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**VIA FEDERAL RULEMAKING PORTAL**

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U.S. Small Business Administration  
Office of Policy, Planning and Liaison  
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Washington, DC 20416

Re: RIN 3245-AG75, Comments on Advance Notice of Proposed Rulemaking  
Regarding Women-Owned Small Business and Economically  
Disadvantaged Women-Owned Small Business—Certification

Dear Ms. Fernandez:

We are writing to submit comments on the U.S. Small Business Administration's ("SBA") above-referenced advance notice of proposed rulemaking ("ANPR"), issued December 18, 2015, 80 Fed. Reg. 78,984. Our firm represents small business federal contractors, including women-owned and economically-disadvantaged women-owned small businesses ("WOSBs/EDWOSBs"). We submit these comments to assist SBA in drafting a viable proposed rule that is fair and workable for WOSBs and EDWOSBs.

***SBA Should Delay Implementation and Work to Change the Law***

Before providing substantive comments to the ANPR, we must express our strong objection to the certification requirement. Since its inception, the WOSB Federal Contracting Program ("WOSB Program") has lacked parity with the other set-aside programs. It took 10 years for the WOSB Program to be implemented and, when it was, the contract awards were limited, based on industry, value, and an inability to direct award. Through zealous advocacy by women business owners and the associations that represent them, both the dollar caps and lack of sole source have been remedied through the lawmaking process. Yet now, just as the WOSB Program is finally positioned to rise to expectations, Congress imposes another restriction on participants: a statutory requirement that WOSBs be certified by a third party—whether it is a national certifying entity, a Federal agency, a State government, or the SBA.

The certification requirement of Section 825 of the National Defense Authorization Act for Fiscal Year 2015 ("2015 NDAA") presents an unfair hindrance on the growth of WOSBs. Should it be implemented as-is, WOSBs could not compete for contracts set-aside or receive sole

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source awards under the WOSB Program until they are certified as owned and controlled by women by a third party. Such a certification process may take months, with every passing day presenting missed business opportunities for the contractors and government alike. WOSBs would lose the ability to do business with the federal government and procuring agencies would lose the ability to increase competition and spend funds earmarked for WOSBs. Agencies already struggle to make the WOSB spending goal given other hindrances, such as the lack of sole source authority, which was recently rectified, and the North American Industry Classification System (“NAICS”) code limitations, which continue. Thus, SBA should delay implementation of the statutory certification requirement, maintaining the status quo of a modified self-certification system, with the option to pursue certification by a third party. Meanwhile, SBA may work with Congress, advocating on behalf of WOSBs, to change the certification requirement.

At a minimum, SBA should first work with Congress to resolve a clear disparity in the certification requirement—as drafted, it applies only to WOSBs, but not to certifications pertaining to a WOSB’s economic disadvantage. Indeed, 15 U.S.C. § 637(m)(2)(E) provides that contracting officers may restrict competition for any contract to small business concerns owned and controlled by women if “each of the concerns is certified by a Federal agency, a State government, the Administrator, or a national certifying entity approved by the Administrator as a small business concern owned and controlled by women.” This subsection, therefore, does not address economically disadvantaged women. It would not be fair to implement a certification requirement that disparately impacts certain women, but not others. This is a fundamental flaw in the 2015 NDAA, and should lead SBA to refuse to implement any certification process until it is fair and does not prejudice women, as a whole, or certain women based on their financial wherewithal.

With our general concerns expressed, we turn to the various questions raised by SBA in the ANPR.

### ***SBA Certification Program***

#### **❖ If SBA Adopts the Certification Requirement, SBA Should Be the Only Certifier**

If SBA proceeds to implement the 2015 NDAA provision calling for certification of WOSBs, we believe that SBA is the best and only choice for the certifying entity to ensure uniformity, fairness and parity. We also suggest that SBA complete its standard operating procedures (“SOP”) for the WOSB Program before implementing the certification requirement and, once the SOP is in place, firms be allowed a one-year grace period to complete the certification process with SBA. Additionally, we propose that SBA repurpose the current WOSB Repository for use as a dynamic application portal.

