time warp. Quite frankly, I just feel like I am in a time warp. And there is this huge disconnect between what is happening in the 21st century in com-

munities across this Nation and what our government is really stuck on at this point. It pains me, it totally frustrates me to hear and read that despite this progress, it has been seven years since the Equity in Contracting for Women Act of 2000 was enacted. Women-owned businesses are still underrepresented in many industry and regions across this country. Almost 50 percent of all the women-owned businesses provide goods and services to the Federal Government, yet this administration has continually failed to increase procurement opportunities and provide a fair share to a sector that has made an invaluable contribution to the Federal marketplace.

As you know, women-owned businesses recently received a meager 3.4 percent of small business contracting dollars from the Federal Government, which cost these businesses about $5 billion a year. This is disturbing when the Federal Government, the largest purchasing organization of the world, has seemingly not been able to provide a fair share of about $410 billion annual procurement spending to women-owned businesses.

As a member of this Committee and as a Member who just completed their first congressional session, I find it unacceptable that here we are yet again exploring and examining why the SBA has still not implemented the women's procurement program.

Now, I understand all of the litigation and all of the challenges that we are facing in terms of interpretation of the law, but at what point is disparity morphed into discrimination is really what we are trying to deal with here. Can we agree that it will take a concerted effort within your agency to break through this wall that has been built up through litigation? On the one hand we have the acknowledgement that the participation of women-owned business is most desirable. On the other hand we have this paralyzing fear of the court challenge that keeps your agency operating under a philosophy of the lowest expectations of what could possibly happen.

The one thing I know is that at the end of the 110th session, the end of your administration's tenure, we will all be able to say that through the procurement mechanism for women-owned business under the Presidency of this administration, there was no support, no assistance and virtually nothing was done. And I say, what a shame.

Mr. Preston, in our last hearing I asked you whether you believed that the SBA, and by extension the Federal Government, discriminated against women. You stated, no, you did not believe it. Now, your agency recently proposed a rule that will require agencies to find evidence of direct discrimination against women-owned small business in order to qualify for protected status. Is there a change in position here, or do you believe that there may be discrimination?

Mr. PRESTON. You have got a number of points in your speech. Let me make a couple of comments. First of all, I find it entirely unreasonable that you would say that about the administration. Contracts to women during the administration have gone up two and a half times where they were when the President came into office. It is a 17 percent growth rate, and it is significantly higher growth rate than occurred in the prior administration.

Ms. CLARKE. But five percent has not been achieved. I am sorry, in No Child Left Behind, if you don't meet the mark, you shut down the school.

Mr. PRESTON. You also said it is a faster-growing sector. We agree. Last year the women-owned business sector in the Federal Government grew faster than any of the other set-aside programs. And so what I am unwilling to do is to let there be any implication that we aren't working hard, making progress, and that the President is for some reason not committed to this. The other thing is we rolled out a scorecard that one of the measures is the performance of women-owned business and expanded the transparency there.

So I think this administration has done a lot here. We are presuming that a set-aside rule here is the only way through which we are going to expand contracting, and that is totally unrealistic, and it is not the right way to go, because I think that diminishes the strength of the businesses that are actually coming in here to do the contracting.

So the other thing I would like to highlight is your comment to me in the last hearing addressed discrimination with me personally, and that is why we got a little fire in the last hearing. Your question did not have to do with discrimination more broadly. Thank you.

Ms. PAPEZ. If I may have a chance also.

Ms. CLARKE. But you didn't answer my question. My question is is there an acknowledgement now with the agency? And certainly as the head of the agency, you would be able to determine this. This is something that as the head of the agency you would be able to see. This is something that as the head of the agency you would set a tone for in terms of how all of your subordinates would focus on this project.

It was not personal, and if you took it personally, I am sorry. It certainly was not personal. It is to the office that you hold.

Mr. PRESTON. Well, what I would tell you, within the agency is 25 percent of our procurements this year went to women-owned small businesses. I think that shows a pretty big commitment within the agency. And I think if you look at the activities of people within the agency that have led to the expansion of this number dramatically over the past year, you will see commitment of people in the agency to expanding this goal.

Ms. CLARKE. My time is up. But we are to go about a very specific program here, and I think we need to focus on that because that is where the failure exists.

And I yield back, Madam Chair.

Chairwoman VELÁZQUEZ. Mr. Gohmert.

Mr. GOHMERT. Thank you, Madam Chair.

Since all of this is being recorded, taken down—and I appreciate my friend Representative González's comment about Judge Curry, having been a judge—I just have to point out for posterity that any judge at the trial court level who says I am not going to follow the law, I am going to make new law is legislating from the bench and is violating his constitutional oath that he takes when he takes office. He is violating his oath, and I find that reprehensible.

Mr. GONZÁLEZ. Will the gentleman yield?

Mr. GOHMERT. Sure.

Mr. GONZÁLEZ. If Judge Curry heard you say that, and you are a Texan, you would probably be called out there, and you all would have your six guns, and you would have a shoot-out.

He is a very honorable man. I think what Judge Curry was saying and, to be honest with you, was telling the lawyers to think beyond where we may be today and to continue to advocate and fight for a more just society. It was his way of telling us. Of course Judge Curry was going to follow his duties and his responsibilities. I only said that as an example.

Mr. GOHMERT. Let me reclaim my time here. He was not following his oath, he was not following the law, he was creating law. And as a judge, the way I would do that with lawyers was to say, I don't like this law, I think it is an unfair law, but I took an oath to follow the law, so I hope you will pursue this to the appellate court because I do not think it is fair and just, and that is where the change will be made. But my oath was to follow the law at this level, and that is what I will have to do. But I would encourage the lawyers to think outside the box, just as you. And that is why I think you were right when you felt like the judge was being unfair.

Mr. GONZÁLEZ. And you are speaking to the lawyer, as a matter of fact.

Mr. GOHMERT. I understand, I understand. And I will encourage that. But just so everybody understands, too, just basic constitutional law, when we have programs that say we want you to specifically consider gender in awarding contracts, that violates the Constitution, except that it is allowed to violate the Constitution if it is fixing past discrimination and past injustice. That is where we constitutionally allow discrimination based on race and gender is if there has been past discrimination. Otherwise, we can—and I hope and pray and look so forward to the day when we can achieve Martin Luther King, Jr.'s dream of people being judged by the content of their character, by their capability, and not by race, not by gender, but just by the content of what they can provide.

But there are some—there have been some injustices in the past. And I think just Representative Clarke's comment, you know, just when disparity morphs into discrimination, that was a good characterization, that is the issue. But that still has to be addressed if it is going to pass constitutional muster.

So I think the problem is you have obviously felt from this Committee is let us don't take too long finding those places where disparity has been discrimination. Let us fix those, let us address the discrimination so that we can move closer ever to that day when we can live out Martin Luther King's dream.

And just a parenthetical, the No Child Left Behind probably isn't an adequate comparison because I think that is an area where this administration has stepped far beyond its powers and started having the Federal Government tell local governments what they can do.

Ms. CLARKE. Will the gentleman yield?

I was saying that with regard to the No Child Left Behind Act, if school districts didn't meet the goals, they were seen as failures.

Mr. GOHMERT. Right.

Ms. CLARKE. I am not disparaging the program. I am saying now we have a situation, we have a group that is saying that they—we will talk about that in the Labor Committee. But what I am saying here is that now we are saying, well, we made minimal movement, and so that should be touted a success, when we actually had a goal set at five percent, which has never been met, and it has been seven years. The administration is almost over. So I think we need to acknowledge that and not brush that aside and pat ourselves on the back. I believe in movement, but then let us say that across the board, that everywhere we are in this administration, those standards are held.

Thank you for yielding.

Mr. GOHMERT. And reclaim my time. Thank you.

My point is there, that is a program where the administration has vastly exceeded, in my opinion, their constitutional authority because they haven't really understood the 10th amendment.

But anyway, I appreciate your time and effort here, and we hope we will continue to see great progress in the future. Thank you.

Chairwoman VELÁZQUEZ. Mr. Preston, I would like to ask you my last question. We have votes on the House floor. Regulations specify four unique industries as being underrepresented. My question to you is do you find it arbitrary, for instance, that your agency specifies that women are underrepresented in the field of kitchen cabinet making but not in installing kitchen floors?

Mr. PRESTON. No. I find that the information that came out of the RAND study was based on a methodology that was supportable. So I haven't looked at the specific kitchen floor category to determine whether that is or not.

Chairwoman VELÁZQUEZ. Well, I did. That is my function here; it should be your function, too, to look at the industry and the RAND study.

Mr. PRESTON. I looked at every number in that study and wax eloquent on them if you would like.

Chairwoman VELÁZQUEZ. When I looked at it, and I saw yes for this one, kitchen cabinet making, but not in installing kitchen floors, you know, my first reaction, this is silly.

Mr. PRESTON. Ma'am, the category isn't kitchen cabinet making, it is a much broader cabinetry category and gets to institutional furniture and all sorts of things. So I think it is important to look at the fullness of the category.

Chairwoman VELÁZQUEZ. Okay. My last question to you is would you at least agree with me that this program as currently crafted by SBA will do little, little to ensuring the government will come closer to achieving its five percent contracting goal for women-owned businesses?

Mr. PRESTON. I think the government is going to have to focus on many different programs other than this program to reach those goals.

Chairwoman VELÁZQUEZ. Well, the focus of this hearing today is this program, the women's procurement program. And the fact is that after seven years, with all the things that you read in your testimony saying that we are training staff, that we are making these changes, that there is a scorecard, I am happy to know that after all the many scorecards report that we issue from this side,

that you decided and opted to issue your own scorecard. That is great, but yet the five percent per women's procurement program has not been achieved. And with all these roadblocks under the proposed rule, I doubt that it will be achieved.

Mr. PRESTON. I think it is important to note that there are no additional roadblocks being put in front of women through this rule. This specifically deals with an additional opportunity, not putting a roadblock in front of the opportunities that exist today.

Chairwoman VELÁZQUEZ. I think that all comes down to a philosophical disagreement with the program.

With that, I excuse the first panel. And the Committee will be—will adjourn until we take the votes on the House floor. Basically we will be back in 20 minutes.

[Recess.]

Chairwoman VELÁZQUEZ. This hearing is now called to order, and we are going to start with our second panel. And I want to, in advance, thank all the witnesses for being here this morning.

Chairwoman VELÁZQUEZ. Our first witness is Ms. Margot Dorfman, she is the CEO of the U.S. Women's Chamber of Commerce based in Washington, D.C.; the Chamber represents 500,000 women throughout the country.

Ms. Dorfman, you will have five minutes to make your presentation.

STATEMENT OF MARGOT DORFMAN, CEO, U.S. WOMEN'S CHAMBER OF COMMERCE

Ms. DORFMAN. Thank you, Congresswoman Velázquez, Ranking Member Chabot and members of the House Small Business Committee; thank you again for addressing this very important issue.

I am here again today on behalf of millions of women-owned firms all across America to tell you that the Small Business Administration has once again sabotaged the implementation of the Women's Federal Procurement Program, and to remind you why this program, as Congress originally intended it to be implemented, is so dearly needed.

Recently, the SBA filed a new set of proposed rules for the implementation of the Women's Procurement Program. These new rules ignore the recommendation of the scientific and legal experts and render the program ineffective by limiting its use to a handful of industries and requiring each and every Federal agency to conduct an analysis of the agencies past procurement activities and make a finding of discrimination by that agency in that particular industry.

For years and years, the SBA has hidden behind false pleas for time while women business owners have lost billions of dollars annually: time to hear from the experts, time to gather the data and time to understand how to determine women-owned status. But with this last action they can no longer hide their contemptuous position towards securing fair access to Federal contracts for women business owners.

The arbitrary and unscientific method they have chosen to select the industries for the program looks more like something pulled out of a hat than the results of seven years of work and of this sci-

entific disparity study. And the outrageous requirement that every agency that conducts the studies of discrimination in all industries only shows us how far this administration will go to prevent women from gaining fair access to Federal contracts.

When Congress first passed the Equity in Contracting for Women Act of 2000, the SBA was to prepare a study to determine industries in which women business owners were underrepresented in Federal contracting and establish procedures to verify eligibility and participation in a competitive set-aside program. The SBA first undertook this study in house after completing their own study, the SBA leadership determined that they needed a study of the study and that they needed experts to tell them how to do their study correctly and how interpret the data.

To this end, the SBA employed the National Research Council of the National Academy of Sciences. NRC is a prestigious and well-respected institution which regularly is employed to provide experts advice to the Federal Government.

The NRC established a prestigious steering committee for the project including the Chair of the School of Public Policy in Social Research at the University of California, Los Angeles, and scholars from the Hass and Marshall Schools of Business, the Department of Sociology at Rutgers University and the School of Law at the University of Virginia.

The scientific experts and legal experts carefully framed the requirements for the study through the lens of the legal framework of disparity studies and the legal standards of gender preferences. They made a very clear set of recommendations. They recommended using four variables in four tables to show industry groups using a wide view of ″ready and able″ and a narrow view, and measuring contract actions versus contract dollars.

The NRC clearly stated how they recommend this data be interpreted. The agencies that appear in two or more of the four tables may be deemed unrepresented. Using the NRC recommendations and the RAND data that followed, 87 percent of all industries should be included as underrepresented in Federal contracting.

But nothing is simple, direct or clear in the hands of the SBA. The SBA threw out the NRC scholarly recommendations and whittled away possible measurements until they found a narrow selection they liked. Then they tried to move the emphasis from underrepresentation to discrimination and tagged on the incredible requirement that every agency complete a discrimination study in every industry. Again, the SBA has turned years of time and money into a ridiculous circus treating the lives of thousands and thousands of American citizens as toys in some political game.

Trust me, to women business owners, this is no game. Fair access to Federal contracts is serious business. The economic and political rise of women in America is truly something for the history books, but the economic realities for women business owners remains very troublesome.

Since the paltry five percent goal for contracting with women-owned firms was set in 1994, the Federal Government has never hit the mark. Even today, as women own 30 percent of all firms in America, the Federal Government lags behind in doing business with women. Women lose between $5 and $6 billion every year as

the Federal Government fails to meet the low five percent mark. And the openly unsupported attitude that is exhibited by the SBA only serves to continue a sad tradition of failure within the government contracting ranks.

Once again I ask the House Committee on Small Business to compel the SBA to implement the Equity and Contracting for Women Act of 2000 as intended by Congress seven years ago. It is clear that without this law in place, women-owned firms are losing billions of dollars annually. Women business owners are ready and able to grow their businesses. We ask you to support their growth as they provide for their families and advance the economic growth for their communities.

Thank you.

Chairwoman VELÁZQUEZ. Thank you, Ms. Dorfman.

[The prepared statement of Ms. Dorfman may be found in the Appendix on page 74.]

Chairman VELÁZQUEZ. And now we would like to recognize Mr. Moore from Kansas for the purpose of introducing his constituent, Ms. Farris.

STATEMENT OF THE HON. DENNIS MOORE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF KANSAS

Mr. MOORE. Thank you, Madam Chair, for the invitation to be here today.

I am Dennis Moore from the Third District of Kansas, and as the member of the Small Business Committee who has been on leave from the committee since the beginning of 2001, it is great to be back here in the hearing room.

I am here today to introduce my constituent and your next panelist, Denise Farris. Denise is the founder and managing partner of the Farris Law Firm where she practices general business in commercial construction law. She was AV-rated by Martindale-Hubbell, representing the highest peer review ratings for expertise and ethics. Her firm provides legal services related to corporate consultation information with special emphasis on women and minority-owned small business, including Federal contracts and affirmative action, along with risk management and general contract litigation.

Denise is a rising star in Kansas City and in surrounding areas with her law practice and experience as a small business owner. During 2007 alone, she was named Women Impacting Public Policy's Instant Impact Team Leader and awarded their 2007 National Public Policy Award.

Kansas City Business Magazine named her among the 50 most influential businesswomen and the Kansas City Chapter of the Nation Association of Women Business Owners named her Member of the Year. She is rated by the Missouri Bar top 25 presenters.

Denise is a frequent speaker and author for various local, regional, and national trade organizations and magazines. She has authored chapters on affirmative action, and Denise has also been a featured presenter for the National Foremen in Construction Industry annual meeting, the Association of General Contractors, Builders Association of Kansas City and Springfield.

My staff has another 14 pages of introduction, I will stop right there and welcome Denise Farris.

Chairwoman VELÁZQUEZ. Ms. Farris, you will be recognized for five minutes.

STATEMENT OF DENISE FARRIS, FOUNDER AND MANAGING PARTNER, FARRIS LAW FIRM

Ms. FARRIS. Thank you very much. Thank you, Chair Velázquez, Ranking Member Chabot, members of the committee. And Congressman Moore, thank you for coming by.

My name is Denise Farris and I am appearing today on behalf of WIPP, Women Impacting Public Policy, and its general membership, which represent over a half million business owners nationwide. I own the Farris Law Firm in Stilwell, Kansas, which sits on the border of Kansas and Missouri. I am a certified WBE company, and I am apparently one of the 55,000 women currently registered in the CCR.

I am a commercial construction lawyer and for the past 17 years I have focused on the constitutional parameters of affirmative action in government contracting. I know the committee appreciates how important this rule is to us and to me personally and professionally. I have focused my comments today on three aspects of rule: first, the RAND study, the legal standard applied and then the flow-down effect.

The 2000 law gave the SBA the responsibility to determine in which industries women-owned businesses were underrepresented. The RAND Corporation released its study in 2007 after seven long years of waiting.

As discussed earlier in this hearing, the RAND Corporation, per SBA direction, computed disparity ratios for women-owned businesses in four different categories. The RAND study concluded that depending on how the SBA chose to interpret the data, either 87 percent on the one hand or zero percent on the other hand of industries shows a significant disparity for women-owned businesses.

We believe this indicates some fundamental flaws in the data on which the proposed rule is based, and the RAND study actually admits the owned errors in the data. It identifies inaccurate NAICS codes, does not analyze the huge disparity variance in the methods, relies on outdated size standards. It omits important data such as the entire Department of Defense procurement stats, and it also ignores the effect of multiyear schedule contracts and classifications. In light of these deficiencies, the SBA nonetheless chose the method least supportive of the original legislative intent.

Second, we believe the SBA proposed rule applies an incorrect standard of review. Although it says it is applying intermediate scrutiny, it clearly, in fact, has created a new level which goes beyond even strict scrutiny and created a level that doesn't currently exist for any other program. For example, under intermediate scrutiny, the government only has to show an important State interest or a government interest and a program substantially related to achievement of that interest. This standard has already been met. Specifically, as acknowledged in Public Law 106-554 and the RAND study and the preface to the current Federal Register Rule,

the government has acknowledged, one, that women-owned businesses are the fastest growing segment of our economy; number two, that we are growing at twice the rate of the average business in the economy; and three, that despite this fact since 1994 we have not been able to hit a five percent target in Federal procurement.

But here the SBA is actually saying we need a new strict scrutiny standard because we are saying, first, despite the law, the program can't be implemented until we have done this 7-year study. And secondly, even after this study has found underrepresentation, we are now requiring a new level that requires each agency to do an additional study before the rule is implemented; and that is the key fact.

For example, the 2007 study determines that if you are a women cabinetmaker you are substantially underrepresented, but before you can justify a set-aside, each agency then has to review its discriminatory cabinetmaking contracting practices before they can justify the set-aside. Now, we all know that government moves deliberately and slowly, but quite frankly under this standard any contracting opportunity will be gone once this study-after-study is done.

Finally and importantly, this rule has a chilling effect on State and local programs because of this new standard, which effectively kills all gender-related programs.

True availability cannot be measured until women business owners are encouraged to register their businesses and their capabilities. The message flows down to women-owned businesses that there is no reason to register because effectively no program will ever survive this standard. We urge the committee to send the SBA back to the drawing board and to investigate why only 55,000 women-owned businesses out of a pool of 10.4 million are currently registered in the CCR.

