



**QUESTIONS FOR THE RECORD**

related to the

Testimony of

David Smith

Deputy Inspector General

U.S. Department of Commerce

before the

House Committee on Science, Space, and Technology

Subcommittee on Oversight

***Top Challenges for Science Agencies:  
Reports from the Inspectors General, Part I***

February 28, 2013

## Questions from Chairman Paul Broun

### MANUFACTURING

**1) *How successful have DOC programs like the Repatriation Task Force and the Advanced Manufacturing Technology Consortia (AMTech) been in meeting DOC goals that include repatriating jobs that have moved abroad back to the U.S., or bringing manufacturing jobs back to the United States?***

The Repatriation Task Force has a mandate to examine incentives and other activities to encourage U.S. companies to bring back manufacturing and research and development (R&D) activities from overseas. The Advanced Manufacturing Technology Consortia is a public-private partnership aimed at improving R&D investments. OIG has not performed audit work on the Department's manufacturing initiatives recently but is tracking reviews conducted by other independent entities. For example, GAO has ongoing reviews of the implementation of the America COMPETES Reauthorization Act. OIG will use these review results to plan for future work.

**2) *Given that, as your office's Management Challenges report states, "Many offices, task forces, and councils are involved with studying and establishing manufacturing initiatives," is DOC doing enough to ensure it avoids duplicating the activities of its partners in other federal agencies?***

In its *Follow-up on 2011 Report: Status of Actions Taken to Reduce Duplication, Overlap, and Fragmentation, Save Tax Dollars, and Enhance Revenue* (GAO-12-453SP, February 2012) GAO identified continued needs for better coordination between the Department of Commerce and other agencies to avoid duplications/overlaps on economic development programs. However, given the current constrained budget environment that Commerce and other executive departments and agencies are experiencing, we believe it is imperative that the Department ensure that its existing resources are used effectively on targeted programs, to maximize their efforts and avoid duplication of resources.

### **Manufacturing Extension Partnership (MEP)**

**3) *Is your office conducting any audits of MEP centers, and if so, which ones and how were they selected?***

We completed extensive audit work of 6 MEP centers and issued reports in 2009–2010 and have continued to conduct follow-up activities associated with the audits. NIST is still using the lessons it learned from these audits to help it better manage the program.

While we have not audited any additional MEP centers, centers expending more than \$500,000 in a fiscal year are required by the Single Audit Act to submit audits on a fiscal year basis. These single audits are performed by independent public accountants, and OIG receives and reviews relevant reports on an ongoing basis. The most recent single audit reports for Florida MEP and Massachusetts MEP have been received. In these audits, the independent public accounting firm rendered its opinion on the financial statements;

however, the firm issued a qualification to its opinion on compliance issues due to unresolved issues first revealed in our March 2009 audit report.

Recently, NIST issued a determination on the audit findings of OIG's 2009 audit. NIST staff determined that the MEPs did not provide sufficient evidence or documentation that would persuade them to change their original position. After an appeal by both MEP Centers did not result in further adjustments, NIST issued a bill for \$2 million to the MEP center in Florida and for \$790,000 to the MEP center in Massachusetts. The entire amount must be paid in full or negotiated under another acceptable arrangement or the MEP centers could encounter enforcement action under their current MEP awards, including but not limited to administrative offset of award payments, suspension of the awards, and termination of the awards.

***4) According to press accounts, Florida's 2013 "Manufacturing Innovation" conference was cancelled shortly before the DOC announced it would review the event's expenses for the past two years. While there are many legitimate questions about some of the expenses related to last year's Florida conference, questions have also been raised about the role of the NIST MEP (National Institute of Standards and Technology's Manufacturing Extension Partnership), which organizes and hosts the annual event.***

***a. Does your office have any ongoing work regarding the Florida MEP and its relationship with the NIST MEP?***

***b. If so, please provide an update.***

We have not performed an audit of the Florida MEP since completion of an incurred cost audit in March 2009, where we questioned \$12.6 million of the Florida MEP's claimed costs for the period July 2005 through March 2007. While we have ongoing work regarding the NIST MEP program, it is not focused on Florida MEP. We are not planning to conduct any additional OIG audits of the Florida MEP program or its cooperative agreement relationship with NIST MEP at this time. However, we will be monitoring any single audit reports received for the MEPs as noted in question 3 above. We are auditing NIST MEP conference costs for FYs 2011 and 2012, including the Orlando Annual Conference, and anticipate completion in the third quarter of FY 2013.

