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SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN 3245-AG59

Advisory Small Business Size Decisions

AGENCY: Small Business Administration.
ACTION: Final rule.

SUMMARY: This rule implements provisions of the National Defense Authorization Act of 2013 (NDAA) pertaining to small business size. This rule amends the U.S. Small Business Administration's (SBA or Agency) program regulations to implement statutory provisions establishing limitations of liability 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 small business status advisory opinions received from Small Business Development Centers (SBDCs) or Procurement Technical Assistance Centers (PTACs). The rule also amends SBA's regulations to establish the criteria small business status advisory opinions must meet in order to be deemed adequate and specify the review process for such opinions. Finally, the rule further amends SBA's regulations to update the circumstances under which SBA may initiate a formal size determination.

DATES: This rule is effective August 10, 2015.

FOR FURTHER INFORMATION CONTACT: Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning & Liaison, 409 Third Street SW., 8th Floor, Washington, DC 20416, (202) 205-7337, brenda.fernandez@sba.gov.

SUPPLEMENTARY INFORMATION: On January 2, 2013, Congress amended the

Small Business Act to provide that the penalties created under 15 U.S.C. 645(d) for misrepresentation of a firm as a small business concern do not apply to individuals or firms that act in good faith reliance upon small business status advisory opinions they receive from SBDCs or PTACs. Additionally, the Small Business Act was amended to give responsibility for reviewing, accepting, or rejecting these small business status advisory opinions to SBA's Office of General Counsel. Finally, the Small Business Act was further amended to require that SBA promulgate regulations to implement this provision no later than 270 days after the date of passage of the statutory amendment.

SBA published a proposed rule regarding these statutory provisions in the **Federal Register** on June 25, 2014 (79 FR 35963), inviting the public to submit comments on or before August 25, 2014.

Summary of Comments and SBA's Responses

SBA received and considered sixteen comments on the proposed rule. Twelve commenters opposed the creation of the limitation on liability in general and urged SBA not to adopt the proposed rule. As noted in the preamble to the proposed rule, Congress has mandated via legislation that SBA establish this limitation on liability protection via regulation. With this rule, SBA is implementing that legislative mandate. The remaining comments, as well as SBA's responses to them, are discussed below.

Requiring SBDCs/PTACs To Provide Advisory Opinions

Two comments urged SBA to change the approach taken under the proposed rule and require SBDCs and PTACs to provide small business status advisory opinions to interested parties rather than giving them the authority to do so. SBA notes that the statutory provision does not mandate that SBDCs and PTACs perform such services. As such, SBA believes that the approach taken in the proposed rule is consistent with the authorizing legislation. Moreover, SBA notes that the PTAC program is administered by the Department of Defense, not SBA. Absent express statutory authority, SBA believes it lacks the power to impose performance

mandates on a program administered by another agency.

Additionally, with regard to SBDCs, 15 U.S.C. 648(a)(3)(A) requires SBA to consult with the association representing SBDC grant recipients prior to defining the scope of activities conducted under the SBDC program. That provision further obligates SBA to develop, in conjunction with that association, the rules governing the general operations and administration of the SBDC program. Therefore, there are statutory obstacles to SBA unilaterally requiring SBDCs to provide these new advisory opinion services. Such new performance requirements may only be established following the consultation required by 15 U.S.C. 648(a)(3)(A), which the Agency conducts with the association on an annual basis. It is SBA's intention to address the topic of small business status advisory opinions during the next annual consultation.

Liability of SBDCs/PTACs

SBA received two comments regarding the potential liability of SBDCs or PTACs that issue small business status advisory opinions to firms that subsequently turn out to be other than small. SBA notes that § 1681 of the enabling legislation expressly provides that an SBDC or PTAC that issues a positive advisory opinion will not be liable to that business concern in the event SBA subsequently declines to accept the opinion. In cases where an SBDC or PTAC issues a negative advisory opinion for a business concern that is subsequently determined to be small, the issue of whether section 1681's grant of immunity from liability would apply in those circumstances is one that SBA must leave to the courts to determine.