Since it has taken the SBA seven years to get this far, we believe the agency should thoughtfully consider the public comments it receives during the next 60 days. WIPP encourages Congress to require the SBA to implement a meaningful Women's Procurement Program which will actually have a positive effect on women-owned businesses in Federal procurement. Thank you.

Chairwoman VELÁZQUEZ. Thank you, Ms. Farris.

[The prepared statement of Ms. Ferris may be found in the Appendix on page 77.]

Chairwoman VELÁZQUEZ. Our next witness is Ms. Beth Gloss. Ms. Gloss is the President of United Materials, a small business in the roofing industry located in Denver, Colorado. Ms. Gloss's company is one of the less than two percent of women-owned business firms in construction.

Welcome.

STATEMENT OF BETH GLOSS, MANAGING MEMBER, UNITED MATERIALS, LLC

Ms. GLOSS. Thank you very much. I am Beth Gloss, the managing member of United Materials. We are a roofing contractor in

Denver, and we specialize in commercial roofing, particularly re-roofing and roof repair.

We are a successful company and handle Federal contracts as part of our normal business. We provide excellent value and customer service, but lose out on a great deal of business due to the lack of a clear, defined woman-owned business procurement program and an emphasis from Washington to fulfill the guidelines that are set.

The SBA in my experience does nothing to encourage Federal buying from women-owned business, but only from existing, formal set-aside programs, and vehemently discourages contracting officers in a variety of agencies from attempting to purchase from women-owned small business. Conversely, the SBA, in its own words, has a program whose mission is to level the playing field for women entrepreneurs still facing unique obstacles in the business world.

The ambivalence found inside this taxpayer-sponsored agency is frustrating and unconscionable, because there is no set-aside program for women owners in business in place. Every pressure is continually applied in our construction field to purchase from contractors where a formal set-aside program is in place; this happens even when there are women-owned contractors available and eager to do the work.

I have been floored in any and every attempt to encourage government buyers to do business with my company as a woman-owned business. I have questioned the individual buyers and purchasers with whom I have been working, and they have directed me to one reason for not following through with a woman-owned bid opportunity. The one common answer is, the SBA is pressuring them to use one of the existing formal programs.

Consequently, the lack of a women-owned set-aside program is a double-edged sword. There is no way for contracting officers to reach out and set aside competition between women-owned businesses, and there is obviously not a serious push from Washington to reach women business owners.

The attitude towards women's businesses is negative. There is no pressure coming down to the local level to outreach to women. The abundance of other set-asides without a specific program for women makes it difficult for women to get a fair opportunity to compete.

Following a review of my negative experiences in dealing with the SBA and government purchasing, I have made three different trips to the local SBA office to search for information and help in obtaining Federal contracts. I was sent from person to person only to be repeatedly told, unless I was undercapitalized and could qualify for an 8(a) program, I was beating my head against a wall.

We were the successful bidder on a contract for indefinite-quantity roof repairs at the Denver military base. Without a women's program in place, the SBA pushed the buyer to cancel the bid and to do their purchasing within another formal program. This resulted in the purchasing being bundled in with other contracts to hide their steps.

We have been told many times bundling is horrible approach in our field because the number of lawyers and people involved in

communications essentially takes up the possibility of good emergency response to water leaks and infiltration. This is poor value for the government because a great deal of physical damage is done to valuable real estate and property while wading through procedures required in the bundled contract.

I have had several meetings with the director of the Small Business Utilization Center at the Denver Federal Center. I wanted to encourage buying based on a woman-owned small business status. While I received courteous treatment, when I have gone back to the government buyers, they say that they were discouraged from pursuing woman-owned business purchases by the very office set in place to help us, because it doesn't help meet any formal percentages that are required.

The new SBA proposal has unreasonable expectations and requirements, which are not included in other government set-aside programs. It is unrealistic and unfair to ask contracting officers of Federal agencies to prove which industries have discriminated against women. That statistical analysis has already been developed by the SBA. Several separate government-funded studies have been presented which identify over 2,300 types of businesses that are underutilized when it comes to women, yet only four have been outlined.

Small business employs approximately 50 percent of the private sector workforce. We account for 60 to 80 percent of new jobs. A great deal of new technology and innovation comes from the small business community. Even though over 30 percent of the small business in the United States today is owned by women, only 3.4 percent of contracting dollars go to these businesses.

Providing a strong set-aside program for women-owned small businesses will increase the number of excellent competitive contractors from which purchasing agents have the right to procure goods and services quickly and efficiently. This increases opportunities for women business owners, helps them gain a stronger foothold into Federal contracting, makes sound economic sense, and provides far better value for the government as they continue to encourage small business to build and grow.

Chairwoman VELÁZQUEZ. Thank you, Ms. Gloss.

[The prepared statement of Ms. Gloss may be found in the Appendix on page 92.]

Chairwoman VELÁZQUEZ. Our next witness is Ms. Pam Rubenstein, the President and CEO of Allied Specialty Precision, headquartered in Indiana, a aerospace manufacturing firm. Ms. Rubenstein's company is one of the 0.1 percent of women-owned businesses in the manufacturing industry.

Welcome, and you have five minutes.

STATEMENT OF PAM RUBENSTEIN, OWNER AND CEO, ALLIED SPECIALTY PRECISION, INC.

Ms. RUBENSTEIN. Thank you. Good afternoon.

My name is Pam Rubenstein. I am the second-generation owner and CEO of Allied Specialty Precision, Inc., in Indiana. My company was founded in 1954, and today has grown to 85 employees.

We produce precision aerospace component parts serving the hydraulic fuel control and braking systems of every commercial and military aircraft that flies in the USA today.

Since I bought my business in 2005, I am proud to say that we have added a major customer, doubled sales, increased employment and purchased five major machine tools. We have invested over $1.5 million in the last year alone in equipment and training.

The advanced manufacturing business is expensive and competitive; and even with our strong effort, it is clear to me that implementing the Women's Federal Procurement Program would be a terrific boost to my company and employees. Direct Federal contracts are very important to our growth and movement into new industry sectors.

The only industry we currently serve is aerospace. Right now, as you all know, aerospace is booming, and the outlook for the next ten years is excellent, but all business, even advanced manufacturing, is cyclical. I need to begin to prepare for that eventual downturn in aerospace manufacturing now, so that my employees and their families will be protected in the future. The Women's Federal Procurement Program would be an amazing asset in this endeavor. If the Federal Government is encouraged to seek out women-owned manufacturers, I would see more potential work, could quote more and find my way into other industries.

Allied Specialty Precision, Inc., does not play on a level playing field. Unfortunately many daily challenges arise simply because I am a woman. Business people, whether bankers, insurance brokers, tool salespeople, machinery brokers, even some of our customers are shocked when they call or visit my shop. Many men are so taken aback at the fact that we are woman-owned that they can't look me in the eye during a conversation. We may be talking about my purchasing a half million dollar machine, but they just can't get past my being female.

Two years ago I attended the international manufacturing technology show in Chicago; it is a huge venue dedicated to showcasing the latest in machine tools, technology, software, et cetera, for advanced manufacturing plants. I had been to the tool show many times during my years at Allied, but this was the first time that I was there as a business owner, and I had a mission at that show.

I was shopping for a $500,000 five-axis simultaneous mill, a very high-tech, specialized piece of equipment that I needed to manufacture parts for hydraulic pumps in aircraft. As you might imagine, most booths at the show were staffed with men, giving out information, answering questions and writing quotes.

As I entered the booths of manufacturers who offered such machines, most of the salesmen ignored me. One asked, what do YOU want? Another asked me whether my husband was out shopping since I was at the tool show. When I told them what I was looking for, their jaws dropped, but not one of those men apologized or offered me the information I was seeking. Obviously, they did not get my business or my money. Since that show, I have purchased two five-axis simultaneous mills from a company who took me seriously.

Just yesterday I had a telephone call from a customer who wants to come visit our shop. He ended the conversation by asking me to

make his plane reservations between New York and South Bend, find him a hotel and tell him how to get around town. He certainly would not have asked that of a male business owner. Needless to say, if he really comes to visit us, he will have made his own travel reservations.

So why does the SBA feel that advanced manufacturing businesses owned by women should not be one of the industries selected for the Women's Procurement Program? Not a day goes by that we don't have some issue over my gender. Obviously, those issues haven't shut us down, but they certainly have slowed our growth.

My employees and their families deserve the best that I can offer them, and I can offer them more if I can attract more work, especially from industries that are new to us.

I ask the support of Congress to assure that the SBA amends the proposed rules for the implementation of the Women's Procurement Program to include manufacturing. We are ready to step up to new heights in business, and we hope Congress will act to support women business owners. Thank you.

Chairwoman VELÁZQUEZ. Thank you, Ms. Rubenstein.

[The prepared statement of Ms. Rubenstein may be found in the Appendix on page 95.]

Chairwoman VELÁZQUEZ. Our next witness is Ms. Jennifer Brown. She is the Vice President and Legal Director of Legal Momentum, founded in 1970. Legal Momentum is the oldest legal advocacy organization dedicated to advancing the rights of women and girls. Legal Momentum is a leader in establishing litigation and public policy strategies to secure equality and justice for women.

Ms. Brown, you are welcome and have five minutes.

STATEMENT OF JENNIFER K. BROWN, VICE PRESIDENT AND LEGAL DIRECTOR, LEGAL MOMENTUM

Ms. BROWN. Good morning, distinguished members of the House Committee on Small Business. Thank you so much, Chairwoman Velázquez, for inviting me to speak here today. And thank you, as well, Ranking Member Chabot.

I have been the Legal Director at Legal Momentum for five years, and I am very happy to have the opportunity to contribute today to your consideration of the Small Business Administration's proposed rule for implementing the Women's Procurement Program. I can summarize my testimony very briefly, but of course I will go on for five minutes.

The SBA has correctly named "intermediate scrutiny" or "heightened scrutiny" as the constitutional standard that the Women's Procurement Program must meet; and the program, as Congress created it, meets that standard. It is substantially related to the important governmental objective of redressing and ending discrimination against women-owned businesses. The SBA's proposed rule, however, would require Federal agencies to make a public finding that the particular agency had discriminated against small women-owned businesses in particular industries in their own pro-

curement practices before they could let a single contract under this program.

This is an emperor-has-no-clothes moment. The SBA's requirement is frankly preposterous. It has no basis in law and would doom this program.

I used to represent the Federal Government against discrimination claims as an Assistant U.S. Attorney in the Southern District of New York. I can assure you no Federal agency will ever voluntarily make a finding that it has discriminated in its contracting practices. It is absurd.

The proposed rule would guarantee that no woman-owned business would ever benefit from this program. It is an insult to the Congress that created the program, and it is an insult to the women like those on the panel today who own small businesses and are the driving force behind economic growth that this country needs.

Congress created the Women's Procurement Program against a background of persistent discriminatory barriers faced by women-owned small businesses in government contracting, and amid evidence of the Federal government's continuing failure to award even a mere five percent of its contracting procurement dollars to these businesses despite the goal that was set to do so in 1994.

My written testimony details some of the evidence that Congress has had available to it over the years of discrimination against women business owners. There can be no doubt that the program meets the Constitution's requirement that it serve a substantial government objective.

The Constitution also requires that gender-conscious means, like the Women's Procurement Program, be substantially related to the achievement of their objectives. Congress met this requirement by limiting the availability of the program to small, women-owned businesses in exactly those industries where they are underrepresented in Federal procurement contracting. This type of limitation is exactly what courts look for when they assess the scope of affirmative action programs.

The SBA's proposed rule would go far beyond constitutional requirements into unrecognizable territory. It would impose an unprecedented and entirely unwarranted condition on a well-crafted program by actually barring any Federal agency from letting a single contract under it without first making—and I quote this from the introduction to the Federal rule as submitted by the SBA—"a finding of discrimination by that agency in that particular industry."

As I said, this is truly remarkable. What agency would ever announce to the world that it had documented its own history of sex discrimination in awarding contracts? I can only imagine the rush to the courthouse the next day by disappointed contract bidders, a rush that would be fully justified. Of course, there is no precedent for such an absurd requirement nor any constitutional justification.

To the contrary, the Supreme Court flatly rejected the position that the SBA is taking here, that the government may take affirmative measures only to address its own discrimination. The Court dealt with that forthrightly in the landmark Croson decision.

Now, the Croson decision for the first time required strict scrutiny of a race-based State affirmative action program. It was a ruling that drastically reduced the scope of affirmative action programs, and yet in that ruling, the Supreme Court said the government has, ″a compelling interest in assuring that public dollars drawn from the tax contributions of all citizens do not serve to finance the evil of private prejudice,″ and that was nearly 20 years ago.

Courts evaluating sex-conscious measures to enlarge opportunity have held explicitly—and over and over again as was noted this morning—that it is perfectly acceptable for such remedies to address societal rather than governmental discrimination against women.

As lawyers who work to advance the rights of women and girls, we at Legal Momentum are frankly astonished by the SBA's action here. After so many years of stalling, the agency has finally promulgated a rule to implement the Women's Procurement Program only to include what can only be called a ″poison pill.″ Far from finally fulfilling its duty to implement this congressionally authorized program, the SBA's proposed rule would render it a nullity.

And if I could just very briefly, I do want to flag for the committee an issue which is not addressed in my written testimony, but I would urge you to get further expert advice on the methodology of the RAND study, in particular the way that the dollar value disparity measure is calculated. It says that if government spending for women-owned businesses, small women-owned businesses, in proportion to all spending in the industry is proportionate to not the number of women-owned businesses in that area, but the dollar value of those businesses in comparison to the dollar value of all businesses in the industry, then you have parity.

That means that - small businesses are always going to be a very small fragment of the total dollar value of businesses in their fields, or most often they will be. So very small amounts of government spending will always produce parity when you are using that kind of measure. It is not how many dollars did we spend on women-owned businesses compared to what percentage of the companies in the field are women-owned businesses.

So I would—as I said, I am not an expert in the area, but I would really urge you to get another look at that. It is not the way that most disparity studies are done, and it definitely bears further scrutiny from you. Thank you very much.

Chairwoman VELÁZQUEZ. Thank you, Ms. Brown.

[The prepared statement of Ms. Brown may be found in the Appendix on page 100.]

Chairwoman VELÁZQUEZ. I would like to address my first questions to you.

Would you say, Ms. Brown, that this regulation is more in accordance with strict scrutiny or intermediate scrutiny?

Ms. BROWN. I would say it is an unrecognizable standard. Contrary to Ms. Papez's testimony this morning, there is no case in the country that has held that an individual Federal agency administering a government-wide program has to make findings of its own to begin with, much less an admission that it has discrimi-

nated in the past. So whether you are talking about a race-based affirmative action program or a gender-based affirmative action program, that just comes out of nowhere.

Chairwoman VELÁZQUEZ. Basically, you are stating that the representation made by DOJ this morning is incorrect?

Ms. BROWN. Absolutely. It is not recognizable as intermediate scrutiny; it is not even recognizable as strict scrutiny.

Chairwoman VELÁZQUEZ. Had the Supreme Court ruled that strict scrutiny should be applied in a situation compatible to this?

Ms. BROWN. No. The Supreme Court is very clear that heightened scrutiny is the standard for gender-based scrutiny. We are a women's rights organization; we like to see government measures that differentiate on the basis of gender scrutinized very carefully. The Supreme Court has adopted the heightened scrutiny standard for that; it has spelled it out in different ways, but substantial relation to an important governmental objective is the standard, and this program clearly meets that.

Chairwoman VELÁZQUEZ. How would you respond to Ms. Papez's testimony that the agencies must show past discrimination to meet the intermediate standard?

Ms. BROWN. I think Ms. Papez was skating on two lines, with all due respect. First of all, when she said that Court decisions require the government—and she inserted here the agency—to show past discrimination, what she is ignoring and what that analysis ignores, not to personalize it, is that Congress speaks for the government here.

Congress has had testimony before it for years about discrimination against women-owned businesses, and as I mentioned, some of that is detailed in my written testimony. Congress made the decision that there is a governmental objective here, and that is what would be tested, not an individual agency's finding.

And then she goes beyond that, most of her remarks focused on agencies having to show there is discrimination—discrimination in the industry. Well, that is exactly what the disparity study did. That was an important part of—that was an important, very useful thing that was built into this statute to require a disparity study, so you know that your remedies are focused on the industries where you have a proven disparity. But she goes even beyond that to say you also need an admission of discrimination by the agency. And the Supreme Court in the Croson decision itself said, no, you don't.

Chairwoman VELÁZQUEZ. Are you familiar with the case cited in the regulation, Engineering Contractors Association of South Florida v. Metropolitan Dade County?

Ms. BROWN. Yes, I am.

Chairwoman VELÁZQUEZ. Do you think that this case justifies the SBA's requirement of individual agency determinations of discrimination?

Ms. BROWN. Absolutely not. Again, I would say on two levels.

First, let's note that that is a case where a county has an affirmative action program for women-owned business enterprises. Nothing is the equivalent to the Federal Government on the county level—excuse me, the equivalent to requiring an agency-by-agency finding would be if the Court had said, where is the department

of buildings, where is the school construction authority, where is the hospital, the health department that lets construction dollars?

The Court never suggested for a moment that each agency of that county would have to show discrimination, never for a moment. And that is where the Department of Justice analysis would lead us. But besides that, the reason that the women-owned business provision was struck down in that case was that the disparity studies didn't show sufficient disparity.

Well, that is no problem. We are talking about a program here that is targeted, that can only be used if you already have a disparity finding for the industry. So it wasn't that disparity findings were not enough.

My testimony mentions multiple cases where courts, including the Supreme Court, have said disparity is prima facie evidence of discrimination. In that case, the disparity study showed results all over the place—up, down, all around—and the district court said, that doesn't convince me, and the court of appeals said, I can't see you are clearly wrong.

Chairwoman VELÁZQUEZ. Thank you, Ms. Brown.

Ms. Rubenstein and Gloss, a lot of testimony and questions today have been regarding our concerns with the SBA's approach to its proposed rule. The bottom line is, without this program, the Women's Procurement Program, women business owners will continue to be shut out of government contracts. Less than two percent of women entrepreneurs are in construction and only 0.1 percent are in manufacturing, both of which are represented today.

Aside from implementing this program, how can we increase the representation of women in your industry, if you can offer any guidance?

Ms. GLOSS. I would say an active role needs to be taken by the Small Business Administration to genuinely educate and encourage women business owners.

I have been in the roofing industry myself for 32 years and have experienced nothing but a negative approach or discouragement. Unless I was undercapitalized and couldn't essentially afford to run my business—high litigation business takes a large dollar amount to be able to cure a problem, and they were not willing to help in any instance in any way unless I was an 8(a) contractor. Women-owned business, they said, means nothing to them because it doesn't provide statistics, and without statistics they aren't willing to put dollars behind it. That was all strictly at the local level.

Chairwoman VELÁZQUEZ. Ms. Rubenstein.

Ms. RUBENSTEIN. From manufacturing there are very few of us, and in aerospace probably a lot fewer. It might be good to reach out to the trade associations, though. There are so many associations for manufacturing.

I am very active in the National Tooling and Machining Association; there are some women-owned businesses there. So going that way may help you identify those of us that are there.

That is the best I can say.

Chairwoman VELÁZQUEZ. Ms. Farris, the SBA regulation lists only four industries where women are considered sufficiently underrepresented. Do you think that adding more industries to

that list, consistent with the RAND study's finding, would make the program constitutionally questionable?

Ms. FARRIS. Let me be sure I understand that question. In other words, if the SBA enlarges the four groups, including the women cabinetmakers—

Chairwoman VELÁZQUEZ. Correct.

