



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUL 24 2019

The Honorable Marco Rubio  
Chairman  
Committee on Small Business and Entrepreneurship  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on the discussion draft of the Chairman's Mark of S. \_\_\_\_, the "SBA Reauthorization and Improvement Act of 2019." Several provisions of the legislation raise constitutional concerns. Below, we suggest edits to address some of those concerns.

**Anti-Aggrandizement and Appointments Clause Concerns  
Regarding the National Women's Business Council**

Section 604(a) of the bill would amend section 29 of the Small Business Act to authorize appropriations for the National Women's Business Council ("Council"). *See* S. \_\_\_\_, sec. 604(a), § 29(b)(9)(A). The Council would be "an independent source of advice and policy recommendations to the Administrator [of the Small Business Administration] . . . , to Congress, and to the President." *Id.* § 29(b)(2). In addition to studying the receipt of federal prime contracts and access to credit by women entrepreneurs, or contracting with public or private entities to do so, *id.* § 29(b)(4), the duties of the Council would be to:

- "review, coordinate, and monitor plans and programs developed in the public and private sectors, which affect the ability of women-owned business enterprises to obtain capital and credit";
- "promote and assist in the development of a women's business census and other surveys of women-owned businesses";
- "monitor and promote the plans, programs, and operations of the departments and agencies of the Federal Government which may contribute to the establishment and growth of women's business enterprise";

- “develop and promote new initiatives, policies, programs, and plans designed to foster women’s business enterprise”; and
- “submit to the President and to the Committee on Small Business and Entrepreneurship of the Senate and the Committee on Small Business of the House of Representatives [an annual] report containing—
  - (I) a detailed description of the activities of the [C]ouncil . . . ;
  - (II) the findings, conclusions, and recommendations of the Council; and
  - (III) the recommendations of the Council for such legislation and administrative actions as the Council considers appropriate to promote the development of small business concerns owned and controlled by women.”

*Id.* § 29(b)(3)(A). The annual report must be transmitted “verbatim, together with any separate additional, concurring, or dissenting views of the Administrator.” *Id.* § 29(b)(3)(B).

The Council would be chaired by a prominent businesswoman, appointed by the President in consultation with the Administrator, although the Council would have the ability in the event of a vacancy to appoint by majority vote an interim chairperson from the President’s political party. *Id.* § 29(b)(5)(A). Fourteen Council members would serve staggered three-year terms: six members would be “appointed by the Administrator from among representatives of women’s business organizations,” with the remaining eight members appointed by the chairs of certain congressional committees from among owners of small business concerns. *Id.* § 29(b)(5)(B), (D). Council members would not be paid, receiving only reimbursement for travel, subsistence, and other necessary expenses, although the Council would have a paid executive director appointed by the Administrator and four additional paid employees appointed by the chairperson. *Id.* § 29(b)(5)(G), (6). Furthermore, members of the Council would be required to relinquish their position within 30 days of taking on another role as “an officer or employee of the Federal Government or of Congress.” *Id.* § 29(b)(5)(E).

The creation of an entity with members appointed by both the Executive and Legislative Branches “is inconsistent with the tripartite system of government established by the framers of our Constitution” and “tends to erode the structural separation of powers.” *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 251 (1989). These separation of powers issues are lessened when the entity is limited to preparing reports and making recommendations. *See Constitutionality of the Ronald Reagan Centennial Commission Act of 2009*, 33 Op. O.L.C. \_\_\_, \*2–3 (Apr. 21, 2009). But when functions are inherently executive, they must be performed by an executive entity. *See id.* at \*5 (“A statute may not give members of Congress, or congressional agents, the authority to perform Executive Branch functions.”).

Certain of the Council’s responsibilities — for example, to “coordinate . . . plans and programs . . . which affect the ability of women-owned business enterprises to obtain capital and

credit,” to “promote . . . a women’s business census and other surveys of women-owned businesses,” to “promote the plans, programs, and operations of the departments and agencies of the Federal Government which may contribute to the establishment and growth of women’s business enterprise,” and to “promote new initiatives, policies, programs, and plans designed to foster women’s business enterprise” — are executive functions that cannot be performed by an entity with members appointed by the Congress. *See Bowers v. Synar*, 478 U.S. 714, 733–34 (1986) (“[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly — by passing new legislation.”). Therefore, we recommend that the drafters eliminate the role of congressional committee chairs in appointing eight members of the Council and instead assign those members’ appointments to an executive branch official accountable to the President, such as the Administrator.

