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August 25, 2014

**VIA EMAIL ONLY**

Mr. Dean R. Koppel  
Assistant Director  
Office of Policy and Research  
Office of Government Contracting  
U.S. Small Business Administration  
409 3<sup>rd</sup> Street, SW  
Washington, DC 20416

**Re: Comments on Proposed Rule Regarding Advisory Small Business  
Size Decisions  
RIN: 3245-AG59, Docket Number: SBA-2014—7**

Dear Mr. Koppel:

We are writing to submit comments regarding the U.S. Small Business Administration's ("SBA") proposed rule of June 25, 2014, regarding the implementation of a statutory mandate for the provision of small business status advisory opinions ("Advisory Opinion"). See Advisory Small Business Size Decisions, 79 Fed. Reg. 35963 (June 25, 2014). The proposed rule is designed to implement section 1681 of the National Defense Authorization Act ("NDAA") of 2013, which establishes a "safe harbor" from fraud penalties for individuals or firms that misrepresent business concerns as being small for purposes of Federal procurement opportunities if they acted in good faith reliance upon an Advisory Opinion received from a Small Business Development Center ("SBDC") or a Procurement Technical Assistance Center ("PTAC").

Our firm represents small businesses that operate across the government contracting spectrum. This rulemaking is positive for the small business community because it serves Congress' laudable intent to provide such firms with a defense to fraud penalties for mistaken small business representations. In addition, we see this rulemaking as a significant potential benefit for small businesses that want to proactively confirm their small business status before embarking on a business opportunity or strategy that might impact their small business status. Effective Advisory Opinions also have the potential to help curtail fraud while easing the burden on SBA, for Advisory Opinions would allow small businesses to learn of and have a chance to correct issues with their small business status before making a potentially inaccurate representation or facing a size protest.

That said, to reach its full potential, we believe the final rule needs more clarity as well as a way for SBA to assist the PTACs and SBDCs in formulating the Advisory Opinions. SBDCs and PTACs are not required to provide this service and may be unlikely to do so without more

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assistance because there is no funding in place for them to perform or be trained to provide Advisory Opinions. Furthermore, although section 1681 ostensibly excludes PTACs and SBDCs from liability to the recipient of the Advisory Opinion if SBA later finds the recipient other than small, it is unclear whether liability could nonetheless attach with respect to the Government or third parties. This lack of clarity may discourage PTACs and SBDCs from providing Advisory Opinions. Finally, Advisory Opinions could be viewed by some as an inherently government function being taken on by private actors. It is not clear whether PTACs and SBDCs have the authority to direct business concerns to complete SBA Form 355s or direct potential or acknowledged affiliates to provide them with confidential and proprietary information regarding the operations of their concerns.

Section 1681(b) directed SBA to issue rules “defining what constitutes an adequate advisory opinion.” We believe the proposed rules provide insufficient guidance for an SBDC or a PTAC to follow in preparing an “adequate advisory opinion.” The proposed rules set forth at 13 C.F.R. sec. 121.109(b) state what must be included in an Advisory Opinion to be submitted to SBA for review. The Advisory Opinion must include (a) the identity of the concern, including contact information such as address, DUNS code or EIN, as well as the identity of the principals of the concern; (b) the applicable NAICS code and size standard; (c) a determination that the concern does not exceed the size standard, dated and signed by a counselor or “similarly qualified employee” of an SBDC or PTAC; (d) copies of the evidence documenting the concern’s annual receipts and/or number of employees “as those terms are defined by §§ 121.104 and 121.106”; and (e) a written statement by a principal that the information provided to the SBDC or PTAC for purposes of obtaining the Advisory Opinion is, to the best of his/her knowledge, true, accurate, and complete.

However, the proposed rules provide no guidance as to what evidence documenting the annual receipts or number of employees is considered “adequate.” Although there are references to the regulations on the method for calculating receipts and number of employees, there is a lack of clarity as to whether the SBDC or PTAC is to make affiliation determinations and, if so, the standards by which it makes such determinations. What are the documents that must be submitted by a business entity? Is a Form 355 required? If PTACs or SBDCs are to evaluate for ostensible subcontractor affiliation determinations, what documents are to be submitted? Will decisions of the Office Hearings and Appeals govern such determinations? In contrast, if all that is required for an Advisory Opinion are tax returns, financial statements, or payroll information (as the case may be), could not a small business readily perform accurate size calculations themselves?

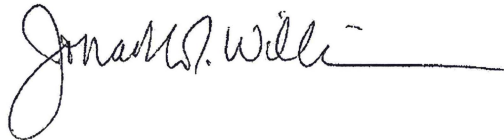
Moreover, it is unclear what would constitute a “qualified employee” similar to that of a counselor that would be able to sign an Advisory Opinion, as the expertise required to render an “adequate” Advisory Opinion is undefined and, as a practical matter, relatively uncommon. SBA should provide guidelines and training for becoming a “qualified employee” so PTACs and SBDCs will have staff able to render Advisory Opinions.

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In sum, there should be more guidance in the regulation to give PTACs and SBDCs sufficient standards to issue an “adequate” Advisory Opinion upon which a business concern could reasonably rely and SBA would be likely to uphold. Accordingly, we strongly urge SBA to issue more robust standards for the type of evidence that will be required for a SBDC or PTAC to render an “adequate” Advisory Opinion, the extent to which they should decide issues of affiliation,<sup>1</sup> as well as guidelines and training for the staff of PTACs and SBDCs who will be the qualified employees to render the Advisory Opinions. We do not have recommendations as to what particular guidelines and standards should be used; rather we think that it is more important at this stage that at least some standards are identified in order to give both the business concern seeking, and the PTAC and SBDC issuing, the Advisory Opinion some idea of what needs to be done and whether what they do will be upheld by SBA either upon review or a subsequent size determination proceeding.

We appreciate your attention to this matter and trust that you will carefully consider these comments. Please do not hesitate to contact us if you have any questions.

Very truly yours,



Pamela J. Mazza  
Antonio R. Franco  
Jonathan T. Williams  
Isaias “Cy” Alba, IV  
Dean S. Nordlinger

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<sup>1</sup> If the Advisory Opinions do not address affiliation, they will be of limited utility. Firms should know their own employee count or revenues and perhaps might seek assistance from a PTAC or SBDC to confirm those calculations are within the appropriate size standard for their inquiry. But, we envision the need for a formal Advisory Opinion – both to protect against potential liability for a misrepresentation and to provide greater certainty for a new business strategy – will almost always arise when there are questions about affiliation and the sufficiency of affiliation mitigation strategies.