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Although certification requirements exist in other set-aside programs, specifically the 8(a) Business Development Program (“8(a) Program”) and Historically Underutilized Business Zones Program (“HUBZone Program”), these certifications are not performed by non-governmental entities. Rather, SBA operates the certification processes. Therefore, a basic question facing SBA in implementing the certification requirement of Section 825 of the 2015 NDAA is whether SBA wants to perpetuate the disparity between its WOSB Program and every other set-aside program available for small business contractors. We submit that the answer to this question should be no. The WOSB Program will only reach success—and the elusive 5% government-wide spending goal—when participants are given the same privileges and obligations as those small businesses participating in other set-aside programs.

However, we also recognize that SBA must ferret out fraud, waste and abuse in its programs, which includes identifying those businesses claiming to be owned and controlled by women when they are not. But data shows that national certifying entities are not the solution. An October 2014 U.S. Government Accountability Office (“GAO”) report detailed various problems with the national certifying entities and, specifically, SBA’s failure to monitor and oversee their activities. See GAO, Women-Owned Small Business Program: Certifier Oversight and Additional Eligibility Controls Are Needed, GAO-15-54 (Washington, D.C.: October 2014). GAO observed that pursuing third party certification does not ensure a firm claiming WOSB status is, in fact, eligible as a WOSB. Indeed, SBA conducted annual eligibility examinations in 2012 and 2013 of both self- and third party certified businesses, and found that 42 percent in the 2012 sample and 43 percent in the 2013 sample were ineligible. Id. at 16.

Accordingly, we submit that in implementing a certification process for WOSBs, SBA should eliminate non-governmental entities as potential certifiers. Further, we believe that involving state and other federal agencies in the WOSB certification process will lead to inconsistency and confusion. Rather, to put the WOSB Program on equal footing with other set-aside programs with certification requirements, SBA should be the only available certifying entity.<sup>1</sup>

Indeed, it is logical that SBA retain its certifying authority because the protest process and eligibility examination process remain in place, even with the certification requirement. Therefore, SBA faces the real possibility with non-governmental, state, and other federal agency certifiers that they may deem a business an eligible WOSB under the certifier’s interpretation of the eligibility requirements, but when the business is subject to a status protest or eligibility examination, it will then be found ineligible by SBA. Certification by multiple entities invites

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<sup>1</sup> Again, we submit that a certification requirement is improper for the WOSB Program because it is an unnecessary barrier to entry and may discourage women business owners from participating and it will discriminate against non-disadvantaged women because the law only requires them to be certified (but does not apply a similar requirement for economically disadvantaged women).

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inconsistent results and, thus, the best path for the WOSB Program is a single certifying entity: SBA.

#### ❖ Streamlined Application Process

Implementing this certification program will require an expenditure of time and resources for SBA; however, to minimize these expenses, SBA may build on what is currently in place for the Program, including the WOSB Repository. We submit that SBA should only require minimal documentation in the form of governing documents of the firm and proof of U.S. citizenship for its owners at the time of application. As noted above, 15 U.S.C. § 637(m)(2)(E) does not require certification as to economically disadvantaged status and, absent clarification from Congress, SBA would not be required to review financial records for purposes of the certification. After initial vetting, SBA could monitor participant eligibility through the protest process, as it currently does.

SBA should structure the WOSB certification program like the current certifications for 8(a) and HUBZone participants.<sup>2</sup> A concern desiring WOSB certification would apply to SBA, ideally through an electronic form like what is used for the 8(a) Program. Indeed, SBA should consider repurposing the current WOSB Repository as an electronic application portal. The application would seek basic information concerning the ownership and control of the firm with the company's governing documents as attachments. These governing documents would be the same ones self-certifying WOSBs and EDWOSBs are required to upload to the Repository. See 13 C.F.R. § 127.300(e). An applicant would also be required to prove the U.S. citizenship of its women owner(s) through birth certificates, naturalization papers, or unexpired passports. See *id.* If SBA finds a firm ineligible during the application process, the firm should have the right to a request for reconsideration or an appeal of that decision to SBA's Office of Hearings and Appeals, like the 8(a) Program.

However, because SBA already has the ability to monitor WOSBs through the protest process and eligibility examinations, the application review under the certification program should be minimal, focusing on whether a business represents it is small and owned and controlled by women. Such representations would be supported by uploading governing documents and proof of citizenship to the repurposed WOSB Repository. If a business makes such representations and uploads all required documents to the Repository, SBA should deem it certified unless and until the concern's status is challenged in a status protest or subject to examination. The WOSB Repository should use a dynamic interface so that businesses know

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<sup>2</sup> We are not addressing EDWOSB certification because, as noted above, we do not believe the 2015 NDAA required certification for EDWOSBs. As such, EDWOSBs can continue to utilize the existing modified self-certification system. If SBA disagrees, or if SBA ultimately decides or is required to implement an EDWOSB certification program, we would make the same suggestions as offered in these comments for WOSB certification.