With regard to the potential liability of an SBDC or PTAC to third parties for advisory opinion it issued, while one commenter suggested that section 1681 of the enabling legislation might also immunize an SBDC or PTAC from liability in those circumstances, SBA must similarly defer to the courts to determine the scope of the shield afforded under section 1681.

Inherently Governmental Function

Two commenters objected to the use of SBDCs and PTACs as issuers of small business status advisory opinions on the grounds that this approach will result in the impermissible delegation of an

inherently governmental function. SBA notes that the legislation requires the use of SBDCs and PTACs in this role and the Agency is merely implementing that scheme. Moreover, SBA has historically permitted outside organizations to act as private certifiers for its contracting programs. Where private or outside certifiers are utilized, ultimate decisionmaking authority as to whether a firm qualifies for participation in its contracting programs, including small business set-asides, still rests with SBA. In the case of small business status advisory opinions, the regulations provide that SBA will review and either accept or reject. As such, SBA does not believe the issuance of small business status advisory opinions by SBDCs and PTACs will lead to the delegation of an inherently governmental function. In addition, the firm's size may always be challenged through a size protest in connection with an actual procurement.

Evidence of Business Size

One commenter requested that SBA provide more detailed guidance and specific examples regarding the type of evidence a firm could provide to an SBDC or PTAC to adequately document its compliance with the size standards. SBA concurs with this suggestion and has amended § 121.109(b)(4) accordingly.

Qualifications of SBDC or PTAC Employees Issuing Advisory Opinions

One commenter alleged that the phrase "counselor or similarly qualified employee" as used in § 121.109(b)(3) may create uncertainty or confusion on the part of SBDCs or PTACs. However, there was insufficient information provided for SBA to create an alternative term to describe these individuals. SBA does agree with the suggestion that it would be beneficial to provide periodic training on SBA's size rules to SBDCs and PTACs to enable them to better carry out their roles under this rule. SBA is currently exploring the most effective method of accomplishing that objective.

Timeframe for Issuing Advisory Opinions

One commenter suggested that SBA impose a deadline on the length of time SBDCs and PTACs are allowed to take when preparing small business status advisory opinions. SBA has no reason to doubt the capability or responsiveness of SBDCs and PTACs in this area. SBA notes that the performance of SBDCs and PTACs in carrying out their duties is already being monitored and policed by the program offices charged with

administering their grant agreements. As such, the responsiveness and timeliness of SBDCs and PTACs will be taken into account during the regular grant recipient performance review process and any shortcomings on their parts will be addressed during that process. However, SBA does reserve the right to impose such a deadline if circumstances subsequently demonstrate a need for it.

Review of Advisory Opinions

SBA concurs with one commenter's request that firms which receive small business status advisory opinions holding that they are other than small be permitted to seek review of those determinations. Therefore, SBA is amending 13 CFR 121.1001 to permit a firm that receives a negative advisory opinion (*i.e.*, an opinion concluding that it is other than small) from an SBDC or PTAC to request that SBA conduct a formal size determination of it.

Furthermore, with regard to the review of advisory opinions rejected by SBA, it is SBA's intention to immediately initiate a formal size determination for each firm that is the subject of an advisory opinion that is rejected by the Agency. Affected firms will thus be able to avail themselves of the standard appeals process set forth in 13 CFR 121.1101.

Expiration of Advisory Opinions

One commenter suggested that small business status advisory opinions issued by SBDCs and PTACs should expire, or that the remoteness in time from when they were issued should be taken into account when determining whether they are entitled to avail themselves of the safe harbor provision. SBA rejects this suggestion. The enabling statute does not include a provision calling for the expiration of advisory opinions and does not envision that the safe harbor protection is something that should be switched on or off. As the statute makes clear, firms that receive positive advisory opinions are automatically entitled to protection from liability. Of course, a firm's size status can be protested in connection with an actual procurement.