***5) Last year, your office received a letter from Congress requesting that you look into potential mismanagement of the NIST MEP. The letter alleged that "NIST MEP is targeting certain state centers by withholding matching federal funds to which they are entitled by statute." Moreover, press reports have explained that "MEP Centers allege that NIST has avoided sending more money to the centers in order to boost the share of its budget that remains in Washington." What is the status of your review, and when can we expect your report on it?***

Our office is currently gathering information to respond to the letter we received from Chairman Issa in September 2012. We cannot estimate the date of the completion of our work at this time.

## NATIONAL WEATHER SERVICE (NWS)

*6) After Hurricane Sandy, NOAA and NWS put together a team to conduct a service assessment of Sandy, which is a common practice following major weather-related events. The first team was disbanded partially because it was going to be co-led by a person from the private sector, which, according to agency documents, appears to be a violation of the Federal Advisory Committee Act (FACA). Do you have any ongoing work to assess whether past NWS Service Assessments violated FACA?*

We do not have any ongoing work assessing whether past NWS service assessments violated FACA.

*7) NOAA and DOC issued memos last May in the aftermath of revelations of financial mismanagement at NOAA. Those memos listed several action items with most due dates within a few months.*

*a. Have you tracked those items to ensure they were accomplished, and can you give us a status update on them?*

OIG is currently conducting a review of the status of the Department and NOAA's actions to address the decision memoranda issued on May 24, 2012, by Acting Secretary Blank and former Under Secretary Lubchenco, respectively. We are evaluating the actions that the Department and NOAA deem complete and will issue a report after the completion of our work during the third quarter of FY 2013.

*8) Please provide the Committee an update on the status of financial issues at NOAA:*

*a. What actions have NWS, NOAA and DOC taken?*

The Department and NOAA are implementing the actions required by the decision memoranda issued on May 24, 2012, by Acting Secretary Blank and former Under Secretary Lubchenco, respectively. We are evaluating these actions and will issue a report after the completion of our work which is estimated during the third quarter of FY 2013.

*b. What actions are outstanding?*

The Department and NOAA have asserted that many of the decision memoranda requirements are complete. We are assessing their actions for sufficiency. Our review is under way, and we will report the results after the completion of our work estimated to be during the third quarter of 2013.

*c. What work do you have ongoing related to the matter?*

In June 2012, OIG received an anonymous complaint alleging that continuous unauthorized reprogramming had occurred at NWS from 2000 through June 2012 and that senior NOAA officials were aware of this activity. In the course of our investigation, several instances of potentially unauthorized reprogramming were identified. In March 2013, we referred these specific instances to NOAA and requested it determine if the unauthorized reprogramming occurred and, in coordination with the Department, any Antideficiency Act violations. OIG

is currently preparing a Report of Investigation addressing whether senior officials were involved in or aware of unauthorized reprogramming.

In August 2012, OIG initiated a review to evaluate the adequacy of the actions taken by the Department and NOAA to address the NWS financial management issues. The Department and NOAA actions were mandated by the decision memoranda issued on May 24, 2012, by Acting Secretary Blank and former Under Secretary Lubchenco.

We have other ongoing work that identifies funds control issues in the Department. In addition, our audit in process of the Department's unliquidated obligations and the annual financial statement audit work has identified funds control issues.

## **SATELLITES**

**9) *Has NOAA given a good reason for why the JPSS-2 satellite is going to be re-competed instead of sole sourcing both contracts? What impact will there-compete process have on the agency in terms of schedule and cost?***

NOAA and the JPSS program have not yet completed an acquisition strategy decision memorandum, which was expected by late March 2013. Until we can review the memorandum, we cannot comment on their acquisition strategy or what impact the strategy will have in terms of schedule and cost. We are aware, however, that NASA—the JPSS acquisition agent—has a streamlined competitive bidding process for spacecraft contracts that is designed to avoid potential schedule delays. In addition, the Federal Acquisition Regulation generally requires contracting officers to use full and open competition in soliciting offers and awarding government contracts.