Because the bill primarily authorizes the Council just to review, monitor, study, promote, and coordinate various initiatives culminating in the submission of a recommendatory report, the majority of the Council’s responsibilities are likely insufficient to constitute “significant authority” of the United States and, thus, would not need to be performed by constitutional officers appointed in a manner consistent with the Appointments Clause of Article II of the Constitution. *Cf. Lucia v. SEC*, 138 S. Ct. 2044, 2051, 2053 (2018) (an “officer” for purposes of the Appointments Clause must “hold a continuing office established by law” and “exercis[e] significant authority pursuant to the laws of the United States” (internal quotation marks omitted)); *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 77 (2007) (“*Officers of the United States*”) (federal officer duties involve exercising delegated “sovereign powers of the federal government,” which “primarily involve binding the government or third parties for the benefit of the public, such as by administering, executing, or authoritatively interpreting the laws”); *id.* (“By contrast, an individual who occupies a purely advisory position . . . does not hold a federal office.”). But the legislation’s authorization for the Council to enter contracts with public or private entities to carry out research activities might constitute the kind of delegated sovereign authority that can be exercised only by an Article II-appointed “Officer of the United States.” *See Officers of the United States*, 31 Op. O.L.C. at 89 (observing that delegated sovereign authority “include[s] legal authority over the contracts and supplies . . . of the nation” (internal quotation marks omitted) (ellipsis in original)). Therefore, we recommend either limiting the Council’s contracting authority to *recommending* contractual agreements to the Administrator or another Article II officer who must then sign off on the contract, or providing that the Council’s members be appointed in conformity with the Appointments Clause, such as by having the Administrator, the “Head[]” of a “[D]epartment[],” appoint the Council’s members, *see* U.S. Const. art. II, § 2, cl. 2.

In any event, to avoid interbranch aggrandizement concerns, members of the Council engaged in executive functions should not be selected by members of the Legislative Branch. Having the Administrator appoint the Council members would address this concern and obviate any Appointments Clause concerns posed by the significance of the authorities delegated to the Council. The separation of powers concerns with legislative officials appointing members of the

Council also could be mitigated — although not entirely eliminated — by limiting the Council’s tasks to precatory functions, such as preparing reports and making recommendations.

### **Supervision of the Executive Branch and Recommendations Clause Concerns Related to the Council**

Because the Council is most properly viewed as an executive entity, the Congress cannot require the Council to transmit its annual reports to the Congress “verbatim” without the opportunity for executive branch review. This would interfere with the ability of the President to supervise subordinates in the Executive Branch. *See Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress*, 6 Op. O.L.C. 632, 638–39 (1982) (“[Judicial decisions and the long practical history concerning the right of the President to protect his control over the Executive Branch are based on the fundamental principle that the President’s relationship with his subordinates must be free from certain types of interference from the coordinate branches of government in order to permit the President effectively to carry out his constitutionally assigned responsibilities.”). We have objected consistently to statutes that purport to require members of the Executive Branch to report information directly to the Congress without prior review and approval from their agency head or the President, even when the information may not be privileged. *See, e.g., id.* at 633 (statutory “requirement that subordinate officials within the Executive Branch submit reports directly to Congress, without any prior review by their superiors, would greatly impair the right of the President to exercise his constitutionally based right to control the Executive Branch” and a provision would be unconstitutional if so construed); *Inspector General Legislation*, 1 Op. O.L.C. 16, 18 (1977) (“Reports of problems encountered . . . may be required of the agencies in question, but . . . the statutory head of the agency . . . must reserve the power of supervision over the contents of these reports.”).

And the constitutional concern is further amplified here because the report may contain recommendations that are legislative in nature, *see* S. \_\_\_, sec. 604(a), § 29(b)(3)(A)(v)(III), thus implicating the power held by the President alone to “recommend to [Congress’s] Consideration such Measures as he shall judge necessary and expedient,” U.S. Const. art. II, § 3. The Recommendations Clause implicitly prohibits the Congress from circumventing the President in obtaining legislative recommendations from the Executive Branch and, consequently, from authorizing the Council to submit such recommendations free from executive branch review and approval. *See Application of the Recommendations Clause to Section 802 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003*, 40 Op. O.L.C. \_\_\_, \*3 (Aug. 25, 2016) (“[T]he [Recommendations] Clause implicitly prohibits Congress from enacting legislation that would prevent the President from exercising, or would usurp, that duty and authority.”); *Authority of the Special Counsel of the Merit Systems Protection Board to Litigate and Submit Legislation to Congress*, 8 Op. O.L.C. 30, 31 (1984) (“Congress may not grant [the Special Counsel] the authority to submit legislative proposals directly to Congress without prior review and clearance by the President, or other appropriate authority, without raising serious separation of powers concerns.”).

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Accordingly, we recommend omitting the requirement to transmit Council reports to the Congress verbatim, which we would otherwise consider nonbinding or subject to the opportunity for higher-level executive branch review.

Thank you for the opportunity to present our views. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in cursive script that reads "Prim Escalona". The signature is written in black ink and is positioned to the right of the word "Sincerely,".

Prim F. Escalona  
Principal Deputy Assistant Attorney General

cc: The Honorable Benjamin L. Cardin  
Ranking Member