Moreover, such an approach would be inconsistent with the treatment given formal size determinations, which do not expire absent a material change in circumstances. See 13 CFR 121.1009. However, SBA does believe that § 121.109 of the new rule should make clear that a firm is no longer justified in relying upon a positive advisory opinion where it has experienced a material change in circumstances with regard to its average annual receipts or its number of employees. SBA has

therefore amended § 121.109 accordingly.

Other Comments

In addition to the comments received from the public, SBA also received comments during its internal review cycle which recommended that the Agency simplify and streamline the process of issuing small business status advisory opinions by requiring SBDCs and PTACs to utilize the same form SBA relies upon when making size determinations. These internal commenters also suggested that SBA clarify that SBDCs and PTACs must take into account the principles of affiliation established under 13 CFR 121.103 when issuing advisory opinions. SBA concurs with these recommendations and has therefore amended § 121.109 accordingly.

Compliance With Executive Orders 12866, 12988, 13132, 13175, 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Paperwork Reduction Act (44 U.S.C., Chapter 35)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this final rule is not a significant regulatory action under Executive Order 12866. This is also not a "major" rule under the Congressional Review Act, 5 U.S.C. 801, *et seq.*

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

For purposes of Executive Order 13132, SBA has determined that this final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, for the purpose of Executive Order 13132, Federalism, SBA determines that this final rule has no federalism implications warranting preparation of federal assessment.

Executive Order 13175

For purposes of Executive Order 12175, SBA has determined that this final rule will not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and

Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Therefore, for the purpose of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, SBA determines that this final rule does not require consultations with tribal officials or warrant the publication of a Tribal Summary Impact Statement.

Executive Order 13563

As part of its ongoing efforts to engage stakeholders in the development of its regulations, SBA consulted with representatives from the contracting community regarding the intent of this rule and the various components related to it. No concerns or comments were raised that needed to be addressed in this rule.

Paperwork Reduction Act, 44 U.S.C. Ch. 35

At the proposed rule stage SBA concluded this rule imposed no reporting or recordkeeping requirements. However, during review of this final rule, SBA realized it erred in its conclusion. Specifically, as outlined in section 121.109(b), in order to obtain an advisory opinion on their size status, concerns must submit to SBDCs and PTACs information to support their claims, including payroll records, time sheets, federal income tax returns, or other documentation that would show concerns annual receipts or number of employees. SBDCs and PTACs will use submit this information to SBA as basis for their opinions. The information to concerns will submit to SBDCs and PTACs is the same information that concerns currently submit to SBA for a size determination using SBA Form 355, *Information for Small Business Size Determination*. Therefore, SBA will amend this information collection to include this additional use and submit same to OMB for approval.

Regulatory Flexibility Analysis, 5 U.S.C. 601-612

SBA has determined that this rule may have a significant impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601-612. In accordance with 5 U.S.C. 603(b), SBA sets forth a regulatory flexibility analysis (RFA) of this final rule addressing the following topics: (1) The legal basis, need for, and objective of the rule; (2) a description and estimate of the number of small entities to which the rule will apply; (3) the projected reporting, record keeping, and other

compliance requirements of the rule; (4) the relevant Federal rules which may duplicate, overlap or conflict with the rule; and (5) any significant alternatives that would allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities.

1. *What is the legal basis, need for, and objective of the rule?* Pursuant to section 1681 of Public Law 112-239, SBA is statutorily required to publish a regulation granting an exemption from the misrepresentation penalties imposed under 15 U.S.C. 645(d) in cases where a party's erroneous claim to small business status stems from its good faith reliance upon an advisory opinion issued by an SBDC or PTAC. SBA is also obligated under § 1681 to define via regulation what constitutes an adequate advisory opinion and to review and accept or reject all advisory opinions issued by SBDCs and PTACs. In addition to giving effect to these statutory mandates, the final rule also establishes the procedures and timeline by which SBA will review advisory opinions.