**10) *Toward the end of last year, NOAA issued a contingency plan in response to a GAO directive to address potential gaps in weather forecasting due to launch delays of weather satellites, and a larger general plan is expected to be unveiled later this year. Are you familiar with either of these products? Can you provide some insight on them?***

NOAA's contractor conducted an independent analysis of alternatives to mitigate the degradation of National Weather Service products in the event a gap in afternoon polar-orbiting satellite data occurs. The study captured and assessed ideas, such as leveraging other data sources and improving computing capabilities, from a broad range of organizations and individuals and made 17 recommendations. Most of the recommendations are funded in the Hurricane Sandy supplemental appropriations law. Separately, NOAA developed its October 2012 "Mitigation Plan for Potential Data Gap Between Suomi National Polar-orbiting Partnership (SNPP) and JPSS-1" report. It includes plans for continuous monitoring of indicators of a potential gap, which would trigger further decisions, and mitigation options (echoing the 17 recommendations in the analysis of alternatives) and references a mitigation decision process.

**11) *The Department plans to "replace all legacy financial systems--core financial accounting, financial management, grants management, acquisition management, and property management--with commercially available software between FY s 2014 and 2018."***

***a. What benefits does the Department expect to achieve in its move to modernize its financial management system?***

According to the Department, the legacy systems are antiquated, highly customized, and not well documented. They have become more and more difficult and expensive to maintain, especially with a shrinking pool of knowledge. Conversely, commercial software uses table-driven design; is easier to maintain; and is more responsive to government-wide changing requirements, such as the expansion of Standard General Ledger accounts from four to six digits and 508 compliance. Finally, the Department expects the modernized system to have the ability to automate the consolidation of the bureau financial statements; the legacy systems are not integrated.

***b. What impact would this have on NWS, specifically, would it prevent the ability of an individual to use summary level transfers to secretly reprogram funds?***

No, an individual's ability to make summary level transfers is not related to the legacy system. However, we will work with the Department to ensure that there are both appropriate automated system and documentation/approval controls to better prevent and detect inappropriate transactions.

***c. Will this transformation help the Department provide Congress more accurate and timely cost estimates, schedules, and program baselines?***

With the replacement system, management should be able to provide more timely information to Congress. However, the accuracy of the information still depends on the integrity of the data entered into the system.

## **OFFICE OF ACQUISITION MANAGEMENT**

***12) When did the Office of Acquisition Management develop an Acquisition Project Management Framework/Guidebook?***

The framework policy was signed in November 2012, and the bureaus have 6 months to describe to the Office of Acquisition Management (OAM) how they will implement the new policy. However, in January 2013, OAM designated three high-profile projects to first implement the framework: 2020 decennial census, NIST laboratory construction, and the NOAA JPSS satellite.

***a. How well have the bureaus incorporated the new framework/guideline? Who's done the best job of this and who's experiencing the most problems?***

So far, NIST appears to be the most successful at incorporating the framework, and Census has had the most challenges because it has been difficult for OAM to determine what initial acquisition phase their program is in and, accordingly, what documentation is needed.

***b. What impact has this framework/guideline had on NOAA, given its relationship with NASA where NASA is the acquiring agent in the JPSS program for example?***

We have not yet observed any impact of the Department's recently issued framework on NOAA based on its relationship with NASA for the acquisition of JPSS.

## **INFORMATION TECHNOLOGY (IT)**

***13) In June 2012, the Acting Secretary issued the "Department IT Portfolio Management Strategy," which expanded the role of the Commerce CIO (Chief Information Officer). Oversight.***

***a. How much leeway does the CIO have in requiring the different bureaus to take steps to strengthen IT security posture now, as compared to before the issuance of this document, and is it enough?***

The Acting Secretary's June 2012 memorandum defines the CIO's responsibilities for managing the IT portfolio of the Department, including having the lead role in information security. By the time the memorandum was issued, we were well into our FY 2012 Federal Information Management Act of 2002 (FISMA) audits, and we did not observe any significant IT security improvements attributable to the memorandum. We will, however, assess the impact of the Acting Secretary's memorandum as we conduct the FY 2013 FISMA audits.