Ms. FARRIS. Would the program be vulnerable to a legal challenge?

Chairwoman VELÁZQUEZ. Uh-huh.

Ms. FARRIS. No. As a matter of fact, my concern is that if the rule is implemented as currently written, the program will be subject to a legal challenge on several bases. Number one, when I say it creates a new standard, I am very serious about this, there are currently three constitutional standards—rationale basis, intermediate scrutiny and strict scrutiny.

There was a very good 1995 internal memorandum from the Department of Justice right after the Adarand decision came out that identified exactly what level of evidence is required before you implement these types of programs under a strict scrutiny standard.

I want to point out to the committee there was some very good language in that internal memorandum. Under a strict scrutiny standard of review, it says, number one, you don't delay the program until you do all these disparity studies, you only show that there is substantial evidence to make a prima facie case of the need of the program.

Number two, it says, what level of evidence is required; and it uses the language, Not that level of evidence that rises to paradise; the SBA had basically suggested a rule that goes beyond paradise and lands at the foot of God.

The third point in that internal memorandum, which I think is very, very good, is that it indicates that; and I think I know where Ms. Papez was coming from when she saying you have to do an agency-by-agency study. Croson was passed in 1989 and dealt with local remedial programs under strict scrutiny.

Adarand was passed in 1995 in a series of cases that took that standard and applied it to the Federal Government. After Adarand came out in 1995, there was a flurry of internal governmental memorandums to the agency saying, What do we do now; how does this impact our program. The memorandum was saying, Let's buttress our facts by taking a look at our internal practices.

The big distinction is that all those remedial programs were already in place. You already had a WBE program basically working; you had an 8(a) program working.

In this instance, the women-owned set-aside is not in place yet; and so applying this strict scrutiny-plus standard which states you have got to have a disparity study, you have to have a study of the disparity study and then you have to have an agency study of the disparity study that studied the disparity study. That is where it goes into this new strict, strict scrutiny standard.

I think it is a slippery slope for the SBA and also a concern to all of the minority programs that are in existence, because it is suggesting a new standard that essentially means no program will ever by implemented because the studies will never be completed.

Chairwoman VELÁZQUEZ. Ms. Brown, do you believe that the program will be constitutional even if additional industries were added?

Ms. BROWN. Well, you do need evidence that the—not need, but I think it is useful to have evidence that the particular industries are underrepresented in Federal contracting. But the RAND study produces, as you have discussed, four different ways to look at that question, and some of them have as many as 87 percent of industries underrepresented.

So, no, I don't think it would be subject to constitutional scrutiny—or overturned, rather—simply because there were additional industries identified through a different methodology.

Chairwoman VELÁZQUEZ. Thank you, Ms. Brown.

I now recognize the ranking member, Mr. Chabot.

Mr. CHABOT. Thank you, Madam Chair.

Ms. Dorfman, I will begin with you, if I can.

Without revealing any potential attorney/client communications, is the U.S. Women's Chamber of Commerce planning on taking any further action in the federal court case?

Ms. DORFMAN. We do have a status hearing coming up on January 28th. It is my hope here today to once again ask you all to take a look at what you can do to compel the SBA to do its job to implement the program. Certainly, passing H.R. 1873, which has the language that is needed to get a program in place for women-owned firms is a great start, and we are working with the Senate side to try and help them to make sure to get that through. But that may take some time, and I am curious if there is not something that Congress can do that deals with agencies that are, in fact, breaking the laws that they had passed and intended for implementation.

So I am passing it back to you to see if there is something here that we can take further to compel the SBA to implement this program as intended by Congress when it was originally passed.

Mr. CHABOT. Thank you.

Ms. Gloss, I will move to you next, if I can.

Do you know approximately how many women-owned roofing firms there are in the Denver area, and how does the SBA discourage contracting officers from buying from women-owned small businesses—if you know, if you have heard?

Ms. GLOSS. I am aware of five women roofing contractors, and they are all members of the National Roofing Contractor Association, so I am familiar with them.

In cases where I have been working with, since I have been in the industry for 30-plus years, I have gotten to know contracting officers throughout the Federal Government before many of the set-aside programs were even in place. We have done business successfully with them. They solicited bids from us actively. We have actively solicited work with the Federal Government; we enjoy them as a good buyer of ours.

Over the past five to six years, contracting officers have come to me and talked to me about, How can we better buy from you, how are they going to be able to continue to do business with us when the SBA pressure is so high to go to one of the other government set-aside programs.

They say there is active discouragement from doing business with a women-owned firm versus doing business with an already set aside formal program; and I have lost, I would say, about $2 million a year in bids set aside to just one of those programs.

Roofing is an easy thing for people to feel it doesn't take much talent to do. It is easy to shove it off onto someone who doesn't have much experience, and that is exactly what the contracting officers that I have dealt with in the past have said. The pressure is so high from SBA to go with one of the other set-aside programs that they have no dollars left to come and purchase.

Mr. CHABOT. Thank you.

Ms. Rubenstein, what other steps, other than the implementation of the Women's Procurement Program, could the SBA, in your opinion, or other Federal agencies take to increase participation by women in Federal Government procurement programs?

Ms. RUBENSTEIN. I am really only familiar with my industry, and as I said, there are very few women in the industry. I think, for me, the best thing that Congress can do is implement the law as you originally intended it and that would help me and my employees tremendously.

Mr. CHABOT. Thank you.

Any of the others who would like to take—

Ms. FARRIS. Yes. Thank you. I do a lot of work with minority and women-owned businesses, and I have a couple of thoughts on that.

First of all, I think it is critically important that this committee acknowledge that Federal contracts use a unique type of delivery system called ″indefinite delivery, indefinite quantity″ contracts; these are large, long-term contracts that typically have thousands of line items within them that might include parts, might include roofing, might include labor services, et cetera. You bid it on a fair market value times a markup or a discount. And so there are many, many small businesses out there that don't understand these IDIQ contracts or even how to bid them.

My experience with the SBA has been that it is more of a ″come to us,″ instead of ″let us come to you and actively recruit.″ There should be active regional and local programs that are designed specifically to look at the local availability.

Every major city in the United States has done its own internal disparity study that identifies minority and women-owned businesses within that city. There should be detailed training of the difference between a standard contract and an IDIQ contract. And I hate to admit my own stupidity, but I am a lawyer that specializes in this area; when I went through the CCR registration process, I had to stop and start over three or four different times because I wasn't quite understanding what they were looking for.

The NAICS classifications are extremely difficult to be able to take your company and get it to fit in this little hole. For instance, I am a law firm, but I also do education, I also do training. There are three or four different NAICS codes that I can register under.

So all of these things are things that potentially are barriers to women within Federal contracting, and I think the fact that there are only 55,000 women currently registered in the CCR should be of significant concern to the SBA and should be addressed immediately.

Mr. CHABOT. Thank you very much.

Ms. DORFMAN. May I answer as well?

Mr. CHABOT. Sure.

Ms. DORFMAN. Thank you.

First of all, when we met with the U.S. Women's Chamber of Commerce we met with all the agency heads, and we said, How can we help you improve your goals for women-owned firms; you are not meeting them. They said, You have to get this law implemented. There is—the other set-aside programs that—there is an order they have to go through when we are at the very end, but they usually have to fulfill that. That means that women-owned firms are left to have to compete in full and open with the larger corporations. So we don't have that access.

When you get into the different programs that you were talking about, there are the procurement technical assistance centers out there to assist small businesses in contract accessing, that kind of information. But what we see the SBA's whole focus should be on is implementing this program, not worrying about whether it will pass the court's scrutiny, because that is not their role. Their role is to get this implemented, let the court do their job and help women to access these contracts.

We have hundreds, if not thousands, of women-owned firms who are not registered in CCR right now. Why not? Because this program has not been implemented; it has been a waste of time for them to do so. So you will not see more registrants in CCR until we get this program moving forward.

Mr. CHABOT. Thank you.

Ms. Brown, I only have time for one more question. Do you want to take your shot at that one or do you want me to ask you an entirely different question?

Ms. BROWN. Ask me what you would like.

Mr. CHABOT. We will give you a different question. What data would you suggest that the SBA needs to examine to determine underrepresentation of women-owned small bushiness in the Federal contracting arena?

Ms. BROWN. The data of an underutilization study—

Chairwoman VELÁZQUEZ. Would you please get the mike?

Ms. BROWN. Sure. I am neither an economist nor a statistician. As a lawyer, I can tell you that with underutilization studies, one court after the next has said this is excellent evidence of discrimination. So the repeated refrain earlier today from Ms. Papez, that you need that plus something else, is just not supported in the cases no matter how many times she asserted that it was.

The thing about the underutilization analysis - the point I was making earlier about the dollar value measures as done by RAND, they basically accept that small businesses are going to get very, very small portions of Federal contract dollars. And as long as—and since the whole—the problem with relying on that, it is a measure of underutilization, but the problem with relying on that is, it kind of freezes the status quo in place.

Much of the impetus for having special efforts made to invite small businesses, minority-owned, women-owned or just small businesses period into the contracting realm is based on the idea that that will help them grow, that they remain small because they

have been shut out; and by coming in, they will be able to realize their economic potential. So a measure that kind of captures and reinforces the status quo, as far as their size in relation to their industry as a whole, is not going to help you make any progress on getting them to grow, which I think is the whole idea of these programs in the first place. And that is why I hope the committee can get some additional expertise on that point.

I looked at—I think it is mentioned in my written testimony—there was a meta-analysis of maybe 60 disparity studies, it was undertaken by the Urban Institute under a contract with the Department of Justice, that is referenced in my testimony. And the normal disparity study as it was described there—they were looking at ones with different methods, too, but it was taking, not the number of contracts and the number of firms—I can see why that is no good; you can have a million tiny contracts that would look like disparity, but mean nothing economically for the businesses. But it was the percent of spending on that category of business compared to the number of those businesses in their industry. And I think that is a measure that many courts and statisticians and economists have been satisfied with for years. It would look to me like RAND could rerun the numbers it has already collected under that analysis and see what the result was.

Mr. CHABOT. Thank you very much. I yield back my time.

Chairwoman VELÁZQUEZ. Ms. Clarke.

Ms. CLARKE. This question is for Ms. Dorfman. It sort of is a follow-up to the question that our ranking member raised. I want to say that after being in Congress for one year, I too an outraged and frustrated by the blatant disregard of the SBA for the law mandated by our colleagues in 2000.

Can you provide this committee today with any recent factual or legal background as to your association's next steps? And are you planning another lawsuit against the SBA? And if so, what would be the nature of your action?

Ms. DORFMAN. This, as you know, is the number one issue that we are working on and we will do whatever it takes to get this law implemented as originally intended by Congress.

At this point, we do have the status hearing set for January 28th. We are here today again to ask, Please help us to compel the SBA to implement the program, as it was originally intended. The fact that we have got the law that was put in a very narrow scope, which is in total disregard of the NAS study, it just shows that the SBA is again dragging its feet; and it is time to hold them accountable. And there certainly should be some remedy for Congress to be able to address an agency that is clearly breaking the law.

We need to move forward to the next step, whatever it takes.

Ms. CLARKE. Let me just say to all of you, thank you so much for coming and for testifying and for making it real, particularly from a legal perspective, from a practical application. I am just astounded, as our chairwoman has been, that again it has been seven years. And I raise that—I keep saying seven years, and I think we all do; but for me, being a freshman, who realizes that at the end of this year, we are entering into a whole new administration, it just indicates to us that this administration has done nothing, nothing, to advance, you know, the ability for women-owned busi-

nesses to participate in billions of dollars that are being spent annually by our Nation, dollars that, quite frankly, you all contribute to, right, as women in our economy.

And so I am standing very close to our chairwoman, who I know is going to pursue this, but quite frankly, I just don't see it happening under this administration. If they have done this for seven years and they have not been able to close the deal with the American people, and women in particular, to make sure that they are equal participants in our economy and the things that we do, I don't hold out a whole lot of hope that it is going to happen before this administration leaves.

Having said that, I yield back the rest of my time, Madam Chair.

Chairwoman VELÁZQUEZ. Thank you, Ms. Clarke.

Mr. González.

Mr. GONZÁLEZ. Thank you very much, Madam Chairwoman. I think my colleague, Congressman Gohmert, indicated he had been a judge; and I also had the great privilege of being a judge. After listening to the testimony by Ms. Elizabeth Papez and listening to the testimony of Ms. Brown and Ms. Farris, then I understand the need for judges.

But it really is interesting, because the basic proposition, the different hurdles that have to be overcome just to give this particular program, which has been legislated by Congress, and I think Ms. Brown points out—we see that there is a problem, we would like to see it addressed; we pass the ball off to the appropriate agency in our department, and then hopefully they will follow through. I do not think that has been the case.

But I do not believe that Ms. Papez came here today to misrepresent anything to this committee in bad faith. She could be wrong. In her opinion, it is not an open, legal question, yet her interpretation of the same cases is 180 degrees from that which we have heard from this particular panel of the two attorneys Ms. Brown and Ms. Farris.

In her written testimony, Ms. Papez states the Justice Department's position on gender-based set-aside programs reflects these cases, and the simple lesson they offer Federal entities considering such programs, if those entities which must establish and administer gender-based set-asides in a constitutional manner wish to maximize the chances that a particular program will survive constitutional scrutiny, it is both legally appropriate and legally prudent to require evidence of discrimination before implementing the program.

Now, I think the chairwoman specifically asked that question. I am not sure that Ms. Papez really looked at her own written testimony, because she didn't basically just stand by those couple of sentences. But let's just say it is an open, legal question, let's just say it is out there and there is a prudent judge somewhere out there who is going to rule on this and try to give meaning to the legislative intent of Congress which—if you recall, that is one of those guiding principles in separation of the three branches of government and the duties of each and every one of them.

The problem that I see, to be real honest with you—and those that are here from SBA and from DOJ, I don't mind you going back and telling people. My problem is, the argument advanced by Ms.

Brown and Ms. Farris, to the objective observer, would be the argument that would support and promote the program.

The argument advanced today by DOJ and the representative, Elizabeth Papez, you would expect to hear from the opponent. No one has to do work for the government on this one, it is over, its over, because the position they have taken defeats it, that is my problem. That has been my problem with many representatives from different departments and agencies. I mean, from the get-go, we are not going anywhere.

All I am saying to the agencies, to the Department, to DOJ, we are not asking you to misconstrue or lie to a court, but if I had Ms. Brown and Ms. Farris that can knowledgeably look at the same cases and come to this other conclusion, why can't you advance the same legal argument to promote that which we are trying to accomplish as Members of Congress. That is the real question after all this is said and done today, but it doesn't look like we are going to get anywhere.

I am not sure what we do. We have a new Attorney General who knows, all sorts of things could happen in the coming months. It really is frustrating. That is a speech and that is a statement, but when it is all said and done, it really is, who is your advocate? This is the government attorney, this is the government attorney that is giving advice and guidance to agencies.

Now, let's just say you start off with the RAND information and all of us up here know all about statistics and studies and such and we can do all sorts of things with them. They have already placed a huge hurdle. I am not sure if Ms. Gloss's enterprise is going to come under those enterprises' product services where there is an easily identified disparity. I think Ms. Rubenstein might, maybe not, we don't know.

But a lot of people, the majority, the huge majority of women-owned businesses are not going to fall under certain categories. That is number one. We are going to have to deal with that; I don't know what we do about it. Let's see if the comment period is extended; let's see if we get some good information out there, and people will listen.

When we get into the legal framework, I don't see that there is one change in giving direction on how they are going to meet what DOJ believes are the legal standards, and that is going to be past discrimination.

My question goes back to what Ms. Brown says. I have never see a government official, civil servant—actually, I have never seen it in the civilian society either—someone come up and say, Oh, yeah, our practices are discriminatory, oh, yeah. Because you know why? There are consequences to that. Why would you expose yourself to that? Confession is fine in a confessional.

This is just beyond belief.

What I want to know, let's just say we do have good-faith introspection by agencies and departments, and someone says, you know what, that appears to be discriminatory, it might be found to be discriminatory so we are changing it; as of right now, right now, we are not going to do that anymore.

Would that cure it? Because it is past discrimination, are we talking about ongoing discrimination? I am just trying to figure out

all sorts of ways to frustrate this whole program. We are going to come against—I am just saying, What are we talking about—past discrimination, present discrimination, ongoing discrimination? What is it that we are talking about?

Either Ms. Brown or Ms. Farris or both.

Ms. BROWN. Should I start?

Ms. FARRIS. Go ahead.

Ms. BROWN. Well, we could look at what DOJ or SBA in response to DOJ has said, and I think it would be saying that the agency has to find that it has a history of discrimination.

But I want to address this one point. The Adarand decision was the Supreme Court decision that, for the first time, said Federal affirmative action programs also must meet the strict scrutiny standard if they are using race-conscious measures, by implication intermediate scrutiny if they are using gender-conscious measures.

Now, the Adarand decision—Adarand went back on remand to the 10th Circuit Court of Appeals, and the 10th Circuit Court of Appeals examined the record of discrimination. They didn't examine the Department of Transportation's record of discrimination and that is the department of the Federal Government that was carrying out the program.

They examined what Congress had before it, how did Congress come to the conclusion that this race-conscious program was necessary to redress discrimination. And again, I just have to emphasize, there is no court that has said that the government can act only to redress its own discriminatory actions. It has said time and again that participating in existing discriminatory practices is enough, and in the gender context it has said over and over again that societal discrimination is enough.

So both—I do not believe, with all due respect, that there is a good-faith basis in the cases for requiring an agency-by-agency examination of discrimination, nor do I think there is a good-faith basis for requiring an agency determination that it itself has discriminated in order to implement a congressionally enacted program.

Mr. GONZÁLEZ. Thank you, Ms. Farris.

Ms. BROWN. One other note. If you examine, as I did, the testimony submitted for the Department of Justice by Ms. Papez, you will not find cases cited to support those propositions; and that is a very glaring omission when you are talking about a lawyer's testimony.

Mr. GONZÁLEZ. Ms. Farris.

Ms. FARRIS. Thank you, I want to be sure your question again is, do the programs require remediation of past discrimination or are they more forward looking. And the case law again—I want to clarify. When I refer to "case law," I am referring to the top law of the law of the land, U.S. Supreme Court decisions.

The case law indicates that the programs are remedial in nature; they are designed to remedy past discrimination, but they are also forward looking because it defines discrimination as those patterns and practices which have created barriers to a certain class of people that don't exist for other classes of people.

So, in answer to your question, the programs are both backward and forward looking.

I also wanted to pick up on a point that you made that I think is very important, and that is that there is a fundamental lack of logic to the SBA's entire argument. That argument is that they have to do all of these studies to be sure that they have enough justification to withstand a legal challenge.

Well, we are missing the fact that there will never be a legal challenge because there is no darn program in place to challenge and never will be.

So, you know, I feel like sometimes we are out there doing battle with smoke and mirrors, when it is not complicated.

Member González, you correctly pointed out there is not a single Supreme Court decision identifying intermediate scrutiny that has the words ″disparity study″ and ″narrowly tailored″ in it; it is a different standard. The only case law, the only case in the entire universe of case law out there that the DOJ is building their argument on is one decision that even within the decision talks about you being able to use societal discrimination as proof.

In my mind, there is no reason that the SBA cannot immediately implement this program.

I want to address one other question and that was, do we have to do another disparity study? No. The proof has already been made through the disparity between the number of women-owned businesses and the ones that are currently competing in the CCR.

But even taking it a step farther, if you want a disparity study, you have one with the RAND Corporation. Now, is it perfect? No. But you all look at statistics all the time and have you ever seen a perfect statistical study?

What the study did was, it identified in a very forthcoming manner the flaws within its own study. It said, here are the four methodologies we were given; you have one that is way out there, and you have one that is way out here and you have two that are in the middle.