2. *What is SBA's description and estimate of the number of small entities to which the rule will apply?* Because SBA's programs do not apply to small governmental jurisdictions or small organizations, only small businesses will be affected by this final rule. Additionally, the final rule will not apply to all small businesses generally, but only to those firms that represent themselves as being small for purposes of federal procurement opportunities.

The limitation on liability provision of the final rule will only affect those firms that incorrectly claim status as small business concerns after obtaining small business status advisory opinions from SBDCs or PTACs. In Fiscal Year 2014, SBA determined that approximately 137 firms that had represented themselves as being small for purposes of federal procurement opportunities were not small. Most of these cases did not involve fraud, but instead were the result of errors or misunderstandings of the size regulations. To date, SBA is unaware of any firms being penalized under 15 U.S.C. 645(d) for fraudulently misrepresenting themselves as small business concerns. Therefore, SBA anticipates that the limitation on liability provision of the final rule will impact very few concerns.

With regard to the small business status advisory opinion provision of the final rule, SBA notes that neither SBDCs nor PTACs are required to provide such opinions under the language of the statute. It is currently unknown how

many SBDCs and PTACs will elect to provide such services, particularly given that no additional funding will be awarded to them to cover the cost of these services. Moreover, it is unclear how much demand there will be for such services from those SBDCs and PTACs that offer them. While it is thus impossible to gauge the number of small businesses that will obtain these services, SBA anticipates that very few concerns will be affected by the small business status advisory opinion provision of the final rule.

3. *What are the projected reporting, record keeping, and other compliance requirements of the rule and an estimate of the classes of small entities which will be subject to the requirements?* There would be no additional reporting or recordkeeping requirements imposed by the rule, but there would be certain minor compliance requirements. Businesses that believe they are small and that wish to receive advisory opinions to that effect from SBDCs or PTACs would be required to provide information documenting the basis for that belief to SBDCs or PTACs and attest to its accuracy.

4. *What are the relevant Federal rules which may duplicate, overlap or conflict with the rule?* The Federal Acquisition Regulation (FAR) defers to and incorporates the substance of the provisions set forth in SBA's regulations for issues pertaining to business size. To the extent the FAR is inconsistent with size rules implemented by SBA, the FAR would need to be changed to be consistent.

5. *Are there any significant alternatives that would allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities?* SBA has considered a number of alternatives to the final rule. One alternative SBA has considered would have permitted firms to simply self-certify to SBDCs or PTACs that they are small. Another alternative SBA considered would have had the General Counsel review the SBDC or PTAC advisory opinions rather than the Associate General Counsel, Office of Procurement Law. SBA has not incorporated the first alternative in the final rule because it would render any advisory opinion pro forma and would not provide the Agency with any basis for accepting or rejecting the opinion. With regard to the second alternative, SBA did not propose it given the substantial time demands already placed upon the General Counsel. SBA believes that delegating this responsibility to the Associate General Counsel, Office of Procurement Law would permit the Agency to provide a

quicker turnaround time for reviewing advisory opinions and would take advantage of the established subject matter expertise of that official.

List of Subjects in 13 CFR Part 121

Administrative practice and procedure, Reporting and recordkeeping requirements, and Small Businesses.

For the reasons stated in the preamble, SBA amends 13 CFR part 121 as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 662, and 694a(9).

■ 2. Amend 121.108 by revising the section heading and adding paragraph (e)(4) to read as follows:

§ 121.108 What are the penalties for misrepresentation of size status?

* * * * *

(e) * * *

(4) *Limitation on Liability.* An individual or business concern will not be subject to the penalties imposed under 15 U.S.C. 645(a) where it acted in good faith reliance on a small business status advisory opinion accepted by SBA under § 121.109.

§ 121.109 [Redesignated as § 121.110]

■ 3. Redesignate § 121.109 as § 121.110.
 ■ 4. Add new § 121.109 to read as follows:

§ 121.109 What is a small business status advisory opinion?