***b. Given that most IG offices work closely with their respective agencies on Information Technology issues, how closely does your office work with the Department on IT issues?***

We have established and maintain a strong working relationship with the Department on IT issues. My senior staff and I meet with the Department CIO and his senior staff regularly to discuss IT issues associated with management, budget, development, and security. We also attend CIO Council meetings, where key IT topics are discussed, and the Commerce Information Technology Review Board meetings, where program managers of major Department IT investments brief cost, schedule, and performance information. In addition, we continue to work closely with the Department to strengthen its IT security program.

***14) What tools does your office have to deal with situations when DOC does not address OIG-referred complaints in a timely manner?***

The Department's written policy states that an "operating unit or agency shall report its findings . . . within 60 days of the referral", but does not prescribe how OIG should handle cases where agencies are delinquent in looking into allegations or otherwise not timely in responding to referrals.<sup>1</sup> In order to persuade agencies to handle referrals in a timely manner, OIG provides status updates to the agency liaisons and Departmental leadership.

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<sup>1</sup> See Departmental Administrative Order 207-10, Section 5(d).  
[http://www.osec.doc.gov/opog/dmp/daos/dao207\\_10.html](http://www.osec.doc.gov/opog/dmp/daos/dao207_10.html).

- **Monthly Reports to Agencies:** OIG provides agencies with monthly reports of their current pending referrals, in order to remind management about aging referrals, and to check the integrity of their own tracking systems.
- **Quarterly Reports to the Secretary:** On a quarterly basis, the IG sends a memorandum to the Secretary, Deputy Secretary, and other senior officials to inform them about the backlog of aging referrals. For example, in January 2013, our office reported that “over half the Department’s complaint referrals are pending with NOAA, where the portion of referrals older than 60 days without an initial response increased from 73 percent to 89 percent this quarter.”

*a. How big a problem is this?*

As of March 28, the Department had 101 pending complaint referrals, of which 72 were older than 60 days without an initial response. NOAA had the largest share of complaints pending, 54, of which 85 percent were older than 60 days without a response. NOAA has three complaint referrals that are older than two years, and seven additional complaints older than one year.

*b. How does your office determine when to forward allegations to the Department?*

OIG staff conducts preliminary research on Department-related complaints and briefs the Inspector General and OIG senior leadership, who determine how each complaint should be handled. Before deciding to refer a complaint to an operating unit in this manner, OIG determines whether the matter would be more appropriately handled by Departmental management.

*c. How do you ensure that you are not forwarding complaints that will potentially be reviewed by the very individuals identified in the allegation of misconduct?*

In January of 2012, OIG issued the *Guide to Conducting Administrative Inquiries* to the Department, which outlines best practices and guidance for conducting administrative inquiries. In OIG’s *Guide*, and on our memoranda forwarding such complaints, we request that any officials involved in conducting the inquiry sign a statement testifying to their independence from the matters at hand before commencing any inquiry-related activity. In our *Guide*, we note that “It is critical that the operating unit appoint an inquiry official who is outside the supervisory chain of the subject and removed from the immediate affairs that the allegations relate to.”<sup>2</sup> In cases where senior officials or agency liaisons are implicated in the allegations, we will refer allegations to a different bureau or set of officials to ensure independence.

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<sup>2</sup> See U.S Department of Commerce Office of Inspector General, January 2012. *Guide to Conducting Administrative Inquiries*. Washington, DC: DOC OIG, 6.

## MANAGEMENT

**15) *Your office's 2012 Management Challenges report states "Commerce leadership must continue showing the way forward to establish an accountability culture with increased transparency, readily available support, and independent validation." The report describes this as "perhaps the Department's biggest challenge of all." Can you elaborate on this observation by providing examples, and explain whether this is a Department-wide issue, or if certain bureaus are more problematic than others?***

The need for an accountability culture with increased transparency, readily available support, and independent validation is Department-wide. However, since NOAA accounts for almost one-half of the Department's total budget and has more complex operations than other bureaus, it has a greater need for improved accountability. The following are Department-wide examples identified in recent years:

- Acquisitions: insufficient procurement alternative analysis (e.g., NOAA Marine Operations Center-Pacific) and inadequate oversight of cost-plus-award-fee contracts (e.g., Census and NOAA)
- Fund controls: inappropriate accounting of funds received through reimbursable agreements (NIST), reporting estimated (vs. actual) conference spending (Department-wide), and unauthorized reprogramming of funds (NOAA/NWS)
- Asset controls: inappropriate use of forfeited assets (NOAA Fisheries), improper and untimely accounting for property acquisitions, transfers, construction work-in-process, asset retirements, and impairment assessments (NOAA)
- Cybersecurity: perpetual security weaknesses (Department-wide)
- Grants: inadequate oversight of Federal fund recipients (NOAA, NIST, EDA)

## Questions from Ranking Member Dan Maffei

### 1. Commerce OIG Potential ADA

At the hearing you testified that you were unaware of any suspected or actual AntiDeficiency Act (ADA) violations that have occurred in the Department of Commerce's Office of Inspector General (OIG) since Todd Zinser became the Inspector General in December 2007. You said that you would look into the matter and provide the Committee with any relevant information.

Please provide the Committee with a list of any Department of Commerce (DOC) OIG budget actions which triggered internal OIG or DOC review for potential ADA violations (from December 2007 to present). If any suspected or declared ADA violations have occurred please provide a detailed explanation, which includes at a minimum when the ADA violation(s) or suspected violation(s) occurred, why they occurred, when Inspector General Todd Zinser became aware of the issue, who investigated the allegations and whether or not any suspected ADA violations were actually declared or referred from the OIG to the Department of Commerce or any other entity, including the Council of Inspectors General on Integrity and Efficiency (CIGIE), for review.

In addition, please provide the Committee with supporting documentation regarding each of the suspected or declared ADA violations that may have occurred in the Commerce IG's office. This should include, but not be limited to, any Memorandum, reports or draft reports or correspondence with, to or between the Commerce OIG and any other offices within the Department of Commerce, including the Commerce Department's Office of Budget or the Office of General Counsel regarding actual or suspected ADA violations.

The OIG is not aware of any ADA violations that were committed by this office under the current Inspector General. The OIG and Department's Office of General Counsel (OGC) did review an OIG contract obligation for ADA compliance in 2011, but it was determined that the obligation had been proper. That contract was for financial statement audit services and the OIG entered into it on December 30, 2010 during the December 22, 2010–March 2, 2011, continuing resolution (CR) period. It was always clear that the OIG had sufficient appropriations to cover the obligation. The availability of apportioned funds needed to be confirmed, however, given some confusion within the Department as to whether the entire amount of an automatic CR apportionment became available immediately when issued by Office of Management and Budget (OMB) Bulletin.

The OIG and Department's OGC both evaluated the transaction, consistent with Department policy, and OMB was consulted as part of the process. OMB advised that the "full amount [of the automatic apportionment] was apportioned for the entire CR period" per OMB Bulletin 10-3, and thus that it appeared that the OIG had more than adequate apportioned funds to cover the contract obligation. Based on this guidance, the Department's OGC and the OIG both concurred with OMB that no ADA violation had occurred. The Department's OGC issued a memorandum to that effect and concluded its review. The OIG and the Department's Office of Budget have subsequently worked together to clarify and strengthen procedures for the apportionment approval process within the Department.

Because the contract obligation at issue here was proper, there was no reporting required under the ADA. See 31 U.S.C. §§ 1351 and 1517(b). Moreover, because the matter involved a question of appropriations law and did not involve any allegation of wrongdoing by the Inspector General or high-level management, the OIG had no reason to refer the matter to the Council of Inspectors General on Integrity and Efficiency (CIGIE). See Policies and Procedures of the Integrity Committee of the Council of the Inspectors General on Integrity and Efficiency. However, the OIG strived to be transparent and collaborative with the Department and other government entities throughout the process. Notably, this legal review was included in the Department's Performance and Accountability Report for 2011 that was made publicly available, including through posting on the Department's website. See pg. 291.

Regarding your request for supporting documentation: given the sensitive nature of the documents you request, we would be pleased to provide those documents in accordance with the procedures for document requests required under the Privacy Act.