I am not a statistician either, but I do remember a course that I took, and isn't there a concept that you throw out the top and you throw out the bottom and you look at what is left to be somewhat average or representative?

There really—again going to what Ms. Dorfman said, there is no administrative or legal justification for failure to immediately implement this program at a five percent level.

Mr. GONZÁLEZ. Thank you very much. I yield back. Thank you for your patience.

Chairwoman VELÁZQUEZ. Ms. Brown, if strict scrutiny is applied to gender-based programs like this one, what will that mean for the 8(a) and other SBA business development programs?

Ms. BROWN. I would have to say I don't know the 8(a) programs, so I can't answer that question.

Ms. FARRIS. I would like to answer that.

It should be a matter of extreme concern to any members of a minority or ethnic-based group, because what it is basically doing again is, it is creating a strict scrutiny-plus standard that, if it is applying to gender-based programs, its only a matter of time. The writing is on the wall that it will trickle down not only to every program within the Federal, but also to every program at the State, county and local level. Extremely concerning.

Chairwoman VELÁZQUEZ. Thank you. And as you can see, there is so much concern about the proposed rule. Based on the testimony provided here by all the witnesses, I just can't help myself but to conclude that the proposed rule goes far beyond congressional intent. And it is my intent to submit comments on the proposed rule to the SBA, and basically stating the fact that what I feel they are doing, the bottom line regarding the proposed rule, is to destroy the program, just to make it so difficult that it will never be implemented.

And if we are going to apply past discrimination, I just would like to find the one agency, including SBA, that will come out and say, yes, in the past we have committed discrimination against women business owners.

Given all these facts and the testimony presented today by both SBA and the Department of Justice and the fine second panel of witnesses that we have with us this afternoon, I would strongly suggest to the Small Business Administration that they must scrap the proposed rule and go back to the drawing board.

With that, I ask unanimous consent that members will have five days to submit a statement and supporting materials for the record. Without objection, so ordered.

Chairwoman VELÁZQUEZ. This hearing is now adjourned.

[Whereupon, at 1:51 p.m., the committee was adjourned.]

NYDIA M. VELÁZQUEZ, New York
Chairwoman

STEVE CHABOT, Ohio

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STATEMENT
of the
Honorable Nydia M. Velázquez, Chair
Committee on Small Business
Hearing on SBA's Progress in Implementing the Women's Procurement Program
Wednesday, January 16, 2008

Today, the Committee will continue its review of SBA's progress in implementing the Women's Procurement Program. This initiative was created in part because of the government's inability to meet the five percent contracting goal for women-owned small businesses. Even though this goal was set in 1994, federal agencies have yet to achieve it.

Seven years – yes, seven years – have passed since the Women's Procurement Program was enacted. And now, after all of this time, the SBA publishes a rule that is so poorly constructed and so ill-conceived that it is insulting to the tens of thousands women business owners that have been waiting for action. This makes it apparent that the administration is not serious about carrying out the law and I don't believe it ever will be.

In creating the program, Congress' objectives were clear – to increase participation by women-owned firms in the federal marketplace. The very design of the legislation was meant to reverse – at a systemic level – the lack of women businesses involved in federal contracting. But the SBA's proposed rule is just too narrow and burdensome to achieve this intent.

It is evident that few – if any – women-owned businesses will benefit from the new regulation. **As a result, of the more than 10 million women-owned businesses in this country, only 1,247 businesses would qualify.** Women entrepreneurs in industries like construction and manufacturing that are omitted are left scratching their heads – can this be for real?

SBA has chosen one of the most restrictive methodologies to determine which industries will qualify for the program. Out of the 28 approaches identified by RAND, the agency chose a method that designates less than 3 percent of industries as under-represented by women businesses. In doing so, it is using a "dollar amount of contracts" method for determining under-representation, which is inconsistent with the program's intent.

The initiative was designed to be used as a contracting tool – to reverse the under-usage of women firms in the federal marketplace – not as a way to solely advance large dollar awards. A better measure would be the "number of contracts" method, which would find 77.1 percent of industries as underrepresented, or a mix of both the number and dollar approaches.

The SBA is also requiring that federal agencies make a determination of discrimination before any contract can be awarded under the program. This step creates another massive roadblock – in the long series of obstructions – to the program's implementation. The manner in which this finding is required is vague and could add layers of unnecessary bureaucracy to the program's administration.

Perhaps most problematic, the proposed rule appears to exceed what is constitutionally required. As a gender-based program, "intermediate scrutiny" is called for. But instead, it appears that the administration is stealthily applying a restrictive "strict scrutiny" standard. They can call it what they want, but the reality is that this is a standard that has no place in this rule.

The truth is that the SBA's proposal does not embody the program that Congress envisioned. If this rule becomes final, the administration will be successful in "blocking by regulation" the program's implementation. As a result, women businesses will be one step farther from gaining access to the federal marketplace.

Instead the SBA should scrap this rule and go back to the drawing board to provide a wider path for the inclusion of women. Women-owned firms are one of the fastest growing segments of the economy. They employ nearly 13 million people, and their annual payroll is almost $175 billion. These firms are driving future growth and job creation in our communities. It is long past the time that they are given greater access to the federal government as a customer.

U.S. House of Representatives
SMALL BUSINESS COMMITTEE
Representative Steve Chabot, Republican Leader
Wednesday, January 16, 2008

Opening Statement of Ranking Member Steve Chabot

SBA's Progress in Implementing the Women's Procurement Program

Today, the Committee is again examining the implementation of the women's procurement program by the Small Business Administration. This hearing continues the efforts of the Committee to understand the issues and difficulties associated with the regulatory establishment of a program enacted by Congress in 2000. Without prejudging the ultimate outcome of the SBA's effort, I remain concerned that the will of Congress remains unfulfilled after more than seven years and more than two years after a federal district court ordered the implementation of the program.

Federal agencies are required to ensure that small businesses receive a fair proportion of contracts for goods and services purchased by the federal government. Recognizing the growing importance of women-owned small businesses to the growth of the economy and the longstanding perceptions that women-owned small businesses were at a disadvantage in obtaining federal government contracts, Congress enacted bipartisan legislation authorizing the SBA to create a women's procurement program.

Slightly more than seven years after enactment, the SBA finally issued a proposed rule to commence the process for implementation. I, like many members of this Committee and Congress, am somewhat dismayed at the length of time it took to begin the process of implementing the will of Congress. Administrator Preston's efforts to manage the implementation process should be commended even if there is disagreement about the results.

The notice of proposed rulemaking identifies certain industries in which women-owned small businesses are underrepresented in federal government contracting. However, I am troubled by the fact that the notice does not provide the public with sufficient information on the type of probative evidence that would convince the agency to expand the scope of the industries initially covered by the rules.

The crucial part of the program is the identification of industries in which women-owned businesses are underrepresented in the federal procurement. In the notice, the SBA proposes to calculate underrepresentation every five years but fails to specify how it will make that calculation. Without that information, the potentially affected public has no way of accurately informing the SBA whether the proposal is adequate.

In conclusion, the Administrator has taken an important first step to see that the program is implemented. On the other hand, the deficiencies in the notice raise real concerns about the adequacy of the notice and comment procedures mandated by the Administrative Procedure Act. I would urge the SBA to provide additional supplemental information to enable the public to respond to the notice in an intelligent manner.

I yield back the balance of my time.

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January 16, 2008

Congressman Bruce Braley Opening Statement

Hearing on "SBA's Implementation of the Women's Procurement Program"

Thank you Madam Chairwoman, and thank you for holding this hearing.

It seems that once again the Small Business Administration is giving women-owned businesses the run-around. In proposed rules last month, the SBA identified just 4 industries in which they said women-owned businesses were underrepresented. This is a far cry from the SBA study in 2001 that identified 66 out of 71 industries as being underrepresented.

The SBA is going to have a hard time convincing any of the women in this room that enough progress has been made since 2001 to account for these disparities.

Reasonable people cannot be expected to believe that only 4 industries are underrepresented when women-run companies

represent about 30% of all companies, yet in 2006 they made up a paltry 3.4% of government contracts.

Our own Chairwoman, the Hon. Nydia Velazquez, has been working tirelessly on this issue for years. She introduced the *Equity in Contracting for Women Act,* which Congress passed into law on December 21, 2000. This important act requires the SBA to implement the Women's Procurement Program. More than seven years have passed, and the SBA has not yet implemented the program. This is a disgrace.

At a recent hearing I asked SBA Deputy Administrator Jovita Carranza, former vice president of air operations at UPS the hypothetical ~~rhetorical~~ question of what would happen at her former company if an employee had failed to implement a mandated program after 7 years. She didn't answer the question directly, but we all know what would happen – that person would be fired.

The SBA's recent ruling indicates to me that they are not serious about giving women a fair opportunity to compete for federal contracts. In my first subcommittee hearing, one of my constituents, Ms. Karyl Smith, owner of Iowa Valley Appraisal, came to testify about difficulties women-owned businesses face when competing for

federal contracts. How am I going to explain to her the recent SBA rules?

Women business owners are one of the fastest growing segments of the small business population and are expanding at twice the rate of other companies. Great strides have been made in the private sector to expand opportunities for women. It's time for the federal government to do its share.

Thank you again Madam Chairwoman, and thank you to the witnesses for coming in today.

Statement of Rep. Jason Altmire
Committee on Small Business Hearing
"SBA's Implementation of the
Women's Procurement Program"
January 16, 2007

Thank you, Madam Chairwoman, for holding today's hearing to examine the Small Business Administration's (SBA) implementation of the women's procurement program. The Women's Procurement Program was initiated in part because of the federal government's slow response to meeting the five percent contracting goal for women-owned small businesses. Seven years later, federal agencies still fail to meet that goal. Recently, the SBA published a rule to fully implement the program to ensure that women-owned small businesses receive their fair share, however, many claim that the proposed rule will do more harm than good.

There are more than 10 million women-owned businesses in the U.S., however, only a little over 1,200 businesses qualify for federal contracts. SBA's plan for implementation is too narrow and precludes many women businesses from actively participating in federal contracting in industries like construction and manufacturing,

Today, we have an opportunity to discuss the rule with the SBA and women business owners to determine if the proposal is in line with what Congress originally intended when it passed the Women's Procurement Program. It is my hope that we can work with the SBA to re-draft the rule in a way that ensures agencies compliance with the five percent mandate.

Madam Chair, thank you again for holding this important hearing today. I yield back the balance of my time.

# # #

Administrator Steven C. Preston
U.S. Small Business Administration
U.S. House of Representatives Small Business Committee
Federal Government Efforts in Contracting with Women-Owned Small Businesses

Thank you for inviting me to testify today on behalf of the U.S. Small Business Administration (SBA) regarding Federal Government Efforts in Contracting with Women-Owned Small Businesses. The proposed rule that will implement the Women-Owned Small Business Federal Contracting Procedures set-forth in P.L. 106-554 has been published. Public comments on the proposed rule are due by February 25. SBA has been, and remains committed to implementing the statutorily-authorized set-aside for women-owned businesses and intends to do so in a constitutionally-valid manner, while at the same time meeting the specific directives provided in the legislation.

History

In 1994, through the Federal Acquisition Streamlining Act (FASA), Congress established a statutory goal of not less than 5 percent of the total value of all Federal Government prime contract and subcontract awards for each fiscal year going to women-owned small businesses (WOSBs). The Federal Government made consistent progress toward reaching the prime goal. Federal prime contract dollars going to WOSBs increased from $2.4 billion in FY 1994 to $11.6 billion in FY 2006 (3.4 percent of contracting dollars). Subcontracting dollars have increased from $3.6 billion in FY 2000 to over $10.1 billion in FY 2006 representing 6 percent of subcontracting dollars. SBA's Office of Government Contracting and Business Development (GCBD) is working closely with Offices of Small Disadvantaged Business Utilization (OSDBUs) in the major Federal procuring agencies to promote the use of women-owned small businesses and encourage them to reach the 5 percent goal.

In December of 2000, Congress passed legislation creating the framework for Women-Owned Small Business Federal Contracting Procedures.

Consistent with the requirement in the legislation for SBA to determine the underrepresentation of WOSBs in the Federal contracting marketplace, SBA itself conducted a study to establish the necessary findings. Once completed, an independent panel of experts at the National Academy of Sciences (NAS) reviewed the study to assess the sufficiency and validity of SBA's methodology. Ultimately, NAS concluded that the original SBA study was flawed. NAS recommended a methodology for performing a study that would more effectively withstand legal and statistical scrutiny.

RAND Report

On February 21, 2006, SBA awarded a contract to the RAND Corporation and it commenced work on a study, in accordance with the methodology recommended by NAS, to determine those industries in which women-owned small businesses are underrepresented and substantially underrepresented in Federal procurement. The RAND study was completed in April 2007 and since then SBA has been engaged in a government-wide effort to complete this proposed rule in a manner that will satisfy both statutory and constitutional requirements.

Based on NAS guidance, RAND defined underrepresentation as a disparity ratio of 0.80, while substantial underrepresentation was defined as a ratio of 0.50. The NAS recommended applying this analysis to data found in the 2004 CCR and 2005 procurement data and four digit North American Industry Classification System (NAICS) codes based on contract dollar amount and the number of contracts. With the disparity thresholds of 0.50 and 0.80 established, RAND examined 28 different approaches that looked at a wide range of data collected by the federal government including data in the Central Contractor Registration (CCR), the Federal Procurement Data System/Next Generation (FPDS/NG) and the 2002 Survey of Business Owners (SBO) from the five-year economic Census. Relying on the guidance offered by the NAS and the actual results of parsing the data, RAND then began to zero-in on those methods that accurately measured underrepresentation and substantial underrepresentation. The methodology utilizing the dollar amount was found to be the most valid measure of WOSB contract participation because:

- Most importantly, the very goal (5 percent WOSB) the statute was intended to support is based on contracting dollars, and thus using contract dollars as the primary measure of participation is most consistent with the statutory scheme;
- In addition, Congress appropriates federal funding in dollars;
- The Federal budget is divided in dollars;
- All government contracts are awarded in dollars;
- The accounting and auditing processes focus on how dollars are spent; and
- Contract actions do not allow for an accurate accounting of the financial benefits of business development that occur when small businesses receive federal contracts.

Based on the determined methodology, four industries were identified where women-owned small businesses were either underrepresented or substantially underrepresented:

- National Security and International Affairs;
- Coating, Engraving, Heat Treating, and Allied Activities;
- Household and Institutional Furniture and Kitchen Cabinet Manufacturing; and
- Other Motor Vehicle Dealers.

Constitutional Concerns

While the role of SBA is to aid, counsel and assist small businesses, it is not the role of the agency to advise on questions of law. Therefore, the SBA worked closely with the Department of Justice in drafting a proposed rule that is cognizant of the exacting constitutional requirements that apply in implementing a gender specific set-aside program. According to Supreme Court precedent, the Equal Protection Clause requires "skeptical scrutiny of official action denying rights or opportunities based on sex," and any gender-based preference program must be supported by an "exceedingly persuasive justification." *United States v. Virginia, 518 U.S. 515, 533 (1996)*. As applied to the Federal Government, the constitutional standards prohibit federal agencies from discriminating on the basis of gender in awarding of federal contracts unless the preference furthers important governmental objectives and the means employed are substantially related to the achievement of those objectives. *Id.* at 533 (1996)

In order to conform to these constitutional standards, simply finding underrepresentation generally will not suffice to sustain the set aside of contracts for women-owned businesses. The equal protection standards the Supreme Court has articulated for gender programs have been applied by Federal courts to invalidate numerous WOSB contracting programs imposed by state and local governments when studies and other statistical evidence failed to demonstrate sufficient evidence of relevant discrimination. Consequently, we concluded that the soundest means of assuring constitutional compliance is for the agency to determine that setting aside those contracts solely for women-owned small businesses is substantially related to remedying gender discrimination in the relevant industry or contracting sector.

Summary of the Regulation

The proposed rule will assist WOSBs in procuring contracting opportunities with the federal government by providing procedures for certifying a business as an eligible WOSB, protesting eligibility determinations and awards, as well as providing a framework for agencies to make the determination that women-owned small business underrepresentation is related to gender discrimination. In addition, the rule sets forth when contractors can restrict competition to WOSBs.

Women's Procurement Goal

SBA's goal is not only to develop regulations implementing these procedures, but to help women-owned small businesses so they can compete both in the private market place and for federal contracts.

In analyzing the data found in the RAND study, we recognize that the real issue is that there are not enough WOSBs registered in CCR. As a result, we are analyzing what we have done in the past and what additional steps we can take to increase the number of WOSBs able to pursue federal contracts.

SBA has been working with its resource partners to educate women entrepreneurs not only on how to contract with the federal government, but on how to establish and grow their businesses. Currently, SBA provides business counseling and events including business matchmaking and networking opportunities through SBA field offices located around the country and through SBA resource partners, including Small Business Development Centers (SBDCs), SCORE and Women Business Centers (WBCs), that counsel prospective business owners on elements necessary to start a business.

SBA is taking a forward-looking approach. First, our programs are tasked with growing the universe of WOSBs and encouraging these businesses to register with the CCR, thus making these businesses eligible to contract with the federal government. Second, the role of SBA is to help those businesses become ready, willing and able to undertake and build a successful track record working with the federal government.

These initiatives will help WOSBs to achieve the congressionally- established goals. We must remember that there is no single magical approach that will expand the participation of women-owned small businesses in federal procurement; rather a combination of initiatives that take into account the individual needs of businesses is the best approach to provide opportunities for women small business owners to do business with the Federal Government.

The WOSB rule submitted by the SBA represents careful analysis which culminated in a proposed rule utilizing the most appropriate measures and methodology as well as the most pertinent legal advice. SBA fully supports women owned businesses and will take all necessary steps to implement this rule.

Thank you for the opportunity to testify today. I look forward to any questions that you may have.

Department of Justice

STATEMENT OF

ELIZABETH PAPEZ
DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON SMALL BUSINESS
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

FEDERAL GOVERNMENT EFFORTS IN
CONTRACTING WITH WOMEN-OWNED BUSINESSES

PRESENTED ON

JANUARY 16, 2008

STATEMENT OF
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Thank you Chairwoman Velazquez, Ranking Member Chabot, and Members of the Committee for the opportunity to appear here today to discuss the Justice Department's views on the federal Government's efforts to contract with women-owned businesses in a manner consistent with the Constitution and federal statutes.

One of the most recent developments in this area is the Small Business Administration's ("SBA's") publication of a proposed rule implementing the Women-Owned Small Business ("WOSB") Federal Contracting Program authorized by Public Law 106-554. That particular rule is addressed in SBA Administrator Preston's testimony before the Committee. For that reason, and because the Justice Department's position on federal contracting programs that employ gender preferences is based on constitutional and legal standards that are not specific to the program addressed by the recently published SBA rule, I will focus on the legal standards that govern the Department's approach to such programs generally.

As Administrator Preston testified and the Committee is aware, the federal Government has taken a number of measures to increase the participation of women-owned small businesses in federal Government contracting. Most of these efforts assist women-owned small businesses by improving their ability to compete with other small businesses for federal contracts, not by shielding them from such competition through gender-based restrictions on bidding opportunities. That said, one form of agency assistance that is authorized, though not required, by federal statute is the reservation, or set aside, of certain contracts for competition only by "small business concerns owned and controlled by women." 15 U.S.C. § 637(m)(2). Federal agencies that employ such set asides in their contracting programs must engage in gender discrimination among potential contract recipients because the set asides require the contracting agencies to exclude otherwise qualified businesses from competing for certain contracts based solely on the degree to which those businesses are owned or controlled by men.