(a) *Defined.* A small business status advisory opinion is a written opinion issued by either a Small Business Development Center (SBDC) operating under part 130 of this chapter or a Procurement Technical Assistance Center (PTAC) operating under 10 U.S.C. chapter 142 which concludes that a firm is entitled to represent itself as a small business concern for purposes of federal government procurement opportunities.

(b) *Submission.* An SBDC or PTAC must submit a copy of each small business status advisory opinion it issues to the following Agency official for review: Associate General Counsel, Office of Procurement Law, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416 or by fax to (202) 205-6390 marked Attn: Small Business Status Advisory Opinion. A small business status advisory opinion must:

(1) Provide a written analysis explaining the reasoning underlying the

SBDC or PTAC's determination that the covered concern, along with its affiliates, either does or does not exceed the size standard(s). This analysis must be dated and signed by an SBDC or PTAC business counselor or similarly qualified individual.

(2) Include, as an attachment, a completed copy of an SBA Form 355 for the covered concern and its affiliates.

(3) Include, as an attachment, copies of the evidence (such as payroll records, time sheets, federal income tax returns, etc.) provided by the covered concern to the SBDC or PTAC clearly documenting its annual receipts and/or number of employees as those terms are defined by §§ 121.104 and 121.106.

(c) *Review.* Unless a referral is made under paragraph (e) of this section, SBA will decide within 10 business days of receiving a small business status advisory opinion to accept or reject it based on its consistency with part 121. SBA will provide written notification of that decision to the SBDC or PTAC that issued the small business status advisory opinion as well as to the covered concern.

(d) *Reliance.* A concern that receives a small business status advisory opinion holding that it does not exceed the applicable size standard(s) may rely upon that determination for purposes of responding to Federal procurement opportunities from the date it is issued unless and until that advisory opinion is rejected by SBA in accordance with paragraph (c) of this section or the concern undergoes a significant change in its ownership, management, or other factors bearing on its status as a small business concern. However, the firm's size may be protested by interested parties in connection with a specific procurement.

(e) *Referral for size determination.* Nothing in this section precludes the Associate General Counsel, Office of Procurement Law from requesting a formal size determination for a concern that is the subject of a small business status advisory opinion pursuant to § 121.1001(b)(9).

(f) *Penalties for misrepresentation—*
 (1) *Suspension or debarment.* The SBA suspension and debarment official may suspend or debar a person or concern for misrepresenting a concern's size for purposes of obtaining a small business status advisory opinion pursuant to the procedures set forth in 48 CFR subpart 9.4.

(2) *Civil penalties.* Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729-3733, and under the Program Fraud Civil Remedies Act, 331 U.S.C.

3801-3812, and any other applicable laws.

(3) *Criminal Penalties.* Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the small business size status of a concern in connection with procurement programs pursuant to section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as amended, 18 U.S.C. 1001, 18 U.S.C. 287, and any other applicable laws. Persons or concerns are subject to criminal penalties for knowingly making false statements or misrepresentations for the purpose of influencing any actions of SBA pursuant to section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct "continuing representations" that are no longer true.

■ 4. Amend § 121.1001 by revising paragraph (b)(9), redesignating paragraph (b)(10) as paragraph (b)(11), and adding new paragraph (b)(10) to read as follows:

§ 121.1001 Who may initiate a size protest or request a formal size determination?

* * * * *

(b) * * *

(9) For other purposes related to protecting the integrity of the Federal procurement process, including validating that firms listed in the System for Award Management database are small, the Government Contracting Area Director or the Director, Office of Government Contracting may initiate a formal size determination when sufficient information exists that calls into question a firm's small business status. The current date will be used to determine size, and SBA will initiate the process to remove from the database the small business designation of any firm found to be other than small.

(10) For purposes of determining compliance with small business requirements for firms relying upon small business status advisory opinions, the Associate General Counsel, Office of Procurement Law may request a formal size determination. Additionally, any firm that is the subject of a small business status advisory opinion holding that it is other than small may request a formal size determination.

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Dated: January 28, 2015.

Maria Contreras-Sweet,
Administrator.

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