## **2. Temporary Duty Status OIG Employees**

I asked at the hearing that you provide the Committee with information about the Commerce IG employee who lives in Arizona but spends the majority of his time on Temporary Duty (TDY) assignment in Washington, D.C. and any other OIG employees that spend more than one week per month on TDY in the Washington, D.C. area. Please provide the Committee with the number of employees who have spent more than one week per month on TDY status in Washington, D.C. for any time period between January 1, 2010 and present. Please indicate their "home" assignment, the reason for the TDY, and the cost of their Temporary Duty assignment.

The U.S Attorney's Office for the District of Maryland and the Federal Bureau of Investigation requested that the OIG employee from Arizona assist in a criminal investigation, under the exclusive direction of the Department of Justice, beginning in March 2012. During the time the employee worked for the Department of Justice, he did not work in OIG spaces nor was he assigned tasks by OIG personnel. OIG has another employee who has spent more than one week per month on TDY assignment in Washington, DC, over the past year. This employee works out of OIG's Denver office, and travels to Washington, DC, to supervise investigations, meet with OIG officials, and to coordinate with the Department of Justice, as needed.

## **3. Office of Personnel Management 2012 Survey of Commerce OIG**

Mr. Smith, when I asked about the Office of Personnel Management (OPM) 2012 Survey of the Commerce OIG at the hearing you responded that, "the number of negative responses from last year's survey has actually decreased for almost every question, and I do consider that progress."

I wanted to clarify with you that you were referencing the same survey as I was. I assume you are familiar with that survey as you have been put in charge of the IG's employee working groups. The link to the survey that I referred to at the hearing can be found here: <http://democrats.science.house.gov/publication/federal-employee-viewpointsurvey-results-2012>.

This survey clearly indicates a dramatic decline in both the morale of the Commerce OIG staff over the past two years and a significant deterioration in the staffs respect for the Commerce IG's top leaders. To highlight some of the responses:

In answer to Question #15, "My performance appraisal is a fair reflection of my performance," the number of OIG employees responding positively to that question dropped from 64.8% in 2010 to 54.7% in 2012.

In answer to Question #17, "I can disclose a suspected violation of any law, rule or regulation without fear of reprisal," the number of OIG staff responding positively to that question dropped from 63.3% in 2010 to 55.4% in 2012.

In answer to Question #21, "My work unit is able to recruit people with the right skills," the number of OIG employees responding negatively to that question nearly doubled from 15.2% in 2010 to 35.1% in 2012.

In answer to Question #22, "Promotions in my work unit are based on merit," the number of employees responding negatively to that question rose from 22.2% in 2010 to 39.6% in 2012.

In answer to Question #25, "Awards in my work unit depend on how well employees perform their jobs," the number of employees responding positively to that question dropped from 42.4% in 2010 to 34.7% in 2012.

In answer to Question #27, "The skill level in my work unit has improved in the past year," the number of employees responding negatively more than tripled in the past two years from 9.2% in 2010 to 30.0% in 2012.

In answer to Question #29, "The workforce has the job-relevant knowledge and skills necessary to accomplish organizational goals," the number of negative responses swelled from 5.7% in 2010 to 19.6% in 2012.

In answer to Question #38, "Prohibited Personnel Practices (for example, illegally discriminating for or against any employee/applicant, obstructing a person's right to compete for employment, knowingly violating veterans' preference requirements) are not tolerated," the number of negative responses jumped from 9.8% in 2010 to 16.8% in 2012.

In answer to Question #40, "I recommend my organization as a good place to work," the number of OIG staff responding negatively ballooned from 8.8% in 2010 to 45.4% just two years later in 2012.

In answer to Question #41, "I believe the results of this survey will be used to make my agency a better place to work," the number of negative responses more than doubled from 23.5% in 2010 to 49.4% in 2012.

In answer to Question #53, "In my organization, leaders generate high levels of motivation and commitment in the workforce," the number of negative responses rose from 16.4% in 2010 to 48.5% in 2012.

In answer to Question #54, "My organization's leaders maintain high standards of honesty and integrity," the number of OIG staff responding negatively rose by nearly 400% from 10.6% in 2010 to 39.6% in 2012.