To be constitutional, federal programs that discriminate on the basis of gender in awarding government contracts must pass muster under the equal protection component of the

Due Process Clause of the Fifth Amendment. *See United States v. Virginia*, 518 U.S. 515 (1996) ("*VMI*"); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982). The Justice Department's position on gender-based contracting programs necessarily reflects this constitutional requirement because the Department, like the rest of the Executive Branch, must construe and implement federal laws in a constitutional manner. The Department's position on gender-based contracting programs also reflects Supreme Court opinions and other federal cases applying the Constitution's equal protection requirements to such programs, because these are the cases that courts will consider in deciding whether specific agency WOSB programs are constitutional. The Department's general position on these matters serves as the basis for the Department's administration of its own programs, as well as for any guidance the Department may provide to other agencies.

The level of scrutiny that a government contracting program must satisfy in order to comply with equal protection depends on the type of preference at issue. Preferences, such as veterans' preferences, that do not depend on a recipient's race or gender are subject to rational basis scrutiny, which means courts will generally uphold them as constitutional if the Government can demonstrate a rational basis for adopting them. Preferences that are based on a recipient's race or gender are subject to higher levels of constitutional scrutiny. Race-based preferences must satisfy "strict scrutiny," which means that the Government must prove that the specific preference at issue is "narrowly tailored" to serve a "compelling government interest." Gender-based preferences must satisfy "intermediate" or "heightened" scrutiny, which the Supreme Court has identified as considerably more demanding than rational basis scrutiny, but distinct from the strict scrutiny the Court applies to government preferences based on race.

In *VMI*, the 1996 case in which the Supreme Court considered the constitutionality of a government program that discriminated on the basis of gender, the Court emphasized that its decision to apply intermediate scrutiny did not excuse the Government from establishing an "exceedingly persuasive" justification for the program. Noting the "strong presumption that gender classifications are invalid," Justice Ginsburg's opinion for the Court explained that "skeptical scrutiny of official action denying rights or opportunities based on" a person's gender is necessary to ensure that government programs, no matter how well-intentioned, do not violate the hard-fought line of equal protection precedents rejecting the notion that an individual's opportunity to "participate in and contribute to" a particular field should depend on that individual's gender. Accordingly, the Court held that to justify a gender-based preference program under intermediate scrutiny, the Government bears the burden of showing, through evidence that is "genuine" and "not hypothesized or invented *post hoc*," "at least that the [program] serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" 518 U.S. 515, 532-33 (1996).

It bears mention that at least one court – the Seventh Circuit in an opinion by Judge Posner – has questioned whether there is any meaningful practical difference between the exacting intermediate scrutiny standard the Supreme Court articulated in *VMI* and the strict scrutiny the Court applies to racial preferences. *See Builders Ass'n of Chicago v. County of Cook*, 256 F.3d 642, 644 (7th Cir. 2001). Whether or not this opinion raises a valid practical

question, the Justice Department, like the majority of federal courts, adheres to the Supreme Court's determination in *VMI* that there is a distinction between intermediate and strict scrutiny.

Federal courts applying this distinction to government programs for women-owned businesses have construed the "important governmental interest" aspect of intermediate scrutiny to mean that some degree of discrimination must have occurred in the economic sphere in which the program is administered in order for the Government to justify the program's constitutionality. The cases upholding gender-based preference programs under this standard emphasize the importance of the Government's proof of such discrimination. Similarly, the cases invalidating programs as unconstitutional under this standard emphasize the Government's failure to present evidence of discrimination in the economic sphere to which the preference program is directed.

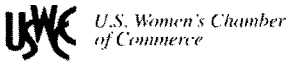
Although strict scrutiny also requires the Government to prove discrimination in justifying racial preference programs, the federal courts' focus on the Government's ability to prove discrimination in gender cases does not erase the distinction between strict and intermediate scrutiny. The Eleventh Circuit has explained this distinction as follows: "While there is a difference between the evidentiary foundation necessary to support a race-conscious affirmative action program and the evidentiary foundation necessary to support a gender preference, that difference is one of degree, not of kind. In both circumstances, the test of the program is the adequacy of evidence of discrimination, but in the gender context less evidence is required." *Engineering Contractors Ass'n v. Metropolitan Dade Cty.*, 122 F.3d 895, 901 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998).

Determining exactly how much evidence of discrimination is needed to support a gender-based, as opposed to race-based, preference program is, in the Eleventh Circuit's words, a "difficulty" that all government entities face in considering whether gender-based preference programs are constitutional. Federal cases upholding such programs do not generally distinguish between the evidence required to satisfy strict versus intermediate scrutiny in a way that readily allows the Government to determine that a particular study or other evidence of discrimination clearly goes far enough to justify a program under intermediate scrutiny, but does not go so far as to satisfy unnecessarily the requirements of strict scrutiny. What is clear from the cases is that mere findings of disparity or underrepresentation are generally not sufficient to establish the constitutionality of a gender-based preference program, and that courts are likely to strike down such programs if the Government cannot show genuine and non-hypothetical evidence of discrimination in the economic sphere in which the program will operate.

The Justice Department's position on gender-based set aside programs reflects these cases and the simple lesson they offer federal entities considering such programs: if those entities, which must establish and administer gender-based set asides in a constitutional manner, wish to maximize the chances that a particular program will survive constitutional scrutiny, it is both legally appropriate and legally prudent to require evidence of discrimination before implementing the program. This position accords with the requirement that the federal Government administer all federal programs, including those benefiting women, in a

constitutional manner, consistent with Supreme Court and other federal judicial precedents evaluating gender-based preference programs under intermediate scrutiny.

Thank you for the opportunity to testify today.



Testimony
of
Margot Dorfman, CEO
U.S. Women's Chamber of Commerce
Before the House Small Business Committee
On the Women's Procurement Program
January 16, 2008

I am here again today on behalf of millions of women business owners from all across America to tell you that the Small Business Administration has once again sabotaged the implementation of the Women's Procurement Program. And, to remind you why this program – as Congress originally intended it to be implemented – is so dearly needed.

Recently the SBA filed a new set of proposed rules for the implementation of the Women's Procurement Program. These new rules ignore the recommendations of scientific and legal experts, and render the program ineffective by limiting its use to a handful of industries, and requiring each and every federal agency to "conduct an analysis of the agency's past procurement activities and make a finding of discrimination by that agency in that particular industry."

For years and years the SBA has hidden behind false pleas for time while women business owners have lost billions of dollars: time to hear from the experts, time to gather the data, and time to understand how to determine women-owned status. But, with this latest action, they can no longer hide their contemptuous position towards securing fair access to federal contracts for women business owners.

The arbitrary and unscientific method they have chosen to select the industries for this program looks more like something pulled out of a hat than the results of seven years of work and a scientific disparity study. And the outrageous requirement that every agency conduct studies of discrimination in all industries, only shows us how far this administration will go to prevent women from gaining fair access to federal contracts.

When Congress first passed the Equity in Contracting for Women Act of 2000 – the SBA was to prepare a study to determine industries in which women business owners were underrepresented in federal contracting and establish procedures to verify eligibility

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and participate in a competitive set-aside program. The SBA first undertook this study in house. After completing their own study, the SBA leadership determined that they needed a study of their study – and that they needed experts to tell them how to do the study correctly and how to interpret this study.

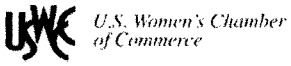
To this end, the SBA employed the National Research Council of the National Academy of Sciences. The NRC is a prestigious and well-respected institution which regularly is employed to provide expert advice to the federal government. The NRC established a prestigious Steering Committee for the project including the Chair of the School of Public Policy and Social Research at the University of California, Los Angeles, and scholars from the Hass and Marshall Schools of Business, the Department of Sociology at Rutgers University, and the School of Law at the University of Virginia.

These scientific and legal experts carefully framed the requirements for the study through the lens of the legal framework of disparity studies and the legal standards of gender preferences. They made a very clear set of recommendations. They recommended using four variables in four tables to show industry groups using a wide view of "ready and able" and a narrow view; and measuring contract actions vs. contract dollars.

The NRC also clearly stated how they recommend this data be interpreted. Industries that appear on two or more of the four tables may be deemed underrepresented. Using the NRC recommendations and the RAND data that followed, 87% of all industries should be included as underrepresented in federal contracting.

But, nothing is simple, direct and clear in the hands of the SBA! The SBA threw out the NRC's scholarly recommendations and whittled away at possible measurements until they found a narrow selection they liked. Then, they tried to move the emphasis from underrepresentation to discrimination and tagged on the incredible requirement that every agency complete a discrimination study in every industry. Again, the SBA has turned years of time and money into a ridiculous circus treating the lives of thousands and thousands of American citizens as toys in some political game.

Trust me, to women business owners, this is no game. Fair access to federal contracts is serious business. The economic and political rise of women in America is



truly something for the history books. But, the economic realities for women business owners remain very troublesome.

Since the paltry five percent goal for contracting with women-owned firms was set in 1994, the federal government has never hit the mark. Even today, as women own thirty percent of all firms in America, the federal government lags behind in doing business with women. Women lose between five and six billion dollars every year as the federal government fails to meet the low five percent mark. And the openly unsupportive attitude that is exhibited by the SBA only serves to continue a sad tradition of failure within the government contracting ranks.

Once again I ask the House Small Business Committee to compel the SBA to implement the Equity in Contracting for Women Act of 2000 as intended by congress seven years ago. It is clear that, without this law in place, women owned firms are losing billions of dollars annually. Women business owners are ready and able to grow their businesses. We ask you to support their growth as they provide for their families and advance the economic growth of their communities.

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Statement of Denise Farris on Behalf of Women Impacting Public Policy

Before The U.S. House of Representatives Committee on Small Business

"SBA's Progress in Implementing the Women's Procurement Program"

January 16, 2008

Good morning. Chair Velázquez, Ranking Member Chabot, and Members of the Committee, my name is Denise Farris. Thank you for holding this hearing and thank you for inviting me to testify. I am appearing today on behalf of Women Impacting Public Policy (WIPP) and am honored to speak on behalf of its membership which is well over half a million women business owners nationwide. I own my own law firm, Farris Law Firm LLC, located in Stilwell, Kansas.

Just to give you a little background on my practice, I am a commercial construction lawyer and for the past seventeen years I have focused on the constitutional parameters of affirmative action in government contracting. I have been a speaker and author on the topic, most recently in the American Bar Association's book, Federal Government Construction Contracts, 2003. I have represented women, minority and majority-owned firms, as well as large business organizations on this issue, and regularly serve as a consultant in the review of pending legislation from a local, county, state and federal level. I am also currently working on a multi-coalition, minority, women and non-minority initiative to implement a formal small business and affirmative action plan in the State of Kansas. I am sure the Committee can appreciate how important this proposed rule is to me both professionally and personally.

As this Committee well knows, Public Law 106-554 {Section 8(m) of the Small Business Act, 15 U.S.C. Section 637(m)} was passed in the year 2000. The law sought to address and remedy discrimination against women business owners in federal contracting by creating a women's procurement program which gives contracting officers the ability to restrict competition to women-owned businesses for up to five percent of all federal contracts. The law defined women-owned small businesses (WOSBs) that

qualify for restricted competition as small according to the SBA size standards, majority-owned by women, and certified as economically disadvantaged. The law further states that WOSBs need not be economically disadvantaged to qualify for procurement preferences in contracts up to $3 million ($5 million in manufacturing) in industries where they are found to be "substantially underrepresented." The law gave the Small Business Administration (SBA) the responsibility to determine which industries were underrepresented by women, requiring a study of the data to determine which industries were "substantially underrepresented".

Initially, the SBA undertook its own study, but rejected it internally. For seven long years, the SBA studied and restudied the data with the culmination of the report published by the RAND Corporation, titled, "The Utilization of Women-Owned Small Businesses in Federal Contracting," published in the summer of 2007.

The RAND Corporation was asked by the SBA to compute disparity ratios for WOSBs using contract dollars and number of contracts. RAND computed the disparity ratios in four different ways: (1) number of contracts using total WOSB numbers; (2) number of contracts using WOSBs registered in the Central Contractor Registration (CCR); (3) contract dollars using all WOSBs; and (4) contract dollars using WOSBs registered in the CCR. The method used to define industries was the North American Industry Classification System (NAICS) codes.

The RAND Study concluded that, depending on how SBA wanted to interpret the data, 87 percent of industries would be considered underrepresented, or 0 percent of industries would be considered underrepresented depending on whether contract dollars or number of contracts were used and whether the total number of women-owned firms

or only those registered in the CCR were used. Even the impact of whether the SBA used a 2 digit (broad category), 3 digit, or 4 digit (narrow industry category) NAICS code affected the outcome.

The SBA, in the proposed rule, chose to use the disparity ratio that analyzed the number of WOSBs registered in the CCR by contract dollars awarded, and the 4 digit NAICS code as the industry definition, thus choosing the narrowest method of data analysis. The proposed rule identifies four NAICS codes that will be subject to restricted competition: cabinetmaking, engraving, other motor vehicle dealers, and national security and international affairs; however, there is an additional requirement even for those four categories under this proposed rule—an agency must perform an internal audit of its past contracting actions to show that it is rectifying its own past discrimination before the contract can be designated for restricted competition.

WIPP believes that the practical effect of this rule is that virtually no contracts will ever be successfully set aside under this program as structured in the proposed rule.

The proposed SBA ruling that we are discussing today also carries a significant impact in that it incorrectly suggests to state and local authorities that gender based programs are subject to an incorrect legal standard of review, thus making it more difficult for gender based programs to survive at a state and local level.

Let me devote some time to discuss the legal side of this proposed rule. First, we believe that the SBA proposed rule applies the wrong legal standard of review. Second, the proposed rule not only incorrectly applies strict scrutiny, but creates a new "Strict Strict Scrutiny" standard.

On page one of the RAND Study, which forms the statistical underpinning for the SBA's current rule as described above, a detailed analysis of the Supreme Court decisions in *Croson*[1] and *Adarand*[2] makes the leap of applying the *Croson* and *Adarand* cases to gender-based studies. But in fact, each of these cases dealt specifically with legal challenge to a race-based, not gender-based, program. The Study then makes the following statement: "Although there have been few cases concerning women-owned businesses per se, it appears that Congress **assumes** that a similar standard would hold – hence its stipulation that before the SBA can restrict bidding to WOSBs [women-owned small businesses], it must first show that there are disparities that adversely affect them." No citations or other references are listed to back up this "assumption," and the conclusory statement ignores nearly forty years of Supreme Court precedent on this exact issue.

In fact, this issue was squarely addressed by the U.S. Attorney General's office. In its June 28, 1995, report to the Department of Justice General Counsels, the Assistant Attorney General, Walter Dillinger, concluded that the *Adarand* decisions, which applied a "strict scrutiny" review, did not apply to gender-based affirmative action programs. Specifically, the report concluded:

> "*Adarand* did not address the appropriate constitutional standard of review for affirmative action programs that use gender classifications as a basis for decision making. Indeed, the Supreme Court has never resolved the matter. (Footnote omitted). However, both before and after *Croson*, nearly all circuit court decisions have applied intermediate scrutiny to affirmative action measures that benefit women. (Footnote omitted). The Sixth Circuit is the only court that has

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[1] City of Richmond v. J. A. Croson, 488 U.S. 469 (1989).

[2] The *"Adarand" decision was issued in three separate Supreme Court decisions: Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995); *Adarand Constructors, Inc. v. Slater,* 528 U.S. 216 (2000); and *Adarand Constructors, Inc. v. Mineta,* 532 U.S. 967 (2001).

equated racial and gender classifications: purporting to rely on *Croson*, it held that gender-based affirmative action measures are subject to strict scrutiny. (Footnote omitted). That holding has been criticized by other courts of appeals, which have correctly pointed out that *Croson* does not speak to the appropriate standard of review for such measures." (Walter Dillinger, Assistant Attorney General, "Memorandum to General Counsels", U.S. Department of Justice, Office of Legal Counsel, Washington DC. June 28, 1995)

The significance of these different review standards is illustrated below:

Standard of Review	**Applicable**	**Criteria**	**Explanation**
Strict Scrutiny	Race National Origin Religion Alienage **(SUSPECT CLASSIFICATIONS under Equal Protection Clause of 5th and 14TH Amendment)**	Class justified via: 1. **Compelling** state interest And 2. **Narrowly tailored** program	1. Proof of past discrimination thru disparity study 2. Flexible program based on local availability / capability; not overinclusive (ie goals for non-represented groups); not underinclusive (must contain race neutral measures such as small business development, bonding, etc.) 3. Most difficult to justify on equal protection grounds.

Intermediate Scrutiny	Gender Illegitimacy	Class justified via: 1. **Important** state interest And 2. Program **substantially related** to serving that interest	1. No case law supporting disparity study requirement. Only government acknowledge-ment of important policy reason. 2. No case law restrictions as in "Strict Scrutiny" above. 3. Easier to justify on equal protection grounds.
Rational Basis	All classifications except the above	1. Class is "rationally related" to 2. Serving legitimate state interest	1. Widespread discretion to create classes 2. Easiest to justify on equal protection grounds – extremely difficult to challenge.

Accordingly, if Public Law 106-554 were subject to strict scrutiny, it would require a disparity study and a "narrowly tailored program" per the above. However, as a gender based program, it is our belief that Public Law 106-554 does not require a disparity study and could be immediately implemented with no further statistics or additional agency-by-agency investigations. We would argue that strict scrutiny is not the proper test for the SBA or the Department of Justice to assume. We believe, based on

legal history, that a gender based program should use "intermediate scrutiny" as the proper legal standard of review.

A long line of legal cases, but most importantly the 1989 decision of *City of Richmond v. J. A. Croson*, indicated that all programs based on race were inherently suspect and would only be implemented following proof of a compelling government interest, coupled with a program narrowly tailored to address that interest. This standard first applied only to local and state programs, but following the line of *Adarand* Supreme Court cases in the late 1990's, extended the standard to federal programs as well. Thus all race-based programs required a statistical disparity study to justify affirmative action programs and goals, and additionally required narrowly tailored programs to meet those goals, "narrowly tailored" being defined as flexible, regional, and ethnic group specific, containing waiver processes; and also containing race-neutral measures such as small business programs for access to capital and bonding. Although this standard applied only to race-based programs, for years gender-based programs have incorrectly been subjected to the same legal standard.

In fact, under *Craig v. Boren*, a 1976 case argued by then attorney Ruth Bader Ginsburg[3], the Supreme Court has long held that gender-based programs are subject to "intermediate scrutiny" standards, meaning that to justify the program, the government need only prove an important governmental interest, and a program substantially related to achievement of that interest or purpose. Simply put, intermediate scrutiny does not

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[3] *See e.g., Reed v. Reed*, 404 U.S. 71 (1971): First gender classification case measured under "rational basis" review; *Frontiero v. Richardson*, 411 U.S. 677 (1973); acknowledging "Our country has had a long and unfortunate history of sex discrimination".; *Craig v. Boren*, 429 U.S. 190 (1976), argued by then attorney and current Supreme Court Justice Ruth Bader Ginsburg in decision which created "intermediate scrutiny" for gender based classifications.

require disparity studies to implement the program, nor does it require the narrow structuring required in race-based programs.

In this instance, under intermediate scrutiny the SBA easily possesses the legal ability to recognize the following and act accordingly:

1. As of 2007, 7.7 million businesses are 51% owned and controlled by women; employing 7.1 million people and generating revenues of $1.1 trillion. [4]
2. Despite this fact, women-owned businesses receive only a mere 3.4% of federal procurement contracts. [5]

This differential, standing on its own, immediately implies that either the government is not doing an adequate job of reaching out to WOSBs to integrate them into the procurement system, or alternatively that there remain active barriers preventing women-owned businesses from open competition in federal procurement.

