

January 28, 2010

**Via Facsimile and E-mail**

Mr. Joseph Loddo  
Associate Administrator  
Office of Contract Assistance  
Office of Business Development  
Small Business Administration  
409 3<sup>rd</sup> Street, SW  
Washington, DC 20416

**RE: Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations. Federal Register 74 Fed. 55694, October 28, 2009**

Dear Associate Administrator Loddo:

The Office of Advocacy submits this comment letter to the U.S. Small Business Administration (SBA) in response to the above-referenced notice of proposed rulemaking.

**I. Advocacy Background**

Congress established the Office of Advocacy (Advocacy) under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration(SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or of the Administration. Section 612 of the Regulatory Flexibility Act (RFA) requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act.<sup>1</sup> The RFA requires agencies to analyze the economic impact of proposed regulations on small entities, and where there is likely to be a significant economic impact on a substantial number of small entities, to consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on these small entities.<sup>2</sup>

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<sup>1</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

<sup>2</sup> See generally, Office of Advocacy, U.S. Small Business Administration, *A Guide for Federal Agencies: How to Comply with the Regulatory Flexibility Act* (2003).

In addition, under Executive Order 13272 agencies are required to give every appropriate consideration to comments provided by Advocacy.<sup>3</sup> The agency must include, in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.<sup>4</sup>

## **II. Potentially Positive Aspects of the Proposed 8(a) Contracting Regulation**

Since 1978, SBA has had a legislative requirement of trying to provide maximum practicable opportunity for socially and economically disadvantaged small business owners to participate in the performance of contracts let by any Federal agency. The Office of Advocacy commends SBA for attempting to provide some necessary regulatory revisions to its 8(a) and socially and economically disadvantaged business (SDB) programs. Attempting to move some of SBA's internal practices regarding these programs to a regulatory framework is a good move for small businesses. It is also commendable that SBA, recognizing some of the cost burdens that 8(a) companies encounter with having to comply with SBA's requirement of audited financial statements, is proposing to provide some companies with alternative compliance opportunities. The Office of Advocacy is pleased that SBA is proposing to exempt funds in Individual Retirement Accounts (IRA) from the calculation of net worth. Moreover, SBA should be applauded for its efforts to seek broad public input on this regulatory initiative by conducting regional public forums across the United States. The 8(a) program is one of the Federal government's most recognized programs for small and disadvantaged business owners and because of the current legal challenges facing its survival, Advocacy would like to recommend that SBA publish the full transcripts of those hearings prior to finalization of the current proposed regulation.

## **III. Areas of Concern with the Proposed Contracting Regulation**

### **A. Residency Requirement**

The proposed regulation attempts for the first time to establish a residency requirement for 8(a) companies. The proposal if implemented would require the participant to spend part of every month physically present at his/her primary offices. Public Law 95-507 is the legal authority for the 8(a) program and it requires the participant to be a citizen of the United States. There is no legislative or regulatory history of the 8(a) program to support this residency provision. This residency requirement is more limiting than the SBA definition of business concern. According to 13 CFR section 121.105, SBA defines a business concern as an entity organized for profit, with a place of business located in the United States and which operates primarily within the United States. SBA points to a single Office of Hearings and Appeals case as the justification for the proposal;<sup>5</sup> that case was vacated on grounds not related to the residency issue of the

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<sup>3</sup> Exec. Order No. 13272 § 1, 67 Fed. Reg. 53461 (Aug. 16, 2002).

<sup>4</sup> *Id.* at § 3(c).

<sup>5</sup> 74 Federal Register 55700 (October 28, 2009).

participant. Nor does SBA not provide any data or analysis to support that this proposed change will prevent “negative control issues.” SBA does not provide a statutory authority for this proposed change. If available, SBA should provide the following information in support of the proposal:

How many cases are reviewed each year for negative control issues?

How many of these cases involve the Participant residing in foreign countries?

Since companies are required to submit and operate under approved business plans, how many plans involve Participants engaged in business activities with multi-national companies or Participants who are trying to provide product and services to United States activities in foreign countries?

### **B. Program Graduation**

The proposed rule sets forth conditions for graduation that appear to solely be related to removing the economic conditions of being disadvantaged. Public Law 95-507 defines the eligible participants for the 8(a) as ones who are socially and economically disadvantaged. As such, program graduation should also provide consideration for the removal of the social disadvantaged barriers.

### **C. Administration of 8(a) Contracts**

The proposed rule would add clarifying language that the administration of the program has been delegated to procuring agencies. The 8(a) program is a business development program. As such, each participant has been assigned a Business Opportunity Specialist (BOS) who should have the responsibility of being its advocate. This individual should be able to assist the participant in negotiating terms and conditions of contracts and other matters that should arise during contract performance. By law the 8(a) contract still resides with SBA as the prime contractor and the 8(a) company as the subcontractor. The delegation of the administration of the 8(a) program to procuring agencies would seem to place a tremendous cost burden on 8(a) companies.

### **D. Requirements Relating to SDBs**

SBA is proposing to allow part-time companies to participate in the SDB program. SBA proposes to add a new paragraph to section 124.1002 that would allow SDB owners to devote fewer than 40 hours per week to their SDB firms. SBA’s only justification for this is the fact that the SDB program is not a business development program as is the 8(a) program. The Initial Regulatory Flexibility Analysis (IRFA) does not provide any data to support this change nor does the IRFA provide the legal authority for SBA to deviate from its definition of a small business concern. Moreover, the legislative history of the socially and economic disadvantaged programs does not seem not to support or encourage the participation of part-time business owners.

## **VI. Recommendation**

SBA’s IRFA for this proposed regulation is a good first step; however, it does not provide an economic impact analysis on any of the above areas of concern. Moreover, because SBA has conducted regional field hearings on this proposed regulation,

Advocacy recommends that the public be given an opportunity to review the written testimony from these regional hearings before the closing of the comment period for this regulation. In the alternative, SBA should consider re-proposing this rule, taking into consideration the new data and information gathered from the field hearings, which should provide a better analysis of the cost burdens on small entities.

If you have any questions regarding this letter, please contact Major L. Clark, III in my office at (202) 205-7150.

Sincerely,  
Susan Walthall

/S/  
Acting Chief Counsel for Advocacy

/S/  
Major L. Clark, III

Assistant Chief Counsel for Procurement

cc: The Honorable Cass Sunstein, Administrator,  
Office of Information and Regulatory Affairs