In answer to Question #60, "Overall, how good a job do you feel is being done by the manager directly above your immediate supervisor/team leader?" the number of employees responding negatively increased from just 5.6% in 2010 to 26.2% in 2012.

In answer to Question #61, "I have a high level of respect for my organization's senior leaders," the number of employees responding in the negative rose from 16.2% in 2010 to 37.1% in 2012.

In answer to Question #69, "Considering everything, how satisfied are you with your job?" the number of negative responses increased from 18.9% in 2010 to 30.4% in 2012.

At the hearing, in answer to my question about this survey you said: "... I would like to point out the fact that even though the difference between the positive and the neutral negative may not be where we want it to be, it is encouraging to see that the number of negative responses from last year's survey has actually decreased for almost every question, and I do consider that progress." Mr. Smith, I do not consider the above responses progress. Please identify for me the specific areas you believe point to progress in the management of the Commerce Office of Inspector General as highlighted in the OPM survey.

Regarding the OPM 2012 survey, I think it important to point out that the overall satisfaction of federal employees who participated in the survey dropped to its lowest level in nearly a decade, according to the Partnership for Public Service. Other reference points in the survey showed two-thirds of all federal agencies experienced decreasing employee satisfaction. According to one federal human capital practice director who worked with the Partnership on the survey, the "overall morale decline is likely due to the stresses faced by federal employees in the last year, such as at least two years of pay scale freezes, tight budgets, staffing declines and increasing workloads." Despite this, Commerce OIG showed a drop in the percentage of negative responses in several morale related areas, such as satisfaction with training, sense of accomplishment, and overall job satisfaction.

As you quoted, I said in my testimony "that the number of negative responses from last year's survey has actually decreased for almost every question, and I do consider that progress." If people who took the survey are less negative in their responses from one year to the next, I consider that progress. My response stated I was comparing the current year results (2012) with the prior year results (2011). I was also speaking of improvements in the percentages of those who provided a "negative" response. I was not comparing our results from the current year with responses from two years ago (2010), nor was I speaking to differences between "positive" responses from the current year with "positive" responses from two years ago, both of which you cited in your examples. Responses to questions 1, 4, 6, 7, 11, 28, 34, 37, 38, 43, 46, 49, 50, 52, 63, 64, 67, 68, and 69 represent

examples of improvements in the percentage of “negative” responses between 2012 and 2011.

## Questions from The Honorable Scott Peters

### Commerce IG Nondisclosure Orders (“Gag Orders.”)

**QFR #1:** Mr. Smith, in response to my question at the hearing about the non-disclosure or “gag orders” that the Commerce Inspector General Mr. Todd Zinser, Mr. Rick Beitel, the Principal Assistant Inspector General for Investigations and Whistleblower Protection, and Mr. Wade Green, the Commerce IG’s General Counsel, forced several departing IG staff to sign, you said:

“We do not believe that the interpretation that was provided, that those were gag orders, is correct. We actually used the definition of disparage within the EEOC website, which says telling of falsehoods and lies with reckless regard to the truth. That is the connotation that was used. In addition, we have been working with OSC and they have—through the MSPB [Merit Systems Protection Board], and they have in fact requested through the arbitrator that we submit a joint motion to dismiss the stay as well as dismiss the protective order, and the last we heard from OSC, they consider through the additional language that we submitted on those nondisclosure agreements as well as the Whistleblower Enhancement Act that was passed, that that is no longer an issue.”

I believe your statement mischaracterized the facts relating to both the purpose of the non-disclosure agreements and the status of the investigation into prohibited personnel practices of the Commerce Inspector General and his senior staff by the Office of Special Counsel (OSC).

You claimed that the word “disparage” as used in the non-disclosure agreements was an innocent effort to prevent these employees from telling “lies, falsehoods” to Congress and others. It seems nonsensical that this was the actual intent of the gag orders. In a November 2012 press release regarding these illegal orders, OSC said: “The agreements prohibit employees from voluntarily communicating with OSC or Congress.” No where did the OSC find that the Commerce Office of Inspector General feared that any of the individuals who signed these non-disclosures were forced to do so because there was a legitimate fear by the Commerce OIG that these departing employees would run off telling “lies” or “falsehoods.”