Couple this with evidence of the overall importance of women-owned businesses to the economy (again, 7.7 million women-owned businesses employing more than 7.1 million people, and generating $1.1 trillion in sales), and the intermediate scrutiny standards are met. This is proof of an important government interest --support of women-owned businesses in the national economy and all of the flow down positive effects of same - along with a program substantially related to achievement of that interest – five percent restricted set-aside to encourage procurement officers to more aggressively recruit and move WOSBs into the system, and a percent that is extremely modest given the fact that WOSBs represent 50 percent of the total businesses in the United States.

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[4] Center for Women's Business Research. http://www.cfwbr.org/facts/index.php (2007).

[5] "The Utilization of Women owned Small Businesses in Federal Contracting", Kauffman-Rand Institute for Entrepreneurship Public Policy, Ch. 1, p. 1; (2007).

The SBA not only misapplied the legal standard, in our opinion, but took it a step further and created a new "Strict Strict" scrutiny standard for gender-based programs for women.

The SBA has acknowledged disparity in only four narrow areas: cabinetmaking, engraving, other motor vehicle dealers, and national security and international affairs. But instead of authorizing restricted competition immediately in these four areas, as should be allowed through the statistical study just completed, the SBA placed an additional requirement on any agency wishing to restrict competition to WOSBs to conduct its own internal study proving that it has actively discriminated against women business owners. Not only is this additional layer of study not required or even applicable for gender-based programs, but it represents an additional layer of review even if strict scrutiny were the correct standard to apply in the first place. This additional investigation poses another delay in program implementation and additionally requires the agency to go a step further in making express findings of discrimination against itself. We do not believe that any other groups who are recipients of restricted competition under the Small Business Act, such as 8(a) or service-disabled veterans, are subject to this new "Strict, Strict Scrutiny" as proposed in the rule.

In addition, the creation of this artificial standard at the federal level will have chilling and highly detrimental consequences at the state and local level. One of my volunteer responsibilities is to review the annual WBE performance goal reports issued by our local governments. These programs require proof of availability. Availability cannot be measured accurately until women business owners register their businesses and capabilities. The federal government sets the tone for WOSBs as well. If the federal

government, by actions such as this proposed rule, indicates that WOSBs are not "underrepresented" in federal contracting, the message flows down that WOSBs are not "underrepresented" at any level. And if that is the handwriting on the wall, why should WOSBs attempt to register, particularly where local and state registration requires submission of annual revenues, ownership documents, and tax returns?

Another example is our recent effort to draft and enact new legislation in the State of Kansas which creates a Small and Minority / Women-Owned Business program for the first time. We have thirteen sponsoring organizations and have also just received the endorsement from the Topeka Kansas and Greater Kansas City Chamber of Commerce. If the Chambers, which are largely made up of non-minority businesses, hear that WOSB programs are getting trimmed at the federal level, it is likely their endorsement will be withdrawn at the state and local levels, as well.

We also believe there are some fundamental flaws in the data on which this proposed rule is based. We believe that the RAND study did its best to analyze what SBA directed it to do, but find it insufficient. We believe the Study relies on flawed Nails codes, does not analyze the huge disparity variance between all WOSB awards by contracts versus WOSB CCR awards by contract dollars, and additionally, relies on outdated size standards.

Although the RAND Study concludes that only four NAICS industry codes had been discriminated against, it also expressly admits that collection of accurate data by NAICS code was a problem where: (a) the codes were substantially changed during the study's time frame, thus having some companies listed as one NAICS code at one time, and then transferring to another NAICS code later in the time frame. In other words, the

NAICS code segregation was a constantly moving target during the time frame chosen by the SBA for the study parameters. In addition - and this is a critical point that needs to be addressed here and later - the RAND Study also admits that in the NAICS code review, the SBA did not conduct any independent verification of size standards within that code.

The RAND Study indicates that it followed four primary data gathering processes, each one directed by the SBA and each one predicated solely on attention to WOSBs as prime contractors. Thus, by its control, the SBA prevented the RAND Study from analyzing and recommending its own independent data gathering mechanism which might have ensured a more neutral, and thus more statistically reliable, report. The Study admits: "Discrimination in the awarding of contracts, however, might result from women business owners being less likely to bid on [federal] contracts. This would not be detected if the pool of available firms consists of only firms that have demonstrated their interest by bidding on contracts. Again, the disparity ratio can only measure the difference; it cannot explain it". [6]

We note that in 2006, the SBA amended its size standards to raise the threshold for commercial construction to $13 million for specialty subcontractors and $31 million for general contractors. Despite this fact, the report uses pre-2006 size standards. The correct size standards could easily be located per applicable NAICS codes at: http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=b6e780955530049be4cc0d0a0e391115&rgn=div5&view=text&node=13:1.0.1.1.15&idno=13. See also CFR Section 121.201.

[6] RAND Study, p. 4.

The RAND Study admits it had to rely on outdated NAICS codes. In its footnote (page 8), it states that the Army did not begin reporting transactions above $2500 until FY 2003; the Marine Corps in FY 2004; and most other services and agencies in FY 2005. It is difficult to see how a credible contracting history can be compiled with the absence of the Department of Defense numbers- the largest buyer of federal goods and services in the federal government.

Finally, the Study in Chapter 3, pg. 9, par. 3, noted the difficulty it encountered in gathering data where federal contracts {many using Indefinite Delivery Indefinite Quality (IDIQ) style delivery systems covering both goods and services over several NAICS codes in a single procurement over a 3 year period} makes it difficult or impossible to "parse out" specific NAICS code for actual goods and services purchased, resulting in "generalized" reporting. This and the issue directly above may account for why the disparity methodology using CCR registrations to total contract dollars awarded shows limited disparity. We do not believe the SBA should promulgate a rule which is reliant on insufficient data. Although WIPP believes the rule is seriously flawed and does not need a disparity study, at the very least, we believe the SBA should correct the flaws in the data on which it is basing the proposed program.

In summary, WIPP believes that the SBA proposed rule erroneously relies on a disparity study applying "Strict Scrutiny" instead of "Intermediate Scrutiny" and that the creation of a new "Strict, Strict Scrutiny" standard is unnecessary and lacks parity with other preference programs under the Small Business Act. Furthermore, we believe the proposed rule is based on a study of data which contains flawed data.

We urge the Committee to send SBA back to the drawing board. We urge the Committee to investigate why only 55,000 women-owned businesses are registered in the CCR when in fact, there are 10.4 million women business owners nationwide. Since it has taken the SBA seven years to implement the program, we believe the agency should thoughtfully consider the public comments it gathers through the current 60 day period. WIPP urges Congress to require the SBA to implement a meaningful women's procurement program which will have a positive impact on WOSBs to perform federal contracts.

Thank you for giving me the opportunity to testify. I am happy to answer any questions.

Appendix A

Supreme Court Decisions Gender Based "Intermediate Scrutiny"

Defined as: " Important governmental objectives and program **substantially related** to achievement of those objectives.""

Case	Description
Reed vs. Reed, 404 U.S. 71 (1971)	**Importance:** First case since 14th Amendment passed in 1868 which struck a state law on grounds of gender discrimination. (Male over female preference in estate administration.) **Standard applied:** Rejected attorneys request (Ruth Bader Ginsburg) to apply "strict scrutiny" and applies "rational basis" with extra emphasis on facts.
Frontiero v. Richardson, 411 U.S. 677 (1973)	**Importance:** First Supreme Court case squarely placing issue of whether "rational basis" or "strict scrutiny" applies to gender discrimination cases. (Restrictions against perqs to husbands of females serving in armed forces. Wives of male servicemen received perqs without showing of dependence; husbands of female servicewomen received perqs only upon showing of dependence). **Standard applied:** Court defines "sex" as a "suspect classification"; suggests a "strict scrutiny" level of review but fails to obtain plurality opinion; court utilizes standard somewhere between rational basis and strict scrutiny in finding restriction unconstitutional.
Craig v. Boren, 429 U.S. 190 (1976)	**Importance:** Court begins move to formalizing a new standard between "rational basis" and "strict scrutiny". Case involved Oklahoma statute permitting women 18 years old to purchase 3/2 beer but prohibiting young men until age 21. **Standard applied:** Justice Brennan authors new "intermediate scrutiny" standard: "To withstand constitutional challenge, previous cases establish that **classifications by gender** must serve **important governmental objectives** and must be **substantially related to achievement of those objectives**."
United States v. Virginia, 518 U.S. 515 (1996)	**Importance:** In a decision rendered seven years after *City of Richmond v. J. A. Croson,* subjects race based programs to "strict scrutiny" review with definition of required disparity study and narrowly tailored program, Supreme Court declines to apply strict scrutiny review to gender based discrimination. Dealing with female's right to apply to Virginia Military Institute. **Standard applied:** Court declines to apply strict scrutiny and holds that intermediate scrutiny remains the applicable standard for gender based discrimination. No discussion of disparity study; no discussion of "narrowly tailored program", even though decision is issued seven years after the *Croson* decision.

1. None of the above cases mention or set forth a "disparity study" requirement
2. None of these case require a program "narrowly tailored" as defined in *Croson* and *Adarand*
3. None of the *Croson* or *Adarand* cases setting forth "disparity study requirements" and criteria for "narrowly tailored program" mention gender based programs; they deal exclusively with race or ethnicity based programs.

I am Beth Gloss, the managing member of UNITED MATERIALS, LLC. We are a roofing contractor in Denver, Colorado specializing in commercial roofing, particularly reroofing, roof repair and roof maintenance. We are a successful company and handle federal contracts as part of our normal business. We provide excellent value and customer service but lose out on a great deal of business due to the lack of a clear, defined women-owned business procurement program and an emphasis from Washington D.C. to fulfill guidelines previously set.

The SBA, in my experience, does nothing to encourage federal buying from women-owned business, but only existing formal set-aside programs and vehemently discourages contracting officers in a variety of agencies from attempting to purchase from women owned small businesses. The SBA, in its own words, has a program "whose mission is to level the playing field for women entrepreneurs still facing unique obstacles in the business world." The ambivalence found inside this taxpayer sponsored agency is frustrating and unconscionable.

Because there is no set-aside program for women-owners businesses in place, heavy pressure is continually applied in our construction field to purchase from contractors where a formal set-aside program is in place. This happens even when there are women-owned contractors available and eager to do the work. I have been thwarted in any attempt to encourage the government buyers to do business with my company as a woman-owned business.

I have questioned the individual buyers and purchasers with whom I have been working. They have directed me to one reason for not following through with a women-owned bid opportunity. They have one common answer, the SBA is pressuring them to use only existing formal programs. Consequently, the lack of a women-owned set-aside program is a double-edged sword. There is no way for contracting officers to reach out and set-aside competition between women-owned businesses, and there is obviously not a serious push from Washington to reach women business owners.

The attitude towards women's businesses is negative. There is no pressure coming down to the local level to outreach to women. The abundance of OTHER set-asides without a specific program for women – makes it very difficult for women to get a fair opportunity to compete.

Following are a few of my negative experiences in dealing with the SBA and government purchasing:

- I've made 3 different trips to the local SBA office to search for information or help in obtaining federal contracts. I made these in-person visits after being frustrated in my searches online through the SBA website for guidance on obtaining federal work as a women-owned small business. I was sent from person to person only to be repeatedly told that unless I was undercapitalized and could qualify for the 8(a) program, I was beating my head against the wall.

The SBA employees all said that there wasn't time or a mechanism for them to try to meet or encourage the meeting of the "informal guidelines" of the five percent buying quota mandated by the federal government over the last twelve years. The local SBA office expressed no imperative to do business with women because there is not a formal program in place.

- We were the successful bidder on a contract for indefinite quantity roof repairs at a Denver military base. Without a women's program in place, the SBA pushed the buyer to cancel the bid and pushed them to do their purchasing within another formal program. This resulted in the purchase being bundled in with other contracts to hide their steps.

  We have been told several times that this is a horrible approach because the number of layers and people involved in communications essentially take out the possibility of good emergency responses to water leaks and infiltration. This is POOR VALUE for the government because a great deal of physical damage is done to valuable real estate and property while wading through the procedures required in these bundled contracts.

- We have repeated seen how the "good old boy" politics block women contractors as contracting methods are abused to assure the women are blocked from competition.

- I have had several meetings with the Director of the "Small Business Utilization Center" at the Denver Federal Center. I have wanted to encourage buying based on a women-owned small business status. While I received courteous treatment, I have gone back to the government buyers who say that they were discouraged from pursuing a woman-owned business purchase by this office because it doesn't help meet any percentages required.

This new SBA proposal has unreasonable expectations and requirements, which are not included in other government set-aside programs. It's unrealistic and unfair to ask the Contracting Officers of federal agencies to prove which industries have discriminated against women. That statistical analysis has have already been developed by the SBA itself. Several separate government-funded studies have been presented which identify over 2300 types of business that are underutilized when it comes to women.

With the workload expected of Contracting Officers it will be impossible for them to have the time or resources to do a statistical analysis of each business type for each contract. Burdening agencies with this task is ludicrous and expensive, and makes a mockery of the purported purpose of this proposal which is to encourage the federal government to expand purchasing from women-owned businesses.

Small businesses employ approximately fifty-percent of the private sector work-force. We also account for sixty- to eighty-percent of new jobs. A great deal of new technology and innovative ideas have always come from the small businesses in the United States.

We employ workers at a living wage, provide good benefits, make sure our hiring practices are fair, provide family health insurance, and continuing education. Any growth we experience will be reinvested into more jobs, more education, and especially good value provided to the government, as we have in the past.

Even though over thirty-percent of the small businesses in the United States today are owned by women, only 3.1% of federal contracting dollars go to these businesses. Providing a strong set-aside program for women-owned small businesses will increase the number of excellent, competitive contractors from which purchasing agents have the right to procure goods and services quickly and efficiently. This will increase opportunities for women business owners and help them to gain a stronger foothold into federal contracting. This makes sound economic sense and provides far better value for the government as they continue to encourage small businesses to expand and grow.

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Good morning. My name is Pam Rubenstein and I am the second generation owner and CEO of Allied Specialty Precision, Inc. in Indiana. My company was founded in 1954 and today has grown to 85 employees. We produce precision aerospace component parts serving the hydraulic, fuel control, and braking systems of every commercial and military aircraft that flies in the U.S. today.

Since 1954, Allied Specialty Precision, Inc. (ASPI) has built a thriving precision manufacturing business on a solid foundation of continuous innovation, uncompromising quality, and outstanding customer service. As the company expanded, so did its reputation for innovation and problem-solving. That reputation, as well as its machining expertise, is an integral part of the company, and continues at Allied Specialty Precision to this day. Today, Allied Specialty Precision is a top-quality precision manufacturing facility with 26,000 square feet of manufacturing space, highly skilled employees, a solid management team, and a company-wide spirit of excellence built on fifty-four years of quality and customer service. Allied performs a wide range of processing including CNC machining; gear manufacturing, O.D., surface and Blanchard grinding; wire EDM; EDM small hole drilling; honing; broaching; brazing; pressure, leak and load testing; passivation; deburring and assembly.

Since I bought my business in 2005, I am proud to say that we have added a major customer, doubled sales, increased employment, and purchased 5 major machine tools. We have invested over $1.5 million in the last year alone in equipment and training. The advanced manufacturing business is expensive and competitive. And, even with our

strong effort, it is clear to me that implementing the Women's Federal Procurement Program would be a terrific boost to my company and employees.

Direct federal contracts are very important to our growth and our movement into new industry sectors. The only industry we currently serve is aerospace. Right now, as you all know, aerospace is booming and the outlook for the next 10 years is excellent. But all business, even advanced manufacturing, is cyclical.

I need to begin to prepare for the eventual downturn in aerospace manufacturing now so that my employees and their families will be protected in the future. The Women's Federal Procurement Program would be an amazing asset in this endeavor. If the federal government is encouraged to seek out woman-owned manufacturers, I would see more potential work, could quote more, and find my way into other industries.

Allied Specialty Precision, Inc. does not play on a level playing field. Unfortunately, many daily challenges arise simply because I am a woman. Business people – bankers, insurance brokers, tool salespeople, machinery brokers, etc. – are all shocked when they call or visit my shop. Many men are so taken aback at the fact that we are woman-owned that they can't look me in the eye during a conversation! We may be talking about my purchasing a $500,000 machine, but they just can't seem to get past my being female.

Two years ago I attended the International Manufacturing Technology Show in Chicago. It's a huge venue dedicated to showcasing the latest in machine tools, technology,

software, etc. for advanced manufacturing plants. I had been to the tool show many times during my years at Allied, but this was the first time I was there as a business owner. And I had a mission at that show – I was shopping for a $500,000 five-axis simultaneous mill – a very high-tech, specialized piece of equipment that I needed to manufacture parts for hydraulic pumps in aircraft. As you might imagine, most booths at the show were staffed by men giving out information, answering questions, and writing quotes.

As I entered the booths of manufacturers who offered such machines, most of the salesmen ignored me. One asked, "What do YOU want?" Another asked me whether my husband was out shopping since I was at the tool show. When I told them what I was looking form, their jaws dropped. But not one of those men apologized or offered me the information I was seeking. Obviously, they did not get my business or my money. Since that show, I have purchased 2 five-axis simultaneous mills – from a company that took me seriously.

Just yesterday, I had a telephone call from a customer who wants to come visit our shop. We are always open for customers – for any visitors, in fact. I'm very proud of my facility and my employees. The bottom line is that without our employees, there wouldn't be a company. The customer who's coming to visit later this week ended our conversation by asking me to make his plane reservations between New York and South Bend, find him a hotel, and tell him how to get around town. He certainly wouldn't have asked that of a male business owner! Needless to say, if he really comes to visit us, he will have made his own travel reservations.

So why does the Small Business Administration feel that advanced manufacturing businesses owned by women should not be one of the industries selected for the Women's Procurement Program? Not a day goes by that we don't have some issue over my gender. Obviously, those issues have not shut us down, but they've certainly slowed our growth. My employees and their families deserve the best I can offer them – and I can offer them more if I can attract more work – especially from industries new to us.

In addition, I am an active member in the National Tooling & Machining Association (NTMA), serving as Education Team Leader and co-leader of their workforce development initiative – Precision Jobs for American Manufacturing. NTMA is one of the largest metalworking associations in America.

Every product that is manufactured is formed by a tool, die, or mold made by our industry. Manufacturing companies like mine contribute more to the economy than just employment and spending. The self-sufficiency of the U.S. manufacturing sector rests squarely on the shoulders of a strong domestic tooling industry.

Our $40 billion industry employs 200,000 workers in 11,000 companies across the nation (Bureau of Labor Statistics data - 2005). Tool and die makers are some of the best-paid workers in the country, making approximately $47,000 per year. The majority of our

operations are small, family-owned businesses. In fact, ninety percent of all tool and die shops employ less than 50 people. I am proud to be an owner in this strong and independent manufacturing industry.

I ask the support of Congress to assure that the SBA amend the proposed rules for the implementation of the Women's Procurement Program to include manufacturing. We are ready to step up to new heights in business and we hope Congress will act to support women business owners. Thank you.

Testimony of Jennifer K. Brown
Vice President and Legal Director
Legal Momentum

Hearing: SBA's Progress in Implementing the Women's Procurement Program

Committee on Small Business
United States House of Representatives

January 16, 2008

Good morning, distinguished Members of the House of Representatives Committee on Small Business. Thank you, Chairwoman Velazquez, for inviting me to testify today, and thank you as well, Ranking Member Chabot.

I am Jennifer Brown, Legal Director of Legal Momentum. Founded in 1970, Legal Momentum is the nation's oldest legal advocacy organization dedicated to advancing the rights of women and girls. With headquarters in New York City and offices in Washington, D.C., Legal Momentum has been a leader in establishing legal, legislative, and educational strategies to secure equality and justice for women across the country. Our public policy and litigation efforts focus on four areas that are of greatest concern to women in the United States: freedom from violence against women, equal work and equal pay; the health of women and girls; and strong families and strong communities.