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when information is missing or incomplete. It could be akin to a contractor completing its System for Award Management (“SAM”) profile, although potentially requiring much less time. Indeed, it is conceivable that answering relevant questions about ownership and control and uploading the supporting documentation may only take a contractor a matter of hours, likely the same amount of time expended now by WOSBs who self-certify. This streamlined certification process will ensure that the time period for certification by SBA is not overly lengthy or burdensome and, further, that SBA’s role in the protest process and eligibility examinations remains intact.

Firms presently self-certifying as WOSBs should be allowed at least a one-year grace period to receive SBA certification. WOSBs currently certified by one of the national certifying entities should be given a lengthy grace period, like two or three years, to apply to SBA for certification. In the meantime, their eligibility will be policed through the protest process.

❖ **Concurrent Certification Through 8(a) Program**

There is a great deal of overlap relating to ownership and control determinations between the 8(a) Program and the WOSB Program. For efficiency sake, once a firm is certified by SBA in the 8(a) Program, it should be entitled to receive certification from SBA as a WOSB, assuming it meets the eligibility criteria.

❖ **Term of SBA Certification**

If the Repository becomes a dynamic system like SAM, then users could be required to update and verify their status annually, as SAM users are required to do. Certified WOSBs should also be required to notify SBA of a triggering event that impacts its status, like a merger or acquisition.

***Third Party Certification***

❖ **New Regulations & Procedures Are Needed if SBA Permits Third Party Certification in Addition to SBA Certification**

If SBA decides to allow certification by non-governmental entities, there are a number of changes SBA must implement before such third party certifications could be accurate and uniform. (We contend it will be near impossible to ensure third party certifications are accurate and uniform, and GAO’s report referenced above agrees.) SBA will at a minimum need to modify its regulations and develop robust SOPs to set forth the requirements and processes that third party certifiers will use to certify firms as WOSBs for the WOSB Program.

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To this end, SBA must develop and implement written procedures for itself and non-governmental certifiers before allowing certifiers to apply for status as an SBA-approved certifier and before requiring WOSBs to be certified. In the October 2014 Report, GAO seems to suggest that the high rate of ineligibility may be tied to SBA's failure to provide procedures for both certifiers and program participants. GAO noted that SBA had not yet developed written procedures for certifier oversight—or even the SOP for the WOSB Program. *Id.* at 11. Further, GAO noted that although the current third party certifiers are required to submit a monthly report to SBA, “[a]ccording to SBA officials, the agency did not have consistent procedures for reviewing monthly reports, including procedures to identify and resolve discrepancies in reports or oversee how certifiers collect and compile information transmitted to the agency.” GAO-15-54 at 12. Therefore, we submit that before SBA can implement the certification requirement for WOSBs, it must (1) develop written procedures for how SBA will oversee the certifiers, including review of monthly reports; and (2) complete its SOP for the WOSB Program, which will inform certifiers and participants alike. If non-governmental entities are allowed to continue certifying WOSBs, then at a minimum SBA's SOP for the WOSB Program must provide guidelines for the certifiers, including specifics on eligibility requirements. Procedures developed and published by SBA are the first step in ensuring uniformity among the certifiers. Only after the appropriate procedures are in place should SBA proceed with allowing non-governmental entities to certify WOSBs.

As it is, WOSB Program participants choosing to seek third party certification may be found eligible by one certifier and ineligible by another. If SBA proceeds with allowing certification by third parties and SBA, a great potential exists for non-governmental entities misunderstanding or incorrectly applying the requirements, leading to disparate results and a lack of uniformity. One means by which to mitigate these risks is to simplify the certification requirements. 15 U.S.C. § 637(m)(2)(E) simply requires certification that the concern is a “small business concern owned and controlled by women.” Thus, to implement this statute, SBA may boil the certification process down to the few key determinations: stock certificates or operating agreement for ownership, and operating agreement or bylaws to confirm control. In this regard, the certification would focus only on the relevant objective characteristics. The certifiers would not look at more nuanced issues of control, such as relationships with other businesses and the roles played by male subordinate officers. These types of issues would remain subject to SBA review in a protest, or in a WOSB eligibility examination.