**Can you please provide the Committee with the name or names of the individuals within the Commerce IG’s office that described to you the nature, intent and scope of these non-disclosure agreements?**

We disagree with the characterization of the Settlement Agreements that appeared in the November 2012 press release, and subsequently in the media. On February 27, 2013, we issued our own press release entitled “Statement Regarding Science Committee Minority Press Release,” which included the following: “We have and will continue to cooperate fully with the Office of Special Counsel (OSC) as they continue their investigation. Most recently, at the suggestion of the Merit Systems Protection Board (MSPB) mediator, we have filed with the OSC a joint request to withdraw the application for Stay and Protective Order. Both parties are waiting for the MSPB to act on this joint request. We have met with and updated our oversight committees and will continue to keep them informed about this matter.”

Today, the MSPB granted the motion to dismiss the protective order and closed the case number associated with the motion to withdraw the stay because the stay had already expired.

Further, our use of the word “disparage” is consistent with the definition of disparage used by the EEOC, as contained in a sample Settlement Agreement on its website: “Disparage as used herein shall mean any communication, or written, of false information or the communication of information with reckless disregard to its truth or falsity.”

**QFR #2:**

In describing your justification for why IG staff were forced to sign these nondisclosures you also failed to mention a portion of the orders that clearly threatened the IG employees coerced into signing these agreements, that the OIG would provide their new employers with poor performance appraisals of their work if they broke their vow of silence about discussing issues regarding the IG’s office with either Congress or the Office of Special Counsel. These agreements seem intended to both frighten and silence departing employees through reprehensible coercive tactics. Again, the OSC said in its November 2012 press release that:

“The employees were told that manufactured negative performance appraisals would be shared with prospective employers if the employees did not sign the nondisclosure agreements.”

**Why did you omit this important section of the nondisclosure order from your testimony?**

In reviewing my testimony, I do not see where I provided “justification for why IG staff were forced to sign these nondisclosures.” As noted in my testimony, we disagree with the media’s characterization of these agreements. My understanding is that the agreements were negotiated between OIG attorneys and employees who were represented by counsel—or with the employee’s counsel directly—in arms-length transactions. I was not asked about this section of the OSC press release; I answered the questions I was asked.

**QFR #3:** You implied in your testimony that the Department of Commerce Inspector General’s office has worked with the Office of Special Counsel to resolve the questions regarding the nondisclosure orders and that you filed a “joint motion” with the Merit Systems Protection Board to dismiss the stay and protective order as a result of the revised nondisclosure agreements that you personally signed and sent to the former IG staff originally forced into signing these agreements in the first place. In your testimony, you said that as a result OSC believes “that that is no longer an issue.” As you must know, the “joint motion” essentially dealt with rescinding the illegal “gag orders” that were imposed on the former IG staff by your office. It did nothing to halt the ongoing substantive investigation into the “prohibited personnel practices” that occurred in the IG’s office. Your sworn testimony created a false impression that OSC was about to close their case.

**At the time of your testimony, were you aware that the Office of Special Counsel still had an ongoing investigation into the Department of Commerce Office of Inspector General? Why did you not acknowledge that fact to the Members of the Committee?**

I have clarified my testimony to emphasize that the joint motion the OIG filed with the OSC, at the request of the MSPB arbitrator, cleared up the issue of the stay and protective order. As stated above, I answered questions I was asked. Had the question been asked whether or not I was aware of OSC's ongoing investigation, I would certainly have "acknowledged that fact to the Members of the Committee;" however, since the OSC has not provided details on specific allegations, I would not have been able to provide any further details other than to say we are cooperating fully with their investigation.

Finally, in your testimony you suggested that the Committee has been provided with copies of the nondisclosure agreements from your office. I have been informed by Committee staff that we have received no such documents from the Commerce OIG. Since, you assumed we had been provided with these records at the hearing I would ask that you provide the Committee with copies of all of the nondisclosure agreements signed by any staff in the IG's office, both the original agreements and any subsequent revisions to them.

Regarding your request for copies of settlement agreements: given the sensitive nature of the documents you request, we would be pleased to provide those documents in accordance with the procedures for document requests required under the Privacy Act.