I very much appreciate the opportunity to contribute today to the Committee's consideration of the Small Business Administration's Proposed Rule for implementing the Women's Procurement Program. As you know, this program was authorized by Congress in 2000 as a tool for promoting contracting opportunities for women-owned business enterprises. It is only the most recent in a series of actions Congress has taken to root out longstanding discrimination against women business owners, and to promote their equal opportunity to compete for federal contracts.

The Women's Procurement Program authorizes federal agencies to reserve certain contracts for bidding by women-owned small business enterprises in industries where detailed analysis has demonstrated that such businesses are not getting appropriate opportunities to participate in federal contracting. This program was carefully crafted by

Congress to meet relevant constitutional standards. The SBA's Proposed Rule implementing the program would add on a completely unnecessary and debilitating requirement before any federal agency could use this program: it would require the agency to conduct its own, additional analysis of its procurement history, and to find that it had discriminated against women-owned small businesses in the relevant industry.

I can summarize my testimony very briefly. The SBA has correctly identified intermediate, or heightened, scrutiny as the constitutional standard that the Women's Procurement Program must meet. The program as Congress created it meets that standard. Far from ensuring the constitutionality of government operations, the SBA's Proposed Rule instead would graft onto this program additional agency obligations that would virtually guarantee no women-owned business would ever benefit from the program. These additional obligations are not constitutionally mandated and in practice, they would only undermine Congress's clearly expressed intent and well-founded interest in increasing participation in government procurement by small businesses owned by women.

I. The Heightened Scrutiny Standard Provides the Correct Constitutional Framework for Assessing the Women's Procurement Program

As SBA acknowledged in the Supplementary Information to the Proposed Rule, the Women's Procurement Program must satisfy the heightened scrutiny standard to be constitutionally sound. Women-Owned Small Business Federal Contract Assistance Procedures, 72 Fed. Reg. 73,285, 73,288 (Dec. 27, 2007). As with other gender classifications in the law, affirmative action programs benefiting women must carry an "exceedingly persuasive justification" to satisfy this level of scrutiny. *See, e.g.*, *United*

States v. Virginia, 518 U.S. 515, 533 (1996). A gender-conscious program is constitutional only if it serves "important governmental objectives," using means that are "substantially related to the achievement of those objectives." *Id.* And, importantly, the justification for such a program "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* Rulings by, for example, the Eleventh Circuit in *Ensley Branch NAACP v. Seibels*, 31 F.3d 1548, 1579-80 (11th Cir. 1994) and the Third Circuit in *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990, 1000-01 (3d Cir. 1993) confirm the applicability of heightened scrutiny to government affirmative action programs benefiting women. *See also, e.g., Coral Constr. Co. v. King County*, 941 F.2d 910, 930-31 (9th Cir. 1991).

II. The Women's Procurement Program Serves "Important Governmental Objectives"

Without question, preventing discrimination against women-owned businesses in the award of tax dollars through the federal government's procurement processes is an important governmental interest. Literally for decades, beginning with the 1978 report of the Federal Interagency Task Force on Women Business Owners, *The Bottom Line: Unequal Enterprise in America*, Congress has been receiving evidence of discrimination against women-owned businesses and these businesses' extremely low level of participation in government procurement opportunities. Actions taken over the years, including executive orders issued by Presidents Carter and Clinton, produced little progress. Responding to the snail's pace of progress in this area, Congress in 1994 established a goal that five percent of all federal contracts be awarded to businesses controlled by women, *see* 15 U.S.C. § 644(g).

Yet even this extremely modest goal has never been reached. *See, e.g., Trends and Challenges in Contracting With Women-Owned Small Businesses*, GAO-01-346, at 16 (2001) (noting failure to meet the five percent goal in first four years after it was adopted). And meanwhile, Congress continued to receive evidence of discrimination and underutilization of women-owned businesses. For example, in 1996, not long before the Women's Procurement Program was created, the Department of Justice issued an extensive report, *The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey,* 61 Fed. Reg. 26,050 (May 23, 1996). While focused on evidence of discriminatory contracting barriers faced by minority business owners, the report also documented extensive discrimination against women-owned businesses. Among the areas discussed were the virtual exclusion of women from all aspects of the construction industry, *id.* at 26,056 & n.62; the persistence of "glass ceiling" employment discrimination that blocks women from reaching the private sector management positions that are most likely to lead to self-employment, *id.* at 26,056-57 & n.75; sex discrimination by lenders, *id.* at 26,057 & n.86; and exclusion from business networks, *id.* at 26,059 & nn.108-109, and bonding, *id.* at 26,060 & n.118.

Another study, commissioned by the U.S. Department of Justice and reported in 1997, assessed 58 studies of disparity in government contracting from states and localities across the country, and made a stunning finding: that "[w]omen-owned businesses receive only 29 cents of every dollar expected to be allocated to them based on firm availability." Maria E. Enchautegui *et al.,* The Urban Institute, *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?* 15 (1997). Indeed,

underutilization of women-owned businesses was the most widespread finding among the disparity studies. *Id.*

Similarly, a brief filed by the Department of Justice in early 2001 in defense of another federal affirmative action program for both minority- and women-owned businesses catalogued what the Government termed the "enormous body of evidence of discrimination and the effects of discrimination" that Congress had received over a period of years concerning these businesses, especially in the construction field. *See* Federal Defendant-Intervenors' Post-Trial Brief in *Gross Seed Company v. Nebraska Dep't of Roads, available at* http://www.usdoj.gov/crt/emp/documents/grossbrief901.htm#Effects.

Numerous courts have recognized that government has a "legitimate and important interest in remedying the many disadvantages that confront women business owners." *See, e.g., Coral Construction Company v. King County*, 941 F.2d 910, 932 (9th Cir. 1991); *Contractors Ass'n of Eastern Pa., Inc. v. City of Philadelphia*, 6 F.3d 990, 1009-10; *cf. Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.*, 345 F.3d 964, 969 (8th Cir. 2003) (federal affirmative action program for minority- and women-owned businesses serves "compelling governmental interest"). As the United States Supreme Court held in *City of Richmond v. J.A. Croson Company*, "[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Croson*, 488 U.S. 469, 492 (1989).

Against this background of persistent discriminatory barriers faced by women-owned small businesses, and amid evidence of the federal government's continuing failure to award even a mere five percent of its contracting procurement dollars to these

businesses, the program established by Congress to improve their contracting opportunities clearly serves a "substantial governmental interest" in preventing and remedying discrimination against women business owners.

III. The Women's Procurement Program, as Designed by Congress, Is Substantially Related to the Achievement of the Program's Goals

Any affirmative action program must be carefully designed to target the discrimination it is intended to redress. Overbroad efforts are constitutionally infirm. For example, in the *Croson* case, the Supreme Court struck down a program adopted by the City of Richmond, Virginia, that required construction contractors on city-funded jobs to subcontract at least 30% of the dollar amount of the contracts to minority-owned business enterprises, in part because there was no evidence in the case about the number of such companies qualified to perform contracting work. *Croson*, 488 U.S. at 502.

One way to ensure that a government procurement program targets businesses affected by discrimination is to direct it only to those industries that are demonstrably underutilized in contracting. *Croson* itself supports just this approach, stating, "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." *Id.* at 509.

The Women's Procurement Program is just this type of targeted program. It permits agency contracting officers to designate certain contracts for bidding only by women-owned small businesses.[1] However, these designated contracts can only be for

[1] The design of the program serves a specific need that was identified in the GAO report, referenced above, *Trends and Challenges in Contracting With Women-Owned Small Businesses*. That report uncovered a "wide consensus" among government contracting officials that "the absence of a specific contracting

goods or services provided by industries in which the government's past utilization of women-owned small businesses has been below their representation in the industry. The government's underutilization of women-owned small businesses in these industries provides an "exceedingly persuasive justification" for the program, meeting the requirements of heightened scrutiny. *See United States v. Virginia*, 518 U.S. at 533. Likewise, limiting the benefits of the Women's Procurement Program to businesses in industries that actually have been underutilized demonstrates that the program is not founded on "overbroad generalizations about the different talents, capacities, or preferences of males and females," *id.*—for example, assumptions about which types of businesses men or women are more likely to own—but instead on data showing a lack of equal opportunity on the basis of sex.

Pursuant to the statute, the Kauffman-RAND Institute for Entrepreneurship Public Policy (the "RAND Institute") produced a study for the SBA, *The Utilization of Women – Owned Small Businesses in Federal Contracting*, to identify the industries in which women-owned small businesses are being underutilized by the federal government. This study produced "disparity ratios" to measure the use of women-owned small businesses in proportion to their availability for various types of procurement opportunities. Putting aside the very critical issue of how the SBA has decided to use the Rand Institute study, it is important to realize just how credible properly formulated disparity ratios are in supporting anti-discrimination efforts. As the Third Circuit, using the term "disparity indices" in place of "disparity ratios," noted, "[d]isparity indices are *highly probative evidence of discrimination* because they ensure that the 'relevant statistical pool' of

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program targeting [women-owned small businesses]" was an important reason for the government's continuing failure to meet the five percent contracting goal for such businesses that Congress had set in 1994. *Id.* at 23.

contractors is being considered." *Contractors Ass'n of Eastern Pa.* 6 F.3d at 1005. As that decision further explained, such evidence is clearly sufficient to support the constitutionality of a program like the one at issue here. *Id.* at 1006-07.

In sum, then, the Women's Procurement Program as created by Congress fully meets relevant constitutional standards.

IV. The SBA's Proposed Rule Imposes Debilitating Requirements on Implementation of the Women's Procurement Program that Thwart Congressional Intent

The Proposed Rule issued by the SBA implicitly acknowledges that redressing discrimination against women-owned small businesses is an important governmental interest, but it adds debilitating burdens to implementation of the Women's Procurement Program that would, in all likelihood, prevent it from ever serving the purpose for which it was created: to remove barriers to women-owned small businesses' full participation in federal contracting.

The key requirement appears in § 127.501(3)(b) of the Proposed Rule, "Agency determination of discrimination." This rule would require each federal agency to conduct its own analysis "of the agency's procurement history and make a determination of whether there is evidence of relevant discrimination *in that industry by that agency*" before it could let a single contract under the Women's Procurement Program. Without authority or precedent, the SBA has declared that only sex discrimination by the particular government agency may be remedied through an affirmative procurement program. The SBA's section by section analysis of the Proposed Rule states this requirement even more clearly: the contracting agency "must make a finding of

discrimination by that agency in that particular industry," 72 Fed. Reg. at 73,290, in order to use the procurement program.

The SBA asserts that the Constitution requires such agency-by-agency findings of actual discrimination, but its position is unsupported by any legal citation and is clearly wrong. First, we have uncovered absolutely no precedent for requiring agency-by-agency findings in order to implement a federal affirmative action program created by Congress. No court applying any level of scrutiny has made such a demand. Rather, "[w]hen the program is federal, the inquiry is . . . national in scope. If Congress . . . acted for a proper purpose and with a strong basis in the evidence, the program has the requisite compelling government interest nationwide." *Sherbrooke Turf*, 345 F.3d at 970.

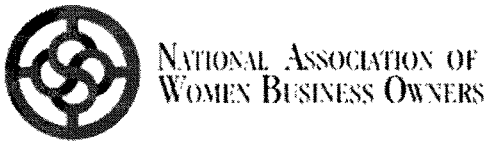
In this instance, where an underutilization analysis has already been performed for the federal government as a whole, it defies logic to require that a particular agency undertake its own analysis. Indeed, in many instances an agency's own contracts would not be sufficiently numerous to identify underutilization with any particularity, and in any event, such analyses would clearly be a waste of money and would further delay implementation of a program that has already been stalled for more than seven years.

Moreover, the contention that any unit of government may take affirmative measures only to address its own discrimination was flatly rejected by the Supreme Court nearly twenty years ago in the *Croson* decision. In that case, which involved race-conscious affirmative action judged by the stringent strict scrutiny standard, the Supreme Court rejected the argument that government may use such measures only to "eradicate[e] the effects of its own prior discrimination." *Croson*, 488 U.S. at 486. To the contrary, the Court ruled that government has a "compelling interest in assuring that

public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Id.* at 492.

Under the constitutional standards that apply to sex-conscious measures to enlarge opportunity, courts are explicit that it is perfectly acceptable for such remedies to be adopted in order to address societal, rather than governmental, discrimination against women. As the Eleventh Circuit wrote in 1994, "One of the distinguishing features of intermediate scrutiny is that . . . the government interest prong of the inquiry can be satisfied by a showing of societal discrimination in the relevant economic sector." *Ensley Branch NAACP v. Seibels*, 31 F.3d at 1580. The Ninth Circuit agreed in its *Coral Construction Company* decision, writing that "intermediate scrutiny does not require any showing of government involvement . . . in the discrimination it seeks to remedy." *Coral Construction Co.,* 941 F.2d at 932.

Against this backdrop, the SBA's proposed rule is extreme and appears to be designed to prevent the Women's Procurement Program from ever being used. It is frankly impossible to imagine any federal agency making a formal determination that it had engaged in sex discrimination in awarding government contracts—a determination that would not only embarrass the agency but presumably open it to litigation by past disappointed contractors. Far from finally fulfilling its duty to implement this congressionally authorized program, the SBA's Proposed Rule would render it a nullity.



Statement of Lisa Kaiser Hickey

on behalf of

the National Association of Women Business Owners

Presented to

the U.S. House of Representatives

Committee on Small Business

January 16, 2008

Statement of Lisa Kaiser Hickey, 2007-2008 President, National Association of Women Business Owners

On behalf of the National Association of Women Business Owners® (NAWBO®), its 9,000 members and 80 chapters across the country, we strongly oppose the recent Small Business Administration proposed rule regarding federal contract opportunities for women-owned businesses. NAWBO believes that this proposed rule lacks any acknowledgment of the strength of the more than 10.4 million women business owners within the United States today. Instead, these rules gut the more than decade-old Congressional mandate designed to ensure that women business owners have access to five percent of federal contract spending.

As a business owner, federal contractor and president of the only dues-based national organization representing the interests of all women entrepreneurs across all industries, I am disappointed that the Small Business Administration has, again, failed to be an advocate for women business owners. NAWBO urges the US House of Representatives Committee on Small Business to reconsider these ill-conceived rules, and I look forward to a brand New Year when we can work together with both Congress and the SBA to develop a policy that will truly benefit women entrepreneurs.

It has been clear to women business owners for some time that the SBA has never evidenced commitment to implementing the women owned small business set-aside program or to assuring that women owned businesses get their fair share of federal contract dollars. It took a lawsuit to get the SBA to focus on complying with the law establishing the set-aside program, which Congress mandated in back in 2000. And now, instead of taking a step forward in implementing the seven-year-old mandate to establish a set-aside program for women owned small businesses, the SBA's proposed rules eviscerate the program.

In 1994, Congressional legislation mandated that five percent of government contracts go to women-owned businesses. To help meet this goal, a set-aside program for women-owned businesses was established in 2000. Currently, only three percent of federal contracts go to women-owned businesses. The new SBA proposed rule will only allow federal agencies to implement the set-aside program for women owned businesses in four of over 2,300 business categories, and even then, only after the agencies individually document that they previously discriminated against women-owned businesses. If implemented consistent with the proposed rules, the set-aside program will do little if anything to increase the share of federal contracts that go to women-owned businesses.

The annual opportunity cost to women business owners for this spending shortfall approaches $5 BILLION, based on receiving five percent (rather than three) of the $277.5 billion spent by the federal government with prime contractors in FY 2003. Women business owners felt this small

procurement goal was worth fighting for in 1994; it is no less important today. Meeting the five percent procurement goal is both possible and productive. It will help women business owners achieve greater success.

NAWBO has proactively engaged the Small Business Administration on this issue over the last three years. NAWBO encourages the SBA to reconsider the proposed rule and to take other actions designed to assure that women business owners get their fair share of federal contracts and no less than the five percent of federal dollars that Congress set as the target in 1994.

About NAWBO: Since 1975, NAWBO has served as the nation's longest standing advocate for initiatives that benefit women-owned businesses, which continue to grow at twice the rate of all business development in the United States. We appreciate this opportunity to add our voices to the public record on this important topic, and appreciate the U.S. House of Representatives Committee on Small Business's active and timely review of this proposed rule. For a complete overview of our ongoing efforts to work with the SBA on this and other issues, please go to http://www.nawbo.org/advocacy.

Statement regarding SBA Proposed Rules on Set-Aside Program
Janet Harris-Lange, President
National Women Business Owners Corporation
January 22, 2008

The National Women Business Owners Corporation, the first national certifier of women business enterprises, strongly opposes the recent Small Business Administration proposed rules regarding federal contract opportunities for women-owned businesses.

Congress passed legislation in 1994 mandating that five percent (5%) of government contracts go to women-owned businesses. In 2000, a set-aside program was established to help meet this goal. At the present time, only 3 percent (3%) of federal contracts go to women-owned businesses. The new SBA proposed rule would only allow federal agencies to implement the set-aside program for women-owned businesses in four (4) out of 2,300 business categories (only .00173913% of the categories). Additionally, the agencies will have to individually document that they previously discriminated against the women-owned businesses in these four areas. If this rule goes into effect, the set-aside program will not help to increase the share of federal contracts that go to women-owned businesses. Of the thousands of women business enterprises that we have certified, only .0037% of them fall into the four categories earmarked: Cabinet Making (NAICS code 3371); Coating and Engraving (NAICS code 3328); National Security and International Affairs (NAICS code 9281); and, Other Motor Vehicle Dealers (NAICS code 4412).

The federal government spent $277.5 billion with prime contractors in fiscal year 2003. If the five percent (5%) goal had been achieved, women business owners would have received $13.68 billion in contracts. Instead, women-owned companies received $8.78 billion (~3%) - $4.9 billion less than the goal established by Congress in 1994. It's obvious to see that meeting the five percent (5%) procurement goal will help women business owners grow their companies and achieve greater success. This growth is critical to our country's economic vitality.

We highly recommend the SBA withdraw these proposed rules and begin again - this time with the input, experience and knowledge of numerous women's business organizations instead of solely on a study conducted by the Rand Corporation.

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CMW & Associates
INCORPORATED

CMW & Associates received a GSA schedule in 2003. I am a top salesperson with a technical background. I have worked for such firms as McDonnell Douglas and Computer Associates. My firm, CMW & Associates has a good reputation in the commercial area for information technology. I believed CMW should have been able to get work from the Federal government.

I began calling on the GSA small business advocates, as well as other small business advocates. I repeatedly heard "Come back when you get your 8(a)". I am a registered BEP or woman owned business in Illinois. This did not matter to the small business advocates, whose bonuses depended on placing business with those small businesses that had set asides. I am an older woman and white, so I am sure they were positive they would never see me again.

Unfortunately I had worked for a firm which actively discriminated against women. I was the only sales woman working for this computer consulting firm. I was the company's most successful sales person in 1990. When I asked for a promotion to sales manager, which was the career path, afforded the salesmen in the company, I was told point blank, the company did not believe in promoting women. The case of discrimination was settled in my favor. This allowed me to get my 8(a) which was the ONLY way CMW & Associates could have begun to get work with the Federal government. I believe the set aside is the only way a very small firm can begin to compete in the Federal marketplace.

We have grown rapidly because we are perceived as a competent 8(a) firm BUT again we would never have the chance to prove how good we are WITHOUT the set aside. No one was willing to give CMW & Associates a chance unless they were charged to do so.

I believe the Woman's set aside would allow the Federal government to tap into another source of competent businesses, allowing the Federal government to continue to contain costs and improve procurement. Without a boost in the door, small women owned businesses will never get a chance to sell to the Federal government.