To prevent disparity in results, SBA should create checklists for certifiers to use specifying the eligibility requirements for WOSBs and EDWOSBs. These checklists will reflect baseline WOSB eligibility requirements, like whether one or more women who are U.S. citizens unconditionally and directly own at least 51 percent of the purported WOSB, whether the management and daily business operations of the concern are controlled by one or more women who are U.S. citizens, and whether the business qualifies as a small business. Insofar as a certification program is later required for EDWOSBs, the checklist for EDWOSBs potentially

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would include the same inquiries, as they apply to EDWOSBs, with the additional qualifications that the concern must qualify as a small business under its primary NAICS code and the women who own the business are economically disadvantaged.

To the extent a concern is found ineligible by a third party certifier, it should remain able to request an eligibility examination by SBA once it believes in good faith that it satisfies all of the eligibility requirements to qualify as an EDWOSB or WOSB, pursuant to 13 C.F.R. § 127.305. On this front, SBA should put more resources into eligibility examinations, which will be necessary if SBA proceeds with a more streamlined upfront certification. A streamlined process may be viewed as less favorable from the standpoint of avoiding fraud, but SBA must balance that concern against the real likelihood that legitimate WOSBs will be kept out of the WOSB Program as the result of an unnecessarily stringent certification process. The best way to balance both interests is to limit the certification process to a few objective assessments upfront, and then use protests and regular SBA eligibility reviews to ensure the upfront certifications were accurate. SBA also should continue to require participants to continue to upload all of their documents in the Repository, so the WOSB Program would remain a modified self-certification with all the appropriate penalties for misrepresentation.

Furthermore, SBA should prohibit non-governmental entities from charging a fee to certify small businesses as owned and controlled by women. The other set-aside programs requiring certification do not charge businesses a fee to participate, and WOSBs should be no different. The certifiers step into the shoes of SBA when certifying WOSBs and, therefore, if they want to be paid for their services, it is SBA and not the small businesses that should foot the bill.

Lastly, SBA should require, in its regulations and procedures, that certifiers render certification decisions within a set period of time, like 90 days.<sup>3</sup> Currently, the time between application and certification spans weeks or months, depending on the certifier. A long turnaround time only serves to harm the small businesses, which will not be allowed to pursue WOSB contracts without the certification. Therefore, the certifiers must be given a definite, short time in which to render their decision and required to report their compliance with this timeframe in their monthly reports to SBA. SBA should consider penalizing, in the form of a fine, any certifier that is unable to render a certification decision within the set time period.

#### ❖ **All Certifiers Should Apply or Re-Apply**

The four current non-governmental certifiers should not be grandfathered in as third party certifiers. Rather, SBA should propose to terminate the agreements with current certifiers, pursuant to 13 C.F.R. § 127.303(a), unless each certifier demonstrates it will comply with the

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<sup>3</sup> SBA aims to process 8(a) Program applications within 90 days. See 13 C.F.R. § 124.204(a).

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new SBA-approved certification standards, as outlined in SBA's amended regulations and procedures. SBA should amend its regulations to specify how non-governmental entities may become approved certifiers, as the current regulations are not clear on this point, and consider placing a cap on the total number of certifiers around six, which reflects the number of SBA Area Offices who handle size protests. This cap should include certifier partner organizations. For instance, the Women's Business Enterprise National Council ("WBENC") delegates its current certifying authority to 14 regional partner organizations. These partner organizations are one step removed from SBA oversight and review. Capping certifiers at six nationwide entities, including partner organizations, will better allow SBA to monitor these entities. Entities approved by SBA for purposes of WOSB certification should continue to be listed on SBA's website as the primary means of their identification.

❖ **Term of Third Party Certification**

SBA should specify a three-year term period during which a third party certification is valid. After three years, a WOSB must recertify it is a small business owned and controlled by women who are U.S. citizens. This three-year period matches the certification term for participants in the HUBZone Program. See 13 C.F.R. § 126.500. Also, a simplified re-verification process should be utilized so if the WOSB has not experienced any changes since its initial verification, this would streamline the re-verification.