Respectfully submitted

Charlene Turczyn
President
CMW & Associates, Inc
An 8(a) WBE SDB firm

CMW & Associates
INCORPORATED

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Respectfully submitted

Charlene Turczyn
President
CMW & Associates, Inc
An 8(a) WBE SDB firm

architecture
BAILEY EDWARD

35 East Wacker Drive
Tower Floor 28

Chicago, IL 60601

To: House Committee on Small Business

RE: Small Business Administration
Women's Procurement Program

January 28, 2008

Dear House Committee on Small Business,

I am writing to express my disappointment in the Small Business Administration's inactivity in enacting the year 2000 law establishing a set-aside program for women-owned businesses. I own and manage a small woman-owned business, Bailey Edward; I have faced limits to the growth of my business because the field of architecture is male-dominated and because the set-aside opportunities are for small businesses only.

My field of business, architecture, is a male-dominated business whose federal government contracts are awarded on a qualifications-based basis. Typically, the main qualification is past experience with the specific building type under question which eliminates the opportunity for women-owned businesses because prior experience has historically been given to male-owned firms. This makes it extremely difficult to compete in a market place that requires experience if we are not given the opportunity to gain any experience even on small-scale projects. In addition, set-asides are often waived because qualifications are considered to be so important. Again, if we don't have an opportunity to build the qualifications then we are not competing on a level playing field.

After frustration on that tack, my firm was able to gain experience through small projects using a small-business status. We have performed well for the federal government and are considered a preferred contractor. However, we are limited to small projects because the small business size limit of $4.5million limits our ability to pursue larger contracts with the federal government. Therefore the growth of our business is limited. If there were a women-owned business set-aside than we could grow our firm and show our capabilities on mid-sized projects and eventually we would not need any set-asides which is the intent of any set-aside or goal-oriented program.

The SBA's small-business program has worked for Bailey Edward and I encourage the House Committee on Small Business to expand the woman-owned business set-aside to include all business not just four. By doing so you will be encouraging the growth of many striving businesses.

Sincerely,

Ellen B. Dickson

Bailey Edward Design, Inc.
President
(312) 440-2300 x-217
ebd@bedesign com

NRG ...putting eNeRGy into opportunities

Nash Resources Group, NRG

Nash Resources Group is a woman-owned small business located in the Kansas City, Missouri area. NRG employs 28 full-time and 2 part-time employees. I am proud to have received the following awards and honors: Kansas City Business Journal's 25 Women who Mean Business – 2006, Kansas City Small Business Monthly's 25 Under 25 Award in 2008, the 2008 50 Most Influential Women in Kansas City by the Kansas City Business Magazine, the Tyro of the Year 2006 by the Rotary Club 13, 2006 Small Business Supporting the Arts by the KC Arts Council and 2001 President of the Association of Information Technology Professionals KC Chapter.

Five years ago I was awarded a GSA TAPS schedule. This affords NRG the opportunity to do business with the Departments of the Federal Government. NRG competes for this business with no advantages for being small or being woman-owned. When NRG first was awarded the schedule, NRG was told there would be set aside business for woman-owned business. NRG was told the SBA was going to put the policies and procedures in place. NRG is still waiting.

Just recently the SBA determined there is no need for women to have an advantage. Obviously in making this decision, the SBA itself has never had to compete with large technology consulting firms or staff augmentation companies who are awarded large government contracts. Because a small business does not have a chance to compete against these large corporations, the federal government has favored large companies who bundle there bids, bundling by sub-contracting with minority and women owned business. Computer Science Corporation has given me sub-contract work largely because NRG is woman-owned. If the government stops looking at women owned businesses, this type of sub-contracting will go away. Larger corporations will no larger have any incentive to fulfill this requirement.

Interesting fact - NRG was awarded a five year contract for the call center at the GSA location on 95th street. Three months into the contract the government determined we used the wrong schedule. The contract was taken away and given to a large minority firm located on the East Coast. NRG applied for the LOGWORLD schedule and NRG was approved - two weeks too late to participate. Being woman owned should have given NRG some advantage – not a disadvantage.

There is major revenue in doing government business. Without the government backing of small businesses, the large corporations would rule. Thank you to our federal government for recognizing this need. But, if anyone who for one moment thinks being a woman should be no different, needs to compete in the private sector. I am looking to my government to recognize the continuing barriers and to help companies like NRG succeed.

If the SBA does not want to take the time to put the Women Equity in Contracting Act into place, then basically this says that a bureaucratic arm of the government can essentially ignore a legislative Act of Congress, passed by Republican and Democratic Senators and Representatives speaking on behalf of their constituents. That really concerns me.

Available anytime to discuss the above.

Mary Lou Nash-Herrera

Mary Lou Nash-Herrera
Owner/CEO

PROFESSIONAL STAFFING SPECIALIST
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Nash Resources Group, 3217 Broadway, Ste. 300, Kansas City, Missouri 64111

January 17, 2008

Mr. Robert C. Taylor
Office of Contracting
U.S. Small Business Administration
409 3rd St., SW
Washington, DC 20416

RIN 3245-AF40 – Women-Owned Small Business Federal Contract Assistance Procedures

Dear Mr. Taylor:

My name is Patricia Miller and I am the owner and operator of Miller's Office Products, a women-owned small business located in Lorton, Virginia. The reason for my letter today is to comment on your recently published Proposed Rule in the Federal Register proposing to amend the Small Business Administration's (SBA) regulations governing the implementation of the Women's Procurement Program.

We are a successful women-owned small business, but are concerned with the new proposed rule. After reading over the Federal Register Notice and reviewing the Rand study, I'm particularly concerned that the SBA has so narrowly crafted this rule that it will help only a very limited number of women-owned businesses. According to the Rand study only four industries, based on their NAICS Code, were identified as under represented in the federal government contracting process. That has me very puzzled.

I don't know how much you know about the office products industry, but it is dominated by "white males." Our firm competes each and everyday for commercial and Federal government business and our challenge is the same, competing against a male dominated industry. For some reason there is a stigma in the Federal market about women competing as business owners. We can and do compete successfully when the field is level and we are looked at as equals. I'm not sure your proposed rule takes these types of situations into account.

As an agency which is supposed to be helping and supporting small businesses, this proposed rule appears to go against that mission. I would have hoped the SBA in its review of this issue would have used every avenue available to it to cover as many industries as it could. Looking at the proposed rule it looks like the SBA has set out to

limit even further the role of women-owned businesses in the Federal contracting process. This seems to contradict the Administrations position to do everything it can to help small businesses get a larger share of the federal procurement budget.

Women-owned businesses, according to government statistics, are one of the fastest growing segments in the federal market, employing some nearly 13 million people with an annual payroll of almost $175 billion, yet we are getting less of an opportunity to compete with proposed rules like this one. This rule would seem to have a limited impact when it should set out, based on the numbers above, to help more women-owned companies like mine continue to help drive the economy. This rule hinders that ability.

I was also a bit surprised the SBA decided to only use a dollar value of contracts criteria to evaluate under representation. In my own experience this is not a method that will provide you with the real contracting picture. Our dealership has won numerous contracting awards, the problem is, many of these awards are non-mandatory Blanket Purchase Agreements (BPA) and therefore the dollar value of these contracts could be in the $10, 20, 50 million or more range, but the reality is they are not mandatory contracts; and therefore we are not getting the full value of these contracts as agencies are free to go outside the BPA if they choose. From our experience we find this to be the case. When agencies have good relationships with a particular vendor they tend to use that vendor for most if not all of their purchases. By using the evaluation method you did seems to include these types of contract awards, which likely keeps us from the under represented category.

The Rand study identifies 28 different methodologies to determine which industries qualify for this program, yet the SBA in putting forth the proposed rule chose to use less than three percent of the industries as under represented by women-owned businesses. Again, after reviewing the Rand study, I would have thought SBA would have used multiple methods of evaluating under representation to ensure that the greatest number of industries would be included. This again gives the appearance that the SBA has done everything it could to limit the number of women-owned businesses able to be classified as under represented. I'm not sure this was the actual intent of those members of Congress who passed this legislation some seven years ago.

Each year the Federal government is required by statute to spend at least 5% of their contracting dollars with women-owned businesses. From the data I've reviewed, it's clear that is not happening. This begs the question, if the Federal government isn't meeting its 5% goal how is it possible that only four industries are under represented? In a hearing on Capitol Hill on January 16, I was shocked to learn that under the method the SBA chose to evaluate under representation, it would require the government to spend roughly $4 million with the four industries, identified in the Rand study and your proposed rule, to meet its statutory requirement of 5%. I'm not sure that's possible. This is further evidence of the narrow approach taken by the SBA.

Women-owned businesses can compete when the rules aren't stacked against them. Your proposed rule is just another one of those unnecessary hurdles women-owned companies like mine will have to endure if this becomes final. I would urge the SBA to rethink its approach and go back to the drawing board and do everything it can to include as many industries as it can in any new proposed rule.

I want to thank you for allowing me to submit my comments. I hope they will be taken serious as this issue is too critical to my business. I am also hoping the SBA will decide to throw this proposal out in the best interests of all women-owned businesses. All we ask is that you advocate for us and not against us as in its current form this rule appears to do.

Respectfully,

Patricia Miller
Owner

13 February 2008

My name is Sherry Walker, and I have owned a small electrical company in Colorado Springs since 2001. Only 9% of all electrical companies in this country are owned by women.

I have been gravely disappointed in the SBA's proposed rules for the Women-Owned Business Set-Aside Program. This is a huge setback for small business, as well as an enormous insult to every woman who owns a small business in the U.S., by ignoring and trivializing the ongoing, significant and measurable discrimination faced by women-owned businesses today.

There is critical need for an SBA set-aside program that recognizes the true nature of business in today's market, and the challenges that women face in competing, not just against "the good ole boys," but also against male-owned companies who have earned disadvantaged status (i.e. 8a certification) that practice significant discrimination in their dealings with women-owned business.

In 2005, I applied for SBA 8(a) certification as a disadvantaged business owner. The 8(a) certification is critical for the growth of small businesses, like mine, who perform work for government clients.

When I first went to the SBA website for information on 8(a) certification, there was nothing in the website or other SBA literauter that identified women (specifically, non-minority women) as one of the economically disadvantaged groups encouraged to apply. However, I learned through NAWBO members and other business contacts that women could be considered for 8(a) certification if a "preponderance of evidence" of discrimination could be shown.

I got to work. It took nearly 3 months to complete the significant 8(a) application. When the final version was sent, it was more than 300 pages long – and longer and harder than my master's thesis. The most challenging section to complete was a narrative section describing my experience with discrimination. I'd been told that that ethnic minority males could complete this section in a page or two, simply by identifying their heritage.

However, as a woman of Caucasian heritage, my Narrative of Social and Economic Disadvantage weighed in at 15 pages, and required a table of contents. I included copies of timecards, paychecks, emails, memos, and more that documented my personal story of discrimination. I wanted to be very sure to establish a "preponderance of evidence" of discrimination.

The SBA responded with an intent to reject my application, noting 16 deficiencies in my application to meeting requirements. I responded to each of the deficiencies in detail, and hired a lawyer to draft an opinion regarding an issue of "critical license."

I received my (8)a certification.

The SBA suggests that existing programs meet the needs of disadvantaged individuals. However, I firmly believe that had I not had 1) the educational training and experience to write my story and argue my legitimate qualification effectively, and 2) had the resources to hire a lawyer to support my argument, I do not believe my application would have prevailed. In fact, the SBA 8(a) program illustrated to me that disadvantaged men certainly had an advantage over disadvantaged women in the application process.

Women have to work twice as hard to prove their legitimate qualifications to the SBA. It is my personal opinion and experience that the SBA 8(a) certification process favors disadvantaged males.

I also believe, that women have to work triply hard to earn 8(a) standing, because the program was abused in the past. In an effort to screen effectively, I believe the SBA errs on the side of over-restriction for applications involving women.

The SBA is critically underfunded, and I can understand the reluctance to put a set-aside program into place that would parallel the 8(a) program – there simply isn't staffing to support this. SBA representatives cannot adequately manage the client load they have now, though they do their best.

However, as many disadvantaged groups have gained their chance to compete fairly on government projects –minority-owned, Native American and Alaskan Native Corporations, as well as service-disabled veteran firms—women have been consistently overlooked. **The real problem here, I believe, is funding. Women business owners should not be unfairly penalized by lack of development of set-aside programs because of SBA funding.**

Why would a woman with 8(a) certification, with current access to some sole source work, be concerned about a new program of set-asides for women? I would not additionally benefit from the new program, and indeed, would gain women competitors from it as a result.

I advocate for a fair and fully adequate set-aside for women-owned businesses, because of the thousands and thousands of women-owned business owners who are unfairly blocked from access to other set-aside programs. This hurts business, community and the economy.

Finally, I'd like to offer a brief list of discrimination I've faced, even after earning 8(a) certification:

- When I marketed an 8(a) contractor with a significant 5-year government contract, I was told, "Sure, I can always use more women in my harem."
- We sometimes do bids for clients (sole source and otherwise) that seem to be used to evaluate poor IGO bids. Using our numbers, the jobs are then awarded to male-owned companies. W
- One federal client continues to address his email correspondence to my husband, though I conduct all correspondence with him and have signed all contracts. I hesitate to make an issue of this, as there is potential for future work, and I don't want to risk offending the client.
- My former bonding company addressed all letters "Dear Sirs."
- Nearly 140 contractors attended a walk-through for a major job; only a few were women. Like many walk-throughs, male contractors (competitors) discussed the project among themselves, but excluded women from the conversation. Men's questions about the project were taken more often and answered more completely than those from women.
- I recently attended an electrical management workshop - I was the only woman in attendance. The facilitator called on each participant in turn for responses to class exercises. He skipped me several times until I spoke up.
- I called a meeting for employees to learn about their 401(k) options. Because the meeting would be held at a jobsite, the investment company's rep instructed his colleague that he should bring his "pink hard hat."

This reference to a woman contractor was meant as a joke, and I did not take it seriously, but illustrates the sort of comment I (and many other women in the construction industry) deal with often. **Clearly, the focus is on my gender, not my business. Often that translates into bias and discrimination.**

I have learned that it's not enough to run a good construction company well. Daily I must overcome the "pink hardhat" stereotype, so that my company's work, and not my gender, is what matters. As a woman electrical contractor, I must overcome significant social and economic disadvantage to grow a successful company.

Women across this country, in a wide variety of sectors, face discrimination on a daily business. It's time to level the playing field for women in the realm of government contracting. The SBA needs to hear and respond to this need with a fair and adequate set-aside program for women-owned business.

Sincerely,

Sherry L. N. Walker
President, Peak Electric, LLC

RE: SBA proposed rule - response for the record

Pamela Pope
President
Pope Institute for Health and Education, LLC
(Elder Care & Aging in Place Consulting firm)
St. Louis Missouri
(314) 830-9000

As a black female small business owner, I am very concerned about this proposed rule. My business (Pope Institute) is having a difficult time entering the government-contracting arena for **elder care public policy and long-term care quality improvement projects**. This proposed rule does nothing to help me and my company participate in the elder care and long-term care government consulting/contracting arena. Are women "over represented" in this particular government contracting area? I should doubt it. Further, good luck getting a government agency or primary contractor to condemn itself by admitting to a previous pattern of gender discrimination in contract/sub-contractor assignments. We can barely get an admission that discrimination exists, and can forget hoping for a true confession of who practices it-as the SBA suggests with this proposed rule. There is always another plausible reason--size, experience in government contracting, etc, etc. How can my company grow to be a bigger firm with a larger portfolio with which to win future contracts if I can never get started in the first place?

I encourage the SBA to withdraw the proposed rule and use its power to help women small business enterprises actively participate in government contracting. As far as it depends on me and my business, I am ready, willing, able, and actively putting forth effort to succeed. I welcome a commiserate level of support from the SBA.

Please feel free to contact me for additional information.

Sincerely,

Pamela Pope
(314) 830-9000

CertifytoSuccess
707 Yucca Drive
Colorado Spring, CO 80906

February 13, 2008

LeAnn Delaney
Senior Procurement Counsel
Committee on Small Business
Majority Staff

Dear Ms. Delaney,

The truth of the matter is, I started this business because of the discrimination and contract bundling issues that exist in the world of government contracting. Back in 2000, I was President of our local chapter of National Association of Women Business Owners. I had several meetings with our members to determine what their expectations were and how NAWBO could assist them. The majority of the responses I received were members asking how they could procure government contracts. Colorado Springs has five military installations and our membership was struggling to unlock the secret of gaining access to some of the government contracts for these installations.

Therefore, I began researching their request and mentored individuals, wrote articles, developed workshops and keynote addresses on strategies to overcome contract bundling. These strategies included planning and organization to ensure their operation was capable of performing the requirements of government contracting and developing strategic alliances to increase the products and services they currently offered. Soon I found myself inundated with requests to mentor and even receiving referrals from the SBA because "there was no one else in my area with expertise on the various certification programs." It was then I decided I had to develop a new business specializing in procuring government contracts to compliment my planning and organization consulting service.

On a few occasions when I am speaking to a group, minority business owners questioned why they would want to form an alliance with women business owners who were now competing for part of their small percentage of minority and small disadvantage business set aside contracts. This is not an easy question to address. The percentage of small business set-asides has remained the same even though Congress has mandated additional groups being discriminated against in contracting should have their own designated portion of this unchanging percentage.

Through my keynote addresses and workshops, I have heard the frustrations of hundreds of women. They come to me seeking an answer on how to gain access to contracting to the government. Several times, they have been told "off the record" in a verbal conversation with purchasing officers that they would have a better chance of getting contracts if they would get the 8(a) Business Development Certification. Even though women are not one of the recognized socially disadvantaged groups under the 8(a) or SDB Certification programs, I have not had a female client denied this certification yet because they are more than capable of providing a preponderance of evidence supporting how they have been discriminated against.

I know you have heard from two of these clients, Sherry Walker of Peak Electric and Jody Papa of C&D Electric. These women both represent an industry that is still extremely dominated by men. However, Electrical Contractors were not an Industry included in the SBA Ruling as underutilized. My clients use me to protest inequities and fight for their rights without naming names. This allows them to address inequities with contracting officers without involving them directly so they will not be seen as a troublemaker.

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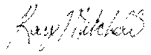
I have also had Caucasian, male clients come to me saying that they were told by a contracting officer or prime contractor how to form their company as woman or minority owned. There intent was to maintain control but operate under woman or minority ownership through a silent partner. This would allow them to obtain contracts through purchasing officers with whom they had developed a relationship. I refuse to work with these individuals and have reported their name to the local SBA Office in hopes they will be prevented from sneaking in as an 8(a) company, since there are other Consultants that I know will take their money and help them do whatever they desire.

Therefore, I have met both sides in my business. Those who are truly discriminated against and those who are attempting to "cheat the system." This is a key reason why self-certification of woman owned and minority owned companies is unacceptable.

I have been a small business owner for over 20 years and experienced discrimination as both a business owner and an employee before and between businesses. Back in the late 1980s the first business I owned provided new construction cleaning services in combination with a special dry carpet cleaning process. To market my company, I became a member of the Home Builders Association (HBA). As one of only two female members of the 200 plus members of the HBA, it was extremely difficult to network. The men did not take me seriously and often excluded me from their conversations. In fact, there were even times when one of the male members would turn and hand me an empty glass or bottle and ask me for a refill. When I clarified I was not a waitress, they would walk away to find someone who was wait staff. I lost count of the "sure you are sweetheart" responses when I would introduce myself as owner of my business.

The playing ground is far from level, but it has advanced some with great effort. The proposed SBA Ruling would indeed put our struggle as women to be recognized for our capabilities in a back slide. Until everyone is considered on their merits, capabilities and price for completing a contract, my services will continue to be needed. I look forward to a time when I will have to find another service to provide.

Sincerely,



Kaye Mitchell
President