❖ **No Repository Access for Third Party Certifiers**

SBA should not authorize a third party limited access to an applicant's WOSB Repository file for the purpose of directly uploading approved certification documents. Doing so creates a risk that sensitive information kept on the Repository could be compromised. The small business concern should remain responsible for maintaining all necessary documents in the WOSB Repository.

❖ **Mentor-Protégé Agreements and Joint Venture Agreements**

SBA should not consider allowing third party certifiers to approve mentor-protégé agreements and joint venture agreements involving EDWOSB and WOSB participants because these business relationships may involve partnerships with an other-than-small business, creating the greater potential for a misrepresentation of size and status. To ensure SBA maintains oversight over all aspects of general small business contracting, it should reserve the right to review WOSB and EDWOSB mentor-protégé agreements and joint venture agreements.

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❖ **SBA Should Clarify Applicability of the Certification Requirement to WOSB and EDWOSB Industries**

Lastly, we request that SBA clarify certification requirements as it applies to the NAICS codes designated for WOSB Program contracts. In a webinar with WOSBs and EDWOSBs concerning the ANPR on January 19, 2016, Sean Crean, SBA's Director, Office of Government Contracting, stated that if a firm is a WOSB and is not competing for a WOSB set-aside contract under one of the WOSB-specified NAICS codes, then that firm will be allowed to self-certify as a WOSB. In such a situation, the procuring agency may take WOSB spending credit based on the firm's self-certification, even though SBA would not consider this firm a participant in the WOSB Program. Should the procuring agency count such spending towards its WOSB goal, spending reports may not accurately reflect the success of the WOSB Program.

*Certification by States and Other Federal Agencies*

❖ **State WOSB/EDWOSB Certification Authority**

As a general matter, we do not believe that the authority to certify WOSBs and EDWOSBs should be extended to States. While many States have their own socio-economic programs and certifications, it has always been SBA's policy not to accept such certifications at the federal level, as these programs have their own specific set of eligibility requirements. This makes sense, as it will create confusion for those concerns that, for example, qualify for a State WOSB program but do not meet the eligibility requirements of SBA's WOSB Program. Moreover, it would be problematic to have States evaluating WOSBs under potentially rivaling eligibility criteria. We believe that allowing States to participate as WOSB and EDWOSB certifying entities would create unnecessarily confusing and complicated evaluation structures.

❖ **Acceptance of DBE Certifications in Determining Ownership and Control**

We believe that only an evaluation of a concern's eligibility under SBA's WOSB eligibility criteria should render a concern a certified WOSB. Therefore, SBA should not accept a Disadvantaged Business Enterprise ("DBE") certification as being determinative of ownership and control by women over the applicant concern.

❖ **State Entities' Expertise**

We are unfamiliar with any State entities having sufficient expertise to make WOSB and EDWOSB certifications.

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❖ **Other Federal Agency Certification, Including Contract-Specific Certification**

As we explain above, SBA is the only entity that is uniquely qualified to certify WOSBs and EDWOSBs. Allowing other federal agencies to make contract-specific WOSB eligibility determinations would ultimately undermine a consistent application of the eligibility criteria. Further, there would be no way to ensure a fair playing field amongst “certified” WOSB firms when potentially different evaluation standards are applied by various agencies. If the WOSB Program is to be successful, there must be a certain amount of trust and confidence in the WOSB certification. Piecemeal certifications by agencies would not install such confidence. A very real example exists for SBA with regard to its Service-Disabled Veteran-Owned Small Business (“SDVOSB”) Program and the U.S. Department of Veterans Affairs’ (“VA”) Center for Verification and Evaluation VetBiz Vendor Information Pages Program. A small business owned by a service-disabled veteran may be in full compliance with SBA’s SDVOSB Program regulations and yet have its application to the VA’s Program denied because of VA’s distinct requirements. SBA must avoid creating the same dilemma for WOSBs.

❖ **WOSB/EDWOSB Protests of Firms Not Certified by SBA**

Under the current regulations, all WOSB protests are adjudicated by SBA. If a firm is participating in the WOSB Program, SBA should be the ultimate arbiter of the firm’s WOSB eligibility.

Please do not hesitate to contact Pamela Mazza, Jon Williams, Katie Flood or Megan Connor at (202) 857-1000 if you have any questions about these comments.

Very truly yours,



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